Case No. 2022-001618R

British Columbia Labour Relations Board

Between:

His Majesty the King in right of the Province of British Columbia

(the "Province")

and

BC Government Lawyers Association

("Association")

Application for Certification under Section 18(1)

BRIEF OF AUTHORITIES OF THE ASSOCIATION

BRIEF OF AUTHORITIES

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Privy Council Appeal No. 55 *of* 1945

The Province of Bombay - - - - - - *Appellant*

v.

The Municipal Corporation of the City of Bombay and another - - - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH OCTOBER, 1946

Present at the Hearing :

LORD MACMILLAN
LORD SIMONDS
LORD DU PARCQ
MR. M. R. JAYAKAR
SIR MADHAVAN NAIR

[*Delivered by* LORD DU PARCQ]

By a written agreement dated the 1st March, 1943, the parties to this appeal concurred in stating a special case for the opinion of the High Court of Bombay. The question of law for the opinion of the Court was:— " Whether the Crown is bound by sections 222 (1) and 265 of the City of Bombay Municipal Act." The High Court (Sir John Beaumont, C.J. and Rajadhyaksha, J.) declared that the Crown was bound by these sections, and, in accordance with the agreement between the parties, made an order as to costs in the respondents' favour. The present appeal is against this decision.

The City of Bombay Municipal Act, 1888, has twenty-one chapters and 528 sections and covers, as might be expected, a wide field. Chapter X deals with water-supply. Section 265, which is in this chapter, is as follows:—

> " The Commissioner shall have the same powers and be subject to the same restrictions for carrying, renewing and repairing water-mains, pipes and ducts within or without the city, as he has and is subject to under the provisions hereinbefore contained for carrying, renewing and repairing drains within the city."

The terms of this section thus necessitate a reference to Chapter IX, which has for its subject " Drains and Drainage-works," and contains section 222 (1), which says:—

> " The Commissioner may carry any municipal drain through, across or under any street, or any place laid out as or intended to be a street, or under any cellar or vault which may be under any street, and, after giving reasonable notice in writing to the owner or occupier, into, through or under any land whatsoever within the city, or, for the purpose of outfall or distribution of sewage, without the city."

It appears from the special case, and from the correspondence annexed thereto, that the Corporation wished to lay a water-main in a road known as Antop Hill Road, for the convenience of residents in the district known as Antop Hill. The case states that " the land in the locality of Antop Hill is for the most part private land belonging to the Government of Bombay, and the road serving the locality, known as Antop Hill Road,

is also a private road belonging to the Government and in charge of the Public Works Department." The meaning of the expression " private land belonging to the Government " is obscure, but the correspondence suggests that the land forms a residential district in which Government employees (among others) are housed, and counsel were agreed that for the purposes of this appeal it might be assumed that it had been acquired by the Crown from private owners after the passing of the Municipal Act.

In these circumstances the Corporation's hydraulic engineer sought to obtain permission from the Provincial Government to lay the required water-main along the Antop Hill Road. The Government was willing to consent, but only subject to four conditions, two of which the Corporation regarded as objectionable. The two conditions to which objection was made were (1) that the Corporation should, on twelve months' notice, remove the water-main and restore the land to its original condition, (2) that the Corporation should pay in advance a rental of one rupee per annum. Eventually the Commissioner (the second respondent to this appeal), in purported exercise of his powers under sections 265 and 222 (1), gave notice of his intention to carry out the proposed work. There followed the agreement under which the question in issue was submitted to the High Court.

The High Court held, following previous decisions of its own, that the principle to be applied for the decision of the question whether or not the Crown is bound by a statute is no different in the case of Indian legislation from that which has long been applied in England. The parties concurred in accepting this view, and their Lordships regard it as correct.

The general principle to be applied in considering whether or not the Crown is bound by general words in a statute is not in doubt. The maxim of the law in early times was that no statute bound the Crown unless the Crown was expressly named therein, " Roy n'est lie par ascun statute si il ne soit expressement nosme." But the rule so laid down is subject to at least one exception. The Crown may be bound, as has often been said, " by necessary implication." If, that is to say, it is manifest from the very terms of the statute, that it was the intention of the legislature that the Crown should be bound, then the result is the same as if the Crown had been expressly named. It must then be inferred that the Crown, by assenting to the law, agreed to be bound by its provisions.

In the judgment delivered by the learned Chief Justice, in which Rajadhyaksha J. concurred, the principle " that the Crown is not bound by legislation in which it is not named expressly or by necessary implication " was in terms accepted, but an interpretation was placed upon it which their Lordships are unable to approve. After stating the principle in the words just quoted, the learned Chief Justice went on to say that if it can be shown that legislation " cannot operate with reasonable efficiency unless the Crown is bound, that would be a sufficient reason for saying that the Crown is bound by necessary implication " and he concluded his judgment by enunciating the proposition that if the provisions of the Act " cannot operate efficiently and smoothly unless the Crown is bound . . . the Crown must be held to be bound by necessary implication." Applying the general principle in this sense, and in the light of the knowledge which the Court had of existing conditions in Bombay, the Chief Justice came to the conclusion that the Corporation could not be sure of carrying out its statutory duty efficiently unless it had the same powers in relation to the Crown as it possessed in respect of the subject. The High Court therefore held that the question put in the special case must be answered in the affirmative.

Even if the High Court were correct in its interpretation of the principle, its method of applying it would be open to the objection that regard should have been had, not to the conditions which it found to be in existence many years after the passing of the Act, but to the state of things which existed, or could be shown to have been within the contemplation of the legislature, in the year 1888. It may also be objected that the view taken by the High Court appears to ignore the possibility that the legislature

may have expected that the Crown would be prepared to co-operate with the Corporation so far as its own duty to safeguard a wider public interest made co-operation possible and politic, and may well have thought that to compel the Crown's subservience to the Corporation beyond that point would be unwise. As was pointed out by Wills J. in *Gorton Local Board* v. *Prison Commissioners* [1904] 2 K.B. 165 (n), at p. 168, it may be reasonable to suppose that the legislature has no less confidence in a department which represents the Crown than in a local authority.

Apart from these considerations, however, their Lordships are of opinion that to interpret the principle in the sense put upon it by the High Court would be to whittle it down, and they cannot find any authority which gives support to such an interpretation.

It was contended on behalf of the respondents that whenever a statute is enacted " for the public good " the Crown, though not expressly named, must be held to be bound by its provisions and that, as the Act in question was manifestly intended to secure the public welfare, it must bind the Crown. This contention, which did not meet with success in the High Court, was again raised before their Lordships. The proposition which the respondents thus sought to maintain is supported by early authority, and is to be found in Bacon's Abridgement and other text-books, but in their Lordships' opinion it cannot now be regarded as sound except in a strictly limited sense. Every statute must be supposed to be " for the public good," at least in intention, and even when, as in the present case, it is apparent that one object of the legislature is to promote the welfare and convenience of a large body of the King's subjects by giving extensive powers to a local authority, it cannot be said, consistently with the decided cases, that the Crown is necessarily bound by the enactment. In the recent case of *The Attorney-General* v. *Hancock* [1940] 1 K.B. 427, at p. 435, Wrottesley J. cited a series of decisions in which the Crown was held not to be bound although the statute in question was clearly for the public benefit. A plain and striking example is the case which their Lordships have already cited of *Gorton Local Board* v. *Prison Commissioners* (*supra*), where it was held that a by-law, made under the Public Health Act, 1875, and clearly designed to safeguard the health of the public, did not bind the Crown, and gave the local board no control over one of His Majesty's prisons. In the present case the High Court disposed of the submission by a finding that, on the material before them, it was not shown to be for the public good that the Crown should be bound by the Municipal Act. This is perhaps not a wholly satisfactory way of dealing with the respondents' contention, which was, not that the Court must consider whether it is for the public good that the Crown should be bound by a particular Act, but that wherever an Act is " for the public good " it must be taken to bind the Crown. Their Lordships prefer to say that the apparent purpose of the statute is one element, and may be an important element, to be considered when an intention to bind the Crown is alleged. If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound. Their Lordships will add that when the court is asked to draw this inference, it must always be remembered that, if it be the intention of the legislature that the Crown shall be bound, nothing is easier than to say so in plain words.

It is necessary to deal here with one further point which was not argued before the High Court. While this appeal was under their Lordships' consideration, their attention was directed to some weighty observations in two Scottish cases which suggested a possible answer to the Crown's claim to exemption. These observations are to be found in *Somerville* v. *the Lord Advocate* 20 R. 1050 (particularly in the judgment of Lord Kyllachy (at pp. 1064, 1065), and in *Magistrates of Edinburgh* v. *the Lord Advocate* (1912) S.C. 1085 per Lord Dunedin (then Lord President) at pp. 1090,

1091). It will be sufficient to quote a passage from the judgment of Lord Dunedin in the latter case, in which he said:—

> "I may say that I agree personally with the views expressed by Lord Kyllachy in Somerville's case, and I think the outcome of it is this: While I do not doubt that there are certain provisions by which the Crown never would be bound unless that were clearly expressed—such, for instance, as the provisions of a taxing statute or certain enactments with penal clauses adjected, as, for example, certain provisions of the Motor Car Act, and so on—yet, when you come to a set of provisions in a statute having for its object the benefit of the public generally, there is not an antecedent unlikelihood that the Crown will consent to be bound, and this, I think, would be so in the case of regulations which are meant to apply to all the land in a city, and where the Crown's property is not property held *jure coronae*, but has been acquired from a subject-superior for the use of one of the public departments."

In the present case it appears that the land of the Crown is not held *jure coronae* but, as has been said, was acquired from private owners, so that the dicta of the learned Lord President are directly in point. Their Lordships thought it right to require further argument on this aspect of the appeal, but, after careful consideration, remain of opinion that the law of England, and of India, is what they have stated it to be, and that no distinction can be drawn in such a case as the present between property held *jure coronae* and other property of the Crown. The view expressed in the Scottish cases has not been adopted in England, and does not seem to their Lordships to be in accordance with a body of English authority which, where an ancient doctrine of the common law of England is in question, ought in their Lordships' opinion to prevail.

Their Lordships have accordingly considered the question before them in the light of the principle as they have stated it. In so stating it their Lordships believe that they have done no more than express in their own words a well-settled proposition of law, and they need only refer, in addition to the cases already cited, to *Hornsey U.D.C.* v. *Hennell* [1902] 2 K.B. 73 and *Cooper* v. *Hawkins* [1904] 2 K.B. 164. After full consideration their Lordships can find no reason to say that, by necessary implication, the Crown is bound by the relevant sections of the Municipal Act. They were pressed with the argument that such an inference might be drawn from certain express references to the Crown in other parts of the Act itself and from the fact that by the Government Building Act, 1899, the legislature had provided for the exemption of government buildings from certain municipal laws. The argument was that no express provisions saving the rights of the Crown would be necessary if the Crown were already immune. This is not an unfamiliar argument, but, as has been said many times, such provisions may often be inserted in one part of an Act, or in a later general Act, *ex abundanti cautela*, and, so far as the Act of 1899 is concerned, it is fallacious to argue that the legislature which passed it must have had in mind the particular sections of the Act of 1888 which are now under review or that it was impliedly interpreting those sections.

For these reasons their Lordships have come to the conclusion that the appeal ought to be allowed. The decree of the High Court should be set aside, and a decree substituted declaring that the Crown is not bound by sections 222 (1) and 265 of the City of Bombay Municipal Act, 1888, and ordering that, in accordance with the agreement between the parties, the defendants (the respondents to this appeal) shall bear their costs and pay the plaintiff its costs of the special case. The costs of this appeal must be paid by the respondents. Their Lordships will humbly advise His Majesty accordingly.

(52121) Wt. 8013—5 170 10/46 D.L. G. 338

In the Privy Council

THE PROVINCE OF BOMBAY

v.

THE MUNICIPAL CORPORATION OF
THE CITY OF BOMBAY
AND ANOTHER

DELIVERED BY LORD DU PARCQ

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS
DRURY LANE, W.C.2.

1946

2015 SCC 1 (CanLII)

Mounted Police Association of Ontario and British Columbia Mounted Police Professional Association, on their own behalf and on behalf of all members and employees of the Royal Canadian Mounted Police *Appellants*

v.

Attorney General of Canada *Respondent*

and

Attorney General of Ontario, Attorney General of British Columbia, Attorney General for Saskatchewan, Attorney General of Alberta, Association des membres de la Police Montée du Québec Inc., Mounted Police Members' Legal Fund, Confédération des syndicats nationaux, Canadian Police Association, Canadian Labour Congress, Canadian Civil Liberties Association, Public Service Alliance of Canada and British Columbia Civil Liberties Association *Interveners*

Association de la police montée de l'Ontario et British Columbia Mounted Police Professional Association, en leur propre nom et au nom de tous les membres et les employés de la Gendarmerie royale du Canada *Appelantes*

c.

Procureur général du Canada *Intimé*

et

Procureur général de l'Ontario, procureur général de la Colombie-Britannique, procureur général de la Saskatchewan, procureur général de l'Alberta, Association des membres de la Police Montée du Québec Inc., Fonds de recours juridique des membres de la Gendarmerie, Confédération des syndicats nationaux, Association canadienne des policiers, Congrès du travail du Canada, Association canadienne des libertés civiles, Alliance de la Fonction publique du Canada et Association des libertés civiles de la Colombie-Britannique *Intervenants*

Indexed as: Mounted Police Association of Ontario *v.* Canada (Attorney General)

2015 SCC 1

File No.: 34948.

2014: February 18; 2015: January 16.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

Répertorié : Association de la police montée de l'Ontario *c.* Canada (Procureur général)

2015 CSC 1

N° du greffe : 34948.

2014 : 18 février; 2015 : 16 janvier.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Cromwell, Karakatsanis et Wagner.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Freedom of association — Right to collective bargaining — Scope of constitutional protection — Private associations of RCMP members challenging constitutionality of legislation excluding RCMP members from public service labour relations regime and imposing non-unionized regime — Legislatively imposed regime not independent from management and not providing for employee choice

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit constitutionnel — Charte des droits — Liberté d'association — Droit de négocier collectivement — Portée de la protection constitutionnelle — Contestation par des associations privées de membres de la GRC de la constitutionnalité de la législation qui exclut les membres de la GRC du régime de relations du travail de la fonction publique et impose un régime non syndical — Le régime imposé par la législation n'est pas indépendant de

of association or input into selection of collective goals — Whether impugned legislation substantially interferes with right to meaningful process of collective bargaining and thereby infringes constitutional guarantee of freedom of association — If so, whether infringement justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 2(d) — Royal Canadian Mounted Police Regulations, 1988, SOR/88-361, s. 96 — Public Service Labour Relations Act, S.C. 2003, c. 22, s. 2(1) "employee" (d).

RCMP members are not permitted to unionize or engage in collective bargaining. They have been excluded from the labour relations regime governing the federal public service since collective bargaining was first introduced in the federal public service, first, under the *Public Service Staff Relations Act* ("*PSSRA*") and now under the *Public Service Labour Relations Act* ("*PSLRA*"). Instead, members of the RCMP are subject to a non-unionized labour relations scheme. At the time of the hearing of this appeal, that scheme was imposed upon them by s. 96 of the *Royal Canadian Mounted Police Regulations, 1988* ("*RCMP Regulations*"), since repealed and replaced by the substantially similar s. 56 of the *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281.

The core component of the current RCMP labour relations regime is the Staff Relations Representative Program ("SRRP"). The SRRP is the primary mechanism through which RCMP members can raise labour relations issues (excluding wages), and the only form of employee representation recognized by management. The SRRP is governed by a National Executive Committee and is staffed by member representatives from various RCMP divisions and regions elected for a two-year term by both regular and civilian members of the RCMP. Two of its representatives act as the formal point of contact with the national management of the RCMP. The aim of the program is that, at each level of the hierarchy, members' representatives and management consult on human resources initiatives and policies, with the understanding that the final word always rests with management.

A little over 15 years ago, the Court held that the exclusion of RCMP members from collective bargaining under the *PSLRA*'s predecessor legislation did not infringe s. 2(*d*) of the *Charter*: *Delisle v. Canada (Deputy*

la direction et ne permet pas aux employés de choisir leur association ni de participer au choix des objectifs collectifs — La législation contestée entrave-t-elle substantiellement le droit à un processus véritable de négociation collective et, du coup, viole-t-elle la garantie constitutionnelle relative à la liberté d'association? — Dans l'affirmative, cette violation est-elle justifiée? — Charte canadienne des droits et libertés, art. 1, 2d) — Règlement de la Gendarmerie royale du Canada (1988), DORS/88-361, art. 96 — Loi sur les relations de travail dans la fonction publique, L.C. 2003, c. 22, art. 2(1) « fonctionnaire » d).

Les membres de la GRC ne peuvent ni se syndiquer ni négocier collectivement. Ils sont exclus du régime de relations de travail qui s'applique à la fonction publique fédérale depuis que la négociation collective y a été instaurée, tout d'abord en application de la première *Loi sur les relations de travail dans la Fonction publique* (« première *LRTFP* ») et aujourd'hui en application de la *Loi sur les relations de travail dans la fonction publique* actuellement en vigueur (« *LRTFP* actuelle »). Les membres de la GRC se trouvent plutôt assujettis à un régime non syndical de relations de travail. À la date de l'audition du présent pourvoi, ce régime leur était imposé par l'art. 96 du *Règlement de la Gendarmerie royale du Canada (1988)* (« *Règlement de la GRC* »), abrogé depuis et remplacé par une disposition essentiellement similaire, l'art. 56 du *Règlement de la Gendarmerie royale du Canada (2014)*, DORS/2014-281.

Le Programme de représentants des relations fonctionnelles (« PRRF ») est au cœur du régime actuel de relations de travail de la GRC. Le PRRF constitue le principal mécanisme par lequel les membres de la GRC peuvent soulever des questions concernant les relations de travail (à l'exception de la solde), et l'unique forme de représentation des employés que reconnaît la direction. Le PRRF est dirigé par le Comité exécutif national (« CEN ») et il est composé de membres représentants provenant de diverses régions et divisions de la GRC et élus pour un mandat de deux ans par les membres réguliers et civils. Deux des représentants agissent comme point de contact officiel avec la direction nationale de la GRC. Le programme vise à permettre, à chaque niveau de la hiérarchie, la tenue de consultations entre les représentants des employés et la direction au sujet des initiatives et des politiques relatives aux ressources humaines, même s'il est entendu que la décision finale revient toujours à la direction.

Il y a un peu plus de 15 ans, la Cour a conclu que l'exclusion des membres de la GRC du régime de négociation collective établi par la première *LRTFP* alors en vigueur ne portait pas atteinte à l'al. 2*d*) de la *Charte* : *Delisle*

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Attorney General), [1999] 2 S.C.R. 989. That case did not involve a direct challenge to the sufficiency of the entire RCMP labour relations scheme. Since that decision was rendered, the RCMP labour relations regime has undergone a number of changes that have increased the independence afforded to the SRRP, but none of those changes has substantially altered its purpose, place or function within the RCMP chain of command.

In May 2006, a constitutional challenge was initiated by two private associations of RCMP members whose goal is to represent RCMP members in Ontario and British Columbia on work-related issues, but who have never been recognized for the purpose of collective bargaining or consultation on workplace issues by RCMP management or the federal government. They sought a declaration that the combined effect of the exclusion of RCMP members from the application of the *PSLRA* and the imposition of the SRRP as a labour relations regime unjustifiably infringes members' freedom of association. A judge of the Ontario Superior Court of Justice concluded that s. 96 of the *RCMP Regulations*, which imposed the SRRP as a labour relations regime, substantially interfered with freedom of association and could not be justified under s. 1 of the *Charter*. However, the judge also held that the exclusion of RCMP members from the federal public service labour relations regime did not infringe s. 2(*d*) of the *Charter*. The Court of Appeal allowed the Attorney General of Canada's appeal and held that the current RCMP labour relations scheme does not breach s. 2(*d*) of the *Charter*.

Held (Rothstein J. dissenting): The appeal should be allowed. Section 96 of the *RCMP Regulations*, which was in effect at the time of the hearing of this appeal, infringed s. 2(*d*) of the *Charter*. Similarly, para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* infringes s. 2(*d*). Neither infringement is justified under s. 1 of the *Charter*. Had s. 96 of the *RCMP Regulations* not been repealed, it would have been declared to be of no force or effect. The offending provision of the *PSLRA* is of no force and effect pursuant to s. 52 of the *Constitution Act, 1982*. This declaration of invalidity is suspended for a period of 12 months.

c. Canada (Sous-procureur général), [1999] 2 R.C.S. 989. Dans cette affaire, la valeur constitutionnelle du régime de relations de travail de la GRC en entier n'était pas directement contestée. Depuis que ce jugement a été rendu, le régime de relations de travail de la GRC a connu plusieurs changements qui ont permis de rendre le PRRF plus indépendant, mais aucun de ces changements n'a eu pour effet de modifier sensiblement l'objectif qu'il poursuit, son rôle ou ses fonctions au sein de la chaîne de commandement de la GRC.

En mai 2006, une contestation constitutionnelle a été intentée par deux associations privées de membres de la GRC dont l'objectif consiste à représenter des membres de la GRC en Ontario et en Colombie-Britannique quant aux questions relatives à leurs conditions de travail. Aucune n'a toutefois été reconnue à quelque moment que ce soit, par la direction de la GRC ou par le gouvernement fédéral, aux fins de négociations collectives ou de consultations au sujet d'enjeux relatifs au travail. Elles voulaient obtenir un jugement déclarant que l'effet combiné de l'exclusion des membres de la GRC du champ d'application de la *LRTFP* actuelle et de l'imposition du PRRF comme régime de relations de travail viole la liberté d'association des membres d'une manière qui ne saurait se justifier. Un juge de la Cour supérieure de justice de l'Ontario a conclu que l'art. 96 du *Règlement de la GRC*, qui imposait le PRRF à titre de régime de relations de travail, entravait substantiellement la liberté d'association et ne pouvait se justifier au regard de l'article premier de la *Charte*. Le juge était cependant également d'avis que l'exclusion des membres de la GRC du régime de relations de travail dans la fonction publique fédérale ne portait pas atteinte au droit garanti par l'al. 2*d*) de la *Charte*. La Cour d'appel a accueilli l'appel interjeté par le procureur général du Canada et a conclu que le régime actuel de relations de travail de la GRC ne violait pas l'al. 2*d*) de la *Charte.*

Arrêt (le juge Rothstein est dissident) : Le pourvoi est accueilli. L'article 96 du *Règlement de la GRC*, qui était en vigueur au moment de l'audition du présent pourvoi, violait l'al. 2*d*) de la *Charte*. De même, l'al. *d*) de la définition de « fonctionnaire » qui figure au par. 2(1) de la *LRTFP* actuelle viole l'al. 2*d*). Aucune de ces violations n'est justifiée au regard de l'article premier de la *Charte*. N'eût été son abrogation, l'art. 96 du *Règlement de la GRC* aurait été déclaré inopérant. La disposition attentatoire de la *LRTFP* actuelle est inopérante en application de l'art. 52 de la *Loi constitutionnelle de 1982*. La prise d'effet de la déclaration d'invalidité est suspendue pour une période de 12 mois.

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Per McLachlin C.J. and LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ.: The s. 2(*d*) guarantee of freedom of association protects a meaningful process of collective bargaining that provides employees with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests. However, the current labour relations regime denies RCMP members that choice, and imposes on them a scheme that does not permit them to identify and advance their workplace concerns free from management's influence.

Section 2(*d*) protects three classes of activities: (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities. Viewed purposively, s. 2(*d*) guarantees the right of employees to meaningfully associate in the pursuit of collective workplace goals. This guarantee includes a right to collective bargaining. Collective bargaining is a necessary precondition to the meaningful exercise of the constitutional guarantee of freedom of association. It is not a derivative right protected only if state action makes it effectively impossible to associate for workplace matters. That said, however, the right to collective bargaining is one that guarantees a process rather than an outcome or a particular model of labour relations.

The government cannot enact laws or impose a labour relations process that substantially interferes with the right of employees to associate for the purpose of meaningfully pursuing collective workplace goals. Just as a ban on employee association impairs freedom of association, so does a labour relations process that substantially interferes with the possibility of having meaningful collective negotiations on workplace matters. Similarly, a process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals. 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.

La juge en chef McLachlin et les juges LeBel, Abella, Cromwell, Karakatsanis et Wagner : La liberté d'association garantie par l'al. 2*d*) protège l'existence d'un processus véritable de négociation collective qui offre aux employés une liberté de choix et une indépendance suffisantes pour leur permettre de décider de leurs intérêts collectifs et de les défendre. Toutefois, le régime actuel de relations de travail prive les membres de la GRC de cette liberté de choix et leur impose un programme qui ne leur permet pas de définir et de faire valoir leurs préoccupations professionnelles à l'abri de l'influence de la direction.

L'alinéa 2*d*) protège trois catégories d'activités : (1) le droit de s'unir à d'autres et de constituer des associations; (2) le droit de s'unir à d'autres pour exercer d'autres droits constitutionnels; et (3) le droit de s'unir à d'autres pour faire face, à armes plus égales, à la puissance et à la force d'autres groupes ou entités. Considéré en fonction de son objet, l'al. 2*d*) garantit le droit des employés de véritablement s'associer en vue de réaliser des objectifs collectifs relatifs à leurs conditions de travail. Cette protection inclut un droit de négocier collectivement. La négociation collective est une condition qui doit nécessairement être réalisée pour permettre l'exercice véritable de la liberté d'association garantie par la Constitution. Il ne s'agit pas d'un droit dérivé protégé uniquement si l'acte de l'État rend effectivement impossible l'association en vue de régler des questions relatives au travail. Le droit à la négociation collective garantit toutefois un processus plutôt qu'un résultat ou qu'un modèle particulier de relations de travail.

Le gouvernement ne saurait adopter des lois ou imposer un processus de relations de travail qui entrave substantiellement le droit des employés de s'associer en vue de réaliser véritablement des objectifs collectifs relatifs au travail. Tout comme l'interdiction pour des employés de s'associer porte atteinte à la liberté d'association, le modèle de relations de travail qui entrave substantiellement la possibilité d'engager de véritables négociations collectives sur des questions relatives au travail porte également atteinte à cette liberté. De même, un processus de négociation collective n'aura pas un caractère véritable s'il empêche les employés de poursuivre leurs objectifs. Quelle que soit la nature de la restriction, il faut essentiellement déterminer si les mesures en question perturbent l'équilibre des rapports de force entre les employés et l'employeur que l'al. 2*d*) vise à établir, de telle sorte qu'elles interfèrent de façon substantielle avec un processus véritable de négociation collective.

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A meaningful process of collective bargaining is a process that provides employees with a degree of choice and independence sufficient to enable them to determine their collective interests and meaningfully pursue them. But choice and independence are not absolute: they are limited by the context of collective bargaining.

The degree of choice required by the *Charter* for collective bargaining purposes is one that enables employees to have effective input into the selection of the collective goals to be advanced by their association. Moreover, accountability to the members of the association plays an important role in assessing whether employee choice is present to a sufficient degree in any given labour relations scheme. A scheme that holds representatives accountable to the employees who chose them ensures that the association works towards the purposes for which the employees joined together.

In the same vein, the degree of independence required by the *Charter* for collective bargaining purposes is one that ensures that the activities of the association are aligned with the interests of its members. Although the function of collective bargaining is not served by a process which is dominated by or under the influence of management, like choice, independence in the collective bargaining context is not absolute. The degree of independence required is one that permits the activities of the association to be aligned with the interests of its members.

What is required to permit meaningful collective bargaining varies with the industry culture and workplace in question. As with all s. 2(*d*) inquiries, the required analysis is contextual. Choice and independence do not require adversarial labour relations; nothing in the *Charter* prevents an employee association from engaging willingly with an employer in different, less adversarial and more cooperative ways. However, whatever the labour relations model, the *Charter* does not permit choice and independence to be eroded such that there is substantial interference with a meaningful process of collective bargaining.

This is not a case of a complete denial of the constitutional right to associate. Rather, it is a case of substantial interference with the right to associate for the purpose of addressing workplace goals through a meaningful process of collective bargaining, free from employer control.

Un processus véritable de négociation collective est tel qu'il offre aux employés une liberté de choix et une indépendance suffisantes pour leur permettre de décider de leurs intérêts collectifs et de véritablement les réaliser. Cela dit, cette liberté de choix et cette indépendance ne sont pas absolues : elles sont limitées par le contexte de la négociation collective.

La liberté de choix requise par la *Charte* à des fins de négociation collective correspond à celle qui permet aux employés de participer véritablement au choix des objectifs collectifs que devra poursuivre leur association. En outre, l'obligation de l'association de rendre compte aux membres joue un rôle important pour apprécier la suffisance de la liberté de choix des employés dans un régime de relations de travail donné. Tout régime qui oblige les représentants à rendre compte aux employés qui les ont choisis garantit que l'association travaille à l'atteinte des objectifs pour lesquels les employés se sont associés.

Dans la même veine, l'indépendance exigée par la *Charte* à des fins de négociation collective se définit comme celle qu'assure une correspondance entre les activités de l'association et les intérêts de ses membres. Certes, l'objectif de la négociation collective n'est pas atteint si l'employeur domine ou influence le processus qui l'entoure, mais, à l'instar de la liberté de choix, l'indépendance dans le contexte de la négociation collective n'est pas absolue. L'indépendance requise est celle qui fait correspondre les activités de l'association aux intérêts de ses membres.

Les conditions nécessaires pour permettre une véritable négociation collective varient en fonction de la culture du secteur d'activité et du milieu de travail en question. Comme pour tous les examens fondés sur l'al. 2*d*), l'analyse requise est contextuelle. La liberté de choix et l'indépendance n'exigent pas des relations de travail de nature contradictoire; rien dans la *Charte* n'empêche une association d'employés de s'engager librement avec l'employeur dans un type de négociation différent, moins contradictoire et davantage axé sur la collaboration. Sans égard au modèle de relations de travail, la *Charte* n'autorise cependant pas que la liberté de choix et l'indépendance soient affaiblies jusqu'au point où apparaît une entrave substantielle à l'existence d'un processus véritable de négociation collective.

En l'espèce, on ne se trouve pas devant un cas de négation complète du droit constitutionnel de s'associer. Il s'agit plutôt d'un cas d'entrave substantielle au droit de s'associer en vue de réaliser des objectifs relatifs au travail au moyen d'un processus véritable de négociation

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The flaws in the SRRP process do not permit meaningful collective bargaining, and are inconsistent with s. 2(*d*) of the *Charter*. That process fails to respect RCMP members' freedom of association in both its purpose and its effects.

Section 96 of the *RCMP Regulations* imposed the SRRP on RCMP members for the purpose of preventing collective bargaining through an independent association. Not only are members represented by an organization they did not choose and do not control, they must work within a structure that is part of the management organization of the RCMP and thus lacks independence from management. The SRRP process fails to achieve the balance between employees and employer that is essential to meaningful collective bargaining, and leaves members in a disadvantaged, vulnerable position.

The SRRP also infringes s. 2(*d*) in its effects. The relevant inquiry is directed at whether RCMP members can genuinely advance their own interests through the SRRP, without interference by RCMP management. On the record here, they cannot. Simply put, the SRRP is not an association in any meaningful sense, nor a form of exercise of the right to freedom of association. It is simply an internal human relations scheme imposed on RCMP members by management. The element of employee choice is almost entirely missing and the structure has no independence from management.

The second issue raised by the present constitutional challenge concerns the exclusion of RCMP members from the application of the *PSLRA* by para. (*d*) of the definition of "employee" in s. 2(1). This Court, in *Delisle*, held that the exclusion of the RCMP from the *PSSRA*, the *PSLRA*'s predecessor legislation, did not violate s. 2(*d*) of the *Charter*. Overturning precedents of this Court is not a step to be lightly taken. However, *Delisle* was decided before this Court's shift to a purposive and generous approach to labour relations and *Delisle* considered a different question and narrower aspects of the labour relations regime than those at issue here. It follows that the result in *Delisle* must be revisited.

The purpose of para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA*, viewed in its historical context, violates s. 2(*d*) of the *Charter*. The *PSSRA* and,

collective, à l'abri du contrôle de l'employeur. Les lacunes relevées dans le PRRF empêchent la tenue de véritables négociations collectives et violent l'al. 2*d*) de la *Charte*. Ce processus contrevient donc à la liberté d'association des membres de la GRC tant par son objet que par ses effets.

L'article 96 du *Règlement de la GRC* imposait aux membres de la GRC le PRRF afin d'empêcher la négociation collective au moyen d'une association indépendante. Non seulement les membres se trouvent représentés par un organisme qu'ils n'ont pas choisi et qu'ils ne contrôlent pas, mais ils sont tributaires d'une structure qui relève de l'organisme de gestion de la GRC et qui est ainsi dépourvue d'indépendance à l'égard de la direction. Les employés se trouvent dans une position désavantageuse et vulnérable parce que le PRRF n'établit pas, entre eux et l'employeur, l'équilibre essentiel à la tenue d'une véritable négociation collective.

Le PRRF viole également l'al. 2*d*) en raison de ses effets. La question qu'il faut poser est celle de savoir si les membres de la GRC peuvent faire véritablement valoir leurs propres intérêts, au moyen du PRRF, sans ingérence de la direction de la GRC. Le dossier de l'espèce démontre que tel n'est pas le cas. Autrement dit, le PRRF ne constitue pas une association au vrai sens du terme ni un exercice du droit à la liberté d'association. Il s'agit simplement d'un régime interne de relations humaines imposé aux membres de la GRC par la direction de celle-ci. La liberté de choix de l'employé devient donc pratiquement inexistante et la structure en question n'est pas indépendante de la direction.

La deuxième question que soulève la présente contestation constitutionnelle porte sur l'exclusion des membres de la GRC du régime établi par l'al. *d*) de la définition de « fonctionnaire » qui figure au par. 2(1) de la *LRTFP* actuelle. Dans l'arrêt *Delisle*, la Cour a jugé que l'exclusion de cet organisme du régime de la première *LRTFP* ne violait pas l'al. 2*d*) de la *Charte*. Il faut se garder d'écarter un précédent de la Cour à la légère. Cependant, la décision rendue dans *Delisle* a précédé le changement d'orientation effectué par la Cour vers une interprétation généreuse et téléologique des relations de travail et elle portait sur une question différente de celle dont nous sommes saisis en l'espèce et sur des aspects plus restreints du régime de relations de travail que ceux en cause dans la présente affaire. En conséquence, il y a lieu de revoir la décision rendue dans *Delisle*.

Considéré dans son contexte historique, l'objet de l'al. *d*) de la définition de « fonctionnaire » qui figure au par. 2(1) de la *LRTFP* actuelle contrevient à l'al. 2*d*) de

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later, the *PSLRA* established the general framework for labour relations and collective bargaining in the federal public sector. A class of employees, the members of the RCMP, has, since the initial enactment of this regime, been excluded from its application in order to prevent them from exercising their associational rights under s. 2(*d*). The purpose of excluding a specific class of employees from the labour relations regime in order to deny them the exercise of their freedom of association impermissibly breaches the constitutional rights of the affected employees.

Section 2(*d*) gives Parliament much leeway in devising a scheme of collective bargaining that satisfies the special demands of the RCMP. Beyond this, s. 1 of the *Charter* provides additional room to tailor a labour relations regime to achieve pressing and substantial objectives, provided it can show that these are justified. In the present case, the infringement of the guarantee of freedom of association cannot be justified under s. 1 of the *Charter*.

Although the government's objective of maintaining an independent and objective police force constitutes a pressing and substantial objective, the infringing measures are not rationally connected to their objective. First, it is not apparent how the exclusion of RCMP members from a statutorily protected collective bargaining process ensures the neutrality, stability or even reliability of the Force. Second, it is not established that permitting meaningful collective bargaining for RCMP members would disrupt the stability of the police force or affect the public's perception of its neutrality.

While this conclusion is sufficient to dispose of the s. 1 analysis, denying RCMP members any meaningful process of collective bargaining is also more restrictive than necessary to maintain the Force's neutrality, stability and reliability. The RCMP is the only police force in Canada without a collective agreement to regulate the working conditions of its officers. It has not been shown how or why the RCMP is materially different from the police forces that have the benefit of collective bargaining regimes that provide basic bargaining protections. A material difference between the forces having not been shown, it is clear that total exclusion of RCMP members from meaningful collective bargaining cannot be minimally impairing.

la *Charte*. Les deux versions successives de la *LRTFP* ont établi le cadre général applicable aux relations de travail et à la négociation collective dans la fonction publique fédérale. Une catégorie d'employés, soit les membres de la GRC, est exclue de ce régime, et ce, depuis son adoption, afin de les empêcher d'exercer le droit à la liberté d'association que leur confère l'al. 2*d*) de la *Charte*. L'objet de l'exclusion d'une catégorie particulière d'employés du régime de relations de travail en vue de les priver de l'exercice de leur droit à la liberté d'association contrevient de façon inacceptable aux droits constitutionnels des employés touchés.

L'alinéa 2*d*) accorde au législateur une grande latitude dans l'établissement d'un régime de négociation collective qui satisfait aux exigences spéciales de la GRC. En outre, l'article premier de la *Charte* accorde à celui-ci une marge de manœuvre additionnelle qui lui permet d'établir un régime de relations de travail pour atteindre des objectifs urgents et réels, dans la mesure, toutefois, où il peut démontrer que ces objectifs sont justifiés. En l'espèce, la violation de la liberté d'association garantie n'est pas justifiée au regard de l'article premier de la *Charte*.

Bien que l'objet du gouvernement de préserver une force policière indépendante et objective constitue un objectif urgent et réel, il n'existe pas de lien rationnel entre la mesure attentatoire et son objectif. D'une part, il est difficile de comprendre pourquoi l'exclusion des membres de la GRC d'un processus de négociation collective protégé par la loi peut assurer la neutralité, la stabilité ou même la fiabilité de cette force policière. D'autre part, il n'est pas établi que l'autorisation d'un véritable régime de négociation collective pour les membres de la GRC perturbera la stabilité de cette force policière ou influencera la perception du public quant à sa neutralité.

Bien que cette conclusion suffise pour mettre fin à l'analyse fondée sur l'article premier, le fait de priver les membres de la GRC d'un processus véritable de négociation collective est également plus restrictif que ce qui est nécessaire pour assurer la neutralité, la stabilité et la fiabilité de cette force policière. La GRC est la seule force policière au Canada n'ayant pas de convention collective qui régit les conditions de travail de ses agents. Il n'est établi ni comment ni pourquoi la GRC est substantiellement différente des forces policières qui bénéficient d'un régime de négociation collective leur accordant des protections fondamentales en matière de négociation. Une différence substantielle entre les forces policières n'ayant pas été établie, l'exclusion totale des membres de la GRC d'un régime véritable de négociation collective ne peut clairement pas constituer une atteinte minimale.

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Having found that s. 96 of the *RCMP Regulations* and para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* infringe the freedom guaranteed to RCMP members under s. 2(*d*) of the *Charter*, and that these provisions cannot be saved under s. 1, the appropriate remedy is to strike down the offending provision of the *PSLRA* under s. 52 of the *Constitution Act, 1982*. This declaration of invalidity is suspended for a period of 12 months. We would similarly strike down s. 96 of the *RCMP Regulations* were it not repealed. This conclusion does not mean that Parliament must include the RCMP in the *PSLRA* scheme. Section 2(*d*) of the *Charter* does not mandate a particular model of labour relations. Should it see fit to do so, Parliament remains free to enact any labour relations model it considers appropriate to address the specific context in which members of the RCMP discharge their duties, within the constitutional limits imposed by the guarantee enshrined in s. 2(*d*) and s. 1 of the *Charter*.

Per Rothstein J. (dissenting): The language used by the majority creates greater rights, and imposes greater restrictions on the government, than either a plain or generous reading of s. 2(*d*) of the *Charter* can logically provide. The interpretation of a *Charter* right must be principled and must not be so divorced from the text of the provision as to depart from the foundation of the right. When, in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, and *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, this Court recognized a derivative right to collective bargaining stemming from the purpose of s. 2(*d*) of the *Charter*, it extended constitutional rights beyond what had previously been accepted.

Now, less than four years after *Fraser* was decided, the majority further expands freedom of association and retreats from the effective impossibility test stated in that case. It also enshrines an adversarial model of labour relations as a *Charter* right, reversing this Court's findings in *Health Services* and in *Fraser* that s. 2(*d*) does not guarantee a particular model of collective bargaining or a particular outcome.

Après avoir statué que l'art. 96 du *Règlement de la GRC* et l'al. *d*) de la définition de « fonctionnaire » qui figure au par. 2(1) de la *LRTFP* actuelle portent atteinte à la liberté que garantit l'al. 2*d*) de la *Charte* aux membres de la GRC et ne peuvent se justifier au regard de l'article premier, la réparation appropriée consiste à annuler la disposition attentatoire de la *LRTFP* actuelle en application de l'art. 52 de la *Loi constitutionnelle de 1982*. La prise d'effet de cette déclaration d'invalidité est suspendue pour une période de 12 mois. N'eût été son abrogation, nous invaliderions également l'art. 96 du *Règlement de la GRC*. Cette conclusion signifie non pas que le législateur doit inclure la GRC dans le régime de la *LRTFP* actuelle. L'alinéa 2*d*) de la *Charte* n'impose pas un modèle particulier de relations du travail. S'il le juge à propos, le législateur demeure libre d'adopter tout modèle qu'il estime adapté au contexte particulier dans lequel les membres de cette organisation s'acquittent de leurs fonctions dans le respect des limites constitutionnelles imposées par la garantie prévue à l'al. 2*d*) et par l'article premier de la *Charte*.

Le juge Rothstein (dissident) : Les termes choisis par les juges majoritaires confèrent des droits plus étendus aux employés et restreignent encore davantage la marge de manœuvre du gouvernement que ce que le sens ordinaire ou une interprétation généreuse de l'al. 2*d*) de la *Charte* pourraient logiquement justifier. L'interprétation d'un droit protégé par la *Charte* doit reposer sur des principes et ne doit pas être dissociée du texte de la disposition au point de s'écarter du fondement du droit. En reconnaissant, dans *Health Services and Support — Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, 2007 CSC 27, [2007] 2 R.C.S. 391, et dans *Ontario (Procureur général) c. Fraser*, 2011 CSC 20, [2011] 2 R.C.S. 3, l'existence d'un droit dérivé à la négociation collective fondé sur l'objectif visé par l'al. 2*d*) de la *Charte*, la Cour a élargi la portée des droits constitutionnels au-delà de ce qui avait déjà été reconnu.

Or, moins de quatre ans après le prononcé de l'arrêt *Fraser*, les juges majoritaires élargissent encore la portée de la liberté d'association et abandonnent le critère de l'impossibilité effective de mener une véritable négociation collective établi dans cet arrêt. Ils inscrivent également un modèle de relations de travail contradictoire en tant que droit reconnu par la *Charte*, ce qui revient à répudier les conclusions tirées antérieurement par la Cour dans *Health Services* et dans *Fraser* selon lesquelles l'al. 2*d*) ne garantit ni l'application d'un modèle particulier de négociation collective, ni l'obtention d'un résultat donné.

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Section 2(*d*) of the *Charter* protects the right to associate to make collective representations and to have employers consider those representations in good faith. The majority in *Fraser* unambiguously held that the test to find an infringement of s. 2(*d*) in the labour relations context is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals. The language in *Fraser* does not support the majority's revised — and lowered — s. 2(*d*) standard. There is no doubt that the majority in *Fraser* firmly established a high threshold for infringement of the derivative right to collective bargaining. Fairness and certainty require that where settled law exists, courts must apply it to determine the result in a particular case. They may not identify a desired result and then search for a novel legal interpretation to bring that result about.

The essential feature of a labour relations regime that allows employees to exercise their constitutional right to make meaningful collective representations on their workplace goals is representativeness. Representativeness is the constitutional imperative required in order to ensure that s. 2(*d*) rights are protected in the collective bargaining context and it is only where legislation impairs the right of employees to have their interests advanced honestly and fairly that legislation will be constitutionally deficient.

Neither the choice of the organization representing employees for bargaining purposes nor the independence of that association are necessary to ensure that meaningful collective bargaining can occur. Choice and independence are central to Wagner-style labour relations and, by selecting choice and independence as constitutional requirements for meaningful collective bargaining, the majority mandates an adversarial model of labour relations and precludes others which may be just as or more effective in contributing to meaningful collective bargaining.

A statutorily designated bargaining model can ensure that employees' interests will be effectively represented to management even where the employees do not choose their individual representatives or the system in which this representation takes place. Section 2(*d*) requires that

L'alinéa 2*d*) de la *Charte* protège le droit de s'associer en vue de présenter des revendications collectives à l'employeur et de les voir prises en considération de bonne foi par ce dernier. Les juges majoritaires dans l'arrêt *Fraser* déclarent sans équivoque que le test permettant de conclure à une violation de l'al. 2*d*) dans le contexte des relations de travail est celui de savoir si la loi ou la mesure gouvernementale contestée rend impossible l'action collective visant la réalisation d'objectifs liés au travail. La formulation de l'arrêt *Fraser* n'appuie pas la norme révisée — et abaissée — que les juges majoritaires appliquent à l'al. 2*d*). Il ne fait aucun doute que, dans *Fraser*, les juges majoritaires ont fixé un seuil exigeant pour pouvoir conclure à la violation du droit dérivé à la négociation collective. L'équité et la notion de certitude exigent que, lorsque la jurisprudence est déjà fixée, les tribunaux doivent l'appliquer pour arrêter la solution dans l'affaire dont ils sont saisis. Ils ne peuvent pas déterminer à l'avance le résultat souhaité pour chercher ensuite une nouvelle interprétation juridique permettant d'obtenir ce résultat.

La caractéristique essentielle d'un régime de relations de travail qui permet aux employés d'exercer leur droit constitutionnel de formuler véritablement des revendications collectives quant à leurs objectifs relatifs au travail est la représentativité. Celle-ci est l'impératif constitutionnel auquel il faut satisfaire pour s'assurer que les droits prévus à l'al. 2*d*) sont protégés dans le contexte de la négociation collective, et ce n'est que si elle porte atteinte au droit des employés de faire défendre leurs droits honnêtement et équitablement qu'une loi sera considérée comme lacunaire sur le plan constitutionnel.

Ni le choix de l'organisation qui représente les employés aux fins de la négociation collective ni son indépendance face à la direction ne sont des éléments nécessaires pour assurer la tenue d'une véritable négociation collective. La liberté de choix et l'indépendance sont des aspects cruciaux des relations de travail structurées selon le modèle Wagner. En considérant que la liberté de choix et l'indépendance constituent des impératifs constitutionnels à la tenue de véritables négociations collectives, les juges majoritaires imposent un modèle de relations de travail contradictoire et ils écartent d'autres modèles qui peuvent être aussi efficaces sinon plus pour contribuer à la tenue de telles négociations.

Un modèle de négociation désigné par la loi peut garantir que les intérêts des employés seront efficacement défendus auprès de la direction même lorsqu'ils ne choisissent pas leurs représentants individuels ou le système dans le cadre duquel cette représentation s'effectue.

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the voice with which employees communicate with their employer as a collective be representative of their interests. Provided that the spokespersons through whom employees make representations to their employer have a duty to represent the interests of all employees and that there is a means to hold those representatives to account, the workers' constitutional right to make collective representations and to have their collective representations considered in good faith is met. Representativeness is what *Fraser* mandates and there is no justification to embark upon the imposition of unnecessary constitutional constraints.

As with choice, the notion of independence is not an inherent aspect of collective bargaining. Where concerns are raised with respect to the independence of a legislatively prescribed employee association, the relevant question is not whether the association or process is independent in the sense that it segregates employees from management, but whether the process prevents employees, such as RCMP members, from associating to advance their collective workplace goals. To reiterate, the touchstone is representativeness. So long as employees have recourse to ensure that their views are put forward to management and that their representatives are working in their interests, the labour relations process will not be dominated by management and employees will have the means to work towards their collective workplace goals. Any representative who limits representation based on what management permits or who places their own employment interests above the interests of all employees will be held accountable for his or her own actions.

In the case at bar, the context of a national police force led to the adoption of a statutory collaborative labour relations model, the SRRP. The correct standard against which the SRRP should be evaluated is whether the process renders meaningful collective bargaining effectively impossible. Whether the *Fraser*-mandated effective impossibility test or the majority's new substantial interference test is applied, it is clear that the SRRP does not infringe s. 2(*d*) of the *Charter*.

That Parliament chose a collaborative model like the SRRP as a means of facilitating employer-employee engagement for the national police force does not mean that that model has rendered it effectively impossible for RCMP members to achieve collective workplace goals.

L'alinéa 2*d*) exige que le porte-parole qui s'adresse à leur employeur en leur nom à tous représente leurs intérêts. À condition que le porte-parole par l'entremise duquel les employés font des représentations auprès de leur employeur ait l'obligation de représenter les intérêts de l'ensemble des employés et qu'il existe un moyen d'obliger ce porte-parole à rendre des comptes, le droit constitutionnel des travailleurs de formuler des revendications collectives et de les voir prises en considération de bonne foi est respecté. C'est la représentativité qu'exige l'arrêt *Fraser* et rien ne justifie d'imposer des contraintes constitutionnelles inutiles.

À l'instar de la liberté de choix, le principe d'indépendance ne constitue pas un élément inhérent à la négociation collective. Lorsque l'indépendance d'une association d'employés prescrite par la loi est mise en doute, la vraie question n'est pas celle de savoir si l'association ou le processus est indépendant, en ce sens qu'il ou elle dissocie les employés de la direction, mais plutôt celle de savoir si cette association ou ce processus empêche des employés, comme les membres de la GRC, de s'associer en vue de réaliser leurs objectifs collectifs relatifs au travail. Une fois de plus, la pierre angulaire, c'est la représentativité. Dès lors que les employés disposent de recours pour s'assurer que leur point de vue est relayé à la direction et que leurs représentants travaillent dans leur intérêt, le processus de relations de travail n'est pas dominé par la direction et les employés disposent de moyens leur permettant de travailler en vue de réaliser leurs objectifs collectifs relatifs au travail. Le représentant qui restreint le cadre de son mandat en fonction de ce que lui permet la direction ou qui fait passer ses intérêts professionnels avant ceux de l'ensemble des employés devra répondre de ses gestes.

Dans le cas qui nous occupe, le contexte d'un corps policier national a conduit à l'adoption d'un modèle de relations de travail créé par la loi et axé sur la collaboration, le PRRF. La norme qu'il convient d'appliquer pour examiner le PRRF est celle de savoir si le processus mis en place rend effectivement impossible la tenue d'une véritable négociation collective. Qu'on applique le test de l'impossibilité effective prévu par l'arrêt *Fraser* ou le nouveau test de l'entrave substantielle proposé par les juges majoritaires, il est évident que le PRRF ne porte pas atteinte au droit protégé par l'al. 2*d*) de la *Charte*.

Le fait que le législateur ait retenu un modèle axé sur la collaboration comme le PRRF pour favoriser les relations employeur-employés dans l'intérêt du corps policier national que constitue la GRC ne signifie pas que, du fait de l'adoption de ce modèle, il est effectivement

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Although RCMP members did not choose their associational framework for bargaining purposes, they are able to democratically elect their representatives and those representatives have a statutory duty to represent employee interests. They can be replaced if they fail to uphold that duty. Management also has a constitutional obligation to consider in good faith the representations made on behalf of RCMP members. In short, the evidence before this Court is that Staff Relations Representatives fairly advance employee interests to RCMP management and thus the SRRP meets the constitutional requirement of representativeness mandated under this Court's interpretation of s. 2(*d*).

The purpose of excluding RCMP members from the *PSLRA* is not to interfere with collective bargaining, but is driven by a legitimate concern that the model imposed under that legislation is ill suited to the national police force. The evolution in the legal understanding of s. 2(*d*) since *Delisle* bears no relation to the majority's finding in that case as to the purpose of the exclusion of RCMP members from the *PSLRA*'s predecessor legislation, and thus cannot be used to support revisiting the issues settled in *Delisle*. Although *Delisle* was decided before *Health Services* and *Fraser* ushered in a more expansive approach to labour relations, the jurisprudential developments since do not allow this Court to conclude that the purpose of the exclusion is to deny RCMP members' associational rights. In fact, changes to the SRRP since *Delisle* have reinforced the understanding that the program's goal is to enhance representation of the interests of RCMP members without the imposition of an adversarial model.

Even if *Delisle* had been incorrectly decided and the purpose of the exclusion contained in the *PSSRA* in 1967 was to deny RCMP members meaningful collective bargaining, it does not follow that this continues to be the purpose of para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* today. By 2003, when the *PSSRA* was replaced by the *PSLRA*, the RCMP labour relations scheme was considerably changed from that which existed in 1967. The decision to continue the exclusion was made with the knowledge that doing so did not deny members collective bargaining rights. These individuals were subject to a parallel labour relations regime — the

devenu impossible pour les membres de la GRC de réaliser leurs objectifs collectifs relatifs au travail. Certes, les membres de la GRC n'ont pas choisi leur cadre associatif pour les besoins de la négociation, mais ils sont en mesure d'élire démocratiquement leurs représentants qui, du fait de la loi, sont tenus de défendre les intérêts des employés. Ils peuvent d'ailleurs être remplacés s'ils manquent à ce devoir. La direction a également l'obligation constitutionnelle de tenir compte de bonne foi des observations présentées au nom des membres de la GRC. Bref, suivant la preuve soumise à la Cour, les représentants des relations fonctionnelles défendent équitablement les intérêts des employés auprès de la direction de la GRC; le PRRF respecte donc l'exigence constitutionnelle de représentativité exigée selon l'interprétation que la Cour a donnée à l'al. 2*d*).

L'exclusion des membres de la GRC du champ d'application de la *LRTFP* actuelle n'a pas pour objet de nuire à la négociation collective; elle est plutôt motivée par la crainte légitime que le modèle prévu par cette loi ne convienne pas au service de police national que constitue la GRC. L'évolution de l'interprétation juridique de l'al. 2*d*) depuis l'arrêt *Delisle* n'a rien à voir avec la conclusion tirée par les juges majoritaires dans cet arrêt en ce qui concerne l'objet de l'exclusion des membres de la GRC du champ d'application de la première *LRTFP*. On ne peut donc pas s'en servir pour revenir sur des questions qui ont été tranchées dans cet arrêt. Certes, l'arrêt *Delisle* a été rendu avant que les arrêts *Health Services* et *Fraser* ne marquent le début d'une nouvelle ère se caractérisant par une interprétation large dans le contexte des relations de travail. Cependant, l'évolution de la jurisprudence depuis ne permet pas à la Cour de conclure que l'exclusion en question vise à priver les membres de la GRC de la liberté d'association. En fait, les modifications apportées au PRRF depuis l'arrêt *Delisle* ont renforcé l'idée que le programme a pour objet d'améliorer la défense des intérêts des membres de la GRC sans imposer un modèle contradictoire.

Même si l'arrêt *Delisle* était mal fondé et que l'exclusion prévue à la première *LRTFP* dans sa rédaction en vigueur en 1967 avait pour objet de priver les membres de la GRC d'une véritable négociation collective, il ne s'ensuit pas pour autant qu'il s'agit toujours de l'objectif visé par l'al. *d*) de la définition de « fonctionnaire » qui figure au par. 2(1) de la *LRTFP* actuelle. En 2003, lorsque l'ancienne loi a été remplacée par la *LRTFP* actuelle, le régime de relations de travail de la GRC a été modifié de fond en comble par rapport à celui qui existait en 1967. La décision de maintenir l'exclusion a été prise à la lumière du fait que cela n'avait pas pour effet

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SRRP. To ignore the significantly different context in which the exclusion of RCMP members was re-enacted in the *PSLRA* disregards the current legislative reality.

Had para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* been found to breach s. 2(*d*) of the *Charter*, it would nonetheless constitute a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society and would therefore be justified under s. 1 of the *Charter*. Parliament is entitled to address concerns that an adversarial RCMP members' association might order its members to refuse to intervene in certain circumstances involving the labour disputes of others or that belonging to such associations could inhibit members from responding to such situations impartially. The RCMP is materially different from other Canadian police forces. The government must be permitted to organize the Force's labour relations in view of its distinctive and essential role as our national police force.

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de priver les membres de la GRC de leurs droits à la négociation collective. Ces individus étaient simplement assujettis à un régime de relations de travail parallèle : le PRRF. Ignorer le contexte radicalement différent dans lequel l'exclusion des membres de la GRC a été adoptée de nouveau dans la *LRTFP* actuelle revient à méconnaître la réalité législative actuelle.

Même si on concluait que l'al. *d*) de la définition de « fonctionnaire » qui figure au par. 2(1) de la *LRTFP* actuelle porte atteinte au droit protégé par l'al. 2*d*) de la *Charte*, cette atteinte constituerait néanmoins une limite raisonnable prescrite par une règle de droit et dont la justification pourrait se démontrer dans le cadre d'une société libre et démocratique au regard de l'article premier de la *Charte*. Le législateur a le droit de se préoccuper du fait qu'une association de membres de la GRC fondée sur un modèle contradictoire pourrait ordonner à ses membres de refuser d'intervenir dans certaines circonstances où il est question de conflits de travail d'autres groupes ou que le fait d'appartenir à de telles associations pourrait amener ses membres à hésiter à répondre à de telles situations de façon impartiale. La GRC est différente des autres forces policières canadiennes. Le gouvernement doit être habilité à organiser les relations de travail au sein de cette force policière en tenant compte du rôle particulier et essentiel de celle-ci en tant que service de police national.

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APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Rosenberg and Juriansz JJ.A.), 2012 ONCA 363, 111 O.R. (3d) 268, 292 O.A.C. 202, 350 D.L.R. (4th) 261, 260 C.R.R. (2d) 242, 220 L.A.C. (4th) 107, [2012] O.J. No. 2420 (QL), 2012 CarswellOnt 6781 (WL Can.), setting aside a decision of MacDonnell J., 96 O.R. (3d) 20, 188 C.R.R. (2d) 225, 2009 CLLC ¶220-027, 2009 CanLII 15149, [2009] O.J. No. 1352 (QL), 2009 CarswellOnt 1780 (WL Can.). Appeal allowed, Rothstein J. dissenting.

Laura C. Young and *Patric Senson*, for the appellants.

Peter Southey, *Donnaree Nygard* and *Kathryn Hucal*, for the respondent.

Robin K. Basu and *Michael Dunn*, for the intervener the Attorney General of Ontario.

Jonathan Penner, *Keith Evans* and *Karen Horsman*, for the intervener the Attorney General of British Columbia.

Graeme G. Mitchell, *Q.C.*, for the intervener the Attorney General for Saskatchewan.

Roderick S. Wiltshire, for the intervener the Attorney General of Alberta.

James R. K. Duggan and *Alexander H. Duggan*, for the intervener Association des membres de la Police Montée du Québec Inc.

John D. R. Craig and *Christopher D. Pigott*, for the intervener the Mounted Police Members' Legal Fund.

Benoit Laurin and *Éric Lévesque*, for the intervener Confédération des syndicats nationaux.

Ian J. Roland and *Michael Fenrick*, for the intervener the Canadian Police Association.

Steven Barrett and *Ethan Poskanzer*, for the intervener the Canadian Labour Congress.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges Doherty, Rosenberg et Juriansz), 2012 ONCA 363, 111 O.R. (3d) 268, 292 O.A.C. 202, 350 D.L.R. (4th) 261, 260 C.R.R. (2d) 242, 220 L.A.C. (4th) 107, [2012] O.J. No. 2420 (QL), 2012 CarswellOnt 6781 (WL Can.), qui a infirmé une décision du juge MacDonnell, 96 O.R. (3d) 20, 188 C.R.R. (2d) 225, 2009 CLLC ¶220-027, 2009 CanLII 15149, [2009] O.J. No. 1352 (QL), 2009 CarswellOnt 1780 (WL Can.). Pourvoi accueilli, le juge Rothstein est dissident.

Laura C. Young et *Patric Senson*, pour les appelantes.

Peter Southey, *Donnaree Nygard* et *Kathryn Hucal*, pour l'intimé.

Robin K. Basu et *Michael Dunn*, pour l'intervenant le procureur général de l'Ontario.

Jonathan Penner, *Keith Evans* et *Karen Horsman*, pour l'intervenant le procureur général de la Colombie-Britannique.

Graeme G. Mitchell, *c.r.*, pour l'intervenant le procureur général de la Saskatchewan.

Roderick S. Wiltshire, pour l'intervenant le procureur général de l'Alberta.

James R. K. Duggan et *Alexander H. Duggan*, pour l'intervenante l'Association des membres de la Police Montée du Québec Inc.

John D. R. Craig et *Christopher D. Pigott*, pour l'intervenant le Fonds de recours juridique des membres de la Gendarmerie.

Benoit Laurin et *Éric Lévesque*, pour l'intervenante la Confédération des syndicats nationaux.

Ian J. Roland et *Michael Fenrick*, pour l'intervenante l'Association canadienne des policiers.

Steven Barrett et *Ethan Poskanzer*, pour l'intervenant le Congrès du travail du Canada.

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Ranjan K. Agarwal and *Ashley L. Paterson*, for the intervener the Canadian Civil Liberties Association.

Andrew Raven, *Andrew Astritis* and *Morgan Rowe*, for the intervener the Public Service Alliance of Canada.

Lindsay M. Lyster, for the intervener the British Columbia Civil Liberties Association.

The judgment of McLachlin C.J. and LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ. was delivered by

THE CHIEF JUSTICE AND LEBEL J. —

I. Introduction

[1] In this appeal, we must decide whether excluding members of the Royal Canadian Mounted Police ("RCMP") from collective bargaining under the *Public Service Labour Relations Act*, enacted by the *Public Service Modernization Act*, S.C. 2003, c. 22, s. 2 ("*PSLRA*"), and imposing a non-unionized labour relations regime violates the guarantee of freedom of association in s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*. This requires us to review the nature and interpretation of the right guaranteed by s. 2(*d*) of the *Charter*, and to clarify the scope of the constitutional protection of collective bargaining recognized in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, and *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3.

[2] RCMP members are not permitted to unionize or engage in collective bargaining. They have been excluded from the *PSLRA* and its predecessor statute since collective bargaining was first introduced in the federal public service in the late 1960s. Instead, there exists a non-unionized labour relations regime with three core components. First, members

Ranjan K. Agarwal et *Ashley L. Paterson*, pour l'intervenante l'Association canadienne des libertés civiles.

Andrew Raven, *Andrew Astritis* et *Morgan Rowe*, pour l'intervenante l'Alliance de la Fonction publique du Canada.

Lindsay M. Lyster, pour l'intervenante l'Association des libertés civiles de la Colombie-Britannique.

Version française du jugement de la juge en chef McLachlin et des juges LeBel, Abella, Cromwell, Karakatsanis et Wagner rendu par

LA JUGE EN CHEF ET LE JUGE LEBEL —

I. Introduction

[1] Dans le présent pourvoi, nous sommes appelés à décider si l'exclusion des membres de la Gendarmerie royale du Canada (« GRC ») du régime de négociation collective établi par la version actuelle de la *Loi sur les relations de travail dans la fonction publique*, édictée par la *Loi sur la modernisation de la fonction publique*, L.C. 2003, c. 22, art. 2 (« *LRTFP* actuelle »), et si l'imposition d'un régime non syndical de relations du travail porte atteinte à la liberté d'association garantie par l'al. 2*d*) de la *Charte canadienne des droits et libertés*. Pour ce faire, nous devons examiner la nature du droit protégé par l'al. 2*d*) de la *Charte* ainsi que l'interprétation qui en a été donnée, et préciser la portée de la protection constitutionnelle accordée à la négociation collective par les arrêts *Health Services and Support — Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, 2007 CSC 27, [2007] 2 R.C.S. 391, et *Ontario (Procureur général) c. Fraser*, 2011 CSC 20, [2011] 2 R.C.S. 3.

[2] Les membres de la GRC ne peuvent ni se syndiquer ni négocier collectivement. Ils sont exclus de l'application de la *LRTFP* actuelle et de la loi antérieure à cette dernière depuis que la négociation collective a été instaurée dans la fonction publique fédérale à la fin des années 1960. Ils se trouvent plutôt assujettis à un régime non syndical de relations

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can advance their workplace concerns through the Staff Relations Representative Program ("SRRP"). Second, members' concerns regarding pay and benefits are communicated to management through the RCMP Pay Council process. Third, RCMP members have created the Mounted Police Members' Legal Fund ("Legal Fund"), a not-for-profit corporation funded through membership dues, which provides legal assistance to RCMP members for employment-related issues.

[3] A little over 15 years ago, this Court held that exclusion of RCMP members from collective bargaining under the *PSLRA*'s predecessor legislation did not infringe s. 2(*d*): *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989. On this appeal we are asked to reconsider that decision as it relates to the *PSLRA*. Unlike this appeal, however, *Delisle* did not involve a direct challenge to the sufficiency of the SRRP: *Delisle*, at para. 34.

[4] This case was heard together with a related appeal, brought by two Staff Relations Representatives ("SRRs") on behalf of all members of the RCMP, challenging the constitutionality of federal wage restraint legislation: *Meredith v. Canada (Attorney General)*, 2015 SCC 2, [2015] 1 S.C.R. 125. While the factual background of both appeals overlap, they raise different legal issues. *Meredith* addresses the question of whether a piece of legislation and its implementation unconstitutionally interfered with the existing RCMP labour relations scheme, but does not challenge that scheme as a whole as constitutionally deficient under s. 2(*d*). The present appeal is directed at the constitutionality of the scheme comprising both the *PSLRA* exclusion and the SRRP process.

de travail reposant sur trois éléments principaux. Tout d'abord, les membres peuvent faire valoir leurs préoccupations à propos de leurs conditions de travail par l'entremise du Programme de représentants des relations fonctionnelles (« PRRF »). Ensuite, leurs représentations quant aux questions de nature salariale et quant à leurs avantages sociaux sont transmises à la direction grâce au Conseil de la solde de la GRC. Enfin, les membres de la GRC ont créé le Fonds de recours juridique des membres de la Gendarmerie (« Fonds de recours juridique ») — société à but non lucratif financée par leurs cotisations — qui leur fournit de l'assistance juridique pour les questions relatives à leur emploi.

[3] Il y a un peu plus de 15 ans, la Cour a conclu que l'exclusion des membres de la GRC du régime de négociation collective établi par la première *LRTFP* alors en vigueur ne portait pas atteinte à l'al. 2*d*) (*Delisle c. Canada (Sous-procureur général)*, [1999] 2 R.C.S. 989). Dans le présent pourvoi, nous devons réexaminer cette décision en ce qui a trait à la *LRTFP* actuelle, même si dans l'affaire *Delisle*, contrairement à ce qui est en cause en l'espèce, la valeur constitutionnelle du PRRF n'était pas directement contestée (*Delisle*, par. 34).

[4] La présente cause a été entendue en même temps que le pourvoi connexe, formé par deux représentants des relations fonctionnelles (« RRF ») au nom de tous les membres de la GRC, pour contester la constitutionnalité des dispositions législatives diminuant les augmentations salariales accordées aux employés de l'administration fédérale (*Meredith c. Canada (Procureur général)*, 2015 CSC 2, [2015] 1 R.C.S. 125). Même si les faits en cause se recoupent, les deux pourvois soulèvent des questions juridiques différentes. Dans l'affaire *Meredith*, la Cour est appelée à décider si une loi et sa mise en œuvre ont interféré de manière inconstitutionnelle avec le régime existant de relations de travail à la GRC, sans que soit contestée la portée constitutionnelle de l'ensemble du régime au regard de l'al. 2*d*). Le présent pourvoi porte plutôt sur la constitutionnalité du régime qui comprend à la fois l'exclusion prévue par la *LRTFP* actuelle et le système fondé sur le PRRF.

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[5] We conclude that the s. 2(*d*) guarantee of freedom of association protects a meaningful process of collective bargaining that provides employees with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests. The current RCMP labour relations regime denies RCMP members that choice, and imposes on them a scheme that does not permit them to identify and advance their workplace concerns free from management's influence. Accordingly, we allow the appeal and find that s. 96 of the *Royal Canadian Mounted Police Regulations, 1988*, SOR/88-361 ("*RCMP Regulations*"),[1] which was in effect at the time of the hearing of this appeal, is inconsistent with s. 2(*d*) of the *Charter*. We also find that the exclusion of RCMP members from collective bargaining under para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* infringes s. 2(*d*) of the *Charter*. Neither infringement is justified under s. 1 of the *Charter*.

[5] Nous concluons que la liberté d'association garantie par l'al. 2*d*) protège l'existence d'un processus véritable de négociation collective qui offre aux employés une liberté de choix et une indépendance suffisantes pour leur permettre de décider de leurs intérêts collectifs et de les défendre. Le régime actuel de relations de travail de la GRC prive les membres de cette liberté de choix et leur impose un programme qui ne leur permet pas de définir et de faire valoir leurs préoccupations professionnelles à l'abri de l'influence de la direction. Par conséquent, nous sommes d'avis d'accueillir le pourvoi et nous concluons que l'art. 96 du *Règlement de la Gendarmerie royale du Canada (1988)*, DORS/88-361 (« *Règlement de la GRC* »)[1], qui était en vigueur lorsque le pourvoi a été entendu, viole l'al. 2*d*) de la *Charte*. Nous sommes également d'opinion que l'exclusion des membres de la GRC du régime de négociation collective prévu à l'al. *d*) de la définition de « fonctionnaire » qui figure au par. 2(1) de la *LRTFP* actuelle viole l'al. 2*d*) de la *Charte*. Enfin, selon nous, aucune de ces violations n'est justifiée au regard de l'article premier de la *Charte*.

II. The Parties

[6] The appellants are voluntary, private associations of RCMP members organized at the initiative of members. The Mounted Police Association of Ontario ("MPAO") is a non-profit corporation registered in Ontario, formed in 1998 from an amalgamation of two predecessor groups. It represents RCMP members in the National Division (the National Capital Region), Headquarters (RCMP national office in Ottawa) and "O" Division (Ontario, outside the National Capital Region). The British Columbia Mounted Police Professional Association ("BCMPPA") is a non-profit society incorporated in British Columbia in 1994. Its members are principally drawn from "E" Division (British Columbia). A similar organization, the Association des membres de la Police Montée du Québec Inc., intervenes in

II. Les parties

[6] Les appelantes sont des associations de membres de la GRC, privées et volontaires, qui ont été mises sur pied par certains d'entre eux. L'Association de la police montée de l'Ontario (« APMO »), une société à but non lucratif immatriculée en Ontario, est issue de la fusion, en 1998, de deux groupes qui l'ont précédée. Elle représente des membres de la GRC appartenant à la Division nationale (de la région de la capitale nationale), à la Direction générale (du quartier général de la GRC à Ottawa) et à la Division « O » (de l'Ontario, excluant la région de la capitale nationale). La British Columbia Mounted Police Professional Association (« BCMPPA ») est une société à but non lucratif constituée en Colombie-Britannique en 1994. Ses membres proviennent principalement de la Division « E » (soit de

[1] Repealed since the hearing of this appeal (SOR/2014-281, s. 58) and replaced by a substantially similar provision, s. 56 of the *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281 ("*RCMP Regulations, 2014*").

[1] Abrogé depuis l'audition du présent pourvoi (DORS/2014-281, art. 58) et remplacé par une disposition essentiellement similaire, l'art. 56 du *Règlement de la Gendarmerie royale du Canada (2014)*, DORS/2014-281 (« *Règlement de la GRC (2014)* »).

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this appeal. It represents the majority of members of "C" Division (Quebec) as well as French-speaking members across Canada.

[7] The goal of all three associations is to represent RCMP members on work-related issues. The associations engage in political lobbying, educational efforts, and social activities. They provide advice and assistance to their members in discipline and grievance matters. Their operations are funded through membership dues, and the associations have no full-time staff. None of the associations has ever been recognized for the purpose of collective bargaining or consultation on workplace issues by RCMP management or the federal government.

[8] The respondent, the Attorney General of Canada, joined by a number of provincial Attorneys General, opposes the appellants' contention that the current labour relations scheme violates the guarantee of freedom of association under s. 2(*d*) of the *Charter*.

III. The Current Process

[9] The labour relations system currently in place at the RCMP is composed of three bodies: the SRRP, the Pay Council and the Legal Fund. The core component of the scheme is the SRRP.

[10] The SRRP is the primary mechanism through which RCMP members can raise labour relations issues (excluding wages), and the only form of employee representation recognized by management. The program is the result of consultations that took place as early as 1974. It was formalized in s. 96 of the *RCMP Regulations*:

96. (1) The Force shall have a Division Staff Relations Representative Program to provide for representation of

la Colombie-Britannique). Une organisation semblable, l'Association des membres de la Police Montée du Québec Inc., agit à titre d'intervenante dans le présent pourvoi. Elle représente la majorité des membres de la Division « C » (du Québec) de même que les membres francophones de l'ensemble du pays.

[7] Les trois associations ont pour objectif de représenter des membres de la GRC quant aux questions relatives à leurs conditions de travail. Elles participent à des activités de lobby politique et de sensibilisation, ainsi qu'à des activités sociales. Elles conseillent leurs membres et leur prêtent assistance en matière de discipline et de griefs. Leurs activités sont financées à même les cotisations des membres et elles n'ont aucun employé à temps plein. Aucune des associations n'a été reconnue à quelque moment que ce soit, par la direction de la GRC ou par le gouvernement fédéral, aux fins de négociations collectives ou de consultations au sujet d'enjeux relatifs au travail.

[8] L'intimé, le procureur général du Canada, auquel se sont joints plusieurs procureurs généraux des provinces, conteste la prétention des appelantes voulant que le régime actuel de relations de travail porte atteinte à la liberté d'association garantie par l'al. 2*d*) de la *Charte*.

III. Le processus actuel

[9] Le régime de relations de travail actuellement en vigueur au sein de la GRC s'articule autour de trois organismes : le PRRF, qui est au cœur du régime, le Conseil de la solde et le Fonds de recours juridique.

[10] Le PRRF constitue le principal mécanisme par lequel les membres de la GRC peuvent soulever des questions concernant les relations de travail (à l'exception de la solde), et l'unique forme de représentation des employés que reconnaît la direction. Le programme résulte de consultations menées dès 1974. Son existence était officialisée par l'art. 96 du *Règlement de la GRC* :

96. (1) La Gendarmerie établit un programme de représentants divisionnaires des relations fonctionnelles

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the interests of all members with respect to staff relations matters.

(2) The Division Staff Relations Representative Program shall be carried out by the division staff relations representatives of the members of the divisions and zones who elect them.

[11] The SRRP process is amplified by the RCMP Staff Relations Representative Program Constitution ("SRRP Constitution"), unilaterally adopted by the SRRP, and by an agreement between the National Executive Committee of the SRRP and the RCMP Commissioner addressing matters such as the composition of the program (the "Agreement"). The SRRP Constitution states the purpose of the program is to "promote mutually beneficial relations between Force management and the wider membership" (s. 2). To this end, the SRRP seeks to provide RCMP members "with fair and equitable representation in staff relations matters and to facilitate their participation in the development and implementation of Force policies and programs" (*ibid.*).

[12] The SRRP was designed to resolve issues at the lowest possible level within the RCMP hierarchy. The aim is that at each level (divisional, regional and national), members' representatives and management consult on human resources initiatives and policies, with the understanding that the final word always rests with management.

[13] Both the current and former RCMP regulations (s. 96, *RCMP Regulations*; s. 56, *RCMP Regulations, 2014*) provide for SRRP staffing by elected representatives known as the Staff Relations Representatives or SRRs. Thirty-four SRRs are elected by both regular and civilian members of the RCMP for a two-year term and serve in this capacity full-time. Additionally, 150 part-time sub-representatives are elected but continue to perform their regular duties while acting as representatives.

qui a pour objet d'assurer la représentation des membres en matière de relations fonctionnelles.

(2) Le programme de représentants divisionnaires des relations fonctionnelles est mis en application par les représentants divisionnaires des relations fonctionnelles qu'élisent les membres des divisions et des secteurs.

[11] Le PRRF est complété à la fois par les Statuts du Programme des représentants des relations fonctionnelles de la GRC (les « Statuts du PRRF »), adoptés unilatéralement par le PRRF, et par une entente intervenue entre le Comité exécutif national du PRRF et le commissaire de la GRC qui précise, entre autres, la structure du programme (« Entente entre le commissaire et le PRRF »). Selon les Statuts du PRRF, le programme vise à « promouvoir des relations mutuellement avantageuses entre la direction et les membres de la Gendarmerie » (art. 2). À cette fin, il a pour objet d'offrir aux membres de la GRC « une représentation juste et équitable en matière de relations fonctionnelles et [de] faciliter leur participation à l'élaboration et à la mise en application des politiques et des programmes de la Gendarmerie » (*ibid.*).

[12] Le PRRF a été conçu pour régler les problèmes à l'échelon le plus bas possible de la hiérarchie de la GRC. Il vise à permettre, à chaque niveau (divisionnaire, régional et national), la tenue de consultations entre les représentants des membres et la direction au sujet des initiatives et des politiques relatives aux ressources humaines, même s'il est entendu que la décision finale revient toujours à la direction.

[13] Suivant à la fois l'ancien et l'actuel règlement de la GRC (l'art. 96 du *Règlement de la GRC*; l'art. 56 du *Règlement de la GRC (2014)*), le PRRF est appliqué par des représentants élus, connus sous le nom de représentants des relations fonctionnelles ou RRF. Trente-quatre RRF sont élus par les membres réguliers et civils de la GRC pour un mandat de deux ans et ils exercent cette fonction à temps plein. Le programme compte de plus 150 sous-représentants à temps partiel, qui sont élus, mais qui continuent d'exercer leurs fonctions courantes pendant leur mandat.

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[14] The SRRP is organized regionally and divisionally (generally corresponding to a province or territory) to align with the RCMP's nation-wide structure. The National Caucus is the collective body of elected SRRs. Regional Caucuses comprise all SRRs in a region, while Divisional Caucuses comprise all SRRs and sub-representatives in a province or territory. Regional and Divisional Caucuses provide the formal point of contact between membership and regional and divisional management.

[15] The National Executive Committee ("NEC") is the governing body of the SRRP, as well as the presiding body of the National Caucus. The National Caucus elects two SRRs to fulfill a three-year term as full-time members of the NEC. In addition, one SRR is elected to the NEC by each of the five Regional Caucuses for a one-year term. The two full-time members of the NEC are the formal point of contact for the National Caucus with the national management of the RCMP (Commissioner, senior management, and the Minister of Public Safety and Emergency Preparedness). As such, they attend meetings of the RCMP's Senior Executive Committee, where strategic decisions are made.

[16] To fully understand the SRRP's role and function, it is necessary, as the application judge and the Court of Appeal did, to take a step back and review the history of labour relations at the RCMP and the origins of the SRRP. As we shall see, the SRRP has undergone a number of changes since its inception. None of them, however, has substantially altered its purpose, place or function within the RCMP chain of command.

A. *Origins of the Staff Relations Representative Program*

[17] RCMP members were forbidden from unionizing for much of the last century. From 1918 to 1974, *all* associational activities were prohibited on pain of instant dismissal, by virtue of Orders in Council P.C. 1918-2213 and later P.C. 174/1981 (1945). This policy was believed to be necessary to

[14] Le PRRF est organisé en régions et en divisions (qui correspondent pour ainsi dire aux provinces et aux territoires) de manière à refléter la structure de la GRC à l'échelle nationale. Son Caucus national est formé de l'ensemble des RRF. Les caucus régionaux comprennent tous les RRF d'une région, tandis que les caucus divisionnaires regroupent tous les RRF et sous-représentants d'une province ou d'un territoire. Les caucus régionaux et divisionnaires agissent comme point de contact officiel entre les membres et la direction régionale et divisionnaire.

[15] Le Comité exécutif national (« CEN ») constitue l'organe directeur du PRRF. En outre, il préside le Caucus national. Ce dernier élit deux RRF qui siègent à temps plein au CEN pour un mandat de trois ans, tandis qu'un RRF est élu par chacun des cinq caucus régionaux pour y siéger durant un mandat d'un an. Les deux membres à temps plein du CEN agissent comme point de contact officiel entre le Caucus national et la direction nationale de la GRC (le commissaire, la haute direction et le ministre de la Sécurité publique et de la Protection civile). À ce titre, ils participent aux réunions de l'État-major supérieur de la GRC, lieu de prises des décisions stratégiques.

[16] Pour bien comprendre le rôle et la fonction du PRRF, il faut revenir sur l'histoire des relations de travail à la GRC et sur les origines du PRRF, comme l'ont fait le juge saisi de la demande et la Cour d'appel. Comme nous le verrons, le PRRF a connu plusieurs changements depuis sa création. Cependant, aucun d'entre eux n'a eu pour effet de modifier sensiblement l'objectif qu'il poursuit, son rôle ou ses fonctions au sein de la chaîne de commandement de la GRC.

A. *Origines du Programme de représentants des relations fonctionnelles*

[17] Pendant une grande partie du siècle dernier, il était interdit aux membres de la GRC de se syndiquer. Entre 1918 et 1974, les décrets C.P. 1918-2213 et plus tard C.P. 174/1981 (1945) interdisaient *toute* activité associative, sous peine de congédiement immédiat. Cette politique était jugée nécessaire pour

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preserve the loyalty of RCMP members and their obedience to superior orders, which could have been disturbed by allegiance to fellow workers: *Delisle*, at paras. 92-96, per Cory and Iacobucci JJ., dissenting.

[18] Collective bargaining in the federal public service in Canada was implemented in 1967, with the adoption of the *Public Service Staff Relations Act*, S.C. 1966-67, c. 72 ("*PSSRA*"). Members of the RCMP were excluded from bargaining under that Act, as they continue to be excluded under the *PSLRA*. Prior to the enactment of the *PSSRA* in 1967, a committee struck by the government to examine whether and how to implement collective bargaining in the federal public service had expressed concerns related to loyalty and obedience within the Force. The concerns were of the same nature as the ones which had led to Orders in Council prohibiting all associational activities by RCMP members. In what is known as the Heeney Report, the committee recommended excluding RCMP members from the labour relations regime proposed by it: *Report of the Preparatory Committee on Collective Bargaining in the Public Service* (1965), at p. 27; *Delisle*, at paras. 97-98, per Cory and Iacobucci JJ., dissenting. The Woods Report of 1968, however, recommended that federal law enforcement officials have the right to organize and engage in collective bargaining, subject to certain limitations (*Canadian Industrial Relations: The Report of the Task Force on Labour Relations* (1969), at para. 440).

[19] Later, in the early 1970s, dissatisfaction within the RCMP led members to take steps towards the formation of a members' association to advance their interests (J. F. Hardy and A. Ponak, "Staff Relations in the Royal Canadian Mounted Police" (1983), 12 *J. Collective Negotiations* 87, at pp. 89-90). An exploratory committee was established in 1972 in the hopes of establishing an association, and, by early 1974, well-attended meetings to consider forming an association were being held in Montréal, Toronto, Ottawa, Vancouver, and smaller

garantir la loyauté des membres de la GRC et leur obéissance aux ordres de leurs supérieurs, et ainsi éviter les conflits qu'aurait pu provoquer leur allégeance à la cause d'autres travailleurs (*Delisle*, par. 92-96, les juges Cory et Iacobucci, dissidents).

[18] L'existence d'un régime de négociation collective dans la fonction publique au Canada remonte à 1967, avec l'adoption de la première version de la *Loi sur les relations de travail dans la Fonction publique*, S.C. 1966-67, c. 72 (« première *LRTFP* »). Cette loi excluait les membres de la GRC du régime de négociation collective, un principe maintenu par la *LRTFP* actuelle. Avant l'adoption de la première *LRTFP* en 1967, le comité mis sur pied par le gouvernement pour examiner l'opportunité et la manière de mettre en œuvre un régime de négociation collective dans la fonction publique fédérale avait exprimé des inquiétudes sur la loyauté et l'obéissance au sein de la Gendarmerie. Le comité exprimait alors des préoccupations similaires à celles qui avaient mené à la prise des décrets interdisant aux membres de la GRC de se livrer à des activités associatives. Dans ce qui est connu sous le nom de Rapport Heeney, le comité recommandait l'exclusion des membres de la GRC du régime de relations de travail qu'il proposait (*Rapport du Comité préparatoire des négociations collectives dans la fonction publique* (1965), p. 27; *Delisle*, par. 97-98, les juges Cory et Iacobucci, dissidents). Le Rapport Woods de 1968 proposait toutefois d'accorder aux agents fédéraux responsables de l'application de la loi le droit de s'associer et de négocier collectivement, sous réserve de certaines limites (*Les relations du travail au Canada : Rapport de l'Équipe spécialisée en relations de travail* (1969), par. 440).

[19] Plus tard, au début des années 1970, le mécontentement qui se faisait sentir au sein de la GRC a incité ses membres à entreprendre de former une association pour défendre leurs intérêts (J. F. Hardy et A. Ponak, « Staff Relations in the Royal Canadian Mounted Police » (1983), 12 *J. Collective Negotiations* 87, p. 89-90). Un comité exploratoire a été créé en 1972 dans l'espoir de créer une association, et, au début de l'année 1974, des rencontres sur l'opportunité de constituer une association, qui ont attiré un grand nombre de participants, ont eu lieu à

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centres (*SRR Challenge 2000 Review: Final Report* (January 2003), at pp. 10-11). In or around the same time, RCMP management began to show greater openness to members' concerns. The then-Commissioner began a series of annual meetings with members' representatives from each division. It is worth noting that those "representatives" were in some cases elected by the members, but in most cases, were simply appointed by their commanding officers and mandated to attend meetings in addition to their other full-time duties. Consultation occurred, but no agreement was reached on the issues that were raised.

[20] In May 1974, newly appointed RCMP Commissioner Maurice Jean Nadon met with representatives of RCMP members and proposed a plan to formalize labour relations within the RCMP. A referendum was held on the plan, and it was approved by members in all divisions except "C" Division (Quebec), where it was rejected. The Division Staff Relations Representative Program ("DSRRP") was, accordingly, implemented by Commissioner's Standing Order, which formed the program's legal basis from 1974 to 2003 (*Commissioner's Standing Orders (Division Staff Relations Representative Program)* (repealed by *Commissioner's Standing Orders Repealing the Commissioner's Standing Orders (Division Staff Relations Representatives Program)*, SOR/2003-325)). It featured full-time, elected representatives and it was to be funded by Divisional Commanding Officers from within divisional budgets. The DSRRP was led by a program director appointed by the RCMP Commissioner.

[21] The program was progressively implemented within the RCMP. In 1987, a joint committee composed of management representatives and Division Staff Relations Representatives ("DSRRs") was formed to review the program. It concluded that many features of the labour relations plan proposed by the Commissioner in 1974 had never been

Montréal, à Toronto, à Ottawa, à Vancouver et dans de petits centres (*Examen Défi 2000 du programme des RRF : Rapport final* (janvier 2003), p. 10-11). À la même époque, la direction de la GRC a commencé à manifester plus d'ouverture à l'égard des préoccupations des membres et le commissaire alors en poste a entamé une série de réunions annuelles avec les représentants des membres de chaque division. Il convient toutefois de souligner que, si ces « représentants » étaient dans certains cas élus par les membres, ils étaient, dans la plupart des cas, simplement nommés par leur commandant et devaient participer aux réunions en plus d'exercer leurs fonctions à temps plein. Des consultations eurent ainsi lieu, mais aucune entente ne fut conclue sur les questions soulevées.

[20] En mai 1974, le nouveau commissaire, Maurice Jean Nadon, a rencontré les représentants des membres de la GRC et a proposé un plan en vue d'établir un régime formel de relations de travail au sein de la GRC. Le plan a fait l'objet d'un référendum et les membres de toutes les divisions l'approuvèrent, sauf la Division « C » (du Québec). Le Programme de représentants divisionnaires des relations fonctionnelles (« PRDRF ») a donc été mis en œuvre par les Consignes du commissaire, qui en ont constitué le fondement juridique de 1974 à 2003 (*Consignes du Commissaire (Programme des représentants divisionnaires des relations fonctionnelles)* (abrogées par les *Consignes du commissaire abrogeant les Consignes du Commissaire (Programme des représentants divisionnaires des relations fonctionnelles)*, DORS/2003-325)). Le programme comptait des représentants élus qui exerçaient leurs fonctions à temps plein et devait être financé par les commandants divisionnaires à même les budgets de division. Le PRDRF était dirigé par un directeur nommé par le commissaire de la GRC.

[21] Le programme a été mis en œuvre progressivement au sein de la GRC. En 1987, un comité mixte composé de représentants de la direction et de représentants divisionnaires des relations fonctionnelles (« RDRF ») a été formé pour en faire l'examen. Ce comité a conclu que de nombreux éléments du plan de relations de travail proposé par

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formally implemented, and were in fact unknown to many RCMP members. At the recommendation of the committee, a chapter dedicated to the DSRRP was then inserted in the RCMP administration manual as a first step towards the program's formal recognition.

B. *The SRR Challenge 2000 Review*

[22] In 1999, a review of the inadequacies and shortcomings of the DSRRP was undertaken, partly in response to the constitutional challenge in *Delisle*. The SRR Challenge 2000 Review was the first review of the program to be undertaken at the initiative of the DSRRs. The Caucus of the DSRRP approached the Commissioner to discuss three key principles: independence and accountability; consultation and efficiency; and exclusive agency and caucus discipline (*SRR Challenge 2000 Review: Final Report*, at pp. 29-32).

[23] The SRR Challenge 2000 Review triggered two changes to the functioning of the program (whose name was changed to the SRRP and whose members are known as SRRs). The first change was the adoption by the SRRs of the SRRP Constitution as a governance scheme to replace Commissioner's Standing Orders that had until that time governed the program. The Constitution formalized matters such as the purpose of the program, its composition and its organization. The second change was the execution of the Agreement by the RCMP Commissioner and the NEC of the SRRP. Both changes were implemented in 2002.

[24] As a result of these changes, the Government of Canada repealed the redundant *Commissioner's Standing Orders (Division Staff Relations Representative Program)*. However, some Commissioner's Standing Orders and provisions of the RCMP administrative manual remained in place, to cover matters not addressed by the SRRP Constitution. For instance, s. 3(*b*) of the *Commissioner's Standing Orders (Representation), 1997*, SOR/97-399, still limits the member representatives' rights to represent members in grievances, proceedings, preparations

le commissaire en 1974 n'avaient jamais été officiellement appliqués et que, en fait, les membres de la GRC en ignoraient même l'existence. Par suite de la recommandation du comité, un chapitre sur le PRDRF a alors été incorporé au Manuel d'administration de la GRC; il s'agissait d'une première étape vers une reconnaissance formelle de ce programme.

B. *L'Examen Défi 2000 du programme des RRF*

[22] En 1999, un examen des lacunes du PRDRF a été entrepris par suite, notamment, de la contestation constitutionnelle dans l'affaire *Delisle*. L'Examen Défi 2000 était le premier examen du programme entrepris à l'initiative des RDRF. Le caucus du PRDRF a communiqué avec le commissaire pour discuter de trois principes clés : l'indépendance et l'obligation de rendre compte, la consultation et l'efficience, ainsi que le statut d'unique agent négociateur et la discipline au sein du Caucus (*Examen Défi 2000 du programme des RRF : Rapport final*, p. 29-32).

[23] L'Examen Défi 2000 a provoqué deux changements dans le fonctionnement du programme (dont le nom a été changé pour le PRRF et dont les membres portent le titre de RRF). Le premier a été l'adoption par les RRF des Statuts du PRRF à titre de régime de gouvernance pour remplacer les Consignes du commissaire qui avaient jusqu'alors régi le programme. Les Statuts ont officialisé, entre autres, l'objet du programme, sa composition et son organisation. Le deuxième a été la signature de l'entente par le commissaire de la GRC et le CEN du PRRF. Ces deux changements sont survenus en 2002.

[24] Par suite de ces changements, le gouvernement du Canada a abrogé les *Consignes du Commissaire (Programme des représentants divisionnaires des relations fonctionnelles)* devenues redondantes. Cependant, certaines des Consignes du Commissaire et des dispositions du Manuel d'administration de la GRC sont demeurées en vigueur, car elles couvrent des sujets non abordés dans les Statuts du PRRF. Par exemple, l'al. 3*b*) des *Consignes de 1997 du commissaire (représentation)*, DORS/97-399, limite encore le droit des représentants des membres d'agir

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or appeals under the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, where that representation "could impair the efficiency, administration or good government of the Force".

[25] Undoubtedly, the SRR Challenge 2000 Review increased the independence afforded to the SRRP. Pursuant to the Agreement, the NEC now names the SRR Program Director. It also administers its annual budget. However, the reform left the SRRP largely unchanged with respect to its role within the RCMP chain of command.

IV. The Present Constitutional Challenge

[26] The current challenge to the SRRP and *PSLRA* was commenced in May 2006. The appellants' application was heard in the Ontario Superior Court of Justice by MacDonnell J., who rendered his decision before this Court's judgment in *Fraser*: (2009), 96 O.R. (3d) 20. Applying the then-existing framework, he concluded that s. 96 of the *RCMP Regulations* substantially interfered with freedom of association because (i) the SRRP is not an independent association formed or chosen by members of the RCMP, and (ii) the interaction between the SRRP and management could not reasonably be described as a process of collective bargaining.

[27] The Court of Appeal for Ontario (Doherty, Rosenberg and Juriansz JJ.A.), in a decision rendered after this Court's decision in *Fraser*, reversed MacDonnell J.'s decision: 2012 ONCA 363, 111 O.R. (3d) 268. The court, per Juriansz J.A., focused on *Fraser*'s description of collective bargaining as a "derivative right" (para. 109, citing *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815) and concluded that "a positive obligation to engage in good faith collective bargaining will only be imposed on an employer when it is effectively impossible for the workers to act collectively to achieve workplace goals" (para. 111).

au nom de ces derniers lors des griefs, des procédures, de la préparation d'observations ou d'appels visés par la *Loi sur la Gendarmerie royale du Canada*, L.R.C. 1985, c. R-10, lorsque la représentation « pourrait nuire à l'efficacité et à la bonne administration de la Gendarmerie ».

[25] Il ne fait aucun doute que l'Examen Défi 2000 a permis de rendre le PRRF plus indépendant. En effet, conformément à l'entente, le CEN nomme désormais le directeur du PRRF et administre le budget annuel du programme. Toutefois, la réforme n'a eu que peu d'incidence sur le rôle du PRRF au sein de la chaîne de commandement de la GRC.

IV. La présente contestation constitutionnelle

[26] La présente contestation du PRRF et de la *LRTFP* actuelle a été engagée en mai 2006. La demande des appelantes a été entendue par le juge MacDonnell de la Cour supérieure de justice de l'Ontario, qui a rendu sa décision avant que notre Cour se prononce dans l'affaire *Fraser* : (2009), 96 O.R. (3d) 20. Après avoir appliqué le cadre d'analyse alors reconnu, le juge MacDonnell a conclu que l'art. 96 du *Règlement de la GRC* entravait substantiellement la liberté d'association, parce que (i) le PRRF ne constituait pas une association indépendante formée ou choisie par les membres de la GRC, et que (ii) l'interaction entre le PRRF et la direction ne pouvait pas être raisonnablement qualifiée de processus de négociation collective.

[27] Dans un jugement postérieur à l'arrêt *Fraser* de notre Cour, la Cour d'appel de l'Ontario (les juges Doherty, Rosenberg et Juriansz) a infirmé la décision du juge MacDonnell (2012 ONCA 363, 111 O.R. (3d) 268). La Cour d'appel, sous la plume du juge Juriansz, s'est concentrée sur la notion de « droit dérivé », terme employé par notre Cour dans l'arrêt *Fraser* pour décrire la négociation collective (par. 109, citant *Ontario (Sûreté et Sécurité publique) c. Criminal Lawyers' Association*, 2010 CSC 23, [2010] 1 R.C.S. 815), et a conclu que [TRADUCTION] « l'obligation positive de s'engager de bonne foi dans une négociation collective ne sera imposée à l'employeur que s'il est effectivement impossible pour les employés d'agir collectivement en vue de réaliser des objectifs relatifs au travail » (par. 111).

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[28] The Court of Appeal held that it is not "effectively impossible" for RCMP members to meaningfully exercise their s. 2(*d*) right (para. 121) because of (1) the existence of voluntary associations such as the appellants; (2) the members' Legal Fund, which assists members; and (3) the SRRP. The Court of Appeal recognized that the SRRP was "created by regulation", was "not institutionally independent", and did not allow members of the RCMP to choose "a bargaining agent in a Wagner labour regime" (para. 128). It nevertheless concluded that RCMP members could act collectively through the SRRP to pursue workplace issues in a meaningful way. Accordingly, it held that the current labour relations scheme does not breach s. 2(*d*) of the *Charter*.

[28] La Cour d'appel a estimé qu'il n'est pas « effectivement impossible » pour les membres de la GRC d'exercer véritablement leur droit garanti par l'al. 2*d*) (par. 121) en raison de l'existence : (1) d'associations volontaires telles que les appelantes; (2) du Fonds de recours juridique qui fournit de l'assistance à ses membres; et (3) du PRRF. La Cour d'appel a reconnu que le PRRF a été [TRADUCTION] « créé par règlement », qu'il n'était pas « indépendant d'un point de vue institutionnel » et qu'il ne permettait pas aux membres de la GRC de choisir « un agent négociateur dans un régime de relations de travail de type Wagner » (par. 128). Elle a néanmoins conclu que les membres de la GRC pouvaient agir collectivement au moyen du PRRF, et ainsi faire valoir, de façon utile, toute préoccupation relative à leurs conditions de travail. En conséquence, selon la Cour d'appel, le régime actuel de relations de travail ne violait pas l'al. 2*d*) de la *Charte*.

V. Issues

[29] On February 20, 2013, the Chief Justice stated the following constitutional questions:

1. Does s. 96 of the *Royal Canadian Mounted Police Regulations, 1988*, SOR/88-361, infringe s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

3. Does para. (*d*) of the definition of "employee" at s. 2(1) of *Public Service Labour Relations Act*, S.C. 2003, c. 22, infringe s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

V. Questions en litige

[29] Le 20 février 2013, la Juge en chef a formulé les questions constitutionnelles suivantes :

1. L'article 96 du *Règlement de la Gendarmerie royale du Canada (1988)*, DORS/88-361, viole-t-il l'al. 2*d*) de la *Charte canadienne des droits et libertés*?

2. Dans l'affirmative, s'agit-il d'une violation constituant une limite raisonnable, établie par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique conformément à l'article premier de la *Charte canadienne des droits et libertés*?

3. L'alinéa *d*) de la définition de « fonctionnaire » au par. 2(1) de la *Loi sur les relations de travail dans la fonction publique*, L.C. 2003, c. 22, viole-t-il l'al. 2*d*) de la *Charte canadienne des droits et libertés*?

4. Dans l'affirmative, s'agit-il d'une violation constituant une limite raisonnable, établie par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique conformément à l'article premier de la *Charte canadienne des droits et libertés*?

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VI. Analysis

A. *Evolution of Section 2(d) Jurisprudence Toward a Purposive and Contextual Approach*

[30] The jurisprudence on freedom of association under s. 2(*d*) of the *Charter* — which developed mainly with respect to labour relations (J. Fudge, "Freedom of Association", in E. Mendes and S. Beaulac, eds., *Canadian Charter of Rights and Freedoms* (5th ed. 2013), 527, at pp. 527-28) — falls into two broad periods. The first period is marked by a restrictive approach to freedom of association. The second period gradually adopts a generous and purposive approach to the guarantee.

[31] In what has come to be known as the Labour Trilogy, a majority of this Court held that s. 2(*d*) does not protect the right to bargain collectively or the right to strike: *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (the "*Alberta Reference*"); *PSAC v. Canada*, [1987] 1 S.C.R. 424; and *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460.

[32] The reasoning is set out most fully in the three opinions issued in the *Alberta Reference*. There Le Dain J., in brief reasons supported by Beetz and La Forest JJ., endorsed an interpretation of s. 2(*d*) that would protect "the freedom to work for the establishment of an association, to belong to an association, to maintain it, and to participate in its lawful activity without penalty or reprisal" (p. 391). However, he described collective bargaining and the right to strike as "modern rights" created by statute, and hence not protected by s. 2(*d*) (*ibid.*).

[33] McIntyre J. reached the same conclusion, but for somewhat different reasons. In his view, freedom of association rested on the following proposition: ". . . the attainment of individual goals, through the exercise of individual rights, is generally impossible without the aid and cooperation of others" (p. 395). Accordingly, McIntyre J. held that freedom

VI. Analyse

A. *Évolution de la jurisprudence sur l'al. 2d) vers une interprétation téléologique et contextuelle*

[30] La jurisprudence sur la liberté d'association garantie par l'al. 2*d*) de la *Charte* — qui s'est principalement développée en matière de relations de travail (J. Fudge, « Freedom of Association », dans E. Mendes et S. Beaulac, dir., *Charte canadienne des droits et libertés* (5e éd. 2013), 527, p. 527-528) — se divise en deux périodes importantes. La première s'est caractérisée par une interprétation restrictive de la liberté d'association. La seconde a, pour sa part, graduellement privilégié une interprétation généreuse et fondée sur l'objet de la garantie constitutionnelle.

[31] Dans ce qu'on appelle désormais la « trilogie en droit du travail », la Cour a conclu à la majorité que l'al. 2*d*) ne garantit ni le droit de négocier collectivement ni celui de faire la grève (*Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313 (« *Renvoi relatif à l'Alberta* »); *AFPC c. Canada*, [1987] 1 R.C.S. 424; et *SDGMR c. Saskatchewan*, [1987] 1 R.C.S. 460).

[32] Le raisonnement sous-tendant cette conclusion est expliqué en détail par les trois opinions formulées dans le *Renvoi relatif à l'Alberta*. Dans de brefs motifs, auxquels ont souscrit les juges Beetz et La Forest, le juge Le Dain a retenu une interprétation de l'al. 2*d*) qui protégeait « la liberté de travailler à la constitution d'une association, d'appartenir à une association, de la maintenir et de participer à ses activités licites sans faire l'objet d'une peine ou de représailles » (p. 391). Toutefois, il a qualifié le droit de négocier collectivement et de faire la grève de « droits contemporains » créés par la loi et, partant, non protégés par l'al. 2*d*) (*ibid.*).

[33] Le juge McIntyre a conclu de la même manière, mais pour des motifs quelque peu différents. À son avis, la liberté d'association reposait sur la proposition selon laquelle : « . . . pour l'individu, la réalisation de certains objectifs par l'exercice de ses droits individuels est généralement impossible sans l'aide et la coopération d'autrui » (p. 395). Par

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of association protected a right to engage collectively in those activities which are constitutionally protected for each individual:

> The only basis on which it is contended that the *Charter* enshrines a right to strike is that of freedom of association. Collective bargaining is a group concern, a group activity, but the group can exercise only the constitutional rights of its individual members on behalf of those members. If the right asserted is not found in the *Charter* for the individual, it cannot be implied for the group merely by the fact of association. It follows as well that the rights of the individual members of the group cannot be enlarged merely by the fact of association. [pp. 398-99]

[34] After reviewing six possible approaches to the scope of s. 2(*d*), McIntyre J. concluded that freedom of association encompassed the right to form and join associations, the right to exercise other constitutional freedoms collectively, and the right to do in concert with others what an individual may lawfully do alone (p. 409). On the particular question before the Court, he found that an individual could not lawfully refuse to work, and that there was no individual equivalent of a strike conducted in accordance with labour legislation (p. 410). Accordingly, he concluded that the right to strike was not protected (p. 412).

[35] Dickson C.J., dissenting (Wilson J. concurring), would have allowed the appeal. He identified three possible approaches to s. 2(*d*). The first, which he termed the "constitutive" approach, protects the freedom to belong to or form an association (p. 362). The second, the "derivative" approach, goes beyond the constitutive approach to protect associational activity that relates specifically to other constitutional freedoms enumerated in s. 2 (p. 364). Dickson C.J. rejected these alternatives as too restrictive and opted for a third approach. In his view, a purposive approach to freedom of association was needed. He identified the purpose and scope of s. 2(*d*) as follows, at pp. 365-66:

conséquent, selon lui, la liberté d'association garantissait le droit de s'adonner collectivement à des activités protégées par la Constitution pour chaque individu :

> La liberté d'association est le seul motif invoqué à l'appui de la prétention que la *Charte* consacre le droit de grève. La négociation collective constitue une affaire de groupe, une activité de groupe, mais le groupe ne peut exercer, au nom de ses membres, que les droits constitutionnels dont ils jouissent individuellement. Si le droit revendiqué n'est pas prévu par la *Charte* au profit de l'individu, il ne saurait exister implicitement pour le groupe du simple fait de l'association. Il s'ensuit aussi que les droits dont jouissent individuellement les membres du groupe ne sauraient être élargis du simple fait de l'association. [p. 398-399]

[34] Après avoir examiné six interprétations possibles de la portée de l'al. 2*d*), le juge McIntyre a conclu que la liberté d'association englobait le droit de constituer une association et d'y adhérer, le droit d'exercer collectivement d'autres libertés constitutionnelles et celui d'accomplir de concert avec d'autres ce que l'individu peut licitement accomplir seul (p. 409). À propos de la question particulière dont la Cour était saisie, il a estimé qu'un individu ne peut licitement refuser de travailler et qu'il n'existait pas d'équivalent individuel à la grève menée conformément à la législation en matière de travail (p. 410). Il a donc décidé que le droit de faire la grève n'était pas garanti par la Constitution (p. 412).

[35] Le juge en chef Dickson, dissident (avec l'appui de la juge Wilson), était d'avis d'accueillir le pourvoi. Il a relevé trois approches pouvant être appliquées à l'al. 2*d*). La première, qu'il a appelée l'approche « constitutive », protégerait la liberté d'appartenir à une association ou de la constituer (p. 362). La deuxième, l'approche « déductive », irait au-delà de l'approche constitutive et viserait à protéger les actes de l'association qui sont liés précisément à d'autres libertés constitutionnelles énumérées à l'art. 2 (p. 364). Le juge en chef Dickson a écarté ces approches parce qu'elles étaient trop restrictives. À son avis, il fallait adopter une troisième approche et aborder la liberté d'association sous l'angle téléologique ou de l'objet visé. Il a exposé comme suit l'objet et la portée de l'al. 2*d*) :

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The purpose of the constitutional guarantee of freedom of association is, I believe, to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends. . . .

. . .

As social beings, our freedom to act with others is a primary condition of community life, human progress and civilized society. Through association, individuals have been able to participate in determining and controlling the immediate circumstances of their lives, and the rules, mores and principles which govern the communities in which they live. . . .

Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict. . . .

. . .

What freedom of association seeks to protect is not association activities *qua* particular activities, but the freedom of individuals to interact with, support, and be supported by, their fellow humans in the varied activities in which they choose to engage.

[36] Dickson C.J. recognized as a starting point that s. 2(*d*) protected the right to do collectively what one may do as an individual. But he would also have held that the *Charter* protected some collective activities that have no true individual equivalents, including the right to strike.

[37] The approach to freedom of association endorsed by the majority in the Labour Trilogy was affirmed three years later in *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 ("*PIPSC*"). In that case, the *Public Service Act*, R.S.N.W.T. 1974,

À mon sens, la garantie constitutionnelle de la liberté d'association vise à reconnaître la nature sociale profonde des entreprises humaines et à protéger l'individu contre tout isolement imposé par l'état dans la poursuite de ses fins. . .

. . .

En tant qu'êtres sociaux, notre liberté d'agir collectivement est une condition première de la vie communautaire, du progrès humain et d'une société civilisée. En s'associant, les individus ont été en mesure de participer à la détermination et au contrôle des conditions immédiates de leur vie et des règles, mœurs et principes qui régissent les collectivités dans lesquelles ils vivent. . .

La liberté d'association est on ne peut plus essentielle dans les circonstances où l'individu risque d'être lésé par les actions de quelque entité plus importante et plus puissante comme le gouvernement ou un employeur. L'association a toujours été le moyen par lequel les minorités politiques, culturelles et raciales, les groupes religieux et les travailleurs ont tenté d'atteindre leurs buts et de réaliser leurs aspirations; elle a permis à ceux qui, par ailleurs, auraient été vulnérables et inefficaces de faire face, à armes plus égales, à la puissance et à la force de ceux avec qui leurs intérêts interagissaient et, peut-être même, entraient en conflit. . .

. . .

Ce que la liberté d'association vise à protéger, ce ne sont pas les activités de l'association en tant qu'activités particulières, mais la liberté des individus d'interagir avec d'autres êtres humains, de les aider et d'être aidés par eux dans les diverses activités qu'ils choisissent d'exercer. [p. 365-366]

[36] Le juge en chef Dickson a reconnu, comme point de départ, que l'al. 2*d*) protégeait le droit de faire collectivement ce qu'il est permis de réaliser comme individu. Il était toutefois également d'avis que la *Charte* protégeait certaines activités collectives qui n'avaient pas d'équivalent individuel, notamment le droit de faire la grève.

[37] L'interprétation de la liberté d'association qu'ont adoptée les juges majoritaires dans la trilogie en droit du travail a été confirmée trois ans plus tard dans l'arrêt *Institut professionnel de la Fonction publique du Canada c. Territoires du Nord-Ouest (Commissaire)*, [1990] 2 R.C.S. 367 (« *IPFPC* »). Cette

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c. P-13, subjected the employees' choice of bargaining agent to approval by the legislature of the Northwest Territories. Like the present appeal, *PIPSC* involved a challenge to a labour relations scheme that imposed a framework for collective bargaining on a group of public service employees, limiting their ability to represent themselves through a freely chosen association. But the association itself remained entirely independent from management (p. 408).

[38] The seven judges who heard the case wrote five separate opinions. The majority agreed with Sopinka J. who concluded that s. 2(*d*) protected only the ability to form and join unions, but did not protect the right to collective bargaining. Famously, he outlined four principles concerning the scope of s. 2(*d*) drawn from the *Alberta Reference*, at p. 402:

> . . . first, that s. 2(*d*) protects the freedom to establish, belong to and maintain an association; second, that s. 2(*d*) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association; third, that s. 2(*d*) protects the exercise in association of the constitutional rights and freedoms of individuals; and fourth, that s. 2(*d*) protects the exercise in association of the lawful rights of individuals.

[39] Sopinka J.'s disposition of the case was supported by Dickson C.J., La Forest J. and L'Heureux-Dubé J., but only L'Heureux-Dubé J. endorsed the third and fourth propositions as limiting principles under s. 2(*d*). Dickson C.J. and La Forest J. each found that the appeal could be resolved by application of the Labour Trilogy's conclusion that s. 2(*d*) did not protect collective bargaining, without deciding the broader question of its scope.

[40] Cory J. (Wilson and Gonthier JJ. concurring), dissented on the scope of freedom of association. In his view, freedom of association permits individuals

affaire portait sur la *Public Service Act*, R.S.N.W.T. 1974, c. P-13, qui subordonnait le choix d'un agent négociateur par les employés à l'approbation de la législature des Territoires du Nord-Ouest. Tout comme en l'espèce, la Cour était alors saisie d'une contestation relative à un régime de relations de travail qui imposait un cadre de négociation collective à un groupe de fonctionnaires et qui limitait ainsi leur capacité d'être représentés par l'intermédiaire d'une association librement choisie. Cela dit, l'association comme telle demeurait tout à fait indépendante de la direction (p. 408).

[38] Les sept juges qui ont entendu le pourvoi ont rédigé cinq opinions distinctes. Les juges majoritaires ont convenu avec le juge Sopinka qui a conclu que l'al. 2*d*) protégeait uniquement la capacité de constituer un syndicat et d'y adhérer, et non le droit de négocier collectivement. Il a en outre formulé comme suit, à la p. 402, sa célèbre description des quatre principes dégagés du *Renvoi relatif à l'Alberta* sur la portée de l'al. 2*d*) :

> . . . premièrement, l'al. 2*d*) protège la liberté de constituer une association, de la maintenir et d'y appartenir; deuxièmement, l'al. 2*d*) ne protège pas une activité pour le seul motif que cette activité est un objet fondamental ou essentiel d'une association; troisièmement, l'al. 2*d*) protège l'exercice collectif des droits et libertés individuels consacrés par la Constitution; et quatrièmement, l'al. 2*d*) protège l'exercice collectif des droits légitimes des individus.

[39] Le juge en chef Dickson ainsi que les juges La Forest et L'Heureux-Dubé ont souscrit au dispositif du juge Sopinka, mais seule la juge L'Heureux-Dubé a confirmé l'effet restrictif des troisième et quatrième principes au regard de la portée de l'al. 2*d*). Le juge en chef Dickson et le juge La Forest ont conclu, dans des motifs distincts, que le pourvoi pouvait être tranché en appliquant la conclusion formulée dans la trilogie en droit du travail selon laquelle l'al. 2*d*) ne protégeait pas la négociation collective, sans se prononcer sur la question plus large de sa portée.

[40] Le juge Cory (avec l'accord des juges Wilson et Gonthier) était dissident sur la portée de la liberté d'association. À son avis, cette liberté permet aux

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to work together for the purpose of achieving common goals. This freedom is fundamental to a free and democratic society and extends into the workplace. He succinctly stated one aspect of freedom of association in the workplace:

> Whenever people labour to earn their daily bread, the right to associate will be of tremendous significance. Wages and working conditions will always be of vital importance to an employee. It follows that for an employee the right to choose the group or association that will negotiate on his or her behalf with regard to those wages and working conditions is of fundamental importance. The association will play a very significant role in almost every aspect of the employee's life at work, acting as advisor, as spokesperson in negotiations, and as a shield against wrongful acts of the employer. If collective bargaining is to function properly, employees must have confidence in their representative. That confidence will be lost if the individual employee is unable to choose the association. [Emphasis added; p. 380.]

[41] To recap, and notwithstanding noteworthy dissents, the majority of this Court in this early period maintained a narrow view of freedom of association, which protected only the bare formation of the association and the collective exercise of individual freedoms. This view prevailed for some time. Outside the labour relations context, the same approach was applied in *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157. And in the labour relations context, this approach resulted in the majority of this Court holding that the exclusion of RCMP members from the *PSSRA* did not violate s. 2(*d*) in the 1999 case of *Delisle*.

[42] Parallel to these cases, the Court considered the "negative" aspect of freedom of association — the freedom not to associate: *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211; *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 S.C.R. 209; affirmed in *Bernard*

individus de collaborer pour réaliser des objectifs communs. Il s'agit d'un droit fondamental dans une société libre et démocratique et il s'applique dans le contexte du travail. Le juge Cory a exposé brièvement un des aspects de la liberté d'association dans ce contexte :

> Partout où des personnes travaillent pour gagner leur vie, le droit d'association a une importance énorme. Le salaire et les conditions de travail auront toujours une importance vitale pour un employé. Il s'ensuit que pour un employé, le droit de choisir le groupe ou l'association qui négociera pour son compte ce salaire et ces conditions de travail a une importance fondamentale. L'association jouera un rôle très important dans à peu près tous les aspects de la vie de l'employé dans son lieu de travail, en faisant fonction de conseiller, de porte-parole dans les négociations et de rempart contre les actes illicites de l'employeur. Pour que les négociations collectives donnent des résultats, les employés doivent avoir confiance en leurs représentants. Cette confiance n'existera pas si l'employé à titre individuel n'est pas en mesure de choisir l'association. [Nous soulignons; p. 380.]

[41] Pour résumer, et malgré des dissidences notables, on peut affirmer que, pendant cette première période, les juges majoritaires de la Cour ont donné à la liberté d'association une interprétation étroite qui ne protégeait que la simple constitution de l'association et l'exercice collectif des libertés individuelles. Cette interprétation a prédominé pendant un certain temps. Ainsi, dans un contexte autre que celui des relations de travail, elle a été appliquée dans l'arrêt *Office canadien de commercialisation des œufs c. Richardson*, [1998] 3 R.C.S. 157. Puis, de nouveau dans le domaine des relations de travail, elle a amené les juges majoritaires de la Cour à conclure, dans l'arrêt *Delisle* rendu en 1999, que l'exclusion des membres de la GRC de l'application de la première *LRTFP* ne portait pas atteinte à l'al. 2*d*).

[42] Parallèlement aux affaires mentionnées précédemment, la Cour a examiné « l'envers » de la liberté d'association, soit celle de ne pas s'associer : *Lavigne c. Syndicat des employés de la fonction publique de l'Ontario*, [1991] 2 R.C.S. 211; *R. c. Advance Cutting & Coring Ltd.*, 2001 CSC

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v. Canada (Attorney General), 2014 SCC 13, [2014] 1 S.C.R. 227. But, *Lavigne* and *Advance Cutting* are significant because they applied a purposive approach to s. 2(*d*). In *Lavigne*, at p. 318, La Forest J. suggested that, in keeping with democratic ideals, the guarantee of freedom of association should be interpreted as protecting "the individual's potential for self-fulfillment and realization as surely as voluntary association will develop it". (See also *Lavigne*, at p. 344, per McLachlin J.; and *Advance Cutting*, at paras. 15-17, per Bastarache J., and at paras. 170-71, per LeBel J.) Both judgments emphasized the importance of a purposive interpretation of s. 2(*d*).

[43] These cases marked the beginning of a more generous, purposive approach to s. 2(*d*) — an approach that was resoundingly affirmed in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016. In that case, agricultural workers challenged their exclusion from the collective bargaining regime created by the Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A. Bastarache J., for the majority, began his analysis with a review of the existing case law, concluding that Sopinka J.'s four principles could not capture all of the potential scope of s. 2(*d*). Justice Bastarache wrote, at para. 16:

In my view, while the four-part test for freedom of association sheds light on this concept, it does not capture the full range of activities protected by s. 2(*d*). In particular, there will be occasions where a given activity does not fall within the third and fourth rules set forth by Sopinka J. in *PIPSC*, *supra*, but where the state has nevertheless prohibited that activity solely because of its associational nature. These occasions will involve activities which (1) are not protected under any other constitutional freedom, and (2) cannot, for one reason or another, be understood as the lawful activities of individuals.

[44] This renewed focus on the collective aspect of freedom of association and on its purposive

70, [2001] 3 R.C.S. 209; confirmé par *Bernard c. Canada (Procureur général)*, 2014 CSC 13, [2014] 1 R.C.S. 227. Or, les arrêts *Lavigne* et *Advance Cutting* sont importants parce qu'ils ont appliqué à l'al. 2*d*) l'interprétation téléologique. Dans *Lavigne*, le juge La Forest a suggéré que, conformément aux idéaux démocratiques, la garantie de la liberté d'association devrait être interprétée de manière à protéger « la possibilité pour l'individu de réaliser son épanouissement et son accomplissement personnels aussi sûrement que l'association volontaire la développera » (p. 318). (Voir aussi *Lavigne*, p. 344, la juge McLachlin; et *Advance Cutting*, par. 15-17, le juge Bastarache, et par. 170-171, le juge LeBel.) Les deux arrêts ont souligné l'importance de donner une interprétation téléologique à l'al. 2*d*).

[43] Ces décisions ont marqué l'amorce du virage de la Cour vers une interprétation plus généreuse et fondée sur l'objet visé de l'al. 2*d*), interprétation confirmée de manière catégorique dans l'arrêt *Dunmore c. Ontario (Procureur général)*, 2001 CSC 94, [2001] 3 R.C.S. 1016. Dans cette affaire, des travailleurs agricoles contestaient leur exclusion du régime de négociation collective créé par la *Loi de 1995 sur les relations de travail* de l'Ontario, L.O. 1995, c. 1, ann. A. Au nom des juges majoritaires, le juge Bastarache a commencé son analyse par un examen de la jurisprudence et a conclu que les quatre principes énoncés par le juge Sopinka ne rendaient pas compte de toute la portée potentielle de l'al. 2*d*). Le juge Bastarache a écrit ces commentaires, au par. 16 :

À mon avis, même si le critère à quatre volets applicable à la liberté d'association clarifie cette notion, il ne rend pas compte de toute la gamme d'activités protégées par l'al. 2*d*). En particulier, il y a des cas où une activité n'est pas visée par les troisième et quatrième règles énoncées par le juge Sopinka dans *IPFPC*, précité, mais où l'État l'interdit néanmoins en raison seulement de sa nature associative. Il s'agit d'activités (1) qui ne sont pas protégées par une autre liberté constitutionnelle, et (2) qui ne peuvent, pour une raison ou une autre, être considérées comme des activités licites d'un individu.

[44] En raison de l'importance accrue qui avait été accordée à l'aspect collectif de la liberté d'association

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interpretation led to the express recognition of a s. 2(*d*) right to collective bargaining in *Health Services*. All seven judges who heard that appeal agreed that a purposive interpretation of s. 2(*d*) required constitutional protection for the right of employees to engage in a process of collective bargaining:

Based on the principles developed in *Dunmore* and in this historical and international perspective, 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.

(Para. 89, per McLachlin C.J. and LeBel J.; see also para. 174, per Deschamps J.)

[45] Finally, in *Fraser*, this Court reaffirmed that s. 2(*d*) confers the right to a process of collective bargaining, understood as meaningful association in pursuit of workplace goals. This process includes the employees' rights to join together, to make collective representations to the employer, and to have those representations considered in good faith:

What s. 2(*d*) guarantees in the labour relations context is a meaningful process. A process which permits an employer not even to consider employee representations is not a meaningful process. . . . Without such a process, the purpose of associating in pursuit of workplace goals would be defeated, resulting in a significant impairment of the exercise of the right to freedom of association. One way to interfere with free association in pursuit of workplace goals is to ban employee associations. Another way, just as effective, is to set up a system that makes it impossible to have meaningful negotiations on workplace matters. [para. 42]

[46] In summary, after an initial period of reluctance to embrace the full import of the freedom of association guarantee in the field of labour relations,

et à son interprétation téléologique, l'arrêt *Health Services* a expressément reconnu que l'al. 2*d*) garantit le droit de négocier collectivement. Les sept juges qui ont entendu ce pourvoi ont tous convenu que, selon une interprétation téléologique de l'al. 2*d*), le droit des employés de participer à un processus de négociation collective devait bénéficier d'une protection constitutionnelle :

Selon les principes élaborés dans *Dunmore* et dans cette perspective historique et internationale, le droit constitutionnel de négocier collectivement vise à protéger la capacité des travailleurs de participer à des activités associatives et leur capacité d'agir collectivement pour réaliser des objectifs communs concernant des questions liées au milieu de travail et leurs conditions de travail.

(Par. 89, la juge en chef McLachlin et le juge LeBel; voir aussi le par. 174, la juge Deschamps.)

[45] Enfin, dans l'arrêt *Fraser*, la Cour a réaffirmé que l'al. 2*d*) confère le droit de participer à un processus de négociation collective, c'est-à-dire de former une association véritable en vue de réaliser des objectifs relatifs au travail. Ce droit à un processus véritable s'entend des droits des employés de s'associer, de formuler des revendications collectives auprès de l'employeur et de les voir prises en considération de bonne foi :

En effet, [l'al. 2*d*)] garantit, dans le contexte des relations du travail, le droit à un processus véritable. Dans cette optique, on ne saurait tenir pour véritable un processus qui permet à l'employeur de ne même pas prendre en compte les observations de ses employés. [. . .] À défaut d'un tel processus, l'association aux fins de réaliser des objectifs liés au travail perd sa raison d'être, ce qui entrave substantiellement l'exercice de la liberté d'association. On peut entraver l'exercice de la liberté d'association voué à la réalisation d'objectifs liés au travail en frappant d'interdiction la formation d'associations d'employés. On peut le faire tout aussi efficacement en établissant un système qui rend impossible la négociation véritable de questions liées au travail. [par. 42]

[46] En résumé, après une période initiale marquée par une réticence à reconnaître toute la portée de la liberté d'association en matière de relations de

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the jurisprudence has evolved to affirm a generous approach to that guarantee. This approach is centred on the purpose of encouraging the individual's self-fulfillment and the collective realization of human goals, consistent with democratic values, as informed by "the historical origins of the concepts enshrined" in s. 2(*d*): *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344.

B. *Defining the Scope of the Section 2(d) Guarantee*

(1) A Purposive, Generous and Contextual Approach

[47] As is the case with other *Charter* rights, the jurisprudence establishes that s. 2(*d*) must be interpreted in a purposive and generous fashion, having regard to "the larger objects of the *Charter* . . ., to the language chosen to articulate the . . . freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*": *Big M Drug Mart*, at p. 344. In a phrase, in order to determine whether a restriction on the right to associate violates s. 2(*d*) by offending its purpose, we must look at the associational activity in question in its full context and history. Neither the text of s. 2(*d*) nor general principles of *Charter* interpretation support a narrow reading of freedom of association.

[48] This interpretative approach to freedom of association is consistent with the approach to other basic rights connected with human activities and needs. The scope of freedom of religion, for example, is derived from its history and the range of activities to which it applies — holding, proclaiming and transmitting beliefs in the bosom of a secular state (R. Moon, "Freedom of Conscience and Religion", in Mendes and Beaulac, 339). Similarly, the scope of freedom of expression is defined by the different forms it takes and the different interests it protects — including, notably, "the quest for truth, self-fulfillment, and an embracing marketplace of ideas": *Saskatchewan (Human Rights Commission)*

travail, la jurisprudence a évolué vers une approche généreuse de cette liberté. Cette approche visait essentiellement à encourager l'épanouissement individuel et la réalisation collective des objectifs humains, dans le respect des valeurs démocratiques, à la lumière des « origines historiques des concepts enchâssés » dans l'al. 2*d*) (*R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, p. 344).

B. *Définir la portée du droit garanti par l'al. 2d)*

(1) Une interprétation téléologique, généreuse et contextuelle

[47] Comme dans le cas d'autres droits protégés par la *Charte*, la jurisprudence a établi que l'al. 2*d*) doit recevoir une interprétation généreuse et téléologique, qui tient compte des « objectifs plus larges de la *Charte* [. . .], des termes choisis pour énoncer ce droit ou cette liberté, des origines historiques des concepts enchâssés et, s'il y a lieu, [. . .] du sens et de l'objet des autres libertés et droits particuliers qui s'y rattachent selon le texte de la *Charte* » (*Big M Drug Mart*, p. 344). Bref, pour déterminer si une restriction au droit d'association viole l'al. 2*d*) du fait qu'elle contrevient à l'objet de cette disposition, nous devons considérer l'activité associative en cause dans son contexte global et en fonction de son histoire. En effet, ni le libellé de l'al. 2*d*) ni les principes généraux d'interprétation de la *Charte* ne favorisent une lecture restrictive de la liberté d'association.

[48] Cette interprétation de la liberté d'association correspond à celle donnée à d'autres droits fondamentaux relatifs aux activités et aux besoins de l'être humain. La portée de la liberté de religion, par exemple, tient à son historique et à la gamme d'activités auxquelles elle s'applique — avoir, manifester et transmettre des croyances au sein d'un État laïc (R. Moon, « Freedom of Conscience and Religion », dans Mendes et Beaulac, 339). De même, la portée de la liberté d'expression se définit par ses différentes manifestations et les intérêts divers qu'elle protège — notamment, « la recherche de la vérité, [. . .] l'épanouissement personnel ou [. . .] la tenue d'un débat d'idées riche et ouvert » (le juge

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v. Whatcott, 2013 SCC 11, [2013] 1 S.C.R. 467, at para. 171, per Rothstein J. for the Court; see also *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 766; P. B. Schabas, "The Ups and Downs of Freedom of Expression — Section 2(b)", in R. Gilliland, ed., *The Charter at Thirty* (2012), 1; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (5th ed. 2008), at p. 1060. An activity-based contextual approach is equally essential for freedom of association. Freedom of association, like the other s. 2 freedoms — freedom of expression, conscience and religion, and peaceful assembly — protects rights fundamental to Canada's liberal democratic society.

Rothstein au nom de la Cour dans *Saskatchewan (Human Rights Commission) c. Whatcott*, 2013 CSC 11, [2013] 1 R.C.S. 467, par. 171; voir aussi *R. c. Keegstra*, [1990] 3 R.C.S. 697, p. 766; P. B. Schabas, « The Ups and Downs of Freedom of Expression — Section 2(b) », dans R. Gilliland, dir., *The Charter at Thirty* (2012), 1; H. Brun, G. Tremblay et E. Brouillet, *Droit constitutionnel* (5e éd. 2008), p. 1060). Il est tout aussi essentiel d'adopter une interprétation contextuelle fondée sur les activités visées à l'égard de la liberté d'association. À l'instar des autres libertés garanties par l'art. 2 — la liberté d'expression, la liberté de conscience et de religion, et la liberté de réunion pacifique —, la liberté d'association protège des droits de nature fondamentale dans une société libérale et démocratique que forme le Canada.

[49] Freedom of association is not derivative of these other rights. It stands as an independent right with independent content, essential to the development and maintenance of the vibrant civil society upon which our democracy rests.

[49] Le droit d'association ne représente pas un droit simplement dérivé des autres droits et libertés garantis par la Constitution. Au contraire, il constitue un droit distinct doté d'un contenu autre, un droit essentiel au développement et au maintien de la société civile dynamique sur laquelle repose notre démocratie.

[50] The purposes underlying *Charter* rights and freedoms may be framed at varying levels of abstraction. At the broadest level, a purposive interpretation must be consistent with the "larger objects of the *Charter*", including "basic beliefs about human worth and dignity" and the maintenance of "a free and democratic political system": *Big M Drug Mart*, at pp. 344 and 346; see also *Health Services*, at para. 81. At the same time, however, while *Charter* rights and freedoms should be given a broad and liberal interpretation, a purposive analysis also requires courts to consider the most concrete purpose or set of purposes that underlies the right or freedom in question, based on its history and full context. That is the task to which we now turn with respect to s. 2(*d*).

[50] Par ailleurs, les objectifs qui sous-tendent les droits et libertés garantis par la *Charte* peuvent atteindre divers niveaux d'abstraction. Au niveau le plus élevé, une interprétation téléologique doit être compatible avec les « objectifs plus larges de la *Charte* », y compris les « convictions fondamentales quant à la valeur et à la dignité de l'être humain » et le maintien d'un « système politique libre et démocratique » (*Big M Drug Mart*, p. 344 et 346; voir aussi *Health Services*, par. 81). Cela dit, s'il faut certes donner aux droits et libertés protégés par la *Charte* une interprétation large et libérale, une analyse téléologique exige aussi que les tribunaux examinent l'objectif le plus concret — ou l'ensemble des objectifs les plus concrets — qui sous-tend le droit ou la liberté en cause, eu égard à son historique et à son contexte global. C'est la tâche à laquelle nous allons maintenant nous livrer au sujet de l'al. 2*d*).

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(2) The Content of Section 2(*d*) Protection

[51] In his dissenting reasons in the *Alberta Reference*, Dickson C.J. identified three possible approaches to the interpretation of s. 2(*d*) — constitutive, derivative and purposive. We conclude that s. 2(*d*) protects each of the aspects of freedom of association with which these approaches are concerned.

[52] The narrowest approach, the "constitutive", would protect only the bare right to belong to or form an association. The state would thus be prohibited from interfering with individuals meeting or forming associations, but would be permitted to interfere with the *activities* pursued by the associations people form. This protection, while narrow, is not trivial; history is replete with examples of states that have banned associations or prevented people from associating, either absolutely or in terms of restrictions on the number of people who can associate for a particular purpose.

[53] The "derivative" approach would protect not only the right to associate, but also the right to associational *activity* that specifically relates to other constitutional freedoms. This approach prevails in the United States, where freedom of association is recognized insofar as it supports other constitutional rights, like freedom of religion and the political rights. Beyond this, however, associational activities would not be constitutionally protected.

[54] The purposive approach, adopted by Dickson C.J. in the *Alberta Reference*, defines the content of s. 2(*d*) by reference to the purpose of the guarantee of freedom of association: ". . . to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends" (*Alberta Reference*, at p. 365). The object of Dickson C.J.'s words is a concrete one, not an abstract expression of a desire for a better life. Elaborating on this interpretive approach, Dickson C.J. states that the purpose

(2) Le contenu de la protection conférée par l'al. 2*d*)

[51] Dans le *Renvoi relatif à l'Alberta*, le juge en chef Dickson, dissident, a énoncé trois approches possibles quant à l'interprétation de l'al. 2*d*) : l'approche constitutive, l'approche déductive et l'approche téléologique. Nous concluons que l'al. 2*d*) protège chacun des aspects de la liberté d'association visés par ces approches.

[52] L'approche la plus restrictive, soit l'approche « constitutive », ne protège que le simple droit d'appartenir à une association ou de la constituer. L'État n'aurait donc pas le droit d'empêcher les gens de se réunir ou de constituer des associations, mais il pourrait intervenir dans les *activités* exercées par les associations ainsi formées. Cette protection, bien qu'étroite, n'est pas négligeable. L'histoire donne de nombreux exemples d'États qui ont interdit les associations ou empêché les citoyens de s'associer, soit de façon absolue, soit en restreignant le nombre de personnes autorisées à se regrouper dans un but précis.

[53] L'approche « déductive » protège non seulement le droit de s'associer, mais aussi celui d'exercer des *activités* associatives qui s'attachent expressément à d'autres libertés constitutionnelles. Cette approche est appliquée aux États-Unis, où la liberté d'association est reconnue dans la mesure où elle renforce d'autres droits constitutionnels comme la liberté de religion et les droits politiques. Sous cette réserve, les activités associatives ne jouissent pas d'une protection constitutionnelle.

[54] L'approche téléologique, adoptée par le juge en chef Dickson dans le *Renvoi relatif à l'Alberta*, définit le contenu de l'al. 2*d*) au regard de l'objet de la protection du droit d'association, soit de : « . . . reconnaître la nature sociale profonde des entreprises humaines et [de] protéger l'individu contre tout isolement imposé par l'État dans la poursuite de ses fins » (*Renvoi relatif à l'Alberta*, p. 365). L'objet auquel réfère le juge en chef Dickson est concret; il ne correspond pas à l'expression abstraite d'un désir d'une vie meilleure. Lorsqu'il a

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of the freedom of association encompasses the protection of (1) individuals joining with others to form associations (the constitutive approach); (2) collective activity in support of other constitutional rights (the derivative approach); and (3) collective activity that enables "those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict": *Alberta Reference*, at p. 366.

exploré plus en détail cette interprétation, le juge en chef Dickson a précisé que l'objet de la liberté d'association englobe la protection (1) de la capacité des individus de se joindre à d'autres pour former des associations (l'approche constitutive); (2) de l'activité collective à l'appui d'autres droits constitutionnels (l'approche déductive); et (3) de l'activité collective qui permet à « ceux qui, par ailleurs, auraient été vulnérables et inefficaces de faire face, à armes plus égales, à la puissance et à la force de ceux avec qui leurs intérêts interagiss[ent] et, peut-être même, entr[ent] en conflit » (*Renvoi relatif à l'Alberta*, p. 366).

[55] The purposive approach thus recognizes that freedom of association is empowering, and that we value the guarantee enshrined in s. 2(*d*) because it empowers groups whose members' individual voices may be all too easily drowned out. This conclusion is rooted in "the historical origins of the concepts enshrined" in s. 2(*d*) (*Big M Drug Mart*, at p. 344).

[55] L'approche téléologique reconnaît donc que la liberté d'association est constitutive de pouvoirs. En effet, nous attachons de l'importance à la garantie inscrite à l'al. 2*d*) parce qu'elle accorde des pouvoirs à des groupes dont les membres, pris individuellement, pourraient trop facilement ne pas réussir à se faire entendre. Cette conclusion se fonde sur les « origines historiques des concepts enchâssés » à l'al. 2*d*) (*Big M Drug Mart*, p. 344).

[56] The historical emergence of association as a fundamental freedom — one which permits the growth of a sphere of civil society largely free from state interference — has its roots in the protection of religious minority groups: M. Walzer, "The Concept of Civil Society", in M. Walzer, ed., *Toward a Global Civil Society* (1995), 7, at p. 20. More recent history also illustrates how the freedom to associate has contributed to the women's suffrage and gay rights movements: J. D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* (2012), at p. 45; and D. Carpenter, "Expressive Association and Anti-Discrimination Law After *Dale*: A Tripartite Approach" (2001), 85 *Minn. L. Rev.* 1515.

[56] L'émergence historique du droit d'association en tant que liberté fondamentale — une liberté qui permet à une sphère de la société civile de se développer largement à l'abri de l'ingérence de l'État — puise son origine dans la protection des minorités religieuses (M. Walzer, « The Concept of Civil Society », dans M. Walzer, dir., *Toward a Global Civil Society* (1995), 7, p. 20). L'histoire plus récente illustre également l'apport de la liberté d'association au vote des femmes et aux mouvements en faveur des droits des homosexuels (J. D. Inazu, *Liberty's Refuge : The Forgotten Freedom of Assembly* (2012), p. 45; et D. Carpenter, « Expressive Association and Anti-Discrimination Law After *Dale* : A Tripartite Approach » (2001), 85 *Minn. L. Rev.* 1515).

[57] Historically, those most easily ignored and disempowered as individuals have staked so much on freedom of association precisely because association was the means by which they could gain a voice in society. As Dickson C.J. put it in the *Alberta Reference*:

[57] Si les personnes les plus facilement ignorées et désavantagées ont toujours misé autant sur la liberté d'association, c'est précisément parce que l'association est le moyen de faire entendre leur voix dans la société. Comme l'a affirmé le juge en chef Dickson dans le *Renvoi relatif à l'Alberta* :

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Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict. [Emphasis added; pp. 365-66.]

La liberté d'association est on ne peut plus essentielle dans les circonstances où l'individu risque d'être lésé par les actions de quelque entité plus importante et plus puissante comme le gouvernement ou un employeur. L'association a toujours été le moyen par lequel les minorités politiques, culturelles et raciales, les groupes religieux et les travailleurs ont tenté d'atteindre leurs buts et de réaliser leurs aspirations; elle a permis à ceux qui, par ailleurs, auraient été vulnérables et inefficaces de faire face, à armes plus égales, à la puissance et à la force de ceux avec qui leurs intérêts interagissaient et, peut-être même, entraient en conflit. [Nous soulignons; p. 365-366.]

[58] This then is a fundamental purpose of s. 2(*d*) — to protect the individual from "state-enforced isolation in the pursuit of his or her ends": *Alberta Reference*, at p. 365. The guarantee functions to protect individuals against more powerful entities. By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society.

[58] Un des objets fondamentaux de l'al. 2*d*) est donc de protéger l'individu contre « tout isolement imposé par l'État dans la poursuite de ses fins » (*Renvoi relatif à l'Alberta*, p. 365). Cette garantie permet de protéger les individus contre des entités plus puissantes. En s'unissant pour réaliser des objectifs communs, des personnes sont capables d'empêcher des entités plus puissantes de faire obstacle aux buts et aux aspirations légitimes qu'elles peuvent avoir. Le droit à la liberté d'association confère donc certains pouvoirs aux groupes vulnérables et les aide à corriger les inégalités au sein de la société. Il protège ainsi les groupes marginalisés et favorise la formation d'une société plus équitable.

[59] The flip side of the purposive approach to freedom of association under s. 2(*d*) is that the guarantee will not necessarily protect all associational activity. Section 2(*d*) of the *Charter* is aimed at reducing social imbalances, not enhancing them. For this reason, some collective activity lies outside the *Charter*'s protection. For example, associational activity that constitutes violence is not protected by s. 2(*d*): *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 107.

[59] L'application de l'approche téléologique à la liberté d'association garantie par l'al. 2*d*) a toutefois pour revers que cette garantie ne protégera pas nécessairement toutes les activités associatives. En effet, puisque cette disposition vise à réduire les inégalités sociales, et non à les accentuer, certaines activités collectives échappent à la protection de la *Charte*. C'est le cas, par exemple, des activités associatives violentes (*Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3, par. 107).

[60] Whether there are other categories of activity in addition to violence that are by their very nature entirely excluded from s. 2(*d*) protection need not be canvassed here. It suffices to note that a purposive interpretation of s. 2(*d*) confers *prima facie* protection on a broad range of associational activity, subject to limits justified pursuant to s. 1 of the *Charter*.

[60] En l'espèce, il n'est pas nécessaire de déterminer si, en plus de la violence, d'autres catégories d'activités sont entièrement exclues de la protection conférée par l'al. 2*d*) en raison de leur nature même. Il suffit de souligner qu'une interprétation téléologique de l'al. 2*d*) protège à première vue un vaste éventail d'activités associatives, sous réserve des limites justifiées au regard de l'article premier de la *Charte*.

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[61] The nature of a given associational activity and its relation to the underlying purpose of s. 2(*d*) may also be relevant to the s. 1 analysis, in the same way that the nature of particular expression is relevant in s. 2(*b*) cases. For instance, as Rothstein J. explains in *Whatcott*, at paras. 112 and 114:

> Violent expression and expression that threatens violence does not fall within the protected sphere of s. 2(*b*) of the *Charter*: *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555, at para. 70. However, apart from that, not all expression will be treated equally in determining an appropriate balancing of competing values under a s. 1 analysis. That is because different types of expression will be relatively closer to or further from the core values behind the freedom, depending on the nature of the expression. This will, in turn, affect its value relative to other *Charter* rights, the exercise or protection of which may infringe freedom of expression.
>
> . . .
>
> Hate speech is at some distance from the spirit of s. 2(*b*) because it does little to promote, and can in fact impede, the values underlying freedom of expression. As noted by Dickson C.J. in *Keegstra*, expression can be used to the detriment of the search for truth (p. 763). As earlier discussed, hate speech can also distort or limit the robust and free exchange of ideas by its tendency to silence the voice of its target group. It can achieve the self-fulfillment of the publisher, but often at the expense of that of the victim. These are important considerations in balancing hate speech with competing *Charter* rights . . . . [Emphasis added.]

[62] Section 2(*d*), we have seen, protects associational activity for the purpose of securing the individual against state-enforced isolation and empowering individuals to achieve collectively what they could not achieve individually. It follows that the associational rights protected by s. 2(*d*) are not

[61] La nature de l'activité associative et sa relation à l'objet sous-jacent de l'al. 2*d*) peuvent également devenir pertinentes pour les besoins d'une analyse fondée sur l'article premier, tout comme la nature d'une forme particulière d'expression l'est dans les affaires pertinentes relatives à l'al. 2*b*). À titre d'exemple, comme l'a expliqué le juge Rothstein dans *Whatcott* :

> L'alinéa 2*b*) de la *Charte* ne protège pas l'écrit ou le discours qui exprime la violence ou la menace de recourir à la violence : *R. c. Khawaja*, 2012 CSC 69, [2012] 3 R.C.S. 555, par. 70. À cette exception près, les écrits et les discours ne seront pas traités sur un pied d'égalité lorsqu'il s'agit de trouver un juste équilibre entre des valeurs concurrentes dans le cadre d'une analyse fondée sur l'article premier. Cette situation tient au fait que, selon leur nature, les divers types d'écrits et de discours se rapprochent ou s'éloignent relativement des valeurs fondamentales à la base de la liberté, ce qui à son tour influe sur la valeur de l'écrit ou du discours en question par rapport aux autres droits garantis par la *Charte* dont l'exercice ou la protection peut porter atteinte à la liberté d'expression.
>
> . . .
>
> Le propos haineux est quelque peu éloigné de l'esprit de l'al. 2*b*) parce qu'il contribue peu à promouvoir les valeurs sous-jacentes à la liberté d'expression et qu'il peut en fait les entraver. Le juge en chef Dickson a fait observer dans l'arrêt *Keegstra* qu'un écrit ou un discours peut être utilisé au détriment de la recherche de la vérité (p. 763). Comme nous l'avons déjà expliqué, le propos haineux peut également fausser ou restreindre l'échange sain et libre d'idées en raison de sa tendance à réduire au silence les membres du groupe visé. Il peut permettre à son auteur de s'épanouir, mais il le fait souvent aux dépens de la victime. Il s'agit là de considérations importantes lorsqu'on recherche l'équilibre entre le discours haineux et les droits opposés garantis par la *Charte* . . . [Nous soulignons; par. 112 et 114.]

[62] Comme nous l'avons vu, l'al. 2*d*) protège l'activité associative afin de prémunir les individus contre l'isolement provoqué par l'État et de leur permettre de réaliser collectivement ce qu'ils ne pourraient pas accomplir seuls. En conséquence, les droits d'association protégés par l'al. 2*d*) ne

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merely a bundle of individual rights, but collective rights that inhere in associations. L'Heureux-Dubé J. put it well in *Advance Cutting*:

> In society, there is an element of synergy when individuals interact. The mere addition of individual goals will not suffice. Society is more than the sum of its parts. Put another way, a row of taxis do not a bus make. An arithmetic approach to *Charter* rights fails to encompass the aspirations imbedded in it. [para. 66]

[63] It has been suggested that collective rights should not be recognized because they are inconsistent with the *Charter*'s emphasis on individual rights, and because this would give groups greater rights than individuals. In our view, neither criticism is well founded.

[64] First, the *Charter* does not exclude collective rights. While it generally speaks of individuals as rights holders, its s. 2 guarantees extend to groups. The right of peaceful assembly is, by definition, a group activity incapable of individual performance. Freedom of expression protects both listeners and speakers: *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, at para. 28. The right to vote is meaningless in the absence of a social context in which voting can advance self-government: *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 31. The Court has also found that freedom of religion is not merely a right to hold religious opinions but also an individual right to establish communities of faith (see *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567). And while this Court has not dealt with the issue, there is support for the view that "the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection" of freedom of religion (*Hutterian Brethren*, at para. 131, per Abella J., dissenting, citing *Metropolitan Church of Bessarabia v. Moldova*, No. 45701/99, ECHR 2001-XII (First Section), at para. 118). See also

constituent pas simplement un ensemble de droits individuels, mais également des droits collectifs inhérents aux associations. La juge L'Heureux-Dubé a rappelé avec justesse dans *Advance Cutting* :

> L'interaction des individus entraîne un élément de synergie dans la société. La simple addition d'objectifs individuels ne suffit pas. La société est plus que la somme de ses parties. Autrement dit, une rangée de taxis n'équivaut pas à un autobus. L'application d'une méthode mathématique à l'égard des droits garantis par la *Charte* ne tient pas compte des aspirations qu'elle enchâsse. [par. 66]

[63] On a soutenu que les droits collectifs ne devraient pas être reconnus parce qu'ils seraient incompatibles avec la *Charte*, qui met l'accent sur les droits individuels, et parce que les groupes bénéficieraient ainsi de droits plus étendus que les individus. À notre avis, aucun de ces arguments n'est fondé.

[64] D'abord, la *Charte* n'exclut pas les droits collectifs. Bien que les titulaires de droit auxquels elle renvoie soient en général des particuliers, les garanties prévues par l'art. 2 s'appliquent également aux groupes. La liberté de réunion pacifique vise, par définition, une activité collective qui n'est pas susceptible d'être accomplie par une seule personne. La liberté d'expression protège tant les auditeurs que les orateurs (*R. c. National Post*, 2010 CSC 16, [2010] 1 R.C.S. 477, par. 28). Le droit de vote ne signifie rien sans un contexte social où son exercice peut favoriser la gouvernance démocratique (*Sauvé c. Canada (Directeur général des élections)*, 2002 CSC 68, [2002] 3 R.C.S. 519, par. 31). La Cour a également reconnu que la liberté de religion ne se limite pas au droit de posséder des croyances religieuses, mais qu'elle inclut aussi le droit individuel d'établir des communautés organisées autour d'une même foi (voir *Alberta c. Hutterian Brethren of Wilson Colony*, 2009 CSC 37, [2009] 2 R.C.S. 567). Bien que la Cour n'ait pas examiné cette question, un courant de jurisprudence appuie par ailleurs l'idée que « l'autonomie des communautés religieuses est indispensable au pluralisme dans une société démocratique et se

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Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

[65] It has also been suggested that recognition of a collective aspect to s. 2(*d*) rights will somehow undermine individual rights and the individual aspect of s. 2(*d*). We see no basis for this contention. Recognizing group or collective rights complements rather than undercuts individual rights, as the examples just cited demonstrate. It is not a question of *either* individual rights *or* collective rights. Both are essential for full *Charter* protection.

[66] In summary, s. 2(*d*), viewed purposively, protects three classes of activities: (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities.

C. *The Right to a Meaningful Collective Bargaining Process*

[67] Applying the purposive approach just discussed to the domain of labour relations, we conclude that s. 2(*d*) guarantees the right of employees to meaningfully associate in the pursuit of collective workplace goals, affirming the central holdings of *Health Services* and *Fraser*. This guarantee includes a right to collective bargaining. However, that right is one that guarantees a process rather than an outcome or access to a particular model of labour relations.

trouve donc au cœur même de la protection » de la liberté de religion (*Hutterian Brethren*, par. 131, la juge Abella, dissidente, citant *Église métropolitaine de Bessarabie c. Moldova*, n° 45701/99, CEDH 2001-XII (1re Section), par. 118). Voir aussi *Serbian Eastern Orthodox Diocese c. Milivojevich*, 426 U.S. 696 (1976).

[65] On a également laissé entendre que la reconnaissance d'aspects collectifs aux droits protégés par l'al. 2*d*) porterait en quelque sorte atteinte aux droits individuels eux-mêmes ainsi qu'à l'aspect individuel de cette disposition. Cette prétention est dépourvue de tout fondement. La reconnaissance des droits collectifs complète, mais n'efface pas, les droits individuels, comme le démontrent les exemples que nous venons de citer. Il ne s'agit pas de reconnaître *soit* les droits individuels *soit* les droits collectifs. Ces deux catégories de droits sont essentielles pour que la *Charte* puisse offrir une protection complète.

[66] En résumé, considéré en fonction de son objet, l'al. 2*d*) protège trois catégories d'activités : (1) le droit de s'unir à d'autres et de constituer des associations; (2) le droit de s'unir à d'autres pour exercer d'autres droits constitutionnels; et (3) le droit de s'unir à d'autres pour faire face, à armes plus égales, à la puissance et à la force d'autres groupes ou entités.

C. *Le droit à un processus véritable de négociation collective*

[67] Après avoir appliqué l'approche téléologique que nous venons d'examiner au contexte des relations du travail, nous reconnaissons que l'al. 2*d*) garantit le droit des employés de véritablement s'associer en vue de réaliser des objectifs collectifs relatifs aux conditions de travail. Ce constat confirme les conclusions fondamentales tirées dans les arrêts *Health Services* et *Fraser*. Cette protection inclut un droit de négocier collectivement. Ce droit garantit toutefois un processus plutôt qu'un résultat ou que l'accès à un modèle particulier de relations de travail.

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[68] Just as a ban on employee association impairs freedom of association, so does a labour relations process that substantially interferes with the possibility of having meaningful collective negotiations on workplace matters. Without the right to pursue workplace goals collectively, workers may be left essentially powerless in dealing with their employer or influencing their employment conditions. This idea is not new. As the United States Supreme Court stated in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), at p. 33:

> Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment . . . . [Emphasis added.]

[69] Similarly, this Court recently affirmed the importance of freedom of expression in redressing the imbalance inherent in the employer-employee relationship in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733, at paras. 31-32:

> A person's employment and the conditions of their workplace can inform their identity, emotional health, and sense of self-worth . . . .
>
> Free expression in the labour context can also play a significant role in redressing or alleviating the presumptive imbalance between the employer's economic power and the relative vulnerability of the individual worker . . . . It is through their expressive activities that unions are able to articulate and promote their common interests, and, in the event of a labour dispute, to attempt to persuade the employer. [Citations omitted.]

[70] The same reasoning applies to freedom of association. As we have seen, s. 2(*d*) functions to

[68] Tout comme l'interdiction pour des employés de s'associer, le modèle de relations de travail qui entrave substantiellement la possibilité d'engager de véritables négociations collectives sur des questions relatives au travail porte atteinte à la liberté d'association. Les employés privés du droit de poursuivre collectivement des objectifs relatifs aux conditions de travail pourraient se retrouver essentiellement impuissants dans leurs échanges avec leur employeur ou pour influencer leurs conditions d'emploi. L'idée n'est pas nouvelle. Comme la Cour suprême des États-Unis l'a souligné dans l'arrêt *National Labor Relations Board c. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) :

> [TRADUCTION] Il y a longtemps nous avons exposé la raison d'être des organisations ouvrières. Nous avons dit qu'elles se sont formées pour répondre à l'urgence de la situation; qu'un simple employé était démuni quand il traitait avec un employeur et qu'il était habituellement tributaire de son salaire quotidien pour ce qui est de son entretien et de celui de sa famille; que si l'employeur refusait de lui payer le salaire qu'il estimait juste, il était néanmoins incapable de quitter son emploi et de résister à un traitement arbitraire et injuste . . . [Nous soulignons; p. 33.]

[69] De même, dans l'arrêt *Alberta (Information and Privacy Commissioner) c. Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 401*, 2013 CSC 62, [2013] 3 R.C.S. 733, la Cour a récemment confirmé l'importance de la liberté d'expression dans l'élimination de l'inégalité inhérente à la relation employeur-employé :

> L'emploi d'une personne et ses conditions de travail sont susceptibles de façonner son identité, sa santé psychologique et sa perception de sa valeur personnelle . . .
>
> Dans le contexte du travail, la liberté d'expression peut également jouer un rôle important pour éliminer ou atténuer l'inégalité présumée entre le pouvoir économique de l'employeur et la vulnérabilité relative du travailleur [. . .] C'est grâce à leurs activités expressives que les syndicats sont en mesure de formuler et de promouvoir leurs intérêts communs et, en cas de conflit de travail, de tenter d'infléchir l'employeur. [Renvois omis; par. 31-32.]

[70] Le même raisonnement s'applique à la liberté d'association. Comme nous l'avons vu, l'al. 2*d*)

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prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power. Nowhere are these dual functions of s. 2(*d*) more pertinent than in labour relations. Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals.

[71] The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in a meaningful way (*Health Services*; *Fraser*). Yet a process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals. As this Court stated in *Health Services*: "One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees . . ." (para. 84). A process that substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power is therefore inconsistent with the guarantee of freedom of association enshrined in s. 2(*d*).

[72] The balance necessary to ensure the meaningful pursuit of workplace goals can be disrupted in many ways. Laws and regulations may restrict the subjects that can be discussed, or impose arbitrary outcomes. They may ban recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power. They may make the employees' workplace goals impossible to achieve. Or they may set up a process that the employees cannot effectively control or influence. 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,

vise à la fois à empêcher que des personnes — qui, isolées, demeureraient impuissantes — soient opprimées par des entités plus puissantes et à accroître leur influence par l'exercice d'un pouvoir collectif. Or, cette double fonction de l'al. 2*d*) ne peut être plus évidente que dans le cadre des relations de travail. En effet, les employés, agissant individuellement, ne disposent habituellement pas du pouvoir de négocier et de poursuivre des objectifs relatifs à leurs conditions de travail avec un employeur plus puissant. Seul le regroupement en association en vue de négocier collectivement — qui augmente ainsi leur pouvoir de négociation — permet à des employés de poursuivre véritablement leurs objectifs relatifs à leurs conditions de travail.

[71] Le droit à un processus véritable de négociation collective constitue donc un élément nécessaire du droit de poursuivre collectivement et de manière véritable des objectifs relatifs au travail (*Health Services*; *Fraser*). Un processus de négociation collective n'aura toutefois pas un caractère véritable s'il empêche les employés de poursuivre leurs objectifs. Comme l'a affirmé la Cour dans *Health Services*, « un des succès fondamentaux résultant de la négociation collective est de pallier l'inégalité qui a toujours existé entre employeur et employés . . . » (par. 84). Ainsi, le mécanisme qui porte substantiellement atteinte à un processus véritable de négociation collective en réduisant le pouvoir de négociation des employés ne respecte pas la liberté d'association garantie par l'al. 2*d*).

[72] L'équilibre nécessaire à la poursuite véritable d'objectifs relatifs au travail peut être rompu de maintes façons. Des lois et des règlements peuvent restreindre les sujets susceptibles de faire l'objet de négociation ou imposer des résultats arbitraires. Ils peuvent interdire l'action collective des employés sans offrir de mesures de protection adéquate en compensation et réduire ainsi leur pouvoir de négociation. Ils peuvent rendre impossible la réalisation des objectifs des employés relatifs aux conditions de travail. Ou encore, des lois et des règlements pourraient établir un processus que les employés seraient incapables de contrôler ou d'influencer. Quelle que soit la nature de la restriction, il faut

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so as to substantially interfere with meaningful collective bargaining: *Health Services*, at para. 90.

[73] Against this conception, the Attorney General of Canada, relying on *Fraser*, argues that collective bargaining is at best a "derivative right" from the basic or "core" right to associate (the constitutive approach). It follows, according to the Attorney General, that collective bargaining is protected only if state action makes it *effectively impossible* to associate for workplace matters. Here that impossibility is lacking, the Attorney General asserts, because the SRRP process is a means by which RCMP members can associate for workplace purposes. The Court of Appeal accepted this position. We disagree. We will address the terms "effectively impossible" and "derivative right" in turn.

[74] The reference in *Fraser* to the effective impossibility of achieving workplace goals must be understood with reference to the legislative schemes at issue. For instance, in discussing *Dunmore*, the majority in *Fraser* explained that Bastarache J. had "concluded that the absence of legislative protection for farm workers to organize in order to achieve workplace goals made meaningful association to achieve workplace goals impossible and therefore constituted a substantial interference with the right to associate guaranteed by s. 2(*d*) of the *Charter*" (para. 31 (emphasis added)). Similarly, the majority in *Fraser* explained that the legislation impugned in *Health Services* — legislation that unilaterally nullified terms concerning seniority and lay-offs in existing collective agreements and precluded future bargaining over those matters — "rendered the meaningful pursuit of [workplace] goals impossible and effectively nullified the right to associate of its employees" (para. 38).

essentiellement déterminer si les mesures en question perturbent l'équilibre des rapports de force entre les employés et l'employeur que l'al. 2*d*) vise à établir, de telle sorte qu'elles interfèrent de façon substantielle avec un processus véritable de négociation collective (*Health Services*, par. 90).

[73] À l'encontre de cette conception, le procureur général du Canada soutient, en se fondant sur l'arrêt *Fraser*, que la négociation collective est tout au plus un « droit dérivé » du droit fondamental ou « essentiel » de s'associer (l'approche constitutive). Il s'ensuit, selon lui, que la négociation collective n'est protégée que si l'acte de l'État rend *effectivement impossible* l'association en vue de régler des questions relatives au travail. En l'espèce, affirme le procureur général, cette impossibilité n'existe pas, parce que le PRRF constitue un moyen pour les membres de s'associer à des fins relatives au travail. La Cour d'appel a accepté cette thèse. Nous ne sommes pas d'accord. Nous examinerons maintenant à tour de rôle les termes « effectivement impossible » et « droit dérivé ».

[74] La mention dans *Fraser* de l'impossibilité effective de réaliser des objectifs relatifs au travail doit être interprétée eu égard aux régimes législatifs en cause. À titre d'exemple, lorsqu'ils se sont penchés sur l'arrêt *Dunmore*, les juges majoritaires dans *Fraser* ont expliqué que le juge Bastarache avait « décid[é] [. . .] que l'omission du législateur de protéger les travailleurs agricoles désireux de s'associer pour réaliser des objectifs liés au travail rend[ait] à toutes fins utiles impossible l'association à cette fin et entrav[ait] de ce fait substantiellement l'exercice du droit garanti à l'al. 2*d*) de la *Charte* » (par. 31 (nous soulignons)). De même, les juges majoritaires dans *Fraser* ont souligné que la loi contestée dans *Health Services* — une loi qui annulait unilatéralement certaines conditions relatives à l'ancienneté et à la mise en disponibilité dans des conventions collectives existantes et qui interdisait toute négociation ultérieure sur ces questions — « rend[ait] impossible la poursuite véritable [d']objectifs [relatifs au travail] et [. . .] supprim[ait] dans les faits le droit de ses employés de s'associer » (par. 38).

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[75] These passages from *Fraser* and *Health Services* use terms like "impossible" and "effectively nullified" to describe the effect of legislative schemes (including legislative exclusions), not the legal test for infringement of s. 2(*d*). Explaining the reasoning in *Dunmore*, the majority in *Fraser* states that: "The *effect* of a process that renders impossible the meaningful pursuit of collective goals is to substantially interfere with the exercise of the right to free association . . ." (para. 33 (emphasis in original)). In *Fraser*, the majority further explains that there cannot "be any doubt that legislation (or the absence of a legislative framework) that makes achievement" of collective workplace goals "substantially impossible, constitutes a limit on the exercise of freedom of association" (para. 32 (emphasis added)). It is clear that such passages do not adopt "substantial impossibility" as the threshold test for finding an infringement of freedom of association. Rather, the passages demonstrate that the majority in *Fraser* adopts substantial interference as the *legal test* for infringement of freedom of association.

[75] Dans ces passages des arrêts *Fraser* et *Health Services*, la Cour utilise des termes comme « impossible » et « supprimer dans les faits » pour décrire l'effet de certains régimes législatifs (notamment les exclusions prévues par la loi) et non pas le critère juridique permettant de conclure à une violation de l'al. 2*d*). En expliquant le raisonnement suivi dans *Dunmore*, les juges majoritaires dans *Fraser* ont affirmé que « [l]e processus qui rend impossible la poursuite véritable d'objectifs collectifs a pour *effet* d'entraver substantiellement l'exercice du droit de libre association . . . » (par. 33 (en italique dans l'original)). Comme l'ont expliqué en outre les juges majoritaires dans *Fraser*, on ne peut « douter que la loi (ou l'absence d'un cadre législatif) qui rendait essentiellement impossible » l'atteinte d'objectifs collectifs relatifs au travail « restreignait l'exercice de la liberté d'association » (par. 32 (nous soulignons)). Manifestement, de tels passages ne fixent pas comme seuil pour conclure à l'existence d'une atteinte à la liberté d'association, la démonstration qu'il soit « essentiellement impossible » de poser certains gestes. Ces passages démontrent plutôt que les juges majoritaires dans *Fraser* ont adopté le *test juridique* de l'entrave substantielle pour conclure à une atteinte au droit d'association.

[76] Dissenting in the case at bar, Rothstein J. highlights the fact that the majority reasons in *Fraser* "referred to the test of impossibility — either effective or substantial impossibility — *no less than 12 times*, tracing its origins in the decisions of *Dunmore* and *Health Services* . . . see *Fraser*, at paras. 31-34, 38, 42, 46-48, 62 and 98" (para. 213 (emphasis in original)). In virtually every case (see paras. 31-33, 38, 42, 46-48, 62 and 98), the "impossibility" in question refers explicitly to the *effect* of legislation or the absence of a legislative framework. A test of substantial interference or substantial impairment is also explicitly stated as the standard for finding a s. 2(*d*) infringement at paras. 31, 33, 47-48 and 62. Finally, the majority in *Fraser* reaffirmed the holding in *Health Services* that "[t]he fundamental inquiry is whether the state action would *substantially impair* the ability of 'union

[76] En dissidence dans la présente affaire, le juge Rothstein souligne que les juges majoritaires dans *Fraser* « mentionnent le critère de l'impossibilité — substantielle ou effective — *à pas moins de douze reprises*, en en retraçant les origines aux arrêts *Dunmore* et *Health Services* [. . .] (voir *Fraser*, par. 31-34, 38, 42, 46-48, 62 et 98) » (par. 213 (en italique dans l'original)). Dans presque tous les cas (voir les par. 31-33, 38, 42, 46-48, 62 et 98), l'« impossibilité » renvoie expressément à l'*effet* de la loi ou à l'absence d'un cadre législatif. Aux paragraphes 31, 33, 47-48 et 62, les juges majoritaires affirment expressément que le critère d'entrave ou d'atteinte substantielle constitue la norme applicable pour conclure à une violation de l'al. 2*d*). Enfin, les juges majoritaires dans *Fraser* ont confirmé la conclusion de *Health Services* selon laquelle « [l]a question fondamentale en jeu demeure

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members to pursue shared goals in concert' (para. 96 (emphasis added))": para. 64 (emphasis in original); see *Health Services*, at paras. 92 and 96.

[77] This said, we agree that some of the passages in *Fraser* seem to unnecessarily complicate the analysis by referring to both effective impossibility (as the effect of certain state action) and substantial interference or impairment (as the test for infringement of s. 2(*d*)). For the reasons just discussed, however, such references should be understood consistently with the majority reasons in *Fraser*, read in their entirety, and with this Court's precedents in *Dunmore* and *Health Services*. More generally, they must be understood consistently with this Court's purposive and generous approach to s. 2(*d*), as explained above.

[78] We turn now to use of the term "derivative right" in *Fraser*. On the Court of Appeal's interpretation of *Fraser*, the right to a meaningful process of collective bargaining is "derivative" in the sense that it exists only where employees establish that it is effectively impossible for them to act collectively to achieve workplace goals (paras. 110-11 and 135). However, in *Fraser*, the majority explained that "collective bargaining is a derivative right" in the sense that it is "a 'necessary precondition' to the meaningful exercise of the constitutional guarantee of freedom of association": para. 66. The majority cited *Criminal Lawyers' Association* where the Court stated, at para. 30: "Access [to information in government hands] is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government" (emphasis added). The Court of Appeal understood this to mean that the right to collective bargaining similarly *may arise* as a necessary precondition to meaningful association in the workplace only where some other condition is first met. The Court of Appeal

celle de déterminer si l'acte de l'État *entraverait substantiellement* la capacité des "syndiqués de poursuivre collectivement des objectifs communs" (par. 96 (nous soulignons)) » (par. 64 (souligné dans l'original); voir *Health Services*, par. 92 et 96).

[77] Cela dit, nous convenons que certains passages de *Fraser* semblent compliquer inutilement l'analyse en renvoyant à la fois à l'impossibilité effective (en tant qu'effet de certaines mesures gouvernementales) et à l'entrave ou atteinte substantielle (en tant que critère applicable pour conclure à une violation de l'al. 2*d*)). Cependant, pour les motifs que nous venons d'exposer, ces renvois devraient être interprétés conformément aux motifs des juges majoritaires dans *Fraser*, lus dans leur intégralité, ainsi qu'aux précédents établis par la Cour dans *Dunmore* et *Health Services*. De façon plus générale, leur interprétation doit respecter l'interprétation téléologique et généreuse donnée par la Cour à l'al. 2*d*), et qui a été expliquée précédemment.

[78] Penchons-nous maintenant sur l'utilisation du terme « droit dérivé » dans *Fraser*. Selon l'interprétation que la Cour d'appel a donnée à cet arrêt, le droit à un processus véritable de négociation collective est un droit « dérivé », en ce sens qu'il n'existe que si les employés établissent qu'il est effectivement impossible pour eux d'agir collectivement en vue de réaliser des objectifs relatifs au travail (par. 110-111 et 135). Or, les juges majoritaires dans *Fraser* ont expliqué que « la négociation collective est un droit dérivé », définie comme « une "condition qui doit nécessairement être réalisée" pour permettre l'exercice véritable de la liberté d'association garantie par la Constitution » : par. 66. À ce propos, ils ont cité l'arrêt *Criminal Lawyers' Association* où la Cour affirme au par. 30 que : « L'accès [à des renseignements détenus par le gouvernement] est un droit dérivé qui peut intervenir lorsqu'il constitue une condition qui doit nécessairement être réalisée pour qu'il soit possible de s'exprimer de manière significative sur le fonctionnement du gouvernement » (nous

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took that condition to be the effective impossibility of acting collectively to achieve workplace goals.

[79] However, the majority in *Fraser* did not qualify the right to collective bargaining in this way. It held that collective bargaining is "a 'necessary precondition' to the meaningful exercise of the constitutional guarantee of freedom of association": para. 66. Similarly, at para. 99, "the right of an employees' association to make representations to the employer and have its views considered in good faith" is described as "a derivative right under s. 2(*d*) of the *Charter*, necessary to meaningful exercise of the right to free association" (emphasis added). To the extent the term "derivative right" suggests that the right to a meaningful process of collective bargaining only applies where the guarantee under s. 2(*d*) is otherwise frustrated, use of that term should be avoided. Furthermore, any suggestion that an aspect of a *Charter* right may somehow be secondary or subservient to other aspects of that right is out of keeping with the purposive approach to s. 2(*d*).

[80] To recap, s. 2(*d*) protects against substantial interference with the right to a meaningful process of collective bargaining. Historically, workers have associated in order "to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict", namely, their employers: *Alberta Reference*, at p. 366. The guarantee entrenched in s. 2(*d*) of the *Charter* cannot be indifferent to power imbalances in the labour relations context. To sanction such indifference would be to ignore "the historical origins of the concepts enshrined" in s. 2(*d*): *Big M Drug Mart*, at p. 344. It follows that the right to a meaningful process of collective bargaining will not be satisfied by a legislative scheme that strips employees of adequate protections in their interactions with management so as

soulignons). Pour la Cour d'appel, cela signifie que le droit de négocier collectivement *peut* de façon similaire *intervenir* comme une condition nécessaire à l'exercice véritable de la liberté d'association au travail seulement si une autre condition est tout d'abord réalisée. De l'avis de la Cour d'appel, cette condition consiste en l'impossibilité effective d'agir collectivement pour réaliser des objectifs relatifs au travail.

[79] Or, les juges majoritaires dans *Fraser* n'ont pas restreint ainsi le droit de négocier collectivement. Pour eux, la négociation collective est « une "condition qui doit nécessairement être réalisée" pour permettre l'exercice véritable de la liberté d'association garantie par la Constitution » (par. 66). De même, au par. 99 : « . . . le droit d'une association d'employés de présenter des observations à l'employeur et de les voir prises en compte de bonne foi » est décrit comme un droit « dérivé de la liberté garantie à l'al. 2*d*) de la *Charte* et [. . .] nécessaire à l'exercice véritable du droit de libre association » (nous soulignons). Dans la mesure où l'expression « droit dérivé » laisse entendre que le droit à un processus véritable de négociation collective ne s'applique que s'il a été autrement porté atteinte à la garantie prévue à l'al. 2*d*), il convient de l'éviter. De plus, toute suggestion selon laquelle un aspect d'un droit protégé par la *Charte* serait d'une manière ou d'une autre secondaire ou accessoire à d'autres aspects de ce droit n'est pas compatible avec l'interprétation téléologique de l'al. 2*d*).

[80] Pour récapituler, l'al. 2*d*) protège contre une entrave substantielle au droit à un processus véritable de négociation collective. Historiquement, les travailleurs se sont associés pour « faire face, à armes plus égales, à la puissance et à la force de ceux avec qui leurs intérêts interagissaient et, peut-être même, entraient en conflit », c'est-à-dire leur employeur (*Renvoi relatif à l'Alberta*, p. 366). La garantie prévue à l'al. 2*d*) de la *Charte* ne peut faire abstraction du déséquilibre des forces en présence dans le contexte des relations du travail. Le permettre reviendrait à ne pas tenir compte « des origines historiques des concepts enchâssés » à l'al. 2*d*) (*Big M Drug Mart*, p. 344). Portera donc atteinte au droit à un processus véritable de négociation collective tout régime législatif qui prive

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to substantially interfere with their ability to meaningfully engage in collective negotiations.

D. *Essential Features of a Meaningful Process of Collective Bargaining Under Section 2(d)*

[81] We have concluded that s. 2(*d*) protects the right of employees to associate for the purpose of meaningfully pursuing collective workplace goals. The government therefore cannot enact laws or impose a labour relations process that substantially interferes with that right. This raises the question — what are the features essential to a meaningful process of collective bargaining under s. 2(*d*)? In this section, we conclude that a meaningful process of collective bargaining is a process that provides employees with a degree of choice and independence sufficient to enable them to determine their collective interests and meaningfully pursue them.

[82] Collective bargaining constitutes a fundamental aspect of Canadian society which "enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work" (*Health Services*, at para. 82). Put simply, its purpose is to preserve collective employee autonomy against the superior power of management and to maintain equilibrium between the parties. This equilibrium is embodied in the degree of choice and independence afforded to the employees in the labour relations process.

[83] But choice and independence are not absolute: they are limited by the context of collective bargaining. In our view, the degree of choice required by the *Charter* for collective bargaining purposes is one that enables employees to have effective input into the selection of the collective goals to be advanced by their association. In the same vein, the degree of independence required by the *Charter* for

les employés de protections adéquates dans leurs interactions avec l'employeur de manière à créer une entrave substantielle à leur capacité de véritablement mener des négociations collectives.

D. *Caractéristiques essentielles d'un processus véritable de négociation collective au sens où il faut l'entendre pour l'application de l'al. 2d)*

[81] Nous avons conclu que l'al. 2*d*) protège le droit des employés de s'associer en vue de réaliser véritablement des objectifs collectifs relatifs au travail. Le gouvernement ne saurait donc adopter des lois ou imposer un processus de relations de travail qui entrave substantiellement ce droit. Il faut alors rechercher les caractéristiques essentielles d'un processus véritable de négociation collective au sens où il faut l'entendre pour l'application de l'al. 2*d*). Dans la présente partie, nous reconnaîtrons qu'un processus véritable de négociation collective est tel qu'il offre aux employés une liberté de choix et une indépendance suffisantes pour leur permettre de décider de leurs intérêts collectifs et de véritablement les réaliser.

[82] La négociation collective représente un aspect fondamental de la société canadienne qui « favorise la dignité humaine, la liberté et l'autonomie des travailleurs en leur donnant l'occasion d'exercer une influence sur l'adoption des règles régissant leur milieu de travail et, de ce fait, d'exercer un certain contrôle sur un aspect d'importance majeure de leur vie, à savoir leur travail » (*Health Services*, par. 82). En termes simples, son objectif consiste à protéger l'autonomie collective des employés contre le pouvoir supérieur de l'administration et à maintenir un équilibre entre les parties. Cet équilibre s'établit grâce à la liberté de choix et à l'indépendance accordées aux employés dans le cadre de ce processus de relations de travail.

[83] Cela dit, cette liberté de choix et cette indépendance ne sont pas absolues : elles sont limitées par le contexte de la négociation collective. À notre avis, la liberté de choix requise par la *Charte* à des fins de négociation collective correspond à celle qui permet aux employés de participer véritablement au choix des objectifs collectifs que devra poursuivre leur association. Dans la même

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collective bargaining purposes is one that ensures that the activities of the association are aligned with the interests of its members.

[84] In the following subsections, we lay out the theoretical underpinnings of choice and independence and we explain how they are inherent to the nature and purpose of collective bargaining. We then explain how the requirements of choice and independence can be respected by a variety of labour relations models, as long as such models allow collective bargaining to be pursued in a meaningful way.

(1) Choice and Independence Are Inherent to the Nature and Purpose of Collective Bargaining

(a) *Employee Choice*

[85] The function of collective bargaining is not served by a process which undermines employees' rights to choose what is in their interest and how they should pursue those interests. The degree of choice required by the *Charter* is one that enables employees to have effective input into the selection of their collective goals. This right to participate in the collective is crucial to preserve employees' ability to advance their own interests, particularly in schemes which involve trade-offs of individual rights to gain collective strength (J. E. Dorsey, "Individuals and Internal Union Affairs: The Right to Participate", in K. P. Swan and K. E. Swinton, eds., *Studies in Labour Law* (1983), 193).

[86] Hallmarks of employee choice in this context include the ability to form and join new associations, to change representatives, to set and change collective workplace goals, and to dissolve existing associations. Employee choice may lead to a diversity of associational structures and to competition between associations, but it is a form of exercise of freedom of association that is essential to the existence of employee organizations and to the

veine, l'indépendance exigée par la *Charte* à des fins de négociation collective se définit comme celle qui assure une correspondance entre les activités de l'association et les intérêts de ses membres.

[84] Dans les paragraphes qui suivent, nous exposerons les fondements théoriques de la liberté de choix et de l'indépendance, et nous expliquerons à quel point celles-ci sont inhérentes à la nature et à l'objet de la négociation collective. Nous exposerons ensuite comment cette liberté de choix et cette indépendance peuvent s'inscrire dans les différents modèles de relations du travail, dans la mesure où ils permettent une véritable négociation collective.

(1) La liberté de choix et l'indépendance sont inhérentes à la nature et à l'objectif de la négociation collective

a) *Liberté de choix de l'employé*

[85] L'objectif de la négociation collective n'est pas atteint si le processus qui l'entoure entrave le droit des employés de choisir ce qui est dans leur intérêt et comment ils devraient défendre ce dernier. La liberté de choix requise par la *Charte* doit permettre aux employés de participer réellement au choix de leurs objectifs collectifs. Ce droit de participer au processus collectif s'avère essentiel pour protéger la capacité des employés de faire valoir leurs propres intérêts, surtout dans les régimes où ces derniers sont appelés à faire des compromis sur leurs droits individuels pour accroître leur pouvoir collectif (J. E. Dorsey, « Individuals and Internal Union Affairs : The Right to Participate », dans K. P. Swan et K. E. Swinton, dir., *Studies in Labour Law* (1983), 193).

[86] Parmi les caractéristiques de la liberté de choix des employés dans un tel contexte figurent la capacité de constituer de nouvelles associations et d'y adhérer, celle de changer de représentants, celle d'établir et de modifier les objectifs collectifs relatifs au travail et celle de dissoudre les associations existantes. Certes, la liberté de choix des employés peut susciter une diversité de structures associatives et une concurrence entre les associations, mais

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maintenance of the confidence of members in them (*PIPSC*, at p. 380, per Cory J., in dissent; P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law* (3rd ed. 1983), at p. 200).

[87] Accountability to the members of the association plays an important role in assessing whether employee choice is present to a sufficient degree in any given labour relations scheme. Employees choose representatives on the assumption that *their* voice will be conveyed to the employer by the people *they* choose (A. Bogg and K. Ewing, "A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada" (2012), 33 *Comp. Lab. L. & Pol'y J.* 379, at p. 405). A scheme that holds representatives accountable to the employees who chose them ensures that the association works towards the purposes for which the employees joined together. Accountability allows employees to gain control over the selection of the issues that are put forward to the employer, and the agreements concluded on their behalf as a result of the process of collective bargaining.

(b) *Independence From Management*

[88] The function of collective bargaining is not served by a process which is dominated by or under the influence of management. This is why a meaningful process of collective bargaining protects the right of employees to form and join associations that are independent of management (*Delisle*, at paras. 32 and 37). Like choice, independence in the collective bargaining context is not absolute. The degree of independence required by the *Charter* for collective bargaining purposes is one that permits the activities of the association to be aligned with the interests of its members.

[89] Just as with choice, independence from management ensures that the activities of the association reflect the interests of the employees, thus respecting the nature and purpose of the collective bargaining process and allowing it to function properly. Conversely, a lack of independence means that

cette forme d'exercice de la liberté d'association est essentielle à l'existence des associations de travailleurs et au maintien de la confiance des membres à l'égard de ces dernières (*IPFPC*, p. 380, le juge Cory, dissident; P. Davies et M. Freedland, *Kahn-Freund's Labour and the Law* (3e éd. 1983), p. 200).

[87] L'obligation de rendre compte aux membres de l'association joue un rôle important pour apprécier la suffisance de la liberté de choix des employés dans un régime de relations de travail donné. Ces derniers choisissent leurs représentants en tenant pour acquis que *leur* point de vue sera transmis à l'employeur par les gens qu'*ils* ont choisis (A. Bogg et K. Ewing, « A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada » (2012), 33 *Comp. Lab. L. & Pol'y J.* 379, p. 405). Tout régime qui oblige les représentants à rendre compte aux employés qui les ont choisis garantit que l'association travaille à l'atteinte des objectifs pour lesquels les employés se sont associés. L'obligation de rendre compte assure aux employés un meilleur contrôle sur le choix des questions soumises à l'attention de l'employeur et sur les ententes conclues en leur nom à l'issue du processus de négociation collective.

b) *Indépendance à l'égard de la direction*

[88] L'objectif de la négociation collective n'est pas atteint si l'employeur domine ou influence le processus qui l'entoure. C'est pourquoi un processus véritable de négociation collective protège le droit des employés de former des associations qui sont indépendantes de la direction, et d'y adhérer (*Delisle*, par. 32 et 37). À l'instar de la liberté de choix, l'indépendance dans le contexte de la négociation collective n'est pas absolue. L'indépendance requise par la *Charte* aux fins de la négociation collective est celle qui fait correspondre les activités de l'association aux intérêts de ses membres.

[89] Tout comme le choix, l'indépendance à l'égard de l'employeur garantit que les activités de l'association reflètent les intérêts des employés, ce qui respecte la nature et l'objet du processus de négociation collective et en assure le bon fonctionnement. À l'inverse, un manque d'indépendance

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employees may not be able to advance their own interests, but are limited to picking and choosing from among the interests management permits them to advance. Relevant considerations in assessing independence include the freedom to amend the association's constitution and rules, the freedom to elect the association's representatives, control over financial administration and control over the activities the association chooses to pursue.

[90] Independence and choice are complementary principles in assessing the constitutional compliance of a labour relations scheme. *Charter* compliance is evaluated based on the *degrees* of independence and choice guaranteed by the labour relations scheme, considered with careful attention to the entire context of the scheme. The degrees of choice and independence afforded should not be considered in isolation, but must be assessed globally always with the goal of determining whether the employees are able to associate for the purposes of meaningfully pursuing collective workplace goals.

[91] We now turn to the practical implications of choice and independence for labour relations models.

(2) Labour Relations Models Must Permit Collective Bargaining to Be Pursued in a Meaningful Way

[92] A variety of labour relations models may provide sufficient employee choice and independence from management to permit meaningful collective bargaining. As discussed, choice and independence are not absolute in the context of collective bargaining. By necessity, a collective framework not only serves employees' interests, but imposes limits on individual entitlements in order to permit the pursuit of collective goals. Collective bargaining is "an exercise in solidarity in which individual interests are not simply aggregated but transformed in the process of democratic deliberation" (J. Fudge, "Introduction: Farm Workers, Collective Bargaining

signifie que les employés ne sont peut-être pas en mesure de faire valoir leurs propres intérêts, mais qu'ils doivent choisir parmi ceux que l'employeur les autorise à défendre. Au nombre des facteurs à considérer dans l'examen de l'indépendance, mentionnons la liberté de modifier l'acte constitutif et les règles de l'association, la liberté de choisir les représentants de celle-ci ainsi que le contrôle sur l'administration financière et sur les activités que l'association décide de mener.

[90] L'indépendance et la liberté de choix forment des règles complémentaires pour déterminer si un régime de relations de travail respecte les exigences de la Constitution. Le respect de la *Charte* s'évalue en fonction des *degrés* d'indépendance et de liberté de choix garantis par le régime de relations de travail, en portant une attention particulière au contexte global du régime. Les degrés de liberté de choix et d'indépendance accordés ne devraient pas être examinés isolément, mais plutôt globalement, toujours dans le but de déterminer si les employés sont en mesure de s'associer en vue de réaliser véritablement des objectifs collectifs relatifs au travail.

[91] Nous examinerons maintenant les conséquences pratiques de la liberté de choix et de l'indépendance sur les modèles de relations de travail.

(2) Les modèles de relations de travail doivent permettre une véritable négociation collective

[92] Divers modèles de relations de travail peuvent offrir aux employés une liberté de choix et une indépendance suffisantes à l'égard de l'employeur pour permettre une véritable négociation collective. En effet, comme nous l'avons vu, la liberté de choix et l'indépendance ne sont pas absolues dans le contexte de la négociation collective. Forcément, un cadre collectif sert non seulement les intérêts des employés, mais impose aussi des limites aux droits individuels afin de permettre la poursuite d'objectifs collectifs. La négociation collective demeure [TRADUCTION] « un exercice de solidarité où les intérêts individuels ne sont pas

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Rights, and the Meaning of Constitutional Protection", in F. Faraday, J. Fudge and E. Tucker, eds., *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (2012), 1, at p. 17; see also G. Murray and P. Verge, *La représentation syndicale: visage juridique actuel et futur* (1999), at pp. 2-3; Dorsey, at pp. 195 and 219). As Professor Wellington states: "Accommodating the interests of the dissenter and those of the majority is always difficult. The hallmark of a truly democratic society is its unwillingness to give up easily either majority rule or individual freedom" (*Labor and the Legal Process* (1968), at p. 129).

[93] This Court has consistently held that freedom of association does not guarantee a particular model of labour relations (*Delisle*, at para. 33; *Health Services*, at para. 91; *Fraser*, at para. 42). What is required is not a particular model, but a regime that does not substantially interfere with meaningful collective bargaining and thus complies with s. 2(*d*) (*Health Services*, at para. 94; *Fraser*, at para. 40). What is required in turn to permit meaningful collective bargaining varies with the industry culture and workplace in question. As with all s. 2(*d*) inquiries, the required analysis is contextual.

[94] The Wagner Act model of labour relations in force in most private sector and many public sector workplaces offers one example of how the requirements of choice and independence ensure meaningful collective bargaining. That model permits a sufficiently large sector of employees to *choose* to associate themselves with a particular trade union and, if necessary, to decertify a union that fails to serve their needs. The principles of majoritarianism and exclusivity, the mechanism of "bargaining units" and the processes of certification and decertification — all under the supervision of an independent labour relations board — ensure that an employer deals with the association most representative of its employees: G. W. Adams, *Canadian*

simplement regroupés, mais transformés au cours d'un processus de délibération démocratique » (J. Fudge, « Introduction : Farm Workers, Collective Bargaining Rights, and the Meaning of Constitutional Protection », dans F. Faraday, J. Fudge et E. Tucker, dir., *Constitutional Labour Rights in Canada : Farm Workers and the Fraser Case* (2012), 1, p. 17; voir aussi G. Murray et P. Verge, *La représentation syndicale : visage juridique actuel et futur* (1999), p. 2-3; Dorsey, p. 195 et 219). Comme le dit le professeur Wellington : [TRADUCTION] « Il est toujours difficile de concilier les intérêts du dissident et ceux de la majorité. La marque d'une société véritablement démocratique tient à son refus de renoncer facilement tant à la règle de la majorité qu'à la liberté individuelle » (*Labor and the Legal Process* (1968), p. 129).

[93] La Cour a constamment affirmé que la liberté d'association n'imposait pas un modèle particulier de relations de travail (*Delisle*, par. 33; *Health Services*, par. 91; *Fraser*, par. 42). Aucun modèle particulier n'est requis; seulement un régime qui n'entrave pas substantiellement la tenue d'une véritable négociation collective et qui respecte donc les exigences de l'al. 2*d*) (*Health Services*, par. 94; *Fraser*, par. 40). En revanche, les conditions nécessaires pour permettre une véritable négociation collective varient en fonction de la culture du secteur d'activité et du milieu de travail en question. Comme pour tous les examens fondés sur l'al. 2*d*), l'analyse requise est contextuelle.

[94] La loi Wagner, appliquée dans la grande majorité du secteur privé et dans plusieurs lieux de travail du secteur public, constitue un exemple de la façon dont les exigences de la liberté de choix et de l'indépendance assurent la conduite d'une véritable négociation collective. Ce modèle permet à un secteur d'employés suffisamment important de *choisir* de s'associer à un syndicat en particulier et, au besoin, d'obtenir le retrait d'accréditation d'un agent négociateur qui ne répond pas à leurs besoins. Les principes de la majorité et de l'exclusivité, le mécanisme des « unités de négociation » et les processus d'accréditation et de retrait d'accréditation — le tout sous la supervision d'une commission indépendante des relations de travail

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Labour Law (2nd ed. (loose-leaf)), at paras. 2.3800 to 2.4030; D. D. Carter et al., *Labour Law in Canada* (5th ed. 2002), at pp. 286-87; P. Verge, G. Trudeau and G. Vallée, *Le droit du travail par ses sources* (2006), at pp. 41-42.

[95] The Wagner Act model, however, is not the only model capable of accommodating choice and independence in a way that ensures meaningful collective bargaining. The designated bargaining model (see, e.g., *School Boards Collective Bargaining Act, 2014*, S.O. 2014, c. 5) offers another example of a model that may be acceptable. Although the employees' bargaining agent under such a model is designated rather than chosen by the employees, the employees appear to retain sufficient choice over workplace goals and sufficient independence from management to ensure meaningful collective bargaining. This is but one example; other collective bargaining regimes may be similarly capable of preserving an acceptable measure of employee choice and independence to ensure meaningful collective bargaining.

[96] Labour schemes are responsive to the interests of the parties involved and the particular workplace context. Different models have emerged to meet the specific needs of diverse industries and workplaces. The result has been ongoing debate on the desirability of various forms of workplace representation and cooperation and on their coexistence: D. J. Doorey, "Graduated Freedom of Association: Worker Voice Beyond the Wagner Model" (2013), 38 *Queen's L.J.* 511; B. W. Burkett, "The Future of the *Wagner Act*: A Canadian-American Comparison" (2013), 38 *Queen's L.J.* 363; D. Taras, "Reconciling Differences Differently: Employee Voice in Public Policymaking and Workplace Governance" (2007), 28 *Comp. Lab. L. & Pol'y J.* 167; Adams, at paras. 1.290 to 1.340.

— garantissent que l'employeur négocie avec l'association la plus représentative des travailleurs qui en sont membres (G. W. Adams, *Canadian Labour Law* (2e éd. (feuilles mobiles)), par. 2.3800 à 2.4030; D. D. Carter et autres, *Labour Law in Canada* (5e éd. 2002), p. 286-287; P. Verge, G. Trudeau et G. Vallée, *Le droit du travail par ses sources* (2006), p. 41-42).

[95] La loi Wagner n'est cependant pas le seul modèle capable de concilier la liberté de choix et l'indépendance d'une façon qui permette une véritable négociation collective. Le modèle faisant appel à un agent négociateur désigné (voir, par ex., la *Loi de 2014 sur la négociation collective dans les conseils scolaires*, L.O. 2014, c. 5) offre un autre exemple de régime qui pourrait être acceptable. Bien que, suivant ce modèle, l'agent négociateur représentant les employés soit désigné plutôt que choisi par les employés, ces derniers semblent conserver la liberté de choisir les objectifs relatifs à leurs conditions de travail et une indépendance à l'égard de l'employeur qui suffisent à assurer la tenue d'une véritable négociation collective. Ce n'est qu'un exemple; d'autres régimes de négociation collective peuvent aussi assurer à l'employé un degré acceptable de liberté de choix et d'indépendance qui permet une véritable négociation collective.

[96] Les divers régimes de relations du travail tiennent compte des intérêts des parties concernées et du contexte particulier du milieu de travail en cause. On a d'ailleurs vu apparaître différents modèles destinés à répondre aux besoins particuliers des divers secteurs et milieux de travail, d'où le débat actuel sur l'opportunité de différentes formes de représentation et de collaboration en milieu de travail et sur leur coexistence (D. J. Doorey, « Graduated Freedom of Association : Worker Voice Beyond the Wagner Model » (2013), 38 *Queen's L.J.* 511; B. W. Burkett, « The Future of the *Wagner Act* : A Canadian-American Comparison » (2013), 38 *Queen's L.J.* 363; D. Taras, « Reconciling Differences Differently : Employee Voice in Public Policymaking and Workplace Governance » (2007), 28 *Comp. Lab. L. & Pol'y J.* 167; Adams, par. 1.290 à 1.340).

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[97] The search is not for an "ideal" model of collective bargaining, but rather for a model which provides sufficient employee choice and independence to permit the formulation and pursuit of employee interests in the particular workplace context at issue. Choice and independence do not *require* adversarial labour relations; nothing in the *Charter* prevents an employee association from engaging willingly with an employer in different, less adversarial and more cooperative ways. This said, genuine collective bargaining cannot be based on the suppression of employees' interests, where these diverge from those of their employer, in the name of a "non-adversarial" process. Whatever the model, the *Charter* does not permit choice and independence to be eroded such that there is substantial interference with a meaningful process of collective bargaining. Designation of collective bargaining agents and determination of collective bargaining frameworks would therefore not breach s. 2(*d*) where the structures that are put in place are free from employer interference, remain under the control of employees and provide employees with sufficient choice over the workplace goals they wish to advance.

[97] Il ne s'agit pas de trouver le régime « idéal » de négociation collective, mais plutôt un modèle qui offre à l'employé une liberté de choix et une indépendance suffisantes pour exprimer et défendre ses intérêts dans le contexte particulier du milieu de travail en cause. La liberté de choix et l'indépendance n'*exigent* pas des relations de travail de nature contradictoire; rien dans la *Charte* n'empêche une association d'employés de s'engager librement avec l'employeur dans un type de négociation différent, moins contradictoire et davantage axé sur la collaboration. Cela dit, une véritable négociation collective ne saurait être fondée sur la négation des intérêts des employés, lorsqu'ils divergent de ceux de l'employeur, au nom d'un processus « non contradictoire ». Sans égard au modèle, la *Charte* n'autorise pas que la liberté de choix et l'indépendance soient affaiblies jusqu'au point où apparaît une entrave substantielle à l'existence d'un processus véritable de négociation collective. La désignation d'agents négociateurs et l'établissement d'un cadre de négociation collective ne porteraient donc pas atteinte à l'al. 2*d*) si la structure qui est créée reste à l'abri de l'ingérence de l'employeur, demeure sous le contrôle des employés et offre à ces derniers une liberté de choix suffisante quant aux objectifs qu'ils entendent poursuivre au sujet de leurs conditions de travail.

[98] The respondent argues that this view of s. 2(*d*) would require an employer, even a government employer, to recognize and bargain with every association chosen by employees, whatever the size. In our view, this result does not follow. Freedom of association requires, among other things, that no government process can substantially interfere with the autonomy of employees in creating or joining associations of their own choosing, even if in so doing they displace an existing association. It also requires that the employer consider employees' representations in good faith, and engage in meaningful discussion with them. But s. 2(*d*) does not require a process whereby *every* association will ultimately *gain* the recognition it seeks (see M. Coutu et al., *Droit des rapports collectifs du travail au Québec* (2nd ed. 2013), vol. 1, *Le régime général*, at para. 98). As we said, s. 2(*d*) can also accommodate a model based on majoritarianism and exclusivity (such as the Wagner Act model) that imposes

[98] L'intimé soutient que cette façon d'interpréter l'al. 2*d*) imposerait à l'employeur, même au gouvernement employeur, l'obligation de reconnaître chaque association choisie par les employés, quelle que soit sa taille, et de négocier avec elle. À notre avis, ce n'est pas le cas. La liberté d'association suppose, entre autres choses, qu'aucun processus gouvernemental ne puisse entraver substantiellement la liberté des employés de créer une association ou d'adhérer à une association de leur choix, même si, de ce fait, ils écartent une association existante. Elle suppose également que l'employeur examine les observations des employés de bonne foi et qu'il s'engage avec ces derniers dans une véritable discussion. L'alinéa 2*d*) n'impose cependant pas un processus où *chaque* association finira par *obtenir* la reconnaissance qu'elle cherche (voir M. Coutu et autres, *Droit des rapports collectifs du travail au Québec* (2e éd. 2013), vol. 1, *Le régime général*, par. 98). Comme

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restrictions on individual rights to pursue collective goals.

[99] In summary, a meaningful process of collective bargaining is a process that gives employees meaningful input into the selection of their collective goals, and a degree of independence from management sufficient to allow members to control the activities of the association, having regard to the industry and workplace in question. A labour relations scheme that complies with these requirements and thus allows collective bargaining to be pursued in a meaningful way satisfies s. 2(*d*).

[100] Before turning to the application of these principles to the constitutional questions raised in this case, we address Rothstein J.'s dissenting reasons. In Rothstein J.'s view, "[t]he essential feature of a labour relations regime that allows employees to exercise their constitutional right to make meaningful collective representations on their workplace goals is representativeness: the voice that speaks on behalf of employees must represent their interests and be ultimately accountable to them. Representativeness is the constitutional imperative required in order to ensure that s. 2(*d*) rights are protected in the collective bargaining context, nothing more" (para. 172).

[101] So stated, the notions of choice and independence, on the one hand, and representativeness, on the other, overlap considerably. However, we consider choice and independence best suited for the constitutional analysis at issue. If employees cannot choose the voice that speaks on their behalf, that voice is unlikely to speak up for their interests. It is precisely employee choice of representative that guarantees a representative voice. Similarly, if employees must "have confidence in their spokespersons" (Rothstein J.'s reasons, at para. 219), the way to ensure such confidence is through a sufficient degree of employee choice in the selection of representatives.

nous l'avons dit, il peut aussi être satisfait à l'al. 2*d*) en présence d'un modèle reposant sur la majorité et l'exclusivité (tel que le modèle fondé sur la loi Wagner) qui impose des restrictions aux droits des individus afin de réaliser des objectifs communs.

[99] En résumé, un processus véritable de négociation collective donne aux employés l'occasion de véritablement participer au choix de leurs objectifs collectifs et leur assure une indépendance suffisante par rapport à la direction pour qu'ils puissent contrôler les activités de l'association, eu égard au secteur d'activités et au milieu de travail en cause. Tout régime de relations de travail qui satisfait à ces conditions et qui permet donc la tenue d'une véritable négociation collective satisfait à l'al. 2*d*).

[100] Avant de passer à l'application de ces principes aux questions constitutionnelles soulevées en l'espèce, examinons les motifs dissidents du juge Rothstein. À son avis, « [l]a caractéristique essentielle d'un régime de relations de travail qui permet aux employés d'exercer leur droit constitutionnel de formuler véritablement des revendications collectives quant à leurs objectifs relatifs au travail est la représentativité : le porte-parole des employés doit défendre leurs intérêts et, ultimement, leur rendre des comptes. La représentativité est l'impératif constitutionnel auquel il faut satisfaire, sans plus, pour s'assurer que les droits prévus à l'al. 2*d*) sont protégés dans le contexte de la négociation collective » (par. 172).

[101] Exprimées ainsi, les notions de liberté de choix et d'indépendance, d'une part, et celle de représentativité, d'autre part, se chevauchent considérablement. La liberté de choix et l'indépendance sont toutefois celles qui, à notre avis, se prêtent le mieux à l'analyse constitutionnelle nécessaire en l'espèce. Si les employés ne peuvent choisir leur porte-parole, il est peu probable que celui-ci défende leurs intérêts. Or c'est précisément la liberté de se choisir un représentant qui garantit aux employés la possibilité de se faire entendre. De même, si les employés doivent « avoir confiance en leurs porte-parole » (motifs du juge Rothstein, par. 219), le moyen d'assurer cette confiance consiste à leur accorder une liberté de choix suffisante dans la sélection de leurs représentants.

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[102] Justice Rothstein argues that "the touchstone is representativeness" (para. 195). He acknowledges, however, that employees must be able to hold their representatives "to account" (paras. 193 and 222). Yet employees will be unable to hold representatives accountable if those employees lack sufficient choice in selecting their representatives or if their representatives are dependent on management (for instance, in determining the acceptable subject matter of employee grievances, or the relative priority of employee concerns).

[103] Representativeness and accountability rest on choice and independence. We conclude that the latter two principles are the most appropriate in assessing s. 2(*d*) compliance in the context of labour relations. That said, these principles are tools in an analysis that must in each case determine whether the right to the meaningful pursuit of collective workplace goals is respected. In our view, the disagreement between majority and Rothstein J. on the terminology of "choice and independence" versus "representativeness" is more semantic than real. The real difference lies in how the concepts are understood and applied.

[104] Against this background, we therefore turn to the constitutional questions raised in the case at bar, that is whether the imposition of the SRRP and the exclusion of RCMP members from the application of the *PSLRA* violate s. 2(*d*) of the *Charter*, and if so, whether the violation is a reasonable limit prescribed by law, which can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*.

E. *Whether the Imposition of the SRRP Infringes Section 2(d) of the Charter*

[105] This is not a case of a complete denial of the constitutional right to associate and of its related constitutional guarantees. It is rather a case of substantial interference with the right to associate for the purpose of addressing workplace goals through

[102] Le juge Rothstein soutient que « la pierre angulaire, c'est la représentativité » (par. 195). Il reconnaît toutefois que les employés doivent pouvoir demander à leurs représentants de leur « rendre des comptes » (par. 193 et 222). Or, ces derniers ne seront pas en mesure de le faire s'ils ne disposent pas d'une liberté de choix suffisante dans la sélection de ceux-ci ou si ces représentants dépendent de la direction (par exemple, pour déterminer l'objet acceptable des griefs des employés, ou la priorité relative des préoccupations des employés).

[103] La représentativité et l'obligation de rendre compte reposent sur la liberté de choix et l'indépendance. À notre avis, ces deux derniers principes sont ceux qui se prêtent le mieux à l'analyse de la conformité constitutionnelle d'un modèle à l'al. 2*d*) dans le contexte des relations de travail. Cela dit, ces principes servent d'outils dans une analyse qui doit, dans chaque cas, permettre de déterminer si l'on respecte le droit à un processus véritable de recherche d'objectifs collectifs relatifs au travail. À notre avis, le désaccord entre la majorité et le juge Rothstein au sujet des termes « liberté de choix et indépendance » et « représentativité » demeure davantage sémantique que réel. Le point de divergence véritable porte plutôt sur la façon dont les concepts sont interprétés et appliqués.

[104] Nous examinerons donc, sur cette toile de fond, les questions constitutionnelles soulevées en l'espèce, soit celles de savoir si l'imposition du PRRF et l'exclusion des membres de la GRC du champ d'application de la *LRTFP* actuelle violent l'al. 2*d*) de la *Charte* et, le cas échéant, si cette violation constitue une limite raisonnable prescrite par une règle de droit dont la justification peut se démontrer dans le cadre d'une société libre et démocratique suivant l'article premier de la *Charte*.

E. *L'imposition du PRRF viole-t-elle l'al. 2d) de la Charte?*

[105] En l'espèce, on ne se trouve pas devant un cas de négation complète du droit constitutionnel de s'associer et des garanties constitutionnelles qui y sont connexes. Il s'agit plutôt d'un cas d'entrave substantielle au droit de s'associer en vue de réaliser

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a meaningful process of collective bargaining, free from employer control, as understood by Dickson C.J. in the *Alberta Reference*. We conclude that the flaws in the SRRP process do not permit meaningful collective bargaining, and are inconsistent with s. 2(*d*). The SRRP process fails to respect RCMP members' freedom of association in both its purpose and its effects.

[106] Section 96 of the *RCMP Regulations* imposed the SRRP on RCMP members as the sole means of presenting their concerns to management. Section 56 of the current-day *RCMP Regulations, 2014* continues to impose the SRRP under nearly identical terms. RCMP members are represented by an organization they did not choose and do not control. They must work within a structure that lacks independence from management. Indeed, this structure and process are part of the management organization of the RCMP. The process fails to achieve the balance between employees and employer that is essential to meaningful collective bargaining, and leaves members in a disadvantaged, vulnerable position.

(1) The Purpose of the Imposition of the SRRP Infringes Section 2(*d*)

[107] We earlier described the history of RCMP labour relations. This history evidences a long-standing hostility on the part of RCMP management and successive Canadian governments to unionization in the Force. In the early 20th century, the federal government deployed one of the RCMP's predecessor bodies — the Royal Northwest Mounted Police — to confront labour unrest, most famously in breaking the Winnipeg General Strike of 1919. At a time when municipal police forces in Canada were beginning to unionize, the Canadian government issued Order in Council P.C. 1918-2213, which prohibited members of the Dominion Police and the Royal Northwest Mounted Police from becoming "a member of or in any wise associated with any Trades Union Organization . . . or with any Union, Society

des objectifs relatifs au travail au moyen d'un processus véritable de négociation collective, à l'abri du contrôle de l'employeur, comme l'entendait le juge en chef Dickson dans le *Renvoi relatif à l'Alberta*. Selon nous, les lacunes relevées dans le PRRF empêchent la tenue de véritables négociations collectives et violent l'al. 2*d*). Le PRRF contrevient donc à la liberté d'association des membres de la GRC tant par son objet que par ses effets.

[106] En effet, l'art. 96 du *Règlement de la GRC* imposait aux membres de la GRC le PRRF comme seul moyen de faire valoir leurs préoccupations à la direction. L'article 56 du *Règlement de la GRC (2014)*, actuellement en vigueur, continue à imposer le PRRF à des conditions pratiquement identiques. Les membres de la GRC se trouvent représentés par un organisme qu'ils n'ont pas choisi et qu'ils ne contrôlent pas. Ils sont tributaires d'une structure dépourvue d'indépendance à l'égard de la direction. De fait, cette structure et ce programme relèvent de l'organisme de gestion de la GRC. Les employés se trouvent dans une position désavantageuse et vulnérable parce que le programme n'établit pas, entre eux et l'employeur, l'équilibre essentiel à la tenue d'une véritable négociation collective.

(1) L'objet de l'imposition du PRRF viole l'al. 2*d*)

[107] Nous avons décrit précédemment l'historique des relations de travail à la GRC. Celui-ci recèle une attitude d'hostilité envers la syndicalisation au sein de la Gendarmerie tant de la part de la direction de la GRC que des gouvernements qui se sont succédé, et ce, depuis longtemps. Au début du 20e siècle, le gouvernement fédéral a demandé à un des organismes qui ont précédé la GRC — la Police à cheval du Nord-Ouest (« P.C.N.-O. ») — d'intervenir dans des conflits de travail, notamment pour briser la grève générale de Winnipeg de 1919. À l'époque où les services de police municipaux au Canada commençaient à se syndiquer, le gouvernement canadien a pris le décret C.P. 1918-2213, qui interdisait aux membres de la Police fédérale et de la P.C.N.-O. [TRADUCTION] « d'adhérer ou de

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or Association . . . connected or affiliated therewith" on penalty of immediate dismissal.

[108] This stance was softened in the early 1970s, with the repeal of P.C. 1918-2213 (P.C. 1974-1339), but the federal government continued to resist the formation of independent RCMP members' associations. The DSRRP, precursor to the present SRRP, was openly presented as an alternative to unionization. The year it was created, RCMP Commissioner Nadon commissioned a report on the effects of police associations and the advantages and disadvantages of implementing such an association in the RCMP: J. P. Middleton, *A Study Report on Police Associations* (1974). The Middleton report was largely supportive of the formation of an RCMP members' association or union. In circulating the report, however, Commissioner Nadon included a brief foreword, in which he stated:

> At the outset I wish to make the Force's position very clear; the Force is opposed to the formation of an association or union of members and this position has been made known to our Minister. [p. i]

[109] Section 3(2) of the *Commissioner's Standing Orders (Division Staff Relations Representative Program)*, which formed the legal basis of the DSRRP from 1974 to 2003, prohibited DSRRs from promoting "*alternate* programs in conflict with the non-union status of the Division Staff Relations Representative Program".

[110] Even before this Court, the Attorney General of Canada does not contend that the current-day SRRP provides RCMP members with an independent association. Indeed, the Attorney General appears to concede that the SRRP continues to be imposed on members of the RCMP for the purpose of preventing collective bargaining through an independent association. Its position is rather that s. 2(*d*)

s'associer de quelque façon à une organisation syndicale [. . .] ou à un syndicat, à une société ou à une association qui y est lié ou affilié » sous peine de congédiement immédiat.

[108] Cette position s'est assouplie au début des années 1970, avec l'abrogation du décret C.P. 1918-2213 (C.P. 1974-1339), mais le gouvernement fédéral a continué de s'opposer à la constitution d'associations indépendantes par les membres de la GRC. Le PRDRF, précurseur du PRRF actuel, a été ouvertement présenté comme une solution de rechange à la syndicalisation. Au cours de l'année où ce programme a été créé, le commissaire Nadon de la GRC a commandé un rapport sur les effets des associations de policiers et sur les avantages et les désavantages de créer une telle association au sein de la GRC (J. P. Middleton, *Rapport d'étude sur les associations policières* (1974)). Le rapport Middleton appuyait largement la formation d'une association ou d'un syndicat des membres de la GRC. Toutefois, lorsqu'il a diffusé le rapport, le commissaire Nadon a inclus un bref avant-propos débutant comme suit :

> Précisons d'abord la position de la Gendarmerie : comme elle l'a fait savoir à son ministre, elle s'oppose à la formation d'une association ou d'un syndicat et ce, pour bien des raisons. [p. i]

[109] Le paragraphe 3(2) des *Consignes du Commissaire (Programme des représentants divisionnaires des relations fonctionnelles)* — qui ont constitué le fondement juridique du PRDRF de 1974 à 2003 — interdisait aux RDRF de contribuer « à d'*autres* programmes qui sont en opposition avec le caractère non syndicaliste du Programme des représentants divisionnaires des relations fonctionnelles ».

[110] Même devant la Cour, le procureur général du Canada n'affirme pas que le PRRF actuel permette aux membres de la GRC de constituer une association indépendante. En fait, il semble que le procureur général admette que le PRRF continue d'être imposé aux membres de la GRC afin d'empêcher la négociation collective au moyen d'une association indépendante. Il plaide plutôt

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does not guarantee RCMP members a right to form and bargain through an association of their own choosing. We have rejected this view. Accordingly, it follows that the purpose of the imposition of the SRRP, to prevent the formation of independent RCMP members' associations for the purposes of collective bargaining, is unconstitutional.

(2) The Effects of the Imposition of the SRRP Infringe Section 2(*d*)

[111] While it would be sufficient to find a violation of s. 2(*d*) solely on the basis of the purposes of the imposition of the SRRP as a labour relations regime (*Big M Drug Mart*), we also find that imposing this regime infringes s. 2(*d*) in its effects. Our inquiry here is directed at whether RCMP members can genuinely advance their own interests through the SRRP, without interference by RCMP management. We are satisfied, on the record before us, that they cannot.

[112] The organizational structure of the SRRP has evolved significantly since its predecessor was first established in 1974. These changes are detailed above. While these changes have expanded the SRRs' freedom to direct the program, they nonetheless fall short of respecting RCMP members' right to join associations that are of their choosing and independent of management, to advance their interests.

[113] At the level of institutional structure, the SRRP is plainly not independent of RCMP management. Rather, it is squarely under its control. It is a part of the labour-management structure of the RCMP. In 1989, the Government of Canada formalized the SRRP (then known as the DSRRP) by adding s. 96 to the *RCMP Regulations*: SOR/89-581. The Regulatory Impact Analysis Statement that accompanied the amendment to the *RCMP Regulations* expressly stated that the DSRRP was "co-ordinated and monitored at R.C.M.P. Headquarters" and "subject to biannual reviews at R.C.M.P. Divisions

que l'al. 2*d*) ne garantit pas aux membres de la GRC le droit de former des associations et de négocier par l'entremise d'une association qu'ils ont choisie. Nous avons rejeté ce point de vue. En conséquence, l'objet de l'imposition du PRRF, soit d'empêcher les membres de la GRC de former des associations indépendantes en vue de négocier collectivement, est inconstitutionnel.

(2) Les effets de l'imposition du PRRF violent l'al. 2*d*)

[111] Bien qu'il soit suffisant de conclure à une violation de l'al. 2*d*) sur le seul fondement des objets de l'imposition du PRRF comme régime de relations de travail (*Big M Drug Mart*), nous décidons également que l'imposition de ce régime viole l'al. 2*d*) en raison de ses effets. Nous examinerons maintenant si les membres de la GRC peuvent faire véritablement valoir leurs propres intérêts, au moyen du PRRF, sans ingérence de la direction de la GRC. Le dossier dont nous sommes saisis démontre que tel n'est pas le cas.

[112] Certes, la structure organisationnelle du PRRF a beaucoup évolué depuis la création en 1974 du programme qui l'a précédé. Les changements en question ont été exposés en détail précédemment. Bien qu'ils aient permis d'élargir le pouvoir des RRF quant à la gestion du programme, ils ne respectent cependant pas le droit des membres de la GRC d'adhérer à l'association de leur choix et, indépendamment de la direction, de faire valoir leurs intérêts.

[113] Au niveau de la structure institutionnelle, le PRRF n'est manifestement pas indépendant de la direction de la GRC. Au contraire, il se trouve carrément sous le contrôle de cette dernière. Le programme appartient à la structure de la GRC relative aux relations entre les employés et l'employeur. En 1989, le gouvernement du Canada a officialisé le PRRF (alors appelé le PRDRF) en ajoutant l'art. 96 au *Règlement de la GRC* (DORS/89-581). Le Résumé de l'étude d'impact de la réglementation qui accompagnait la modification apportée énonçait expressément que le PRDRF était « coordonné et

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with reports to the Commissioner from the Internal Communications Officer". Although not determinative nor exhaustive of a regulation's purpose or interpretation, regulatory impact analysis statements are a useful tool to understand how regulations are intended to work: see *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, at para. 33; *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at pp. 352-53.

[114] The lack of independence of the current-day SRRP is further emphasized by the 2007 Brown Report: *Rebuilding the Trust: Report of the Task Force on Governance and Cultural Change in the RCMP* (2007). In June 2007, an independent investigator raised issues regarding the RCMP's handling of reports of mismanagement or irregularities in the administration of the RCMP's pension and insurance plans in a report that was submitted to the Minister of Public Safety and the President of the Treasury Board: *A Matter of Trust: Report of the Independent Investigator into Matters Relating to RCMP Pension and Insurance Plans* (2007). The investigator recommended that the Government of Canada establish a task force to examine issues pertaining to the RCMP's governance and culture. This led to the Brown Report. While the Task Force did not focus exclusively on labour relations at the RCMP, it did consider comments from members and employees about the SRRP.

[115] In the Brown Report, the Task Force reported the comments of some officers who said they were not sure what happens to their concerns after they give them to SRRs: ". . . it is not clear whether they have been passed on by the SRRs at all, or whether management has decided not to act on them" (Brown Report, at p. 33). The Task Force also noted that the SRRs had become "part of the chain of command of the RCMP organization" (*ibid.*), specifically that the presence of SRRs as

contrôlé à la Direction générale de la GRC » et qu'il faisait « également l'objet de révisions semestrielles dans les divisions de la Gendarmerie et [que] des rapports [étaient] présentés au Commissaire par l'agent des Communications internes ». Bien qu'il ne soit pas déterminant ni exhaustif quant à l'objet ou à l'interprétation du règlement, l'analyse de l'étude d'impact de la réglementation représente un moyen utile pour comprendre son application (voir *Mines Alerte Canada c. Canada (Pêches et Océans)*, 2010 CSC 2, [2010] 1 R.C.S. 6, par. 33; *RJR — MacDonald Inc. c. Canada (Procureur général)*, [1994] 1 R.C.S. 311, p. 352-353).

[114] En outre, le rapport Brown de 2007, *Rétablir la confiance : Rapport du Groupe de travail sur la gouvernance et le changement culturel à la GRC* (2007), a souligné l'absence d'indépendance du PRRF. En juin de cette année-là, un enquêteur indépendant s'est interrogé sur la façon dont la GRC traitait les rapports sur la mauvaise gestion ou les irrégularités relevées dans l'administration des régimes de retraite et d'assurances de la GRC dans un rapport transmis au ministre de la Sécurité publique et au président du Conseil du Trésor : *Une question de confiance : Rapport de l'enquêteur indépendant sur les allégations concernant les régimes de retraite et d'assurances de la GRC* (2007). L'enquêteur recommandait que le gouvernement du Canada constitue un groupe de travail chargé d'examiner les enjeux relatifs à la gouvernance et à la culture de la GRC. Cette recommandation a mené au rapport Brown. Bien qu'il ne se soit pas exclusivement intéressé aux relations de travail au sein de la GRC, le Groupe de travail a examiné les commentaires de membres et d'employés au sujet du PRRF.

[115] Dans le rapport Brown, le Groupe de travail a rapporté les propos de certains officiers qui affirmaient ne pas savoir avec certitude ce qu'il advenait de leurs observations après leur transmission aux RRF : « . . . on ne sait pas si les RRF les transmettent à la direction ou si la direction a décidé de ne pas y donner suite » (rapport Brown, p. 34). Le Groupe de travail a également noté que les RRF faisaient « partie intégrante de la chaîne de commandement de la GRC » (*ibid.*) et plus précisément que la présence

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observers at meetings of the Senior Executive Committee, composed of the Commissioner and Deputy Commissioners, gave the impression of their concurrence with the decisions of RCMP management. The authors of the report expressed the view that "more distance from management [was] appropriate" (*ibid.*). They ultimately recommended that the SRRs "focus entirely on labour relations and thus be independent from management" (p. 34).

[116] We note the following additional areas of concern. First, pursuant to the Agreement between the Commissioner and the NEC of the SRRP, significant aspects of the program structure are determined by RCMP management, including the number of SRRs and the program budget. Members of the SRRP are prohibited from communicating with anyone outside the RCMP concerning RCMP programs and activities without permission of the Commissioner. An exception relating to conditions of work and employment exists, but the conditions for its exercise are narrowly restricted and obviously slanted toward management. The NEC must submit an annual report to management on its activities. The operation of the SRRP is to be regularly reviewed jointly by the SRRP and RCMP management, and the consent of both the SRRP and management is required to amend the program.

[117] Second, the SRRP deliberately restricts members' freedom to advocate for the ability to be represented by an independent association. As a matter of policy and practice, RCMP members who are active in such associations are excluded from full participation in the SRRP, and SRRs are prohibited from promoting alternative modes of representation for RCMP members. Yet members have no option outside of the SRRP to meet with management to promote their interests in other forms of representation.

[118] Simply put, in our view, the SRRP is not an association in any meaningful sense, nor a form of exercise of the right to freedom of association. It is simply an internal human relations scheme imposed

des RRF à titre d'observateurs lors des réunions de l'État-major supérieur — composé du commissaire et des sous-commissaires — donnait l'impression que ceux-ci souscrivaient aux décisions prises par la direction de la GRC. Selon les auteurs du rapport, « il conviendrait de se distancier de la direction » (*ibid.*). Enfin, ces derniers ont recommandé que les RRF soient tenus de « se concentrer entièrement sur les relations de travail et [qu'ils soient] ainsi indépendants de la haute direction » (p. 35).

[116] Nous notons aussi d'autres problèmes tout aussi préoccupants. Premièrement, conformément à l'entente conclue entre le commissaire et le CEN du PRRF, certains aspects importants de la structure du programme sont déterminés par la direction de la GRC, notamment le nombre de RRF et le budget du programme. Ainsi, il est interdit aux membres du PRRF de communiquer avec quiconque à l'extérieur de la GRC au sujet des programmes et des activités de la GRC sans l'autorisation du commissaire. Une exception visant les conditions de travail et d'emploi existe bien, mais son application est étroitement limitée et favorise de toute évidence l'opinion de la direction. De plus, le CEN doit présenter à la direction un rapport annuel sur ses activités, l'application du PRRF doit être examinée régulièrement par le PRRF et la direction de la GRC et le consentement du PRRF et de la direction est requis pour modifier le programme.

[117] Deuxièmement, le PRRF restreint délibérément la liberté des membres de défendre leur droit d'être représentés par une association indépendante. Selon les politiques et les pratiques établies, les membres de la GRC qui font partie d'une telle association sont exclus d'une pleine participation au PRRF, et il est interdit aux RRF de promouvoir d'autres modes de représentation des membres de la GRC. Ainsi, les membres n'ont aucune autre option que le PRRF pour rencontrer la direction, afin de défendre leur droit à d'autres formes de représentation.

[118] Autrement dit, nous estimons que le PRRF ne constitue pas une association au vrai sens du terme ni un exercice du droit à la liberté d'association. Il s'agit simplement d'un régime interne de

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on RCMP members by management. Accordingly, the element of employee choice is almost entirely missing under the present scheme.

[119] While the Attorney General of Canada observes that adoption of the SRRP was endorsed by members in all divisions outside Quebec in a referendum in 1974, we do not consider this fact determinative, for two reasons. First, the referendum in question evidently offered the SRRP a "take it or leave it" proposition. It does not reflect whether members would have preferred representation through an independent association. Second, the referendum took place 40 years ago. Today, there is no opportunity for RCMP members to indicate their support for an alternative form of association. Members have no ability to opt out of participation in the SRRP, and there is no other means for them to communicate their workplace concerns to management. As we have seen, the structure has no independence from management; it is but a part of management itself.

[120] These constitutional defects in the SRRP are not cured by the election of SRRs. On this point we agree with the conclusion of the application judge, that "agreeing to populate a structure created by management for the purpose of labour relations cannot reasonably be construed as a choice not to conduct labour relations through an association of the members' own making" (para. 63).

[121] In conclusion, s. 96 of the *RCMP Regulations*, which imposed the SRRP as the sole recognized vehicle for engagement between RCMP membership and senior management, constituted a substantial interference with freedom of association in both its purpose and effects. Before considering whether that infringement could be justified under s. 1 of the *Charter*, we consider the related challenge to para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA*.

relations humaines imposé aux membres de la GRC par la direction de celle-ci. La liberté de choix de l'employé devient donc pratiquement inexistante dans le cadre du présent régime.

[119] Même si le procureur général du Canada plaide que l'adoption du PRRF a été approuvée par les membres de toutes les divisions hors du Québec lors d'un référendum tenu en 1974, ce fait n'a pas de portée déterminante, et ce, pour deux raisons. D'abord, le référendum en question ne donnait pas, de toute évidence, d'autre choix que d'accepter le PRRF ou de le refuser. Il ne permettait pas de déterminer si les membres auraient préféré être représentés par une association indépendante. Ensuite, le référendum a été tenu il y a 40 ans. Or, aujourd'hui, les membres de la GRC n'ont pas la possibilité d'exprimer leur appui à une autre forme d'association. En outre, les membres ne peuvent pas se retirer du PRRF et ils ne disposent d'aucun autre moyen de communiquer à la direction leurs préoccupations relatives au travail. Comme nous l'avons constaté, la structure en question n'est donc pas indépendante de la direction; elle forme plutôt une partie de cette dernière.

[120] L'élection des RRF ne remédie pas aux vices constitutionnels du PRRF. Sur ce point, nous sommes d'accord avec le juge saisi de la demande pour affirmer qu'il [TRADUCTION] « ne serait pas raisonnable d'interpréter l'acceptation d'une structure créée par la direction aux fins des relations de travail comme une décision de ne pas négocier des relations de travail par l'entremise d'une association constituée par les membres » (par. 63).

[121] En conclusion, l'art. 96 du *Règlement de la GRC*, qui imposait le PRRF comme moyen unique de discussion entre les membres de la GRC et la haute direction, portait substantiellement atteinte à la liberté d'association tant par son objet que par ses effets. Avant d'examiner si cette atteinte pourrait être justifiée au regard de l'article premier de la *Charte*, nous nous pencherons sur la contestation connexe de l'al. *d*) de la définition de « fonctionnaire » qui figure au par. 2(1) de la *LRTFP* actuelle.

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F. *Whether Paragraph (d) of the Definition of "Employee" in Section 2(1) of the PSLRA Infringes Section 2(d) of the Charter*

[122] The appellants challenge the exclusion of RCMP members from the application of the *PSLRA* and ask that para. (*d*) of the definition of "employee" in s. 2(1) of that Act be struck down. Most employees in federally regulated workplaces are governed by the *Canada Labour Code*, R.S.C. 1985, c. L-2 ("*CLC*"), but the collective bargaining regime established by Part I of the *CLC* is inapplicable to employees of the Crown, with limited exceptions: s. 6.

[123] For employees in the federal public service, the *PSLRA* provides the general framework through which they can join and participate in employee associations; these associations can be certified as bargaining agents, and good faith collective bargaining can occur. The *PSLRA* provides for mediation, conciliation and arbitration when problems arise during collective bargaining and provides remedies for unfair labour practices. While being significantly different from private-sector labour relations models in many ways, the *PSLRA* and its predecessor, the *PSSRA*, are generally referred to as a Wagner Act model of labour relations (C. Rootham, *Labour and Employment Law in the Federal Public Service* (2007), at pp. 19-20).

[124] Paragraph (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* excludes RCMP members from the application of the *PSLRA*. This Court in *Delisle* held that the exclusion of the RCMP from the *PSSRA*, the *PSLRA*'s predecessor legislation, did not violate s. 2(*d*) of the *Charter*. This raises a threshold question: Should the Court's decision in *Delisle* be reconsidered? In our view, it should, for two reasons.

[125] First, *Delisle* was decided before this Court's decisions in *Health Services* and *Fraser*,

F. *L'alinéa d) de la définition de « fonctionnaire » qui figure au par. 2(1) de la LRTFP actuelle viole-t-il l'al. 2d) de la Charte?*

[122] Les appelantes contestent l'exclusion des membres de la GRC du régime de la *LRTFP* actuelle et demandent l'invalidation de l'al. *d*) de la définition de « fonctionnaire » qui figure au par. 2(1) de cette loi. La plupart des employés assujettis à la législation fédérale sont régis par le *Code canadien du travail*, L.R.C. 1985, c. L-2 (« Code »), mais le régime de négociation collective établi à la partie I du Code ne s'applique pas aux employés de la Couronne, à quelques exceptions près (art. 6).

[123] La *LRTFP* actuelle établit, à l'intention des employés de la fonction publique fédérale, un cadre général à l'intérieur duquel ces derniers peuvent adhérer à des organisations syndicales et participer à leurs activités. Ces organisations peuvent être accréditées comme agents négociateurs et mener des négociations collectives de bonne foi. Cette loi prévoit de plus la possibilité de recourir à la médiation, à la conciliation et à l'arbitrage si des problèmes surviennent au cours des négociations collectives, de même que des recours en cas de pratiques déloyales. Bien qu'elles établissent des régimes très différents à bien des égards des modèles de relations du travail du secteur privé, les deux versions successives de la *LRTFP* ont mis en œuvre des régimes généralement reconnus comme des modèles de relations de travail fondés sur la loi Wagner (C. Rootham, *Labour and Employment Law in the Federal Public Service* (2007), p. 19-20).

[124] L'alinéa *d*) de la définition de « fonctionnaire » qui figure au par. 2(1) de la *LRTFP* actuelle exclut les membres de la GRC du régime établi par cette loi. Dans l'arrêt *Delisle*, la Cour a jugé que l'exclusion de cet organisme du régime de la première *LRTFP* ne violait pas l'al. 2*d*) de la *Charte*. Une question préliminaire se pose donc : la Cour devrait-elle réexaminer la décision rendue dans *Delisle*? À notre avis, elle le devrait, et ce, pour deux raisons.

[125] Premièrement, l'arrêt *Delisle* a été rendu avant les arrêts *Health Services* et *Fraser*, qui ont

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which marked a shift to a purposive and generous approach to labour relations. At the time *Delisle* was decided, the right to a meaningful process of collective bargaining was not recognized as part of the s. 2(*d*) *Charter* guarantee. All three sets of reasons in *Delisle* make clear that the Court in that case was *not* addressing the issue of whether the purpose of the *PSSRA* exclusion was to prevent RCMP members from engaging in collective bargaining: para. 5, per L'Heureux-Dubé J.; para. 20, per Bastarache J.; paras. 51, 88 and 107, per Cory and Iacobucci JJ. As formulated by Bastarache J., writing for the majority, the question in *Delisle* was whether the purpose of the exclusion "was to prevent RCMP members from forming any type of independent association": para. 20. The question of an interference with the right to a meaningful process of collective bargaining was neither asked nor answered in *Delisle*.

marqué un changement d'orientation vers des interprétations téléologiques et généreuses dans le contexte des relations de travail. À ce moment-là, il n'avait pas été reconnu que le droit à un processus véritable de négociation collective était visé par la garantie prévue à l'al. 2*d*) de la *Charte*. Les trois séries de motifs dans *Delisle* énoncent par ailleurs clairement que, dans cette affaire, la Cour *n*'était *pas* appelée à décider si l'objet de l'exclusion prévue par la première *LRTFP* consistait à empêcher les membres de la GRC de négocier collectivement (par. 5, la juge L'Heureux-Dubé; par. 20, le juge Bastarache; par. 51, 88 et 107, les juges Cory et Iacobucci). Comme l'a exposé le juge Bastarache, qui écrivait pour la majorité, la question en jeu dans *Delisle* consistait à déterminer si l'objet de l'exclusion était « d'empêcher les membres de la GRC de former n'importe quel type d'association indépendante » (par. 20). La question d'une entrave au droit à un processus véritable de négociation collective n'a pas été posée dans *Delisle*; et on n'y a donc pas répondu.

[126] Second, in *Delisle*, only part of the scheme governing the labour relations of RCMP members — their exclusion from the *PSSRA* — was before this Court. In the present appeal, the challenge targets the entire labour relations scheme — the exclusion from the application of the *PSLRA* and the imposition of the labour relations regime that we have found is intended to deny RCMP members the right to form an independent association capable of engaging in a meaningful process of collective bargaining. In other words, the majority in *Delisle* found that the legislative exclusion, viewed in isolation, did not prevent the creation of an independent association, but the Court now considers the complete scheme which is clearly intended to prevent associational activity protected under s. 2(*d*) of the *Charter*.

[126] Deuxièmement, dans *Delisle*, la Cour n'avait été appelée à statuer que sur un élément du régime de relations de travail des membres de la GRC — soit leur exclusion de la première *LRTFP*. En l'espèce, la contestation vise l'ensemble du régime de relations de travail, soit l'exclusion du régime de la *LRTFP* actuelle ainsi que l'imposition du régime dont nous avons conclu qu'il vise à priver les membres de la GRC du droit de constituer une association indépendante capable de participer à un processus véritable de négociation collective. Autrement dit, les juges majoritaires dans *Delisle* ont conclu que l'exclusion législative, prise isolément, n'empêchait pas la création d'une association indépendante, mais la Cour examine maintenant la totalité d'un régime qui vise manifestement à empêcher des activités syndicales protégées par l'al. 2*d*) de la *Charte*.

[127] Overturning precedents of this Court is not a step to be lightly taken (*Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at para. 24; *Fraser*, at para. 56; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 47). However, as explained, *Delisle* was decided before

[127] Il faut se garder d'écarter un précédent de la Cour à la légère (*Canada c. Craig*, 2012 CSC 43, [2012] 2 R.C.S. 489, par. 24; *Fraser*, par. 56; *Canada (Procureur général) c. Bedford*, 2013 CSC 72, [2013] 3 R.C.S. 1101, par. 47). Cependant, comme nous l'avons expliqué, la décision rendue dans

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this Court's shift to a purposive and generous approach to the exercise of freedom of association and *Delisle* considered a different question and narrower aspects of the labour relations regime than those at issue here. It follows that the result in *Delisle* must be revisited.

[128] We therefore propose to examine whether para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* infringes s. 2(*d*) in its purpose.

(1) The Purpose of the *PSLRA* Exclusion Infringes Section 2(*d*)

[129] The statutory exclusion of RCMP members must be read and its constitutionality assessed in relation to P.C. 1918-2213, the Order in Council that constituted the labour relations regime that applied to members of the RCMP at the time of enactment of the *PSSRA*. The blanket prohibition of associational activity in pursuit of workplace goals imposed by P.C. 1918-2213 unquestionably violates s. 2(*d*) of the *Charter*. The implementation of this labour relations regime was made possible by the exclusion of the RCMP members from the labour relations regime governing the federal public service under the *PSSRA*.

[130] Although they originated from different legal sources, the *PSSRA* exclusion and P.C. 1918-2213, working together, constituted a labour relations regime that was designed to interfere with the right to freedom of association of RCMP members. The *PSSRA* exclusion cannot be viewed in the abstract, independently from the Order in Council. These two prongs of the predecessor labour relations regime shared a common purpose. They were both intended to deny to RCMP members the constitutional exercise of their freedom of association. Like P.C. 1918-2213, para. (*e*) of the definition of "employee" in s. 2(1) of the *PSSRA*, now re-enacted as para. (*d*) of the definition of "employee" in s. 2(1)

Delisle a précédé le changement d'orientation effectué par la Cour vers une interprétation généreuse et téléologique de l'exercice du droit d'association et elle portait sur une question différente de celle dont nous sommes saisis en l'espèce et sur des aspects plus restreints du régime de relations de travail que ceux en cause en l'espèce. En conséquence, il y a lieu de revoir la décision rendue dans *Delisle*.

[128] Nous nous proposons donc d'examiner si l'objet de l'al. *d*) de la définition de « fonctionnaire » qui figure au par. 2(1) de la *LRTFP* actuelle viole l'al. 2*d*) de la *Charte*.

(1) L'objet de l'exclusion de la *LRTFP* actuelle viole l'al. 2*d*)

[129] L'exclusion légale des membres de la GRC doit être interprétée et sa constitutionnalité examinée au regard du décret C.P. 1918-2213, qui constituait le régime de relations de travail applicable aux membres de la GRC au moment de l'adoption de la première *LRTFP*. L'interdiction complète de mener des activités associatives afin de poursuivre des objectifs relatifs aux conditions de travail créée par le décret C.P. 1918-2213 viole sans l'ombre d'un doute l'al. 2*d*) de la *Charte*. La mise en œuvre de ce régime de relations de travail a été rendue possible par l'exclusion des membres de la GRC du régime de relations de travail qui s'appliquait à la fonction publique fédérale en application de la première *LRTFP*.

[130] Même s'ils ont tiré leur origine de sources juridiques différentes, l'exclusion prévue par la première *LRTFP* et le décret C.P. 1918-2213, par leur effet combiné, ont constitué un régime de relations de travail conçu pour entraver le droit à la liberté d'association des membres de la GRC. L'exclusion prévue par la première *LRTFP* ne peut être considérée dans l'abstrait, indépendamment du décret. Ces deux volets de ce régime de relations de travail avaient un objet commun. Ils visaient tous les deux à priver les membres de la GRC de l'exercice de leur droit constitutionnel à la liberté d'association. À l'instar du décret C.P. 1918-2213, l'al. *e*) de la définition de « fonctionnaire » qui figurait au

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of the *PSLRA*, is tainted by an improper purpose and breaches s. 2(*d*) of the *Charter*.

[131] The purpose of para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA*, viewed in its historical context, thus violates s. 2(*d*) of the *Charter*. The *PSSRA* and, later, the *PSLRA* established the general framework for labour relations and collective bargaining in the federal public sector. A class of employees, the members of the RCMP, has, since the initial enactment of this regime, been excluded from its application in order to prevent them from exercising their associational rights under s. 2(*d*). Thus the issue to be addressed is whether the purpose of excluding a specific class of employees from the labour relations regime impermissibly breaches the constitutional rights of the affected employees. The issue is not whether Parliament must impose a new statutory labour relations regime in the presence of a legislative void.

[132] Paragraph (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* excludes every person "who is a member or special constable of the Royal Canadian Mounted Police or who is employed by that force under terms and conditions substantially the same as those of one of its members".

[133] Before 1967, the concept of collective bargaining was unknown to the federal public service generally and, of course, to the RCMP specifically. Parliament adopted the *PSSRA* to implement a process of collective bargaining in the federal public service (Rootham, at p. 37; R. Caron, *Employment in the Federal Public Service* (loose-leaf), at para. 1:200; J. C. Anderson and T. A. Kochan, "Collective Bargaining in the Public Service of Canada" (1977), 32 *Relat. ind.* 234, at p. 234). The *PSSRA*'s successor, the *PSLRA*, reflected a similar commitment to collective bargaining (see the preamble of the *PSLRA* and Advisory Committee on Labour Management

par. 2(1) de la première *LRTFP*, définition maintenant reconduite à l'al. *d*) de la définition de « fonctionnaire » qui figure au par. 2(1) de la *LRTFP* actuelle, est vicié par un objet inapproprié et viole l'al. 2*d*) de la *Charte*.

[131] Considéré dans son contexte historique, l'objet de l'al. *d*) de la définition de « fonctionnaire » qui figure au par. 2(1) de la *LRTFP* actuelle contrevient donc à l'al. 2*d*) de la *Charte*. Les deux versions successives de la *LRTFP* ont établi le cadre général applicable aux relations de travail et à la négociation collective dans la fonction publique fédérale. Une catégorie d'employés, soit les membres de la GRC, est exclue de ce régime, et ce, depuis son adoption, afin de les empêcher d'exercer le droit à la liberté d'association que leur confère l'al. 2*d*) de la *Charte*. La question à trancher dans la présente affaire est donc celle de savoir si l'objet de l'exclusion d'une catégorie particulière d'employés du régime de relations de travail contrevient de façon inacceptable aux droits constitutionnels des employés touchés. Il ne s'agit pas de savoir si le législateur doit prescrire un nouveau régime de relations de travail en présence d'un vide juridique.

[132] L'alinéa *d*) de la définition de « fonctionnaire » qui figure au par. 2(1) de la *LRTFP* actuelle exclut toute personne « qui est membre ou gendarme auxiliaire de la Gendarmerie royale du Canada, ou y est employée sensiblement aux mêmes conditions que ses membres ».

[133] Avant 1967, la notion de négociation collective n'était pas connue au sein de la fonction publique fédérale en général et, bien sûr, de la GRC en particulier. Le législateur a adopté la première *LRTFP* pour mettre en œuvre un régime de négociation collective dans la fonction publique fédérale (Rootham, p. 37; R. Caron, *Employment in the Federal Public Service* (feuilles mobiles), par. 1:200; J. C. Anderson et T. A. Kochan, « Collective Bargaining in the Public Service of Canada » (1977), 32 *Relat. ind.* 234, p. 234). La loi qui lui a succédé, la *LRTFP* actuelle, fait état d'un engagement semblable à l'égard de la négociation

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Relations in the Federal Public Service, *Working Together in the Public Interest* (2001), at p. 14).

[134] The exclusion of RCMP members from the *PSSRA* in 1967 — the only vehicle available for meaningful collective bargaining in the federal public service — was intended to prevent them from engaging in collective bargaining. The then-Commissioner of the RCMP acknowledged this in correspondence to the Solicitor General of Canada in 1980, stating: "There is no enabling legislation which allows members to collectively bargain and we must infer that Parliament has not intended that members of the Force have that right" (see A.F., at para. 106).

[135] The *PSSRA*'s successor, the *PSLRA*, reduced the categories of excluded public servants. RCMP members, however, continued to be excluded in identical terms as under the *PSSRA*, and no other statute permitted RCMP members to engage in a process of collective bargaining (*Delisle*, at para. 85, per Cory and Iacobucci JJ., dissenting; R. MacKay, "The Royal Canadian Mounted Police and Unionization", Parliamentary Research Branch, September 3, 2003, at p. 20). Nothing indicated that the purpose of the initial exclusion of RCMP members from collective bargaining had changed: *Interpretation Act*, R.S.C. 1985, c. I-21, at s. 44(*f*); see also *Big M Drug Mart*, at p. 335. Indeed, the *PSLRA* exclusion makes possible the current imposition of the SRRP, which we have found to substantially interfere in both purpose and effect with RCMP members' rights to a meaningful process of collective bargaining. Working in tandem with P.C. 1918-2213, the *PSSRA* exclusion had similarly sought to deny the members of the RCMP the exercise of their right to freedom of association. The simple re-enactment of this exclusion in the *PSLRA* did not cure this constitutionally impermissible purpose. The *PSLRA* exclusion is but a part of a constitutionally defective regime of labour relations, designed to prevent the exercise of the s. 2(*d*) rights of RCMP members. We therefore

collective (voir le préambule de la *LRTFP* actuelle et le Comité consultatif sur les relations patronales-syndicales dans la fonction publique fédérale, *Travailler ensemble dans l'intérêt public* (2001), p. 14).

[134] L'exclusion en 1967 des membres de la GRC du régime de la première *LRTFP* — qui constituait le seul moyen de permettre une véritable négociation collective dans la fonction publique fédérale — visait à empêcher ceux-ci de négocier collectivement. Le commissaire de la GRC alors en poste l'a reconnu dans une lettre envoyée au solliciteur général du Canada en 1980, dans laquelle il a affirmé : [TRADUCTION] « Aucune loi habilitante ne permet aux membres de négocier collectivement et nous devons en déduire que le Parlement ne voulait pas que les membres de la Gendarmerie aient ce droit » (voir m.a., par. 106).

[135] La loi qui a succédé à la première *LRTFP*, soit la *LRTFP* actuelle, a réduit les catégories de fonctionnaires exclus. Les membres de la GRC restaient toutefois exclus dans les mêmes termes, et aucune autre loi ne leur a permis de participer à un processus de négociation collective (*Delisle*, par. 85, les juges Cory et Iacobucci, dissidents; R. MacKay, « The Royal Canadian Mounted Police and Unionization », Direction de la recherche parlementaire, 3 septembre 2003, p. 20). Rien n'indiquait que l'objet de l'exclusion initiale des membres de la GRC du régime de négociation collective avait changé (*Loi d'interprétation*, L.R.C. 1985, c. I-21, al. 44*f*); voir également *Big M Drug Mart*, p. 335). En effet, l'exclusion prévue par la *LRTFP* actuelle permet d'imposer le PRRF, dont nous avons conclu qu'il entrave substantiellement tant par son objet que par son effet le droit des membres de la GRC à un processus véritable de négociation collective. Agissant en tandem avec le décret C.P. 1918-2213, l'exclusion prévue par la première *LRTFP* visait de même à priver les membres de la GRC de leur droit à la liberté d'association. Le simple renouvellement de cette exclusion dans la *LRTFP* actuelle n'a pas validé cet objet inacceptable sur le plan constitutionnel. L'exclusion prévue dans la version actuelle de cette loi n'est qu'un élément d'un régime de relations de travail déficient

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conclude that the purpose of the *PSLRA* exclusion infringes s. 2(*d*) of the *Charter*.

(2) Summary

[136] We conclude that the purpose of the exclusion in s. 2(1) of the *PSLRA* substantially interferes with freedom of association. At this point, we need not consider the effects of the *PSLRA* exclusion independently from those of the imposition of the SRRP as a labour relations regime.

[137] This conclusion does not mean that Parliament must include the RCMP in the *PSLRA* scheme. As discussed above, s. 2(*d*) of the *Charter* does not mandate a particular model of labour relations. Our conclusion with respect to the constitutionality of the *PSLRA* exclusion means only that Parliament must not substantially interfere with the right of RCMP members to a meaningful process of collective bargaining, unless this interference can be justified under s. 1 of the *Charter*. For example, it remains open to the federal government to explore other collective bargaining processes that could better address the specific context in which members of the RCMP discharge their duties.

[138] We now turn to whether the infringements of s. 2(*d*) rights caused by the legislative imposition of the SRRP and by the exclusion of RCMP members from the application of the *PSLRA* are justified under s. 1 of the *Charter*.

G. *Are the Limits Imposed on the RCMP Members' Section 2(d) Rights Justified Under Section 1 of the Charter?*

[139] Section 1 of the *Charter* permits Parliament to enact laws that limit *Charter* rights if it establishes

sur le plan constitutionnel, et conçu pour empêcher les membres de la GRC d'exercer les droits que leur garantit l'al. 2*d*). Nous concluons donc que l'objet de l'exclusion prévue par la *LRTFP* actuelle viole l'al. 2*d*) de la *Charte*.

(2) Résumé

[136] Nous concluons que l'objet de l'exclusion prévue au par. 2(1) de la *LRTFP* actuelle constitue une entrave substantielle à la liberté d'association. À ce stade, nous estimons par ailleurs qu'il n'est pas nécessaire que nous nous penchions sur les effets de l'exclusion prévue par cette disposition indépendamment de ceux de l'imposition du PRRF comme régime de relations de travail.

[137] Cette conclusion ne signifie pas que le législateur doit inclure la GRC dans le régime de la *LRTFP* actuelle. Comme nous l'avons vu, l'al. 2*d*) de la *Charte* n'impose pas un modèle particulier de relations du travail. Notre conclusion quant à la constitutionnalité de l'exclusion prévue par la *LRTFP* actuelle signifie seulement que le législateur ne doit pas entraver substantiellement le droit des membres de cette organisation à un processus véritable de négociation collective, à moins que cette entrave puisse être justifiée au regard de l'article premier de la *Charte*. Par exemple, le gouvernement fédéral peut toujours examiner d'autres processus de négociations collectives qui seraient plus adaptés au contexte particulier dans lequel les membres de la GRC s'acquittent de leurs fonctions.

[138] Nous examinerons maintenant si les violations des droits protégés par l'al. 2*d*) de la *Charte* découlant de l'imposition par la loi du PRRF et de l'exclusion des membres de la GRC du champ d'application de la *LRTFP* actuelle sont justifiées au regard de l'article premier de la *Charte*.

G. *Les restrictions imposées aux droits que garantit l'al. 2d) aux membres de la GRC sont-elles justifiées au regard de l'article premier de la Charte?*

[139] L'article premier de la *Charte* permet au législateur d'adopter des lois qui restreignent les

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that the limits are reasonable and demonstrably justified in a free and democratic society. This requires that the objective of the measure be pressing and substantial, and that the means by which the objective is furthered be proportionate, i.e. that the means are rationally connected to the law's objective, minimally impair the s. 2(*d*) right, and are proportionate in effect (*R. v. Oakes*, [1986] 1 S.C.R. 103; *Health Services*, at paras. 137-39). The onus rests on the party seeking to uphold the limitation of the *Charter* right, and the burden of proof is a preponderance of probabilities (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at paras. 137-38 ("*RJR-MacDonald (1995)*"). At the outset, we note that a *Charter*-infringing measure adopted by regulation is undoubtedly "prescribed by law" for the purposes of s. 1 (*Hutterian Brethren*, at paras. 39-40).

droits garantis par la *Charte* s'il est établi que les limites imposées sont des limites raisonnables dont la justification peut se démontrer dans le cadre d'une société libre et démocratique. Cette procédure de justification exige que l'objectif de la mesure soit urgent et réel et que le moyen choisi pour l'atteindre soit proportionné à cet objectif, c.-à-d. qu'il possède un lien rationnel avec l'objet de la loi, qu'il porte le moins possible atteinte au droit garanti par l'al. 2*d*) et qu'il soit proportionné sur le plan de ses effets (*R. c. Oakes*, [1986] 1 R.C.S. 103; *Health Services*, par. 137-139). La partie qui défend la validité de la mesure restreignant un droit protégé par la *Charte* doit établir qu'elle est justifiée, suivant la prépondérance des probabilités (*RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199, par. 137-138 (« *RJR-MacDonald (1995)* »). Au départ, mentionnons qu'une mesure qui porte atteinte à la *Charte* et qui est prise par voie de règlement est sans aucun doute « prescrite par une règle de droit », pour l'application de l'article premier (*Hutterian Brethren*, par. 39-40).

[140] We have already seen that s. 2(*d*) gives Parliament much leeway in devising a scheme of collective bargaining that satisfies the special demands of the RCMP. Beyond this, s. 1 provides additional room to tailor a labour relations regime to achieve pressing and substantial objectives, provided it can show that these are justified.

[140] Comme nous l'avons vu précédemment, l'al. 2*d*) accorde au législateur une grande latitude dans l'établissement d'un régime de négociation collective qui satisfait aux exigences spéciales de la GRC. En outre, l'article premier accorde à celui-ci une marge de manœuvre additionnelle qui lui permet d'établir un régime de relations de travail pour atteindre des objectifs urgents et réels, dans la mesure, toutefois, où il peut démontrer que ces objectifs sont justifiés.

[141] In their written submissions on s. 1, the parties addressed the limits imposed by s. 96 of the *RCMP Regulations* and para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* together. We do the same.

[141] Dans leurs observations écrites sur l'article premier, les parties ont traité des limites imposées par l'effet conjugué de l'art. 96 du *Règlement de la GRC* et de l'al. *d*) de la définition de « fonctionnaire » qui figure au par. 2(1) de la *LRTFP* actuelle. Nous ferons de même.

(1) Is the Objective of Imposing the SRRP Pressing and Substantial?

(1) L'objet de l'imposition du PRRF est-il urgent et réel?

[142] The question at this stage is whether the objective of the infringing measure is sufficiently important to be capable in principle of justifying

[142] À cette étape, la question est de savoir si l'objet de la mesure attentatoire est suffisamment important pour justifier en principe une restriction

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a limitation on the rights and freedoms guaranteed by the constitution (*RJR-MacDonald (1995)*, at para. 143). The Attorney General of Canada says the objective of excluding RCMP members from the *PSLRA* and the objective of the *RCMP Regulations* is to maintain and enhance public confidence in the neutrality, stability and reliability of the RCMP by providing a police force that is independent and objective. We conclude that the need for an independent and objective police force constitutes a pressing and substantial objective under s. 1 of the *Charter*.

(2) Are the Means by Which the Objective Is Furthered Proportionate?

(a) *Rational Connection*

[143] The government must demonstrate that the infringing measure is rationally connected to its objective. This test "is not particularly onerous" (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at para. 228; *Health Services*, at para. 148). It is not necessary to establish that the measure will *inevitably* achieve the government's objective. A reasonable inference that the means adopted by the government will help bring about the objective suffices (*Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 40; *Health Services*, at para. 149). The assessment is a matter of causal relationship.

[144] Philosophical, political and social claims are not always amenable to proof by empirical evidence: *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at para. 104; *Sauvé*, at para. 18. For this reason, courts have not always insisted on direct proof of a relationship between the infringing measure and the legislative objective, accepting conclusions supported by logic and reason (*RJR-MacDonald (1995)*, at para. 154; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 101). However, this does not relieve the government from establishing that it was at least reasonable to conclude that a causal relationship existed between the *PSLRA* exclusion and the imposition of the SRRP and the preservation

des droits et libertés garantis par la Constitution (*RJR-MacDonald (1995)*, par. 143). Le procureur général du Canada soutient que l'exclusion des membres de la GRC du régime de la *LRTFP* actuelle et l'adoption du *Règlement de la GRC* visaient à préserver et à renforcer la confiance du public à l'égard de la neutralité, de la stabilité et de la fiabilité de la GRC à titre de force policière indépendante et objective. Nous concluons que la nécessité de mettre en place une force policière indépendante et objective constitue un objectif urgent et réel au titre de l'article premier de la *Charte*.

(2) Le moyen choisi pour atteindre l'objectif est-il proportionné?

a) *Le lien rationnel*

[143] Le gouvernement doit démontrer qu'il existe un lien rationnel entre la mesure attentatoire et son objectif. Ce critère « n'est pas particulièrement exigeant » (*Little Sisters Book and Art Emporium c. Canada (Ministre de la Justice)*, 2000 CSC 69, [2000] 2 R.C.S. 1120, par. 228; *Health Services*, par. 148). Il n'est pas nécessaire d'établir que la mesure permettra *inévitablement* d'atteindre l'objectif visé par le gouvernement. Une inférence raisonnable que les moyens adoptés par ce dernier aideront à réaliser l'objectif en question suffit (*Canada (Procureur général) c. JTI-Macdonald Corp.*, 2007 CSC 30, [2007] 2 R.C.S. 610, par. 40; *Health Services*, par. 149). L'examen doit porter sur le lien causal.

[144] Les revendications de nature philosophique, politique et sociale ne se prêtent pas toujours à une preuve empirique (*Harper c. Canada (Procureur général)*, 2004 CSC 33, [2004] 1 R.C.S. 827, par. 104; *Sauvé*, par. 18). Les tribunaux n'ont donc pas toujours insisté sur la nécessité d'une preuve directe de lien entre la mesure attentatoire et l'objet de la loi, et ont accepté des conclusions fondées sur la logique et la raison (*RJR-MacDonald (1995)*, par. 154; *Ross c. Conseil scolaire du district n^o^ 15 du Nouveau-Brunswick*, [1996] 1 R.C.S. 825, par. 101). Toutefois, cela ne libère pas le gouvernement de son obligation d'établir qu'il était à tout le moins raisonnable de conclure à l'existence d'un lien causal entre l'exclusion prévue par la *LRTFP* actuelle

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of neutrality, stability and reliability in the RCMP. As McLachlin J. (as she then was) wrote in *RJR-MacDonald (1995)*, at para. 129:

> While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. It is the task of the courts to maintain this bottom line if the rights conferred by our constitution are to have force and meaning.

[145] The position of the Attorney General of Canada is that the creation of a separate labour relations regime, free from collective bargaining and unionism, is rationally connected to the goal of ensuring a stable, reliable and neutral police force. In our view, the Attorney General has not established that this is a reasonable inference.

[146] First, it is not apparent how an exclusion from a statutorily protected collective bargaining process ensures neutrality, stability or even reliability. The exclusion of RCMP members from the federal public service collective bargaining regime when it was first enacted in 1967 fostered, rather than inhibited, dissatisfaction and unrest within the RCMP. This unrest was what ultimately led to the creation of the SRRP, which was introduced "after R.C.M.P. members began bringing employment-related grievances to the attention of the media and began to complain in public about the absence of mechanisms through which their grievances could be addressed" (Hardy and Ponak, at p. 89).

[147] Second, it is not established that permitting meaningful collective bargaining for RCMP members will disrupt the stability of the police force or affect the public's perception of its neutrality. The government offered no persuasive evidence to that effect. Empirical research tends to show the opposite, as does provincial experience with unionized police forces (see, e.g., D. Forcese, "Police Unionism: Employee-Management Relations in

et l'imposition du PRRF et l'objectif de la préservation de la neutralité, de la stabilité et de la fiabilité au sein de la GRC. Comme l'écrivait la juge McLachlin (maintenant Juge en chef) dans *RJR-MacDonald (1995)*, au par. 129 :

> Bien qu'ils doivent demeurer conscients du contexte socio-politique de la loi attaquée et reconnaître les difficultés qui y sont propres en matière de preuve, les tribunaux doivent néanmoins insister pour que, avant qu'il ne supprime un droit protégé par la Constitution, l'État fasse une démonstration raisonnée du bien visé par la loi par rapport à la gravité de la violation. Les tribunaux doivent respecter cette démarche fondamentale pour que les droits garantis par notre Constitution soient opérants.

[145] Le procureur général du Canada soutient que la création d'un régime de relations de travail distinct, exempt de négociations collectives et de syndicalisme, a un lien rationnel avec l'objectif d'assurer l'existence d'une force policière stable, fiable et neutre. À notre avis, le procureur général n'a pas établi qu'il s'agit là d'une inférence raisonnable.

[146] D'une part, il est difficile de comprendre pourquoi l'exclusion d'un groupe d'un processus de négociation collective protégé par la loi peut assurer sa neutralité, sa stabilité ou même sa fiabilité. L'exclusion des membres de la GRC du régime de négociation collective de la fonction publique fédérale, lors de son adoption en 1967, a eu pour effet de favoriser plutôt que d'atténuer le mécontentement et l'agitation qui régnaient au sein de cette organisation. D'ailleurs, cette agitation a finalement mené à la création du PRRF, qui a été adopté [TRADUCTION] « après que les membres de la GRC eurent commencé à porter à l'attention des médias leurs griefs en matière d'emploi et à se plaindre publiquement de l'absence de mécanismes pour les régler » (Hardy et Ponak, p. 89).

[147] D'autre part, il n'est pas établi que l'autorisation d'un véritable régime de négociation collective pour les membres de la GRC perturbera la stabilité de cette force policière ou influencera la perception du public quant à sa neutralité. Le gouvernement n'a produit aucun élément de preuve convaincant à cet égard. La recherche empirique tend plutôt à indiquer le contraire, tout comme l'expérience des provinces avec les forces policières

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Canadian Police Forces" (1980), 4 *Canadian Police College Journal* 79: "There is nothing inherently disruptive about police unions" (p. 120)). Indeed, the evidence suggests that respecting associational rights has the potential to ensure, rather than undermine, a positive working relationship and therefore enhance labour stability.

[148] We conclude that the government has failed to establish a rational connection between denying RCMP members' their s. 2(*d*) right to meaningful collective bargaining, and maintaining a neutral, stable and reliable police force. While this conclusion is sufficient to dispose of the s. 1 analysis, we will nonetheless go on to address the requirement that the limit on the right be minimally impairing.

(b) *Minimal Impairment*

[149] At this stage, the question is whether the measure impairs the s. 2(*d*) right as little as possible in order to achieve the government's objective. The government is not required to pursue the least drastic means of achieving its objective, but it must adopt a measure that falls within a range of reasonable alternatives:

> The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement . . . . On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail. [Citations omitted.]

(*RJR-MacDonald (1995)*, at para. 160; see also *Hutterian Brethren*, at paras. 53-55; *Health Services*, at para. 150.)

syndiquées (voir, par ex., D. Forcese, « Le syndicalisme policier : relations de travail dans les forces policières canadiennes » (1980), 4 *Journal du Collège canadien de police* 85 : « Les policiers syndiqués ne sont pas fondamentalement des agitateurs » (p. 130)). En fait, selon la preuve, le respect de la liberté d'association peut même assurer plutôt que compromettre l'existence de bonnes relations de travail et ainsi en renforcer la stabilité.

[148] Nous concluons donc que le gouvernement n'a pas réussi à établir l'existence d'un lien rationnel entre le fait de priver les membres de la GRC du droit à une véritable négociation collective que leur garantit l'al. 2*d*), et le maintien d'une force policière neutre, stable et fiable. Bien que cette conclusion suffise pour mettre fin à l'analyse fondée sur l'article premier, nous examinerons tout de même l'exigence selon laquelle la limite imposée doit constituer une atteinte minimale.

b) *L'atteinte minimale*

[149] Il faut maintenant se demander si la mesure porte le moins possible atteinte au droit garanti par l'al. 2*d*) tout en permettant au gouvernement de réaliser son objectif. Certes, le gouvernement n'est pas tenu de recourir au moyen le moins attentatoire possible pour réaliser son objectif, mais celui qu'il choisit doit se situer à l'intérieur d'une gamme de mesures alternatives raisonnables :

> La restriction doit être « minimale », c'est-à-dire que la loi doit être soigneusement adaptée de façon à ce que l'atteinte aux droits ne dépasse pas ce qui est nécessaire. Le processus d'adaptation est rarement parfait et les tribunaux doivent accorder une certaine latitude au législateur. Si la loi se situe à l'intérieur d'une gamme de mesures raisonnables, les tribunaux ne concluront pas qu'elle a une portée trop générale simplement parce qu'ils peuvent envisager une solution de rechange qui pourrait être mieux adaptée à l'objectif et à la violation [. . .] Par contre, si le gouvernement omet d'expliquer pourquoi il n'a pas choisi une mesure beaucoup moins attentatoire et tout aussi efficace, la loi peut être déclarée non valide. [Renvois omis.]

(*RJR-MacDonald (1995)*, par. 160; voir aussi *Hutterian Brethren*, par. 53-55; *Health Services*, par. 150.)

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[150] The appellants argue that (1) other police forces throughout Canada have access to meaningful collective bargaining regimes without disruption of their neutrality, stability or reliability; and (2) the government has not shown that the RCMP is different in any way that would make collective bargaining more disruptive to their neutrality, stability or reliability. It follows, they argue, that denying RCMP members any meaningful process of collective bargaining is therefore more restrictive than necessary to maintain the Force's neutrality, stability and reliability.

[151] The RCMP "is the only police force in Canada without a collective agreement to regulate the working conditions of its officers" (application judge's reasons, at para. 96). In the rest of the country, the police have the benefit of collective bargaining regimes that provide basic bargaining protections. In Ontario, Quebec, and Newfoundland and Labrador, provincial forces are regulated under their own statutes which provide for, among other things, the establishment of employee associations, the negotiation of collective agreements between management and employee associations, grievance procedures, conciliation and arbitration: *Ontario Provincial Police Collective Bargaining Act, 2006*, S.O. 2006, c. 35, Sch. B; *An Act respecting the Syndical Plan of the Sûreté du Québec*, CQLR, c. R-14; *Royal Newfoundland Constabulary Act, 1992*, S.N.L. 1992, c. R-17. In other provinces, the police are covered by general labour relations statutes, with specific provisions applicable to them. For example, in Saskatchewan, conciliation and arbitration are provided as a means of resolving labour disputes, and restrictions are placed on strikes and lock-outs, pursuant to *The Police Act, 1990*, S.S. 1990-91, c. P-15.01, ss. 83 to 86.

[152] Unless it is established that the RCMP is materially different from the provincial police forces, it is clear that total exclusion from meaningful collective bargaining cannot be minimally impairing. A material difference has not been shown.

[150] Les appelantes soutiennent que (1) d'autres forces policières canadiennes ont accès à des régimes véritables de négociation collective sans que soient perturbées leur neutralité, leur stabilité ou leur fiabilité, et que (2) le gouvernement n'a pas établi que la GRC différait de ces forces policières d'une façon qui fasse en sorte que la négociation collective perturberait davantage sa neutralité, sa stabilité ou sa fiabilité. Le fait de priver les membres de la GRC d'un processus véritable de négociation collective est donc, à leur avis, plus restrictif que ce qui est nécessaire pour assurer la neutralité, la stabilité et la fiabilité de cette force policière.

[151] La GRC [TRADUCTION] « est la seule force policière au Canada n'ayant pas de convention collective qui régit les conditions de travail de ses agents » (motifs du juge saisi de la demande, par. 96). Tous les autres policiers du pays bénéficient d'un régime de négociation collective qui leur accorde des protections fondamentales en matière de négociation. Les corps policiers provinciaux de l'Ontario, du Québec et de Terre-Neuve-et-Labrador sont régis par leurs propres lois, qui prévoient entre autres l'établissement d'associations d'employés, la négociation de conventions collectives entre la direction et les associations d'employés, des procédures de règlement des griefs, la conciliation et l'arbitrage (*Loi de 2006 sur la négociation collective relative à la Police provinciale de l'Ontario*, L.O. 2006, c. 35, ann. B; *Loi sur le régime syndical applicable à la Sûreté du Québec*, RLRQ, c. R-14; *Royal Newfoundland Constabulary Act, 1992*, S.N.L. 1992, c. R-17). Dans les autres provinces, les policiers sont protégés par les lois générales en matière de relations du travail, dont certaines dispositions s'appliquent à eux. Par exemple, en Saskatchewan, la conciliation et l'arbitrage sont des moyens de résoudre les conflits de travail, et les grèves et les lock-out font l'objet de restrictions, conformément à *The Police Act, 1990*, S.S. 1990-91, c. P-15.01, art. 83 à 86.

[152] À moins qu'on établisse que la GRC est substantiellement différente des forces policières provinciales, son exclusion totale d'un régime véritable de négociation collective ne peut clairement pas constituer une atteinte minimale. Une différence

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Moreover, concerns about the independence of the members of the Force could easily be considered in determining the scope of the police bargaining unit under schemes like the *PSLRA*, without requiring total exclusion from bargaining in the present regime. For example, s. 4 of the *Labour Code*, CQLR, c. C-27, restricts the membership and affiliations of municipal police associations.

[153] The only argument advanced by the Attorney General of Canada in order to support the view that the RCMP's particularities warrant the exclusion of members from the *PSLRA* and the imposition of the SRRP is that in the event of an unlawful strike or other debilitating job action by other police forces, or other security-related workers such as prisons guards, it could ultimately be left to the RCMP to provide policing services to the public affected by those events. While the RCMP's mandate differs from that of other police forces, there is no evidence that providing the RCMP a labour relations scheme similar to that enjoyed by other police forces would prevent it from fulfilling its mandate. Again, no material difference in RCMP labour relations has been shown.

H. *Remedy*

[154] Within the impugned legislative scheme, the imposition of the SRRP and the exclusion in s. 2(1) of the *PSLRA* deny members of the RCMP the right to any meaningful process of collective bargaining. And, while s. 2(*d*) does not protect the right to any *particular* process of collective bargaining, it does protect the right to a *meaningful* process. Having found that s. 96 of the *RCMP Regulations* and para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* infringe the freedom guaranteed to RCMP members under s. 2(*d*) of the *Charter*, and that these provisions cannot be saved under s. 1, we conclude that the appropriate remedy is to strike down the offending provision of the *PSLRA*

substantielle n'a pas été établie. De plus, dans des régimes comme celui de la *LRTFP* actuelle, les préoccupations quant à l'indépendance des membres de la Gendarmerie pourraient facilement être examinées au moment de déterminer l'étendue de l'unité de négociation — sans qu'une exclusion totale ne soit nécessaire. Par exemple, l'art. 4 du *Code du travail*, RLRQ, c. C-27, impose des restrictions en matière d'appartenance et d'affiliation aux associations de policiers municipaux.

[153] Le procureur général du Canada a présenté un seul argument pour étayer l'opinion selon laquelle les caractéristiques particulières de la GRC justifient d'exclure ses membres de l'application de la *LRTFP* actuelle et de leur imposer le PRRF. Selon l'intimé, dans l'éventualité d'une grève illégale ou de tout autre moyen de pression important déclenché par un autre corps de police, ou par tout autre groupe œuvrant dans le secteur de la sécurité, comme les gardiens de prison, il appartiendrait en fin de compte à la GRC d'assurer les services de police nécessaires au public touché par ces événements. Bien que son mandat diffère de celui des autres forces policières, rien ne prouve que le fait d'accorder à la GRC un régime de relations de travail semblable à celui dont bénéficient d'autres forces policières aurait pour effet d'empêcher cet organisme de s'acquitter de son mandat. Là encore, aucune différence substantielle n'a été établie au sujet des relations de travail à la GRC.

H. *Réparation*

[154] Dans le régime législatif contesté, l'imposition du PRRF et l'exclusion prévue au par. 2(1) de la *LRTFP* actuelle privent les membres de la GRC du droit à un processus véritable de négociation collective. En outre, si l'al. 2*d*) de la *Charte* ne protège pas le droit à un processus *particulier* de négociation collective, il garantit bel et bien le droit à un processus *véritable* de négociation. Après avoir statué que l'art. 96 du *Règlement de la GRC* et l'al. *d*) de la définition de « fonctionnaire » qui figure au par. 2(1) de la *LRTFP* actuelle portent atteinte à la liberté que garantit l'al. 2*d*) de la *Charte* aux membres de la GRC et ne peuvent se justifier au regard de l'article premier, nous concluons que

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under s. 52 of the *Constitution Act, 1982*. We would similarly strike down s. 96 of the *RCMP Regulations* were it not repealed.

[155] The Attorney General of Canada argues that this conclusion would go against the proposition, which we accept, that s. 2(*d*) does not guarantee a right to a particular labour relations process. The Attorney General argues that striking down the offending provision of the *PSLRA* would constitutionalize the labour relations process set out in that Act.

[156] This argument misconstrues our conclusion. We do not conclude that the *PSLRA* process is constitutionalized, but rather that the existing labour relations scheme and the purpose motivating the *PSLRA* exclusion are inconsistent with the *Charter* and fail under s. 52 of the *Constitution Act, 1982*. This conclusion does not mandate a particular labour relations regime or bar the federal government from pursuing an avenue other than the *PSLRA* to govern labour relations within the RCMP. Should it see fit to do so, Parliament remains free to enact any labour relations model it considers appropriate to the RCMP workforce, within the constitutional limits imposed by the guarantee enshrined in s. 2(*d*) and s. 1 of the *Charter*.

VII. Conclusion

[157] We would allow the appeal, with costs to the appellants throughout, and answer the constitutional questions as follows:

1. Does s. 96 of the *Royal Canadian Mounted Police Regulations, 1988*, SOR/88-361, infringe s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?

Yes.

la réparation appropriée consiste à invalider la disposition attentatoire de la *LRTFP* actuelle en application de l'art. 52 de la *Loi constitutionnelle de 1982*. N'eût été son abrogation, nous invaliderions également l'art. 96 du *Règlement de la GRC*.

[155] Le procureur général du Canada plaide que cette conclusion irait à l'encontre de la proposition, à laquelle nous souscrivons, selon laquelle l'al. 2*d*) ne garantit pas le droit à un processus de relations de travail particulier. Il argumente en outre que l'annulation de la disposition attentatoire de la *LRTFP* actuelle aurait pour effet de constitutionnaliser le processus de relations de travail établi par cette loi.

[156] Cet argument procède d'une mauvaise interprétation de notre conclusion. Nous ne concluons pas que le processus prévu par la *LRTFP* actuelle est constitutionnalisé, mais plutôt que le régime de relations de travail existant et l'objet de l'exclusion prévue par cette loi sont incompatibles avec la *Charte* et doivent être annulés en application de l'art. 52 de la *Loi constitutionnelle de 1982*. Cette conclusion ne requiert pas l'adoption d'un régime de relations de travail en particulier ni n'empêche le gouvernement fédéral d'adopter un modèle autre que celui prévu par la *LRTFP* actuelle pour régir les relations de travail au sein de la GRC. En effet, s'il le juge à propos, le législateur demeure libre d'adopter tout modèle qu'il estime indiqué pour régir les relations de travail des employés de cette organisation, dans le respect des limites constitutionnelles imposées par la garantie prévue à l'al. 2*d*) et par l'article premier de la *Charte*.

VII. Conclusion

[157] Nous sommes d'avis d'accueillir le pourvoi, avec dépens en faveur des appelantes devant toutes les cours, et de répondre ainsi aux questions constitutionnelles :

1. L'article 96 du *Règlement de la Gendarmerie royale du Canada (1988)*, DORS/88-361, viole-t-il l'al. 2*d*) de la *Charte canadienne des droits et libertés*?

Oui.

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2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

No.

3. Does para. (*d*) of the definition of "employee" at s. 2(1) of *Public Service Labour Relations Act*, S.C. 2003, c. 22, infringe s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?

Yes.

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

No.

[158] Had s. 96 of the *RCMP Regulations* not been repealed, it would have been declared to be of no force or effect. Paragraph (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* is of no force or effect pursuant to s. 52 of the *Constitution Act, 1982*. We suspend the declaration of invalidity for a period of 12 months.

The following are the reasons delivered by

ROTHSTEIN J. (dissenting) —

I. Introduction

[159] In a constitutional democracy, the judicial branch of government is entrusted to rule on whether laws enacted by the legislature pass constitutional muster. But this Court's rulings are not subject to review. Its rulings are binding on the legislative branch, unless that branch invokes the rarely resorted-to s. 33 of the *Canadian Charter of Rights and Freedoms* to provide that its legislation will operate notwithstanding breaches of certain constitutional rights. This means that constitutional

2. Dans l'affirmative, s'agit-il d'une violation constituant une limite raisonnable, établie par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique conformément à l'article premier de la *Charte canadienne des droits et libertés*?

Non.

3. L'alinéa *d*) de la définition de « fonctionnaire » au par. 2(1) de la *Loi sur les relations de travail dans la fonction publique*, L.C. 2003, c. 22, viole-t-il l'al. 2*d*) de la *Charte canadienne des droits et libertés*?

Oui.

4. Dans l'affirmative, s'agit-il d'une violation constituant une limite raisonnable, établie par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique conformément à l'article premier de la *Charte canadienne des droits et libertés*?

Non.

[158] N'eût été son abrogation, l'art. 96 du *Règlement de la GRC* aurait été déclaré inopérant. L'alinéa *d*) de la définition de « fonctionnaire » qui figure au par. 2(1) de la *LRTFP* actuelle est inopérant en application de l'art. 52 de la *Loi constitutionnelle de 1982*. Nous suspendons la prise d'effet de la déclaration d'invalidité pour 12 mois.

Version française des motifs rendus par

LE JUGE ROTHSTEIN (dissendent) —

I. Introduction

[159] Dans une démocratie constitutionnelle, le pouvoir judiciaire se prononce sur la constitutionnalité des lois adoptées par le législateur. Les décisions de la Cour ne sont toutefois pas susceptibles de contrôle. Elles lient le pouvoir législatif, à moins que celui-ci n'invoque l'art. 33 de la *Charte canadienne des droits et libertés* — une disposition rarement invoquée — pour que la loi ait effet indépendamment des atteintes portées à certains droits constitutionnels. Cela signifie que les décisions de

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decisions of this Court have the power to freeze matters in time and restrict Parliament's ability to change course in the future, where facts and policy imperatives may suggest or require a different approach.

[160] It is fundamental, therefore, that the judicial and legislative branches of government have respect for the role and responsibility of the other. The legislative branch must respect the decisions of the courts and comply with them. Courts must equally respect the role of the democratically elected legislature and its policy choices. The judicial branch must not exercise its great constitutional power to make rulings that are not firmly rooted in the text, context, and purpose of Canadian constitutional law. While a purposive approach to *Charter* interpretation has long been accepted, in the words of Dickson J. (as he then was) in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344, "it is important not to overshoot the actual purpose of the right or freedom in question". See also *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157, at para. 19, per Abella J.

[161] Courts must be especially cautious when dealing with questions of socio-economic policy. Just as the government and legislature must respect the courts' expertise as judicial bodies, so too must courts appreciate that they are not best placed to make determinations as to which specific social or economic policy choice is most appropriate. The evaluation and implementation of social and economic policy require flexibility and fine-tuning. Courts should not expand *Charter* rights in such a way as to prevent governments from responding to new information or changing social and economic conditions.

la Cour qui tranchent des questions de nature constitutionnelle ont le pouvoir de figer les choses dans le temps et de restreindre la capacité du législateur de changer ultérieurement la teneur des lois, même si la conjoncture et des impératifs politiques pourraient suggérer ou exiger un changement d'orientation.

[160] Il est donc essentiel que les pouvoirs judiciaires et législatifs respectent leurs rôle et attributions respectifs. Ainsi, le pouvoir législatif doit respecter les décisions des tribunaux et s'y conformer et les tribunaux doivent, à leur tour, respecter le rôle des assemblées législatives démocratiquement élues et leurs choix de principe. Les organes du pouvoir judiciaire doivent se garder d'exercer les vastes pouvoirs que leur confère la Constitution pour rendre des décisions qui ne sont pas solidement ancrées dans le texte, le contexte et l'objet du droit constitutionnel canadien. Bien que la méthode d'interprétation téléologique de la *Charte* soit celle qu'appliquent les tribunaux depuis longtemps, il importe, pour reprendre la formule employée par le juge Dickson (plus tard Juge en chef) dans l'arrêt *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, p. 344 : « de ne pas aller au-delà de l'objet véritable du droit ou de la liberté en question ». Voir également *Divito c. Canada (Sécurité publique et Protection civile)*, 2013 CSC 47, [2013] 3 R.C.S. 157, par. 19, la juge Abella.

[161] Les tribunaux doivent être particulièrement prudents lorsqu'ils abordent des questions ayant trait à des politiques socio-économiques. Tout comme l'État et le législateur doivent respecter la compétence des tribunaux en tant qu'organes judiciaires, les tribunaux doivent comprendre qu'ils ne sont pas les autorités les mieux placées pour prendre des décisions quant aux choix de politiques sociales ou économiques qui conviennent le mieux. L'évaluation et la mise en œuvre des politiques sociales et économiques exigent de la souplesse et des ajustements minutieux. Les tribunaux ne devraient donc pas élargir la portée des droits garantis par la *Charte* de telle sorte qu'ils empêchent les gouvernements de s'adapter à de nouvelles données ou encore à l'évolution de la société ou de la conjoncture économique.

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[162] In my respectful opinion, the majority has departed from these core principles of constitutional law in this case. I am compelled to dissent. The courts must respect that concerns such as maintaining "the balance between employees and employer" and attaining "equilibrium" in labour relations (see majority reasons, at paras. 72 and 82) fall within the proper role and expertise of governments and legislatures, not the judiciary.

[163] Parliament enacted legislation creating a non-adversarial labour relations scheme for the Royal Canadian Mounted Police ("RCMP") — the Staff Relations Representative Program ("SRRP") — that balances the competing policy interests arising in the context of a national police force. RCMP members democratically elect Staff Relations Representatives ("SRRs") to represent their interests directly to management. Members can also communicate their workplace concerns to SRRs through independent employee associations, such as the appellant associations. The evidence is that, as the constitutional protection of freedom of association now guarantees, SRRs make collective representations on behalf of RCMP members and management considers those representations in good faith.

[164] This labour relations model permits RCMP members to exercise their freedom of association under s. 2(*d*) of the *Charter*. That the SRRP does not mimic the adversarial, Wagner model of labour relations prevalent in much labour legislation in Canada is of no consequence for constitutional purposes: *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at paras. 44-47. The majority in *Fraser* rejected the submission that *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, "constitutionalizes a full-blown Wagner system of collective bargaining" and clarified that *Health Services* "unequivocally

[162] Soit dit en tout respect, en l'espèce, les juges majoritaires se sont écartés de ces principes fondamentaux du droit constitutionnel. Je me vois donc contraint d'exprimer ma dissidence. Les tribunaux doivent respecter le fait que des préoccupations comme le souci d'atteindre « l'équilibre [. . .] entre les employés et l'employeur » et d'assurer un juste « rapport de forces » dans les relations de travail (voir motifs des juges majoritaires, par. 72 et 82) sont des préoccupations qui relèvent, non pas des tribunaux, mais du rôle et de la compétence des gouvernements et du législateur.

[163] Le législateur a adopté une loi créant, pour la Gendarmerie royale du Canada (« GRC »), un régime de relations de travail non contradictoire : le Programme de représentants des relations fonctionnelles (« PRRF »). Ce dernier concilie des intérêts stratégiques qui s'opposent dans le contexte d'un corps policier national. Les membres de la GRC élisent démocratiquement leurs représentants des relations fonctionnelles (« RRF ») pour que ceux-ci défendent leurs intérêts directement auprès de la direction. Les membres peuvent également informer leur RRF de leurs préoccupations relatives au travail par l'intermédiaire d'associations d'employés indépendantes, comme les associations appelantes. Suivant la preuve, grâce à la protection que la Constitution accorde à la liberté d'association, les RRF formulent des revendications collectives au nom des membres de la GRC et la direction les considère de bonne foi.

[164] Ce modèle de relations de travail permet aux membres de la GRC d'exercer la liberté d'association que leur garantit l'al. 2*d*) de la *Charte*. Le fait que le PRRF n'imite pas le modèle contradictoire de relations de travail de type Wagner qui prédomine dans la plupart des lois du travail au Canada ne tire pas à conséquence sur le plan constitutionnel (*Ontario (Procureur général) c. Fraser*, 2011 CSC 20, [2011] 2 R.C.S. 3, par. 44-47). Dans cette décision, les juges majoritaires ont écarté l'argument selon lequel l'arrêt *Health Services and Support — Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, 2007 CSC 27, [2007] 2 R.C.S. 391, « constitutionnalise en vérité le modèle Wagner

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stated that s. 2(*d*) does not guarantee a particular model of collective bargaining or a particular outcome": paras. 44-45; *Health Services*, at para. 91.

[165] The majority now reverses this Court's recent interpretation of s. 2(*d*) of the *Charter* in both *Fraser* and *Health Services* so as to effectively compel a single model of collective bargaining. I cannot agree with such an approach. The evolution of labour relations in Canada will surely inspire further legislative changes to address changing circumstances and accumulated experience. This Court should not interpret s. 2(*d*) so as to stymie future reform and progress in this area. As acknowledged in *Health Services*:

> . . . it is impossible to predict with certainty that the present model of labour relations will necessarily prevail in 50 or even 20 years ([P. A. Gall,] "Freedom of Association and Trade Unions: A Double-Edged Constitutional Sword", in J. M. Weiler and R. M. Elliot, eds., *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (1986), 245, at p. 248). [para. 91]

[166] Moreover, the majority in *Fraser* articulated the test for constitutionality under s. 2(*d*), in the labour relations context: whether the government action "makes meaningful association to achieve workplace goals effectively impossible" (para. 98). Now, less than four years after that case was decided, the majority resiles from this test as it does not justify the conclusion it wishes to reach.

[167] I respectfully disagree with this constitutional reversal. As this Court has indicated, once rendered, constitutional decisions should only be subject to change or reversal under limited and rigorous conditions: *Fraser*, at para. 57. In

de négociation collective » et ont précisé que cet arrêt avait statué « sans équivoque que [l'al. 2*d*)] ne garantit ni l'application d'un modèle particulier de négociation collective, ni l'obtention d'un résultat donné » (par. 44-45; *Health Services*, par. 91).

[165] Les juges majoritaires répudient maintenant l'interprétation récente que la Cour a donnée à l'al. 2*d*) de la *Charte* dans les arrêts tant *Fraser* que *Health Services* et imposent en réalité un modèle unique en matière de négociation collective. Je ne puis souscrire à cette démarche. L'évolution des relations de travail au Canada inspirera sûrement aux divers législateurs et gouvernements des modifications aux lois et règlements pour faire face à des changements de circonstances et pour tenir compte de l'expérience accumulée. La Cour ne devrait donc pas interpréter l'al. 2*d*) de manière à bloquer les réformes futures ou les progrès dans ce domaine. D'ailleurs, comme la Cour l'a reconnu dans *Health Services* :

> . . . on ne saurait prédire avec certitude si le modèle actuel des relations de travail sera celui qui s'imposera dans 50 ou même 20 ans ([P. A. Gall,] « Freedom of Association and Trade Unions : A Double-Edged Constitutional Sword », dans J. M. Weiler et R. M. Elliot, dir., *Litigating the Values of a Nation : The Canadian Charter of Rights and Freedoms* (1986), 245, p. 248). [par. 91]

[166] De plus, toujours dans l'arrêt *Fraser*, les juges majoritaires ont formulé comme suit le critère de la constitutionnalité au regard de l'al. 2*d*) dans le contexte des relations de travail : il s'agit de savoir si la mesure prise par le gouvernement « rend de fait impossible l'association véritable en vue de réaliser des objectifs liés au travail » (par. 98). Or, moins de quatre ans après le prononcé de cet arrêt, les juges majoritaires abandonnent ce critère parce qu'il ne justifie pas la conclusion à laquelle ils souhaitent en arriver.

[167] Soit dit en tout respect, je ne suis pas d'accord pour répudier de la sorte les décisions qui tranchent des questions de nature constitutionnelle. Comme la Cour l'a expliqué, une fois qu'elles ont été rendues, les décisions de ce type ne devraient

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Fraser, this Court issued a stern warning: "The seriousness of overturning . . . recent precedents of this Court, representing the considered views of firm majorities, cannot be overstated" (*ibid.*). The majority in this case does precisely that.

II. Facts and Judicial History

[168] I accept, in general terms, the majority's summary of the facts and lower court decisions in this case. Where I disagree, it is noted in the analysis below.

III. Analysis

A. *Freedom of Association*

[169] This Court has frequently been called upon to determine the ambit of freedom of association under s. 2(*d*) of the *Charter*. At its core, freedom of association protects an individual's ability "to act in association with others to pursue common objectives and goals" (*Fraser*, at para. 25). However, the way in which this general proposition applies in the labour relations context has been hotly contested. In its 2007 decision in *Health Services*, the Court departed from earlier decisions and found that s. 2(*d*) encompasses a right to collective bargaining that "requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation": para. 90. The majority of the Court affirmed this conclusion in 2011 in *Fraser*.

[170] Since the decisions in *Health Services* and *Fraser*, employees have had a constitutional right to make collective representations, which their employer must consider in good faith. The test to find an infringement of s. 2(*d*) in the labour relations context is "whether the impugned law or state

être modifiées ou infirmées qu'à de strictes et rigoureuses conditions (*Fraser*, par. 57). En effet, dans cet arrêt, la Cour a servi un sévère avertissement : « On ne saurait trop insister sur la gravité du renversement de deux arrêts récents de la Cour qui expriment l'avis réfléchi de majorités claires » (*ibid.*). Or, c'est précisément ce que font les juges majoritaires dans le cas qui nous occupe.

II. Les faits et l'historique judiciaire

[168] J'accepte, dans l'ensemble, le résumé que font les juges majoritaires des faits de l'espèce et des décisions des juridictions inférieures. Je signalerai dans l'analyse qui suit les points avec lesquels je suis en désaccord.

III. Analyse

A. *Liberté d'association*

[169] La Cour a fréquemment été appelée à se prononcer sur la portée de la liberté d'association garantie par l'al. 2*d*) de la *Charte*. Cette liberté protège essentiellement le droit des individus de « s'associer avec d'autres en vue de réaliser des objectifs communs » (*Fraser*, par. 25). Toutefois, la façon dont cette proposition générale s'applique dans le contexte des relations de travail est très controversée. Dans la décision *Health Services* rendue en 2007, la Cour a rompu avec sa jurisprudence antérieure et conclu que l'al. 2*d*) englobait un droit à la négociation collective qui « implique que l'employeur et les employés se rencontrent et négocient de bonne foi en vue de réaliser leur objectif commun d'accommodement par des moyens pacifiques et productifs » (par. 90). Une majorité des juges de la Cour a confirmé cette conclusion en 2011 dans l'arrêt *Fraser*.

[170] Depuis les arrêts *Health Services* et *Fraser*, les employés ont un droit reconnu par la Constitution de présenter des revendications collectives dont leur employeur doit tenir compte de bonne foi. Le test permettant de conclure à une violation de l'al. 2*d*) dans le contexte des relations de travail est

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action has the effect of making it impossible to act collectively to achieve workplace goals" (*Fraser*, at para. 46). Collective bargaining is protected, but only "in the minimal sense of good faith exchanges" (*Fraser*, at para. 90; see also para. 42).

[171] Now, less than four years after *Fraser* was decided, the majority in this case expands freedom of association, requiring much more than good faith negotiations. It finds that the only way to have meaningful collective bargaining is through a process which "provides employees with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests" (para. 5). The majority also retreats from the effective impossibility test. Instead, it finds that s. 2(*d*) will be infringed by "[a] process that substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power" (para. 71 (emphasis added)).

[172] By relaxing the standard required to find a s. 2(*d*) violation, the majority takes freedom of association far beyond the ordinary meaning of those words and well beyond what the concept of "association" has been held to include. *Health Services* and *Fraser* provide that s. 2(*d*) protects the right to associate to make collective representations and to have employers consider those representations in good faith. The essential feature of a labour relations regime that allows employees to exercise their constitutional right to make meaningful collective representations on their workplace goals is representativeness: the voice that speaks on behalf of employees must represent their interests and be ultimately accountable to them. Representativeness is the constitutional imperative required in order to ensure that s. 2(*d*) rights are protected in the collective bargaining context, nothing more. Only if legislation impairs the right of employees to have their interests advanced honestly and fairly

« [celui] de savoir si la loi ou la mesure gouvernementale contestée rend impossible l'action collective visant la réalisation d'objectifs liés au travail » (*Fraser*, par. 46). La négociation collective est protégée, mais uniquement « dans le sens d'un droit minimal strict à des échanges de bonne foi » (*Fraser*, par. 90; voir aussi le par. 42).

[171] Or, moins de quatre ans après le prononcé de l'arrêt *Fraser*, les juges majoritaires élargissent en l'espèce la portée de la liberté d'association en exigeant beaucoup plus que des négociations de bonne foi. Ils estiment que la seule façon d'assurer une véritable négociation collective est de prévoir un processus qui « offre aux employés une liberté de choix et une indépendance suffisantes pour leur permettre de décider de leurs intérêts collectifs et de les défendre » (par. 5). Les juges majoritaires abandonnent également le critère de l'impossibilité effective de mener une véritable négociation collective. Ils concluent plutôt qu'il y a violation de l'al. 2*d*) lorsqu'on est en présence d'« [un] mécanisme qui porte substantiellement atteinte à un processus véritable de négociation collective en réduisant le pouvoir de négociation des employés » (par. 71 (je souligne)).

[172] En faisant ainsi le choix d'une norme moins exigeante pour conclure à une violation du droit protégé par l'al. 2*d*), les juges majoritaires confèrent à l'expression « liberté d'association » un sens qui dépasse de beaucoup celui qu'on reconnaît normalement à ces mots et qui déborde largement le cadre du concept d'« association » reconnu par la jurisprudence. Les arrêts *Health Services* et *Fraser* prévoient que l'al. 2*d*) protège le droit de s'associer en vue de présenter des revendications collectives à l'employeur et de les voir prises en considération de bonne foi par ce dernier. La caractéristique essentielle d'un régime de relations de travail qui permet aux employés d'exercer leur droit constitutionnel de formuler véritablement des revendications collectives quant à leurs objectifs relatifs au travail est la représentativité : le porte-parole des employés doit défendre leurs intérêts et, ultimement, leur rendre des comptes. La représentativité est l'impératif constitutionnel auquel

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will that legislation be constitutionally suspect. That is not the case here.

[173] Facially, the type of right described in s. 2(*d*) does not impose obligations on third parties. However, freedom of association has now been interpreted as imposing obligations on others; in *Health Services* and *Fraser*, this Court found that employers are obliged to engage in good faith collective bargaining. Nonetheless, courts must be particularly cautious when considering an expansion of a constitutional right that would impose a constitutional obligation on a third party. The expansion of such rights, although beneficial for some, comes at the expense of the freedom of others, a trade-off that requires careful deliberation. This is particularly true given that such a decision removes matters from the scope of Parliament's powers to adjust the balance between parties as a matter of ordinary lawmaking.

[174] The interpretation of a *Charter* right must be principled and must not be so divorced from the text of the provision as to depart from the foundation of the right. When, in *Health Services* and *Fraser*, this Court recognized a derivative right to collective bargaining stemming from the purpose of s. 2(*d*) of the *Charter*, it extended constitutional rights beyond what had previously been accepted. To now add to that shaky foundation a further, attenuated addition — a derivative right onto the derivative — makes for an unsound and indefensible structure.

[175] The language used by the majority in this case creates greater rights, and imposes greater restrictions on the government, than either a plain or generous reading of s. 2(*d*) can logically provide, and rights beyond those that have been recognized

il faut satisfaire, sans plus, pour s'assurer que les droits prévus à l'al. 2*d*) sont protégés dans le contexte de la négociation collective. Ce n'est que si elle porte atteinte au droit des employés de faire défendre leurs droits honnêtement et équitablement qu'une loi sera considérée comme suspecte sur le plan constitutionnel, ce qui n'est pas le cas en l'espèce.

[173] À première vue, le type de droit visé à l'al. 2*d*) n'impose pas d'obligations à autrui. Or, la liberté d'association est désormais interprétée comme imposant des obligations à des tiers : en effet, dans les arrêts *Health Services* et *Fraser*, la Cour a jugé que les employeurs sont tenus de mener des négociations collectives de bonne foi. Les tribunaux doivent néanmoins être particulièrement prudents lorsqu'ils envisagent d'élargir la portée d'un droit constitutionnel qui imposerait une obligation constitutionnelle à un tiers. L'élargissement de la portée de tels droits, si elle est avantageuse pour certains, se fait aux dépens de la liberté d'autres personnes. Il s'agit d'un compromis exigeant une réflexion sérieuse, surtout qu'une telle décision retire au législateur certains pouvoirs grâce auxquels il peut rétablir l'équilibre entre les parties dans le cadre du processus habituel d'élaboration des lois.

[174] L'interprétation d'un droit protégé par la *Charte* doit reposer sur des principes et ne doit pas être dissociée du texte de la disposition au point de s'écarter du fondement du droit. En reconnaissant, dans *Health Services* et dans *Fraser*, l'existence d'un droit dérivé à la négociation collective fondé sur l'objectif visé par l'al. 2*d*) de la *Charte*, la Cour a élargi la portée des droits constitutionnels au-delà de ce qui avait déjà été reconnu. Rajouter maintenant à cette fondation fragile un élément aussi ténu — un droit dérivé d'un droit dérivé — ne fait que contribuer à créer une structure bancale et indéfendable.

[175] Les termes choisis par les juges majoritaires dans la présente affaire confèrent des droits plus étendus aux employés et restreignent encore davantage la marge de manœuvre du gouvernement que ce que le sens ordinaire ou une interprétation

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in the context of s. 2(*a*), (*b*) and (*c*) of the *Charter*. There is no basis in s. 2(*d*) for such a departure.

B. *A Meaningful Process of Collective Bargaining*

[176] What the majority proposes as a meaningful process of collective bargaining under s. 2(*d*) of the *Charter* now requires more than that "the parties . . . meet and engage in meaningful dialogue": *Fraser*, at para. 41; see also *Health Services*, at para. 101. Now the majority says that the only way to achieve meaningful collective bargaining is through a process that "provides employees with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests".

[177] I would not dispute that individuals may generally form or join associations of their choosing and may have those organizations be independent from other entities. However, *Health Services* and *Fraser* construed s. 2(*d*) in a particular context: association for the purposes of engaging in meaningful collective bargaining. Neither the choice of the organization representing employees for bargaining purposes nor the independence of that association are necessary to ensure that meaningful collective bargaining can occur.

[178] Choice and independence are central to Wagner-style labour relations. As will be explained, by selecting choice and independence as constitutional requirements for meaningful collective bargaining, the majority mandates an adversarial model of labour relations and precludes others which may be just as or more effective in contributing to meaningful collective bargaining.

généreuse de l'al. 2*d*) pourraient logiquement justifier et ils confèrent des droits qui vont plus loin que ceux qui ont été reconnus dans le cas des al. 2*a*), *b*) et *c*) de la *Charte*. Rien à l'al. 2*d*) n'autorise de s'écarter ainsi de ces autres interprétations.

B. *Un processus véritable de négociation collective*

[176] Ce que les juges majoritaires proposent comme processus véritable de négociation collective répondant aux conditions de l'al. 2*d*) de la *Charte* exige maintenant davantage que le fait que « les parties se rencontrent et qu'elles engagent un véritable dialogue » (*Fraser*, par. 41; voir aussi *Health Services*, par. 101). En effet, ils affirment désormais que, pour assurer un processus véritable de négociation collective, la seule façon de faire consiste à adopter un processus qui offre aux employés « une liberté de choix et une indépendance suffisantes pour leur permettre de décider de leurs intérêts collectifs et de les défendre ».

[177] Je ne conteste pas que des personnes peuvent généralement former des associations de leur choix ou y adhérer et faire en sorte que ces organisations soient indépendantes d'autres entités. Toutefois, les arrêts *Health Services* et *Fraser* interprétaient l'al. 2*d*) dans un contexte particulier, soit celui d'une association en vue d'entamer de véritables négociations collectives. Ni le choix de l'organisation qui représente les employés aux fins de la négociation collective ni son indépendance face à la direction ne sont des éléments nécessaires pour assurer la tenue d'une véritable négociation collective.

[178] La liberté de choix et l'indépendance sont des aspects cruciaux des relations de travail structurées selon le modèle Wagner. Comme je l'expliquerai plus loin, en considérant que la liberté de choix et l'indépendance constituent des impératifs constitutionnels à la tenue de véritables négociations collectives, les juges majoritaires imposent un modèle de relations de travail contradictoire et ils écartent d'autres modèles qui peuvent être aussi efficaces sinon plus pour contribuer à la tenue de telles négociations.

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(1) Choice

[179] Individuals have the constitutional right to form or belong to lawful associations of their choosing and there is nothing in the record before us to suggest that such a right has been infringed. RCMP members are free to join the appellants or other employee associations to seek fulfillment, autonomy, and self-actualization. Through those organizations they can participate in lobbying, educational, social, and other incidental activities. Those associations can also seek to advance the workplace interests of RCMP members by communicating with SRRs on their members' behalf.

[180] However, the appellants and the majority in this appeal propose that freedom of association extends beyond the right of employees to form and belong to an association of their choosing and includes the right to choose the association to represent employee interests for bargaining purposes and with which the employer must bargain. However, recognizing that the Wagner model in place in workplaces across Canada imposes limits on choice, the majority does not suggest that freedom of association protects an *individual's* right to choose the association to which he or she wishes to belong. Instead, the majority limits the constitutional right to the ability of employees, *en masse*, "to form and bargain through an association of their own choosing" (para. 110).

[181] The majority also acknowledges that even the collective right to bargain through an association of the group's choosing will not always be protected. For example, designated bargaining models such as the one established under Ontario's *School Boards Collective Bargaining Act, 2014*, S.O. 2014, c. 5, "may be acceptable" (para. 95), even though they provide the employee group with no choice of association. The bargaining agent for the group is designated. In order to legitimize its restriction on choice, the majority restates its requirement as a

(1) La liberté de choix

[179] Chacun a le droit, conféré par la Constitution, de former l'association licite de son choix ou d'y adhérer, et rien au dossier qui nous a été soumis ne permet de penser que ce droit a été violé. Les membres de la GRC sont libres de se joindre aux appelantes ou à d'autres associations d'employés pour favoriser leur épanouissement, leur autonomie et leur accomplissement personnel. Par l'entremise de ces organisations, ils peuvent faire du lobbying et participer à des activités éducatives ou sociales ou à d'autres activités connexes. Ces associations peuvent également chercher à promouvoir les intérêts professionnels des membres de la GRC en communiquant avec les RRF au nom de leurs membres.

[180] Toutefois, les appelantes et les juges majoritaires dans le présent pourvoi proposent d'étendre la portée de la liberté d'association, au-delà du droit des employés de former une association de leur choix et d'y adhérer, de manière à ce qu'elle englobe le droit de choisir l'association qui représentera leurs intérêts lors des négociations collectives et avec laquelle l'employeur devra négocier. Cependant, s'ils reconnaissent que le modèle Wagner adopté dans des milieux de travail partout au Canada limite la liberté de choix, les juges majoritaires ne suggèrent pas que la liberté d'association protège le droit d'*un individu* de choisir l'association à laquelle il souhaite appartenir. Ils limitent plutôt le droit constitutionnel en matière de négociation collective à la capacité reconnue aux employés, en bloc, « de former des associations et de négocier par l'entremise d'une association qu'ils ont choisie » (par. 110).

[181] Les juges majoritaires reconnaissent aussi que même le droit du groupe de négocier par l'entremise d'une association de son choix ne sera pas toujours protégé. Ainsi, selon eux, le modèle faisant appel à un agent négociateur désigné comme celui que prévoit la *Loi de 2014 sur la négociation collective dans les conseils scolaires* de l'Ontario, L.O. 2014, c. 5 « pourrait être acceptable » (par. 95), et ce, même si ce modèle ne permet pas au groupe d'employés de choisir son association. L'agent négociateur du groupe est désigné. Pour légitimer la

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vague constitutional right to the "degree of choice . . . that enables employees to have effective input into the selection of [their] collective goals" (para. 83).

[182] However, logically, effective input into the selection of collective workplace goals is not a matter of the choice of representative; it is a matter of having the right to choose the priorities that should be advanced on behalf of employees. The majority states that employees' ability "to set and change collective workplace goals" is one hallmark of employee choice (para. 86). But the ability to have one's views represented in shaping workplace goals is more than a hallmark: it is the key element in meaningful collective bargaining. What the majority's restatement describes is a right to fair representation by a spokesperson, not a right to choose that representative.

[183] In the labour relations context, "choice" is ill suited as a criterion upon which to base the constitutional protection afforded to collective bargaining. There are schemes in place throughout the country, based on the Wagner model, that provide a mechanism by which a single employee representative association is designated for the purposes of bargaining with the employer, under the principle of majoritarian exclusivity. This principle mandates that the employer recognize an exclusive bargaining agent selected by a majority of employees to represent their interests within a given industry, sector, or business. However, there may be a large minority of employees whose preferred representative is not selected. Under such a model, their freedom of association will be constrained not only as to their choice of representative association, but also as to their ability to establish or join a rival association to bargain with management. Choice is similarly circumscribed for so-called Rand employees, who are denied the choice of paying union dues and refusing representation by the bargaining

restriction qu'ils apportent ainsi à la liberté de choix, les juges majoritaires reformulent leur critère comme un vague droit constitutionnel à la « liberté de choix [. . .] qui permet aux employés de participer véritablement au choix [de leurs] objectifs collectifs » (par. 83).

[182] Or, en toute logique, cette participation réelle quant au choix des objectifs collectifs ne dépend pas du représentant choisi, mais bien de la possibilité d'exercer le droit de choisir les priorités qui doivent être défendues au nom des employés. Suivant les juges majoritaires, la capacité des employés « d'établir et de modifier les objectifs collectifs relatifs au travail » est une des caractéristiques de la liberté de choix des employés (par. 86). La possibilité de faire défendre son point de vue afin de définir les objectifs de son milieu de travail est cependant bien plus qu'une caractéristique : il s'agit de l'élément clé d'une véritable négociation collective. Ce que les juges majoritaires évoquent dans leur reformulation du critère applicable est le droit d'être bien représenté par un porte-parole et non le droit de choisir ce représentant.

[183] Dans le contexte des relations de travail, la « liberté de choix » ne convient pas comme critère pour fonder la protection constitutionnelle du droit de négocier collectivement. En effet, il existe, un peu partout au Canada, des régimes inspirés du modèle Wagner qui prévoient un mécanisme par lequel une seule association chargée de représenter les employés est désignée pour négocier avec l'employeur, et ce, en application du principe du monopole syndical conféré par le vote majoritaire. Suivant ce principe, l'employeur doit reconnaître un seul agent négociateur choisi par une majorité d'employés pour qu'il défende leurs intérêts au sein d'une industrie, d'un secteur ou d'une entreprise donnés. Il est toutefois possible que le représentant que préfère une importante minorité d'employés ne soit pas celui qui est finalement choisi. Dans le contexte de l'application de ce modèle, leur liberté d'association se verra donc limitée non seulement quant au choix de leur représentant, mais également quant à leur capacité de créer une association rivale ou à y adhérer pour négocier avec la direction. La

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agent. Such a limit on choice has been recognized as a valid limit on employees' freedom of association, since permitting unbounded choice of association would undermine the collective bargaining strength of employees and render the process of good faith bargaining unworkable for employers: see *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R 211; *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 S.C.R. 209.

[184] The majority defines "choice" in terms of four hallmarks: "the ability to form and join new associations, to change [employee] representatives, to set and change collective workplace goals, and to dissolve existing associations" (para. 86). The majority asserts that a designated bargaining model, such as Ontario's *School Boards Collective Bargaining Act, 2014*, where specific bargaining agents are legislatively imposed, allows employees to "retain sufficient choice over workplace goals and sufficient independence from management to ensure meaningful collective bargaining" (para. 95). However, this model lacks three of the so-called hallmarks of choice: Ontario teachers cannot form and join new associations to bargain with employers, they cannot change the legislatively imposed bargaining agents that represent them, and they cannot dissolve those bargaining agents. The hallmark that this model does possess is what I have termed "representativeness": the ability to set and change collective workplace goals (that is, the ability of teachers to have their interests represented). This suggests that the constitutional standard of s. 2(*d*) is likely met. The majority's acceptance of the Ontario *School Boards Collective Bargaining Act, 2014* model undermines its argument that choice is an essential element of freedom of association.

liberté de choix est également restreinte pour les employés régis par la formule Rand, qui n'ont pas le choix de payer des cotisations syndicales et de refuser d'être représentés par l'agent négociateur. Cette contrainte sur le plan du choix a été reconnue comme une limite valide à la liberté d'association des employés, puisque le fait de permettre un choix d'associations illimité affaiblirait le pouvoir de négociation collective des employés et rendrait impossible la négociation de bonne foi pour les employeurs (voir *Lavigne c. Syndicat des employés de la fonction publique de l'Ontario*, [1991] 2 R.C.S. 211; *R. c. Advance Cutting & Coring Ltd.*, 2001 CSC 70, [2001] 3 R.C.S. 209).

[184] Les juges majoritaires définissent la « liberté de choix » en fonction de quatre caractéristiques : « la capacité de constituer de nouvelles associations et d'y adhérer, celle de changer de représentants, d'établir et de modifier les objectifs collectifs relatifs au travail et celle de dissoudre les associations existantes » (par. 86). Ils affirment qu'un modèle faisant appel à un agent négociateur désigné, comme celui prévu par la *Loi de 2014 sur la négociation collective dans les conseils scolaires* de l'Ontario, permet aux employés de conserver « la liberté de choisir les objectifs relatifs à leurs conditions de travail et une indépendance à l'égard de l'employeur qui suffisent à assurer la tenue d'une véritable négociation collective » (par. 95). Ce modèle ne respecte toutefois pas trois des soi-disant caractéristiques de la liberté de choix : les enseignants ontariens ne peuvent pas constituer de nouvelles associations ni y adhérer pour négocier avec leurs employeurs, ils ne peuvent pas changer les agents négociateurs qui les représentent, ceux-ci étant imposés par la loi, et ils ne peuvent déloger ces derniers. La caractéristique que possède toutefois ce modèle est ce que j'appelle la « représentativité », soit la capacité d'établir et de modifier les objectifs collectifs relatifs au travail (c'est-à-dire la capacité des enseignants de faire défendre leurs intérêts). Cela suggère que la norme constitutionnelle prévue à l'al. 2*d*) est vraisemblablement respectée. L'acceptation, par les juges majoritaires, du modèle créé par la *Loi de 2014 sur la négociation collective dans les conseils scolaires* de l'Ontario mine leur argument selon lequel la liberté de choix constitue un élément essentiel de la liberté d'association.

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[185] Even the Wagner model does not rely exclusively on choice and independence to protect employee interests. The statutory provisions and associated case law recognize the central importance of representativeness by providing a number of protections for employee interests unrelated to choice or independence *per se*.

[186] Under the Wagner model of labour relations, the association designated as an exclusive bargaining agent cannot discriminate in carrying out its duties towards the employees it represents or go off in pursuit of its own agenda. Legislation and jurisprudence have evolved to guard against abuses of power by single bargaining agents, by imposing upon those agents a duty to represent all employees, even those who choose not to become "members" of that association: see the discussions in *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509, at pp. 518-20; and *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298, at pp. 1309-15. It is the jurisprudence and legislation that ensures that the bargaining agent is representative of the interests of its constituency in whatever work that it undertakes on their behalf, whether the individual employees have chosen it or not.

[187] Similarly, a designated bargaining model, like Ontario's *School Boards Collective Bargaining Act, 2014*, only leads to meaningful collective bargaining where there are statutory safeguards built in to ensure that the designated bargaining agent represents the interests of all employees and is ultimately accountable to them.

[188] The majority claims that choice and independence "overlap considerably" with representativeness and that the difference between them "is more semantic than real" (paras. 101 and 103). With respect, such blurring of distinct concepts

[185] Même le modèle Wagner ne compte pas exclusivement sur la liberté de choix et sur l'indépendance pour assurer la protection des droits des employés. Les dispositions législatives et la jurisprudence applicable reconnaissent l'importance capitale de la représentativité en prévoyant plusieurs mécanismes de protection des droits des employés qui n'ont rien à voir avec la liberté de choix ou l'indépendance comme tels.

[186] Suivant le modèle Wagner de relations de travail, l'association désignée comme agent négociateur exclusif ne peut faire preuve de discrimination dans l'accomplissement de ses obligations envers les employés qu'elle représente ni chercher à parvenir à ses propres fins. La loi et la jurisprudence ont évolué de manière à protéger les employés des abus de pouvoir de la part des agents négociateurs uniques en les obligeant à représenter l'ensemble des employés, même ceux qui choisissent de ne pas devenir « membres » de l'association en question : voir l'analyse de cette question dans les arrêts *Guilde de la marine marchande du Canada c. Gagnon*, [1984] 1 R.C.S. 509, p. 518-520, et *Gendron c. Syndicat des approvisionnements et services de l'Alliance de la Fonction publique du Canada, section locale 50057*, [1990] 1 R.C.S. 1298, p. 1309-1315. C'est la jurisprudence et la loi qui assurent que l'agent négociateur représente les intérêts de ses commettants, peu importe le travail qu'il entreprend en leur nom, et ce, que les employés individuellement l'aient ou non choisi.

[187] De même, un modèle faisant appel à un agent négociateur désigné comme celui prévu par la *Loi de 2014 sur la négociation collective dans les conseils scolaires* de l'Ontario ne permet une véritable négociation collective que lorsqu'il incorpore des garanties légales assurant que l'agent négociateur en question représente les intérêts de l'ensemble des employés et leur rende des comptes.

[188] Les juges majoritaires affirment que les notions de liberté de choix et d'indépendance, d'une part, et celle de représentativité, d'autre part, « se chevauchent considérablement » et que la différence entre ces concepts est « davantage sémantique que

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only creates confusion and ambiguity. Choice and independence may be a means by which representativeness is obtained, but there may be others, such as the statutory safeguards discussed above.

[189] A statutorily designated bargaining model such as the scheme established by the Ontario *School Boards Collective Bargaining Act, 2014*, can ensure that employees' interests will be effectively represented to management even where the employees do not choose their individual representatives or the system in which this representation takes place. Section 2(*d*) of the *Charter* requires that bargaining agents represent the interests and workplace concerns of employees, what I call representativeness. The method by which the representative is determined is not a constitutional diktat.

[190] Mandating choice and independence as constitutional requirements forecloses an entire class of collaborative bargaining approaches that could be designed to address particular contexts in which a Wagner model of labour relations may be ill suited.

[191] In the case at bar, the context of a national police force led to the adoption of a statutory collaborative labour relations model. Within that model, RCMP members democratically select their representatives and those representatives have a statutory duty to represent employee interests. They can be replaced if they fail to uphold that duty.

[192] What protects the interests of employees under the Wagner model, a designated bargaining model such as that found in the Ontario *School Boards Collective Bargaining Act, 2014* or the RCMP's SRRP scheme is the obligation of representatives to act honestly and fairly in putting forward

réel[le] » (par. 101 et 103). Soit dit en tout respect, un tel embrouillement de concepts distincts ne fait que créer de la confusion et de l'ambiguïté. La liberté de choix et l'indépendance peuvent être des moyens d'assurer la représentativité, mais il existe d'autres mécanismes pour le faire, tels que les garanties légales dont nous avons déjà parlé.

[189] Un modèle de négociation désigné par la loi, comme dans le cas du modèle imposé par la *Loi de 2014 sur la négociation collective dans les conseils scolaires* de l'Ontario, peut garantir que les intérêts des employés seront efficacement défendus auprès de la direction même lorsqu'ils ne choisissent pas leurs représentants individuels ou le système dans le cadre duquel cette représentation s'effectue. L'alinéa 2*d*) de la *Charte* exige que les agents négociateurs représentent les intérêts et les préoccupations relatifs au milieu de travail des employés, c'est ce que j'appelle la représentativité. La méthode utilisée pour assurer cette représentation n'est pas prescrite par la Constitution.

[190] Imposer la liberté de choix et l'indépendance en tant qu'impératifs constitutionnels empêche de recourir à toute une panoplie d'autres méthodes de négociations collectives axées sur la collaboration qui pourraient être conçues pour satisfaire aux besoins de contextes donnés auxquels le modèle Wagner de relations de travail ne serait pas adapté.

[191] Dans le cas qui nous occupe, le contexte d'un corps policier national a conduit à l'adoption d'un modèle de relations de travail créé par la loi et axé sur la collaboration. Suivant ce modèle, les membres de la GRC choisissent démocratiquement leurs représentants qui, du fait de la loi, sont tenus de défendre les intérêts des employés. Ils peuvent d'ailleurs être remplacés s'ils manquent à ce devoir.

[192] Ce qui protège les intérêts des employés dans le contexte du modèle Wagner, un modèle faisant appel à un agent négociateur désigné comme celui que l'on trouve dans la *Loi de 2014 sur la négociation collective dans les conseils scolaires* de l'Ontario ou le PRRF de la GRC, c'est l'obligation

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the views of the employees they represent and the establishment of a mechanism to remove those representatives if they do not.

[193] Neither the choice of the associational framework (*Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, at para. 33) nor the selection of a particular bargaining agent is a necessary component of freedom of association. Rather, because employees have a right to a "meaningful proces[s] by which they can pursue workplace goals" (*Fraser*, at para. 117), the voice with which they communicate with their employer as a collective must be representative of their interests. Provided that the spokespersons through whom employees make representations to their employer have a duty to represent the interests of all employees and that there is a means to hold those representatives to account, the workers' "constitutional right to make collective representations and to have their collective representations considered in good faith" is met (*Fraser*, at para. 51). Representativeness is what *Fraser* mandates and there is no justification to embark upon the imposition of unnecessary constitutional constraints as the majority seeks to do in this appeal.

(2) Independence of the Association

[194] The majority says that independence of the employee association from management is constitutionally required. However, it concedes that independence may not be absolute. The argument is that independence is sufficient if it permits the activities of the association to be "aligned with the interests of its members" (para. 83).

[195] With respect, the relevant question is not whether a legislatively prescribed association or process is independent in the sense that it segregates employees from management, but whether that process prevents employees, such as RCMP members, from associating to advance their collective workplace goals. To reiterate, the touchstone is representativeness.

qu'ont les représentants d'agir honnêtement et équitablement en faisant valoir le point de vue des employés qu'ils représentent, ainsi que la mise en place d'un mécanisme permettant de destituer ces représentants s'ils ne respectent pas cette obligation.

[193] Ni le choix du cadre associatif (*Delisle c. Canada (Sous-procureur général)*, [1999] 2 R.C.S. 989, par. 33), ni la sélection d'un agent de négociation donné ne constituent des éléments nécessaires de la liberté d'association. Comme les employés ont droit à « un processus véritable leur permettant de réaliser des objectifs liés au travail » (*Fraser*, par. 117), il faut plutôt que le porte-parole qui s'adresse à leur employeur en leur nom à tous représente leurs intérêts. À condition que le porte-parole par l'entremise duquel les employés font des représentations auprès de leur employeur ait l'obligation de représenter les intérêts de l'ensemble des employés et qu'il existe un moyen d'obliger ce porte-parole à rendre des comptes, le « droit constitutionnel [des travailleurs] de formuler des revendications collectives et de les voir prises en considération de bonne foi » est respecté (*Fraser*, par. 51). C'est la représentativité qu'exige l'arrêt *Fraser* et rien ne justifie d'imposer des contraintes constitutionnelles inutiles comme les juges majoritaires tentent de le faire dans le présent pourvoi.

(2) Indépendance de l'association

[194] Selon les juges majoritaires, la Constitution exige que l'association d'employés soit indépendante de la direction. Ils admettent toutefois que cette indépendance peut ne pas être absolue. Selon leur raisonnement, l'indépendance suffisante est celle qu'assure une « correspondance entre les activités de l'association et les intérêts de ses membres » (par. 83).

[195] J'estime, soit dit en tout respect, que la vraie question ne soit pas celle de savoir si une association ou un processus prescrit par la loi est indépendant, en ce sens qu'il ou elle dissocie les employés de la direction, mais plutôt celle de savoir si cette association ou ce processus empêche des employés, comme les membres de la GRC, de s'associer en vue de réaliser leurs objectifs collectifs relatifs au travail. Je le répète, la pierre angulaire, c'est la représentativité.

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[196] The requirement that an employee association be independent from the employer originates from the *Wagner Act* (*National Labor Relations Act*, 49 Stat. 449 (1935)) — it did not pre-exist it. In recounting the history of labour relations in Canada, the majority of this Court in *Health Services* acknowledged that it was the *Wagner Act* that "explicitly recognized the right of employees to belong to a trade union of their choice, free of employer coercion or interference" and that "imposed a duty upon employers to bargain in good faith with their employees' unions": para. 56.

[197] In the years preceding the enactment of the *Wagner Act*, "company unions" — that is, employee associations featuring some degree of employer influence — were plentiful in both the United States and Canada: L. S. MacDowell, "Company Unionism in Canada, 1915-1948", in B. E. Kaufman and D. G. Taras, eds., *Nonunion Employee Representation: History, Contemporary Practice, and Policy* (2000), 96, at p. 97. Though some company unions were contrived by employers to thwart legitimate worker representation, other non-union plans were designed to actively foster representation: see D. G. Taras, "Why Nonunion Representation Is Legal in Canada" (1997), 52 *Relat. ind.* 763.

[198] In 1935, Senator Robert Wagner introduced in the U.S. Senate the bill that would become known as the *Wagner Act*. This Act effectively abolished company unions: B. E. Kaufman, "Accomplishments and Shortcomings of Nonunion Employee Representation in the Pre-Wagner Act Years: A Reassessment", in Kaufman and Taras, 21, at p. 26.

[199] Canada implemented its own version of the *Wagner Act* in 1944: the *Wartime Labour Relations Regulations*, P.C. 1003. This Order in Council, made under the authority of the *War Measures Act*, R.S.C. 1927, c. 206, incorporated the Wagnerian principle that employee associations be independent from the employer. At the end of the war, the Wagner model was continued in Canada by the federal *Industrial Relations and Disputes Investigation Act*, S.C.

[196] L'obligation qu'une association d'employés soit indépendante de l'employeur tire son origine de la loi Wagner (*National Labor Relations Act*, 49 Stat. 449 (1935)) — elle n'existait pas avant elle. En relatant l'historique des relations de travail au Canada dans *Health Services*, les juges majoritaires de la Cour ont reconnu que c'est cette loi qui a « expressément reconnu aux employés le droit d'appartenir au syndicat de leur choix, sans coercition ni ingérence de la part de l'employeur, et [qui] oblig[e] l'employeur à négocier de bonne foi avec les syndicats des travailleurs » (par. 56).

[197] Dans les années qui ont précédé l'adoption de la loi Wagner, les « syndicats de boutique » — c'est-à-dire les associations d'employés se caractérisant par un certain degré d'influence de l'employeur — étaient monnaie courante tant aux États-Unis qu'au Canada (voir L. S. MacDowell, « Company Unionism in Canada, 1915-1948 », dans B. E. Kaufman et D. G. Taras, dir., *Nonunion Employee Representation : History, Contemporary Practice, and Policy* (2000), 96, p. 97). Même si certains syndicats de ce type étaient forcés par les employeurs à contrecarrer la représentation légitime des travailleurs, d'autres formes de représentation non syndicale visaient à favoriser activement la représentation des travailleurs (voir D. G. Taras, « Why Nonunion Representation Is Legal in Canada » (1997), 52 *Relat. ind.* 763).

[198] En 1935, le sénateur Robert Wagner a soumis au Sénat américain le projet de loi qui allait devenir ce qui est depuis connu comme étant la loi Wagner. Cette loi a eu pour effet d'abolir les syndicats de boutique (B. E. Kaufman, « Accomplishments and Shortcomings of Nonunion Employee Representation in the Pre-Wagner Act Years : A Reassessment », dans Kaufman et Taras, 21, p. 26).

[199] Le Canada a adopté sa propre version de la loi Wagner en 1944 : le *Règlement des Relations ouvrières en temps de guerre*, C.P. 1003. Ce décret, pris en application de la *Loi des mesures de guerre*, S.R.C. 1927, c. 206, incorporait le principe wagnérien suivant lequel les associations d'employés doivent être indépendantes de l'employeur. À la fin de la guerre, le modèle Wagner a été repris au Canada par la *Loi sur les relations industrielles*

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1948, c. 54, and similar legislation enacted by most of the provinces: R. J. Adams, "A Pernicious Euphoria: 50 Years of Wagnerism in Canada" (1995), 3 *C.L.E.L.J.* 321, at p. 328.

[200] Thus, the *Wagner Act* consciously introduced the notion that trade unions should be independent from the employer for the purposes of collective bargaining. Canadian labour legislation, largely modelled on the *Wagner Act*, likewise imported this principle of independence. The notion of independence gained popularity in this particular historical context. It is not however an inherent aspect of collective bargaining.

[201] But even if independence were an essential feature of meaningful collective bargaining, the SRRP satisfies two of the majority's indicia of independence: the freedom to elect employee representatives and control the association's financial administration and activities. RCMP members democratically select the SRRs who will bring their workplace goals to management for consideration, and the Staff Relations Sub-Representatives ("sub-SRRs") have the power to replace those SRRs who are not representative of employee interests. The SRRP administers its own budget. RCMP members cannot change their bargaining representative (the SRRP) without the consent of management and the government. But it is certainly open to them to change their SRRs if they are of the view that their collective workplace goals are not being adequately represented by the SRRP. Ontario teachers similarly cannot change their bargaining representatives without legislative approval. If the Ontario teachers' bargaining statute meets the majority's constitutional requirements, the SRRP must also meet those requirements.

[202] The majority states that "a lack of independence means that employees may not be able to advance their own interests, but are limited to picking and choosing from among the interests management permits them to advance" (para. 89). Similarly,

et sur les enquêtes visant les différends du travail, S.C. 1948, c. 54, ainsi que dans d'autres lois semblables édictées par la plupart des provinces (R. J. Adams, « A Pernicious Euphoria : 50 Years of Wagnerism in Canada » (1995), 3 *C.L.E.L.J.* 321, p. 328).

[200] Ainsi, la loi Wagner a délibérément introduit le concept selon lequel les syndicats devraient être indépendants de l'employeur pour tout ce qui concerne la négociation collective. La législation canadienne en matière du travail, qui s'est largement inspirée de cette loi, a également intégré ce principe d'indépendance qui est devenu plus populaire dans ce contexte historique particulier. Il ne constitue toutefois pas pour autant un élément inhérent à la négociation collective.

[201] Cela dit, même si l'indépendance était un élément essentiel de toute véritable négociation collective, le PRRF satisfait à deux des caractéristiques d'indépendance retenues par les juges majoritaires : la liberté de choisir les représentants des employés et celle de contrôler la gestion financière et les activités de l'association. En effet, les membres de la GRC choisissent démocratiquement les RRF qui soumettront à l'examen de la direction leurs objectifs relatifs au travail et les sous-représentants ont le pouvoir de remplacer les RRF qui ne défendent pas les intérêts des employés. De plus, le PRRF administre son propre budget. Certes, les membres de la GRC ne peuvent changer leur représentant (le PRRF) sans le consentement de la direction et du gouvernement. Il leur est toutefois loisible de changer leurs RRF s'ils estiment que leurs objectifs en matière de travail ne sont pas adéquatement défendus par le PRRF. Les enseignants ontariens ne peuvent pas non plus changer d'agent négociateur sans approbation législative. Si la loi régissant les négociations collectives des enseignants ontariens satisfait aux exigences constitutionnelles des juges majoritaires, le PRRF doit lui aussi y satisfaire.

[202] Les juges majoritaires déclarent qu'« un manque d'indépendance signifie que les employés ne sont peut-être pas en mesure de faire valoir leurs propres intérêts, mais qu'ils doivent choisir parmi ceux que l'employeur les autorise à défendre »

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the appellants suggest that employee representatives working within a cooperative employee-management labour relations model cannot properly represent the interests of employees. According to them, employees who are dependent on management for salary increases, performance appraisals, and promotions will be reluctant to put forward employee interests that may not be looked upon favourably by management.

[203] However, both the majority and the appellants ignore representativeness. Representatives must fairly represent the interests of all employees. Any representative who limits representation based on what management permits or who places their own employment interests above the interests of all employees will be held accountable for his or her own actions. So long as employees have recourse to ensure that their views are put forward to management and that their representatives are working in their interests, the labour relations process will not be dominated by management and employees will have the means to work towards their collective workplace goals.

[204] Thus, the Wagner model is by no means the only way to achieve meaningful collective bargaining: alternative schemes could be equally or more effective. It is not the role of this Court to preclude legislative reform by entrenching key features of a particular system and shoehorning them into the fundamental *Charter* guarantee of freedom of association.

C. *Adversarialism*

[205] By requiring independence, and defining it as it does, the majority constitutionalizes adversarial labour relations, a central feature of the Wagner model. As explained above, s. 2(*d*) of the *Charter* currently protects a process whereby employees may make representations and have them considered in good faith by employers. Nothing in that requirement mandates that employees must

(par. 89). De même, les appelantes suggèrent que des représentants des employés qui travaillent dans le cadre d'un modèle de relations de travail fondé sur la collaboration entre la direction et les employés ne peuvent représenter correctement les intérêts des employés. Selon elles, les employés qui dépendent de la direction pour leurs hausses salariales, leurs évaluations de rendement et leurs promotions hésiteront à défendre les intérêts des employés que la direction pourrait ne pas voir sous un jour favorable.

[203] Tant les juges majoritaires que les appelantes négligent toutefois la représentativité. Le représentant se doit de bien défendre les intérêts de tous les employés. Celui qui restreint le cadre de son mandat en fonction de ce que lui permet la direction ou qui fait passer ses intérêts professionnels avant ceux de l'ensemble des employés devra répondre de ses gestes. Dès lors que les employés disposent de recours pour s'assurer que leur point de vue est relayé à la direction et que leurs représentants travaillent dans leur intérêt, le processus de relations de travail n'est pas dominé par la direction et les employés disposent de moyens leur permettant de travailler en vue de réaliser leurs objectifs collectifs relatifs au travail.

[204] En conséquence, le modèle Wagner est loin d'être le seul moyen qui permet d'assurer une véritable négociation collective; d'autres régimes pourraient être aussi efficaces sinon plus. Il n'appartient pas à la Cour d'empêcher des réformes législatives en cristallisant certaines caractéristiques essentielles d'un régime particulier et en les intégrant à la garantie fondamentale de la liberté d'association prévue par la *Charte*.

C. *Caractère contradictoire*

[205] En exigeant l'indépendance et en la définissant comme ils le font, les juges majoritaires constitutionnalisent les relations de travail contradictoires, un trait caractéristique du modèle Wagner. Comme je l'ai déjà expliqué, l'al. 2*d*) de la *Charte* protège actuellement le processus par lequel les employés peuvent formuler des revendications et s'assurer que l'employeur les examine de bonne foi.

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make their representations through an adversarial advocate rather than through a collaborative model.

[206] Research has suggested that adversarialism generates outcomes that are less beneficial for employees than systems involving labour-management cooperation: see R. J. Adams, "Public Employment Relations: Canadian Developments in Perspective", in G. Swimmer, ed., *Public-Sector Labour Relations in an Era of Restraint and Restructuring* (2001), 212, at p. 221. Critics have decried the inherently adversarial nature of the Wagner model of labour relations as inconsistent with modern "high performance workplace" systems, and have noted that the Wagner model's encouragement of conflict may be associated with lower levels of performance: Adams, "A Pernicious Euphoria", at pp. 344-45. Roy J. Adams has noted the negative consequences of the Wagner model, including the model's encouragement of employee exclusion from managerial decision making: *ibid.*, at pp. 342-45.

[207] It is a mistake to view an adversarial approach as essential to meaningful collective bargaining. Where there are discussions between employees and management allowing employee concerns to be taken into account in future planning, a collaborative form of negotiation can be better at furthering workplace goals than an adversarial negotiation that takes place after managerial planning and decisions have been made and positions hardened.

[208] No labour relations model is perfect. That is why governments need flexibility to select the appropriate model in any given situation and to adapt to changing circumstances. The majority concedes that there "has been ongoing debate on the desirability of various forms of workplace representation and cooperation and on their coexistence"

Rien dans ce processus n'oblige les employés à formuler leurs observations par l'intermédiaire d'un porte-parole qui mise sur l'affrontement plutôt que de recourir à un modèle axé sur la collaboration.

[206] Les recherches indiquent que l'antagonisme produit des résultats moins avantageux pour les employés que les systèmes faisant appel à une collaboration entre les travailleurs et la direction (voir R. J. Adams, « Public Employment Relations : Canadian Developments in Perspective » dans G. Swimmer, dir., *Public-Sector Labour Relations in an Era of Restraint and Restructuring* (2001), 212, p. 221). Les critiques reprochent au modèle Wagner des relations de travail son caractère intrinsèquement contradictoire en faisant valoir qu'il est incompatible avec les systèmes modernes de [TRADUCTION] « milieux de travail à haut rendement »; ils font également observer qu'il est possible d'associer le fait que le modèle Wagner encourage les conflits aux niveaux plus faibles de rendement obtenus (Adams, « A Pernicious Euphoria », p. 344-345). En outre, l'auteur Roy J. Adams a signalé les conséquences néfastes du modèle Wagner, dont le fait qu'il incite la direction à exclure les employés de la prise de décisions (*ibid.*, p. 342-345).

[207] C'est une erreur de considérer le modèle contradictoire comme essentiel à la tenue de véritables négociations collectives. Lorsque des discussions entre les employés et la direction permettent la prise en compte des préoccupations des employés lors des planifications futures, une forme de négociation axée sur la collaboration peut davantage favoriser l'atteinte des objectifs en milieu de travail qu'une négociation contradictoire qui intervient après la planification et après que les décisions ont été prises par la direction et que les parties ont durci leur position.

[208] Aucun modèle de relations de travail n'est parfait. C'est la raison pour laquelle les gouvernements doivent faire preuve de souplesse lorsqu'ils choisissent celui qui convient à une situation donnée et c'est la raison pour laquelle ils doivent tenir compte de l'évolution de la situation. Les juges majoritaires prennent acte du

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and that "[t]he search is not for an 'ideal' model" (paras. 96-97). The majority also acknowledges that "nothing in the *Charter* prevents an employee association from engaging willingly with an employer in different, less adversarial and more cooperative ways" (para. 97). I agree that s. 2(*d*) has not been interpreted to impose a particular type of labour relations framework, until now.

[209] By making the independence of an employee association a necessary condition to satisfy s. 2(*d*) of the *Charter*, the majority ensures that conflict-based rather than collaborative schemes will be inevitable. To say that parties are still free to cooperate with each other is unrealistic once this Court has entrenched a requirement for a Wagner-style scheme, which inescapably leads to confrontation and posturing. A bargaining agent that takes a cooperative approach to negotiating with an employer will be vulnerable to the same criticisms leveled by the appellants here — that they have become one with management and are not identifying and advancing employee workplace goals free from management influence or interference. Inevitably, bargaining agents will have to embrace a confrontational rather than cooperative style of negotiations, not only to justify their existence but to keep more aggressive, rival bargaining agents at bay. The result will be to widen differences between employee and employer bargaining positions and make negotiation and resolution more difficult to achieve.

[210] Implicit in the majority's articulation of meaningful collective bargaining is the view that management is the enemy of the employees and the only way in which employees may improve their position is through adversarial confrontation.

« débat actuel sur l'opportunité de différentes formes de représentation et de collaboration en milieu de travail et sur leur coexistence » et du fait qu'il « ne s'agit pas de trouver le régime "idéal" de négociation collective » (par. 96-97). Ils reconnaissent également que « rien dans la *Charte* n'empêche une association d'employés de s'engager librement avec l'employeur dans un type de négociation différent, moins contradictoire et davantage axé sur la collaboration » (par. 97). Je suis d'accord pour dire que l'al. 2*d*) n'a pas été interprété de manière à imposer un type de cadre de relations de travail donné, du moins jusqu'à maintenant.

[209] En faisant de l'indépendance d'une association d'employés une condition nécessaire pour satisfaire à l'al. 2*d*) de la *Charte*, les juges majoritaires s'assurent que ce sont des modèles axés sur la confrontation plutôt que sur la collaboration qui seront inévitablement mis en place. Dire que les parties pourront encore collaborer est irréaliste dès lors que la Cour aura consacré la nécessité d'adopter un système inspiré du modèle Wagner, un système qui conduit forcément à la confrontation et au durcissement des positions. Dans un tel contexte, l'agent négociateur qui adopterait une approche collaborative pour négocier avec l'employeur prêterait le flanc aux mêmes critiques que celles formulées par les appelantes en l'espèce : il se ferait reprocher d'avoir pris fait et cause pour la direction, de ne pas s'identifier aux objectifs des employés quant à leurs conditions de travail et de ne pas défendre leurs intérêts à l'abri de l'influence ou de l'ingérence de la direction. Inévitablement, les agents négociateurs devront adopter un style de négociation axé sur la confrontation plutôt que sur la collaboration, non seulement pour justifier leur existence, mais pour tenir à distance des agents négociateurs rivaux plus agressifs. Du coup, l'écart entre les positions de négociation de la direction et des employés se creusera encore plus, ce qui rendra les négociations et la recherche d'une solution plus difficiles.

[210] La façon dont les juges majoritaires conçoivent la notion de véritable négociation collective laisse implicitement entendre que la direction est l'ennemi des employés et que la seule façon pour ces derniers d'améliorer leur sort consiste

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However, a collaborative model that provides an opportunity for employees to have input and influence at the strategic planning stage of decision making can enhance rather than undermine employee control over their working conditions. Collaborative models are consistent with the majority's holding in *Health Services*, that the employees' right to collective bargaining "requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation" (para. 90 (emphasis added)).

[211] To hold that the derivative right to collective bargaining in s. 2(*d*) of the *Charter*, as determined in *Fraser*, mandates that workplace associations be structurally independent of the employer constitutionalizes an adversarial model of labour relations and effectively excludes collaborative models. To enshrine an adversarial model of labour relations as a *Charter* right reverses this Court's findings in *Health Services* and in *Fraser* that s. 2(*d*) does not guarantee a particular model of collective bargaining or a particular outcome: *Fraser*, at para. 45; *Health Services*, at para. 91. The majority in *Fraser* further noted that "the logic of *Dunmore* and *Health Services* is at odds with the view that s. 2(*d*) protects a particular kind of collective bargaining": para. 46. Less than four years after *Fraser*, the majority reverses not only the Labour Trilogy (*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *PSAC v. Canada*, [1987] 1 S.C.R. 424; *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460), *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, and *Delisle*, but also *Health Services* and *Fraser* in order to arrive at the result it seeks in this case. In doing so, the majority ignores the caution given in *Fraser*:

à recourir à la confrontation et à l'affrontement. Toutefois, un modèle axé sur la collaboration qui offre la possibilité aux employés de participer à l'étape de la planification stratégique de la prise de décision et d'influencer celle-ci est susceptible d'améliorer et non de miner le contrôle des employés sur leurs conditions de travail. De fait, les modèles axés sur la collaboration s'accordent avec la conclusion des juges majoritaires dans *Health Services* suivant laquelle le droit des employés à la négociation collective « implique que l'employeur et les employés se rencontrent et négocient de bonne foi en vue de réaliser leur objectif commun d'accommodement par des moyens pacifiques et productifs » (par. 90 (je souligne)).

[211] Conclure que le droit dérivé à la négociation collective conféré par l'al. 2*d*) de la *Charte*, qui a été reconnu dans *Fraser*, exige que les associations créées en milieu de travail soient structurellement indépendantes de l'employeur revient à constitutionnaliser un modèle de relations de travail axé sur la confrontation et à exclure tout modèle axé sur la collaboration. Inscrire un modèle de relations de travail contradictoire en tant que droit reconnu par la *Charte* revient à répudier les conclusions tirées antérieurement par la Cour selon lesquelles l'al. 2*d*) ne garantit ni l'application d'un modèle particulier de négociation collective, ni l'obtention d'un résultat donné (*Fraser*, par. 45; *Health Services*, par. 91). Les juges majoritaires dans *Fraser* ont également fait observer que « la logique qui sous-tend les arrêts *Dunmore* et *Health Services* n'admet pas l'idée que l'al. 2*d*) protège un type particulier de négociation collective » (par. 46). Or, moins de quatre ans après le prononcé de cet arrêt, les juges majoritaires désavouent non seulement la trilogie en matière de droit du travail (*Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313; *AFPC c. Canada*, [1987] 1 R.C.S. 424; et *SDGMR c. Saskatchewan*, [1987] 1 R.C.S. 460), *Dunmore c. Ontario (Procureur général)*, 2001 CSC 94, [2001] 3 R.C.S. 1016, et *Delisle*, mais ils répudient également les arrêts *Health Services* et *Fraser* pour pouvoir parvenir au résultat qu'ils recherchent dans le cas qui nous occupe. Ce faisant, les juges majoritaires ignorent la mise en garde formulée dans *Fraser* :

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The seriousness of overturning two recent precedents of this Court, representing the considered views of firm majorities, cannot be overstated. This is particularly so given their recent vintage. *Health Services* was issued only four years ago, and, when this appeal was argued, only two years had passed. [para. 57]

[212] As this Court recently observed in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101: "Certainty in the law requires that courts follow and apply authoritative precedents. Indeed, this is the foundational principle upon which the common law relies" (para. 38). Certainty in the law is essential: it permits Canadians to know what to expect from the courts, their governments, and each other. It is open to this Court to depart from its previous jurisprudence in some circumstances, but the importance and value of certainty demand that such departures be made infrequently and only where they have been carefully and explicitly considered to ensure that the departure is justified and that the implications of such a deviation from the normal rule of *stare decisis* have been fully and carefully analyzed. The majority has failed to do so and its departure from authoritative precedents does not satisfy this high standard.

D. *Is It Effectively Impossible to Achieve Workplace Goals?*

[213] In *Fraser*, the test for infringement of s. 2(*d*) of the *Charter* was stated to be whether the government action or legislation made it *effectively impossible* for employees to join in meaningful association to make representations to the employer and to have their views considered in good faith: para. 98. There is no escaping the majority's decision in that case; it referred to the test of impossibility — either effective or substantial impossibility — *no less than 12 times*, tracing its origins in the decisions of *Dunmore* and *Health Services* and then applying it to the case before the Court: see *Fraser*, at paras. 31-34, 38, 42, 46-48, 62 and 98. Despite the emphatic finding in *Fraser* that "the question is

On ne saurait trop insister sur la gravité du renversement de deux arrêts récents de la Cour qui expriment l'avis réfléchi de majorités claires. Leur caractère récent milite d'autant plus contre leur abandon. *Health Services* a été prononcé il y a seulement quatre ans, et lorsque le présent pourvoi a été entendu, seulement deux ans s'étaient écoulés. [par. 57]

[212] Ainsi que la Cour l'a récemment fait observer dans l'arrêt *Canada (Procureur général) c. Bedford*, 2013 CSC 72, [2013] 3 R.C.S. 1101 : « La notion de certitude du droit exige que les tribunaux suivent et appliquent les précédents qui font autorité. C'est d'ailleurs l'assise fondamentale de la common law » (par. 38). La certitude du droit est essentielle : elle permet aux Canadiens de savoir à quoi s'attendre des tribunaux, de leurs gouvernements et les uns des autres. Si la Cour peut bel et bien rompre avec sa jurisprudence antérieure dans certaines circonstances, l'importance et la valeur de la notion de certitude exigent qu'elle ne le fasse que rarement et qu'après avoir attentivement et expressément examiné la situation pour s'assurer que sa décision est justifiée et que les conséquences de cette dérogation au principe habituel de la règle du *stare decisis* ont été attentivement et pleinement soupesées. Les juges majoritaires ne l'ont pas fait en l'espèce et leur décision de rompre avec la jurisprudence antérieure ne satisfait pas à cette norme exigeante.

D. *Est-il effectivement impossible de réaliser les objectifs des membres relatifs au travail?*

[213] Dans l'arrêt *Fraser*, le test permettant de conclure à une violation de l'al. 2*d*) de la *Charte* a été défini comme suit : la loi ou la mesure adoptée par l'État rend-elle *effectivement impossible* l'association véritable d'employés en vue de présenter des observations à l'employeur et de les voir prises en compte de bonne foi par lui? (par. 98). On ne peut ignorer la décision des juges majoritaires dans cet arrêt : ils mentionnent le critère de l'impossibilité — substantielle ou effective — *à pas moins de 12 reprises*, en en retraçant les origines aux arrêts *Dunmore* et *Health Services* et en appliquant ensuite ce critère à l'affaire dont ils sont saisis (voir *Fraser*, par. 31-34, 38, 42, 46-48, 62 et 98). Même si la Cour

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whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals" (para. 46 (emphasis added)), less than four years later, the majority now says that "the majority in *Fraser* adopts substantial interference as the *legal test* for infringement of freedom of association": para. 75 (emphasis added). With respect, by resiling from a test so recently established and refusing to acknowledge this departure, the majority undermines the legitimacy of its approach in this appeal.

déclare de façon catégorique dans l'arrêt *Fraser* que « [l]a question demeure celle de savoir si la loi ou la mesure gouvernementale contestée rend impossible l'action collective visant la réalisation d'objectifs liés au travail » (par. 46 (je souligne)), moins de quatre ans plus tard, mes collègues affirment maintenant que « les juges majoritaires dans *Fraser* ont adopté le *test juridique* de l'entrave substantielle pour conclure à une atteinte au droit d'association » (par. 75 (je souligne)). Soit dit en tout respect, je suis d'avis qu'en répudiant un test admis aussi récemment et en refusant de reconnaître qu'ils s'en écartent, les juges majoritaires discréditent la légitimité de leur démarche dans le présent pourvoi.

[214] The majority attempts to excuse its departure from the *Fraser* standard by asserting that the Court in that decision used "effective impossibility" to describe the effect of a legislative scheme but used "substantial interference" as the legal test for infringement of s. 2(*d*). Inconveniently for my colleagues, at para. 46, the majority in *Fraser* unambiguously states: "In every case, the question is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals" (emphasis added).

[214] Les juges majoritaires tentent de justifier leur décision de s'écarter de la norme établie dans *Fraser* en faisant valoir que, dans cet arrêt, la Cour a recouru au concept de « l'impossibilité effective » pour décrire les effets d'un régime législatif, alors que c'est le test de « l'entrave substantielle » qui a été retenu comme test juridique pour juger de l'atteinte ou non au droit protégé par l'al. 2*d*). Malencontreusement pour mes collègues, au par. 46 de l'arrêt *Fraser*, les juges majoritaires déclarent sans équivoque que : « [l]a question demeure celle de savoir si la loi ou la mesure gouvernementale contestée rend impossible l'action collective visant la réalisation d'objectifs liés au travail » (je souligne).

[215] Such clear language is now dismissed by the majority as "unnecessarily complicate[d]" (para. 77). However, the real complication is that the language in *Fraser* does not support the majority's revised s. 2(*d*) standard. There is no doubt that the majority in *Fraser* firmly established a high threshold for infringement of the derivative right to collective bargaining. A labour relations regime that permits representatives to advance the interests of employees to the employer, who must in turn consider and discuss these representations in good faith, will not meet this threshold and therefore will not infringe s. 2(*d*) of the *Charter*.

[215] Les juges majoritaires écartent maintenant du revers de la main une formulation pourtant limpide en faisant valoir qu'elle « compliqu[e] inutilement » l'analyse (par. 77), alors que la véritable complication réside plutôt dans le fait que la formulation de l'arrêt *Fraser* n'appuie pas la norme révisée qu'ils appliquent à l'al. 2*d*). Il ne fait aucun doute que, dans *Fraser*, les juges majoritaires ont fixé un seuil exigeant pour pouvoir conclure à la violation du droit dérivé à la négociation collective. Un régime de relations de travail qui permet aux représentants des employés de défendre les intérêts de ces derniers auprès de l'employeur qui doit, à son tour, examiner et analyser ces représentations de bonne foi, n'atteint pas ce seuil minimal et ne contrevient donc pas à l'al. 2*d*) de la *Charte*.

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[216] The majority, however, now lowers this threshold by adopting a substantial interference test, stating that "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" (para. 72). With respect, the majority's numerous references to balance and equilibrium blur the true effect of its decision: to impose adversarial collective bargaining on the complex labour negotiation process.

[217] Despite *Fraser*'s repeated articulation of the effective impossibility test, the majority now reverts to a less stringent test in order to reach its desired outcome. It finds that the SRRP substantially interferes with the ability of RCMP members to associate to achieve collective workplace goals because the collaborative scheme does not achieve the employer-employee balance it says s. 2(*d*) of the *Charter* now requires. Fairness and certainty require that where settled law exists, courts must apply it to determine the result in a particular case. They may not identify a desired result and then search for a novel legal interpretation to bring that result about.

E. *Application to the Facts of This Case*

(1) The Imposition of the SRRP

[218] The majority finds that in both purpose and effect, the imposition of the SRRP violates s. 2(*d*) because RCMP members "are represented by an organization they did not choose and do not control", the SRRP is not independent of management, and the "process fails to achieve the balance between employees and employer that is essential to meaningful collective bargaining", leaving members in "a disadvantaged, vulnerable position" (para. 106). I respectfully disagree. The correct standard against

[216] Les juges majoritaires abaissent toutefois maintenant ce seuil en adoptant le test de l'entrave substantielle lorsqu'ils écrivent qu'« il faut essentiellement déterminer si les mesures en question perturbent l'équilibre des rapports de force entre les employés et l'employeur que l'al. 2*d*) vise à établir, de telle sorte qu'elles interfèrent de façon substantielle avec un processus véritable de négociation collective » (par. 72). J'estime, en toute déférence, que les nombreuses allusions des juges majoritaires à l'équilibre masquent l'effet véritable de leur décision, soit d'imposer un modèle contradictoire au processus complexe des négociations collectives.

[217] Même si le test de l'impossibilité effective a été formulé à répétition dans *Fraser*, les juges majoritaires se rabattent maintenant sur un test moins rigoureux pour parvenir au résultat qu'ils désirent. Ils concluent que le PRRF entrave de façon substantielle la capacité des membres de la GRC de s'associer pour réaliser leurs objectifs collectifs relatifs au travail parce que ce modèle axé sur la collaboration ne permet pas d'atteindre l'équilibre employeur-employé exigé désormais selon eux par l'al. 2*d*) de la *Charte*. L'équité et la notion de certitude exigent que, lorsque la jurisprudence est déjà fixée, les tribunaux l'appliquent pour arrêter la solution dans l'affaire dont ils sont saisis. Ils ne peuvent pas déterminer à l'avance le résultat souhaité pour chercher ensuite une nouvelle interprétation juridique permettant d'obtenir ce résultat.

E. *Application aux faits de la présente affaire*

(1) L'imposition du PRRF

[218] Les juges majoritaires concluent que, tant par son objet que par ses effets, l'imposition du PRRF porte atteinte au droit protégé par l'al. 2*d*) parce que les membres de la GRC « se trouvent représentés par un organisme qu'ils n'ont pas choisi et qu'ils ne contrôlent pas », que le PRRF est dépourvu d'indépendance à l'égard de la direction, et que « [l]es employés se trouvent dans une position désavantageuse et vulnérable parce que le programme n'établit pas, entre eux et l'employeur, l'équilibre

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which the SRRP should be evaluated is whether the process renders meaningful collective bargaining effectively impossible. Collective bargaining will be meaningful where the employee association is representative of employee interests. SRRs are able to fairly represent employee interests to management and the employer, in turn, considers their representations in good faith. Whether the *Fraser*-mandated effective impossibility test or even the majority's new substantial interference test is applied, it is clear that the SRRP does not infringe s. 2(*d*) of the *Charter*.

(a) *Representativeness*

[219] RCMP members did not choose their associational framework for bargaining purposes. But this is not the crucial issue. Rather, this Court must consider whether the labour relations structure that was imposed by s. 96 of the *Royal Canadian Mounted Police Regulations, 1988*, SOR/88-361 (repealed and replaced by SOR/2014-281), enables RCMP members to have confidence in their spokespersons and whether those representatives have a duty to represent the interests of all employees and can be held to account. Management then has a constitutional obligation to consider in good faith the representations made on behalf of RCMP members: see *Fraser*, at para. 99.

[220] The SRRP must represent "the interests of all members of the Royal Canadian Mounted Police" (SRRP Constitution, s. 1 (emphasis added)) and must "facilitate [the] participation" of RCMP members "in the development and implementation of Force policies and programs" (SRRP Constitution, s. 2; see also SRRP Agreement, s. 1). RCMP members within a particular division or zone elect SRRs and sub-SRRs for that area (SRRP Constitution, ss. 4 and 16; SRRP Agreement, s. 3), and any RCMP member who is not in a conflict of interest may run for election. SRRs serve for a two-year term. They must "[c]onsult with members and/or their

essentiel à la tenue d'une véritable négociation collective » (par. 106). Soit dit en tout respect, je ne suis pas d'accord. La norme qu'il convient d'appliquer pour examiner le PRRF est celle de savoir si le processus mis en place rend effectivement impossible la tenue d'une véritable négociation collective. Il y a une telle négociation lorsque l'association d'employés représente les intérêts de ces derniers. Or, les RRF sont en mesure de représenter équitablement les intérêts des employés auprès de la direction, et l'employeur, à son tour, tient compte de bonne foi des revendications qui lui sont faites. Qu'on applique le test de l'impossibilité effective prévu par l'arrêt *Fraser* ou même le nouveau test de l'entrave substantielle proposé par les juges majoritaires, il est évident que le PRRF ne porte pas atteinte au droit protégé par l'al. 2*d*) de la *Charte*.

a) *Représentativité*

[219] Certes, les membres de la GRC n'ont pas choisi leur cadre associatif pour les besoins de la négociation. Ce n'est toutefois pas la question cruciale. La Cour doit plutôt se demander si la structure de relations de travail qui était prescrite par l'art. 96 du *Règlement de la Gendarmerie royale du Canada (1988)*, DORS/88-361 (abrogé et remplacé par DORS/2014-281) permet aux membres de la GRC d'avoir confiance en leurs porte-parole et crée l'obligation pour ces derniers de défendre les intérêts de l'ensemble des employés et de leur rendre des comptes. La direction a ensuite l'obligation constitutionnelle de tenir compte de bonne foi des observations présentées au nom des membres de la GRC (voir *Fraser*, par. 99).

[220] Le PRRF doit assurer la représentation des « intérêts de tous les membres de la Gendarmerie royale du Canada » (Statuts du PRRF, art. 1 (je souligne)) et doivent « faciliter [. . .] [la] participation [des membres de la GRC] à l'élaboration et à la mise en application des politiques et des programmes de la Gendarmerie » (Statuts du PRRF, art. 2; voir également l'Entente entre le commissaire et le PRRF, art. 1). Les membres de la GRC d'une division ou d'une zone désignée choisissent leur RRF et les sous-représentants de cette région (Statuts du PRRF, art. 4 et 16; Entente entre le commissaire et le PRRF, art. 3), et tout membre de la

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representatives on issues affecting or potentially affecting them" (SRRP Constitution, s. 13(C)(3)), while sub-SRRs must "[e]stablish and maintain good working relations and open channels of communication with members, supervisors and the area commander" (SRRP Constitution, s. 14(B)(1)). The program is designed, in part, to "facilitate effective representation and participation at all appropriate levels" (SRRP Constitution, s. 3(D)). All sub-SRRs in a given division, zone or designated area may unanimously declare that they do not have confidence in an SRR, removing that SRR from office. Accordingly, SRRs can be held to account to ensure that they represent employee interests.

GRC qui n'est pas en conflit d'intérêts peut se porter candidat. Les RRF sont élus pour un mandat de deux ans. Ils doivent « [c]onsulter les membres, leurs représentants ou les deux sur les questions ayant ou pouvant avoir une incidence sur eux » (Statuts du PRRF, art. 13(C)(3)), tandis que les sous-représentants doivent « [é]tablir et maintenir de saines relations de travail et une communication ouverte avec les membres, les superviseurs et le chef de secteur » (Statuts du PRRF, art. 14(B)(1)). Le programme est conçu pour, notamment, « facilit[er] la représentation et la participation efficaces à tous les niveaux appropriés » (Statuts du PRRF, art. 3(D)). Tous les sous-représentants d'une division, d'une zone ou d'un secteur désigné peuvent unanimement déclarer qu'ils retirent leur confiance à un RRF et le destituer de son poste. On peut donc obliger les RRF à rendre des comptes pour s'assurer qu'ils défendent bel et bien les intérêts des employés.

[221] RCMP members may also form and join independent employee organizations of their choice, such as the appellant organizations and the Mounted Police Members' Legal Fund: see *Delisle*, at para. 31. These associations are able to submit the concerns of their members about workplace issues to the SRRs and sub-SRRs. The SRRP Constitution specifies that SRRs have the duty to represent members' interests: this includes the duty to "[c]onsult with members and/or their representatives on issues affecting or potentially affecting them that are the subject of discussion in committees, at [the SRRP] Caucus or as part of studies or reviews" (s. 13(C)(3)). Sub-SRRs are similarly responsible for liaising between SRRs and members, and must "alert the SRR and management to emerging issues and concerns requiring redress at their level": SRRP Constitution, s. 14(B)(2).

[221] Les membres de la GRC peuvent aussi constituer les associations indépendantes de travailleurs de leur choix, comme les organisations appelantes et le Fonds de recours juridique des membres de la Gendarmerie, et y adhérer (voir *Delisle*, par. 31). Ces associations peuvent soumettre aux RRF et aux sous-représentants les préoccupations de leurs membres au sujet de problèmes relatifs au travail. Les Statuts du PRRF précisent que les RRF ont l'obligation de défendre les intérêts de leurs membres, ce qui comprend l'obligation de « [c]onsulter les membres, leurs représentants ou les deux sur les questions ayant ou pouvant avoir une incidence sur eux et faisant l'objet de discussions en comité ou en Caucus, ou dans le cadre d'études ou d'examens » (art. 13(C)(3)). Les sous-représentants sont également chargés de faire le lien entre les RRF et les membres de la GRC et doivent « aviser les RRF et la direction des préoccupations et des problèmes nouveaux devant être abordés à leur niveau » : Statuts du PRRF, art. 14(B)(2).

[222] The appellants present some evidence that SRRs do not always engage with independent employee associations. But this does not render the system unconstitutional, as long as the SRRs represent the interests of all employees and can be held

[222] Les appelantes ont présenté certains éléments de preuve suivant lesquels les RRF ne collaborent pas toujours avec les associations d'employés indépendantes. Cela ne rend pas pour autant le système inconstitutionnel, dans la mesure où les

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to account. Moreover, if it is the case that some SRRs don't fully represent the interests of the members, the situation can be remedied without abolishing the entire labour relations model and certainly without declaring the scheme unconstitutional.

[223] The current SRRP is far removed from the original target of U.S. Senator Wagner's labour bill: ". . . the sham or dummy union which is dominated by the employer, which is supported by the employer, which cannot change its rules or regulations without his consent, and which cannot live except by the grace of the employer's whims": explanatory statement by Senator Wagner on February 21, 1935, in the Senate upon introducing bill S. 1958 (79 Cong. Rec. 2368, at 2372), in *Legislative History of the National Labor Relations Act, 1935*, vol. 1 (1949), at p. 1313.

[224] Following this Court's decision in *Delisle*, a number of changes were made to the SRRP that, as the trial judge acknowledged, enhanced its autonomy. The Staff Relations Program Officer, chosen by the RCMP Commissioner, was replaced by a Program Director selected by, and accountable to, the SRRP's National Caucus. In 2003, the Commissioner's Standing Orders which had governed the SRRP were replaced with the SRRP Constitution and SRRP Agreement adopted the previous year. Further, SRRs are able to challenge the conduct of RCMP management, in the labour relations context, in the courts. The companion case *Meredith v. Canada (Attorney General)*, 2015 SCC 2, [2015] 1 S.C.R. 125, is an illustration of that fact.

[225] Should management or the government now attempt to unjustifiably strip away RCMP members' representational rights, the requirement to bargain in good faith will not be met. In these circumstances, the members will have judicial recourse

RRF représentent les intérêts de l'ensemble des employés et peuvent être tenus de rendre des comptes. En outre, s'il advenait que certains RRF ne représentaient pas pleinement les intérêts des membres, il serait possible de remédier à la situation sans abolir tout le modèle de relations de travail et certainement sans déclarer le régime inconstitutionnel.

[223] Le PRRF actuel est loin de ce que visait le sénateur américain Wagner lorsqu'il a proposé son projet de loi original sur le droit du travail : [TRADUCTION] « . . . le syndicat de façade ou de pacotille dominé par l'employeur qui ne peut changer ses règles et ses règlements sans le consentement de ce dernier et dont l'existence même dépend des caprices de l'employeur » (exposé explicatif du sénateur Wagner du 21 février 1935 devant le Sénat lors de la présentation du projet de loi de 1958 (79 Cong. Rec. 2368, p. 2372), dans *Legislative History of the National Labor Relations Act, 1935*, vol. 1 (1949), p. 1313.

[224] À la suite de l'arrêt *Delisle* de la Cour, plusieurs changements ont été apportés au PRRF qui, comme l'a reconnu le juge de première instance, en ont amélioré l'autonomie. L'agent des programmes des relations de travail, qui était choisi par le commissaire de la GRC, a été remplacé par un directeur de programme qui est choisi, lui, par le Caucus national du PRRF et qui doit rendre des comptes à ce dernier. En 2003, les Consignes du commissaire qui régissaient le PRRF ont été remplacées par les Statuts du PRRF et par l'Entente entre le commissaire et le PRRF adoptés l'année précédente. De plus, les RRF peuvent désormais contester devant les tribunaux les agissements de la direction de la GRC dans le contexte des relations de travail. Le pourvoi connexe *Meredith c. Canada (Procureur général)*, 2015 CSC 2, [2015] 1 R.C.S. 125, est une illustration de ce nouveau pouvoir.

[225] Si la direction ou le gouvernement tentait maintenant de dépouiller de façon injustifiable les membres de la GRC de leurs droits d'être représentés, l'obligation de négocier de bonne foi ne serait pas respectée. Dans ces conditions, les membres de

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to assert their *Charter* right to meaningful collective bargaining.

[226] The appellants point out that executive members or leaders of employee associations such as the appellant organizations have been prevented from running as SRRs. The appellants intimate that this is indicative of management interference with freedom of association. However, the evidence is that the SRRP Caucus is responsible for this rule, not management. And nothing precludes other members of the appellant associations from running for SRR positions. Employee associations like the appellants are essentially rivals of the SRRP. Were a Wagner-type model in place for the RCMP, only one of the appellants could succeed in their bid to be the members' bargaining agent. Similar restrictions would apply against holding a leadership role within rival, independent employee associations. Restrictions of this nature reasonably seek to preclude conflicts of interest in the duties and commitments undertaken for competing associations. They do not indicate employer interference with the SRRP.

[227] In oral argument, the appellants expressed concerns that financial constraints on the SRRP may limit the efficacy of representation. However, the appellants conceded that there was no evidence that budgetary constraints had prevented the SRRP from representing members. It may be that a government employer cannot provide an unlimited budget for its collaborative model of labour relations. However, as the appellants know, independent employee associations also face funding limits based on their income from union dues and other sources.

[228] On an operational level, the SRRP benefits from a high level of financial autonomy: while the RCMP determines an annual budget for the SRRP, which is approved by managers at the various levels, the National Executive Council ("NEC")

la GRC pourraient s'adresser aux tribunaux pour faire respecter le droit à une véritable négociation collective que leur reconnaît la *Charte*.

[226] Les appelantes soulignent que les membres de l'exécutif ou les dirigeants des associations d'employés comme les organisations appelantes ont été empêchés de se porter candidats à des postes de RRF. Selon elles, on peut en conclure que la direction a entravé leur liberté d'association. Or, suivant la preuve, c'est le Caucus national du PRRF qui s'occupe de cette règle et non la direction. Et rien n'empêche les autres membres des associations appelantes de se porter candidats à des postes de représentants. Les associations d'employés comme les appelantes sont essentiellement des rivales du PRRF. Si un modèle Wagner était en vigueur dans le cas de la GRC, une seule des appelantes pourrait réussir à être retenue comme agent négociateur. Des restrictions semblables s'appliqueraient aux postes de dirigeants dans le cas d'associations d'employés indépendantes rivales. Les restrictions de cette nature visent légitimement à empêcher des conflits d'intérêts dans les obligations et les engagements souscrits pour des associations concurrentes. Elles n'indiquent pas une ingérence de l'employeur dans le PRRF.

[227] Lors des débats, les appelantes ont expliqué craindre que les contraintes financières imposées au PRRF ne limitent l'efficacité de la représentation. Elles ont toutefois admis que rien ne permettait de penser que des contraintes budgétaires avaient empêché jusqu'ici le PRRF de représenter ses membres. Il se peut qu'un employeur gouvernemental ne puisse offrir un budget illimité pour son modèle de relations de travail axé sur la collaboration. Cela dit, comme les appelantes le savent bien, les associations d'employés indépendantes font elles aussi face à des limites de financement en raison des revenus qu'elles reçoivent sous formes notamment de cotisations syndicales.

[228] Sur le plan opérationnel, le PRRF jouit d'une grande autonomie financière : bien que la GRC établisse le budget annuel du programme, budget qui est approuvé par des gestionnaires à divers niveaux, c'est le Comité exécutif national (« CEN »)

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of the SRRP is responsible for managing it (SRRP Agreement, ss. 12 and 14). The Commissioner does not influence, guide, or control the budgetary decisions of the NEC. The SRRP Agreement also contains a procedure through which the SRRP may request additional funding: s. 13.

[229] The SRRP allows for meaningful collective bargaining between RCMP members and their employer. The evidence before this Court is that SRRs fairly advance employee interests to management and thus the SRRP meets the constitutional requirement of representativeness mandated under this Court's interpretation of s. 2(*d*).

(b) *The SRRP Does Not Render Collective Bargaining Effectively Impossible*

[230] The majority contends that the imposition of the SRRP was designed to thwart association. It says that the SRRP's predecessor program was "openly presented as an alternative to unionization" (para. 108). Yet both the SRRP Constitution and the SRRP Agreement, which continued that program under its current form and name, indicate that the purpose of the SRRP is not to preclude freedom of association. Rather, its purpose is to create a collaborative system of labour relations "governed by the spirit of cooperation, mutual respect and trust in which the Program was conceived" (SRRP Constitution, s. 3(B)) and to ensure "the promotion of mutually beneficial relations" (SRRP Agreement, s. 1). Further, the trial judge found as fact that "the collaboration that occurs between the SRRs and management is extensive and that it is carried out in good faith by everyone involved": (2009), 96 O.R. (3d) 20, at para. 31.

[231] As an alternative to the formation of an adversarial association, a collaborative labour relations scheme was a reasonable policy choice for a national police force. As noted by the Attorney General of Canada, the RCMP is the only police

du PRRF qui est chargé de gérer ce budget (Entente entre le commissaire et le PRRF, art. 12 et 14). Le commissaire n'influence, ne guide ni ne contrôle aucune des décisions budgétaires du CEN. L'Entente entre le commissaire et le PRRF prévoit également une procédure qui permet au PRRF d'obtenir du financement supplémentaire (art. 13).

[229] En définitive, le PRRF permet une véritable négociation collective entre les membres de la GRC et leur employeur. Suivant la preuve soumise à la Cour, les RRF défendent équitablement les intérêts des employés auprès de la direction; le PRRF respecte donc l'exigence constitutionnelle de représentativité exigée selon l'interprétation que la Cour a donnée à l'al. 2*d*).

b) *Le PRRF ne rend pas effectivement impossible une véritable négociation collective*

[230] Les juges majoritaires prétendent que l'imposition du PRRF a été conçue de manière à faire obstacle à la liberté d'association. Ils affirment que le programme qui a précédé le PRRF était « ouvertement présenté comme une solution de rechange à la syndicalisation » (par. 108). Or, tant les Statuts du PRRF que l'Entente entre le commissaire et le PRRF — qui a prolongé ce dernier sous son nom et sa forme actuels — indiquent que le programme n'a pas pour objet de faire obstacle à la liberté d'association, mais plutôt de créer un régime de relations de travail axé sur la collaboration, « emprein[t] de l'esprit de collaboration, de respect mutuel et de confiance dans lequel [il] a été conçu » (Statuts du PRRF, art. 3(B)), et visant à « promouvoir des relations mutuellement avantageuses » (Entente entre le commissaire et le PRRF, art. 1). De plus, le juge de première instance a conclu [TRADUCTION] « qu'il existe une grande collaboration entre les RRF et la direction, le tout dans un climat de bonne foi de la part de chacun » ((2009), 96 O.R. (3d) 20, par. 31).

[231] Comme solution de rechange à la formation d'une association axée sur la confrontation, un régime de relations de travail fondé plutôt sur la collaboration constituait un choix de principe raisonnable pour un corps policier national. Ainsi que

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force wholly responsible for national security. It can be called upon to play a role when there are strikes among provincial correctional services workers, and may be the only provider of a particular police service in a geographical area. Those dependent upon its security services cannot be left vulnerable during a confrontational work stoppage, or doubt its neutrality during a prison strike. The constitutional inquiry is not whether the SRRP is sufficiently independent or adversarial, but, according to *Fraser*, whether it renders associative activities by RCMP members in order to achieve workplace goals effectively impossible. It plainly does not.

le procureur général du Canada l'a fait observer, la GRC est le seul service de police chargé d'assurer la sécurité à l'échelle nationale. Ses membres peuvent être appelés à intervenir en cas de grève déclenchée par les travailleurs des services correctionnels provinciaux, et ils peuvent être les seuls fournisseurs de services policiers sur un territoire donné. Les personnes qui dépendent des services de maintien de l'ordre qu'offre la GRC ne peuvent être laissées dans une position de vulnérabilité au cours d'un arrêt de travail susceptible de dégénérer en affrontements, et elles ne doivent pas douter de sa neutralité au cours d'une grève dans un établissement carcéral. L'analyse constitutionnelle ne consiste pas à se demander si le PRRF est suffisamment indépendant ou s'il s'agit d'un modèle contradictoire, mais plutôt, suivant l'arrêt *Fraser*, à se demander s'il rend effectivement impossibles les activités d'association des membres de la GRC en vue de réaliser des objectifs relatifs au travail. Ce n'est de toute évidence pas le cas.

[232] The SRRP facilitates association insofar as it is "responsible for representation of the interests of all members of the Royal Canadian Mounted Police", from Constable to Commissioner: SRRP Constitution, s. 1.

[232] Le PRRF facilite l'association dans la mesure où il « assur[e] la représentation des intérêts de tous les membres de la Gendarmerie royale du Canada », du simple agent jusqu'au commissaire (Statuts du PRRF, art. 1).

[233] Democratically elected SRRs and sub-SRRs are tasked with representing RCMP members at all levels of the Force before management. The specific duties of SRRs include providing information, guidance, and support to RCMP members; attempting to resolve workplace issues informally and at the lowest level possible; representing members' interests and ensuring their participation in the overall management of the RCMP; and supporting the effectiveness of the SRRP: SRRP Constitution, s. 13. Sub-SRRs have similar duties, and are also obliged to "liaise between the SRRs and members, dealing with first-level needs and notifying the SRR of emerging issues": SRRP Constitution, s. 14(B). Both SRRs and sub-SRRs are expected to communicate with management at the appropriate level (SRRP Constitution, ss. 13(B) and 14(B)(1); SRRP Agreement, s. 9(a)) and to represent member interests in meetings, committees, and studies: SRRP Constitution, ss. 13(C) and 14(C); SRRP

[233] Les RRF et les sous-représentants qui sont démocratiquement élus se voient confier la tâche de représenter les membres de la GRC auprès de la direction, à tous les niveaux de la GRC. Parmi les attributions des RRF, mentionnons les suivantes : renseigner, conseiller et soutenir les membres de la GRC; tenter de résoudre à l'amiable et au plus bas niveau hiérarchique possible les questions relatives aux conditions de travail; défendre les intérêts des membres et assurer leur participation à la gestion globale de la GRC; et favoriser l'efficacité globale du PRRF (Statuts du PRRF, art. 13). Les sous-représentants ont des attributions semblables et sont tenus d'« [a]ssurer la liaison entre les RRF et les membres pour répondre aux besoins immédiats et aviser les RRF des problèmes nouveaux » (Statuts du PRRF, art. 14(B)). Les RRF et les sous-représentants sont censés communiquer avec la direction au niveau hiérarchique approprié (Statuts du PRRF, art. 13(B) et 14(B)(1); Entente entre le

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Agreement, s. 9(b) to (d). These procedures ensure that RCMP members may submit their workplace concerns to management through the SRRP.

[234] The SRRP also prescribes duties and obligations for management. For instance, the SRRP Constitution states that "[c]ommunication between Staff Relations Representatives and RCMP management will be conducted openly and honestly" and that "[r]equests for information or assistance should be met in the spirit of cooperation within reasonable time frames" (s. 3(G)). Management must also respond to SRR and NEC requests and proposals "in a timely and open fashion" (SRRP Agreement, s. 11(b)); grant access to documents necessary for the conduct of SRRP business (s. 11(c)); and "provide rationale for major decisions" (s. 11(d)). And, the trial judge accepted "that RCMP management listens carefully and with an open mind to the views of SRRs in the consultative process established by the SRRP" (para. 68). Viewed together, these duties ensure that management considers the representations of SRRs and sub-SRRs in good faith. It cannot be said that such a process makes it effectively impossible for RCMP members to pursue collective workplace goals.

[235] There is evidence of the effectiveness of the SRRP. While the achievement of workplace goals is not protected by s. 2(*d*) of the *Charter*, the fact that the SRRP has been effective in some respects supports a conclusion that the program does not render meaningful collective bargaining effectively impossible. Changes were made to RCMP pensions in response to concerns raised by an SRR. The SRRP was also successful in obtaining an increase both to members' entitled funeral expenses and to

commissaire et le PRRF, art. 9a)); ils doivent aussi défendre les intérêts des membres lors d'assemblées, devant les comités et dans le cadre d'études (Statuts du PRRF, art. 13(C) et 14(C); Entente entre le commissaire et le PRRF, art. 9b) à d)). Ce processus garantit que les membres de la GRC peuvent faire valoir leurs préoccupations relatives au travail auprès de la direction par l'entremise du PRRF.

[234] Le PRRF impose également certaines obligations à la direction. Par exemple, les Statuts du PRRF prévoient que « [l]a communication entre les représentants des relations fonctionnelles (RRF) et les cadres se fera de manière ouverte et honnête » et qu'on répondra aux « demandes de renseignements ou d'assistance dans un esprit de collaboration et dans un délai raisonnable » (art. 3(G)). La direction doit également répondre aux propositions et aux demandes des RRF ou du CEN « en temps opportun et de manière transparente » (Entente entre le commissaire et le PRRF, art. 11b)); « autorise[r] [. . .] l'accès aux [. . .] documents nécessaires à l'exécution des travaux du PRRF » (art. 11c)); et « justifie[r] toute décision importante » (art. 11d)). De plus, le juge de première instance a accepté le fait que [TRADUCTION] « la direction de la GRC écoute attentivement et avec un esprit ouvert les opinions exprimées par les RRF au cours du processus de consultation établi par le PRRF » (par. 68). Considérées globalement, ces obligations assurent que la direction tient compte de bonne foi des observations formulées par les RRF et par les sous-représentants. On ne peut pas dire que ce processus empêche effectivement les membres de la GRC de réaliser leurs objectifs collectifs relatifs au travail.

[235] En outre, des éléments de preuve tendent à démontrer l'efficacité du PRRF. Bien que la réalisation d'objectifs relatifs au travail ne soit pas protégée par l'al. 2*d*) de la *Charte*, le fait que le PRRF ait été efficace à certains égards permet de conclure que le programme ne rend pas effectivement impossible la tenue d'une véritable négociation collective. Des modifications ont été apportées au régime de retraite de la GRC en réponse aux préoccupations soulevées par un RRF. Le

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the minimum life insurance coverage for pensioners over 70 years of age, and in resolving inequities related to the Force's relocation program, to name a few examples. The action commenced by Messrs. Meredith and Roach challenging the *Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393, in the companion case of *Meredith*, indicates that SRRs do bring challenges against the employer in defence of employee interests.

[236] *Meredith* deals with issues relating to the Pay Council, which is separate from the SRRP, but which is one of two other bodies forming part of the labour relations regime of the RCMP. Two SRRs sit on the Pay Council to advocate the views of RCMP members on issues that have been identified by the SRRP Caucus or by management. The Pay Council makes recommendations about pay and benefits of RCMP members to the RCMP Commissioner. The Pay Council's objective is that RCMP members receive compensation near the average of the total compensation of the top three comparator police forces in Canada. Between 2000 and 2008, that objective was achieved in all but one year.

[237] In *Meredith*, the majority indicates that notwithstanding its finding that the labour relations regime imposed on members of the RCMP infringes freedom of association, the record established that RCMP members used the Pay Council to advance their compensation-related workplace goals: para. 25. With respect, if the scheme in place permits employees to make representations for good faith consideration by management in pursuit of collective workplace goals such as ensuring competitive rates of compensation, there is no principled basis upon which to hold it unconstitutional.

[238] The evidence indicates that the labour relations model adopted by Parliament does not make it effectively impossible for RCMP members to achieve their collective workplace goals. Even according to the new test articulated by the majority,

PRRF a également réussi à faire augmenter tant les frais funéraires auxquels les membres ont droit que l'assurance-vie de base des retraités de plus de 70 ans et à résoudre des iniquités relatives au programme de réinstallation de la GRC, pour ne nommer que quelques exemples. L'action introduite par MM. Meredith et Roach pour contester la *Loi sur le contrôle des dépenses*, L.C. 2009, c. 2, art. 393, dans le pourvoi connexe *Meredith*, indique aussi que les RRF défendent bel et bien les intérêts des employés en formulant des contestations contre l'employeur.

[236] L'affaire *Meredith* porte sur des questions relatives au Conseil de la solde, un organisme qui est distinct du PRRF, mais qui est l'un des deux autres organismes faisant partie du régime de relations de travail de la GRC. Deux RRF siègent au Conseil de la solde pour défendre les points de vue des membres de la GRC sur les questions qui ont été cernées par le Caucus du PRRF ou par la direction. Le Conseil de la solde formule des recommandations au sujet de la solde et des allocations des membres de la GRC et de son commissaire. Il vise à ce que la rémunération des membres de la GRC s'approche de la moyenne des trois corps de police canadiens ayant la rémunération la plus élevée dans le groupe de comparaison. Entre 2000 et 2008, cet objectif a été atteint chaque année sauf une.

[237] Dans *Meredith*, les juges majoritaires expliquent que, malgré leur conclusion selon laquelle le régime de relations de travail imposé aux membres de la GRC porte atteinte à leur liberté d'association, le dossier établit qu'ils se servent du Conseil de la solde pour tenter d'atteindre leurs objectifs en matière de rémunération (par. 25). J'estime, en toute déférence, que si le régime en vigueur permet aux employés de présenter des observations — dont la direction tient compte de bonne foi — afin d'atteindre des objectifs collectifs de travail tels que celui d'obtenir des taux de rémunération compétitifs, il n'y a aucune raison logique de déclarer ce régime inconstitutionnel.

[238] Suivant la preuve, le modèle de relations de travail qu'a retenu le législateur n'empêche pas effectivement les membres de la GRC de réaliser leurs objectifs collectifs relatifs au travail. Même en appliquant le nouveau test formulé par

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the imposition of the SRRP as a labour relations scheme does not substantially interfere with a meaningful process of collective bargaining for RCMP members.

[239] The trial judge ultimately held that the SRRP provides a process of consultation, but not collective bargaining. This conclusion appears to rest on the fact that, despite the process of consultation envisaged by the SRRP, final decisions are made by management: see trial reasons, at paras. 69-70.

[240] However, the constitutional right to collective bargaining prescribes no particular model of labour relations and does not necessitate a dispute resolution process. In *Fraser*, this Court held that the *Agricultural Employees Protection Act, 2002*, S.O. 2002, c. 16 ("*AEPA*"), applicable to Ontario agricultural workers satisfied the requirements of collective bargaining under s. 2(*d*) of the *Charter*: para. 117. It is incongruous for this Court to strike down the SRRP, which provides a process of collective bargaining that is more robust than the one contained in the *AEPA* and which was previously upheld by this Court. This inconsistent result is even all the more jarring given the vulnerability of Ontario agricultural workers when compared with the advantageous position of RCMP members, who are "educated, empowered, and organised" (R.F., at para. 86). This is yet further evidence that the majority in this case departs from this Court's recent decision in *Fraser*.

[241] The SRRP facilitates "'a process of collective action to achieve workplace goals', requiring engagement by both parties": *Fraser*, at para. 117. It also involves good faith consideration of employee representations by management. That Parliament chose a collaborative model like the SRRP as a means of facilitating employer-employee engagement for the national police force does not mean that that model has rendered it effectively impossible for RCMP members to achieve collective workplace

les juges majoritaires, l'imposition du PRRF à titre de régime de relations de travail n'entrave pas substantiellement le processus véritable de négociation collective auquel participent les membres de la GRC.

[239] Le juge de première instance a conclu en définitive que le PRRF prévoyait un processus de consultation et non un processus de négociation collective. Cette conclusion semble reposer sur le fait que, malgré le processus de consultation envisagé par le programme, les décisions finales sont prises par la direction (voir motifs de première instance, par. 69-70).

[240] Or, le droit constitutionnel à la négociation collective n'impose aucun modèle particulier de relations de travail et ne requiert pas un processus de règlement des différends. Dans *Fraser*, la Cour a jugé que la *Loi de 2002 sur la protection des employés agricoles*, L.O. 2002, c. 16 (« *LPEA* »), qui s'applique aux travailleurs agricoles de l'Ontario, satisfaisait aux exigences du droit à la négociation collective protégé par l'al. 2*d*) de la *Charte* (par. 117). Il est incongru que la Cour invalide le PRRF, qui prévoit un processus de négociation collective plus robuste que celui que prévoyait la *LPEA*, dont elle a pourtant confirmé la validité. Cette contradiction saute d'autant plus aux yeux lorsqu'on considère la vulnérabilité des travailleurs agricoles ontariens par rapport à la situation avantageuse des membres de la GRC, qui sont [TRADUCTION] « instruits, autonomes et organisés » (m.i., par. 86). Voilà une autre preuve que les juges majoritaires s'écartent du récent arrêt *Fraser* de la Cour.

[241] Le PRRF facilite « "une action collective visant à atteindre des objectifs liés au [. . .] travail" », et oblige les « deux parties [à] participer au processus » (*Fraser*, par. 117). Il suppose en outre que la direction examine de bonne foi le point de vue des employés. Le fait que le législateur ait retenu un modèle axé sur la collaboration comme le PRRF pour favoriser les relations employeurs-employés dans l'intérêt du corps policier national que constitue la GRC ne signifie pas qu'il est

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goals. The SRRP does not infringe s. 2(*d*) of the *Charter*.

(2) Paragraph (*d*) of the Definition of "Employee" in Section 2(1) of the *PSLRA*

[242] The *Public Service Staff Relations Act*, S.C. 1966-67, c. 72 ("*PSSRA*"), was enacted in 1967 and created the first comprehensive collective bargaining rights regime for federal public servants. However, a number of categories of federal public servants were not included in this new regime, including casual employees, employees in managerial or confidential positions, and RCMP members (paras. (*e*), (*g*) and (*j*) of the definition of "employee" in s. 2).

[243] In 2003, the *PSSRA* was repealed and replaced by the *Public Service Labour Relations Act*, enacted by the *Public Service Modernization Act*, S.C. 2003, c. 22, s. 2 ("*PSLRA*"), which modernized labour relations in the federal public service. Section 2(1) of the *PSLRA* defines "employee" as a "person employed in the public service" subject to a list of exceptions. Paragraph (*d*) states that "a person who is a member or special constable of the Royal Canadian Mounted Police or who is employed by that force under terms and conditions substantially the same as those of one of its members" is excluded from the definition of "employee". The result of this provision is that the *PSLRA* labour relations scheme does not apply to RCMP members.[2]

[244] The majority finds that para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* infringes RCMP members' rights under s. 2(*d*) of the *Charter*. However, it is evident that it is not

[2] Note that RCMP members are not excluded from Part 3 of the *PSLRA* — Occupational Health and Safety.

devenu effectivement impossible pour les membres de la GRC de réaliser leurs objectifs collectifs relatifs au travail. Le PRRF ne porte pas atteinte à l'al. 2*d*) de la *Charte.*

(2) L'alinéa *d*) de la définition de « fonctionnaire » qui figure au par. 2(1) de la *LRTFP*

[242] La *Loi sur les relations de travail dans la Fonction publique*, S.C. 1966-67, c. 72 (la « première *LRTFP* ») a été adoptée en 1967. Elle créait le premier régime complet de droits en matière de négociation collective pour les fonctionnaires fédéraux. Toutefois, certaines catégories de ces fonctionnaires étaient soustraites du champ d'application de ce régime, notamment les employés occasionnels, les employés occupant un poste de direction ou de confiance et les membres de la GRC (al. *e*), *g*) et *j*) de la définition de « fonctionnaire » qui figure à l'art. 2).

[243] En 2003, la première *LRTFP* a été abrogée et remplacée par l'actuelle *Loi sur les relations de travail dans la fonction publique* (la « *LRTFP* actuelle »), édictée par la *Loi sur la modernisation de la fonction publique*, L.C. 2003, c. 22, art. 2, de manière à moderniser les relations de travail dans la fonction publique fédérale. Le paragraphe 2(1) de la *LRTFP* actuelle définit comme suit le « fonctionnaire » : « personne employée dans la fonction publique », sous réserve d'une liste d'exceptions dont, à l'al. *d*), toute personne « qui est membre ou gendarme auxiliaire de la Gendarmerie royale du Canada, ou y est employée sensiblement aux mêmes conditions que ses membres ». Du fait de cette disposition, le régime de relations de travail créé par la *LRTFP* actuelle ne s'applique pas aux membres de la GRC[2].

[244] Les juges majoritaires concluent que l'al. *d*) de la définition de « fonctionnaire » qui figure au par. 2(1) de la *LRTFP* actuelle porte atteinte aux droits qui sont reconnus aux membres de la

[2] Il convient de signaler que les membres de la GRC ne sont pas soustraits au champ d'application de la partie 3 de la *LRTFP* actuelle — Santé et sécurité au travail.

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the purpose of the exclusion of RCMP members from the *PSLRA* to interfere with freedom of association nor is the effect of this exclusion to render collective bargaining effectively impossible. Moreover, the appellants' challenge to the exclusion of RCMP members from the federal public service labour relations regime was decisively dealt with in *Delisle*.

[245] The majority finds that the exclusion of RCMP members from the definition of "employee" in s. 2(1) of the *PSLRA* was "intended to deny RCMP members the right to form an independent association capable of engaging in a meaningful process of collective bargaining" (para. 126). In other words, the majority concludes that it was Parliament's intent to deny RCMP members' freedom of association. However, in *Delisle*, Bastarache J. found that "para. (*e*) of the definition of 'employee' in s. 2 of the *PSSRA* does not infringe s. 2(*d*) of the *Charter* in its purpose": para. 23.

[246] The conclusion of the majority in *Delisle* was that "the purpose of the exclusion of RCMP members is simply to not grant them any status under the *PSSRA* — trade union representation and all it entails — which does not violate the appellant's freedom of association": para. 22, per Bastarache J. The purpose of excluding RCMP members from the *PSLRA* is not to interfere with collective bargaining, but is driven by a legitimate concern that the model imposed under that legislation is ill suited to the national police force.

[247] It is true that *Delisle* was decided before *Health Services* and *Fraser* ushered in a more "purposive and generous approach to labour relations" (majority reasons, at para. 125). But the jurisprudential developments since *Delisle* do not allow this Court to conclude that the purpose of the exclusion is to deny RCMP members' associational rights. On the

GRC par l'al. 2*d*) de la *Charte*. Il est toutefois évident que leur exclusion du champ d'application de la *LRTFP* actuelle n'a pas pour objet de nuire à leur liberté d'association et n'a pas l'effet de rendre effectivement impossible la tenue de véritables négociations collectives. De plus, la contestation que font les appelantes de l'exclusion des membres de la GRC du régime général des relations de travail des fonctionnaires fédéraux a été tranchée de façon définitive dans l'arrêt *Delisle*.

[245] Les juges majoritaires estiment que l'exclusion des membres de la GRC de la définition du terme « fonctionnaire » qui figure au par. 2(1) de la *LRTFP* actuelle « vise à priver les membres de la GRC du droit de constituer une association indépendante capable de participer à un processus véritable de négociation collective » (par. 126). Autrement dit, les juges majoritaires ont conclu que l'intention du législateur était bel et bien de priver les membres de la GRC de la liberté d'association. Pourtant, dans l'arrêt *Delisle*, le juge Bastarache a conclu que « l'al. *e*) de la définition de "fonctionnaire" contenue à l'art. 2 de la [première] *LRTFP* ne porte pas atteinte par son objet à l'al. 2*d*) de la *Charte* » (par. 23).

[246] Selon la conclusion des juges majoritaires dans l'arrêt *Delisle*, « l'objet de l'exclusion des membres de la GRC est simplement de ne pas leur accorder de statut sous le régime de la *LRTFP*, soit la représentation syndicale et tout ce qu'elle entraîne, ce qui ne viole pas la liberté d'association de l'appelant » (par. 22, le juge Bastarache). L'exclusion des membres de la GRC du champ d'application de la *LRTFP* n'a pas pour objet de nuire à la négociation collective; elle est plutôt motivée par la crainte légitime que le modèle prévu par cette loi ne convienne pas au service de police national que constitue la GRC.

[247] Certes, l'arrêt *Delisle* a été rendu avant que les arrêts *Health Services* et *Fraser* ne marquent le début d'une nouvelle ère se caractérisant par « des interprétations téléologiques et généreuses dans le contexte des relations de travail » (motifs des juges majoritaires, par. 125). Cependant, l'évolution de la jurisprudence depuis l'arrêt *Delisle* ne

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contrary, the conclusion in *Delisle* was reaffirmed by this Court's statements in *Health Services* and *Fraser* that s. 2(*d*) of the *Charter* does not guarantee the right to a particular labour relations model or process. I do not agree with the reversal of these decisions.

[248] The evolution in the legal understanding of s. 2(*d*) bears no relation to the majority's finding in *Delisle* as to the purpose of the *PSSRA*, and thus cannot be used to support revisiting the issues settled in *Delisle*. Contrary to the majority's view in the case at bar, *Bedford* does not stand for the proposition that an evolution in one aspect of the law allows this Court (and lower courts) to discard all aspects of a previous decision. In this respect, *Bedford* merely stands for the proposition that courts can revisit *the particular legal issue* that has been found to have evolved dramatically.

[249] There has been no change of circumstances since this Court's 1999 decision in *Delisle* that would justify abandoning the determination of the purpose of the exclusion of RCMP members from the general federal public service labour relations scheme at issue in that case. In fact, quite the opposite: changes to the SRRP since 1999 have reinforced the understanding that the program's goal is to enhance representation of the interests of RCMP members without the imposition of an adversarial model. The SRRP Constitution, adopted in 2002, provides that its primary purpose is "to promote mutually beneficial relations between Force management and the wider membership" and states that the SRRP "will be recognized as the system and program of choice for management-employee relations for members of the RCMP" (ss. 2 and 3(A)). Likewise, an October 2002 agreement between the NEC of the SRRP and the RCMP Commissioner states that "[m]anagement at all appropriate levels will . . . recognize the role of the [SRRP]; . . . respond to proposals . . . from [the

permet pas à la Cour de conclure que l'exclusion en question vise à priver les membres de la GRC de la liberté d'association. Au contraire, la conclusion tirée dans cet arrêt a été confirmée par la Cour dans *Health Services* et *Fraser* lorsqu'elle a affirmé que l'al. 2*d*) de la *Charte* ne garantit pas le droit à un modèle ou à un processus particulier en matière de relations de travail. Je ne suis pas d'accord pour répudier ces décisions.

[248] L'évolution de l'interprétation juridique de l'al. 2*d*) n'a rien à voir avec la conclusion tirée par les juges majoritaires dans l'arrêt *Delisle* en ce qui concerne l'objet de la première *LRTFP*. On ne peut donc pas s'en servir pour revenir sur des questions qui ont été tranchées dans cet arrêt. Contrairement à ce qu'estiment les juges majoritaires dans la présente cause, à mon avis, l'arrêt *Bedford* ne permet pas d'affirmer que l'évolution d'un aspect du droit autorise la Cour — et les juridictions inférieures — à écarter tous les aspects d'une décision antérieure. À cet égard, l'arrêt *Bedford* se borne à appuyer la proposition selon laquelle les tribunaux peuvent réexaminer *le point de droit bien précis* dont ils ont conclu qu'il a fait l'objet d'une évolution spectaculaire.

[249] Depuis l'arrêt *Delisle* de la Cour rendu en 1999, il n'est survenu aucun changement de situation qui justifierait d'écarter la raison retenue dans cet arrêt pour expliquer l'exclusion des membres de la GRC du régime général des relations de travail régissant les fonctionnaires fédéraux en cause en l'espèce. En fait, c'est plutôt le contraire qui s'est produit : les modifications apportées au PRRF depuis 1999 ont renforcé l'idée que ce dernier a pour objet d'améliorer la défense des intérêts des membres de la GRC sans imposer un modèle contradictoire. Les Statuts du PRRF, qui ont été adoptés en 2002, prévoient en effet que le principal objectif du programme est de « promouvoir des relations mutuellement avantageuses entre la direction et les membres de la Gendarmerie » et qu'il « sera reconnu comme l'unique mécanisme de gestion des relations entre les membres et la direction de la GRC » (art. 2 et 3(A)). De même, l'entente conclue en octobre 2002 entre le CEN du PRRF et le commissaire de la GRC stipule que

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SRRs] . . . in a timely fashion; and . . . provide rationale for major decisions" and that "[m]anagement and the [SRRP] will consult on specific human resources initiatives and national policy center committees in a timely and meaningful fashion" (SRRP Agreement, ss. 11(a), (b) and (d), 24). That Agreement also states that "[a]lthough final decisions rest with management, consultation will promote an active participatory regime" (s. 24).

« [l]es cadres de tous les niveaux pertinents [. . .] reconnaîtront le rôle du PRRF [et] répondront aux propositions [. . .] des RRF [. . .] en temps opportun et de manière transparente » et que « [l]a direction et les intervenants du PRRF se consulteront de manière utile et opportune sur les initiatives spéciales touchant les ressources humaines et sur les travaux des comités des centres nationaux de décision » (Entente entre le commissaire et le PRRF, al. 11a), b) et d), et art. 24). Cette entente stipule en outre que « [b]ien que les décisions finales incombent à la direction, la consultation favorisera la participation active des RRF » (art. 24).

[250] Even if we were to accept that *Delisle* was incorrectly decided and that the purpose of para. (*e*) of the definition of "employee" in s. 2 of the *PSSRA* in 1967 was to deny RCMP members meaningful collective bargaining, it does not follow that this continues to be the purpose of para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* today. The legislative context in which the exclusion operates has changed significantly since the *PSSRA* was enacted in 1967. To argue that Parliament may never revise its views as to the purpose of a statute or of a particular provision thereof in light of changes to the framework in which the statutory provision operates and must forever be held to the purpose it envisioned for the statute on the day of its initial enactment, is a fiction and fails to take into account the actual history of the legislative provision.

[250] Même si nous devions considérer que l'arrêt *Delisle* est mal fondé et que l'al. *e*) de la définition de « fonctionnaire » qui figure au par. 2 de la première *LRTFP* dans sa rédaction en vigueur en 1967 avait pour objet de priver les membres de la GRC d'une véritable négociation collective, il ne s'ensuit pas pour autant qu'il s'agit toujours de l'objectif visé par la disposition équivalente de la *LRTFP* actuelle (al. *d*) de la définition de « fonctionnaire » qui figure au par. 2(1)). Le contexte législatif dans lequel cette exclusion s'applique a considérablement évolué depuis l'adoption de la première *LRTFP* en 1967. Prétendre que le législateur ne peut jamais changer d'avis sur l'objet d'une loi ou d'une des dispositions de celle-ci à la lumière des changements apportés au cadre dans lequel elle s'applique et soutenir que le législateur doit s'en tenir à jamais à l'objectif qu'il avait en tête au moment où la version originale de la loi a été édictée est une illusion qui fait abstraction de l'historique véritable de la disposition législative en cause.

[251] When the *PSSRA* was enacted in 1967, there were two Orders in Council which forbade RCMP members from engaging in any collective bargaining activity. These were later revoked and, in 1974, the Division Staff Relations Representative Program was created, the predecessor of the SRRP (*Commissioner's Standing Orders (Division Staff Relations Representative Program)*, made pursuant to s. 21(2) of the *Royal Canadian Mounted Police Act*, R.S.C. 1970, c. R-9).

[251] Lorsque la première *LRTFP* a été adoptée en 1967, deux décrets interdisaient aux membres de la GRC de participer à des activités de négociation collective. Ultérieurement, ces décrets ont été abrogés et, en 1974, le Programme des représentants divisionnaires des relations fonctionnelles, le prédécesseur du PRRF, a été créé (*Consignes du Commissaire (Programme des représentants divisionnaires des relations fonctionnelles)*, édictées en application du par. 21(2) de la *Loi sur la Gendarmerie royale du Canada*, S.R.C. 1970, c. R-9).

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[252] By 2003, when the *PSSRA* was replaced by the *PSLRA*, the RCMP labour relations scheme was considerably changed from that which existed in 1967. When s. 2 of the *PSSRA* was replaced by s. 2(1) of the *PSLRA*, Parliament reduced the number of exclusions from the definition of "employee" in the Act, thus expanding the categories of public servants who would be subject to the new statutory labour relations scheme. Parliament, however, maintained the exclusion of RCMP members. The decision to continue the exclusion was made with the knowledge that doing so did not deny members collective bargaining rights. These individuals were subject to a parallel labour relations regime — the SRRP.

[253] In *Big M Drug Mart*, this Court rejected the idea that legislative provisions could have shifting purposes in response to changing social conditions (see pp. 334-36). However, in this appeal, we are faced not with a question of social change, but of legislative change. The purpose of the exclusion of RCMP members from the *PSSRA* and subsequently from the *PSLRA* has changed, as can be seen in the evolution of relevant statutory and regulatory provisions. Subsequent legislative changes may evidence a change in the purpose of Parliament in re-enacting a statutory provision. This is precisely what has occurred in this case. To ignore the significantly different context in which the exclusion of RCMP members was re-enacted in the *PSLRA* disregards the current legislative reality.

[254] Parliament chose to create a collaborative labour relations model for the RCMP, to address concerns about divided loyalties and interruptions in the essential services provided by this national police force. The majority now makes the policy choice that an adversarial Wagner-type model of labour relations is necessary. With respect, Parliament, as the provider of the essential service delivered by the RCMP, must be accorded deference

[252] En 2003, lorsque l'ancienne loi a été remplacée par la *LRTFP* actuelle, le régime de relations de travail de la GRC a été modifié de fond en comble par rapport à celui qui existait en 1967. En remplaçant l'art. 2 de l'ancienne loi par le par. 2(1) de la nouvelle loi, le législateur a réduit le nombre d'exceptions prévues par la Loi, applicables au terme « fonctionnaire », élargissant ainsi les catégories de fonctionnaires assujettis au nouveau régime légal de relations de travail. Il a toutefois maintenu l'exclusion des membres de la GRC. Il a pris cette décision en étant conscient du fait que cela n'avait pas pour effet de priver les membres de la GRC de leurs droits à la négociation collective. Ces individus étaient simplement assujettis à un régime de relations de travail parallèle : le PRRF.

[253] Dans l'arrêt *Big M Drug Mart*, la Cour a écarté l'idée que des dispositions législatives pouvaient avoir un objet changeant pour répondre à l'évolution de la société (voir p. 334-336). Toutefois, dans le présent pourvoi, il ne s'agit pas d'une question d'évolution sociale, mais de modification législative. La raison qui a motivé et qui motive l'exclusion des membres de la GRC des deux versions de la *LRTFP* a changé, comme le démontre l'évolution des dispositions législatives et réglementaires pertinentes. Les modifications législatives ultérieures peuvent faire état d'un changement survenu dans l'objet que visait le législateur en adoptant de nouveau une disposition législative. C'est précisément ce qui s'est produit dans le cas qui nous occupe. Ignorer le contexte radicalement différent dans lequel l'exclusion des membres de la GRC a été adoptée de nouveau dans la *LRTFP* actuelle revient à méconnaître la réalité législative actuelle.

[254] Le législateur a choisi de créer, pour la GRC, un modèle de relations de travail axé sur la collaboration. Cela visait à dissiper tout doute pouvant exister quant aux sentiments de loyauté partagée des membres ou quant à d'éventuelles interruptions dans les services essentiels offerts par ce corps policier national. Les juges majoritaires décident aujourd'hui qu'il est nécessaire de choisir un modèle de relations de travail contradictoire de

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in the manner in which it ensures stability and reliability of that service. Courts must be cognizant of the delicate balance that labour relations regimes seek to maintain between employers, employees, and the public, and of the different contexts for which legislatures must adapt their labour relations policies. As earlier explained, para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* does not have the effect of infringing the constitutional right of RCMP members to a meaningful process of collective bargaining, and thus Parliament's policy judgments should not be disturbed.

[255] The majority asserts that s. 2(*d*) of the *Charter* does not mandate the Wagner model of labour relations. With respect, the effect of its decision is precisely that: it has restricted the government to the *PSLRA* or a regime with essentially the same characteristics. The constitutional entrenchment of choice and independence show that the majority creates an illusion of flexibility by saying that "it remains open to the federal government to explore other collective bargaining processes" for the RCMP (para. 137).

[256] Courts are not best placed to decide which specific labour relations scheme is best suited for a particular group of employees. In my view, requiring RCMP members to be included in the *PSLRA* or equivalent scheme is "to enter the complex and political field of socio-economic rights and unjustifiably encroach upon the prerogative of Parliament": *Delisle*, at para. 23.

(3) Section 1 of the *Charter*

[257] Although my conclusions as to the constitutionality of both the imposition of the SRRP

type Wagner. Soit dit en tout respect, il y a lieu de faire preuve de déférence envers le législateur, en sa qualité de fournisseur du service essentiel offert par la GRC, pour ce qui est des moyens qu'il préconise pour assurer la stabilité et la fiabilité de ce service. Les tribunaux doivent être conscients de l'équilibre délicat que les régimes de relations de travail tentent de maintenir entre les employeurs, les employés et le public, et de la nécessité de tenir compte des différents contextes en fonction desquels le législateur doit adapter les politiques en matière de relations de travail. Comme je l'ai déjà expliqué, l'al. *d*) de la définition de « fonctionnaire » qui figure au par. 2(1) de la *LRTFP* actuelle n'a pas pour effet de porter atteinte au droit constitutionnel des membres de la GRC à une véritable négociation collective, et l'on ne devrait donc pas modifier les décisions de principe prises par le législateur.

[255] Les juges majoritaires affirment que l'al. 2*d*) de la *Charte* n'impose pas le modèle Wagner en matière de relations de travail. En toute déférence, c'est toutefois précisément l'effet qu'a leur décision : elle oblige le gouvernement à s'en tenir à la *LRTFP* actuelle ou encore à un régime qui possède essentiellement les mêmes caractéristiques. La constitutionnalisation de la liberté de choix et de l'indépendance démontre que les juges majoritaires créent l'illusion de souplesse en affirmant que « le gouvernement fédéral peut toujours examiner d'autres processus de négociations collectives » pour la GRC (par. 137).

[256] Les tribunaux ne sont pas les autorités les mieux placées pour se prononcer sur le régime de relations de travail qui convient le mieux à un groupe d'employés précis. À mon avis, le fait d'obliger les membres de la GRC à relever de la *LRTFP* actuelle « pén[ètre] dans le domaine complexe et politique des droits socio-économiques et emp[iète] de façon injustifiée sur les prérogatives du Parlement » (*Delisle*, par. 23).

(3) Article premier de la *Charte*

[257] Bien que mes conclusions quant à la constitutionnalité à la fois de l'imposition du PRRF en

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as a labour relations scheme and the exclusion of RCMP members from the application of the *PSLRA* make it unnecessary to consider whether *Charter* infringements are justified, I will nonetheless comment briefly on the s. 1 analysis conducted by the majority.

[258] The majority concedes that the government's objective in this case — maintaining an independent and objective police force — is pressing and substantial. Although the majority acknowledges that the rational connection test is not onerous, it concludes that that test is not met in this case. To satisfy the rational connection test, the government must demonstrate that it is logical and reasonable to conclude that the impugned action will help bring about its objective — not that it will inevitably succeed: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at para. 228; *Health Services*, at paras. 148-49; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 40.

[259] The state need not always adduce direct proof of a relationship between the infringing measure and the legislative objective. So long as it has been shown that logic and reason would lead one to conclude that the impugned measure will help the government attain its objective, the rational connection threshold has been met: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 154; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 101. The low threshold discussed above is met where the legislature has implemented a collaborative model of labour relations in order to achieve a neutral, stable, and reliable national police force. It is reasonable to conclude, as explained below, that a police force which is polarized by adversarial posturing or that could be called to inaction when other bargaining units are on strike, will be viewed as less objective, neutral and reliable by the public.

tant que régime de relations de travail et de l'exclusion des membres de la GRC du champ d'application de la *LRTFP* actuelle rend inutile l'examen de la question de savoir si les atteintes portées à la *Charte* sont justifiées, je tiens malgré tout à formuler de brefs commentaires au sujet de l'analyse de l'article premier faite par les juges majoritaires.

[258] Mes collègues admettent que, dans le cas qui nous occupe, l'objectif du gouvernement — soit le maintien d'une force policière indépendante et objective — est urgent et réel. Tout en admettant que le critère du lien rationnel ne soit pas particulièrement exigeant, les juges majoritaires estiment qu'il n'a pas été respecté en l'espèce. Pour satisfaire à ce critère, le gouvernement doit démontrer qu'il est logique et raisonnable de conclure que la mesure contestée facilitera la réalisation de son objectif — et non qu'elle permettra inévitablement de le réaliser (*Little Sisters Book and Art Emporium c. Canada (Ministre de la Justice)*, 2000 CSC 69, [2000] 2 R.C.S. 1120, par. 228; *Health Services*, par. 148-149; *Canada (Procureur général) c. JTI-Macdonald Corp.*, 2007 CSC 30, [2007] 2 R.C.S. 610, par. 40).

[259] Il n'est pas toujours nécessaire que l'État présente une preuve directe d'un lien entre la mesure attentatoire et l'objectif législatif. Dès lors qu'il a été démontré que la logique et la raison mèneraient à conclure que la mesure contestée aidera le gouvernement à atteindre son objectif, il a été satisfait au critère du lien rationnel (*RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199, par. 154; *Ross c. Conseil scolaire du district n^o^ 15 du Nouveau-Brunswick*, [1996] 1 R.C.S. 825, par. 101). Il est satisfait au critère peu exigeant dont il a été question précédemment si le législateur a mis en œuvre un modèle de relations de travail axé sur la collaboration de manière à ce que le pays soit doté d'un corps policier national neutre, stable et fiable. On peut raisonnablement conclure, comme je l'expliquerai plus loin, qu'une force policière qui est polarisée par des prises de position conflictuelles ou qui pourrait se voir ordonner de refuser d'intervenir lorsque d'autres unités de négociation sont en grève sera jugée moins objective, neutre et fiable par le public.

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[260] The majority does not accept the argument made by the Attorney General of Canada that labour action by the RCMP could disrupt the stability of the Force and affect the perception of it as a neutral law-enforcing body. The majority, however, disregards the fact that RCMP members play a special role in cases of national security, in emergency situations occurring in communities which do not have access to other police forces, and in situations where they can be called upon to interject in the labour disputes of others. Although unionized provincial police forces do not generally have the right to strike, there have been incidents of working to rule and job actions by municipal police forces in Hamilton, Toronto, Montréal and Québec. Some have even resorted to illegal strikes. Parliament is entitled to address concerns that an adversarial association might order its members to refuse to intervene in certain circumstances involving the labour disputes of others or that belonging to such associations could inhibit members from responding to such situations impartially.

[260] Les juges majoritaires n'acceptent pas l'argument du procureur général du Canada suivant lequel les activités syndicales de la GRC risquent de perturber la stabilité de la force policière et de nuire à la perception qu'elle donne en tant qu'organisme neutre de maintien de l'ordre. Ils font toutefois abstraction du fait que les agents de la GRC jouent un rôle unique lorsqu'il est question de sécurité nationale, lorsque surviennent des situations d'urgence dans des communautés qui n'ont pas accès à d'autres corps policiers, de même que dans des situations lors desquelles ils peuvent être appelés à intervenir dans des conflits de travail opposant d'autres corps policiers avec leur direction. Bien que les forces policières provinciales syndiquées ne jouissent pas, en principe, du droit de grève, on a assisté à des incidents de grève du zèle et à des moyens de pression de la part de forces policières municipales à Hamilton, Toronto, Montréal et Québec. Certaines ont même eu recours à des débrayages illégaux. Le législateur a le droit de se préoccuper du fait qu'une association fondée sur un modèle contradictoire pourrait ordonner à ses membres de refuser d'intervenir dans certaines circonstances où il est question de conflits de travail d'autres groupes ou que le fait d'appartenir à de telles associations pourrait amener les membres à hésiter à répondre à de telles situations de façon impartiale.

[261] In considering whether the SRRP minimally impairs freedom of association, the majority again starts from the premise that a labour relations scheme that is non-adversarial will not be within the range of reasonable alternatives that satisfy the minimal impairment standard. While acknowledging that the government is not bound to follow the least impairing means to achieve its end, the majority finds the SRRP inadequate in comparison to the adversarial labour relations schemes of provincial police forces. Again, the majority refuses to acknowledge that the RCMP is materially different from other Canadian police forces.

[261] Pour examiner la question de savoir si le PRRF porte atteinte de façon minimale à la liberté d'association, les juges majoritaires partent là encore du principe qu'un régime de relations de travail qui n'est pas contradictoire ne fait pas partie des solutions de rechange raisonnables qui satisfont à la norme de l'atteinte minimale. Tout en reconnaissant que le gouvernement n'est pas tenu de prendre le moyen le moins attentatoire possible pour atteindre son objectif, les juges majoritaires concluent que le PRRF est inadéquat par rapport aux régimes de relation de travail contradictoires applicables dans le cas de certaines forces policières provinciales. Là encore, les juges majoritaires refusent de reconnaître à quel point la GRC est différente des autres forces policières canadiennes.

[262] The majority argues that

[262] Les juges majoritaires expliquent que

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concerns about the independence of the members of the Force could easily be considered in determining the scope of the police bargaining unit under schemes like the *PSLRA*, without requiring total exclusion from bargaining in the present regime. For example, s. 4 of the *Labour Code*, CQLR, c. C-27, restricts the membership and affiliations of municipal police associations. [para. 152]

dans des régimes comme celui de la *LRTFP* actuelle, les préoccupations quant à l'indépendance des membres de la Force pourraient facilement être examinées au moment de déterminer l'étendue de l'unité de négociation — sans qu'une exclusion totale ne soit nécessaire. Par exemple, l'art. 4 du *Code du travail*, RLRQ, c. C-27, impose des restrictions en matière d'appartenance et d'affiliation aux associations de policiers municipaux. [par. 152]

With respect, the scope of the bargaining unit is beside the point. A unionized national police force would be inconsistent with the government's pressing and substantial objective, as any adversarial, Wagner-style collective bargaining; whether the bargaining unit is restricted to RCMP members or not risks compromising the objectivity and independence of the Force.

Soit dit en tout respect, j'estime que l'étendue de l'unité de négociation n'a rien à voir avec la question. L'existence d'un corps policier national syndiqué est incompatible avec l'objectif urgent et réel visé par le gouvernement, comme tout modèle de négociation collective contradictoire de type Wagner, et risque de compromettre l'objectivité et l'indépendance de notre service de police national, et ce, peu importe que l'unité de négociation soit composée uniquement de membres de la GRC ou non.

[263] As acknowledged by LeBel J., at para. 275 of *Advance Cutting*, "differences between legislative approaches to similar problems are part of the very fabric of the Canadian constitutional experience". He observed that in a "system of divided legislative authority", where members within the federation have different cultural and historical experiences, "the principle of federalism means that the application of the *Charter* in fields of provincial jurisdiction does not amount to a call for legislative uniformity" (*ibid.*). This reasoning also applies to the legislative policy choices of Parliament which must address not only local interests but also the broader public interest, including national security.

[263] Comme le juge LeBel l'a reconnu au par. 275 de l'arrêt *Advance Cutting*, « les différences entre les mesures législatives visant des problèmes semblables font partie de la nature même de l'expérience constitutionnelle canadienne ». Le juge LeBel a en outre fait observer que, « [d]ans un système de partage des compétences législatives » où les membres de la fédération ont vécu des expériences culturelles et historiques différentes, « le principe du fédéralisme signifie que l'application de la *Charte* dans les domaines de compétence provinciale n'équivaut pas à un appel à l'uniformité des lois » (*ibid.*). Ce raisonnement vaut également pour les choix politiques du législateur, qui doit tenir compte non seulement des enjeux locaux, mais également des enjeux plus larges, comme la sécurité nationale.

[264] It follows that the salutary effects of the imposition of the SRRP outweigh any deleterious effects.

[264] Il s'ensuit que les effets bénéfiques de l'imposition du PRRF l'emportent sur ses effets préjudiciables.

[265] The RCMP is a unique Canadian law enforcement organization. Not only is it our national police force, but it also provides provincial and municipal policing services in much of the country, as well as providing police services to international

[265] La GRC est un organisme canadien chargé de l'application de la loi unique en son genre. Non seulement est-elle notre service de police national, mais elle offre également des services de police provinciaux et municipaux dans une bonne

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airports and hundreds of Aboriginal communities. The RCMP provides protective services to Canadian and foreign dignitaries, security at significant national and international events in Canada, and border policing. It provides specialized policing services to all police services in Canada, including criminal intelligence, biological evidence recovery, DNA analysis, fingerprint and criminal record information, and ballistics identification. The RCMP also runs the Canadian Firearms Program, the Canadian Police Information Centre, the Canadian Police College, the National Child Exploitation Coordination Centre, the National Sex Offender Registry, and the Technological Crime Program. Across Canada, the RCMP enforces a host of federal laws, including those dealing with commercial crime, counterfeiting, drug trafficking, organized crime, and terrorism.

partie du pays, en plus d'offrir des services policiers aux aéroports internationaux et à des centaines de communautés autochtones. La GRC offre des services de protection aux dignitaires canadiens et étrangers, des services de sécurité lors de la tenue d'événements d'envergure nationale et internationale en sol canadien, ainsi que des contrôles aux frontières. De plus, elle offre des services de police spécialisés à tous les corps policiers canadiens, notamment en matière de renseignements criminels, de prélèvement de preuves biologiques, d'analyse génétique, de renseignements sur les empreintes digitales et les antécédents judiciaires et d'analyse balistique. La GRC dirige également le Programme canadien des armes à feu, le Centre d'information de la police canadienne, le Collège canadien de police, le Centre national de coordination contre l'exploitation des enfants, le Registre national des délinquants sexuels et le Programme de la criminalité technologique. Sur l'ensemble du territoire canadien, la GRC veille au respect d'une foule de lois fédérales, y compris celles portant sur les crimes commerciaux, la contrefaçon, le trafic de stupéfiants, le crime organisé et le terrorisme.

[266] The government must be entitled to organize RCMP labour relations in view of the distinctive and essential role the Force plays as our national police force. Labour action by RCMP members could cause disruption on a different order of magnitude than that of similar action by other police forces. It could also have adverse effects on other law enforcement agencies across Canada.

[266] Le gouvernement doit avoir le droit d'organiser les relations de travail au sein de la GRC en tenant compte du rôle particulier et essentiel qui lui est dévolu en tant que service de police national. Des mesures que pourraient prendre des agents de la GRC dans le contexte d'un conflit de travail seraient susceptibles de causer des perturbations d'une ampleur différente de celles qu'entraîneraient des mesures similaires mettant en cause d'autres corps policiers. Elles pourraient aussi avoir des répercussions négatives sur d'autres organismes chargés d'appliquer la loi partout au Canada.

[267] Parliament's decision to use a collaborative scheme for labour relations within the RCMP is consistent with international instruments regarding freedom of association. While international conventions and covenants do not prevent domestic law from granting associational rights to police forces, the wording of those instruments reflects the fact that other countries may find it reasonable to restrict such rights in comparable contexts. See, for

[267] La décision du législateur de recourir à un régime axé sur la collaboration dans le cas de la GRC s'accorde avec ce que prévoient les instruments internationaux en matière de liberté d'association. Bien que les conventions et les pactes internationaux n'empêchent pas les législateurs nationaux d'accorder des droits d'association aux forces policières, il ressort du libellé de ces instruments que d'autres pays peuvent juger raisonnable

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example, the International Labour Organization's *Convention (No. 87) concerning freedom of association and protection of the right to organize*, 68 U.N.T.S. 17, art. 9, the United Nations' *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, art. 8, and the United Nations' *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, art. 22.

[268] Even if para. (*d*) of the definition of "employee" in s. 2(1) of the *PSLRA* were found to breach s. 2(*d*) of the *Charter*, it constitutes a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society and is therefore justified under s. 1 of the *Charter*.

IV. Conclusion

[269] The appellants have failed to establish that the SRRP makes meaningful association to achieve workplace goals effectively impossible. This labour relations scheme is responsive to employee interests and accountable to employees. The majority departs from this Court's recent jurisprudence on freedom of association in order to justify a particular result in this case. So long as it is not effectively impossible for employees to make collective representations on workplace issues, through individuals who are representative of their interests, and that those representations are considered by management in good faith, there is no violation of s. 2(*d*) of the *Charter*.

[270] I would dismiss the appeal with costs to the respondent.

Appeal allowed with costs, ROTHSTEIN J. *dissenting.*

Solicitors for the appellants: Laura Young Law Offices, Toronto.

de restreindre ces droits dans des contextes comparables. Voir, par exemple, la *Convention (nº 87) concernant la liberté syndicale et la protection du droit syndical* de l'Organisation internationale du Travail, 68 R.T.N.U. 17, art. 9, le *Pacte international relatif aux droits économiques, sociaux et culturels* des Nations Unies, 993 R.T.N.U. 3, art. 8, et le *Pacte international relatif aux droits civils et politiques* des Nations Unies, 999 R.T.N.U. 171, art. 22.

[268] Même si l'on devait conclure que l'al. *d*) de la définition de « fonctionnaire » qui figure au par. 2(1) de la *LRTFP* actuelle porte atteinte au droit protégé par l'al. 2*d*) de la *Charte*, cette atteinte constituerait une limite raisonnable prescrite par une règle de droit et dont la justification pourrait se démontrer dans le cadre d'une société libre et démocratique au sens de l'article premier de la *Charte*.

IV. Conclusion

[269] Les appelantes n'ont pas réussi à démontrer que le PRRF empêche effectivement les employés de s'associer véritablement en vue de réaliser des objectifs relatifs au travail. Le présent modèle de relations de travail tient compte des intérêts des employés et assure que des comptes leur soient rendus. Les juges majoritaires rompent avec la jurisprudence récente de la Cour sur la liberté d'association pour justifier un résultat particulier en l'espèce. J'estime, pour ma part, que dès lors qu'il n'est pas effectivement impossible pour les employés de formuler des revendications collectives au sujet de questions relatives à leurs conditions de travail par l'entremise de personnes qui représentent leurs intérêts et que la direction tient compte de ces revendications de bonne foi, il n'y a pas violation du droit protégé par l'al. 2*d*) de la *Charte*.

[270] Je rejetterais le pourvoi, avec dépens en faveur de l'intimé.

Pourvoi accueilli avec dépens, le juge ROTHSTEIN *est dissident.*

Procureurs des appelantes : Laura Young Law Offices, Toronto.

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Solicitor for the respondent: Attorney General of Canada, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener Association des membres de la Police Montée du Québec Inc.: Duggan avocats, Montréal.

Solicitors for the intervener the Mounted Police Members' Legal Fund: Fasken Martineau DuMoulin, Toronto.

Solicitors for the intervener Confédération des syndicats nationaux: Laroche Martin, Montréal.

Solicitors for the intervener the Canadian Police Association: Paliare Roland Rosenberg Rothstein, Toronto.

Solicitors for the intervener the Canadian Labour Congress: Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Bennett Jones, Toronto.

Solicitors for the intervener the Public Service Alliance of Canada: Raven, Cameron, Ballantyne & Yazbeck, Ottawa.

Solicitors for the intervener the British Columbia Civil Liberties Association: Moore, Edgar, Lyster, Vancouver.

Procureur de l'intimé : Procureur général du Canada, Toronto.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Vancouver.

Procureur de l'intervenant le procureur général de la Saskatchewan : Procureur général de la Saskatchewan, Regina.

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Edmonton.

Procureurs de l'intervenante l'Association des membres de la Police Montée du Québec Inc. : Duggan avocats, Montréal.

Procureurs de l'intervenant le Fonds de recours juridique des membres de la Gendarmerie : Fasken Martineau DuMoulin, Toronto.

Procureurs de l'intervenante la Confédération des syndicats nationaux : Laroche Martin, Montréal.

Procureurs de l'intervenante l'Association canadienne des policiers : Paliare Roland Rosenberg Rothstein, Toronto.

Procureurs de l'intervenant le Congrès du travail du Canada : Sack Goldblatt Mitchell, Toronto.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : Bennett Jones, Toronto.

Procureurs de l'intervenante l'Alliance de la Fonction publique du Canada : Raven, Cameron, Ballantyne & Yazbeck, Ottawa.

Procureurs de l'intervenante l'Association des libertés civiles de la Colombie-Britannique : Moore, Edgar, Lyster, Vancouver.

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BCLRB No. B308/93
(Leave for Reconsideration of IRC No. C217/92 and BCLRB No. B49/93)

BRITISH COLUMBIA LABOUR RELATIONS BOARD

ISLAND MEDICAL LABORATORIES LTD.

("IML")

- and -

DUECK CHEVROLET OLDSMOBILE CADILLAC LIMITED

("Dueck")

-and-

TEAMSTERS LOCAL UNION NO. 213

("Teamsters")

-and-

HEALTH SCIENCES ASSOCIATION OF BRITISH COLUMBIA

("HSA")

PANEL: Stan Lanyon, Chair
Brent Mullin, Vice-Chair
Keith Oleksiuk, Vice-Chair

COUNSEL: Michael A. Coady, for IML
Jeanne Myers, for HSA
Patricia M. Gallivan, for Dueck
Ed Norman, for the Teamsters

CASE NOS.: 13557 and 14425

DATE OF HEARING: May 25, 1993

DATE OF DECISION: September 21, 1993

DECISION OF THE BOARD

I. NATURE OF APPLICATION

This matter arises from the consolidation of two applications for reconsideration. One concerns a decision of the Labour Relations Board and the other a decision of the Industrial Relations Council. In each case the employer applies for a reconsideration of a decision that the bargaining units proposed by the respective unions was appropriate for certification.

The first application is that of Dueck Chevrolet Oldsmobile Cadillac Limited, pursuant to Section 36 of the *Industrial Relations Act* for reconsideration of IRC No. C217/92. The second application is that of Island Medical Laboratories Ltd., pursuant to Section 141 of the *Labour Relations Code*, for leave to apply for reconsideration of BCLRB No. B49/93 . The two matters were consolidated due to the similarity of the applications.

II. TRANSITIONAL

Dueck's application is for reconsideration of a decision of the Industrial Relations Council, and was filed under the *Industrial Relations Act.* The right to appeal is a substantive right, and in Dueck's case is one which had crystallized prior to the *Labour Relations Code* coming into force. Therefore, Dueck is entitled to have the decision reconsidered, without having to apply for leave to reconsider. However, the provisions of the Code dealing with the requirement that the Board determine that a bargaining unit is appropriate for bargaining are the same as the equivalent sections in the *Industrial Relations Act*. Therefore, for the purpose of the substance of this matter it is of no consequence as to whether the *Labour Relations Code* or the *Industrial Relations Act* applies (see *Speed-Erect Foundations and Framing Systems Ltd.*, BCLRB No. B1/93).

III. LEAVE TO APPLY

IML brings its application pursuant to Section 141 of the *Labour Relations Code*. Therefore, with respect to IML, the Board must determine whether or not leave to apply for reconsideration should be granted. After reading the submissions of the parties and hearing oral argument, the Board is satisfied that IML has demonstrated a good arguable case of sufficient merit such that leave to apply for a reconsideration should be granted. Among other things, we find that there are conflicting authorities as to the appropriate principles to be applied in determining whether or not a unit is an appropriate bargaining unit. Therefore, following the test established in *Brinco Coal Mining Corporation,* BCLRB No. B74/93, IML is granted leave to apply for reconsideration and its application will be considered on the merits.

IV. FINDINGS OF THE ORIGINAL PANEL

1. Island Medical Laboratories Ltd. - (BCLRB No. B49/93)

This case involved an application by the Health Sciences Association ("HSA") for a certification of a bargaining unit of "medical laboratory technologists employed by IML at Lower Vancouver Island sites, including Yates Street, Sooke, Royal Oak and Duncan". The Employer objected to the application on the basis that the bargaining unit was inappropriate.

The original panel found that, although the most appropriate unit at IML would be broader than the proposed unit, a narrower unit was appropriate for collective bargaining.

The panel found that the medical laboratory technologists ("RTs") constituted a special group of employees who shared a distinct community of interest arising out of their status as paramedical professionals. The RTs had different educational backgrounds, qualifications, skills, nature of work and interests from the other employees at IML. This finding was not disturbed by the performance of overlapping functions at the periphery of the RT's core activities. It was also found

appropriate to separate the Lower Vancouver Island sites from the up Island sites because, although there was a close connection between the sites in terms of business operations, there was no day-to-day operational interchange of employees generally or in particular between included and excluded RTs.

2. Dueck Chevrolet Oldsmobile Cadillac Limited - IRC No. C217/92

In this decision the trade unions applied for certification of a group of employees described as "mechanics and mechanics' helpers". The Employer objected to the application for certification arguing that the proposed unit was inappropriate for collective bargaining. The original panel found that the issue to be determined was:

> Have the mechanics and mechanics helpers in the service area shown evidence of a community of interest sufficiently distinct from the employees in the other areas (body shop and parts department) to justify a separate unit for service area employees? (p. 2)

The panel found that administrative efficiency and convenience in bargaining did not favour an all-employee unit because the parts, service and body shop did not operate jointly. With respect to the common framework of employment conditions, the panel found that that factor led to the question of whether "it was possible to draw a defensible boundary around the mechanics and mechanics' helpers?". The panel relied on the fact that the mechanics had separate foremen, a separate dispatch system and used a separate "Mitchell's" book to determine their flat rate for pay. The panel also found that the mechanics "clock-in" system was distinct from the bodymen and parts area. The panel held that although the mechanics, mechanics helpers and bodymen shared similar skills and had some interaction, that was not fatal to the application.

With respect to industrial stability, the panel found that this factor was less of a concern where there was no trade union representation already at the work site. Finally, with respect to lateral mobility, the panel found that both parties had accepted there had been no lateral mobility among the employees. The panel

concluded that the unit proposed by the trade unions did have interests distinct from the body shop and parts employees; therefore, the unit was appropriate for collective bargaining.

V. POSITIONS OF THE PARTIES

1. Island Medical Laboratories Ltd.

IML argues that the unit applied for is not appropriate for collective bargaining. IML notes that the application affected only one out of three classifications of employees involved in the clinical/analytical/technical aspects of its business and one classification of a substantially larger number of classifications in the Employer's business as a whole. Further, the application covered only four of the seven locations at which IML employs RTs and covers only 70 RTs out of a total of 106. IML argues that the distinction between the Lower Vancouver Island sites and the more northern sites is purely artificial and does not take into account the integrated and interdependent nature of its operations.

IML argues that where a union is certified for a unit smaller than an all-employee unit, the demonstrated community of interest must encompass all employees who share the same community of interest. That is to say, it is not only the employees within the proposed bargaining unit that must share a community of interest, but it must be determined that they do not share a community of interest with employees outside the proposed unit. IML relies on *Loomis Armored Car*, BCLRB No. 407/84; *Whistler Mountain Ski Corporation*, IRC No. C83/90; *Jim Pattison Industries Ltd.*, BCLRB No. 39/79, [1979] 2 CLRBR 517; and *Progressive Products*, IRC No. C167/88. IML argues that the panel erred in not applying the test in this manner.

Second, IML argues that the panel erred in not giving any weight to its interests or to the interests of the excluded employees in the proposed unit.

Third, IML argues that the panel erred by failing to give weight to the functional coherence and interdependence of the Employer's operations, relying on *Whistler, supra*.

Fourth, IML argues that the panel erred by failing to give weight to the extensive overlap in job duties between the RTs and the other employees who perform clinical/analytical/technical duties.

Fifth, IML argues that the panel erred in holding that the separate geographic locations contributed to the community of interest, noting that previously the Union had successfully organized the RTs and the other clinical/analytical/technical employees.

IML further argues that the only true exception to the all-employee unit is that created in *Woodward Stores (Vancouver) Limited*, BCLRB No. 129/74, [1975] 1 CLRBR 114, where, due to difficulty in organizing, the Board will exercise its discretion to certify a smaller unit in order to facilitate the achievement of collective bargaining. Even under the *Woodward Stores* approach, IML notes that the Board has stated that it will not carve out "totally artificial units, based solely on the extent of organization by the union (and sufficiently to give the latter a majority)".

2. Health Sciences Association of British Columbia

In response, HSA argues that the original panel's analysis accurately reflects the Board's policy with respect to determination of appropriate bargaining units. HSA argues that the determination includes an element of discretion and requires that the determination be made on a case by case basis weighing all the relevant factors. HSA argues that the original panel properly considered the application of the "community of interest test".

3. Dueck Chevrolet Oldsmobile Cadillac Limited

Dueck argues that the facts relied on by the panel including separate foremen, separate Mitchell's book, and a separate clock-in system are not factors which identify a distinct community of interest. Dueck also points to other findings of the panel to show that in its operation there is a broader community of interest which would at least include the bodymen. The panel effectively certified one classification of employees within the employer's operation.

Dueck argues that the Board's decision in *Whistler, supra*, was "...accurate in its analysis of the law and in particular in identifying the confusion that now exists in the jurisprudence".

In oral argument Dueck noted that certification of the bargaining unit proposed by the Teamsters amounted to certifying a single job classification in an integrated operation. Dueck argues that it is not the practice of the Board to certify every trade in the industrial sector and that that approach had been specifically rejected by the Council in *Lega Fabricating Ltd.,* BCLRB No. 5/77, [1977] 1 CLRBR 389 and *Chimo Structures Ltd.,* BCLRB No. 5/76, [1976] 1 CLRBR 373. Finally, Dueck noted that the panel found that the Board had not previously certified a unit of mechanics and mechanics' helpers.

4. Teamsters Local Union No. 213

The Teamsters argue that the thrust of Dueck's argument was to disagree with the significance or lack of significance the panel placed on various portions of the evidence. The Teamsters argue that Section 36 of the *Industrial Relations Act* is not intended to review findings of fact by the original panel.

VI. ANALYSIS AND REASONS

1. Introduction

This decision is concerned throughout with the integration and balancing of two fundamental principles of the Code in the determination of an appropriate unit: access to collective bargaining and industrial stability.

Our analysis and reasons are set out in the following order: first, the history and purpose of certification is discussed; second, the statutory scheme of certification is briefly described; third, the doctrines in *Insurance Corporation of British Columbia*, BCLRB No. 63/74, [1974] 1 CLRBR 403; and *Woodward Stores, supra,* are examined; fourth, the evolution of the concept of community of interest is traced from *ICBC* and *Woodward Stores* through to *Canadian Kenworth Division of Paccar of Canada Ltd.*, BCLRB No. 22/79, [1979] 2 CLRBR 64; and *B.C. Coal Ltd.,* BCLRB No. 36/82, [1982] 3 CLRBR 177; fifth, there follows an analysis of the *ICBC* criteria (primarily, industrial stability) in relation to the "building block" approach to all-employee units in *Crest Motor Hotel Ltd.,* BCLRB No. 189/87, (1988), 17 CLRBR (NS) 223; sixth, *MacMillan Bloedel Limited (Alberni Pulp and Paper Division)*, BCLRB No. 393/84, (1985) 8 CLRBR (NS) 42, (hereinafter referred to as *"Alpulp"*), and the doctrine of "extraordinary remedy" are discussed; seventh, the IML and Dueck decisions are reviewed in light of the foregoing policy analysis.

2. Certification - History and Purpose

We rely on two labour law texts in describing the history and purpose of certification: Adams, *Canadian Labour Law*, 2nd Edition, (Canada Law Book Inc., May 1993); and A. W. Carrothers, E. Palmer, and W. B. Rayner, *Collective Bargaining Law in Canada*, Second Edition, (Toronto: Butterworths, 1986).

The single most significant piece of legislation in the development of the North American scheme of labour relations was the *National Labour Relations Act*, Chapter 372, 49 Stat. 449, (1935), (the "*Wagner Act*"). The *Wagner Act* brought "...a new and positive meaning to the role of law in labour relations" (Adams, p. 1-11, para. 1.150).It recognized the right of employees to belong to trade unions, free from employer coercion or interference, and imposed a duty upon employers to bargain

in good faith. It established three components of labour relations - certification, prohibitions against unfair labour practices and the duty to bargain in good faith - that have remained a core part of all labour relations schemes in North America since that time. In addition, the *Wagner Act* also established the National Labour Relations Board. This scheme has proved immensely important to the development of Canadian labour law.

The Federal Government of Canada asserted jurisdiction over labour relations in 1944 by enacting Order-in-Council P.C. 1003. This represented Canada's first comprehensive labour relations policy. It contained the same basic elements as the *Wagner Act* - certification, prohibitions against unfair labour practices, and the duty to bargain in good faith. P.C. 1003 had a significant impact on the development of labour relations in Canada: "Of all the sources that influenced the contents of post-war legislation, the War Time Labour Relations Regulation of 1944 had the most direct impact" (Carrothers, supra, p. 50).

These principles were adopted by and incorporated into the *Industrial Relations and Disputes Investigation Act*, S.C. 1948, c.54. In 1948, the national emergency underlying the Federal Government's jurisdiction over labour relations was declared at an end and most of the provinces brought their labour relations into line with this federal policy. Canada therefore has a basic core of labour laws which recognize the right of employees to associate and bargain collectively.

Canadian labour law also has an international component. The Federal Government has made commitments at the international level, specifically the Treaty of Versailles and to the Conventions of the International Labour Organizations ("I.L.O."). In 1972, Convention No. 87 was included in the preamble to Part 5 of the *Canada Labour Code*, stating that Canada had assumed international reporting responsibilities with regard to freedom of association.

Finally, in 1982, the *Canadian Charter of Rights and Freedoms* was enacted and freedom of association (Section 2(b)) was made imperative as a basic freedom (see: re *Public Service Employee Relations Act,* (Alta.) [1987] 1 S.C.R. 313; *Public*

Service Alliance of Canada, [1987] 1 S.C.R. 424; *Retail, Wholesale, Department Store Workers' Union,* (Sask.), [1987] 1 S.C.R. 460; *Professional Institute of the Public Service of Canada v. Northwest Territories (Commission),* [1990] 2 S.C.R. 367; *Lavigne v. Ontario Public Service Employees Union,* [1991] 2 S.C.R. 211).

The moral commitment of provincial and federal governments in Canada to the public policy of collective bargaining is based upon, as Carrothers states, "...the philosophy that the labour of a human being is not a commodity or article of commerce" (p. 3).

A critical element in this recognition is the rejection of the 19th century doctrine of employment at will - the right of the employer to fire its workers for "good reason, bad reason, or no reason at all". There is, therefore, expressed in public policy, a recognition of the value of one's employment, the inequality in bargaining power between employers and employees, and the need for fairness in addressing this imbalance.

Simply put, an employee, in the absence of a collective agreement, has no vested rights. The ability of an employee to not simply accept what is offered but to be able to bargain what he or she considers to be desirable in order to provide protection from material and legal insecurity, directly results in that employee having greater rights, voice and dignity (see Paul Weiler in *Reconcilable Differences*, (Toronto: Carswell Company Limited, 1980, pp. 15-33).

Finally, a collective bargaining relationship that achieves a greater balancing of the power between employers and employees, that vests employment rights in employees, that allows decisions to be challenged and disagreements to be settled by neutral arbitrators, without economic disruptions, establishes the rule of law in employer-employee relationships.

This, as Weiler notes, is "...intrinsically valuable as an exercise in self-government" (p. 33).

3. Statutory Scheme

There is no common law equivalent to certification. Its origins lay in the *Wagner Act* which was specifically enacted to replace recognition strikes conducted by unions for the purpose of obtaining union recognition and a first collective agreement.

Part 3 of the *Labour Relations Code*, Acquisition and Termination of Bargaining Rights, sets out the legislative scheme with regard to certification.

The effect of certification is to give a union the exclusive bargaining authority on behalf of all employees in the proposed unit. This exclusive bargaining authority is set out in Section 27 of the Code. The scope of the unit is the key both to securing trade union representation and in setting the appropriate framework for collective bargaining. This affects the potential bargaining power of both the employer and the union.

This scheme contemplates that an application for certification can be made when 45% of the employees in a proposed bargaining unit have signed membership cards in a union. The form of this membership card is set out in Part 2 of the Labour Relations Regulation. If an application for certification is supported by more than 45% but less than 55% of employees in the unit, a vote is ordered. In order to be successful, a union must obtain a majority of votes cast. If a union applies with 55% or more of the employees having signed membership cards, the union is normally granted an "automatic certification". In that case there is no requirement for a vote. These provisions are set out in Sections 18 and 23 respectively. In addition, two other determinations are made: first, a union must meet the definition of "trade union"; and second, the unit applied for must be an appropriate unit.

This certification scheme borrows heavily from our democratic traditions of majority rule. As Carrothers notes, labour relations boards across Canada are given "extensive discretionary powers" in relation to the issue of appropriateness. In this area the jurisdiction of the board is the "least violable by judicial review"

and seems limited only by "...the limits of the constitutional and geographical jurisdiction of the Board" (p. 371).

4. Community of Interest: Introduction

The issue in these two appeals is the appropriateness of the proposed bargaining units. We will therefore review *ICBC, supra, Woodward Stores*, *supra*, *Canadian Kenworth, supra*, and *B.C. Coal*, *supra*. A reading of these decisions combined with the experience of this Board convinces us that on applications for certification, the "community of interest" concept is the test employed in determining an appropriate unit. On *initial* applications, access to collective bargaining is the most important principle to consider in determining appropriateness.

In regard to the *second or additional applications* (the expansion or addition of bargaining units) it is our conclusion that industrial stability, as set out in *ICBC, supra*, should be given increasingly greater weight. We set out the "building block" approach (see *Crest Motor Hotel Ltd., supra,*) to the expansion of bargaining units which, in our view incorporates the "all-employee" unit as the most desirable bargaining unit.

Finally, this Board rejects the "extraordinary remedy" test set out in *Alpulp, supra*, for the varying, merging and consolidating of existing bargaining units.

A. *Insurance Corporation of British Columbia, Woodward Stores (Vancouver) Limited, Canadian Kenworth Division of Paccar of Canada Ltd.* and *B.C. Coal Ltd.*

I.C.B.C.

The Insurance Corporation of British Columbia was a recently created Crown corporation in 1974. It implemented the provincial government's participation in the insurance business and had a monopoly over all motor vehicle insurance. It employed approximately 1600 people; 1,000 at the head office in Vancouver, with 600 others at centres throughout the province. Three unions applied for certification (C.U.P.E., O.T.E.U. and the Teamsters). A fourth union (B.C.G.E.U.) asked to be put on the ballot. The three applications for certification had essentially divided up the employees by function. The potential result of granting all the applications for certification was a multiplicity of bargaining units.

The crucial policy conclusion in *ICBC* is the appropriateness of an all-employee unit. The negotiation and administration of a single collective agreement, covering all employees, rather than several agreements, furthers industrial stability. Among the four factors listed - administrative efficiency and convenience, lateral mobility, common framework of employment conditions, and industrial stability - clearly industrial stability is the most significant. Indeed, although the other factors facilitate the administration of collective agreements (e.g. one seniority list), and simplify collective bargaining, their underlying purpose is the furtherance of industrial stability. Therefore, the *ICBC* policy conclusion that industrial stability is enhanced in preferring a single bargaining unit over multiple bargaining units is as fundamental to our labour relations scheme today as it was in 1974.

There are two vital points to note about the *ICBC* decision. The first is the factual context of the decision. The Insurance Corporation of British Columbia is a public sector employer. It was an entirely new employer, non-union,

province-wide, and had and continues to have a virtual monopoly over car insurance. The employer was not only tolerant of collective bargaining, "but rather anxious for it to get underway". Thus, access to collective bargaining was not a concern. Finally, a Government report (the "Higgins Report"), which examined collective bargaining in the public sector, recommended that there not be fragmented bargaining units in the public sector. All these factors were influential in Chair Weiler's conclusion that there was a "presumption" (p. 412) in favour of all-employee units.

The second point, and the most crucial to our discussion, is the fifth *ICBC* factor in determining appropriateness - community of interest. Although it formed only a small part of the decision, and was not extensively discussed, it later became the basic policy rationale for granting certifications for bargaining units which were narrower than all-employee units.

The reason for granting certifications for less than all-employee units was straightforward - it furthered the express purpose of the *Labour Code* of facilitating the securing of collective bargaining rights. Indeed, the *ICBC* decision states that the granting of certifications at that time, on the basis of community of interest, was "common":

> It is common to find certifications granted by this Board where narrower unit boundaries are drawn. The usual reason for that description of the appropriate bargaining unit is the Board's judgment about the *community of interest* of the employees. There is a simple explanation for the importance of this factor. The point of certification under the Code is to secure collective bargaining for the employees. (p. 409; emphasis in original)

Quite clearly, therefore, community of interest may include an all-employee unit, but also may commonly include a less than all-employee unit. Indeed, it may be precisely what *Whistler, supra,* stated *ICBC* did not allow: "a scaled down version of an all-employee unit". We will return to this point later in our decision.

There was an express recognition by the Weiler Board that the facts surrounding a public sector employer and the policies which applied to it, could not be transferred directly to private sector employers who were not hospitable to

collective bargaining. *ICBC* and *Woodward Stores*, were decided in June and September 1974 respectively, and represent two significant pillars underlying the statutory policy of appropriateness. However, there is no statutory distinction which leads to the *ICBC* and *Woodward Stores* "split" in policy. Appropriateness is almost entirely a policy creation. In the *Woodward* decision we see the other "pillar" of this policy of appropriateness.

Woodward Stores

Woodward Stores (Vancouver) Limited was a family controlled business with a chain of department stores in British Columbia and Alberta. It exhibited a high degree of central control from the head office which was located at the West Hastings Street store in downtown Vancouver. It employed approximately 8,500 employees in British Columbia of which approximately 5,000 were in the Lower Mainland. There were three unions already certified at Woodward Stores, including the Meat Cutters, the I.B.E.W. and the Retail Clerks when the Graphic Artists had applied for the advertising department employees.

The application was for 20 employees who had separate quarters of their own and included layout artists, copy writers and traffic employees. The department was responsible for newspapers, radio, television, catalogue and flyer advertising. The bulk of the department's work was with the production of newspaper and catalogue advertising. The Graphic Artists' employees represented only 18 out of 136 employees in the department. The total employee complement at the Vancouver location was 2,800. Included in the department was a display group whose function was 'in-store' advertising. The evidence indicated that "much the same skills and talents" were exhibited by these individuals as those who were to be included in the bargaining unit (one group did 'in-store' advertising and the other did 'out-of-store' advertising). Indeed, the Board said that a "good case" could be made for both of these employees to "be grouped together for the purposes of collective bargaining" (p. 121). The simple reason they were not was that the display employees "...evinced no interest in collective bargaining":

> The only result of merging the two departments into one bargaining unit would be to deny collective bargaining to the advertising department employees who do want it.
> (p. 122)

The Bakery Workers also applied seeking collective bargaining rights about the same time. They applied for three separate bargaining units - Vancouver, Oakridge and New Westminster. The Vancouver store produced a variety of baked goods for all the stores, and had the greatest number of bakery employees (47 out of 105). In addition, 84 of the 105 worked in the Lower Mainland stores. There was some evidence of functional integration and inter-store transfers of temporary employees. The Board concluded that an appropriate bargaining unit would be a single unit composed of all three locations.

There are several important policy issues to note in *Woodward Stores*. First, to focus on a long-range inquiry of how collective bargaining should best be carried out may result in no collective bargaining being established, especially in regard to traditionally difficult to organize sectors. This was the case in the retail sector in British Columbia. The Board had evidence before it that the retail sector in British Columbia exhibited a low union density. Community of interest factors were accordingly "relaxed" in order to facilitate the establishment of collective bargaining. Therefore, at the initial stage of securing collective bargaining rights, "an appropriate" bargaining unit was not to be sacrificed for the most rational or ideal bargaining unit. The *Woodward Stores* decision employed the following strong language:

> It is an absolutely fundamental policy of the Code that the achievement of collective bargaining is to be facilitated for those groups of employees who choose to use this procedure as a means of settling their terms and conditions of employment.
>
> ...However, we will not reject applications for small bargaining units on the basis that a large unit is a more rational structure for hypothetical collective bargaining in the distant future, where the result would be the denial of actual bargaining rights now.
> (p. 119)

A second and linked policy conclusion in *Woodward Stores* was that once collective bargaining was established, after a time, rather than creating a new bargaining unit, existing units would have to be enlarged or merged with the ultimate goal of creating an all-employee unit. Further, trade unions did not have "property rights" in either the continued existence of certifications or collective agreements where the existing unit was found to be no longer appropriate. We will return to this policy in our discussion of industrial stability.

In summarizing *ICBC* and *Woodward Stores* we set out the following principles of appropriateness:

(a)There are two fundamental purposes in making determinations of appropriateness: industrial stability and access to collective bargaining.

(b)In furtherance of industrial stability a single bargaining unit of all employees is preferable to multiple bargaining units.

(c)Community of interest is a "common" basis for the granting of certifications for a narrower unit than an all-employee unit.

(d)In traditionally difficult to organize sectors, community of interest factors are "relaxed" to assist in the establishment of collective bargaining.

(e)Once collecting bargaining has been established, after a time, rather than creating new bargaining units, existing units will either be enlarged or merged.

Therefore, in making the decision to grant or dismiss an application for certification for a unit narrower than all-employee, the most significant factor in *ICBC* and *Woodward Stores* was community of interest. Increasingly, both as a matter of practice and policy, the *ICBC* criterion of community of interest was merged with the *Woodward Stores* test of a "reasonably coherent and defensible boundary". (Indeed, the additional *ICBC* factors such as common framework of employment

conditions and lateral mobility were also collapsed under the community of interest umbrella.)

The analysis of *ICBC* and *Woodward Stores*, was extensively discussed by all parties to these appeals. Both employers relied upon *Whistler, supra*.

The Council in *Whistler* dismissed the application for certification on the grounds that the union was not able to show a "...unique community of interest sufficient to outweigh the practicality of an all-employee unit" (p. 19). The Council stated that the proposed unit was "nothing more than a scaled-down version of an all-employee unit" (p. 19). Further, the variation in the skills of employees within the proposed unit and those excluded was as great within the bargaining unit as it was among employees outside the bargaining unit. Additionally, community of interest was drawn in the widest possible terms:

> The nature of the work generally is servicing the visitor to the mountain. In that sense it is a community of interest which spans both the employees sought to be included in the bargaining unit and the employees sought to be excluded from the bargaining unit. In terms of individual duties performed, the variance in the nature of the work is as great amongst groups within the proposed unit and amongst groups within the excluded group as it is between the excluded and the included. (p. 21)

The Council, in its review of "community of interest" stated that there had been a regrettable blending of the community of interest test set out in *ICBC* and the *Woodward Stores* test. The result was the "relaxing" of the community of interest test in *ICBC* without the onus of showing that the industry was one which was traditionally difficult to organize. This resulted in certifications based upon "...the mere existence of some minimal defensible boundary" (p. 18).

To "correct" this, the Council in *Whistler* tried to reconstruct what it saw as the "original intention" of *ICBC* and *Woodward Stores*: defining community of interest as requiring a "...unique community of interest sufficient to outweigh the practicality of an all-employee unit and thus justify the division" (p. 19). This statement was intended to reflect the following passage from *ICBC*:

> In each case, then, the Board must decide whether the distinctive needs of special groupings of employees are strong enough to outweigh the practical arguments in favour of one all-employee bargaining unit. (p. 410)

First, simply as a defined term, the choice of "unique" is arguably capable of a more restrictive meaning than the term "distinctive". Second, the subsequent policy development of community of interest did precisely what *Whistler* stated it did not - "distinctiveness" in *ICBC* became blended with the concept of a "reasonably coherent defensible boundary" set out in *Woodward Stores*. (It should be noted as an aside that in *ICBC* Chair Weiler saw several potentially different communities of interest among the employees of *ICBC.* However, it was not where the unions had drawn it in their applications for certification (p. 410).)

It is this Board's view that the most serious conceptual error made by the *Whistler* panel was in regard to the issue of community of interest. This is true not only in relation to *ICBC,* and *Woodward Stores,*, but also in regard to subsequent decisions, specifically *Canadian Kenworth, supra,* and *B.C. Coal, supra* - neither of which were reviewed in the *Whistler* decision. In these decisions we see a "regrettable blending", as the *Whistler* decision describes it, of the community of interest test. Indeed, in our view this "blending" has been neither inadvertent nor regrettable, but rather an express part of the evolution of the doctrine of appropriateness.

The two cases that best capture this development are: *Canadian Kenworth* and *B.C. Coal*. We will therefore proceed to an analysis of those decisions.

Canadian Kenworth

In *Canadian Kenworth*, CAIMAW had an existing certification for the plant production employees. The total employee complement was 635 employees of which approximately 455 were covered by the certification. The balance of the employees were salaried personnel, including management, office and sales staff and a data

processing group. CAIMAW filed an application to vary its certification to include the data processing department. The original panel rejected the union's application for certification on the grounds that it would be inappropriate to sever off a small portion of the office staff and include them with the production employees. The data processing department serviced all the data processing needs of all the departments of the employer. Therefore, there was a strong functional relationship between data processing and all other aspects of the employer's operation. In addition, this functional relationship was predominantly with the non-union departments of the company, especially the office staff. The accounting department was the predominant user. On reconsideration Chair Munroe granted the variation of the certification on the basis of community of interest. He stated the following:

> It is our view that the data processing employees share no less a community of interest with the plant production workers than they do with the rest of the office staff. In the words of the panel in *Insurance Corporation of British Columbia,* cited earlier, we are satisfied that the interests of the presently certified unit and those of the data processing group "...can reasonably be reflected in one set of negotiations and [their] working conditions can be incorporated into one document". We are also satisfied that a rational line can be drawn between the new bargaining unit thus created and the balance of the office complement which will remain excluded. (p. 71)

First, the fact that the data processing employees may have shared an equal community of interest with employees who remained outside the bargaining unit did not prevent their being included in the bargaining unit. In this case they were included because in the words of *ICBC* their "working conditions can be incorporated into one document". Further, the Board was satisfied that a "rational line" could be drawn between those employees included and the remaining office staff excluded. "Distinct" or "distinctiveness" was equated with the term "defensible boundary". This is, of course, a far less stringent community of interest test than that of uniqueness set out in *Whistler*.

Second, the unit sought did not need to be the most appropriate, or the only appropriate unit. The *ICBC* criteria were to be used in determining what was "an appropriate unit".

Third, these *ICBC* criteria were to be employed not only in initial applications for certification, but also when a trade union sought to enlarge its bargaining unit.

Fourth, although the various components of a proposed bargaining unit may not be appropriate, separate and apart from the whole, only the combined unit need be an appropriate unit.

Fifth, in dealing with community of interest, the Board will make the distinction between a functional relationship between departments and the functional integration between employees. We will discuss this distinction in greater detail later in our decision.

Sixth, Chair Munroe set out a policy of appropriateness distinct from an attempt to place all applications, other than those in the traditionally difficult to organize sectors, within only the *ICBC* framework. The preference for an all-employee unit is simply "a preference", not an "invariable" rule (p. 66). Chair Munroe went on to discuss clear exceptions to the rule: the traditional craft certification, the separation of plant employees from office and sales personnel, the traditionally difficult to organize sectors, and the geographical separation of employees. In addition, this list was not seen as "exhaustive" of the Board's discretion in regard to the determination of what constitutes an appropriate unit.

Finally, as previously stated, when the Industrial Relations Council distanced itself from the *Whistler* decision in *Moonlight Building Maintenance Ltd.,* IRC No. C227/90 (Reconsideration of IRC No. C111/90), it did so by stating that the policy on appropriateness would remain as set out in *Canadian Kenworth.*

B.C. Coal

Chair Kelleher's decision in *B.C. Coal, supra*, is also a reconsideration decision. B.C. Coal started a new mine close to its existing operations for which the United Mineworkers of America ("UMA") was certified. B.C. Coal operated three mines in the Elk River Valley, with approximately 1,500 employees, all three consisting of a single bargaining unit. An additional mining operation was being constructed some 50 kilometres from the existing mine sites. The International Union of Operating Engineers had been certified when ten employees were on site although it was projected that the eventual employee complement number would be approximately 400 employees. The majority of the original panel concluded that the Operating Engineers' bargaining unit was appropriate for collective bargaining. The Vice-Chair on the original panel, however, dissented and was of the view that the only appropriate unit was one which encompassed both the employees at the new operation and the existing operations. On appeal, two issues were argued: build-up and appropriateness. In regard to appropriateness, the UMA argued that the operations were functionally integrated including the sharing of computer facilities, rail lines, and the interchange of supervisory personnel between the two operations. In addition, the mine employees would be doing essentially the same work. The Board decided that because of the geographical separation and the "functional distinction" of the Greenhills operation, a "defensible boundary" could be drawn around the new operation.

Chair Kelleher captured most fully the distinction between an appropriate unit, a more appropriate unit and a most appropriate unit. In *B.C. Coal* there was an express finding that the unit proposed by the UMWA was both a more appropriate and a most appropriate unit. Notwithstanding that the *ICBC* factors clearly pointed to an all-employee unit in the circumstances of this case, there was a sufficient community of interest to draw a "defensible boundary" around the Greenhills site - specifically, geography and a functionally distinct operation (no employee interchange and separate work processes). Therefore, where community of interest factors were sufficient to meet the test of "an appropriate unit" the Board was compelled to grant the certification:

> While the Board prefers large broad-based bargaining units, each case must be considered on the merits of the particular certification application before the Board. In terms of administrative efficiency, industrial stability, and the

> other factors considered in Insurance Corporation of British Columbia, it appears obvious to us in this case that a unit comprising both the Sparwood and Greenhills operations would be a more appropriate unit. However, we cannot deny the Operating Engineers' application on that basis, since, for reasons stated earlier, we have also concluded that the specific unit applied for is an appropriate unit. (p. 184)

It may be that in certain employment circumstances an all-employee unit is equated to a more appropriate or most appropriate conclusion. Indeed, there is a recognition that the *ICBC* factors not only assist in determining what constitutes an appropriate unit, but also tend to support the conclusion of an all-employee unit; in other words, the result is to some degree contained in the factors used to determine the result. Therefore, the *B.C. Coal* analysis is helpful in making the distinction between an appropriate unit and an all-employee unit, which may be an appropriate unit, but may also amount to a more appropriate or most appropriate determination. This distinction combined with the use of the *Woodward Stores* language in *Canadian Kenworth* (a rational line) and in *B.C. Coal* (a defensible boundary) strengthens considerably the *ICBC* factor of community of interest in the determination of an appropriate unit.

B. Community of Interest: The Factors

Community of interest is utilized as a concept in determining appropriateness in every jurisdiction in Canada. Only one province - Nova Scotia (*Trade Union Act, R.S.N.S. 1989 c.475, s.25(14))* - actually uses the words "community of interest" in its statute. However, "all labour boards whether dictated by statute or not "apply the concept of community of interest in determining appropriateness" (Adams, para. 7.50). Its origin lay in the United States, first arising in the 1937 decision *Goodyear Tire & Rubber Co.,* 3 N.L.R.B. 431 (1937). In the Third Annual Report of the National Labour Relations Board (1938), the Board further discussed the concept of community of interest:

> The appropriate unit selected must operate for the mutual benefit of all the employees included therein. To express it another way, the Board must consider whether there is

> that community of interest among the employees which is likely to further harmonious organization and facilitate collective bargaining. (p. 174)

Further, in Canada, it is clear that the test is "an appropriate unit", not a more appropriate or most appropriate unit:

> The overwhelming majority view in Canada is that a labour relations board may certify an appropriate unit which need not be the most appropriate unit. This view has been endorsed by the Supreme Court of Canada dealing with what was then s. 126 (now s. 28) of the *Canada Labour Code* and holding that "the statute makes clear that what is an appropriate bargaining unit is for the Board to determine. (Adams, p. 7-7, para. 7.130)

Therefore, where an all-employee unit is equated with a more appropriate or most appropriate unit, but there is present amongst employees a community of interest sufficient to establish "an appropriate unit", a certification may be granted.

The factors used to define community of interest are set out in *Usarco Ltd.*, [1967] OLRB Rep. September 525, which was influential at the time it was issued. These factors are as follows:

1. Nature of work performed

2. Conditions of employment

3. Skills of employees

4. Administration

5. Geographic circumstances

6. Functional coherence and interdependence

We note that in *Usarco, supra*, the Ontario Board also considered three other factors in addition to community of interest in determining the appropriateness of the bargaining unit: centralization of management authority, economic factors and source of work. These additional factors have not been commonly referred to in British Columbia and appear to correspond generally with the administrative structure and functional integration factors noted below. It is obvious, however, that the *Usarco* factors as a whole, were adopted, changed and incorporated into our own case law since *ICBC.*

For example, the *ICBC* factor of a common framework of employment conditions can be seen to include the following *Usarco* factors: nature of work performed, conditions of employment and skills of employees. Administrative efficiency and convenience fit within the *Usarco* factor of administration. Lateral mobility fits within the factor of functional coherence and interdependence. This is precisely why community of interest has always logically overlapped with the other four *ICBC* criteria of what constitutes an appropriate unit.

In acknowledging community of interest as the crucial factor in the determination of what constitutes "an appropriate unit", the concept needs greater clarification. We begin with the factors set out in *Usarco,* and *ICBC.* Community of interest therefore, in an *initial* application for certification (an application for certification for an employer where no collective bargaining relationship is in place) is determined on the following four factors:

1. Similarity in skills, interests, duties, and working conditions;

2.The physical and administrative structure of the employer;

3. Functional Integration; and

4. Geography.

In reviewing the above factors the following points are important to note. First, the issues of similarity in skills, interests, duties and working conditions

are fairly self-evident with regard to any measure of community of interest. Those who perform similar work under similar terms and conditions of employment will have a community of interest which can be neatly set within the framework of a single collective agreement. However, we note this factor may not have the same weight as it has had in the past jurisprudence.

During the 1940's, 1950's and 1960's, with unionization being primarily in the private sector, historical divisions took place which reflected a more traditional view of community of interest; i.e. the separation of white collar from blue collar workers. This distinction was often based upon gender, skills, or sometimes an unstated division based upon class. A plant would be separated from office; indeed, if the office was organized it may often have been to an entirely different union. However, in the late sixties, seventies and eighties, with the growth of public sector unions and the policy of a single, all-employee bargaining unit, these distinctions were no longer observed in the public sector. Indeed, today in British Columbia, an all-employee bargaining unit will include within one collective agreement widely different skills and terms and conditions of employment. In the public service, a master collective agreement combined with subsidiary component agreements will include groups as diverse as prison guards, conservation officers, senior financial officers, and social workers. Within the health care industry, there are different professional groups with their own self-governing bodies (some national in scope and some established by statute), all included in the same bargaining unit. Traditional boundaries have been deliberately erased in favour of large bargaining units, which have proved viable in collective bargaining terms. So although similarities in skills, interests, duties and working conditions remain at a common sense level a factor in community of interest, it may be of less help in drawing a rational and defensible line; its inherent flexibility may prove useful but provide only limited conceptual guidance.

The remaining criteria essentially concern the nature of the employer's organization. And it is really the nature of the employer's place of business that is the crucial factor in determining appropriateness. Once again, labour relations experience and common sense dictate that the structure of the employer physically,

administratively, and operationally is really the evidentiary basis upon which the appropriateness of the bargaining unit is determined.

The second factor of the physical and administrative structure of the employer involves a complete picture of the employer, including everything from the physical layout to the organizational chart. Most of this evidence is familiar to parties and in our view is not contentious and should be admitted by agreement in certification hearings.

The third factor is functional integration. This was first identified by Chair Munroe in *Canadian Kenworth, supra*. A distinction was made between functional *relationships* between *departments* and functional *integration* of *employees* (p. 68; italics in original). Any employer concerned with productivity and efficiency will, of course, try to achieve as much functional integration, coherence, or relationship as possible. In that sense these terms tend to overlap, but for the purposes of defining community of interest Chair Munroe's distinction is helpful. A functional relationship between departments is to be expected in any business and would in itself not prevent a community of interest being found in any single department. (And of course it goes without saying that it would not prevent a finding of a larger community of interest). However, the functional integration of employees in several departments - employee interchange, shared duties, etc. - would require all such departments within one unit. This functional integration - employee interchange, job duties integrated - must be on a day to day basis, reflecting a consistent managerial policy of functional integration, and not simply amount to holiday relief or the replacement of sick employees. There are also the integrated work processes that go beyond a functional relationship between departments. A continuous work process (e.g. assembly line), overlapping and shared duties, team processes, all require a single bargaining unit. The focus of this criterion is therefore upon how the employer has organized itself operationally.

Geography is the final significant criterion in determining community of interest. This was recognized in *ICBC, supra*:

> As a general matter, the geographic factor seems neutral in this case. In principle, this can often be a material factor in creating a community of interest. (p. 411)

Geography as a factor is also a straightforward issue. Employees who are physically separated, whether at different branches or outlets, often develop and have a separate community of interest simply because of their physical separation. Their everyday work life is only with those employees at that one location. This does not, however, justify multiple bargaining units with separate collective agreements at each location - either with the same union or different unions. In addition, where there is a consistent managerial policy of interchange of employees (not simply holiday relief) between geographical sites, then the community of interest may well be the several geographic sites taken as a whole.

However, two important caveats must be maintained with regard to the employer's operation. First, employers in a non-union setting will not have organized their administrative structure for labour relations purposes. Second, management is able to and does change its physical, administrative and operational structure. These two caveats must be kept in mind. However, in the end, the union must take the employer as it finds it.

Once again, these four criteria operate in regard to an *initial* application for certification outside of the construction industry. And by *initial* we mean an application for certification for an employer which has no collective bargaining relationship whatsoever.

A criticism which has arisen from both sides of the labour relations community, and which the *Whistler* decision indirectly touched upon, has been that either side may "cherry pick" from a wide number of decisions, a particular fact pattern or result that is on "all fours" with their own facts.

If community of interest is capable of spanning, at a single workplace, several different appropriate bargaining units, as well as such concepts as more appropriate, or most appropriate, then there is an obvious inherent "flexibility"

or "elasticity" to this concept; and equally obvious, there is a wide discretion. Chair Weiler captures this in *Woodward Stores, supra*:

> One can conceive of a wide range of possible bargaining units for the employees of Woodwards, ranging from an "all employee" unit, right down to a single classification in a single store. (p. 116)

The experience at *Woodward Stores* had been at "the latter end of the scale".

We make the following observations. First, the discretion which clearly derives from the statute is both necessary and desirable, allowing for labour relations judgments that more accurately fit both the employer's operations and the employees' occupations.

Second, community of interest as a factor in determining an appropriate unit has flourished in every jurisdiction in Canada and in the United States for approximately 50 years, setting the basic structure for collective bargaining.

Third, for whatever reason, community of interest was never expressly defined in this jurisdiction. We have now done this, borrowing heavily from our past jurisprudence and the jurisprudence of other jurisdictions.

Fourth, it must be noted that most applications for certification are not for large employers (such as *ICBC* and *Woodward Stores*) where there is a greater potential for a number of different bargaining units. The Board, in taking notice of its own records (specifically reports published by the Board) directs the community's attention to the fact that approximately 65% - 70% of all certifications granted are for fewer than 20 employees; further, 90% of all certifications granted are for fewer than 50 employees. These certifications would also include all-employee units. A fewer number of employees results in fewer potential communities of interest, and this in turn reduces the element of discretion.

Further, in defining community of interest more explicitly, we have identified those factors that will constrain the Board's discretion in deciding what is "an

appropriate unit". Moreover, we note the following restrictions which have additionally constrained the Board's discretion in deciding what is "an appropriate unit":

1. The wishes of employees is not determinative of the extent of the bargaining unit. The desire of employees to have additional groups included or excluded will not be determinative of bargaining unit appropriateness;

2. The extent of the union's organizing drive. The desire of the union to have certain groups included or excluded is not determinative of appropriateness; nor is the extent of organizing a factor in determining appropriateness; and

3. The Board will not cut across classification lines, nor certify a single classification. An obvious exception to the single classification is of course if it happens to be the majority of bargaining unit members at a certain geographical location, or the employees fall within the *Woodward Stores* doctrine of the traditionally difficult to organize.

Finally, in dealing with the Board's discretion it is important that all these factors not be applied as simply a checklist but that the Board identify the weight it has applied to each of these factors in making its determination. In this way, the Board's exercise of its discretion is clearly identified in its determination.

C. Community of Interest: The Statute

For whatever reason the definition of "unit" has not played a factor in the determination of appropriateness. This is not true in other jurisdictions. In Ontario for instance, Section 1(1) of the *Ontario Labour Relations Act*, R.S.O. 1990, ch. 2, defines bargaining unit as "a unit of employees appropriate for collective bargaining whether it is an employer unit or a plant unit or sub-division of either of them". This definition closely models the American definition of appropriateness

of a unit contained in Section 9(b) of the *National Labour Relations Act*, 29, U.S.C. 160(b), (1964): "...the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit or sub-division thereof" (exceptions are made for units of professionals, crafts and guards). Needless to say, our jurisprudence has evolved from both the United States and Ontario. The definition contained in the current Code which has remained unchanged since the original *Labour Code* in 1973, defines a "unit" as follows:

> ...a unit determined by the board to be appropriate for collective bargaining whether it is an employer unit, craft unit, technical unit, plant unit or another unit... .

The definition of unit in British Columbia, therefore, is much wider than that in either Ontario or the United States. The words "another unit" give the Board a wide discretion in defining "an appropriate unit". The jurisprudence concerning community of interest which has developed in other jurisdictions and has been adopted in this province has evolved from a much narrower definition of "unit" than that contained in the B.C. statute. Therefore, community of interest as we have defined it, comes well within the current statutory definition of unit which has remained unchanged for the last 20 years.

D. Community of Interest: *Woodward Stores*

The same community of interest factors that we have outlined as applying in initial applications for certification are to be applied in determining an application for certification in traditionally difficult to organize situations. However, they are to be applied in a more "relaxed" fashion. For instance, if a group of employees seeking certification have a fairly coherent community of interest, the fact that there may be others outside the group who may share other similar skills or interests or duties, would not be sufficient to defeat a favourable community of interest determination. This is best seen through the facts of the *Woodward Stores* decision, where Chair Weiler concluded that there were others within the display department who exercised the same skills as those seeking certification and these other employees would normally have been included within an appropriate

unit. These other employees were not included because to do so would have defeated the application for certification. It is a case of a single classification having been certified in a traditionally difficult to organize situation. We adopt that test.

In order to come under that test, however, there is a requirement for evidence to show a traditionally difficult to organize circumstance. This evidence can include the following:

1. The Board will take note of its own records in regard to any determination under the *Woodward Stores* doctrine - i.e., certification and collective agreements. These records will be made available to the parties when requested.

2. The evidence of persons (union, management and employees) who are knowledgeable about the particular industry or sector.

3. Expert evidence concerning the sector.

The evidence should establish a low-union density either in the particular industry or among a group of employees which reflects structural or systemic aspects of the workforce which have made it difficult to organize.

This completes our review of community of interest on *initial* applications for certification. In doing so, it is helpful to keep in mind the comments of Chair Weiler in *Reconcilable Differences, supra*:

> I was in the business of defining appropriate units for nearly five years. I had to read closely the decisions on that subject by labour boards across North America. I do not think that labour boards deliberately gerrymander the unit definition simply in order to give the trade union a certification. But there is a wide spectrum of plausible units in any employment setting, units for which a defensible case can be made, and for which a precedent can be found. Notwithstanding the long, intricate reasoning often found in these judgments, I am satisfied in my own mind that any labour board will select that alternative - that is, it will find a sufficient "community of interest" to constitute an "appropriate bargaining

> unit" - among that group of employees for which there is a realistic expectation that a majority would choose to engage in collective bargaining. I am also persuaded that that attitude is perfectly defensible. After all, what would be the result of the alternative attitude, sticking rigidly to the most rational structure for negotiations in the hypothetical long run? Almost inevitably that would abort the law's effort to give collective bargaining a real-life footing right now... . (p. 155)

E. Industrial Stability

In determining an appropriate bargaining unit the Board must always balance two objectives. The first is the issue of access to collective bargaining that arises from the freedom of association of the employees. The scope of the bargaining unit is key to access the securing of trade union representation and collective bargaining rights. This is a fundamental purpose of the Code and the Board's policies must facilitate the organization of employees. This specific statutory purpose, combined with the evolution of the Board's policies in regard to community of interest, and the legislative history of collective bargaining across Canada since the Second World War, all point to the fundamental public policy of facilitating the organization of employees.

However, the second purpose in establishing an appropriate bargaining unit is to foster industrial peace and stability through collective bargaining. The bargaining unit sets the framework for actual bargaining between the parties. That structure has to be conducive to the orderly resolution of collective bargaining disputes by the parties. If the bargaining unit fails to relate to the specific organization and structure of the employer, efficient and stable collective bargaining will be undermined.

We believe that the concept of community of interest as employed by all labour relations boards in North America adequately addresses both goals on initial applications for certification. The facilitation and encouragement of collective bargaining and the issue of industrial stability are not policy matters completely divorced from one another either at the initial stage of certification or at the

second or additional stage of the expansion of collective bargaining. For example, at the initial stage of certification, the design of the bargaining unit must ensure the viability of collective bargaining. The Board would not put into a single bargaining unit employees whose communities of interest directly conflict; further, no bargaining unit would be created that cuts across a particular classification, where all members are in the same physical location, resulting in half of the employees in that classification in the bargaining unit and the other half out of the bargaining unit. Both these situations would not be conducive to the settlement of collective bargaining disputes.

Industrial stability, however, has different facets, depending upon whether one is at the *initial* stage of certification or at the *second or additional* stage of certification. At the initial stage of certification, the concern with industrial stability is with the design of the bargaining unit. The focus is on a single unit - one union, one employer. However, at the second or additional stage of certification the concern is threefold: first, the design of the bargaining unit; second, the proliferation of bargaining units; and third, the relationship not just between the second or additional units and the employer but between the units themselves. As the number of units increases, so does the potential for industrial instability.

At the second or additional stage of certification, among the four criteria cited in *ICBC* - administrative efficiency and convenience, lateral mobility, common framework of employment conditions and industrial stability - we see industrial stability as the most crucial factor. The factors of administrative efficiency and convenience, lateral mobility, and a common framework of employment conditions really go to only one factor: the simplification of the administration and negotiation of collective agreements (and thus contribute to industrial stability). It is axiomatic in labour relations that a proliferation of bargaining units increases the potential for industrial instability. Multiple bargaining units *per se*, raise a serious concern about industrial stability. Instead of one strike, there may be several strikes. Each union may potentially whipsaw the employer by trying to leapfrog the last set of negotiations. Therefore, in regard to applications for certification in relation to employers who have existing collective

bargaining regimes, the *ICBC* factor of industrial stability must be given the greatest weight in the determination of what constitutes an appropriate bargaining unit.

What this means as a matter of practice and policy is that when an application for certification is received where there are existing units in place a choice will be made either to grant certification to the new additional unit or to require the enlargement, variation or merger of the existing units. If the latter decision is made, any new union seeking to represent the employees of that employer must either apply for the existing unit(s) or apply for a larger unit. In furtherance of industrial stability there will be a presumption against multiple bargaining units. The presumption markedly increases with the number of units.

In addition to the four factors we have already outlined in determining community of interest - similarity in skills, interests, duties, and working conditions, the physical and administrative structure of the employer, functional integration, and geography - on initial applications for certification, we now add these two additional factors that are to be examined in determining community of interest at the second or additional stage of certification:

(e)The practice and history of the current collective bargaining scheme.

(f)The practice and history of collective bargaining in the industry or sector.

Included within these six community of interest factors are the size of the employer, the number of existing units, and whether the employer is in the private or public sector (where access is often of much less of a concern). As well, the reason why an incumbent union does not represent the employees may be relevant. Therefore, depending upon the outcome of these community of interest factors, the presumption against multiple bargaining units will or will not be rebutted.

In applying this policy the Board adopts the "building block" approach set out by Chair Kinzie in *Crest Motor Hotel Ltd., supra*. In that case the employees in the hotel lounge were certified to the Hotel & Restaurant Employees' and

Bartenders' Union, Local No. 626. There were six employees working in the lounge. The remaining employees, approximately 40 to 45, remained unorganized. The BCGEU applied to be certified for these remaining employees. Its application for certification was dismissed and that dismissal was upheld on appeal. The BCGEU then applied for an all-employee unit. The employer argued that this amounted to a raid, which was not timely and further, that the BCGEU enjoyed no support among the currently certified employees. This, therefore, violated the principle in *Olivetti*, BCLRB No. 113/74, [1975]) 1 CLRBR 60, "sweeping in" employees without majority support.

The Board found in favour of the BCGEU's application, and applied the decision in *White Spot Limited*, BCLRB No. 84/75, [1976] 1 CLRBR 241, which stated that where a proposed unit is larger than and inclusive of an existing unit, then that application is not a raid because there is no collective agreement in force for the *unit* proposed by the applicant. (This had previously received judicial support in the B.C. Court of Appeal decision: *Retail Clerks' Union, Local 1518 v. Beverage Dispensers & Culinary Workers' Union, Local 835, et al*, 72 CLLC 14,140). The result of certifying this wider unit is the cancellation of the current collective agreement for the smaller unit. This, however, is consistent with the Board's policy that when a unit is found to be no longer appropriate for collective bargaining, and the employees are subsequently included in another unit, the collective agreement covering that former unit is cancelled: *B.C. Ice & Cold Storage Limited*, BCLRB No. 45/78, [1978] 2 CLRBR 545. This is also the case where a variance has significantly altered the nature of a bargaining unit: *Standard Bus Contracting Ltd., et al*, BCLRB No. 72/75, [1976] 1 CLRBR 30.

Finally, the Board in *Crest Motor Hotel* stated that the *Olivetti* principle does not apply to an application for certification that is larger and inclusive of a smaller unit. An application for certification by a trade union that is not currently certified or has no existing collective agreement with an employer, is unlike the situation of an incumbent union seeking to vary its certification and "sweep in" employees without a vote. The union, when applying for a larger unit, is simply required to obtain an overall majority among all employees within the proposed unit. This is consistent with the majoritarian principle because any other

rule would in effect give a smaller existing unit a minority veto over the establishment of any larger bargaining units.

F. Appropriateness: Existing Multiple Bargaining Units

The final issue of appropriateness that we address is the situation where there are multiple bargaining units already in existence at a particular employer.

It is this Board's view that we will more readily look at collective bargaining relationships where there are currently in existence multiple bargaining units which create adverse labour relations consequences. The Board's decision in *Alpulp, supra*, set out an extremely high test before it would look at varying or consolidating certifications. Indeed, it is hard to find a similar labour relations test with regard to any part of the existing labour relations scheme. In the *Alpulp* decision the Board stated that it would not consider exercising its discretion to vary or cancel a certification unless "*extraordinary*" (italics in original) relief was required.

This Board has the jurisdiction and the authority to vary or cancel certifications pursuant to Section 142 (formerly Section 36 of the Code): *MacMillan Bloedel Limited (Alberni Pulp and Paper Division)*, BCLRB No. 16/82, [1982] 2 CLRBR 114; *MacMillan Bloedel Limited (Alberni Pulp and Paper Division)*, BCLRB No. 30/82, [1982] 2 CLRBR 489; and *B.C. Ice & Cold Storage, supra*.

Second, as stated in *Alpulp*, there is nothing "sacrosanct" about the bargaining units founded by the Labour Relations Board many years ago. Much more important is the collective bargaining experience of the parties since the determination of that bargaining unit. If that bargaining unit is no longer appropriate then the Board should not hesitate to establish and indeed, is obliged to establish, an appropriate bargaining unit to deal with industrial strife.

Third, there is nothing in the wording of Section 142 that compels such a restrictive gloss as the word "extraordinary" denotes. Although the *Alpulp* series of decisions seemed to ascribe to the *Woodward Stores* policy, that a certification

does not confer a "property right", it proceeded to set out a test under Section 142 that was akin to expropriation.

Therefore, in rejecting the very restrictive test set out in *Alpulp*, *supra*, we have decided that the following three factors must be examined by the Board in making a determination that bargaining units should be varied, consolidated or merged:

(a)A determination that one or more bargaining units is no longer appropriate.

(b)A determination of what would constitute "an appropriate" bargaining unit, employing all six community of interest factors.

(c)Evidence of potential or actual industrial instability.

In regard to the above three factors, the first two concern community of interest and appropriateness, which we have discussed in detail. However, in relation to the third factor we note the following: first, evidence of "potential" industrial unrest or instability must amount to more than mere speculation; it must be unrest or instability that is both immediate and likely. Second, "actual" unrest or instability need not be as described in *Alpulp* - of a "profoundly serious nature" - but can amount to documentation of multiple strikes, illegal work stoppages, jurisdictional disputes which are a result (direct or indirect) of the existence of multiple bargaining units. Should it appear from the evidence that the collective bargaining relationship is not likely to improve in the future, the Board will exercise its discretion under Section 142 to vary, consolidate or merge the existing bargaining units.

Once a determination has been made to vary, consolidate, or merge the existing bargaining units the options of the Board are varied. It may cancel one or more of the certifications; it may vary the employees into another existing bargaining unit; it may conduct run-off ballots to determine which remaining unit(s) the employees wish to be represented by; or it may, pursuant to a direction from the Minister or on application by the parties, establish a joint council of unions,

pursuant to Sections 20 and 41 of the Code. The willingness of unions to participate in a joint council may mitigate the need to take the more significant steps of variation or cancellation.

The twin policies of the *Crest Motor Hotel* doctrine, which may be referred to as the "building block" approach, and the variation or cancellation of certification under Section 142 are consistent with the Board's original approach of balancing access at the initial application stage and the achievement of industrial stability within existing collective bargaining regimes.

As Chair Weiler noted in the *Woodward Stores* decision, subsequent to the initial acquisition of collective bargaining rights, the Board's policy in regard to appropriateness will not allow for the proliferation of bargaining units. In addition, certification will not be treated as a property right:

> ...rather than creating new bargaining units we will consider that the existing units must be enlarged or merged and all of those employees represented by one trade union (which could be a council of unions voluntarily agreed to or imposed by the Board under Section 57 of the Code). We do not interpret the Labour Code as giving trade unions ' property rights' in the continued existence of certifications or collective agreements where the unit upon which they depend no longer appears appropriate. (p. 120)

G. Summary: Law and Policy

We will now summarize our conclusions regarding appropriateness.

1. There are two fundamental principles in the Code regarding the determination of appropriate bargaining units, access to collective bargaining and industrial stability. These principles are always present in any determination of appropriateness.

2.Community of interest is the test for determining an appropriate unit. An appropriate unit must have a rational and defensible boundary.

3.On an *initial* application for certification, community of interest is determined by the following factors:

(a)similarity in skills, interests, duties and working conditions.

(b)the physical and administrative structure of the employer.

(c)functional integration.

(d)geography.

Access to collective bargaining is the most important principle in determining appropriateness on an initial application.

4.In a traditionally difficult sector to organize, the community of interest factor on an initial application for certification is "relaxed".

5.To establish that a sector or industry or group of employees is traditionally difficult to organize, the evidence can include the following:

(a)the Board's own records - i.e., collective agreements and certifications.

(b)evidence of individuals with experience in the sector or industry.

(c)expert evidence concerning the sector or industry.

The evidence should establish a low-union density either in the particular industry or among the group of employees which reflects structural or systemic aspects of the workforce which have made it difficult to organize.

6. At the *second or additional stage* of certification (i.e., where there is already at least one collective bargaining regime in place), the community of interest factors are expanded to include the following two (for a total of six factors):

(a) the practice and history of the current collective bargaining scheme.

(b) the practice and history of collective bargaining in the industry or sector.

Industrial stability is the most important principle in determining appropriateness at the second or additional stage of certification. There is a presumption against multiple bargaining units. This presumption markedly increases with the number of units.

7. When an application for certification is received, and there are existing units in place, a choice will be made either to grant certification to the new additional unit or to require the enlargement, variation or merger of the existing units. If the latter decision is made, any new union seeking to represent the employees of that employer must either apply for the existing unit(s) or apply for a larger unit in accordance with *Crest Motor Hotel, supra*.

8. In relation to multiple bargaining units already in existence, the Board will exercise its jurisdiction under Section 142 to vary, merge, or consolidate bargaining units after a determination of the following three factors:

(a) a determination that one or more bargaining units is no longer appropriate.

(b)a determination of what would constitute a new or appropriate bargaining unit (employing all six community of interest factors).

(c)evidence of potential or actual industrial instability.

With these rules of appropriateness we hope to accomplish several things: first, to bring the Board's policy in line with its practice; second, to integrate the policy approach to appropriateness beginning with the statutory emphasis on the facilitation of collective bargaining on initial applications for certification, and "build" towards the establishment of all-employee units in furtherance of the statutory purpose of achieving industrial stability in collective bargaining; third, to set out more clearly the evidentiary requirements and the principles to be applied in making determinations of appropriateness.

From *ICBC, supra*, and *Woodward Stores, supra*, we affirm the two crucial principles of access to collective bargaining and industrial stability, as well as community of interest as the standard test. The factors of lateral mobility, common framework of employment conditions, and administrative efficiency and convenience, are all expressly included within the concept of community of interest. Finally, from *ICBC* and *Woodward Stores,* and the subsequent jurisprudence of the Board - *Canadian Kenworth, supra,* and *B.C. Coal, supra* - community of interest (a rational and defensible boundary) has clearly emerged as the basis for the determination of what constitutes an appropriate unit.

VII. DECISION

1. Island Medical Laboratories Ltd.

HSA filed an application for certification under Section 39(1) of the Industrial Relations Act for a bargaining unit consisting of "medical laboratory technologists employed (by IML) at Lower Vancouver Island sites, including Yates Street, Sooke, Royal Oak, Duncan". We will not review all the facts or issues which

arose in the original decision. We will relate only those facts and issues which are determinative of the issues on reconsideration.

Briefly, the facts are as follows. HSA currently represents 7,500 to 8,500 employees in approximately 130 certified bargaining units in British Columbia. The standard HSA certified bargaining unit described as:

> Para-medical professional groups including dietitians, physiotherapists, occupational therapists, medical record librarians (now known as health record administrators), medical technologists, X-ray technologists (now known as medical radiology technologists), pharmacists, medical social workers and remedial Gymnasts (now blended into physiotherapists).

HSA certifications also include registered psychiatric nurses.

HSA is certified predominantly in the acute care hospitals in this province. Also typically found in the acute care hospitals are the following unions: the British Columbia Nurses' Union ("BCNU"), representing nurses; the Hospital Employees' Union ("HEU"), representing support staff; the International Union of Operating Engineers ("IUOE"), representing operating engineers; and the Professional Association of Residents and Interns of British Columbia ("PARI"), representing the interns and residents.

It was agreed at the original hearing that within an acute care facility the HSA bargaining unit includes medical technologists (the registered technologists) while the HEU would represent the departmental assistants and other support staff.

Following our description of the community of interest criteria - the similarity of skills, interest, duties and working conditions, physical and administrative structure of the employer, functional integration and geography - we are satisfied that the original panel reached correct conclusions with regard to three of the four criteria.

As found by the original panel, the Registered Technologists are a certified occupation which requires two years' post-secondary education plus a one year clinical practicum. The Registered Technologists write national examinations and are eligible for registration and membership in the Canadian Society of Laboratory Technologists ("CSLT"). The Society governs the professional conduct and ethics of its members and is also the disciplinary body. IML is only able to maintain its accreditation as a private medical laboratory so long as its Registered Technologists obtain and remain certified by CSLT. IML has 12 departments, six of which perform clinical and analytical services: haematology, chemistry and microbiology, endocrinology, microscopy, immunology and accessioning/communications and distribution.

As the original panel found, Registered Technologists require a level of education, skill, and training which is considerably different than that possessed by either the departmental assistants or the technical assistants who perform some of the same duties. What distinguishes the Registered Technologists from the Departmental Assistants and Technical Assistants are the following:

1. education and training;

2. the technical knowledge of laboratory equipment;

3. the ultimate responsibility for the analytical and interpretative functions - test results and quality control.

We therefore agree with the original panel that the Registered Technologists, much like any professional group, meets the first criteria - they share a similarity of skills, interests, duties, and working conditions.

In regard to the remaining community of interest factors, the two most significant for the purposes of this appeal are geography and functional integration. We are in agreement with the original panel in its conclusions in regard to geography. When an employer, as in this case, has different laboratory settings in different locations on Vancouver Island, the employees will not be required to organize all physical locations of the employer in order to acquire

collective bargaining rights. Separate locations are, *prima facie*, a rational and defensible boundary.

The obvious exception to that is, of course, a regular interchange of employees between locations. The Board found in this case that there was no regular interchange of employees. We therefore affirm the original panel's conclusion that an appropriate bargaining unit can consist of only some geographical locations.

However, given our analysis of the law and policy concerning community of interest, the final factor of functional integration poses difficulties in the circumstances of this Employer.

The evidence found by the original panel in regard to the "overlap" of job functions between the registered technologists (RT's), the departmental assistants (DA's) and the technical assistants (TA's) is as follows:

> As mentioned earlier, in accessioning, RTs spend the majority of their time performing DA-type duties. However, a portion of each shift is taken up with the reference services which only RTs are qualified to perform. In Duncan, there is no DA in the analytical laboratory; thus, the RTs perform the DA-type functions there.
>
> ...The percentage of RTs time spent doing DA-type functions ranges from 5% to 10% on some benches and 25% to 30% on other benches. ...
>
> At the Nanaimo haematology laboratory, there are five RTs and no DA's; accordingly, DA-type functions are performed partly by RTs and partly by the receptionist. Eleven RTs and two DAs work at the Yates Street haematology laboratory in Victoria. Here, one of the DA's performs office functions, and the other D.A. does the accessioning. RTs replace DA's who are off work on vacation or sick leave. On Saturdays, this laboratory is open for four hours and is staffed with one RT only. This RT performs all the DA-type duties on Saturday.

> In the Microbiology Laboratory at Royal Oak there are eighteen RTs, eight DAs and two cleaning assistants. From 4 p.m. to 8:30 p.m., RTs and DA's share the DA-type duties, although from 4 p.m. to 5 p.m. one of the two RTs on duty performs analytical tests which only RTs can perform...During the late afternoon shift, RT's and DA's work closely in the laboratory. There is very little interaction between DA's and RT's on the early shift. Additionally, a number of test results generated in this department can only be reported by RT's. The parasitology room is separate from a main microbiology laboratory. Here, DAs and RTs work in the same room together. The DA prepares specimens for "reading" by the RT. (pp. 12-13)
>
> ...
>
> ...Similarly, at IML, many RTs spend portions of their work day performing duties which are also performed by DAs. In departments such as asscessioning and microbiology, RTs spend a significant portion of their work day performing DA-type functions. The RT in Sooke and the RTs in the analytical laboratory in Duncan also spend a notable portion of the work day performing DA-type functions. (p.22)

The original panel relied on *United Used Auto and Truck Parts,* IRC No. C130/89 for the proposition that the overlap of work between registered technologists, the departmental assistants and technical assistants had to do with unskilled and semi-skilled preparatory and clerical functions as opposed to the core group of skills of which the registered technologists possess.

Although there is some similarity, on a closer examination, the facts in this case do not correspond to the facts in *United Used Auto* nor its resulting conclusion. The sales people in *United Used Auto* had two basic tools - a screwdriver and a wrench (p. 3). The dismantling work which they performed amounted to simply removing a "small part", rather than having to call (and thus wait) for a yardman. The Council found as follows:

> Similarly, while the yardmen receive assistance on occasion from others in the work place and while yardmen reciprocate with advice, lending a hand to load a truck or answering the telephone this type of assistance does not blur in any significant way the essential distinction between yardmen and other employees. Salesmen and inventory

> personnel do not regularly perform Yardmens' work, and vice versa, because people have their own jobs to do, and the fact of the matter is that most would be incapable of performing work in another job category, in any event. (p. 11)

The overlap of duties found in *United Used Auto* had to do with helping out or the assisting of another employee or simply doing some small aspect of another person's work, in order to make things operate more efficiently. As is evident from the above passage, no other employee was capable of performing the great majority of duties performed by yardmen - the dismantling of entire engines and bodies of cars for the purpose of salvage.

The degree of functional integration between Registered Technologists and Departmental Assistants exceeds most employment situations. The two classifications can and do, as a regular part of their job description, perform precisely the same duties. Whether it be in the accessioning department where Registered Technologists spend the "majority" of their time performing Departmental Assistant duties, or in the Nanaimo haematology laboratory where Departmental Assistant functions are performed by Registered Technologists, or in the microbiology laboratory at Royal Oak where on the 4:00 p.m. - 8:30 p.m. shift the Departmental Assistants and Registered Technologists perform the same duties, it is clear that the actual overlap of duties requires a bargaining unit that is inclusive of both occupations (leaving aside the issue of Technical Assistants).

However, before proceeding to the issue of the application of the *Woodward Stores* doctrine, a comment should be made about the Council's prior decision in *Island Medical Laboratories Ltd.*, IRC No. C265/89 ("IML (No. 1)").

Before both the original panel and this appeal panel, the Employer relied on the decision of the Council in IML (No. 1), where HSA applied for the following bargaining unit at Island Medical Laboratories:

> employees of Island Medical Laboratories except clerical employees, supervisors and persons above the rank of supervisors.

In this prior application for certification, the Union applied for the Registered Technologists, the Technical and Departmental Assistants, as well as employees in the Maintenance Department, two employees in the Storage Department, and one employee who was a driver responsible for bringing specimens from collection locations to the analytical sites.

The Council dismissed this application for certification on the basis that there was a substantial lateral movement of employees from the clerical positions (which had been excluded) to the Technical and Departmental Assistant positions (which had been included in the application). The certification, if issued in the terms requested, would have created a barrier to this lateral mobility. As well, the Council found an increased potential for industrial instability if a different union other than HSA sought certification for the excluded employees. Indeed, as found by the original panel of this Board, there was an agreement between the parties that if the RT's were within the HSA unit, the TA's and DA's and others would likely fall within the traditional HEU unit.

It is understandable that HSA applied for the Registered Technologists only after having been told by the Council that the lateral mobility which exists between the clerical classifications and the Departmental and Technical Assistants made exclusion of the clerical employees an inappropriate unit. Secondly, there is a strong "professional community of interest" existing within the Registered Technologists.

As is evident from the two bargaining unit descriptions applied for (both before the original panel of the Board and before the Council), HSA has not applied for its standard bargaining unit description. That is understandable because this is a private medical laboratory, not a public health care facility. However, this Board will not create new technical units representing a single para-medical group in the health care industry. It has been the policy of the Board to include, as the HSA standard description reveals, all para-medical professions within one bargaining unit.

Thus no union representing a single para-medical profession could raid or partially decertify the existing HSA units. Chair Munroe stated the following in *Canadian Kenworth, supra*, in dealing with the distinctive features of data processing employees and whether or not they qualified as a craft under Section 41 of the *Labour Code*:

> Section 41 amounts to a legislative recognition of certain historical facts of industrial relations life which might reasonably be preserved; it was never intended that in 1978 it should be used as a vehicle for "discovering" new "crafts" and creating exotic new bargaining unit descriptions. (p. 70)

It should be remembered that crafts are a historical anomaly. They preceded the development of the concept of appropriateness. They are therefore to be restricted, not expanded. This is equally true of the creation of new technical units.

It is this Board's view, therefore, that the private sector health care facilities will not necessarily simply repeat the bargaining unit patterns of the public health care facilities. The Seaton Commission noted, for instance, that there should be fewer bargaining units in the public health care facilities (see: *Closer to Home: Summary of the Report of the British Columbia Royal Commission on Health Care and Costs*, 1991, Vol. 2, p. D-27). We will approach applications for additional units in the private healthcare sector consistent with the principles in this decision. One exception may be where several trade unions apply for a joint council (s. 20 or reference by Minister under s. 41), and a single collective agreement is brought into existence.

The functional integration of Registered Technologists and Departmental Assistants makes it appropriate under the standard community of interest test that they be included in the same unit.

However, that does not end the matter. What must be addressed is the Union's application for certification under the *Woodward Stores* doctrine - the "relaxed" community of interest test.

Therefore, the final matter in IML is the issue of the appropriateness of the Registered Technologists' unit under the *Woodward Stores* doctrine. The original panel had before it evidence and argument related to the issue of the difficulty to organize but in view of its findings on appropriateness, did not deal with these arguments and evidence.

As stated in the facts of *Woodward Stores,* (and recited above), the employees in the display department of Woodwards, whose functions were basically in-store advertising, exhibited "much the same skills" and "talents" as the layout artists in the Advertising Department. As Chair Weiler stated:

> A good case could be made for the conclusion that the employees in the two departments should be grouped together for the purposes of collective bargaining. (p. 121)

However, they were not included in the bargaining unit because:

> The only result of merging the two Departments into one bargaining unit would be to deny collective bargaining to the Advertising Department employees who do want it. (p. 122)

The Registered Technologists are a self-governing profession. The licensing of the Employer is dependent upon their accreditation. They are ultimately responsible for the interpretation and analysis of complex medical laboratory tests. Their self-governing society pursues their professional goals and is responsible for entry into the profession and the discipline of its members. It would seem evident that if employees in a display department (a single classification in retail stores) have a community of interest, then a self-governing profession such as these Registered Technologists have a sufficient community of interest to meet the *Woodward Stores* test.

As noted the original panel is seized of this matter. We therefore remit the matter back to the original panel to determine if IML (a private medical facility) falls within the traditionally difficult to organize sector.

2. Dueck Chevrolet Oldsmobile Cadillac Limited

The original panel concluded that there was a community of interest between mechanics and mechanic helpers "sufficiently distinct" to make this unit appropriate for collective bargaining.

On this appeal the Employer relies upon *Jim Pattison Industries Ltd., supra*; *Lega Fabricating Ltd., supra;* and *Chimo Structures Ltd., supra*, for the principle that a craft certification in the industrial sector is inappropriate.

Vice-Chair Germaine, in *Jim Pattison Industries Ltd.,* dismissed an application for certification which had excluded from the Service Department employees who worked in the parts department and body shop. In that case, the three departments were housed in separate buildings. However, the employees in these different departments had continual contact with one another and shared common facilities.

The facts as found by the original panel show that the mechanics and bodymen operate out of the same building. They interact with both the parts department and the body shop. The same benefit package is in effect and the method of payment is based upon a flat rate incentive.

The Employer argues, and it is a fair reading of the decision, that the single most important factor with regard to the original panel's finding of a community of interest amongst the mechanics and mechanics' helpers is that they practice a particular craft.

However, it has clearly been the policy of the Board and the Council that it will not certify a craft in the industrial sector. The Board stated in *Chimo Structures Ltd., supra*, the following:

> The situation here is not unique. In the forest industry and in the mining industry the Board has certified bargaining units which include tradesmen of all kinds. The Board's firm policy is to include those tradesmen in one large plant or industrial unit and it is not to create tradesmens'

> units that will give rise to competitive collective bargaining between units of the same employer with the dangers of strikes by each separate unit closing down the plant. (p. 379)

As Vice-Chair Baigent stated in *Lega Fabricating Ltd., supra*:

> In many instances skilled tradesmen, who might in other circumstances be certified in a craft unit, will be included in the unit which transcends traditional craft boundaries and is designed to respond to the exigencies of a permanent localized employer-employee relationship. (p. 393)

The effect of the certification issued for Dueck is to certify a craft within an industrial unit. As a matter of policy we affirm *Lega Fabricating Ltd.* and *Chimo Structures Ltd.* and therefore consider the unit inappropriate on that basis. We are further supported in this view with regard to this specific industry given the decision in *Jim Pattison Industries Ltd., supra.*

Although not necessary to our determination in this case, we also note, that on the facts, we would have concluded that the application did not meet the standard community of interest test on an initial application for certification. Specifically, the Board will not select out a minority of classifications in a physically integrated plant as an appropriate unit in other than traditionally difficult to organize sectors.

No issue arises with regard to the *Woodward Stores* doctrine.

We therefore find that the unit is inappropriate for collective bargaining and set aside the original panel's decision to grant certification.

LABOUR RELATIONS BOARD

STAN LANYON
CHAIR

BRENT MULLIN
VICE-CHAIR

KEITH OLEKSIUK
VICE-CHAIR

Aramark Canada Facility Services Ltd. (Re)

British Columbia Labour Relations Board Decisions

British Columbia Labour Relations Board

J. O'Brien (Vice-Chair), M. Leffler (Member) and G. Martin (Member)

Heard: June 9 - 11, 2004.

Decision: July 29, 2004.

Case Nos. 50967, 50972, 51053, 51094, 51160, 51231,

51248, 51333, 51545 and 51554

[2004] B.C.L.R.B.D. No. 244 | BCLRB Decision No. B243/2004

Between Aramark Canada Facility Services Ltd. ("Aramark" or the "employer"), and Hospital Employees' Union (the "HEU"), and B.C. Government and Service Employees' Union (the "BCGEU"), and Industrial Wood and Allied Workers of Canada (I.W.A. Canada), CLC, Local Union Number 1-3567 (the "IWA"), and Sodexho MS Canada Limited and Compass Group Canada (Health Services) Ltd./Groupe Compass Canada (Services de Santé) Ltée ("Sodexho" and "Compass", together, the "intervenors")

(115 paras.)

Counsel

Kim Thorne and Muriel Henry, for Aramark

David Tarasoff, for the HEU

Keith Oleksiuk, for the BCGEU

Jessica Gregory, for the IWA

Andrea Zwack, for Sodexho

David Duncan Chesman and Brian Dartnell, for Compass

DECISION OF THE BOARD

I. NATURE OF THE APPLICATION

1 The HEU applies under Section 18 of the Labour Relations Code ("Code") to represent employees at 14 or 17 sites where Aramark provides housekeeping services to the Vancouver Coastal Health Authority ("VCHA") and Providence Health Care ("Providence").

2 Aramark objects to the bargaining unit proposed by the HEU. Aramark argues that the only appropriate bargaining unit is one covering all 650 employees and 30 sites where it provides services for the VCHA and Providence. Aramark contends that the only appropriate bargaining unit is one that mirrors its contract with VCHA and Providence.

3 The Intervenors were granted standing to provide industry-wide evidence and argument on bargaining unit structure: BCLRB No. B114/2004. The IWA was granted interested party status: BCLRB No. B114/2004. The BCGEU was granted interested party status after it made a certification application for Aramark employees at a VCHA site.

II. PRELIMINARY RULINGS

A. Evidence from Alberta and Manitoba

4 In an outline of evidence provided before the hearing, Aramark indicated that it intended to call evidence about its collective bargaining experience in Alberta and Manitoba. In Alberta, Aramark provides services at 12 geographically separate correctional facility sites. At seven sites, the United Food and Commercial Workers' International Union is certified for stand-alone bargaining units. At the other five sites, the Aramark employees are non-union. Aramark submits that this bargaining unit structure has led to industrial instability. In Manitoba, Aramark has a contract with a health authority covering five sites. The Canadian Union of Public Employees is certified for a single unit of employees at all five sites. Aramark has been able to achieve greater operational efficiencies in this contract.

5 In a letter, we told the parties it was not necessary for Aramark to lead evidence on the bargaining unit structures in Alberta and Manitoba:

> ... We reach this conclusion because the evidence that Aramark intends to introduce with respect to the two different situations it has encountered in Alberta and Manitoba is designed to illustrate that industrial instability arises when there are multiple bargaining units. This is a presumption found in Island Medical Laboratories Ltd., BCLRB No. 308/93 (Leave for Reconsideration of IRC No. C217/92 and BCLRB No. B49/93), (1993), 19 CLRBR (2d) 161, (pp. 187-188, 193.) It is not necessary to provide evidence to establish what is already a presumption under Board jurisprudence. Aramark may argue this point without providing evidence from other jurisdictions. It is up to the applicant to rebut the presumption.

6 At the hearing, Aramark stated it also wanted to call this out-of-province evidence in relation to its argument that a single bargaining unit enhances economic viability.

7 The evidence related to the bargaining units in Alberta and Manitoba arises in different jurisdictions where different entities have contracted with Aramark to provide services. Different unions have been certified and reached collective agreements with Aramark. If the HEU were to challenge or explore this evidence, the result could be time consuming and inconclusive.

8 In our view, evidence from Alberta or Manitoba would be of marginal probative value which is outweighed by considerations of fairness and efficiency: Simon Fraser University, BCLRB No. B253/2003; Checkmate Cabs Ltd., BCLRB No. B359/95.

B. Presumption against proliferation of bargaining units

9 At the outset of the hearing, the HEU contended that Aramark had never raised in any way an objection based on the proliferation of bargaining units. The HEU asserted that it does not need to answer the objection and on that basis the presumption against the proliferation of multiple bargaining units is rebutted: Island Medical Laboratories Ltd., BCLRB No. 308/93 Leave for Reconsideration of IRC No. C217/92 and BCLRB No. B49/93), (1993) 19 CLRBR (2d) 161, ("IML").

10 The HEU stated this was a critical issue because it continued to organize and file certification applications in a certain way based on its understanding that Aramark was not objecting to their applications on the basis of proliferation of bargaining units. Otherwise, the HEU might have adopted a different approach to organizing. The HEU contended that Aramark is estopped from raising this objection.

11 The HEU applied on February 13, 2004 to be certified for a bargaining unit of employees at several locations in

Powell River and Sechelt (the "Sunshine Coast"). On February 16, 2004, the HEU applied for a second bargaining unit at Brock Fahrni Pavilion, 749 West 33rd Avenue, Vancouver. Both applications went to the same certification hearing on February 20, 2004.

12 Ararmark set out the nature of its objections to the HEU applications in a written submission on February 27, 2004. Ararmark's primary objection was that a collective agreement with the IWA barred the HEU's certification applications. This objection was dismissed in BCLRB No. B173/2004.

13 Aramark set out its other objections as follows:

> 2. The second objection is that even if the HEU applications were timely under section 19 of the Code, the HEU seeks to represent only a portion of an existing bargaining unit. As set out above, the existing bargaining unit covers some 30 sites and 650 employees. It is a unit that relates to the Coastal contract business that ARAMARK obtained, and is consistent with the pattern of collective bargaining in the service sector.
>
> 3. ARAMARK asserts that the onus is on the HEU to show very compelling reasons why the Board should consider certifying a unit that is a portion of an existing unit, which results in a fragmentation of that existing unit. There is a presumption that the most appropriate unit is an all-employee unit. In this industry and context, that means that at a minimum the HEU would need to apply to represent all of the employees employed by ARAMARK in respect of the Coastal contract.
>
> 4. ARAMARK also asserts that the HEU application must be dismissed as it introduces a second bargaining agent and a second unit into the Coastal business of ARAMARK. This clearly increases the potential for industrial instability within this business unit. The Employer therefore relies upon the presumption against multiple bargaining units within an employer's operations, or a proliferation of such units. These principles have been endorsed consistently by the Board since its seminal decision in Island Medical Laboratories Ltd., BCLRB No. 308/93, as recently as last month in Sodexho MS Canada Ltd., BCLRB No. B23/2004.
>
> 5. Finally, if the Board should find that the HEU applications are timely, and that the presumption against proliferation of units can be rebutted, the Employer asserts that the units sought are not appropriate for collective bargaining due to the significant functional integration between the sites named in the HEU applications, and other sites of the Employer which are also part of the Coastal contract business.

14 As a result of BCLRB No. B173/2004, Aramark is no longer able to object to HEU on the basis that it is a second bargaining agent. However, we are satisfied that Ararmark's objection to more than one bargaining unit continues to be a live question. We find that an objection based on the presumption against the proliferation of bargaining units was sufficiently raised by Aramark in its February 27, 2004 submission.

C. Bargaining unit description amendment

15 As a result of our ruling regarding the objection based on the presumption against the proliferation of bargaining units, the HEU applied on June 10, 2004 to amend the 10 certification applications before us to a single bargaining unit for employees at all sites in the applications. Aramark opposes the HEU's application to amend the bargaining unit description.

16 (Aramark indicated that the HEU's applications cover 17 sites. However, only 14 addresses are listed on the certification applications. At this stage in the process, nothing turns on whether there are 14 or 17 sites.)

17 Aramark and the HEU agree that the issue is whether this amendment is substantive. A substantive amendment means the application is treated as a new application and the effective date of the application is the day the amendment request was received. This day becomes the date on which membership support evidence is assessed. If the amendment is not substantive then the date for assessing membership support evidence remains the day the application was first received.

18 In Chase and District Health Society, BCLRB No. B530/98, the Board describes the types of matters that lead to an amendment being considered substantive:

> In certification applications when an amendment is made which alters the essential character of the unit applied for, adds or substitutes a party, or brings it under another section of the Code which "will involve a number of different issues" it is considered substantive and the amended application speaks from the date of the amendment: Regional District of Fraser-Fort George, BCLRB No. B393/96; Fraser Lakes Sawmills Ltd. (1980), 20 B.C.L.R. 210. (para. 13)

19 The Board considers the essential character of the bargaining unit has changed when a significant group of employees are added or deleted, locations are added or deleted, or a new or unrelated employer is added. (This list is not exhaustive.)

20 In this case, the HEU initially applied for 10 bargaining units covering 14 or 17 sites. Aramark argues that only one bargaining unit covering all employees working at 30 sites is appropriate. According to Aramark, it moves employees among sites on a casual and permanent basis to help achieve efficiencies. HEU says its amendment is responsive to Aramark's concerns.

21 We find the following cases, cited by Ararmark, to be distinguishable. In Compass Group Canada (Health Services) Ltd./Groupe Compass Canada (Services De Santé) Ltée, BCLRB No. B95/2003, an amendment was substantive when the union sought to change the composition of the group of employees and significantly changed the issues to be addressed. In Gainor Services Ltd. (We Care Home Health Services), BCLRB No. B273/2003, an amendment that added a second site was found to be substantive. In Granville Island Hotel & Marina Ltd. and Pelican Bay Restaurant Inc., BCLRB No. 253/83 an amendment removing segments of the employer's operations that affected a considerable number of employees was substantive.

22 In this case, the proposed amendment does not add or delete employees or add or delete locations. The same employees at the same sites would be included in the proposed bargaining unit. In our view, the HEU is essentially changing the format of the bargaining unit from 10 separate bargaining units to one bargaining unit. We are not persuaded that this change amounts to a substantive amendment. As stated in Cascade Masonry Center Ltd., BCLRB No. B194/2000, "the sum now applied for is no different than the parts in the previous applications" (para. 35). Further support for this analysis is found in The Greater Victoria Hospital Society, IRC No. C118/89 and Cunningham Drug Stores Ltd., 21 D.L.R. (3d) 735 (B.C.C.A.). We are satisfied that the amendment does not change the essential character of the bargaining unit.

23 We turn now to Aramark's argument that different legal issues will arise under the amended bargaining unit. Aramark acknowledges that the amended bargaining unit does not change any of the legal issues with respect to its argument that it is inappropriate to certify a portion of an all-employee bargaining unit. If the case proceeds to the next phase, Aramark intends to argue that the bargaining unit is not appropriate as a result of functional integration. Ararmark says that if the bargaining unit is amended, it will have to make a new assessment to determine if issues like functional integration arise. Aramark will also want to argue issues such as the appropriateness of the bargaining agent.

24 In our view, Aramark will not suffer any prejudice as a result of the amendment. The amendment does not significantly change the issues raised in the initial applications regarding the appropriateness of the bargaining unit. The same section of the Code applies. No new sections of the Code need to be addressed. Aramark has not yet provided any particulars with respect to functional integration. If the hearing proceeds to that issue, Aramark will have ample time to provide particulars. At this time, we make no ruling with respect to other objections that Aramark has raised in some of the 10 certification applications.

25 In summary, we grant HEU's application to amend the bargaining unit to a single unit of employees at the 14 or 17 sites encompassed in the 10 initial certification applications. We find that this change in form is not a substantive amendment.

26 As a result, there is no longer a concern regarding proliferation of bargaining units arising from the HEU having applied for 10 bargaining units.

D. Date of the amended application

27 Since we found that the amendment was not substantive, the dates on the 10 original applications do not change. All that changes is the bargaining unit description. The proposed bargaining description has been amended so that there would no longer be 10 stand-alone bargaining units covering 14 (or possibly 17) sites. There would now be one bargaining unit covering the 14 or 17 sites.

III. ISSUES

28 The central issue is whether the unit applied for is appropriate. Aramark has raised a number of objections to the HEU's Section 18 application, some of which have been eliminated and others of which remain outstanding.

29 The objection based on the IWA's collective agreement was dismissed in BCLRB No. B173/2004. The objection based on there being a proliferation of bargaining units has been answered by the HEU's amendment of the bargaining unit description from 10 units to one.

30 In this decision, we deal with Aramark's position that the only appropriate bargaining unit is an all-employee unit, and that the Board should not apply its usual "building-block" approach to the creation of such a unit.

31 In order to evaluate Aramark's position it is necessary to consider the context or background in which HEU's application and Aramark's response to it has been made.

IV. BACKGROUND

32 As a result of the Health Social Services Delivery Improvement Act, SBC 2002, c. 2, also known as Bill 29, private facility service providers such as Aramark, Sodexho and Compass are now able to bid on contracts to provide non-clinical services such as housekeeping, maintenance, and food services in the public health care system.

33 Up until about a year ago, employees directly employed by public health authorities did this work. These employees were represented by unions in the Facilities Sub-Sector Bargaining Unit, where the HEU is the predominant union.

34 Neither Sodexho nor Compass provided any evidence. Lynn Ervin, Aramark's Director of Human Resources in Western Canada, testified.

35 Aramark Canada Facility Services Ltd. is a subsidiary of Aramark Canada Ltd. Aramark Canada Facility Services Ltd. provides housekeeping services in hospitals and other similar facilities. Like other service providers, Aramark bids on contracts through a tender process. Aramark has no input into the way clients set up contracts. For instance, Aramark had no influence over the sites chosen or the parameters set for the work to be done in the facilities under the VCHA/Providence contract.

36 The facility service provider business is very competitive and runs on a narrow profit margin. Aramark's two main competitors are Sodexho and Compass but there are other smaller competitors.

37 Clients become dissatisfied if Aramark is experiencing labour instability and they will find another contractor if Aramark fails to provide labour stability.

38 For the VCHA/Providence contract, Aramark bid a fixed price. This means the VCHA/Providence is paying a set amount to Aramark for housekeeping service regardless of what it costs Ararmark to provide the service. If Aramark's costs are higher than expected, it is Aramark's problem.

39 Each contract is self-contained. The contract determines the amount of money available, the type of work done, and the amount of money Aramark will receive from the client. These factors vary from client to client. Aramark does not interchange employees among contracts nor does it move money from one contract to finance another.

40 Aramark attempts to maximize efficiencies under each contract. As employee turnover is very expensive, Aramark tries to minimize labour costs by operating with a core group of employees who are offered more hours. In a multi-site contract, this may be achieved by offering the employees work at more than one site. This helps Ararmark achieve efficiencies and provides employees with full-time hours. By doing this, Aramark hopes to have fewer people on the payroll, thus bringing down the cost of training and fixed costs such as benefits.

41 Aramark submits that its drive for efficiency is inhibited when less than all-employees and all sites are unionized. At unionized sites, there may be higher rates of pay or different hours of work. As a result, employees working under a collective agreement may be reluctant to transfer to a non-union site. This may result in Aramark hiring more part-time employees or employing a larger number of casual employees.

42 If some sites under the VCHA/Providence contract were union and some were not, Aramark would have to make some changes. Aramark would probably require a different skill set from managers at union sites. Aramark expects that it would have difficulty transferring employees from union to non-union sites because of a difference in wages and schedules. As result, costs would increase.

43 The VCHA/Providence contract covers an area extending from Powell River and Pemberton in the north to Richmond in the south and from the University of BC in the west to Boundary Road in Vancouver to the east. Aramark has one general manager who works with a team of human resource and technical specialists to oversee all 30 sites. There are seven site managers who each look after a cluster of sites that are near one another. The size of the sites varies considerably. Some sites employ less than 10 individuals while others have up to 200 employees. The nature of the facilities also varies. Some are large acute care hospitals like Vancouver General Hospital and St. Paul's Hospital. Other much smaller sites, such as Youville, provide long-term care.

44 Under cross-examination, Susan Fisher, HEU director of organizing, testified that the HEU organizing strategy at Aramark's VCHA/Providence sites is based on where it is getting support from employees. The 10 initial certification applications before this panel were not "decided logically" or on the basis of geography. Organizing proceeded on the basis of which employees called the HEU.

45 There is one job classification - housekeeping aid - at Aramark's VCHA/Providence sites. There are also lead hands. The skill set among the employees is much the same. Employees attend the same three-day basic training course no matter which site they work at. A casual employee pool runs out of Mount St. Joseph's Hospital. Casual employees are available to work at any site on a temporary basis to cover sickness, leaves, vacations and days off. Some employees have also been permanently transferred to different sites at their request.

46 Aramark has been experiencing a severe employee shortage at some sites. Aramark is not yet operating at a level of organizational efficiency that would produce a profit in the VCHA/Providence contract. In the future, Aramark hopes to set up specialized cleaning teams to do jobs like carpet cleaning. These teams would move among all the sites.

47 Ervin agreed that her comments regarding the difficulties of working with union and non-union sites under the same contracts were assumptions. However, she said it was based on Aramark's experience here and in Alberta. In British Columbia, Aramark encountered difficulties in providing services for the corrections department when two unions had two separate collective agreements under the one contract. In that case, there was no mechanism for coordinated bargaining. Ervin agreed it was possible Ararmark could bargain a collective agreement which provides the same method of scheduling at the union and non-union sites.

48 Fisher testified that she agreed with many of Ervin's concerns about the need to maximize efficiencies through

employee transfers, wages, and training. The HEU would like to explore with Aramark ways for employees to have access to hours at other sites. Fisher said creating experienced groups of specialized cleaners was a positive step.

49 The HEU has not objected to the BCGEU applying for certification at the George Pearson Centre, a site included in Aramark's VCHA/Providence contract even though this application raises the possibility of another bargaining agent. Nor has the HEU objected to the International Union of Operating Engineers ("IUOE") applying to represent employees at Mount Edward Court, a facility in Victoria where Sodexho provides services.

50 Fisher testified that an organizing advisory committee of the BC Federation of Labour ("BCFL") met in the spring of 2002 to discuss concerns arising from the passage of Bill 29. The group focussed on how to maintain labour stability in the face of the widespread contracting out to private firms made possible under Bill 29. They reached agreement on an organizing protocol that was signed by a number of unions including the HEU, the BCGEU, and the IUOE. The IWA is not a party to the protocol.

51 The resulting document, entitled Code of Practice: Organizing Successor Employers (the "Code of Practice") and dated September 4, 2002, sets out three objectives:

1. Maximize the retention of employees and their work within the union movement.
2. Minimize the potential for conflict that will weaken solidarity among unions by establishing principles, practices and procedures for unions to follow.
3. Avoid costly inter-union disputes at Board proceedings.

52 A key tenet in the Code of Practice is that employees should be encouraged to join the union that represented the employees before contracting out took place. The Code of Practice calls this union, the predecessor union. Another union should only try to organize a contractor's employees if they reject the predecessor union.

53 Since BCGEU is the "predecessor union" for housekeeping employees at George Pearson Centre, the HEU does not object to the BCGEU seeking to represent them at this time. The HEU also supports the IUOE because it is the predecessor union at Mount Edward Court. Fisher testified that the HEU has a practice and history of cooperating in collective bargaining with the BCGEU and the IOUE. They will not take contrary positions in collective bargaining and will establish procedures to work together.

54 Fisher agreed that one of the guiding principles of the Code of Practice is to avoid the fragmentation of workplaces into multiple bargaining units to the greatest extent possible.

55 The HEU objects to the IWA representing employees working for service providers because it has been uncooperative and has not agreed to abide by the Code of Practice. Fisher testified that it does not object to the IWA organizing employees at new operations where there is no predecessor union.

56 The HEU concedes that at the time that Compass Group (Health Services) Ltd./Groupe Compass Canada (Services de Santé) Ltée, BCLRB No. B328/2003 was before the Board, it took the position that the IWA should be excluded from organizing in the health care sector.

V. EXISTING CERTIFICATIONS

57 A search of Board records lists 30 certifications and one voluntary recognition agreement with several different unions for Aramark Canada Ltd., the parent company. According to Ervin, a large number of these certifications are inactive. Ervin testified that there are four active collective agreements. One is with the United Food and Commercial Workers, two are with the Hotel, Restaurant & Culinary Employees & Bartenders Union Local 40, and one is with the IWA. A fifth is being negotiated with Local 40. According to Ervin, each of these collective agreements is based on a single service provider contract.

58 The Board records show that no certifications have been granted for Aramark Canada Facilities Services Ltd. All certification applications for Aramark Canada Facilities Services Ltd. are pending.

59 In Compass Group (Health Services) Ltd./Groupe Compass Canada (Services de Santé) Ltée, BCLRB No. B194/2004 ("Compass"), the Board lists the 29 certifications that several different unions then held with Compass (para. 32). According to the Board's certification records, all of the existing bargaining units at Aramark Canada Ltd., Compass, and Sodexho are contract specific: Compass.

60 In Compass, the Board was satisfied that:

> ... the contract service industry serviced by Compass, Aramark and Sodexho has historically been subject to contract/location specific certifications, and that pattern has been followed even in circumstances resulting in a multiple bargaining unit design for these employers. I should add that this finding is based on the evidence that was tendered in these proceedings, including a review of the Board's certification records, and may not accurately or completely reflect the pattern of certification in the industry. That said, no party to this proceeding tendered any evidence demonstrating any exceptions to this pattern of certification. ... (para. 34)

61 This is no longer the case as Sodexho concedes that it has multiple bargaining units with different unions within a single contract with the Fraser Health Authority ("FHA").

VI. ANALYSIS AND DECISION

A. Inconsistent positions

62 Before dealing with the issue of the appropriate bargaining unit, we turn to the Intervenors' allegation that the HEU has taken inconsistent positions when applying for certification and in opposing stand-alone certification applications by the IWA in the service provider sector. Compass notes that HEU has asserted that IWA stand-alone applications would result in proliferation of bargaining units while at the same time HEU is applying for a stand-alone bargaining unit. HEU for a time made a number of variance applications that have either been dismissed, withdrawn or are the subject of an application to withdraw. HEU then made a number of stand-alone certification applications.

63 Compass submits that the Board should be mindful of such inconsistencies and ensure that they do not result in an ad hoc, arbitrary bargaining unit certification regime for any of the employers in service provider industry.

64 Sodexho takes issue with the HEU's opposition to the IWA's certification applications on the basis of proliferation of bargaining units and its support of the BCGEU's and IUOE's applications. Sodexho argues that HEU should apply the same standards to itself, the BCGEU and IUOE as it applies to the IWA with respect to its argument about the proliferation of bargaining units. Sodexho argues that the Board should not be bound by the Code of Practice which sets out the manner in which the unions want to divide up the bargaining units.

65 The HEU says that in trying to secure access to collective bargaining for employees in the service provider industry it has tried different strategies and taken different positions in an effort to avoid objections.

66 The HEU contends that the inconsistency issue goes both ways as some of the employers' have taken conflicting positions. In HEU's view, Aramark acted in an inconsistent way by opposing the HEU's application to amend the bargaining unit description to create a large stable bargaining unit.

67 Aramark's opposition to the HEU's amendment is somewhat inconsistent with its view that one bargaining unit is the appropriate bargaining unit. However, it is consistent with Aramark's view that the building-block approach is not an appropriate way to achieve a single bargaining unit. The underlying consistency in Aramark's position is its stance that the bargaining unit structure must mirror the client contract structure from the beginning of collective bargaining.

68 Sodexho candidly admits that it has recently taken different positions before the Board with respect to appropriate bargaining unit design. Sodexho has not opposed certification applications for multiple bargaining units under its single contract with the FHA. Sodexho says when it established a voluntary recognition agreement with the IWA, it did so on a site-by-site basis under its contract with the FHA. As a result, Sodexho has not argued that certification applications for single sites under this contract are inappropriate. It now has collective bargaining relationships with more than one union at the FHA sites. Sodexho says it has come to the view that this approach was a mistake. With respect to its contract with VCHA, Sodexho takes the same position as Aramark, there should be a single bargaining unit covering all employees at all sites.

69 The passage of Bill 29 created a new business opportunity for the service providers which has led the Board in other decisions to describe this as an "evolving" industry: Sodexho MS Canada Limited, BCLRB No. B104/2004. It is not surprising that as developments advance, the HEU and to some extent the employers would adopt different positions. We do not find the different positions taken by the HEU and at least one of the employers to be relevant to our determination of the appropriate bargaining unit. Nor do we find the BCFL Code of Practice to be determinative.

70 We turn now to the issues related to the appropriate bargaining unit by first dealing briefly with the employers' second presumption against multiple bargaining units argument.

B. Second presumption against multiple bargaining units argument

71 The HEU argues that it has met the presumption against multiple bargaining units by amending its application to a single bargaining unit. Aramark and the Intervenors contend that we must look beyond the amended application to three other applications for stand-alone bargaining units that are pending. HEU has made two of these applications. The BCGEU has made the third, thus another bargaining agent could be added to Aramark's collective bargaining relationship.

72 We are satisfied that HEU has rebutted the presumption against multiple bargaining units by amending its application to a single bargaining unit. If this bargaining unit is certified then the presumption against multiple bargaining units will be a live issue when the pending certification applications from the HEU and the BCGEU are considered.

73 We turn now to the IML factors which set out the approach the Board takes in determining the appropriateness of a bargaining unit.

C. IML factors

74 The HEU's amended application is for a single bargaining unit covering about one-half of the VCHA/Providence sites. The Board's approach when less than all-employee bargaining unit is sought is succinctly set out in Compass:

> ... Under IML, the Board's policy is to allow smaller or less than all-employee bargaining units in the first stage of certification in order to facilitate access to collective bargaining but encourages the broadening of the scope of that initial bargaining unit through variances or consolidating rather than a proliferation of small stand-alone bargaining units. This is because the Board recognized in IML that a proliferation of bargaining units at an employer's operation raises serious concerns about industrial stability. Thus the Board's general policy, as enunciated in IML, is to apply a building-block approach to the establishment of all-employee units through variances and/or consolidations. The preference for an all-employee unit is not however an invariable rule.
>
> The six IML factors which are to be assessed in determining community of interest among the employees, are well known and are as follows:
>
> i) similarity in skills, interests, duties, and working conditions
>
> ii) the physical and administrative structure of the employer

iii) functional integration

iv) geography

v) the practice and history of the current collective bargaining scheme; and

vi) the practice and history of collective bargaining in the industry or sector. (paras. 44 - 45)

75 The consideration given to these factors depends on whether the application is an initial application for certification. With an initial application for certification, access to collective bargaining is the primary concern. On second or additional applications, industrial stability is given greater weight.

76 Aramark argues that the nature of the business in the service provider sector justifies a departure from the IML building-block principle. In this case, Ararmark, supported by the Intervenors and the IWA, argues that the only appropriate bargaining unit is a single, all-employee unit covering all 30 sites under the VCHA/Providence contract. Aramark argues that a bargaining unit of less than all sites will hamper the employer economic efficiency or force it to change its mode of operation. Aramark asserts that the HEU has called no evidence to rebut the presumption favouring an all employee bargaining unit. Aramark further contends that the HEU application before us is not an initial application.

77 The presumption favouring an all-employee bargaining contains within it the IML "building-block" approach to certification. It is a presumption against multiple bargaining units, not a presumption against a single, less than all-employee bargaining unit. Where a union applies for a less than all employee bargaining unit, the issue is whether a rational defensible line can be drawn around the proposed bargaining unit based on the IML factors. Which IML factors are relevant will depend on whether the application is for an initial or subsequent bargaining unit.

1. Is the HEU's application an initial application for certification?

78 We begin our analysis by determining whether the HEU application should be treated as an initial application for certification. If it is an initial application then only the first four IML factors are considered, otherwise all six IML factors will be examined. Greater weight is also given to industrial stability on a second or additional application for certification.

79 Although the Board records show that the parent corporation, Aramark Canada Ltd. has been certified for a numerous stand-alone bargaining units, there are no certifications recorded in the name of Aramark Canada Facility Services Ltd.. On the basis that there are no other certifications in the name of Aramark Canada Facility Services Ltd. and none involving the VCHA/Providence site, the HEU's amended application is an initial certification. Only if the employer is considered to be Aramark Canada Ltd. would this conclusion be incorrect. The Employer does not argue that the appropriate bargaining unit is all employees of Aramark Canada Ltd., but rather that it is all employees of Aramark Canada Facility Services Ltd. covered by the VCHA/Providence contract. In our view, this supports the conclusion that this is an initial application for certification of Aramark Canada Facility Services Ltd. and not a subsequent application for employees of Aramark Canada Ltd..

80 We are satisfied that the employer is Aramark Canada Facility Services Ltd. and we will treat this application as an initial certification application. However, out of an abundance of caution, we will consider all six IML factors in making our determination, with the exception of functional integration which Aramark and the HEU have agreed to set aside for the time being.

2. History and practice of collective bargaining

81 We turn first to a consideration of the practice and history of the current collective bargaining scheme and the practice and history of collective bargaining in this industry. We find that the relevant industry is the private service provider industry. As noted by Aramark, contracts within the public health sector resulting from the passage of Bill 29 represent a new sub-sector of the service provider industry.

82 With the exception of Sodexho's bargaining units under its FHA contract, the bargaining units in this industry

have generally been structured to mirror the client contract. This has resulted in a multiplicity of bargaining units represented by a variety of bargaining agents being certified to each employer. Aramark argues that the quid pro quo for this arrangement which allows unions to organize even if another union is already certified is that units encompassing less than all of the employees and sites under the contract should not be allowed.

83 Aramark and the Intervenors take the view that multiple, stand-alone bargaining units represented by different bargaining agents do not create industrial instability as long as each bargaining unit mirrors a service provider contract. This view is contrary to the underlying assumption of the Board's IML policy that a proliferation of bargaining units creates industrial instability. An incidental consequence of the employers' preference for stand-alone bargaining units is that unions may be able to overcome the IML presumption against a proliferation of bargaining units when they apply for second or additional bargaining units. However, that situation does not provide an answer to the question of whether a bargaining unit of less than all sites and all employees within one contract is an appropriate unit.

84 Compass contends that the HEU's amended application is a deviation from the industry bargaining unit design. In our view, the HEU's amended application is not at odds with the history and practice of the industry. The HEU is not seeking to be certified for a bargaining unit that covers more than one Aramark contract. The HEU's amended application is for a single bargaining unit that falls within the parameters of a single Aramark contract. The issue here is whether a defensible and rational line may be drawn around less than all of the sites within that contract or whether the only appropriate bargaining unit is one that covers all employees and all sites within that contract.

3. Industrial stability

85 Aramark and the Intevenors urge us to pay close attention to Section 2(b) of the Code in making our determination. Section 2(b) requires the Board to exercise its powers and perform its duties under the Code in a manner that "fosters the employment of workers in economically viable businesses".

86 Aramark equates industrial stability with economic viability. In Aramark's view the overriding principle to consider in determining the appropriate bargaining unit is industrial stability. Aramark argues that a large stable bargaining unit is necessary to ensure economic viability. For this reason, Aramark urges the Board to depart from the "building-block" approach.

87 In our view, the addition of Section 2(b) to the Code has not changed the fact that a balance must be achieved when determining whether a bargaining unit is appropriate. Section 2(b) is one part of the equation and cannot be considered in isolation. As noted in James W.D. Judd, BCLRB No. B63/2003, 91 CLRBR (2d) 33.

> The subsections in Section 2 need to be read as a whole and in conjunction with the other provisions in the Code. They set out a comprehensive view of labour relations which is to be followed by the Board and others who exercise powers and perform duties under the Code. Section 2 sets out a vision of labour relations which: describes the goals of the system to the immediate parties; places those goals within a larger, societal context; and emphasizes the mechanisms by which to proceed towards those goals (i.e., the "cooperative participation" of (d) and the mediative approach emphasized in (h)). (para. 18)

88 The Board faced a similar argument in Vancouver Film School, BCLRB No. B291/2003 (Leave for Reconsideration of BCLRB No. B387/2002) where the employer argued that the "building-block" approach in IML needed to be reformulated to take into account the new Section 2 provisions of the Code. The Reconsideration Panel confirmed that both industrial stability and access to collective bargaining are fundamental to the appropriateness analysis:

> IML itself, however, does not contemplate a singular focus. Rather, it regards both principles - access to collective bargaining and industrial stability - as fundamental and emphasizes that both are always present in any determination of appropriateness. ... (para. 15).

4. Access to collective bargaining

89 At the certification stage, the Board must also, as set out in Section 2(c), encourage "the practice and

procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees". Access to collective bargaining continues to be an issue beyond an initial application for certification.

90 For this reason, in accordance with IML, we will consider both industrial stability and access to collective bargaining in determining the appropriate bargaining unit. We adopt the following comments from IML:

> ... The facilitation and encouragement of collective bargaining and the issue of industrial stability are not policy matters completely divorced from one another at either the initial stage of certification or at the second or additional stage of the expansion of collective bargaining. For example, at the initial stage of certification, the design of the bargaining unit must ensure the viability of collective bargaining. The Board would not put into a single bargaining unit employees whose communities of interest directly conflict; further, no bargaining unit would be created that cuts across a particular classification, where all members are in the same physical location, resulting in half of the employees in that classification in the bargaining unit and the other half out of the bargaining unit. Both these situations would not be conducive to the settlement of collective bargaining disputes.
>
> Industrial stability, however, has different facets, depending upon whether one is at the initial stage of certification or at the second or additional stage of certification. At the initial stage of certification, the concern with industrial stability is with the design of the bargaining unit. The focus is on a single unit -- one union, one employer. However, at the second or additional stage of certification the concern is threefold: first, the design of the bargaining unit; second, the proliferation of bargaining units; and third, the relationship not just between the second or additional units and the employer but between the units themselves. As the number of units increases, so does the potential for industrial instability. (p. 187, emphasis in original)

91 We must balance Aramark's legitimate interest in the economic viability of its contract with VCHA/Providence and in industrial stability with the employees' desire to be represented by a union. Employee free choice with respect to unionization is a "fundamental premise" of the Code: Section 4, Forano Limited, BCLRB No. 2/74, [1974] 1 Can LRBR 13, (p. 17). Accordingly, while we accept that an all-employee unit may be arguably the most appropriate unit, the issue before us is whether the unit applied for may be nevertheless an appropriate bargaining unit.

5. Similarity of skills, duties and working conditions

92 We turn now to a consideration of the similarity in skills, duties and working conditions. According to IML: "Those who perform similar work under similar terms and conditions of employment will have a community of interest that can be neatly set within the framework of a single collective agreement" (p. 180). At the VCHA/Providence sites, there is a single classification of Aramark employees, housekeeping aide, as well as some lead hands. The same training is provided to each employee. In the future, Aramark hopes to train specialized cleaning crews.

93 These facts are not an impediment to a less than all-employee unit. IML recognizes that a single classification may be appropriate for collective bargaining if it covers the majority of bargaining unit members at a certain geographical location. In this case, the HEU does not seek to divide single sites into union and non-union sectors where some employees in the single classification would be in the bargaining unit and others would be out. The HEU seeks to represent all employees of Aramark at each site.

94 Compass contends that a bargaining unit that covered less than all the employees at the 30 sites would cut across classification lines resulting in some housekeeping aides working in the bargaining unit and some outside the bargaining unit. Compass further asserted that some housekeeping aides may work in the bargaining unit one day and outside the bargaining unit the next day. However, there was no evidence from Aramark in this regard.

95 In support of its argument, Compass cites a number of decisions: Tonto Mining, a Division of Dynatec Mining Limited, BCLRB No. B92/93; West Fraser Mills Ltd., BCLRB No. B283/96 (Leave for Reconsideration of BCLRB No. B137/96); and Paramount Pictures Corp. (Canada) Inc./Compagnie des Films Parament (Canada) Inc., BCLRB No.

B204/2000. We find that these cases are distinguishable as they are based on a consideration of functional integration, an issue that has been set aside for the time being. In any case, where all the employees of an employer happen to be a single classification, taking a building-block, site-by-site approach to certification does not constitute "cutting across classification lines".

96 As recognized in IML, the nature of the employer's business and the manner in which it is organized is a critical factor in determining an appropriate bargaining unit, particularly at the second or additional stage of certification. As functional integration is not being considered at this time, the two remaining factors concerning the nature of Aramark's organization - physical and administrative structure and geography - remain to be considered.

6. Physical and administrative structure

97 Aramark submits it has no control over the way clients set up contracts. The profit margin is narrow and Aramark structures itself to operate in the most efficient manner possible within the boundaries of its commercial relationship.

98 Under the VCHA/Providence contract, a general manager working with a team of technical and human resources specialists is responsible for overall management of Aramark's sites. There are seven managers who are responsible for groups of sites clustered together on the basis of geography. Aramark is concerned that the managers responsible for union sites would require different training.

99 Aramark says its experience is that employees would not want to work at the non-union sites if the wages are lower thus it would be more difficult for employees to maximize their hours. This would impact Aramark's administrative efficiency leading to an increase in Ararmark's contract costs because more employees would have to be added to the payroll.

100 Aramark's argument is based on the assumption that the presence of a union would cause wages to rise. This is a matter for collective bargaining as contemplated under the Code.

101 Aramark operates a casual pool from Mount St. Joseph's. Employees are sent to other sites to fill in on a temporary basis to cover sickness, leaves, vacations and days off. Some employees have been permanently transferred at their request to other sites. Aramark says a less than all-employee bargaining unit could result in some employees moving from union to non-union sites. This concern is dealt with under the factor, functional integration.

102 Subject to a determination about functional integration, we find that Aramark's administrative structure does not preclude a less than all-employee bargaining unit.

7. Geography

103 The distances are great across the VCHA/Providence contract. The sites span a large geographic area stretching from Pemberton and the Sunshine Coast through West Vancouver, North Vancouver, and Vancouver to Richmond.

104 The HEU's amended application is for a single bargaining unit covering about one-half of these sites. The HEU application does not attempt to cut through a single site. HEU candidly concedes that its application is based on the extent of its organizing campaign. Aramark notes that HEU's application does not follow its own geographical structure. However, Aramark does not specify whether the form of the HEU's application would mean a rational and defensible line could not be drawn around the bargaining unit.

105 Where an employer has multiple work sites, site-by-site organizing is recognized as a valid building block to achieving an all-employee unit. Aramark is asking the Board to abandon the "building-block" approach at its VCHA/Providence sites. In doing so, Aramark is really asking the Board to treat it as a single-site employer when it

is not. Even in the case, of a single-site employer, the Board may be willing to certify a less than all-employee site if a rational and defensible line can be drawn around a portion of the site.

106 In our view, requiring a union to obtain the support of 650 employees at 30 geographically dispersed sites, all at once, clearly does not give any emphasis to the principle of access to collective bargaining, a principle that must always be given some weight, whether at the initial or secondary stage of certification.

107 We conclude our analysis by returning to Aramark's economic viability argument.

8. Economic viability

108 Under the traditional IML analysis, the HEU's application would be an appropriate bargaining unit subject to a determination of functional integration. However, Aramark asks for an exception to the IML analysis on the basis of the Board's Section 2(b) duty to exercise its powers under the Code in a way that "fosters employment in economically viable businesses".

109 Aramark claims that carving up the sites under its VCHA/Providence contract into union and non-union sites would be a "potentially deadly threat" to the survival of its contract. In our view, Aramark's concern never went beyond a bald assertion. We do not find that Aramark established an evidentiary foundation which would cause us to depart from the IML "building-block" approach.

9. Summary

110 In considering whether a union has applied for an appropriate bargaining unit, the Board applies the principles and factors set out in IML, including the "building-block" approach.

111 Aramark argues that on the basis of economic viability, added to the Code under Section 2(b) after IML, a different approach should be taken in this case. We have considered economic viability but conclude it must be balanced with access to collective bargaining at the certification stage.

112 IML is not a perfect approach to bargaining unit appropriateness. However, it has the advantage of offering the parties certainty and predictability. We have applied the IML factors with the exception of functional integration. We accept that industrial stability must be considered and balanced with access to collective bargaining whether this is a first or additional certification application.

113 We reject Aramark's contention that the Board should not apply the "building-block" approach to this application for certification of about one-half of the sites under its contract with VCHA/Providence. To do so would not give sufficient weight to the principle of access to collective bargaining.

114 We are satisfied that the HEU has applied for an appropriate bargaining unit subject to a determination on functional integration.

VII. CONCLUSION

115 We dismiss Aramark's objection that a bargaining unit covering all employees and all sites is the only appropriate bargaining unit.

J. O'BRIEN, VICE-CHAIR
M. LEFFLER, MEMBER
G. MARTIN, MEMBER

Between:
Public Service Commission, and
Graphic Arts International Union, Local No. 210, International Typographical Union, Local No. 226 (Vancouver Typographical Union), Victoria Printing Pressmen and Assistants Union, Local No. 79, Graphic Arts International Union, Local No. 105B (the Printing Unions), and
British Columbia Government Employees Union

[1975] B.C.L.R.B.D. No. 47

No. 45/75

British Columbia Labour Relations Board

Heard: June 5, 1975
Judgment: July 14, 1975

Panel: John Baigent, Vice-Chairman
Graham Leslie, Member
Angus Macdonald, Member

Counsel: Bruce McColl, for the Commission
Earl Kinney and Wm. Dunsmuir, for the Printing Unions

I

This case began on December 17th, 1974 with a letter from the Public Service Commission requesting the Board to decide whether five employees of the B.C. Printing Bureau (Queen's Printer) were excluded from the definition of "employees" contained in the Public Service Labour Relations Act, (P.S.L.R.A.). At issue was not whether the individuals were to be represented by a trade-union but rather, which trade-union was to represent them. The Commission and the British Columbia Government Employees Union, (B.C.G.E.U.) argued in written submissions that the five

individuals were employees within the meaning of the P.S.L.R.A. and, as such, within the bargaining unit for which the B.C.G.E.U. was certified under that statute. The printing unions argued, on the other hand, that the individuals were excluded from the P.S.L.R.A. and within the bargaining unit for which they had been certified under the Labour Code.

The Board is empowered both under Section 2(1) of the P.S.L.R.A. and Section 34 of the Labour Code to interpret the former statute. On February 21st Vice- Chairman Peck in a letter-decision held that the five individuals were excluded from the definition of "employee" in the P.S.L.R.A. and therefore covered by the certification issued to the Printing Unions. The Commission applied to the Board for a reconsideration of that decision and on May 21st a panel of the Board heard arguments from the Commission and the Printing Unions. The B.C.G.E.U. was not represented at the hearing.

Before reviewing the decision of Vice-Chairman Peck certain background facts should be set out. On March 8th, 1974, the B.C.G.E.U. was certified for a unit consisting of "employees in Public Service bargaining unit as defined in Section 4(c) of the Public Service Labour Relations Act ...". Section 4 of that statute defines three bargaining units which encompass all public service employees in British Columbia except those specifically excluded by the statute. By far the largest of those three bargaining units is the one for which the B.C.G.E.U. was certified. Section 4(c) of the statute describes that unit in the following terms:

> 4(c) A public service bargaining unit including all employees other than those described in clause (a) or (b).

Subsections (a) and (b) of Section 4 deal respectively with bargaining units for nurses in the public service and licensed professional employees.

On March 27th, 1974, the Council of Printing Unions was certified under the Labour Code for a unit described as "employees of the B.C. Printing Bureau".

The office of the Queen's Printer was created by the Public Printing Act (R.S. 1948, c. 264, s. 1), and the historical anomalies regarding its staffing lie at the root of this appeal. These anomalies were noted in The Higgins' Commission which was constituted as a Commission of Inquiry into Employer-Employee relations in the Public Service of British Columbia shortly after the present government came into power.

> Employees of the Queen's Printer
>
> The Queen's Printer is a branch of the Department of the Provincial Secretary, but it operates relatively independently and on a profit and loss basis. While appointments to its small clerical and allied staff are made under the Civil Service Act, appointments to its plant staff are not. The plant staff has had some semblance of bargaining over the years in that there has been an arrangement that

> employees would be paid whatever rates were negotiated by printing trades unions in the Victoria area.
>
> The Commission considers that the role and function of the Queen's Printer are such that it should be established as a separate agency. From this thinking follows the view that its employees should be granted bargaining rights on the same basis as employees in the private sector.
>
> The Commission recommends that:
>
> (a) the Queen's Printer be established as a separate government agency; and
> (b) employees of the Queen's Printer be granted the right to collective bargaining under the Labour Relations Act.

(Making Bargaining Work in British Columbia's Public Service, December 1972, at p. 12).

When the Public Service Labour Relations Act (P.S.L.R.A.) came into force the Commission's recommendation was followed at least to the extent that a portion of the employees of the Queen's Printer were excluded from the ambit of that statute, (and by inference included under the legislation for employees in private sector. i.e. the Labour Code.) Section 1(1)(X)(B) of the P.S.L.R.A. provides:

> 1(1) "employee" means a member of the public service, as the expression "public service" is defined in the Public Service Act, or a person employed by or holding office at the pleasure of the Crown, but does not include
>
> (X) a person employed by, or in the service of,
>
> (B) the Queen's Printer under the Public Printing Act, other than clerical or administrative employees;

This section of the statute set up a situation where the "plant staff" at the Queen's Printer would come under the Labour Code while "clerical or administrative employees" would be considered employees under the P.S.L.R.A. The question before Vice-Chairman Peck was which statute prevailed for the five employees named in the application, or more simply, whether they were "clerical or administrative employees".

As the Higgins Commission noted, there are two broad categories of employees at the Queen's

Printer. Firstly, there is a small complement of approximately 25 clerical staff who were appointed to their positions by the Public Service Commission. By and large they perform clerical and secretarial duties and are not directly or immediately involved in the printing process. They do not work in the "shop area" where the second category of employees is found. This second category was referred to by the Higgins Commission as the "plant staff" and consists of between 100 - 110 employees. These persons are directly involved with the printing and binding process and work in the "shop area". They include in their numbers, compositors, pressmen, collators and related general workers. It is this latter category of employees who are represented by the Printing Unions.

Of the five individuals named in this application, three are copy-typists and two are stockmen. The copytypist type metal or magnetic tapes which are photographed and used in the printing process. One could describe their duties by stating that they reduce "copy" into a form (tape) intelligible to the printing process. The two stockmen package printed material and forward it to the shipping room.

All five employees, unlike other members of the "plant staff", were appointed to their positions by the Public Service Commission and are classified by the Commission as "clerical". However, unlike other members of the Public Service at the Queen's Printer they are immediately and directly involved in the physical process of printing, binding and shipping. They work in the "shop area" with the "plant staff".

II

Two points were made on appeal by the Commission. The first of these was by way of exception taken to the following passage of Vice-Chairman Peck's decision.

A secondary question of some importance is which bargaining unit is the more appropriate one for these employees. . Considering the matter of appropriate bargaining unit, there seems no doubt that these employees most closely identify with the printing trades represented by the trade-unions who were certified for employees of the B.C. Printing Bureau, and to break them away from their fellow workers in the Bureau would be to fragment the unit which now a represents employees of the Queen's Printer. In my view this would be poor labour relations policy.

Counsel for the Commission argued that Section 4 of the P.S.L.R.A. defined three public service bargaining units and that, the legislature having mandated the parameters of those bargaining units, the Vice-Chairman erred in law in considering which unit was the more appropriate one to represent these individuals. It is true that under the P.S.L.R.A., this Board must not, as it must under the Labour Code, determine if a unit for which certification is sought is "appropriate for collective bargaining". Section 4 of the P.S.L.R.A. has defined the three bargaining units for the public service and the removal of this determination from the Labour Relations Board was recognized in British Columbia Government Professional Employees Association and the Public Service Commission and the British Columbia Government Employees Union (No. 166/74). However, this is not to say that the Board will not have to determine from time to time (as it did in the last mentioned case)

whether or not certain employees are within the statutory bargaining units. In so doing the Board will have to interpret not only Section 4 but provisions such as Section 1(1)(X)(B) of the P.S.L.R.A. The intent of that section, as is clear from the Higgins Commission, was to recognize and provide for the distinct community of interests which is an historical fact at the Queen's Printer. By excluding from the P.S.L.R.A. employees of the Queen's Printer other than "clerical or administrative" the Legislature was inferentially recognizing a distinct and separate unit of "plant staff" which was not appropriately included in the larger unit created by Section 4(c) of the P.S.L.R.A. The Board is now asked whether five employees are within that bargaining unit. The answer to that question must of necessity involve a consideration of the intent of the Legislature in enacting Section 1(1)(X)(B) and this in turn entails a consideration of the appropriateness of the unit both with and without the five named employees. If the Board concluded that a bargaining unit represented by the Printing Unions and including these five persons would be inappropriate for collective bargaining it would determine that the employees were in the larger B.C.G.E.U. unit since a decision to include them in the bargaining unit of the Printing Unions would frustrate the intent of the Legislature. This does not mean that the Board may redefine the bargaining units created by Section 4 of the P.S.L.R.A. Rather, it means that where a question arises as to whether a person is included in the three public service bargaining units or excluded by Section 1(1), then the Board may consider the purpose of any particular exclusion. Where, as here, the purpose is to retain an existing bargaining unit which was considered "appropriate", then the Board, may consider whether the purpose will be achieved (i.e. whether the unit will or will not be "appropriate") in making its determination.

There is also a shorter answer to this objection by the Commission and it is that the Vice-Chairman found as a matter of fact that the employees' functions were not clerical. This determination having been made, the Vice-Chairman was bound to rule that they were excluded from the B.C.G.E.U. bargaining unit.

III

This brings the panel to the main objection of the Commission, which was that the Vice-Chairman was not entitled to make any determination other than that the employees' functions were clerical.

The Public Service Commission has directed the Board's attention to Sections 4, 14 and 16 of the Public Service Act. (Stats. B.C. 1973, 2nd Sess. c. 143). Those sections outline the statutory duty of the Commission "to establish and maintain a system of position classification and job evaluation in the public service". The position of the Commission is that since these employees have been classified as "clerical" under the Public Service Act, they are clerical employees within the meaning of Section 1(1)(X), and as such are not excluded from the definition of "employee" for the purposes of the Public Services Labour Relations Act. If they are not excluded, the argument runs, the only bargaining unit for which they are eligible as public servants is the larger bargaining unit delineated in Section 4(c) of the same statute.

The position of the Printing Unions is that the Public Service Classification has no relevance for purposes of a determination under Section 34 of the Labour Code of British Columbia as to which unit employees belong. The Printing Unions say that these employees are neither "clerical" nor "administrative" within the meaning of Section 1(1)(X)(B) of the P.S.L.R.A., and as such are not employees within the purview of that statute. They cannot therefore be employees in one of the bargaining units of the P.S.L.R.A. (the B.C.G.E.U. in the present instance) but rather are employees for whom certification has been granted under the Labour Code.

IV

In his reasons for judgment, Vice-Chairman Peck had this to say about the argument of the Public Service Commission and the B.C.G.E.U.

> Finally, it seems to be implicit in the positions taken by the B.C.G.E.U. and the Commission that the act of appointing these persons to clerical positions within the Public Service of British Columbia had somehow rendered them ineligible for inclusion in any other bargaining unit but that for which the B.C.G.E.U. is certified. I must say I can find no authority at law to support this proposition.

The key passage in the Vice-Chairman's decision is found on page 3, where he concludes -

> In other words, in the absence of any definition in the Public Service Labour Relations Act of the expression "clerical or administrative employees", I am obliged to apply the popular and common definition which does not, so far as I can determine, characterize the duties and responsibilities of these persons. ... For these reasons, I find pursuant to s. 34 of the Code that the five employees in this case are not "clerical or administrative employees" within the meaning of that term as it is found in the Public Service Labour Relations Act, but are in fact "employees of the B.C. Printing Bureau" and therefore covered by terms of the certification of March 27 and the Collective Agreement between the Queen's Printer and the Printing Unions.

The chief determination to be made by this Board in the present appeal is whether or not it is bound to consider these public servants as clerical because their employer has classified them in that fashion under the Public Service Act. There is nothing in that statute to suggest that the classification system utilized by the Public Service Commission was to in any way bind this Board for purposes of labour relations determinations under Section 34 of the Labour Code. Nor is there any language in the Public Service Labour Relations Act which suggests that classification under the Public Service Act is to detract from the jurisdiction of this Board. Indeed there is language suggesting the very opposite. Section 4(b), which defines the licensed professional bargaining unit specifically refers to the Public Service Classification system.

> 4 For the purpose of collective bargaining, every employee shall be included in one of

the following bargaining units:

(b) A licensed professional bargaining unit including all employees in a professional classification in the Public Service Classification structure who are members of an association that has statutory authority to license a person to practise that profession, other than those persons described in clause (a):

It is clear that the Commission's classification is determinative in the delineation of bargaining units under Section 4(b) but the absence of similar language in Section 1(1)(X)(B) of the statute reinforces the Vice- Chairman's conclusion that the classification structure is not decisive in the present case. The Board cannot accept the position of the Commission that their classification, which they are empowered to make under a statute other than the statute governing labour relations in the public service, in any way binds this Board in arriving at its interpretation of the relevant language of the P.S.L.R.A.

The determination as to whether or not these employees were clerical was made by Vice-Chairman Peck after receiving submissions from all the parties. He concluded, as a matter of fact,

> I am obliged to apply the popular and common definition (of clerical and administrative) which does not, so far as I can determine characterize the duties and responsibilities of these persons.

A hearing was not granted prior to the decision of Vice-Chairman Peck but detailed submissions were received from all parties. The members of this panel were unanimous in their conclusion that a consideration of the job functions of these employees could only lead them to the same conclusion as that reached by the Vice-Chairman. This point is not surprising and the finding of fact was not questioned by the Commission which chose to make its argument on the "effect" of the Public Service Classifica- tion. For reasons indicated above this Board is not prepared to accept that argument.

The conclusion of the Board then is that it is not bound by the Commission's classification of these employees as "clerical". It accepts Vice-Chairman Peck's finding that the individuals' job functions are not clerical and, as a corollary of that finding is bound to hold that they are not employees within the B.C.G.E.U. bargaining unit.

Although this disposes of the chief point raised in the appeal, the Board has also considered a point raised for the first time at the hearing and not thoroughly argued by the parties. That is whether or not it necessarily follows that the employees are within the bargaining unit of the Printing Unions. As the Board has pointed out the Printing Unions were certified for "employees of the B.C. Printing Bureau" and it is common ground that the five persons involved in this appeal - unlike other "printing personnel" within the Queen's Printer - were appointed by the Commission

and are employees in the Public Service. As such can they be "employees of the B.C. Printing Bureau"?

It should be obvious from a consideration of s. 1(1) of the Public Service Labour Relations Act that public servants may not fall within the compass of that statute and that that was the effect of Vice-Chairman Peck's ruling in the present case. Since this is so, it would be within the power of the Board to include these employees within a bargaining unit certified under the private sector provisions of the Labour Code. Similarly the Board could even now vary the Certificate of March 27th, should it conclude that the wording of the Certificate is too narrow to encompass the five individuals whose status is presently in issue. However, the Board need not make any determination as to whether such a variance is now necessary. This is because the Commission stated at the hearing that, should it be unsuccessful in its appeal, the five individuals would be "terminated" as public servants but continue to work as employees of the Queen's Printer. When that occurs there will be no doubt but that the employees fall within the Certificate of March 27th Hence, the Board need not determine the neat issue of whether a public servant holding office at the pleasure of the Crown and appointed by the Commission in contradistinction to the other "printing staff" who are employed directly by the Queen's Printer, - may nevertheless be an employee of the B.C. Printing Bureau. Suffice it to say that even if the Board had answered that question in the negative it would have been prepared to vary the Certificate of March 27th to include these persons.

For all of these reasons the appeal is dismissed.

John Baigent, Vice-Chairman
Graham Leslie, Member
Angus Macdonald, Member

British Columbia Automobile Assn. (Re)

British Columbia Labour Relations Board Decisions

British Columbia Labour Relations Board

J.B. Hall, Vice-Chair, K. Bennett and C. Snell, Members

Hearing: February 23, 24 and 25, 1999.

Decision: March 10, 1999.

Case No. 39153

[1999] B.C.L.R.B.D. No. 94 | 50 C.L.R.B.R. (2d) 273 | BCLRB Decision No. B94/99

Between British Columbia Automobile Association (the "Employer"), and Office and Professional Employees' International Union, Local No. 378 (the "Union")

(15 pp.)

Counsel

Allan E. Black, for the Union. Maria Giardini, for the Employer.

The following are the reasons for decision of panel members J.B. Hall, Vice-Chair and K. Bennett, Member. Separate dissenting reasons were delivered by C. Snell, Member (para. 53).

Decision of the Board

I. NATURE OF APPLICATION

1 The Union is engaged in a lawful strike against the Employer. It has filed an application alleging the Employer is using replacement workers contrary to Sections 6(3)(e) and 68 of the Labour Relations Code. The application as filed also seeks orders permitting picketing at locations other than the sites or places where the Union's members normally work.

2 The application was set for hearing and notice was given to a number of third parties who might be affected if the Board allowed the Union to expand the scope of its picketing. At a later case management meeting it was agreed that the Board would not go beyond determining whether the Union had a right to picket other locations; if so, a further hearing would be scheduled after giving notice to the third parties.

3 Following opening statements at the hearing, the parties met and reached agreement on some of the matters in dispute. A copy of their written agreement was provided to the Board. On the second day, the Union advised that it was by agreement adjourning the portions of its application dealing with picketing of the Employer's head office, the alleged direction of work from Union to non-union service centres, and picketing of the Employer's warehouse. As a result, the only issue currently before us is the Union's allegation that the Employer has used replacement workers in violation of the Code.

4 The Employer does not deny that it has used four individuals to perform work at its service centres, and that the work is ordinarily done by employees in the bargaining unit on strike. For its part, the Union does not allege that the individuals were recently engaged. In fact, the individuals have all been with the Employer for many years and

36 Thus, both Nicholson and Warren were able to work at North Vancouver and Surrey during the labour dispute. The panel stated, however, that "any Surrey employee who does not ordinarily work at the North Vancouver location would be prohibited from working out of the North Vancouver location" (para. 17).

37 The IUOE sought reconsideration but the labour dispute was resolved before the application was decided. The employer submitted the matter should be dismissed because it was academic. The reconsideration panel did exercise its discretion to not address the application, but did so because of a Legislative review process then underway: see BCLRB No. B382/97, at para. 6. The panel nonetheless commented on the parties' positions:

> The positions of the parties on the merits of the Operating Engineers' reconsideration application stand in stark contrast. The Employer, supporting the decision of the original panel, takes the position that the amount of work performed by Nicholson at the Surrey location effectively permits unlimited work at that location during a strike. The Unions, on the other hand, rely upon a strict interpretation of the language of Section 68(1)(b) and argue that any work ordinarily done at another of the Employer's locations precludes working at a struck location during a strike. As noted in one submission, either of these results would work harshly for the losing side. This issue has not been fully canvassed by a reconsideration panel of the Board. (para. 5)

38 Finally, there is Davis Wire Industries Ltd., BCLRB No. B148/98. On the facts, the panel found a violation of Section 68. However, it stated that the determination of whether a person "ordinarily works" at another location is made by examining "...the nature of work performed in different locations, time spent in different locations and other relevant facts relating to the work of the individual" (para. 26). The panel cited the Dunleavy reconsideration decision for the proposition that a person who spends a significant period of time working at two or more places of an employer's operations may have the right to work in more than one operation during the labour dispute (para. 27).

39 As indicated, the Union disputes this proposition. It argues that persons will normally have one place where they ordinarily work. They are then prohibited from performing bargaining unit work elsewhere during a labour dispute because they ordinarily work at another of the employer's operations. The Union argues this applies even where the persons may perform some work at the other locations as part of their normal duties. It relies in part on judicial authorities which have interpreted the words "ordinarily resident" found in tax legislation.

40 The Union does allow that there may be some situations where an individual ordinarily works at more than one location. For example, two of the Employer's service centre managers are responsible for two locations. The Union acknowledges the logical extension of its argument, and asserts these managers may not perform bargaining unit at either location during the strike (although they may continue with their normal duties). This illustrates what the Employer characterizes as the "absurdity" of the Union's argument.

41 The Union's argument certainly reflects a literal reading of Section 68(1)(b). On the other hand, as argued by the Employer, this interpretation is not so "plain" that it has been immediately evident to other panels of the Board. Indeed, and recognizing that the Union's interpretation may not have been explicitly argued, panels considering the matter have all reached a different conclusion. The various decisions reviewed above contemplate the prospect of some individuals being able to work in more than one place of operations during a labour dispute.

42 The immediate question is whether we should adopt an interpretation of Section 68 which is at odds with previous panels. We do not believe that would be appropriate. The doctrine of stare decisis does not apply to administrative tribunals. Nonetheless, the Board has recognized that uniform and consistent decision-making is a valued objective under its statutory mandate. The labour relations community is entitled to organize its affairs based on past decisions, particularly where those decisions have been rendered on reconsideration: see JJM Construction Ltd., BCLRB No. B16/96, at paras. 139 and 141; and Weyerhaeuser Canada Ltd., BCLRB No. B296/96, at para. 120. An original panel should have a persuasive reason for adopting a different interpretation of the statute.

43 We do not agree with the Union's submission that all panels of the Board have asked "the wrong question".

British Columbia (Re)

British Columbia Labour Relations Board Decisions

British Columbia Industrial Relations Council

Panel: V.A. Pylypchuk, Vice-Chairman

October 26, 1989

No. C225/89

[1989] B.C.L.R.B.D. No. 224

Between British Columbia Government Employees' Union (the "Union"), and The Government of The Province of British Columbia (the "Government")

Counsel: David Blair for the Union Don Jordan for the Government

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I

This matter concerns an application pursuant to Section 39(1) of the Industrial Relations Act (the "IRA") for certification of a bargaining unit consisting of "internal auditors working at and from 3284 East Broadway, Vancouver, B.C.". These employees perform internal auditing functions in the Liquor Distribution Branch of the B.C. Government.

The Government objects to the application on the ground that internal auditors do not have access to collective bargaining by virtue of their exclusion from the definition of "employee" under Section 1(1) of the Public Service Labour Relations Act (the "PSLRA"). The Union resists this objection on the ground that although internal auditors may be excluded from collective bargaining under the PSLRA, they nevertheless have access to collective bargaining under the IRA. It is common ground between the parties that the internal auditors who are the subject of the application are appointed to their positions under the Public Service Act (the "PSA"), and fall within the exclusion in the definition of "employee" contained in Section 1(1) of the PSLRA.

II

The Government characterizes the issue as whether or not a person who is an employee of or engaged by the Government has access to collective bargaining under the IRA when excluded from the PSLRA. The Government says in order to address this issue, it is necessary to understand the relationship between three statutes: the PSLRA, the IRA, and the PSA. With regard to the PSLRA, the Government invites the Panel to review the report and recommendations of the Commission of Inquiry Into Employer/Employee to inconsistencies. Consequently, when regard is had to Section 26 of the PSLRA, it is clear that the IRA cannot possibly apply.

Moreover, says the Government, the bargaining rights of employees who do have the right to bargain are restricted. These restrictions are contained in Section 13 of the PSLRA and they indicate that the subject matter of bargaining is limited. More importantly, the Government qua employer is not obliged to bargain regarding matters outside the limitation of Section 13. To

allow access to collective bargaining under the IRA would defeat the Government's preferred position in this regard.

The object of all of these restrictions both in terms of circumscription of those with whom the Government is obliged to bargain and with respect to the content of what is bargainable, is to minimize disruption in the public service. Consequently, only the three groups identified in Sections 4(a), (b) and (c) of the PSLRA have access to collective bargaining with Government qua employer.

The Government relies on a number of authorities in support of its position. In these authorities, the Government says, the Panel will find more than a passing reference to the Higgins Report as well as a determination of what constitutes inconsistency between the IRA and the PSLRA. The Government refers to the Government of the Province of British Columbia and the British Columbia Government Employees' Union, BCLRB No. 7/74 which was the first certification under the PSLRA. In that case, the Labour Relations Board (the "Board") stated:

> ...The language of Section 4(c) is clear and unequivocal.
>
> The Legislature plainly contemplated that a single
>
> bargaining unit would represent all employees in the public
>
> service save the professionals described in Sections 4(a)
>
> and (b).
>
> (at 6)

The Government says that this statement supports the proposition that employees who want to bargain with the Government qua employer, must bring themselves within one of the three bargaining units described in Section 4 of the PSLRA. The Government qua employer is not obliged to bargain collectively with anyone outside of the scope of Section 4. Putting this together with the definition of employee under the PSLRA, which excludes internal auditors, leads to the inescapable conclusion that internal auditors cannot bargain collectively with the Government.

For further support for this proposition, the Government relies on Inter Provincial Power Engineers Association, BCLRB No. 32/74. In that case, the union applied for certification for a group of professional power engineers under the PSLRA and in the alternative, under the then British Columbia Labour Code (the "Labour Code"). The argument that the subject employees could, in the alternative, be considered employees under the Labour Code was dismissed by the Board. This, says the Government, proves that an employee cannot be included under the IRA if excluded by the PSLRA.

The Government also submits the case of British Columbia Government Professional Employees' Association and The Public Service Commission and British Columbia Government Employees' Union, BCLRB No. 166/74; and the case of Public Service Commission, BCLRB No. 45/75 (the "Queen's Printer Case"), as examples of the relationship between the PSLRA and the IRA demonstrating that the two schemes of bargaining are totally inconsistent. The Government invites the Panel in reading these cases to refer to the Higgins Report. Further, the Government says that the case of Government Employee Relations Bureau and British Columbia Government Employees Union, BCLRB No. 10/77 demonstrates the obverse situation where

there is no inconsistency between the two Acts and where the then Labour Code was found to be applicable to public service employees.

According to the Government, the point is best made in the case of Narcotic Addiction Services of Vancouver Resource Board, BCLRB No. 7/77. In that case, a group of employees was transferred from the Vancouver Resources Board to the Department of Health. These employees attempted to import under the successorship provision in Section 53(1) of the Labour Code, their private sector collective agreement into the public sector. The Board held that because of the completely inconsistent schemes of bargaining under the PSLRA and the Labour Code, there was no possibility of importing the collective agreement into the public sector. Although there was no explicit inconsistency in that case, the Government says the decision establishes that one must look at the whole scheme of bargaining to decide whether a provision of the IRA is inconsistent with the PSLRA. Clearly, says the Government, it is not obliged to bargain collectively outside the limits set out in Section 13 of the PSLRA, nor can there be any more collective agreements than specified in Section 11 of the PSLRA. If, in that case, the collective agreement had been imported, then the Government would have had to bargain collectively about matters which the Legislature had excluded, and there would have been in existence an agreement not contemplated in Section 11. This would have been an impossible result.

Finally, the Government also relies by analogy on three School Act cases in support of its proposition that the PSLRA is definitive with respect to bargaining units in the public service. Likewise, the PSLRA sets the limits for collective bargaining in which the Government qua employer is obliged to engage. For this reason, the only access to a collective agreement with the Government qua employer is by means of the kind of agreement specified by the PSLRA.

The Government concludes by saying that if the Union's argument is accepted, the Government qua employer would be obliged to bargain with thirty or more potential bargaining units not contemplated by the Legislature, the Government qua employer would be obliged to bargain on matters the Legislature intended to exempt under Section 13 of the PSLRA, and the number of collective agreements which the Government qua employer would have in the public service would exceed those enumerated under Section 11 of the PSLRA.

The Union takes the position that persons who are employees under the IRA have a right to representation under that Act. The Union invites the Panel to apply the IRA's definition of employee, in view of the IRA's declaration under Section 2(1) of the freedom of employees to join the union of their choice. The Union says there is no basis for the Government's argument and that therefore the primacy of the rights of employees under the IRA should be recognized.

The Union says that the exclusion from statutorily mandated bargaining under the PSLRA is not exclusion from collective bargaining. The Union invites the Panel to review the Higgins Report with a view to the legislation that resulted from it, and says the recommendations of the Higgins Report are reflected in the PSLRA. The Union discounts the Government's focus on the concept of collective bargaining as defined by the PSLRA, because it argues the Government ignored the subtle differences between the definitions under the PSLRA and the IRA. The Union submits that an employee under the PSLRA in a PSLRA bargaining unit is entitled to public service Government bargaining rights. However, the bargaining unit as defined in the PSLRA is different than that defined in the IRA. For example, the bargaining unit as defined in the PSLRA includes managers and employees involved in a confidential capacity who would be excluded on

that basis under the IRA. The PSLRA, Section 12, leaves it up to the parties to determine those managers and confidential employees whom they wish to exclude from the bargaining unit. The exclusions specified in the definition of employee under the PSLRA Section 1(1) are not necessarily managers or confidential people. The rationale for exclusions under that Section is clearly different than the basis for exclusion under the IRA. The Union submits, however, that the definition of employee under the PSLRA does exclude some people who would be managers or confidential exclusions per the definition in the IRA. Those people would ultimately be denied bargaining rights under the IRA. Other than those few exceptions which the Union recognizes, all others would meet the definition of employee under the IRA. Therefore, says the Union, there is no inconsistency between the two collective bargaining regimes.

The Union submits that Government employees outside the PSLRA boundary remain entitled to IRA representation. Where there are IRA employees excluded by Section 4 of the PSLRA, the Council has a duty to certify those employees pursuant to the IRA. That, says the Union, is the consequence of the finding in the Queen's Printer Case, supra, upon which the Union relies heavily. In that case, the Board said:

> Finally, it seems to be implicit in the positions taken by the B.C.G.E.U. and the Commission that the act of appointing these persons to clerical positions within the Public Service of British Columbia had somehow rendered them ineligible for inclusion in any other bargaining unit but that for which the B.C.G.E.U. is certified. I must say I can find no authority at law to support this proposition. (at 2)

The Union says employees excluded from the PSLRA such as Queen's Printer employees, who were employees as defined under the Labour Code, were entitled to representation under the Labour Code. The Union argues this is a historically sensible arrangement.

The Union suggests that under the definition of employee in PSLRA Section 1(1), (b) and (d) excluded professionals are entitled to representation under the IRA. The Union further suggests that employees excluded from the definition of employee in PSLRA Sections 1(1)(j) and (l), including employees of the Queen's Printer are likely to be entitled to representation under the IRA. The Union says that the Higgins Report fully supported this proposition and found it historically acceptable that public servants have bargaining rights under the Labour Code.

The Union dismisses the Government's reliance on Narcotic Addiction Services of Vancouver Resource Board, supra, by pointing out that the inconsistency in that case arose because the employees who entered Government service as a result of the successorship fell within the definition of a bargaining unit under Section 4(c) of the PSLRA. Once having met the definition under the PSLRA one cannot, at the same time, meet the definition under the IRA because then there would be an inconsistency as contemplated under Section 26 of the PSLRA. But that would not preclude a person from meeting the definition of employee under the IRA if he or she is excluded from the definition of employee under the PSLRA.

The Union suggests that the rationale for excluding internal auditors from the definition of employee under the PSLRA is that they would be involved in administration of procedures to

prevent and detect theft by other employees. Consequently, the rationale that they ought not to be in the same bargaining unit as employees whom they are auditing makes sense. The statutory interpretation urged to permit these employees to be in a bargaining unit represented by a Union certified under the IRA is consistent with this rationale, and consistent with the decision of the IRC in The Greater Victoria Hospital Society, IRC No. C283/88, reconsideration of BCLRB No. 75/87. In that case the Panel, in its discussion of exclusions and the resulting denial of collective bargaining, stated:

> Such exclusions are, however, to be applied restrictively.
>
> As noted in The Corporation of the District of Burnaby, supra, it is a serious matter to find that a non-managerial employee is excluded from collective bargaining. The exclusion of "employees" whose duties put them in conflict with their fellow employees should be narrowly interpreted to include only those who are closely aligned with the management team.... (at 13)

In that case, it was held that the fire security officers can be certified under the IRA and are not to be excluded from collective bargaining. The Union says it is a sensible labour relations policy to exclude internal auditors from the very large unit which they monitor. That labour relations policy, submits the Union, is reflected in the definition of employee in the PSLRA. Nothing in that definition, however, detracts from the rights of those employees under the IRA.

The Union argues that the restrictions in Sections 11 and 13 are of no relevance. Those restrictions apply to employees who are included under the PSLRA in Section 4, not to those who are not. The Union says there are other employees such as B.C. Hydro employees who are covered by the IRA who also have statutory restrictions in bargaining, for example, in respect of pensions. Consequently these provisions are of no interpretive assistance with respect to the issue before the Panel.

The Union says many employees in the public sector have rights under the IRA, including employees in B.C. Hydro, the Queen's Printer, and others. It makes no difference whether people are appointed under the PSA or not, because they are still paid by the public purse and they are still public servants. The Government is wrong to suggest the Queen's Printer employees were not employees of the Government.

The Government responds that the Queen's Printer Case, supra, is clearly distinguishable on the very fact that the employees excluded under the PSLRA Section 1(l) were not appointed by or employed by the Government qua employer. They were employed by a separate employer. Consequently, the Government says that case was the exception that proves the rule and is of no assistance to the Union. The list of exclusions from the definition of "employee" contained in the PSLRA Section 1(1) is a "mixed bag". However, it submits that without doubt employees of the Government qua employer, but for their exclusion, could only bargain collectively with the Government qua employer under the PSLRA. Once they are excluded from the PSLRA, they obtain no additional or greater inconsistency as set out in Section 26 of the PSLRA which essentially does not address the question of scope. The Union on the other hand, in its equally

able response, discounted the arguments of the Government by pointing out that the Section 26 inconsistencies lie within the four corners of the PSLRA and its applicability to employees, who under that Act do have bargaining rights. The Union said that the inconsistencies do not apply to employees who are excluded from the definition of "employee" under the PSLRA. The Union, after discounting the inconsistency theory, went on to argue from the premise that if one is excluded from the PSLRA, one is automatically included in the IRA by a literal reading of the definition of "employee" in the IRA. Therefore, the Union also did not address the question of scope.

Normally one would begin interpreting a statute by looking at the grammatical and ordinary sense of the words used. Here the application for certification is brought pursuant to Section 39(1) of the IRA and therefore the departure point would be a literal reading of the IRA. Indeed, the Union invites the Panel to do just that.

In this instance, the plain and ordinary meaning of the words "employer", "employee", and "person" as used in the IRA are so broad so as to, at first blush, encompass the Government and all of its employees in the broadest sense, whether or not they are covered by the PSLRA. There is no specific provision in the IRA stating that it does not apply to Government employees or to persons under the PSLRA. The only exclusion on the basis of statute are those persons covered by the Canada Labour Code. Such a broad interpretation based on a plain reading of the IRA would enable employees, even if covered by the PSLRA, to elect to unionize under the IRA. This would render the PSLRA entirely redundant which is, of course, absurd.

The "Golden Rule" of interpretation requires that where a literal interpretation would lead to an absurdity, something more must be examined in order to determine the true intention of the Legislature (Vacher Sons Ltd. v. London Society of Compositors, [1913] A.C. 107 (H.L.)). Since the predecessors of the IRA and PSA were in existence for some time prior to the enactment of the PSLRA fifteen years ago, one interpretive device permitted by the "Golden Rule" is to consider the relationship between these Acts in their historical context. As Fletcher Moulton L.J. said in MacMillan v. Dent, [1907] 1 Ch. 107 at 120 cited in Craies on Statute Law (Sweet & Maxwell London, 1971) at p. 96:

> In interpreting an Act of Parliament you are entitled, and in many cases bound to look to the state of the law at the date of the passing of the Act; not only the common law but the law as it then stood under previous statutes, in order to properly interpret the statute in question.

An historical approach was adopted by Chief Justice Laskin in a concurring opinion while resolving a problem of the relationship between the Public Service Staff Relations Act ("PSSRA") and the Canada Labour Code ("CLC") in Canada Labour Relations Board and Public Service Alliance of Canada v. City of Yellowknife (1977, 77 CLLC 14,073). Chief Justice Laskin stated as follows:

> ...[V]iewing Part V of the present Canada Labour Code, 1972
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> (Can.) c. 18, s. 1 historically, and looking at the
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> interlocking effect of ss. 108 and 109 of that Code,
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> covering both the private sector and public sector, the
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> latter either under s. 109(1) or under the Public Service

> Staff Relations Act, R.S.C. 1970, c. P-35, it would be incongruous to declare a gap in the application of collective bargaining advantages to employees who are employed by a municipality in the Northwest Territories.... (at 14,617; emphasis added)

Both parties recognized the need to look to more than just the IRA to resolve this issue as well as the validity of an historical approach in urging the Panel to refer to the Higgins Report. It is well established that such a report may be used to determined the mischief which the Legislature sought to cure by the enactment of legislation. In Laidlaw v. The Municipality of Metropolitan Toronto, [1978] 2 S.C.R. 736 at 743, Mr. Justice Spence speaking on behalf of the Court quoted with approval BlackClawson International Ltd. v. Papierwerke Waldhof-Aschaffensburg AG, [1975] 1 All E.R. 810 (H.L.) per Lord Reid at p 814:

> But the principle is that if the enactment is ambiguous, that meaning which relates the scope of the Act to the mischief should be taken rather than a different or wider meaning which the contemporary situation did not call for. The mischief which this Act was intended to remedy may have been common knowledge 40 years ago. I do not think that it is today. But it so happens that a committee including many eminent and highly skilled members made a full investigation of the matter and reported some months before the Act was passed. I think that we can take this report as accurately stating the "mischief" and the law as it was then understood to be, and therefore we are fully entitled to look at those parts of the report which deal with those matters.
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> (at 743; emphasis added)

That approach may be summarized as the "purpose" or "mischief" approach to statutory interpretation. What then was the state of the law and the mischief, if any, to be cured in 1973? The Higgins Commission (the "Commission") was appointed to look into employer/employee relations in the public service in the Province of British Columbia. In the Higgins Report, the Commission described the then "current scene", the public servants that were the object of its inquiry, and ultimately the mischief which it was required to address. The Higgins Report says:

Wages, salaries and working conditions in the public service of British Columbia are determined unilaterally by the Lieutenant-Governor in Council. Such decisions are usually made following the receipt of recommendations from the Civil Service Commission which has the statutory responsibility under the Civil Service Act and Order-in-Council 2204/67 to review employee representations on "...matters affecting the general welfare and conditions of employment".

...

...[T]he present system is a very poor substitute indeed for real collective bargaining. The present system has been most aptly described by the former Chairman of the Civil Service Commission as "legal paternalism".

...

La Reine ne negocie pas (The Queen does not negotiate) is the classic statement of the principle of sovereignty. It was from this principle that those who opposed collective bargaining in the public service drew theoretical sustenance. They relied upon the orthodox position on sovereignty that maintains that government has the sole authority to govern and that this authority cannot be given to, taken by, or shared with anyone.

The orthodox position on sovereignty permitted only the government to establish terms and conditions of employment. Clearly, genuine collective bargaining is incompatible with such a position....

...

...[T]his denial of basic rights to provincial government employees had led to deleterious side effects. Relationships between the government and the major organizations representing provincial employees were not as constructive or as meaningful as they should have been. Furthermore, there was quite clearly a degree of hostility felt by a number of major employee groups towards their employer that could in no way be considered in the best interest of the people of the province. Virtually all of this discontent and ill will could be traced directly to the annoyance on the part of the employees and their organizations that they were being denied fundamental rights enjoyed by all other workers in the province.

...

At the outset of its deliberations, the Commission of Inquiry had to determine the meaning intended by the term "public service" in its terms of reference. The Commission concluded that collective bargaining existed in the major Crown agencies of the British Columbia Hydro and Power Authority and the British Columbia Railway and, as such, these jurisdictions should be excluded from its inquiry. Clearly, then, the Commission's main concern was with the approximately 31,000 employees holding appointments under the Civil Service Act who are engaged in a variety of tasks within the departmental structure of government and who do not have the right to bargain

> collectively.... (at 2, 3, 6, 7, and 11)

The Commission found that collective bargaining was a complex process which had been developing in the private sector in the Province of British Columbia for a number of years. In that context, the Commission considered certain agencies established by the Government but which operated independently from the Government. The Commission felt that such agencies which operate on a profit and loss basis or which are funded externally and which hire staff independently ought to be permitted collective bargaining pursuant to the Labour Relations Act. At that time, employees of the Queen's Printer, B.C. Hydro and B.C. Rail, had already achieved that goal.

The Commission, in noting the Queen's Printer situation, as well as that of the B.C. Hydro and Power Commission and B.C. Rail, recognized a disparity in the public service. Some public servants had collective bargaining rights while the vast majority did not. Whether or not public servants were entitled to bargain collectively depended on the characterization of the particular employer in the public service. Where the Government qua employer was exercising its Crown prerogative, public servants were denied access to collective bargaining. Where the "Government" was a Crown agency or a Crown corporation or an entity of the Crown exercising an independent right to employ, whether mandated by statute or whether exercised in its own independent capacity, employees acquired private sector bargaining rights even though they were, in the broadest sense, public servants.

The notion of being able to characterize the Crown or the Government as somehow distinct from its own agencies or emanations operating independently from it has long been recognized in law. This point was made in Craies on Statute Law, at p. 424:

> In 1949, Denning L.J. (now Lord Denning) held that the property of the British Transport Commission was not Crown property although controlled by the Minister of Transport and that its property was subject to the Rent Restrictions Acts. "In considering whether any subordinate body is entitled to this Crown privilege the question is not so much whether it is an 'emanation of the Crown' but whether it is properly to be regarded as the servant or agent of the Crown. When Parliament intends that a new corporation should act on behalf of the Crown, it as a rule says so expressly as it did in the case of the Central Land Board by the Town and Country Planning Act 1947. In the absence (as here) of any such expressed provision, the proper inference, in the case at any rate of a commercial corporation, is that it acts on its own behalf, even though it is controlled by a government department."

This synopsis of affairs as they existed in 1972 leads this Panel to conclude that the state of the law at the inception of the PSLRA was as follows. Collective bargaining in the private sector had been developing for a number of years. Employees in the private sector had access to collective bargaining pursuant to the Labour Relations Act, which was the predecessor to the Code. Public servants, on the other hand, had no access and were not covered by the Labour Relations Act. Moreover, the employer of public servants, the Crown in right of the Province of British Columbia, i.e. the Government qua employer, was also not covered nor bound by the Labour Relations Act and therefore not the subject of any statutory compulsion under that Act to engage in collective bargaining. The Government, based on the principle of sovereignty, exercised its right to unilaterally set wages and terms and conditions of employment for public servants. This right was, by and large, declared in the Civil Service Act, RSBC 1960 Chap. 56,

which was the predecessor of the PSA. However, B.C. Hydro and Power Authority, a Crown agency, was directed by the Legislature by its enabling statute into the fold of the Labour Relations Act. There were other agencies of the Government which operated independently, such as B.C. Rail and the Queen's Printer, the employees of which had also obtained collective bargaining rights pursuant to the Labour Relations Act.

The mischief to be remedied was the Government qua employer's use of its Crown prerogative to unilaterally set terms and conditions of employment, thereby denying the right to engage in collective bargaining to those public servants who were neither entitled by statute to bargain collectively under the Labour Relations Act, nor employed by agencies of Government acting in an independent capacity. The Legislature, in remedying the mischief identified by the Commission, did not elect to amend the private sector legislative scheme to encompass the Government qua employer. The Commission recognized, at page 2 of the Higgins Report, that the difficulty facing the Legislature was, "...that there are differences between employer/employee relations in the public and private sectors. These differences...caution against adopting, unchanged, the private sector bargaining practices in order to cope with the peculiar problems associated with Government employment...", and at page 4, "...should there be a special statute to govern collective bargaining and if so, what should it cover?" The Legislature elected to address this mischief by passing into law a special Act, the PSLRA.

This Panel concludes that by enactment of a special statute the Legislature intended to proceed cautiously in extending compulsory collective bargaining to Government. A careful reading of the PSLRA reveals that this caution is exemplified by the circumscription of the number of bargaining units, the numbers and types of collective agreements, and the scope of what is bargainable. All of the Government's arguments with respect to provisions and limitations in the PSLRA support both this notion of a cautious approach, and the view that the Legislature intended to expose the Government qua Employer to collective bargaining only in a limited way, the scope of which was entirely contained in the PSLRA.

An equally careful reading of the Labour Code which was enacted contemporaneously with the PSLRA, reveals that no changes material to this issue were made to the definition of "employer" or "employee" as previously found in the Labour Relations Act nor was the addition of the definition of "person" significant. Given that the Government qua employer was not subject to the Labour Relations Act, as clearly evident from the Higgins Report, and given that no material changes relative to this issue occurred upon the enactment of its successor the Labour Code contemporaneously to the passage of the PSLRA, this Panel concludes that the Government qua employer was thus no more subject to the Labour Code following the passage of the PSLRA and the Labour Code than it had been subject to the previous Labour Relations Act. This Panel concludes that the Legislature in its cautious approach to extending compulsory collective bargaining, made the Government qua employer compellable to bargain collectively only within the framework of the PSLRA with a union representing those employees defined therein, who hitherto had no collective bargaining rights, nor had any potential of obtaining them under the private sector legislation. Thus it is only PSLRA that addresses the mischief identified in the Higgins Report, and only to the extent specified in the provisions. The scope of the private sector scheme under the Labour Code was, and continues to be, limited to the "private sector" as it had been under the Labour Relations Act.

This Panel further concludes that as a result, there are two mutually exclusive collective bargaining regimes in the Province of British Columbia today. The first, under the umbrella of the IRA, successor to the Labour Code, can be loosely termed private sector but includes some public sector employees. The second regime governs the public service in the truest sense and brings under compulsion of statute, the Government qua employer. That second regime, contained in the PSLRA, incorporates the IRA by virtue of Section 26. The IRA as incorporated by the PSLRA takes on the character of the latter when applied in that statutory regime (Township of Goulbourn et al v. Regional Municipality of Ottawa-Carleton et al (1979), 101 D.L.R. (3d) 1). The Union is thus correct in its submission when it says Section 26 only applies to those inconsistencies between the IRA and the PSLRA which arise by virtue of the application of the IRA to employees who are, in fact, included in collective bargaining under the PSLRA, Sections 4(a), (b) and (c). This Panel concurs with the Union's interpretation of this point. However, that particular view is of no assistance to the Union because it confines the scope of the IRA's applicability to the Government qua employer within the framework of the PSLRA. By implication, and as the Panel has already concluded, the scope of the IRA standing alone does not encompass the Government qua employer.

In defining "employee" under the PSLRA, the Legislature began by including more than simply those public servants who hitherto had no bargaining rights. The Board in Robert Enoch and the Public Service Commission, BCLRB 24/76 recognized this at page 10 of that decision, "...the legal net was cast much wider by the actual language used in the statutory definition of 'employee' [in the PSLRA]."

But in so doing, the Legislature did not intend to erase the rights of those public servants who already bargained collectively in the private sector as described in the Higgins Report. There was no mischief which needed to be cured with respect to these public servants who bargained under the Labour Relations Act, the successor Labour Code and continue to bargain today under the umbrella of the IRA. This intention was manifested when the Legislature excluded them from that broader legal net thus narrowing the focus and the scope of the PSLRA.

The Union latches onto this fact and says if these employees by virtue of their exclusion come under the umbrella of the IRA, then all the exclusions must come under that umbrella subject to any exclusions that are found in the IRA. This thesis turns on the erroneous assumption that it is the act of exclusion from the PSLRA which creates rights under the IRA which flows in part, from an effort to isolate a common denominator amongst those exclusions. The common denominator to which the Union's argument is directed is the right to bargain collectively under the IRA, i.e. if some public servants who bargain under the IRA are excluded from the PSLRA, then all who are excluded from the PSLRA must be able to bargain under the IRA. However, the Board equally recognized in British Columbia Government Professional Employees' Association and Public Service Commission, BCLRB No. 166/74 at page 8, that some of the exclusions from the definition of "employee" in the PSLRA were intended to preclude collective bargaining altogether. In that decision the Board held:

> First of all, in the definition of "employee" in Section 1 of the Public Service Labour Relations Act, government lawyers are excluded by this wording: "a person qualified under the Legal Professions Act...who is engaged and working in the practice of such profession." Almost exactly the same language is used in the Labour Code in its general exclusion of professionals from the scope of collective bargaining:

> "employee" means a person employed by an employer, and includes a person engaged in police duties, and a dependent contractor included in an appropriate bargaining unit under section 48, but does not include a person who, in the opinion of the board,
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> ....
>
> (iii) is qualified in a profession, trade, or calling and is licenced under the Architectural Profession Act, Chartered Accountants Act, Chiropractic Act, Dentistry Act, Engineering Profession Act, Insurance Act, Land Surveyors Act, Legal Professions Act, Medical Act, Naturopathic Physicians Act, Optometry Act, Podiatry Act, Real Estate Act, Securities Act, 1967, or Veterinary Medical Act, or is an enrolled student under any such Act, and is engaged and working in the practice of such profession, trade, or calling;

In each provision, by contract with Section 4 of the P.S.L.R.A., the statute made it clear that it was referring only to those licensed professionals who were actually practicing their profession. The need for the Legislature to be explicit on that point was brought home by the decision of the B.C. Court of Appeal in Scotton and Office and Technical Employees Union, Local, Local 378 (1974) 39 DLR (3d) 392 . In that case, dealing with the somewhat different wording in the predecessor Labour Relations Act, the Court held that a student engineer was excluded from the statute though he was not doing engineering work in his job. That decision was issued on June 12, 1973. It led to the revised wording, quoted earlier, of the professional exclusion in the new Labour Code which was enacted at the Fall 1973 session of the B.C. Legislature. The same language was inserted in the Public Service Labour Relations Act to exclude lawyers in the public service from collective bargaining.... (at 8-9; emphasis added)

Consequently, the common denominator which the Union says is present, is really not there.

There is, however, another common denominator that is present, which the Commission identified in the Higgins Report as separating most public servants who had no bargaining rights at all, and those others that did acquire bargaining rights under the then Labour Relations Act, and which the Government says is the focus of its case namely: the characterization of the Employer. All of the exclusions from the definition of "employee" in the PSLRA are precluded

from collective bargaining with the Government qua employer. The term Government qua employer is used in the narrower sense excluding those agencies of Government which act in an independent capacity in hiring employees or which by enabling statute, are covered by the IRA.

The Panel concludes that this distinction continues to be key. It must be remembered that the object of certification is to enlist the aid of statutory compulsion to bring an employer to the bargaining table. Employees cannot obtain collective bargaining representation under a statute which does not apply to their employer. Where the Government qua employer is under the umbrella of the PSLRA and where certain independent agencies of Government fall under the umbrella of the IRA, so that "public service" in the broad sense of the term spans both statutory regimes, the identification of the Employer becomes critical in determining under which scheme a union representing a particular group of public servants can compel their particular employer to bargain. Similarly, the characterization of the Employer becomes critical in determining whether a particular exclusion under the PSLRA is denied collective bargaining altogether because it is employed by Government qua employer which is only compellable under the PSLRA, or whether a particular exclusion has the ability to belong to a union certified under the Industrial Relations Act because he or she actually works for another kind of employer, albeit an agency of the Crown acting in an independent capacity as an employer. In other words, all exclusions under the PSLRA are precluded from having a union bargaining on their behalf with the Government qua employer under the PSLRA. But some, who are not employed by the Government qua employer, may well be able to compel their particular employer to bargain through union representation under the IRA.

That is indeed the pivotal point of the Queen's Printer case. In that case, the Queen's Printer acting in its independent capacity, hired employees who were represented by printing unions certified under the Labour Code. The Legislature in enacting the PSLRA recognized this historical fact and it excluded those employees from the definition of "employee" in the PSLRA. However, the Legislature reserved to the Government the right to hire clerical or administrative staff for the Queen's Printer under to the PSA. The Government then proceeded to hire five employees purportedly as such clerical or administrative staff, but who, in actual fact, were no different than employees hired independently by the Queen's Printer. The Board in considering the issue did not feel constrained from going behind the simple act of hiring to determine the true nature of the employment relationship. The formality of hiring was not determinative of the issue. The Board's statement at page (2) of that decision which is so heavily relied upon by the Union in this case, means no more than that. The Board in fact determined that the five employees were no different than all the others who had been hired by the Queen's Printer who were represented by unions certified under the Labour Code. For those five employees, exclusion from the definition of "employee" under the PSLRA resulted in inclusion within the bargaining unit under the Labour Code which bargained directly with the Queen's Printer as a separate employer from the Government. Although the Board did not directly consider the question whether or not employees excluded under the PSLRA definition of "employee" could then be "employees" in a bargaining unit represented by a union with collective bargaining rights under the Code, the reconsideration panel certainly recognized the presence of that issue. At page 11, the reconsideration panel said:

> Although this disposes of the chief point raised in the appeal, the Board has also considered a point raised for the first time at the hearing and not thoroughly argued by

the parties. That is whether or not it necessarily follows that the employees are within the bargaining unit of the Printing Unions. As the Board has pointed out the Printing Unions were certified for "employees of the B.C. Printing Bureau" and it is common ground that the five persons involved in this appeal - unlike other "printing personnel" within the Queen's Printer - were appointed by the Commission and are employees in the Public Service. As such can they be "employees of the B.C. Printing Bureau"?

> It should be obvious from a consideration of s. 1(1) of the Public Service Labour Relations Act that public servants may not fall within the compass of that statute and that that was the effect of Vice-Chairman Peck's ruling in the present case. Since this is so, it would be within the power of the Board to include these employees within a bargaining unit certified under the private sector provisions of the Labour Code. Similarly, the Board could even now vary the Certificate of March 27th, should it conclude that the wording of the Certificate is too narrow to encompass the five individuals whose status is presently in issue. However, the Board need not make any determination as to whether such a variance is now necessary. This is because the Commission stated at the hearing that, should it be unsuccessful in its appeal, the five individuals would be "terminated" as public servants but continue to work as employees of the Queen's Printer. When that occurs there will be no doubt but that the employees fall within the Certificate of March 27th. Hence, the Board need not determine the neat issue of whether a public servant holding office at the pleasure of the Crown and appointed by the Commission in contradistinction to the other "printing staff" who are employed directly by the Queen's Printer, - may nevertheless be an employee of the B.C. Printing Bureau. Suffice it to say that even if the Board had answered that question in the negative it would have been prepared to vary the Certificate of March 27 to include these persons. (at 11-12; emphasis added)

It is quite apparent from the passage cited, that the issue before that panel did not receive the full argument that it did be fore this one. Moreover, it is apparent that the Government in that case curtailed the necessity of a decision on the point by taking a position consistent with the one which it holds before the present Panel. I am not prepared, in this case, to speculate on the reasons behind that panel's remarks in the last sentence of its reasons. Suffice it to say that that panel quite readily recognized the characterization of the employer has a significant impact on the status of the employee concerned. It may well have been necessary for that panel, in answering the question posed, to delve into the related issue of who was the real employer, and from that to find sufficient ground to determine that notwithstanding the act of hiring by the Public Service Commission, the real employer was the Queen's Printer which would enable the Labour Code certificate to be varied accordingly. For the above reasons, the Queen's Printer decision, in my view fully supports the Government's position in the instant matter.

Decisions of the Courts also support the notion that for purposes of determining whether an employee falls under the public sector or private sector legislation a public servant draws his colour from the character of his or her employer. The British Columbia Supreme Court in Re City of Revelstoke and Local 213 of the International Brotherhood of Electrical Workers A.F.L. (1953), 8 W.W.R. (NS) 462, dealing with the issue whether costs could be recovered by a Conciliation Board appointed by the Labour Relations Board said:

> The conciliation board was appointed by the Labour Relations Board. That Board is established by the Lieutenant-Governor in Council, pursuant to Section 55 of the said Act. I have no doubt and, indeed, it is not disputed that the Labour Relations Board is a servant or agent of the Crown.
>
> The Labour Relations Board, in its turn appointed the conciliation board under powers given it by Sec. 48 of Industrial Conciliation Arbitration Act. Having read the appropriate Sections of that Act and particularly Sect. 24, which requires the conciliation board to report its findings to the Labour Relations Board, I think its clear that the conciliation board is a servant and agent of the Labour Relations Board.
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> Thus, I have only to decide whether the servant or agent of
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> a servant or agent of the crown is himself a servant or
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> agent of the crown. In a case like this, where the statute
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> clearly authorizes the crown's servant or agent to appoint
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> servants or agents I think the position is clear, and that
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> therefore the conciliation board is a servant or agent of
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> the Crown and not entitled to costs.
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> (at 463; emphasis added)

This same point was made by Mr. Justice Pigeon speaking for a unanimous Court in Canada Labour Relations Board and Public Service Alliance of Canada v. City of Yellowknife, supra:

> ...In my view, it would be contrary to the whole concept of
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> classifying employees for jurisdictional purposes by
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> reference to the character of the operation, to attempt to

> make a distinction depending upon whether the employer is a private company or a public authority. Different considerations may obtain where the employer is a government or government corporation and this is apparent from s. 109 of the Labour Code. However, this is a question with which we are not concerned in this case. (at 14,616; emphasis added)

This approach was adopted by the Canada Board in The Government of the Northwest Territories and Housing Corporation and Northwest Territories and Public Service Alliance of Canada and Attorney General of Canada, [1979] 2 Can LRBR 521, as well as another Canada Labour Relations Board case Retail Clerks Union, Local 1518 and Canadian Forces Exchange System (Canex), [1978] 1 Can LRBR 219. In the former case, the Board stated the critical question as follows:

> A more conclusive answer to the jurisdictional question can be found by asking who is the employer of the employees of the public service of the Northwest Territories. (at 463; emphasis added)

Turning then to the internal auditors in the Liquor Distribution Branch, it is common ground between the parties that they are indeed excluded from the PSLRA. It is also common ground that they are appointed under the PSA. Given that the PSA is declaration of a Crown prerogative exercised by the Government, and reviewing the Liquor Distribution Act, it is clear the internal auditors are servants of the Government qua employer. They are not employees of an independent agency nor a corporation under a statutory mandate which is subject to the IRA. The Board in Robert Enoch, supra, recognized that minimally all appointments under the PSA were prima facie employees of the Government qua employer. Internal auditors thus fall into that class of public servants, who if they are to bargain collectively must be entitled to do so under the PSLRA and no other statute. For internal auditors, being excluded from the PSLRA, and failing to identify any other employer which is compellable under the IRA, means that these particular public servants have no access to collective bargaining.

The Canada Labour Relations Board in Public Service Alliance of Canada and The House of Commons, [1985] 6 CLRBR (NS) 354 considered the relationship between the Canada Labour Code and the Public Service Staff Relations Act while being mindful of the comments of Chief Justice Laskin in The City of Yellowknife, supra, concluded that certain public servants were indeed deprived of collective bargaining rights.

> Also in the City of Yellowknife, the late Chief Justice Laskin had the following to say at p. 731, in his concurring judgement:
>
> > It would be incongruous to declare a gap in the application of collective bargaining advantages to employees who are employed by a municipality in the Northwest Territories. In view of the all-encompassing legislative authority of the Parliament of Canada in the Northwest Territories, I do not think there is any justification for assessing the scope of Part V of the Labour Code, in its application to the Northwest Territories, in exactly the same way in which the respective limits of federal and provincial legislative jurisdiction in relation to labour relations would be measured.

> Moreover, having regard to the definition of "federal work, undertaking or business" in s. 2 of the Labour Code, R.S.C. 1970, c. L-1, and especially s. 2(i) ("a work, undertaking or business outside the exclusive legislative authority of the Province") any ambiguity or doubt whether the federal statute covers the employees of a municipality, organized in federal and federally administered territory, and such municipalities in their relations with their employees, should be resolved in favour of inclusion rather than of exclusion.

There is jurisprudence of this Board where it has concluded that it is without jurisdiction even where no other statutory scheme of collective bargaining applied:

> Cdn. Union of Professional and Technical Employees v. Cdn. Advisory Counsel on the Status of Women, unreported Board decision, file 555-16245.
>
> Retail Clerks Union v. Cdn. Forces Exchange System (CANEX) (1977), 24 di 183; [1978] 1 Canadian L.R.B.R. 219.
>
> Public Service Alliance of Canada v. Gov't of the Northwest Territories and Housing Corp. of the Northwest Territories (1978) 31 di 165; [1979] 2 Canadian L.R.B.R. 521; 78 C.L.L.C. 16,171.

In all these cases, the Board concluded that it was without jurisdiction because the employees were employees of Her Majesty and, therefore, specifically excluded by operation of s. 109(4) of the Code:

> Except as provided by this section, this Part does not
>
> apply in respect of employment by Her Majesty in right of
>
> Canada.
>
> (at 362-362; emphasis added)

Notwithstanding the fact that in the instant case there is no specific provision in the IRA excluding employees of her Majesty in right of the Province of British Columbia, given the state of the law when the PSLRA was enacted and given the historical analysis herein the same result obtains.

It would be incongruous, indeed, if the Union's view of the world were true, that is, by being excluded from the definition of "employee" under PSLRA, a person obtained collective bargaining rights under the IRA. One of the examples offered by the Union in its argument to whom such a premise would apply was "a person employed for a period of less than sixty days". That would mean a person with a short term and at best a tenuous employment relationship to the Government and, by comparison to public servants employed for more than sixty days or on a permanent basis, having virtually no stake in the job, would obtain broader collective bargaining rights under the IRA than career public servants employed in identical jobs who were confined to bargaining under the PSLRA. The incongruity of that result flies in the face of common sense and good labour relations policy. Moreover, this would lead to the proposition that the Legislature best helped public servants obtain bargaining rights by excluding them from the very statute (the PSLRA) which was intended to give them those bargaining rights. By extension, at a time when there was no PSLRA, all public servants should have been able to bargain collectively under the Labour Relations Act. As the Higgins Report so clearly

established, that was not the state of the law and that reinforces this Panel's conclusion that internal auditors cannot obtain certification under the IRA.

For the foregoing reasons, the application is dismissed.

V.A. PYLYPCHUK
VICE-CHAIRMAN

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British Columbia (Re)

British Columbia Labour Relations Board Decisions

British Columbia Industrial Relations Council

Panel: Edward R. Peck, Commissioner Duncan Wilkins, Member Monty Alton, Member

March 6, 1990

No. C55/90

(Reconsideration of IRC No. C225/90)

[1990] B.C.L.R.B.D. No. 52

Between Government of the Province of British Columbia (the "Government" or "Employer"), and British Columbia Government Employees' Union (the "Union" or "BCGEU")

Counsel: Donald J. Jordan, QC for the Government David Blair for the Union

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I

The Panel is concerned here with an application by the Union under Section 36 of the Industrial Relations Act (the "IRA") to reconsider IRC Decision No. C225/89 of October 26, 1989. The Union, through an application for certification under Section 39(1) of the IRA, seeks to certify a bargaining unit of persons employed by the B.C. Government Liquor Distribution Branch as internal auditors at 3284 East Broadway, Vancouver. In general, the Union represents Government employees under the Public Service Labour Relations Act, R.S.B.C. 1979, c. 346 (the "PSLRA"); but any "internal auditor in a ministry" is excluded from that legislation by Section 1(1)(x). Consequently, this application must be brought under another enactment, here the IRA, if it is to succeed.

The legal issue in this case is whether internal auditors who are excluded from the PSLRA can be represented by a union in a bargaining unit under the IRA, or whether their collective bargaining rights are limited to the PSLRA. If these employees' bargaining rights are limited to the PSLRA, the certification application fails; if they possess rights under the IRA, the application may succeed.

II

The original panel decided that the internal auditors are not subject to the IRA only because they are excluded from the operation of the PSLRA: exclusion from one statutory regime does not automatically create rights under another. The original panel began with the proposition that if the Union's argument is correct and employees covered by the PSLRA also have rights under the IRA, "[t]his would render the PSLRA entirely redundant which is, of course, absurd" (at 9). In order to discern the intention of the Legislature in passing both pieces of legislation, that panel used the "Golden Rule" of interpretation, which allows a tribunal or court to determine the "true" intention of the Legislature in passing the legislation where a literal interpretation of the enactment leads to an absurdity. The background to the legislative intention was gleaned from

the historic relationship of the Crown to its employees, and the Report and Recommendations of the Commission of Inquiry into Employer-Employee Relations in the Public Service of British Columbia, December 1972 (the "Higgins Report") which examined public sector bargaining (and the lack of it) in the Province. The original panel concluded that there were two collective bargaining regimes in the Province, one for the private sector (and certain elements of the public sector) and another for the public sector:

> The mischief to be remedied was the Government qua employer's use of its crown prerogative to unilaterally set terms and conditions of employment, thereby denying the right to engage in collective bargaining to those public servants who were neither entitled by statute to bargain collectively under the Labour Relations Act, nor employed by agencies of Government acting in an independent capacity. The Legislature, in remedying the mischief identified by the Commission, did not elect to amend the private sector legislative scheme to encompass the Government qua employer. The Commission recognized, at page 2 of the Higgins Report, that the difficulty facing the Legislature was, "... that there are differences between employer[/]employee relations in the public and private sectors. These differences ... caution against adopting, unchanged, the private sector bargaining practices in order to cope with the peculiar problems associated with [G]overnment employment ...", and at page 4, "... [s]hould there be a special statute to govern collective bargaining and if so[,] what should it cover?" The Legislature elected to address this mischief by passing into law a special Act, the PSLRA.
>
> This Panel concludes that by enactment of a special statute the Legislature intended to proceed cautiously in extending compulsory collective bargaining to Government. A careful reading of the PSLRA reveals that this caution is exemplified by the circumscription of the number of bargaining units, the numbers and types of collective agreements, and the scope of what is bargainable. All of the Government's arguments with respect to provisions and limitations in the PSLRA support both this notion of a cautious approach, and the view that the Legislature intended to expose the Government qua Employer to collective bargaining only in a limited way, the scope of which was entirely contained in the PSLRA.
>
> An equally careful reading of the Labour Code which was enacted contemporaneously with the PSLRA, reveals that no changes material to this issue were made to the definition of "employer" or "employee" as previously found in the Labour Relations Act nor was the addition of the definition of "person" significant. Given that the Government qua employer was not subject to the Labour Relations Act, as clearly evident from the Higgins Report, and given that no material changes relative to this issue occurred upon the enactment of its successor the Labour Code contemporaneously to the passage of the PSLRA, this Panel concludes that the Government qua employer was thus no more subject to the Labour Code following the passage of the PSLRA and the Labour Code than it had been subject to the previous Labour Relations Act. This Panel concludes that the Legislature in its cautious approach to extending compulsory collective bargaining, made the Government qua employer compellable to bargain collectively only within the framework of the PSLRA with a union representing those employees defined therein, who hitherto had no collective bargaining rights, nor had any potential of obtaining them under the private sector legislation. Thus it is only PSLRA that addresses the mischief identified in the Higgins Report, and only to the extent specified in the provisions. The scope of the

> private sector scheme under the Labour Code was, and continues to be, limited to the "private sector" as it had been under the Labour Relations Act.
>
> (at 14-15; emphasis in original)

According to the original panel, the IRA (successor to the Labour Code) applies to the private sector and certain parts of the public sector, whereas the PSLRA applies exclusively to formerly ineligible public servants in their dealings with the Crown qua the Employer. The question of jurisdiction is settled by asking whether a person is an employee of the Crown or an employee of one of its agents. The original panel states:

> Whether or not public servants were entitled to bargain collectively depended on the characterization of the particular employer in the public service. Where the Government qua employer was exercising its Crown prerogative, public servants were denied access to collective bargaining. Where the "Government" was a Crown agency or a Crown corporation or an entity of the Crown exercising an independent right to employ, whether mandated by statute or whether exercised in its own independent capacity, employees acquired private sector bargaining rights even though they were, in the broadest sense, public servants.
>
> (at 12-13)

Certain employees on the periphery of the public service (with an agency of the Crown, e.g., B.C. Hydro) are covered by the IRA, whereas those employed by the Government qua the Employer were entirely excluded from collective bargaining until passage of the PSLRA.

The Union claims that the original panel misinterpreted the IRA and the PSLRA, made material errors in fact, and incorrectly interpreted a previous LRB decision (Public Service Commission -and- Graphic Arts International Union, BCLRB No. 45/75 (reconsideration of Letter Decision of February 21, 1975) ("Queen's Printer"). It also claims that the original panel was incorrect when it preferred policy considerations and the scope of the Act over the legislation's literal meaning.

As this Panel understands the argument advanced by the Union, Section 13 of the Interpretation Act, S.B.C. 1974, c. 42, means that the IRA applies to the Government's relationship with its employees:

> 13. Unless an enactment otherwise specifically provides, every Act, and every enactment made thereunder, is binding on Her Majesty.

(We note that under R.S.B.C. 1979, c. 206, the above provision became, in part, Section 14(1).) Thus some employment relationships with the Crown are governed by the IRA while others fall under the PSLRA. Any conflicts which arise under the IRA and the PSLRA are resolved by Section 26 of the PSLRA:

> 26. Unless otherwise provided in this Act, the Industrial Relations Act applies, but, where this Act is contrary to, in conflict with or inconsistent with that or any other Act, this Act prevails.

Thus the PSLRA overrides. The Union argues that because internal auditors are excluded from the PSLRA, there can be no conflict, and consequently the IRA applies and the certification application succeeds. According to the Union, there can only be an inconsistency between the two enactments where an employee is covered by the PSLRA in the first place, and that does

not arise here. Mixing of the two statutes was foreseen in the Higgins Report and should not be avoided by the Council for policy reasons, says the Union. Moreover, leaving excluded employees unrepresented is inconsistent with the admonition of the Supreme Court of Canada in LRB (Can.) v. City of Yellowknife (1977), 77 CLLC 14,073 at p. 81 , that "it would be incongruous to declare a gap in the application of collective bargaining advantages to employees" covered by both public sector and private sector legislation. The Union defended its reliance on the Queen's Printer decision by saying that at no time did anyone in that case cast doubt on the propriety of the certification under the Labour Code.

The Employer supports the reasoning of the original panel that employees excluded from the definition of "employee" under the PSLRA do not have access to collective bargaining under the IRA. This conclusion, says the Employer, is "self-evident" from the language of the IRA which in turn is consistent with the historical development of collective bargaining rights for public servants in British Columbia. The Government qua the Employer is subject only to the PSLRA which is obvious from the fact that several provisions in that legislation differ significantly from corresponding provisions in the IRA. For example, the Employer cites the conflict in the definitions of "bargaining agent", "collective agreement", and "bargaining unit" in the PSLRA when compared to those in the IRA.

Criticizing the Union's reliance on Queen's Printer as authority for the proposition that employees not subject to the PSLRA are subject to the Labour Code, the Employer notes that the earlier decision did not squarely address the issue addressed here. It points out that Queen's Printer arose in the context of five employees seeking to be included in one of two bargaining units, one represented by the Union under the PSLRA or by one of several printing unions under the Labour Code. Ultimately, the Board concluded that these employees were more properly included in the bargaining unit represented by the printing unions under the Code; but it only addressed the issue of which of two bargaining units was appropriate, not whether this group had collective bargaining rights under the predecessor Labour Code. Since the earlier decision does not address the same issue, the Employer says the decision cannot stand as a precedent in favour of the Union's case.

III

The difficulty in this case stems from the imperfectly meshed provisions of two pieces of legislation in the same general policy area, and is compounded by the unusual legal status of "Government" employees who are either employed by the Crown or an agency of the Crown. There is a superficial appeal in the interpretation offered by the Union; after all, the IRA definitions prima facie cover the Government's relationship with its employees and there is nothing explicit in either piece of legislation to address the status of PSLRA excluded employees under the IRA. On the other hand, as pointed out by the original panel, the Union's argument, if successful, would render the PSLRA redundant. If persons excluded from the definition of "employee" in the PSLRA have collective bargaining privileges under the IRA, there was no reason for the Legislature to have passed the PSLRA in the first place since all employees in the Province would fall under the umbrella of the IRA.

More subtle problems arise if the Union's argument were to succeed. For example, the Government could be obliged to bargain with a whole spectrum of bargaining units, groups otherwise excluded by Section 1(1). One such bargaining unit could be comprised of persons

employed as justices, or in the Office of Legislative Counsel, or those employed for a period of less than 60 days. As stated by the original panel:

> That would mean a person with a short term and at best a tenuous employment relationship to the Government and, by comparison to public servants employed for more than sixty days or on a permanent basis, having virtually no stake in the job, would obtain broader collective bargaining rights under the IRA than career public servants employed in identical jobs who were confined to bargaining under the PSLRA.

(at 23-24)

Such a proliferation of bargaining units becomes even more curious in light of the comments of Weiler P.C. in British Columbia Government Professional Employees Association, BCLRB No. 166/74, who noted that the structure of PSLRA bargaining units severely limits the number of bargaining units to three and gives this tribunal no discretion to determine appropriateness. Moreover, it "provides for quite an unusual bargaining unit structure ... that there should be one trade union representing one bargaining unit composed of the more than 30,000 employees in the Public Service, despite the wide variations in their work, qualifications, and background" (at 11).

The interpretation in C225/89 strikes a balance between these two extremes: each piece of legislation has an independent application but simultaneously fits the historic development of labour relations legislation in British Columbia. Furthermore, the interpretation is tempered by an understanding of the unique position of the Crown, as an employer, in contrast with that of a private employer. Unlike the private employer, the public employer's overriding responsibility is to the public interest, so that different considerations arise when it bargains with its employees. Different legislative schemes are appropriate.

Following the reasoning of the original panel, it is essential to understand the background of public sector collective bargaining as it is affected by the related issue of Crown immunity. It is to be recalled that at common law, those employed directly by the Crown had no right to bargain with their employer, but rather were subject to unilateral imposition of terms and conditions of employment. That was clearly explained by the Higgins Report:

> "La Reine ne negocie pas" (The Queen does not negotiate) is the classic statement of the principle of sovereignty. It was from this principle that those who opposed collective bargaining in the public service drew theoretical sustenance. They relied upon the orthodox position on sovereignty that maintains that government has the sole authority to govern and that this authority cannot be given to, taken by, or shared with anyone.
>
> The orthodox position on sovereignty permitted only the government to establish terms and conditions of employment. Clearly, genuine collective bargaining is incompatible with such a position.

(at 6-7)

But it has long been accepted that not all governmental entities fall within the meaning of "Crown", and employment law is not an exception to the general rule: some employees who might be characterized as Crown employees really work for agents of the Crown. Employees in the latter category are akin to employees in the private sector and thus properly subject to the collective bargaining regime of the IRA. Those employed directly by the Crown occupy a different position. Prior to enactment of the PSLRA, they had no collective bargaining rights.

Thus the question of which legislative scheme covers the employment relationship of those loosely referred to as "public servants" is a matter of characterizing the Employer as either the "Crown" or one of its agencies. This was the approach of the Labour Relations Board (the "LRB") in Workmen's Compensation Board Employees, [1974] 1 Can LRBR 135 at 138-39, which involved an application by the employers (Workmen's Compensation Board and Insurance Corporation of British Columbia) for a determination of "appropriateness" under the Labour Code. The application was opposed by the unions on the basis that the two organizations as the "Crown" qua the employer were not "employers" as defined in the Code and therefore lacked status to bring the application. In determining that the two organizations were "employers", the LRB said this of the collective bargaining regime then in place:

> If we step back for a moment, the total picture which appears is essentially this: collective bargaining is now the legal policy for private businesses, for independent public bodies such as universities, for elected municipal governments, and for the provincial government itself ... I would hold that the Crown agencies, such as the WCB and the ICBC are subject to the general labour legislation (and thus the earlier Board decisions denying jurisdiction were incorrect) ... Now, in British Columbia, the Crown itself is required by statute to engage in collective bargaining with its own employees. In the Public Service Labour Relations Act, the legislature expressly imposed this obligation on Her Majesty in right of the Province and agencies of the Crown. When it excluded Crown corporations such as ICBC and the WCB from coverage under that statute, it did not intend to leave them outside the scope of the province's labour laws. Instead, it intended and provided that they should each be treated as an "employer" under the Labour Code ... To hold otherwise would be to treat one branch of the traditional Crown prerogative as still alive and flourishing long after the main trunk has been cut down at its roots.

(at 138-140)

Like the current legislation, that scheme provided certification rights for three types of employees: those in the private sector, those in the "quasi-public" sector (i.e., Government agencies), and those in the "public" sector (i.e., Crown qua employer). The first two properly sought bargaining rights under the Labour Code while the last sought them under the PSLRA. The conclusions of the original panel reinforce the continued existence of this system. The IRA (and its predecessor) was intended to apply to private sector and quasi-public sector employees of Crown agents, while the PSLRA was intended to confer collective bargaining rights on previously ineligible employees of the Crown itself. To now find that the mere act of exclusion from the PSLRA automatically creates rights under the IRA, is, with respect, straining the language of that enactment. If the Legislature had intended such a drastic change in the state of the law, surely it would have said so in explicit terms.

Regarding Queen's Printer, supra, and the argument that the original panel misinterpreted and consequently failed to grasp the import of this case, we go first to the Higgins Report:

> The Queen's Printer is a branch of the Department of the Provincial Secretary, but it operates relatively independently and on a profit and loss basis. While appointments to its small clerical and allied staff are made under the Civil Service Act, appointments to its plant staff are not. The plant staff has had some semblance of bargaining over the years in that there has been an arrangement that employees would be paid whatever rates were negotiated by printing trades unions in the Victoria area.

> The Commission considers that the role and function of the Queen's Printer are such that it should be established as a separate agency. From this thinking follows the view that its employees should be granted bargaining rights on the same basis as employees in the private sector.
>
> The Commission recommends that:
>
> (a) the Queen's Printer be established as a separate government agency; and
>
> (b) employees of the Queen's Printer be granted the right to collective bargaining under the Labour Relations Act.
>
> (at 12; underlining added)

Analysis of the foregoing leads us to two conclusions in this matter:

1) the original panel erred when it declared that at the time of the Higgins Report employees of the Queen's Printer had already achieved the goal of collective bargaining rights (at 12);

2) the Higgins Report clearly intended that, as the Queen's Printer was an agency of an independent character, its employees should be granted bargaining rights on the same basis as employees in the private sector, through the medium of the Labour Relations Act (later the Labour Code).

And the avenue to bargaining rights under the Labour Code was made clear by the exclusion from the definition of "employee" under the PSLRA (R.S.B.C. 1973, c. 144) of a portion of the employees of the Queen's Printer; Section 1(1)(x)(B) then provided:

> 1(1) In this Act, unless the context otherwise requires ...
>
> "employee" means a member of the public service, as the expression "public service" is defined in the Public Service Act, or a person employed by, or holding office at the pleasure of, the Crown, but does not include ...
>
> (x) a person employed by, or in the service of ...
>
> (B) the Queen's Printer under the Public Printing Act, other than clerical or administrative employees ...
>
> (emphasis added)

The Queen's Printer issue which subsequently arose before the LRB concerned five employees who were engaged as copy-typists and stockmen. The printing unions claimed them under the terms of the certification order which had been issued in their favour, while the BCGEU claimed them as clerical staff included within the Administrative Support Component. Beyond this the BCGEU argued that as "clerical" employees these persons were distinguishable from other Queen's Printer employees by virtue of the exclusion incorporated in Section 1(1)(x)(B). In Queen's Printer the LRB found that the work the five performed was closely related to the work of the printing trades, that they were not clerical and administrative employees within the meaning of Section 1(1)(x)(B), and consequently were properly included in the certification awarded to the printing unions.

It is clear from the foregoing that Queen's Printer did not have as its focus the issue of certification under the IRA where the employees had been excluded from the jurisdiction of the

PSLRA. Rather, the issue was in which of two competing bargaining units certain employees should reside. Next, unlike internal auditors and certain other persons excluded from the provisions of the PSLRA, Queen's Printer employees (excepting clerical and administrative) were specifically identified by the Higgins Report as employees who "should be granted bargaining rights on the same basis as employees in the private sector." Finally, the original panel in this case did not rely on Queen's Printer because the issue before it was not fully argued before the LRB, a fact openly acknowledged by the Queen's Printer reconsideration panel (at 11).

IV

The original panel in this case resolved a relatively complex structure of interlocking statutory provisions while retaining the integrity of the two pieces of legislation and adhering to statutory history. There is no reason to overturn it. In the result, the Union's application for reconsideration is dismissed.

EDWARD R. PECK
COMMISSIONER

DUNCAN WILKINS
MEMBER

MONTY ALTON
MEMBER

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Attorney General of Canada *Appellant*

v.

Daniel Thouin and Automobile Protection Association *Respondents*

- and -

Ultramar Ltd., Olco Petroleum Group ULC, Irving Oil Limited, Alimentation Couche-Tard inc., Dépan-Escompte Couche-Tard inc., Couche-Tard inc., Global Fuels Inc., Global Fuels (Québec) Inc., Philippe Gosselin & Associés ltée, Céline Bonin and Claude Bédard *Appellants*

v.

Daniel Thouin and Automobile Protection Association *Respondents*

and

Attorney General of Quebec *Intervener*

Procureur général du Canada *Appelant*

c.

Daniel Thouin et Association pour la protection automobile *Intimés*

- et -

Ultramar ltée, Groupe Pétrolier Olco ULC, Les Pétroles Irving inc., Alimentation Couche-Tard inc., Dépan-Escompte Couche-Tard inc., Couche-Tard inc., Les Pétroles Global inc., Les Pétroles Global (Québec) inc., Philippe Gosselin & Associés ltée, Céline Bonin et Claude Bédard *Appelants*

c.

Daniel Thouin et Association pour la protection automobile *Intimés*

et

Procureure générale du Québec *Intervenante*

INDEXED AS: CANADA (ATTORNEY GENERAL) *v.* THOUIN

2017 SCC 46

File No.: 36869.

2017: May 24; 2017: September 28.

Present: McLachlin C.J. and Abella, Moldaver, Wagner, Gascon, Brown and Rowe JJ.

RÉPERTORIÉ : CANADA (PROCUREUR GÉNÉRAL) *c.* THOUIN

2017 CSC 46

N° du greffe : 36869.

2017 : 24 mai; 2017 : 28 septembre.

Présents : La juge en chef McLachlin et les juges Abella, Moldaver, Wagner, Gascon, Brown et Rowe.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Civil procedure — Evidence — Immunity — Class action against oil companies and retailers who had been subjects of investigation by Competition Bureau — Motion for permission to examine chief investigator from Competition Bureau and for order requiring Attorney General of Canada to disclose evidence obtained in investigation — Objection based on Crown immunity — Whether chief investigator may be required to submit to

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Procédure civile — Preuve — Immunité — Recours collectif contre des pétrolières et détaillants ayant fait l'objet d'une enquête menée par le Bureau de la concurrence — Requête sollicitant l'autorisation d'interroger l'enquêteur-chef du Bureau de la concurrence ainsi qu'une ordonnance enjoignant au procureur général du Canada de communiquer des éléments de preuve obtenus dans le cadre de l'enquête — Objection fondée sur

2017 SCC 46 (CanLII)

discovery under Quebec rules of civil procedure in proceedings in which neither Crown nor chief investigator is party — Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 27 — Interpretation Act, R.S.C. 1985, c. I-21, s. 17.

Crown law — Prerogatives — Immunity — Civil procedure — Obligation to provide discovery — Whether Parliament has lifted common law Crown immunity from discovery and, if so, to what extent — Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 27 — Interpretation Act, R.S.C. 1985, c. I-21, s. 17.

The respondents instituted a class action against the appellant oil companies and retailers further to allegations of a conspiracy to fix gasoline retail prices in certain regions of Quebec, which allegations had already been investigated by the Competition Bureau of Canada. In their class action, the respondents sought permission to examine the Competition Bureau's chief investigator and an order requiring the Attorney General of Canada, as the Competition Bureau's legal representative, to disclose to them all intercepted communications and all documents in the investigation file. The appellants countered by raising the common law immunity from discovery on the ground that neither the Crown nor the chief investigator was a party in the class action.

The Superior Court granted the respondents' motion, granting permission to summon the chief investigator to be examined on discovery solely for the purpose of obtaining information about any knowledge he had specific to the territory covered by the class action. It also ordered the disclosure of any recordings and documents relevant to the proceedings in this case. The Court of Appeal dismissed the appeal, concluding that Crown immunity could not be relied on in this case because of s. 27 of the *Crown Liability and Proceedings Act* ("CLPA"), which provides that "the rules of practice and procedure of the court in which proceedings are taken apply in those proceedings". The Court of Appeal held that s. 27 establishes a general rule that applies in any proceedings by, against or involving the Crown.

Held: The appeal should be allowed.

l'immunité de l'État — L'enquêteur-chef peut-il être contraint à un interrogatoire préalable en vertu des règles de procédure civile québécoises lorsque ni l'État ni l'enquêteur-chef ne sont parties au litige concerné? — Loi sur la responsabilité civile de l'État et le contentieux administratif, L.R.C. 1985, c. C-50, art. 27 — Loi d'interprétation, L.R.C. 1985, c. I-21, art. 17.

Droit de la Couronne — Prérogatives — Immunité — Procédure civile — Assujettissement à un interrogatoire préalable — L'immunité de l'État en matière d'interrogatoire préalable reconnue par la common law a-t-elle été écartée par le législateur fédéral et, le cas échéant, dans quelle mesure? — Loi sur la responsabilité civile de l'État et le contentieux administratif, L.R.C. 1985, c. C-50, art. 27 — Loi d'interprétation, L.R.C. 1985, c. I-21, art. 17.

Les intimés ont entrepris un recours collectif contre les pétrolières et détaillants appelants par suite d'allégations de complot en vue de fixer les prix de l'essence à la pompe dans certaines régions du Québec, ces allégations ayant précédemment fait l'objet d'une enquête menée par le Bureau de la concurrence du Canada. Dans le cadre de leur recours collectif, les intimés ont sollicité l'autorisation d'interroger l'enquêteur-chef du Bureau de la concurrence, ainsi qu'une ordonnance enjoignant au procureur général du Canada, en sa qualité de représentant légal du Bureau de la concurrence, de leur faire part de toutes les communications interceptées et de tous les documents que renferme le dossier d'enquête. Les appelants s'y opposent en invoquant l'immunité de common law en matière d'interrogatoire préalable au motif que ni l'État ni l'enquêteur-chef ne sont parties au recours collectif.

La Cour supérieure accueille la requête des intimés et permet l'assignation de l'enquêteur-chef pour un interrogatoire préalable à la seule fin d'obtenir des précisions concernant les éléments d'information dont ce dernier dispose sur les territoires visés par le recours collectif. Elle ordonne aussi, le cas échéant, la communication des enregistrements et documents pertinents se rapportant au litige visé. La Cour d'appel rejette l'appel et conclut qu'il n'est pas possible d'invoquer une immunité de l'État en l'espèce compte tenu de l'art. 27 de la *Loi sur la responsabilité civile de l'État et le contentieux administratif* (« LRCE »), qui prévoit que « les instances suivent les règles de pratique et de procédure du tribunal saisi ». Selon la Cour d'appel, cette disposition énonce une règle générale applicable dans tout litige susceptible d'intéresser l'État, à titre de partie ou autrement.

Arrêt : Le pourvoi est accueilli.

2017 SCC 46 (CanLII)

[18] If this immunity meant that the Crown was not then required to submit to discovery in proceedings in which it *was* a party, it stands to reason that, at common law, the Crown was certainly not required to do so in proceedings in which it *was not* a party.

[19] That being said, there is a presumption that the common law remains unchanged absent a clear and unequivocal expression of legislative intent. In *Lizotte v. Aviva Insurance Co. of Canada*, 2016 SCC 52, [2016] 2 S.C.R. 521, this Court summarized the case law on this point and noted "that it must be presumed that a legislature does not intend to change existing common law rules in the absence of a clear provision to that effect" (para. 56; see also *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, at para. 39; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1077; and R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 504-5).

[20] In this regard, s. 17 of the *Interpretation Act* now serves as a starting point in each case in which the Crown might have immunity. It reads as follows: "No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment." In short, unless the immunity is clearly lifted, the Crown continues to have it. In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, the Court recognized that s. 17 is indeed the starting point for the analysis regarding immunity and that, as a result, where there are no express words in an Act to the effect that the Act applies to the Crown, "it . . . remains to be decided whether the Crown is bound by necessary implication" (p. 50).

[21] In the past, language similar to the words "except as mentioned or referred to" in s. 17 had been used in s. 16 of the *Interpretation Act*, R.S.C. 1970, c. I-23, which provided that no enactment could bind the Crown, "except only as therein mentioned or referred to". In *Oldman River* and in *Alberta Government Telephones v. Canada (Canadian*

[18] Si, grâce à cette immunité, l'État n'était alors pas assujetti aux interrogatoires préalables lorsqu'il *était* une partie au litige, il va de soi que, selon la common law, il n'y était certainement pas assujetti lorsqu'il *n'était pas* une partie au litige.

[19] Cela dit, il existe une présomption voulant que la common law demeure inchangée en l'absence d'une expression de volonté claire et non équivoque du législateur. Dans *Lizotte c. Aviva, Cie d'assurance du Canada*, 2016 CSC 52, [2016] 2 R.C.S. 521, notre Cour résume la jurisprudence sur ce point et rappelle « que l'on doi[t] présumer qu'un législateur n'a pas l'intention de modifier les règles de common law existantes à moins d'une disposition claire à cet effet » (par. 56; voir aussi *Parry Sound (district), Conseil d'administration des services sociaux c. S.E.E.F.P.O., section locale 324*, 2003 CSC 42, [2003] 2 R.C.S. 157, par. 39; *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038, p. 1077; et R. Sullivan, *Sullivan on the Construction of Statutes* (6e éd. 2014), p. 504-505).

[20] À ce chapitre, l'art. 17 de la *Loi d'interprétation* sert aujourd'hui de point de départ dans chaque cas où une immunité pourrait exister en faveur de l'État. Il édicte ceci : « Sauf indication contraire y figurant, nul texte ne lie Sa Majesté ni n'a d'effet sur ses droits et prérogatives. » Bref, sans dérogation claire à l'immunité, l'État en jouit toujours. Dans *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3, la Cour reconnaît que le point de départ de l'analyse en matière d'immunité est bel et bien cet art. 17 et, qu'en conséquence, lorsqu'une loi ne prévoit pas expressément qu'elle s'applique à l'État, « il reste [. . .] à déterminer si la Couronne est liée par déduction nécessaire » (p. 50).

[21] Une expression similaire à l'expression « [s]auf indication contraire » de l'art. 17 se retrouvait anciennement à l'art. 16 de la *Loi d'interprétation*, S.R.C. 1970, c. I-23. Ce dernier prévoyait que « sauf dans la mesure y mentionnée ou prévue », nul texte de loi ne pouvait lier l'État. Dans *Oldman River* et *Alberta Government Telephones c. Canada (Conseil*

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Westlake et al. v. The Queen in right of the Province ofOntario

Ontario Reports

ONTARIO

High Court of Justice

Houlden J.

July 26, 1971

[1971] 3 O.R. 533

Case Summary

Administrative law — Boards and commissions — Status in law — Whether Ontario Securities Commission capable of being sued in action for damages.

Securities regulation — Remedies — Securities owners suffering loss by reason of corporations's bankruptcy — Securities sold pursuant to prospectus accepted for filing by Ontario Securities Commission — Whether Commission capable of being sued in action for damages — Securities Act, 1966.

Practice — Parties — Whether Ontario Securities Commission capable of being sued in action for damages.

In the light of the language of s. 26 of the Interpretation Act, R.S.O. 1960, c. 191 (now R.S.O. 1970, c. 225), and of various statutes creating boards and commissions in Ontario, on the proper construction of the Securities Act, 1966 (Ont.), c. 142 (now R.S.O. 1970, c. 426), the Ontario Securities Commission, although enjoying such legal existence as to enable it to appear and be represented when its actions are before the Court for review by way of mandamus, certiorari and prohibition where questions of its jurisdiction arise, is not a legal entity capable of being sued in an action for damages. Accordingly, no action may be brought against it by a bankrupt corporation's owners of securities issued pursuant to a prospectus and supplementary documents accepted by the Commission, in which such owners seek damages for breach of trust, breach of contract, deceit, common law negligence and negligence in failing to perform statutory duties.

[Bishop v. Ontario Securities Commission, *[1964] 1 O.R. 17*, *41 D.L.R. (2d) 24*, distd; Hollinger Bus Lines Ltd. v. Ontario Labour Relations Board, *[1952] O.R. 366*, *[1952] 3 D.L.R. 162*, apld; Bank of Montreal v. Bole, *[1931] 1 W.W.R. 203*; Retail Wholesale & Department Store Union, Local 580 v. Baldwin et al., *[1953] 4 D.L.R. 735*; Taff Vale Railway v. Amalgamated Society of Railway Servants, [1901] A.C. 426; Sellars v. Village of Dutton et al. *(1904), 7 O.L.R. 646*; Re Provincial Board of Health for Ontario and City of Toronto *(1920), 46 O.L.R. 587*, *51 D.L.R. 444*, refd to]

MOTION for an order striking out the statement of claim and dismissing an action as against the defendant, the Ontario Securities Commission.
E. Marshall Pollock and S.L. Goldenberg, for defendant, applicant, Ontario Securities Commission.

Leonard Max, for plaintiffs, respondents.

HOULDEN, J.

This is an application for an order striking out the respondents' statement of claim and dismissing the action on the ground that the Ontario Securities Commission is not an entity which can be sued for damages. The writ in this action was issued on June

18, 1969. It named three defendants but was only served on the defendant the Ontario Securities Commission. The statement of claim was delivered on February 2, 1971; again, it was only delivered to the one defendant.

The action arises out of the disastrous bankruptcy of Prudential Finance Corporation Limited which occurred on November 18, 1966. Prudential, prior to its bankruptcy, had sold various types of securities to the public. These securities were issued pursuant to a prospectus and supplementary documents filed with the Ontario Securities Commission. The prospectus was accepted for filing on June 20, 1963. After that date, further documents were filed with the Commission up until March 31, 1966, in respect of securities being sold during this period by Prudential to the public.

In essence, the respondents, who are the persons holding, owning, or entitled to ownership of securities sold by Prudential, allege that the Ontario Securities Commission failed to properly perform the duties imposed upon it in respect of the prospectus and other documents, with the result that the respondents have suffered the monetary loss set forth opposite the name of each respondent in schedule 1 attached to the statement The respondents seek damages for breach of trust, breach of contract, deceit, common law negligence and negligence in failing to perform statutory duties.

This application is brought on the narrow ground that the applicant is not an entity which can be sued for damages, and therefore, the statement of claim should be struck out, and the action dismissed as against the defendant Commission.

From the standpoint of liability to suit, there are various types of bodies created by statute in the Province of Ontario. They are as follows:

() There are bodies corporate which are not expressly declared to be suable. Examples of this type of body are: the Law Enforcement Compensation Board (the Law Enforcement Act, 1967 (Ont.), c. 45, s. 2(4) [now R.S.O. 1970, c. 237], and the Ontario Water Resources Commission (the Ontario Water Resources Commission Act, R.S.O. 1960, c. 281, s. 3(1), as amended by 1970, c. 124, s. 2(1) [now R.S.O. 1970, c. 332].

As regards this type of body, s. 26 of the Interpretation Act, R.S.O. 1960, c. 191 [now R.S.O. 1970, c. 225], is applicable. It provides as follows: 26. In every Act, unless the contrary intention appears, words making any association or number of persons a corporation or body politic and corporate,

> (a) vest in the corporation power to sue and be sued, to contract and be contracted with by its corporate name, to have a common seal, to alter or change the seal at its pleasure, to have perpetual succession, to acquire and hold personal property or moveables for the purpose for which the corporation is constituted, and to alienate the same at pleasure;

As a result of s. 26, bodies corporate created by statute may sue and be sued unless the incorporating statute otherwise provides.

(2) There are bodies corporate which are expressly declared to be suable. Examples of this are: the Ontario Food Terminal Board (the Ontario Food Terminal Act, R.S.O. 1960, c. 272, ss. 2(1) and 11) [now R.S.O. 1970, c. 313], and the Commissioner of Agricultural Loans (the Agricultural Development Act, R.S.O. 1960, c. 8, 2(1) [now R.S.O. 1970, c. 10].

(3) There are bodies corporate which are expressly declared not to be suable. Examples of this are: the Commission for the Investigation of Cancer Remedies (the Cancer Remedies Act, R.S.O. 1960, c. 46, ss. 2(2) and 8 [now R.S.O. 1970, c. 56], and the Hydro-Electric Power Commission (the Power Commission Act, R.S.O. 1960, c. 300, ss. 2(1) and 7(5) [now R.S.O. 1970, c. 354].

(4) There are non-corporate bodies which are, by the terms of the statute creating them, expressly liable to suit. Examples of this are: the Health Insurance Registration Board (the Health Insurance Registration Board Act, 1967 (Ont.), c. 33, s. 3(3) [now R.S.O. 1970, c. 199], and the Liquor Control Board of Ontario (the Liquor Control Act, R.S.O. 1960, c. 217, s. 26(3), as amended by 1965, c. 58 s. 13(3) [now R.S.O. 1970, c. 249].

(5) There are non-corporate bodies which are not by the terms of the statute incorporating them expressly liable to suit but which are by necessary implication liable to be sued in an action for damages. The Ontario Securities Commission [Securities Act, 1966 (Ont.), c. 142 (now R.S.O. 1970, c. 426)] does not fit into any one of the first four categories, but counsel for the respondents submits that it comes within the fifth category with the result that the action is maintainable against the Commission.

An example of this fifth category is Bank of Montreal v. Bole, *[1931] 1 W.W.R. 203*. That case involved a garnishee summons directed to the Liquor Board of Saskatchewan. It was submitted that there was money owing by the Board to the

judgment debtor, and the issue was whether or not the debt was attachable in view of the fact that the Board was not a body corporate. Taylor, J., of the Saskatchewan Court of King's Bench held that the debt could be attached even though the Board was not a body corporate and there was no provision in the statute which created it, empowering the Board to sue or be sued. He reviewed the provisions of the statute creating the Board and at p. 206 he summed up its powers as follows: "That Board under its statutory designation of the Liquor Board is empowered to contract, buy and sell, accept a grant, may pledge its credit for money borrowed, it can be guaranteed ... " . The learned Judge concluded that the statute had created a Board distinct in entity from the members thereof, and as a necessary intendment from the statute, the Board was amenable to the ordinary processes of the Court.

Counsel for the applicant acknowledges that the Commission is an administrative body whose actions are subject to review by way of mandamus, certiorari and prohibition if it acts without jurisdiction or in excess of its jurisdiction and to this limited extent, the Commission is a suable entity: Bishop v. Ontario Securities Commission, *[1964] 1 O.R. 17*, *41 D.L.R. (2d) 24*. However, he submits on the basis of Hollinger Bus Lines Ltd. v. Ontario Labour Relations Board, *[1952] O.R. 366*, *[1952] 3 D.L.R. 162*, that the Ontario Securities Commission is not an entity that can be sued in an action for damages. In the Hollinger case, Roach, J.A., in holding that the Ontario Labour Relations Board was not an entity that could be sued for damages, said (O.R. pp. 337-8, D.L.R. p. 166):

> The whole scheme and purpose of the Act is to deal with certain phases of the employer-employee relationship. The Board does not carry on any business. Its function is primarily administrative and it has been given power to exercise certain functions of a judicial nature. There is nothing in the Act remotely suggesting that it was intended by the Legislature that the Board should have the capacity either to sue or be sued.

Counsel for the applicant has prepared for the Court a detailed comparison of the Ontario Labour Relations Act, 1948 (R.S.O. 1950, c. 194) -- the Act involved in the Hollinger case -- and the SecuritiesAct , R.S.O. 1960, c. 363, as amended. I do not propose to go through the comparison in detail. Suffice it to say that the two Acts are remarkably similar. The composition and appointment of the Commission of the Board, the decision-making powers, the remuneration, the method of enacting regulations are almost identical in the two Acts. Under the Securities Act, 1966 the Commission is, of course, dealing with the registration and control of dealers in securities and the trading in securities. In the Labour Relations Act, R.S.O. 1960, c. 202 [now R.S.O. 1970, c. 232], the Board is concerned with the certification of trade unions. These parts of the Acts are of necessity different. However, the investigative and enforcement sections are similar in both Acts.

There is nothing in the Securities Act, 1966 or the Labour Relations Act which confers upon the Commission or the Board the power to enter into contracts, to acquire and hold property and to dispose of same, or to carry on any commercial activity. If s. 26(a) of the Interpretation Act is examined, it will be seen that these are the essential powers conferred upon a body corporate created by statute. If a statute confers powers of this type upon a non-corporate entity which it brings into existence, then as Taylor, J., pointed out in Bank of Montreal v. Bole, it flows as a necessary intendment from the enactment that the statutory body is to be amenable to the ordinary processes of the Courts. If such powers are not conferred, on the basis of the Hollinger case, the statutory body cannot sue or be sued by the ordinary processes of the Court: see also Retail, Wholesale & Department Store Union, Local 580 v. Baldwin et al., *[1953] 4 D.L.R. 735*.

In urging that the Commission can properly be sued for damages, counsel for the respondents points out that s. 70(a) of the Securities Act, R.S.O. 1960, c. 363 -- the privative clause which prohibits action 'being taken against individual members of the Commission -- does not mention the Commission, as does for example the Power Commission Act. This omission was relied upon in Bishop v. Ontario Securities Commission, supra, to permit proceedings to to be taken against the applicant Commission by way of certiorari. It should be noted that the privative clause (s. 69) of the Labour Relations Act at the time of the Hollinger decision contained no prohibition against action being taken against the Board; unlike s. 70(a) of the Securities Act (1960), it did mention the Board in connection with review of its proceedings by way of certiorari, mandamus, etc. I cannot agree with the submission of counsel for the respondents that the failure to name the Commission in s. 70(a) carries the logical consequence that the Legislature intended the Commission to be liable to be sued for damages.

Counsel for the respondents further contends that in Bishop v. Ontario Securities Commission the Ontario Court of Appeal found the Commission to be a distinct legal entity and hence it follows that such a body can be sued for damages. At pp. 20-1 O.R., pp. 27-8 D.L.R., of the Bishop case, Roach, J.A., said:

> Mr. Bray on behalf of the respondent raised the preliminary objection that s. 69(a) [now s. 70(a)] of the Act constitutes a bar to the relief sought by the appellant in these proceedings. The simple answer to that objection is that s. 69(a) has no application because this is not a proceeding against any member of the Commission but is against the Commission itself which is a distinct legal entity and such a proceeding is not prohibited by the section.

(Insert is mine.) I interpret these words to mean that the Commission is a legal entity for the purpose of review of its proceedings by way of the extraordinary remedies of prohibition, certiorari and mandamus; but in the light of the decision of the Court of Appeal in the Hollinger case, I cannot intrepret them to mean that the Commission is a legal entity which is capable of being sued in an action for damages.

Counsel for the respondents has referred the Court to the decision of Taff Vale Railway v. Amalgamated Society of Railway Servants, [1901] A.C. 426, as authority for the proposition that, if the effect of the Court holding the Commission not to be a suable entity, will be to leave the respondents without any relief, this is an important factor to be considered in deciding whether or not the Commission can be sued. He submits that, if the action is dismissed, the respondents are left without any remedy for the failure of the Commission to perform the duties imposed on it. While I agree that the fact that there is no other relief available to the respondents is a matter to be considered in deciding whether or not the Commission may be sued, it is only one factor. In the Taff Vale case, the Court, in addition to this item, took into account that the union had capacity to hold property and to act by agents.

In the present case on a careful review of the powers conferred upon the Commission, I cannot imply that the Legislature intended the Commission to be subject to an action for damages.

(6) It will be obvious from what has been said that there is a sixth category of statutory bodies and it is in this category that, in my opinion, the Ontario Securities Commission belongs. These are non-corporate bodies which are not by the terms of the statute incorporating them or by necessary implication liable to be sued in an action for damages, but who are legal entities in that their actions may be reviewed in proceedings brought against them by way of the extraordinary remedies of certiorari, mandamus and prohibition. Counsel for the applicant has called to my attention the decision of a Divisional Court in Sellars v. Village of Dutton et al. *(1904), 7 O.L.R. 646*, in which it was held that a local board of health could not be sued for tort. It was argued that, while the local board of health might not be a corporation, yet the Legislature, in creating it, had given it such powers and privileges that it was suable in a Court of law for tort. This argument was rejected by a majority of the Court.

In the subsequent case of Re Provincial Board of Health for Ontario and City of Toronto *(1920), 46 O.L.R. 587*, *51 D.L.R. 444*, Riddell, J., referring to a local board of health, said (at p. 596 O.L.R., p. 451 D.L.R.):

> I think that the Act throughout implies that the Board is a legal entity with rights as well as duties, and in that view it has a right to be heard in Court. I cannot think that it is a tertiumquid, both a legal entity and not a legal entity. If there be anything in Sellars v. Village of Dutton *(1904), 7 O.L.R. 646*, inconsistent with this, it is not to be followed.

The City of Toronto case involved an application for mandamus, and wit h all due respect to the dicta of Riddell, J., in my opinion in view of the considered judgment of the Court of Appeal in the Hollinger case, there are statutory bodies which are not legal entities for the purpose of an action for damages but which are legal entities for the purpose of review of their actions by their extraordinary remedies. The Ontario Securities Commission is such a body.

In the result, much as I dislike having to close a door to recovery to the unfortunate security holders of Prudential Finance Corporation Ltd. without their having an opportunity to air their grievances at a full hearing in Court, I have no alternative. On the law, I entertain no doubt that the Ontario Securities Commission is not an entity which can be sued for damages eo nomine. I appreciate the severe consequences this judgment has for the Prudential investors, but I believe it was proper for the applicant to bring the application at the present stage of the proceedings rather than permit the security holders, who have already sustained such heavy losses, to suffer the considerable expense involved in carrying this complicated action to a full-scale trial.

An order will, therefore, go striking out the statement of claims and dismissing the action as against the defendant the Ontario Securities Commission. Counsel for the applicant has informed the Court that he is not asking for costs and accordingly I make no order in that regard.

Motion granted.

Westlake v. The Queen in right of Ontario

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[COURT OF APPEAL]

GALE, C.J.O., SCHROEDER and ARNUP, JJ.A.

27th MARCH 1972.

[1972] 2 O.R. 605

Case Summary

Administrative law — Boards and commissions — Status in law — Ontario Securities Commission not capable of being sued in action for damages.

Practice — Parties — Status to sue or be sued — Ontario Securities Commission not capable of being sued in an action for damages.

APPEAL from the decision of Houlden, J., *[1971] 3 O.R. 533*, *21 D.L.R. (3d) 129*, striking out the statement of claim and dismissing the action as against the defendant Commission.

The judgment of the Court was delivered orally by
L. Max, for appellants.

M. Pollock and S.L. Goldenberg,(SECTION)ie for respondents.

GALE, C.J.O.

This is an appeal from the order of the Honourable Mr. Justice Houlden made on July 26, 1971, striking out the statement of claim herein and dismissing the action as against the defendant, the Ontario Securities Commission.

On June 18, 1969, the writ of summons in this action was issued by the plaintiff against three defendants; the statement of claim herein was served upon the Commission on February 2, 1971.

The plaintiffs allege that they are the owners of securities issued by the Prudential Finance Corporation pursuant to a prospectus accepted by the defendant Commission for filing on June 20, 1963, and further documents filed with the Commission between that date and March 31, 1966. They further allege that the Prudential Finance Corporation Limited went into bankruptcy on November 18, 1966, and that the securities yielded only a fraction of their face value. They now claim damages against the Commission for breach of trust, breach of contract, negligence and deceit.

On July 26, 1971, on application by the defendant Commission, the Honourable Mr. Justice Houlden ordered that the statement of claim herein be struck out and the action dismissed against the defendant the Ontario Securities Commission on the ground that the Commission is a non-corporate body constituted by the statute which is not, by the terms of that statute, or by necessary implication, liable to be sued in an action for damages. Despite the able argument presented to us in a case which we conclude was hopeless, we are of the view that the appeal must be dismissed for the reasons expressed by Mr. Justice Houlden, which reasons we adopt and with which we can find no fault. The appeal will therefore be dismissed with costs, if demanded.

Appeal dismissed.

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Westlake v. Ontario

Supreme Court of Canada Judgments

Supreme Court of Canada

Present: Fauteux C.J. and Abbott, Martland, Judson, Ritchie, Spence and Pigeon JJ.

1973: March 2.

File No.: 12693.

[1973] S.C.J. No. 13 | [1973] A.C.S. no 13

Florence Westlake, suing in her personal capacity and all those persons named in Appendix "A" and Appendix "B" and Appendix "C" and Appendix "D" and Appendix "E" and Appendix "F" annexed to the Writ of Summons herein*, each and every one suing in his or her own personal capacity; and Florence Westlake, suing on behalf of herself and all other creditors, bond holders, debenture holders, shareholders, and note holders of Prudential Finance Corporation Limited named in Appendix "A" and Appendix "B" and Appendix "C" and Appendix "D" and Appendix "E" and Appendix "F" annexed to the Writ of Summons herein*, and all other members of the same class whether ascertained or not yet ascertained, appellants, and Her Majesty the Queen in Right of the Province of Ontario, the Ontario Securities Commission and the Director of the Ontario Securities Commission, respondents.

[Quicklaw note: The reasons have been released in French only. Please see [1973] A.C.S. no 13.]

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Whalley v. Royal Canadian Mounted Police Public Complaints Commission

Nova Scotia Judgments

Nova Scotia Court of Appeal

Halifax, Nova Scotia

E.A. Roscoe, J.W.S. Saunders and M.J. Hamilton JJ.A.

Heard: November 24, 2009.

Judgment: December 2, 2009.

Docket: CA 312984

Registry: Halifax

[2009] N.S.J. No. 570 | 2009 NSCA 122 | 284 N.S.R. (2d) 361 | 314 D.L.R. (4th) 498 | 88 C.P.C. (6th) 208 | 183 A.C.W.S. (3d) 262 | 2009 CarswellNS 659

Between Richard Whalley, Appellant, and The Royal Canadian Mounted Police Public Complaints Commission, Respondent

(33 paras.)

Case Summary

Government law — Crown — Actions by and against Crown — Abuse of legal procedure — Malicious prosecution by Crown servants — Statutory defences, immunities and bars to actions — Appeal by former RCMP constable from summary dismissal of civil action against RCMP Public Complaints Commission dismissed — Constable had sought damages in tort based on manner in which Commission handled a public complaint against him — Chambers judge summarily dismissed action on basis that Commission was not a suable entity — Appellate court upheld decision as correct — Commission was not capable of being sued under its enabling statute, or by necessary implication based on analysis of its powers thereunder — Judicial review was only recourse to challenge its decisions — Royal Canadian Mounted Police Act, s. 45.31.

Civil litigation — Civil procedure — Actions — Availability — Parties — Capacity to sue or be sued — Appeal by former RCMP constable from summary dismissal of civil action against RCMP Public Complaints Commission dismissed — Constable had sought damages in tort based on manner in which Commission handled a public complaint against him — Chambers judge summarily dismissed action on basis that Commission was not a suable entity — Appellate court upheld decision as correct — Commission was not capable of being sued under its enabling statute, or by necessary implication based on analysis of its powers thereunder — Judicial review was only recourse to challenge its decisions — Royal Canadian Mounted Police Act, s. 45.31.

Appeal by the plaintiff, former RCMP constable Whalley, from summary judgment dismissing his action against the defendant, the Royal Canadian Mounted Police Public Complaints Commission. The constable had sued the Commission for damages for negligence, abuse of process, interference with economic relations, misfeasance in public office, abuse of statutory power, malicious prosecution, and infliction of economic and emotional damage and mental suffering. The lawsuit arose from the Commission's investigation of a complaint that the constable had used excessive force in arresting the complainant. The complaint was filed in 1994 and dismissed in 1995. Upon review during 1996 and 1997, the Commission concluded that excessive force had been used and recommended corrective measures. As a result, the constable was transferred from his unit in 1998. The Commission's report was quashed in 2000 following judicial review. In 2001, the constable commenced an action that he ultimately discontinued against all parties except for the Commission. A chambers judge dismissed the claim on the basis that the Commission was not a suable entity. The Commission was an administrative body that performed adjudicative rather than commercial functions. Based on examination of its enabling statute, the Commission was found to be a non-corporate legal entity subject to judicial review, but not capable of being sued in an action for damages. Summary judgment

14 In reaching the conclusion that the Northern Pipeline Agency fell into the fifth **Westlake** category, the Court stated at p. 539:

> ... Service for the state takes many forms in today's world, including the employment, on a considerable scale, of individuals by agencies such as the one involved in this appeal. The Agency, as a plain reading of the statute indicates, must be seen as the employer of its staff. It is as much an entity within its own sphere of operations as is a trade union, and, in the latter case, the law already recognizes the reality of the legal entity even though the corporate form has not been expressly provided by the statutes.
>
> Where a fair construction of the enabling statute permits an agency to enter into a contract on its own behalf, even if it may be on behalf of the Crown as well, the agency, having entered the contract in its own name, may be sued in its own right in an action for breach of that contract. This would place the agency in question here within the fifth category enunciated by Holden J. in *Westlake, supra*. In my opinion, the appellant, pursuant to s. 11 of the Act, is an entity which can enter a contract of employment on its own behalf, and sue or be sued on that contract in its own name. Consequently, the respondent (plaintiff), in commencing an action on this employment contract, is entitled to claim relief against the Agency itself. ... [emphasis added]

15 The statute creating the respondent Commission does not have authorization regarding employees that is equivalent to that of the Northern Pipeline Agency. Rather, the **RCMP Act** expressly provides in s. 45.31 that the Commission's employees are to be appointed pursuant to the **Public Service Employment Act** and temporary appointments require the approval of the Treasury Board. As well, the Northern Pipeline Agency is much more like a corporate business than the Commission. For example, as noted by the Supreme Court of Canada at p. 520:

> 17 In the *Northern Pipeline Act, supra*, the Agency was established to carry out and give effect to an agreement which had been previously entered into by this country and the United States relating to the establishment of gas transmission pipeline facilities in the federal territories and the Province of Alberta. To this end the Agency, pursuant to s. 3, was given a statutory mandate to "facilitate the efficient and expeditious planning and construction of the pipeline", and in doing so "to carry out ... federal responsibilities in relation to the pipeline", and finally to:
>
> > advance national economic and energy interests and to maximize related industrial benefits by ensuring the highest possible degree of Canadian participation in all aspects of the planning and construction of, and procurement for, the pipeline while ensuring that the procurement of goods and services for the pipeline will be on generally competitive terms.

16 The Commission is more like the Board in **Hollinger Bus Lines Ltd. v. Ontario Labour Relations Board**, *[1952] O.R. 366*, which was described by the Supreme Court in the Northern Pipeline case at p. 526:

> The whole scheme and purpose of the Act is to deal with certain phases of the employer-employee relationship. The Board does not carry on any business. Its function is primarily administrative and it has been given power to exercise certain functions of a judicial nature. There is nothing in the Act remotely suggesting that it was intended by the Legislature that the Board should have the capacity either to sue or to be sued. [quoting from the Ontario Court of Appeal]
>
> The Labour Relations Board, of course, is not a board with any operative functions. It is rather a regulatory board, operating in a quasi-judicial sense to determine issues assigned to it by a statute manifesting the broad policies of the Legislature in the field of labour relations. The board has more of the attributes of a tribunal than it has of a functioning agency in the executive branch of government.

17 In any event, being able to enter into contracts whether for employment or other purposes does not, by necessary implication, make the Commission liable to be sued for damages in tort. Surely, the human rights, labour relations and security commissions that have routinely been found not to be suable in tort are able to enter into contracts, for example, to acquire office supplies. See: **Westlake** (pp. 536-538), and **Smith v. New Brunswick (Human Rights Commission)**, *[1997] N.B.J. No. 29* (N.B.C.A.) para. 19.

18 As noted by Justice Houlden in **Westlake**, it is important to examine the powers of the agency in question to determine whether the necessary implication arises (p. 537):

Her Majesty The Queen *Appellant*;

and

Eldorado Nuclear Limited—Eldorado Nucléaire Limitée *Respondent.*

and between

Her Majesty The Queen *Appellant*;

and

Uranium Canada Limited—Uranium Canada Limitée *Respondent.*

File Nos.: 17175 and 17176.

1983: January 27; 1983: December 15.

Present: Laskin C.J. and Ritchie, Dickson, Beetz, McIntyre, Chouinard and Wilson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Crown immunity — Combines investigation — Crown corporations charged with conspiracy to lessen competition — Whether corporations entitled to Crown immunity — Combines Investigation Act, R.S.C. 1970, c. C-23, s. 32(1)(c) [rep. & sub. 1974-75-76 (Can.), c. 76, s. 14] — Interpretation Act, R.S.C. 1970, c. I-23, ss. 16, 27(2) — Atomic Energy Control Act, R.S.C. 1970, c. A-19, s. 10 — Government Companies Operation Act, R.S.C. 1970, c. G-7, ss. 2 [am. 1974-75-76 (Can.), c. 33, s. 265 (Item 4)], 3, 6.

The respondents were charged under s. 32(1)(*c*) of the *Combines Investigation Act* of conspiring with others to unduly lessen competition in the production or sale of uranium products in Canada. They applied to the Supreme Court of Ontario for an order prohibiting the Provincial Court from proceeding to inquire into the charges on the basis that the Provincial Court lacked jurisdiction to proceed because they were agents of the Crown and therefore the *Combines Investigation Act* did not apply. The Supreme Court granted the applications and the Court of Appeal upheld the decision. This appeal is to determine whether respondents are immune from criminal liability under s. 32(1)(*c*) of the *Combines Investigation Act* because they are agents of the Crown.

Sa Majesté La Reine *Appelante*;

et

Eldorado Nuclear Limited—Eldorado Nucléaire Limitée *Intimée.*

et entre

Sa Majesté La Reine *Appelante*;

et

Uranium Canada Limited—Uranium Canada Limitée *Intimée.*

N^os^ du greffe: 17175 et 17176.

1983: 27 janvier; 1983: 15 décembre.

Présents: Le juge en chef Laskin et les juges Ritchie, Dickson, Beetz, McIntyre, Chouinard et Wilson.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit criminel — Immunité de l'État — Enquête sur les coalitions — Sociétés d'État accusées de complot pour diminuer la concurrence — Bénéficient-elles de l'immunité de l'État? — Loi relative aux enquêtes sur les coalitions, S.R.C. 1970, chap. C-23, art. 32(1)c) [abr. et rempl. 1974-75-76 (Can.), chap. 76, art. 14] — Loi d'interprétation, S.R.C. 1970, chap. I-23, art. 16, 27(2) — Loi sur le contrôle de l'énergie atomique, S.R.C. 1970, chap. A-19, art. 10 — Loi sur le fonctionnement des compagnies de l'État, S.R.C. 1970, chap. G-7, art. 2 [mod. 1974-75-76 (Can.), chap. 33, art. 265 (Item 4)], 3, 6.

Les intimées ont été accusées en vertu de l'al. 32(1)*c*) de la *Loi relative aux enquêtes sur les coalitions* d'avoir comploté avec d'autres personnes pour diminuer indûment la concurrence dans la production ou la vente de produits d'uranium au Canada. Elles ont demandé à la Cour suprême de l'Ontario une ordonnance interdisant à la Cour provinciale de procéder à une enquête sur les accusations pour le motif que la Cour provinciale n'avait pas compétence parce qu'elles étaient mandataires de l'État et que, par conséquent, la *Loi relative aux enquêtes sur les coalitions* ne s'appliquait pas. La Cour suprême a accueilli les demandes et la Cour d'appel a maintenu la décision. Il s'agit, dans ce pourvoi, de déterminer si, parce qu'elles sont mandataires de l'État, les intimées échappent à la responsabilité criminelle fondée sur l'al. 32(1)*c*) de la *Loi relative aux enquêtes sur les coalitions*.

1983 CanLII 34 (SCC)

Held (McIntyre and Wilson JJ. dissenting in part): The appeals should be dismissed.

Per Laskin C.J. and Ritchie, Dickson, Beetz and Chouinard JJ.: The *Combines Investigation Act* is not binding on the Crown. Section 16 of the *Interpretation Act* makes it clear that the Crown is immune unless expressly bound. There is no section in the *Combines Investigation Act* or the *Interpretation Act* which makes the Act applicable to Her Majesty. The effect of Crown immunity is not that the Crown is immune from prosecution even though there has been an unlawful act, rather, there is no unlawful act under the statute because the statute does not apply to the Crown. Crown immunity extends to agents and servants because the Crown only acts through agents and servants. The respondents are each by statute "for all its purposes an agent of Her Majesty". A Crown agent is only entitled to immunity when it acts within the scope of the public purposes it is statutorily empowered to pursue. *Prima facie*, the conduct complained of was within the scope of Crown purposes, for which the companies were incorporated—namely, to implement national policy relating to atomic energy in all its aspects. No evidence was presented or alluded indicating that the companies acted outside corporate objects for other than Crown purposes. Accordingly, there is no merit in the appellant's submission that the prohibition orders were premature.

[*Canadian Broadcasting Corporation v. The Queen*, [1983] 1 S.C.R. 339, distinguished; *Canadian Broadcasting Corporation v. Attorney-General for Ontario*, [1959] S.C.R. 188; *Province of Bombay v. City of Bombay*, [1947] A.C. 58; *Conseil des Ports Nationaux v. Langelier*, [1969] S.C.R. 60; considered; *Her Majesty in Right of the Province of Alberta v. Canadian Transport Commission*, [1978] 1 S.C.R. 61; *Bank voor Handel en Scheepvaart N.V. v. Administrator of Hungarian Property*, [1954] A.C. 584; *Willion v. Berkley* (1561), 1 Plowd. 223, 75 E.R. 339; *Bonanza Creek Gold Mining Co. v. The King*, [1916] 1 A.C. 566; *Feather v. The Queen* (1865), 122 E.R. 1191; *Formea Chemicals Ltd. v. Polymer Corporation Ltd.*, [1968] S.C.R. 754; *R. v. Stradiotto*, [1973] 2 O.R. 375; *Metropolitan Meat Industry Board v. Sheedy*, [1927] A.C. 899; *Tamlin v. Hannaford*, [1950] 1 K.B. 18; *British Columbia Power Corp. v. Attorney-General of British Columbia* (1962), 34 D.L.R. (2d) 25, referred to.]

APPEALS from a judgment of the Ontario Court of Appeal (1982), 138 D.L.R. (3d) 626, 68

Arrêt (les juges McIntyre et Wilson sont dissidents en partie): Les pourvois sont rejetés.

Le juge en chef Laskin et les juges Ritchie, Dickson, Beetz et Chouinard: La *Loi relative aux enquêtes sur les coalitions* ne lie pas l'État. Selon l'art. 16 de la *Loi d'interprétation*, seuls des termes exprès peuvent lier l'État. Aucun article de la *Loi d'interprétation* ou de la *Loi relative aux enquêtes sur les coalitions* n'a pour effet de rendre cette dernière applicable à Sa Majesté. L'immunité de l'État n'a pas pour effet de faire échapper l'État aux poursuites même s'il y a eu acte illégitime; elle a plutôt pour effet d'entraîner qu'il n'y a pas eu d'acte illégitime au sens de la loi parce que celle-ci ne s'applique pas à l'État. Les mandataires de l'État bénéficient de l'immunité de l'État parce que celui-ci agit uniquement par l'intermédiaire de préposés et de mandataires. Les dispositions législatives font de chaque intimée un mandataire de l'État «à toutes ses fins». Un mandataire de l'État ne peut bénéficier de l'immunité que lorsqu'il agit conformément aux fins de l'État qu'il est autorisé à poursuivre. À première vue, les actes reprochés sont conformes aux fins de l'État pour lesquelles les sociétés ont été constituées, savoir la mise en oeuvre de la politique nationale relative à l'énergie atomique sous tous ses aspects. Aucune preuve n'indique que les sociétés ont outrepassé leurs objets et agi à des fins autres que celles de l'État. Par conséquent, la prétention de l'appelante que les ordonnances de prohibition sont prématurées est sans fondement.

[Jurisprudence: distinction faite avec l'arrêt: *Société Radio-Canada c. La Reine*, [1983] 1 R.C.S. 339; arrêts examinés: *Canadian Broadcasting Corporation v. Attorney-General for Ontario*, [1959] R.C.S. 188; *Province of Bombay v. City of Bombay*, [1947] A.C. 58; *Conseil des Ports Nationaux v. Langelier*, [1969] R.C.S. 60; arrêts mentionnés: *Sa Majesté du chef de la province de l'Alberta c. Commission canadienne des transports*, [1978] 1 R.C.S. 61; *Bank voor Handel en Scheepvaart N.V. v. Administrator of Hungarian Property*, [1954] A.C. 584; *Willion v. Berkley* (1561), 1 Plowd. 223, 75 E.R. 339; *Bonanza Creek Gold Mining Co. v. The King*, [1916] 1 A.C. 566; *Feather v. The Queen* (1865), 122 E.R. 1191; *Formea Chemicals Ltd. v. Polymer Corporation Ltd.*, [1968] R.C.S. 754; *R. v. Stradiotto*, [1973] 2 O.R. 375; *Metropolitan Meat Industry Board v. Sheedy*, [1927] A.C. 899; *Tamlin v. Hannaford*, [1950] 1 K.B. 18; *British Columbia Power Corp. v. Attorney-General of British Columbia* (1962), 34 D.L.R. (2d) 25.]

POURVOIS contre un arrêt de la Cour d'appel de l'Ontario (1982), 138 D.L.R. (3d) 626, 68

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C.C.C. (2d) 200, 39 O.R. (2d) 474, 21 B.L.R. 72, affirming a judgment of J. Holland J. (1982), 138 D.L.R. (3d) 626, 68 C.C.C. (2d) 200, 38 O.R. (2d) 130, 17 B.L.R. 275, granting an application for a writ of prohibition. Appeals dismissed, McIntyre and Wilson JJ. dissenting in part.

John W. Brown, Q.C., *Calvin S. Goldman* and *Michael R. Dambrot*, for the appellant.

P. Y. Atkinson and *F. D. Cass*, for the respondent Eldorado Nuclear Ltd.

Gordon F. Henderson, Q.C., and *Emilio Binavince*, for the respondent Uranium Canada Ltd.

The judgment of Laskin C.J. and Ritchie, Dickson, Beetz and Chouinard JJ. was delivered by

DICKSON J.—The question is whether respondents, Uranium Canada Limited ("Uranium Canada") and Eldorado Nuclear Limited ("Eldorado"), are immune from criminal liability under s. 32(1)(*c*) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23, because they are agents of the Crown.

I The Proceedings to Date

By informations sworn July 4 and July 7, 1981 by Orest R. Sametz, Combines Investigation Officer, the respondents and others were charged with having conspired, combined, agreed or arranged together and with another to prevent or lessen, unduly, competition in the production, manufacture, purchase, sale or supply in Canada of uranium, uranium oxide and other uranium substances, contrary to s. 32(1)(*c*) of the *Combines Investigation Act*. A summons was issued to each of the respondent Companies. Each appeared before Judge Rice of the Ontario Provincial Court (Criminal Division). Tentative dates were set for a preliminary inquiry. Before the commencement of the inquiry, each Company applied to the Supreme Court of Ontario for an order prohibiting Judge Rice or any other judge from proceeding to inquire into the charges. It was contended that the Provincial Court lacked jurisdiction to proceed because

C.C.C. (2d) 200, 39 O.R. (2d) 474, 21 B.L.R. 72, qui a confirmé un jugement du juge J. Holland (1982), 138 D.L.R. (3d) 626, 68 C.C.C. (2d) 200, 38 O.R. (2d) 130, 17 B.L.R. 275, qui a fait droit à une demande de bref de prohibition. Pourvois rejetés, les juges McIntyre et Wilson sont dissidents en partie.

John W. Brown, c.r., *Calvin S. Goldman* et *Michael R. Dambrot*, pour l'appelante.

P. Y. Atkinson et *F. D. Cass*, pour l'intimée Eldorado Nucléaire Ltée.

Gordon F. Henderson, c.r., et *Emilio Binavince*, pour l'intimée Uranium Canada Ltée.

Version française du jugement du juge en chef Laskin et des juges Ritchie, Dickson, Beetz et Chouinard rendu par

LE JUGE DICKSON—Il s'agit de décider si, parce qu'elles sont mandataires de l'État, les intimées Uranium Canada Limitée (Uranium Canada) et Eldorado Nucléaire Limitée (Eldorado) échappent à la responsabilité criminelle fondée sur l'al. 32(1)*c*) de la *Loi relative aux enquêtes sur les coalitions*, S.R.C. 1970, chap. C-23.

I Les procédures jusqu'à ce jour

Dans les dénonciations faites sous serment les 4 et 7 juillet 1981 par Orest R. Sametz, un agent d'enquête sur les coalitions, les intimées et d'autres personnes ont été accusées d'avoir comploté, de s'être coalisées, de s'être concertées ou de s'être entendues entre elles et avec une autre personne pour empêcher ou diminuer indûment la concurrence dans la production, la fabrication, l'achat, la vente ou la fourniture au Canada d'uranium, d'oxyde d'uranium et d'autres substances d'uranium, contrairement à l'al. 32(1)*c*) de la *Loi relative aux enquêtes sur les coalitions*. Une citation à comparaître a été délivrée à chacune des compagnies intimées qui ont comparu devant le juge Rice de la Cour provinciale de l'Ontario (Division criminelle). Des dates provisoires ont été fixées pour la tenue d'une enquête préliminaire. Avant le début de l'enquête, chaque compagnie a demandé à la Cour suprême de l'Ontario de rendre une

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rather, that there has been no unlawful act under the statute. I have already said that the *Combines Investigation Act* does not bind the Crown. If Uranium Canada and Eldorado share the Crown's immunity, they can have committed no offence under the Act.

Both the majority and the dissent in the *1959 CBC* case, *supra*, accepted that proposition of law that s. 16 of the *Interpretation Act* extends to agents of the Crown. This Court's decision in *Formea Chemicals Ltd. v. Polymer Corporation Ltd.*, [1968] S.C.R. 754 also makes it clear that a reference to the Crown in a statute extends to Crown agents. If this were not the interpretation given to s. 16, the section would have no meaning, since the Crown only acts through servants and agents. Crown agents benefit from Crown immunity because they are acting on behalf of the Crown. The critical question, then, is whether Uranium Canada and Eldorado were acting as agents.

Uranium Canada and Eldorado are each, by statute, expressly made "an agent of Her Majesty". Uranium Canada owes its status as a Crown agent to s. 10(4) of the *Atomic Energy Control Act*, which reads:

> A company is for all its purposes an agent of Her Majesty and its powers may be exercised only as an agent of Her Majesty.

Eldorado's agency status derives from the *Government Companies Operation Act*, R.S.C. 1970, c. G-7; section 3 reads:

> Every Company is for all its purposes an agent of Her Majesty and its powers may be exercised only as an agent of Her Majesty.

The fact that these statutory provisions make each of the respondent Corporations "for all its purposes" an agent of the Crown does not mean, however, that these Companies act as Crown agents in everything they do.

Statutory bodies such as Uranium Canada and Eldorado are created for limited purposes. When a Crown agent acts within the scope of the public

poursuivie même si un acte illégitime a été commis, mais plutôt qu'il n'y a pas eu d'infraction à la loi. J'ai déja dit que la *Loi relative aux enquêtes sur les coalitions* ne lie pas l'État. Si Uranium Canada et Eldorado partagent l'immunité de l'État, elles ne peuvent avoir commis aucune infraction à la Loi.

Dans l'arrêt *Radio-Canada de 1959*, précité, tant les juges formant la majorité que les juges dissidents ont accepté le précepte de droit que l'art. 16 de la *Loi d'interprétation* s'applique aux mandataires de l'État. De même, il ressort clairement de l'arrêt de cette Cour, *Formea Chemicals Ltd. v. Polymer Corporation Ltd.*, [1968] R.C.S. 754, qu'une mention de l'État dans une loi s'étend aux mandataires de l'État. Si on n'avait pas interprété ainsi l'art. 16, cet article serait dénué de sens puisque l'État agit uniquement par l'intermédiaire de préposés et de mandataires. Les mandataires de l'État bénéficient de l'immunité de l'État parce qu'ils agissent pour le compte de l'État. La question primordiale est alors de savoir si Uranium Canada et Eldorado agissaient en qualité de mandataires.

La loi déclare expressément qu'Uranium Canada et Eldorado sont «mandataire[s] de Sa Majesté». Uranium Canada doit son statut de mandataire de l'État au par. 10(4) de la *Loi sur le contrôle de l'énergie atomique* qui se lit ainsi:

> Une compagnie est, à toutes ses fins, mandataire de Sa Majesté, et elle ne peut exercer qu'à ce titre les pouvoirs dont elle est investie.

Eldorado doit son statut de mandataire à l'art. 3 de la *Loi sur le fonctionnement des compagnies de l'État*, S.R.C. 1970, chap. G-7, qui dispose:

> Chaque compagnie est, à toutes ses fins, mandataire de Sa Majesté, et elle ne peut exercer ses pouvoirs qu'en cette qualité.

Le fait que ces dispositions législatives font de chaque compagnie intimée un mandataire de l'État «à toutes ses fins» ne signifie pas cependant que ces compagnies agissent en qualité de mandataires de l'État dans tout ce qu'elles font.

La loi crée des organismes comme Uranium Canada et Eldorado à des fins précises. Lorsqu'un mandataire de l'État agit conformément aux fins

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purposes it is statutorily empowered to pursue, it is entitled to Crown immunity from the operation of statutes, because it is acting on behalf of the Crown. When the agent steps outside the ambit of Crown purposes, however, it acts personally, and not on behalf of the state, and cannot claim to be immune as an agent of the Crown. This follows from the fact that s. 16 of the *Interpretation Act* works for the benefit of the state, not for the benefit of the agent personally. Only the Crown, through its agents, and for its purposes, is immune from the *Combines Investigation Act*.

This Court recently adopted this approach in *Canadian Broadcasting Corporation v. The Queen*, [1983] 1 S.C.R. 339 (the *1983 CBC* case), where the CBC sought immunity in relation to charges of showing an obscene film contrary to s. 159(1)(*a*) of the *Criminal Code*. The CBC is established under the *Broadcasting Act*, R.S.C. 1970, c. B-11; section 40(1) of that Act provides as follows:

> Except as provided in subsection 38(3), the Corporation is, for all purposes of this Act, an agent of Her Majesty, and its power under this Act may be exercised only as an agent of Her Majesty.

This Court upheld the decision of the Ontario Court of Appeal that the CBC could be prosecuted under the *Criminal Code*, notwithstanding it was an agent of the Crown. In the Court of Appeal and here, the key to this result was a Regulation promulgated under the *Broadcasting Act* which prohibited the broadcast of any "obscene, indecent or profane ... presentation". The CBC was charged with breach of the *Criminal Code*, not with breach of the Broadcasting Regulations, but the Regulation was important because the *Broadcasting Act* made the Corporation a Crown agent "for all purposes of this Act", and the Regulation demonstrated that in broadcasting an obscene film the Corporation was not acting for purposes entrusted to it under the Act. This Court expressly adopted the following passage from the judgment of the Ontario Court of Appeal (at p. 353):

publiques qu'il est autorisé légalement à poursuivre, il a le droit de se prévaloir de l'immunité de l'État à l'encontre de l'application des lois parce qu'il agit pour le compte de l'État. Cependant, lorsque le mandataire outrepasse les fins de l'État, il agit personnellement et non pour le compte de l'État, et il ne peut invoquer l'immunité dont bénéficie le mandataire de l'État. Cela découle du fait que l'art. 16 de la *Loi d'interprétation* s'applique à l'avantage de l'État et non à l'avantage du mandataire personnellement. Seul l'État, par l'intermédiaire de ses mandataires et pour ses propres fins, ne peut être poursuivi en vertu de la *Loi relative aux enquêtes sur les coalitions*.

Cette Cour a adopté récemment ce point de vue dans l'arrêt *Société Radio-Canada c. La Reine*, [1983] 1 R.C.S. 339 (l'arrêt *Radio-Canada de 1983*), où la Société Radio-Canada invoquait l'immunité à l'égard d'une accusation d'avoir présenté un film obscène contrairement à l'al. 159(1)*a*) du *Code criminel*. La Société Radio-Canada a été créée en vertu de la *Loi sur la radiodiffusion*, S.R.C. 1970, chap. B-11, dont le par. 40(1) se lit ainsi:

> Sous réserve des dispositions du paragraphe 38(3), la Société, pour tous les objets de la présente loi, est mandataire de Sa Majesté et ne peut exercer qu'à ce titre les pouvoirs que lui confère la présente loi.

Cette Cour a maintenu l'arrêt de la Cour d'appel de l'Ontario portant que la Société Radio-Canada peut être poursuivie en vertu du *Code criminel* même si elle est un mandataire de l'État. En Cour d'appel et en cette Cour, l'issue reposait sur un règlement promulgué en vertu de la *Loi sur la radiodiffusion*, qui interdit de diffuser toute «présentation ... obscène ..., indécent[e] ou blasphématoire ...». La Société Radio-Canada était accusée d'avoir enfreint le *Code criminel* et non le règlement sur la radiodiffusion, mais le règlement était important parce qu'en vertu de la *Loi sur la radiodiffusion*, la Société est mandataire de l'État «pour tous les objets de la présente loi», et le règlement démontrait qu'en présentant un film obscène, la Société ne poursuivait pas les objets que lui conférait la Loi. Cette Cour a adopté expressément le passage suivant de l'arrêt de la Cour d'appel de l'Ontario (à la p. 353):

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BRITISH COLUMBIA LABOUR RELATIONS BOARD

2014 CanLII 21539 (BC LRB)

THE GOVERNMENT OF THE PROVINCE OF BRITISH COLUMBIA

(the "Employer" or the "Government")

-and-

ASSOCIATION OF JUDICIAL ADMINISTRATIVE ASSISTANTS

(the "Association")

-and-

B.C. GOVERNMENT AND SERVICE EMPLOYEES' UNION

(the "BCGEU")

PANEL:	Richard S. Longpre, Vice-Chair
APPEARANCES:	Peter A. Gall, Q.C., for the Employer Shona A. Moore, Q.C., for the Association Kenneth R. Curry, for the BCGEU
CASE NO.:	66390
DATE OF DECISION:	April 17, 2014
DATE OF REASONS:	April 25, 2014

REASONS FOR THE BOARD'S DECISION

I. NATURE OF THE APPLICATION

1 The Association applies under Section 18 of the *Labour Relations Code* (the "Code") for certification to represent a unit described as "employees working as judicial administrative assistants to the superior courts judiciary in British Columbia".

2 The Employer submits the application should be dismissed because judicial administrative assistants are excluded from collective bargaining under the *Public Service Labour Relations Act*, R.S.B.C. 1996, c. 388 (the "*PSLRA*"). The Association submits the *PSLRA* does not bar its application under the Code. The BCGEU made a brief submission supporting the Association's application.

3 I am able to decide this matter on the basis of the parties' written submissions.

II. BACKGROUND

4 The proposed bargaining unit consists of 41 judicial administrative assistants employed by the Government at superior courts across British Columbia. Twenty-three work in Vancouver, four in New Westminster, four in Victoria, two in Kamloops, two in Kelowna, and one each in Chilliwack, Cranbrook, Nanaimo, Nelson, Prince George and Smithers. They work in the non-public area of superior courthouses in those locations, providing secretarial administrative support to judges, masters and registrars of the British Columbia Supreme Court and Court of Appeal.

5 The judicial administrative assistants perform a variety of duties including: preparing, editing and proofreading reasons for judgment; preparing court orders and other documents for judicial signature; and providing confidential secretarial services to judges, including drafting correspondence, coordinating meetings, processing mail, reviewing invoices, and completing expense forms. The Association submits their work is analogous to that of a legal secretary or legal assistant employed by a law firm.

6 Section 1(1) of the *PSLRA* expressly excludes a list of persons from the definition of "employee" under that legislation, including "(y) a person employed to provide administrative or clerical support services to a judge of a court in British Columbia".

III. POSITIONS OF THE PARTIES

The Association

7 The Association acknowledges that, as a result of Section 1(1)(y) of the *PSLRA*, judicial administrative assistants are excluded from accessing collective bargaining under the *PSLRA*. It submits, however, that their exclusion from the *PSLRA* does not prevent the judicial administrative assistants from pursuing collective bargaining rights

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under the Code. There is nothing in the Code, the *PSLRA*, or any other statute that explicitly prohibits the judicial administrative assistants from engaging in collective bargaining.

8 The Association submits the Code is a statute of general application that sets out a comprehensive scheme by which employees may access bargaining. The *PSLRA* sets up a statutory regime regulating bargaining between the Government, as an employer, and certain Government employees. The Association submits the *PSLRA* is not a separate and parallel regime to the Code. Judicial administrative assistants are excluded from the definition of "employee" in the *PSLRA*, and therefore, they do not fall under a specific statutory regime for collective bargaining. Instead, the Association submits, they fall under the more general statutory regime for collective bargaining established by the Code.

9 The Association submits the Code remains available to all employees who satisfy its certification requirements, except those who are covered by specific alternate regimes. In this case, judicial administrative assistants fall within the Code's definition of "employee", and therefore, the proposed bargaining unit satisfies the Code definition of "unit". The Association satisfies the Code definition of "trade union" and the Government satisfies the Code definition of "employer". Accordingly, the Board has jurisdiction to grant its application for certification under the Code.

10 The Association further submits that Section 2(d) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") protects the judicial administrative assistants' right to collective bargaining, whether or not the *PSLRA* applies to them. In *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 ("*Health Services*"), the Supreme Court of Canada held that Section 2(d) of the *Charter* "protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues" (para. 19). In coming to this conclusion, the Court explicitly disagreed with its earlier view that collective bargaining did not fall within the scope of Section 2(d) protection. The Association submits that part of the Court's rationale for this changed perspective was a recognition that the right to bargaining collectively does not arise from statute, but existed long before legislatures enacted statutory labour relations regimes. In *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 ("*Fraser*"), the Supreme Court of Canada reaffirmed that Section 2(d) of the *Charter* protects the right of employees acting collectively to associate to achieve collective goals.

11 The Association submits this Supreme Court of Canada jurisprudence makes it clear that the judicial administrative assistants have a *Charter*-protected right to associate in order to achieve workplace goals. Accordingly, while the Government has excluded judicial administrative assistants from a specific statutory regime that could have allowed the judicial administrative assistants to exercise their Section 2(d) rights (the *PSLRA*), the general labour relations scheme (the Code) exists to allow such employees the right to pursue collective bargaining. The legislature has not expressly stated that the Code does not apply to judicial administrative assistants, and accordingly it applies to them.

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12 The Association submits that if the Code is interpreted as not applying to the judicial administrative assistants, therefore not permitting them access to collective bargaining, this would constitute a "substantial interference" with collective bargaining rights as described in *Health Services* and *Fraser*. Such an interpretation would require the Government to establish that the breach of the *Charter*-protected right constitutes a reasonable limit justified under Section 1 of the *Charter*.

13 The Association acknowledges that the Board (and its predecessor, the Industrial Relations Council) issued decisions holding that there is no jurisdiction under the Code to certify a bargaining unit of Government employees who fall outside of the *PSLRA* definition of employee. However, the Board's understanding of the relationship between the *PSLRA* and the Code on this issue must be revisited for two reasons: first, the Board's analysis was "wholly dependent on a historical analysis and common law principles that have since been rendered constitutionally impermissible"; and second, the Board "erred in privileging the historical and common law perspective over all other considerations, including the ordinary meaning of the *PSLRA* itself".

14 The Association submits that in *The Government of the Province of British Columbia*, IRC No. C225/89 (Application for Reconsideration Dismissed, IRC No. C55/90) ("*Internal Auditors Case*"), and two other decisions which followed the reasoning in that decision, the Board found the purpose of the *PSLRA* was to provide access to collective bargaining to certain Government employees who would not otherwise have access to bargaining. In coming to this conclusion, the Board relied on a historical analysis of the legislation in the context of the common law principle that the Crown has no legal obligation to negotiate with its employees. The Association submits these decisions can no longer be considered good law, because the Supreme Court of Canada has made it clear that the constitutional right of employees to pursue common employment goals and the corresponding duty on employers to negotiate in good faith, exist independently of any statute. The *PSLRA* and the Code did not create collective bargaining rights but merely regulated these *Charter*-protected rights. The Association submits the *PSLRA* "did nothing more than regulate the Government's collective bargaining relationship with some of its public sector employees".

15 The Association further submits the common law principle that the Government as the employer, has no legal obligation to negotiate with its employees, no longer has legal force. The Government as the employer, is bound by the *Charter* and cannot refuse to negotiate with its employees. Accordingly, the Board's interpretation of its jurisdiction in decisions such as the *Internal Auditors Case* is clearly wrong, in light of the Supreme Court of Canada's recent jurisprudence to the effect that the right to bargain collectively is not dependent on statute and is *Charter*-protected. It is no longer open to the Board to find that the mere exclusion of a group of employees from one statutory collective bargaining regime indicates an intention to extinguish the *Charter*-protected right to bargain collectively under another regime from which those employees are not explicitly excluded.

16 The Association further submits that in previous decisions, the Board failed to properly analyze the relationship between the general regime under the Code and the

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specific regime under the *PSLRA*. Section 23 of the *PSLRA* sets out a specific regime that applies to a segment of public sector employees. This does not mean that Government employees excluded from that regime are excluded from the Code. It is not evident why certain Government employees were excluded from the *PSLRA* regime, but it likely resulted from a number of different considerations, including "the fact that certain groups of employees do not fit well into the structure of bargaining set out in the *PSLRA*". The Board erred "because it subjugated both the *Code* and the *PSLRA* to the principle of Crown prerogative".

17 The Association submits the Board's prior decisions characterized the *PSLRA* as a public sector collective bargaining regime and the Code as a private sector regime. With the changes in patterns of unionization over the last few decades and the growth in public sector bargaining under the Code, it is "simply not possible to still understand the *Code* and the *PSLRA* as two mutually exclusive regimes, one pertaining to the private sector and the other to the public sector". The Association therefore urges the Board to "revisit its interpretation of the *Code* and the *PSLRA* and the relationship between the two statutes in order to give them an interpretation consistent with the *Charter* and modern labour law principles". This means the exclusion of the judicial administrative assistants from the *PSLRA* does not have the effect of excluding them from the Code. Any such exclusion would have to be explicit, and the Government would be required to justify such an infringement of the *Charter*-protected right to bargain collectively under Section 1 of the *Charter*.

The Employer

18 The Employer submits the Board has correctly determined in its previous decisions that the legislature intended the *PSLRA* to be a comprehensive code governing access to collective bargaining for Government employees. Accordingly, Government employees who are excluded from collective bargaining under the *PSLRA* cannot be certified under the Code. If the Association believes precluding judicial administrative assistants from accessing statutory collective bargaining rights is contrary to the *Charter*, the Association would have to bring a *Charter* challenge to their exclusion from the *PSLRA*, which the Association has not done.

19 The Association acknowledges that judicial administrative assistants do not have a right to seek access to collective bargaining under the *PSLRA*. The Employer submits that, in light of this exclusion, the judicial administrative assistants do not have a right to seek certification outside that regime. Further, the application under the Code seeks a separate bargaining unit and a separate bargaining agent; both are inconsistent with the collective bargaining regime for public sector employees under the *PSLRA* which mandates three statutory bargaining units represented by statutorily mandated bargaining agents.

20 The Employer submits the *Charter* "cannot be used to override the clear legislative intention that the *PSLRA* is a complete code for certification of Government employees". It cites the Supreme Court of Canada's decision in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at paragraphs 62-64 ("*Bell ExpressVu*").

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21 The Employer submits that the seminal Board decision on this issue is the *Internal Auditors Case*. In that case, the original panel held that the *PSLRA* is a complete code for the certification of Government employees and therefore Government employees excluded under the *PSLRA* could not be certified under the Code. In coming to that conclusion, the original panel noted that, prior to the passage of the *PSLRA*, public sector employees had no access to collective bargaining through the predecessor to the Code, the *Labour Relations Act* (the "*LRA*"), which applied only to private sector employees. The panel noted that, rather than amending the *LRA* to apply to public sector as well as private sector employees, the Government chose instead to extend collective bargaining rights to certain public sector employees under the *PSLRA* on certain conditions, and to exclude other public sector employees from its ambit.

22 The original panel in the *Internal Auditors Case* further found that the contemporaneous enactment of the Code in 1974 was not intended to extend statutory collective bargaining rights to public sector employees more broadly:

> ... This Panel concludes that the Legislature in its cautious approach to extending compulsory collective bargaining, made the Government *qua* employer compellable to bargain collectively *only within the framework of the PSLRA* with a union representing those employees defined therein, who hitherto had no collective bargaining rights, nor had any potential of obtaining them under the private sector legislation. Thus it is only PSLRA that addresses the mischief identified in the Higgins Report, and only to the extent specified in the provisions. The scope of the private sector scheme under the Labour Code was, and continues to be, limited to the "private sector" as it had been under the Labour Relations Act. (p. 15, emphasis in original)

23 The Employer submits that the reconsideration panel in the *Internal Auditors Case* found that, if the Code was interpreted as permitting Government employees excluded from the scope of the *PSLRA* to apply for certification, a proliferation of bargaining units would result. This would be contrary to the legislative intent expressed in the *PSLRA* that the number of bargaining units and agents representing Government employees be limited and regulated by the statute. The conclusions in the *Internal Auditors Case* have been confirmed in subsequent Board decisions which all recognized the legislative intent that the *PSLRA* comprise a complete code for the certification of Government employees.

24 The Association argued that such an interpretation of the Code interferes with the judicial administrative assistants' *Charter*-protected right to bargaining collectively. The Employer submits that absent a *Charter* challenge addressing exclusion of the judicial administrative assistants from the *PSLRA*, the legislative intent cannot be "finessed" by using the *Charter* to argue that these employees should be permitted to apply for their own bargaining unit and agent under the Code. Absent a *Charter* challenge, provisions must be interpreted consistent with the intention of the legislature, and the *Charter* cannot be used to give them a meaning the legislature did not intend: *Bell ExpressVu.*

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25 The Employer submits that the Association's ability to obtain certification for its members under the Code would frustrate the legislative intention that collective bargaining for Government employees be governed exclusively by the *PSLRA*, that there be only three bargaining units of Government employees, that certain subjects are not open to collective bargaining in the public service, and other statutory limitations on collective bargaining that are set out in the *PSLRA*.

26 The Employer submits that if a constitutional challenge to the exclusion of the judicial administrative assistants from the *PSLRA* were raised, the Government would lead evidence that they were excluded for the same reasons other Government employees are excluded; that is, because of the nature of their jobs, and the conflict for them to be included in a bargaining unit. In *Health Services* and *Fraser*, the Supreme Court of Canada did not hold that government employees have a constitutional right to engage in collective bargaining under either the Code or the *PSLRA*. Rather, the Court confirmed in *Fraser* that Section 2(d) of the *Charter* protects the right of employees to collectively make representations to their employer which must be considered in good faith by the employer in discussions with employees. The Association has not shown or claimed the judicial administrative assistants have been denied the ability to do this. The Employer submits there is no constitutional right to be included in a collective bargaining statute, let alone a particular collective bargaining statute.

27 The Employer submits there is also no constitutional right to a particular bargaining unit or bargaining representative. Accordingly, even if the exclusion of the judicial administrative assistants from collective bargaining was a breach of the *Charter*, which it denies, this would mean they would be included in the BCGEU bargaining unit under the *PSLRA*. It would not mean that the judicial administrative assistants could obtain certification for their own separate bargaining unit and agent under the Code.

28 The Association has not raised a constitutional challenge to the provision in the *PSLRA* excluding the judicial administrative assistants. The Employer argues the Association cannot finesse their exclusion from that collective bargaining regime by applying for a separate bargaining unit under the Code. The *Charter* cannot be used to give these Government employees a right to engage in collective bargaining under the Code, contrary to the intention of the legislature. Accordingly, the application should be dismissed.

The Association's Final Reply

29 In its reply, the Association maintains its position that the *Internal Auditors Case* and subsequent decisions misread the legislative intent of the *PSLRA* and the Code in finding that they were intended to be two separate statutory regimes for establishing collective bargaining rights. It also maintains its position that, in light of recent Supreme Court of Canada decisions such as *Fraser*, the Board's earlier interpretation cannot be upheld. It also maintains that the *Internal Auditors Case* must be revisited because of its "reliance on obsolete common law principles of little application and its failure to recognize the *Code* as a statute of general application". The Board failed to appreciate that allowing certain Government employees certification under the Code does not

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render the *PSLRA* redundant. The Board did not address Section 23 of the *PSLRA*, which the Association submits expresses the legislative intent that the Code remain the statute of general application and the "prevalent" collective bargaining regime where the *PSLRA* does not apply.

30 The Association submits that, notwithstanding their express exclusion from the definition of "employee" under the *PSLRA*, some Government employees do nonetheless engage in collective bargaining with the Government. Crown counsel engage in collective bargaining regulated by the *Crown Counsel Act*, R.S.B.C. 1996, c. 87 (the "*Crown Counsel Act*"), which sets out that the British Columbia Crown Counsel Association is their statutory bargaining agent. The "specific nature of the Crown counsel regime is not relevant to this application", but the Association submits, "its existence is demonstrative of the fact that employees who are excluded from the *PSLRA* are not, by operation of that *Act*, barred from collective bargaining".

31 The Association further submits that it is not raising a *Charter* challenge to legislation in this case because it is not asserting any infringement of the judicial administrative assistants' *Charter*-protected rights. Rather, it is asserting that these Government employees have access to collective bargaining under the Code. It is asking the Board to revisit and decline to follow its previous misinterpretation of the Code as precluding judicial administrative assistants from applying for certification under it. The only barrier to these employees exercising their *Charter*-protected rights lies in the Board's previous decisions; therefore, the Board "should revisit this issue and remove this archaic hurdle once and for all".

32 The Association submits its arguments and position are not in breach of the principle of statutory interpretation expressed in *Bell ExpressVu*. There is no ambiguity whatsoever in the relevant statutory provisions of the *PSLRA* and the Code - the former clearly excludes judicial administrative assistants from the ambit of the *PSLRA* whereas the Code equally clearly does not exclude them from its ambit. Accordingly, it is not seeking to rely on a "*Charter* values" approach to interpretation.

33 Alternatively, if the Board finds any ambiguity in the relevant statutory provisions, the Association submits that its interpretation is a "differing, but equally plausible" interpretation from the one in the Board's previous decisions. As its interpretation is consistent with the *Charter* whereas an interpretation which denies judicial administrative assistants access to collective bargaining is not, its interpretation should be preferred.

34 The Association submits it is not claiming a right to its own separate bargaining unit or bargaining agent. Rather, it submits that, while judicial administrative assistants are excluded from the particular statutory collective bargaining regime established under the *PSLRA* for certain Government employees, they are nonetheless subject to the general statutory collective bargaining regime established under the Code. If the legislature intended that they be covered by a different regime, it would have legislated to that effect, as it did with respect to Crown counsel.

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35 The Association "acknowledges that the *Charter* does not give any employee a statutory right to access collective bargaining under a specific statute such as the *Code* or the *PSLRA*". It submits, however, that the Supreme Court of Canada in *Fraser* held that employees' freedom of association under Section 2(d) of the *Charter* does not merely mean being able to collectively make representations to their employer which must be considered in good faith in discussions with employees, as the Employer asserts. Employees have a right to a "process of engagement" that permits this to occur (*Fraser* at para. 2). In the present case the legislature enacted the regime under which the Association may engage in collective bargaining, namely, the Code.

IV. ANALYSIS AND DECISION

36 It is not disputed that judicial administrative assistants are excluded from the statutory collective bargaining regime under the *PSLRA* and this application for certification is not challenging that exclusion. Rather, the issue is whether the Code is a statute of general application and with an exclusion from the *PSLRA*, the judicial administrative assistants are included in the Code.

37 I start with the assumption that judicial administrative assistants would have the right to certification under the Code if they are not covered by the *PSLRA*. Under the Code, "employee" includes "a person employed by an employer" except "a manager or superintendent" and those employed in a "confidential capacity in matters relating to labour relations or personnel". Under the *PSLRA*, employee "means an employee as defined in the *Public Service Act*, or a person employed by or holding office at the pleasure of the government" and then excludes a list of positions. Section 1(1)(y) of the *PSLRA* specifically excludes judicial administrative assistants from the definition of employee. Section 23 of the *PSLRA* applies in these circumstances but not in the way the Association promotes. Section 23 of the *PSLRA* reads:

> Unless otherwise provided in this Act, the *Labour Relations Code* applies, but, if this Act is contrary to, in conflict with or inconsistent with that or any other Act, this Act prevails.

38 The *PSLRA* excludes judicial administrative assistants from the definition of employee, while the Code definition includes judicial administrative assistants. The definitions of employee in the *PSLRA* and the Code are therefore, in conflict and are inconsistent in their respective definitions of employee as they apply to judicial administrative assistants. Section 23 states that where such a conflict or inconsistency exists, the definition of employee in the *PSLRA* prevails. I do not accept the Association's argument that if the judicial administrative assistants are excluded from the *PSLRA* they are therefore covered by the Code. The position is covered by the *PSLRA* and is specifically excluded from the definition of employee.

39 Inherent in the Association's arguments is the acknowledgement that "employee" is defined differently in the *PSLRA* and the Code. Board jurisprudence has consistently concluded that the *PSLRA* specifically excluded a list of Government employees, including the judicial administrative assistants, from the *PSLRA.* As the Employer

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argued, a constitutional challenge is necessary to overturn the language of the legislation.

40 I turn now to the Association's submissions that the Board's previous decisions on this issue should be revisited. The *Internal Auditors Case* addressed an application by the BCGEU to be certified under the Code as the bargaining agent for a group of internal auditors employed by the Government. The Government objected to the BCGEU's application on the basis that the internal auditors did not have access to collective bargaining by virtue of their exclusion from the definition of "employee" under Section 1(1) of the *PSLRA*. The BCGEU argued that, while the internal auditors were excluded from collective bargaining under the *PSLRA*, they nevertheless had access to collective bargaining under the Code.

41 The *Internal Auditors Case* acknowledged that "the plain and ordinary meaning of the words 'employer', 'employee', and 'person' as used in the [Code] are so broad so as to, at first blush, encompass the Government and all of its employees in the broadest sense, whether or not they are covered by the PSLRA", and that there is "no specific provision in the [Code] stating that it does not apply to Government employees or to persons under the PSLRA" (p. 9). Nonetheless, the *Internal Auditors Case* concluded that it would not be correct to interpret the Code as permitting the application before it.

42 Applying a purposive approach to the issue of statutory interpretation, the *Internal Auditors Case* found the mischief the *PSLRA* was intended to address when it was enacted in 1974 was the lack of access to collective bargaining for public sector employees. At that time, the *LRA*, the predecessor legislation to the Code, granted access to collective bargaining to private sector employees. The Government as employer, was not covered by the *LRA* and accordingly was not subject to any statutory compulsion to engage in collective bargaining with its employees. The *Internal Auditors Case* noted that the legislature could have addressed this issue by amending the *LRA* to encompass public sector employers and their employees but chose not to. Instead, it "elected to address this mischief by passing into law a special Act, the PSLRA" (p. 14).

43 The *Internal Auditors Case* further noted that the enactment of the *PSLRA* followed the Higgins Report, which had recommended caution in extending compulsory collective bargaining to the Government as an employer. Noting provisions in the *PSLRA* that circumscribed the number of bargaining units, the numbers and types of collective agreements, and the scope of what was bargainable, the *Internal Auditors Case* found that in passing the *PSLRA*, "the Legislature intended to expose the Government *qua* Employer to collective bargaining only in a limited way, the scope of which was entirely contained in the PSLRA" (p. 14).

44 The Code was enacted contemporaneously with the *PSLRA* and the Code was not intended to be inconsistent with the intention of the *PSLRA*. The *Internal Auditors Case* concluded that there were "two mutually exclusive collective bargaining regimes" in British Columbia, one under the Code which it stated "can be loosely termed private sector but includes some public sector employees", and the other under the *PSLRA* (p. 15). While some public sector employees have rights under the Code, namely those

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whose employers were public sector agencies and not the Government *qua* employer, the *Internal Auditors Case* found that access to a statutory collective bargaining regime for Government employees was determined by the *PSLRA*.

45 The *Internal Auditors Case* was upheld on reconsideration and followed in two subsequent Board decisions: *Government of the Province of British Columbia*, IRC No. C62/90 (Application for Reconsideration Dismissed, IRC No. C214/90) and *The Government of the Province of British Columbia*, BCLRB No. B375/93. In all of these decisions, the Board accepted that Government employees excluded from the *PSLRA* cannot access collective bargaining rights under the Code.

46 The *Internal Auditors Case* considered the argument that the Code does not expressly exclude Government employees, and that the definitions of "employee" and "employer" in the Code are broad enough to encompass Government employees and the Government as the employer. The panel found that interpreting the Code in this manner would, however, result in absurdity and be inconsistent with the legislative intent evident on a purposive interpretation of both the *PSLRA* and the Code - a legislative intent that statutory collective bargaining rights would be extended to Government employees only in the manner and on the terms expressed in the *PSLRA*. The Association's submission does not convince me there was an error in that conclusion.

47 The Association submits that the *Internal Auditors Case* was based on outmoded common law principles and a historical, "archaic" analysis of the legislation. I disagree. I am satisfied that, as explained in the *Internal Auditors Case*, the legislative intent in simultaneously passing the *PSLRA* and the Code was not to allow some Government employees access to collective bargaining under the *PSLRA* and allow those excluded from the *PSLRA* access under the Code. The intent was to extend statutory collective bargaining rights to certain Government employees under the terms of the *PSLRA* who were excluded by the Code.

48 The predecessor to the Code, the *LRA*, extended statutory bargaining rights to private sector employees. With the introduction of the Code and the *PSLRA*, as the *Internal Auditors Case* states: "there are two mutually exclusive collective bargaining regimes in the Province of British Columbia" (p. 15). The purpose of the *PSLRA* was to grant access to a particular statutory collective bargaining regime to certain Government employees, but not to others. On a purposive reading of the Code and the *PSLRA*, the legislative intent was not to allow Government employees, excluded from the statutory bargaining regime established under the *PSLRA*, to apply for bargaining rights under the Code. Such an interpretation would produce results contrary to the intent of the legislature in passing these two pieces of legislation.

49 The Association's arguments do not persuade me that the Board's analysis in the *Internal Auditors Case* is an incorrect interpretation of the Code in light of recent Supreme Court of Canada decisions. It is important to note that the Association does not argue that the Government is in breach of the *Charter*. Rather, in light of recent decisions of the Supreme Court of Canada, it is clear the judicial administrative

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assistants have access to collective bargaining under the Code. In *Fraser*, the Court recognized that freedom of association in Section 2(d) of the *Charter* protects employees' rights to bargaining collectively with their employers. The employees' right to bargain collectively did not arise from legislation but existed long before statutory collective bargaining regimes were established. The Association submits that the Board erred in concluding that Government employees did not have the right to bargain collectively except to the extent that such a right was granted under the *PSLRA*.

50 I find this argument fails to distinguish between a *Charter*-protected, non-statutory right of employees to bargain collectively with their employers, and the right to access a particular collective bargaining regime established by a statute. Section 1(1) of the *PSLRA* excludes practicing lawyers from the definition of "employee", yet under the *Crown Counsel Act*, practicing lawyers employed by the Government are granted access to the statutory collective bargaining regime established by that legislation. The Association submits that this demonstrates that merely because a Government employee is excluded under Section 1(1) of the *PSLRA*, it cannot be inferred that the legislature intended that employee to have no access to collective bargaining. I find that the existence of the *Crown Counsel Act* is further evidence that exclusion from the *PSLRA* under Section 1(1) demonstrates a legislative intention that the excluded employees do not have access to collective bargaining under the Code.

51 If the legislature decides a particular category of excluded Government employees should have access to collective bargaining, it can either remove them from the list of Government employees excluded under Section 1(1), in which case those employees become subject to the *PSLRA*, or it can establish a separate statutory bargaining regime which specifically applies to that category of excluded Government employee (as in the *Crown Counsel Act*). As long as a category of Government employees is excluded from the definition of employee under the *PSLRA*, and no other statutory collective bargaining regime has been established for them, the legislative intent is that they not have access to collective bargaining under the Code. Indeed, even where another statutory collective bargaining regime has been established, they may not have access to collective bargaining under the Code. Even assuming for the purposes of this decision that Government employees have a *Charter*-protected right to bargain collectively with their employer, as the Association concedes, this does not give them a right to do so under the auspices of a particular statutory regime. Crown counsel, for example, have access to the statutory regime for collective bargaining established under the *Crown Counsel Act*.

52 The Association acknowledges in its final reply that "the *Charter* does not give any employee a statutory right to access collective bargaining under a specific statute such as the *Code* or the *PSLRA*". In *Fraser*, employees have a right to a "process of engagement" that permits them to collectively make representations to their employer which must be considered in good faith by their employer in discussions with employees. The Court did not say that this "process of engagement" must take place under the auspices of a statutorily mandated collective bargaining regime. As the

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Association concedes, there is no *Charter*-protected right to access to collective bargaining under a specific statute such as the Code.

53 In these circumstances, I find that the judicial administrative assistants do not have access to collective bargaining under the Code. Absent a successful *Charter* challenge, the Board is bound by the legislative intent expressed in the *PSLRA* and the Code. Government employees, such as the judicial administrative assistants, who are excluded from the *PSLRA* do not have access to statutory collective bargaining rights under the Code. I find this legislative intent is unambiguous and therefore a *Charter* values approach cannot be used to interpret the legislation to achieve a result which the legislature clearly did not intend: *Bell ExpressVu*.

V. CONCLUSION

54 For the reasons given, the Association's application for certification of a bargaining unit of judicial administrative assistants is dismissed.

LABOUR RELATIONS BOARD

"*RICHARD S. LONGPRE*"

RICHARD S. LONGPRE
VICE-CHAIR

2014 CanLII 21539 (BC LRB)

1998 CanLII 837 (SCC)

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited *Appellants*

v.

Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited *Respondent*

and

The Ministry of Labour for the Province of Ontario, Employment Standards Branch *Party*

INDEXED AS: RIZZO & RIZZO SHOES LTD. (RE)

File No.: 24711.

1997: October 16; 1998: January 22.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Employment law — Bankruptcy — Termination pay and severance available when employment terminated by the employer — Whether bankruptcy can be said to be termination by the employer — Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) — Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the *Employment Standards Act* ("*ESA*") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to sever-

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez et Lindy Wagner en leur propre nom et en celui des autres anciens employés de Rizzo & Rizzo Shoes Limited *Appelants*

c.

Zittrer, Siblin & Associates, Inc., syndic de faillite de Rizzo & Rizzo Shoes Limited *Intimée*

et

Le ministère du Travail de la province d'Ontario, Direction des normes d'emploi *Partie*

RÉPERTORIÉ: RIZZO & RIZZO SHOES LTD. (RE)

Nº du greffe: 24711.

1997: 16 octobre; 1998: 22 janvier.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Employeur et employé — Faillite — Indemnités de licenciement et de cessation d'emploi payables en cas de licenciement par l'employeur — Faillite peut-elle être assimilée au licenciement par l'employeur? — Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2(3) — Loi sur la faillite, L.R.C. (1985), ch. B-3, art. 121(1) — Loi d'interprétation, L.R.O. 1990, ch. I.11, art. 10, 17.

Les employés d'une entreprise en faillite ont perdu leur emploi lorsqu'une ordonnance de séquestre a été rendue à l'égard des biens de l'entreprise. Tous les salaires, les traitements, toutes les commissions et les paies de vacances ont été versés jusqu'à la date de l'ordonnance de séquestre. Le ministère du Travail de la province a vérifié les dossiers de l'entreprise pour déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi* (la «*LNE*») et il a remis une preuve de réclamation au syndic. Ce dernier a rejeté les réclamations pour le

the words, "Where . . . fifty or more employees have their employment terminated by an employer. . . ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by an employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by an employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by an employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by an employer" for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legisla-*

licencier un employé . . .» Le paragraphe 40*a*(1a) contient également les mots: «si [. . .] l'employeur licencie cinquante employés ou plus . . .» Par conséquent, la question dans le présent pourvoi est de savoir si l'on peut dire que l'employeur qui fait faillite a licencié ses employés.

La Cour d'appel a répondu à cette question par la négative, statuant que, lorsqu'un créancier présente une pétition en faillite contre un employeur, les employés ne sont pas licenciés par l'employeur mais par l'effet de la loi. La Cour d'appel a donc estimé que, dans les circonstances de l'espèce, les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNE* n'étaient pas applicables et qu'aucune obligation n'avait pris naissance. Les appelants répliquent que les mots «l'employeur licencie» doivent être interprétés comme établissant une distinction entre la cessation d'emploi volontaire et la cessation d'emploi forcée. Ils soutiennent que ce libellé visait à dégager l'employeur de son obligation de verser des indemnités de licenciement et de cessation d'emploi lorsque l'employé quittait son emploi volontairement. Cependant, les appelants prétendent que la cessation d'emploi forcée résultant de la faillite de l'employeur est assimilable au licenciement effectué par l'employeur pour l'exercice du droit à une indemnité de licenciement et à une indemnité de cessation d'emploi prévu par la *LNE*.

Une question d'interprétation législative est au centre du présent litige. Selon les conclusions de la Cour d'appel, le sens ordinaire des mots utilisés dans les dispositions en cause paraît limiter l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi aux employeurs qui ont effectivement licencié leurs employés. À première vue, la faillite ne semble pas cadrer très bien avec cette interprétation. Toutefois, en toute déférence, je crois que cette analyse est incomplète.

Bien que l'interprétation législative ait fait couler beaucoup d'encre (voir par ex. Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3e éd. 1994) (ci-après «*Construction of Statutes*»); Pierre-André Côté, *Interprétation des lois* (2e éd.

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tion in Canada (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of "... the interests of employees by requiring employers to comply with

1990)), Elmer Driedger dans son ouvrage intitulé *Construction of Statutes* (2e éd. 1983) résume le mieux la méthode que je privilégie. Il reconnaît que l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. À la p. 87, il dit:

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution: il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

Parmi les arrêts récents qui ont cité le passage ci-dessus en l'approuvant, mentionnons: *R. c. Hydro-Québec*, [1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103.

22 Je m'appuie également sur l'art. 10 de la *Loi d'interprétation*, L.R.O. 1980, ch. 219, qui prévoit que les lois «sont réputées apporter une solution de droit» et doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

23 Bien que la Cour d'appel ait examiné le sens ordinaire des dispositions en question dans le présent pourvoi, en toute déférence, je crois que la cour n'a pas accordé suffisamment d'attention à l'économie de la *LNE*, à son objet ni à l'intention du législateur; le contexte des mots en cause n'a pas non plus été pris en compte adéquatement. Je passe maintenant à l'analyse de ces questions.

24 Dans l'arrêt *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986, à la p. 1002, notre Cour, à la majorité, a reconnu l'importance que notre société accorde à l'emploi et le rôle fondamental qu'il joue dans la vie de chaque individu. La manière de mettre fin à un emploi a été considérée comme étant tout aussi importante (voir également *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701). C'est dans ce contexte que les juges majoritaires dans l'arrêt *Machtinger* ont défini, à la p. 1003, l'objet de la *LNE* comme étant la protection «. . . [d]es intérêts des employés en exigeant que

1998 CanLII 837 (SCC)

Brian Conception *Appellant*

v.

Her Majesty The Queen, Person in Charge of the Centre for Addiction and Mental Health and Person in Charge of the Mental Health Centre Penetanguishene *Respondents*

and

Attorney General of Canada, Attorney General of Quebec, Criminal Lawyers' Association of Ontario and Mental Health Legal Committee *Interveners*

Indexed as: R. *v.* Conception

2014 SCC 60

File No.: 34930.

Hearing: October 17, 2013.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

Re-hearing ordered: July 30, 2014.

Judgment: October 3, 2014.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Mental disorder — Dispositions by a court or review board — Treatment disposition — Accused declared unfit to stand trial — Hearing judge issuing a "forthwith" treatment order without consent of treating hospital — Whether a court may make a disposition order directing that treatment begin immediately even though the hospital or treating physician does not consent to that disposition — Whether the consent requirement relates to the timing of carrying out the order or just to the treatment itself — Criminal Code, R.S.C. 1985, c. C-46, ss. 672.58, 672.62(1)(a).

Brian Conception *Appelant*

c.

Sa Majesté la Reine, responsable du Centre de toxicomanie et de santé mentale et responsable du Centre de santé mentale de Penetanguishene *Intimés*

et

Procureur général du Canada, procureur général du Québec, Criminal Lawyers' Association of Ontario et Mental Health Legal Committee *Intervenants*

Répertorié : R. *c.* Conception

2014 CSC 60

N° du greffe : 34930.

Audition : 17 octobre 2013.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

Nouvelle audition ordonnée : 30 juillet 2014.

Jugement : 3 octobre 2014.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner et Gascon.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit criminel — Troubles mentaux — Décisions rendues par un tribunal ou une commission d'examen — Décision prévoyant un traitement — Accusé déclaré inapte à subir son procès — Ordonnance de traitement applicable « sur-le-champ » rendue par la juge présidant l'audience sans le consentement de l'hôpital chargé du traitement — Le tribunal peut-il ordonner que le traitement débute immédiatement même si l'hôpital ou le médecin traitant ne consentent pas à cette décision? — L'exigence relative au consentement porte-t-elle sur la date d'exécution de l'ordonnance ou simplement sur le traitement même? — Code criminel, L.R.C. 1985, ch. C-46, art. 672.58, 672.62(1).

2014 SCC 60 (CanLII)

Constitutional law — Charter of Rights — Right to life, liberty and security of the person — Criminal law — Mental disorder — Treatment disposition — Whether requiring hospital's consent for all provisions of the treatment disposition would infringe accused's right to procedural fairness — Whether treatment disposition provisions of Criminal Code are unconstitutionally vague or arbitrary — Canadian Charter of Rights and Freedoms, s. 7 — Criminal Code, R.S.C. 1985, c. C-46, ss. 672.58, 672.62(1)(a).

C was charged with sexual assault. When he appeared in court, he was in a psychotic state and was declared unfit to stand trial. Crown counsel recommended a treatment order. The Crown stated that a bed would be available in a facility at one hospital six days after the hearing. The hearing judge issued a "forthwith" treatment order, specifying C be treated at a second hospital or its "designate" (preferably the facility at the first hospital). Court services delivered C to the first hospital and left him in a hallway. The hospitals appealed this decision. The Court of Appeal held that the hearing judge erred by acting on the basis that the consent requirement of the *Criminal Code* provision relating to treatment had been satisfied. The Court of Appeal also determined that the applicable provisions of the *Criminal Code* (ss. 672.58 and 672.62(1)(*a*)) engage the rights to liberty and security of the person guaranteed under s. 7 of the *Charter*, but do not violate the principles of fundamental justice.

Held: The appeal should be dismissed.

Per LeBel, Abella, Rothstein, Cromwell and Gascon JJ.: Consent is required for the disposition order in its entirety, not simply to the treatment aspect of it. A court may not make a disposition order directing that treatment begin immediately if the hospital or treating physician does not consent to that disposition unless the situation is a rare case in which a delay in treatment would breach the accused's rights under the *Canadian Charter of Rights and Freedoms* and an order for immediate treatment is an appropriate and just remedy for that breach.

Droit constitutionnel — Charte des droits — Droit à la vie, à la liberté et à la sécurité de la personne — Droit criminel — Troubles mentaux — Décision prévoyant un traitement — Le fait d'exiger le consentement de l'hôpital à toutes les modalités de la décision prévoyant un traitement porte-t-il atteinte au droit de l'accusé à l'équité procédurale? — Les dispositions du Code criminel relatives à la décision prévoyant un traitement sont-elles imprécises ou arbitraires au point d'être inconstitutionnelles? — Charte canadienne des droits et libertés, art. 7 — Code criminel, L.R.C. 1985, ch. C-46, art. 672.58, 672.62(1).

C était accusé d'agression sexuelle. Il était en psychose lorsqu'il a comparu, et il a été déclaré inapte à subir son procès. L'avocate du ministère public a recommandé que soit rendue une décision prévoyant un traitement. Elle a indiqué qu'une place dans un établissement d'un certain hôpital se libérerait six jours après la date de l'audience. La juge qui présidait l'audience a rendu une ordonnance de traitement applicable « sur-le-champ », ordonnant que C soit traité à un deuxième hôpital ou à « l'établissement désigné » (l'établissement du premier hôpital de préférence). Les services aux tribunaux ont conduit C au premier hôpital et l'ont laissé dans un couloir. Les hôpitaux ont interjeté appel de la décision. La Cour d'appel était d'avis que la juge qui présidait l'audience avait conclu à tort qu'il avait été satisfait à l'exigence relative au consentement prévue aux dispositions du *Code criminel* relatives au traitement. La Cour d'appel a également statué que les dispositions applicables du *Code* (l'art. 672.58 et le par. 672.62(1)) mettent en jeu le droit à la liberté et à la sécurité de la personne garanti à l'art. 7 de la *Charte*, mais n'enfreignent pas les principes de justice fondamentale.

Arrêt : Le pourvoi est rejeté.

Les juges LeBel, Abella, Rothstein, Cromwell et Gascon : Le consentement est obligatoire à l'égard de la décision dans son ensemble, et non pas simplement à l'égard du traitement. Le tribunal ne peut ordonner que le traitement débute immédiatement si l'hôpital ou le médecin traitant ne consentent pas à cette décision à moins que la situation n'appartienne à l'un des rares cas où retarder le traitement porterait atteinte aux droits garantis à l'accusé par la *Charte canadienne des droits et libertés* et où une ordonnance de traitement immédiat constituerait une réparation convenable et juste d'une telle atteinte.

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medical personnel, hospital staff and others when potentially violent psychotic patients are detained in settings where proper facilities are not available; and it permits Ontario's forensic psychiatric facilities to co-operate in triaging the needs of UST and NCR accused, matters not within the knowledge of the courts. The Court of Appeal concluded that it is not unreasonable that a UST accused may have to wait on some occasions for a short period of time until a bed becomes available in a designated psychiatric facility and there was no evidence that a six-day delay in starting treatment might impair the likelihood of the appellant becoming fit to stand trial.

[11] The Court of Appeal also held that s. 672.62(1)(*a*) is not void for vagueness or arbitrariness.

[12] On the further appeal to this Court, the appellant raises two main questions concerning the scope of the hospital's required consent:

1. Does the consent requirement relate to the timing of carrying out the order or just to the treatment itself?

2. If the consent requirement relates to the timing of carrying out the order, does the s. 672.58 order violate s. 7 of the *Charter*?

III. Analysis

A. *Does the Consent Requirement Relate to Timing?*

(1) The Approach to Statutory Interpretation

[13] In our view, the meaning of the relevant provisions, supported by an understanding of their full context, leads to the conclusion that the hospital or

relative à l'ordonnance de traitement soit entreprise et [. . .] susceptible de produire des résultats positifs » (par. 52) —; on mitige les risques considérables pour les patients, les professionnels de la santé et le personnel hospitalier, entre autres, qu'emporte la détention de psychotiques potentiellement violents dans un environnement non adapté et on habilite les établissements de psychiatrie médicolégale de l'Ontario à collaborer au triage des accusés inaptes à subir leur procès ou jugés non criminellement responsables, des questions dont le tribunal n'a pas une connaissance particulière. La Cour d'appel a conclu qu'il n'était pas déraisonnable qu'un accusé inapte doive parfois attendre un peu qu'une place dans un établissement psychiatrique désigné se libère et qu'il n'avait pas été démontré qu'une attente de six jours avant le début du traitement risquait d'empêcher l'appelant de devenir apte à subir son procès.

[11] La Cour d'appel a également statué que le par. 672.62(1) n'était pas nul, car il n'était ni imprécis, ni arbitraire.

[12] Devant notre Cour, l'appelant soulève principalement deux questions concernant la teneur du consentement obligatoire de l'hôpital :

1. L'exigence relative au consentement porte-t-elle sur la date d'exécution de l'ordonnance ou simplement sur le traitement même?

2. Si l'exigence relative au consentement porte effectivement sur la date d'exécution de l'ordonnance, la décision rendue en vertu de l'art. 672.58 enfreint-elle l'art. 7 de la *Charte*?

III. Analyse

A. *L'exigence relative au consentement porte-t-elle sur la date d'exécution de l'ordonnance?*

(1) La méthode d'interprétation des lois

[13] Nous estimons que le sens des dispositions pertinentes, interprétées à la lumière de l'ensemble du contexte dans lequel elles s'inscrivent, mène à

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person in charge of treatment must consent to all the terms of a disposition ordering treatment and, if there is no consent, the order cannot be made. The terms of the order include when it is to be carried out and therefore consent relates to timing.

[14] This issue raises a question of statutory interpretation which must be resolved according to the modern principle of statutory interpretation: "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1, citing E. A. Driedger, *The Construction of Statutes* (1974), at p. 67). We underline that the starting point is the text of the provisions in their grammatical and ordinary sense. This is especially the case where, as here, the key term "disposition" is expressly defined in the statute. In our view, the appellant fails to do this.

(2) Statutory Context and Statutory Text

[15] It is helpful to begin by putting the most relevant provisions in their wider statutory context. The relevant provisions are found within Part XX.1 of the *Code* which deals with mental disorder. The twin purposes of this Part of the *Code* are protection of the public and fair treatment, in the sense of procedural fairness, of the accused: *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, at paras. 20, 21 and 44; see also *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, 2006 SCC 7, [2006] 1 S.C.R. 326, at para. 27.

[16] The *Code* provides that no court shall make a "disposition" under s. 672.58 without the consent of the hospital or person in charge of treatment. The provisions respecting "dispositions" are central to the legislative scheme set out in Part XX.1 of the

la conclusion que la décision prévoyant un traitement est subordonnée au consentement de l'hôpital ou de la personne chargée du traitement à toutes les modalités de la décision. Sans consentement, la décision ne peut être rendue. Les modalités dont la décision est assortie incluent la date d'exécution de l'ordonnance; par conséquent, le consentement porte sur la date du traitement.

[14] Se pose donc une question d'interprétation législative qu'il convient de résoudre conformément au principe moderne d'interprétation des lois, selon lequel [TRADUCTION] « il faut interpréter les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'économie de la loi, son objet et l'intention du législateur » (R. Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 1, citant E. A. Driedger, *The Construction of Statutes* (1974), p. 67). Soulignons que le point de départ est le texte des dispositions, pris dans son sens ordinaire et grammatical, en particulier dans un cas comme celui-ci, où le terme déterminant « décision » est défini expressément dans la loi. À notre avis, ce n'est pas ce que fait l'appelant.

(2) Texte et contexte législatifs

[15] Il est utile de commencer par examiner les dispositions les plus pertinentes dans leur contexte législatif global. Ces dispositions se trouvent à la partie XX.1 du *Code*, laquelle porte sur les troubles mentaux et poursuit un double objet, soit la protection du public et le traitement équitable — au sens d'équité procédurale — de l'accusé (*Winko c. Colombie-Britannique (Forensic Psychiatric Institute)*, [1999] 2 R.C.S. 625, par. 20, 21 et 44; voir aussi *Mazzei c. Colombie-Britannique (Directeur des Adult Forensic Psychiatric Services)*, 2006 CSC 7, [2006] 1 R.C.S. 326, par. 27.

[16] Aux termes du *Code*, le tribunal ne peut rendre une « décision » en vertu de l'art. 672.58 sans le consentement de l'hôpital ou de la personne chargée du traitement. Les dispositions relatives à la « décision » forment le pivot du régime établi à la

2014 SCC 60 (CanLII)

2006 SCC 48 (CanLII)

Jocelyn Binet *Appellant*

v.

Pharmascience Inc. and Morris S. Goodman *Respondents*

- and -

Attorney General of Quebec *Appellant*

v.

Pharmascience Inc. and Morris S. Goodman *Respondents*

Jocelyn Binet *Appelant*

c.

Pharmascience Inc. et Morris S. Goodman *Intimés*

- et -

Procureur général du Québec *Appelant*

c.

Pharmascience Inc. et Morris S. Goodman *Intimés*

INDEXED AS: PHARMASCIENCE INC. *v.* BINET

Neutral citation: 2006 SCC 48.

File No.: 30995.

2006: May 9; 2006: October 26.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

RÉPERTORIÉ : PHARMASCIENCE INC. *c.* BINET

Référence neutre : 2006 CSC 48.

N° du greffe : 30995.

2006 : 9 mai; 2006 : 26 octobre.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron et Rothstein.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Law of professions — Ethics — Syndic's powers of investigation — Injunction — Syndic of Ordre des pharmaciens requiring manufacturer of generic drugs to provide him with any documents indicating that rebates, discounts or other benefits had been granted to pharmacists — Whether power of inquiry provided for in s. 122 of Professional Code authorizes syndic of professional order to request information from persons who are not members of that order — Whether, where third party refuses to provide requested information, syndic may seek injunction pursuant to Code of Civil Procedure — Professional Code, R.S.Q., c. C-26, ss. 2, 122, 191 — Code of Civil Procedure, R.S.Q., c. C-25, art. 751.

In 2003, the Quebec media reported that a large number of pharmacists had received rebates, discounts and other financial benefits from generic drug manufacturers in exchange for orders for drugs, a practice that is prohibited by the *Code of ethics of pharmacists*.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit des professions — Déontologie — Pouvoirs d'enquête du syndic — Injonction — Syndic de l'Ordre des pharmaciens exigeant d'un fabricant de médicaments génériques de lui fournir tout document indiquant que des rabais, ristournes ou autres avantages ont été accordés à des pharmaciens — Le pouvoir d'enquête prévu à l'art. 122 du Code des professions permet-il au syndic d'un ordre professionnel de demander des renseignements à des personnes qui ne sont pas membres de l'ordre? — Le refus d'un tiers de fournir les renseignements demandés permet-il au syndic de réclamer une injonction en vertu du Code de procédure civile? — Code des professions, L.R.Q., ch. C-26, art. 2, 122, 191 — Code de procédure civile, L.R.Q., ch. C-25, art. 751.

Les médias québécois révèlent en 2003 qu'un grand nombre de pharmaciens recevraient des rabais, ristournes et autres avantages financiers de la part de fabricants de médicaments génériques en contrepartie de leurs commandes. Le *Code de déontologie des*

D. *Interpretation of Section 122*

In my view, a grammatical analysis of the statutory provision together with a review of the relevant contextual aspects, such as the purpose of the statute and of the provision in issue, confirms that the legislature intended to subject third parties to the syndic's power of inquiry under s. 122 *Prof. C.* This contextual analysis resolves any ambiguity flowing from s. 122 without it being necessary to refer to *Charter* principles or values. This Court has consistently held that the courts may turn to *Charter* values to interpret the meaning of a statutory provision only if an ambiguity persists following a contextual analysis (*Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, 2005 SCC 26; *Charlebois v. Saint John (City)*, [2005] 3 S.C.R. 563, 2005 SCC 74). In the case at bar, the Court of Appeal did not adhere to this interpretive approach when it referred to *Charter* values without trying to determine the meaning of the text in question by situating it in its context.

1. Effect of a Textual Interpretation

Although the weight to be given to the ordinary meaning of words varies enormously depending on their context, in the instant case, a textual interpretation supports a comprehensive analysis based on the purpose of the Act. Most often, "ordinary meaning" refers "to the reader's first impression meaning, the understanding that spontaneously emerges when words are read in their immediate context" (R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 21; *Marche v. Halifax Insurance Co.*, [2005] 1 S.C.R. 47, 2005 SCC 6, at para. 59). In *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735, Gonthier J. spoke of the "natural meaning which appears when the provision is simply read through".

D. *L'interprétation de l'art. 122*

29 À mon avis, l'analyse grammaticale du texte législatif, complétée par l'évaluation des aspects contextuels pertinents, comme l'objet de la loi et de la disposition en discussion, confirme l'intention du législateur d'assujettir les tiers au pouvoir d'enquête du syndic prévu à l'art. 122 *C. prof.* Cette analyse contextuelle permet de résoudre toute ambiguïté émanant de l'art. 122 sans qu'il soit nécessaire de recourir ici aux principes ou aux valeurs consacrées par la *Charte*. En effet, selon la jurisprudence constante de notre Cour, il est bien établi que les tribunaux ne doivent se tourner vers les valeurs inscrites dans la *Charte* pour interpréter le sens d'une disposition législative que si une ambiguïté persiste au terme de l'application de la méthode contextuelle (*Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42; *Bristol-Myers Squibb Co. c. Canada (Procureur général)*, [2005] 1 R.C.S. 533, 2005 CSC 26; *Charlebois c. Saint John (Ville)*, [2005] 3 R.C.S. 563, 2005 CSC 74). En l'espèce, la Cour d'appel n'a pas respecté cette méthode d'interprétation, lorsqu'elle a recouru aux valeurs consacrées par la *Charte*, sans chercher à dégager le sens du texte en cause en le replaçant dans son contexte.

1. L'effet du recours à l'interprétation textuelle

30 Bien que le poids à accorder au sens ordinaire des mots varie énormément suivant le contexte de leur emploi, dans la présente affaire, l'interprétation textuelle appuie l'analyse globale fondée sur l'objet de la loi. Le sens ordinaire réfère la plupart du temps [TRADUCTION] « à la première impression du lecteur, c'est-à-dire au sens qui lui vient spontanément lorsqu'il lit les termes dans leur contexte immédiat » (R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4e éd. 2002), p. 21, citée dans *Marche c. Cie d'Assurance Halifax*, [2005] 1 R.C.S. 47, 2005 CSC 6, par. 59). Dans *Lignes aériennes Canadien Pacifique Ltée c. Assoc. canadienne des pilotes de lignes aériennes*, [1993] 3 R.C.S. 724, p. 735, le juge Gonthier parlait du « sens naturel qui se dégage de la simple lecture de la disposition ».

2006 SCC 48 (CanLII)

Re:Sound *Appellant*

v.

Motion Picture Theatre Associations of Canada, Rogers Communications Inc., Shaw Communications Inc., Bell ExpressVu LLP, Cogeco Cable Inc., EastLink, Quebecor Media, TELUS Communications Company, Canadian Association of Broadcasters and Canadian Broadcasting Corporation *Respondents*

and

Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic *Intervener*

Ré:Sonne *Appelante*

c.

Fédération des associations de propriétaires de cinémas du Canada, Rogers Communications Inc., Shaw Communications Inc., Bell ExpressVu LLP, Cogeco Câble inc., EastLink, Quebecor Media, Société TELUS Communications, Association canadienne des radiodiffuseurs et Société Radio-Canada *Intimées*

et

Clinique d'intérêt public et de politique d'internet du Canada Samuelson-Glushko *Intervenante*

Indexed as: Re:Sound *v.* Motion Picture Theatre Associations of Canada

2012 SCC 38

File No.: 34210.

2011: December 7; 2012: July 12.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

Répertorié : Ré:Sonne *c.* Fédération des associations de propriétaires de cinémas du Canada

2012 CSC 38

N[o] du greffe : 34210.

2011 : 7 décembre; 2012 : 12 juillet.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver et Karakatsanis.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Intellectual Property — Copyright — Whether pre-existing recording incorporated into soundtrack of cinematographic work constitutes a sound recording subject to payment of tariff — Whether soundtrack of cinematographic work consists of aggregate of sounds or component parts — Copyright Act, R.S.C. 1985, c. C-42, ss. 2 "sound recording", 19.

Propriété intellectuelle — Droit d'auteur — Un enregistrement préexistant incorporé à la bande sonore d'une œuvre cinématographique constitue-t-il un enregistrement sonore qui donne droit à une rémunération fondée sur un tarif? — La bande sonore d'une œuvre cinématographique est-elle constituée d'un ensemble de sons ou de composantes? — Loi sur le droit d'auteur, L.R.C. 1985, ch. C-42, art. 2 « enregistrement sonore », 19.

The *Copyright Act* provides that performers and makers of sound recordings are entitled to remuneration for the performance in public or the communication to the public by telecommunication of their published sound recordings. The appellant filed two tariff proposals claiming royalties for the use of sound

La *Loi sur le droit d'auteur* confère aux artistes-interprètes et aux producteurs d'enregistrements sonores le droit à une rémunération pour l'exécution ou la représentation en public ou la communication au public par télécommunication de leurs enregistrements sonores publiés. L'appelante a déposé deux projets de tarifs qui

2012 SCC 38 (CanLII)

(*a*) in the case of a sound recording of a musical work, to the collective society authorized under Part VII to collect them; . . .

[31] As I noted above, the word "soundtrack" used in the definition of "sound recording" is not defined.

D. *Statutory Interpretation*

[32] This Court has reiterated on many occasions that the object of statutory interpretation is to establish Parliament's intent by reading the words of the provisions in question in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87).

[33] Although statutes may be interpreted purposively, the interpretation must nevertheless be consistent with the words chosen by Parliament. Moreover, the legislative history can be of great assistance in discerning Parliament's intent with respect to a particular wording in a statute.

[34] In the instant case, the statutory interpretation process must begin with the words of s. 2.

[35] According to s. 2, a "sound recording" is a recording consisting of sounds, "but excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work". Therefore, a "soundtrack" is a "sound recording" except where it accompanies the motion picture. Otherwise, the exclusion would be superfluous.

[36] When it accompanies the motion picture, therefore, the recording of sounds that constitutes a soundtrack does not fall within the definition of "sound recording" and does not trigger the application of s. 19. A pre-existing sound recording is made up of recorded sounds. The Act does not specify that a pre-existing recording of "sounds"

a) dans le cas de l'enregistrement sonore d'une œuvre musicale, à la société de gestion chargée, en vertu de la partie VII, de les percevoir; . . .

[31] Je le répète, le terme « bande sonore » utilisé dans la définition que l'art. 2 donne d'« enregistrement sonore » n'est pas défini.

D. *Interprétation législative*

[32] La Cour a souvent réitéré que l'interprétation législative vise à discerner l'intention du législateur à partir des termes employés, compte tenu du contexte global et du sens ordinaire et grammatical qui s'harmonise avec l'esprit de la Loi, son objet et l'intention du législateur (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, citant E. A. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87).

[33] Même si les lois peuvent être interprétées de manière téléologique, leur interprétation doit néanmoins respecter les mots choisis par le législateur. En outre, l'historique législatif peut aider considérablement à discerner l'intention qu'avait le législateur lorsqu'il a choisi le libellé particulier d'un texte législatif.

[34] En l'espèce, nous devons amorcer l'interprétation législative par les mots qui figurent à l'art. 2.

[35] Selon cette disposition, un « enregistrement sonore » est un enregistrement constitué de sons, dont « est exclue [. . .] la bande sonore d'une œuvre cinématographique lorsqu'elle accompagne celle-ci ». Ainsi, une « bande sonore » est un « enregistrement sonore » sauf quand elle accompagne un film. S'il en était autrement, l'exclusion serait superflue.

[36] Lorsqu'il accompagne un film, l'enregistrement de sons qui constituent une bande sonore n'est pas visé par la définition d'« enregistrement sonore » et ne déclenche pas l'application de l'art. 19. Un enregistrement sonore préexistant est constitué de sons enregistrés. Or, la Loi ne précise pas que l'enregistrement préexistant d'un « son » qui

2012 SCC 38 (CanLII)

British Columbia Council of Human Rights *Appellant*

v.

University of British Columbia School of Family and Nutritional Sciences *Respondent*

and

Janice Berg *Respondent*

and

Canadian Human Rights Commission *Intervener*

and between

Janice Berg *Appellant*

v.

University of British Columbia School of Family and Nutritional Sciences *Respondent*

and

British Columbia Council of Human Rights *Respondent*

and

Canadian Human Rights Commission *Intervener*

INDEXED AS: UNIVERSITY OF BRITISH COLUMBIA *v.* BERG

File Nos.: 22640, 22638.

1993: January 27; 1993: May 19.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

British Columbia Council of Human Rights *Appelant*

c.

École des sciences de la famille et de l'alimentation de l'Université de la Colombie-Britannique *Intimée*

et

Janice Berg *Intimée*

et

Commission canadienne des droits de la personne *Intervenante*

et entre

Janice Berg *Appelante*

c.

École des sciences de la famille et de l'alimentation de l'Université de la Colombie-Britannique *Intimée*

et

British Columbia Council of Human Rights *Intimé*

et

Commission canadienne des droits de la personne *Intervenante*

RÉPERTORIÉ: UNIVERSITÉ DE LA COLOMBIE-BRITANNIQUE *c.* BERG

N^os^ du greffe: 22640, 22638.

1993: 27 janvier; 1993: 19 mai.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

1993 CanLII 89 (SCC)

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Civil rights — Discrimination in public facilities — Services customarily available to the public — Master's student denied rating sheet and key to faculty building because of mental disability — Whether university discriminated against student with respect to services "customarily available to the public" — Meaning of the word "public" — Human Rights Act, S.B.C. 1984, c. 22, s. 3.

Judicial review — Standard of review — Human rights tribunal.

In 1979, the appellant Berg was accepted into the master's program of the University of British Columbia School of Family and Nutritional Sciences. As a student, she consistently performed above average. Although she experienced a recurrence of depression in 1981, she continued to attend classes and was capable of responding to the same demands and expectations as other students. During that period, on a particularly stressful day, the appellant wrote "I am dead" on the mirror in the School's washroom and, later the same day, when frightened upon seeing RCMP and security personnel in the hall, she attempted to jump through a plate glass window. When the School moved to new premises in 1982, the appellant was denied a key to the building although other graduate students were provided with one. The School's Director was later assured by a physician that there was no risk and issued the appellant a key. In 1983, a faculty member refused to complete the appellant's rating sheet required for an application for a hospital internship on the basis of her observation of the appellant's behaviour and problems. The faculty member later testified that she was not obliged to fill out the sheet and that she had refused to do so on a number of occasions every year. This testimony was contradicted by that of the Director of the School. Following a complaint by the appellant, the member-designate of the British Columbia Council of Human Rights found that the School had contravened s. 3 of the *Human Rights Act* by denying the appellant the key and rating sheet because of her mental disability. The British Columbia Supreme Court set aside the decision, holding that the provision of a key or a rating sheet did not constitute services "customarily available to the public" within the meaning of s. 3, and that the member-designate therefore had no jurisdiction to determine the complaint. The Court of Appeal affirmed the judgment. In this Court, the School conceded that the key and rating sheet were

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Libertés publiques — Discrimination dans des établissements publics — Services habituellement offerts au public — Étudiante au programme de maîtrise se voyant refuser un formulaire d'évaluation et une clé donnant accès à l'édifice de la faculté en raison d'une déficience mentale — L'université a-t-elle agi de façon discriminatoire envers l'étudiante à l'égard de services «habituellement offerts au public»? — Signification du mot «public» — Human Rights Act, S.B.C. 1984, ch. 22, art. 3.

Contrôle judiciaire — Norme de contrôle — Tribunal des droits de la personne.

En 1979, l'appelante Berg a été admise au programme de maîtrise de l'École des sciences de la famille et de l'alimentation de l'Université de la Colombie-Britannique. Elle a obtenu régulièrement des résultats scolaires supérieurs à la moyenne. Bien qu'elle ait connu un nouvel accès de dépression en 1981, elle a continué d'assister aux cours et a pu répondre aux mêmes exigences et aux mêmes attentes que les autres étudiants. Durant cette période, pendant une journée particulièrement stressante, l'appelante a écrit «Je suis morte» sur le miroir des toilettes de l'École et, plus tard le même jour, effrayée à la vue d'agents de la GRC et d'agents de sécurité dans l'entrée de l'immeuble, elle a essayé de passer à travers une baie vitrée. Lorsque l'École a déménagé dans de nouveaux locaux en 1982, on n'a pas voulu remettre à l'appelante une clé donnant accès à l'édifice même si les autres étudiants des deuxième et troisième cycles en avaient reçu une. Plus tard, comme un médecin l'avait assuré qu'il n'y avait aucun risque, le directeur de l'École a remis une clé à l'appelante. En 1983, un membre du corps professoral a refusé de remplir le formulaire d'évaluation de l'appelante qui devait accompagner une demande d'internat en milieu hospitalier en raison de ce qu'il avait pu remarquer au sujet du comportement et des problèmes de l'appelante. Ce membre du corps professoral a témoigné, par la suite, qu'il n'était pas tenu de remplir le formulaire et qu'il avait refusé de le faire à un certain nombre de reprises chaque année. Ce témoignage a été contredit par celui du directeur de l'École. À la suite d'une plainte portée par l'appelante, le membre désigné du British Columbia Council of Human Rights a conclu que l'École avait contrevenu à l'art. 3 de la *Human Rights Act* en refusant de fournir à l'appelante la clé et le formulaire d'évaluation en raison de sa déficience mentale. La Cour suprême de la Colombie-Britannique a annulé cette décision et a statué que la remise d'une clé ou d'un for-

1993 CanLII 89 (SCC)

fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

This interpretive approach does not give a board or court license to ignore the words of the Act in order to prevent discrimination wherever it is found. While this may be a laudable goal, the legislature has stated, through the limiting words in s. 3, that some relationships will not be subject to scrutiny under human rights legislation. It is the duty of boards and courts to give s. 3 a liberal and purposive construction, without reading the limiting words out of the Act or otherwise circumventing the intention of the legislature.

(b) Interpretation of Section 3

(i) *Analogous Provisions*

Most, but not all, human rights Acts contain similar limiting provisions. The *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, s. 5, provides that discrimination on prohibited grounds in the "provision of goods, services, facilities or accommodation customarily available to the general public" is prohibited. Some statutes prohibit discrimination in the same field as the British Columbia Act's "customarily available to the public" (see Alberta's *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2, s. 3). New Brunswick's *Human Rights Act*, R.S.N.B. 1973, c. H-11, s. 5(1), refers more broadly to services, etc., "available to the public"; Quebec's *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, s. 12, refers to goods and services "ordinarily offered to the public", and the Yukon Territory's *Human Rights Act*, R.S.Y. 1986, c. 11 (Supp.), s. 8, applies to any person "offering or providing services, goods, or facilities to the public".

d'interprétation, L.R.C. (1985), ch. I-21, qui dispose que «[t]out texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.»

Cette méthode d'interprétation ne permet pas à une commission ou à une cour de justice de faire abstraction des termes de la Loi pour empêcher les pratiques discriminatoires où que ce soit. Bien que ce puisse être là un but louable, la législature a affirmé, au moyen des termes restrictifs de l'art. 3, que certaines relations ne seront pas sujettes à un examen fondé sur la loi en matière de droits de la personne. Il incombe aux commissions et aux cours de justice de donner à l'art. 3 une interprétation libérale et fondée sur l'objet visé, sans faire abstraction des termes restrictifs de la Loi ni autrement contourner l'intention de la législature.

b) L'interprétation de l'art. 3

(i) *Dispositions analogues*

La plupart des lois en matière de droits de la personne, et non pas toutes, contiennent des dispositions restrictives semblables. L'article 5 de la *Loi canadienne sur les droits de la personne*, L.R.C. (1985), ch. H-6, prévoit qu'il est interdit au «fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public» d'accomplir un acte discriminatoire fondé sur un motif illicite. Certaines lois interdisent la discrimination dans le même domaine que la disposition [TRADUCTION] «habituellement offerts au public» figurant dans la loi de la Colombie-Britannique (voir l'*Individual's Rights Protection Act* de l'Alberta, R.S.A. 1980, ch. I-2, art. 3). La *Loi sur les droits de la personne* du Nouveau-Brunswick, L.R.N.-B. 1973, ch. H-11, par. 5(1), mentionne de manière plus générale les services, etc., «disponibles au public»; la *Charte des droits et libertés de la personne* du Québec, L.R.Q., ch. C-12, art. 12, parle des biens et services «ordinairement offerts au public», et la *Human Rights Act* du territoire du Yukon, R.S.Y. 1986, ch. 11 (suppl.), art. 8, s'applique à toute personne qui offre ou fournit au public des services, des biens ou des installations.

1993 CanLII 89 (SCC)

Robert Meredith and Brian Roach (representing all members of the Royal Canadian Mounted Police) *Appellants*

v.

Attorney General of Canada *Respondent*

and

Attorney General of Ontario, Attorney General of British Columbia, Attorney General for Saskatchewan, Attorney General of Alberta, Canadian Labour Congress, Professional Institute of the Public Service of Canada, Canadian Union of Public Employees, Local 675, Public Service Alliance of Canada, Confédération des syndicats nationaux and Union of Canadian Correctional Officers *Interveners*

Robert Meredith et Brian Roach (représentant tous les membres de la Gendarmerie royale du Canada) *Appelants*

c.

Procureur général du Canada *Intimé*

et

Procureur général de l'Ontario, procureur général de la Colombie-Britannique, procureur général de la Saskatchewan, procureur général de l'Alberta, Congrès du travail du Canada, Institut professionnel de la fonction publique du Canada, Syndicat canadien de la fonction publique, section locale 675, Alliance de la Fonction publique du Canada, Confédération des syndicats nationaux et Syndicat des agents correctionnels du Canada *Intervenants*

2015 SCC 2 (CanLII)

Indexed as: Meredith *v.* Canada (Attorney General)

2015 SCC 2

File No.: 35424.

2014: February 19; 2015: January 16.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

Répertorié : Meredith *c.* Canada (Procureur général)

2015 CSC 2

N° du greffe : 35424.

2014 : 19 février; 2015 : 16 janvier.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Cromwell, Karakatsanis et Wagner.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Charter of Rights — Freedom of association — Right to collective bargaining — Wage rollback — Statutory limit on wage increases in public sector — Treasury Board unilaterally reducing previously agreed-upon wage increases for RCMP members — Federal wage restraint legislation subsequently enacted in response to global financial crisis, giving statutory effect to Treasury Board decision with respect to RCMP members — Whether legislation infringes constitutional guarantee of freedom of association — If so, whether infringement justifiable — Expenditure Restraint Act, S.C. 2009, c. 2, s. 393 — Canadian Charter of Rights and Freedoms, ss. 1, 2(d).

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Charte des droits — Liberté d'association — Droit de négocier collectivement — Réduction salariale — Loi restreignant les augmentations salariales dans le secteur public — Réduction unilatérale par le Conseil du Trésor des augmentations salariales déjà convenues pour les membres de la GRC — Loi fédérale sur le contrôle des salaires édictée subséquemment, en réaction à une crise financière mondiale, donnant un effet législatif à la décision du Conseil du Trésor relative aux membres de la GRC — La loi viole-t-elle la liberté d'association garantie par la Constitution? — Dans l'affirmative, la violation est-elle justifiable? — Loi sur le contrôle des dépenses, L.C. 2009, c. 2, art. 393 — Charte canadienne des droits et libertés, art. 1, 2d).

The Treasury Board establishes the pay and allowances paid to members of the RCMP. In setting their pay, the Treasury Board considers recommendations developed through the Pay Council, an advisory board composed of representatives of RCMP management and RCMP members.

In June 2008 and in response to recommendations initially made by the Pay Council, the Treasury Board announced salary increases of 3.32%, 3.5% and 2% for RCMP members for the years 2008 to 2010, as well as increases in certain forms of supplemental compensation. A government-wide response to a global financial crisis led the Treasury Board to revisit its decision concerning RCMP wages for the fiscal years 2008-10. In December 2008, the Treasury Board communicated to the RCMP Commissioner a revised wage decision providing for salary increases of 1.5% in each of 2008, 2009 and 2010, in line with limits previously announced for the whole of the public sector. Members of the Staff Relations Representative Program's ("SRRP") National Executive Committee and the Pay Council approached Treasury Board officials and members of Cabinet to discuss the wage rollback. All of their proposals for change were rejected.

Finally, in March 2009, the *Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393 ("*ERA*"), was enacted, imposing a limit of 1.5% on wage increases in the public sector for the 2008 to 2010 fiscal years. The *ERA* also prohibited any other increases to compensation but contained an exception for RCMP members permitting the negotiation of additional allowances as part of transformational initiatives within the RCMP.

M and R, who are members of the National Executive Committee of the SRRP, brought a constitutional challenge on behalf of all members of the RCMP, arguing that the December 2008 decision of the Treasury Board and the *ERA* violate the constitutional right to collective bargaining protected by s. 2(*d*) of the *Charter* by rolling back scheduled wage increases for RCMP members without prior consultation. They did not, however, challenge the constitutionality of the RCMP labour relations process.

A judge of the Federal Court declared that both the Treasury Board's December 2008 decision and the impugned provisions of the *ERA* violated s. 2(*d*) of the *Charter*. The judge found that the Pay Council was the only

Le Conseil du Trésor établit la solde et les indemnités versées aux membres de la GRC. Pour fixer leur solde, le Conseil du Trésor tient compte des recommandations élaborées par l'entremise du Conseil de la solde, un comité consultatif composé de représentants de la direction et des membres de la GRC.

Au mois de juin 2008, en réponse aux recommandations présentées initialement par le Conseil de la solde, le Conseil du Trésor a annoncé des hausses salariales de 3,32 %, 3,5 % et 2 % accordées aux membres de la GRC pour les années 2008 à 2010, ainsi que la majoration de certaines indemnités supplémentaires. La réaction gouvernementale à une crise financière mondiale a amené le Conseil du Trésor à réviser sa décision concernant la solde des membres de la GRC pour les années 2008 à 2010. En décembre 2008, le Conseil du Trésor a communiqué au commissaire de la GRC une décision révisée dans laquelle il accordait des augmentations salariales de 1,5 % pour chacune des années 2008, 2009 et 2010, en conformité avec les limites déjà annoncées pour l'ensemble du secteur public. Des membres du Comité exécutif national du Programme des représentants des relations fonctionnelles (« PRRF ») de la GRC et le Conseil de la solde ont pris contact avec des représentants du Conseil du Trésor et des membres du Cabinet pour discuter de la réduction des salaires. Toutes les modifications qu'ils ont proposées ont été rejetées.

Enfin, au mois de mars 2009, la *Loi sur le contrôle des dépenses*, L.C. 2009, c. 2, art. 393 (« *LCD* »), a été adoptée, limitant à 1,5 % les augmentations salariales dans le secteur public pour les exercices 2008 à 2010. La *LCD* interdisait aussi toute autre augmentation de la rémunération, mais prévoyait une exception pour les membres de la GRC en permettant la négociation d'allocations additionnelles dans le cadre de toute initiative de transformation au sein de la GRC.

M et R, qui sont membres du Comité exécutif national du PRRF ont engagé une contestation constitutionnelle au nom de tous les membres de la GRC. Ils ont plaidé que la décision de décembre 2008 du Conseil du Trésor et la *LCD*, en réduisant sans consultation préalable les augmentations salariales prévues pour les membres de la GRC, violent le droit constitutionnel de négocier collectivement garanti par l'al. 2*d*) de la *Charte*. Ils n'ont toutefois pas contesté la constitutionnalité du processus des relations de travail de la GRC.

Une juge de la Cour fédérale a déclaré que la décision de décembre 2008 du Conseil du Trésor et les dispositions attaquées de la *LCD* violaient l'al. 2*d*) de la *Charte*. Elle a conclu que le Conseil de la solde était le

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formal means by which RCMP members could collectively pursue goals relating to remuneration with the Treasury Board and that the Treasury Board's decision and the subsequently enacted *ERA* made it effectively impossible for the Pay Council to make representations on behalf of members of the RCMP and to have those representations considered in good faith. Neither violation was found to be saved by s. 1 of the *Charter*. The Federal Court of Appeal disagreed. Having found that the *ERA* gave statutory effect to the Treasury Board's December 2008 decision, and that it was the constitutionality of that Act which was truly at issue, the Court of Appeal found that the *ERA* did not violate the freedom of association of RCMP members. It allowed the appeal.

Held (Abella J. dissenting): The appeal should be dismissed. The *ERA* does not infringe s. 2(*d*) of the *Charter*. Rolling back scheduled wage increases for RCMP members without prior consultation does not infringe their constitutional right to collective bargaining.

Per McLachlin C.J. and LeBel, Cromwell, Karakatsanis and Wagner JJ.: For the reasons given in the companion case, *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3 ("*MPAO*"), s. 2(*d*) of the *Charter* protects RCMP members' freedom to associate and pursue their workplace goals through collective bargaining. In the absence of a true collective bargaining process, RCMP members used the Pay Council to develop recommendations for members' pay and to advance their compensation-related goals. The *Charter* protects that associational activity, even though the Pay Council process is part of the scheme found to be constitutionally inadequate in *MPAO*. Despite the deficiencies in the Pay Council process, it nonetheless constitutes associational activity that attracts *Charter* protection.

Interference with a constitutionally inadequate labour relations process may attract scrutiny under s. 2(*d*). However, in this case, the *ERA* did not substantially interfere with the process so as to infringe RCMP members' freedom of association. The limits imposed by the *ERA* were shared by all public servants, were consistent with the going rate reached in agreements concluded elsewhere in the core public administration and did not preclude consultation on other compensation-related issues, either in the past or the future. Furthermore, the *ERA* did not prevent the consultation process from moving forward.

seul mécanisme formel qui permettait aux membres de la GRC de poursuivre collectivement des objectifs liés à la rémunération avec le Conseil du Trésor, et que la décision du Conseil du Trésor et la *LCD* adoptée par la suite ont rendu de fait impossible pour le Conseil de la solde de présenter des observations au nom des membres de la GRC et de les voir prises en compte de bonne foi. Elle a statué qu'aucune de ces violations n'était justifiée au regard de l'article premier de la *Charte*. La Cour d'appel fédérale a exprimé son désaccord. Après avoir conclu que la *LCD* donnait un effet législatif à la décision de décembre 2008 du Conseil du Trésor et que la véritable question en litige avait trait à la constitutionnalité de cette loi, la Cour d'appel fédérale a décidé que la *LCD* ne portait pas atteinte à la liberté d'association des membres de la GRC et elle a accueilli l'appel.

Arrêt (la juge Abella est dissidente) : Le pourvoi est rejeté. La *LCD* ne viole pas l'al. 2*d*) de la *Charte*. La réduction sans consultation préalable des augmentations salariales prévues pour les membres de la GRC ne porte pas atteinte à leur droit constitutionnel de négocier collectivement.

La juge en chef McLachlin et les juges LeBel, Cromwell, Karakatsanis et Wagner : Pour les motifs exposés dans l'arrêt connexe *Association de la police montée de l'Ontario c. Canada (Procureur général)*, 2015 CSC 1, [2015] 1 R.C.S. 3 (« *APMO* »), l'al. 2*d*) de la *Charte* protège la liberté des membres de la GRC de s'associer et de poursuivre leurs objectifs liés au travail au moyen de la négociation collective. En l'absence d'un processus véritable de négociation collective, les membres de la GRC se sont servis du Conseil de la solde en vue d'élaborer des recommandations au sujet de leur solde et d'atteindre leurs objectifs liés à la rémunération. La *Charte* protège cette activité associative, même si le processus du Conseil de la solde fait partie du régime qui, dans *APMO*, a été jugé inadéquat du point de vue constitutionnel. Malgré les vices qui l'affectent, le processus du Conseil de la solde constitue tout de même une activité associative qui bénéficie de la protection de la *Charte*.

Une entrave à un processus de relations de travail inadéquat au plan constitutionnel peut être l'objet d'un examen constitutionnel à l'égard des exigences de l'al. 2*d*). En l'espèce toutefois, la *LCD* n'a pas entravé de façon substantielle le processus de sorte qu'elle a porté atteinte à la liberté d'association des membres de la GRC. Les restrictions imposées par la *LCD* s'appliquaient à l'ensemble des fonctionnaires; elles correspondaient au taux courant établi dans des ententes conclues avec d'autres groupes dans l'administration publique centrale et n'interdisaient pas la consultation sur d'autres questions salariales, que

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An exception for RCMP members included in the *ERA* allowed RCMP members to obtain significant benefits as a result of subsequent proposals brought forward through the existing Pay Council process. Actual outcomes are not determinative of a s. 2(*d*) analysis, but, in this case, the evidence of outcomes supports a conclusion that the impact of the enactment of the *ERA* on the associational activity of RCMP members was minor.

Simply put, the Pay Council continued to afford RCMP members a process for consultation on compensation-related issues within the constitutionally inadequate labour relations scheme that was then in place. The *ERA* and the government's course of conduct cannot be said to have substantially impaired the collective pursuit of the workplace goals of RCMP members. It is therefore unnecessary to comment on the application of s. 1 of the *Charter*.

Per Rothstein J.: There is agreement with the majority that there was no s. 2(*d*) violation in this case. However, the majority in *MPAO* made no findings with regard to the Pay Council process and the constitutionality of that process has not been challenged in this appeal. Accordingly, it must be assumed to be *Charter* compliant for the purposes of this appeal.

The December 2008 decision rolling back RCMP members' previously agreed-to wage increases was an interim measure designed to ensure that the RCMP's scheduled wage increases would not come into effect before wage restraint legislation could be enacted. That decision was subsequently overridden by the enactment of the *ERA*. It is therefore the validity of the *ERA* that is at issue here and the correct framework to analyse its validity is to ask whether the Act rendered meaningful collective bargaining for RCMP members, via the Pay Council process, effectively impossible.

The facts of this case unfolded in the midst of the 2008 global financial crisis. Though not determinative, this context is relevant to the inquiry into the adequacy of the government's consultation with the Pay Council. That context does not excuse the government's failure to consult before the December 2008 decision, but it helps us to understand the manner in which the process leading to the enactment of the *ERA* unfolded.

ce soit pour le passé ou pour l'avenir. Qui plus est, la *LCD* n'empêchait pas la poursuite du processus de consultation. Une exception prévue dans la *LCD* à l'égard des membres de la GRC leur a permis d'obtenir d'importants avantages à la suite de propositions ultérieures présentées dans le cadre du processus du Conseil de la solde. Les résultats concrets ne sont pas déterminants dans une analyse relative à l'al. 2*d*), mais ceux qui ont été mis en preuve en l'espèce étayent une conclusion selon laquelle l'adoption de la *LCD* a eu des répercussions mineures sur les activités associatives des membres de la GRC.

Bref, le Conseil de la solde a continué d'offrir aux membres de la GRC un processus de consultation sur les questions de rémunération en dépit du régime de relations de travail constitutionnellement défectueux alors en place. On ne saurait alors affirmer que la *LCD* et la conduite du gouvernement ont entravé de façon substantielle, pour les membres de la GRC, la poursuite collective de leurs objectifs liés au travail. Il n'est donc pas nécessaire de faire des commentaires sur l'application de l'article premier de la *Charte*.

Le juge Rothstein : Les juges majoritaires ont raison d'affirmer qu'il n'y a pas eu violation de l'al. 2*d*) en l'espèce. Cependant, dans l'arrêt *APMO*, les juges majoritaires n'ont tiré aucune conclusion au sujet du processus du Conseil de la solde, et la validité constitutionnelle de ce processus n'a pas été contestée en l'espèce. Pour le besoin du présent pourvoi, il faut en conséquence présumer qu'il est conforme à la *Charte*.

La décision du mois de décembre 2008 réduisant les hausses salariales déjà consenties aux membres de la GRC constituait une mesure provisoire visant à éviter que les hausses salariales prévues à l'égard de la GRC prennent effet avant l'édiction de la loi de contrôle des dépenses. Cette décision a subséquemment été écartée par l'édiction de la *LCD*. C'est donc la validité de la *LCD* qui est en cause dans le présent pourvoi et le cadre approprié pour en analyser la validité consiste à déterminer si la loi a effectivement rendu impossible pour les membres de la GRC une négociation collective véritable au moyen du processus du Conseil de la solde.

Les faits sont survenus au milieu de la crise financière qui a secoué le monde en 2008. Sans être déterminant, ce contexte est utile pour juger si les consultations que le gouvernement a menées avec le Conseil de la solde ont été suffisantes. Ce contexte n'excuse pas le défaut du gouvernement de procéder à des consultations avant la décision du mois de décembre 2008, mais il nous aide à comprendre de quelle manière s'est déroulé le processus ayant conduit à l'adoption de la *LCD*.

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A contextual approach in this case requires an examination of the impact of the *ERA* on the ability of the Pay Council to engage in good faith exchanges with RCMP management. The *ERA* did place limits on the wage increases of RCMP members for three fiscal years. However, it did not completely restrict all compensation increases and it did not make collective bargaining effectively impossible for RCMP members. While the *ERA* precluded negotiations on the issue of wages for a limited period of time, there were other areas in which the members could see their compensation increase. And, pursuant to s. 62 of the *ERA*, members were able to negotiate an allowance increase for themselves. Although results of collective bargaining are not guaranteed under s. 2(*d*) of the *Charter*, the fact that such allowances were approved in a period of serious budgetary restraint is an important contextual factor in evaluating whether the *ERA* made collective bargaining effectively impossible for RCMP members.

After the December 2008 decision, members of the Pay Council and SRRP had several opportunities to meet with government representatives about the yet-to-be enacted *ERA*. These meetings constituted good faith and meaningful consultation that remedied the government's earlier failure to consult RCMP members. Government representatives demonstrated an openness to negotiate on compensation issues and to engage with the members.

The constitutionality of the *ERA* rests on whether its provisions make collective bargaining between the government and RCMP members effectively impossible, not on the manner in which the law was enacted. The restriction on wage increases imposed by the *ERA* was undoubtedly not the result that RCMP members hoped for. But so long as good faith consultation took place, their dissatisfaction with the result has no bearing on the constitutional analysis. The *ERA* did not make meaningful collective bargaining effectively impossible.

Per Abella J. (dissenting): The federal government's unilateral decision to roll back the agreed-upon RCMP pay increases through the *ERA* was unconstitutional. The increases themselves were the result of an extensive consultation process with the RCMP. The absence of any

L'analyse contextuelle en l'espèce requiert l'examen des conséquences de la *LCD* sur la possibilité pour le Conseil de la solde de procéder à des échanges de bonne foi avec la direction de la GRC. La *LCD* a effectivement restreint pour une période de trois ans les hausses salariales des membres de la GRC. Toutefois, elle n'a pas complètement exclu toute augmentation de la rémunération, et elle n'a pas rendu effectivement impossible toute négociation collective pour les membres de la GRC. La *LCD* empêchait les négociations sur la question salariale pour une période de temps limitée, mais d'autres aspects de la rémunération des membres de la GRC pouvaient donner lieu à une augmentation de leur rémunération. Conformément à l'art. 62 de la *LCD*, les membres ont pu négocier une augmentation de leurs allocations. Bien que l'al. 2*d*) de la *Charte* ne garantisse pas l'issue de la négociation collective, le fait que ces allocations aient été approuvées durant une période de sévères restrictions budgétaires constitue un facteur contextuel important pour déterminer si la *LCD* a fait en sorte qu'il a été effectivement impossible pour les membres de la GRC de négocier collectivement.

Après la décision du mois de décembre 2008, les membres du Conseil de la solde et du PRRF ont eu plusieurs occasions de rencontrer des représentants du gouvernement et de discuter avec eux de la *LCD* avant qu'elle soit édictée. Ces rencontres ont constitué des consultations véritables menées de bonne foi qui ont remédié au défaut antérieur du gouvernement de consulter les membres de la GRC. Les représentants du gouvernement se sont montrés ouverts à négocier les questions de rémunération et à échanger avec les membres de la GRC.

La constitutionnalité de la *LCD* dépend de la réponse à la question de savoir si ses dispositions rendent effectivement impossible la négociation collective entre le gouvernement et les membres de la GRC, et non de la façon dont la loi a été édictée. La restriction des augmentations salariales par la *LCD* ne constituait certainement pas le résultat souhaité par les membres de la GRC. Mais dès lors que des consultations ont été menées de bonne foi, leur insatisfaction quant à l'issue de ces consultations n'a aucune incidence sur l'analyse constitutionnelle. La *LCD* n'a pas rendu effectivement impossible la tenue de négociations collectives véritables.

La juge Abella (dissidente) : La décision unilatérale du gouvernement fédéral de réduire, par application de la *LCD*, les augmentations salariales convenues avec la GRC était inconstitutionnelle. Les augmentations elles-mêmes résultaient d'un vaste processus de consultation

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meaningful opportunity for the RCMP to make representations about the extent and impact of the rollbacks had the effect of completely nullifying the right to a meaningful consultation process. This conduct was precisely what led this Court, in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, to find an unjustified infringement of s. 2(*d*).

An employer cannot unilaterally reduce employees' wages, and must give them an opportunity to make meaningful representations. The unilateral rollback of the RCMP's agreed-upon wage increases without any such prior consultation is a substantial interference with the bargaining process. The fact that the rollbacks were for a three-year period and did not preclude discussion on some other issues did not diminish the severity of the breach.

This breach does not survive the s. 1 proportionality analysis. The government's articulated objectives for the *ERA* were to reduce wage pressure in the private sector, to demonstrate leadership by showing economic restraint in the use of public funds and to manage public sector wage costs to ensure fiscal stability. Even in the midst of a fiscal crisis, however, there are limits on the extent to which the government can restrain public sector wages that are the subject of collective agreements.

While wage rollbacks may technically be seen to be rationally connected to fiscal stability and responsibility, the refusal to engage in any meaningful form of consultation is not. Treasury Board consulted directly with all 17 bargaining agents of the core public service before the *ERA* was enacted. There is nothing in the record to explain what made the RCMP singularly ineligible for discussions about whether or how to roll back its agreed-upon wage package, or how refusing to engage in such discussions furthered the government's ability to address its fiscal concerns.

But even if rationally connected, the unilateral rollback cannot be said to be minimally impairing. Because meaningful consultation took place with almost every other bargaining agent in the core public service, it is clear that less infringing options than a complete absence of negotiations were available to the government. The breach of s. 2(*d*) cannot therefore be justified under s. 1.

avec la GRC. L'absence de toute occasion véritable pour la GRC de présenter des observations au sujet de la portée et des répercussions de la réduction a eu pour effet de réduire à néant le droit à un processus véritable de consultation. C'est précisément une conduite de ce genre qui a amené notre Cour à conclure, dans *Health Services and Support — Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, [2007] 2 R.C.S. 391, à l'existence d'une atteinte injustifiée à l'al. 2*d*).

Un employeur ne peut réduire unilatéralement les salaires des employés et doit leur donner une occasion de présenter des observations utiles. La réduction unilatérale, sans consultation préalable, des augmentations salariales convenues pour la GRC constitue une entrave substantielle au processus de négociation. Le fait que les réductions s'appliquaient pendant une période de trois ans et qu'elles n'interdisaient pas les discussions sur certains autres points n'a pas atténué la gravité de l'atteinte.

Cette atteinte ne résiste pas à l'analyse de la proportionnalité de l'article premier. Les objectifs déclarés du gouvernement, en ce qui concerne la *LCD*, étaient de réduire la pression sur les salaires dans le secteur privé, de montrer la voie à suivre en faisant preuve de retenue dans l'utilisation des fonds publics et de gérer la charge salariale du secteur public de façon à assurer une stabilité financière. Toutefois, même en pleine crise financière, il y a des limites aux restrictions que le gouvernement peut imposer aux salaires du secteur public qui font l'objet de conventions collectives.

Même si les réductions salariales peuvent en principe paraître rationnellement liées à la stabilité et à la responsabilité financières, le refus de prendre part à toute forme de consultation véritable n'y est pas lié. Le Conseil du Trésor a directement consulté tous les 17 agents négociateurs de la fonction publique fédérale centrale avant l'adoption de la *LCD*. Rien au dossier n'explique pourquoi la GRC uniquement n'a pas eu droit à des discussions relatives à l'opportunité de la réduction des augmentations salariales convenues et à la façon de l'appliquer, et rien n'explique comment le refus de prendre part à de telles discussions a pu aider le gouvernement à faire face à ses préoccupations d'ordre financier.

Toutefois, même s'il existe un lien rationnel, on ne saurait affirmer que la réduction unilatérale constituait une atteinte minimale. Parce que des consultations véritables ont eu lieu avec presque tous les autres agents négociateurs de la fonction publique fédérale centrale, il est clair que le gouvernement disposait d'options moins attentatoires qu'une absence totale de négociations. La violation de l'al. 2*d*) ne peut en conséquence être justifiée au regard de l'article premier.

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Christopher Rootham et *Alison McEwen*, pour les appelants.

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Peter Southey, *Donnaree Nygard* and *J. Sanderson Graham*, for the respondent.

Robin K. Basu and *Michael S. Dunn*, for the intervener the Attorney General of Ontario.

Karen Horsman, *Jonathan Penner* and *Keith Evans*, for the intervener the Attorney General of British Columbia.

Graeme G. Mitchell, *Q.C.*, for the intervener the Attorney General for Saskatchewan.

Roderick S. Wiltshire, for the intervener the Attorney General of Alberta.

Steven Barrett and *Ethan Poskanzer*, for the intervener the Canadian Labour Congress.

Fay Faraday, for the intervener the Professional Institute of the Public Service of Canada.

Annick Desjardins, for the intervener the Canadian Union of Public Employees, Local 675.

Andrew Raven, *Andrew Astritis* and *Morgan Rowe*, for the intervener the Public Service Alliance of Canada.

Éric Lévesque, for the interveners Confédération des syndicats nationaux and the Union of Canadian Correctional Officers.

The judgment of McLachlin C.J. and LeBel, Cromwell, Karakatsanis and Wagner JJ. was delivered by

THE CHIEF JUSTICE AND LEBEL J. —

I. Introduction

[1] This appeal raises the question whether the *Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393 ("*ERA*"), violates the guarantee of freedom of association in s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*, and if so, whether the infringement is justified under s. 1. The appellants are serving members of the Royal Canadian Mounted Police

Peter Southey, *Donnaree Nygard* et *J. Sanderson Graham*, pour l'intimé.

Robin K. Basu et *Michael S. Dunn*, pour l'intervenant le procureur général de l'Ontario.

Karen Horsman, *Jonathan Penner* et *Keith Evans*, pour l'intervenant le procureur général de la Colombie-Britannique.

Graeme G. Mitchell, *c.r.*, pour l'intervenant le procureur général de la Saskatchewan.

Roderick S. Wiltshire, pour l'intervenant le procureur général de l'Alberta.

Steven Barrett et *Ethan Poskanzer*, pour l'intervenant le Congrès du travail du Canada.

Fay Faraday, pour l'intervenant l'Institut professionnel de la fonction publique du Canada.

Annick Desjardins, pour l'intervenant le Syndicat canadien de la fonction publique, section locale 675.

Andrew Raven, *Andrew Astritis* et *Morgan Rowe*, pour l'intervenante l'Alliance de la Fonction publique du Canada.

Éric Lévesque, pour les intervenants la Confédération des syndicats nationaux et le Syndicat des agents correctionnels du Canada.

Version française du jugement de la juge en chef McLachlin et des juges LeBel, Cromwell, Karakatsanis et Wagner rendu par

LA JUGE EN CHEF ET LE JUGE LEBEL —

I. Introduction

[1] Dans le présent pourvoi, notre Cour doit décider si la *Loi sur le contrôle des dépenses*, L.C. 2009, c. 2, art. 393 (« *LCD* »), porte atteinte à la liberté d'association garantie à l'al. 2*d*) de la *Charte canadienne des droits et libertés* et, dans l'affirmative, si cette atteinte est justifiée au sens de l'article premier. Les appelants sont des membres actifs de

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("RCMP") who were elected to the national executive of the Staff Relations Representative Program ("SRRP"). They argue that the *ERA*, by rolling back scheduled wage increases for RCMP members without prior consultation, violates the members' constitutional right to collective bargaining, as recognized in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391.

[2] This case was heard together with a related appeal challenging the constitutionality of the RCMP labour relations regime, which prohibits RCMP members from bargaining through an independent union or employee association: *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3 ("*MPAO*"). In the companion case, we affirm and explain the protection afforded to collective bargaining by the freedom of association set out at s. 2(*d*) of the *Charter*.

[3] In *MPAO*, we have concluded that the imposition of the SRRP, combined with a prohibition on collective bargaining by RCMP members, infringes s. 2(*d*) and is not saved under s. 1. As stated at para. 9 of our reasons in that case, the SRRP is the "core component" of the labour relations system currently in place at the RCMP, though it is complemented by two other bodies — the Pay Council and the Mounted Police Members' Legal Fund, a non-profit corporation funded through membership dues that provides legal assistance to RCMP members on employment-related issues. As detailed below, the Pay Council process depends on the existence of the SRRP and therefore cannot survive (at least in its current form) the conclusion in *MPAO* that the SRRP, within the existing RCMP labour relations system, unconstitutionally impairs the s. 2(*d*) rights of RCMP members. The Pay Council process is part of the scheme found to be constitutionally inadequate in *MPAO*.

la Gendarmerie royale du Canada (« GRC ») élus à l'exécutif national du Programme des représentants des relations fonctionnelles (« PRRF »). Ils plaident que la *LCD*, en réduisant sans consultation préalable les augmentations salariales prévues pour les membres de la GRC, viole leur droit constitutionnel de négocier collectivement, que reconnaît l'arrêt *Health Services and Support — Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, 2007 CSC 27, [2007] 2 R.C.S. 391.

[2] La présente affaire a été entendue en même temps qu'un appel connexe dans lequel on conteste la constitutionnalité du régime de relations de travail de la GRC, qui interdit aux membres de cet organisme de négocier par l'entremise d'un syndicat indépendant ou d'une association d'employés : *Association de la police montée de l'Ontario c. Canada (Procureur général)*, 2015 CSC 1, [2015] 1 R.C.S. 3 (« *APMO* »). Dans le pourvoi connexe, nous confirmons et expliquons la protection de la négociation collective par la liberté d'association garantie à l'al. 2*d*) de la *Charte*.

[3] Dans *APMO*, nous avons conclu que l'imposition du PRRF, conjuguée à l'interdiction faite aux membres de la GRC de négocier collectivement, viole l'al. 2*d*) et n'est pas justifiée au regard de l'article premier. Comme nous l'avons indiqué au par. 9 de nos motifs dans cette affaire, le PRRF est « au cœur » du régime de relations de travail actuellement en vigueur au sein de la GRC, même si s'ajoutent à lui deux autres organismes — le Conseil de la solde de la GRC et le Fonds de recours juridique des membres de la Gendarmerie, une société sans but lucratif financée par les cotisations de ses adhérents, qui offre aux membres de la GRC une aide juridique pour des questions liées à l'emploi. Comme nous l'expliquerons en détail ci-après, le processus du Conseil de la solde dépend de l'existence du PRRF et ne peut donc subsister (tout au moins dans sa forme actuelle) puisque, suivant la conclusion tirée dans *APMO*, dans le régime de relations de travail actuellement en vigueur à la GRC, le PRRF viole de façon inconstitutionnelle les droits que l'al. 2*d*) garantit aux membres de la GRC. Le processus du Conseil de la solde fait partie du régime qui, dans *APMO*, a été jugé inadéquat du point de vue constitutionnel.

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[4] This creates difficulties in the present appeal, as we must determine whether s. 2(*d*) can apply in the absence of a constitutionally adequate process of collective bargaining. The appellants do not challenge the constitutionality of the Pay Council process in these proceedings; they take no position on that issue as it arises in *MPAO*. In our view, despite the deficiencies in the Pay Council process, it nonetheless constitutes associational activity that attracts *Charter* protection. The question to be determined on this appeal is whether the *ERA* amounted to substantial interference with that activity despite its constitutional deficiencies. We conclude that it did not and would dismiss the appeal.

II. Background

A. *The Pay Council*

[5] The definition of "employee" in s. 2(1) of the *Public Service Labour Relations Act* ("*PSLRA*"), enacted by the *Public Service Modernization Act*, S.C. 2003, c. 22, s. 2, excludes RCMP members from the labour relations regime governed by the *PSLRA*. They are not permitted to unionize or attempt to bargain collectively. The *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, s. 22(1), provides that the Treasury Board shall establish the pay and allowances paid to members of the RCMP. The Treasury Board is a committee of the federal Cabinet and deals with public sector unions and employee representatives through intermediaries. In the case of RCMP members, the relevant intermediaries are the Minister of Public Safety and Emergency Preparedness (the "Minister") and the RCMP Commissioner. In setting members' pay, the Treasury Board responds to requests from the Minister, who, in turn, acts on recommendations received from the RCMP Commissioner. These recommendations are developed through an advisory board called the Pay Council.

[6] The Pay Council is a committee established by the RCMP Commissioner in 1996. It has no legislative

[4] Cette situation crée des difficultés en l'espèce, car nous devons décider si l'al. 2*d*) peut s'appliquer en l'absence d'un processus de négociation collective adéquat sur le plan constitutionnel. En effet, les appelants ne contestent pas la constitutionnalité du processus du Conseil de la solde dans la présente instance; ils ne prennent pas position sur cette question, car celle-ci est soulevée dans *APMO*. À notre avis, malgré les vices qui l'affectent, le processus du Conseil de la solde constitue tout de même une activité associative qui bénéficie de la protection de la *Charte*. La question à trancher dans le présent pourvoi est donc de savoir si la *LCD* représentait une entrave substantielle à cette activité malgré ses vices constitutionnels. Nous concluons que ce n'était pas le cas et nous sommes d'avis de rejeter le pourvoi.

II. Contexte

A. *Le Conseil de la solde*

[5] L'alinéa *d*) de la définition de « fonctionnaire » au par. 2(1) de la *Loi sur les relations de travail dans la fonction publique* (« *LRTFP* »), adoptée par la *Loi sur la modernisation de la fonction publique*, L.C. 2003, c. 22, art. 2, exclut les membres de la GRC du régime de relations de travail que prévoit la *LRTFP*. Ceux-ci ne peuvent se syndiquer ni tenter de négocier collectivement. Le paragraphe 22(1) de la *Loi sur la Gendarmerie royale du Canada*, L.R.C. 1985, c. R-10, prévoit que le Conseil du Trésor établit la solde et les indemnités versées aux membres de la GRC. Le Conseil du Trésor est un comité du Cabinet fédéral et traite avec les syndicats et les représentants des employés du secteur public au moyen d'intermédiaires. Dans le cas des membres de la GRC, ces intermédiaires sont le ministre de la Sécurité publique et de la Protection civile (le « ministre ») et le commissaire de la GRC. Pour fixer la solde des membres, le Conseil du Trésor répond aux demandes du ministre, qui agit lui-même sur la base des recommandations du commissaire de la GRC. Ces recommandations sont élaborées par l'entremise d'un comité consultatif appelé le Conseil de la solde.

[6] Le Conseil de la solde forme un comité que le commissaire de la GRC a créé en 1996. Il ne possède

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basis. The Pay Council consists of five members: two representatives of management, two representatives of RCMP members, and a neutral chairperson appointed by the Commissioner. Of the two members' representatives, one is the Chair of the SRRP's Pay and Benefits Committee, and the other is an external compensation consultant appointed by the Commissioner on the advice of the SRRP National Executive Committee. The structure and operation of the SRRP is considered more fully in *MPAO*, released concurrently.

B. *The ERA and Its Impact on RCMP Wage Levels*

[7] The Pay Council develops its recommendations for RCMP members' pay and benefits with reference to a comparator group of eight Canadian police forces. The Pay Council aims to provide compensation placing the RCMP near the average of the top three comparator police forces. The anticipated wage increases at issue on this appeal were first discussed in 2007 and cover the years 2008, 2009 and 2010. The Pay Council's recommendations for those years were forwarded to the Commissioner and, subsequently, to the Minister and the Treasury Board. On June 26, 2008, the Treasury Board announced salary increases of 3.32%, 3.5% and 2% for 2008-10. Certain supplemental compensation was also increased: a doubling of service pay (an annual lump sum payment based on years of service) and an increase in the Field Trainer Allowance. These pay levels would have placed total compensation within the Pay Council's target range, the average compensation of the top three Canadian comparator police forces.

[8] According to the respondent, a change in economic circumstances led the government to revisit these increases. The collapse of the U.S. housing

aucun fondement législatif. Le Conseil de la solde est composé de cinq membres : deux représentants de l'organisation, deux représentants des membres de la GRC et un président neutre nommé par le commissaire. L'un des deux représentants des membres est le président du Comité de la solde et des avantages du PRRF, et l'autre est un conseiller externe en rémunération nommé par le commissaire sur le conseil du Comité exécutif national du PRRF. L'organisation et le fonctionnement du PRRF sont examinés plus en détail dans l'arrêt *APMO*, rendu simultanément.

B. *La LCD et ses répercussions sur les niveaux de rémunération de la GRC*

[7] Le Conseil de la solde élabore ses recommandations au sujet de la solde et des avantages sociaux des membres de la GRC en fonction d'un groupe de comparaison référentiel de huit corps policiers canadiens. Il a pour objectif de recommander une rémunération qui situe la GRC près de la moyenne des trois corps policiers les mieux rémunérés dans le groupe de comparaison. Les augmentations de salaire prévues qui sont en cause en l'espèce ont fait pour la première fois l'objet de discussions en 2007 et s'appliquaient aux années 2008, 2009 et 2010. Les recommandations du Conseil de la solde relatives à ces années ont été transmises au commissaire et, par la suite, au ministre ainsi qu'au Conseil du Trésor. Le 26 juin 2008, le Conseil du Trésor a annoncé des hausses salariales de 3,32 %, 3,5 % et 2 % pour les années 2008 à 2010. Certaines indemnités supplémentaires ont également été majorées : la solde de service (une somme forfaitaire annuelle calculée en fonction du nombre d'années de service) a été doublée et l'indemnité aux moniteurs de formation pratique a été augmentée. Ces niveaux de solde auraient placé la rémunération totale des membres de la GRC dans la fourchette cible du Conseil de la solde, soit la rémunération moyenne des trois corps policiers canadiens les mieux rémunérés dans le groupe de comparaison.

[8] Selon l'intimé, l'évolution de la situation économique a amené le gouvernement à revoir ces augmentations. L'effondrement du marché américain de

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market in the summer of 2007 resulted in a global financial crisis that reached its peak in the fall of 2008. As is well known, this crisis included the bankruptcy of the American investment bank Lehman Brothers and the near-collapse of other significant financial institutions. Projections of gross domestic product growth fell dramatically, and unemployment in Canada rose sharply in November 2008.

[9] The Minister of Finance, Hon. James M. Flaherty, delivered an economic and fiscal statement on November 27, 2008 (*Protecting Canada's Future: Economic and Fiscal Statement, November 27, 2008* (2008) ("*Statement*")). The *Statement* projected budget deficits for fiscal years 2009-10, 2010-11 and 2011-12, and proposed wide-ranging economic measures intended to stabilize the financial system and enhance credit availability to Canadian businesses affected by the global credit crisis. At the same time, the government implemented a review of public spending, including public sector wages and salaries. As a result, the Treasury Board Secretariat recommended limiting spending on compensation. Where collective bargaining was underway, the Treasury Board Secretariat provided its negotiators with a mandate to bargain within certain wage increase limits. The *Statement* announced the government's intention to introduce wage restraint legislation — to limit or roll back wage increases for the public sector to 2.3% for 2007-8, and 1.5% for 2008-10 (p. 10).

[10] On December 4, 2008, the Governor General prorogued Parliament. Accordingly, the announced wage restraint legislation — the *ERA* — could not be introduced until early 2009. On December 11, 2008, however, the Treasury Board revisited its decision concerning RCMP wages for the fiscal years 2008-10. It communicated to the RCMP Commissioner a revised wage decision providing for salary increases of 1.5% in each of 2008, 2009 and 2010, in line with limits previously announced for the public sector.

l'habitation à l'été 2007 a provoqué une crise financière mondiale qui a atteint son paroxysme à l'automne 2008. Comme on le sait, cette crise a entraîné la faillite de la banque d'investissement américaine Lehman Brothers et le quasi-effondrement d'autres institutions financières importantes. Les prévisions de la croissance du produit intérieur brut ont chuté de façon spectaculaire et le taux de chômage a grimpé en flèche au Canada en novembre 2008.

[9] Le 27 novembre 2008, le ministre des Finances, l'honorable James M. Flaherty, a présenté un énoncé économique et financier (*Protéger l'avenir du Canada : Énoncé économique et financier, le 27 novembre 2008* (2008) (« *Énoncé* »)) dans lequel il prévoyait des déficits budgétaires pour les exercices financiers 2009-2010, 2010-2011 et 2011-2012, et proposait d'importantes mesures économiques visant à stabiliser le système financier et à améliorer l'accès au crédit pour les entreprises canadiennes touchées par la crise du crédit mondiale. À la même époque, le gouvernement procédait à un examen des dépenses de l'État, notamment de la rémunération dans le secteur public. En conséquence, le Secrétariat du Conseil du Trésor a recommandé de limiter les dépenses salariales. Là où des négociations collectives étaient en cours, le Secrétariat du Conseil du Trésor donnait mandat à ses agents de négocier les augmentations de salaire dans le cadre de certaines limites. Dans son *Énoncé*, le gouvernement annonçait son intention de déposer un projet de loi sur le contrôle des salaires — pour limiter ou réduire les augmentations salariales dans le secteur public à 2,3 % pour 2007-2008 et à 1,5 % pour les années 2008 à 2010 (p. 10).

[10] Le 4 décembre 2008, la gouverneure générale a prorogé le Parlement. Le projet de loi sur le contrôle des salaires qui avait été annoncé — la *LCD* — n'a donc pu être déposé avant le début de 2009. Cependant, le 11 décembre 2008, le Conseil du Trésor a révisé sa décision concernant la solde des membres de la GRC pour les exercices 2008 à 2010. Il a communiqué au commissaire de la GRC une décision révisée dans laquelle il accordait des augmentations salariales de 1,5 % pour chacune des années 2008, 2009 et 2010, en conformité avec les limites déjà annoncées pour le secteur public.

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[11] Members of the SRRP's National Executive Committee and the Pay Council approached Treasury Board officials and members of Cabinet to discuss the wage rollback. The appellants met with the Minister of Public Safety, Hon. Peter Van Loan, on January 27, 2009 and February 2, 2009, and with the President of the Treasury Board, Hon. Vic Toews, on February 5, 2009. On February 11, 2009, the Pay Council presented the President of the Treasury Board with a package of recommendations concerning the announced rollback, but this proposal was rejected as inconsistent with the *ERA*.

[12] The *ERA* was enacted by s. 393 of the *Budget Implementation Act, 2009*, S.C. 2009, c. 2, which was tabled in the House of Commons on February 6, 2009, and received Royal Assent on March 12, 2009. Section 16 of the *ERA* imposed the following limits on wage increases in the public sector:

16. Despite any collective agreement, arbitral award or terms and conditions of employment to the contrary, but subject to the other provisions of this Act, the rates of pay for employees are to be increased, or are deemed to have been increased, as the case may be, by the following percentages for any 12-month period that begins during any of the following fiscal years:

(*a*) the 2006–2007 fiscal year, 2.5%;

(*b*) the 2007–2008 fiscal year, 2.3%;

(*c*) the 2008–2009 fiscal year, 1.5%;

(*d*) the 2009–2010 fiscal year, 1.5%; and

(*e*) the 2010–2011 fiscal year, 1.5%.

[13] The *ERA* prohibited any other increases to compensation. Any terms or conditions providing for such increases, for a period beginning December 8, 2008 and ending March 31, 2011, were of no effect pursuant to ss. 44 to 49. However, the *ERA* contained an exception for RCMP members:

[11] Des membres du Comité exécutif national du PRRF et le Conseil de la solde ont pris contact avec des représentants du Conseil du Trésor et des membres du Cabinet pour discuter de la réduction des salaires. Les appelants ont rencontré le ministre de la Sécurité publique, l'honorable Peter Van Loan, le 27 janvier et le 2 février 2009, ainsi que le président du Conseil du Trésor, l'honorable Vic Toews, le 5 février 2009. Le 11 février 2009, le Conseil de la solde a présenté au président du Conseil du Trésor un ensemble de recommandations portant sur la réduction annoncée, mais celles-ci ont été rejetées en raison de leur incompatibilité avec la *LCD*.

[12] La *LCD* a été édictée par l'art. 393 de la *Loi d'exécution du budget de 2009*, L.C. 2009, c. 2, qui a été déposée à la Chambre des communes le 6 février 2009 et a reçu la sanction royale le 12 mars 2009. L'article 16 de la *LCD* imposait les limites suivantes aux augmentations de salaire dans le secteur public :

16. Malgré toute convention collective, décision arbitrale ou condition d'emploi à l'effet contraire, mais sous réserve des autres dispositions de la présente loi, les taux de salaire des employés sont augmentés, ou sont réputés l'avoir été, selon le cas, selon les taux figurant ci-après à l'égard de toute période de douze mois commençant au cours d'un des exercices suivants :

a) l'exercice 2006-2007, un taux de deux et demi pour cent;

b) l'exercice 2007-2008, un taux de deux et trois dixièmes pour cent;

c) l'exercice 2008-2009, un taux de un et demi pour cent;

d) l'exercice 2009-2010, un taux de un et demi pour cent;

e) l'exercice 2010-2011, un taux de un et demi pour cent.

[13] La *LCD* interdisait toute autre augmentation de la rémunération. Toute condition d'emploi prévoyant une telle augmentation, au cours de la période allant du 8 décembre 2008 au 31 mars 2011, était rendue inopérante aux termes des art. 44 à 49. Toutefois, la *LCD* prévoyait une exception pour les membres de la GRC :

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62. Despite sections 44 to 49, the Treasury Board may change the amount or rate of any allowance, or make any new allowance, applicable to members of the Royal Canadian Mounted Police if the Treasury Board is of the opinion that the change or the new allowance, as the case may be, is critical to support transformation initiatives relating to the Royal Canadian Mounted Police.

[14] On June 9, 2009, pursuant to s. 62, the Treasury Board approved compensation increases for RCMP members. A new policy was implemented increasing compensation for off-duty members required to be available for work. Service pay was also increased from 1% to 1.5% for every five years of service and extended, for the first time, to certain civilian members. The service pay increase had been first proposed by the Pay Council, in its February 11, 2009 recommendations to the Treasury Board.

III. Judicial History

A. *Federal Court, 2011 FC 735, 392 F.T.R. 25*

[15] The application judge, Heneghan J., allowed the application for judicial review of the Treasury Board's December 11, 2008 decision. She also declared that both the decision and ss. 16, 35, 38, 43, 46 and 49 of the *ERA* violated s. 2(*d*) of the *Charter*, and that neither violation was saved by s. 1.

[16] Heneghan J. found that the Pay Council was "the only formal means through which Members of the RCMP [could] collectively pursue goals relating to remuneration with their employer, . . . the Treasury Board" (para. 72). She concluded that the Treasury Board's 2008 decision and the subsequently enacted *ERA* made it effectively impossible for the Pay Council to make representations on behalf of members of the RCMP and to have those representations considered in good faith. The unilateral cancellation of the previous pay and benefits agreement was found to be a substantial interference with the right protected by s. 2(*d*) of the *Charter*. Given that the cancellation of the pay increases would have lasting effects on pension amounts and

62. Malgré les articles 44 à 49, le Conseil du Trésor peut créer une nouvelle allocation applicable aux membres de la Gendarmerie royale du Canada ou modifier le montant ou le taux d'une allocation qu'ils reçoivent s'il estime qu'une telle mesure est indispensable à la mise en œuvre de toute initiative de transformation relative à cet organisme.

[14] Conformément à l'art. 62, le Conseil du Trésor a approuvé le 9 juin 2009 des augmentations de la rémunération des membres de la GRC. Lors de la mise en œuvre d'une nouvelle politique, la rémunération des membres qui doivent demeurer disponibles en dehors de leurs heures de travail a été augmentée. La solde de service a elle aussi été augmentée, passant de 1 à 1,5 % pour chaque période de cinq ans de service et pouvait, pour la première fois, être versée à certains membres civils. L'augmentation de la solde de service avait initialement été proposée par le Conseil de la solde, dans les recommandations du 11 février 2009 au Conseil du Trésor.

III. Historique judiciaire

A. *Cour fédérale, 2011 CF 735*

[15] La juge Heneghan a accueilli la demande de contrôle judiciaire de la décision prise le 11 décembre 2008 par le Conseil du Trésor. Elle a également déclaré que la décision ainsi que les art. 16, 35, 38, 43, 46 et 49 de la *LCD* violaient l'al. 2*d*) de la *Charte*, et qu'aucune de ces violations n'était justifiée au regard de l'article premier.

[16] La juge Heneghan a conclu que le Conseil de la solde était « le seul mécanisme formel qui permet[tait] aux membres de la GRC de poursuivre collectivement des objectifs liés à la rémunération avec leur employeur, [. . .] le Conseil du Trésor » (par. 72 (CanLII)). Elle a estimé que la décision de 2008 du Conseil du Trésor et la *LCD* adoptée par la suite ont rendu de fait impossible pour le Conseil de la solde de présenter des observations au nom des membres de la GRC et de les voir prises en compte de bonne foi. L'annulation unilatérale de l'entente antérieure sur la solde et les avantages sociaux constituait, selon elle, une entrave substantielle aux droits que protège l'al. 2*d*) de la *Charte*. Comme l'annulation des augmentations de la solde prévues aurait

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future wage increases, the trial judge held that the impact of the *ERA* was permanent.

[17] Turning to her s. 1 *Charter* analysis, the trial judge held that some of the stated aims of the Treasury Board's decision — such as providing leadership, showing restraint and demonstrating respect for public funds in a time of financial crisis — were political in nature and were not pressing and substantial. She went on to find that the Attorney General of Canada had not provided persuasive and cogent evidence to show a rational connection between the reduction of wage increases of RCMP members and the stated aims of reducing upward pressure on private sector wages in a time of economic turmoil, providing leadership and demonstrating restraint with public funds. On the issue of minimal impairment, the judge held that the impairment to be considered was not the financial impact to members of the RCMP but the impairment of the s. 2(*d*) *Charter* right, particularly of the Pay Council process. Noting that the Treasury Board had taken the time to consult 17 bargaining agents and that it, along with separate government agencies, had succeeded in signing upwards of 40 agreements with bargaining agents inside and outside of the core public administration, the application judge found the Treasury Board's unilateral action and disregard for the Pay Council process to be not minimally impairing. Finally, the trial judge found that the only substantiated benefit — saving the Treasury Board an undisclosed amount of money — did not outweigh the detrimental effects of the *ERA*.

B. *Federal Court of Appeal, 2013 FCA 112, 444 N.R. 129*

[18] The Federal Court of Appeal (per Dawson J.A., Nadon and Trudel JJ.A. concurring) held that

des effets durables sur les prestations de pension et les futures hausses salariales, la juge de première instance a statué que les répercussions de la *LCD* étaient permanentes.

[17] Dans son analyse relative à l'article premier de la *Charte*, la juge de première instance a conclu que certains objectifs déclarés de la décision du Conseil du Trésor — par exemple, montrer la voie à suivre, faire preuve de retenue et démontrer du respect à l'égard des fonds publics en période de crise financière — constituaient des objectifs de nature politique et n'étaient pas urgents et réels. Elle a ajouté que le procureur général du Canada n'avait pas présenté d'éléments de preuve établissant de façon convaincante l'existence d'un lien rationnel entre la réduction des augmentations de la solde des membres de la GRC et les objectifs déclarés de réduire la pression à la hausse sur les salaires dans le secteur privé dans une période de bouleversements économiques, de montrer la voie à suivre et de faire preuve de retenue dans l'emploi des fonds publics. Sur la question de l'atteinte minimale, la juge a statué que l'atteinte qu'il fallait examiner ne portait pas sur les répercussions financières sur les membres de la GRC, mais plutôt sur la violation du droit garanti à l'al. 2*d*) de la *Charte*, plus particulièrement à l'égard du processus du Conseil de la solde. Elle a fait remarquer que le Conseil du Trésor avait pris le temps de consulter 17 agents négociateurs et que, de concert avec des organismes distincts du gouvernement, il avait signé plus de 40 ententes avec les agents négociateurs de l'intérieur et de l'extérieur de l'administration publique centrale. La juge de première instance a alors conclu que la mesure unilatérale prise par le Conseil du Trésor et son indifférence à l'égard du processus du Conseil de la solde ne constituaient pas une atteinte minimale. Enfin, elle a statué que le seul avantage justifié — permettre au Conseil du Trésor d'épargner une somme d'argent non dévoilée — ne l'emportait pas sur les effets préjudiciables de la *LCD*.

B. *Cour d'appel fédérale, 2013 CAF 112*

[18] La Cour d'appel fédérale (la juge Dawson, avec l'accord des juges Nadon et Trudel) a estimé

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the application judge had committed an error of law by treating the Treasury Board decision and the *ERA* as a single limit on freedom of association and failing to conduct separate constitutional analyses of each. Having found that the *ERA* gave statutory effect to the Treasury Board's December 2008 decision, the Federal Court of Appeal conducted a *de novo* analysis of the constitutionality of the impugned provisions of the *ERA*. It found that the *ERA* did not violate the appellants' right of association and allowed the appeal.

[19] The Federal Court of Appeal identified two contextual factors relevant to its analysis of the constitutionality of the *ERA*: (i) the nature of the associational activity enjoyed by members of the RCMP, including the fact that the Treasury Board can act unilaterally as it is not obliged to consult or negotiate with the Pay Council or Staff Relations Representatives with respect to wages and benefits; and (ii) the purpose of the *ERA* and its effect upon members of the RCMP.

[20] The court concluded that the *ERA* did not substantially interfere with the process by which members of the RCMP pursue their associational activity, as it did not make it impossible for members of the RCMP to act collectively to achieve workplace goals. Rather, the *ERA* merely modified terms and conditions of employment which the Treasury Board was authorized by law to set. According to the Federal Court of Appeal, the *ERA* did not substantially interfere with the existing process by which associational activity was pursued because that process is one in which members do not bargain directly with their employer and where the employer, as the ultimate decision-maker, was authorized to set the terms and conditions of employment without consultation or negotiation. Furthermore, the Pay Council continued to exert meaningful influence over certain working conditions other than pay and benefits, demonstrating that the associational process continued to function despite the enactment of the *ERA*. Accordingly, the *ERA* did not render the RCMP's associational process pointless.

que la juge de première instance avait commis une erreur de droit en considérant que la décision du Conseil du Trésor et la *LCD* constituaient ensemble une seule restriction à la liberté d'association, et en n'effectuant pas une analyse constitutionnelle distincte de chacune d'elles. Après avoir conclu que la *LCD* donnait un effet législatif à la décision de décembre 2008 du Conseil du Trésor, la Cour d'appel fédérale a effectué sa propre analyse de la constitutionnalité des dispositions contestées de la *LCD*. Elle a décidé que la *LCD* ne portait pas atteinte au droit d'association des appelants et elle a accueilli l'appel.

[19] La Cour d'appel fédérale a relevé deux facteurs contextuels pertinents pour son analyse de la constitutionnalité de la *LCD* : (i) la nature de l'activité associative dont bénéficient les membres de la GRC, notamment le fait que le Conseil du Trésor peut agir unilatéralement et n'est pas tenu de consulter le Conseil de la solde ou les représentants des relations fonctionnelles, ni de négocier avec eux, sur la question de la solde et des avantages sociaux; (ii) l'objet de la *LCD* et ses effets sur les membres de la GRC.

[20] Selon la Cour d'appel, la *LCD* n'avait pas entravé de façon substantielle le processus par lequel les membres de la GRC poursuivaient leur activité associative, car elle n'avait pas éliminé la possibilité pour eux d'agir collectivement pour réaliser des objectifs liés au travail. La *LCD* avait plutôt simplement modifié des conditions d'emploi que le Conseil du Trésor était autorisé à établir en vertu de la loi. D'après la Cour d'appel, la *LCD* n'avait pas entravé sérieusement le processus existant par lequel l'activité associative était poursuivie, parce qu'il s'agit d'un processus dans lequel les membres ne négocient pas directement avec leur employeur et où celui-ci est autorisé, en tant que décideur ultime, à établir les conditions d'emploi sans consultation ni négociation. En outre, le Conseil de la solde a continué d'exercer une influence significative sur certaines conditions de travail, autres que la solde et les avantages sociaux, ce qui démontre que le processus d'association a continué de fonctionner malgré l'adoption de la *LCD*. Par conséquent, la Cour d'appel a estimé que la *LCD* n'avait pas rendu la liberté d'association inutile.

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[21] On the issue of the *ERA*'s purpose, the Federal Court of Appeal found that the purpose of the *ERA* was valid as part of a series of measures designed to stabilize the economy in a time of financial crisis. Moreover, the Federal Court of Appeal held that the measures contained in the *ERA* did not prohibit or make it substantially impossible for members of the RCMP to exercise their freedom of association in the future.

IV. Issues

[22] On November 4, 2013, the Chief Justice stated the following constitutional questions:

1. Do ss. 16, 35, 38, 43, 46 and 49 of the *Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393, infringe s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

[23] The parties have also raised issues concerning the constitutionality of the Treasury Board decision of December 11, 2008, and the appropriate remedy. These issues are rendered moot by our decision in this case that the impugned provisions of the *ERA* are constitutionally valid, and by our decision in *MPAO* that the SRRP violates s. 2(*d*) and cannot be saved under s. 1 of the *Charter*.

V. Analysis

A. *Theoretical Foundations of Section 2(d)*

[24] For the reasons given in the companion case, *MPAO*, s. 2(*d*) of the *Charter* protects workers' freedom to associate and pursue their workplace goals through collective bargaining. In s. 2(*d*) cases, the courts must ask whether state action has substantially impaired the employees' collective pursuit of

[21] À propos de l'objet de la *LCD*, la Cour d'appel fédérale a conclu à sa validité, comme il faisait partie d'une série de mesures destinées à stabiliser l'économie en période de crise financière. En outre, elle a statué que les mesures contenues dans la *LCD* n'avaient pas empêché ou rendu de fait impossible l'exercice futur de la liberté d'association des membres de la GRC.

IV. Questions en litige

[22] Le 4 novembre 2013, la Juge en chef a formulé les questions constitutionnelles suivantes :

1. Les articles 16, 35, 38, 43, 46 et 49 de la *Loi sur le contrôle des dépenses*, L.C. 2009, c. 2, art. 393, violent-ils l'al. 2*d*) de la *Charte canadienne des droits et libertés*?

2. Dans l'affirmative, s'agit-il d'une violation constituant une limite raisonnable, établie par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique conformément à l'article premier de la *Charte canadienne des droits et libertés*?

[23] Les parties ont également soulevé des questions portant sur la constitutionnalité de la décision prise par le Conseil du Trésor le 11 décembre 2008, et sur la réparation appropriée. Ces questions sont maintenant théoriques puisque nous avons statué en l'espèce que les dispositions attaquées de la *LCD* sont constitutionnellement valides, et du fait de notre décision, dans *APMO*, suivant laquelle le PRRF viole l'al. 2*d*) et que cette violation ne peut être validée par application de l'article premier de la *Charte*.

V. Analyse

A. *Fondements théoriques de l'al. 2d)*

[24] Pour les motifs exposés dans l'arrêt connexe *APMO*, l'al. 2*d*) de la *Charte* protège la liberté des travailleurs de s'associer et de poursuivre leurs objectifs liés au travail au moyen de la négociation collective. Dans les instances relatives à l'al. 2*d*), les tribunaux doivent déterminer si les mesures prises

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workplace goals. The test applicable to this question is set out in *Health Services*.

[25] Section 2(*d*) guarantees a right to a meaningful labour relations process, but it does not guarantee a particular outcome. What is guaranteed is the right of employees to associate in a meaningful way in the pursuit of collective workplace goals. In *MPAO*, we concluded that the imposition of the SRRP, combined with a prohibition on collective bargaining by RCMP members, infringes this right. At the same time, the record here establishes that, in the absence of a true collective bargaining process, RCMP members used the Pay Council to advance their compensation-related goals. In our view, the *Charter* protects that associational activity, even though the process does not provide all that the *Charter* requires. The legal alternatives available are not full collective bargaining or a total absence of constitutional protection. Interference with a constitutionally inadequate process may attract scrutiny under s. 2(*d*). Accordingly, we must examine whether the *ERA* substantially interfered with the existing Pay Council process, so as to infringe the appellants' freedom of association.

B. *Whether the ERA Infringes Section 2(d)*

[26] For the affected RCMP members, the *ERA* resulted in a rollback of scheduled wage increases from the previous Pay Council recommendations accepted by the Treasury Board, from between 2% and 3.5% to 1.5% in each of 2008, 2009 and 2010. The original increase would also have doubled service pay and increased the Field Trainer Allowance. Both of these were also eliminated by the *ERA*, subject to subsequent negotiations pursuant to s. 62 of that Act.

par l'État ont entravé de façon substantielle la poursuite collective par les employés d'objectifs liés au travail. Le critère applicable pour trancher cette question est énoncé dans l'arrêt *Health Services*.

[25] L'alinéa 2*d*) garantit le droit à un processus véritable de relations de travail, sans pour autant donner la certitude d'un résultat en particulier. Cette disposition protège le droit des employés de s'associer de façon utile dans la poursuite d'objectifs collectifs relatifs au travail. Dans *APMO*, nous avons conclu que l'imposition du PRRF, conjuguée à l'interdiction pour les membres de la GRC de négocier collectivement, portait atteinte à ce droit. En même temps, le dossier en l'espèce établit que, en l'absence d'un processus véritable de négociation collective, les membres de la GRC se sont servis du Conseil de la solde en vue d'atteindre leurs objectifs liés à la rémunération. À notre avis, la *Charte* protège cette activité associative, même si le processus ne respecte pas l'ensemble des exigences de la *Charte*. Un processus complet de négociation collective ou une absence totale de protection constitutionnelle ne constituent pas des solutions de rechange légales possibles. Mais une entrave à un processus inadéquat au plan constitutionnel peut être l'objet d'un examen constitutionnel à l'égard des exigences de l'al. 2*d*). Par conséquent, nous devons déterminer si la *LCD* a entravé de façon substantielle le processus du Conseil de la solde existant, de sorte qu'elle a porté atteinte à la liberté d'association des appelants.

B. *La LCD viole-t-elle l'al. 2d)?*

[26] Pour les membres de la GRC qui sont touchés, la *LCD* a entraîné une réduction des augmentations salariales recommandées par le Conseil de la solde et acceptées par le Conseil du Trésor. Les augmentations qui devaient se situer entre 2 % et 3,5 % ont été réduites à 1,5 % pour chacune des années 2008, 2009 et 2010. On prévoyait aussi initialement le doublement de la solde de service et une augmentation de l'indemnité versée aux moniteurs de formation pratique. La *LCD* a également supprimé ces deux avantages, sous réserve de négociations ultérieures sous le régime de l'art. 62 de cette loi.

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[27] The Attorney General of Canada acknowledges that wages are an important issue, but notes that the limits imposed by the *ERA* were time-limited in nature, were shared by all public servants, and did not permanently remove the subject of wages from collective bargaining. Accordingly, he suggests that the importance of the wage restraints does not rise to the level of a s. 2(*d*) violation. For the reasons that follow, we conclude that s. 2(*d*) was not breached.

[28] The facts of *Health Services* should not be understood as a minimum threshold for finding a breach of s. 2(*d*). Nonetheless, the comparison between the impugned legislation in that case and the *ERA* is instructive. The *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2, Part 2, introduced radical changes to significant terms covered by collective agreements previously concluded. By contrast, the level at which the *ERA* capped wage increases for members of the RCMP was consistent with the going rate reached in agreements concluded with other bargaining agents inside and outside of the core public administration and so reflected an outcome consistent with actual bargaining processes. The process followed to impose the wage restraints thus did not disregard the substance of the former procedure. And the *ERA* did not preclude consultation on other compensation-related issues, either in the past or the future.

[29] Furthermore, the *ERA* did not prevent the consultation process from moving forward. Most significantly in the case of RCMP members, s. 62 permitted the negotiation of additional allowances as part of "transformation[al] initiatives" within the RCMP. The record indicates that RCMP members were able to obtain significant benefits as a result of subsequent proposals brought forward through the existing Pay Council process. Service pay was increased from 1% to 1.5% for every five years of service — representing a 50% increase — and extended for the first time to certain civilian members. A new and more generous policy for stand-by pay was also approved. 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

[27] Le procureur général du Canada reconnaît l'importance des salaires, mais fait remarquer que les restrictions imposées par la *LCD* s'appliquaient pour une durée limitée à l'ensemble des fonctionnaires et n'excluaient pas cette question définitivement du processus de la négociation collective. Par conséquent, il laisse entendre que les restrictions salariales n'ont pas une importance telle qu'il en résulte une violation de l'al. 2*d*). Pour les motifs qui suivent, nous concluons qu'il n'y a pas eu violation de l'al. 2*d*).

[28] Il ne faut pas considérer que les faits de l'affaire *Health Services* constituent un seuil minimal pour causer une violation de l'al. 2*d*). Néanmoins, la comparaison entre la loi contestée dans cette affaire et la *LCD* est instructive. La partie 2 de la *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2, modifiait radicalement des conditions importantes de conventions collectives en vigueur. En revanche, le niveau des augmentations salariales des membres de la GRC prévu dans la *LCD* correspondait au taux courant établi dans des ententes conclues avec d'autres agents négociateurs de l'intérieur et de l'extérieur de l'administration publique centrale et reflétait donc un résultat conforme aux processus réels de négociation. Le processus d'imposition des restrictions salariales ne faisait donc pas abstraction de la procédure suivie antérieurement. Et la *LCD* n'interdisait pas la consultation sur d'autres questions salariales, que ce soit pour le passé ou pour l'avenir.

[29] Qui plus est, la *LCD* n'empêchait pas la poursuite du processus de consultation. Fait plus important encore dans le cas des membres de la GRC, l'art. 62 permettait la négociation d'allocations additionnelles dans le cadre de toute « initiative de transformation » au sein de la GRC. Il ressort du dossier que les membres de la GRC ont pu obtenir d'importants avantages à la suite de propositions ultérieures présentées dans le cadre du processus du Conseil de la solde. La solde de service a été augmentée de 1 à 1,5 % pour chaque période de cinq ans de service — ce qui représentait une augmentation de 50 % — et pouvait pour la première fois être versée à certains membres civils. On a également approuvé une nouvelle politique plus généreuse relative à l'indemnité de disponibilité. Les

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of the *ERA* had a minor impact on the appellants' associational activity.

[30] Simply put, the Pay Council continued to afford RCMP members a process for consultation on compensation-related issues within the constitutionally inadequate labour relations framework that was then in place. The *ERA* and the government's course of conduct cannot be said to have substantially impaired the collective pursuit of the workplace goals of RCMP members. This said, our conclusions, as they relate to the *ERA*'s impact on the Pay Council process, should not be taken to endorse the constitutional validity of that process or of similar schemes.

VI. Justification

[31] In view of our conclusion on the s. 2(*d*) question, we need not determine whether any infringement in this case is a reasonable limit justified in a free and democratic society. We will not comment on the application of s. 1 of the *Charter*.

VII. Conclusion

[32] We would dismiss the appeal, with costs to the respondent throughout, and answer the constitutional questions as follows:

1. Do ss. 16, 35, 38, 43, 46 and 49 of the *Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393, infringe s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?

No.

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

résultats concrets ne sont pas déterminants dans une analyse relative à l'al. 2*d*), mais ceux qui ont été mis en preuve en l'espèce étayent une conclusion selon laquelle l'adoption de la *LCD* a eu des répercussions mineures sur les activités associatives des appelants.

[30] Bref, le Conseil de la solde a continué d'offrir aux membres de la GRC un processus de consultation sur les questions de rémunération en dépit du cadre de relations de travail constitutionnellement inadéquat alors en place. On ne saurait alors affirmer que la *LCD* et la conduite du gouvernement ont entravé de façon substantielle, pour les membres de la GRC, la poursuite collective de leurs objectifs liés au travail. Cela dit, il ne faut pas considérer que nos conclusions relatives à l'incidence de la *LCD* sur le processus du Conseil de la solde confirment la validité constitutionnelle de ce processus ou de régimes semblables.

VI. Justification

[31] Compte tenu de notre conclusion sur la question relative à l'al. 2*d*), il n'est pas nécessaire de déterminer si une violation en l'espèce constitue une limite raisonnable qui est justifiée dans le cadre d'une société libre et démocratique. Nous n'émettons aucun commentaire sur l'application de l'article premier de la *Charte*.

VII. Conclusion

[32] Nous sommes d'avis de rejeter le pourvoi, avec dépens à l'intimé devant toutes les cours, et de répondre ainsi aux questions constitutionnelles :

1. Les articles 16, 35, 38, 43, 46 et 49 de la *Loi sur le contrôle des dépenses*, L.C. 2009, c. 2, art. 393, violent-ils l'al. 2*d*) de la *Charte canadienne des droits et libertés*?

Non.

2. Dans l'affirmative, s'agit-il d'une violation constituant une limite raisonnable, établie par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique conformément à l'article premier de la *Charte canadienne des droits et libertés*?

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It is not necessary to answer the question.

The following are the reasons delivered by

ROTHSTEIN J. —

I. Introduction

[33] I concur with the majority's disposition of this appeal. However, as their reasons apply the analytical framework of the majority reasons in the companion case of *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3 ("*MPAO*"), in which I have dissented, I now issue separate reasons. The correct framework to analyse this case is to ask whether the *Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393 ("*ERA*"), rendered meaningful collective bargaining for RCMP members, via the Pay Council process, effectively impossible. As meaningful collective bargaining occurred and the *ERA* did not preclude negotiations in the future, there is no violation of s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*.

II. Facts and Judicial History

[34] I accept the majority's summary of the facts and judicial history. Any departures or additions are in the analysis below.

III. Analysis

A. *The Effective Impossibility Test*

[35] In *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, this Court found that s. 2(*d*) encompasses a right to collective bargaining that "requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation" (para. 90). The majority of the Court affirmed this conclusion in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, and set out the test for finding an infringement of s. 2(*d*) of the *Charter* in the labour relations context: ". . . whether the impugned law or state action

Il n'est pas nécessaire de répondre à cette question.

Version française des motifs rendus par

LE JUGE ROTHSTEIN —

I. Introduction

[33] Je souscris au dispositif des juges majoritaires en l'espèce. Toutefois, comme ils appliquent le cadre analytique proposé par la majorité dans l'affaire connexe *Association de la police montée de l'Ontario c. Canada (Procureur général)*, 2015 CSC 1, [2015] 1 R.C.S. 3 (« *APMO* »), dans laquelle je suis dissident, je formule des motifs distincts. Le cadre approprié pour analyser cette affaire consiste à déterminer si la *Loi sur le contrôle des dépenses*, L.C. 2009, c. 2, art. 393 (la « *LCD* »), a effectivement rendu impossible pour les membres de la GRC une négociation collective véritable au moyen du processus du Conseil de la solde. Comme une négociation collective véritable a eu lieu et que la *LCD* n'a pas empêché les négociations pour l'avenir, il n'y a pas eu violation de l'al. 2*d*) de la *Charte canadienne des droits et libertés*.

II. Faits et historique judiciaire

[34] Je fais mien le résumé des faits et de l'historique judiciaire des juges majoritaires. Toute divergence ou tout ajout se retrouve dans l'analyse qui suit.

III. Analyse

A. *Le critère de l'impossibilité effective*

[35] Dans l'arrêt *Health Services and Support — Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, 2007 CSC 27, [2007] 2 R.C.S. 391, notre Cour a jugé que l'al. 2*d*) comporte un droit de négocier collectivement qui « implique que l'employeur et les employés se rencontrent et négocient de bonne foi en vue de réaliser leur objectif commun d'accommodement par des moyens pacifiques et productifs » (par. 90). La Cour à la majorité a confirmé cette conclusion dans *Ontario (Procureur général) c. Fraser*, 2011 CSC 20, [2011] 2 R.C.S. 3, et y a énoncé comme suit le critère applicable pour décider s'il y a violation de l'al. 2*d*) de la *Charte* en

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has the effect of making it impossible to act collectively to achieve workplace goals" (para. 46). Collective bargaining is protected, but only "in the minimal sense of good faith exchanges" (*Fraser*, at para. 90). An infringement of s. 2(*d*) will be found where employees or employee representatives can demonstrate that government action or legislation makes it effectively impossible to make collective representations and to have management consider these representations in good faith (*Fraser*, at para. 98).

B. *The Relevant Inquiry Is Into the Validity of the ERA*

[36] There is some debate between the parties to this appeal as to the relevant time period to consider when determining whether there was a s. 2(*d*) breach in the present case. That debate has focused on the timing and degree of consultation between the Treasury Board and the RCMP's Pay Council, a body designed to resolve pay and benefits issues with a cooperative and consultative approach. The Attorney General of Canada maintains that the validity of the *ERA* is what is ultimately at issue and that any consultation which occurred prior to its adoption by Parliament is relevant. The appellants, on the other hand, argue that the crucial period for determining whether there was an infringement of their rights under s. 2(*d*) of the *Charter* was before December 11, 2008, when the Treasury Board made its decision modifying the previously agreed-upon wage increases for RCMP members (the "December 11 Decision"). Specifically, they say that meaningful consultation should have occurred between November 17, 2008 (when officials from the Treasury Board Secretariat met with the Commissioner of the RCMP about the wage increase limits to urge him to meet with the Pay Council) and the December 11 Decision. The appellants argue that the *ERA*, which was introduced in the House of Commons on February 6, 2009, and received Royal Assent on March 12, 2009, was merely a codification of the December 11 Decision.

contexte de relations de travail : « . . . si la loi ou la mesure gouvernementale contestée rend impossible l'action collective visant la réalisation d'objectifs liés au travail » (par. 46). Le droit à la négociation collective est protégé, mais uniquement « dans le sens d'un droit minimal strict à des échanges de bonne foi » (*Fraser*, par. 90). Les tribunaux concluront à l'existence d'une violation de l'al. 2*d*) lorsque les employés ou leurs représentants peuvent démontrer que la mesure gouvernementale ou législative les empêche effectivement de formuler des revendications collectives et de les voir prises en considération de bonne foi par la direction (*Fraser*, par. 98).

B. *La question pertinente est celle de la validité de la LCD*

[36] Les parties au présent pourvoi ne s'entendent pas sur la période qui doit être prise en compte pour déterminer s'il y a eu violation de l'al. 2*d*) en l'espèce. Elles ont axé le débat sur le moment et l'étendue des consultations qu'ont tenues le Conseil du Trésor et le Conseil de la solde de la GRC, un organisme chargé de résoudre les questions de rémunération et d'avantages sociaux dans un esprit de collaboration et de consultation. Le procureur général du Canada soutient que la question ultime porte sur la validité de la *LCD*, et que les consultations tenues avant l'adoption de cette loi sont pertinentes. Les appelants soutiennent par contre que la période cruciale pour déterminer si les droits que leur garantit l'al. 2*d*) de la *Charte* ont été violés est celle qui a précédé le 11 décembre 2008, date de la décision du Conseil du Trésor modifiant les augmentations salariales convenues auparavant en faveur des membres de la GRC (la « décision du 11 décembre »). Plus précisément, ils affirment que des consultations véritables auraient dû avoir lieu entre le 17 novembre 2008 — date à laquelle des représentants du Secrétariat du Conseil du Trésor ont rencontré le commissaire de la GRC au sujet des limites imposées aux hausses salariales et l'ont exhorté à rencontrer le Conseil de la solde — et la décision du 11 décembre. Les appelants prétendent que la *LCD*, qui a été déposée à la Chambre des communes le 6 février 2009 et qui a reçu la sanction royale le 12 mars 2009, ne faisait que confirmer par la loi la décision du 11 décembre.

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[37] The appellants' argument does not stand up to scrutiny. The December 11 Decision was an interim measure. It was designed, in light of the Governor General's December 4, 2008 prorogation of Parliament, to ensure that the RCMP's previously agreed-to wage increases would not come into effect in January 2009, only to be rolled back a few months later when the *ERA* was brought into force. Even if the December 11 Decision had been made with appropriate consultation, it was overridden by the enactment of the *ERA*. It is therefore the validity of the *ERA* that is at stake here and any consultations having occurred prior to its enactment are relevant to the s. 2(*d*) analysis.

C. *The ERA Does Not Infringe Section 2(d) of the Charter*

(1) The Pay Council Process Must Be Assumed to Be Constitutionally Compliant

[38] The majority in *MPAO* found that the Staff Relations Representative Program ("SRRP") did not meet the requirements of s. 2(*d*) of the *Charter*. However, it made no findings with regard to the Pay Council process, and the appellants have not challenged the constitutionality of that process in this case. Respectfully, I cannot agree with the majority's finding that the Pay Council process "does not provide all that the *Charter* requires" (para. 25) when the constitutional questions stated by the Chief Justice in this appeal do not deal with this issue. The appropriate analysis is that since the Pay Council process itself is not challenged, it must be assumed to be constitutionally compliant. In any event, there is no reason to believe, on the evidence as presented, that the Pay Council process renders meaningful collective bargaining effectively impossible for RCMP members.

(2) Sufficient Consultation After December 11, 2008

[39] The Attorney General of Canada conceded that there was no consultation with the Pay Council

[37] L'argument des appelants ne résiste toutefois pas à l'examen. La décision du 11 décembre constituait une mesure provisoire. Compte tenu de la prorogation du Parlement ordonnée par la gouverneure générale le 4 décembre 2008, cette mesure visait à éviter que les hausses salariales consenties plus tôt à la GRC prennent effet en janvier 2009 puis soient réduites quelques mois plus tard lors de l'entrée en vigueur de la *LCD*. Même si la décision du 11 décembre a été prise à la suite de consultations adéquates, elle a été écartée par l'édiction de la *LCD*. C'est donc la validité de la *LCD* qui est en cause dans le présent pourvoi, et les consultations tenues avant l'édiction de cette loi sont pertinentes dans l'analyse relative à l'al. 2*d*).

C. *La LCD ne contrevient pas à l'al. 2d) de la Charte*

(1) Le processus du Conseil de la solde doit être présumé conforme à la Constitution

[38] Dans l'arrêt *APMO*, la Cour à la majorité a conclu que le Programme des représentants des relations fonctionnelles (le « PRRF ») ne satisfaisait pas aux exigences de l'al. 2*d*) de la *Charte*. Elle n'a toutefois tiré aucune conclusion au sujet du processus du Conseil de la solde, et les appelants n'ont pas contesté la validité constitutionnelle de ce processus en l'espèce. En toute déférence, je ne puis souscrire à la conclusion de la majorité suivant laquelle le processus du Conseil de la solde « ne respecte pas l'ensemble des exigences de la *Charte* » (par. 25) alors que les questions constitutionnelles énoncées par la Juge en chef en l'espèce ne traitent aucunement de cette question. Pour les besoins de l'analyse, il faut considérer que, puisque le processus du Conseil de la solde lui-même n'est pas contesté, il doit être présumé conforme à la Constitution. En tout état de cause, aucune raison ne porte à croire, eu égard à la preuve présentée, que le processus du Conseil de la solde rend effectivement impossible pour les membres de la GRC une négociation collective véritable.

(2) Consultations suffisantes après le 11 décembre 2008

[39] Le procureur général du Canada concède que le Conseil de la solde n'a pas été consulté avant

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prior to the December 11 Decision limiting wage increases for RCMP members. At the hearing, counsel for Messrs. Meredith and Roach conceded that the government may rehabilitate any deficiency in the consultation process up until the time that the legislation receives Royal Assent. The question is thus whether the government subsequently remedied its failure to consult prior to the December 11 Decision by engaging in meaningful and good faith consultation with members of the Pay Council between December 11, 2008 and the enactment of the *ERA* on March 12, 2009.

[40] In assessing whether the consultations that took place after December 11, 2008 satisfied the requirements of the derivative right to collective bargaining under s. 2(*d*) of the *Charter*, this Court should adopt a broad, contextual approach, as advocated in *Health Services* (para. 92). The facts of this case unfolded in the midst of the 2008 global financial crisis. Though not determinative, this context is relevant to the inquiry into the adequacy of the government's consultation with the Pay Council. The context of the financial crisis does not excuse the government's failure to consult before the December 11 Decision, but the existence of those exigent circumstances helps us to understand the circumstances in which the process leading to the *ERA* unfolded.

[41] A contextual approach in this case requires an examination of the impact of the *ERA* on the ability of the Pay Council to engage in good faith exchanges with RCMP management. The *ERA* did place limits on RCMP members' wage increases for three fiscal years, until 2011. However, it did not completely restrict all compensation increases and it did not make collective bargaining effectively impossible for RCMP members.

[42] While the freeze on wage increases precluded negotiations on that issue for a limited period of time, there were other areas in which the members could see their compensation increase (see *ERA*, s. 62). And RCMP members took advantage of these opportunities to subsequently negotiate an increase in

la décision du 11 décembre qui a limité les augmentations salariales des membres de la GRC. À l'audience, l'avocat de MM. Meredith et Roach a reconnu que le gouvernement peut corriger toute lacune survenant dans le processus de consultation, et ce, tant que la loi n'a pas reçu la sanction royale. Il s'agit donc de déterminer si le gouvernement a par la suite remédié à son défaut de mener des consultations avant la décision du 11 décembre en procédant à des consultations véritables et de bonne foi avec les membres du Conseil de la solde entre cette date et l'adoption de la *LCD* le 12 mars 2009.

[40] Pour décider si les consultations tenues après le 11 décembre 2008 satisfont aux exigences du droit dérivé à la négociation collective découlant de l'al. 2*d*) de la *Charte*, la Cour doit procéder à une analyse large et contextuelle, comme le préconise l'arrêt *Health Services* (par. 92). Les faits sont survenus au milieu de la crise financière qui a secoué le monde en 2008. Sans être déterminant, ce contexte est utile pour juger si les consultations que le gouvernement a menées avec le Conseil de la solde ont été suffisantes. Le contexte de la crise financière n'excuse pas le défaut du gouvernement de procéder à des consultations avant la décision du 11 décembre, mais l'existence de cette situation d'urgence nous aide à comprendre les circonstances dans lesquelles s'est déroulé le processus ayant conduit à l'adoption de la *LCD*.

[41] Dans le cas qui nous occupe, l'analyse contextuelle requiert l'examen des conséquences de la *LCD* sur la possibilité pour le Conseil de la solde de procéder à des échanges de bonne foi avec la direction de la GRC. La *LCD* a effectivement limité pour une période de trois ans, jusqu'en 2011, les hausses salariales des membres de la GRC. Toutefois, elle n'a pas complètement exclu toute augmentation de la rémunération, et elle n'a pas rendu effectivement impossible toute négociation collective pour les membres de la GRC.

[42] Le gel des hausses salariales empêchait les négociations sur cette question pour une période de temps limitée, mais d'autres aspects de la rémunération des membres de la GRC pouvaient donner lieu à une augmentation de leur rémunération (voir la *LCD*, art. 62). Les membres ont effectivement

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allowances for members. Although results of collective bargaining are not guaranteed under s. 2(*d*), the fact that such allowances were approved in a period of serious budgetary restraint is an important contextual factor in evaluating whether the *ERA* made collective bargaining effectively impossible for RCMP members.

[43] After the December 11 Decision, Messrs. Meredith and Roach, among others associated with the SRRP and the Pay Council, had several opportunities to speak with senior government officials about the yet-to-be introduced *ERA*. On January 27 and February 2, 2009, they met with the Honourable Peter Van Loan, then-Minister of Public Safety, to discuss alternatives to the wage increase restrictions. On February 5, 2009, they met with the Honourable Vic Toews, then-President of the Treasury Board. Mr. Toews was not willing to discuss changes to the wage increase limits in the *ERA*, because those limits were being imposed across the public sector. He did, however, indicate that he was open to discussion on changes to other aspects of compensation, specifically referencing allowances. When the *ERA* was introduced in the House of Commons on February 6, 2009, it included a provision specific to the RCMP:

> **62.** Despite sections 44 to 49 [the restraints on public sector wage increases], the Treasury Board may change the amount or rate of any allowance, or make any new allowance, applicable to members of the Royal Canadian Mounted Police if the Treasury Board is of the opinion that the change or the new allowance, as the case may be, is critical to support transformation initiatives relating to the Royal Canadian Mounted Police.
>
> (Bill C-10, *An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures*, 2nd Sess., 40th Parl., cl. 393 (first reading))

Messrs. Meredith and Roach, along with other Staff Relations Representatives, met with the RCMP

profité de ces possibilités pour négocier par la suite une augmentation des allocations auxquelles ils ont droit. Bien que l'al. 2*d*) ne garantisse pas l'issue de la négociation collective, le fait que ces allocations aient été approuvées durant une période de sévères restrictions budgétaires constitue un facteur contextuel important pour déterminer si la *LCD* a fait en sorte qu'il a été effectivement impossible pour les membres de la GRC de négocier collectivement.

[43] Après la décision du 11 décembre, MM. Meredith et Roach, ainsi que d'autres personnes associées au PRRF et au Conseil de la solde, ont eu plusieurs occasions de parler à des représentants de haut rang du gouvernement au sujet de la *LCD* avant le dépôt de celle-ci. Le 27 janvier et le 2 février 2009, ils ont rencontré l'honorable Peter Van Loan, alors ministre de la Sécurité publique, pour discuter de solutions de rechange aux limites imposées aux hausses salariales. Le 5 février 2009, ils ont rencontré l'honorable Vic Toews, alors président du Conseil du Trésor. Ce dernier n'était pas disposé à discuter de changements aux limites des augmentations de salaire prescrites par la *LCD* étant donné que ces limites s'appliquaient à l'ensemble de la fonction publique. Il a toutefois indiqué qu'il était prêt à discuter de changements à d'autres aspects de la rémunération, mentionnant plus particulièrement les allocations. Lorsque la *LCD* a été déposée devant la Chambre des communes le 6 février 2009, une de ses dispositions concernait expressément la GRC :

> **62.** Malgré les articles 44 à 49 [restrictions aux hausses salariales dans le secteur public], le Conseil du Trésor peut créer une nouvelle allocation applicable aux membres de la Gendarmerie royale du Canada ou modifier le montant ou le taux d'une allocation qu'ils reçoivent s'il estime qu'une telle mesure est indispensable à la mise en œuvre de toute initiative de transformation relative à cet organisme.
>
> (Projet de loi C-10, *Loi portant exécution de certaines dispositions du budget déposé au Parlement le 27 janvier 2009 et mettant en œuvre des mesures fiscales connexes*, 2e sess., 40e lég., art. 393 (première lecture))

MM. Meredith et Roach, ainsi que d'autres représentants des relations fonctionnelles, ont rencontré

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Commissioner on March 3, 2009 to discuss compensation. At a meeting the following day, the Commissioner instructed the Pay Council to consider how existing allowances could be increased to advance transformation initiatives for the RCMP, in conformity with s. 62 of the *ERA*.

[44] These meetings constituted good faith and meaningful consultation that remedied the government's earlier failure to consult members of the RCMP. Government representatives demonstrated an openness to negotiate on compensation issues and to engage with the RCMP members' representatives. And, pursuant to s. 62 of the *ERA*, the appellants were able to secure a service pay increase from 1% to 1.5% for every five years of service (2011 FC 735, 392 F.T.R. 25, at para. 47).

[45] This Court has never recognized a duty on legislatures to consult with any affected individual or group before enacting legislation, even where a measure impacts constitutional rights (see *Health Services*, at para. 157). Under the doctrine of parliamentary privilege, legislatures' internal procedures are their own and are not for the judiciary to dictate (see *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319). The constitutionality of the *ERA* rests on whether its provisions make collective bargaining between the government and employee representatives effectively impossible, not on the manner in which the law was enacted.

[46] The *ERA* did not constrain future collective bargaining by the Pay Council. It is true that s. 57 of the *ERA* prevents it from negotiating a backward-looking lump sum payment to compensate for the difference in wages between the wage increases originally approved in June 2008 and the limits imposed during the restraint period. However, the fact that there is nothing in the *ERA* that overrides the Pay Council's process of establishing compensation

le commissaire de la GRC le 3 mars 2009 afin de discuter de rémunération. À l'occasion d'une autre rencontre tenue le lendemain, le commissaire a donné pour instruction au Conseil de la solde d'examiner des façons d'augmenter les allocations existantes pour appuyer, conformément à l'art. 62 de la *LCD*, la mise en œuvre d'initiatives de transformation relatives à la GRC.

[44] Ces rencontres ont constitué des consultations véritables et menées de bonne foi qui ont remédié au défaut antérieur du gouvernement de consulter les membres de la GRC. Les représentants du gouvernement se sont montrés ouverts à négocier les questions de rémunération et à échanger avec les représentants des membres de la GRC. Et, conformément à l'art. 62 de la *LCD*, les appelants ont pu obtenir une augmentation de 1 à 1,5 % de leur solde de service pour chaque période de cinq années de service (2011 CF 735, par. 47 (CanLII)).

[45] Notre Cour n'a jamais reconnu que les législateurs sont tenus de consulter des personnes ou groupes touchés avant d'adopter une mesure législative, même si celle-ci a des incidences sur des droits constitutionnels (voir *Health Services*, par. 157). Selon la doctrine du privilège parlementaire, les assemblées législatives sont maîtres de leur procédure interne et il n'appartient pas aux tribunaux de la leur dicter (voir *Canada (Chambre des communes) c. Vaid*, 2005 CSC 30, [2005] 1 R.C.S. 667; *New Brunswick Broadcasting Co. c. Nouvelle-Écosse (Président de l'Assemblée législative)*, [1993] 1 R.C.S. 319). La constitutionnalité de la *LCD* dépend de la réponse à la question de savoir si ses dispositions rendent effectivement impossible la négociation collective entre le gouvernement et les représentants des employés, et non de la façon dont la loi a été édictée.

[46] La *LCD* n'a pas restreint la possibilité pour le Conseil de la solde de mener de futures négociations collectives. Il est vrai que l'art. 57 de la *LCD* a pour effet d'empêcher le Conseil de la solde de négocier un paiement forfaitaire rétroactif qui indemniserait les employés pour les écarts de salaire entre les augmentations salariales approuvées à l'origine en juin 2008 et les limites imposées durant la période de contrôle des dépenses. Cependant, le fait que rien

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recommendations in reference to other police forces suggests that RCMP compensation is likely to remain in step with that of other police forces.

[47] As the majority says in *MPAO*, the fact that some goals are not ultimately achieved by the association does not mean that the interests served by collective bargaining have been frustrated: s. 2(*d*) "guarantees a process rather than an outcome" (para. 67). The restriction on wage increases imposed by the *ERA* was undoubtedly not the result that RCMP members and their representatives hoped for. But so long as good faith consultation took place, their dissatisfaction with the result has no bearing on the constitutional analysis.

[48] In sum, the *ERA* did not render meaningful collective bargaining effectively impossible for RCMP members. On the contrary, through meetings with various senior officials and the inclusion of s. 62 in the *ERA*, the government had engaged in meaningful consultations with RCMP members' representatives and evidenced an openness to continue the dialogue about compensation in the future. There was no breach of s. 2(*d*) of the *Charter*.

IV. Conclusion

[49] The Pay Council process itself has not been challenged in this appeal and it must be assumed to be *Charter* compliant. I agree with the majority that there was no s. 2(*d*) violation in this case. The *ERA* did not make meaningful collective bargaining effectively impossible. There was consultation with RCMP members' representatives before the *ERA* received Royal Assent and s. 62 of the *ERA* explicitly allowed future negotiations on some issues of compensation. I would dismiss the appeal with costs.

dans la *LCD* n'écarte le mécanisme par lequel le Conseil de la solde établit ses recommandations en matière de rémunération en fonction de la rémunération accordée à d'autres corps policiers tend à indiquer que la rémunération versée aux membres de la GRC continuera vraisemblablement de rester en phase avec celle des autres corps policiers.

[47] Comme l'expliquent les juges majoritaires dans l'arrêt *APMO*, le fait que l'association ne puisse pas ultimement réaliser certains objectifs ne signifie pas qu'il a été porté atteinte aux intérêts protégés par la négociation collective : l'al. 2*d*) « garantit [. . .] un processus plutôt qu'un résultat » (par. 67). Les limites imposées aux augmentations salariales par la *LCD* ne constituaient certainement pas le résultat souhaité par les membres de la GRC et par leurs représentants. Mais dès lors que des consultations ont été menées de bonne foi, leur insatisfaction quant à l'issue de ces consultations n'a aucune incidence sur l'analyse constitutionnelle.

[48] En somme, la *LCD* n'a pas rendu effectivement impossible toute négociation collective véritable pour les membres de la GRC. Au contraire, du fait de la participation de certains de ses membres importants à des rencontres et de l'insertion de l'art. 62 dans la *LCD*, le gouvernement a tenu des consultations véritables avec les représentants des membres de la GRC et il s'est montré ouvert à poursuivre le dialogue au sujet de la rémunération à l'avenir. Il n'y a pas eu violation de l'al. 2*d*) de la *Charte*.

IV. Conclusion

[49] Le processus lui-même du Conseil de la solde n'a pas été contesté dans cet appel et il faut présumer qu'il est conforme à la *Charte*. À l'instar des juges majoritaires, j'estime qu'il n'y a pas eu violation de l'al. 2*d*) en l'espèce. La *LCD* n'a pas rendu effectivement impossible la tenue de négociations collectives véritables. Des représentants des membres de la GRC ont été consultés avant que la *LCD* ne reçoive la sanction royale, et l'art. 62 de la *LCD* permettait explicitement des négociations pour l'avenir sur certaines questions touchant la rémunération. Je rejetterais le pourvoi avec dépens.

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The following are the reasons delivered by

[50] ABELLA J. (dissenting) — I do not, with great respect, agree that the federal government's unilateral decision to roll back agreed-upon RCMP wage increases through the *Expenditure Restraint Act*, S.C. 2009, c. 2, is constitutional. These increases were the result of an extensive consultation process between the RCMP and the government. The absence of any real opportunity to make representations about the extent and impact of the rollbacks before they were approved by Treasury Board had the effect of completely nullifying the right to a meaningful consultation process and thereby denied members their s. 2(*d*) *Charter* rights. This failure to consult with the RCMP, particularly when almost every other bargaining agent in the core public service was consulted, was, in my respectful view, neither rationally connected to the government's objective of fiscal stability nor minimally impairing. It cannot, therefore, be justified under s. 1.

[51] The majority concludes that because the rollbacks applied for a limited three-year period and did not preclude discussion on some other issues, the impact of the *Expenditure Restraint Act* on RCMP members' s. 2(*d*) rights was minor. I see the impact as being far more significant.

[52] A measure violates s. 2(*d*) of the *Canadian Charter of Rights and Freedoms* when it substantially interferes with the employees' ability to engage in meaningful associational bargaining activity (*Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, at para. 90). Interference is obviously more likely to be found to be substantial if it relates to an issue that is central to the collective bargaining process (*Health Services*, at paras. 95-96).

Version française des motifs rendus par

[50] LA JUGE ABELLA (dissidente) — En toute déférence, je ne suis pas d'accord pour dire que la décision unilatérale du gouvernement fédéral de réduire, par application de la *Loi sur le contrôle des dépenses*, L.C. 2009, c. 2, les augmentations salariales convenues avec la GRC est constitutionnelle. Ces augmentations résultaient d'un vaste processus de consultation entre la GRC et le gouvernement. L'absence de toute occasion véritable de présenter des observations au sujet de la portée et des répercussions de la réduction avant que le Conseil du Trésor l'approuve a eu pour effet de réduire à néant le droit à un processus véritable de consultation, et de priver de ce fait les membres des droits que leur garantit l'al. 2*d*) de la *Charte*. Cette omission de consulter la GRC, surtout lorsque pratiquement tous les autres agents négociateurs de la fonction publique fédérale centrale ont été consultés, n'était pas, à mon avis, rationnellement liée à l'objectif de stabilité financière du gouvernement et ne constituait pas une atteinte minimale. Cette omission ne saurait en conséquence être justifiée au regard de l'article premier.

[51] Selon les juges majoritaires, parce que les réductions des augmentations salariales s'appliquaient pendant une période limitée de trois ans et qu'elles n'interdisaient pas les discussions sur certains autres points, les répercussions de la *Loi sur le contrôle des dépenses* sur les droits que l'al. 2*d*) garantit aux membres de la GRC étaient mineures. À mon sens, ces répercussions étaient beaucoup plus importantes.

[52] Une mesure viole l'al. 2*d*) de la *Charte canadienne des droits et libertés* lorsqu'elle entrave de façon substantielle la possibilité pour les employés d'exercer une véritable activité associative liée à la négociation (*Health Services and Support — Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, [2007] 2 R.C.S. 391, par. 90). L'entrave sera évidemment plus susceptible d'être jugée substantielle si elle se rapporte à une question d'importance capitale pour le processus de négociation collective (*Health Services*, par. 95-96).

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[53] Ensuring fair wages is among the key purposes of collective bargaining. Dickson C.J. explained its salience in his dissent in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 368:

> The role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers. The capacity to bargain collectively has long been recognized as one of the integral and primary functions of associations of working people. While trade unions also fulfil other important social, political and charitable functions, *collective bargaining remains vital to the capacity of individual employees to participate in ensuring fair wages, health and safety protections, and equitable and humane working conditions*. [Emphasis added.]

[54] That is why labour arbitrators have generally concluded that an employer cannot, no matter how benign its motives, unilaterally reduce the wages of employees and must meet with the union to discuss the rollback (David J. Corry, *Collective Bargaining and Agreement* (loose-leaf), at pp. 21-9 and 21-11).

[55] The RCMP wage increases had been agreed to in June 2008 following a consultation process between the RCMP Pay Council, the RCMP Commissioner, the Minister responsible for the RCMP and Treasury Board. The Pay Council was established by the RCMP Commissioner in 1996 and is the RCMP members' only mechanism for making representations to management about compensation issues. The Pay Council's recommendations are submitted through the RCMP Commissioner to the Minister of Public Safety and then on to the employer, Treasury Board.

[56] The Pay Council process allows for, among other concerns, the ability to maintain competitive salaries to recruit and retain officers. The Pay Council recommendations at issue in this case were made in the spring of 2008 and sought to bring RCMP

[53] L'un des principaux objectifs de la négociation collective est d'assurer des salaires justes. Dans le *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313, p. 368, le juge en chef Dickson en explique toute l'importance dans ses motifs dissidents :

> L'association a toujours joué un rôle vital dans la protection des besoins et des intérêts essentiels des travailleurs. Au cours de l'histoire, les travailleurs se sont associés pour surmonter leur vulnérabilité individuelle face à l'employeur. La capacité de négocier collectivement a depuis longtemps été reconnue comme l'une des fonctions intégrantes et premières des associations de travailleurs. Certes les syndicats ont aussi d'autres fonctions importantes sur les plans social, politique et charitable, mais *la négociation collective demeure essentielle à la capacité de chaque salarié, à titre individuel, de participer au processus qui leur assurera des salaires justes, la santé et la sécurité ainsi que des conditions de travail humaines et équitables*. [Italiques ajoutés.]

[54] Voilà pourquoi les arbitres du travail concluent généralement qu'un employeur ne peut, même pour de bons motifs, réduire unilatéralement les salaires des employés et doit rencontrer le syndicat pour discuter de la réduction (David J. Corry, *Collective Bargaining and Agreement* (feuilles mobiles), p. 21-9 et 21-11).

[55] Les augmentations salariales de la GRC avaient été convenues en juin 2008 à la suite d'un processus de consultation entre le Conseil de la solde de la GRC, le commissaire de la GRC, le ministre responsable de la GRC et le Conseil du Trésor. Le Conseil de la solde a été créé par le commissaire de la GRC en 1996 et il s'agit du seul mécanisme dont disposent les membres de la GRC pour présenter à la direction des observations au sujet des questions de rémunération. Le commissaire de la GRC présente les recommandations du Conseil de la solde au ministre de la Sécurité publique, qui les transmet à l'employeur, le Conseil du Trésor.

[56] Le processus du Conseil de la solde permet notamment à la GRC de maintenir les salaires à un niveau concurrentiel pour le recrutement des agents et la conservation de l'effectif. Les recommandations du Conseil de la solde qui font l'objet

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compensation into the target compensation range by increasing wages in 2008, 2009 and 2010. The proposed wage increases were agreed to by the Commissioner and the Minister of Public Safety, and accepted by Treasury Board. As a result, on June 26, 2008, Treasury Board announced wage increases at rates of 3.32% for 2008, 3.5% for 2009 and 2% for 2010, along with an increase in service pay and the Field Trainer Allowance.

[57] These increases were never implemented. Instead, on November 27, 2008, the federal government announced its intention to limit wage increases in the federal public service. The statutory mechanism for implementing these limits was the *Expenditure Restraint Act*, which was enacted on March 12, 2009. It prohibited not only wage increases greater than 1.5% for the 2008-11 fiscal years, but also barred future bargaining to recoup the wages lost during this period. Treasury Board was responsible for implementing the wage limits.

[58] Prior to the government's announcement on November 27, Treasury Board had consulted with all 17 bargaining agents in the core public administration with whom it normally negotiated compensation issues. By early December 2008, it had signed 14 new agreements with those agents.

[59] In addition, Treasury Board met throughout November 2008 with the heads of federal agencies and Crown corporations, encouraging them to meet with their unions and seek agreements within the forthcoming *Expenditure Restraint Act* limits. By early December, these agencies and corporations had reached over 30 agreements with their respective bargaining agents.

[60] The RCMP, on the other hand, was given no opportunity to make meaningful representations about the forthcoming wage limits. Instead, on

du présent litige ont été faites au printemps 2008 et visaient à placer la rémunération à la GRC dans la fourchette cible de rémunération par des augmentations salariales en 2008, 2009 et 2010. Le commissaire, le ministre de la Sécurité publique et le Conseil du Trésor ont accepté les augmentations salariales proposées. En conséquence, le 26 juin 2008, le Conseil du Trésor a annoncé des augmentations de 3,32 % pour 2008, 3,5 % pour 2009 et 2 % pour 2010, ainsi qu'une augmentation de la solde de service et de l'indemnité aux moniteurs de formation pratique.

[57] Ces augmentations n'ont jamais été mises en œuvre. Le 27 novembre 2008, le gouvernement fédéral annonçait plutôt son intention de limiter les augmentations salariales dans la fonction publique fédérale. La *Loi sur le contrôle des dépenses*, édictée le 12 mars 2009, constituait le mécanisme de mise en œuvre de cette mesure. En plus d'interdire les augmentations salariales de plus de 1,5 % pour les exercices 2008 à 2011, la loi interdisait toute négociation future visant à permettre aux employés de récupérer les salaires perdus pendant cette période. Le Conseil du Trésor était chargé de l'application des limites salariales.

[58] Avant l'annonce faite par le gouvernement le 27 novembre, le Conseil du Trésor avait consulté tous les 17 agents négociateurs de l'administration publique centrale avec lesquels il négociait normalement les questions de rémunération. Au début de décembre 2008, il avait signé avec ces agents négociateurs 14 nouvelles ententes.

[59] En outre, le Conseil du Trésor a rencontré au cours du mois de novembre 2008 les dirigeants d'organismes fédéraux et de sociétés d'État et les a encouragés à rencontrer leurs syndicats et à tenter de conclure des ententes respectant les limites qui allaient être prescrites par la *Loi sur le contrôle des dépenses*. Au début de décembre, ces organismes et sociétés avaient conclu plus de 30 ententes avec leurs agents négociateurs respectifs.

[60] Par ailleurs, la GRC ne s'est vu offrir aucune occasion de présenter des observations utiles au sujet des limites salariales à venir. Le 17 novembre 2008, le

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November 17, 2008, Treasury Board met with the RCMP Commissioner and *informed* him of the rollbacks and then, on December 11, 2008, confirmed that it would not implement the RCMP wage increases agreed to in June 2008.

[61] The Pay Council did not learn that the wage limits would apply to the wages agreed upon in June 2008 until it was informed by the Commissioner on December 12, 2008, hours before the Commissioner notified the general membership of the RCMP of the rollbacks. The Pay Council representatives soon after requested the chance to meet with the President of Treasury Board and the Minister of Public Safety. They received no response until after the January 27, 2009 budget speech, when each agreed to meet with representatives of the Pay Council. Neither Minister was willing to discuss the rollbacks at the meetings. On February 11, 2009, the Pay Council submitted written representations concerning the wage rollbacks to the President of Treasury Board, but they were rejected without discussion.

[62] The unilateral rollback of three years of agreed-upon wage increases without any prior consultation is self-evidently a substantial interference with the bargaining process. This conduct was precisely what led this Court in *Health Services* to find an unjustified infringement of s. 2(*d*). I have difficulty seeing the distinction between that case and this one. The fact that the rollbacks were limited to a three-year period does not attenuate the key fact that they were unilateral. Nor does the fact that consultation was possible on other more minor compensation issues minimize the severity of the breach.

[63] The failure to engage in *any* discussion meant that the RCMP was denied its right to a meaningful negotiation process about wages, a central component of employment relationships generally and particularly for RCMP members whose other benefits — pensions, disability benefits, paid time off, and service pay — were tied to their wage amounts.

Conseil du Trésor a plutôt rencontré le commissaire de la GRC et l'a *informé* des réductions des augmentations salariales, pour ensuite, le 11 décembre 2008, confirmer qu'il ne mettrait pas en œuvre les augmentations salariales à la GRC convenues en juin 2008.

[61] Le Conseil de la solde n'a appris que les limites salariales s'appliqueraient aux soldes convenues que lorsque le commissaire l'en a informé le 12 décembre 2008, quelques heures avant que le commissaire en fasse l'annonce à l'ensemble des membres de la GRC. Peu après, les représentants du Conseil de la solde ont demandé qu'on leur donne l'occasion de rencontrer le président du Conseil du Trésor et le ministre de la Sécurité publique. Ils n'ont obtenu une réponse qu'après le discours du budget du 27 janvier 2009, lorsque les deux ministres ont accepté de les rencontrer. Au cours de ces réunions, ni l'un ni l'autre des ministres n'était disposé à discuter des réductions salariales. Le 11 février 2009, le Conseil de la solde a présenté à ce sujet des observations écrites au président du Conseil du Trésor, mais elles ont été rejetées sans discussion.

[62] La réduction unilatérale, sans consultation préalable, des augmentations salariales convenues pour trois ans constitue manifestement une entrave substantielle au processus de négociation. C'est précisément une conduite de ce genre qui a amené notre Cour à conclure, dans *Health Services*, à l'existence d'une atteinte injustifiée à l'al. 2*d*). Je vois difficilement ce qui peut distinguer cette affaire de celle qui nous occupe. Limiter l'application de cette réduction à une période de trois ans n'atténue en rien le fait primordial que la réduction était unilatérale. La possibilité de tenir des consultations sur d'autres questions de rémunération de moindre importance ne minimise non plus en rien la gravité de l'atteinte.

[63] Le refus de prendre part à *toute* discussion a eu pour effet de priver la GRC de son droit à un processus véritable de négociation des salaires, un élément central des relations de travail généralement, et particulièrement en ce qui concerne les membres de la GRC, dont les autres avantages — pensions, prestations d'invalidité, congés rémunérés et solde de service — étaient rattachés au montant de leur solde.

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[64] This breach does not, in my respectful view, survive the s. 1 proportionality analysis. The government's articulated objectives for the *Expenditure Restraint Act* were to reduce wage pressure in the private sector; to demonstrate leadership by showing economic restraint in the use of public funds; and to manage public sector wage costs to ensure fiscal stability. To be rationally connected to these objectives, it must be reasonable to conclude that the means adopted by the government, in this case the *unilateral* imposition of rollbacks of the previously agreed-to RCMP wage increases, would help meet the objectives.

[65] The fact that there are fiscal concerns does not give the government an unrestricted licence in how it deals with the economic interests of its employees. In *Re British Columbia Railway Co. and General Truck Drivers and Helpers Union, Local No. 31* (unreported, June 1, 1976), Chairman Owen Shime articulated what have come to be seen as six guiding criteria for assessing the fairness of wage settlements for public employees covered by collective agreements. His list of considerations, summarized in *Workplace Health, Safety and Compensation Commission (Re)*, [2005] N.B.L.E.B.D. No. 60 (QL), included the following criteria of particular relevance:

> Public employees should not be required to subsidize the community or the industry in which they work by accepting substandard wages and working conditions. . . . [O]n balance, if the community needs and demands the public service, then the members of the community must bear the necessary cost to provide fair and equitable wages and not expect the employees to subsidize the service by accepting substandard wages. If economies are required to cushion the taxes then they may have to be implemented by curtailing portions of the service rather than wages and working conditions . . . .

. . .

[64] Cette atteinte, à mon humble avis, ne résiste pas à l'analyse de la proportionnalité de l'article premier. Les objectifs déclarés du gouvernement, en ce qui concerne la *Loi sur le contrôle des dépenses*, étaient de réduire la pression sur les salaires dans le secteur privé, de montrer la voie à suivre en faisant preuve de retenue dans l'utilisation des fonds publics et de gérer la charge salariale du secteur public de façon à assurer une stabilité financière. Pour que l'on puisse constater l'existence d'un lien rationnel avec ces objectifs, il faut pouvoir raisonnablement conclure que la mesure gouvernementale — en l'occurrence l'imposition *unilatérale* des réductions des augmentations salariales déjà consenties à la GRC — contribuerait à l'atteinte de ces objectifs.

[65] L'existence de préoccupations d'ordre financier n'autorise pas sans réserve le gouvernement à déterminer la façon dont il s'occupe des intérêts économiques de ses employés. Dans *Re British Columbia Railway Co. and General Truck Drivers and Helpers Union, Local No. 31* (non publié, le 1er juin 1976), le président Owen Shime a exposé ce que l'on considère maintenant comme les six critères pour évaluer l'équité des règlements salariaux des employés du secteur public régis par des conventions collectives. La liste des considérations qu'il a dressée, résumée dans *Workplace Health, Safety and Compensation Commission (Re)*, [2005] N.B.L.E.B.D. No. 60 (QL), comprenait les critères suivants qui sont particulièrement pertinents en l'espèce :

> [TRADUCTION] Les employés du secteur public ne devraient pas être tenus de subventionner la collectivité ou le secteur d'activité dans lequel ils travaillent en acceptant des salaires et des conditions de travail médiocres. [. . .] [T]out compte fait, si la collectivité a besoin d'un service public et l'exige, ses membres doivent assumer ce qu'il en coûte nécessairement pour offrir des salaires justes et équitables et ne pas s'attendre à ce que les employés subventionnent le service en acceptant des salaires médiocres. S'il est nécessaire d'économiser pour atténuer le fardeau fiscal, il faudrait le faire en réduisant certains éléments du service offert, plutôt qu'en réduisant les salaires et les conditions de travail . . .

. . .

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. . . Consideration should be given to the wage rates paid to workers performing similar jobs in other industries, in both the private and public sectors. What are the comparisons to that which prevails in other sectors of the economy? . . . [W]hat are the patterns set in similar occupations in private sector businesses? [para. 26]

[66] The Shime criteria continue to be relied on by arbitrators: *Re Canadian Union of Public Employees and Province of New Brunswick* (1982), 49 N.B.R. (2d) 31; *Halifax (Regional Municipality) and I.A.F.F., Loc. 268 (Re)* (1998), 71 L.A.C. (4th) 129 (N.S.); *New Brunswick (Board of Management) (Re)*, [2004] N.B.L.E.B.D. No. 36 (QL); *New Brunswick (Board of Management) (Re)*, [2004] N.B.L.E.B.D. No. 24 (QL); *New Brunswick (Board of Management (Re)*, [2011] N.B.L.E.B.D. No. 12 (QL); *Workplace Health, Safety and Compensation Commission (Re)*; *New Brunswick (Board of Management) and N.B.U.P.P.E.* (2010), 184 C.L.R.B.R. (2d) 72 (N.B.L.E.B.); *New Brunswick (Board of Management) v. N.B.U.P.P.E.*, 2006 CarswellNB 332 (WL Can.) (L.E.B.); *Prince Edward Island (Department of Health & Wellness) v. P.E.I.U.P.S.E.*, 2010 CarswellPEI 78 (WL Can.); and *N.B.T.F. v. New Brunswick (Board of Management)*, 2004 CarswellNB 653 (WL Can.) (L.E.B.).

[67] Additional guidance can be taken from the Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organization (ILO), which expressed the view that even in the midst of a fiscal crisis, there are limits on the extent to which governments can restrain public sector wages that are the subject of collective agreements (International Labour Office, *Collective bargaining in the public service: A way forward* (International Labour Conference, 102nd Sess., 2013), at p. 124). Notably too the ILO has recognized a general principle that "any limitation on collective bargaining on the part of the authorities should be preceded by consultations with the workers' and employers' organizations in an effort to obtain their agreement" (*Freedom of Association: Digest of decisions and principles of the Freedom of Association*

. . . Il faut prendre en compte les taux de rémunération des travailleurs qui accomplissent les tâches similaires dans d'autres domaines d'activité, tant dans le secteur privé que dans le secteur public. Quelles comparaisons peuvent être faites avec ce qui existe dans d'autres secteurs de l'économie? [. . .] [Q]uelles tendances peut-on observer dans des emplois semblables dans les entreprises du secteur privé? [par. 26]

[66] Les arbitres continuent de s'appuyer sur les critères établis par Shime : *Re Canadian Union of Public Employees and Province of New Brunswick* (1982), 49 R.N.-B. (2e) 31; *Halifax (Regional Municipality) and I.A.F.F., Loc. 268 (Re)* (1998), 71 L.A.C. (4th) 129 (N.-É.); *New Brunswick (Board of Management) (Re)*, [2004] N.B.L.E.B.D. No. 36 (QL); *New Brunswick (Board of Management) (Re)*, [2004] N.B.L.E.B.D. No. 24 (QL); *New Brunswick (Board of Management) (Re)*, [2011] N.B.L.E.B.D. No. 12 (QL); *Workplace Health, Safety and Compensation Commission (Re)*; *New Brunswick (Board of Management) and N.B.U.P.P.E.* (2010), 184 C.L.R.B.R. (2d) 72 (C.T.E.N.-B.); *New Brunswick (Board of Management) c. N.B.U.P.P.E.*, 2006 CarswellNB 332 (WL Can.) (C.T.E.); *Prince Edward Island (Department of Health & Wellness) c. P.E.I.U.P.S.E.*, 2010 CarswellPEI 78 (WL Can.); et *N.B.T.F. c. New Brunswick (Board of Management)*, 2004 CarswellNB 653 (WL Can.) (C.T.E.).

[67] La Commission d'experts pour l'application des conventions et recommandations de l'Organisation internationale du travail (OIT) peut également nous éclairer sur cette question. Selon la Commission, même en pleine crise financière, il y a des limites aux restrictions que les gouvernements peuvent imposer aux salaires du secteur public qui font l'objet de conventions collectives (Bureau international du Travail, *La négociation collective dans la fonction publique : un chemin à suivre* (Conférence internationale du Travail, 102e sess., 2013), p. 132-133). Fait important également, l'OIT a reconnu un principe général selon lequel « les limitations à la négociation collective de la part des autorités publiques devraient être précédées de consultations avec les organisations de travailleurs et d'employeurs en vue de rechercher l'accord des parties » (*La liberté*

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Committee of the Governing Body of the ILO (5th (rev.) ed. 2006), at para. 999).

[68] All of these complexities and interrelated factors make the need for meaningful consultation with affected employees particularly crucial.

[69] While wage rollbacks may technically be seen to be rationally connected to fiscal stability and responsibility, the refusal to engage in any meaningful form of consultation is not. Treasury Board consulted directly with all 17 bargaining agents of the core public service before the *Expenditure Restraint Act* was enacted. There is nothing in the record to explain what made the RCMP singularly ineligible for discussions about whether or how to roll back its agreed-upon wage package, or how refusing to engage in such discussions furthered the government's ability to address its fiscal concerns.

[70] But even if rationally connected, a measure must also be "carefully tailored so that rights are impaired no more than necessary" (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160).

[71] Because meaningful consultation took place with almost every other bargaining agent in the core public service, it is clear that less infringing options than a complete absence of negotiations were available to the government. The unilateral rollback of wages through the *Expenditure Restraint Act* cannot, therefore, be said to be minimally impairing.

[72] I would allow the appeal.

Appeal dismissed with costs, ABELLA J. *dissenting.*

syndicale : Recueil de décisions et de principes du Comité de la liberté syndicale du Conseil d'administration du BIT (5e éd. (rév.) 2006), par. 999).

[68] En raison de toutes ces complexités et tous ces facteurs interreliés, la tenue de consultations véritables avec les employés touchés est particulièrement cruciale.

[69] Même si les réductions des augmentations de salaire peuvent en principe paraître rationnellement liées à la stabilité et à la responsabilité financières, le refus de prendre part à toute forme de consultation véritable n'y est pas lié. Le Conseil du Trésor a directement consulté tous les 17 agents négociateurs de la fonction publique fédérale centrale avant l'adoption de la *Loi sur le contrôle des dépenses*. Rien au dossier n'explique pourquoi la GRC uniquement n'a pas eu droit à des discussions relatives à l'opportunité de la réduction des augmentations salariales convenues et à la façon de l'appliquer, et rien n'explique comment le refus de prendre part à de telles discussions a pu aider le gouvernement à faire face à ses préoccupations d'ordre financier.

[70] Toutefois, même s'il existe un lien rationnel, une mesure doit également être « soigneusement adaptée de façon à ce que l'atteinte aux droits ne dépasse pas ce qui est nécessaire » (*RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199, par. 160).

[71] Parce que des consultations véritables ont eu lieu avec presque tous les autres agents négociateurs de la fonction publique fédérale centrale, il est clair que le gouvernement disposait d'options moins attentatoires qu'une absence totale de négociations. Par conséquent, on ne saurait affirmer que la réduction unilatérale des augmentations salariales par l'effet de la *Loi sur le contrôle des dépenses* constituait une atteinte minimale.

[72] Je suis d'avis d'accueillir le pourvoi.

Pourvoi rejeté avec dépens, la juge ABELLA *est dissidente.*

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Solicitors for the appellants: Nelligan O'Brien Payne, Ottawa.

Solicitor for the respondent: Attorney General of Canada, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the Canadian Labour Congress: Sack Goldblatt Mitchell, Toronto.

Solicitor for the intervener the Professional Institute of the Public Service of Canada: Fay Faraday, Toronto.

Solicitor for the intervener the Canadian Union of Public Employees, Local 675: Canadian Union of Public Employees, Montréal.

Solicitors for the intervener the Public Service Alliance of Canada: Raven, Cameron, Ballantyne & Yazbeck, Ottawa.

Solicitors for the interveners Confédération des syndicats nationaux and the Union of Canadian Correctional Officers: Laroche Martin, Montréal.

Procureurs des appelants : Nelligan O'Brien Payne, Ottawa.

Procureur de l'intimé : Procureur général du Canada, Toronto.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

Procureur de l'intervenant le procureur général de la Saskatchewan : Procureur général de la Saskatchewan, Regina.

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Edmonton.

Procureurs de l'intervenant le Congrès du travail du Canada : Sack Goldblatt Mitchell, Toronto.

Procureure de l'intervenant l'Institut professionnel de la fonction publique du Canada : Fay Faraday, Toronto.

Procureur de l'intervenant le Syndicat canadien de la fonction publique, section locale 675 : Syndicat canadien de la fonction publique, Montréal.

Procureurs de l'intervenante l'Alliance de la Fonction publique du Canada : Raven, Cameron, Ballantyne & Yazbeck, Ottawa.

Procureurs des intervenants la Confédération des syndicats nationaux et le Syndicat des agents correctionnels du Canada : Laroche Martin, Montréal.

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Saskatchewan Federation of Labour (in its own right and on behalf of the unions and workers in the Province of Saskatchewan), Amalgamated Transit Union, Local 588, Canadian Office and Professional Employees' Union, Local 397, Canadian Union of Public Employees, Locals 7 and 4828, Communications, Energy and Paperworkers' Union of Canada and its Locals, Health Sciences Association of Saskatchewan, International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of U.S., its Territories and Canada, Locals 295, 300 and 669, International Brotherhood of Electrical Workers, Locals 529, 2038 and 2067, Saskatchewan Government and General Employees' Union, Saskatchewan Joint Board Retail, Wholesale and Department Store Union, Saskatchewan Provincial Building & Construction Trades Council, Teamsters, Local 395, United Mine Workers of America, Local 7606, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union and its Locals, and University of Regina Faculty Association *Appellants*

v.

Her Majesty The Queen in Right of the Province of Saskatchewan *Respondent*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia,

Saskatchewan Federation of Labour (pour son propre compte et au nom des syndicats et travailleurs de la province de la Saskatchewan), Syndicat uni du transport, section locale 588, Syndicat canadien des employées et employés professionnels et de bureau, section locale 397, Syndicat canadien de la fonction publique, sections locales 7 et 4828, Syndicat canadien des communications, de l'énergie et du papier et ses sections locales, Health Sciences Association of Saskatchewan, Alliance internationale des employés de scène, de théâtre et de cinéma des États-Unis, de ses territoires et du Canada, sections locales 295, 300 et 669, Fraternité internationale des ouvriers en électricité, sections locales 529, 2038 et 2067, Saskatchewan Government and General Employees' Union, Saskatchewan Joint Board Retail, Wholesale and Department Store Union, Saskatchewan Provincial Building & Construction Trades Council, Teamsters, Local 395, United Mine Workers of America, Local 7606, Syndicat international des travailleurs unis de la métallurgie, du papier et de la foresterie, du caoutchouc, de la fabrication, de l'énergie, des services et industries connexes et ses sections locales, et University of Regina Faculty Association *Appelants*

c.

Sa Majesté la Reine du chef de la province de la Saskatchewan *Intimée*

et

Procureur général du Canada, procureur général de l'Ontario, procureur général du Québec, procureur général de la Colombie-Britannique,

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Attorney General of Alberta, Attorney General of Newfoundland and Labrador, Saskatchewan Union of Nurses, SEIU-West, United Nurses of Alberta, Alberta Federation of Labour, Professional Institute of the Public Service of Canada, Canadian Constitution Foundation, Air Canada Pilots' Association, British Columbia Civil Liberties Association, Conseil du patronat du Québec, Canadian Employers Council, Canadian Union of Postal Workers, International Association of Machinists and Aerospace Workers, British Columbia Teachers' Federation, Hospital Employees' Union, Canadian Labour Congress, Public Service Alliance of Canada, Alberta Union of Provincial Employees, Confédération des syndicats nationaux, Regina Qu'Appelle Regional Health Authority, Cypress Regional Health Authority, Five Hills Regional Health Authority, Heartland Regional Health Authority, Sunrise Regional Health Authority, Prince Albert Parkland Regional Health Authority, Saskatoon Regional Health Authority, National Union of Public and General Employees, Canada Post Corporation and Air Canada *Interveners*

procureur général de l'Alberta, procureur général de Terre-Neuve-et-Labrador, Saskatchewan Union of Nurses, SEIU-West, United Nurses of Alberta, Alberta Federation of Labour, Institut professionnel de la fonction publique du Canada, Canadian Constitution Foundation, Association des pilotes d'Air Canada, Association des libertés civiles de la Colombie-Britannique, Conseil du patronat du Québec, Conseil canadien des employeurs, Syndicat des travailleurs et travailleuses des postes, Association internationale des machinistes et des travailleurs et travailleuses de l'aérospatiale, British Columbia Teachers' Federation, Hospital Employees' Union, Congrès du travail du Canada, Alliance de la Fonction publique du Canada, Alberta Union of Provincial Employees, Confédération des syndicats nationaux, Regina Qu'Appelle Regional Health Authority, Cypress Regional Health Authority, Five Hills Regional Health Authority, Heartland Regional Health Authority, Sunrise Regional Health Authority, Prince Albert Parkland Regional Health Authority, Saskatoon Regional Health Authority, Syndicat national des employées et employés généraux du secteur public, Société canadienne des postes et Air Canada *Intervenants*

Indexed as: Saskatchewan Federation of Labour *v.* Saskatchewan

2015 SCC 4

File No.: 35423.

2014: May 16; 2015: January 30.

Répertorié : Saskatchewan Federation of Labour *c.* Saskatchewan

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N° du greffe : 35423.

2014 : 16 mai; 2015 : 30 janvier.

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Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Constitutional law — Charter of Rights — Freedom of Association — Right to strike — Public Service Employees — Stare decisis — Whether right to strike is protected by s. 2(d) of Charter — Whether prohibition on essential services employees participating in strike action amounts to substantial interference with meaningful process of collective bargaining and therefore violates s. 2(d) of Charter — If so, whether such violation is justified under s. 1 of Charter — Canadian Charter of Rights and Freedoms, s. 2(d) — Public Service Essential Services Act, S.S. 2008, c. P-42.2.

Constitutional law — Charter of Rights — Freedom of association — Provincial legislation changing certification process and provisions dealing with communications by employers with employees — Whether legislation violates s. 2(d) of Charter — Canadian Charter of Rights and Freedoms, s. 2(d) — Trade Union Amendment Act, 2008, S.S. 2008, c. 26.

In December, 2007, the newly elected Government of Saskatchewan introduced two statutes: *The Public Service Essential Services Act*, S.S. 2008, c. P-42.2 (*PSESA*), and *The Trade Union Amendment Act, 2008*, S.S. 2008, c. 26, which became law in May, 2008. The *PSESA* is Saskatchewan's first statutory scheme to limit the ability of public sector employees who perform essential services to strike. It prohibits unilaterally designated "essential services employees" from participating in any strike action against their employer. These employees are required to continue the duties of their employment in accordance with the terms and conditions of the last collective bargaining agreement. No meaningful mechanism for resolving bargaining impasses is provided.

The Trade Union Amendment Act, 2008 changes the union certification process by increasing the required level of written support and reducing the period for receiving written support from employees. It also changes the provisions dealing with communications between employers and their employees.

In July 2008, the Saskatchewan Federation of Labour and other unions challenged the constitutionality of both the *PSESA* and *The Trade Union Amendment Act, 2008*. The trial judge concluded that the right to strike

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Cromwell, Karakatsanis et Wagner.

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Droit constitutionnel — Charte des droits — Liberté d'association — Droit de grève — Salariés de l'État — Stare decisis — L'article 2d) de la Charte protège-t-il le droit de grève? — L'interdiction faite aux salariés qui assurent des services essentiels de prendre part à une grève entrave-t-elle substantiellement le droit à un processus véritable de négociation collective et contrevient-elle ainsi à l'art. 2d) de la Charte? — Dans l'affirmative, l'atteinte est-elle justifiée par application de l'article premier de la Charte? — Charte canadienne des droits et libertés, art. 2d) — Public Service Essential Services Act, S.S. 2008, c. P-42.2.

Droit constitutionnel — Charte des droits — Liberté d'association — Loi provinciale modifiant le processus d'accréditation, et dispositions portant sur les communications de l'employeur avec ses salariés — Les mesures législatives contreviennent-elles à l'art. 2d) de la Charte? — Charte canadienne des droits et libertés, art. 2d) — Trade Union Amendment Act, 2008, S.S. 2008, c. 26.

En décembre 2007, le gouvernement fraîchement élu de la Saskatchewan a déposé deux projets de loi, *The Public Service Essential Services Act*, S.S. 2008, c. P-42.2 (*PSESA*), et *The Trade Union Amendment Act, 2008*, S.S. 2008, c. 26, qui ont été adoptés en mai 2008. La *PSESA* est le premier régime législatif de la Saskatchewan à limiter l'exercice du droit de grève des salariés du secteur public qui assurent des services essentiels. Elle interdit unilatéralement aux « salariés [désignés] qui assurent des services essentiels » de prendre part à une grève. Ces salariés doivent continuer d'exercer leurs fonctions conformément aux conditions établies par la convention collective la plus récente. Nul mécanisme véritable n'est prévu pour dénouer l'impasse des négociations collectives.

La *Trade Union Amendment Act, 2008* modifie le processus de certification syndicale par l'accroissement du pourcentage d'appui requis de la part des salariés et par la réduction de la période d'obtention par écrit de cet appui. Elle modifie également les règles sur les communications de l'employeur avec ses salariés.

En juillet 2008, la Saskatchewan Federation of Labour et d'autres syndicats ont contesté la constitutionnalité de la *PSESA* et de la *Trade Union Amendment Act, 2008*. Le juge de première instance a conclu que le droit

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was a fundamental freedom protected by s. 2(*d*) of the *Canadian Charter of Rights and Freedoms* and that the prohibition on the right to strike in the *PSESA* substantially interfered with the s. 2(*d*) rights of the affected public sector employees. He also found that the absolute ban on the right to strike in the *PSESA* was neither minimally impairing nor proportionate and therefore was not saved by s. 1 of the *Charter*. The declaration of invalidity was suspended for one year. On the other hand, the trial judge concluded that the changes to the certification process and permissible employer communications set out in *The Trade Union Amendment Act, 2008* did not breach s. 2(*d*).

The Saskatchewan Court of Appeal unanimously allowed the Government of Saskatchewan's appeal with respect to the constitutionality of the *PSESA*. The appeal against the finding that *The Trade Union Amendment Act, 2008* did not violate s. 2(*d*) of the *Charter* was dismissed.

Held (Rothstein and Wagner JJ. dissenting in part): The appeal with respect to the *PSESA* should be allowed. The prohibition against strikes in the *PSESA* substantially interferes with a meaningful process of collective bargaining and therefore violates s. 2(*d*) of the *Charter.* The infringement is not justified under s. 1. The declaration of invalidity is suspended for one year. The appeal with respect to *The Trade Union Amendment Act, 2008* is dismissed.

Per McLachlin C.J. and LeBel, Abella, Cromwell and Karakatsanis JJ.: The right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations. The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right. 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. This crucial role in collective bargaining is why the right to strike is constitutionally protected by s. 2(*d*).

In *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, this Court recognized that the *Charter* values of "[h]uman dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy" supported protecting the right to a meaningful process of

de grève est une liberté fondamentale protégée par l'al. 2*d*) de la *Charte canadienne des droits et libertés* et que l'interdiction de la grève par la *PSESA* entrave substantiellement l'exercice des droits que garantit l'al. 2*d*) aux salariés du secteur public en cause. Il a en outre estimé que l'interdiction totale de la grève par la *PSESA* ne porte pas atteinte le moins possible aux droits constitutionnels et que son effet n'est pas proportionné à son objectif, de sorte qu'elle n'est pas sauvegardée par application de l'article premier de la *Charte*. Le juge a suspendu l'effet de sa déclaration d'invalidité pendant un an. Il a par ailleurs conclu que les changements apportés par la *Trade Union Amendment Act, 2008* au processus d'accréditation et aux communications permises à l'employeur ne contreviennent pas à l'al. 2*d*).

La Cour d'appel de la Saskatchewan a accueilli à l'unanimité l'appel interjeté par le gouvernement de la Saskatchewan relativement à la constitutionnalité de la *PSESA*. Elle a rejeté l'appel de la décision selon laquelle la *Trade Union Amendment Act, 2008* ne contrevient pas à l'al. 2*d*) de la *Charte*.

Arrêt (les juges Rothstein et Wagner sont dissidents en partie) : Le pourvoi est accueilli relativement à la *PSESA*. L'interdiction de la grève par la *PSESA* entrave substantiellement le droit à un processus véritable de négociation collective et contrevient donc à l'al. 2*d*) de la *Charte*. L'atteinte n'est pas justifiée par application de l'article premier. L'effet de la déclaration d'invalidité est suspendu pendant un an. L'appel visant la *Trade Union Amendment Act, 2008* est rejeté.

La juge en chef McLachlin et les juges LeBel, Abella, Cromwell et Karakatsanis : Dans notre régime de relations de travail, le droit de grève constitue un élément essentiel d'un processus véritable de négociation collective. Il n'est pas seulement dérivé du droit à la négociation collective, il en constitue une composante indispensable. Advenant la rupture de la négociation de bonne foi, la faculté de cesser collectivement le travail est une composante nécessaire du processus grâce auquel les travailleurs peuvent continuer de participer véritablement à la poursuite de leurs objectifs liés au travail. Le droit de grève jouit de la protection constitutionnelle en raison de sa fonction cruciale dans le cadre d'un processus véritable de négociation collective.

Dans l'arrêt *Health Services and Support — Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, [2007] 2 R.C.S. 391, la Cour reconnaît que les valeurs inhérentes à la *Charte* que sont « [l]a dignité humaine, l'égalité, la liberté, le respect de l'autonomie de la personne et la mise en valeur de la démocratie » confirment

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collective bargaining within the scope of s. 2(*d*). The right to strike is essential to realizing these values through a collective bargaining process because it permits workers to withdraw their labour in concert when collective bargaining reaches an impasse. Through a strike, workers come together to participate directly in the process of determining their wages, working conditions and the rules that will govern their working lives. The ability to strike thereby allows workers, through collective action, to refuse to work under imposed terms and conditions. This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives.

The right to strike also promotes equality in the bargaining process. This Court has long recognized the deep inequalities that structure the relationship between employers and employees, and the vulnerability of employees in this context. While strike activity itself does not guarantee that a labour dispute will be resolved in any particular manner, or that it will be resolved at all, it is the possibility of a strike which enables workers to negotiate their employment terms on a more equal footing.

In 1935, the *Wagner Act* was adopted in the United States, introducing a model of labour relations that came to inspire legislative schemes across Canada. This model was adopted in Canada because the federal and provincial governments recognized the fundamental need for workers to participate in the regulation of their work environment. One of the goals of the Wagner model was to reduce the frequency of strikes by ensuring a commitment to meaningful collective bargaining. The right to strike, however, is not a creature just of the Wagner model. Most labour relations models include it because the ability to collectively withdraw services for the purpose of negotiating the terms and conditions of employment — in other words, to strike — is an essential component of the process through which workers pursue collective workplace goals.

Canada's international human rights obligations also mandate protecting the right to strike as part of a meaningful process of collective bargaining. Canada is a party to international instruments which explicitly protect the right to strike. Besides these explicit commitments, other sources confirm the protection of a right to strike recognized in international law. And strikes are protected globally, existing in many of the countries with labour laws outside the *Wagner Act* model.

la protection du droit à un processus véritable de négociation collective dans les limites de l'al. 2*d*). Le droit de grève est essentiel à la réalisation de ces valeurs par voie de négociation collective, car il permet aux travailleurs de cesser le travail de manière concertée en cas d'impasse de cette négociation collective. En recourant à la grève, les travailleurs s'unissent pour participer directement au processus de détermination de leurs salaires, de leurs conditions de travail et des règles qui régiront leur vie professionnelle. Ainsi, le recours possible à la grève fait en sorte que les travailleurs peuvent, par leur action concertée, refuser de travailler aux conditions imposées par l'employeur. Cette action concertée à l'occasion d'une impasse se veut une affirmation de la dignité et de l'autonomie personnelle des salariés pendant leur vie professionnelle.

Le droit de grève favorise aussi l'égalité dans le processus de négociation. La Cour reconnaît depuis longtemps les inégalités marquées qui façonnent les relations entre employeurs et salariés, ainsi que la vulnérabilité des salariés dans ce contexte. La grève ne garantit pas en soi qu'un conflit de travail sera réglé d'une certaine manière, ni même du tout, mais elle permet aux travailleurs de négocier davantage sur un pied d'égalité relativement à leurs conditions de travail.

Adoptée aux États-Unis en 1935, la *Loi Wagner* a établi un modèle de relations de travail qui a inspiré les régimes législatifs partout au Canada. Les gouvernements fédéral et provinciaux ont adopté ce modèle parce qu'ils ont reconnu le besoin fondamental des travailleurs de participer à la réglementation de leur milieu de travail. Le modèle fondé sur la *Loi Wagner* visait entre autres à réduire le recours à la grève en veillant à ce que les parties se livrent à une véritable négociation collective. Or, il n'est pas le seul à reconnaître le droit de grève. La plupart des modèles de relations de travail le font parce que la faculté de cesser collectivement le travail aux fins de la négociation des conditions de travail — le droit de grève, en somme — constitue une composante essentielle de la poursuite d'objectifs liés au travail par les travailleurs.

Les obligations internationales du Canada en matière de droits de la personne commandent également la protection du droit de grève en tant qu'élément d'un processus véritable de négociation collective. Le Canada est partie à des instruments internationaux qui protègent expressément le droit de grève. Outre ces engagements exprès, d'autres sources confirment la protection du droit de grève que reconnaît le droit international. De nombreux pays dotés de lois du travail étrangères au modèle fondé sur la *Loi Wagner* protègent le droit de grève.

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This historical, international, and jurisprudential landscape suggests compellingly 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. The ability to engage in the collective withdrawal of services in the process of the negotiation of a collective agreement is, and has historically been, the irreducible minimum of the freedom to associate in Canadian labour relations.

To determine whether there has been an infringement of s. 2(*d*) of the *Charter*, the test is whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with a meaningful process of collective bargaining. The prohibition in the *PSESA* on designated employees participating in strike action for the purpose of negotiating the terms and conditions of their employment meets this threshold and therefore amounts to a violation of s. 2(*d*) of the *Charter*.

The breach of s. 2(*d*) of the *Charter* is not justified under s. 1. The maintenance of essential public services is self-evidently a pressing and substantial objective, but the determinative issue in this case is whether the means chosen by the government are minimally impairing, that is, carefully tailored so that rights are impaired no more than necessary.

The fact that a service is provided exclusively through the public sector does not inevitably lead to the conclusion that it is properly considered "essential". Under the *PSESA*, a public employer has the unilateral authority to dictate whether and how essential services will be maintained, including the authority to determine the classifications of employees who must continue to work during the work stoppage, the number and names of employees within each classification, and, for public employers other than the Government of Saskatchewan, the essential services that are to be maintained. Only the number of employees required to work is subject to review by the Saskatchewan Labour Relations Board. And even where an employee has been prohibited from participating in strike activity, the *PSESA* does not tailor his or her responsibilities to the performance of essential services alone. The provisions of the *PSESA* therefore go beyond what is reasonably required to ensure the uninterrupted delivery of essential services during a strike.

Il appert de ce tour d'horizon historique, international et jurisprudentiel qu'un processus véritable de négociation collective exige que les salariés puissent participer à un arrêt collectif du travail aux fins de la détermination de leurs conditions de travail par une convention collective. La faculté de cesser collectivement le travail pendant la négociation d'une convention collective constitue donc — et a toujours constitué — le minimum irréductible de la liberté d'association dans les relations de travail au Canada.

Pour savoir s'il y a atteinte à la liberté garantie par l'al. 2*d*) de la *Charte*, il faut déterminer si, dans un cas donné, la limitation législative du droit de grève entrave substantiellement le droit à un processus véritable de négociation collective. L'interdiction que fait la *PSESA* aux salariés désignés de prendre part à une grève aux fins de la négociation de leurs conditions de travail satisfait à cette condition, si bien qu'il y a atteinte à la liberté garantie par l'al. 2*d*) de la *Charte*.

L'atteinte à la liberté que garantit cet alinéa n'est pas justifiée par application de l'article premier. L'ininterruption des services publics essentiels constitue à l'évidence un objectif urgent et réel, mais la question décisive en l'espèce est celle de savoir si les moyens retenus par l'État portent atteinte le moins possible ou non aux droits constitutionnels en cause, c'est-à-dire s'ils sont ou non soigneusement adaptés de façon que l'atteinte aux droits n'aille pas au delà de ce qui est nécessaire.

Le fait qu'un service est offert uniquement par le secteur public ne mène pas inévitablement à la conclusion qu'il est à juste titre considéré comme « essentiel ». La *PSESA* confère à l'employeur public le pouvoir unilatéral de décider que des services essentiels seront assurés, ainsi que celui de déterminer la manière dont ils le seront, y compris les catégories de salariés qui continueront d'exercer leurs fonctions pendant l'arrêt de travail, le nombre et le nom des salariés de chacune des catégories et, dans le cas d'un employeur public autre que le gouvernement de la Saskatchewan, les services essentiels qui seront assurés. Seul le nombre de salariés qui demeureront au travail peut être révisé par la Saskatchewan Labour Relations Board. Même lorsqu'il est interdit à un salarié de prendre part à une grève, les dispositions de la *PSESA* ne limitent pas ses fonctions à la seule prestation des services essentiels. Elles vont au delà de ce qui est raisonnablement nécessaire pour assurer la prestation ininterrompue des services essentiels durant une grève.

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Nor is there any access to a meaningful alternative mechanism for resolving bargaining impasses, such as arbitration. Where strike action is limited in a way that substantially interferes with a meaningful process of collective bargaining, it must be replaced by one of the meaningful dispute resolution mechanisms commonly used in labour relations. Those public sector employees who provide essential services have unique functions which may argue for a less disruptive mechanism when collective bargaining reaches an impasse, but they do not argue for no mechanism at all.

The unilateral authority of public employers to determine whether and how essential services are to be maintained during a work stoppage with no adequate review mechanism, and the absence of a meaningful dispute resolution mechanism to resolve bargaining impasses, justify the conclusion that the *PSESA* is not minimally impairing. It is therefore unconstitutional.

The Trade Union Amendment Act, 2008, on the other hand, does not violate s. 2(*d*). The changes it introduces to the process by which unions may obtain or lose the status of a bargaining representative, as well as the changes to the rules governing employer communication to employees, do not substantially interfere with freedom of association.

Per Rothstein and Wagner JJ. (dissenting in part): This Court should not intrude into the policy development role of elected legislators by constitutionalizing the right to strike under the freedom of association guarantee in s. 2(*d*) of the *Charter*. The statutory right to strike, along with other statutory protections for workers, reflects a complex balance struck by legislatures between the interests of employers, employees and the public. Providing for a constitutional right to strike not only upsets this delicate balance, but also restricts legislatures by denying them the flexibility needed to ensure the balance of interests can be maintained.

Democratically elected legislatures are responsible for determining the appropriate balance between competing economic and social interests in the area of labour relations. This Court has long recognized that it is the role of legislators and not judges to balance competing tensions in making policy decisions, particularly in the area

La *PSESA* ne prévoit pas non plus d'autre moyen véritable (tel l'arbitrage) de mettre fin à l'impasse des négociations. Lorsque le droit de grève est limité d'une manière qui entrave substantiellement le droit à un processus véritable de négociation collective, il doit être remplacé par l'un ou l'autre des mécanismes véritables de règlement des différends qui sont couramment employés en relations de travail. Les salariés du secteur public qui assurent des services essentiels exercent des fonctions dont le caractère unique est susceptible de militer en faveur d'un mécanisme moins perturbateur que la grève lorsque la négociation collective se heurte à une impasse, mais ces fonctions ne sauraient justifier l'absence de tout mécanisme de règlement des différends.

Le pouvoir unilatéral de l'employeur public de décider que des services essentiels seront assurés durant un arrêt de travail et de déterminer la manière dont ils le seront, à l'exclusion de tout mécanisme de contrôle approprié, sans compter l'absence d'un mécanisme véritable de règlement des différends, justifie la conclusion selon laquelle la *PSESA* porte atteinte plus qu'il n'est nécessaire aux droits constitutionnels en cause. Il est donc inconstitutionnel.

Par contre, la *Trade Union Amendment Act, 2008* ne contrevient pas à l'al. 2*d*). Les modifications qu'elle apporte au processus d'accréditation ou de désaccréditation d'un agent négociateur, ainsi qu'aux règles applicables aux communications de l'employeur avec ses salariés, n'entravent pas de manière substantielle la liberté d'association.

Les juges Rothstein et Wagner (dissidents en partie) : Notre Cour ne devrait pas s'immiscer dans l'élaboration de politiques par les élus en constitutionnalisant le droit de grève sur le fondement de la liberté d'association que garantit l'al. 2*d*) de la *Charte*. Comme les autres protections que la loi accorde aux travailleurs, le droit de grève d'origine législative rend compte de l'équilibre complexe établi par les législateurs entre les intérêts respectifs des employeurs, des salariés et du public. Protéger constitutionnellement le droit de grève a pour effet non seulement de bouleverser cet équilibre délicat, mais aussi de limiter le pouvoir des législateurs en les privant de la souplesse nécessaire au maintien de cet équilibre.

C'est au législateur démocratiquement élu qu'il revient d'établir le juste équilibre entre les intérêts économiques et sociaux qui s'opposent dans le domaine des relations de travail. Notre Cour reconnaît depuis longtemps que, lorsqu'il s'agit de prendre des décisions de politique générale, il appartient au législateur et non aux

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of socio-economic policy. The legislative branch requires flexibility to deal with changing circumstances and social values. Canadian labour relations is a complex web of intersecting interests, rights and obligations, and has far-reaching implications for Canadian society. It is not the role of this Court to transform all policy choices it deems worthy into constitutional imperatives. The exercise of judicial restraint is essential in ensuring that courts do not upset the balance by usurping the responsibilities of the legislative and executive branches.

Constitutionalizing a right to strike restricts governments' flexibility, impedes their ability to balance the interests of workers with the broader public interest, and interferes with the proper role and responsibility of governments. Constitutionalizing a right to strike introduces great uncertainty into labour relations: it will make all statutory limits on the right to strike presumptively unconstitutional. By constitutionalizing a broad conception of the right to strike, the majority binds the governments hands and limits its ability to respond to changing needs and circumstances in the dynamic field of labour relations.

Constitutionalizing a right to strike enshrines a political understanding of the concept of "workplace justice" that favours the interests of employees over those of employers and even over those of the public. While employees are granted constitutional rights, constitutional obligations are imposed on employers. Employers and the public are equally entitled to justice: true workplace justice looks at the interests of all implicated parties. In the public sector, strikes are a political tool. The public expects that public services, and especially essential services, will be delivered. Thus unions attempt to pressure the government to agree to certain demands in order that these services be reinstated. Public sector labour disputes are unique in that the government as employer must take into account that any additional expenditures incurred to meet employee demands will come from public funds.

It is incorrect to say that without the right to strike a constitutionalized right to bargain collectively is meaningless. The threat of work stoppage is not what motivates good faith bargaining. It is the statutory duty, and after *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007]

tribunaux de mettre en balance les intérêts concurrents, spécialement en ce qui concerne la politique socio-économique. Le pouvoir législatif a besoin d'une marge de manœuvre pour adapter la loi à l'évolution du contexte et des valeurs sociales. Un entrelacement complexe d'intérêts, de droits et d'obligations interreliés caractérise les relations de travail au Canada, lesquelles ont de grandes répercussions sur la société canadienne. Il n'appartient pas à la Cour de transformer en diktat constitutionnel tout choix de politique générale qu'elle tient pour valable. La déférence judiciaire s'impose afin que les tribunaux ne rompent pas l'équilibre en usurpant les attributions des organes législatif et exécutif.

Constitutionnaliser le droit de grève réduit la marge de manœuvre de l'État, entrave sa faculté de mettre en balance les intérêts des travailleurs et ceux des citoyens en général et empiète sur la fonction et les attributions de l'État. Conférer la protection constitutionnelle au droit de grève est de nature à créer une grande incertitude dans le monde des relations de travail, car toute limitation du droit de grève par le législateur sera dès lors tenue pour inconstitutionnelle. Par la consécration constitutionnelle d'une conception large du droit de grève, les juges majoritaires ligotent l'État et l'empêchent de donner suite à l'évolution des besoins et de la réalité dans le monde bouillonnant des relations de travail.

La constitutionnalisation du droit de grève consacre une interprétation politique de la notion de « justice au travail » qui favorise les intérêts des salariés au détriment de ceux des employeurs, voire du public. Si les salariés se voient conférer des droits constitutionnels, les employeurs, eux, se voient imposer des obligations constitutionnelles. Les employeurs et le public ont autant droit à la justice que les salariés : la véritable justice au travail se soucie des intérêts de tous les intéressés. Dans le secteur public, la grève est un outil politique. La population s'attend à la prestation de services publics, en particulier ceux qui sont essentiels. Les syndicats tentent donc de faire pression sur l'État pour qu'il accède à certaines demandes en échange de la reprise du travail. Les conflits de travail du secteur public revêtent un caractère unique en ce que l'État, en tant qu'employeur, doit tenir compte du fait que les sommes supplémentaires requises pour accéder aux demandes des salariés seront prélevées sur les fonds publics.

Il est erroné d'affirmer que, sans le droit de grève, le droit constitutionnel de négocier collectivement perd tout son sens. Ce n'est pas la menace d'un arrêt de travail qui incite les parties à négocier de bonne foi. C'est l'obligation en ce sens que prévoient la loi et, depuis l'arrêt *Health Services and Support — Facilities Subsector Bargaining*

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2 S.C.R. 391, the constitutional duty, not the possibility of job action, that compels employers to bargain in good faith. The statutory right to strike allows both employers and employees to exercise economic and political power. Now by constitutionalizing only the ability of employees to exert such power, the majority disturbs the delicate balance of labour relations in Canada and impedes the achievement of true workplace justice.

The conclusion that the right to strike is an indispensable component of collective bargaining does not accord with recent jurisprudence. There is nothing in the concept of collective bargaining as it was defined by this Court in *Health Services*, *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, and *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3, that would imply that employees have a constitutional right to strike and that employers have a constitutional obligation to preserve the jobs of those employees. The threshold for overturning prior judgments is high. While the s. 2(*d*) jurisprudence has developed since the Labour Trilogy, neither this development, nor any change in the circumstances of Canadian labour relations justifies a departure from precedent. If anything, developments in the law support a finding that the right to freedom of association does not require constitutionalizing the right to strike. This is because recent s. 2(*d*) jurisprudence has already established a right to meaningful, good faith collective bargaining.

International bodies disagree as to whether the right to strike is protected under international labour and human rights instruments. The current state of international law on the right to strike is unclear and provides no guidance in determining whether this right is an essential element of freedom of association.

A right to strike is not required to ensure the constitutional guarantee of freedom of association. Therefore, the *PSESA*, which restricts the ability of public sector workers who provide essential services to strike, does not violate the right to meaningful collective bargaining protected under s. 2(*d*) of the *Charter*. The *PSESA*'s controlled strike regime does not render effectively impossible, nor substantially interfere with, the ability of associations representing affected public sector employees to submit representations to employers and to have

Assn. c. Colombie-Britannique, 2007 CSC 27, [2007] 2 R.C.S. 391, la Constitution, non le recours possible à un moyen de pression, qui force l'employeur à négocier de bonne foi. Le droit de grève d'origine législative permet aux employeurs et aux salariés d'exercer leurs pouvoirs économiques et politiques. Or, en constitutionnalisant seulement la faculté des salariés d'exercer ces pouvoirs, les juges majoritaires rompent l'équilibre délicat des relations de travail au Canada et font obstacle à une véritable justice au travail.

La conclusion selon laquelle le droit de grève constitue une composante indispensable de la négociation collective est incompatible avec la jurisprudence récente. La notion de négociation collective définie par notre Cour dans les arrêts *Health Services*, *Ontario (Procureur général) c. Fraser*, 2011 CSC 20, [2011] 2 R.C.S. 3, et *Association de la police montée de l'Ontario c. Canada (Procureur général)*, 2015 CSC 1, [2015] 1 R.C.S. 3, ne donne en rien à penser que les salariés jouissent du droit constitutionnel de faire la grève et que l'employeur a l'obligation constitutionnelle de protéger les emplois des grévistes. Les conditions auxquelles on peut rompre avec un jugement antérieur sont strictes. Si la jurisprudence relative à l'al. 2*d*) a évolué depuis la trilogie en droit du travail, ni cette évolution, ni un quelconque changement dans les relations de travail au Canada ne justifient que l'on s'écarte de la jurisprudence de notre Cour. Au contraire, l'évolution du droit permet de conclure que le droit à la liberté d'association ne commande pas la constitutionnalisation du droit de grève car la jurisprudence récente relative à l'al. 2*d*) reconnaît déjà le droit à un processus véritable de négociation collective de bonne foi.

Les organismes internationaux ne s'entendent pas quant à savoir si les instruments internationaux en matière de droit du travail et de droits de la personne protègent ou non le droit de grève. L'état actuel du droit international sur le recours à la grève est incertain et n'offre pas de repères qui permettent à la Cour de décider si ce droit constitue ou non un élément essentiel de la liberté d'association.

Le droit de grève n'est pas nécessaire à la protection constitutionnelle de la liberté d'association. Par conséquent, la *PSESA*, qui limite le droit de grève des travailleurs du secteur public assurant des services essentiels, ne porte pas atteinte au droit à une négociation collective véritable garantie par l'al. 2*d*) de la *Charte*. Le régime de grève contrôlée qu'elle établit ne prive pas dans les faits les associations qui représentent les salariés du secteur public en cause du droit de présenter des observations à l'employeur et de les voir prises en compte et débattues

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them considered and discussed in good faith. The *PSESA* facilitates consultation between employers and unions regarding the designation of essential services and the evidence in this case demonstrates that good faith collective bargaining took place. A violation of s. 2(*d*) of the *Charter* cannot be founded simply on allegations that the legislation does not provide an adequate dispute resolution process; s. 2(*d*) does not entail such a right. Moreover, the goal of strikes is not to ensure meaningful collective bargaining, but instead to exert political pressure on employers. Finally, the statutory balance struck by the Government of Saskatchewan is eminently reasonable. Canadian federal and provincial governments have made a constitutional commitment "to provid[e] essential public services of reasonable quality to all Canadians" (*Constitution Act, 1982*, s. 36(1)(*c*)). As a result, the Government of Saskatchewan cannot subject itself to arbitral awards that could make it unaffordable to deliver on its undertaking. It has devised a particular legislative framework in order to safeguard the continued delivery of essential services to the community during labour disputes. This Court should defer to the government's policy choices in balancing the interests of employers, employees, and the public.

The Trade Union Amendment Act, 2008 does not infringe the right to freedom of association.

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By Abella J.

Overruled: *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; **referred to:** *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *Perrault v. Gauthier* (1898), 28 S.C.R. 241; *Canadian Pacific Railway Co. v. Zambri*, [1962] S.C.R. 609; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733; *Gagnon v. Foundation Maritime Ltd.*, [1961] S.C.R. 435; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156; *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home* (1983), 4 D.L.R. (4th) 231; *Williams*

de bonne foi, ni n'entrave substantiellement l'exercice de ce droit. Elle facilite la consultation entre employeurs et syndicats sur la désignation des services essentiels et, selon la preuve offerte en l'espèce, il y a eu négociation de bonne foi. La seule allégation voulant que la loi n'offre pas de mécanisme adéquat de règlement des différends ne permet pas de conclure à la violation des droits protégés par l'al. 2*d*) de la *Charte*; cet alinéa ne garantit pas le droit à pareil mécanisme. En outre, la grève n'a pas pour objectif de garantir le déroulement d'une négociation collective véritable, mais bien d'exercer une pression politique sur l'employeur. Enfin, l'équilibre établi par le gouvernement de la Saskatchewan est éminemment raisonnable. Le gouvernement fédéral et ses homologues provinciaux doivent respecter l'engagement constitutionnel de « fournir à tous les Canadiens, à un niveau de qualité acceptable, les services publics essentiels » (*Loi constitutionnelle de 1982*, al. 36(1)*c*)). Le gouvernement de la Saskatchewan ne peut donc pas s'en remettre à des décisions arbitrales susceptibles de faire en sorte que la province n'ait plus les moyens de donner suite à son engagement. Il a conçu un cadre législatif unique afin d'assurer à la collectivité la prestation continue de services essentiels pendant un conflit de travail. La Cour devrait déférer aux choix politiques de l'État dans l'établissement d'un équilibre entre les intérêts respectifs des employeurs, des employés et du public.

La *Trade Union Amendment Act, 2008* ne porte pas atteinte au droit à la liberté d'association.

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Rejeté : *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313; **arrêts mentionnés :** *Health Services and Support — Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, 2007 CSC 27, [2007] 2 R.C.S. 391; *Ontario (Procureur général) c. Fraser*, 2011 CSC 20, [2011] 2 R.C.S. 3; *Association de la police montée de l'Ontario c. Canada (Procureur général)*, 2015 CSC 1, [2015] 1 R.C.S. 3; *Canada (Procureur général) c. Bedford*, 2013 CSC 72, [2013] 3 R.C.S. 1101; *Perrault c. Gauthier* (1898), 28 R.C.S. 241; *Canadian Pacific Railway Co. c. Zambri*, [1962] R.C.S. 609; *Alberta (Information and Privacy Commissioner) c. Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 401*, 2013 CSC 62, [2013] 3 R.C.S. 733; *Gagnon c. Foundation Maritime Ltd.*, [1961] R.C.S. 435; *S.D.G.M.R., section locale 558 c. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 CSC 8, [2002] 1 R.C.S. 156; *Re Service Employees'*

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Rick Engel, *Q.C.*, *Craig D. Bavis* and *Peter Barnacle*, for the appellants.

Graeme G. Mitchell, *Q.C.*, *Barbara C. Mysko* and *Katherine M. Roy*, for the respondent.

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POURVOI contre un arrêt de la Cour d'appel de la Saskatchewan (le juge en chef Klebuc et les juges Richards, Ottenbreit, Caldwell et Herauf), 2013 SKCA 43, 414 Sask. R. 70, 575 W.A.C. 70, 361 D.L.R. (4th) 132, 280 C.R.R. (2d) 187, [2013] 6 W.W.R. 453, 227 C.L.R.B.R. (2d) 1, 2013 CLLC ¶220-032, [2013] S.J. No. 235 (QL), 2013 CarswellSask 252 (WL Can.), qui a infirmé en partie une décision du juge Ball, 2012 SKQB 62, 390 Sask. R. 196, 254 C.R.R. (2d) 288, [2012] 7 W.W.R. 743, 211 C.L.R.B.R. (2d) 1, 2012 CLLC ¶220-016, [2012] S.J. No. 49 (QL), 2012 CarswellSask 64 (WL Can.). Pourvoi accueilli en partie, les juges Rothstein et Wagner sont dissidents en partie.

Rick Engel, *c.r.*, *Craig D. Bavis* et *Peter Barnacle*, pour les appelants.

Graeme G. Mitchell, *c.r.*, *Barbara C. Mysko* et *Katherine M. Roy*, pour l'intimée.

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Mark R. Kindrachuk, *Q.C.*, and *Sean Gaudet*, for the intervener the Attorney General of Canada.

Robert E. Charney and *Sarah Wright*, for the intervener the Attorney General of Ontario.

Caroline Renaud and *Amélie Pelletier Desrosiers*, for the intervener the Attorney General of Quebec.

Keith Evans, for the intervener the Attorney General of British Columbia.

Roderick Wiltshire, for the intervener the Attorney General of Alberta.

Chantelle MacDonald Newhook, for the intervener the Attorney General of Newfoundland and Labrador.

Gary L. Bainbridge and *Marcus R. Davies*, for the intervener the Saskatchewan Union of Nurses.

Drew S. Plaxton, for the intervener SEIU-West.

Written submissions only by *Ritu Khullar*, *Q.C.*, and *Vanessa Cosco*, for the interveners the United Nurses of Alberta and the Alberta Federation of Labour.

Written submissions only by *Peter C. Engelmann* and *Colleen Bauman*, for the intervener the Professional Institute of the Public Service of Canada.

Darryl Cruz and *Brandon Kain*, for the intervener the Canadian Constitution Foundation.

Steve Waller and *Christopher Rootham*, for the intervener the Air Canada Pilots' Association.

Lindsay M. Lyster, for the intervener the British Columbia Civil Liberties Association.

Written submissions only by *Louise Laplante*, *Nancy Ménard-Cheng* and *Sébastien Beauregard*, for the intervener Conseil du patronat du Québec.

Mark R. Kindrachuk, *c.r.*, et *Sean Gaudet*, pour l'intervenant le procureur général du Canada.

Robert E. Charney et *Sarah Wright*, pour l'intervenant le procureur général de l'Ontario.

Caroline Renaud et *Amélie Pelletier Desrosiers*, pour l'intervenant le procureur général du Québec.

Keith Evans, pour l'intervenant le procureur général de la Colombie-Britannique.

Roderick Wiltshire, pour l'intervenant le procureur général de l'Alberta.

Chantelle MacDonald Newhook, pour l'intervenant le procureur général de Terre-Neuve-et-Labrador.

Gary L. Bainbridge et *Marcus R. Davies*, pour l'intervenant Saskatchewan Union of Nurses.

Drew S. Plaxton, pour l'intervenant SEIU-West.

Argumentation écrite seulement par *Ritu Khullar*, *c.r.*, et *Vanessa Cosco*, pour les intervenantes United Nurses of Alberta et Alberta Federation of Labour.

Argumentation écrite seulement par *Peter C. Engelmann* et *Colleen Bauman*, pour l'intervenant l'Institut professionnel de la fonction publique du Canada.

Darryl Cruz et *Brandon Kain*, pour l'intervenante Canadian Constitution Foundation.

Steve Waller et *Christopher Rootham*, pour l'intervenante l'Association des pilotes d'Air Canada.

Lindsay M. Lyster, pour l'intervenante l'Association des libertés civiles de la Colombie-Britannique.

Argumentation écrite seulement par *Louise Laplante*, *Nancy Ménard-Cheng* et *Sébastien Beauregard*, pour l'intervenant le Conseil du patronat du Québec.

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John D. R. Craig and *Christopher D. Pigott*, for the intervener the Canadian Employers Council.

Paul J. J. Cavalluzzo and *Adrienne Telford*, for the interveners the Canadian Union of Postal Workers and the International Association of Machinists and Aerospace Workers.

Joseph J. Arvay, *Q.C.*, and *Catherine J. Boies Parker*, for the interveners the British Columbia Teachers' Federation and the Hospital Employees' Union.

Written submissions only by *Steven Barrett* and *Ethan Poskanzer*, for the intervener the Canadian Labour Congress.

Andrew Raven and *Andrew Astritis*, for the intervener the Public Service Alliance of Canada.

Patrick G. Nugent and *Tamara Friesen*, for the intervener the Alberta Union of Provincial Employees.

Éric Lévesque and *Benoît Laurin*, for the intervener Confédération des syndicats nationaux.

Evert van Olst, *Q.C.*, and *Leah Schatz*, for the interveners the Regina Qu'Appelle Regional Health Authority, the Cypress Regional Health Authority, the Five Hills Regional Health Authority, the Heartland Regional Health Authority, the Sunrise Regional Health Authority, the Prince Albert Parkland Regional Health Authority and the Saskatoon Regional Health Authority.

Paul Champ and *Bijon Roy*, for the intervener the National Union of Public and General Employees.

Written submissions only by *Brian W. Burkett*, for the interveners the Canada Post Corporation and Air Canada.

John D. R. Craig et *Christopher D. Pigott*, pour l'intervenant le Conseil canadien des employeurs.

Paul J. J. Cavalluzzo et *Adrienne Telford*, pour les intervenants le Syndicat des travailleurs et travailleuses des postes et l'Association internationale des machinistes et des travailleurs et travailleuses de l'aérospatiale.

Joseph J. Arvay, *c.r.*, et *Catherine J. Boies Parker*, pour les intervenants British Columbia Teachers' Federation and Hospital Employees' Union.

Argumentation écrite seulement par *Steven Barrett* et *Ethan Poskanzer*, pour l'intervenant le Congrès du travail du Canada.

Andrew Raven et *Andrew Astritis*, pour l'intervenante l'Alliance de la Fonction publique du Canada.

Patrick G. Nugent et *Tamara Friesen*, pour l'intervenant Alberta Union of Provincial Employees.

Éric Lévesque et *Benoît Laurin*, pour l'intervenante la Confédération des syndicats nationaux.

Evert van Olst, *c.r.*, et *Leah Schatz*, pour les intervenantes Regina Qu'Appelle Regional Health Authority, Cypress Regional Health Authority, Five Hills Regional Health Authority, Heartland Regional Health Authority, Sunrise Regional Health Authority, Prince Albert Parkland Regional Health Authority et Saskatoon Regional Health Authority.

Paul Champ et *Bijon Roy*, pour l'intervenant le Syndicat national des employées et employés généraux du secteur public.

Argumentation écrite seulement par *Brian W. Burkett*, pour les intervenantes la Société canadienne des postes et Air Canada.

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The judgment of McLachlin C.J. and LeBel, Abella, Cromwell and Karakatsanis was delivered by

[1] ABELLA J. — In the *Alberta Reference* (*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313), this Court held that the freedom of association guaranteed under s. 2(*d*) of the *Canadian Charter of Rights and Freedoms* did not protect the right to collective bargaining or to strike. Twenty years later, in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, this Court held that s. 2(*d*) protects the right of employees to engage in a meaningful process of collective bargaining. The rights were further enlarged in *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3, where the Court accepted that a meaningful process includes employees' rights to join together to pursue workplace goals, to make collective representations to the employer, and to have those representations considered in good faith, including having a means of recourse should the employer not bargain in good faith. And, most recently, in *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] 1 S.C.R. 3, the Court recognized that a process of collective bargaining could not be meaningful if employees lacked the independence and choice to determine and pursue their collective interests. Clearly the arc bends increasingly towards workplace justice.

[2] The question in this appeal is whether a prohibition on designated employees participating in strike action for the purpose of negotiating the terms and conditions of their employment amounts to a substantial interference with their right to a meaningful process of collective bargaining and, as a result, violates s. 2(*d*) of the *Charter*. The question of whether other forms of collective work stoppage are protected by s. 2(*d*) of the *Charter* is not at issue here.

Version française du jugement de la juge en chef McLachlin et des juges LeBel, Abella, Cromwell et Karakatsanis rendu par

[1] LA JUGE ABELLA — Dans le *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313 (le « *Renvoi relatif à l'Alberta* »), notre Cour statue que la liberté d'association garantie par l'al. 2*d*) de la *Charte canadienne des droits et libertés* ne protège ni le droit de négociation collective, ni le droit de grève. Vingt ans plus tard, dans l'arrêt *Health Services and Support — Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, [2007] 2 R.C.S. 391, la Cour décide que l'al. 2*d*) protège le droit des salariés de prendre part à un processus véritable de négociation collective. La portée de ce droit s'accroît ensuite dans l'arrêt *Ontario (Procureur général) c. Fraser*, [2011] 2 R.C.S. 3, où la Cour reconnaît que ce processus véritable comprend le droit des salariés de se regrouper en vue d'atteindre des objectifs liés au travail, de faire des représentations collectives à leur employeur et de les voir prises en compte de bonne foi, ce qui comprend l'accès à une voie de recours pour le cas où l'employeur ne négocierait pas de bonne foi. Et plus récemment, dans l'arrêt *Association de la police montée de l'Ontario c. Canada (Procureur général)*, [2015] 1 R.C.S. 3, la Cour reconnaît qu'un processus de négociation collective ne peut être véritable lorsque les salariés n'ont pas la liberté de choix et l'indépendance voulues pour décider de leurs intérêts collectifs et les poursuivre. Ce parcours fait ressortir une inclination croissante à favoriser la justice au travail.

[2] La question en litige est celle de savoir si l'interdiction faite aux salariés désignés de prendre part à une grève aux fins de la négociation de leurs conditions de travail entrave substantiellement leur droit à un processus véritable de négociation collective et, de ce fait, porte atteinte aux droits que leur garantit l'al. 2*d*) de la *Charte*. La question de savoir si d'autres formes d'arrêt collectif du travail sont protégées ou non par cette disposition n'a pas à être tranchée en l'espèce.

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[3] The conclusion that the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations is supported by history, by jurisprudence, and by Canada's international obligations. As Otto Kahn-Freund and Bob Hepple recognized:

> The power to withdraw their labour is for the workers what for management is its power to shut down production, to switch it to different purposes, to transfer it to different places. A legal system which suppresses the freedom to strike puts the workers at the mercy of their employers. This — in all its simplicity — is the essence of the matter.

(*Laws Against Strikes* (1972), at p. 8)

The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right. It seems to me to be the time to give this conclusion constitutional benediction.

[4] This applies too to public sector employees. Those public sector employees who provide essential services undoubtedly have unique functions which may argue for a less disruptive mechanism when collective bargaining reaches an impasse, but they do not argue for no mechanism at all. Because Saskatchewan's legislation abrogates the right to strike for a number of employees and provides no such alternative mechanism, it is unconstitutional.

Background

[5] On December 19, 2007, the newly elected Government of Saskatchewan introduced two statutes which ground this appeal: *The Public Service Essential Services Act*, S.S. 2008, c. P-42.2 (*PSESA*), and *The Trade Union Amendment Act, 2008*, S.S. 2008, c. 26. They became law on May 14, 2008.

[6] Prior to the enactment of *The Public Service Essential Services Act*, public sector strikes were regulated on an *ad hoc* basis in Saskatchewan.

[3] L'histoire, la jurisprudence et les obligations internationales du Canada confirment que, dans notre régime de relations de travail, le droit de grève constitue un élément essentiel d'un processus véritable de négociation collective. Otto Kahn-Freund et Bob Hepple l'ont d'ailleurs reconnu :

> [TRADUCTION] Le pouvoir des travailleurs de cesser le travail équivaut à celui de la direction de cesser la production, de la réorienter, de la déplacer. Le régime juridique qui supprime la liberté de grève met les salariés à la merci de l'employeur. Là réside tout simplement l'essentiel.

(*Laws Against Strikes* (1972), p. 8)

Le droit de grève n'est pas seulement dérivé de la négociation collective, il en constitue une composante indispensable. Le temps me paraît venu de le consacrer constitutionnellement.

[4] Les salariés du secteur public sont tout autant visés. Ceux d'entre eux qui assurent des services essentiels ont certainement des fonctions dont le caractère unique est susceptible de militer en faveur d'un mécanisme moins perturbateur que la grève lorsque la négociation collective se heurte à une impasse, mais ne saurait justifier l'absence de tout mécanisme de règlement des différends. Parce qu'elle supprime le droit de grève d'un certain nombre de salariés sans le remplacer par un tel mécanisme, la loi saskatchewanaise en cause est inconstitutionnelle.

Contexte

[5] Le 19 décembre 2007, le gouvernement fraîchement élu de la Saskatchewan a déposé deux projets de loi qui forment l'assise du pourvoi : *The Public Service Essential Services Act*, S.S. 2008, c. P-42.2 (*PSESA*) et *The Trade Union Amendment Act, 2008*, S.S. 2008, c. 26. Ces textes législatifs ont été adoptés le 14 mai 2008.

[6] Avant l'adoption de la *Public Service Essential Services Act*, le législateur de la Saskatchewan intervenait de manière ponctuelle lorsqu'une grève

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Without a regime in place, it was often difficult to ensure the adequate provision of essential services during labour disputes. In April 1999, for example, 8,400 members of the Saskatchewan Union of Nurses participated in a province-wide strike and many health care facilities throughout the province lost the capacity to provide critical care to patients. Similarly, in 2001, health care employees represented by the Canadian Union of Public Employees withdrew their services, seriously affecting the delivery of health care:

As the strike progressed, the impact on health care services became more serious. In the Regina area alone, elective procedures were cancelled, patients were transferred out of province to alternate provincial sites, and there were no admissions to permanent beds, convalescent beds, palliative beds or respite beds. Admissions to long term care facilities were halted. All day support programs and Meals on Wheels programs were cancelled. Eighty-eight beds at the Regina General Hospital were closed, which left it functioning at 75 percent, and 110 beds at the Pasqua Hospital were closed, leaving it functioning at only 54 percent of capacity. Operating room theatres were reduced from eight to one at the Regina General Hospital, and from seven to one at the Pasqua Hospital, being the only two operating hospitals in the city. The women's health centre was closed and five children's beds were closed in in-patient rehabilitation at Wascana Rehabilitation Centre, in addition to eight adult rehabilitation beds.

And from December 2006 to February 2007, the Saskatchewan Government and General Employees' Union engaged in lawful strike action. A large number of highway workers, snow plow operators, and corrections workers participated, sparking concerns about public safety.

[7] As a result of these experiences, in 2007 the newly elected provincial government moved to implement an essential services labour relations regime in the province. The *PSESA* is Saskatchewan's first statutory scheme to regulate and limit the ability of public sector employees who perform "essential

survenait dans le secteur public. Sans dispositions applicables en la matière, il était souvent difficile d'assurer la prestation adéquate de services essentiels pendant un conflit de travail. En avril 1999, par exemple, 8 400 membres de la Saskatchewan Union of Nurses ont fait la grève à la grandeur de la province, et de nombreux établissements de santé n'ont plus été en mesure d'offrir aux patients des soins indispensables. De même, en 2001, des salariés du secteur de la santé représentés par le Syndicat canadien de la fonction publique ont cessé le travail et compromis ainsi sérieusement la prestation de soins de santé :

[TRADUCTION] Au fur et à mesure que la grève se poursuivait, l'effet sur les services de santé s'accentuait. Dans la seule région de Regina, les interventions non urgentes étaient annulées, les patients étaient envoyés dans d'autres provinces et il n'y avait pas d'attribution de lits permanents, non plus que de lits réservés aux soins de convalescence, aux soins palliatifs ou au service de relève. L'accès aux soins de longue durée était lui aussi suspendu. Toutes les activités d'aide de jour ou de popote roulante étaient annulées. Quatre-vingt-huit lits étaient fermés à l'hôpital général de Regina, qui fonctionnait à 75 pour 100 de sa capacité, et 110 lits étaient fermés à l'hôpital Pasqua, qui fonctionnait à seulement 54 pour 100 de sa capacité. Le nombre de blocs opératoires était passé de huit à un à l'hôpital général de Regina, et de sept à un à l'hôpital Pasqua. Il s'agissait des deux seuls hôpitaux de la ville où des activités chirurgicales avaient lieu. Le centre de santé des femmes était fermé, et au service des patients hospitalisés du centre de réadaptation Wascana, cinq lits réservés aux enfants étaient fermés, en plus de huit lits réservés aux adultes.

De plus, de décembre 2006 à février 2007, le Saskatchewan Government and General Employees' Union a fait la grève légalement. Un grand nombre d'employés de la voirie, de préposés au déneigement et d'employés des services correctionnels ont pris part au moyen de pression, ce qui a fait craindre pour la sécurité publique.

[7] Par suite de ces événements, le gouvernement provincial nouvellement élu a entrepris en 2007 la mise en œuvre d'un régime de services essentiels dans la province. La *PSESA* est le premier régime législatif de la Saskatchewan à réglementer et à limiter l'exercice du droit de grève des salariés du

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services" to strike. The *Act* applies to every "public employer" in Saskatchewan and to every "employee" of a public employer who is represented by a union.

[8] Under the *PSESA*, designated "essential services employees" are prohibited from participating in any work stoppage against their public employer. In the event of a strike, those employees are required to continue "the duties of [their] employment with the public employer in accordance with the terms and conditions of the last collective bargaining agreement", and are prohibited from refusing to continue those duties "without lawful excuse". Contravention of any provision under the *PSESA* is a summary conviction offence that could result in an increasing fine for every day the offence continues.

[9] The *PSESA* sets out a broad definition of "essential services":

s. 2(c)

(i) with respect to services provided by a public employer other than the Government of Saskatchewan, services that are necessary to enable a public employer to prevent:

(A) danger to life, health or safety;

(B) the destruction or serious deterioration of machinery, equipment or premises;

(C) serious environmental damage; or

(D) disruption of any of the courts of Saskatchewan; and

(ii) with respect to services provided by the Government of Saskatchewan, services that:

(A) meet the criteria set out in subclause (i); and

(B) are prescribed;[1]

[1] The "prescribed" services referred to in s. 2(c)(ii) are listed in Table 1 of the Appendix of *The Public Service Essential Services Regulations*, R.R.S., c. P-42.2, Reg. 1, enacted in 2009.

secteur public qui assurent des [TRADUCTION] « services essentiels ». Elle s'applique à tout « employeur public » de la Saskatchewan et à tout « salarié » d'un employeur public représenté par un syndicat.

[8] La *PSESA* interdit aux [TRADUCTION] « salariés [désignés] qui assurent des services essentiels » de prendre part à un arrêt de travail. En cas de grève, ces salariés doivent continuer d'exercer « leurs fonctions [. . .] conformément aux conditions établies par la convention collective la plus récente », et ils ne peuvent refuser de le faire « sans excuse valable ». L'inobservation de l'une ou l'autre des dispositions de la *PSESA* constitue une infraction punissable sur déclaration de culpabilité par procédure sommaire et rend passible d'une amende dont le montant s'accroît chaque jour où l'infraction se poursuit.

[9] La *PSESA* définit largement les [TRADUCTION] « services essentiels » :

[TRADUCTION]

al. 2(c)

(i) dans le cas de services fournis par un employeur public autre que le gouvernement de la Saskatchewan, les services nécessaires pour permettre à l'employeur public d'empêcher, selon le cas :

(A) la mise en danger de la vie, de la santé ou de la sécurité;

(B) la destruction ou la détérioration grave de machines, de matériel ou de locaux;

(C) l'endommagement grave de l'environnement;

(D) la perturbation des tribunaux de la Saskatchewan;

(ii) dans le cas de services fournis par le gouvernement de la Saskatchewan, les services qui

(A) répondent aux critères énoncés au sous-alinéa (i) et

(B) qui sont visés par règlement[1];

[1] Le service « visé par règlement » dont il est question au sous-al. 2(c)(ii) figure au Tableau 1 de l'annexe du *Public Service Essential Services Regulations,* R.R.S., c. P-42.2, règl. 1, entré en vigueur en 2009.

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[10] A "public employer" is defined as:

s. 2(i)

(i) the Government of Saskatchewan;

(ii) a Crown corporation as defined in *The Crown Corporations Act, 1993*;

(iii) a regional health authority as defined in *The Regional Health Services Act*;

(iv) an affiliate as defined in *The Regional Health Services Act*;

(v) the Saskatchewan Cancer Agency continued pursuant to *The Cancer Agency Act*;

(vi) the University of Regina;

(vii) the University of Saskatchewan;

(viii) the Saskatchewan Polytechnic;

(ix) a municipality;

(x) a board as defined in *The Police Act, 1990*;

(xi) any other person, agency or body, or class of persons, agencies or bodies, that:

(A) provides an essential service to the public; and

(B) is prescribed;

[11] A public employer and the union are to negotiate an "essential services agreement" to govern how public services are to be maintained in the event of a work stoppage. In the event that the negotiations break down, the public employer has the authority to unilaterally designate, by "notice", which public services it considers to be essential, the classifications of employees required to continue to work during a work stoppage, and the names and number of employees in each of the classifications. Further notice may be given by the public employer at any time, either to increase or decrease the numbers of employees required to maintain essential services.

[10] Le terme [TRADUCTION] « employeur public » est défini comme suit :

[TRADUCTION]

al. 2(i)

(i) le gouvernement de la Saskatchewan;

(ii) une société d'État au sens de la *Crown Corporations Act, 1993*;

(iii) un office régional de la santé au sens de la loi intitulée *The Regional Health Services Act*;

(iv) un affilié au sens de la *Regional Health Services Act*;

(v) la Saskatchewan Cancer Agency prorogée en vertu de la *Cancer Agency Act*;

(vi) l'Université de Regina;

(vii) l'Université de la Saskatchewan;

(viii) la Saskatchewan Polytechnic;

(ix) une municipalité;

(x) un conseil au sens de la loi intitulée *The Police Act, 1990*;

(xi) tout autre organisme, personne ou agence, ou catégorie d'organismes, de personnes ou d'agences :

(A) qui fournit un service essentiel au public et

(B) qui est visée par règlement;

[11] L'employeur public et le syndicat doivent négocier un [TRADUCTION] « accord sur les services essentiels » qui détermine la manière dont les services publics seront assurés advenant un arrêt de travail. S'ils n'y parviennent pas, l'employeur public a le pouvoir de désigner unilatéralement, au moyen d'un « avis », les services publics qui sont tenus pour essentiels et les catégories de salariés qui doivent continuer d'exercer leurs fonctions durant un arrêt de travail, ainsi que de préciser les noms et le nombre des salariés de chacune de ces catégories. L'employeur public peut à tout moment donner un nouvel avis à l'effet d'augmenter ou de diminuer le nombre de salariés tenus d'assurer des services essentiels.

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[12] Where the employer is the Government of Saskatchewan, essential services are prescribed by regulation.

[13] The Saskatchewan Labour Relations Board has limited jurisdiction to review the numbers of employees required to work in a given classification during a strike, but it has no authority to review whether any particular service is essential, which classifications involve the delivery of genuinely essential services, or whether specific employees named by the employer to work during the strike have been reasonably selected.

[14] The second statute at issue in this appeal is *The Trade Union Amendment Act, 2008*. It introduced stricter requirements for a union to be certified by increasing the required level of written support from 25% to 45% of employees; by reducing the period for receiving written support from the employees from six months to three; and by eliminating the automatic certification previously available when over 50% of the employees had given written support prior to the application. The Saskatchewan Labour Board no longer had any discretion to decide whether a representation vote by secret ballot was needed.

[15] *The Trade Union Amendment Act, 2008* also decreased the level of employee support required for decertification. The predecessor legislation, *The Trade Union Act*, R.S.S. 1978, c. T-17 (repealed by S.S. 2013, c. S-15.1), had set out a process by which employees in a bargaining unit could apply to have a union decertified as the bargaining representative. That provision was changed in *The Trade Union Amendment Act, 2008* by decreasing the required level of advanced written support for decertification from 50% plus one to 45%. The period within which the required written support was to be submitted was reduced from six months to three.

[16] Finally, it was no longer an "unfair labour practice" for an employer to communicate "facts and its opinions to its employees" during the exercise

[12] Lorsque l'employeur est le gouvernement de la Saskatchewan, les services essentiels sont visés par règlement.

[13] La Saskatchewan Labour Relations Board (la Commission) possède une compétence limitée qui lui permet de réviser le nombre de salariés d'une catégorie tenus d'exercer leurs fonctions lors d'une grève, mais elle ne peut aucunement examiner si un service est essentiel ou non, déterminer quelles catégories de salariés assurent véritablement des services essentiels ou si les salariés choisis par l'employeur pour exercer leurs fonctions pendant la grève l'ont été de manière raisonnable ou non.

[14] La *Trade Union Amendment Act, 2008* est la seconde loi en cause dans le pourvoi. Elle a resserré les conditions d'accréditation d'un syndicat en faisant passer de 25 à 45 p. 100 le pourcentage des salariés qui doivent donner leur appui par écrit, en ramenant de six à trois mois la période au cours de laquelle ces appuis doivent être ainsi obtenus et en supprimant l'octroi automatique de l'accréditation lorsque plus de 50 p. 100 des salariés donnaient leur appui par écrit avant le dépôt de la demande. La Commission n'a plus de pouvoir discrétionnaire pour décider si, lors d'un scrutin de représentation, le vote doit être secret ou non.

[15] La *Trade Union Amendment Act, 2008* a également abaissé le pourcentage d'appui des salariés requis pour la révocation de l'accréditation. La loi antérieure intitulée *The Trade Union Act*, R.S.S. 1978, c. T-17 (abrogée par S.S. 2013, c. S-15.1), établissait le processus par lequel les membres d'une unité de négociation pouvaient demander la révocation de l'accréditation d'un syndicat à titre d'agent négociateur. La *Trade Union Amendment Act, 2008* a modifié cette disposition en ramenant de 50 p. 100 plus un à 45 p. 100 le pourcentage d'appui — obtenu au préalable et par écrit — nécessaire à cette fin. La période au cours de laquelle l'appui doit être donné par écrit est passée de six à trois mois.

[16] Enfin, la communication par l'employeur [TRADUCTION] « de faits ou d'opinions à ses salariés » lorsque ceux-ci exercent les droits que leur

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of their rights under *The Trade Union Amendment Act, 2008*.

[17] In July 2008, the Saskatchewan Federation of Labour and other unions challenged the constitutionality of both the *PSESA* and *The Trade Union Amendment Act, 2008*. The Saskatchewan Union of Nurses, the Canadian Union of Public Employees, the Service Employees International Union-West, and the Saskatchewan Government and General Employees' Union each subsequently commenced separate proceedings challenging only the constitutionality of the *PSESA*.

[18] Both sets of challenges were decided by the trial judge, Ball J., under s. 2(*d*) of the *Charter*. In his view, the majority decisions in the *Alberta Reference* had been superseded by this Court's interpretation of the scope of s. 2(*d*) of the *Charter* in *Health Services* and *Fraser* to include protection for the right to engage in collective action to achieve workplace goals. While recognizing that the Court had not yet directly considered whether strike activity was encompassed by s. 2(*d*), Ball J. nonetheless concluded that "the right to strike is a fundamental freedom protected by s. 2(*d*) of the *Charter*".

[19] He accordingly found that the prohibition on the right to strike in the *PSESA* substantially interfered with the s. 2(*d*) rights of the affected public sector employees. He acknowledged that while Canadian and international law supports the restriction or prohibition of strikes by essential services employees, after an extensive and thoughtful analysis, he found that the absolute ban on the right to strike in the *PSESA* was neither minimally impairing nor proportionate for essentially the following reasons:

- Saskatchewan failed to engage in meaningful consultation or negotiation with respect to the *PSESA* and *The Public Service Essential Services Regulations*.

confère la *Trade Union Amendment Act, 2008* n'est plus considérée comme une « pratique déloyale ».

[17] En juillet 2008, la Saskatchewan Federation of Labour et d'autres syndicats ont contesté la constitutionnalité de la *PSESA* et de la *Trade Union Amendment Act, 2008*. Le Saskatchewan Union of Nurses, le Syndicat canadien de la fonction publique, le Service Employees International Union-West et le Saskatchewan Government and General Employees' Union ont ensuite contesté dans des instances distinctes la constitutionnalité de la seule *PSESA*.

[18] En première instance, le juge Ball statue sur les deux séries d'instances en application de l'al. 2*d*) de la *Charte*. À son avis, la décision des juges majoritaires de la Cour dans le *Renvoi relatif à l'Alberta* est supplantée par les arrêts *Health Services* et *Fraser* dans lesquels la Cour se prononce sur la portée de l'al. 2*d*) de la *Charte* et conclut que cet alinéa protège également le droit d'agir de manière concertée en vue de la réalisation d'objectifs liés au travail. Après avoir reconnu que la Cour n'a pas encore directement examiné si l'al. 2*d*) protège le droit de grève ou non, le juge Ball conclut néanmoins que [TRADUCTION] « le droit de grève est une liberté fondamentale protégée par l'al. 2*d*) de la *Charte* ».

[19] Il opine donc que l'interdiction de la grève par la *PSESA* entrave substantiellement l'exercice des droits que garantit l'al. 2*d*) aux salariés du secteur public en cause. Il reconnaît que le droit canadien et le droit international permettent de limiter ou de supprimer le droit de grève des salariés qui assurent des services essentiels. Cependant, à l'issue d'une analyse approfondie et réfléchie, il estime que l'interdiction totale de la grève par la *PSESA* ne porte pas atteinte le moins possible aux droits constitutionnels et que son effet n'est pas proportionné à son objectif, et ce, pour les raisons suivantes :

- La Saskatchewan n'a pas tenu une véritable consultation ou négociation sur la *PSESA* et le *Public Service Essential Services Regulations*.

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- Good-faith negotiation in determining essential services designations is not possible under the *PSESA* since one side has the capacity to impose an agreement.

- The definition of "essential services" is "very broad". In the absence of an agreement with the Unions about what the definition means, employers are entitled unilaterally to decide what they included.

- The definition of "public employer" is also overbroad. There was no evidence that some of the designated public employers actually employed any employees who were engaged in the delivery of essential services.

- The power of public employers during a work stoppage to designate how essential services are to be maintained and by whom was unilateral and required no consultation with the Unions.

- The unilateral decision-making power granted to public employers was unnecessary. There was no explanation for why the Unions were denied any input into naming essential services employees.

- The *PSESA* goes beyond what is reasonably required to ensure the uninterrupted delivery of essential services during a strike.

- Compared to analogous legislation in other Canadian jurisdictions, the *PSESA* is uniquely restrictive of the right to strike and devoid of both review mechanisms and alternate means of addressing workplace issues.

[20] The declaration of invalidity was suspended for one year.

[21] In his analysis of the second statutory scheme, *The Trade Union Amendment Act, 2008*, on the other hand, Ball J. concluded that the legislation

- La *PSESA* ne permet pas aux parties de négocier de bonne foi la désignation de services essentiels, car l'une d'elles peut imposer ses choix à l'autre.

- Le terme [TRADUCTION] « service essentiel » est « très largement » défini. Faute d'un accord avec le syndicat, l'employeur peut décider unilatéralement en quoi il consiste.

- La définition du terme [TRADUCTION] « employeur public » est elle aussi trop large. Nul élément de preuve n'établit que les salariés de certains des employeurs publics désignés assurent vraiment des services essentiels.

- Le pouvoir de l'employeur public de déterminer, lors d'un arrêt de travail, quelles personnes assureront les services essentiels et la manière dont elles le feront est unilatéral, et son exercice n'exige pas la consultation du syndicat.

- Il n'était pas nécessaire d'accorder à l'employeur public un pouvoir de décision unilatéral. Nul motif n'a été invoqué pour refuser au syndicat la possibilité de faire valoir son point de vue sur la désignation des salariés appelés à assurer les services essentiels.

- La *PSESA* va au delà de ce qui est raisonnablement nécessaire pour garantir la prestation ininterrompue de services essentiels durant une grève.

- La *PSESA* restreint plus le droit de grève que les dispositions apparentées des autres ressorts canadiens et elle ne prévoit ni un mécanisme de révision, ni quelque autre moyen de régler des questions liées au travail.

[20] L'effet de la déclaration d'invalidité est suspendu pendant un an.

[21] En revanche, dans son analyse du second régime législatif, celui établi par la *Trade Union Amendment Act, 2008*, le juge Ball conclut que les

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did not breach s. 2(*d*). While he acknowledged that the changes to the certification process introduced by *The Trade Union Amendment Act, 2008* had the effect of reducing the success rate of union applications for certification, he held that s. 2(*d*) does not require the enactment of legislation that ensures that unions succeed easily in their efforts to be certified; "it precludes the enactment of legislation that interferes with the freely expressed wishes of employees in the exercise of their s. 2(*d*) rights".

[22] With respect to the broadened scope of permissible employer communications, Ball J. held that permitting employers to communicate facts and opinions is consistent with the employers' freedom of expression under s. 2(*b*) of the *Charter*. He concluded that both the purpose and effect of the relevant provision is that employers could only communicate with employees in a manner that does not infringe on the ability of the employees to engage their collective bargaining rights.

[23] The Saskatchewan Court of Appeal unanimously allowed the Government of Saskatchewan's appeal with respect to the constitutionality of the *PSESA*, concluding that "[w]hile the Court's freedom of association jurisprudence has evolved in recent years, it has not shifted far enough, or clearly enough, to warrant a ruling by this Court that the right to strike is protected by s. 2(*d*) of the *Charter*". The appeal against the trial judge's finding that *The Trade Union Amendment Act, 2008* did not violate s. 2(*d*) of the *Charter* was dismissed.

[24] I agree with the trial judge. Along with their right to associate, speak through a bargaining representative of their choice, and bargain collectively with their employer through that representative, the right of employees to strike is vital to protecting the meaningful process of collective bargaining within s. 2(*d*). As the trial judge observed, without the right to strike, "a constitutionalized right to bargain collectively is meaningless".

dispositions ne portent pas atteinte aux droits garantis par l'al. 2*d*). Même s'il reconnaît que les changements apportés au processus d'accréditation ont pour effet de réduire les chances qu'un syndicat soit accrédité, il conclut que l'al. 2*d*) n'exige pas l'adoption de dispositions qui permettent aux syndicats d'obtenir aisément leur accréditation, mais [TRADUCTION] « empêche l'adoption de dispositions qui font obstacle au vœu librement exprimé par les salariés dans l'exercice des droits qu'il garantit à ces derniers ».

[22] S'agissant de l'élargissement de ce que l'employeur est autorisé à communiquer aux salariés, le juge Ball estime que permettre à l'employeur de communiquer des faits et des opinions se concilie avec la liberté d'expression que lui garantit l'al. 2*b*) de la *Charte*. Il conclut que la disposition pertinente a pour objet et pour effet de seulement permettre à l'employeur de communiquer avec les salariés d'une manière qui n'entrave pas leur exercice du droit de négocier collectivement.

[23] La Cour d'appel de la Saskatchewan accueille à l'unanimité l'appel interjeté par le gouvernement de la Saskatchewan relativement à la constitutionnalité de la *PSESA*. Elle conclut que [TRADUCTION] « [l]a jurisprudence de la cour sur la liberté d'association a évolué ces dernières années, mais que les changements survenus ne sont pas assez importants ou manifestes pour qu'elle puisse statuer que le droit de grève est protégé par l'al. 2*d*) de la *Charte* ». Elle rejette l'appel de la décision du juge de première instance selon laquelle la *Trade Union Amendment Act, 2008* ne porte pas atteinte au droit garanti par l'al. 2*d*) de la *Charte*.

[24] Je me range à l'avis du juge de première instance. De pair avec le droit de s'associer, de s'exprimer par l'entremise de l'agent négociateur de leur choix et de négocier collectivement avec leur employeur par l'entremise de cet agent, le droit de grève des salariés est indispensable à la protection du processus véritable de négociation collective pour l'application de l'al. 2*d*). Comme le fait observer le juge, sans le droit de grève, [TRADUCTION] « le droit constitutionnel de négocier collectivement perd tout son sens ».

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[25] Where strike action is limited in a way that substantially interferes with a meaningful process of collective bargaining, it must be replaced by one of the meaningful dispute resolution mechanisms commonly used in labour relations. Where essential services legislation provides such an alternative mechanism, it would more likely be justified under s. 1 of the *Charter*. In my view, the failure of any such mechanism in the *PSESA* is what ultimately renders its limitations constitutionally impermissible.

Analysis

[26] Section 2 of the *Charter* guarantees the following:

> **2.** Everyone has the following fundamental freedoms:
>
> . . .
>
> (*d*) freedom of association.

[27] The trial judge in this case relied on changes in this Court's s. 2(*d*) jurisprudence to depart from the precedent set by the majority in the *Alberta Reference*.

[28] The recognition of the broader purpose underlying s. 2(*d*) led the Court to conclude in *Health Services* that "s. 2(*d*) should be understood as protecting the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining" (para. 87). In reaching this conclusion, McLachlin C.J. and LeBel J. held that none of the majority's reasons in the *Alberta Reference* which had excluded collective bargaining from the scope of s. 2(*d*) "survive[d] scrutiny, and the rationale for excluding inherently collective activities from s. 2(*d*)'s protection has been overtaken by *Dunmore*" (*Health Services*, at para. 36).

[29] This Court reaffirmed in *Fraser* that a meaningful process under s. 2(*d*) must include, at a minimum, employees' rights to join together to pursue

[25] Lorsque le législateur limite le droit de grève d'une manière qui entrave substantiellement un processus véritable de négociation collective, il doit le remplacer par l'un ou l'autre des mécanismes véritables de règlement des différends couramment employés en relations de travail. La loi qui prévoit un tel mécanisme de rechange voit sa justification accrue au regard de l'article premier de la *Charte*. À mon avis, l'absence d'un tel mécanisme dans la *PSESA* représente ce qui, en fin de compte, rend les restrictions apportées par celle-ci inadmissibles sur le plan constitutionnel.

Analyse

[26] L'article 2 de la *Charte* garantit ce qui suit :

> **2.** Chacun a les libertés fondamentales suivantes :
>
> . . .
>
> *d*) liberté d'association.

[27] Le juge de première instance invoque l'évolution de la jurisprudence de la Cour relative à l'al. 2*d*) pour s'écarter de l'opinion charnière des juges majoritaires dans le *Renvoi relatif à l'Alberta*.

[28] Dans l'arrêt *Health Services*, l'élargissement de l'objet de l'al. 2*d*) amène la Cour à conclure que « l'al. 2*d*) devrait être interprété comme ayant pour effet de protéger le droit d'employés de s'associer en vue d'atteindre des objectifs [liés] au [. . .] travail par un processus de négociation collective » (par. 87). Ce faisant, la juge en chef McLachlin et le juge LeBel estiment qu'aucune des raisons exposées par les juges majoritaires dans le *Renvoi relatif à l'Alberta* — qui exclut la négociation collective du champ d'application de la disposition — « ne résist[e] à l'examen et [que] le raisonnement à l'origine de l'exclusion des activités purement collectives de la protection de l'al. 2*d*) a été écarté dans *Dunmore* » (*Health Services*, par. 36).

[29] Dans l'arrêt *Fraser*, notre Cour réaffirme que, pour l'application de l'al. 2*d*), un processus véritable doit, à tout le moins, englober le droit des

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workplace goals, to make collective representations to the employer, and to have those representations considered in good faith, including having a means of recourse should the employer not bargain in good faith.

[30] The evolution in the Court's approach to s. 2(*d*) was most recently summarized by McLachlin C.J. and LeBel J. in *Mounted Police*, where they said:

> The jurisprudence on freedom of association under s. 2(*d*) of the *Charter* . . . falls into two broad periods. The first period is marked by a restrictive approach to freedom of association. The second period gradually adopts a generous and purposive approach to the guarantee.
>
> . . .
>
> . . . after an initial period of reluctance to embrace the full import of the freedom of association guarantee in the field of labour relations, the jurisprudence has evolved to affirm a generous approach to that guarantee. This approach is centred on the purpose of encouraging the individual's self-fulfillment and the collective realization of human goals, consistent with democratic values, as informed by "the historical origins of the concepts enshrined" in s. 2(*d*) . . . . [paras. 30 and 46]

[31] They confirmed that freedom of association under s. 2(*d*) seeks to preserve "employee autonomy against the superior power of management" in order to allow for a meaningful process of collective bargaining (para. 82).

[32] Given the fundamental shift in the scope of s. 2(*d*) since the *Alberta Reference* was decided, the trial judge was entitled to depart from precedent and consider the issue in accordance with this Court's revitalized interpretation of s. 2(*d*): *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, at para. 42.

[33] Dickson C.J.'s dissenting reasons in the *Alberta Reference* were influential in the development of the more "generous approach" in the recent

salariés de se regrouper en vue de poursuivre des objectifs liés au travail, de faire des représentations collectives à l'employeur et de les voir prises en compte de bonne foi, ce qui comprend l'accès à une voie de recours advenant que l'employeur ne négocie pas de bonne foi.

[30] Dans le tout récent arrêt *Police montée*, la juge en chef McLachlin et le juge LeBel résument comme suit l'évolution de l'interprétation de l'al. 2*d*) par la Cour :

> La jurisprudence sur la liberté d'association garantie par l'al. 2*d*) de la *Charte* [compte] deux périodes importantes. La première s'est caractérisée par une interprétation restrictive de la liberté d'association. La seconde a, pour sa part, graduellement privilégié une interprétation généreuse et fondée sur l'objet de la garantie constitutionnelle.
>
> . . .
>
> . . . après une période initiale marquée par une réticence à reconnaître toute la portée de la liberté d'association en matière de relations de travail, la jurisprudence a évolué vers une approche généreuse de cette liberté. Cette approche visait essentiellement à encourager l'épanouissement individuel et la réalisation collective des objectifs humains, dans le respect des valeurs démocratiques, à la lumière des « origines historiques des concepts enchâssés » dans l'al. 2*d*) . . . [par. 30 et 46]

[31] Ils confirment que la liberté d'association garantie à l'al. 2*d*) vise à protéger « l'autonomie collective des employés contre le pouvoir supérieur de l'administration » afin de permettre le déroulement d'un processus véritable de négociation collective (par. 82).

[32] Étant donné la rupture fondamentale d'avec le *Renvoi relatif à l'Alberta* concernant la portée de l'al. 2*d*), le juge de première instance était fondé de déroger à celle-ci et d'examiner les questions au regard de l'interprétation actualisée de l'al. 2*d*) par notre Cour (*Canada (Procureur général) c. Bedford*, [2013] 3 R.C.S. 1101, par. 42).

[33] Les motifs de dissidence du juge en chef Dickson dans le *Renvoi relatif à l'Alberta* ont contribué au caractère plus « généreux » de la jurisprudence

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jurisprudence. Recognizing that association "has always been vital as a means of protecting the essential needs and interests of working people" (at p. 368), and that Canada's international human rights obligations required protection for both the formation and essential activities of labour unions, including collective bargaining and the freedom to strike, Dickson C.J. concluded that "effective constitutional protection of the associational interests of employees in the collective bargaining process requires concomitant protection of their freedom to withdraw . . . their services [collectively], subject to s. 1 of the *Charter*" (at p. 371). (See also *Perrault v. Gauthier* (1898), 28 S.C.R. 241, at p. 256, and *Canadian Pacific Railway Co. v. Zambri*, [1962] S.C.R. 609, at pp. 618 and 621.)

[34] His views are supported by the history of strike activity in Canada and globally.

[35] This Court referenced this history in *Health Services*:

> In England, as early as the end of the Middle Ages, workers were getting together to improve their conditions of employment. They were addressing petitions to Parliament, asking for laws to secure better wages or other more favourable working conditions. Soon thereafter, strike activity began (M.-L. Beaulieu, *Les Conflits de Droit dans les Rapports Collectifs du Travail* (1955), at pp. 29-30). [para. 45]

[36] In England in the 19th century, strike action was the subject of criminal sanction under the common law doctrine of criminal conspiracy, reflected in the *Combination Acts* of 1799 and 1800. Even when certain forms of trade unionism and collective bargaining became legal under the *Combination Act* of 1825, strike activity itself remained criminal: *Health Services*, at paras. 47-48. This state of affairs continued in England "until the 'legislative settlement' of the 1870s . . . lifted the threat of criminal sanctions from all but violent forms of behaviour associated with industrial action": Simon Deakin and Gillian S. Morris, *Labour Law* (6th ed. 2012), at p. 8.

récente. Après avoir reconnu que l'association « a toujours joué un rôle vital dans la protection des besoins et des intérêts essentiels des travailleurs » (p. 368) et que les obligations internationales du Canada au chapitre des droits de la personne commandent la protection tant de la formation de syndicats que des activités fondamentales de ceux qui sont formés, dont la négociation collective et la grève, le juge en chef Dickson conclut que « la protection constitutionnelle efficace des intérêts des associations de travailleurs dans le processus de négociation collective requiert la protection concomitante de leur liberté de cesser collectivement de fournir leurs services, sous réserve de l'article premier de la *Charte* » (p. 371). (Voir également *Perrault c. Gauthier* (1898), 28 R.C.S. 241, p. 256, et *Canadian Pacific Railway Co. c. Zambri*, [1962] R.C.S. 609, p. 618 et 621.)

[34] L'histoire du recours à la grève au Canada et ailleurs dans le monde appuie son opinion.

[35] La Cour renvoie d'ailleurs à cette histoire dans *Health Services* :

> En Angleterre, dès la fin du Moyen-Âge, les travailleurs se regroupaient pour demander de meilleures conditions de travail. Ils présentaient des pétitions au Parlement, réclamant des lois leur accordant de meilleurs salaires ou d'autres conditions de travail plus avantageuses. Peu après, ils ont commencé à organiser des grèves (M.-L. Beaulieu, *Les Conflits de Droit dans les Rapports Collectifs du Travail* (1955), p. 29-30). [par. 45]

[36] Dans l'Angleterre du 19e siècle, la grève exposait à des sanctions pénales du fait que la common law l'assimilait à un complot criminel, comme en faisaient foi les *Combination Acts* (lois sur la coalition) de 1799 et 1800. Même lorsque certaines formes de syndicalisme et de négociation collective ont été légalisées par la *Combination Act* de 1825, la grève est demeurée un acte criminel (*Health Services*, par. 47-48). La situation a perduré en Angleterre [TRADUCTION] « jusqu'à ce que, au cours de la décennie 1870, une mesure législative supprime le caractère pénal de tout acte non violent associé à un moyen de pression » (Simon Deakin et Gillian S. Morris, *Labour Law* (6e éd. 2012), p. 8).

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[37] British labour law was influential in the development of Canadian labour law prior to the 1940s, but the extent to which the restrictions on collective action were actually adopted and enforced in Canada appears to be unclear: *Health Services*, at paras. 43 and 50. As Judy Fudge and Eric Tucker wrote in describing the Canadian experience:

> The collective dimension of striking was covered by combination law, but just what that law was in early and mid-nineteenth century Canada is even more opaque than the status of English master and servant law. However, regardless of the formal law, historians have not identified a single case in which workers were successfully prosecuted under combination law simply for the act of striking. It is also clear that the social practice of workers striking to improve terms and conditions of employment became deeply rooted during this era.

("The Freedom to Strike in Canada: A Brief Legal History" (2009-2010), 15 *C.L.E.L.J.* 333, at pp. 340-41)

[38] What is known, however, is that workers participated in strike activity long before the modern system of labour relations was introduced in Canada. Strikes and collective bargaining were seen to go hand in hand since both "are creatures of working class action: working people turned to these methods to improve their lot in industry from the earliest days of nineteenth century Canadian capitalism": Geoffrey England, "Some Thoughts on Constitutionalizing the Right to Strike" (1988), 13:2 *Queen's L.J.* 168, at p. 175. See also Gilles Trudeau, "La grève au Canada et aux États-Unis: d'un passé glorieux à un avenir incertain" (2004), 38 *R.J.T.* 1; Claude D'Aoust and François Delorme, "The Origin of the Freedom of Association and of the Right to Strike in Canada: An Historical Perspective" (1981), 36 *Relat. ind.* 894; Bryan D. Palmer, "Labour Protest and Organization in Nineteenth-Century Canada, 1820-1890" (1987), 20 *Labour* 61; Fudge and Tucker.

[39] The acceptance of the crucial role of strike activity led to its eventual decriminalization. In

[37] Le droit britannique du travail a influencé l'évolution de notre droit du travail jusqu'à la décennie 1940, mais on ignore dans quelle mesure les restrictions apportées à l'action concertée au Royaume-Uni ont réellement été adoptées et appliquées au Canada (*Health Services*, par. 43 et 50). Voici ce qu'écrivent Judy Fudge et Eric Tucker au sujet de la situation canadienne :

> [TRADUCTION] Les règles et principes régissant les coalitions s'appliquaient à la dimension collective de la grève, mais leur teneur réelle au Canada au début et au milieu du 19e siècle est encore plus obscure que l'applicabilité des règles et principes régissant les rapports entre employeur et employé. Cependant, quel que soit l'état du droit positif, les historiens ne relèvent aucune affaire dans laquelle des travailleurs auraient été condamnés sous le régime du droit applicable aux coalitions uniquement pour avoir fait la grève. En outre, il ne fait aucun doute que le recours des travailleurs à la grève pour améliorer leurs conditions de travail s'est fermement implanté durant cette période.

(« The Freedom to Strike in Canada : A Brief Legal History » (2009-2010), 15 *C.L.E.L.J.* 333, p. 340-341)

[38] On sait cependant que les travailleurs ont pris part à des grèves bien avant que le Canada ne se dote d'un régime moderne de relations de travail. On considérait que la grève et la négociation collective allaient de pair puisque tous deux [TRADUCTION] « émanaient des actions de la classe ouvrière; les travailleurs y ont eu recours afin d'améliorer leur sort au tout début du capitalisme canadien, au dix-neuvième siècle » (Geoffrey England, « Some Thoughts on Constitutionalizing the Right to Strike » (1988), 13:2 *Queen's L.J.* 168, p. 175. Voir également Gilles Trudeau, « La grève au Canada et aux États-Unis : d'un passé glorieux à un avenir incertain » (2004), 38 *R.J.T.* 1; Claude D'Aoust et François Delorme, « The Origin of the Freedom of Association and of the Right to Strike in Canada : An Historical Perspective » (1981), 36 *Relat. ind.* 894; Bryan D. Palmer, « Labour Protest and Organization in Nineteenth-Century Canada, 1820-1890 » (1987), 20 *Le Travail* 61; Fudge et Tucker).

[39] La reconnaissance du rôle crucial de la grève a finalement mené à sa décriminalisation. En 1872,

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1872, Parliament began the process of eliminating the criminal prohibition against collective action by enacting the Canadian *The Trade Unions Act, 1872*, S.C. 1872, c. 30. Through a series of legislative reforms, "the taint of criminal liability" had finally been removed from all trade unions in Canada by 1892: George W. Adams, *Canadian Labour Law* (2nd ed. (loose-leaf)), at ¶ 1.80. Parliament recognized the importance of this legislative reform for workers:

[In enacting the 1872 *Trade Unions Act*], the Canadian Parliament recognized the value for the individual of collective actions in the context of labour relations. As Sir John A. Macdonald mentioned in the House of Commons, the purpose of the *Trade Unions Act* of 1872 was to immunize unions from existing laws considered to be "opposed to the spirit of the liberty of the individual" (*Parliamentary Debates*, vol. III, 5th Sess., 1st Parl., May 7, 1872, at p. 392, as cited by M. Chartrand, "The First Canadian Trade Union Legislation: An Historical Perspective" (1984), 16 *Ottawa L. Rev.* 267, at p. 267).

(*Health Services*, at para. 52)

[40] McLachlin C.J. and LeBel J. further explain in *Health Services* that,

[b]efore the adoption of the modern statutory model of labour relations, the majority of strikes were motivated by the workers' desire to have an employer recognize a union and bargain collectively with it (D. Glenday and C. Schrenk, "Trade Unions and the State: An Interpretative Essay on the Historical Development of Class and State Relations in Canada, 1889-1947" (1978), 2 *Alternate Routes* 114, at p. 128; M. Thompson, "Wagnerism in Canada: Compared to What?", in *Proceedings of the XXXIst Conference — Canadian Industrial Relations Association* (1995), 59, at p. 60; C. D. Baggaley, *A Century of Labour Regulation in Canada* (February 1981), Working Paper No. 19, prepared for the Economic Council of Canada, at p. 57). [para. 54]

[41] And in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, [2013] 3 S.C.R. 733, at para. 35, the Court noted that "[s]trikes and picketlines have been used by Canadian unions to exert economic

le législateur canadien a entrepris de lever l'interdiction criminelle de l'action concertée par l'adoption de *l'Acte des Associations Ouvrières*, *1872*, S.C. 1872, c. 30. En 1892, après une série de réformes législatives, les syndicats cessaient enfin de voir leurs activités [TRADUCTION] « tenues pour criminelles » (George W. Adams, *Canadian Labour Law* (2e éd. (feuilles mobiles)), ¶ 1.80). Le Parlement a reconnu l'importance de cette réforme législative pour les travailleurs :

[Par l'adoption de *l'Acte des Associations Ouvrières, 1872*], le Parlement canadien a reconnu la valeur des activités collectives pour les individus dans le contexte des relations du travail. Comme l'a déclaré sir John A. Macdonald à la Chambre des communes, l'*Acte des Associations ouvrières, 1872* visait à soustraire les syndicats à l'application des lois en vigueur considérées comme [TRADUCTION] « incompatibles avec l'esprit de liberté individuelle » (*Débats de la Chambre des communes*, vol. III, 5e sess., 1re lég., 7 mai 1872, p. 392, passage cité par M. Chartrand, « The First Canadian Trade Union Legislation : An Historical Perspective » (1984), 16 *R.D. Ottawa* 267, p. 267).

(*Health Services*, par. 52)

[40] La juge en chef McLachlin et le juge LeBel expliquent en outre dans l'arrêt *Health Services* :

Avant l'adoption du modèle légal contemporain des relations du travail, la majorité des grèves s'expliquaient par le désir des travailleurs d'amener l'employeur à reconnaître le syndicat et à négocier collectivement avec lui (D. Glenday et C. Schrenk, « Trade Unions and the State : An Interpretative Essay on the Historical Development of Class and State Relations in Canada, 1889-1947 » (1978), 2 *Alternate Routes* 114, p. 128; M. Thompson, « Wagnerism in Canada : Compared to What? », dans *Actes du XXXIe Congrès de l'Association canadienne des relations industrielles* (1995), 59, p. 60; C. D. Baggaley, *A Century of Labour Regulation in Canada* (février 1981), Cahier de recherche no 19, préparé par le Conseil économique du Canada, p. 57). [par. 54]

[41] Dans l'arrêt *Alberta (Information and Privacy Commissioner) c. Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 401*, [2013] 3 R.C.S. 733, par. 35, la Cour fait observer que « [l]es syndicats canadiens recourent

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pressure and bargain with employers for over a century".

[42] In 1935, the *Wagner Act* was adopted in the United States, introducing a model of labour relations that came to inspire legislative schemes across Canada. This model was adopted in Canada because the federal and provincial governments "recognized the fundamental need for workers to participate in the regulation of their work environment", and, in doing so, "confirmed what the labour movement had been fighting for over centuries and what it had access to in the laissez-faire era through the use of strikes — the right to collective bargaining with employers" (*Health Services*, at para. 63). One of the goals of the Wagner model, therefore, was to reduce the frequency of strikes by ensuring a commitment to meaningful collective bargaining.

[43] As this Court noted in *Health Services*, the "unprecedented number of strikes, caused in large part by the refusal of employers to recognize unions and to bargain collectively, led to governments adopting the American *Wagner Act* model of legislation" (para. 54). In implementing statutorily protected bargaining rights, modern labour relations legislation was "designed to secure a greater measure of industrial peace to the public by encouraging collective bargaining and conciliation procedures rather than strikes as a method of resolving industrial disputes" (*Gagnon v. Foundation Maritime Ltd.*, [1961] S.C.R. 435, at pp. 443-44, per Ritchie J.).

[44] Modern labour relations legislation in Canada accordingly limited certain forms of strike activities and replaced the freedom to collectively engage in the withdrawal of services with statutorily protected rights to organize and engage in collective bargaining. As Judy Fudge and Eric Tucker noted, this model gave workers collective bargaining protection as a trade-off for limitations imposed on the freedom to strike:

aux grèves et aux lignes de piquetage pour exercer des pressions économiques et négocier avec les employeurs depuis plus d'un siècle ».

[42] Adoptée aux États-Unis en 1935, la *Loi Wagner* a établi un modèle de relations de travail qui a inspiré les régimes législatifs partout au Canada. Les gouvernements fédéral et provinciaux ont adopté ce modèle parce qu'ils ont « reconnu le besoin fondamental des travailleurs de participer à la réglementation de leur milieu de travail » et, ce faisant, ils « ont confirmé la validité de l'objectif central des luttes syndicales depuis des siècles, que le mouvement syndical a atteint pendant la période de laissez-faire en déclenchant des grèves : le droit de négocier collectivement avec les employeurs » (*Health Services*, par. 63). Le modèle fondé sur la *Loi Wagner* visait donc entre autres à réduire le recours à la grève en veillant à ce que les parties se livrent à une véritable négociation collective.

[43] Dans l'arrêt *Health Services*, notre Cour fait remarquer que le « nombre sans précédent de grèves, causées en grande partie par le refus des employeurs de reconnaître les syndicats et de négocier collectivement avec eux, a amené les gouvernements à adopter le modèle [. . .] américain fondé sur la *Loi Wagner* » (par. 54). En établissant des droits de négociation protégés par la loi, la législation moderne [TRADUCTION] « vise à favoriser la paix industrielle dans l'intérêt des citoyens en incitant à la négociation collective et aux mesures de conciliation plutôt qu'à la grève pour régler les conflits de travail » (*Gagnon c. Foundation Maritime Ltd.*, [1961] R.C.S. 435, p. 443-444, le juge Ritchie).

[44] Au Canada, la législation moderne du travail a donc limité le recours à certaines formes de grève et remplacé la liberté des travailleurs de cesser collectivement le travail par le droit de se syndiquer et celui de négocier collectivement, tous deux légalement protégés. Les professeurs Judy Fudge et Eric Tucker font observer que ce modèle garantit aux travailleurs le droit de négocier collectivement en contrepartie de la limitation de leur liberté de grève :

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The loss of the freedom to strike for recognition was accompanied by a certification procedure that enabled employees to obtain union representation through a democratic process, and also imposed on employers a duty to recognize and to bargain in good faith with certified unions. The loss of the freedom to strike during the life of a collective agreement came with a right to enforce the terms of that agreement through binding arbitration. And, of course, the postponement of strikes until after conciliation . . . also came with a statutory freeze on terms and conditions. Finally, the new regime also gave workers a right to strike in the Hohfeldian sense, by prohibiting employers from terminating the contract of employment merely because the worker was on strike. The scope of the right to resume employment varies from jurisdiction to jurisdiction, but it protects striking workers' jobs in most situations. [p. 350]

[TRADUCTION] La perte de la liberté de faire la grève pour obtenir la reconnaissance syndicale s'est accompagnée de l'établissement d'une procédure d'accréditation qui permet aux salariés d'être représentés par un syndicat au terme d'un processus démocratique et qui oblige l'employeur à reconnaître un syndicat accrédité et à négocier de bonne foi avec lui. La perte de la liberté de grève pendant la durée de la convention collective a été compensée par le droit de faire respecter les dispositions de la convention au moyen de l'arbitrage obligatoire. Et, bien sûr, l'imposition de la conciliation avant tout recours à la grève [. . .] a aussi été compensée par le gel des dispositions de la convention. Enfin, le nouveau régime a également accordé aux travailleurs un droit de grève au sens où l'entendait Hohfeld, c'est-à-dire qu'il a interdit à l'employeur de résilier le contrat de travail d'un travailleur pour le seul motif qu'il a fait la grève. Le droit de reprendre le travail a une portée qui varie d'un ressort à l'autre, mais dans la plupart des cas, il protège l'emploi du travailleur en grève. [p. 350]

[45] As George W. Adams writes, "All statutes have a policy commitment to the postponement of the reciprocal rights of lockout and strike until the exhaustion of all settlement mechanisms" (¶ 1.250). The trade-off in the Wagner labour relations model, limiting the ability to strike in favour of an emphasis on negotiated solutions for workplace issues, remains at the heart of labour relations in Canada. That is not to say it is the only model available, but it is the prevailing model in this country and the one under the s. 2(*d*) microscope in this case.

[45] Selon George W. Adams, [TRADUCTION] « [t]outes les lois consacrent l'obligation de reporter l'exercice du droit de lock-out et du droit de grève jusqu'à l'épuisement de tous les mécanismes de règlement » (¶ 1.250). Le compromis établi par le modèle de relations de travail fondé sur la *Loi Wagner*, qui limite l'exercice du droit de grève pour mettre l'accent sur le règlement négocié de questions liées au travail, reste au cœur des relations de travail au Canada. Ce n'est certes pas le seul modèle existant, mais c'est celui qui s'applique au pays et qui doit être examiné à la loupe au regard de l'al. 2*d*).

[46] It is important to point out, however, that the right to strike is not a creature just of the Wagner model. Most labour relations models include it. And where history has shown the importance of strike action for the proper functioning of a given model of labour relations, as it does in Wagner-style schemes, it should come as no surprise that the suppression of legal strike action will be seen as substantially interfering with meaningful collective bargaining. That is because it has long been recognized that the ability to collectively withdraw services for the purpose of negotiating the terms and conditions of employment — in other words, to strike — is an essential component of the process through which workers pursue collective workplace

[46] Il importe toutefois de souligner que la reconnaissance du droit de grève n'est pas propre au seul modèle *Wagner*; elle est de la plupart des modèles de relations de travail. Et lorsque l'histoire montre l'importance de la grève pour le bon fonctionnement d'un modèle de relations de travail en particulier, comme c'est le cas du modèle fondé sur la *Loi Wagner*, on ne doit pas s'étonner que la suppression du droit de grève légal soit considérée comme une entrave substantielle à la négociation collective véritable. En effet, on reconnaît depuis longtemps que le pouvoir des travailleurs de cesser collectivement le travail aux fins de la négociation de leurs conditions de travail — le droit de grève, en somme — constitue une composante essentielle de

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goals. As Prof. H. D. Woods wrote in his landmark 1968 report, the "acceptance of collective bargaining carries with it a recognition of the right to invoke the economic sanction of the strike" (*Canadian Industrial Relations: The Report of the Task Force on Labour Relations* (1969), at p. 175). The strike is "an indispensable part of the Canadian industrial relations system" and "has become a part of the whole democratic system" (pp. 129 and 176).

[47] Bob Hepple writes that "the strike weapon as a last resort is an essential safety-valve, a sanction aimed at achieving meaningful participation" ("The Right to Strike in an International Context" (2009-2010), 15 *C.L.E.L.J.* 133, at p. 139).

[48] The recognition that strikes, while a powerful form of economic pressure, are nonetheless critical components of the promotion of industrial — and therefore socio-economic — peace, was also cogently summarized in *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156:

> Labour disputes may touch important sectors of the economy, affecting towns, regions, and sometimes the entire country. The cost to the parties and the public may be significant. Nevertheless, our society has come to see it as justified by the higher goal of achieving resolution of employer-employee disputes and the maintenance of economic and social peace. The legally limited use of economic pressure and the infliction of economic harm in a labour dispute has come to be accepted as a legitimate price to pay to encourage the parties to resolve their differences in a way that both can live with (see generally G. W. Adams, *Canadian Labour Law* (2nd ed. (loose-leaf)), at pp. 1-11 to 1-15). [para. 25]

[49] As Gilles Trudeau wrote, [TRANSLATION] "[t]he strike was at the heart of the industrial relations system that prevailed throughout most of the 20th century . . . in Canada" (p. 5). Its significance as an economic sanction to collective bargaining

la poursuite, par les travailleurs, d'objectifs liés au travail. Comme l'indique le professeur H. D. Woods dans le rapport décisif qu'il a déposé en 1968, « [a]ccepter un régime de négociation collective, c'est implicitement reconnaître le droit de recours aux sanctions économiques » (*Les relations du travail au Canada : Rapport de l'Équipe spécialisée en relations de travail* (1969), p. 192). La grève fait "partie intégrante du régime canadien de relations du travail" et elle "est devenue partie intégrante de notre régime démocratique"» (p. 142 et 193).

[47] Pour Bob Hepple, [TRADUCTION] « la grève, comme arme de dernier recours, constitue une soupape de sûreté essentielle, une sanction qui vise l'obtention d'une participation véritable » (« The Right to Strike in an International Context » (2009-2010), 15 *C.L.E.L.J.* 133, p. 139).

[48] Dans l'arrêt *S.D.G.M.R., section locale 558 c. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 R.C.S. 156, on résume avec à-propos l'idée que la grève, même si elle constitue un moyen de pression économique redoutable, constitue néanmoins une composante cruciale de la promotion de la paix industrielle et partant, socio-économique :

> Les conflits de travail peuvent toucher des secteurs importants de l'économie et avoir des répercussions sur des villes, des régions et, parfois, sur le pays tout entier. Il peut en résulter des coûts importants pour les parties et le public. Néanmoins, notre société en est venue à reconnaître que ces coûts sont justifiés eu égard à l'objectif supérieur de la résolution des conflits de travail et du maintien de la paix économique et sociale. Désormais, elle accepte aussi que l'exercice de pressions économiques, dans les limites autorisées par la loi, et l'infliction d'un préjudice économique lors d'un conflit de travail représentent le prix d'un système qui encourage les parties à résoudre leurs différends d'une manière acceptable pour chacune d'elles (voir, de manière générale, G. W. Adams, *Canadian Labour Law* (2e éd. (feuilles mobiles)), p. 1-11 à 1-15). [par. 25]

[49] Comme l'écrit Gilles Trudeau, « [l]a grève est au centre même du système de relations industrielles qui a prévalu pendant la majeure partie du 20e siècle [. . .] au Canada » (p. 5). C'est son importance comme sanction économique ou menace

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— or threat thereof — is what led Dickson C.J. to conclude in the *Alberta Reference*, as previously noted, that "effective constitutional protection of the associational interests of employees in the collective bargaining process requires concomitant protection of their freedom to withdraw collectively their services, subject to s. 1 of the *Charter*" (p. 371).

[50] The inevitability of the need for the ability of employees to withdraw services collectively was also accepted by McLachlin C.J. and LeBel J. in *R.W.D.S.U.*, where they recognized that the purpose of strikes — placing economic pressure on employers — is a legitimate and integral means of achieving workplace objectives:

> Occasionally, . . . negotiations stall and disputes threaten labour peace. When this happens, it has come to be accepted that, within limits, unions and employers may legitimately exert economic pressure on each other to the end of resolving their dispute. *Thus, employees are entitled to withdraw their services, inflicting economic harm directly on their employer and indirectly on third parties which do business with their employer*. [Emphasis added; para. 24.]

[51] The preceding historical account reveals that while strike action has variously been the subject of legal protections and prohibitions, the ability of employees to withdraw their labour in concert has long been essential to meaningful collective bargaining. Protection under s. 2(*d*), however, does not depend solely or primarily on the historical/legal pedigree of the right to strike. Rather, the right to strike is constitutionally protected because of its crucial role in a meaningful process of collective bargaining.

[52] Within this context and for this purpose, the strike is unique and fundamental. In *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home* (1983), 4 D.L.R. (4th) 231 (Ont. H.C.J.), Galligan J. emphasized the importance of strikes to the process of collective bargaining:

de sanction économique qui amène le juge en chef Dickson à conclure dans le *Renvoi relatif à l'Alberta*, comme je le mentionne précédemment, que « la protection constitutionnelle efficace des intérêts des associations de travailleurs dans le processus de négociation collective requiert la protection concomitante de leur liberté de cesser collectivement de fournir leurs services, sous réserve de l'article premier de la *Charte* » (p. 371).

[50] Dans l'arrêt *S.D.G.M.R.*, où ils reconnaissent que la grève, du fait qu'elle exerce une pression économique sur l'employeur, constitue un moyen légitime et fondamental d'atteindre des objectifs liés au travail, la juge en chef McLachlin et le juge LeBel conviennent en outre de la nécessité inéluctable que les salariés puissent cesser collectivement le travail :

> . . . il arrive que des négociations cessent et que des conflits menacent la paix dans les relations du travail. On a alors accepté que, le cas échéant, les syndicats et les employeurs puissent légitimement exercer, dans une certaine mesure, des pressions économiques les uns sur les autres en vue de résoudre le différend qui les oppose. *En conséquence, les salariés jouissent du droit de cesser de fournir leurs services, ce qui cause un préjudice économique directement à leur employeur et indirectement aux tiers qui font affaire avec lui*. [Italiques ajoutés; par. 24.]

[51] Les données historiques qui précèdent révèlent que même si la grève a fait l'objet parfois de protections, parfois d'interdictions, la faculté des salariés de cesser le travail de manière concertée est depuis longtemps essentielle à la négociation collective véritable. Or, la protection offerte par l'al. 2*d*) ne dépend pas seulement ou principalement du profil historique et juridique du droit de grève. En fait, le droit de grève jouit de la protection constitutionnelle en raison de sa fonction cruciale dans le cadre d'un processus véritable de négociation collective.

[52] Dans ce contexte et à cette fin, la grève constitue une mesure unique et fondamentale. Dans *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home* (1983), 4 D.L.R. (4th) 231 (H.C.J. Ont.), le juge Galligan fait ressortir l'importance de la grève dans le processus de négociation collective :

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. . . freedom of association contains a sanction that can convince an employer to recognize the workers' representatives and bargain effectively with them. That sanction is the freedom to strike. By the exercise of that freedom the workers, through their union, have the power to convince an employer to recognize the union and to bargain with it.

. . . If that sanction is removed the freedom is valueless because there is no effective means to force an employer to recognize the workers' representatives and bargain with them. When that happens the *raison d'être* for workers to organize themselves into a union is gone. Thus I think that *the removal of the freedom to strike renders the freedom to organize a hollow thing*. [Emphasis added; p. 249.]

[53] In *Health Services*, this Court recognized that the *Charter* values of "[h]uman dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy" supported protecting the right to a meaningful process of collective bargaining within the scope of s. 2(*d*) (para. 81). And, most recently, drawing on these same values, in *Mounted Police* it confirmed that protection for a meaningful process of collective bargaining requires that employees have the ability to pursue their goals and that, at its core, s. 2(*d*) aims

to protect the individual from "state-enforced isolation in the pursuit of his or her ends" . . . . The guarantee functions to protect individuals against more powerful entities. By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society. [para. 58]

[54] The right to strike is essential to realizing these values and objectives through a collective bargaining process because it permits workers to withdraw their labour in concert when collective bargaining reaches an impasse. Through a strike, workers come

[TRADUCTION] . . . la liberté d'association se double d'une sanction susceptible de convaincre l'employeur de reconnaître les représentants des travailleurs et de négocier véritablement avec eux. Cette sanction correspond à la liberté de grève. Grâce à celle-ci, les travailleurs disposent, par l'entremise de leur syndicat, du pouvoir de convaincre l'employeur de reconnaître leur syndicat et de négocier avec lui.

. . . Sans cette sanction, la liberté d'association n'a plus de valeur car les travailleurs n'ont plus de moyen utile de forcer l'employeur à reconnaître leurs représentants et à négocier avec eux. La raison d'être de la formation d'un syndicat par des travailleurs cesse dès lors d'exister. C'est pourquoi j'estime que *la suppression de la liberté de grève rend vaine la liberté des travailleurs de se syndiquer*. [Italiques ajoutés; p. 249.]

[53] Dans l'arrêt *Health Services*, la Cour reconnaît que les valeurs inhérentes à la *Charte* que sont « [l]a dignité humaine, l'égalité, la liberté, le respect de l'autonomie de la personne et la mise en valeur de la démocratie » confirment la protection du droit à un processus véritable de négociation collective dans les limites de l'al. 2*d*) (par. 81). Plus récemment, dans l'arrêt *Police montée*, elle s'en remet à ces mêmes valeurs pour confirmer que la protection d'un processus véritable de négociation collective exige que les employés puissent poursuivre leurs objectifs et que l'alinéa vise essentiellement à protéger

l'individu contre « tout isolement imposé par l'État dans la poursuite de ses fins » [. . .] Cette garantie permet de protéger les individus contre des entités plus puissantes. En s'unissant pour réaliser des objectifs communs, des personnes sont capables d'empêcher des entités plus puissantes de faire obstacle aux buts et aux aspirations légitimes qu'elles peuvent avoir. Le droit à la liberté d'association confère donc certains pouvoirs aux groupes vulnérables et les aide à corriger les inégalités au sein de la société. Il protège ainsi les groupes marginalisés et favorise la formation d'une société plus équitable. [par. 58]

[54] Le droit de grève est essentiel à la réalisation de ces valeurs et de ces objectifs par voie de négociation collective, car il permet aux travailleurs de cesser le travail de manière concertée en cas d'impasse de cette négociation collective. En recourant à

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together to participate directly in the process of determining their wages, working conditions and the rules that will govern their working lives (Fudge and Tucker, at p. 334). The ability to strike thereby allows workers, through collective action, to refuse to work under imposed terms and conditions. This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives.

[55] Striking — the "powerhouse" of collective bargaining — also promotes equality in the bargaining process: England, at p. 188. This Court has long recognized the deep inequalities that structure the relationship between employers and employees, and the vulnerability of employees in this context. In the *Alberta Reference*, Dickson C.J. observed that

> [t]he role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers. [p. 368]

And this Court affirmed in *Mounted Police* that

> . . . s. 2(*d*) functions to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power. Nowhere are these dual functions of s. 2(*d*) more pertinent than in labour relations. Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals.
>
> The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in a meaningful way . . . . [The] process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals. [paras. 70-71]

la grève, les travailleurs s'unissent pour participer directement au processus de détermination de leurs salaires, de leurs conditions de travail et des règles qui régiront leur vie professionnelle (Fudge et Tucker, p. 334). Ainsi, le recours possible à la grève fait en sorte que les travailleurs peuvent, par leur action concertée, refuser de travailler aux conditions imposées par l'employeur. Cette action concertée directe lors d'une impasse se veut une affirmation de la dignité et de l'autonomie personnelle des salariés pendant leur vie professionnelle.

[55] La grève — le « moteur » de la négociation collective — favorise aussi l'égalité dans le processus de négociation (England, p. 188). La Cour reconnaît depuis longtemps les inégalités marquées qui façonnent les relations entre employeurs et salariés, ainsi que la vulnérabilité des salariés dans ce contexte. Dans le *Renvoi relatif à l'Alberta*, le juge en chef Dickson fait observer ce qui suit :

> L'association a toujours joué un rôle vital dans la protection des besoins et des intérêts essentiels des travailleurs. Au cours de l'histoire, les travailleurs se sont associés pour surmonter leur vulnérabilité individuelle face à l'employeur. [p. 368]

Et, dans l'arrêt *Police montée*, la Cour confirme :

> . . . l'al. 2*d*) vise à la fois à empêcher que des personnes — qui, isolées, demeureraient impuissantes — soient opprimées par des entités plus puissantes et à accroître leur influence par l'exercice d'un pouvoir collectif. Or, cette double fonction de l'al. 2*d*) ne peut être plus évidente que dans le cadre des relations de travail. En effet, les employés, agissant individuellement, ne disposent habituellement pas du pouvoir de négocier et de poursuivre des objectifs relatifs à leurs conditions de travail avec un employeur plus puissant. Seul le regroupement en association en vue de négocier collectivement — qui augmente ainsi leur pouvoir de négociation — permet à des employés de poursuivre véritablement leurs objectifs relatifs à leurs conditions de travail.
>
> Le droit à un processus véritable de négociation collective constitue donc un élément nécessaire du droit de poursuivre collectivement et de manière véritable des objectifs relatifs au travail [. . .] Un processus de négociation collective n'aura toutefois pas un caractère véritable s'il empêche les employés de poursuivre leurs objectifs. [par. 70-71]

Judy Fudge and Eric Tucker point out that it is "the possibility of the strike which enables workers to negotiate with their employers on terms of approximate equality" (p. 333). Without it, "bargaining risks being inconsequential — a dead letter" (Prof. Michael Lynk, "Expert Opinion on Essential Services", at par. 20; A.R., vol. III, at p. 145).

[56] In their dissent, my colleagues suggest that s. 2(*d*) should not protect strike activity as part of a right to a meaningful process of collective bargaining because "true workplace justice looks at the interests of all implicated parties" (para. 125), including employers. In essentially attributing equivalence between the power of employees and employers, this reasoning, with respect, turns labour relations on its head, and ignores the fundamental power imbalance which the entire history of modern labour legislation has been scrupulously devoted to rectifying. It drives us inevitably to Anatole France's aphoristic fallacy: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

[57] Strike activity itself does not guarantee that a labour dispute will be resolved in any particular manner, or that it will be resolved at all. And, as the trial judge recognized, strike action has the potential to place pressure on *both* sides of a dispute to engage in good faith negotiations. But what it does permit is the employees' ability to engage in negotiations with an employer on a more equal footing (see *Williams v. Aristocratic Restaurants (1947) Ltd.*, [1951] S.C.R. 762, at p. 780; *Mounted Police*, at paras. 70-71).

[58] Moreover, while the right to strike is best analyzed through the lens of freedom of association, expressive activity in the labour context is directly related to the *Charter*-protected right of workers to associate to further common workplace goals under s. 2(*d*) of the *Charter*: *Fraser*, at para. 38; *Alberta (Information and Privacy Commissioner)*, at para. 30. Strike action "bring[s the] debate on the

Judy Fudge et Eric Tucker relèvent que c'est [TRADUCTION] « l'éventualité de la grève qui permet aux travailleurs de négocier leurs conditions de travail presque sur un pied d'égalité avec l'employeur » (p. 333). Sans le droit de grève, [TRADUCTION] « la négociation risque de n'être qu'un vœu pieux » (Professeur Michael Lynk, opinion d'expert sur les services essentiels, par. 20; d.a., vol. III, p. 145).

[56] Dans leurs motifs de dissidence, mes collègues laissent entendre que l'al. 2*d*) ne devrait pas protéger le recours à la grève comme élément d'un processus véritable de négociation collective parce que « la véritable justice au travail se souci[e] des intérêts de tous les intéressés » (par. 125), y compris l'employeur. Soit dit en tout respect, en tenant essentiellement pour équivalents le pouvoir des salariés et celui des employeurs, ils méconnaissent la réalité des relations de travail et font abstraction du déséquilibre fondamental des forces en présence que la législation moderne du travail s'est toujours efforcée de corriger. Cela nous ramène inexorablement au sophisme aphoristique d'Anatole France : « La loi, dans un grand souci d'égalité, interdit aux riches comme aux pauvres de coucher sous les ponts, de mendier dans les rues et de voler du pain. »

[57] Faire la grève ne garantit pas en soi qu'un conflit de travail sera réglé d'une certaine manière, ni même du tout. Le juge de première instance reconnaît que la grève peut faire pression sur les *deux* parties au conflit pour qu'elles négocient de bonne foi. Elle permet toutefois aux salariés de négocier davantage sur un pied d'égalité avec l'employeur (voir *Williams c. Aristocratic Restaurants (1947) Ltd.*, [1951] R.C.S. 762, p. 780; *Police montée*, par. 70-71).

[58] Qui plus est, même s'il est préférable de considérer le droit de grève sous l'angle de la liberté d'association, l'activité expressive dans le contexte du travail est directement liée au droit que l'al. 2*d*) de la *Charte* garantit aux travailleurs de s'associer en vue de poursuivre des objectifs communs (*Fraser*, par. 38; *Alberta (Information and Privacy Commissioner)*, par. 30). La grève a pour effet de

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labour conditions with an employer into the public realm": *Alberta (Information and Privacy Commissioner)*, at para. 28. Cory J. recognized this dynamic in *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901:

> Often it is only by means of a strike that union members can publicize and emphasize the merits of their position as they see them with regard to the issues in dispute. It is essential that both the labour and management side be able to put forward their position so the public fully understands the issues and can determine which side is worthy of public support. Historically, to put forward their position, management has had far greater access to the media than have the unions. At times unions had no alternative but to take strike action and by means of peaceful picketing put forward their position to the public. This is often the situation today. [p. 916]

[59] As Dickson C.J. observed, "[t]he very nature of a strike, and its *raison d'être*, is to influence an employer by joint action which would be ineffective if it were carried out by an individual" (*Alberta Reference*, at p. 371).

[60] Alternative dispute resolution mechanisms, on the other hand, are generally not associational in nature and may, in fact, reduce the effectiveness of collective bargaining processes over time: Bernard Adell, Michel Grant and Allen Ponak, *Strikes in Essential Services* (2001), at p. 8. Such mechanisms can help avoid the negative consequences of strike action in the event of a bargaining impasse, but as Dickson C.J. noted in *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460, they do not, in the same way, help to realize what is protected by the values and objectives underlying freedom of association:

> . . . as I indicated in the *Alberta Labour Reference*, the right to bargain collectively and therefore the right to strike involve more than purely economic interests of workers . . . . [A]s yet, it would appear that Canadian legislatures have not discovered an alternative mode of industrial dispute resolution which is as sensitive to the

« transporter sur la place publique le débat sur les conditions de travail imposées par un employeur » (*Alberta (Information and Privacy Commissioner)*, par. 28). Le juge Cory le reconnaît également dans l'arrêt *United Nurses of Alberta c. Alberta (Procureur général)*, [1992] 1 R.C.S. 901 :

> La grève est souvent le seul moyen dont disposent les syndiqués pour rendre public et faire valoir le bien-fondé de leur position à l'égard des questions en litige. Il est essentiel que les travailleurs et la direction soient tous les deux en mesure de faire valoir leur position afin que le public comprenne parfaitement les questions et puisse opter pour la partie qui mérite son appui. De tout temps, à ce chapitre, la direction a eu accès beaucoup plus facilement aux médias que les syndicats. À certains moments, ceux-ci n'avaient d'autre choix que de déclencher une grève et de faire connaître leur position au public au moyen d'un piquetage pacifique. C'est souvent le cas aujourd'hui. [p. 916]

[59] Le juge en chef Dickson fait d'ailleurs observer que « [l]a nature même d'une grève, sa raison d'être, est d'influencer l'employeur par une action commune qui serait inefficace si elle était exercée par une seule personne » (*Renvoi relatif à l'Alberta*, p. 371).

[60] Par contre, les autres mécanismes de règlement des différends ne relèvent généralement pas de l'association et peuvent en fait nuire avec le temps à l'efficacité du processus de négociation collective (Bernard Adell, Michel Grant et Allen Ponak, *Strikes in Essential Services* (2001), p. 8). Ces mécanismes peuvent permettre d'échapper aux conséquences néfastes de la grève en cas d'impasse des négociations, mais comme le signale le juge en chef Dickson dans l'arrêt *SDGMR c. Saskatchewan*, [1987] 1 R.C.S. 460, ils ne permettent pas, de la même manière, de réaliser ce que protègent les valeurs et les objectifs qui sous-tendent la liberté d'association :

> . . . comme je l'ai souligné dans le *Renvoi relatif* [*à l'Alberta*], le droit de négocier collectivement et, partant, celui de faire la grève, ne mettent pas en jeu que des intérêts purement économiques des travailleurs, [. . .] Même si, jusqu'à maintenant, les législateurs canadiens ne semblent pas avoir découvert un autre mode de règlement

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associational interests of employees as the traditional strike/lock-out mechanism . . . . [pp. 476-77]

That is why, in the *Alberta Reference*, Dickson C.J. dealt with alternative dispute resolution mechanisms not as part of the scope of s. 2(*d*), but as part of his s. 1 analysis: pp. 374-75.

[61] The ability to engage in the collective withdrawal of services in the process of the negotiation of a collective agreement is therefore, and has historically been, the "irreducible minimum" of the freedom to associate in Canadian labour relations (Paul Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (1980), at p. 69).

[62] Canada's international human rights obligations also mandate protecting the right to strike as part of a meaningful process of collective bargaining. These obligations led Dickson C.J. to observe that

there is a clear consensus amongst the [International Labour Organization] adjudicative bodies that [*Convention (No. 87) concerning freedom of association and protection of the right to organize*, 68 U.N.T.S. 17 (1948)] goes beyond merely protecting the formation of labour unions and provides protection of their essential activities — that is of collective bargaining and the freedom to strike. [*Alberta Reference*, at p. 359]

[63] At the time of the *Alberta Reference*, Dickson C.J.'s reliance on Canada's commitments under international law did not attract sufficient collegial support to lift his views out of their dissenting status, but his approach has more recently proven to be a magnetic guide.

[64] LeBel J. confirmed in *R. v. Hape*, [2007] 2 S.C.R. 292, that in interpreting the *Charter*, the Court "has sought to ensure consistency between its interpretation of the *Charter*, on the one hand, and Canada's international obligations and the relevant principles of international law, on the other":

des conflits de travail qui tienne aussi bien compte des intérêts collectifs des salariés que le mécanisme traditionnel de la grève et du lock-out . . . [p. 476-477]

C'est pourquoi dans le *Renvoi relatif à l'Alberta*, le juge en chef Dickson se prononce sur les autres mécanismes de règlement des différends non pas au regard de l'al. 2*d*), mais dans le cadre de son analyse fondée sur l'article premier (p. 374-375).

[61] La faculté des travailleurs de cesser collectivement le travail pendant la négociation d'une convention collective constitue donc — et a toujours constitué — le [TRADUCTION] « minimum irréductible » de la liberté d'association dans les relations de travail au Canada (Paul Weiler, *Reconcilable Differences : New Directions in Canadian Labour Law* (1980), p. 69).

[62] Les obligations internationales du Canada en matière de droits de la personne commandent également la protection du droit de grève en tant qu'élément d'un processus véritable de négociation collective. Ces obligations ont amené le juge en chef Dickson à faire observer ce qui suit :

. . . il existe un consensus manifeste au sein des organes décisionnels de l'[Organisation internationale du Travail] suivant lequel la [*Convention (n^o^ 87) concernant la liberté syndicale et la protection du droit syndical*, 68 R.T.N.U. 17 (1948)] ne se borne pas uniquement à protéger la formation des syndicats mais protège leurs activités fondamentales, soit la négociation collective et le droit de grève. [*Renvoi relatif à l'Alberta*, p. 359]

[63] À l'époque du *Renvoi relatif à l'Alberta*, les engagements internationaux du Canada invoqués par le juge en chef Dickson n'ont pas convaincu un nombre suffisant de ses collègues de se rallier à lui, de sorte que son opinion est demeurée dissidente, mais l'approche du Juge en chef s'est révélée être un repère magnétique ces dernières années.

[64] Dans *R. c. Hape*, [2007] 2 R.C.S. 292, le juge LeBel confirme que, en interprétant la *Charte*, la Cour « a tenté d'assurer la cohérence entre son interprétation de la *Charte*, d'une part, et les obligations internationales du Canada et les principes applicables du droit international, d'autre part » (par. 55).

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para. 55. And this Court reaffirmed in *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] 3 S.C.R. 157, at para. 23, "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified".

[65] Given this presumption, Canada's international obligations clearly argue for the recognition of a right to strike within s. 2(*d*). Canada is a party to two instruments which explicitly protect the right to strike. Article 8(1) of the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, to which Canada acceded in May 1976, provides that the "States Parties to the present Covenant undertake to ensure . . . (*d*) *the right to strike, provided that it is exercised in conformity with the laws of the particular country*". (See also affidavit of Prof. Patrick Macklem (Expert Report), sworn December 21, 2010.) In Dickson C.J.'s view, the qualification that the right had to be exercised in conformity with domestic law appeared to allow for the regulation of the right, but not its legislative abrogation (*Alberta Reference*, at p. 351, citing *Re Alberta Union of Provincial Employees and the Crown in Right of Alberta* (1980), 120 D.L.R. (3d) 590 (Alta. Q.B.), at p. 597; see also Hepple, at p. 138).

[66] In addition, in 1990, just over two years after the *Alberta Reference* was decided, Canada signed and ratified the *Charter of the Organization of American States*, Can. T.S. 1990 No. 23. Article 45(c) states:

> Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, *including the right to collective bargaining and the workers' right to strike*, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws;

[67] Besides these explicit commitments, other sources tend to confirm the protection of the right to strike recognized in international law. Canada is a

Puis, dans *Divito c. Canada (Sécurité publique et Protection civile)*, [2013] 3 R.C.S. 157, par. 23, la Cour confirme qu'« il faut présumer que la *Charte* accorde une protection au moins aussi grande que les instruments internationaux ratifiés par le Canada en matière de droits de la personne ».

[65] Étant donné cette présomption, les obligations internationales du Canada militent nettement en faveur de la reconnaissance d'un droit de grève protégé par l'al. 2*d*). Le Canada est partie à deux instruments qui protègent expressément le droit de grève. L'alinéa *d*) du paragraphe 1 de l'article 8 du *Pacte international relatif aux droits économiques, sociaux et culturels*, 993 R.T.N.U. 3, auquel le Canada a adhéré en 1976, dispose que « [l]es États parties au présent Pacte s'engagent à assurer [. . .] *d*) *Le droit de grève, exercé conformément aux lois de chaque pays* »; voir également l'affidavit du professeur Patrick Macklem (rapport d'expert) en date du 21 décembre 2010. Pour le juge en chef Dickson, la réserve portant que ce droit doit être exercé conformément au droit interne paraît autoriser sa réglementation, mais non sa suppression législative (*Renvoi relatif à l'Alberta*, p. 351, où il cite l'arrêt *Re Alberta Union of Provincial Employees and the Crown in Right of Alberta* (1980), 120 D.L.R. (3d) 590 (B.R. Alb.), p. 597; voir également Hepple, p. 138).

[66] De plus, en 1990, seulement deux ans après que la Cour s'est prononcée dans le *Renvoi relatif à l'Alberta*, le Canada a signé et ratifié la *Charte de l'Organisation des États Américains*, R.T. Can. 1990 nº 23, dont le paragraphe c) de l'article 45 dispose :

> Les employeurs et les travailleurs, ruraux ou urbains, ont le droit de s'associer librement pour la défense et la promotion de leurs intérêts, *notamment le droit de négociation collective et le droit de grève*, l'attribution de la personnalité juridique à ces associations et la protection de leur liberté et de leur indépendance, conformément à la législation pertinente;

[67] Outre ces deux engagements exprès, d'autres sources tendent à confirmer la protection du droit de grève que reconnaît le droit international.

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party to the International Labour Organization (ILO) *Convention (No. 87) concerning freedom of association and protection of the right to organize*, ratified in 1972. Although *Convention No. 87* does not explicitly refer to the right to strike, the ILO supervisory bodies, including the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations, have recognized the right to strike as an indissociable corollary of the right of trade union association that is protected in that convention: see Pierre Verge and Dominic Roux, "L'affirmation des principes de la liberté syndicale, de la négociation collective et du droit de grève selon le droit international et le droit du travail canadien: deux solitudes?", in Pierre Verge, ed., *Droit international du travail: Perspectives canadiennes* (2010), 437, at p. 460; Janice R. Bellace, "The ILO and the right to strike" (2014), 153 *Int'l Lab. Rev.* 29, at p. 30. Striking, according to the Committee of Experts, is "one of the essential means available to workers and their organizations for the promotion and protection of their economic and social interests": *Freedom of Association and Collective Bargaining* (1994), at para. 147; Jean-Michel Servais, "ILO Law and the Right to Strike" (2009-2010), 15 *C.L.E.L.J.* 147, at p. 150.

[68] Under the *International Covenant on Economic, Social and Cultural Rights* signatory states are not permitted to take "legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in [*Convention No. 87*]": Article 8(3) of the *ICESCR*. The principles relating to the right to strike were summarized by the Committee on Freedom of Association as follows:

521. The Committee has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests.

522. The right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests.

Le Canada adhère à la *Convention (n° 87) concernant la liberté syndicale et la protection du droit syndical* de l'Organisation internationale du Travail (OIT), qu'il a ratifiée en 1972. Bien que la *Convention (n° 87)* ne renvoie pas expressément au droit de grève, les organismes de contrôle d'application de l'OIT, dont le Comité de la liberté syndicale et la Commission d'experts pour l'application des conventions et recommandations, reconnaissent que le droit de grève est indissociable du droit de regroupement en syndicat que protège la convention (voir Pierre Verge et Dominic Roux, « L'affirmation des principes de la liberté syndicale, de la négociation collective et du droit de grève selon le droit international et le droit du travail canadien : deux solitudes? », dans Pierre Verge, dir., *Droit international du travail : Perspectives canadiennes* (2010), 437, p. 460; Janice R. Bellace, « The ILO and the right to strike » (2014), 153 *Rev. int. trav.* 29, p. 30. Pour la Commission d'experts, la grève est « un des moyens essentiels dont disposent les travailleurs et leurs organisations pour promouvoir et pour défendre leurs intérêts économiques et sociaux » (*Liberté syndicale et négociation collective* (1994), par. 147; Jean-Michel Servais, « ILO Law and the Right to Strike » (2009-2010), 15 *C.L.E.L.J.* 147, p. 150).

[68] Les États signataires du *Pacte international relatif aux droits économiques, sociaux et culturels* se voient empêcher par la *Convention (n° 87)* de « prendre des mesures législatives portant atteinte — ou d'appliquer la loi de façon à porter atteinte — aux garanties prévues dans [cette] convention » (Paragraphe 3 de l'article 8 du *PIDESC*, qui renvoie à la *Convention (n° 87)*). Le Comité de la liberté syndicale résume comme suit les principes liés au droit de grève :

521. Le comité a toujours reconnu aux travailleurs et à leurs organisations le droit de grève comme moyen légitime de défense de leurs intérêts économiques et sociaux.

522. Le droit de grève est un des moyens essentiels dont disposent les travailleurs et leurs organisations pour promouvoir et pour défendre leurs intérêts économiques et sociaux.

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523. The right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87.

. . .

526. The occupational and economic interests which workers defend through the exercise of the right to strike do not only concern better working conditions or collective claims of an occupational nature, but also the seeking of solutions to economic and social policy questions and problems facing the undertaking which are of direct concern to the workers. [References omitted.]

(ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th rev. ed. 2006))

[69] Though not strictly binding, the decisions of the Committee on Freedom of Association have considerable persuasive weight and have been favourably cited and widely adopted by courts, tribunals and other adjudicative boards around the world, including our Court: Lynk, at para. 9; *Health Services*, at para. 76; *Alberta Reference*, at pp. 354-55, per Dickson C.J. The relevant and persuasive nature of the Committee on Freedom of Association jurisprudence has developed over time through custom and practice and, within the ILO, it has been the leading interpreter of the contours of the right to strike: Bellace, at p. 62. See also Roy J. Adams, "The Supreme Court, Collective Bargaining and International Law: A Reply to Brian Langille" (2008), 14 *C.L.E.L.J.* 317, at p. 321; Neville Rubin, in consultation with Evance Kalula and Bob Hepple, eds., *Code of International Labour Law: Law, Practice and Jurisprudence*, vol. I, *Essentials of International Labour Law* (2005), at p. 31.

[70] Canada is also a party to the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (*ICCPR*), which incorporates *Convention No. 87* and the obligations it sets out: see Article 22(3); Tonia Novitz, "Connecting Freedom of Association and the Right to Strike: European Dialogue with the ILO and its Potential Impact" (2009-2010), 15 *C.L.E.L.J.* 465, at p. 472; Roy J. Adams, at p. 324.

523. Le droit de grève est un corollaire indissociable du droit syndical protégé par la convention n° 87.

. . .

526. Les intérêts professionnels et économiques que les travailleurs défendent par le droit de grève se rapportent non seulement à l'obtention de meilleures conditions de travail ou aux revendications collectives d'ordre professionnel, mais englobent également la recherche de solutions aux questions de politique économique et sociale et aux problèmes qui se posent à l'entreprise, et qui intéressent directement les travailleurs. [Citations omises.]

(OIT, *La liberté syndicale : Recueil de décisions et de principes du Comité de la liberté syndicale du Conseil d'administration du BIT* (5e éd. rév. 2006))

[69] Même si, à strictement parler, elles n'ont pas d'effet obligatoire, les décisions du Comité de la liberté syndicale ont une force persuasive considérable et elles ont été citées avec approbation et largement reprises à l'échelle mondiale par les cours de justice, les tribunaux administratifs et d'autres décideurs, y compris notre Cour (Lynk, par. 9; *Health Services*, par. 76; *Renvoi relatif à l'Alberta*, p. 354-355, le juge en chef Dickson). Le Comité de la liberté syndicale a vu s'accroître avec le temps la pertinence et le caractère persuasif de ses décisions dans l'usage et dans la pratique et, au sein de l'OIT, c'est à lui principalement qu'il a incombé de délimiter le droit de grève (Bellace, p. 62. Voir aussi Roy J. Adams, « The Supreme Court, Collective Bargaining and International Law : A Reply to Brian Langille » (2008), 14 *C.L.E.L.J.* 317, p. 321; Neville Rubin, en consultation avec Evance Kalula et Bob Hepple, dir., *Code of International Labour Law : Law, Practice and Jurisprudence*, vol. I, *Essentials of International Labour Law* (2005), p. 31).

[70] Le Canada est également partie au *Pacte international relatif aux droits civils et politiques*, 999 R.T.N.U. 171 (*PIDCP*), auquel sont incorporées la *Convention (n° 87)* et les obligations qu'elle crée (voir le paragraphe 3 de l'article 22; Tonia Novitz, « Connecting Freedom of Association and the Right to Strike : European Dialogue with the ILO and its Potential Impact » (2009-2010), 15 *C.L.E.L.J.* 465, p. 472; Roy J. Adams, p. 324).

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[71] Additionally, there is an emerging international consensus that, if it is to be meaningful, collective bargaining requires a right to strike. The European Court of Human Rights now shares this view. After concluding in *Demir v. Turkey* [GC], No. 34503/97, ECHR 2008-V, that freedom of association under Article 11 of the *European Convention on Human Rights*, 213 U.N.T.S. 221, protects a right to collective bargaining, it went on in *Enerji Yapi-Yol Sen v. Turquie*, No. 68959/01, April 21, 2009 (HUDOC), to conclude that a right to strike is part of what ensures the effective exercise of a right to collective bargaining:

> The terms of the Convention require that the law should allow trade unions, in any manner not contrary to Article 11, to act in defence of their members' interests. Strike action, which enables a trade union to make its voice heard, constitutes an important aspect in the protection of trade union members' interests . . . . The Court also observes that the right to strike is recognised by the International Labour Organisation's (ILO) supervisory bodies as an indissociable corollary of the right of trade union association that is protected by ILO Convention C87 on trade union freedom and the protection of trade union rights (for the Court's consideration of elements of international law other than the Convention, see *Demir et Baykara* . . .). It recalls that the European Social Charter also recognises the right to strike as a means of ensuring the effective exercise of the right to collective bargaining.
>
> (Unofficial translation of *Enerji Yapi-Yol Sen*, at para. 24, cited in K. D. Ewing and John Hendy, "The Dramatic Implications of *Demir and Baykara*" (2009-2010), 15 *C.L.E.L.J.* 165, at pp. 181-82 (text in brackets in Ewing and Hendy); see also *National Union of Rail, Maritime and Transport Workers v. United Kingdom*, No. 31045/10, April 8, 2014 (HUDOC).)

[72] Even though German labour relations are not based on the Wagner model, German courts too have concluded that strike action is protected when it is complementary to collective bargaining, that is, when the strike action is aimed at the achievement of a collective agreement and is proportionate to that

[71] Par ailleurs, un consensus se dégage à l'échelle internationale en ce qui concerne la nécessité du droit de grève pour une négociation collective véritable. La Cour européenne des droits de l'homme partage désormais cet avis. Ainsi, après avoir conclu dans l'arrêt *Demir c. Turquie* [GC], nº 34503/97, CEDH 2008-V que la liberté d'association prévue à l'article 11 de la *Convention européenne des droits de l'homme*, 213 R.T.N.U. 221, protège le droit de négocier collectivement, elle a ensuite estimé, dans l'arrêt *Enerji Yapi-Yol Sen c. Turquie*, nº 68959/01, 21 avril 2009 (HUDOC), par. 24, que c'est le droit de grève qui garantit l'exercice réel du droit de négocier collectivement :

> Or ce qu'exige la Convention, c'est que la législation permette aux syndicats, selon les modalités non contraires à l'article 11, de lutter pour la défense des intérêts de leurs membres [. . .] La grève, qui permet à un syndicat de faire entendre sa voix, constitue un aspect important pour les membres d'un syndicat dans la protection de leurs intérêts [. . .] La Cour note également que le droit de grève est reconnu par les organes de contrôle de l'Organisation internationale du travail (OIT) comme le corollaire indissociable du droit d'association syndicale protégé par la Convention C87 de l'OIT sur la liberté syndicale et la protection du droit syndical (pour la prise en compte par la Cour des éléments de droit international autres que la Convention, voir *Demir et Baykara* . . .). Elle rappelle que la Charte sociale européenne reconnaît aussi le droit de grève comme un moyen d'assurer l'exercice effectif du droit de négociation collective.
>
> (Voir également *National Union of Rail, Maritime and Transport Workers c. United Kingdom*, nº 31045/10, 8 avril 2014 (HUDOC).)

[72] En Allemagne, même si les dispositions qui régissent les relations de travail ne sont pas fondées sur la *Loi Wagner*, les tribunaux estiment eux aussi que le recours à la grève est protégé lorsqu'il complémente la négociation collective, c'est-à-dire lorsque la grève vise la conclusion d'une convention

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aim (Hepple, at p. 135; Manfred Weiss and Marlene Schmidt, *Labour Law and Industrial Relations in Germany* (4th rev. ed. 2008), at paras. 484-86).

[73] Israeli courts have also held that freedom of association is a basic right, derived from the right to human dignity. They have interpreted freedom of association to include the right to organize, the right to bargain collectively, and the right to strike: *Attorney-General v. National Labour Court*, [1995-6] Isr. L.R. 149 (H.C.J.), at p. 162; *New Histadrut General Workers' Union v. State of Israel* (2006), 25 I.L.L.R. 375, at para. 10; *Koach La Ovdim v. Jerusalem Cinematheque* (2009), 29 I.L.L.R. 329, at p. 331; Guy Davidov, "Judicial Development of Collective Labour Rights — Contextually" (2009-2010), 15 *C.L.E.L.J.* 235, at p. 241.

[74] And strikes, as collective action, are protected globally, existing in many countries with labour laws outside the *Wagner Act* model: J.-M. Servais, at p. 148. Moreover, several countries have explicitly included the right to strike in their constitutions, including France (Constitution of 1946, § 7 of the preamble), Italy (Constitution of 1948, art. 40), Portugal (Constitution of 1976, art. 57), Spain (Constitution of 1978, art. 28(2)), and South Africa (Constitution of 1996, s. 23(2)) (Hepple, at p. 135). The *European Social Charter* similarly recognizes the importance of the freedom to strike for meaningful collective bargaining (E.T.S. No. 35, 1961(revised E.T.S. No. 163, 1996), Article 6(4)).

[75] 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

collective et que son exercice est proportionné à cet objectif (Hepple, p. 135; Manfred Weiss et Marlene Schmidt, *Labour Law and Industrial Relations in Germany* (4e éd. rév. 2008), par. 484-486).

[73] Les tribunaux israéliens tiennent également la liberté d'association pour un droit fondamental dérivé du droit à la dignité humaine. Ils ont statué que la liberté d'association englobe le droit de se syndiquer, le droit de négocier collectivement et le droit de faire la grève (*Attorney-General c. National Labour Court*, [1995-6] Isr. L.R. 149 (H.C.J.), p. 162; *New Histadrut General Workers' Union c. State of Israel* (2006), 25 I.L.L.R. 375, par. 10; *Koach La Ovdim c. Jerusalem Cinematheque* (2009), 29 I.L.L.R. 329, p. 331; Guy Davidov, « Judicial Development of Collective Labour Rights — Contextually » (2009-2010), 15 *C.L.E.L.J.* 235, p. 241).

[74] La grève comme moyen d'action concertée est protégée dans de nombreux pays dotés de lois du travail étrangères au modèle fondé sur la *Loi Wagner* (J.-M. Servais, p. 148). De plus, maints pays ont expressément intégré le droit de grève à leur Constitution, y compris la France (Constitution de 1946, § 7 du préambule), l'Italie (Constitution de 1948, art. 40), le Portugal (Constitution de 1976, art. 57), l'Espagne (Constitution de 1978, par. 28(2)) et l'Afrique du Sud (Constitution de 1996, par. 23(2)) (B. Hepple, p. 135). De même, la *Charte sociale européenne* reconnaît l'importance de la liberté de grève aux fins d'une négociation collective véritable (S.T.E. no 35, 1961 (révisée S.T.E. no 163, 1996), paragraphe 4 de l'article 6).

[75] Ce tour d'horizon historique, international et jurisprudentiel me convainc que l'interprétation de l'al. 2*d*) est aujourd'hui celle que préconisait le juge en chef Dickson dans le *Renvoi relatif à l'Alberta*, à savoir qu'un processus véritable de négociation collective exige que les salariés puissent cesser collectivement le travail aux fins de la détermination de leurs conditions de travail par voie de négociation collective. Advenant la rupture de la négociation de bonne foi, la faculté de cesser collectivement le travail est une composante nécessaire du processus par lequel les salariés peuvent continuer de participer véritablement à la poursuite de

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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.

[76] In their dissenting reasons, however, my colleagues urge deference to the legislature in interpreting the scope of s. 2(*d*). This Court has repeatedly held that the rights enumerated in the *Charter* should be interpreted generously: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 156; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344. It is not clear to me why s. 2(*d*) should be interpreted differently: *Health Services*, at para. 26; *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, at para. 162; *Mounted Police*, at para. 47. In the context of constitutional adjudication, deference is a conclusion, not an analysis. It certainly plays a role in s. 1, where, if a law is justified as proportionate, the legislative choice is maintained. But the whole purpose of *Charter* review is to assess a law for constitutional compliance. If the touchstone of *Charter* compliance is deference, what is the point of judicial scrutiny?

[77] This brings us to the test for an infringement of s. 2(*d*). The right to strike is protected by virtue of its unique role in the collective bargaining process. In *Health Services*, this Court established that s. 2(*d*) prevents the state from substantially interfering with the ability of workers, acting collectively through their union, to exert meaningful influence over their working conditions through a process of collective bargaining (para. 90). And in *Mounted Police*, McLachlin C.J. and LeBel J. confirmed that

> [t]he balance necessary to ensure the meaningful pursuit of workplace goals can be disrupted in many ways. Laws and regulations may restrict the subjects that can be discussed, or impose arbitrary outcomes. They may ban recourse to collective action by employees without

leurs objectifs liés au travail. Dans le présent dossier, supprimer le droit de grève revient à entraver substantiellement l'exercice du droit à un processus véritable de négociation collective.

[76] Dans leurs motifs de dissidence, mes collègues nous exhortent cependant à déférer au législateur pour déterminer la portée de l'al. 2*d*). La Cour a maintes fois rappelé que les droits énoncés dans la *Charte* doivent être interprétés généreusement (*Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, p. 156; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, p. 344). Je ne vois pas du tout pourquoi l'al. 2*d*) devrait être interprété autrement (*Health Services*, par. 26; *R. c. Advance Cutting & Coring Ltd.*, [2001] 3 R.C.S. 209, par. 162; *Police montée*, par. 47). Lorsqu'il s'agit de statuer sur la constitutionnalité d'une mesure, la déférence s'entend d'une conclusion, non d'une démarche analytique. Elle joue certes un rôle pour l'application de l'article premier, de sorte que, lorsqu'une disposition est justifiée en raison de sa proportionnalité, le choix du législateur est respecté. Or, le contrôle constitutionnel vise précisément à déterminer si une disposition législative respecte la *Charte* ou non. Si la déférence devient la pierre angulaire du respect de la *Charte*, à quoi bon se livrer à un examen judiciaire?

[77] Cela nous amène au test qui permet de déterminer s'il y a ou non atteinte au droit garanti à l'al. 2*d*). Le droit de grève est protégé en raison de sa fonction unique dans le processus de négociation collective. Dans *Health Services*, la Cour dit de cet alinéa qu'il empêche l'État d'entraver substantiellement la faculté des travailleurs d'agir de manière concertée par l'entremise de leur syndicat afin d'exercer une influence véritable sur leurs conditions de travail dans le cadre d'un processus de négociation collective (par. 90). La juge en chef McLachlin et le juge LeBel confirment d'ailleurs ce qui suit dans *Police montée* :

> L'équilibre nécessaire à la poursuite véritable d'objectifs relatifs au travail peut être rompu de maintes façons. Des lois et des règlements peuvent restreindre les sujets susceptibles de faire l'objet de négociation ou imposer des résultats arbitraires. Ils peuvent interdire l'action collective

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adequate countervailing protections, thus undermining their bargaining power. . . . 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* . . . . [Emphasis added; para. 72.]

[78] The test, then, is whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with collective bargaining. The *PSESA* demonstrably meets this threshold because it prevents designated employees from engaging in *any* work stoppage as part of the bargaining process. It must therefore be justified under s. 1 of the *Charter*.

[79] The maintenance of essential public services is self-evidently a pressing and substantial objective, as the Unions acknowledge. The Unions also accept the trial judge's further conclusion that the government's objective — ensuring the continued delivery of essential services — is rationally connected to the "basic structure of the legislation, including the sanctions imposed on employees and their unions to ensure compliance with its provisions".

[80] The determinative issue here, in my view, is whether the means chosen by the government are minimally impairing, that is, "carefully tailored so that rights are impaired no more than necessary" (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160).

[81] The trial judge concluded that the provisions of the *PSESA* "go beyond what is reasonably required to ensure the uninterrupted delivery of essential services during a strike". I agree. The *unilateral* authority of public employers to determine whether and how essential services are to be maintained during a work stoppage with no adequate review mechanism, and the absence of a meaningful

des employés sans offrir de mesures de protection adéquate en compensation et réduire ainsi leur pouvoir de négociation. [. . .] Quelle que soit la nature de la restriction, *il faut essentiellement déterminer si les mesures en question perturbent l'équilibre des rapports de force entre les employés et l'employeur que l'al. 2d) vise à établir, de telle sorte qu'elles interfèrent de façon substantielle avec un processus véritable de négociation collective* . . . [Italiques ajoutés; par. 72.]

[78] Le test consiste alors à déterminer si, dans un cas donné, l'entrave législative au droit de grève équivaut ou non à une entrave substantielle à la négociation collective. Il appert que la *PSESA* satisfait à cette condition en ce qu'elle empêche les salariés désignés de se livrer à *tout* arrêt de travail dans le cadre du processus de négociation. Sa justification doit donc être démontrée au regard de l'article premier de la *Charte*.

[79] L'ininterruption des services publics essentiels constitue à l'évidence un objectif urgent et réel. Les syndicats le reconnaissent et conviennent en outre avec le juge de première instance qu'il doit exister un lien rationnel entre l'objectif de l'État — assurer la prestation ininterrompue de services essentiels — et [TRADUCTION] « la structure fondamentale de la loi, notamment les sanctions imposées aux salariés et à leurs syndicats pour faire en sorte que ceux-ci respectent ses dispositions ».

[80] J'estime que la question décisive en l'espèce est celle de savoir si les moyens retenus par l'État portent atteinte le moins possible ou non aux droits constitutionnels en cause, c'est-à-dire si la mesure législative est ou non « soigneusement adaptée de façon à ce que l'atteinte aux droits ne dépasse pas ce qui est nécessaire » (*RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199, par. 160).

[81] Le juge de première instance conclut que les dispositions de la *PSESA* [TRADUCTION] « vont au delà de ce qui est raisonnablement nécessaire pour assurer la prestation ininterrompue de services essentiels durant une grève ». J'abonde dans le même sens. Le pouvoir *unilatéral* de l'employeur public de décider que des services essentiels seront assurés durant un arrêt de travail et de déterminer

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dispute resolution mechanism to resolve bargaining impasses, justify the trial judge's conclusion that the *PSESA* impairs the s. 2(*d*) rights more than is necessary.

[82] In *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793, L'Heureux-Dubé J. explained why public sector strike action engages singular considerations:

> When "public" employees strike, the pressure exerted on the employer is not largely financial, as in the private sector, but rather arises from the disruption of services upon which society depends for the daily activities of its members. While consumers may simply go to another source for goods and services provided by private enterprise, alternatives to the services targeted by the special regimes may be unavailable or very difficult and expensive to obtain. [para. 32]

[83] That is why the trial judge accepted that "the principle that it is unacceptable to risk the health and safety of others as a means to resolve a public sector collective bargaining dispute is well established in Canada".

[84] But it is important to keep in mind Dickson C.J.'s admonition in the *Alberta Reference* that "essential services" be properly interpreted:

> It is . . . necessary to define "essential services" in a manner consistent with the justificatory standards set out in s. 1. The logic of s. 1 in the present circumstances requires that an essential service be one the interruption of which would threaten serious harm to the general public or to a part of the population. In the context of an argument relating to harm of a non-economic nature I find the decisions of the Freedom of Association Committee of the I.L.O. to be helpful and persuasive. These decisions have consistently defined an essential service as a service "whose interruption would endanger the life, personal safety or health of the whole or part of the population"

la manière dont ils le seront, à l'exclusion de tout mécanisme de contrôle approprié, sans compter l'absence d'un véritable mécanisme de règlement des différends, justifie la conclusion du juge selon laquelle la *PSESA* porte atteinte plus qu'il n'est nécessaire aux droits garantis par l'al. 2*d*).

[82] Dans l'arrêt *Syndicat canadien de la fonction publique, section locale 301 c. Montréal (Ville)*, [1997] 1 R.C.S. 793, la juge L'Heureux-Dubé explique en quoi, dans le secteur public, la grève met en jeu des considérations bien particulières :

> Lorsque des « fonctionnaires » font la grève, les pressions exercées sur l'employeur ne sont pas essentiellement financières, comme dans le secteur privé, mais découlent plutôt de l'interruption de services dont la société dépend pour les activités quotidiennes de ses membres. Tandis que les consommateurs peuvent tout simplement s'adresser à une autre source pour obtenir des biens et des services fournis par l'entreprise privée, il peut être impossible ou très difficile et très onéreux d'obtenir d'autres services en remplacement de ceux visés par les régimes spéciaux. [par. 32]

[83] Voilà pourquoi le juge de première instance reconnaît en l'espèce que [TRADUCTION] « le principe selon lequel il est inacceptable de mettre en péril la santé et la sécurité d'autrui pour régler un différend lors d'une négociation collective dans le secteur public est bien établi au Canada ».

[84] Il importe cependant de se rappeler la mise en garde du juge en chef Dickson dans le *Renvoi relatif à l'Alberta*, à savoir qu'il faut bien définir les « services essentiels » :

> Il est [. . .] nécessaire de définir les « services essentiels » d'une manière qui soit conforme aux normes justificatrices énoncées à l'article premier. La logique de l'article premier, dans les présentes circonstances, exige qu'un service essentiel soit un service dont l'interruption menacerait de causer un préjudice grave au public en général ou à une partie de la population. Dans le contexte d'un argument relatif à un préjudice non économique, je conclus que les décisions du Comité de la liberté syndicale du B.I.T. [Bureau international du Travail] sont utiles et convaincantes. Ces décisions ont toujours défini un service essentiel comme un service « dont l'interruption

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(*Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the I.L.O.*, *supra*). In my view, and without attempting an exhaustive list, persons essential to the maintenance and administration of the rule of law and national security would also be included within the ambit of essential services. *Mere inconvenience to members of the public does not fall within the ambit of the essential services justification for abrogating the freedom to strike*. [Emphasis added; pp. 374-75.]

[85] In other words, the fact that a service is provided exclusively through the public sector does not inevitably lead to the conclusion that it is properly considered "essential". In some circumstances, the public may well be deprived of a service as a result of strike action without being deprived of any essential service at all that would justifiably limit the ability to strike during negotiations. As Ball J. wrote:

> . . . all of the services provided by public sector workers are not essential. It cannot be credibly argued, for example, that the services provided by every employee of every governmental ministry, Crown corporation and agency, every city, town and village, and every educational institution, are so essential that their discontinuance would jeopardize the health and safety of the community. Can it be said that the community would be at risk if employees at casinos and liquor stores in Saskatchewan decided to withdraw their services in support of higher wages? [para. 96]

[86] This need for demarcated limits on both the right of essential services employees to strike and, concomitantly, on the extent to which services may justifiably be limited as "essential", is reflected too in international law. As the trial judge noted:

> International law also recognizes the necessity of limitations on the right to strike of essential service workers. . . . The jurisprudence under ILO Convention No. 87, the ICSECR [*sic*] and the ICCPR has been consistent. As expressed by Prof. Patrick Macklem:

pourrait mettre en péril la vie, la sécurité ou la santé de la personne dans une partie ou dans la totalité de la population » (*La liberté syndicale : Recueil de décisions et de principes du Comité de la liberté syndicale du Conseil d'administration du B.I.T.*, précité). À mon avis, et sans tenter d'en donner une liste exhaustive, les personnes essentielles au maintien et à l'application de la primauté du droit et à la sécurité nationale seraient aussi incluses dans le champ des services essentiels. *Le simple inconvénient subi par des membres du public ne constitue pas un motif du ressort des services essentiels justifiant l'abrogation du droit de grève*. [Italiques ajoutés; p. 374-375.]

[85] En d'autres termes, le fait qu'un service est offert uniquement par le secteur public ne mène pas inévitablement à la conclusion qu'il est à juste titre considéré comme « essentiel ». Dans certaines circonstances, il se peut bien que la population soit privée d'un service à cause d'une grève sans être pour autant privée d'un service essentiel qui justifie la limitation du droit de grève pendant les négociations. Comme le dit le juge de première instance Ball :

> [TRADUCTION] . . . les services assurés par les travailleurs du secteur public ne sont pas tous essentiels. On ne saurait faire droit à la prétention selon laquelle, par exemple, le travail de chacun des salariés de tous les ministères, de tous les organismes et sociétés d'État, dans tous les villages et les villes, et de tous les établissements d'enseignement, correspond à un service si essentiel que son interruption mettrait en péril la santé et la sécurité de la collectivité. Peut-on dire que la collectivité serait en danger si les salariés des casinos et de la société des alcools de la Saskatchewan cessaient le travail afin d'appuyer leur demande d'augmentation de salaire? [par. 96]

[86] Le droit international fait également état de la nécessité de limiter précisément tant le droit de grève des salariés qui assurent des services essentiels que, de façon concomitante, les services qui peuvent à juste titre être qualifiés d'« essentiels ». Le juge de première instance signale :

> [TRADUCTION] Le droit international reconnaît également la nécessité de limiter le droit de grève des travailleurs qui assurent des services essentiels [. . .] La jurisprudence relative à l'application de la Convention n° 87 de l'OIT, du PIDESC [*sic*] et du PIDCP est constante. Voici ce qu'en conclut le professeur Patrick Macklem :

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> Each of these instruments has been interpreted as enshrining the right to strike, and their respective supervisory bodies have insisted that the right to strike may be restricted or prohibited:
>
> (a) in the public service only for public servants exercising authority in the name of the state;
>
> (b) in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population); or
>
> (c) in the event of an acute national emergency and for a limited period of time.

(Paragraph 127, citing affidavit of Patrick Macklem sworn December 21, 2010.)

See also Lynk, at paras. 19-20; Verge and Roux, at pp. 461-62. And within the general category of essential services, the ILO has recognized that "certain classes of personnel . . . should not be deprived of the right to strike, because the interruption of their functions does not in practice affect life, personal safety or health": Servais, at p. 154.

[87] Under the *PSESA*, however, the categories of workers whose right to strike may be abrogated because they provide essential services is subject to the employer's unilateral discretion. The scheme requires a public employer and a trade union to first attempt to negotiate the terms of an essential services agreement. Section 6(2) of the *Act* contemplates that the employer must "advise the trade union" of the services it considers to be essential within the meaning of the *Act*. And where the employer is the Government of Saskatchewan, the prescribed essential services have been identified by regulation, without any room for further discussion about what constitutes an essential service. It is, as a result, not even clear that the scheme necessarily contemplates that the designation of certain services as essential will be the subject of negotiation under an agreement.

[88] Moreover, s. 7(2) of the *PSESA* states that under an essential services agreement, the number

> Chacun de ces instruments a été interprété comme garantissant le droit de grève, et l'organe chargé de son contrôle d'application a insisté sur le fait que le droit de grève ne peut être limité ou supprimé que dans le cas :
>
> a) des salariés de la fonction publique qui exercent un pouvoir au nom de l'État,
>
> b) de services essentiels au sens strict (c'est-à-dire dont l'interruption pourrait mettre en péril soit la vie d'une partie ou de la totalité de la population, soit sa sécurité ou sa santé personnelles, ou
>
> c) d'une urgence nationale extrême, mais seulement pendant une période limitée.

(Paragraphe 127, citant l'extrait de l'affidavit de Patrick Macklem daté du 21 décembre 2010.)

Voir également Lynk, par. 19-20; Verge et Roux, p. 461-462. Pour ce qui concerne les services essentiels en général, l'OIT reconnaît que [TRADUCTION] « les salariés de certaines catégories ne devraient pas être privés du droit de grève puisque l'interruption de leur travail ne compromet pas dans les faits la vie, la sécurité ou la santé des citoyens » (Servais, p. 154).

[87] Or, suivant la *PSESA*, la détermination des salariés auxquels le droit de vote est retiré parce qu'ils assurent des services essentiels relève du pouvoir discrétionnaire unilatéral de l'employeur. Le régime dispose que l'employeur public et le syndicat tentent d'abord de négocier un accord sur les services essentiels. Aux termes du par. 6(2), l'employeur doit [TRADUCTION] « informer le syndicat » des services qu'il juge essentiels au sens de la *PSESA*. Lorsque l'employeur est le gouvernement de la Saskatchewan, les services essentiels sont visés par règlement, ce qui exclut tout débat sur ce qui constitue ou non un service essentiel. Par conséquent, il n'est même pas certain que, suivant le régime, la désignation de certains services jugés essentiels fera nécessairement l'objet de la négociation d'un accord.

[88] Qui plus est, le par. 7(2) de la *PSESA* prévoit que, dans un accord sur les services essentiels,

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of employees within each classification "is to be determined without regard to the availability of other persons to provide essential services". As the trial judge found:

> The apparent purpose of s. 7(2) is to enable managers and non-union administrators to avoid the inconvenience and pressure that would ordinarily be brought to bear by a work stoppage. Yet if qualified personnel are available to deliver requisite services, it should not matter if they are managers or administrators. If anything s. 7(2) works at cross purposes to ensuring the uninterrupted delivery of essential services during a work stoppage. [para. 192]

[89] And in the event that an agreement cannot be reached, s. 9(2) gives a public employer the unilateral authority to dictate whether and how essential services will be maintained, including the authority to determine the classifications of employees who must continue to work during the work stoppage, the number and names of employees within each classification, and, for public employers other than the Government of Saskatchewan, the essential services that are to be maintained. As the trial judge found, "[o]f the unilateral designations made by public employers under s. 9(2) only one, that of the number of employees required to work, is subject to review by the [Saskatchewan Labour Relations Board]." There is no jurisdiction for the Board to even *consider* significant dimensions of an employer's unilateral designation with regard to the maintenance of essential services, such as whether any particular service is essential, or which job classifications involve the delivery of genuinely essential services.

[90] There is no evidence to support Saskatchewan's position that the objective of ensuring the continued delivery of essential services requires unilateral rather than collaborative decision-making authority. And its view that public employers can be relied upon to make fair decisions has the potential

le nombre de salariés de chacune des catégories [TRADUCTION] « est établi sans égard à la disponibilité d'autres personnes pour fournir les services essentiels ». Le juge de première instance tire la conclusion suivante :

> [TRADUCTION] L'objet manifeste du par. 7(2) est de faire en sorte que les gestionnaires et les administrateurs non syndiqués n'aient pas à subir les inconvénients et les pressions auxquels ils seraient normalement exposés lors d'un arrêt de travail. Or, si des membres compétents du personnel sont disponibles pour fournir les services requis, il importe peu qu'il s'agisse de gestionnaires ou d'administrateurs. En fait, le par. 7(2) va à l'encontre de la prestation ininterrompue de services essentiels lors d'un arrêt de travail. [par. 192]

[89] Lorsque les parties ne peuvent parvenir à un accord, le par. 9(2) de la *PSESA* confère à l'employeur public le pouvoir unilatéral de décider que des services essentiels seront assurés ainsi que celui de déterminer la manière dont ils le seront, y compris les catégories de salariés qui continueront d'exercer leurs fonctions pendant l'arrêt de travail, le nombre et le nom des salariés de chacune des catégories et, dans le cas d'un employeur public autre que le gouvernement de la Saskatchewan, les services essentiels qui seront assurés. Le juge de première instance fait observer que, [TRADUCTION] « [p]armi les désignations unilatérales de l'employeur public fondées sur le par. 9(2), une seule — le nombre de salariés qui demeureront au travail — peut être révisée par la [Saskatchewan Labour Relations Board ou la Commission]. » Nulle compétence n'est conférée à celle-ci pour qu'elle *examine* des aspects importants de la désignation unilatérale de l'employeur intervenue pour assurer des services essentiels, comme la question de savoir si un service en particulier est essentiel ou non ou si, selon la classification des fonctions, il y a prestation de services vraiment essentiels.

[90] La preuve n'étaye pas la thèse de la Saskatchewan selon laquelle l'objectif d'assurer la prestation continue de services essentiels requiert l'octroi d'un pouvoir décisionnel exercé de manière unilatérale et non concertée. De plus, la foi qu'elle met dans l'aptitude de l'employeur public à prendre

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to sacrifice the right to a meaningful process of collective bargaining on the altar of aspirations. The history of barriers to collective bargaining over the past century represents a compelling reality check to such optimism.

[91] And even where an employee has been prohibited from participating in strike activity, the *PSESA* does not tailor his or her responsibilities to the performance of essential services alone. Section 18(1)(a) of the *PSESA* requires that in the event of a work stoppage, all essential services employees must continue "the duties of [their] employment with the public employer in accordance with the terms and conditions of the last collective bargaining agreement" and must not fail to continue those duties "without lawful excuse" (s. 18(2)). Requiring those affected employees to perform both essential *and* non-essential work during a strike action undercuts their ability to participate meaningfully in and influence the process of pursuing collective workplace goals.

[92] All this is in addition to the absence of an impartial and effective dispute resolution process to challenge public employer designations under s. 9(2) of the legislation, a particular concern in light of the significant definitional latitude given to public employers. As noted, the ILO's Committee on Freedom of Association defined essential services as those needed to prevent a "clear and imminent threat to the life, personal safety or health of the whole or part of the population" (*Freedom of Association*, at para. 581). The definition of "essential services" under the *PSESA* requires basic judgments to be made about when life, health, safety, or environmental concerns, among others, justify essential services designation. These are fundamental questions, yet all are permitted to be answered unilaterally by the employer under the *Act* with no access to an effective dispute resolution mechanism for reviewing disputed employer designations.

[93] Nor is there any access to a meaningful alternative mechanism for resolving bargaining

de justes décisions risque de sacrifier sur l'autel des aspirations le droit à un processus véritable de négociation collective. Les obstacles auxquels s'est heurtée la négociation collective au cours du siècle dernier ne justifient pas un tel optimisme.

[91] Même lorsqu'il est interdit à un salarié de prendre part à une grève, les dispositions de la *PSESA* ne limitent pas ses fonctions à la seule prestation des services essentiels. L'alinéa 18(1)a) dispose que, en cas d'arrêt de travail, tous les salariés qui assurent des services essentiels continuent d'accomplir [TRADUCTION] « [leurs] fonctions conformément aux conditions établies dans la convention collective la plus récente » et qu'ils ne peuvent s'en abstenir « sans une excuse légitime » (par. 18(2)). Exiger de ces salariés la prestation de services *tant* essentiels *que* non essentiels durant une grève les empêche de participer véritablement à la poursuite d'objectifs liés au travail et de contribuer à définir les modalités de ce processus.

[92] Tous ces éléments s'ajoutent à l'inexistence d'un processus de règlement des différends à la fois impartial et efficace qui permette de contester les désignations de l'employeur public fondées sur le par. 9(2) de la loi, une inexistence particulièrement préoccupante au vu de la grande latitude accordée à l'employeur public pour définir les services essentiels. Rappelons que le Comité de la liberté syndicale de l'OIT tient pour essentiels les services qui préviennent une « menace évidente et imminente pour la vie, la sécurité et la santé dans tout ou partie de la population » (*La liberté syndicale*, par. 581). Définir les « services essentiels » pour l'application de la *PSESA* exige de faire preuve de jugement dans la détermination des situations où, par exemple, la vie, la santé, la sécurité ou le souci environnemental justifie la désignation de services essentiels. Or, la *PSESA* permet à l'employeur de soupeser seul ces considérations fondamentales, les salariés ne disposant d'aucun mécanisme efficace de règlement des différends qui permette la révision de désignations contestées de l'employeur.

[93] La *PSESA* ne prévoit pas non plus d'autre moyen véritable (tel l'arbitrage) de mettre fin à

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impasses, such as arbitration. Paul Weiler persuasively explained why such an alternative is crucial for essential services employees:

> If we pull all the teeth of a union by requiring provision of imperative public safety services, such that any remaining strike option does not afford the union significant bargaining leverage, then I believe the union should have access to arbitration at its option. [Emphasis deleted; p. 237.]

[94] Not surprisingly, Dickson C.J. was alive to the profound bargaining imbalance the union inherits when the removal of the right to strike is not accompanied by a meaningful mechanism for resolving collective bargaining disputes:

> Clearly, if the freedom to strike were denied and no effective and fair means for resolving bargaining disputes were put in its place, employees would be denied any input at all in ensuring fair and decent working conditions, and labour relations law would be skewed entirely to the advantage of the employer. It is for this reason that legislative prohibition of freedom to strike must be accompanied by a mechanism for dispute resolution by a third party. I agree with the Alberta International Fire Fighters Association at p. 22 of its factum that "It is generally accepted that employers and employees should be on an equal footing in terms of their positions in strike situations or at compulsory arbitration where the right to strike is withdrawn". *The purpose of such a mechanism is to ensure that the loss in bargaining power through legislative prohibition of strikes is balanced by access to a system which is capable of resolving in a fair, effective and expeditious manner disputes which arise between employees and employers*. [Emphasis added.]

(*Alberta Reference*, at p. 380)

[95] The trial judge compared the *PSESA* with other Canadian essential services labour relations schemes and was struck by how uniquely restrictive the *PSESA* was:

> . . . no other essential services legislation in Canada comes close to prohibiting the right to strike as broadly,

l'impasse des négociations. Paul Weiler explique de manière convaincante en quoi l'existence d'un tel moyen est indispensable aux salariés qui assurent des services essentiels :

> [TRADUCTION] Lorsque l'obligation d'assurer des services jugés essentiels à la sécurité publique enlève tout son mordant à l'action syndicale de telle sorte que les mesures de grève autorisées privent le syndicat de tout rapport de force important, ce dernier devrait pouvoir recourir à son gré à l'arbitrage. [Italique omis; p. 237.]

[94] Le juge en chef Dickson n'est évidemment pas insensible au profond déséquilibre qui survient à la table de négociation lorsqu'un syndicat se voit retirer le droit de grève sans pouvoir recourir à un mécanisme véritable de règlement des différends liés à la négociation collective :

> Manifestement, si le droit de grève devait être refusé et s'il n'était remplacé par aucun moyen efficace et juste de résoudre les conflits de travail, les employés se verraient refuser tout apport susceptible d'assurer des conditions de travail équitables et décentes et le droit des relations de travail s'en trouverait faussé entièrement à l'avantage de l'employeur. C'est pour cette raison que l'interdiction législative de la grève doit s'accompagner d'un mécanisme de règlement des différends par un tiers. Je suis d'accord avec ce que dit l'Alberta International Fire Fighters Association à la p. 22 de son mémoire, savoir que [TRADUCTION] « Il est généralement reconnu qu'employeurs et employés doivent être sur un pied d'égalité en situation de grève ou d'arbitrage obligatoire lorsque le droit de grève est retiré ». *Le but d'un tel mécanisme est d'assurer que la perte du pouvoir de négociation par suite de l'interdiction législative des grèves est compensée par l'accès à un système qui permet de résoudre équitablement, efficacement et promptement les différends mettant aux prises employés et employeurs*. [Italiques ajoutés.]

(*Renvoi relatif à l'Alberta*, p. 380)

[95] Le juge de première instance compare la *PSESA* à d'autres régimes de relations de travail au Canada qui prévoient des services essentiels, et il se dit frappé de constater à quel point les dispositions de la *PSESA* sont les plus restrictives :

> [TRADUCTION] . . . au Canada, aucune autre loi sur les services essentiels n'interdit le droit de grève aussi largement

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and as significantly, as the [*PSESA*]. No other essential services legislation is as devoid of access to independent, effective dispute resolution processes to address employer designations of essential service workers and, where those designations have the effect of prohibiting meaningful strike action, an independent, efficient, overall dispute mechanism. . . .

. . .

Canadian legislation prohibiting strikes by firefighters and police officers, where the level of essentiality is very high, invariably provides compensatory access to arbitration to resolve collective bargaining disputes. The same is true for legislation prohibiting strikes by hospital workers. Although that legislation contains a variety of approaches for determining when and how access should be provided, the point is that it is invariably provided.

There is a pragmatic reason why "no strike" legislation almost always provides for access to independent, effective dispute resolution processes: mechanisms of that kind can operate as a safety valve against an explosive buildup of unresolved labour relations tensions.

[96] Given the breadth of essential services that the employer is entitled to designate unilaterally without an independent review process, and the absence of an adequate, impartial and effective alternative mechanism for resolving collective bargaining impasses, there can be little doubt that the trial judge was right to conclude that the scheme was not minimally impairing. Quite simply, it impairs the s. 2(*d*) rights of designated employees much more widely and deeply than is necessary to achieve its objective of ensuring the continued delivery of essential services.

[97] *The Public Service Essential Services Act* is therefore unconstitutional.

[98] The Unions had alternatively argued that the *PSESA* interferes with freedom of expression under s. 2(*b*) of the *Charter* by limiting the ability

et de manière aussi importante que la [*PSESA*], et de loin. Aucune autre loi en la matière ne limite autant l'accès à un mécanisme indépendant et efficace de règlement des différends qui permette la révision de la désignation par l'employeur des travailleurs qui assurent des services essentiels et, lorsque cette désignation revient à empêcher l'exercice véritable du droit de grève, ne limite autant l'accès à un mécanisme indépendant et efficace de règlement des différends en général. . .

. . .

Les lois canadiennes qui suppriment le droit de grève des pompiers et des policiers — dont le caractère essentiel des fonctions est indéniable — prévoient toujours, en contrepartie, l'accès à l'arbitrage pour le règlement des conflits de travail. Il en est de même des lois qui interdisent la grève aux travailleurs des services hospitaliers. Bien que ces lois recourent à différentes méthodes pour déterminer à quelles conditions et de quelle manière un tel accès doit être accordé, il demeure qu'elles en prévoient toujours un.

Une raison d'ordre pratique explique pourquoi les lois qui interdisent la grève prévoient presque toujours l'accès à un mécanisme indépendant et efficace de règlement des différends. En effet, un tel mécanisme sert de soupape de sûreté et empêche l'accumulation dangereuse de tensions non résolues dans les relations de travail.

[96] Vu l'ampleur des services essentiels que l'employeur peut désigner unilatéralement à l'exclusion de tout contrôle indépendant et l'absence d'un autre moyen à la fois adéquat, indépendant et efficace de mettre fin à l'impasse de la négociation collective, le juge de première instance a certes raison de conclure que le régime ne porte pas atteinte le moins possible aux droits constitutionnels en cause. En somme, elle porte atteinte aux droits que l'al. 2*d*) garantit aux salariés désignés de manière bien plus étendue et marquée qu'il n'est nécessaire pour atteindre son objectif d'assurer la prestation ininterrompue de services essentiels.

[97] La *Public Service Essential Services Act* est donc inconstitutionnelle.

[98] Les syndicats font valoir subsidiairement que la *PSESA* entrave la liberté d'expression garantie à l'al. 2*b*) de la *Charte* en ce qu'elle limite la

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of essential services employees to conduct and participate in strike activity. In light of the conclusion that the limits on strike activity in the *PSESA* violate the s. 2(*d*) rights of public sector employees, it is unnecessary to realign the arguments under s. 2(*b*).

[99] As for *The Trade Union Amendment Act, 2008*, this Court has long recognized that the freedom of association protects the "right to join associations that are of [employees'] choosing and independent of management, to advance their interests": *Mounted Police*, at para. 112; see *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, at para. 30. In *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367, this Court stated that "s. 2(*d*) protects the freedom to establish, belong to and maintain an association" (p. 402), and in *Health Services* it was reaffirmed that s. 2(*d*) guarantees employees "the right to unite" (para. 89).

[100] But I agree with the trial judge, whose conclusion was upheld by the Court of Appeal, that in introducing amendments to the process by which unions may obtain (or lose) the status of a bargaining representative, *The Trade Union Amendment Act, 2008* does not substantially interfere with the freedom to freely create or join associations. This conclusion is reinforced by the trial judge's findings that when compared to other Canadian labour relations statutory schemes, these requirements are not an excessively difficult threshold such that the workers' right to associate is substantially interfered with.

[101] I also agree with the trial judge that permitting an employer to communicate "facts and its opinions to its employees" does not strike an unacceptable balance so long as the communication is done in a way

that does not infringe upon the ability of the employees to engage their collective bargaining rights in accordance with their freely expressed wishes.

faculté des salariés qui assurent des services essentiels de prendre part à une grève. Puisque je conclus que la limitation du recours à la grève porte atteinte aux droits des salariés du secteur public garantis à l'al. 2*d*), point n'est besoin d'examiner leur thèse au regard de l'al. 2*b*).

[99] S'agissant de la *Trade Union Amendment Act, 2008*, notre Cour reconnaît depuis longtemps que la liberté d'association protège « le droit [des salariés] d'adhérer à l'association de leur choix et, indépendamment de la direction, de faire valoir leurs intérêts » (*Police montée*, par. 112; voir *Dunmore c. Ontario (Procureur général)*, [2001] 3 R.C.S. 1016, par. 30). Dans l'arrêt *Institut professionnel de la Fonction publique du Canada c. Territoires du Nord-Ouest (Commissaire)*, [1990] 2 R.C.S. 367, la Cour affirme que « l'al. 2*d*) protège la liberté de constituer une association, de la maintenir et d'y appartenir » (p. 402) et, dans l'arrêt *Health Services*, elle rappelle que l'al. 2*d*) garantit aux salariés « le droit de s'unir » (par. 89).

[100] Je conviens toutefois avec le juge de première instance — et avec la Cour d'appel, qui confirme sa conclusion — qu'en introduisant des modifications au processus par lequel un syndicat obtient (ou perd) la qualité d'agent négociateur, la *Trade Union Amendment Act, 2008* n'entrave pas de manière substantielle la liberté des travailleurs de former des associations et d'y adhérer. Qui plus est, le juge de première instance constate, après confrontation des exigences de cette loi et de celles d'autres régimes législatifs sur les relations de travail au Canada, que leur respect n'est pas difficile au point d'entraver substantiellement la liberté d'association des travailleurs.

[101] Je conviens également avec lui que permettre à l'employeur de communiquer [TRADUCTION] « des faits et des opinions à ses salariés » ne rend pas inacceptable l'équilibre obtenu, à condition que la communication soit faite

[TRADUCTION] sans porter atteinte à la faculté des salariés d'exercer leurs droits de négociation collective conformément à leur volonté librement exprimée.

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[102] Accordingly, I would uphold the conclusion that *The Trade Union Amendment Act, 2008* does not violate s. 2(*d*) of the *Charter*.

[103] In light of the conclusion that the *PSESA* is unconstitutional, I would therefore allow the Unions' appeal with costs throughout and suspend the declaration of invalidity for one year. I would dismiss the appeal in respect of *The Trade Union Amendment Act, 2008* but, in the circumstances, without costs.

The reasons of Rothstein and Wagner JJ. were delivered by

ROTHSTEIN AND WAGNER JJ. (dissenting in part) —

I. Introduction

[104] This case requires the Court to consider whether the right to strike is constitutionally protected under s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*. The appellant unions challenge Saskatchewan's *The Public Service Essential Services Act*, S.S. 2008, c. P-42.2 ("*PSESA*"), which restricts the ability of public sector workers who provide essential services to strike. The majority finds that these workers do have a constitutional right to strike. We disagree.

[105] McLachlin C.J. and LeBel J., writing for a unanimous Court in *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156, cautioned that

> [j]udging the appropriate balance between employers and unions is a delicate and essentially political matter. Where the balance is struck may vary with the labour climates from region to region. This is the sort of question better dealt with by legislatures than courts. Labour relations is a complex and changing field, and courts should be reluctant to put forward simplistic dictums. [para. 85]

[102] Je suis donc d'avis de confirmer la conclusion selon laquelle la *Trade Union Amendment Act, 2008* ne contrevient pas aux droits garantis à l'al. 2*d*) de la *Charte*.

[103] Vu ma conclusion selon laquelle la *PSESA* est inconstitutionnelle, je suis donc d'avis d'accueillir le pourvoi des syndicats avec dépens devant toutes les cours et de suspendre la déclaration d'invalidité pendant un an. Je suis aussi d'avis de rejeter le pourvoi relatif à la *Trade Union Amendment Act, 2008*, mais sans dépens, étant donné les circonstances.

Version française des motifs des juges Rothstein et Wagner rendus par

LES JUGES ROTHSTEIN ET WAGNER (dissidents en partie) —

I. Introduction

[104] Dans la présente affaire, la Cour doit examiner si le droit de grève est protégé par l'al. 2*d*) de la *Charte canadienne des droits et libertés*. Les syndicats appelants contestent *The Public Service Essential Services Act*, S.S. 2008, c. P-42.2 (la « *PSESA* »), une loi de la Saskatchewan limitant le droit de grève des travailleurs du secteur public qui assurent des services essentiels. Les juges majoritaires estiment que ces travailleurs ont un droit de grève garanti par la Constitution. Nous ne sommes pas de leur avis.

[105] Dans l'arrêt *S.D.G.M.R., section locale 558 c. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 CSC 8, [2002] 1 R.C.S. 156, la juge en chef McLachlin et le juge LeBel font la mise en garde suivante au nom des juges unanimes de la Cour :

> La détermination du juste équilibre entre employeurs et syndicats est une question délicate et essentiellement politique. Le point d'équilibre peut varier selon le climat des relations du travail d'une région à l'autre. Il s'agit du genre de question que le législateur est mieux en mesure de trancher que les tribunaux. Le domaine des relations du travail est complexe et changeant, et les tribunaux devraient hésiter à établir des règles simplistes. [par. 85]

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Thirteen years later, the majority in this case ignores this sage warning in reaching its conclusion. Our colleagues have taken it upon themselves to determine "the appropriate balance between employers and unions", despite the fact that this balance is not any less delicate or political today than it was in 2002. In our respectful view, the majority is wrong to intrude into the policy development role of elected legislators by constitutionalizing the right to strike.

[106] In the Labour Trilogy, this Court firmly rejected the proposition that the right to strike in Canada is constitutionally entrenched (*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (the "*Alberta Reference*"); *PSAC v. Canada*, [1987] 1 S.C.R. 424; *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460 (collectively, the "Labour Trilogy")). Then, in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, and *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, despite the evolution in the s. 2(*d*) jurisprudence, this Court rejected the idea that there is a constitutional right to a dispute resolution process. The majority (at para. 1) now casts off these and other precedents and injects a one-sided view of "workplace justice" into s. 2(*d*) of the *Charter*. The majority has so inflated the right to freedom of association that its scope is now wholly removed from the words of s. 2(*d*).

[107] The statutory right to strike, along with other statutory protections for workers, reflects a complex balance struck by legislatures between the interests of employers, employees, and the public. Providing for a constitutional right to strike not only upsets this delicate balance, but also restricts legislatures by denying them the flexibility needed to ensure the balance of interests can be maintained. We are compelled to dissent.

Aujourd'hui, 13 années plus tard, les juges majoritaires de la Cour font abstraction de ces sages propos pour arriver à leur conclusion. Ils se font forts de déterminer « [le] juste équilibre entre employeurs et syndicats » même si, de nos jours, cet équilibre ne constitue pas moins une question délicate et politique qu'en 2002. À notre humble avis, en constitutionnalisant le droit de grève, les juges majoritaires s'immiscent à tort dans l'élaboration de politiques par les élus.

[106] Dans la trilogie sur le droit du travail, notre Cour rejette fermement l'idée que le droit de grève jouit de la protection constitutionnelle au Canada (*Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313 (le « *Renvoi relatif à l'Alberta* »); *AFPC c. Canada*, [1987] 1 R.C.S. 424; *SDGMR c. Saskatchewan*, [1987] 1 R.C.S. 460 (les trois arrêts formant la « trilogie en droit du travail »)). Puis, dans les arrêts *Health Services and Support — Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, 2007 CSC 27, [2007] 2 R.C.S. 391, et *Ontario (Procureur général) c. Fraser*, 2011 CSC 20, [2011] 2 R.C.S. 3, la Cour nie l'existence d'un droit constitutionnel à un processus de règlement des différends malgré l'évolution de la jurisprudence relative à l'al. 2*d*). Les juges majoritaires (au par. 1) écartent aujourd'hui ces arrêts et d'autres pour attribuer à l'al. 2*d*) de la *Charte* un objectif de « justice au travail » à sens unique. Ils accroissent ainsi la portée du droit à la liberté d'association au point de la dissocier totalement du libellé de l'al. 2*d*).

[107] Le droit de grève d'origine législative, tout comme les autres protections que la loi accorde aux travailleurs, rend compte de l'équilibre complexe établi par les législateurs entre les intérêts respectifs des employeurs, des employés et du public. Protéger constitutionnellement le droit de grève a pour effet non seulement de bouleverser cet équilibre délicat, mais aussi de limiter le pouvoir des législateurs en les privant de la souplesse nécessaire au maintien de cet équilibre. Force nous est donc d'exprimer notre dissidence.

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II. Analysis

A. *There Is No Right to Strike Under Section 2(d) of the Charter*

[108] The majority purports to recognize a violation of s. 2(*d*) of the *Charter* only where a "prohibition on designated employees participating in strike action for the purpose of negotiating the terms and conditions of their employment amounts to a substantial interference with [the] right to a meaningful process of collective bargaining" (para. 2). It attempts to minimize the impact of its decision by stating that the right to strike is only protected where it interferes with the right to meaningful collective bargaining, a right which has already been recognized in *Health Services*, *Fraser*, and *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3. But our colleagues' reasons, in their entirety, reveal the true ambit of this decision: they have created a standalone constitutional right to strike.

[109] The majority's reasons include numerous references to the right to strike as being "essential" to, "crucial", and an "indispensable" component of meaningful collective bargaining. The majority describes the right to strike as "vital to protecting the meaningful process of collective bargaining within s. 2(*d*)" (para. 24). If the right to strike is a necessary element of meaningful collective bargaining, it will not only apply on a case-by-case basis; logically, any limitation on the right to strike will infringe s. 2(*d*) of the *Charter*. With respect, to accept this decision as simply an espousal of the right to meaningful collective bargaining disregards the substance of the majority's reasons.

(1) The Historical Right to Strike That the Majority Invokes Does Not Justify Constitutionalizing the Modern, Statutory Right to Strike

[110] The majority attempts to ground its newfound constitutional right to strike in the long history of strikes. There is no dispute that, at common law,

II. Analyse

A. *L'alinéa 2d) de la Charte ne garantit pas le droit de grève*

[108] Les juges majoritaires prétendent ne vouloir reconnaître l'atteinte à un droit garanti par l'al. 2*d*) de la *Charte* que lorsque « l'interdiction faite aux salariés désignés de prendre part à une grève aux fins de la négociation de leurs conditions de travail entrave substantiellement leur droit à un processus véritable de négociation collective » (par. 2). Ils minimisent l'incidence de leur décision en affirmant qu'il n'y a protection que dans la mesure où l'inexistence du droit de grève entrave le droit à une négociation collective véritable, lequel a déjà été reconnu par notre Cour dans les arrêts *Health Services*, *Fraser* et *Association de la police montée de l'Ontario c. Canada (Procureur général)*, 2015 CSC 1, [2015] 1 R.C.S. 3. Or, il appert de leurs motifs considérés globalement que nos collègues entendent en fait créer un droit constitutionnel autonome de recours à la grève.

[109] Les juges majoritaires disent maintes fois du droit de grève qu'il constitue une composante « essentielle », « cruciale » et « nécessaire » d'une négociation collective véritable. Ils ajoutent qu'il est « indispensable à la protection du processus véritable de négociation collective pour l'application de l'al. 2*d*) » (par. 24). S'il s'agit d'une composante nécessaire à la négociation collective véritable, il ne s'appliquera pas seulement au cas par cas. Logiquement, toute limitation du droit de grève contreviendra à l'al. 2*d*) de la *Charte*. Sauf le respect dû à nos collègues, voir dans leurs motifs la simple reconnaissance du droit à la négociation collective véritable, c'est faire abstraction de la teneur de leur opinion.

(1) Le droit de grève historique qu'invoquent les juges majoritaires ne justifie pas la constitutionnalisation du droit de grève moderne d'origine législative

[110] Les juges majoritaires tentent de justifier leur décision de reconnaître aujourd'hui la constitutionnalité du droit de grève en s'appuyant sur

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employees are permitted to refuse to work (see G. W. Adams, *Canadian Labour Law* (2nd ed. (loose-leaf)), at ¶ 11.90; H. W. Arthurs, "Tort Liability for Strikes in Canada: Some Problems of Judicial Workmanship" (1960), 38 *Can. Bar Rev.* 346, at p. 349).

[111] But the majority conflates this common law right to withdraw labour with the modern, statutory right to strike, which imposes obligations on employers: "Historically, there was no legal 'right' to strike at common law, entailing a correlative obligation on an employer to refrain from retaliatory measures, but rather a common law 'freedom' to do so" (B. Oliphant, "Exiting the Freedom of Association Labyrinth: Resurrecting the Parallel Liberty Standard Under 2(d) & Saving the Freedom to Strike" (2012), 70:2 *U.T. Fac. L. Rev.* 36, at p. 41). Thus, at common law, employers are not obligated to refrain from terminating striking workers or from hiring replacement employees to perform their functions (see B. Langille, "What Is a Strike?" (2009-2010), 15 *C.L.E.L.J.* 355, at pp. 368-69).

[112] This historical common law right to strike is a fundamental component of our legal system insofar as it reflects the idea that employees have no obligation to continue to work under conditions they consider to be unsatisfactory: no legislature can force an individual or a group into servitude. The majority correctly remarks that "[t]he ability to strike thereby allows workers, through collective action, to refuse to work under imposed terms and conditions" (para. 54). The majority, however, is not constitutionalizing this fundamental historical right. Rather, it constitutionalizes a *duty* on employers not to terminate employees who have withdrawn their labour, nor to hire replacement workers.

[113] In the words of Justice Richards of the Saskatchewan Court of Appeal (as he then was) the majority invokes "the *contemporary* right to strike, a right significantly bound up with, integrated into, and defined by a specific statutory regime" (2013

la longue histoire du recours à ce moyen de pression. Nul ne conteste que la common law permet au salarié de refuser de travailler (voir G. W. Adams, *Canadian Labour Law* (2e éd. (feuilles mobiles)), ¶ 11.90; H. W. Arthurs, « Tort Liability for Strikes in Canada : Some Problems of Judicial Workmanship » (1960), 38 *R. du B. can.* 346, p. 349).

[111] Or, les juges majoritaires confondent ce droit que reconnaît la common law de cesser le travail et le droit de grève moderne d'origine législative, lequel impose des obligations à l'employeur : [TRADUCTION] « Traditionnellement, la common law ne prévoit pas un "droit" de grève qui s'accompagne de l'obligation corrélative de l'employeur de ne pas user de représailles contre le salarié, mais elle reconnaît une "liberté" de grève » (B. Oliphant, « Exiting the Freedom of Association Labyrinth : Resurrecting the Parallel Liberty Standard Under 2(d) & Saving the Freedom to Strike » (2012), 70:2 *R.D.U.T.* 36, p. 41). Ainsi, la common law n'empêche pas l'employeur de congédier les travailleurs en grève ou d'embaucher des briseurs de grève pour exercer leurs fonctions (voir B. Langille, « What Is a Strike? » (2009-2010), 15 *C.L.E.L.J.* 355, p. 368-369).

[112] Le droit de grève historique issu de la common law est une composante fondamentale de notre système de droit en ce qu'il rend l'idée que le salarié n'est pas tenu de continuer le travail dans des conditions qu'il juge insatisfaisantes, nul législateur ne pouvant réduire une personne ou un groupe de personnes à la servitude. Les juges majoritaires font observer à juste titre que « le recours possible à la grève fait en sorte que les travailleurs peuvent, par leur action concertée, refuser de travailler aux conditions imposées par l'employeur » (par. 54). Cependant, ils ne constitutionnalisent pas ce droit historique fondamental, mais bien l'*obligation* qui empêche l'employeur de congédier les salariés qui cessent le travail et d'embaucher des briseurs de grève.

[113] Pour reprendre les mots du juge Richards de la Cour d'appel de la Saskatchewan, maintenant Juge en chef, les juges majoritaires invoquent [TRADUCTION] « le droit de grève *contemporain*, un droit qui est étroitement lié à un régime législatif,

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SKCA 43, 414 Sask. R. 70, at para. 61 (emphasis in original)). This statutory regime is not found in s. 2(*d*) of the *Charter* or anywhere else in Canadian constitutional law.

(2) Courts Must Demonstrate Deference in the Field of Labour Relations

[114] While *Charter* rights must be interpreted generously, this Court has cautioned that it is nevertheless "important not to overshoot the actual purpose of the right or freedom in question": *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344. (See also *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157, at para. 19, per Abella J.) Our colleagues assert that affording deference to legislative choices erodes the role of judicial scrutiny (para. 76). In so doing, they overlook that within the Canadian constitutional order each institution plays a unique role. The exercise of judicial restraint is essential in ensuring that courts do not upset the balance by usurping the responsibilities of the legislative and executive branches.

[115] This Court has long recognized that it is the role of legislators and not judges to balance competing tensions in making policy decisions. As this Court recognized in *Vriend v. Alberta*, [1998] 1 S.C.R. 493:

> In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts. [Emphasis added; para. 136.]

qui y est intégré et qui y est défini » (2013 SKCA 43, 414 Sask. R. 70, par. 61(en italique dans l'original)). Ce régime législatif n'est prévu ni à l'al. 2*d*) de la *Charte*, ni par ailleurs en droit constitutionnel canadien.

(2) Les tribunaux doivent faire preuve de déférence dans le domaine des relations de travail

[114] La *Charte* et les droits qu'elle garantit doivent certes être interprétés généreusement, mais notre Cour a rappelé qu'il « importe de ne pas aller au delà de l'objet véritable du droit ou de la liberté en question » (*R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, p. 344; voir aussi *Divito c. Canada (Sécurité publique et Protection civile)*, 2013 CSC 47, [2013] 3 R.C.S. 157, par. 19, la juge Abella). Nos collègues soutiennent que déférer au choix du législateur compromet la fonction du contrôle judiciaire (par. 76). Ils oublient que, dans l'ordre constitutionnel canadien, chacun des organes du gouvernement exerce un pouvoir qui lui est propre. La déférence judiciaire s'impose afin que les tribunaux ne rompent pas l'équilibre en usurpant les pouvoirs des organes législatif et exécutif.

[115] Notre Cour reconnaît depuis longtemps que, lorsqu'il s'agit de prendre des décisions de politique générale, il appartient au législateur et non aux tribunaux de mettre en balance les intérêts qui s'opposent. Comme l'affirme la Cour dans l'arrêt *Vriend c. Alberta*, [1998] 1 R.C.S. 493 :

> Les tribunaux n'ont pas, pour accomplir leurs fonctions, à se substituer après coup aux législatures ou aux gouvernements; ils ne doivent pas passer de jugement de valeur sur ce qu'ils considèrent comme les politiques à adopter; cette tâche appartient aux autres organes de gouvernement. Il incombe plutôt aux tribunaux de faire respecter la Constitution, et c'est la Constitution elle-même qui leur confère expressément ce rôle. Toutefois, il est tout aussi important, pour les tribunaux, de respecter eux-mêmes les fonctions du pouvoir législatif et de l'exécutif que de veiller au respect, par ces pouvoirs, de leur rôle respectif et de celui des tribunaux. [Nous soulignons; par. 136.]

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[116] This is particularly true in the area of socio-economic policy. The legislative branch requires flexibility in this area to deal with changing circumstances and social values. Canadian labour relations is a complex web of intersecting interests, rights, and obligations, and has far-reaching implications for Canadian society. Our colleagues clearly believe that providing an affirmative right to strike, with protection for the striking workers' positions, is a worthy policy choice. But it is not the role of this Court to transform all policy choices that the majority deems worthy into constitutional imperatives. The majority here sets aside the legislature's choice regarding the right to strike and, in so doing, it imposes constitutional burdens on third party employers and limits their rights. It restricts the ability of governments to balance the competing interests of employers, employees, and the public. Relying on a constitutional freedom to impose restrictions on third parties in the absence of clear constitutional wording to that effect threatens to undermine Canada's constitutional order.

[116] Cela se révèle spécialement exact en matière de politique socio-économique. Le pouvoir législatif a besoin d'une marge de manœuvre pour adapter la loi à l'évolution du contexte et des valeurs sociales. Un entrelacement complexe d'intérêts, de droits et d'obligations interreliés caractérise les relations de travail au Canada, et celles-ci ont de grandes répercussions sur la société canadienne. Nos collègues croient manifestement à l'opportunité du choix de politique générale de reconnaître le droit de grève comme tel et de protéger les emplois des travailleurs qui l'exercent. Or, il n'appartient pas à la Cour de transformer en diktat constitutionnel tout choix de politique générale tenu pour valable par la majorité de ses juges. En l'occurrence, les juges majoritaires écartent le choix du législateur concernant l'exercice du droit de grève et, ce faisant, ils imposent des obligations constitutionnelles à des tiers employeurs et limitent les droits de ces derniers. La possibilité pour l'État d'établir un équilibre entre les intérêts opposés des salariés, des employeurs et des citoyens en est réduite. Invoquer une liberté constitutionnelle pour imposer une limite à un tiers malgré l'absence dans la Constitution d'un libellé clair en ce sens pourrait compromettre l'ordre constitutionnel canadien.

[117] The majority's justification for disturbing the government's policy choices fails to acknowledge the constitutional guarantees that already exist to protect employees. Reaching back to Dickson C.J.'s concerns in the Labour Trilogy (and even further to 19th century French novelists), the majority ignores significant evolution in the jurisprudence of s. 2(*d*) of the *Charter*. This Court has asserted on numerous occasions that s. 2(*d*) guarantees *meaningful* collective bargaining (see *Health Services*, *Fraser* and *Mounted Police*). Therefore, a right to collective bargaining without a right to strike cannot possibly be "meaningless", as the majority states (para. 24). This constitutional right had not been recognized when Dickson C.J. wrote his reasons in the Labour Trilogy, and certainly not in *fin de siècle* France. What the majority is constitutionalizing is a particular policy, which cuts directly against this Court's approach to s. 2(*d*) most recently stated in *Mounted Police*: ". . . th[e] right is one that guarantees

[117] Dans leur justification de la mise à l'écart du choix de politique générale du gouvernement, les juges majoritaires omettent de reconnaître les garanties constitutionnelles dont bénéficient déjà les salariés. Se reportant aux préoccupations du juge en chef Dickson dans les arrêts de la trilogie en droit du travail (et même à des auteurs français du 19e siècle), ils font abstraction de l'évolution marquée qu'a connue la jurisprudence relative à l'al. 2*d*) de la *Charte*. Notre Cour a affirmé nombre de fois que cette disposition garantit le droit à la négociation collective *véritable* (voir *Health Services*, *Fraser* et *Police montée*). Dès lors, sans le droit de grève, le droit à la négociation collective ne peut aucunement « perd[re] tout son sens » comme le prétendent les juges majoritaires (par. 24). Ce droit constitutionnel n'avait pas encore vu le jour lorsque le juge en chef Dickson a rédigé ses motifs dans la trilogie en droit du travail, et certainement pas dans la France fin de siècle. Les juges majoritaires constitutionnalisent

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a process rather than an outcome or access to a particular model of labour relations" (para. 67).

[118] Democratically elected legislatures are responsible for determining the appropriate balance between competing economic and social interests in the area of labour relations. Strike action is one of many constituent elements factored into this statutory balance of power. There is always a public interest in avoiding protracted labour disputes, and the public interest in labour relations is amplified where the government or private sector delivers essential services, and indeed in all cases where the government is the employer.

[119] The majority reasons, in describing the impact of public sector strikes in Saskatchewan prior to the enactment of the *PSESA*, illustrate the potentially devastating results of strikes in the area of essential services on the health and safety of individuals (para. 6). Because the government bears the responsibility to protect the public interest, and is responsible to the electorate for doing so, it is reasonable that a legislative regime limit such detrimental strikes. The importance of such legislation is underscored by the government's constitutional commitments. The federal and provincial governments have committed to "providing essential public services of reasonable quality to all Canadians" (s. 36(1)(*c*) of the *Constitution Act, 1982*). In constitutionalizing a right to strike, the majority restricts governments' flexibility and impedes their ability to balance the interests of workers with the broader public interest.

[120] Over time governments have adapted and modified labour relations schemes to fit changing circumstances. The majority's decision to constitutionalize a particular conception of a strike imposes obligations on others and ignores the public interest. In so doing, it interferes with the proper role and responsibility of governments. Governments, not courts, are charged with adapting legislation to

un choix politique, ce qui va carrément à l'encontre de ce qu'affirme la Cour au sujet de l'al. 2*d*) dans le récent arrêt *Police montée* : « Ce droit garantit [. . .] un processus plutôt qu'un résultat ou que l'accès à un modèle particulier de relations de travail » (par. 67).

[118] C'est au législateur démocratiquement élu qu'il revient d'établir le juste équilibre entre les intérêts économiques et sociaux qui s'opposent dans le monde du travail. La grève est l'un des nombreux éléments pris en compte dans cet équilibre des forces établi par le législateur. Il est toujours dans l'intérêt public d'échapper à de longs conflits de travail, et l'intérêt public lié aux relations de travail s'accroît lorsque l'État ou le secteur privé assurent des services essentiels, voire chaque fois que l'État est l'employeur.

[119] Les répercussions des grèves dans le secteur public en Saskatchewan avant l'adoption de la *PSESA* — dont font état les juges majoritaires — montrent les effets potentiellement dévastateurs d'une grève qui touche des services essentiels dans les domaines de la santé et de la sécurité des citoyens (par. 6). Vu l'obligation de l'État de défendre l'intérêt public et son engagement envers l'électorat à s'en acquitter, il est raisonnable qu'un régime législatif limite pareille grève préjudiciable. À l'importance d'un tel régime législatif s'ajoute l'engagement des gouvernements fédéral et provinciaux de « fournir à tous les Canadiens, à un niveau acceptable, les services publics essentiels » (al. 36(1)*c*) de la *Loi constitutionnelle de 1982*). Par la constitutionnalisation du droit de grève, nos collègues réduisent la marge de manœuvre des législateurs et leur faculté de mettre en balance l'intérêt des travailleurs et celui des citoyens en général.

[120] Au fil des ans, les gouvernements ont mis les régimes de relations de travail au diapason des réalités nouvelles. La décision des juges majoritaires de constitutionnaliser une conception particulière de la grève a pour conséquence l'imposition d'obligations à autrui et fait fi de l'intérêt public. Elle empiète ainsi sur la fonction et les attributions de l'État. Ce n'est pas à une cour de justice, mais bien

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changing circumstances in order to achieve a balance between the interests of employers, employees, and the public. Constitutionalizing selected aspects of the modern, statutory right to strike denies governments the flexibility they require to effectively adapt labour relations legislation.

[121] Statutory collective bargaining regimes in Canada are modelled on the American *National Labor Relations Act*, 49 Stat. 449 (1935), 29 U.S.C. §§ 151-169 (the "*Wagner Act*"). Governments adopted this model in response to an "unprecedented number of strikes, caused in large part by the refusal of employers to recognize unions and to bargain collectively" (*Health Services*, at para. 54). Wagner model legislation imposes limitations on workers' ability to strike in exchange for alternative processes that ensure greater stability and predictability. For example, the freedom to engage in recognition strikes was replaced with a democratic union certification process, and the ability to strike during the life of an employment contract was replaced with a process of binding arbitration through which the terms of the agreement could be enforced. Legislatures created, and have since refined, a balance between competing interests in the labour relations sphere by imposing constraints on all parties involved.

[122] Canadian labour relations are heavily regulated and nowhere is this more evident than in the ability of workers to strike. In most Canadian labour relations regimes, employees are only permitted to strike in very specific circumstances. For example, in the *Canada Labour Code*, R.S.C. 1985, c. L-2, strikes are generally only permitted where the term of a collective agreement has elapsed, the union has given notice to the employer, there has been a failure to negotiate or a failure to reach a collective agreement, the Minister of Labour has received a notice of dispute or taken certain prescribed actions, the prescribed time period has elapsed, and the union has held a vote by secret strike ballot where a majority of employees voting approve the strike (see ss. 88.1 and 89). The result of these conditions is

à l'État, qu'il incombe d'adapter les lois aux situations nouvelles afin d'établir un équilibre entre les intérêts respectifs des employeurs, des salariés et des citoyens. Accorder la protection constitutionnelle à certains volets du droit de grève moderne d'origine législative prive l'État de la souplesse nécessaire à l'adaptation de la législation du travail.

[121] Au Canada, les régimes de négociation collective prévus par la loi s'inspirent de la *National Labor Relations Act*, 49 Stat. 449 (1935), 29 U.S.C. §§ 151-169, des États-Unis (la « *Loi Wagner* »). Ce modèle a été adopté en réponse au « nombre sans précédent de grèves, causées en grande partie par le refus des employeurs de reconnaître les syndicats et de négocier collectivement avec eux » (*Health Services*, par. 54). Les dispositions inspirées de la *Loi Wagner* limitent la faculté des travailleurs de faire la grève, mais donnent accès à des procédures qui accroissent la stabilité et la prévisibilité. Par exemple, la liberté de recourir à la grève pour obtenir la reconnaissance d'un syndicat a été troquée contre un processus démocratique d'accréditation syndicale, et la possibilité de faire la grève pendant la durée d'un contrat de travail, contre un processus d'arbitrage obligatoire qui permet de faire respecter les dispositions de la convention collective. Les différents législateurs ont créé un équilibre, qu'ils ont rajusté depuis, entre les intérêts qui s'opposent dans le monde du travail par l'imposition de limites à chacune des parties en cause.

[122] Au Canada, les relations de travail sont étroitement réglementées, une réalité que met d'autant plus en évidence le droit des travailleurs de faire la grève. Dans la plupart des régimes applicables, les salariés ne peuvent faire la grève que s'ils satisfont à des conditions bien précises. À titre d'exemple, le *Code canadien du travail*, L.R.C. 1985, c. L-2 n'autorise généralement la grève que lorsque la convention collective est échue, que le syndicat a donné un avis à l'employeur, qu'il n'y a pas eu de négociation ou qu'aucune convention collective n'a été conclue, que le ministre du Travail a reçu un avis l'informant du différend ou qu'il a pris certaines mesures prévues au Code, que le délai prescrit a expiré ou que, à l'issue d'un vote de grève au scrutin secret tenu par le syndicat, la majorité des

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that actions such as recognition strikes or sympathy strikes are not permitted.

[123] Constitutionalizing a right to strike introduces great uncertainty into labour relations. In Canada, the ability of workers to strike and the limits placed on this ability are essential to the balance between employers, employees, and the public interest. The majority's reasons will make all statutory limits on the right to strike presumptively unconstitutional, a significant concern since all labour relations statutes contain extensive limits on the conditions under which workers may strike. Will governments be forced to defend all of these limits under s. 1 of the *Charter*, no matter how ingrained they may be in Canadian labour relations? What is the true scope of this new, constitutionalized right to strike? Despite our general understanding of *Charter* rights applying broadly to all Canadians, has the majority now created a fundamental freedom that can only be exercised by government employees and the 17 percent of the private sector workforce that is unionized?: R. J. Adams, *Labour Left Out: Canada's Failure to Protect and Promote Collective Bargaining as a Human Right* (2006), at p. 19. Are workers without collective agreements able to exercise this new right? The majority sidesteps these fundamental questions.

[124] These unanswered questions reveal why courts must be deferential. The unbridled right to strike that the majority endorses has far-reaching consequences that are difficult to predict and even more difficult to address once that right is constitutionalized. By constitutionalizing this broad conception of the right to strike, the majority binds the government's hands and limits its ability to respond to changing needs and circumstances in the dynamic field of labour relations.

salariés votants ont approuvé la grève (voir art. 88.1 et 89). Ces conditions font en sorte que certaines activités, telle la grève visant la reconnaissance d'un syndicat ou la grève de soutien, ne sont pas autorisées.

[123] Conférer la protection constitutionnelle au droit de grève est de nature à créer une grande incertitude dans le monde du travail. Au Canada, la faculté des travailleurs de faire la grève et les limitations dont elle est l'objet sont essentielles à l'équilibre entre les intérêts respectifs des employeurs, des salariés et des citoyens. La décision des juges majoritaires fera en sorte que soit tenue pour inconstitutionnelle toute limitation du droit de grève par le législateur, ce qui est fort préoccupant dans la mesure où toutes les lois du travail renferment des dispositions qui limitent considérablement l'exercice de ce droit. Les gouvernements devront-ils justifier toutes ces limitations au regard de l'article premier de la *Charte* sans égard à l'enracinement de celles-ci dans les relations de travail au Canada? Quelle sera la portée réelle de ce droit de grève qui jouira désormais de la protection constitutionnelle? Malgré notre interprétation commune voulant que les droits garantis par la *Charte* s'appliquent à tous les Canadiens dans leur ensemble, les juges majoritaires auront-ils créé une liberté fondamentale que seuls pourront exercer les salariés de l'État et 17 p. 100 des travailleurs syndiqués du secteur privé? (R. J. Adams, *Labour Left Out : Canada's Failure to Protect and Promote Collective Bargaining as a Human Right* (2006), p. 19). Les travailleurs qui ne sont pas parties à une convention collective pourront-ils exercer ce nouveau droit? Les juges majoritaires esquivent ces questions fondamentales.

[124] Ces questions laissées sans réponses sont de nature à justifier la déférence judiciaire. L'exercice du droit absolu de recourir à la grève que consacrent les juges majoritaires s'accompagnera d'effets importants difficiles à prévoir et auxquels il sera encore plus difficile de remédier une fois le droit constitutionnalisé. Par la consécration constitutionnelle du droit de grève, nos collègues ligotent l'État et l'empêchent de donner suite à l'évolution des besoins et de la réalité dans le monde bouillonnant des relations de travail.

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(3) The Court Must Not Constitutionalize Particular Political Positions in Labour Relations

[125] Under the rubric of "workplace justice", our colleagues, relying on a 19th century conception of the relationship between employers and workers, enshrine a political understanding of this concept that favours the interests of employees over those of employers and even over those of the public. While employees are granted constitutional rights, constitutional obligations are imposed on employers. Employers and the public are equally as entitled to justice as employees — true workplace justice looks at the interests of all implicated parties.

[126] As Binnie J. cautioned in *Plourde v. Wal-Mart Canada Corp.*, 2009 SCC 54, [2009] 3 S.C.R. 465, "[c]are must be taken . . . not to hand to one side (labour) a lopsided advantage because employees bargain through their union (and can thereby invoke freedom of association) whereas employers, for the most part, bargain individually" (para. 57). This echoes the Court's holding in *Pepsi-Cola* quoted above. Similarly, McIntyre J.'s warning in the *Alberta Reference* about the danger of excessively restricting the legislature's discretion in the field of labour law is as true today as it was in 1987:

> Labour law . . . is a fundamentally important as well as an extremely sensitive subject. It is based upon a political and economic compromise between organized labour — a very powerful socio-economic force — on the one hand, and the employers of labour — an equally powerful socio-economic force — on the other. The balance between the two forces is delicate and the public-at-large depends for its security and welfare upon the maintenance of that balance. . . . There is clearly no correct balance which may be struck giving permanent satisfaction to the two groups, as well as securing the public interest. The whole process is inherently dynamic and unstable. Care must be taken . . . in considering whether constitutional protection should be given to one aspect of this dynamic and evolving process while leaving the others subject to the social pressures of the day. [Emphasis added; p. 414.]

(3) La Cour ne doit pas constitutionnaliser un parti pris politique en matière de relations de travail

[125] Au nom de la « justice au travail » et en se fondant sur une conception des relations entre employeurs et salariés qui date du 19e siècle, nos collègues adhèrent à une interprétation politique de cet objectif qui favorise les intérêts des salariés au détriment de ceux des employeurs, voire du public. Si les salariés se voient conférer des droits constitutionnels, les employeurs, eux, se voient imposer des obligations constitutionnelles. Les employeurs et le public ont autant droit à la justice que les salariés — la véritable justice au travail se souciant des intérêts de tous les intéressés.

[126] Dans l'arrêt *Plourde c. Compagnie Wal-Mart du Canada*, 2009 CSC 54, [2009] 3 R.C.S. 465, le juge Binnie nous exhorte à « éviter [. . .] d'accorder à une partie (les salariés) un avantage disproportionné parce que les salariés négocient par l'entremise de leur syndicat (et peuvent en conséquence invoquer la liberté d'association) alors que les employeurs, dans la plupart des cas, négocient individuellement » (par. 57), des propos qui font écho à ceux tenus par la Cour dans l'arrêt *Pepsi-Cola*. Aussi, dans le *Renvoi relatif à l'Alberta*, le juge McIntyre met en garde contre le danger de trop restreindre le pouvoir discrétionnaire du législateur en matière de droit du travail, et ses propos valent autant aujourd'hui qu'en 1987 :

> Le droit du travail [. . .] constitue un sujet d'importance fondamentale, mais aussi extrêmement délicat. Il est fondé sur un compromis politique et économique entre d'une part, le syndicalisme, qui constitue une force socio-économique fort puissante, et d'autre part, le patronat, qui constitue une force socio-économique tout aussi puissante. L'équilibre entre ces deux forces est fragile et la sécurité et le bien-être de la population en général dépendent du maintien de cet équilibre. [. . .] Manifestement il n'existe pas de juste équilibre qui puisse satisfaire de façon permanente les deux groupes, tout en sauvegardant l'intérêt public. L'ensemble du processus est fondamentalement dynamique et instable. Il faut [. . .] faire preuve de prudence lorsqu'on se demande si une protection constitutionnelle devrait être accordée à l'un des aspects de ce processus dynamique et changeant, tout en abandonnant les autres sujets aux pressions sociales du jour. [Nous soulignons; p. 414.]

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The majority ignores these wise admonitions.

[127] In the private sector, strikes operate as an economic weapon, a stand-off as to whether employers can forgo or limit carrying on business for longer than employees can forgo wages. In the public sector, strikes are a political tool. The public expects that public services, and especially essential services, will be delivered. Thus unions attempt to pressure the government to agree to certain demands in order that these services be reinstated. Public sector labour disputes are also unique in that the government as employer must take into account that any additional expenditures incurred to meet employee demands will come from public funds. To hold that s. 2(*d*) of the *Charter* protects a particular economic or political weapon of employees, the right to strike together with employer obligations and demands on public resources, plainly tips the balance of power against employers and the public and fails to respect the important role played by democratically elected legislators in balancing the complex competing interests at stake in labour relations. Under a statutory scheme, the legislature is able to make adjustments in appropriate circumstances (e.g. back-to-work legislation or restrictions on strikes by essential service workers). When the right to strike is constitutionalized, elected legislators are faced with an unwarranted hurdle that interferes with their ability to achieve this balance.

(4) The Right to Strike Is Not an Indispensable Component of Collective Bargaining as Defined by This Court

[128] The majority finds that "the right to strike is an essential part of a meaningful collective bargaining process" and that "[t]he right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right" (para. 3).

Les juges majoritaires demeurent sourds à ces sages appels à la retenue.

[127] Dans le secteur privé, la grève constitue une arme économique et donne lieu à un affrontement dont l'issue tient à la durée pendant laquelle l'employeur peut renoncer en tout ou en partie à ses activités, et les salariés à leur rémunération. Dans le secteur public, la grève est un outil politique. La population s'attend à la prestation de services publics, en particulier ceux qui sont essentiels. Les syndicats tentent donc de faire pression sur l'État pour qu'il accède à certaines demandes en échange de la reprise du travail. Les conflits de travail du secteur public revêtent également un caractère unique en ce que l'État, en tant qu'employeur, doit tenir compte du fait que les sommes supplémentaires requises pour accéder aux demandes des salariés seront prélevées sur les fonds publics. Statuer que l'al. 2*d*) de la *Charte* protège le recours à une arme économique ou politique donnée, à savoir le droit de grève, de pair avec les obligations faites à l'employeur et la ponction sur les ressources publiques, fait manifestement pencher la balance contre l'employeur et contre le public, et ne respecte pas la fonction importante d'un législateur démocratiquement élu dans l'établissement d'un équilibre entre les intérêts complexes qui s'opposent en matière de relations de travail. Le législateur peut, par l'adoption d'un régime législatif, effectuer des réglages lorsque les circonstances l'exigent (p. ex., légiférer pour forcer le retour au travail ou pour restreindre le droit de grève par la désignation de travailleurs tenus d'assurer des services essentiels). Lorsque le droit de grève est protégé par la Constitution, le législateur élu se heurte à un obstacle indu qui l'empêche d'établir cet équilibre.

(4) Le droit de grève n'est pas une composante indispensable du droit à la négociation collective selon la définition retenue par la Cour

[128] Pour les juges majoritaires, « le droit de grève constitue un élément essentiel d'un processus véritable de négociation collective » et « [il] n'est pas seulement dérivé de la négociation collective, il en constitue une composante indispensable »

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Such statements expressly contradict the right to meaningful collective bargaining as it was so recently recognized and defined by this Court in *Health Services* and *Fraser*.

[129] In *Fraser*, the majority explains that s. 2(*d*) of the *Charter* protects a right to collective bargaining, that is, "a process that allows employees to make representations and have them considered in good faith by employers, who in turn must engage in a process of meaningful discussion" (para. 54). Nothing in the concept of collective bargaining, as this Court has defined the term, includes a constitutional right for employees to strike with a concomitant constitutional obligation on employers to not hire replacement workers or to take the employees back at the end of the strike.

[130] The majority in *Fraser* found a constitutionally protected dispute resolution process unnecessary. The Court interpreted the Ontario *Agricultural Employees Protection Act, 2002*, S.O. 2002, c. 16 ("*AEPA*"), as including a requirement that employers consider employee representations in good faith. The Court noted that "the Minister . . . stated that the *AEPA* was not intended to 'extend collective bargaining to agricultural workers'", but said that this statement

> may be understood as an affirmation that the *AEPA* did not institute the dominant Wagner model of collective bargaining, or bring agricultural workers within the ambit of the [*Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A], not that the Minister intended to deprive farm workers of the protections of collective bargaining that s. 2(*d*) grants. [para. 106]

Despite the fact that the *AEPA* contained no dispute resolution mechanism, only a bare requirement that employers consider employee representations in good faith, the Court concluded that the Act did not violate s. 2(*d*) of the *Charter* (para. 107).

(par. 3). De telles affirmations contredisent expressément le droit à la négociation collective véritable que la Cour a récemment reconnu et défini dans les arrêts *Health Services* et *Fraser*.

[129] Dans l'arrêt *Fraser*, les juges majoritaires expliquent que l'al. 2*d*) de la *Charte* protège le droit à la négociation collective, c'est-à-dire à « un processus qui permet aux employés de formuler des observations et d'obtenir leur examen de bonne foi par l'employeur, qui doit en outre participer à un dialogue véritable à leur sujet » (par. 54). Le droit à la négociation collective, au sens où l'entend la Cour, n'englobe pas un droit constitutionnel des salariés de faire la grève qui se double de l'interdiction constitutionnelle faite à l'employeur d'embaucher des briseurs de grève ou de son obligation constitutionnelle de reprendre les salariés après la grève.

[130] Dans le même arrêt, les juges formant la majorité concluent qu'il n'est pas nécessaire d'accorder la protection constitutionnelle au processus de règlement des différends. Selon l'interprétation de la Cour, la *Loi de 2002 sur la protection des employés agricoles* (Ontario), L.O. 2002, c. 16 (« *LPEA* »), oblige notamment l'employeur à examiner de bonne foi les observations de ses salariés. Les juges majoritaires relèvent que, pour « la ministre[,] [. . .] la *LPEA* ne vise pas [TRADUCTION] "l'application de la négociation collective aux travailleurs agricoles" », mais ils affirment que l'on peut

> en déduire que la *LPEA* n'instaure pas le modèle Wagner, prédominant en matière de négociation collective, ou qu'elle ne fait pas bénéficier les travailleurs agricoles du régime de la [*Loi de 1995 sur les relations de travail*, L.O. 1995, c. 1, ann. A]. Toutefois, ces commentaires ne signifient pas que la ministre voulait priver ces employés du droit de négociation collective garanti à l'al. 2*d*). [par. 106]

Même si la *LPEA* ne prévoyait aucun mécanisme de règlement des différends et obligeait seulement l'employeur à examiner de bonne foi les observations des salariés, la Cour conclut que la Loi ne porte pas atteinte au droit garanti à l'al. 2*d*) de la *Charte* (par. 107).

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[131] The majority's reasons overlook this Court's findings in *Fraser*. The trial judge in this case held, and the majority agrees, that without the right to strike "a constitutionalized right to bargain collectively is meaningless" (2012 SKQB 62, 390 Sask. R. 196, at para. 92; majority reasons, at para. 24). With respect, this is plainly incorrect — it is not the threat of work stoppage that motivates good faith bargaining. Before *Health Services*, there was a legal duty on employers to bargain in good faith under various labour relations statutes (see, e.g., the current duty in the *Canada Labour Code*, s. 50(*a*); Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, s. 17; Saskatchewan *Trade Union Act*, R.S.S. 1978, c. T-17, s. 2(b); British Columbia *Labour Relations Code*, R.S.B.C. 1996, c. 244, s. 11(1); Alberta *Labour Relations Code*, R.S.A. 2000, c. L-1, s. 60(1)(a); Manitoba *Labour Relations Act*, C.C.S.M., c. L10, s. 62; Quebec *Labour Code*, CQLR, c. C-27, s. 53; Newfoundland and Labrador *Labour Relations Act*, R.S.N.L. 1990, c. L-1, s. 71; New Brunswick *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, s. 1(1), definition of "collective bargaining"; Nova Scotia *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 35(a) (see *Canadian Union of Public Employees v. Labour Relations Board (Nova Scotia)*, [1983] 2 S.C.R. 311); Prince Edward Island *Labour Act*, R.S.P.E.I. 1988, c. L-1, s. 22(a) (see *Perfection Foods Limited v. Retail Wholesale Dairy Worker Union, Local 1515* (1986), 57 Nfld. & P.E.I.R. 147)). After *Health Services*, this duty was constitutionalized. It is the statutory duty, and is now this *constitutional duty*, not the possibility of job action, that compels employers to bargain in good faith. To say that this constitutional right is meaningless without a concomitant constitutionalized dispute resolution process would be to say that individuals can never vindicate their rights through the courts or other public institutions.

[131] Nos collègues font abstraction des conclusions de notre Cour dans l'arrêt *Fraser*. Dans la présente affaire, le juge de première instance affirme — et les juges majoritaires conviennent — que sans le droit de grève, [TRADUCTION] « le droit constitutionnel de négocier collectivement perd tout son sens » (2012 SKQB 62, 390 Sask. R. 196, par. 92; motifs des juges majoritaires, par. 24). Sauf leur respect, cette affirmation est simplement erronée, car ce n'est pas la menace d'un arrêt de travail qui incite les parties à négocier de bonne foi. Avant l'arrêt *Health Services*, différentes lois sur les relations de travail obligeaient l'employeur à négocier de bonne foi (voir p. ex. l'obligation que prévoient actuellement le *Code canadien du travail*, al. 50*a*), la *Loi de 1995 sur les relations de travail* (Ontario), L.O. 1995, c. 1, ann. A, art. 17; la *Trade Union Act* (Saskatchewan), R.S.S. 1978, c. T-17, al. 2(b); le *Labour Relations Code* (Colombie-Britannique), R.S.B.C. 1996, c. 244, par. 11(1); le *Labour Relations Code* (Alberta), R.S.A. 2000, c. L-1, al. 60(1)a); la *Loi sur les relations du travail* (Manitoba), C.P.L.M., c. L10, art. 62; le *Code du travail* (Québec), RLRQ, c. C-27, art. 53; la *Labour Relations Act* (Terre-Neuve-et-Labrador), R.S.N.L. 1990, c. L-1, art. 71; la *Loi sur les relations industrielles* (Nouveau-Brunswick), L.R.N.-B. 1973, c. I-4, par. 1(1) (définition du terme « négociations collectives »); la *Trade Union Act* (Nouvelle-Écosse), R.S.N.S. 1989, c. 475, al. 35(a) (voir *Syndicat canadien de la Fonction publique c. Conseil des relations du travail (Nouvelle-Écosse)*, [1983] 2 R.C.S. 311), et la *Labour Act* (Île-du-Prince-Édouard), R.S.P.E.I. 1988, c. L-1, al. 22(a) (voir *Perfection Foods Limited c. Retail Wholesale Dairy Worker Union, Local 1515* (1986), 57 Nfld. & P.E.I.R. 147)). Depuis l'arrêt *Health Services*, son obligation est constitutionnalisée. C'est l'obligation prévue par la loi — aujourd'hui devenue *obligation constitutionnelle* —, et non le recours possible à un moyen de pression, qui force l'employeur à négocier de bonne foi. Affirmer que, sans l'existence concomitante d'un processus constitutionnalisé de règlement des différends, le droit constitutionnel à la négociation collective perd tout son sens et revient à dire que les individus ne peuvent jamais faire valoir leurs droits devant les tribunaux ou d'autres décideurs publics.

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[132] The goal of strike action is not to guarantee a right that was statutory and is now constitutionally guaranteed. Instead, it is to apply economic or political pressure on employers to meet union demands. As the majority of the Court stated in *Fraser*:

> . . . legislatures are [not] constitutionally required, in all cases and for all industries, to enact laws that set up a uniform model of labour relations imposing a statutory duty to bargain in good faith, statutory recognition of the principles of exclusive majority representation and a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements . . . . What is protected is associational activity, not a particular process or result. [para. 47]

[133] When the right to strike was simply statutory, both employers and employees were able to exercise economic and political power through labour action. In certain circumstances, employees had the right to strike, while employers had the right to lock out. Even when meaningful collective bargaining was constitutionalized, good faith was required of both sides of the bargaining table. In *Health Services*, the majority of the Court noted that the employees' right to collective bargaining "requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation" (para. 90; see also *Fraser*, at para. 40). Now, by constitutionalizing only the ability of employees to exert economic and political pressure, the majority disturbs the delicate balance of labour relations in Canada and impedes the achievement of true workplace justice.

[134] The majority asserts that employees must have some "means of recourse should the employer not bargain in good faith" (para. 29). In the event that bargaining does not occur in good faith, workers *have* recourse: they can bring a claim under the relevant statutory provision or, in some cases, directly under s. 2(*d*) of the *Charter*, which is precisely what was done in *Health Services*.

[132] L'objectif de la grève n'est pas de protéger un droit qui était légal et qui est désormais constitutionnel. Il est plutôt d'exercer une pression économique ou politique afin que l'employeur accède aux demandes du syndicat. Voici ce que disent les juges majoritaires de la Cour dans *Fraser* :

> . . . la Constitution [n'exige pas] que les législateurs, dans tous les cas et pour tous les secteurs d'activité, adoptent des lois établissant un modèle uniforme de relations de travail. Selon la Cour d'appel, ce modèle imposerait l'obligation de négocier de bonne foi, reconnaîtrait les principes du monopole syndical et du vote majoritaire et prévoirait un mécanisme pour dénouer les impasses des négociations et résoudre les différends relatifs à l'interprétation ou à l'application d'une convention collective [. . .] Or, c'est l'activité associative qui est protégée, et non un processus ou un résultat particulier. [par. 47]

[133] Lorsque le droit de grève était seulement conféré par la loi, employeurs et salariés disposaient de moyens de pression pour exercer leurs pouvoirs économiques et politiques. Dans certaines circonstances, les salariés avaient un droit de grève, et l'employeur un droit de lock-out. Même après que la négociation collective véritable eut obtenu la protection constitutionnelle, chacune des deux parties était tenue de faire preuve de bonne foi à la table de négociation. Dans l'arrêt *Health Services*, les juges majoritaires de la Cour signalent que le droit des salariés de négocier collectivement « implique que l'employeur et les employés se rencontrent et négocient de bonne foi en vue de réaliser leur objectif commun d'accommodement par des moyens pacifiques et productifs » (par. 90; voir également *Fraser*, par. 40). Or, en constitutionnalisant la faculté des salariés d'exercer une pression économique ou politique, les juges majoritaires rompent l'équilibre délicat des relations de travail au Canada et font obstacle à une véritable justice au travail.

[134] Les juges majoritaires font valoir que les salariés doivent avoir accès à une « voie de recours advenant que l'employeur ne négocie pas de bonne foi » (par. 29). Lorsque l'employeur ne négocie pas de bonne foi, les travailleurs *ont* bel et bien un recours, car ils peuvent se pourvoir en application de la disposition législative pertinente ou, dans certains cas, sur le fondement de l'al. 2*d*) de la *Charte*, ce qui a été le cas dans l'affaire *Health Services*.

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[135] The majority's conclusion that the right to strike is "an indispensable component" of collective bargaining (at para. 3) does not accord with recent jurisprudence. There is nothing in the concept of collective bargaining as it has been defined by this Court in *Health Services*, *Fraser* and *Mounted Police* that would imply that employees have a constitutional right to strike and that employers have a constitutional obligation to preserve the jobs of those employees.

[136] Contrary to *Fraser*, the majority now says that "[t]he right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right" (para. 3). However, the majority also says that the right to strike is protected simply because "the right to strike is an essential part of a meaningful collective bargaining process" (para. 3). This must mean that the right is indeed derivative — a right to strike is protected only because it derives from the right to collective bargaining, a right which was itself derived from the protection of freedom of association (see *Fraser*, at paras. 46, 54, 66 and 99). As earlier noted, the result is to inflate the right to freedom of association to such an extent that its scope is now completely divorced from the words of s. 2(*d*) of the *Charter* themselves.

(5) This Court Should Not Depart From Its Precedents in This Case

[137] In our legal system, certainty in the law is achieved through the application of precedents. To overrule a precedent is to displace community expectations founded on that decision. As the Ontario Court of Appeal aptly observed in *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161, per Laskin J.A., "[t]he values underlying the principle of *stare decisis* are well known: consistency, certainty, predictability and sound judicial administration. . . . Adherence to precedent . . . enhances the legitimacy and acceptability of judge-made law, and by so doing enhances the appearance of justice" (paras. 119-20).

[135] La conclusion des juges majoritaires selon laquelle le droit de grève constitue « une composante indispensable » de la négociation collective (par. 3) est incompatible avec la jurisprudence récente. La notion de négociation collective définie par notre Cour dans les arrêts *Health Services*, *Fraser* et *Police montée* ne donne en rien à penser que les salariés jouissent du droit constitutionnel de faire la grève et que l'employeur a l'obligation constitutionnelle de protéger les emplois des grévistes.

[136] Contrairement à l'opinion exprimée dans l'arrêt *Fraser*, les juges majoritaires soutiennent aujourd'hui que « [l]e droit de grève n'est pas seulement dérivé de la négociation collective, [mais qu']il en constitue une composante indispensable » (par. 3). Ils ajoutent toutefois que le droit de grève jouit d'une protection seulement parce qu'il « constitue un élément essentiel d'un processus véritable de négociation collective » (par. 3). Il s'ensuit nécessairement que ce droit est effectivement dérivé — le droit de grève est protégé seulement parce qu'il est dérivé du droit à la négociation collective, lequel est lui-même dérivé de la protection accordée à la liberté d'association (voir *Fraser*, par. 46, 54, 66 et 99). Nous le répétons, la portée du droit à la liberté d'association s'en trouve dès lors exagérée au point où elle n'a plus rien à voir avec le libellé même de l'al. 2*d*) de la *Charte*.

(5) La Cour devrait s'abstenir en l'espèce de rompre avec ses décisions antérieures

[137] Dans notre système de justice, le respect des décisions antérieures assure la certitude du droit. Lorsqu'on écarte un précédent, on induit les citoyens en erreur sur le droit applicable. Dans l'arrêt *David Polowin Real Estate Ltd. c. Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161, la Cour d'appel de l'Ontario, par la voix du juge Laskin, fait judicieusement observer que [TRADUCTION] « [l]es valeurs qui fondent le principe du *stare decisis* sont bien connues : cohérence, certitude, prévisibilité et saine administration de la justice. [. . .] Suivre la jurisprudence [. . .] promeut la légitimité et la recevabilité du droit prétorien et, ce faisant, accroît l'apparence de justice » (par. 119-120).

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[138] For this reason, the threshold for overturning prior judgments is high (see *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 44; *Fraser*, at para. 57). In determining whether the threshold is met, courts must balance certainty against correctness (*Bedford*, at para. 47). As Binnie J. observed in *Plourde*, "[i]t would be unfortunate, absent compelling circumstances, if the precedential value of a . . . decision of this Court was thought to expire with the tenure of the particular panel of judges that decided it" (para. 13).

[139] In reaching its conclusion, the majority departs from significant precedents of this Court. Twenty-seven years ago, in the Labour Trilogy, this Court held that s. 2(*d*) does not protect the right to strike. The majority overrules this finding (para. 77). But the Labour Trilogy's precedents are not the only ones reversed by the majority. In finding that s. 2(*d*) of the *Charter* now protects the right to a dispute resolution mechanism (strike action), our colleagues also depart from this Court's finding in *Fraser*, made less than four years ago, that freedom of association "does not require the parties to conclude an agreement or accept any particular terms and does not guarantee a legislated dispute resolution mechanism in the case of an impasse" (para. 41).

[140] Further, in its heavy-handed treatment of Saskatchewan's legislative policy choices in the field of labour relations, the majority defies this Court's cautions in *Pepsi-Cola* that legislatures, not the courts, should deal with the delicate and political balance of interests in labour relations (para. 85).

[141] In *Bedford*, this Court explained that a lower court may deviate from binding appellate jurisprudence where there is a new legal issue or a significant change in the circumstances or evidence:

[138] C'est pourquoi les conditions auxquelles on peut rompre avec un jugement antérieur sont strictes (voir *Canada (Procureur général) c. Bedford*, 2013 CSC 72, [2013] 3 R.C.S. 1101, par. 44; *Fraser*, par. 57). Pour savoir s'il est satisfait à ces conditions, le tribunal doit mettre en balance la certitude et la justesse (*Bedford*, par. 47). Le juge Binnie fait d'ailleurs observer dans l'arrêt *Plourde* qu'« [i]l serait regrettable, en l'absence de circonstances impérieuses, qu'une décision [. . .] de la Cour perde sa valeur de précédent avec le départ de l'un ou de plusieurs des juges qui y ont participé » (par. 13).

[139] Pour arriver à leur conclusion, les juges majoritaires rompent avec d'importantes décisions de la Cour. Il y a 27 ans, dans la trilogie en droit du travail, notre Cour a jugé que l'al. 2*d*) ne protégeait pas le droit de grève. Les juges majoritaires infirment aujourd'hui cette conclusion (par. 77). Les arrêts de la trilogie ne sont pas les seuls qu'ils écartent. En statuant que l'al. 2*d*) de la *Charte* protège désormais le droit à un mécanisme de règlement des différends (la grève), nos collègues se dissocient également de la conclusion tirée par la Cour dans l'arrêt *Fraser* il y a moins de quatre ans, à savoir que la liberté d'association « n'oblige pas les parties à conclure une convention ou à accepter des clauses particulières ni ne garantit un mécanisme légal de règlement des différends permettant de dénouer les impasses » (par. 41).

[140] En outre, lorsqu'ils critiquent sévèrement les choix de politique législative de la Saskatchewan dans le domaine des relations de travail, les juges majoritaires font abstraction de la mise en garde de la Cour dans l'arrêt *Pepsi-Cola*, à savoir qu'établir le délicat équilibre politique entre les intérêts qui s'opposent en matière de relations de travail devrait relever du législateur, non des tribunaux (par. 85).

[141] Dans l'arrêt *Bedford*, la Cour explique qu'un tribunal inférieur peut s'éloigner des décisions des juridictions d'appel lorsqu'il s'agit de trancher une question de droit nouvelle ou qu'une modification importante de la situation ou de la preuve est survenue :

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. . . a trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate. [para. 42]

In this case, neither developments in the s. 2(*d*) jurisprudence, nor any change in the circumstances of Canadian labour relations justifies the trial judge's departure from Supreme Court precedent.

[142] The majority concludes that the high threshold for overruling the Labour Trilogy's finding on the right to strike has been met on the basis that the "historical, international, and jurisprudential landscape" indicate that "s. 2(*d*) has arrived at the destination sought by Dickson C.J. [in dissent] in the *Alberta Reference*" (para. 75). With respect, the sources relied on by the majority to demonstrate this change in circumstances do not provide a basis to overturn the many relevant precedents of this Court.

[143] Many of the sources identified by the majority existed at the time this Court rendered its decisions in the Labour Trilogy. For instance, the history of strike activity in Canada and abroad canvassed by the majority at paras. 36 to 55 was information available to this Court when it considered the Labour Trilogy appeals. It cannot now form the basis for an entirely different result than that reached by this Court in 1987. The criterion that, in order for a precedent to be overruled, there must be "a change in the circumstances or evidence that fundamentally shifts the parameters of the debate" (*Bedford*, at para. 42) is manifestly unsatisfied.

[144] While there has been an evolution in the s. 2(*d*) jurisprudence sufficient to be termed a "significant developmen[t] in the law" (*Bedford*, at para. 42), that evolution does not support departing from the Labour Trilogy's conclusion that there is

À mon avis, le juge du procès peut se pencher puis se prononcer sur une prétention d'ordre constitutionnel qui n'a pas été invoquée dans l'affaire antérieure; il s'agit alors d'une nouvelle question de droit. De même, le sujet peut être réexaminé lorsque de nouvelles questions de droit sont soulevées par suite d'une évolution importante du droit ou qu'une modification de la situation ou de la preuve change radicalement la donne. [par. 42]

En l'espèce, ni l'évolution de la jurisprudence relative à l'al. 2*d*), ni un quelconque changement dans les relations de travail au Canada ne justifient la décision du juge de première instance de s'écarter de la jurisprudence de notre Cour.

[142] Les juges majoritaires concluent qu'il est satisfait aux conditions strictes auxquelles on peut rompre avec la conclusion sur le droit de grève tirée dans trilogie en droit du travail au motif que « [c]e tour d'horizon historique, international et jurisprudentiel » indique que « l'interprétation de l'al. 2*d*) est aujourd'hui celle que préconisait le juge en chef Dickson [dissident] dans le *Renvoi relatif à l'Alberta* » (par. 75). Sauf leur respect, les sources qu'ils invoquent à l'appui de l'existence d'une telle modification de la situation ne permettent pas de revenir sur les nombreux arrêts de notre Cour en la matière.

[143] Bon nombre des sources invoquées par les juges majoritaires existaient lorsque la Cour a rendu les arrêts formant la trilogie en droit du travail. Par exemple, l'histoire de la grève au Canada et à l'étranger que les juges majoritaires relatent aux par. 36 à 55 faisait partie du dossier de la Cour lorsqu'elle a entendu les appels de la trilogie. Ces données historiques ne sauraient aujourd'hui étayer un résultat complètement différent de celui auquel est parvenue la Cour en 1987. La condition voulant qu'un précédent ne puisse être écarté que si « une modification de la situation ou de la preuve change radicalement la donne » (*Bedford*, par. 42) n'est manifestement pas respectée.

[144] La jurisprudence relative à l'al. 2*d*) a certes suffisamment évolué pour que l'on puisse y voir une « évolution importante du droit » (*Bedford*, par. 42), mais cette mutation ne permet pas d'écarter la conclusion tirée dans les arrêts de la trilogie en

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no constitutional right to strike. If anything, developments in the law since 1987 support a finding that the right to freedom of association *does not* require constitutionalization of the right to strike. This is because recent s. 2(*d*) jurisprudence has already established a right to collective bargaining that protects the ability of workers in associations "to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith" and mandates "both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation" (*Health Services*, at para. 90).

[145] Subsequent to the *Alberta Reference*, this Court made it clear that the right to collective bargaining under s. 2(*d*) of the *Charter* does not include a statutory dispute resolution process. Most recently, in *Fraser*, the majority affirmed:

> It follows that *Health Services* does not support the view of the Ontario Court of Appeal in this case that legislatures are constitutionally required, in all cases and for all industries, to enact laws that set up a uniform model of labour relations imposing a statutory duty to bargain in good faith, statutory recognition of the principles of exclusive majority representation and a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements . . . . [para. 47]

[146] The majority in this appeal states that the supposed absence of any dispute resolution mechanism in the *PSESA* "is what ultimately renders its limitations [on the right to strike] constitutionally impermissible" (para. 25).

[147] However, a finding that there is a constitutional right to strike (or to an alternative statutory dispute resolution process), is an express contradiction of this Court's ruling in *Fraser* that s. 2(*d*) of the *Charter* does not require a statutory

droit du travail, à savoir qu'il n'existe pas de droit de grève protégé par la Constitution. Au contraire, l'évolution du droit depuis 1987 permet de conclure que le droit à la liberté d'association *ne* commande *pas* la constitutionnalisation du droit de grève. Cela tient au fait que la jurisprudence récente relative à l'al. 2*d*) reconnaît déjà un droit à la négociation collective qui protège la faculté des travailleurs syndiqués « d'exercer une véritable influence sur les conditions de travail par l'entremise d'un processus de négociation collective menée de bonne foi » et qui exige que « l'employeur et les employés se rencontrent et négocient de bonne foi en vue de réaliser leur objectif commun d'accommodement par des moyens pacifiques et productifs » (*Health Services*, par. 90).

[145] Au cours des années qui ont suivi le *Renvoi relatif à l'Alberta*, la Cour a bien précisé que le droit à la négociation collective garanti par l'al. 2*d*) de la *Charte* n'englobe aucun processus de règlement des différends prévu par la loi. Plus récemment, dans l'arrêt *Fraser*, les juges majoritaires se sont exprimés comme suit :

> Dès lors, l'arrêt *Health Services* n'étaye pas l'opinion de la Cour d'appel de l'Ontario en l'espèce, selon laquelle la Constitution exige que les législateurs, dans tous les cas et pour tous les secteurs d'activité, adoptent des lois établissant un modèle uniforme de relations du travail. Selon la Cour d'appel, ce modèle imposerait l'obligation de négocier de bonne foi, reconnaîtrait les principes du monopole syndical et du vote majoritaire et prévoirait un mécanisme pour dénouer les impasses des négociations et résoudre les différends relatifs à l'interprétation ou à l'application d'une convention collective . . . [par. 47]

[146] Dans le présent pourvoi, les juges majoritaires affirment que l'absence prétendue d'un mécanisme de règlement des différends dans la *PSESA* « représente ce qui, en fin de compte, rend les restrictions apportées [au droit de grève] inadmissibles sur le plan constitutionnel » (par. 25).

[147] Or, conclure à l'existence du droit à la grève (ou, sinon, à un processus de règlement des différends prévu par la loi) contredit expressément l'arrêt *Fraser* dans lequel la Cour statue que l'al. 2*d*) de la *Charte* ne requiert pas l'établissement par la loi

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dispute resolution process (para. 41). While s. 2(*d*) jurisprudence has evolved since 1987, such changes cannot be used to justify contradicting the decisions that brought about these very same changes.

[148] Even more puzzling, the majority claims that the Court affirmed in *Fraser* that a meaningful process under s. 2(*d*) of the *Charter* must include some "means of recourse should the employer not bargain in good faith" (para. 29). They do so despite explicit language to the contrary in that case (see *Fraser*, at para. 41). In misinterpreting the content of *Fraser*, our colleagues overrule that decision without acknowledging that they are doing so.

[149] The more "generous approach" to s. 2(*d*) of the *Charter*, referred to by the majority at para. 33, does not license this Court to indeterminately expand the scope of freedom of association. In imposing constitutional limitations on the legislature in this case, the majority disregards *stare decisis* and the certainty and predictability it is intended to foster.

(6) International Law Is Not Determinative of the Content of Section 2(*d*) of the *Charter*

[150] Contrary to the majority's approach, international law provides no guidance to this Court in determining whether the right to strike is encompassed within s. 2(*d*) of the *Charter* for at least one key reason: the current state of international law on the right to strike is unclear.

[151] Caution must be exercised where the current state of international law is subject to conflicting interpretations. As explained below, international bodies disagree as to whether the right to strike is protected under international labour and human rights instruments. Where this Court opts to rely on non-binding interpretations of international conventions, it should not cherry pick interpretations to support its conclusions.

d'un processus de règlement des différends (par. 41). L'évolution de la jurisprudence relative à l'al. 2*d*) depuis 1987 ne permet pas de contredire les décisions mêmes qui jalonnent cette évolution.

[148] Plus déroutante encore est l'opinion de nos collègues selon laquelle, dans *Fraser*, notre Cour réaffirme que, pour l'application de l'al. 2*d*) de la *Charte*, un processus véritable doit englober quelque « voie de recours advenant que l'employeur ne négocie pas de bonne foi » (par. 29). Ils s'expriment en ce sens malgré la teneur explicitement contraire de cet arrêt (voir *Fraser*, par. 41). Du fait de leur interprétation erronée, ils écartent cette décision sans le reconnaître.

[149] L'interprétation « généreuse » de l'al. 2*d*) de la *Charte* à laquelle renvoient les juges majoritaires au par. 33 de leurs motifs n'autorise pas la Cour à repousser indéfiniment les limites de la liberté d'association. En soumettant en l'espèce le législateur à des contraintes constitutionnelles, les juges majoritaires méconnaissent le principe du *stare decisis*, ainsi que la certitude et la prévisibilité que ce principe est censé promouvoir.

(6) Le droit international n'est pas décisif en ce qui concerne la teneur de l'al. 2*d*) de la *Charte*

[150] Contrairement à ce que soutiennent les juges majoritaires, le droit international n'offre pas de repères qui permettent à la Cour de décider si le droit de grève bénéficie ou non de la protection de l'al. 2*d*) de la *Charte*. Il y a au moins une raison majeure à cela : l'état actuel du droit international sur le recours à la grève est incertain.

[151] Il faut user de prudence lorsque l'état actuel du droit international se prête à des interprétations contradictoires. Comme nous l'expliquons plus loin, les organismes internationaux ne s'entendent pas sur la question de savoir si les instruments internationaux sur le droit du travail et les droits de la personne protègent ou non le droit de grève. Si la Cour décide de s'appuyer sur des interprétations non contraignantes de conventions internationales, elle ne doit pas retenir que les interprétations qui étayent ses conclusions.

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[152] For instance, the majority invokes the International Labour Organization ("ILO") *Convention (No. 87) concerning freedom of association and protection of the right to organize*, 68 U.N.T.S. 17 ("*Convention No. 87*"), as confirming the protection of the right to strike in international law (see para. 67), despite the fact that this right is not found in the text of the convention, nor is it found in the ILO Constitution (online) or the Declaration of Philadelphia (which concerns the aims and purposes of the ILO; see the Annex to the ILO Constitution). Article 3(1) of *Convention No. 87* protects the rights of workers' and employers' organizations to "formulate their programmes", but there is debate as to whether this includes the right to strike.

[153] ILO bodies themselves disagree on the interpretation of ILO *Convention No. 87*. The Committee on Freedom of Association ("CFA") and the Committee of Experts on the Application of Conventions and Recommendations ("COE") have endorsed a right to strike in ILO *Convention No. 87* (*Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th rev. ed. 2006), at para. 520; L. Swepston, "Human rights law and freedom of association: Development through ILO supervision" (1998), 137 *Int'l Lab. Rev.* 169, at p. 187; S. Regenbogen, "The International Labour Organization and Freedom of Association: Does Freedom of Association Include the Right to Strike?" (2012), 16 *C.L.E.L.J.* 385, at p. 404). However, these bodies do not perform judicial functions and do not enforce obligations under ILO conventions — the CFA is an investigative body and the COE, the first stage of the ILO supervisory process, simply provides observations (B. A. Langille, "Can We Rely on the ILO?" (2006-2007), 13 *C.L.E.L.J.* 273, at pp. 285 and 287; N. Valticos and G. von Potobsky, *International Labour Law* (2nd rev. ed. 1995), at paras. 661-62). The Conference Committee on the Application of Standards is the second stage of the ILO supervisory process. This tripartite committee consisting of government, employer, and worker representatives has not reached a consensus on whether freedom of association includes the right to strike (Regenbogen, at pp. 398-400 and 404; Valticos and

[152] À titre d'exemple, les juges majoritaires soutiennent que la *Convention (nº 87) concernant la liberté syndicale et la protection du droit syndical* de l'Organisation internationale du Travail (« OIT »), 68 R.T.N.U. 17 (« *Convention (nº 87)* »), confirme la protection du droit de grève à l'échelle internationale (par. 67), alors que ce droit ne figure ni dans le texte de la convention, ni dans la Constitution de l'OIT (en ligne), ni dans la Déclaration de Philadelphie (qui porte sur les buts et objectifs de l'OIT) (voir l'annexe de la Constitution de l'OIT). Le paragraphe 1 de l'article 3 de la *Convention (nº 87)* protège le droit des organisations de travailleurs et d'employeurs de « formuler leur programme d'action », mais la question de savoir si ce droit comprend celui de faire la grève est l'objet de débats.

[153] Les organismes de l'OIT eux-mêmes ne s'entendent pas sur l'interprétation de la *Convention (nº 87)* de l'OIT. Le Comité de la liberté syndicale et la Commission d'experts pour l'application des conventions et recommandations reconnaissent l'existence d'un droit de grève dans la *Convention (nº 87)* (*La liberté syndicale : Recueil de décisions et de principes du Comité de la liberté syndicale du Conseil d'administration du BIT* (5e éd. rév. 2006), par. 520; L. Swepston, « Droits de l'homme et liberté syndicale : évolution sous le contrôle de l'OIT » (1998), 137 *Rev. int. trav.* 187, p. 206; S. Regenbogen, « The International Labour Organization and Freedom of Association : Does Freedom of Association Include the Right to Strike? » (2012), 16 *C.L.E.L.J.* 385, p. 404). Or, ces organismes n'exercent pas de fonctions judiciaires et ne veillent pas au respect des obligations prévues dans les conventions de l'OIT — le Comité de la liberté syndicale est un organisme d'enquête et la Commission d'experts pour l'application des conventions et recommandations, qui se situe au premier palier de la procédure de contrôle de l'OIT, s'en tient à la formulation d'observations (B. A. Langille, « Can We Rely on the ILO? » (2006-2007), 13 *C.L.E.L.J.* 273, p. 285 et 287; N. Valticos et G. von Potobsky, *International Labour Law* (2e éd. rév. 1995), par. 661-662). La Commission de l'application des normes de la Conférence constitue le second palier de la procédure de contrôle. Cette commission tripartite composée de représentants de l'État, du patronat et des

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von Potobsky, at paras. 663-64; International Labour Conference, 102nd Sess., *Conference Committee on the Application of Standards: Extracts from the Record of Proceedings* (2013)).

[154] The *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 ("*ICCPR*"), does not include an explicit right to strike. While freedom of association is protected under art. 22(1), the U.N. Human Rights Committee, which receives and considers complaints regarding conformity to obligations under the *ICCPR*, found that art. 22 *does not* protect the right to strike (*J.B. v. Canada*, Communication No. 118/1982 (1986), reported in U.N. Doc. CCPR/C/OP/2, *Selected Decisions of the Human Rights Committee under the Optional Protocol*, vol. 2 (1990), p. 34, at para. 6.4). Article 22(3) does explicitly refer to ILO *Convention No. 87*, but given the lack of agreement as to whether this Convention protects the right to strike, the reference alone cannot create this right.

[155] The *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 ("*ICESCR*"), in art. 8(1)(*d*), protects a qualified right to strike. Specifically, the right is subject to explicit restrictions as it applies to public sector workers. Article 8(2) states: "This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State." Even if we accept that there is a general right to strike in international law, which is far from certain, the express restriction on this right in art. 8(2) demonstrates that the measures at issue are not precluded.

[156] There is thus no clear consensus under international law that the right to strike is an essential element of freedom of association.

travailleurs n'est pas parvenue à un consensus sur l'inclusion du droit de grève dans la liberté d'association (Regenbogen, p. 398-399 et 404; Valticos et von Potobsky, par. 663-664; Conférence internationale du Travail, 102e sess., *Commission de l'application des normes de la conférence : Extraits du compte rendu des travaux* (2013)).

[154] Le *Pacte international relatif aux droits civils et politiques*, 999 R.T.N.U. 171 (« *PIDCP* »), ne prévoit pas expressément le droit de grève. Bien que le paragraphe 1 de l'article 22 protège la liberté d'association, le Comité des droits de l'homme des Nations Unies, qui reçoit et examine les plaintes concernant le respect des obligations prévues par le *PIDCP*, a estimé que l'article 22 *ne* protège *pas* le droit de grève (*J.B. c. Canada*, Communication no 118/1982 (1986), publié dans Doc. N.U. CCPR/C/OP/2, *Sélection de décisions du Comité des droits de l'homme prises en vertu du Protocole facultatif*, vol. 2 (1991), p. 36, par. 6.4). Le paragraphe 3 de l'article 22 renvoie expressément à la *Convention (no 87)* de l'OIT, mais faute d'accord quant à savoir si elle protège ou non le droit de grève, ce seul renvoi ne peut être la source de ce droit.

[155] Le *Pacte international relatif aux droits économiques, sociaux et culturels*, 993 R.T.N.U. 3 (« *PIDESC* »), à l'alinéa *d*) du paragraphe 1 de son article 8, protège jusqu'à un certain point le droit de grève dans la mesure où il prévoit expressément l'application possible de restrictions dans le cas des travailleurs du secteur public. Le paragraphe 2 de l'article 8 dispose en effet que « [l]e présent article n'empêche pas de soumettre à des restrictions légales l'exercice de ces droits par les membres des forces armées, de la police ou de la fonction publique. » À supposer même qu'un droit de grève général soit reconnu à l'échelle internationale, ce qui est loin d'être avéré, la limitation éventuelle de ce droit conformément au paragraphe 2 de l'article 8 montre que les mesures contestées ne sont pas exclues.

[156] Du droit international ne se dégage donc aucun consensus net selon lequel le droit de grève constitue un élément essentiel de la liberté d'association.

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[157] Further, this Court has indicated that obligations under international law that are *binding* on Canada are of primary relevance to this Court's interpretation of the *Charter*. In *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, LeBel J. notes that "[i]n interpreting the scope of application of the *Charter*, the courts should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of supporting such a construction" (para. 56 (emphasis added)). Similarly, in *Divito*, Abella J., quoting McLachlin C.J. and LeBel J. in *Health Services*, at para. 70, states that "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified" (para. 23 (emphasis added)). While other sources of international law can have some persuasive value in appropriate circumstances, they should be granted much less weight than sources under which Canada is bound (see, e.g., P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at pp. 36-39 to 36-43; P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at pp. 395-400).

[158] The majority notes that the right to strike is contained in a number of foreign constitutions, as well as in the *European Convention on Human Rights*, 213 U.N.T.S. 221 (1950), and the *European Social Charter* (E.T.S. No. 35, 1961, revised E.T.S. No. 163, 1996) (paras. 71 and 74). However, the express inclusion of the right to strike in domestic constitutions and charters other than our own has little relevance to this Court's interpretation of "freedom of association" under s. 2(*d*). If anything, the absence of an express right to strike in the *Charter* — which was enacted subsequent to many of the constitutions cited by the majority — indicates Parliament and the provincial legislatures' intention to exclude such a right (see *Alberta Reference*, at pp. 414-16).

[159] There is good reason to accord little weight to international instruments to which Canada is not a party. It is the role of the government to accept international obligations on behalf of Canada, not

[157] Par ailleurs, selon la Cour, les obligations qui *lient* le Canada en droit international importent au premier chef dans son interprétation de la *Charte*. Dans l'arrêt *R. c. Hape*, 2007 CSC 26, [2007] 2 R.C.S. 292, le juge LeBel souligne que « [l]orsque le libellé exprès de la *Charte* le permet, la détermination de la portée de celle-ci doit tendre à assurer le respect des obligations du Canada en droit international » (par. 56 (nous soulignons)). De même, dans l'arrêt *Divito*, la juge Abella affirme en reprenant les motifs de la juge en chef McLachlin et du juge LeBel dans *Health Services* (par. 70) qu'« il faut présumer que la *Charte* accorde une protection au moins aussi grande que les instruments internationaux ratifiés par le Canada en matière de droits de la personne » (par. 23 (nous soulignons)). S'il est vrai que d'autres sources de droit international peuvent avoir force persuasive dans les cas qui s'y prêtent, il convient de leur reconnaître une valeur moins grande que celle des sources qui lient le Canada (voir p. ex. P. W. Hogg, *Constitutional Law of Canada* (5e éd. suppl.), p. 36-39 à 36-43; P.-A. Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4e éd. 2009), p. 427-433).

[158] Les juges majoritaires signalent que le droit de grève est inscrit dans la constitution de nombreux pays étrangers, ainsi que dans la *Convention européenne des droits de l'homme*, 213 R.T.N.U. 221 (1950), et dans la *Charte sociale européenne* (S.T.E. no 35, 1961, révisée S.T.E. no 163, 1996) (par. 71 et 74). Cependant, l'inclusion expresse du droit de grève dans d'autres constitutions et chartes que les nôtres ne saurait influencer la Cour dans son interprétation de la « liberté d'association » prévue à l'al. 2*d*). Le fait que le droit de grève ne soit pas expressément prévu dans la *Charte* — dont l'adoption est postérieure à celle de bon nombre des constitutions citées par les juges majoritaires — est plutôt de nature à indiquer que les législateurs fédéral et provinciaux ont voulu écarter ce droit (voir *Renvoi relatif à l'Alberta*, p. 414-416).

[159] Il existe une bonne raison d'accorder peu d'importance aux instruments internationaux auxquels le Canada n'est pas partie. C'est au gouvernement, non aux tribunaux, qu'il appartient d'assujettir

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the courts (see Hogg, at pp. 11-2 to 11-4). Judicial review and the use of international law as an interpretive aid should not become a euphemism for this Court interfering in the government's prerogative over foreign affairs (see *Turp v. Canada (Justice)*, 2012 FC 893, [2014] 1 F.C.R. 439; Hogg, at p. 1-20). Moreover, their invocation of international law is particularly problematic given the unique historic context in which labour relations have developed within different countries.

[160] International law is of no help to this Court in determining whether freedom of association in s. 2(*d*) of the *Charter* includes a right to strike.

B. *The PSESA Does Not Violate Section 2(d) of the Charter*

[161] For the reasons above, s. 2(*d*) does not confer a *Charter* right to strike. The question remains whether the *PSESA* nevertheless violates the right to a process of meaningful collective bargaining protected under s. 2(*d*). In our respectful view, it does not.

[162] The majority in this appeal retreats from the test for determining whether legislation interferes with the constitutional right to collective bargaining that was emphatically established by this Court in *Fraser*.

[163] The *PSESA*'s "controlled strike" regime does not render effectively impossible nor substantially interfere with the ability of associations representing affected public sector employees to submit representations to employers and to have them considered and discussed in good faith. There are three reasons for this conclusion: there is evidence that good faith collective bargaining took place under the *PSESA* framework; *Fraser* and *Health Services* both held that there is no right to a dispute resolution mechanism; and the goal of strikes is not to ensure meaningful collective bargaining, but instead to exert political and economic pressure on employers. Moreover, insofar as the

le Canada à des obligations internationales (voir Hogg, p. 11-2 à 11-4). Le contrôle judiciaire et l'application du droit international ne devraient pas offrir des moyens détournés d'empiéter sur la prérogative du gouvernement en matière d'affaires étrangères (voir *Turp c. Canada (Justice)*, 2012 CF 893, [2014] 1 R.C.F. 439; Hogg, p. 1-20). De plus, leur mise en relief du droit international se révèle particulièrement problématique étant donné le contexte historique unique dans lequel ont évolué les relations de travail dans les différents pays.

[160] Le droit international n'est d'aucune aide à la Cour pour déterminer si la liberté d'association prévue à l'al. 2*d*) de la *Charte* englobe le droit de grève.

B. *La PSESA ne porte pas atteinte aux droits garantis par l'al. 2d) de la Charte*

[161] Pour les motifs qui précèdent, l'al. 2*d*) de la *Charte* ne garantit pas le droit de grève. Il nous faut toutefois examiner si la *PSESA* porte néanmoins atteinte au droit à un processus véritable de négociation collective garanti par l'al. 2*d*). Soit dit en tout respect, nous croyons que ce n'est pas le cas.

[162] Les juges majoritaires rompent avec le critère qui permet de déterminer si une loi porte atteinte ou non au droit constitutionnel de négocier collectivement et que la Cour énonce très clairement dans l'arrêt *Fraser*.

[163] Le régime de « grève contrôlée » établi par la *PSESA* ne prive pas dans les faits les associations qui représentent les salariés du secteur public en cause du droit de présenter des observations à l'employeur et de les voir prises en compte et débattues de bonne foi, ni n'entrave substantiellement l'exercice de ce droit. Il y a trois raisons à cela. Il appert de la preuve qu'il y a eu négociation collective de bonne foi dans le cadre établi par la *PSESA*; dans les arrêts *Fraser* et *Health Services*, la Cour nie l'existence d'un droit à un mécanisme de règlement des différends; la grève n'a pas pour objectif de garantir le déroulement d'une négociation collective véritable, mais bien

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Government of Saskatchewan restricts the jurisdiction of the Labour Relations Board ("LRB"), it does so in good faith and is justified. Saskatchewan essential service workers do not require a right to strike in order to ensure that their s. 2(*d*) rights are respected.

[164] First, the *PSESA* facilitates consultation between employers and unions regarding the designation of essential services. Although the right to collective bargaining under s. 2(*d*) does not protect a particular outcome (*Fraser*, at para. 45), the fact that essential services agreements have been achieved in the provincial public sector during the currency of the *PSESA* indicates that there has been no substantial interference with the right to meaningful collective bargaining. The first collective agreement to be signed after the *PSESA* came into force — the 2009-2012 agreement between the Public Service Commission ("PSC") and the Saskatchewan Government and General Employees' Union ("SGEU") — was signed only eight months after the preceding agreement ended, over three months faster than the average time to reach a collective agreement. Essential services agreements were also signed between the PSC and the SGEU, and between the PSC and the Canadian Union of Public Employees, Local 600. Tentative collective agreements were reached between the Saskatchewan Association of Health Organizations and each of the Canadian Union of Public Employees, the Service Employees International Union, and the SGEU in August 2010; these were later ratified.

[165] Moreover, s. 6 of the *PSESA* requires public employers to negotiate with trade unions with a view to concluding an essential services agreement. The evidence demonstrates that such good faith collective bargaining took place. For instance, the trial judge held that urban municipalities, the University of Regina, and the University of Saskatchewan all engaged in meaningful consultations with unions (para. 189). In fact, the Government of Saskatchewan *exceeded* the requirements of s. 6(3) of the *PSESA*: the PSC consulted the SGEU regarding

d'exercer une pression politique et économique sur l'employeur. Par ailleurs, si le gouvernement de la Saskatchewan limite la compétence de la Labour Relations Board (la « Commission »), elle le fait de bonne foi et sa décision est justifiée. Les travailleurs de la Saskatchewan qui assurent des services essentiels n'ont pas besoin d'un droit de grève pour faire respecter les droits qu'ils tirent de l'al. 2*d*).

[164] Premièrement, la *PSESA* facilite la consultation entre employeurs et syndicats sur la désignation des services essentiels. Le droit à la négociation collective protégé à l'al. 2*d*) ne garantit pas l'obtention d'un résultat donné (*Fraser*, par. 45), mais il appert de la conclusion d'accords sur les services essentiels dans le secteur public sous le régime de la *PSESA* que le droit à une négociation collective véritable n'a fait l'objet d'aucune entrave substantielle dans la province. La première convention collective intervenue après l'entrée en vigueur de la *PSESA* entre la Public Service Commission (la « PSC ») et le Saskatchewan Government and General Employees' Union (le « SGEU ») pour la période 2009-2012 a été signée seulement huit mois après l'expiration de la convention précédente, soit dans un délai d'au moins trois mois inférieur au délai habituel. La PSC et le SGEU, de même que la PSC et le Syndicat canadien de la fonction publique, section locale 600, ont également conclu des accords sur les services essentiels. En août 2010, l'Association of Health Organizations de la Saskatchewan s'est entendue avec le Syndicat canadien de la fonction publique, le Service Employees International Union et le SGEU sur le texte de conventions collectives qui ont ensuite été entérinées.

[165] Qui plus est, l'art. 6 de la *PSESA* exige que les employeurs du secteur public négocient avec les syndicats afin de conclure un accord sur les services essentiels. Selon la preuve, ils se sont acquittés de cette obligation de bonne foi. À titre d'exemple, le juge de première instance conclut que les municipalités urbaines, l'Université de Regina et l'Université de la Saskatchewan ont toutes véritablement consulté les syndicats (par. 189). En fait, le gouvernement de la Saskatchewan a *surpassé* les exigences du par. 6(3) de la *PSESA* : la PSC a

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which services (other than those relating to health and safety) would be designated as essential in *The Public Service Essential Services Regulations*, R.R.S., c. P-42.2, Reg. 1. As a result of these consultations, a number of changes were made to the *Regulations*.

consulté le SGEU en vue de déterminer quels services (hormis ceux liés à la santé et à la sécurité) seraient tenus pour essentiels suivant le *Public Service Essential Services Regulations*, R.R.S., c. P-42.2, règl. 1. À la suite de ces consultations, nombre de modifications ont été apportées au Règlement.

[166] Second, this Court determined in both *Health Services* and *Fraser* that s. 2(*d*) does not entail a right to a dispute resolution mechanism. A violation of s. 2(*d*) cannot be found here simply on allegations that the legislation does not provide an adequate dispute resolution process. As Rothstein J. observed in dissent in *Mounted Police*, the inconsistency between the majority's position here and the Court's decision in *Fraser* is rendered all the more puzzling when one compares the vulnerability of the agricultural workers in that case, who were found not to require a dispute resolution mechanism, with the greatly enhanced position of the public service providers who now come before this Court.

[166] Deuxièmement, dans les arrêts *Health Services* et *Fraser*, la Cour statue que l'al. 2*d*) ne garantit pas le droit à un mécanisme de règlement des différends. À elles seules, les allégations voulant que la *PSESA* n'offre aucun mécanisme adéquat de règlement des différends ne permettent pas en l'espèce de conclure à la violation des droits protégés par l'al. 2*d*). Comme le fait observer en dissidence le juge Rothstein dans l'arrêt *Police montée*, l'écart entre l'opinion des juges majoritaires et celle qui sous-tend l'arrêt *Fraser* est encore plus déconcertant dans la mesure où, dans cette autre affaire, les travailleurs agricoles à qui la Cour n'a pas jugé nécessaire d'accorder l'accès à un mécanisme de règlement des différends étaient bien plus vulnérables que ne le sont les préposés aux services publics qui s'adressent aujourd'hui à la Cour.

[167] Finally, the appellants argue that this Court must defer to the trial judge's finding that, in absence of the ability of workers to strike, there can be no assurance that collective bargaining will occur in good faith. As discussed earlier, this mischaracterizes the primary purpose of the strike, which is to exert political and economic pressure, not to ensure good faith collective bargaining, which is protected by statute and, since *Health Services*, by s. 2(*d*) of the *Charter*.

[167] Enfin, les appelants soutiennent que la Cour doit déférer à la conclusion du juge de première instance selon laquelle, lorsque les travailleurs ne peuvent recourir à la grève, on ne peut être assuré qu'il y aura négociation collective de bonne foi. Nous le répétons, cette affirmation dénature l'objectif premier d'une grève, à savoir exercer une pression politique et économique, et non faire en sorte qu'il y ait négociation collective de bonne foi, ce que garantit la loi et, depuis l'arrêt *Health Services*, l'al. 2*d*) de la *Charte*.

[168] The statutory balance struck by the Government of Saskatchewan is eminently reasonable. The narrow scope of the LRB's powers of review is justifiable in the essential services context, where public health, safety, and security are at stake. As noted earlier, the Government of Saskatchewan, together with the federal and other provincial governments, has a constitutional commitment to "provid[e] essential public services of reasonable quality to all Canadians"

[168] L'équilibre établi par le législateur en Saskatchewan est éminemment raisonnable. La portée restreinte du pouvoir de révision de la Commission se justifie dans le contexte de la prestation de services essentiels lorsque la santé, la sûreté et la sécurité du public sont en jeu. Rappelons que le gouvernement de la Saskatchewan, de même que le gouvernement fédéral et ses homologues provinciaux, doivent respecter l'engagement constitutionnel de « fournir à

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(s. 36(1)(*c*) of the *Constitution Act, 1982*). In view of this commitment, the Government of Saskatchewan cannot subject itself to arbitral awards that could make it unaffordable for the province to deliver on its undertaking. Yet, that is an inherent concern in constitutionalizing the right to strike and finding that a limitation to this right could only be justified if there is "a meaningful alternative mechanism for resolving bargaining impasses, such as arbitration" (majority reasons, at para. 93). The Government of Saskatchewan was entitled to determine that compulsory arbitration could thwart the goal of the *PSESA*: assuring the continued delivery of essential services during labour actions.

[169] Governments are unlike private businesses: they cannot decide to exit a field of economic activity by no longer providing the particular essential service, they are not able to move the service to a jurisdiction with lower labour costs, and they cannot realistically declare bankruptcy and shut down all operations. Recognition of this context is essential in evaluating the Government of Saskatchewan's decision to enact some limits on the LRB's powers of review.

[170] The *PSESA* does not infringe on the right of essential service workers to meaningful, good faith collective bargaining. There is evidence of good faith collective bargaining under the *PSESA*, *Health Services* and *Fraser* confirm that s. 2(*d*) does not entail a right to a dispute resolution mechanism, and the purpose of strikes in the public sector is to exert political pressure, not to ensure meaningful collective bargaining, as meaningful collective bargaining is already statutorily and constitutionally guaranteed. A right to strike is not required to ensure the s. 2(*d*) guarantee of freedom of association.

[171] The Government of Saskatchewan has devised a particular legislative framework in order to safeguard the continued delivery of essential services to the community during labour disputes.

tous les Canadiens, à un niveau de qualité acceptable, les services publics essentiels » (al. 36(1)*c*) de la *Loi constitutionnelle de 1982*). Le gouvernement de la Saskatchewan ne peut donc pas s'en remettre à des décisions arbitrales susceptibles de faire en sorte que la province n'ait plus les moyens de donner suite à son engagement. Or, c'est exactement ce que font craindre la constitutionnalisation du droit de grève et la conclusion portant que la limitation de ce droit n'est justifiée qu'en présence d'un « autre moyen véritable (tel l'arbitrage) de mettre fin à l'impasse des négociations » (motifs majoritaires, par. 93). Le gouvernement de la Saskatchewan avait le droit de conclure que l'arbitrage obligatoire pouvait compromettre l'objectif de la *PSESA*, à savoir la prestation continue des services essentiels durant un conflit de travail.

[169] L'État se distingue de l'entreprise privée en ce qu'il ne peut ni se retirer d'un secteur d'activité économique et cesser d'assurer le service essentiel en cause, ni confier la prestation du service à une administration dont le coût de la main-d'œuvre est inférieur, ni faire véritablement faillite et fermer tout bonnement ses portes. La reconnaissance de cette contrainte est essentielle dans l'examen de la décision de la Saskatchewan de limiter jusqu'à un certain point le pouvoir de révision de la Commission.

[170] La *PSESA* ne porte pas atteinte au droit des préposés aux services essentiels à un processus véritable de négociation collective de bonne foi. La preuve révèle qu'il y a eu négociation collective de bonne foi sous le régime de la *PSESA*, les arrêts *Health Services* et *Fraser* confirment que l'al. 2*d*) ne garantit pas le droit à un mécanisme de règlement des différends et le but d'une grève dans le secteur public est d'exercer une pression politique, non de garantir une négociation collective véritable, ce que font déjà la loi et la Constitution. Le droit de grève n'est pas nécessaire à la protection de la liberté d'association garantie à l'al. 2*d*).

[171] Le gouvernement de la Saskatchewan a conçu un cadre législatif unique afin d'assurer à la collectivité la prestation continue de services essentiels pendant un conflit de travail. La Cour devrait

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This Court should defer to the government's policy choices in balancing the interests of employers, employees, and the public to allow the government to meet its constitutional commitment to deliver these services.

[172] In concluding that the *PSESA* infringes the right to meaningful collective bargaining, the majority fails to apply the substantial interference standard the Court established in recent s. 2(*d*) jurisprudence. In *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, while concluding the inquiry on a standard of "substantial interference" the majority was nevertheless alive to the fact that the exercise of s. 2(*d*) rights was "all but impossible" for the appellant agricultural workers (paras. 25 (emphasis deleted) and 48). The majority in *Health Services* used similar language, concluding that "[t]here must be evidence that the freedom would be next to impossible to exercise" (para. 34). In *Fraser*, the majority of this Court held that "[i]n every case, the question is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals" (para. 46). It was under these circumstances that the standard for substantial interference was developed. Our colleagues overlook this context by applying a lower standard in their constitutional analysis.

[173] Because the *PSESA* does not violate s. 2(*d*) of the *Charter*, it is unnecessary to engage in an analysis under s. 1.

C. *The PSESA Does Not Violate Section 2(b) of the Charter*

[174] The appellants have made an alternative argument under s. 2(*b*). They say that the *PSESA* violates workers' freedom of expression in limiting their ability to participate in strikes. It would not be appropriate to express an opinion on what is an undeveloped record on this point. As was the case before the Court of Appeal, the appellants' submissions on s. 2(*b*) are "very much by way of

déférer à ses choix politiques dans l'établissement d'un équilibre entre les intérêts respectifs des employeurs, des employés et du public et lui permettre ainsi de s'acquitter de son obligation constitutionnelle de fournir de tels services.

[172] Lorsqu'ils concluent que la *PSESA* viole le droit à la négociation collective véritable, nos collègues se gardent d'appliquer le critère de l'entrave substantielle établi récemment par la Cour dans un dossier relatif à l'al. 2*d*). Dans l'arrêt *Dunmore c. Ontario (Procureur général)*, 2001 CSC 94, [2001] 3 R.C.S. 1016, même si elle tranche au regard du critère de l'« [entrave] substantielle », la formation majoritaire demeure consciente de « l'impossibilité » pour les travailleurs agricoles appelants d'exercer les droits garantis par l'al. 2*d*) (par. 25 (soulignement omis) et 48). Dans l'arrêt *Health Services*, la formation majoritaire s'exprime dans le même sens : « [i]l doit être établi qu'il serait pratiquement impossible d'exercer la liberté constitutionnelle en question » (par. 34). Dans *Fraser*, la Cour opine que « [l]a question demeure celle de savoir si la loi ou la mesure gouvernementale contestée rend impossible l'action collective visant la réalisation d'objectifs liés au travail » (par. 46). C'est sur cette toile de fond qu'a vu le jour le critère de l'entrave substantielle. Nos collègues en font aujourd'hui abstraction et appliquent un critère moins strict dans le cadre de leur analyse constitutionnelle.

[173] Comme la *PSESA* ne porte pas atteinte aux droits garantis à l'al. 2*d*) de la *Charte*, il n'est pas nécessaire de se livrer à une analyse fondée sur l'article premier.

C. *La PSESA ne porte pas atteinte aux droits garantis par l'al. 2b) de la Charte*

[174] Les appelants invoquent l'al. 2*b*) à titre subsidiaire et soutiennent que la *PSESA* porte atteinte à la liberté d'expression des travailleurs en ce qu'elle limite leur faculté de participer à une grève. Il ne convient pas de se prononcer sur ce point, le dossier n'étant pas suffisamment étoffé pour le faire. Comme devant la Cour d'appel, leur thèse fondée sur l'al. 2*b*) est avancée [TRADUCTION]

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a secondary argument" (para. 72). Having pursued a detailed argument in respect of s. 2(*d*), the appellants expend little effort in their s. 2(*b*) arguments. It would be ill advised to undertake an evaluation of a *Charter* argument in the absence of substantive arguments on the issue.

D. *The Trade Union Amendment Act, 2008, S.S. 2008, c. 26, Does Not Violate Section 2(d) of the Charter*

[175] We agree with the majority that *The Trade Union Amendment Act, 2008* ("*TUAA*") does not infringe freedom of association. Amending the process for certification and decertification and allowing an employer to communicate "facts and its opinions to its employees" (*TUAA*, s. 6) does not render meaningful collective bargaining effectively impossible nor does it substantially interfere with this process.

III. Conclusion

[176] Neither the *PSESA* nor the *TUAA* infringes s. 2(*d*) of the *Charter*. We would dismiss the appeal with costs. We would answer the constitutional questions as follows:

1. Does *The Public Service Essential Services Act*, S.S. 2008, c. P-42.2, in whole or in part, infringe s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

No.

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. l of the *Canadian Charter of Rights and Freedoms*?

It is unnecessary to answer this question.

3. Does *The Public Service Essential Services Act*, S.S. 2008, c. P-42.2, in whole or in part, infringe s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?

No.

« à titre très accessoire » (par. 72). Alors qu'ils offrent une argumentation détaillée sur l'application de l'al. 2*d*), les appelants étayent bien peu leur thèse fondée sur l'al. 2*b*). Il serait inopportun de se prononcer sur le point constitutionnel soulevé à défaut d'arguments substantiels à l'appui.

D. *La loi intitulée The Trade Union Amendment Act, 2008, S.S. 2008, c. 26, ne contrevient pas à l'al. 2d) de la Charte*

[175] Nous convenons avec les juges majoritaires que la *Trade Union Amendment Act, 2008* (« *TUAA* ») ne porte pas atteinte à la liberté d'association. Modifier le processus d'accréditation et de révocation de l'accréditation et permettre à l'employeur de communiquer [TRADUCTION] « des faits et des opinions à ses salariés » (*TUAA*, art. 6) ne fait pas obstacle à un processus véritable de négociation collective, ni n'entrave substantiellement ce processus.

III. Conclusion

[176] Ni la *PSESA* ni la *TUAA* ne portent atteinte aux droits garantis par l'al. 2*d*) de la *Charte*. Nous sommes d'avis de rejeter le pourvoi avec dépens et de répondre comme suit aux questions constitutionnelles :

1. La *Public Service Essential Services Act*, S.S. 2008, c. P-42.2, en tout ou en partie, viole-t-elle l'al. 2*b*) de la *Charte canadienne des droits et libertés*?

Non.

2. Dans l'affirmative, s'agit-il d'une violation constituant une limite raisonnable, établie par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique conformément à l'article premier de la *Charte canadienne des droits et libertés*?

Il est inutile de répondre à la question.

3. La *Public Service Essential Services Act*, S.S. 2008, c. P-42.2, en tout ou en partie, viole-t-elle l'al. 2*d*) de la *Charte canadienne des droits et libertés*?

Non.

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4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

It is unnecessary to answer this question.

5. Do ss. 3, 6, 7 and 11 of *The Trade Union Amendment Act, 2008*, S.S. 2008, c. 26, in whole or in part, infringe s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?

No.

6. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

It is unnecessary to answer this question.

Appeal allowed in part with costs, ROTHSTEIN *and* WAGNER JJ. *dissenting in part.*

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Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

4. Dans l'affirmative, s'agit-il d'une violation constituant une limite raisonnable, établie par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique conformément à l'article premier de la *Charte canadienne des droits et libertés*?

Il est inutile de répondre à la question.

5. Les articles 3, 6, 7 et 11 de la *Trade Union Amendment Act, 2008*, S.S. 2008, c. 26, en tout ou en partie, violent-ils l'al. 2*d*) de la *Charte canadienne des droits et libertés*?

Non.

6. Dans l'affirmative, s'agit-il d'une violation constituant une limite raisonnable, établie par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique conformément à l'article premier de la *Charte canadienne des droits et libertés*?

Il est inutile de répondre à la question.

Pourvoi accueilli en partie avec dépens, les juges ROTHSTEIN *et* WAGNER *sont dissidents en partie.*

Procureurs des appelants : Gerrand Rath Johnson, Regina; Victory Square Law Office, Vancouver; The W Law Group, Saskatoon.

Procureur de l'intimée : Procureur général de la Saskatchewan, Regina.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Saskatoon.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général du Québec : Procureur général du Québec, Québec.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Vancouver.

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Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Edmonton.

Solicitor for the intervener the Attorney General of Newfoundland and Labrador: Attorney General of Newfoundland and Labrador, St. John's.

Procureur de l'intervenant le procureur général de Terre-Neuve-et-Labrador : Procureur général de Terre-Neuve-et-Labrador, St. John's.

Solicitors for the intervener the Saskatchewan Union of Nurses: Bainbridge Jodouin Cheecham, Saskatoon.

Procureurs de l'intervenant Saskatchewan Union of Nurses : Bainbridge Jodouin Cheecham, Saskatoon.

Solicitors for the intervener SEIU-West: Plaxton & Company, Saskatoon.

Procureurs de l'intervenant SEIU-West : Plaxton & Company, Saskatoon.

Solicitors for the interveners the United Nurses of Alberta and the Alberta Federation of Labour: Chivers Carpenter, Edmonton.

Procureurs des intervenants United Nurses of Alberta et Alberta Federation of Labour : Chivers Carpenter, Edmonton.

Solicitors for the intervener the Professional Institute of the Public Service of Canada: Sack Goldblatt Mitchell, Ottawa.

Procureurs de l'intervenant l'Institut professionnel de la fonction publique du Canada : Sack Goldblatt Mitchell, Ottawa.

Solicitors for the intervener the Canadian Constitution Foundation: McCarthy Tétrault, Toronto.

Procureurs de l'intervenante Canadian Constitution Foundation : McCarthy Tétrault, Toronto.

Solicitors for the intervener the Air Canada Pilots' Association: Nelligan O'Brien Payne, Ottawa.

Procureurs de l'intervenante l'Association des pilotes d'Air Canada : Nelligan O'Brien Payne, Ottawa.

Solicitors for the intervener the British Columbia Civil Liberties Association: Moore Edgar Lyster, Vancouver.

Procureurs de l'intervenante l'Association des libertés civiles de la Colombie-Britannique : Moore Edgar Lyster, Vancouver.

Solicitors for the intervener Conseil du patronat du Québec: Norton Rose Fulbright Canada, Montréal.

Procureurs de l'intervenant le Conseil du patronat du Québec : Norton Rose Fulbright Canada, Montréal.

Solicitors for the intervener the Canadian Employers Council: Fasken Martineau DuMoulin, Toronto.

Procureurs de l'intervenant le Conseil canadien des employeurs : Fasken Martineau DuMoulin, Toronto.

Solicitors for the interveners the Canadian Union of Postal Workers and the International Association of Machinists and Aerospace Workers: Cavalluzzo Shilton McIntyre Cornish, Toronto.

Procureurs des intervenants le Syndicat des travailleurs et travailleuses des postes et l'Association internationale des machinistes et des travailleurs et travailleuses de l'aérospatiale : Cavalluzzo Shilton McIntyre Cornish, Toronto.

2015 SCC 4 (CanLII)

Solicitors for the interveners the British Columbia Teachers' Federation and the Hospital Employees' Union: Farris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for the intervener the Canadian Labour Congress: Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Public Service Alliance of Canada: Raven, Cameron, Ballantyne & Yazbeck, Ottawa.

Solicitors for the intervener the Alberta Union of Provincial Employees: Nugent Law Office, Edmonton.

Solicitors for the intervener Confédération des syndicats nationaux: Laroche Martin, Montréal.

Solicitors for the interveners the Regina Qu'Appelle Regional Health Authority, the Cypress Regional Health Authority, the Five Hills Regional Health Authority, the Heartland Regional Health Authority, the Sunrise Regional Health Authority, the Prince Albert Parkland Regional Health Authority and the Saskatoon Regional Health Authority: Saskatoon Regional Health Authority, Saskatoon; MacPherson Leslie & Tyerman, Saskatoon.

Solicitors for the intervener the National Union of Public and General Employees: Champ & Associates, Ottawa.

Solicitors for the interveners the Canada Post Corporation and Air Canada: Fasken Martineau DuMoulin, Toronto.

Procureurs des intervenants British Columbia Teachers' Federation et Hospital Employees' Union : Farris, Vaughan, Wills & Murphy, Vancouver.

Procureurs de l'intervenant le Congrès du travail du Canada : Sack Goldblatt Mitchell, Toronto.

Procureurs de l'intervenante l'Alliance de la Fonction publique du Canada : Raven, Cameron, Ballantyne & Yazbeck, Ottawa.

Procureurs de l'intervenant Alberta Union of Provincial Employees : Nugent Law Office, Edmonton.

Procureurs de l'intervenante la Confédération des syndicats nationaux : Laroche Martin, Montréal.

Procureurs des intervenantes Regina Qu'Appelle Regional Health Authority, Cypress Regional Health Authority, Five Hills Regional Health Authority, Heartland Regional Health Authority, Sunrise Regional Health Authority, Prince Albert Parkland Regional Health Authority et Saskatoon Regional Health Authority : Saskatoon Regional Health Authority, Saskatoon; MacPherson Leslie & Tyerman, Saskatoon.

Procureurs de l'intervenant le Syndicat national des employées et employés généraux du secteur public : Champ & Associates, Ottawa.

Procureurs des intervenantes la Société canadienne des postes et Air Canada : Fasken Martineau DuMoulin, Toronto.

2015 SCC 4 (CanLII)

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Health Services and Support – Facilities Subsector Bargaining Association, Health Services and Support – Community Subsector Bargaining Association, Nurses' Bargaining Association, Hospital Employees' Union, B.C. Government and Service Employees' Union, British Columbia Nurses' Union, Heather Caroline Birkett, Janine Brooker, Amaljeet Kaur Jhand, Leona Mary Fraser, Pamela Jean Sankey-Kilduff, Sally Lorraine Stevenson, Sharleen G. V. Decillia and Harjeet Dhami *Appellants*

v.

Her Majesty The Queen in Right of the Province of British Columbia *Respondent*

and

Attorney General of Ontario, Attorney General of New Brunswick, Attorney General of Alberta, Confederation of National Trade Unions, Canadian Labour Congress, Michael J. Fraser on his own behalf and on behalf of United Food and Commercial Workers Union Canada, and British Columbia Teachers' Federation *Interveners*

Health Services and Support – Facilities Subsector Bargaining Association, Health Services and Support – Community Subsector Bargaining Association, Nurses' Bargaining Association, Hospital Employees' Union, B.C. Government and Service Employees' Union, British Columbia Nurses' Union, Heather Caroline Birkett, Janine Brooker, Amaljeet Kaur Jhand, Leona Mary Fraser, Pamela Jean Sankey-Kilduff, Sally Lorraine Stevenson, Sharleen G. V. Decillia et Harjeet Dhami *Appelants*

c.

Sa Majesté la Reine du chef de la province de la Colombie-Britannique *Intimée*

et

Procureur général de l'Ontario, procureur général du Nouveau-Brunswick, procureur général de l'Alberta, Confédération des syndicats nationaux, Congrès du travail du Canada, Michael J. Fraser, en son propre nom et au nom de United Food and Commercial Workers Union Canada et British Columbia Teachers' Federation *Intervenants*

INDEXED AS: HEALTH SERVICES AND SUPPORT — FACILITIES SUBSECTOR BARGAINING ASSN. *v.* BRITISH COLUMBIA

Neutral citation: 2007 SCC 27.

File No.: 30554.

2006: February 8; 2007: June 8.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish and Abella JJ.

RÉPERTORIÉ : HEALTH SERVICES AND SUPPORT — FACILITIES SUBSECTOR BARGAINING ASSN. *c.* COLOMBIE-BRITANNIQUE

Référence neutre : 2007 CSC 27.

N^o^ du greffe : 30554.

2006 : 8 février; 2007 : 8 juin.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Deschamps, Fish et Abella.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Freedom of association — Right to bargain collectively

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Charte des droits — Liberté d'association — Droit de négocier collectivement — Loi

2007 SCC 27 (CanLII)

— ***Provincial health and social services delivery*** *improvement legislation adopted in response to pressing health care crisis — Legislation affecting health care workers' terms of employment — Whether constitutional guarantee of freedom of association includes procedural right to collective bargaining — If so, whether legislation infringes right to bargain collectively — Whether infringement justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 2(d) — Health and Social Services Delivery Improvement Act, S.B.C. 2002, c. 2, Part 2.*

Constitutional law — Charter of Rights — Equality rights — Health care workers — Provincial health and social services delivery improvement legislation adopted in response to pressing health care crisis — Legislation affecting health care workers' terms of employment — Whether effects of legislation on health care workers constitute discrimination under s. 15 of Canadian Charter of Rights and Freedoms — Health and Social Services Delivery Improvement Act, S.B.C. 2002, c. 2, Part 2.

The *Health and Social Services Delivery Improvement Act* was adopted as a response to challenges facing British Columbia's health care system. The Act was quickly passed and there was no meaningful consultation with unions before it became law. Part 2 of the Act introduced changes to transfers and multi-worksite assignment rights (ss. 4 and 5), contracting out (s. 6), the status of contracted out employees (s. 6), job security programs (ss. 7 and 8), and layoffs and bumping rights (s. 9). It gave health care employers greater flexibility to organize their relations with their employees as they see fit, and in some cases, to do so in ways that would not have been permissible under existing collective agreements and without adhering to requirements of consultation and notice that would otherwise obtain. It invalidated important provisions of collective agreements then in force, and effectively precluded meaningful collective bargaining on a number of specific issues. Furthermore, s. 10 voided any part of a collective agreement, past or future, which was inconsistent with Part 2, and any collective agreement purporting to modify these restrictions. The appellants, who are unions and members of the unions representing the nurses, facilities, or community subsectors, challenged the constitutional validity of Part 2 of the Act as violative of the guarantees of freedom of association and equality protected by the *Canadian Charter of Rights and Freedoms*. Both the trial judge and the Court of

provinciale sur l'amélioration de la prestation des services de santé et des services sociaux adoptée pour faire face à une crise pressante dans le secteur de la santé — Loi visant les conditions d'emploi des travailleurs de la santé — La liberté d'association garantie par la Constitution comprend-elle le droit procédural de négociation collective? — Dans l'affirmative, la loi porte-t-elle atteinte au droit de négocier collectivement? — Cette atteinte est-elle justifiable? — Charte canadienne des droits et libertés, art. 1, 2d) — Health and Social Services Delivery Improvement Act, S.B.C. 2002, ch. 2, partie 2.

Droit constitutionnel — Charte des droits — Droits à l'égalité — Travailleurs de la santé — Loi provinciale sur l'amélioration de la prestation des services de santé et des services sociaux adoptée pour faire face à une crise pressante dans le secteur de la santé — Loi visant les conditions d'emploi des travailleurs de la santé — Les effets de la loi sur les travailleurs de la santé constituent-ils de la discrimination selon l'art. 15 de la Charte canadienne des droits et libertés? — Health and Social Services Delivery Improvement Act, S.B.C. 2002, ch. 2, partie 2.

La *Health and Social Services Delivery Improvement Act* a été adoptée par suite des difficultés qui pèsent sur le système de santé de la Colombie-Britannique. Elle fut rapidement adoptée. Aucune véritable consultation des syndicats n'est intervenue avant que le projet devienne loi. La partie 2 de la Loi modifie les droits liés aux transferts et affectations dans différents lieux de travail (art. 4 et 5), la sous-traitance (art. 6), le statut des employés contractuels (art. 6), les programmes de sécurité d'emploi (art. 7 et 8), les droits de mise en disponibilité et de supplantation (art. 9). Elle accorde aux employeurs du secteur de la santé une plus grande latitude pour aménager à leur gré leurs relations avec leurs employés et, dans certains cas, pour procéder d'une manière que les conventions collectives existantes n'auraient pas autorisée, et ce, sans se conformer aux exigences de consultation et de notification qui auraient été normalement applicables. Elle invalide d'importantes dispositions des conventions collectives alors en vigueur et effectivement interdit toute véritable négociation collective sur certaines questions. De plus, l'art. 10 invalide toute partie d'une convention collective, présente ou future, incompatible avec la partie 2, et toute convention collective visant à modifier ces restrictions. Les appelants, qui sont des syndicats et des membres des syndicats représentant le sous-secteur des infirmiers, celui des installations ou le sous-secteur communautaire, contestent la constitutionnalité de la partie 2 de la Loi au

Appeal found that Part 2 of the Act did not violate ss. 2(*d*) or 15 of the *Charter.*

Held (Deschamps J. dissenting in part): The appeal is allowed in part. Sections 6(2), 6(4), and 9 of the Act are unconstitutional. This declaration is suspended for a period of 12 months.

Per McLachlin C.J. and Bastarache, Binnie, LeBel, Fish and Abella JJ.: Freedom of association guaranteed by s. 2(*d*) of the *Charter* includes a procedural right to collective bargaining. The grounds advanced in the earlier decisions of this Court for the exclusion of collective bargaining from s. 2(*d*)'s protection do not withstand principled scrutiny and should be rejected. The general purpose of the *Charter* guarantees and the broad language of s. 2(*d*) are consistent with a measure of protection for collective bargaining. Further, the right to collective bargaining is neither of recent origin nor merely a creature of statute. The history of collective bargaining in Canada reveals that long before the present statutory labour regimes were put in place, collective bargaining was recognized as a fundamental aspect of Canadian society, emerging as the most significant collective activity through which freedom of association is expressed in the labour context. Association for purposes of collective bargaining has long been recognized as a fundamental Canadian right which predated the *Charter.* The protection enshrined in s. 2(*d*) of the *Charter* may properly be seen as the culmination of a historical movement towards the recognition of a procedural right to collective bargaining. Canada's adherence to international documents recognizing a right to collective bargaining also supports recognition of that right in s. 2(*d*). The *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified. Lastly, the protection of collective bargaining under s. 2(*d*) is consistent with and supportive of the values underlying the *Charter* and the purposes of the *Charter* as a whole. Recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the *Charter.* [22] [39-41] [66] [68] [70] [86]

The constitutional right to collective bargaining concerns the protection of the ability of workers to engage

motif qu'elle porte atteinte à la liberté d'association et aux droits à l'égalité garantis par la *Charte canadienne des droits et libertés*. Selon la juge de première instance et la Cour d'appel, la partie 2 de la Loi ne va pas à l'encontre de l'al. 2*d*) ni de l'art. 15 de la *Charte*.

Arrêt (la juge Deschamps est dissidente en partie) : Le pourvoi est accueilli en partie. Les paragraphes 6(2) et (4) et l'art. 9 de la Loi sont inconstitutionnels. L'effet de la présente déclaration est suspendu pour 12 mois.

La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Fish et Abella : La liberté d'association garantie par l'al. 2*d*) de la *Charte* comprend le droit procédural de négocier collectivement. Les motifs avancés dans des arrêts antérieurs de la Cour pour exclure les négociations collectives de la protection accordée par l'al. 2*d*) ne résistent pas à un examen fondé sur les principes pertinents et devraient être écartés. L'objet général des garanties de la *Charte* et le libellé général de l'al. 2*d*) se concilient avec la reconnaissance d'une certaine protection de la négociation collective. Par ailleurs, le droit de négociation collective ne représente pas l'œuvre récente du législateur. L'histoire de la négociation collective au Canada révèle que, bien avant la mise en place des régimes légaux actuels des relations du travail, la négociation collective était reconnue comme un aspect fondamental de la vie de la société canadienne, représentant la plus importante activité collective par l'intermédiaire de laquelle s'exprime la liberté d'association dans le contexte des relations du travail. Le droit de s'associer avec d'autres en vue de la négociation collective est reconnu depuis longtemps comme un droit fondamental au Canada, qui existait avant l'adoption de la *Charte.* On peut à juste titre considérer la protection consacrée à l'al. 2*d*) de la *Charte* comme l'aboutissement d'un mouvement historique vers la reconnaissance d'un droit procédural de négocier collectivement. L'adhésion du Canada à des instruments internationaux reconnaissant l'existence du droit de négocier collectivement appuie aussi la thèse que ce droit est protégé à l'al. 2*d*). Il faut présumer que la *Charte* accorde une protection au moins aussi grande que les instruments internationaux ratifiés par le Canada en matière de droits de la personne. Enfin, la protection de la négociation collective garantie par l'al. 2*d*) est compatible avec les valeurs reconnues par la *Charte* et avec l'ensemble de ses objectifs. Reconnaître que le droit des travailleurs de négocier collectivement est inhérent à leur liberté d'association réaffirme les valeurs de dignité, d'autonomie de la personne, d'égalité et de démocratie, intrinsèques à la *Charte*. [22] [39-41] [66] [68] [70] [86]

Le droit constitutionnel de négocier collectivement vise à protéger la capacité des travailleurs de participer

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in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment. Section 2(*d*) of the *Charter* does not guarantee the particular objectives sought through this associational activity but rather the process through which those goals are pursued. It means that employees have the right to unite, to present demands to government employers collectively and to engage in discussions in an attempt to achieve workplace-related goals. Section 2(*d*) imposes corresponding duties on government employers to agree to meet and discuss with them. It also puts constraints on the exercise of legislative powers in respect of the right to collective bargaining. However, s. 2(*d*) does not protect all aspects of the associational activity of collective bargaining. It protects only against "substantial interference" with associational activity. Intent to interfere with the associational right of collective bargaining is not essential to establish breach of s. 2(*d*). It is enough if the effect of the state law or action is to substantially interfere with the activity of collective bargaining. To constitute substantial interference with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer. [89-90] [92]

Determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries: (1) the importance of the matter affected to the process of collective bargaining, and more specifically, the capacity of the union members to come together and pursue collective goals in concert; and (2) the manner in which the measure impacts on the collective right to good faith negotiation and consultation. If the matters affected do not substantially impact on the process of collective bargaining, the measure does not violate s. 2(*d*) and the employer may be under no duty to discuss and consult. If, on the other hand, the changes substantially touch on collective bargaining, they will still not violate s. 2(*d*) if they preserve a process of consultation and good faith negotiation. Only where the matter is both important to the process of collective bargaining and has been imposed in violation of the duty of good faith negotiation will s. 2(*d*) be breached. [93-94] [109]

à des activités associatives et leur capacité d'agir collectivement pour réaliser des objectifs communs concernant des questions liées au milieu de travail et leurs conditions de travail. L'alinéa 2*d*) de la *Charte* protège non pas les objectifs particuliers que les employés cherchent à atteindre par cette activité associative, mais plutôt le processus de réalisation de ces objectifs. Cela signifie que les employés ont le droit de s'unir, de présenter collectivement des demandes à leurs employeurs du secteur public et de participer à des discussions en vue d'atteindre des objectifs liés au milieu de travail. L'alinéa 2*d*) impose aux employeurs du secteur public des obligations correspondantes d'accepter de rencontrer les employés pour discuter avec eux. Il restreint aussi le pouvoir de légiférer en matière de négociation collective. Cependant, il ne protège pas tous les aspects de l'activité associative liée à la négociation collective. Il protège uniquement contre les « entraves substantielles » à l'activité associative. Il n'est pas nécessaire de démontrer l'intention de porter atteinte au droit d'association lié à la négociation collective pour établir la violation de l'al. 2*d*). Il suffit que la loi ou l'acte de l'État ait pour effet d'entraver de façon substantielle l'activité de négociation collective. Pour qu'il s'agisse d'une atteinte substantielle à la liberté d'association, l'intention ou l'effet doit sérieusement compromettre l'activité des travailleurs qui consiste à se regrouper en vue de réaliser des objectifs communs, c'est-à-dire négocier des conditions de travail et des modalités d'emploi avec leur employeur. [89-90] [92]

Pour déterminer si une mesure gouvernementale ayant des répercussions sur le processus de négociation collective constitue une atteinte substantielle, il faut examiner successivement deux questions : (1) l'importance que les aspects touchés revêtent pour le processus de négociation collective et, plus particulièrement, la capacité des syndiqués d'agir d'une seule voix en vue de réaliser des objectifs communs ainsi que (2) l'impact de la mesure sur le droit collectif à une consultation et à une négociation menée de bonne foi. Si les aspects touchés n'ont pas de répercussions importantes sur le processus de négociation collective, la mesure n'enfreint pas l'al. 2*d*) et il se peut que l'employeur n'ait pas l'obligation de tenir des discussions et des consultations. Par ailleurs, les modifications qui ont une profonde incidence sur la négociation collective ne contreviendront pas non plus à l'al. 2*d*) si elles préservent le processus de consultation et de négociation menée de bonne foi. L'atteinte à l'al. 2*d*) ne surviendra que dans le cas où seront en cause à la fois un sujet d'importance pour le processus de négociation collective et une mesure imposée sans égard à l'obligation de négocier de bonne foi. [93-94] [109]

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A basic element of the duty to bargain in good faith is the obligation to actually meet and to commit time to the process. The parties have a duty to engage in meaningful dialogue, to exchange and explain their positions and to make a reasonable effort to arrive at an acceptable contract. However, the duty to bargain in good faith does not impose on the parties an obligation to conclude a collective agreement, nor does it include a duty to accept any particular contractual provisions. In considering whether the legislative provisions impinge on the collective right to good faith negotiations and consultation, regard must be had for the circumstances surrounding their adoption. Situations of exigency and urgency may affect the content and the modalities of the duty to bargain in good faith. Different situations may demand different processes and timelines. Moreover, failure to comply with the duty to consult and bargain in good faith should not be lightly found, and should be clearly supported on the record. [100-101] [103] [107]

In this case, ss. 4, 5, 6(2), 6(4) and 9 of the Act, in conjunction with s. 10, interfere with the process of collective bargaining, either by disregarding past processes of collective bargaining, by pre-emptively undermining future processes of collective bargaining, or both. Sections 4 and 5 are concerned with relatively minor modifications to in-place schemes for transferring and reassigning employees. Significant protections remained in place. While the Act took these issues off the collective bargaining table for the future, on balance, ss. 4 and 5 cannot be said to amount to a substantial interference with the union's ability to engage in collective bargaining so as to attract the protection under s. 2(*d*) of the *Charter.* However, the provisions dealing with contracting out (ss. 6(2) and 6(4)), layoffs (ss. 9(a), 9(b) and 9(c)) and bumping (s. 9(d)) infringe the right to bargain collectively protected by s. 2(*d*). These provisions deal with matters central to the freedom of association and amount to substantial interference with associational activities. Furthermore, these provisions did not preserve the processes of collective bargaining. Although the government was facing a situation of exigency, the measures it adopted constituted a virtual denial of the s. 2(*d*) right to a process of good faith bargaining and consultation. [128] [130-132] [134-135]

The s. 2(*d*) infringement is not justified under s. 1 of the *Charter.* While the government established that the

L'un des éléments fondamentaux de l'obligation de négocier de bonne foi consiste en l'obligation de tenir des rencontres et de consacrer du temps au processus. Les parties ont l'obligation d'établir un véritable dialogue : elles doivent être disposées à échanger et expliquer leurs positions. Elles doivent faire un effort raisonnable pour arriver à un contrat acceptable. Cependant, l'obligation de négocier de bonne foi n'impose pas la conclusion d'une convention collective ni l'acceptation de clauses contractuelles particulières. Pour déterminer si des dispositions législatives empiètent sur le droit collectif à une consultation et à une négociation menées de bonne foi, il faut tenir compte des circonstances de leur adoption. Une situation d'urgence est susceptible d'influer sur le contenu et les modalités de l'obligation de négocier de bonne foi. Différentes situations peuvent commander différents processus et échéanciers. De plus, on se gardera de tirer à la légère, en l'absence d'un dossier bien étayé, une conclusion d'atteinte à l'obligation de consulter et de négocier de bonne foi. [100-101] [103] [107]

En l'espèce, les art. 4, 5 et 9 et les par. 6(2) et (4) de la Loi, appliqués conjointement avec l'art. 10, constituent une ingérence dans le processus de négociation collective, soit en mettant de côté les processus de négociation collective antérieurs, soit en compromettant à l'avance l'intégrité des futurs processus de négociation collective sur ce sujet, ou les deux à la fois. Les articles 4 et 5 apportent des modifications relativement mineures aux régimes existants de transfert et de nouvelle affectation des employés. D'importantes protections subsistaient. Il est vrai que la Loi retirait désormais ces questions de la table des négociations collectives, mais, tout bien considéré, on ne peut pas affirmer que les art. 4 et 5 entravent de façon substantielle la capacité du syndicat d'engager des négociations collectives et qu'il s'agisse d'un cas donnant droit à la protection prévue à l'al. 2*d*) de la *Charte*. Toutefois, les dispositions concernant la sous-traitance (par. 6(2) et (4)), la mise en disponibilité (al. 9a), b) et c)) et la supplantation (al. 9d)) entravent le droit de négocier collectivement garanti par l'al. 2*d*). Ces dispositions portent sur des questions d'une importance capitale pour la liberté d'association et entravent de façon substantielle les activités associatives. De plus, elles ne respectent pas le droit à un processus de négociation collective. Même si le gouvernement se trouvait dans une situation d'urgence, les mesures qu'il a adoptées constituent pratiquement une négation du droit garanti par l'al. 2*d*) à un processus de consultation et de négociation menée de bonne foi. [128] [130-132] [134-135]

La violation de l'al. 2*d*) ne peut se justifier au sens de l'article premier de la *Charte*. Même si le gouvernement

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Act's main objective of improving the delivery of health care services and sub-objectives were pressing and substantial, and while it could logically and reasonably be concluded that there was a rational connection between the means adopted by the Act and the objectives, it was not shown that the Act minimally impaired the employees' s. 2(*d*) right of collective bargaining. The record discloses no consideration by the government of whether it could reach its goal by less intrusive measures. A range of options were on the table, but the government presented no evidence as to why this particular solution was chosen and why there was no meaningful consultation with the unions about the range of options open to it. This was an important and significant piece of labour legislation which had the potential to affect the rights of employees dramatically and unusually. Yet, it was adopted rapidly with full knowledge that the unions were strongly opposed to many of the provisions, and without consideration of alternative ways to achieve the government objective, and without explanation of the government's choices. [143-144] [147-149] [156] [158] [160-161]

Part 2 of the Act does not violate s. 15 of the *Charter*. The distinctions made by the Act relate essentially to segregating different sectors of employment, in accordance with the long-standing practice in labour regulation of creating legislation specific to particular segments of the labour force, and do not amount to discrimination under s. 15. The differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, and not to the persons they are. Nor does the evidence disclose that the Act reflects the stereotypical application of group or personal characteristics. [165] [167]

Per Deschamps J. (dissenting in part): The majority's reasons concerning the scope of freedom of association under s. 2(*d*) of the *Charter* in the collective bargaining context are generally agreed with, as is their conclusion that no claim of discrimination contrary to s. 15 of the *Charter* has been established. However, the analysis relating to both the infringement of s. 2(*d*) and the justification of the infringement under s. 1 of the *Charter* is disagreed with. [170]

Given that this case does not involve a claim of underinclusive legislation, but an obligation that the state not interfere in a collective bargaining process, a "substantial interference" standard for determining whether a

a établi que l'objectif principal de la Loi d'améliorer la prestation des services de santé ainsi que les sous-objectifs étaient pressants et réels et même s'il peut être logique et raisonnable de conclure qu'il existe un lien rationnel entre les moyens adoptés dans la Loi et les objectifs, il n'a pas été démontré que la Loi ne portait qu'une atteinte minimale au droit de négociation collective reconnu aux employés par l'al. 2*d*). Selon le dossier, le gouvernement ne s'est pas demandé s'il pourrait atteindre son objectif par des mesures moins attentatoires. Une gamme de solutions lui ont été présentées, mais il n'a offert aucune preuve expliquant pourquoi il a retenu cette solution en particulier ni pourquoi il n'a pas véritablement consulté les syndicats au sujet de la gamme de solutions qui s'offraient à lui. Le projet de loi représentait une importante mesure législative dans le domaine du travail, qui était susceptible d'avoir un effet dramatique et exceptionnel sur les droits des employés. Pourtant le gouvernement l'a rapidement adopté en sachant parfaitement que les syndicats s'opposaient fortement à de nombreuses dispositions de ce projet, sans envisager d'autres moyens qui lui auraient permis d'atteindre son objectif et sans expliquer ses choix. [143-144] [147-149] [156] [158] [160-161]

La partie 2 de la Loi ne va pas à l'encontre de l'art. 15 de la *Charte*. Les distinctions créées par la Loi tiennent essentiellement aux différences qui existent entre les secteurs d'emploi, en raison des pratiques suivies de longue date selon lesquelles la réglementation en matière de travail est établie par des mesures législatives propres à chaque secteur du marché du travail, et elles ne constituent pas de la discrimination au sens de l'art. 15. La différenciation et les effets préjudiciables de la loi envers certains groupes de travailleurs tiennent essentiellement au genre de travail qu'ils exécutent et non à leur personne. La preuve ne révèle pas non plus que la Loi reflète une application stéréotypée de caractéristiques personnelles ou de groupe. [165] [167]

La juge Deschamps (dissidente en partie) : Il y a accord de manière générale quant aux motifs de la majorité au sujet de l'étendue de la liberté d'association garantie par l'al. 2*d*) de la *Charte* en matière de négociation collective. Il est également reconnu que rien ne permet de conclure qu'il y a eu en l'espèce discrimination au sens de l'art. 15 de la *Charte*. Il y a toutefois désaccord quant à l'analyse relative à l'atteinte à l'al. 2*d*) et relative à la justification de l'atteinte selon l'article premier de la *Charte*. [170]

Étant donné que le litige, en l'espèce, porte non pas sur la portée trop limitative de la loi, mais sur l'obligation de l'État de ne pas entraver un processus de négociation collective, il ne convient pas d'imposer la norme

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government measure amounts to an infringement of s. 2(*d*) should not be imposed. Furthermore, since there is no constitutional protection for the substantive outcome of a collective bargaining process, the matter affected is not the threshold issue when a claim is being evaluated under s. 2(*d*). Rather, the primary focus of the inquiry should be whether the legislative measures infringe the ability of workers to act in common in relation to workplace issues. In the present context, a more appropriate test for determining whether s. 2(*d*) has been infringed can be stated as follows: Laws or state actions that prevent or deny meaningful discussion and consultation about significant workplace issues between employees and their employer may interfere with the activity of collective bargaining, as may laws that unilaterally nullify negotiated terms on significant workplace issues in existing collective agreements. The first inquiry is into whether the process of negotiation between employers and employees or their representatives is interfered with in any way. If so, the court should then turn to the second inquiry and consider whether the issues involved are significant. Only interference with significant workplace issues is relevant to s. 2(*d*). [175] [177-178] [180-181]

In this case, the freedom of association of health care employees has been infringed in several instances, because ss. 4, 5, 6(2), 6(4) and 9 of the Act (in conjunction with s. 10) interfere with their right to a process of collective bargaining with the employer. Sections 4 and 5 nullify some existing terms of collective agreements, limit the scope of future negotiations and prevent workers from engaging in associational activities relating to the important matter of transfer and assignment of employees. Sections 6(2) and 6(4) nullify past collective bargaining relating to contracting out, thereby rendering the process nugatory, and preclude future collective bargaining on the issue. These provisions concern a significant issue of employment security, and negotiating such issues is one of the purposes of associational activities in the workplace. Lastly, s. 9 makes collective bargaining over specified aspects of layoff and bumping meaningless and invalidates parts of collective agreements dealing with these significant workplace issues. [186-188] [252]

de l'« entrave substantielle » quand il s'agit de déterminer si une mesure gouvernementale enfreint l'al. 2*d*). De plus, comme le résultat concret obtenu à l'issue d'un processus de négociation collective ne bénéficie d'aucune protection constitutionnelle, la substance du droit n'est pas la première question qu'il faut se poser pour l'évaluation de la demande selon l'al. 2*d*). Il faudrait plutôt vérifier en premier lieu si les mesures législatives entravent la capacité des travailleurs d'agir de concert pour ce qui est des questions liées au milieu de travail. En l'espèce, il est plus approprié, pour déterminer s'il y a eu atteinte à l'al. 2*d*), de se fonder sur une grille d'analyse qui peut être ainsi libellée : Les lois ou les actes de l'État qui empêchent ou interdisent la tenue de véritables discussions et consultations entre employés et employeur au sujet d'importantes questions liées au milieu de travail peuvent interférer dans l'activité de négociation collective, tout comme les lois qui invalident unilatéralement des stipulations négociées à propos d'importantes questions liées au milieu de travail que prévoient des conventions collectives en vigueur. Premièrement, il faut déterminer s'il y a eu entrave de quelque façon que ce soit au processus de négociation entre employeur et employés ou leurs représentants. Dans l'affirmative, le tribunal doit alors passer à la seconde étape et vérifier si les questions en cause sont importantes. Seules les entraves qui concernent des questions importantes dans le contexte des relations du travail sont pertinentes pour l'application de l'al. 2*d*). [175] [177-178] [180-181]

En l'espèce, la Loi constitue à plusieurs égards une atteinte à la liberté d'association des employés du secteur de la santé parce que les art. 4, 5 et 9 et les par. 6(2) et (4) (appliqués conjointement avec l'art. 10) portent atteinte à leur droit à un processus de négociation collective avec l'employeur. Les articles 4 et 5 annulent des stipulations de conventions collectives existantes, limitent la portée des négociations futures et empêchent les travailleurs de se livrer à des activités associatives concernant l'importante question des transferts et des affectations des employés. Les paragraphes 6(2) et (4) de la Loi rendent nulles les négociations collectives antérieures sur la sous-traitance et du même coup en rendent le processus inopérant; ils excluent aussi, pour l'avenir, la négociation collective de cette question. Ils traitent d'une importante question touchant la sécurité d'emploi, et la négociation des questions de cette nature est l'un des objets des activités associatives en milieu de travail. Enfin, l'art. 9 vide de sens la négociation collective de certains aspects de la mise en disponibilité et de la supplantation et invalide certaines parties de conventions collectives portant sur ces importantes questions relatives au milieu de travail. [186-188] [252]

In enacting Part 2 of the Act, the government's objectives were to respond to growing demands on services, to reduce structural barriers to patient care, and to improve planning and accountability, so as to achieve long term sustainability. In addition to these general objectives, the specific impugned provisions were designed to provide a more seamless and flexible health care delivery system and develop more cost-effective and efficient ways to deliver health services in order to improve patient care and reduce costs. The objectives of Part 2 of the Act and of the impugned provisions are important ones. The health care system is under serious strain and is facing a crisis of sustainability. There is little hope that it can survive in its current form. [198-200]

It is clear from the context of these objectives that while the nature of some of the working conditions that are likely to be affected tends to favour a less deferential approach, substantial deference must be shown in determining whether the measures adopted in this case are justified under s. 1, in particular, in light of the crisis of sustainability in the health care sector and the vulnerability of patients. Here, the measures provided for in ss. 4, 5, 6(2), 6(4) and 9 of the Act are rationally connected to the pressing and substantial objectives being pursued and, with the exception of s. 6(4), meet the requirements of minimal impairment and proportionate effects. [222-223] [252]

With respect to minimal impairment, the record shows that the government adopted the impugned measures after considering and rejecting other options that it believed would not meet its objectives. Further, Part 2 of the Act was not aimed directly at the *Charter* rights of the affected employees. Rather, the goal was to respond to growing demands on services, to reduce structural barriers to patient care and to improve planning and accountability so as to achieve long-term sustainability. Section 4 was specifically designed to facilitate the reorganization of health care service delivery by enabling employers to transfer functions or services to another worksite or to another health sector employer within a region. As for s. 5, it relates to the temporary assignment of an employee to another worksite or another employer. Employees do not lose their employment as a result of ss. 4 and 5 and the regulations adopted pursuant to the Act mitigate the impact of these provisions on employees. Under s. 6(2), contracting out is not obligatory; rather, this provision prohibits collective agreement clauses preventing contracting out. Thus, although union density may be lower when work is contracted out, there is still substantial room for all

En adoptant la partie 2 de la Loi, le gouvernement avait pour objectifs de répondre aux besoins croissants en matière de services, de réduire les obstacles structurels qui limitent l'accès aux soins, d'améliorer la planification et d'accroître l'obligation de rendre compte, de façon à assurer la viabilité à long terme du système. En plus de ces objectifs généraux, les dispositions contestées visaient à offrir un système de santé plus cohérent et flexible et à mettre en place des méthodes de travail permettant d'offrir des services de santé à moindre coût et de façon plus efficace, de manière à améliorer les soins aux patients et à réduire les coûts. Les objectifs de la partie 2 de la Loi et des dispositions contestées sont importants. Le système de santé est mis à rude épreuve et traverse une crise de viabilité. Il est peu probable qu'il puisse survivre dans sa forme actuelle. [198-200]

D'après le contexte de ces objectifs, il est clair que, même si la nature de certaines conditions de travail susceptibles d'être touchées milite en faveur d'une approche moins déférente, il faut faire preuve d'une grande déférence lorsqu'il s'agit de déterminer si les mesures adoptées en l'espèce sont justifiées au sens de l'article premier, surtout compte tenu du problème de viabilité que connaît le système de santé et de la vulnérabilité des patients. En l'espèce, il existe un lien rationnel entre les mesures prévues aux art. 4, 5 et 9 et aux par. 6(2) et (4) de la Loi et les objectifs urgents et réels poursuivis et ces dispositions, à l'exception du par. 6(4), satisfont aux exigences d'atteinte minimale et d'effets proportionnés. [222-223] [252]

En ce qui concerne l'atteinte minimale, il ressort du dossier que le gouvernement a adopté les mesures contestées après avoir examiné et rejeté d'autres options qui, à son avis, ne lui permettraient pas d'atteindre ses objectifs. De plus, la partie 2 de la Loi ne visait pas directement les droits que la *Charte* garantit aux employés concernés. L'objectif était plutôt de répondre aux besoins croissants en matière de services, de réduire les obstacles structurels qui limitent l'accès aux soins, d'améliorer la planification et d'accroître l'obligation de rendre compte, de façon à assurer la viabilité à long terme du système. L'article 4 de la Loi visait spécifiquement à faciliter la réorganisation des services de santé en permettant aux employeurs de transférer des fonctions ou services dans un autre lieu de travail ou à un autre employeur du secteur de la santé dans la même région. Quant à l'art. 5, il porte sur l'affectation temporaire de l'employé dans un autre lieu de travail ou chez un autre employeur. Les employés ne perdent pas leur emploi du fait des art. 4 et 5, et le règlement pris en application de la Loi atténue l'impact de ces dispositions sur les employés. Selon le par. 6(2), la sous-traitance n'est pas obligatoire; sont plutôt interdites les clauses de

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employees providing non-clinical services to exercise their right to freedom of association and to engage in a process of collective bargaining, even when certain of those services are contracted out. In the context of the province's health care crisis, removing prohibitions on contracting out in collective agreements furthered the government's objective in ways that alternative responses could not. Moreover, the alternative measures considered by the government were problematic in that many may have directly affected other *Charter* rights. As for s. 9, it impaired the collective bargaining process in respect of layoffs and bumping, but was limited by a time period. It was adopted as a transitional measure. It did not ban bumping or layoff provisions in collective agreements, but only imposed by legislative means attenuated terms for layoffs and bumping in place of those agreed to in the collective bargaining process. Not only was the impact of s. 9(d) on workers minimized by safeguards provided for in s. 5 of the regulations made under the Act, but there is also sufficient evidence that s. 9 enabled the government to meet its objectives of making the health care system more sustainable and improving service to patients in ways that other alternatives would not permit. As with s. 6(2), the history of labour relations in the province strongly suggests that the terms set out in s. 9 could not have been successfully negotiated by health care sector employers and unions. Sections 4, 5, 6(2) and 9 are carefully tailored so as to ensure that the government's objectives are attained while infringing s. 2(*d*) as little as possible. They are also a proportionate response to the crisis of sustainability in health care, striking an appropriate balance between the government's objectives and the freedom of association of employees. [232] [234-236] [238] [240] [245] [247-248]

Section 6(4) fails both the minimal impairment test and the proportionate effects test and is unconstitutional. The government has failed to establish by evidence, inference or common sense that the employers' ability to contract out would be restricted unreasonably by a requirement to consult with the relevant unions

conventions collectives qui empêchent la sous-traitance. Ainsi, bien que la densité syndicale risque d'être plus faible en cas de sous-traitance, la liberté d'association de tous les employés affectés aux services non cliniques est loin d'être compromise et il demeure tout à fait possible de participer au processus de négociation collective, même si certains de ces services sont sous-traités. Dans le cadre de la crise qui sévissait dans le secteur de la santé en Colombie-Britannique, les autres options n'auraient pas, de la même façon que l'élimination des interdictions en matière de sous-traitance figurant dans les conventions collectives, permis au gouvernement d'atteindre son objectif. Au surplus, les autres mesures que le gouvernement avait envisagées étaient problématiques parce que bon nombre d'entre elles auraient pu toucher directement d'autres droits garantis par la *Charte*. Quant à l'art. 9, il entravait le processus de négociation collective des questions relatives à la mise en disponibilité et à la supplantation, mais son application était assujettie à un délai. Il s'agissait d'une mesure transitoire, qui n'interdisait pas l'incorporation de clauses relatives à la supplantation et à la mise en disponibilité dans les conventions collectives. Elle visait plutôt à atténuer les conditions relatives à la mise en disponibilité et à la supplantation en remplaçant celles convenues lors du processus de négociation collective. Non seulement l'impact de l'al. 9d) sur les travailleurs est minimisé par les garanties prévues par l'art. 5 du règlement pris sous le régime de la Loi, mais aussi la preuve justifie qu'on conclue que l'art. 9 de la Loi a permis au gouvernement d'atteindre ses objectifs — accroître la viabilité du système de santé et améliorer les services aux patients — d'une façon que d'autres solutions ne lui auraient pas permis de le faire. Tout comme pour le par. 6(2), l'histoire des relations du travail en Colombie-Britannique tend nettement à indiquer que les conditions prévues à l'art. 9 n'auraient pu être négociées par les employeurs et les syndicats du secteur de la santé. Les articles 4, 5 et 9 et le par. 6(2) ont donc été soigneusement conçus de façon à permettre au gouvernement d'atteindre ses objectifs tout en enfreignant le moins possible l'al. 2*d*). Ils représentent une réponse proportionnée à la crise de viabilité que traversait le secteur de la santé, permettant d'établir un juste équilibre entre les objectifs du gouvernement et la liberté d'association des employés. [232] [234-236] [238] [240] [245] [247-248]

Le paragraphe 6(4) ne satisfait pas aux critères de l'atteinte minimale et de la proportionnalité et est inconstitutionnel. Le gouvernement n'a pas démontré, que ce soit par la preuve, par inférence ou en se fondant sur le bon sens, qu'on limiterait de façon déraisonnable la capacité de l'employeur de sous-traiter en exigeant qu'il

beforehand. While s. 6(4) does not, strictly speaking, prohibit consultations on contracting out, declaring that any clause in a collective agreement providing for consultation is void is an invitation to employers not to consult. Taking consultation, which is an important component of the collective bargaining process, off the table is also a disproportionate measure. The marginal benefits of this provision are outweighed by the deleterious effects of denying consultation to affected unions. [242] [249] [252]

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consulte au préalable les syndicats concernés. Bien que le par. 6(4) n'interdise pas, à proprement parler, la tenue de consultations sur la sous-traitance, en déclarant que les clauses de conventions collectives prévoyant la tenue de consultations sont nulles, on incite les employeurs à ne pas consulter. L'interdiction de tenir des consultations — lesquelles représentent une composante importante du processus de négociation collective — est aussi une mesure disproportionnée. Les effets préjudiciables que cause aux syndicats concernés le refus de consulter l'emportent sur les minces avantages que comporte cette disposition. [242] [249] [252]

Jurisprudence

Citée par la juge en chef McLachlin et le juge LeBel

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Citée par la juge Deschamps (dissidente en partie)

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APPEAL from a judgment of the British Columbia Court of Appeal (Esson, Low and Thackray JJ.A.) (2004), 30 B.C.L.R. (4th) 219, 243 D.L.R. (4th) 175, [2004] 11 W.W.R. 64, 201 B.C.A.C. 255, 328 W.A.C. 255, 120 C.R.R. (2d) 266, [2004] B.C.J. No. 1354 (QL), 2004 BCCA 377, upholding a judgment of Garson J. (2003), 19 B.C.L.R. (4th) 37, 110 C.R.R. (2d) 320, [2003] B.C.J. No. 2107 (QL), 2003 BCSC 1379. Appeal allowed in part, Deschamps J. dissenting in part.

Joseph J. Arvay, *Q.C.*, and *Catherine J. Boies Parker*, for the appellants.

Peter A. Gall, *Q.C.*, *Nitya Iyer* and *Neena Sharma*, for the respondent.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Esson, Low et Thackray) (2004), 30 B.C.L.R. (4th) 219, 243 D.L.R. (4th) 175, [2004] 11 W.W.R. 64, 201 B.C.A.C. 255, 328 W.A.C. 255, 120 C.R.R. (2d) 266, [2004] B.C.J. No. 1354 (QL), 2004 BCCA 377, qui a confirmé un jugement de la juge Garson (2003), 19 B.C.L.R. (4th) 37, 110 C.R.R. (2d) 320, [2003] B.C.J. No. 2107 (QL), 2003 BCSC 1379. Pourvoi accueilli en partie, la juge Deschamps est dissidente en partie.

Joseph J. Arvay, *c.r.*, et *Catherine J. Boies Parker*, pour les appelants.

Peter A. Gall, *c.r.*, *Nitya Iyer* et *Neena Sharma*, pour l'intimée.

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Robin K. Basu and *Shannon Chace-Hall*, for the intervener the Attorney General of Ontario.

Written submissions only by *Gaétan Migneault*, for the intervener the Attorney General of New Brunswick.

Roderick S. Wiltshire, for the intervener the Attorney General of Alberta.

Mario Évangéliste, for the intervener the Confederation of National Trade Unions.

Steven M. Barrett and *Ethan Poskanzer*, for the intervener the Canadian Labour Congress.

Paul J. J. Cavalluzzo and *Fay C. Faraday*, for the intervener Michael J. Fraser on his own behalf and on behalf of United Food and Commercial Workers Union Canada.

John Baigent and *David Yorke*, for the intervener the British Columbia Teachers' Federation.

The judgment of McLachlin C.J. and Bastarache, Binnie, LeBel, Fish and Abella JJ. was delivered by

THE CHIEF JUSTICE AND LEBEL J. —

I. Introduction

A. *Overview*

The appellants challenge the constitutional validity of Part 2 of the *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2 ("Act"), as violative of the *Canadian Charter of Rights and Freedoms* guarantees of freedom of association (s. 2(*d*)) and equality (s. 15).

We conclude that the s. 2(*d*) guarantee of freedom of association protects the capacity of members of labour unions to engage in collective bargaining on workplace issues. While some of the impugned provisions of the Act comply with this guarantee, ss. 6(2), 6(4) and 9 breach it and have not been shown to be justified under s. 1 of the *Charter*. We further conclude that the Act does not

Robin K. Basu et *Shannon Chace-Hall*, pour l'intervenant le procureur général de l'Ontario.

Argumentation écrite seulement par *Gaétan Migneault*, pour l'intervenant le procureur général du Nouveau-Brunswick.

Roderick S. Wiltshire, pour l'intervenant le procureur général de l'Alberta.

Mario Évangéliste, pour l'intervenante la Confédération des syndicats nationaux.

Steven M. Barrett et *Ethan Poskanzer*, pour l'intervenant le Congrès du travail du Canada.

Paul J. J. Cavalluzzo et *Fay C. Faraday*, pour l'intervenant Michael J. Fraser, en son propre nom et au nom de United Food and Commercial Workers Union Canada.

John Baigent et *David Yorke*, pour l'intervenante British Columbia Teachers' Federation.

Version française du jugement de la juge en chef McLachlin et des juges Bastarache, Binnie, LeBel, Fish et Abella rendu par

LA JUGE EN CHEF ET LE JUGE LEBEL —

I. Introduction

A. *Aperçu des faits*

1 Les appelants contestent la constitutionnalité de la partie 2 de la *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, ch. 2 (« Loi »), au motif qu'elle porte atteinte à la liberté d'association (al. 2*d*)) et aux droits à l'égalité (art. 15) garantis par la *Charte canadienne des droits et libertés*.

2 Nous concluons que la liberté d'association garantie par l'al. 2*d*) protège la capacité des syndiqués d'engager des négociations collectives sur des problèmes reliés au milieu de travail. Bien que certaines des dispositions contestées de la Loi respectent cette garantie, les par. 6(2) et (4) et l'art. 9 y portent atteinte et il n'a pas été démontré que cette atteinte est justifiée au sens de l'article premier de

violate the right to equal treatment under s. 15 of the *Charter*. In the result, the appeal is allowed in part.

B. *The Background*

3 This case requires the Court to balance the need for governments to deliver essential social services effectively with the need to recognize the *Charter* rights of employees affected by such legislation, who were working for health and social service employers. The respondent government characterizes the impugned legislation as a crucial element of its response to a pressing health care crisis, necessary and important to the well-being of British Columbians. The appellants, unions and individual workers representing some of the subsectors of the health care sector affected by the legislation, by contrast, see the Act as an affront to the fundamental rights of employees and union members under the *Charter*, which they understand as including a collective right to pursue fundamental workplace goals through collective bargaining in respect of terms of employment.

C. *The Act*

4 The Act was adopted as a response to challenges facing British Columbia's health care system. Demand for health care and the cost of providing needed health care services had been increasing significantly for years. For example, in the period from 1991 to 2001, the growth rate of health care costs in British Columbia was three times that of the provincial economy. As a result, the government of British Columbia found itself struggling to provide health care services to its citizens. The government characterized the state of affairs in 2001 as a "crisis of sustainability" in the health care system (Respondent's Factum, at para. 3).

5 The goals of the Act were to reduce costs and to facilitate the efficient management of the

la *Charte*. Nous concluons de plus que la Loi ne viole pas le droit à l'égalité de traitement prévu à l'art. 15 de la *Charte*. En conséquence, le pourvoi est accueilli en partie.

B. *Contexte*

Dans le présent pourvoi, la Cour est appelée à trouver un juste équilibre entre le devoir des gouvernements de fournir efficacement des services sociaux essentiels et la nécessité de reconnaître les droits garantis par la *Charte* aux employés visés par la Loi, qui travaillaient pour des employeurs du secteur de la santé et des services sociaux. Le gouvernement intimé qualifie la Loi contestée de mesure cruciale qu'il a adoptée pour faire face à une crise pressante dans le secteur de la santé et qui se révèle nécessaire et importante pour le bien-être des Britanno-Colombiens. Pour les appelants — les syndicats et les travailleurs représentant certains des sous-secteurs du secteur de la santé qui sont visés par la Loi — celle-ci va à l'encontre des droits fondamentaux que la *Charte* garantit aux employés et aux syndiqués et qui, à leur avis, englobent le droit collectif de poursuivre des objectifs fondamentaux en milieu de travail par la négociation collective des conditions de travail.

C. *La Loi*

La Loi a été adoptée par suite des difficultés qui pèsent sur le système de santé de la Colombie-Britannique. Les besoins du secteur de la santé et le coût de la prestation des services nécessaires dans ce domaine ont considérablement augmenté depuis des années. Par exemple, au cours de la décennie 1991-2001, les coûts des soins de santé en Colombie-Britannique ont enregistré un taux de croissance trois fois supérieur à celui de l'économie de la province. C'est ainsi que le gouvernement de la Colombie-Britannique peine à fournir des services de santé à ses citoyens. Il a qualifié la situation qui prévalait en 2001 de [TRADUCTION] « crise de viabilité » dans le système de santé (mémoire de l'intimée, par. 3).

La Loi visait à réduire les coûts et à faciliter la gestion efficiente des effectifs du secteur de la

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workforce in the health care sector. Not wishing to decrease employees' wages, the government attempted to achieve these goals in more sustainable ways. According to the government, the Act was designed in particular to focus on permitting health care employers to reorganize the administration of the labour force and on making operational changes to enhance management's ability to restructure service delivery (see British Columbia, *Debates of the Legislative Assembly*, vol. 2, No. 28, 2nd Sess., 37th Parl., January 25, 2002, at p. 865).

santé. Ne voulant pas diminuer le salaire des travailleurs, le gouvernement a cherché à réaliser ces objectifs au moyen de solutions plus durables. Selon le gouvernement, la Loi voulait particulièrement permettre aux employeurs du secteur de la santé de réorganiser l'administration des effectifs et apporter des changements opérationnels afin que les gestionnaires disposent de plus de moyens pour restructurer la prestation des services (voir Colombie-Britannique, *Debates of the Legislative Assembly*, vol. 2, nº 28, 2e sess., 37e lég., 25 janvier 2002, p. 865).

The Act was quickly passed. It came into force three days after receiving a first reading as Bill 29 before the British Columbia legislature.

6 La Loi fut rapidement adoptée. Elle est entrée en vigueur trois jours après avoir franchi l'étape de la première lecture comme projet de loi 29 devant l'Assemblée législative de la Colombie-Britannique.

There was no meaningful consultation with unions before it became law. The government was aware that some of the areas affected by Bill 29 were of great concern to the unions and had expressed a willingness to consult. However, in the end, consultation was minimal. A few meetings were held between representatives of the unions and the government on general issues relating to health care. These did not deal specifically with Bill 29 and the changes that it proposed. Union representatives expressed their desire to be further consulted. The Minister of Health Services telephoned a union representative 20 minutes before Bill 29 was introduced in the legislative assembly to inform the union that the government would be introducing legislation dealing with employment security and other provisions of existing collective agreements. This was the only consultation with unions before the Act was passed (Appellants' Record, at p. 1076).

7 Aucune véritable consultation des syndicats n'est intervenue avant que le projet devienne loi. Le gouvernement savait que les syndicats accordaient beaucoup d'importance à certains domaines touchés par le projet de loi 29 et s'est déclaré disposé à consulter. Toutefois, la consultation est restée en fin de compte minimale. Quelques rencontres ont eu lieu entre les représentants des syndicats et ceux du gouvernement sur des questions générales se rattachant aux soins de santé. Celles-ci ne portaient pas spécifiquement sur le projet de loi 29 et les changements qui y étaient proposés. Les représentants syndicaux ont exprimé le désir d'être consultés davantage. Le ministre des Services de santé a téléphoné à un représentant syndical 20 minutes avant la présentation du projet de loi 29 devant l'assemblée législative pour informer le syndicat que le gouvernement déposait un texte de loi touchant à la sécurité d'emploi et à d'autres clauses de conventions collectives existantes. C'est à cela que se résume la consultation des syndicats avant l'adoption de la Loi (dossier des appelants, p. 1076).

In British Columbia, the collective bargaining structure in the health services is sectoral. Thus, the Act affects labour relations between "health sector employers" and their unionized employees. A "health sector employer", as defined under the Act, is a member of the Health Employers Association of British Columbia ("HEABC") established under

8 En Colombie-Britannique, la structure des négociations collectives dans les services de santé est sectorielle. Ainsi, la Loi touche aux relations du travail entre les « employeurs du secteur de la santé » et leurs employés syndiqués. Selon la définition donnée dans la Loi, l'« employeur du secteur de la santé » s'entend de tout membre de la

s. 6 of the *Public Sector Employers Act*, R.S.B.C. 1996, c. 384, and whose employees are unionized (s. 3 of the Act). The HEABC is an employers' association accredited to act as the representative of its members in the bargaining process with health sector employees. Members of the HEABC are hospitals and other employers designated by regulation, including employers in the health sector receiving a substantial amount of funding from the Ministry of Health (Appellants' Record, at p. 212). Therefore, while the Act applies mainly to public sector employers, it also applies to some private sector employers.

9 The appellants in the present case are unions and members of the unions representing the nurses, facilities or community subsectors — groups affected by the legislation. Although they were affected by the legislation, other groups like residents and paramedical professionals did not join the litigation.

10 Only Part 2 of the Act is at issue in the current appeal (see Appendix). It introduced changes to transfers and multi-worksite assignment rights (ss. 4 and 5), contracting out (s. 6), the status of employees under contracting-out arrangements (s. 6), job security programs (ss. 7 and 8), and layoffs and bumping rights (s. 9).

11 Part 2 gave health care employers greater flexibility to organize their relations with their employees as they see fit, and in some cases, to do so in ways that would not have been permissible under existing collective agreements and without adhering to requirements of consultation and notice that would otherwise obtain. It invalidated important provisions of collective agreements then in force, and effectively precluded meaningful collective bargaining on a number of specific issues. Section 10 invalidated any part of a collective agreement, past or future, which was inconsistent with Part 2, and any collective agreement purporting to modify these restrictions. In the words of the Act, s. 10: "Part [2] prevails over collective

Health Employers Association of British Columbia (« HEABC ») qui est constituée en vertu de l'art. 6 de la *Public Sector Employers Act*, R.S.B.C. 1996, ch. 384, et dont les employés sont syndiqués (art. 3 de la Loi). La HEABC constitue une association d'employeurs accréditée pour représenter ses membres dans les négociations avec les employés du secteur de la santé. Appartiennent à la HEABC les hôpitaux et d'autres employeurs désignés par règlement, notamment les employeurs du secteur de la santé qui reçoivent des fonds importants du ministère de la Santé (dossier des appelants, p. 212). En conséquence, bien que la Loi s'applique principalement aux employeurs du secteur public, elle vise aussi des employeurs du secteur privé.

Les appelants en l'espèce sont des syndicats et des membres des syndicats représentant le sous-secteur des infirmiers, celui des installations ou le sous-secteur communautaire, qui sont des groupes touchés par la Loi. D'autres groupes comme les médecins résidents et les employés des services paramédicaux, bien qu'également touchés par la Loi, n'ont pas participé au recours.

Seule la partie 2 de la Loi est en cause en l'espèce (voir l'annexe). Elle modifie les droits liés aux transferts et affectations dans différents lieux de travail (art. 4 et 5), la sous-traitance (art. 6), le statut des employés contractuels (art. 6), les programmes de sécurité d'emploi (art. 7 et 8), les droits de mise en disponibilité et de supplantation (art. 9).

La partie 2 accorde aux employeurs du secteur de la santé une plus grande latitude pour aménager à leur gré leurs relations avec leurs employés et, dans certains cas, pour procéder d'une manière que les conventions collectives existantes n'auraient pas autorisée, et ce, sans se conformer aux exigences de consultation et de notification qui auraient été normalement applicables. Elle a invalidé d'importantes dispositions des conventions collectives alors en vigueur et a effectivement interdit toute véritable négociation collective sur certaines questions. L'article 10 invalidait toute partie d'une convention collective, présente ou future, incompatible avec la partie 2, et toute convention collective visant à modifier ces restrictions. La Loi

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agreements". It is not open to the employees (or the employer) to contract out of Part 2 or to rely on a collective agreement inconsistent with Part 2.

The details of the legislation and its practical ramifications for employees and their unions will be considered in greater detail later in these reasons. It suffices to state at this point that while some of the changes were relatively innocuous administrative changes, others had profound effects on the employees and their ability to negotiate workplace matters of great concern to them.

II. Judicial History

Neither the trial court nor the British Columbia Court of Appeal was willing to recognize a right to collective bargaining under s. 2(*d*) of the *Charter*, although the Court of Appeal acknowledged that the Supreme Court of Canada had opened the door to the recognition of such a right. In the result, the Act was held to be constitutional under ss. 2(*d*) and 15.

The plaintiffs argued at trial that the impugned legislation violated several constitutional rights guaranteed under the *Charter*: freedom of association (under s. 2(*d*)), life, liberty and security of the person (under s. 7), and equality (under s. 15). The s. 7 argument was not pursued on subsequent appeals.

A. *British Columbia Supreme Court* (2003), 19 B.C.L.R. (4th) 37, 2003 BCSC 1379

The trial judge, Garson J., dismissed the plaintiffs' freedom of association claim on the ground that collective bargaining was not an activity recognized by the Supreme Court of Canada as falling within the scope of s. 2(*d*) of the *Charter*. Indeed, she noted that the Supreme Court's jurisprudence consistently and explicitly stated that the ability to bargain collectively was not a *Charter*-protected activity. In her opinion, the plaintiffs had not proved

(art. 10) dispose [TRADUCTION] : « La [. . .] partie [2] l'emporte sur les conventions collectives ». Il n'est pas loisible aux employés (ou à l'employeur) de se soustraire à l'application de la partie 2 ou d'invoquer une convention collective qui lui est incompatible.

12 Nous examinerons plus en détail plus loin dans les présents motifs les particularités de la Loi et sa portée pratique pour les employés et leurs syndicats. À ce stade, il suffit de souligner que, si certaines des modifications se résument à des changements administratifs relativement inoffensifs, d'autres ont une profonde incidence sur les employés et leur capacité de négocier des problèmes de milieu de travail de grande importance pour eux.

II. Historique judiciaire

13 Ni le tribunal de première instance ni la Cour d'appel de la Colombie-Britannique n'étaient disposés à reconnaître que l'al. 2*d*) de la *Charte* garantit le droit de négociation collective, bien que la Cour d'appel ait admis que la Cour suprême du Canada a ouvert la porte à la reconnaissance d'un tel droit. La Loi a donc été jugée constitutionnelle selon l'al. 2*d*) et l'art. 15.

14 Les demandeurs ont soutenu au procès que la loi contestée porte atteinte à plusieurs droits constitutionnels garantis par la *Charte* : la liberté d'association (al. 2*d*)), le droit à la vie, à la liberté et à la sécurité de sa personne (art. 7) et le droit à l'égalité (art. 15). L'argument fondé sur l'art. 7 n'a pas été invoqué en appel.

A. *Cour suprême de la Colombie-Britannique* (2003), 19 B.C.L.R. (4th) 37, 2003 BCSC 1379

15 La juge Garson a rejeté l'argument fondé sur la liberté d'association qu'ont fait valoir les demandeurs, au motif que la négociation collective ne constitue pas une activité que la Cour suprême du Canada considère comme visée par l'al. 2*d*) de la *Charte*. En fait, elle a affirmé que la jurisprudence de la Cour suprême indique de façon constante et claire que la capacité de négocier collectivement n'est pas une activité protégée par la *Charte*. À son

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that the law targeted associational conduct because of its concerted nature.

16 The trial judge also dismissed the plaintiffs' claim under the equality provisions in s. 15 of the *Charter.* The plaintiffs argued that the Act subjected them to differential treatment in a manner affecting their dignity and personhood, based on overlapping grounds of sex and being workers who work in "women's jobs" (para. 154). The trial judge, applying *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, held that there was no violation of s. 15. First, the Act did not distinguish between the plaintiffs and others in appropriate comparator groups on the basis of personal characteristics; the distinctions made were based on the claimants' sector of employment, not their personal characteristics. Second, any adverse effects of the impugned law on the claimants did not amount to differential treatment as required for a s. 15 violation; "the fact that this group is predominantly female does not constitutionally shield it from governmental action that may adversely affect them without evidence that it is being subject to differential treatment on the basis of s. 15 characteristics" (para. 174). Third, the Act did not discriminate on the basis of an enumerated or analogous ground. In making this finding, the trial judge characterized the ground of discrimination primarily in terms of occupational status as health care workers, although she explicitly acknowledged that health care workers were more predominantly female than other groups of unionized workers in British Columbia and that their work continued to be considered "women's work" (para. 181). Finally, in the opinion of the trial judge, any adverse treatment imposed by the Act did not affect the dignity of the claimants, as required for a violation of s. 15 (para. 189).

avis, les demandeurs n'avaient pas prouvé que la loi visait une activité collective en raison même de sa nature concertée.

La juge de première instance a également rejeté les prétentions des demandeurs fondées sur les droits à l'égalité garantis à l'art. 15 de la *Charte*. Selon eux, la Loi leur impose un traitement différent, d'une manière qui porte atteinte à leur dignité et leur identité individuelle, qui découle d'un chevauchement de motifs fondés sur le sexe et sur le fait d'exercer un emploi [TRADUCTION] « occupé par des femmes » (par. 154). Appliquant *Law c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 R.C.S. 497, la juge de première instance a conclu à l'absence de violation de l'art. 15. Premièrement, la Loi ne fait aucune distinction entre les demandeurs et d'autres employés de groupes de comparaison appropriés fondée sur leurs caractéristiques personnelles; les distinctions restaient fonction du secteur d'emploi des demandeurs, et non de leurs caractéristiques personnelles. Deuxièmement, les effets préjudiciables de la loi contestée sur les demandeurs ne constituent pas la différence de traitement nécessaire pour établir une contravention à l'art. 15; [TRADUCTION] « le fait que ce groupe soit à prédominance féminine ne lui assure pas une protection constitutionnelle contre les mesures gouvernementales susceptibles de lui porter préjudice, sans la preuve qu'il fait l'objet d'un traitement différent fondé sur les caractéristiques énumérées à l'art. 15 » (par. 174). Troisièmement, la Loi n'établit pas une discrimination fondée sur un motif énuméré ou analogue. En concluant ainsi, la juge de première instance a adopté une qualification de motif de discrimination fondée principalement sur le statut professionnel des travailleurs de la santé, bien qu'elle ait expressément reconnu que le secteur visé ait comporté une proportion nettement plus forte de femmes que d'autres groupes d'employés syndiqués en Colombie-Britannique et que leur travail continuait d'être considéré comme [TRADUCTION] « un travail de femmes » (par. 181). Enfin, elle estime que le traitement préjudiciable imposé par la Loi ne porte pas atteinte à la dignité des demandeurs, comme l'exige la preuve d'une contravention à l'art. 15 (par. 189).

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B. *British Columbia Court of Appeal* (2004), 30 B.C.L.R. (4th) 219, 2004 BCCA 377

The Court of Appeal (*per* Thackray J.A., Esson and Low JJ.A. concurring) concluded that there was no violation of s. 2(*d*) or s. 15 of the *Charter* and dismissed the appeal. After engaging in a detailed review of the Supreme Court's s. 2(*d*) jurisprudence, Thackray J.A. concluded that the current state of authority was insufficient to sustain the conclusion that a right of collective bargaining was protected under s. 2(*d*). He acknowledged that the decisions of the Supreme Court, especially in *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94, left room to recognize a right to collective bargaining in future cases. However, his view was that the appropriate forum for recognizing a right to collective bargaining under s. 2(*d*) of the *Charter* was the Supreme Court of Canada, not lower courts (para. 106).

Having held that the impugned legislation did not violate s. 2(*d*) of the *Charter*, Thackray J.A. went on to consider whether the legislation was also valid under the equality rights provisions in s. 15. He found no error in the analysis of the trial judge. Like the trial judge, he inclined to the view that any disadvantages imposed on health care workers under the Act related to their role as health care workers under a particular scheme of labour relations, and did not involve their personal characteristics, the enumerated or analogous grounds, or their dignity. Even though the appellants had legitimate complaints about the effects of the Act on their lives and work, these adverse effects were outside the scope of s. 15 of the *Charter.*

III. Analysis

A. *Section 2(d) of the Charter*

At issue in the present appeal is whether the guarantee of freedom of association in s. 2(*d*) of the *Charter* protects collective bargaining rights. We conclude that s. 2(*d*) of the *Charter* protects the

B. *Cour d'appel de la Colombie-Britannique* (2004), 30 B.C.L.R. (4th) 219, 2004 BCCA 377

17 La Cour d'appel (motifs du juge Thackray, auxquels souscrivent les juges Esson et Low), concluant à l'absence de violation de l'al. 2*d*) et de l'art. 15 de la *Charte*, a rejeté l'appel. Après un examen détaillé de la jurisprudence de la Cour suprême sur l'al. 2*d*), le juge Thackray a jugé que la jurisprudence actuelle ne permettait pas de soutenir la prétention que l'al. 2*d*) protégeât un droit à la négociation collective. Il a reconnu que la jurisprudence de la Cour suprême, particulièrement *Dunmore c. Ontario (Procureur général)*, [2001] 3 R.C.S. 1016, 2001 CSC 94, laissait des ouvertures à une reconnaissance d'un droit à la négociation collective dans des affaires ultérieures. Il a toutefois estimé qu'il appartenait à la Cour suprême du Canada, et non aux tribunaux d'instance inférieure, de sanctionner une telle reconnaissance d'un droit à la négociation collective en vertu de l'al. 2*d*) de la *Charte* (par. 106).

18 Après avoir statué que la loi contestée ne contrevenait pas à l'al. 2*d*) de la *Charte*, le juge Thackray s'est ensuite interrogé sur sa validité au regard des dispositions sur les droits à l'égalité prévues à l'art. 15. Il n'a relevé aucune erreur dans l'analyse de la juge de première instance à ce propos. Tout comme la juge de première instance, il est porté à croire que les désavantages imposés aux travailleurs de la santé en application de la Loi se rattachent à leur rôle en tant que travailleurs de la santé dans le cadre d'un régime précis des relations du travail, sans mettre en jeu leurs caractéristiques personnelles, ni les motifs énumérés ou analogues de discrimination, ni leur dignité. Malgré la légitimité des plaintes des appelants au sujet des effets de la Loi sur leur vie et leur travail, ces effets préjudiciables ne relèvent pas du champ d'application de l'art. 15 de la *Charte*.

III. Analyse

A. *L'alinéa 2d) de la Charte*

19 Il s'agit en l'espèce de déterminer si la liberté d'association garantie par l'al. 2*d*) de la *Charte* protège le droit de négociation collective. Nous concluons que l'al. 2*d*) de la *Charte* protège la

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capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of "collective bargaining", as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime. What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals. If the government substantially interferes with that right, it violates s. 2(*d*) of the *Charter*: *Dunmore*. We note that the present case does not concern the right to strike, which was considered in earlier litigation on the scope of the guarantee of freedom of association.

capacité des syndiqués de participer en groupe à la négociation collective des questions fondamentales liées au milieu de travail. Cette protection ne couvre pas tous les aspects de la « négociation collective » au sens où ce terme est employé dans les régimes légaux des relations du travail applicables dans tout le pays. Elle ne garantit pas non plus un résultat particulier d'un différend en matière de relations du travail ou l'accès à un régime légal précis. Elle protège simplement le droit des employés de s'associer dans le cadre d'une action collective visant à atteindre des objectifs liés au milieu de travail. Si le gouvernement entrave de façon substantielle l'exercice de ce droit, il contrevient à l'al. 2*d*) de la *Charte* : *Dunmore*. Nous constatons que le pourvoi ne concerne pas le droit de grève, dont il a été question dans des litiges antérieurs sur l'étendue du droit à la liberté d'association.

20 Our conclusion that s. 2(*d*) of the *Charter* protects a process of collective bargaining rests on four propositions. First, a review of the s. 2(*d*) jurisprudence of this Court reveals that the reasons evoked in the past for holding that the guarantee of freedom of association does not extend to collective bargaining can no longer stand. Second, an interpretation of s. 2(*d*) that precludes collective bargaining from its ambit is inconsistent with Canada's historic recognition of the importance of collective bargaining to freedom of association. Third, collective bargaining is an integral component of freedom of association in international law, which may inform the interpretation of *Charter* guarantees. Finally, interpreting s. 2(*d*) as including a right to collective bargaining is consistent with, and indeed, promotes, other *Charter* rights, freedoms and values.

Notre conclusion que l'al. 2*d*) de la *Charte* protège le processus de négociation collective repose sur quatre prémisses. Premièrement, l'examen de la jurisprudence de la Cour sur l'al. 2*d*) révèle que les raisons invoquées par le passé pour expliquer que le droit à la liberté d'association ne s'étendait pas à la négociation collective ne valent plus. Deuxièmement, une interprétation de l'al. 2*d*) qui exclut la négociation collective de son champ d'application ne se concilie pas avec le fait que le Canada a toujours reconnu l'importance de ce processus en matière de liberté d'association. Troisièmement, la négociation collective fait partie intégrante de la liberté d'association selon le droit international, qui peut inspirer l'interprétation des garanties reconnues par la *Charte*. Enfin, interpréter l'al. 2*d*) comme comprenant le droit de négociation collective s'intègre dans la logique, voire la défense, des autres droits, libertés et valeurs consacrés par la *Charte*.

21 In the sections that follow, we discuss each of these propositions. We then elaborate on the scope of the protection for collective bargaining found in s. 2(*d*) of the *Charter*. Ultimately, in applying our analysis to the facts of the case, we find provisions of the Act to be in violation of s. 2(*d*) and not justified by s. 1 of the *Charter*.

Nous examinons ci-dessous chacune de ces prémisses et nous précisons ensuite la portée de la protection accordée par l'al. 2*d*) de la *Charte* à la négociation collective. Enfin, appliquant notre analyse aux faits de l'espèce, nous concluons que certaines des dispositions de la Loi portent atteinte à l'al. 2*d*) sans être justifiées au sens de l'article premier de la *Charte*.

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(1) Reasons for Excluding Collective Bargaining from Section 2(*d*) in the Past Require Reconsideration

In earlier decisions, the majority view in the Supreme Court of Canada was that the guarantee of freedom of association did not extend to collective bargaining. *Dunmore* opened the door to reconsideration of that view. We conclude that the grounds advanced in the earlier decisions for the exclusion of collective bargaining from the *Charter*'s protection of freedom of association do not withstand principled scrutiny and should be rejected.

The first cases dealing squarely with the issue of whether collective bargaining is protected under s. 2(*d*) of the *Charter* were a group of three concurrently released appeals known as the labour "trilogy": *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 ("*Alberta Reference*"), *PSAC v. Canada*, [1987] 1 S.C.R. 424, and *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460. The main reasons were delivered in the *Alberta Reference*, a case involving compulsory arbitration to resolve impasses in collective bargaining and a prohibition on strikes. Of the six justices participating in the case, three held that collective bargaining was not protected by s. 2(*d*); four held that strike activity was not protected. The next case to deal with the issue was *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 ("*PIPSC*"), in which the government of the Northwest Territories refused to enact legislation required in order for the PIPSC union to bargain collectively on behalf of nurses. A majority of four held that collective bargaining was not protected by s. 2(*d*).

In these cases, different members of the majorities put forth five main reasons in support of the contention that collective bargaining does not fall within s. 2(*d*)'s protection.

(1) Nécessité de réexaminer les raisons qui avaient justifié l'exclusion de la négociation collective de l'application de l'al. 2*d*)

22 Dans des arrêts antérieurs, la Cour suprême du Canada, à la majorité, était d'avis que le droit à la liberté d'association ne s'étendait pas aux négociations collectives. L'arrêt *Dunmore* a ouvert la porte au réexamen de cet avis. Nous concluons que les motifs avancés dans les arrêts précédents pour exclure les négociations collectives de la protection accordée par la *Charte* à la liberté d'association ne résistent pas à un examen fondé sur les principes pertinents et qu'ils devraient être écartés.

23 Les premiers arrêts traitant directement de la question de savoir si la négociation collective est protégée par l'al. 2*d*) de la *Charte* formaient un groupe de trois pourvois rendus simultanément appelé la « trilogie » en droit du travail : *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313 (« *Renvoi relatif à l'Alberta* »), *AFPC c. Canada*, [1987] 1 R.C.S. 424, et *SDGMR c. Saskatchewan*, [1987] 1 R.C.S. 460. Les motifs principaux figurent dans le *Renvoi relatif à l'Alberta*, où on traite d'un mécanisme d'arbitrage obligatoire pour résoudre les impasses dans la négociation collective et de l'interdiction de la grève. Sur les six juges qui ont participé à la décision, trois ont conclu que la négociation collective n'était pas protégée par l'al. 2*d*); quatre ont conclu que la grève n'était pas protégée. Dans un arrêt postérieur traitant de la question, *Institut professionnel de la Fonction publique du Canada c. Territoires du Nord-Ouest (Commissaire)*, [1990] 2 R.C.S. 367 (« *IPFPC* »), le gouvernement des Territoires du Nord-Ouest a refusé d'adopter une loi habilitant le syndicat IPFPC à négocier collectivement au nom des infirmiers. Les quatre juges formant la majorité ont conclu que l'al. 2*d*) ne protégeait pas la négociation collective.

24 Dans ces arrêts, les différents juges composant les formations majoritaires ont exposé cinq principaux motifs au soutien de la thèse de l'exclusion de la négociation collective de la protection de l'al. 2*d*).

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25 The first suggested reason was that the rights to strike and to bargain collectively are "modern rights" created by legislation, not "fundamental freedoms" (*Alberta Reference*, *per* Le Dain J., writing on behalf of himself, Beetz and La Forest JJ., at p. 391). The difficulty with this argument is that it fails to recognize the history of labour relations in Canada. As developed more thoroughly in the next section of these reasons, the fundamental importance of collective bargaining to labour relations was the very reason for its incorporation into statute. Legislatures throughout Canada have historically viewed collective bargaining rights as sufficiently important to immunize them from potential interference. The statutes they passed did not create the right to bargain collectively. Rather, they afforded it protection. There is nothing in the statutory entrenchment of collective bargaining that detracts from its fundamental nature.

Selon le premier motif avancé, les droits de faire la grève et de négocier collectivement sont des « droits contemporains » créés par voie législative, et non des « libertés fondamentales » (*Renvoi relatif à l'Alberta*, motifs du juge Le Dain, en son nom et au nom des juges Beetz et La Forest, p. 391). Cet argument pose problème car il ne tient pas compte de l'histoire des relations du travail au Canada. Comme nous l'expliquerons de manière plus approfondie dans la prochaine section des présents motifs, l'importance fondamentale que revêt la négociation collective dans les relations du travail constitue la raison même de son incorporation dans une loi. Les législatures dans l'ensemble du territoire canadien ont de tout temps considéré le droit de négociation collective comme suffisamment important pour le mettre à l'abri d'une atteinte potentielle. Les lois qu'elles ont adoptées n'ont pas créé le droit de négocier collectivement. Elles lui ont plutôt conféré une protection. Rien dans la consécration législative de la négociation collective n'altère sa nature fondamentale.

26 The second suggested reason was that recognition of a right to collective bargaining would go against the principle of judicial restraint in interfering with government regulation of labour relations (*Alberta Reference*, at p. 391). The regulation of labour relations, it is suggested, involves policy decisions best left to government. This argument again fails to recognize the fact that worker organizations historically had the right to bargain collectively outside statutory regimes and takes an overbroad view of judicial deference. It may well be appropriate for judges to defer to legislatures on policy matters expressed in particular laws. But to declare a judicial "no go" zone for an entire right on the ground that it may involve the courts in policy matters is to push deference too far. Policy itself should reflect *Charter* rights and values.

Selon le deuxième motif invoqué, la reconnaissance du droit de négociation collective violerait le principe de retenue judiciaire parce qu'elle entraverait la réglementation gouvernementale des relations du travail (*Renvoi relatif à l'Alberta*, p. 391). La réglementation des relations du travail, soutient-on, implique des décisions de politique générale qui relèvent davantage du gouvernement. Là encore, cet argument oublie que le droit de négociation collective est traditionnellement reconnu aux organisations de travailleurs, même s'il ne s'inscrit pas dans un régime légal, et il attribue une portée excessive au principe de la déférence judiciaire. Certes, il se peut fort bien que les juges aient raison de s'en remettre aux législateurs pour résoudre les questions de politique générale énoncées dans des lois particulières. Cependant, déclarer que tous les aspects d'un droit demeurent à l'abri des interventions judiciaires, au motif que les tribunaux pourraient être appelés à se prononcer sur ces questions de politique générale, pousse trop loin le principe de la déférence judiciaire. La politique générale exprimée par le législateur doit elle-même refléter les droits et valeurs consacrés par la *Charte*.

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The third suggested reason for excluding collective bargaining from s. 2(*d*) of the *Charter* rested on the view that freedom of association protects only those activities performable by an individual (see *PIPSC*, *per* L'Heureux-Dubé and Sopinka JJ.). This view arises from a passage in which Sopinka J. set out the scope of s. 2(*d*) in four oft-quoted propositions (at pp. 402-3): (1) s. 2(*d*) protects the freedom to establish, belong to and maintain an association; (2) it does not protect an activity solely on the ground that the activity is foundational or essential to the association; (3) it protects the exercise in association of the constitutional rights and freedoms of individuals; and (4) it protects the exercise in association of the lawful rights of individuals. If this framework and the premise that s. 2(*d*) covers only activities performable by an individual is accepted, it follows that collective bargaining cannot attract the protection of s. 2(*d*) because collective bargaining cannot be performed by an individual.

27 Le troisième motif utilisé pour exclure la négociation collective de la protection accordée par l'al. 2*d*) de la *Charte* repose sur l'idée que la liberté d'association protège uniquement les activités qui peuvent être accomplies individuellement (voir *IPFPC*, motifs des juges L'Heureux-Dubé et Sopinka). Cette opinion est tirée d'un passage dans lequel le juge Sopinka définit la portée de l'al. 2*d*) en énonçant quatre propositions maintes fois citées (p. 402-403) : (1) l'alinéa 2*d*) protège la liberté de constituer une association, de la maintenir et d'y appartenir; (2) il ne protège pas une activité uniquement parce qu'il s'agit d'une activité essentielle à l'existence de l'association; (3) il protège l'exercice collectif des droits et libertés individuels consacrés par la Constitution; (4) il protège l'exercice collectif des droits légitimes des personnes. Si l'on accepte ce cadre et le postulat que l'al. 2*d*) ne couvre que les activités pouvant être exercées individuellement, il s'ensuit que la négociation collective ne saurait bénéficier de la protection de l'al. 2*d*), car un individu ne peut négocier collectivement.

This narrow focus on individual activities has been overtaken by *Dunmore*, where this Court rejected the notion that freedom of association applies only to activities capable of performance by individuals. Bastarache J. held that "[t]o limit s. 2(*d*) to activities that are performable by individuals would . . . render futile these fundamental initiatives" (para. 16), since, as Dickson C.J. noted in his dissent in the *Alberta Reference*, some collective activities may, by their very nature, be incapable of being performed by an individual. Bastarache J. provided the example of expressing a majority viewpoint as being an inherently collective activity without an individual analogue (para. 16). He concluded that:

28 Cette conception restreinte de la liberté d'association, qui n'inclut que les activités individuelles, a été rendue désuète par l'arrêt *Dunmore*. Notre Cour a alors rejeté le principe que la liberté d'association ne s'applique qu'aux activités pouvant être accomplies individuellement. Le juge Bastarache a reconnu que « limiter l'application de l'al. 2*d*) aux activités qui peuvent être accomplies individuellement viderait de leur sens ces actes fondamentaux » (par. 16) puisque, comme le souligne en dissidence le juge en chef Dickson dans le *Renvoi relatif à l'Alberta*, certaines activités collectives ne pourraient, en raison de leur nature même, être accomplies individuellement. Le juge Bastarache cite en exemple le fait d'exprimer un point de vue majoritaire, activité purement collective qui n'a pas de pendant individuel (par. 16). Il conclut :

> As I see it, the very notion of "association" recognizes the qualitative differences between individuals and collectivities. It recognizes that the press differs qualitatively from the journalist, the language community from the language speaker, the union from the worker. In all cases, the community assumes a life of its own and develops needs and priorities that differ from those

> À mon avis, la notion même d'« association » reconnaît les différences qualitatives entre individu et collectivité. Elle reconnaît que la presse diffère qualitativement du journaliste, la collectivité linguistique du locuteur, le syndicat du travailleur. Dans tous les cas, la collectivité a une existence propre et ses besoins et priorités diffèrent de ceux de ses membres individuels

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of its individual members. . . . [B]ecause trade unions develop needs and priorities that are distinct from those of their members individually, they cannot function if the law protects exclusively what might be "the lawful activities of individuals". Rather, 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. This is not to say that all such activities are protected by s. 2(*d*), nor that all collectivities are worthy of constitutional protection; indeed, this Court has repeatedly excluded the right to strike and collectively bargain from the protected ambit of s. 2(*d*) . . . . It is to say, simply, that certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning. [Emphasis added; para. 17.]

[. . .] [É]tant donné que les besoins et priorités des syndicats tendent à se distinguer de ceux de leurs membres individuels, ils ne peuvent fonctionner si la loi protège exclusivement ce qui pourrait être des « activités licites d'un individu ». La loi doit plutôt reconnaître que certaines activités syndicales — les revendications collectives auprès de l'employeur, l'adoption d'une plate-forme politique majoritaire, le regroupement en fédérations syndicales — peuvent être au cœur de la liberté d'association même si elles ne peuvent exister au niveau individuel. Ceci ne veut pas dire que toutes ces activités sont protégées par l'al. 2*d*), ni que toutes les collectivités ont droit à la protection constitutionnelle; en fait, notre Cour a exclu plusieurs fois le droit de grève et de négociation collective de la protection de l'al. 2*d*) [. . .] Cela veut dire simplement que certaines activités collectives doivent être reconnues pour que la liberté de constituer et de maintenir une association ait un sens. [Nous soulignons; par. 17.]

29 The fourth reason advanced for excluding collective bargaining rights from s. 2(*d*) was the suggestion of L'Heureux-Dubé J. that s. 2(*d*) was not intended to protect the "objects" or goals of an association (see *PIPSC*, at pp. 391-93). This argument overlooks the fact that it will always be possible to characterize the pursuit of a particular activity in concert with others as the "object" of that association. Recasting collective bargaining as an "object" begs the question of whether or not the activity is worthy of constitutional protection. L'Heureux-Dubé J.'s underlying concern — that the *Charter* not be used to protect the substantive outcomes of any and all associations — is a valid one. However, "collective bargaining" as a procedure has always been distinguishable from its final outcomes (e.g., the results of the bargaining process, which may be reflected in a collective agreement). Professor Bora Laskin (as he then was) aptly described collective bargaining over 60 years ago as follows:

Le quatrième motif avancé pour exclure le droit de négociation collective de la protection de l'al. 2*d*) est l'argument de la juge L'Heureux-Dubé selon lequel l'al. 2*d*) n'a pas été conçu pour protéger les « objectifs » ou les buts d'une association (voir *IPFPC*, p. 391-393). Cet argument ne tient pas compte du fait qu'il sera toujours possible d'affirmer que la poursuite concertée d'une activité constitue l'« objectif » de cette association. La redéfinition de la négociation collective pour en faire un « objectif » élude la question de déterminer si cette activité mérite d'être protégée par la Constitution. La préoccupation sous-jacente de la juge L'Heureux-Dubé — éviter l'utilisation de la *Charte* pour protéger les résultats concrets de toute activité associative — reste tout à fait légitime. Toutefois, on a toujours distingué entre la « négociation collective » en tant que processus et son issue (p. ex., les résultats du processus de négociation, qui peuvent être consignés dans la convention collective). Il y a plus de 60 ans, le professeur Bora Laskin (plus tard Juge en chef du Canada) définissait avec justesse la négociation collective :

Collective bargaining is the procedure through which the views of the workers are made known, expressed through representatives chosen by them, not through representatives selected or nominated or approved by employers. More than that, it is a procedure through which terms and conditions of employment may be settled by negotiations between an employer and his

[TRADUCTION] La négociation collective est un processus par lequel les travailleurs expriment leurs opinions, par l'entremise des représentants de leur choix, et non des représentants choisis, nommés ou autorisés par les employeurs. Plus que cela, il s'agit d'un processus par lequel l'employeur et ses employés peuvent négocier pour s'entendre sur les conditions de travail, pourvu

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employees on the basis of a comparative equality of bargaining strength.

("Collective Bargaining in Canada: In Peace and in War" (1941), 2:3 *Food for Thought* 8, at p. 8)

In our view, it is entirely possible to protect the "procedure" known as collective bargaining without mandating constitutional protection for the fruits of that bargaining process. Thus, the characterization of collective bargaining as an association's "object" does not provide a principled reason to deny it constitutional protection.

An overarching concern is that the majority judgments in the *Alberta Reference* and *PIPSC* adopted a decontextualized approach to defining the scope of freedom of association, in contrast to the purposive approach taken to other *Charter* guarantees. The result was to forestall inquiry into the purpose of that *Charter* guarantee. The generic approach of the earlier decisions to s. 2(*d*) ignored differences between organizations. Whatever the organization — be it trade union or book club — its freedoms were treated as identical. The unfortunate effect was to overlook the importance of collective bargaining — both historically and currently — to the exercise of freedom of association in labour relations.

We conclude that the reasons provided by the majorities in the *Alberta Reference* and *PIPSC* should not bar reconsideration of the question of whether s. 2(*d*) applies to collective bargaining. This is manifestly the case since this Court's decision in *Dunmore*, which struck down a statute that effectively prohibited farm workers from engaging in collective bargaining by denying them access to the Province's labour relations regime, as violating s. 2(*d*) of the *Charter*. *Dunmore* clarified three developing aspects of the law: what constitutes interference with the "associational aspect" of an activity; the need for a contextual approach

que leur pouvoir respectif de négociation soit de force relativement égale.

(« Collective Bargaining in Canada : In Peace and in War » (1941), 2:3 *Food for Thought* 8, p. 8)

Il nous apparaît tout à fait possible de protéger le « processus » appelé négociation collective sans aller jusqu'à accorder une protection constitutionnelle aux fruits du processus de négociation. C'est pourquoi qualifier la négociation collective d'« objectif » d'une association ne fournit aucune raison de principe permettant de lui refuser une protection constitutionnelle.

30 Le doute le plus sérieux quant à la validité de la jurisprudence antérieure résulte du fait que les juges majoritaires dans le *Renvoi relatif à l'Alberta* et dans *IPFPC* ont défini l'étendue de la liberté d'association en adoptant une approche insensible à son contexte, contrairement à l'interprétation téléologique donnée à d'autres garanties reconnues par la *Charte*. Cette méthode a pour effet d'amputer l'étude de cette garantie constitutionnelle de l'analyse de son objet. La méthode générale et décontextualisée appliquée à l'al. 2*d*) dans les arrêts antérieurs ne respecte pas les différences entre les associations. Quelle que soit l'association — un syndicat ou un club de lecture —, on a traité ses libertés de manière identique. Or, ce faisant, on perd malheureusement de vue l'importance que présente la négociation collective — par le passé et à l'heure actuelle — pour l'exercice de la liberté d'association dans le cadre des relations du travail.

31 Nous concluons que les motifs des juges majoritaires dans le *Renvoi relatif à l'Alberta* et dans *IPFPC* ne devraient pas nous empêcher de réexaminer la question de l'application de l'al. 2*d*) à la négociation collective. C'est manifestement le cas ici depuis l'arrêt *Dunmore*, qui a invalidé une loi empêchant effectivement les travailleurs agricoles d'engager des négociations collectives en les excluant du régime provincial des relations du travail, au motif qu'elle contrevient à l'al. 2*d*) de la *Charte*. *Dunmore* clarifie trois aspects du droit en évolution : la détermination de ce qui constitue une ingérence dans « l'aspect collectif » d'une activité;

to freedom of association; and the recognition that s. 2(*d*) can impose positive obligations on government.

32 *Dunmore* accepted the conclusion of the majority in *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, that only the "associational aspect" of an activity and not the activity itself are protected under s. 2(*d*). It clarified, however, that equal legislative treatment of individuals and groups does not mean that the "associational aspect" of an activity has not been interfered with. A prohibition on an individual may not raise associational concerns, while the same prohibition on the collective may do so. *Dunmore* concluded:

> In sum, a purposive approach to s. 2(*d*) demands that we "distinguish between the associational aspect of the activity and the activity itself", a process mandated by this Court in the *Alberta Reference* (see *Egg Marketing*, *supra*, *per* Iacobucci and Bastarache JJ., at para. 111). Such an approach begins with the existing framework established in that case, which enables a claimant to show that a group activity is permitted for individuals in order to establish that its regulation targets the association *per se* (see *Alberta Reference*, *supra*, *per* Dickson C.J., at p. 367). Where this burden cannot be met, however, it may still be open to a claimant to show, by direct evidence or inference, that the legislature has targeted associational conduct because of its concerted or associational nature.
>
> (*Per* Bastarache J., at para. 18)

33 Second, *Dunmore* correctly advocated a more contextual analysis than had hitherto prevailed. Showing that a legislature has targeted associational conduct because of its "concerted or associational nature" requires a more contextual assessment than found in the early s. 2(*d*) cases. This contextual approach was foreshadowed by the dissenting reasons of Bastarache J. in *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, 2001 SCC 70, expressing the view that to define the limits of s. 2(*d*), "[t]he whole context of the right must be considered" (para. 9).

la nécessité de donner à la liberté d'association une interprétation contextuelle et la reconnaissance que l'al. 2*d*) peut imposer des obligations positives au gouvernement.

L'arrêt *Dunmore* accepte la conclusion de la majorité dans *Office canadien de commercialisation des œufs c. Richardson*, [1998] 3 R.C.S. 157, selon laquelle seul « l'aspect collectif » de l'activité, et non l'activité elle-même, est protégé par l'al. 2*d*). Il précise toutefois que ce n'est pas parce que la loi réserve le même traitement aux individus et aux groupes qu'il n'y a pas eu ingérence dans « l'aspect collectif » de l'activité. Il est possible que l'interdiction visant un individu ne soulève pas d'inquiétudes quant à l'aspect collectif du droit, mais que la même interdiction en provoque si elle vise un groupe. Dans *Dunmore*, la Cour conclut :

> L'interprétation téléologique de l'al. 2*d*) exige en somme « de distinguer l'aspect collectif d'une activité de l'activité elle-même », la démarche imposée par notre Cour dans le *Renvoi relatif à l'Alberta* (voir *OCCO*, précité, les juges Iacobucci et Bastarache, par. 111). Cette démarche commence avec les paramètres établis dans ce renvoi qui permettent à un demandeur de démontrer que l'activité collective est autorisée pour des individus afin d'établir que sa réglementation vise en fait l'association comme telle (voir le *Renvoi relatif à l'Alberta*, précité, le juge en chef Dickson, p. 367). Le demandeur qui ne peut apporter cette preuve peut cependant établir, directement ou par inférence, que le législateur a ciblé une activité associative en raison de son caractère concerté ou associatif.
>
> (Le juge Bastarache, par. 18)

Deuxièmement, *Dunmore* préconise à juste titre une analyse plus contextuelle qu'auparavant. Établir que le législateur a ciblé une activité associative en raison de « son caractère concerté ou associatif » exige une appréciation plus contextuelle que dans les premières causes relatives à l'al. 2*d*). Les motifs dissidents du juge Bastarache dans *R. c. Advance Cutting & Coring Ltd.*, [2001] 3 R.C.S. 209, 2001 CSC 70, ont laissé présager cette approche contextuelle, indiquant que pour définir les limites de l'al. 2*d*), « [i]l faut examiner l'ensemble du contexte du droit » (par. 9).

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Finally, *Dunmore* recognized that, in certain circumstances, s. 2(*d*) may place positive obligations on governments to extend legislation to particular groups. Underinclusive legislation may, "in unique contexts, substantially impact the exercise of a constitutional freedom" (para. 22). This will occur where the claim of underinclusion is grounded in the fundamental *Charter* freedom and not merely in access to a statutory regime (para. 24); where a proper evidentiary foundation is provided to create a positive obligation under the *Charter* (para. 25); and where the state can truly be held accountable for any inability to exercise a fundamental freedom (para. 26). There must be evidence that the freedom would be next to impossible to exercise without positively recognizing a right to access a statutory regime.

34 Enfin, *Dunmore* reconnaît qu'en certaines circonstances l'al. 2*d*) peut imposer aux gouvernements des obligations positives destinées à étendre la protection légale à des groupes particuliers. Une loi d'application restreinte peut, « dans des contextes exceptionnels, avoir un effet substantiel sur l'exercice d'une liberté constitutionnelle » (par. 22). Un tel effet se produira dans les cas où l'argument fondé sur la portée trop limitative repose sur une liberté fondamentale garantie par la *Charte* et non simplement sur l'accès à un régime légal (par. 24); où la création d'une obligation positive en vertu de la *Charte* exige un fondement de preuve approprié (par. 25); où l'État peut vraiment être tenu responsable de toute incapacité d'exercer une liberté fondamentale (par. 26). Il doit être établi qu'il serait pratiquement impossible d'exercer la liberté constitutionnelle en question sans la reconnaissance positive du droit d'avoir accès à un régime légal.

Bastarache J. reconciled the holding in *Dunmore* of a positive obligation on government to permit farm workers to join together to bargain collectively in an effective manner with the conclusion in *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, that the federal government was not under a positive obligation to provide RCMP officers with access to collective bargaining by distinguishing the effects of the legislation in the two cases. Unlike the RCMP members in *Delisle*, farm workers faced barriers that made them *substantially incapable* of exercising their right to form associations outside the statutory framework (*per* Bastarache J., at paras. 39, 41 and 48). The principle affirmed was clear: Government measures that substantially interfere with the ability of individuals to associate with a view to promoting work-related interests violate the guarantee of freedom of association under s. 2(*d*) of the *Charter.*

35 Le juge Bastarache a concilié la conclusion dans *Dunmore*, selon laquelle une obligation positive incombe au gouvernement de permettre aux travailleurs agricoles de se regrouper pour négocier collectivement de façon efficace, avec celle dans *Delisle c. Canada (Sous-procureur général)*, [1999] 2 R.C.S. 989, selon laquelle le gouvernement fédéral n'avait pas l'obligation positive de donner aux agents de la GRC accès à la négociation collective, en distinguant les effets des lois applicables dans les deux affaires. Contrairement aux membres de la GRC visés dans l'affaire *Delisle*, les travailleurs agricoles se trouvaient confronté à des obstacles qui les rendaient *essentiellement incapables* d'exercer leur droit de former des associations hors du cadre législatif (le juge Bastarache, par. 39, 41 et 48). Le principe qui y est énoncé est clair : les mesures gouvernementales qui diminuent considérablement la capacité des individus de s'associer dans le but de promouvoir leurs intérêts en matière de relations du travail portent atteinte à la liberté d'association garantie par l'al. 2*d*) de la *Charte.*

In summary, a review of the jurisprudence leads to the conclusion that the holdings in the *Alberta Reference* and *PIPSC* excluding collective bargaining from the scope of s. 2(*d*) can no longer stand. None of the reasons provided by the majorities in

36 Bref, l'examen de la jurisprudence mène à la conclusion que les décisions rendues dans le *Renvoi relatif à l'Alberta* et dans *IPFPC* qui excluaient la négociation collective du champ d'application de l'al. 2*d*) ne sauraient être acceptées plus longtemps.

those cases survive scrutiny, and the rationale for excluding inherently collective activities from s. 2(*d*)'s protection has been overtaken by *Dunmore*.

37 Our rejection of the arguments previously used to exclude collective bargaining from s. 2(*d*) leads us to a reassessment of that issue, discussed below.

(2) Collective Bargaining Falls Within the Scope of Section 2(*d*) of the *Charter*

38 The question is whether the s. 2(*d*) guarantee of freedom of association extends to the right of employees to join together in a union to negotiate with employers on workplace issues or terms of employment — a process described broadly as collective bargaining.

39 The general purpose of the *Charter* guarantees and the language of s. 2(*d*) are consistent with at least a measure of protection for collective bargaining. The language of s. 2(*d*) is cast in broad terms and devoid of limitations. However, this is not conclusive. To answer the question before us, we must consider the history of collective bargaining in Canada, collective bargaining in relation to freedom of association in the larger international context, and whether *Charter* values favour an interpretation of s. 2(*d*) that protects a process of collective bargaining: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344, *per* Dickson J. Evaluating the scope of s. 2(*d*) of the *Charter* through these tools leads to the conclusion that s. 2(*d*) does indeed protect workers' rights to a process of collective bargaining.

(a) *Canadian Labour History Reveals the Fundamental Nature of Collective Bargaining*

40 Association for purposes of collective bargaining has long been recognized as a fundamental Canadian right which predated the *Charter*. This

Aucune des raisons exposées par les juges majoritaires dans ces arrêts ne résistent à l'examen et le raisonnement à l'origine de l'exclusion des activités purement collectives de la protection de l'al. 2*d*) a été écarté dans *Dunmore*.

Notre décision de rejeter les arguments employés auparavant pour exclure la négociation collective de la protection de l'al. 2*d*) nous amène au réexamen de cette question, dont l'analyse suit ci-après.

(2) La négociation collective est visée par l'al. 2*d*) de la *Charte*

Il faut décider si la liberté d'association garantie par l'al. 2*d*) englobe le droit des employés d'adhérer à un syndicat pour négocier avec l'employeur les questions liées au milieu de travail ou les conditions de travail — processus généralement décrit comme étant la négociation collective.

L'objet général des garanties de la *Charte* et le libellé de l'al. 2*d*) se concilient à tout le moins avec la reconnaissance d'une certaine protection de la négociation collective. L'alinéa 2*d*) est rédigé en termes généraux et sans restrictions. Toutefois, cela n'est pas déterminant. Pour répondre à la question dont nous sommes saisis, nous devons prendre en compte l'histoire de la négociation collective au Canada, la négociation collective dans le contexte international relatif à la liberté d'association, et rechercher si les valeurs reconnues par la *Charte* favorisent une interprétation de l'al. 2*d*) qui protège le processus de négociation collective : *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, p. 344, le juge Dickson. L'appréciation de la portée de l'al. 2*d*) de la *Charte* par ces moyens permet de conclure que cette disposition protège effectivement le droit des travailleurs à un processus de négociation collective.

a) *L'histoire des relations du travail au Canada révèle la nature fondamentale de la négociation collective*

Le droit de s'associer avec d'autres en vue de la négociation collective est reconnu depuis longtemps comme un droit fondamental au Canada, qui

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suggests that the framers of the *Charter* intended to include it in the protection of freedom of association found in s. 2(*d*) of the *Charter.*

existait d'ailleurs avant l'adoption de la *Charte*. Ce constat suggère que les auteurs de la *Charte* ont voulu que ce droit bénéficie de la protection que l'al. 2*d*) de la *Charte* confère à la liberté d'association.

The respondent argues that the right to collective bargaining is of recent origin and is merely a creature of statute. This assertion may be true if collective bargaining is equated solely to the framework of rights of representation and collective bargaining now recognized under federal and provincial labour codes. However, the origin of a right to collective bargaining in the sense given to it in the present case (i.e., a procedural right to bargain collectively on conditions of employment), precedes the adoption of the present system of labour relations in the 1940s. The history of collective bargaining in Canada reveals that long before the present statutory labour regimes were put in place, collective bargaining was recognized as a fundamental aspect of Canadian society. This is the context against which the scope of s. 2(*d*) must be considered.

41 Selon l'intimée, le droit de négociation collective représente simplement l'œuvre récente du législateur. Cette assertion peut être exacte dans la mesure où on assimile la négociation collective au cadre des droits de représentation et de négociation collective actuellement reconnus dans les codes du travail fédéral et provinciaux. Or, le droit de négociation collective au sens qui lui est donné en l'espèce (c.-à-d. le droit procédural des travailleurs de négocier collectivement leurs conditions de travail) est né avant l'adoption dans les années 1940 du système actuel des relations du travail. L'histoire de la négociation collective au Canada révèle que, bien avant la mise en place des régimes légaux actuels des relations du travail, la négociation collective était reconnue comme un aspect fondamental de la vie de la société canadienne. C'est dans ce contexte qu'on doit examiner la portée de l'al. 2*d*).

Canadian labour history can be summarized by borrowing words from the 1969 *Report of the Task Force on Labour Relations.* As society entered into the industrialized era, "workers began to join unions and to engage in collective bargaining with their employers. Although employers resisted this development with all resources at their command, it eventually became apparent that unions and collective bargaining were natural concomitants of a mixed enterprise economy. The state then assumed the task of establishing a framework of rights and responsibilities within which management and organized labour were to conduct their relations" (Task Force on Labour Relations, *Canadian Industrial Relations: The Report of Task Force on Labour Relations* (1969) ("Woods Report"), at p. 13).

42 On peut résumer l'histoire des relations du travail au Canada en empruntant un court extrait du *Rapport de l'Équipe spécialisée en relations de travail* de 1969. Comme la société entrait dans l'ère industrielle, « les travailleurs commençaient à adhérer à des syndicats et à s'engager dans la négociation collective avec leurs employeurs. Bien que les employeurs aient résisté avec la dernière énergie à cette évolution, il devint finalement évident que syndicats et négociation collective étaient des composants naturels d'une économie d'entreprise mixte. C'est alors que l'État a assumé la tâche d'établir une structure de droits et de responsabilités à l'intérieur de laquelle le patronat et les organisations de travailleurs conduiraient leurs relations » (Équipe spécialisée en relations de travail, *Les relations du travail au Canada : Rapport de l'Équipe spécialisée en relations de travail* (1969) (« Rapport Woods »), p. 14).

Canadian labour law traces its roots to various legal systems, most importantly to British and American law. Prior to the 1940s, British law had

43 Le droit du travail canadien tire son origine de divers systèmes de droit, mais surtout du droit britannique et du droit américain. Avant les années

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a significant influence on the development of our labour law. American law became an influential force when the United States passed the *Wagner Act* in 1935 (also called *National Labor Relations Act*). And a substantial part of Quebec's law governing labour relations and collective bargaining prior to 1944 was influenced by French law (see R. P. Gagnon, L. LeBel and P. Verge, *Droit du travail* (2nd ed. 1991), at pp. 26-27).

44 The development of labour relations law in Canada may be divided into three major eras: repression, toleration and recognition. We are aware that such categorization may not necessarily draw a perfectly accurate picture of the evolution of labour law in our country (see, e.g., E. Tucker, "The Faces of Coercion: The Legal Regulation of Labor Conflict in Ontario, 1880-1889" (1994), 12 *Law & Hist. Rev.* 277). However, for present purpose, such categorization provides a sufficient historical framework in which to summarize the evolution of our law and to underline the flourishing of labour unions and collective bargaining as well as the historic openness of government and society to those organizations over the past century.

(i) Repression of Workers' Organizations

45 Workers' associations have a long history. In England, as early as the end of the Middle Ages, workers were getting together to improve their conditions of employment. They were addressing petitions to Parliament, asking for laws to secure better wages or other more favourable working conditions. Soon thereafter, strike activity began (M.-L. Beaulieu, *Les Conflits de Droit dans les Rapports Collectifs du Travail* (1955), at pp. 29-30).

46 In Canada, workers' organizations can be traced back to the end of the 18th century. "As early as 1794 employees of the North West Fur Trading Company went on strike for higher wages" (D. D. Carter et al., *Labour Law in Canada* (5th ed. 2002), at p. 48). However, it was not until the industrial

1940, le droit britannique a largement contribué à l'évolution de notre droit du travail. L'influence du droit américain s'est fait sentir davantage au moment où les États-Unis ont adopté en 1935 la *Loi Wagner* (aussi appelée *National Labor Relations Act*). Enfin, le droit français a influé sur une bonne partie du droit québécois régissant les relations du travail et la négociation collective avant 1944 (voir R. P. Gagnon, L. LeBel et P. Verge, *Droit du travail* (2e éd. 1991), p. 26-27).

L'évolution du droit du travail canadien peut se diviser en trois grandes périodes : la répression, la tolérance et la reconnaissance. Nous sommes bien conscients que cette catégorisation ne brosse peut-être pas nécessairement un tableau fidèle de l'évolution du droit du travail dans notre pays (voir, p. ex., E. Tucker, « The Faces of Coercion : The Legal Regulation of Labor Conflict in Ontario, 1880-1889 » (1994), 12 *Law & Hist. Rev.* 277). Toutefois, pour les besoins du présent pourvoi, elle fournit un cadre historique suffisant pour résumer l'évolution de notre droit et souligner le développement des syndicats et de la négociation collective ainsi que l'ouverture dont le gouvernement et la société ont su faire preuve envers ces organisations depuis un siècle.

(i) Répression des organisations de travailleurs

Les associations de travailleurs ne datent pas d'hier. En Angleterre, dès la fin du Moyen-Âge, les travailleurs se regroupaient pour demander de meilleures conditions de travail. Ils présentaient des pétitions au Parlement, réclamant des lois leur accordant de meilleurs salaires ou d'autres conditions de travail plus avantageuses. Peu après, ils ont commencé à organiser des grèves (M.-L. Beaulieu, *Les Conflits de Droit dans les Rapports Collectifs du Travail* (1955), p. 29-30).

Au Canada, l'existence des organisations de travailleurs remonte à la fin du 18e siècle. [TRADUCTION] « Dès 1794, des employés de la Compagnie de fourrures du Nord-Ouest ont déclenché une grève pour obtenir des salaires plus élevés » (D. D. Carter et autres, *Labour Law in Canada* (5e éd. 2002), p. 48).

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revolution that workers' organizations took on more than a marginal role, and that a real labour movement was born (Carter et al., at p. 48; C. Lipton, *The Trade Union Movement of Canada, 1827-1959* (4th ed. 1978), at pp. 1-8; J. Rouillard, *Histoire du syndicalisme au Québec: Des origines à nos jours* (1989), at p. 11).

From the beginning, the law was used as a tool to limit workers' rights to unionize. In England, through the 18th and 19th centuries, labour organizations were considered illegal under the common law doctrine of criminal conspiracy (Lord Wedderburn, *The Worker and the Law* (3rd ed. 1986), at pp. 514-15; G. W. Adams, *Canadian Labour Law* (2nd ed. (loose-leaf), at p. 1-2). Statutes soon added new limits. After the French Revolution, the British Parliament, convinced that labour organizations were the nesting ground of potential revolutions, adopted the *Combination Acts* of 1799 and 1800, making it unlawful for two or more workers to combine in an attempt to increase their wages, lessen their hours of work or persuade anyone to leave or refuse work. The Acts, which made it "a criminal offence to be a member of a trade union, to call a strike, or to contribute money for trade union purposes", had the effect of suppressing a large series of collective actions (J. G. Riddall, *The Law of Industrial Relations* (1981), at p. 24). Combinations of workers were already illegal at common law. The *Combination Acts* reinforced the common law by providing faster and more effective tools to enforce criminal penalties upon workers (W. R. Cornish and G. de N. Clark, *Law and Society in England 1750-1950* (1989), at p. 297).

In 1824, the English *Combination Acts* were repealed. The repeal was immediately followed by a series of strikes. The British Parliament responded with a new *Combination Act* less than a year later, which reintroduced strong criminal sanctions against workers. The new *Combination Act* of 1825 made it legal for workers to bargain

Toutefois, ce n'est qu'avec la révolution industrielle que les organisations de travailleurs jouent un rôle moins marginal et que naît véritablement le mouvement syndical (Carter et autres, p. 48; C. Lipton, *The Trade Union Movement of Canada, 1827-1959* (4e éd. 1978), p. 1-8; J. Rouillard, *Histoire du syndicalisme au Québec : Des origines à nos jours* (1989), p. 11).

47 Dès le début, on a recouru à des mesures législatives pour limiter le droit des travailleurs de se syndiquer. En Angleterre, au cours des 18e et 19e siècles, les organisations syndicales étaient considérées comme illégales selon la notion de complot criminel en common law (Lord Wedderburn, *The Worker and the Law* (3e éd. 1986), p. 514-515; G. W. Adams, *Canadian Labour Law* (2e éd. (feuilles mobiles)), p. 1-2). De nouvelles limites ont vite été imposées par voie législative. Convaincu que les organisations syndicales constituaient des nids d'incubation d'éventuelles révolutions, le Parlement britannique a adopté après la Révolution française les *Combination Acts* de 1799 et de 1800, qui interdisaient aux travailleurs de se coaliser, que ce soit pour la majoration des salaires, la réduction des heures de travail ou pour inciter d'autres travailleurs à quitter le travail ou à refuser du travail. Ces lois, disposant que [TRADUCTION] « commet une infraction quiconque est membre d'un syndicat, déclenche une grève ou contribue financièrement à des activités syndicales », empêchèrent longtemps un grand nombre d'activités collectives (J. G. Riddall, *The Law of Industrial Relations* (1981), p. 24). La coalition de travailleurs était déjà frappée d'illégalité en common law. Or, en permettant d'appliquer avec plus de rapidité et d'efficacité des sanctions pénales aux travailleurs, les *Combination Acts* ont renforcé la common law sous cet aspect (W. R. Cornish et G. de N. Clark, *Law and Society in England 1750-1950* (1989), p. 297).

48 En 1824, les *Combination Acts* anglaises ont été abrogées. Une série de grèves a immédiatement suivi l'abrogation. Moins d'un an plus tard, le Parlement britannique a répliqué par l'adoption d'une nouvelle *Combination Act*, qui rétablit de fortes sanctions pénales contre les travailleurs. La nouvelle *Combination Act* de 1825 reconnaît aux

collectively with their employers. However, it made strikes a criminal offence. S. Deakin and G. S. Morris summarize, as follows, the state of the law under the *Combination Act* of 1825:

> For the fifty years or so after 1825 the legal position was, in principle, that freedom of association was permitted, and that collective bargaining could be lawfully pursued; however, strike action remained tightly confined. In practice, there was no effective right to resist employers who refused to enter into collective bargaining since the main weapon open to trade unions, namely strike action, was regulated by the criminal law. The criminal law also imposed sanctions on individual workers who quit their employment in breach of contract, by virtue of the Master and Servant Act 1823 which was the successor to a number of eighteenth-century statutes which had a similar effect.

(*Labour Law* (4th ed. 2005), at p. 7)

49 In the 1860s, two important events led the British Parliament to change course. First, a Royal Commission on Trade Unions was appointed in 1867. It recommended better legal recognition for trade unions. Second, a reform of suffrage law gave a large segment of the working class the right to vote, enabling them to exert more influence over Parliament (Adams, at p. 1-4; A. W. R. Carrothers, E. E. Palmer and W. B. Rayner, *Collective Bargaining Law in Canada* (2nd ed. 1986), at p. 16). In response to these events, in 1871 the British Parliament adopted the *Trade Union Act* and the *Criminal Law Amendment Act*, which were intended to immunize trade unions and their members from the criminal laws of conspiracy and restraint of trade. Nevertheless, British courts continued to view collective actions suspiciously, repressing strikes through the doctrine of criminal conspiracy and repressing other union activity through the application of economic torts. The British Parliament in turn responded on occasion by strengthening the legislative protection for trade unions in that country (Deakin and Morris, at pp. 8-10).

travailleurs le droit de négocier collectivement avec leurs employeurs, mais a fait de la grève une infraction criminelle. Les auteurs S. Deakin et G. S. Morris résument l'état du droit sous le régime de la *Combination Act* de 1825 en ces termes :

> [TRADUCTION] Pendant les quelque cinquante ans qui ont suivi 1825, le droit dictait, en principe, la reconnaissance de la liberté d'association et de la poursuite légitime de la négociation collective; le recours à la grève demeurait toutefois très limité. En pratique, les travailleurs ne pouvaient pas véritablement exercer leur droit de résister aux employeurs qui refusaient la négociation collective puisque la principale arme dont disposaient les syndicats — la grève — était régie par le droit criminel. Le droit criminel imposait en outre des sanctions aux travailleurs qui, abandonnant volontairement leur emploi, contrevenaient à leur contrat de travail selon la Master and Servant Act de 1823, laquelle a remplacé plusieurs lois du 18e siècle dont les effets étaient similaires.

(*Labour Law* (4e éd. 2005), p. 7)

Dans les années 1860, deux événements importants ont amené le Parlement britannique à changer de cap. D'abord, une commission royale d'enquête sur les syndicats, établie en 1867, a recommandé une plus ample reconnaissance juridique des syndicats. Ensuite, la réforme du droit de suffrage a reconnu le droit de vote à un large segment de la classe ouvrière, lui permettant ainsi d'exercer une plus grande influence sur le Parlement (Adams, p. 1-4; A. W. R. Carrothers, E. E. Palmer et W. B. Rayner, *Collective Bargaining Law in Canada* (2e éd. 1986), p. 16). En réaction à ces événements, le Parlement britannique a adopté en 1871 la *Trade Union Act* et la *Criminal Law Amendment Act*, destinées à soustraire les syndicats et leurs membres à l'application des lois criminelles interdisant le complot et l'entrave au commerce. Les tribunaux britanniques ont néanmoins continué de considérer comme douteuses les activités collectives : ils ont réprimé les grèves en invoquant la notion de complot criminel et d'autres activités syndicales en recourant aux ressources du droit de la responsabilité pour des délits économiques. Le Parlement britannique toutefois répliquait à l'occasion par un renforcement de la protection législative accordée aux syndicats de la Grande-Bretagne (Deakin et Morris, p. 8-10).

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The question of whether the repressive common law doctrines and the *Combination Acts* of 1799 and 1800 were introduced into Canada is subject to controversy. Some scholars are of the opinion that the common law doctrines of conspiracy and restraint of trade were introduced into Canadian law (Adams, at p. 1-5; Beaulieu, at p. 73). Others, however, argue that the Canadian common law and the civil law of Quebec were more ambiguous and less oppressive to trade unions than the British common law (Gagnon, LeBel and Verge, at pp. 620-21; *Perrault v. Gauthier* (1898), 28 S.C.R. 241). It is unnecessary to resolve this debate. It suffices to recognize that, at least until 1872, Canadian laws "cast shadows on the legitimacy of trade unions" (B. D. Palmer, *Working-Class Experience: Rethinking the History of Canadian Labour, 1800-1991* (2nd ed. 1992), at p. 66; E. Tucker, "'That Indefinite Area of Toleration': Criminal Conspiracy and Trade Unions in Ontario, 1837-77" (1991), 27 *Labour* 15; see also Carrothers, Palmer and Rayner, at p. 18).

50 La question de savoir si les principes répressifs de la common law et les *Combination Acts* de 1799 et de 1800 ont été introduits en droit canadien demeure sujette à controverse. Selon certains auteurs, les notions de complot et d'entrave au commerce ont bien été introduites dans le droit canadien (Adams, p. 1-5; Beaulieu, p. 73). D'autres prétendent toutefois que la common law canadienne et le droit civil québécois étaient plus ambigus et moins oppressifs à l'égard des syndicats que la common law britannique (Gagnon, LeBel et Verge, p. 620-621; *Perrault c. Gauthier* (1898), 28 R.C.S. 241). Il n'est pas nécessaire de trancher ce débat : il suffit de reconnaître qu'au moins jusqu'en 1872 les lois canadiennes [TRADUCTION] « jettent une ombre sur la légitimité des syndicats » (B. D. Palmer, *Working-Class Experience : Rethinking the History of Canadian Labour, 1800-1991* (2e éd. 1992), p. 66; E. Tucker, « "That Indefinite Area of Toleration" : Criminal Conspiracy and Trade Unions in Ontario, 1837-77 » (1991), 27 *Le Travail* 15; voir également Carrothers, Palmer et Rayner, p. 18).

(ii) Tolerance of Workers' Organizations and Collective Bargaining

(ii) Tolérance envers les organisations de travailleurs et la négociation collective

A major shift in Canadian labour law took place in the aftermath of the Toronto Typographical Unions' strike that occurred in 1872. The strike by the Toronto typographers, inspired by the call for a nine-hour work day, led to numerous arrests and charges against the strikers for common law criminal conspiracy. At that time, Canada had not yet adopted legislation immunizing trade union members from criminal charges for conspiracy or restraint of trade. The criminal charges against the Toronto strikers raised public concern and revealed that Canada was behind the times — at least compared to Britain — on the issue of union protection and recognition.

51 Le droit du travail canadien a pris un tournant décisif à la suite de la grève du syndicat des typographes de Toronto survenue en 1872. La grève des typographes de Toronto, motivée par la revendication de la réduction de la journée de travail à neuf heures, s'est soldée par de nombreuses arrestations de grévistes, suivies d'accusations criminelles de complot portées contre eux en vertu de la common law. À cette époque, le Canada n'avait pas encore adopté de lois visant à protéger les syndiqués contre des accusations criminelles de complot et d'entrave au commerce. Les accusations criminelles portées contre les grévistes de Toronto ont inquiété le public et ont révélé que le Canada accusait un retard — du moins par rapport à la Grande-Bretagne — à l'égard de la question de la protection et de la reconnaissance syndicales.

In consequence, Canada adopted its own legislation copied in part from the British *Trade Union Act* of 1871. The Canadian *Trade Unions Act* of

52 Le Canada a donc adopté sa propre loi, reproduisant en partie la *Trade Union Act* britannique de 1871. La loi canadienne, *Acte des Associations*

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1872 "made it clear that no worker could be criminally prosecuted for conspiracy solely on the basis of attempting to influence the rate of wages, hours of labour, or other aspects of the work relation" (Palmer, at p. 111). Through this legislative action, the Canadian Parliament recognized the value for the individual of collective actions in the context of labour relations. As Sir John A. Macdonald mentioned in the House of Commons, the purpose of the *Trade Unions Act* of 1872 was to immunize unions from existing laws considered to be "opposed to the spirit of the liberty of the individual" (*Parliamentary Debates*, vol. III, 5th sess., 1st Parl., May 7, 1872, at p. 392, as cited by M. Chartrand, "The First Canadian Trade Union Legislation: An Historical Perspective" (1984), 16 *Ottawa L. Rev.* 267, at p. 267).

53 By the beginning of the 1900s, the main criminal barriers to unionism in Canada had been brought down. Criminal law no longer prohibited employees from combining for the purposes of ameliorating their working conditions (Carrothers, Palmer and Rayner, at p. 30). However, courts continued to apply common law doctrines to restrain union activities (Adams, at p. 1-5; Carrothers, Palmer and Rayner, at p. 19). Moreover, nothing in the law required employers to recognize unions or to bargain collectively with them. Employers could simply ignore union demands and even refuse to hire union members. As J. Fudge and E. Tucker explain:

> While workers were also privileged to combine with other workers to advance their common interests, employers were free to contract only with those workers who were not part of a combination. In short, they could refuse to hire union members and could fire those who became union members after taking up employment.

(*Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900-1948* (2001), at p. 2)

54 While employers could refuse to recognize and bargain with unions, workers had recourse to an

ouvrières, 1872, [TRADUCTION] « . . . indiquait clairement que les travailleurs ne pouvaient faire l'objet de poursuites criminelles pour complot au seul motif qu'ils avaient cherché à influer sur les salaires, les heures de travail ou d'autres aspects des relations du travail » (Palmer, p. 111). Par cette mesure législative, le Parlement canadien a reconnu la valeur des activités collectives pour les individus dans le contexte des relations du travail. Comme l'a déclaré sir John A. Macdonald à la Chambre des communes, l'*Acte des Associations ouvrières, 1872* visait à soustraire les syndicats à l'application des lois en vigueur considérées comme [TRADUCTION] « incompatibles avec l'esprit de liberté individuelle » (*Débats de la Chambre des communes*, vol. III, 5e sess., 1re lég., 7 mai 1872, p. 392, passage cité par M. Chartrand, « The First Canadian Trade Union Legislation : An Historical Perspective » (1984), 16 *R.D. Ottawa* 267, p. 267).

Au début des années 1900, les principales mesures pénales qui avaient fait obstacle au syndicalisme canadien n'existaient plus. Le droit criminel n'interdisait plus les mouvements concertés de travailleurs visant de meilleures conditions de travail (Carrothers, Palmer et Rayner, p. 30). Toutefois, les tribunaux ont continué d'appliquer les principes de common law pour restreindre les activités syndicales (Adams, p. 1-5; Carrothers, Palmer et Rayner, p. 19). Par ailleurs les employeurs n'étaient pas tenus par la loi de reconnaître les syndicats ou de négocier collectivement avec eux. Ils pouvaient simplement ignorer les demandes syndicales et même refuser d'engager des travailleurs syndiqués. Comme l'expliquent J. Fudge et E. Tucker :

> [TRADUCTION] Les travailleurs avaient également le privilège de se coaliser pour défendre leurs intérêts communs, mais les employeurs étaient libres de former des contrats uniquement avec les travailleurs qui ne se sont pas coalisés. Bref, ils pouvaient refuser d'engager des travailleurs syndiqués et congédier les travailleurs qui adhéraient à un syndicat une fois embauchés.

(*Labour Before the Law : The Regulation of Workers' Collective Action in Canada, 1900-1948* (2001), p. 2)

Les employeurs pouvaient refuser de reconnaître les syndicats et de négocier avec eux, mais les

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economic weapon: the powerful tool of calling a strike to force an employer to recognize a union and bargain collectively with it. The law gave both parties the ability to use economic weapons to attain their ends. Before the adoption of the modern statutory model of labour relations, the majority of strikes were motivated by the workers' desire to have an employer recognize a union and bargain collectively with it (D. Glenday and C. Schrenk, "Trade Unions and the State: An Interpretative Essay on the Historical Development of Class and State Relations in Canada, 1889-1947" (1978), 2 *Alternate Routes* 114, at p. 128; M. Thompson, "Wagnerism in Canada: Compared to What?", in *Proceedings of the XXXIst Conference — Canadian Industrial Relations Association* (1995), 59, at p. 60; C. D. Baggaley, *A Century of Labour Regulation in Canada* (February 1981), Working Paper No. 19, prepared for the Economic Council of Canada, at p. 57). The unprecedented number of strikes, caused in large part by the refusal of employers to recognize unions and to bargain collectively, led to governments adopting the American *Wagner Act* model of legislation, discussed below.

(iii) Recognition of Collective Bargaining

The first few decades of the 20th century saw Parliament's promotion of voluntary collective bargaining. The federal Parliament enacted a series of statutes to promote collective bargaining by conferring on the labour minister the power to impose conciliation on the parties in an attempt to bring them to compromise (*The Conciliation Act, 1900*, S.C. 1900, c. 24; *The Railway Labour Disputes Act, 1903*, S.C. 1903, c. 55; *The Industrial Disputes Investigation Act, 1907*, S.C. 1907, c. 20). This model failed, mainly because employers had no real incentive to participate in the process. (See J. Webber, "Compelling Compromise: Canada chooses Conciliation over Arbitration 1900-1907" (1991), 28 *Labour* 15; Gagnon, LeBel and Verge, at p. 25; Carrothers, Palmer and Rayner, at p. 32; Adams, at p. 1-6.) Moreover, union members did not receive any protection against unfair labour

employés disposaient d'une arme économique puissante : la capacité de déclencher une grève pour forcer un employeur à reconnaître leur syndicat et à négocier collectivement avec lui. La loi permettait ainsi aux deux parties de recourir à des armes économiques pour parvenir à leurs fins. Avant l'adoption du modèle légal contemporain des relations du travail, la majorité des grèves s'expliquaient par le désir des travailleurs d'amener l'employeur à reconnaître le syndicat et à négocier collectivement avec lui (D. Glenday et C. Schrenk, « Trade Unions and the State : An Interpretative Essay on the Historical Development of Class and State Relations in Canada, 1889-1947 » (1978), 2 *Alternate Routes* 114, p. 128; M. Thompson, « Wagnerism in Canada : Compared to What? », dans *Actes du XXXI^e Congrès de l'Association canadienne des relations industrielles* (1995), 59, p. 60; C. D. Baggaley, *A Century of Labour Regulation in Canada* (février 1981), Cahier de recherche n^o^ 19, préparé pour le Conseil économique du Canada, p. 57). Ce nombre sans précédent de grèves, causées en grande partie par le refus des employeurs de reconnaître les syndicats et de négocier collectivement avec eux, a amené les gouvernements à adopter le modèle légal américain fondé sur la *Loi Wagner*, examiné plus loin.

(iii) Reconnaissance de la négociation collective

55 Au cours des premières décennies du 20^e^ siècle, le Parlement a encouragé la négociation collective volontaire. Le Parlement fédéral a adopté une série de lois visant à encourager la négociation collective en conférant au ministre du Travail le pouvoir d'imposer la conciliation aux parties afin de les orienter vers des compromis (*Acte de conciliation, 1900*, S.C. 1900, ch. 24; *Acte d'arbitrage des chemins de fer, 1903*, S.C. 1903, ch. 55; *Loi des enquêtes en matière de différends industriels, 1907*, S.C. 1907, ch. 20). Ce modèle a échoué, essentiellement parce que rien n'incitait les employeurs à participer au processus ainsi établi. (Voir J. Webber, « Compelling Compromise : Canada chooses Conciliation over Arbitration 1900-1907 » (1991), 28 *Le Travail* 15; Gagnon, LeBel et Verge, p. 25; Carrothers, Palmer et Rayner, p. 32; Adams, p. 1-6.) Par ailleurs, les travailleurs syndiqués ne bénéficiaient d'aucune

practices undertaken by employers (Carrothers, Palmer and Rayner, at p. 37). In search of a better model, Canadian governments looked at what was happening in the United States.

56 In the United States, courts also relied heavily on the doctrine of conspiracy under criminal and civil law as well as antitrust law to limit union activities (Gagnon, LeBel and Verge, at pp. 19-20). In 1914, the American Congress immunized unions from the application of antitrust law and adopted a non-interventionist attitude in order to let workers and employers use their respective economic powers to manage their own labour relations. However, the Depression and resulting industrial tension of the 1930s rendered the old laissez-faire model inappropriate. The result was the *Wagner Act*, which explicitly recognized the right of employees to belong to a trade union of their choice, free of employer coercion or interference, and imposed a duty upon employers to bargain in good faith with their employees' unions (Adams, at p. 1-10).

57 K. E. Klare has identified the following main objects of the *Wagner Act*:

1. *Industrial Peace*: By encouraging collective bargaining, the Act aimed to subdue "strikes and other forms of industrial strife or unrest," because industrial warfare interfered with interstate commerce; that is, it was unhealthy in a business economy. Moreover, although this thought was not embodied in the text, industrial warfare clearly promoted other undesirable conditions, such as political turmoil, violence, and general uncertainty.

2. *Collective Bargaining*: The Act sought to enhance collective bargaining for its own sake because of its presumed "mediating" or "therapeutic" impact on industrial conflict.

3. *Bargaining Power*: The Act aimed to promote "actual liberty of contract" by redressing the unequal balance of bargaining power between employers and employees.

protection contre les pratiques déloyales de travail de l'employeur (Carrothers, Palmer et Rayner, p. 37). En quête d'un meilleur modèle, les gouvernements canadiens ont décidé d'examiner la situation aux États-Unis.

Aux États-Unis, les tribunaux se sont également beaucoup appuyés sur la notion de complot en droit criminel et en droit civil, et sur la législation antitrust pour limiter les activités syndicales (Gagnon, LeBel et Verge, p. 19-20). En 1914, le Congrès américain a soustrait les syndicats à l'application des lois antitrust et adopté une attitude non interventionniste afin de permettre aux travailleurs et employeurs d'utiliser leur pouvoir économique respectif pour gérer leurs propres relations du travail. Toutefois, la Dépression et la tension qu'elle a provoquée dans les relations du travail au cours des années 1930 ont eu raison de l'ancien modèle du laissez-faire. Cette évolution a mené à l'adoption de la *Loi Wagner*, qui a expressément reconnu aux employés le droit d'appartenir au syndicat de leur choix, sans coercition ni ingérence de la part de l'employeur, et oblige l'employeur à négocier de bonne foi avec les syndicats de travailleurs (Adams, p. 1-10).

L'auteur K. E. Klare a relevé les principaux objectifs de la *Loi Wagner* :

[TRADUCTION]

1. *Paix industrielle* : En encourageant la négociation collective, la Loi visait à maîtriser « les grèves et autres formes de conflits de travail » parce que les luttes ouvrières nuisaient au commerce entre les États; en d'autres termes, elles déstabilisaient l'économie d'entreprise. En outre, même si cette idée n'était exprimée nulle part dans le texte, les luttes ouvrières entraînaient clairement d'autres conditions indésirables, par exemple des bouleversements politiques, la violence et un climat général d'incertitude.

2. *Négociation collective* : La Loi cherchait à mettre en valeur la négociation collective en soi, en raison des vertus « médiatrices » ou « thérapeutiques » qu'elle aurait sur les conflits de travail.

3. *Pouvoir de négociation* : La Loi visait à favoriser la « liberté réelle de contracter » en rétablissant l'équilibre du pouvoir de négociation entre employeurs et employés.

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4. *Free Choice*: The Act was intended to protect the free choice of workers to associate amongst themselves and to select representatives of their own choosing for collective bargaining.

5. *Underconsumption*: The Act was designed to promote economic recovery and to prevent future depressions by increasing the earnings and purchasing power of workers.

6. *Industrial Democracy*: This is the most elusive aspect of the legislative purpose, although most commentators indicate that a concept of industrial democracy is embedded in the statutory scheme, or at the least was one of the articulated goals of the sponsors of the Act. Senator Wagner frequently sounded the industrial democracy theme in ringing notes, and scholars have subsequently seen in collective bargaining "the means of establishing industrial democracy, . . . the means of providing for the workers' lives in industry the sense of worth, of freedom, and of participation that democratic government promises them as citizens."

("Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941" (1978), 62 *Minn. L. Rev.* 265, at pp. 281-84)

By the end of the 1930s, most Canadian provinces had passed legislation incorporating the main objectives of the *Wagner Act* (Carrothers, Palmer and Rayner, at pp. 47-48). However, it is Order in Council P.C. 1003, a regulation adopted by the federal government to rule labour relations in time of war, that firmly implemented the principles of the *Wagner Act* in Canada and triggered further development of provincial labour laws (Carrothers, Palmer and Rayner, at p. 50; J. Fudge and H. Glasbeek, "The Legacy of PC 1003" (1995), 3 *C.L.E.L.J.* 357, at p. 358).

Fudge and Glasbeek emphasize the effects of P.C. 1003 on Canadian labour relations:

For the first time in Canada's history, the government compelled employers to recognize and to bargain with duly elected representatives and/or trade unions. From the workers' perspective, this constituted a movement from having a right to state their interest in being represented by a union to having enforceable legal right to have their chosen representative treated as a union by

4. *Libre choix* : La Loi était censée protéger le libre choix des travailleurs de s'associer et de choisir eux-mêmes les représentants qui négocieraient collectivement en leur nom.

5. *Sous-consommation* : La Loi était conçue pour favoriser le redressement de l'économie et prévenir d'autres crises en permettant aux travailleurs d'augmenter leur revenu et leur pouvoir d'achat.

6. *Démocratie industrielle* : C'est là l'aspect le plus insaisissable de l'objectif législatif, quoique selon la plupart des auteurs le concept de démocratie industrielle est ancré dans le régime législatif, ou du moins était l'un des objectifs énoncés par les parrains de la Loi. Le sénateur Wagner a fréquemment abordé le thème de la démocratie industrielle, lui donnant le ton de façon retentissante, et les auteurs ont par la suite considéré que la négociation collective constituait « le moyen d'établir la démocratie industrielle, [. . .] le moyen par lequel la vie professionnelle des travailleurs leur procure un sentiment de valorisation, de liberté et le sentiment qu'ils contribuent à la société, promesse du gouvernement démocratique ».

(« Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941 » (1978), 62 *Minn. L. Rev.* 265, p. 281-284)

58 À la fin des années 1930, la plupart des provinces canadiennes avaient adopté des dispositions législatives reprenant les principaux objectifs de la *Loi Wagner* (Carrothers, Palmer et Rayner, p. 47-48). Toutefois, c'est le décret C.P. 1003 — règlement adopté par le gouvernement fédéral pour régir les relations du travail en temps de guerre — qui a consolidé la mise en œuvre des principes de la *Loi Wagner* au Canada et provoqué un mouvement d'évolution des lois provinciales en matière de travail (Carrothers, Palmer et Rayner, p. 50; J. Fudge et H. Glasbeek, « The Legacy of PC 1003 » (1995), 3 *C.L.E.L.J.* 357, p. 358).

59 Fudge et Glasbeek soulignent les effets du décret C.P. 1003 sur les relations du travail au Canada :

[TRADUCTION] Pour la première fois dans l'histoire canadienne, le gouvernement a forcé les employeurs à reconnaître les représentants dûment élus et les syndicats, et à négocier avec eux. Du point de vue des travailleurs, on partait du droit d'affirmer son désir d'être représenté par un syndicat et on arrivait désormais à un droit ayant force exécutoire qui obligeait l'employeur à

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their employer. There was no longer any need to use collective economic muscle — always seriously limited by the common law — to obtain the right to bargain collectively with employers. [p. 359]

60 P.C. 1003 was a compromise adopted to promote peaceful labour relations. On the one hand, it granted major protections to workers to organize without fear of unfair interference from the employers and guaranteed workers the right to bargain collectively in good faith with their employers without having to rely on strikes and other economic weapons. On the other hand, it provided employers with a measure of stability in their relations with their organized workers, without the spectre of intensive state intervention in the economy (Fudge and Glasbeek, at p. 370). These elements of P.C. 1003 continue to guide our system of labour relations to this day (Adams, at pp. 2-98 *et seq.*).

61 In all the provinces except Saskatchewan, legislation inspired by the *Wagner Act* initially applied only to the private sector. Its extension to the public sector came later. Between 1965 and 1973 statutes were passed across the country extending labour protections to public sectors. (Fudge and Glasbeek, at p. 384; see also J. R. Calvert, "Collective Bargaining in the Public Sector in Canada: Teething Troubles or Genuine Crisis?" (1987), 2 *Brit. J. Can. Stud.* 1.) However, the rights conferred to public sector employees were more restricted than in the private sector:

Some employees are not allowed to bargain about certain subjects, some employees are given the alternative of striking or accepting a compulsory arbitrated award, some employees are not given the right to strike at all. Further, governments have retained the right to determine that, even if a public sector bargaining unit is given the right to strike, some of its members should be designated as being essential workers, that is, workers who must continue to deliver a governmental service during a lawful strike by their bargaining unit colleagues. Moreover, a government's assumed right and need to continue to look after the public's welfare makes it easy to pass legislation suspending or abrogating a

traiter comme un syndicat les représentants choisis. Il n'était plus nécessaire de recourir à la puissance économique collective — toujours sérieusement limitée par la common law — pour obtenir le droit de négocier collectivement avec les employeurs. [p. 359]

Le décret C.P. 1003 représentait un compromis adopté pour l'harmonie des relations du travail. D'une part, il accordait aux travailleurs d'importantes protections leur permettant de se syndiquer sans crainte d'une intervention injuste de la part des employeurs et leur garantissait le droit de négocier collectivement de bonne foi avec leurs employeurs sans avoir recours à la grève ou d'autres armes économiques. D'autre part, il assurait aux employeurs une certaine stabilité dans leurs relations avec leurs employés syndiqués, tout en dissipant le spectre d'une intervention massive de l'État dans l'économie (Fudge et Glasbeek, p. 370). Ces éléments du décret C.P. 1003 guident encore notre régime des relations du travail (Adams, p. 2-98 et suiv.).

Dans toutes les provinces, à l'exception de la Saskatchewan, la législation s'inspirant de la *Loi Wagner* s'est d'abord appliquée uniquement au secteur privé. Son application ne s'est étendue que plus tard au secteur public. Entre 1965 et 1973, des lois conférant des protections aux travailleurs des secteurs publics ont été adoptées d'un bout à l'autre du pays. (Fudge et Glasbeek, p. 384; voir aussi J. R. Calvert, « Collective Bargaining in the Public Sector in Canada : Teething Troubles or Genuine Crisis? » (1987), 2 *Brit. J. Can. Stud.* 1.) Toutefois, les droits conférés aux employés du secteur public restaient plus limités que ceux des travailleurs du secteur privé :

[TRADUCTION] Certains employés ne sont pas autorisés à négocier certaines questions, pour certains autres, la seule alternative à la grève est une sentence arbitrale obligatoire, d'autres encore n'ont aucun droit de grève. Par ailleurs, les gouvernements se sont réservé le droit de décider, même lorsque l'unité de négociation du secteur public a le droit de grève, que certains de ses membres doivent être désignés comme travailleurs affectés aux services essentiels, c'est-à-dire, des travailleurs qui doivent continuer de fournir des services gouvernementaux pendant que leurs collègues appartenant à la même unité de négociation sont en grève licite. De plus, du fait que le gouvernement se donne le droit et le devoir

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trade union's previously granted strike rights. In the same vein, a government can always argue that, whatever collective bargaining rights its workers have, these can justifiably be curtailed to allow the government, not just to continue to deliver services, but also to pursue a major policy, such as the reduction of inflation or the balancing of the budget.

(Fudge and Glasbeek, at p. 385)

Moreover, on many occasions (and with increasing frequency during the 1980s and 1990s), governments used legislation to impose unilaterally upon their own employees specific conditions of employment, in most cases related to wages (J. B. Rose, "Public Sector Bargaining: From Retrenchment to Consolidation" (2004), 59 *IR* 271, at p. 275).

In summary, workers in Canada began forming collectives to bargain over working conditions with their employers as early as the 18th century. However, the common law cast a shadow over the rights of workers to act collectively. When Parliament first began recognizing workers' rights, trade unions had no express statutory right to negotiate collectively with employers. Employers could simply ignore them. However, workers used the powerful economic weapon of strikes to gradually force employers to recognize unions and to bargain collectively with them. By adopting the *Wagner Act* model, governments across Canada recognized the fundamental need for workers to participate in the regulation of their work environment. This legislation confirmed what the labour movement had been fighting for over centuries and what it had access to in the laissez-faire era through the use of strikes — the right to collective bargaining with employers.

(iv) Collective Bargaining in the *Charter* Era

At the time the *Charter* was enacted in 1982, collective bargaining had a long tradition in Canada

de continuer à veiller au bien-être de la population, il devient facile d'adopter des lois qui suspendent ou suppriment l'exercice du droit de grève déjà reconnu aux syndicats. Dans le même ordre d'idée, le gouvernement peut toujours prétendre qu'il est justifié de limiter les droits de ses fonctionnaires à la négociation collective — quels qu'ils soient — non seulement pour lui permettre de continuer à offrir des services, mais également pour appliquer une politique importante, comme la réduction de l'inflation ou l'équilibre budgétaire.

(Fudge et Glasbeek, p. 385)

62 Par ailleurs, les gouvernements ont à plusieurs reprises (et de plus en plus durant les années 1980 et 1990) pris des mesures législatives pour imposer unilatéralement à leurs propres employés des conditions d'emploi précises, généralement liées au salaire (J. B. Rose, « Public Sector Bargaining : From Retrenchment to Consolidation » (2004), 59 *RI* 271, p. 275).

63 Bref, dès le 18e siècle, les travailleurs canadiens ont commencé à se regrouper pour négocier leurs conditions de travail avec leurs employeurs. La common law laisse toutefois les droits des travailleurs d'agir collectivement dans une zone d'ombre. Lorsque le Parlement a commencé à reconnaître les droits des travailleurs, la loi ne conférait pas expressément aux syndicats le droit de négocier collectivement avec les employeurs. Ceux-ci pouvaient simplement les ignorer. Toutefois, les travailleurs ont utilisé une arme économique puissante — la grève — pour forcer graduellement les employeurs à reconnaître les syndicats et à négocier collectivement avec eux. En adoptant un modèle fondé sur la *Loi Wagner*, les gouvernements de l'ensemble du pays ont reconnu le besoin fondamental des travailleurs de participer à la réglementation de leur milieu de travail. Ces dispositions législatives ont confirmé la validité de l'objectif central des luttes syndicales depuis des siècles, que le mouvement syndical a atteint pendant la période de laissez-faire en déclenchant des grèves : le droit de négocier collectivement avec les employeurs.

(iv) Négociation collective à l'ère de la *Charte*

64 Au moment de l'entrée en vigueur de la *Charte* en 1982, la négociation collective était depuis

and was recognized as part of freedom of association in the labour context. The 1969 Woods Report explained the importance of collective bargaining for our society and the special relationship between collective bargaining and freedom of association:

> Freedom to associate and to act collectively are basic to the nature of Canadian society and are root freedoms of the existing collective bargaining system. Together they constitute freedom of trade union activity: to organize employees, to join with the employer in negotiating a collective agreement, and to invoke economic sanctions, including taking a case to the public in the event of an impasse. . . .
>
> In order to encourage and ensure recognition of the social purpose of collective bargaining legislation as an instrument for the advancement of fundamental freedoms in our industrial society, we recommend that the legislation contain a preamble that would replace the neutral tone of the present statute with a positive commitment to the collective bargaining system. [p. 138]

65 The preamble of the *Canada Labour Code*, R.S.C. 1970, c. L-1, was later modified, in 1972 (S.C. 1972, c. 18), to express the benefits that collective bargaining brings to society:

> Whereas there is a long tradition in Canada of labour legislation and policy designed for the promotion of the common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes;
>
> And Whereas Canadian workers, trade unions and employers recognize and support freedom of association and free collective bargaining as the bases of effective industrial relations for the determination of good working conditions and sound labour-management relations;

66 Collective bargaining, despite early discouragement from the common law, has long been recognized in Canada. Indeed, historically, it emerges as the most significant collective activity through which freedom of association is expressed in the labour context. In our opinion, the concept of freedom of association under s. 2(*d*) of the *Charter*

longtemps implantée au Canada et reconnue comme une partie de la liberté d'association dans le contexte des relations du travail. Le Rapport Woods de 1969 explique ainsi l'importance de la négociation collective dans notre société et le rapport particulier qu'entretient la négociation collective avec la liberté d'association :

> Les libertés d'association et d'action collective sont des valeurs fondamentales de la société canadienne et sont à la base du régime actuel de négociation collective. Leur réunion donne aux syndicats la liberté de grouper les travailleurs en association, de négocier avec l'employeur une convention collective et de recourir à des sanctions économiques, et même d'en appeler à l'opinion publique en cas d'impasse. . .
>
> Il faut encourager et assurer la reconnaissance du rôle social de la législation en matière de négociation collective comme instrument de progrès des libertés fondamentales de notre société industrielle. Nous recommandons en conséquence, l'insertion, dans la législation, d'un préambule qui, rompant avec l'allure plutôt neutre de la loi actuelle, dénoterait une attitude positive à l'égard de la négociation collective. [p. 152-153]

Le préambule du *Code canadien du travail*, S.R.C. 1970, ch. L-1, a ensuite été modifié, en 1972 (S.C. 1972, ch. 18), de façon à proclamer les avantages de la négociation collective pour la société :

> Considérant qu'il est depuis longtemps dans la tradition canadienne que la législation et la politique du travail soient conçues de façon à favoriser le bien-être de tous par l'encouragement de la pratique des libres négociations collectives et du règlement positif des différends;
>
> Considérant que les travailleurs, syndicats et employeurs du Canada reconnaissent et soutiennent que la liberté syndicale et la pratique des libres négociations collectives sont les fondements de relations industrielles fructueuses permettant d'établir de bonnes conditions de travail et de saines relations du travail;

Malgré les réticences exprimées à l'origine par la common law, la négociation collective est reconnue depuis longtemps au Canada. Son histoire démontre qu'elle représente la plus importante activité collective et que la liberté d'association s'exprime par son intermédiaire dans le contexte des relations du travail. Nous estimons alors que le concept de la

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includes this notion of a procedural right to collective bargaining.

This established Canadian right to collective bargaining was recognized in the Parliamentary hearings that took place before the adoption of the *Charter*. The acting Minister of Justice, Mr. Robert Kaplan, explained why he did not find necessary a proposed amendment to have the freedom to organize and bargain collectively expressly included under s. 2(*d*). These rights, he stated, were already implicitly recognized in the words "freedom of association":

> Our position on the suggestion that there be specific reference to freedom to organize and bargain collectively is that that is already covered in the freedom of association that is provided already in the Declaration or in the Charter; and that by singling out association for bargaining one might tend to d[i]minish all the other forms of association which are contemplated — church associations; associations of fraternal organizations or community organizations.

(Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, Issue No. 43, January 22, 1981, at pp. 69-70)

The protection enshrined in s. 2(*d*) of the *Charter* may properly be seen as the culmination of a historical movement towards the recognition of a procedural right to collective bargaining.

(b) *International Law Protects Collective Bargaining as Part of Freedom of Association*

Under Canada's federal system of government, the incorporation of international agreements into domestic law is properly the role of the federal Parliament or the provincial legislatures. However, Canada's international obligations can assist courts charged with interpreting the *Charter*'s guarantees (see *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, at para. 46). Applying

liberté d'association prévue à l'al. 2*d*) de la *Charte* comprend cette notion d'un droit procédural à la négociation collective.

67 Ce droit canadien de négociation collective bien établi a été reconnu lors des audiences parlementaires qui se sont déroulées avant l'adoption de la *Charte*. À cette occasion, le ministre suppléant de la Justice, M. Robert Kaplan, a expliqué pourquoi il n'a pas jugé nécessaire un projet d'amendement visant à inclure expressément dans l'al. 2*d*) la liberté de se syndiquer et de mener des négociations collectives. Ces droits, a-t-il déclaré, étaient déjà implicitement reconnus dans l'expression « liberté d'association » :

> Pour ce qui est de la proposition d'inclure un article qui traite tout particulièrement de la liberté d'association et du droit à la négociation collective, nous pensons que ces deux points sont couverts par les termes « libertés d'association », qui figurent dans la charte. En créant un article à part qui traiterait du droit à la négociation collective, cela pourrait amoindrir l'importance des autres types d'associations, comme les associations religieuses, fraternelles ou communautaires.

(*Procès-verbaux et témoignages* du Comité mixte spécial du Sénat et de la Chambre des communes sur la Constitution du Canada, fascicule nº 43, 22 janvier 1981, p. 69-70)

68 On peut à juste titre considérer la protection consacrée à l'al. 2*d*) de la *Charte* comme l'aboutissement d'un mouvement historique vers la reconnaissance d'un droit procédural de négocier collectivement.

b) *Le droit international protège la négociation collective en tant que partie inhérente à la liberté d'association*

69 Dans le système fédéral canadien, il revient au Parlement fédéral et aux législatures provinciales d'incorporer les accords internationaux au droit interne. L'examen des obligations internationales du Canada peut toutefois aider les tribunaux chargés d'interpréter les garanties de la *Charte* (voir *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 3, 2002 CSC 1, par. 46). L'application de cet outil d'interprétation

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this interpretive tool here supports recognizing a process of collective bargaining as part of the *Charter*'s guarantee of freedom of association.

70 Canada's adherence to international documents recognizing a right to collective bargaining supports recognition of the right in s. 2(*d*) of the *Charter.* As Dickson C.J. observed in the *Alberta Reference*, at p. 349, the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.

71 The sources most important to the understanding of s. 2(*d*) of the *Charter* are the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 ("*ICESCR*"), the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 ("*ICCPR*"), and the International Labour Organization's (ILO's) *Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise*, 68 U.N.T.S. 17 ("*Convention No. 87*"). Canada has endorsed all three of these documents, acceding to both the *ICESCR* and the *ICCPR*, and ratifying *Convention No. 87* in 1972. This means that these documents reflect not only international consensus, but also principles that Canada has committed itself to uphold.

72 The *ICESCR*, the *ICCPR* and *Convention No. 87* extend protection to the functioning of trade unions in a manner suggesting that a right to collective bargaining is part of freedom of association. The interpretation of these conventions, in Canada and internationally, not only supports the proposition that there is a right to collective bargaining in international law, but also suggests that such a right should be recognized in the Canadian context under s. 2(*d*).

73 Article 8, para. 1(*c*) of the *ICESCR* guarantees the "right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of

en l'espèce milite en faveur de la reconnaissance du processus de négociation collective comme partie inhérente à la liberté d'association garantie par la *Charte*.

L'adhésion du Canada à des instruments internationaux reconnaissant l'existence du droit de négocier collectivement appuie la thèse que ce droit est protégé à l'al. 2*d*) de la *Charte*. Comme l'a fait remarquer le juge en chef Dickson dans le *Renvoi relatif à l'Alberta*, p. 349, il faut présumer que la *Charte* accorde une protection au moins aussi grande que les instruments internationaux ratifiés par le Canada en matière de droits de la personne.

Pour l'interprétation de l'al. 2*d*) de la *Charte*, les textes les plus utiles sont le *Pacte international relatif aux droits économiques, sociaux et culturels*, 993 R.T.N.U. 3 (« *PIDESC* »), le *Pacte international relatif aux droits civils et politiques*, 999 R.T.N.U. 171 (« *PIDCP* »), et la *Convention (n^o 87) sur la liberté syndicale et la protection du droit syndical*, 68 R.T.N.U. 17 (« *Convention n^o 87* »), adoptée par l'Organisation internationale du Travail (« OIT »). Le Canada a entériné ces trois documents, en adhérant au *PIDESC* et au *PIDCP*, et en ratifiant la *Convention n^o 87* en 1972. Cela signifie que ces documents dégagent non seulement le consensus international, mais aussi des principes que le Canada s'est lui-même engagé à respecter.

Le *PIDESC*, le *PIDCP* et la *Convention n^o 87* accordent une protection aux activités des syndicats d'une manière qui permet de croire que le droit de négociation collective est compris dans la liberté d'association. L'interprétation de ces instruments, au Canada et à l'étranger, permet non seulement de confirmer l'existence d'un droit de négociation collective en droit international, mais tend également à indiquer qu'il y a lieu de reconnaître ce droit dans le contexte canadien en vertu de l'al. 2*d*).

L'article 8, par. 1*c*) du *PIDESC* garantit le « droit qu'ont les syndicats d'exercer librement leur activité, sans limitations autres que celles qui sont prévues par la loi et qui constituent des mesures nécessaires dans une so[c]iété démocratique, dans l'intérêt de la sécurité nationale ou de l'ordre

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others". This Article allows the "free functioning" of trade unions to be regulated, but not legislatively abrogated (*per* Dickson C.J., *Alberta Reference*, at p. 351). Since collective bargaining is a primary function of a trade union, it follows that Article 8 protects a union's freedom to pursue this function freely.

Similarly, Article 22, para. 1 of the *ICCPR* states that "[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests." Paragraph 2 goes on to say that no restriction may be placed on the exercise of this right, other than those necessary in a free and democratic society for reasons of national security, public safety, public order, public health or the protection of the rights of others. This Article has been interpreted to suggest that it encompasses both the right to form a union and the right to collective bargaining: *Concluding observations of the Human Rights Committee — Canada*, U.N. Doc. CCPR/C/79/Add.105 (1999).

Convention No. 87 has also been understood to protect collective bargaining as part of freedom of association. Part I of the Convention, entitled "Freedom of Association", sets out the rights of workers to freely form organizations which operate under constitutions and rules set by the workers and which have the ability to affiliate internationally. Dickson C.J., dissenting in the *Alberta Reference*, at p. 355, relied on *Convention No. 87* for the principle that the ability "to form and organize unions, even in the public sector, must include freedom to pursue the essential activities of unions, such as collective bargaining and strikes, subject to reasonable limits".

Convention No. 87 has been the subject of numerous interpretations by the ILO's Committee on Freedom of Association, Committee of Experts

public, ou pour protéger les droits et les libertés d'autrui ». Cette disposition permet de réglementer les activités « exercées librement » par les syndicats, et non de les abroger par voie législative (le juge en chef Dickson, *Renvoi relatif à l'Alberta*, p. 351). La négociation collective étant l'une des principales activités d'un syndicat, il s'ensuit que l'art. 8 protège la liberté reconnue aux syndicats d'exercer sans entrave cette activité.

74 De même, l'article 22, par. 1 du *PIDCP* prévoit : « Toute personne a le droit de s'associer librement avec d'autres, y compris le droit de constituer des syndicats et d'y adhérer pour la protection de ses intérêts. » Le deuxième paragraphe du même article mentionne aussi que l'exercice de ce droit ne peut faire l'objet que des seules restrictions qui sont nécessaires dans une société libre et démocratique, pour des raisons de sécurité nationale, de sûreté publique, d'ordre public, de santé publique ou pour protéger les droits d'autrui. L'interprétation donnée à cette disposition tend à indiquer qu'elle englobe tant le droit de former un syndicat que celui de négocier collectivement : *Observations finales du Comité des droits de l'homme — Canada*, N.U. Doc. CCPR/C/79/Add.105 (1999).

75 La *Convention n^o^ 87* a elle aussi été interprétée comme ayant pour effet de protéger la négociation collective dans le cadre de la liberté d'association. La partie I de la convention, « Liberté syndicale », établit le droit des travailleurs de constituer librement des organisations qui sont régies par des statuts et règlements administratifs élaborés par les travailleurs et qui peuvent s'affilier à des organisations internationales. Dans ses motifs dissidents dans le *Renvoi relatif à l'Alberta*, p. 355, le juge en chef Dickson s'est appuyé sur la *Convention n^o^ 87* pour énoncer le principe que « la liberté de constituer et d'organiser des syndicats doit, même dans le secteur public, comprendre la liberté d'exercer les activités essentielles des syndicats, telles la négociation collective et la grève, sous réserve de limites raisonnables ».

76 La *Convention n^o^ 87* a été fréquemment interprétée par le Comité de la liberté syndicale, la Commission d'experts et des Commissions

and Commissions of Inquiry. These interpretations have been described as the "cornerstone of the international law on trade union freedom and collective bargaining": M. Forde, "The European Convention on Human Rights and Labor Law" (1983), 31 *Am. J. Comp. L.* 301, at p. 302. While not binding, they shed light on the scope of s. 2(*d*) of the *Charter* as it was intended to apply to collective bargaining: *Dunmore*, at paras. 16 and 27, *per* Bastarache J., applying the jurisprudence of the ILO's Committee of Experts and Committee on Freedom of Association.

d'enquête de l'OIT. Ces interprétations ont été décrites comme constituant la [TRADUCTION] « pierre angulaire du droit international en matière de liberté syndicale et de négociation collective » : M. Forde, « The European Convention on Human Rights and Labor Law » (1983), 31 *Am. J. Comp. L.* 301, p. 302. Bien qu'elles ne soient pas contraignantes, elles clarifient la portée de l'al. 2*d*) de la *Charte* tel qu'il est censé s'appliquer à la négociation collective : *Dunmore*, par. 16 et 27, où le juge Bastarache a appliqué la jurisprudence de la Commission d'experts et du Comité de la liberté syndicale de l'OIT.

77 A recent review by ILO staff summarized a number of principles concerning collective bargaining. Some of the most relevant principles in international law are summarized in the following terms (see B. Gernigon, A. Odero and H. Guido, "ILO principles concerning collective bargaining" (2000), 139 *Int'l Lab. Rev.* 33, at pp. 51-52):

Une étude récente effectuée par des membres du personnel de l'OIT résume plusieurs principes régissant la négociation collective. Certains des principes pertinents du droit international sont exprimés en ces termes (voir B. Gernigon, A. Odero et H. Guido, « Les principes de l'OIT sur la négociation collective » (2000), 139 *Rev. int. trav.* 37, p. 55-57) :

A. The right to collective bargaining is a fundamental right endorsed by the members of the ILO in joining the Organization, which they have an obligation to respect, to promote and to realize, in good faith (ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up).

A. Le droit de négociation collective est un droit fondamental accepté par les Membres de l'OIT du seul fait de leur appartenance à l'Organisation, qu'ils ont l'obligation de respecter, promouvoir et réaliser de bonne foi (Déclaration de l'OIT relative aux principes et droits fondamentaux au travail et son suivi).

. . .

. . .

D. The purpose of collective bargaining is the regulation of terms and conditions of employment, in a broad sense, and the relations between the parties.

D. La négociation collective a pour objet les conditions de travail et d'emploi au sens large et la régulation des relations entre les parties.

. . .

. . .

H. The principle of good faith in collective bargaining implies recognizing representative organizations, endeavouring to reach an agreement, engaging in genuine and constructive negotiations, avoiding unjustified delays in negotiation and mutually respecting the commitments entered into, taking into account the results of negotiations in good faith.

H. Le principe de la bonne foi dans la négociation collective implique les points suivants : reconnaître les organisations représentatives, faire des efforts pour parvenir à un accord, procéder à des négociations véritables et constructives, éviter des retards injustifiés dans la négociation et respecter réciproquement les engagements pris et les résultats obtenus grâce à des négociations de bonne foi.

I. In view of the fact that the voluntary nature of collective bargaining is a fundamental aspect of the principles of freedom of association, collective bargaining may not be imposed upon the parties and

I. Le caractère volontaire de la négociation collective étant un aspect fondamental des principes de la liberté syndicale, la négociation collective ne peut être imposée aux parties et les mécanismes destinés

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procedures to support bargaining must, in principle, take into account its voluntary nature; moreover, the level of bargaining must not be imposed unilaterally by law or by the authorities, and it must be possible for bargaining to take place at any level.

J. It is acceptable for conciliation and mediation to be imposed by law in the framework of the process of collective bargaining, provided that reasonable time limits are established. However, the imposition of compulsory arbitration in cases where the parties do not reach agreement is generally contrary to the principle of voluntary collective bargaining and is only admissible: [cases of essential services, administration of the State, clear deadlock, and national crisis].

K. Interventions by the legislative or administrative authorities which have the effect of annulling or modifying the content of freely concluded collective agreements, including wage clauses, are contrary to the principle of voluntary collective bargaining. These interventions include: the suspension or derogation of collective agreements by decree without the agreement of the parties; the interruption of agreements which have already been negotiated; the requirement that freely concluded collective agreements be renegotiated; the annulment of collective agreements; and the forced renegotiation of agreements which are currently in force. Other types of intervention, such as the compulsory extension of the validity of collective agreements by law are only admissible in cases of emergency and for short periods.

L. Restrictions on the content of future collective agreements . . . are admissible only in so far as such restrictions are preceded by consultations with the organizations of workers and employers and fulfil the following conditions: [restrictions are exceptional measures; of limited duration; include protection for workers' standards of living].

(See also, M. Coutu, *Les libertés syndicales dans le secteur public* (1989), at pp. 26-29.)

The fact that a global consensus on the meaning of freedom of association did not crystallize in the *Declaration on fundamental principles and rights at work*, 6 IHRR 285 (1999), until 1998 does not detract from its usefulness in interpreting s. 2(*d*) of the *Charter.* For one thing, the Declaration was made on the basis of interpretations of international instruments, such as *Convention No. 87*, many of

à faciliter la négociation doivent avoir en principe un caractère volontaire. Cependant, le niveau des négociations ne doit pas être imposé unilatéralement par la législation ou les autorités, car les négociations doivent pouvoir avoir lieu à quelque niveau que ce soit.

J. La conciliation et la médiation imposées par la législation dans le cadre du processus de négociation collective sont admissibles à condition de s'inscrire dans des délais raisonnables. En revanche, l'arbitrage obligatoire au cas où les parties n'arrivent pas à un accord est en règle générale contraire au principe de la négociation collective volontaire et il est uniquement admissible : [lorsqu'il s'agit de services essentiels, de l'administration de l'État, d'une impasse évidente et d'une crise nationale].

K. Sont contraires au principe de la négociation collective volontaire les interventions des autorités législatives ou administratives qui ont pour effet d'annuler ou de modifier le contenu des conventions collectives librement conclues, y compris le contenu des clauses concernant les salaires. Ces interventions peuvent comprendre la suspension ou l'abrogation par voie de décret, sans l'accord des parties, de conventions collectives; l'interruption de conventions préalablement négociées; l'exigence de renégocier des conventions librement convenues; l'annulation de conventions collectives et la renégociation forcée de conventions en vigueur. D'autres types d'intervention, telle que la prolongation obligatoire de la validité des conventions collectives par voie légale, ne sont admissibles que dans des cas d'urgence et pour des périodes brèves.

L. Les limitations au contenu des négociations collectives futures [. . .] sont admissibles dans la mesure où de telles limitations sont précédées de consultations avec les organisations de travailleurs et d'employeurs et remplissent les conditions suivantes : [elles s'appliquent à titre exceptionnel; ont une durée limitée; prévoient des garanties destinées à protéger le niveau de vie des travailleurs].

(Voir également M. Coutu, *Les libertés syndicales dans le secteur public* (1989), p. 26-29.)

78

Le fait que le consensus obtenu à l'échelle internationale au sujet de la liberté d'association n'ait pas été confirmé dans la *Déclaration relative aux principes et droits fondamentaux au travail*, 6 IHRR 285 (1999), avant 1998 n'enlève rien à son utilité pour l'interprétation de l'al. 2*d*) de la *Charte*. D'une part, la Déclaration a été conçue selon les interprétations d'instruments internationaux, par exemple

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which were adopted by the ILO prior to the advent of the *Charter* and were within the contemplation of the framers of the *Charter*. For another, the *Charter*, as a living document, grows with society and speaks to the current situations and needs of Canadians. Thus Canada's *current* international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the *Charter*.

la *Convention nº 87*, dont bon nombre ont été adoptés par l'OIT avant l'avènement de la *Charte* et pris en considération par ses rédacteurs. D'autre part, la *Charte*, en tant qu'instrument vivant, évolue avec la société et s'adresse aux situations et besoins actuels des Canadiens. Ainsi les engagements *actuels* du Canada en vertu du droit international et l'opinion internationale qui prévaut actuellement en matière de droits de la personne constituent une source persuasive pour l'interprétation de la portée de la *Charte*.

79 In summary, international conventions to which Canada is a party recognize the right of the members of unions to engage in collective bargaining, as part of the protection for freedom of association. It is reasonable to infer that s. 2(*d*) of the *Charter* should be interpreted as recognizing at least the same level of protection: *Alberta Reference*.

En bref, les accords internationaux auxquels le Canada est partie reconnaissent que le droit des syndiqués de participer à des négociations collectives bénéficie de la protection accordée à la liberté d'association. Il est donc raisonnable d'inférer que l'al. 2*d*) de la *Charte* confère au moins le même degré de protection à ce droit : le *Renvoi relatif à l'Alberta*.

(c) *Charter Values Support Protecting a Process of Collective Bargaining Under Section 2(d)*

c) *Les valeurs exprimées dans la Charte confirment la protection du processus de négociation collective dans le cadre de l'al. 2d)*

80 Protection for a process of collective bargaining within s. 2(*d*) is consistent with the *Charter*'s underlying values. The *Charter*, including s. 2(*d*) itself, should be interpreted in a way that maintains its underlying values and its internal coherence. As Lamer J. stated in *Dubois v. The Queen*, [1985] 2 S.C.R. 350, at pp. 365-66:

La protection du processus de négociation collective dans le cadre de l'al. 2*d*) est compatible avec les valeurs fondamentales de la *Charte*. Il faut interpréter la *Charte*, y compris l'al. 2*d*) lui-même, d'une manière qui préserve ses valeurs sous-jacentes et sa cohérence interne. Comme l'a écrit le juge Lamer dans *Dubois c. La Reine*, [1985] 2 R.C.S. 350, p. 365-366 :

> Our constitutional *Charter* must be construed as a system where "Every component contributes to the meaning as a whole, and the whole gives meaning to its parts" (P. A. Côté writing about statutory interpretation in *The Interpretation of Legislation in Canada* (1984), at p. 236). The courts must interpret each section of the *Charter* in relation to the others (see, for example, *R. v. Carson* (1983), 20 M.V.R. 54 (Ont. C.A.); *R. v. Konechny*, [1984] 2 W.W.R. 481 (B.C.C.A.); *Reference re Education Act of Ontario and Minority Language Education Rights* (1984), 47 O.R. (2d) 1 (C.A.); *R. v. Antoine*, *supra*).
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> (See also *Big M Drug Mart*, at p. 344, and *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, 2002 SCC 83, at para. 63.)

> Notre *Charte* constitutionnelle doit s'interpréter comme un système où « chaque élément contribue au sens de l'ensemble et l'ensemble au sens de chacun des éléments » (comme l'écrit P. A. Côté dans *Interprétation des lois* (1982), à la p. 257). Les tribunaux doivent interpréter chaque article de la *Charte* en fonction des autres articles (voir, par exemple, *R. c. Carson* (1983), 20 M.V.R. 54 (C.A. Ont.); *R. c. Konechny*, [1984] 2 W.W.R. 481 (C.A.C.-B.); *Reference re Education Act of Ontario and Minority Language Education Rights* (1984), 47 O.R. (2d) 1 (C.A.); *R. v. Antoine*, précité).
>
> (Voir également *Big M Drug Mart*, p. 344, et *Nouvelle-Écosse (Procureur général) c. Walsh*, [2002] 4 R.C.S. 325, 2002 CSC 83, par. 63.)

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Human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy are among the values that underlie the *Charter*: *R. v. Zundel*, [1992] 2 S.C.R. 731; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 100; *R. v. Oakes*, [1986] 1 S.C.R. 103. All of these values are complemented and indeed, promoted, by the protection of collective bargaining in s. 2(*d*) of the *Charter.*

The right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work (see *Alberta Reference*, at p. 368, and *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 93). As explained by P. C. Weiler in *Reconcilable Differences* (1980):

> Collective bargaining is not simply an instrument for pursuing external ends, whether these be mundane monetary gains or the erection of a private rule of law to protect the dignity of the worker in the face of managerial authority. Rather, collective bargaining is intrinsically valuable as an experience in self-government. It is the mode in which employees participate in setting the terms and conditions of employment, rather than simply accepting what their employer chooses to give them . . . . [p. 33]

In *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, 2002 SCC 8, we underlined the importance of protecting workers' autonomy:

> Personal issues at stake in labour disputes often go beyond the obvious issues of work availability and wages. Working conditions, like the duration and location of work, parental leave, health benefits, severance and retirement schemes, may impact on the personal lives of workers even outside their working hours. Expression on these issues contributes to self-understanding, as well as to the ability to influence one's working and non-working life. [para. 34]

81 La dignité humaine, l'égalité, la liberté, le respect de l'autonomie de la personne et la mise en valeur de la démocratie font partie des valeurs inhérentes à la *Charte* : *R. c. Zundel*, [1992] 2 R.C.S. 731; *Corbiere c. Canada (Ministre des Affaires indiennes et du Nord canadien)*, [1999] 2 R.C.S. 203, par. 100; *R. c. Oakes*, [1986] 1 R.C.S. 103. Assurer la protection de la négociation collective au moyen de l'al. 2*d*) de la *Charte* permet de compléter, même de promouvoir, toutes ces valeurs.

82 Le droit de négocier collectivement avec l'employeur favorise la dignité humaine, la liberté et l'autonomie des travailleurs en leur donnant l'occasion d'exercer une influence sur l'adoption des règles régissant leur milieu de travail et, de ce fait, d'exercer un certain contrôle sur un aspect d'importance majeure de leur vie, à savoir leur travail (voir le *Renvoi relatif à l'Alberta*, p. 368, et *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701, par. 93). Le professeur P. C. Weiler a commenté cet aspect du droit à la négociation collective dans son ouvrage *Reconcilable Differences* (1980) :

> [TRADUCTION] La négociation collective ne constitue pas simplement un moyen de poursuivre des fins extrinsèques, qu'il s'agisse des avantages pécuniaires habituels ou de règles de droit privées établies pour protéger la dignité du travailleur face au pouvoir de gestion. Elle est plutôt intrinsèquement valable comme expérience en matière d'autonomie. Elle constitue le mode par lequel les employés jouent un rôle dans l'établissement des conditions de travail au lieu de simplement accepter celles que l'employeur décide d'offrir . . . [p. 33]

83 Dans *S.D.G.M.R., section locale 558 c. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 R.C.S. 156, 2002 CSC 8, nous avons souligné l'importance de protéger l'autonomie des travailleurs :

> Les questions personnelles en jeu dans les conflits de travail transcendent souvent les problèmes usuels de possibilités d'emploi et de détermination des salaires. Les conditions de travail comme la durée et le lieu du travail, les congés parentaux, les prestations de maladie, les caisses de départ et les régimes de retraite peuvent avoir une incidence sur la vie personnelle des travailleurs, même en dehors de leurs heures de travail. L'expression d'opinion sur ces questions contribue à la compréhension de soi ainsi qu'à la capacité d'influencer sa vie au travail et sa vie en dehors du travail. [par. 34]

84 Collective bargaining also enhances the *Charter* value of equality. One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees: see *Wallace*, *per* Iacobucci J. In 1889, the Royal Commission on Capital and Labour appointed by the Macdonald government to make inquiries into the subject of labour and its relation to capital, stated that "Labour organizations are necessary to enable working men to deal on equal terms with their employers" (quoted in Glenday and Schrenk, at p. 121; see also G. Kealey, ed., *Canada investigates industrialism: The Royal Commission on the Relations of Labor and Capital, 1889 (abridged)* (1973), at p. 11). Similarly, Dickson C.J. rightly emphasized this concern about equality in the *Alberta Reference*:

> Freedom of association is the cornerstone of modern labour relations. Historically, workers have combined to overcome the inherent inequalities of bargaining power in the employment relationship and to protect themselves from unfair, unsafe, or exploitative working conditions. As the United States Supreme Court stated in *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), at p. 33:
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> > Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; . . .
> >
> > The "necessities of the situation" go beyond, of course, the fairness of wages and remunerative concerns, and extend to matters such as health and safety in the work place, hours of work, sexual equality, and other aspects of work fundamental to the dignity and personal liberty of employees. [pp. 334-35]

La négociation collective favorise également la réalisation de la valeur d'égalité consacrée par la *Charte*. L'un des succès fondamentaux résultant de la négociation collective est de pallier l'inégalité qui a toujours existé entre employeur et employés : voir *Wallace*, le juge Iacobucci. En 1889, la Commission royale sur les relations entre le capital et le travail, nommée par le gouvernement Macdonald pour faire une enquête sur la question du travail et ses relations avec le capital, a déclaré que « [l]es associations ouvrières sont nécessaires afin de permettre aux ouvriers de traiter avec leurs patrons sur un pied d'égalité » (*Rapport de la Commission royale sur les relations du travail avec le capital du Canada* (1889), p. 9 (cité dans Glenday et Schrenk, p. 121)). De même, le juge en chef Dickson a souligné à juste titre cette préoccupation en matière d'égalité dans le *Renvoi relatif à l'Alberta* :

> La liberté d'association constitue la pierre angulaire des relations de travail modernes. Historiquement, les travailleurs se sont unis pour aplanir les inégalités de puissance de négociation inhérentes aux relations employeur-employé et se prémunir contre des conditions de travail injustes, dangereuses ou favorisant l'exploitation. Comme l'a dit la Cour suprême des États-Unis dans l'arrêt *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), à la p. 33 :
>
> > [TRADUCTION] Il y a longtemps nous avons exposé la raison d'être des organisations ouvrières. Nous avons dit qu'elles se sont formées pour répondre à l'urgence de la situation; qu'un simple employé était démuni quand il traitait avec un employeur et qu'il était habituellement tributaire de son salaire quotidien pour ce qui est de son entretien et de celui de sa famille; que si l'employeur refusait de lui payer le salaire qu'il estimait juste, il était néanmoins incapable de quitter son emploi et de résister à un traitement arbitraire et injuste; . . .
> >
> > Il va sans dire que l'« urgence de la situation » signifie plus que des salaires justes et des préoccupations d'ordre pécuniaire et qu'elle vise également des sujets comme la santé et la sécurité au travail, les heures de travail, l'égalité des sexes et d'autres aspects des tâches qui sont fondamentaux pour la dignité et la liberté personnelle des employés. [p. 334-335]

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Finally, a constitutional right to collective bargaining is supported by the *Charter* value of enhancing democracy. Collective bargaining permits workers to achieve a form of workplace democracy and to ensure the rule of law in the workplace. Workers gain a voice to influence the establishment of rules that control a major aspect of their lives (*Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, at pp. 260-61, *per* Wilson J.; *Alberta Reference*, at p. 369; *Dunmore*, at paras. 12 and 46; Weiler, at pp. 31-32). The 1969 Woods Report explained:

> One of the most cherished hopes of those who originally championed the concept of collective bargaining was that it would introduce into the work place some of the basic features of the political democracy that was becoming the hallmark of most of the western world. Traditionally referred to as industrial democracy, it can be described as the substitution of the rule of law for the rule of men in the work place. [p. 96]

(See also Klare (quoted at para. 57 above).)

We conclude that the protection of collective bargaining under s. 2(*d*) of the *Charter* is consistent with and supportive of the values underlying the *Charter* and the purposes of the *Charter* as a whole. Recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the *Charter.*

(3) Section 2(*d*) of the *Charter* and the Right to Collective Bargaining

The preceding discussion leads to the conclusion that s. 2(*d*) should be understood as protecting the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining. The next question is what this right entails for employees, for government employers subject to the *Charter* under s. 32, and for Parliament and provincial legislatures which adopt labour laws.

Enfin, la valeur qu'attache la *Charte* au renforcement de la démocratie appuie la thèse de l'existence d'un droit constitutionnel de négocier collectivement. En effet, la négociation collective permet aux travailleurs de parvenir à une forme de démocratie et de veiller à la primauté du droit en milieu de travail. Ils acquièrent voix au chapitre pour l'établissement des règles qui régissent un aspect majeur de leur vie (*Lavigne c. Syndicat des employés de la fonction publique de l'Ontario*, [1991] 2 R.C.S. 211, p. 260-261 (motifs de la juge Wilson); *Renvoi relatif à l'Alberta*, p. 369; *Dunmore*, par. 12 et 46; Weiler, p. 31-32). Le Rapport Woods de 1969 explique :

> L'un des grands espoirs des pionniers de la négociation collective était qu'elle fit passer dans les lieux de travail quelques-uns des aspects fondamentaux de cette démocratie politique qui était en train de devenir le cachet du monde occidental. C'est ce que, traditionnellement, on a appelé la démocratie économique, et on peut la décrire comme étant la substitution de la raison juridique aux passions humaines sur le lieu de travail. [p. 107]

(Voir aussi Klare (cité au par. 57 ci-dessus).)

Nous concluons que la protection de la négociation collective garantie par l'al. 2*d*) de la *Charte* est compatible avec les valeurs reconnues par la *Charte* et avec l'ensemble de ses objectifs, et qu'elle confirme ces valeurs. Reconnaître que le droit des travailleurs de négocier collectivement est inhérent à leur liberté d'association réaffirme les valeurs de dignité, d'autonomie de la personne, d'égalité et de démocratie, intrinsèques à la *Charte*.

(3) L'alinéa 2*d*) de la *Charte* et le droit de négocier collectivement

L'analyse qui précède mène à la conclusion que l'al. 2*d*) devrait être interprété comme ayant pour effet de protéger le droit d'employés de s'associer en vue d'atteindre des objectifs relatifs au milieu de travail par un processus de négociation collective. Il s'agit ensuite de déterminer la signification de ce droit pour les employés, les employeurs du secteur public assujettis à la *Charte* en raison de l'art. 32 ainsi que pour le Parlement et les législatures provinciales qui adoptent des lois en matière de relations du travail.

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88 Before going further, it may be useful to clarify who the s. 2(*d*) protection of collective bargaining affects, and how. The *Charter* applies only to state action. One form of state action is the passage of legislation. In this case, the legislature of British Columbia has passed legislation applying to relations between health care sector employers and the unions accredited to those employers. That legislation must conform to s. 2(*d*) of the *Charter*, and is void under s. 52 of the *Constitution Act, 1982* if it does not (in the absence of justification under s. 1 of the *Charter*). A second form of state action is the situation where the government is an employer. While a private employer is not bound by s. 2(*d*), the government as employer must abide by the *Charter*, under s. 32, which provides: "This Charter applies . . . (*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province." This case is concerned with an attack on government legislation; there is no allegation that the government of British Columbia, *qua* employer, violated s. 2(*d*) of the *Charter.*

89 The scope of the right to bargain collectively ought to be defined bearing in mind the pronouncements of *Dunmore*, which stressed that s. 2(*d*) does not apply solely to individual action carried out in common, but also to associational activities themselves. The scope of the right properly reflects the history of collective bargaining and the international covenants entered into by Canada. Based on the principles developed in *Dunmore* and in this historical and international perspective, 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. In brief, the protected activity might be described as employees banding together to achieve particular work-related objectives. Section 2(*d*) does not guarantee the particular objectives sought through this associational activity. However, it guarantees the process through which those goals are pursued. It means that employees have the right to unite, to present

Il peut être utile, avant d'aller plus loin, de préciser qui est touché par la protection de la négociation collective garantie par l'al. 2*d*) et de quelle manière elle l'affecte. La *Charte* s'applique seulement à l'acte de l'État. Une forme d'acte de l'État est l'adoption de textes législatifs. En l'espèce, la législature de la Colombie-Britannique a adopté une loi régissant les relations entre les employeurs du secteur de la santé et les syndicats accrédités auprès d'eux. Cette loi doit être compatible avec l'al. 2*d*) de la *Charte*, sinon elle est inopérante en vertu de l'art. 52 de la *Loi constitutionnelle de 1982* (en l'absence de justification selon l'article premier de la *Charte*). Une deuxième forme d'acte de l'État concerne le cas où le gouvernement est l'employeur. Un employeur du secteur privé n'est pas lié par l'al. 2*d*) alors que le gouvernement en tant qu'employeur doit se conformer à la *Charte* en vertu de l'art. 32, qui prévoit : « La présente charte s'applique [. . .] *b*) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature. » Il s'agit en l'espèce de la contestation d'une loi gouvernementale; il n'est pas allégué que le gouvernement de la Colombie-Britannique, en tant qu'employeur, a violé l'al. 2*d*) de la *Charte*.

La portée du droit de négociation collective doit être définie compte tenu de *Dunmore*, où la Cour a souligné que l'al. 2*d*) vise non seulement les activités individuelles exercées collectivement, mais aussi les activités associatives elles-mêmes. Elle reflète à juste titre l'histoire de la négociation collective et les pactes internationaux auxquels le Canada est partie. Selon les principes élaborés dans *Dunmore* et dans cette perspective historique et internationale, le droit constitutionnel de négocier collectivement vise à protéger la capacité des travailleurs de participer à des activités associatives et leur capacité d'agir collectivement pour réaliser des objectifs communs concernant des questions liées au milieu de travail et leurs conditions de travail. En bref, on pourrait décrire l'activité protégée comme l'union des efforts des employés pour réaliser des objectifs particuliers liés au travail. L'alinéa 2*d*) ne protège pas les objectifs particuliers que les employés cherchent à atteindre par cette activité associative. Il protège toutefois le processus de réalisation de ces objectifs. Cela signifie que les employés ont

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demands to health sector employers collectively and to engage in discussions in an attempt to achieve workplace-related goals. Section 2(*d*) imposes corresponding duties on government employers to agree to meet and discuss with them. It also puts constraints on the exercise of legislative powers in respect of the right to collective bargaining, which we shall discuss below.

Section 2(*d*) of the *Charter* does not protect all aspects of the associational activity of collective bargaining. It protects only against "substantial interference" with associational activity, in accordance with a test crafted in *Dunmore* by Bastarache J., which asked whether "excluding agricultural workers from a statutory labour relations regime, without expressly or intentionally prohibiting association, [can] constitute a substantial interference with freedom of association" (para. 23). Or to put it another way, does the state action target or affect the associational activity, "thereby discouraging the collective pursuit of common goals"? (*Dunmore*, at para. 16). Nevertheless, intent to interfere with the associational right of collective bargaining is not essential to establish breach of s. 2(*d*) of the *Charter*. It is enough if the *effect* of the state law or action is to *substantially interfere* with the activity of collective bargaining, thereby discouraging the collective pursuit of common goals. It follows that the state must not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith. Thus the employees' right to collective bargaining imposes corresponding duties on the employer. It requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation.

The right to collective bargaining thus conceived is a limited right. First, as the right is to a process, it does not guarantee a certain substantive or economic outcome. Moreover, the right is to a general

le droit de s'unir, de présenter collectivement des demandes à leurs employeurs du secteur de la santé et de participer à des discussions en vue d'atteindre des objectifs liés au milieu de travail. L'alinéa 2*d*) impose aux employeurs du secteur public des obligations correspondantes d'accepter de rencontrer les employés pour discuter avec eux. Il restreint aussi le pouvoir de légiférer en matière de négociation collective, question que nous examinerons plus loin.

90 L'alinéa 2*d*) de la *Charte* ne protège pas tous les aspects de l'activité associative liée à la négociation collective. Il protège uniquement contre les « entraves substantielles » à l'activité associative, selon le critère élaboré dans *Dunmore* par le juge Bastarache, qui soulevait la question suivante : « l'exclusion des travailleurs agricoles d'un régime légal des relations de travail, sans interdiction expresse ou intentionnelle de l'association, peut-elle constituer une atteinte substantielle à la liberté d'association? » (par. 23). En d'autres termes, il s'agit de déterminer si l'acte de l'État vise ou touche l'activité associative, « décourageant ainsi la poursuite collective d'objectifs communs » (*Dunmore*, par. 16). Il n'est cependant pas nécessaire de démontrer l'intention de porter atteinte au droit d'association lié à la négociation collective pour établir la violation de l'al. 2*d*) de la *Charte*. Il suffit que la loi ou l'acte de l'État ait pour *effet d'entraver de façon substantielle* l'activité de négociation collective, décourageant ainsi la poursuite collective d'objectifs communs. En conséquence, l'État doit s'abstenir d'empêcher un syndicat d'exercer une véritable influence sur les conditions de travail par l'entremise d'un processus de négociation collective menée de bonne foi. Le droit des employés de négocier collectivement impose donc à l'employeur des obligations correspondantes. Il implique que l'employeur et les employés se rencontrent et négocient de bonne foi en vue de réaliser leur objectif commun d'accommodement par des moyens pacifiques et productifs.

91 Ainsi défini, le droit de négociation collective demeure un droit à portée restreinte. Premièrement, parce qu'il concerne un processus, il ne garantit pas l'atteinte de résultats quant au fond de la

process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method. As P. A. Gall notes, it is impossible to predict with certainty that the present model of labour relations will necessarily prevail in 50 or even 20 years ("Freedom of Association and Trade Unions: A Double-Edged Constitutional Sword", in J. M. Weiler and R. M. Elliot, eds., *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (1986), 245, at p. 248). Finally, and most importantly, the interference, as *Dunmore* instructs, must be substantial — so substantial that it interferes not only with the attainment of the union members' objectives (which is not protected), but with the very process that enables them to pursue these objectives by engaging in meaningful negotiations with the employer.

92 To constitute *substantial interference* with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer that we call collective bargaining. Laws or actions that can be characterized as "union breaking" clearly meet this requirement. But less dramatic interference with the collective process may also suffice. In *Dunmore*, denying the union access to the labour laws of Ontario designed to support and give a voice to unions was enough. Acts of bad faith, or unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation may also significantly undermine the process of collective bargaining. The inquiry in every case is contextual and fact-specific. The question in every case is whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted.

négociation ou à ses effets économiques. Deuxièmement, il confère le droit de participer à un processus général de négociation collective et non le droit de revendiquer un modèle particulier de relations du travail ou une méthode particulière de négociation. Comme le fait remarquer P. A. Gall, on ne saurait prédire avec certitude si le modèle actuel des relations du travail sera celui qui s'imposera dans 50 ou même 20 ans (« Freedom of Association and Trade Unions : A Double-Edged Constitutional Sword », dans J. M. Weiler and R. M. Elliot, dir., *Litigating the Values of a Nation : The Canadian Charter of Rights and Freedoms* (1986), 245, p. 248). Enfin, et plus important encore, comme nous l'enseigne l'arrêt *Dunmore*, l'atteinte au droit doit être substantielle, au point de constituer une entrave non seulement à la réalisation des objectifs des syndiqués (laquelle n'est pas protégée), mais aussi au processus même qui leur permet de poursuivre ces objectifs en s'engageant dans de véritables négociations avec l'employeur.

Pour qu'il s'agisse d'une *atteinte substantielle* à la liberté d'association, l'intention ou l'effet doit sérieusement compromettre l'activité des travailleurs qui consiste à se regrouper en vue de réaliser des objectifs communs, c'est-à-dire négocier des conditions de travail et des modalités d'emploi avec leur employeur, une activité qualifiée de négociation collective. Certes, les lois ou les actions pouvant être considérées comme des tactiques destinées à « briser les syndicats » satisfont à cette exigence, mais les entraves moins graves au processus collectif peuvent également suffire pour rendre applicable la garantie du droit d'association. Dans *Dunmore*, empêcher le syndicat de recourir aux lois ontariennes sur les relations du travail visant à appuyer les syndicats et à leur permettre de se faire entendre a suffi. Agir de mauvaise foi ou annuler de façon unilatérale des modalités négociées, sans véritables discussions et consultations, peut aussi grandement saper le processus de négociation collective. Dans tous les cas, une analyse contextuelle et factuelle s'impose et il faut se demander s'il y a eu ou s'il surviendra vraisemblablement des effets négatifs importants sur le processus de négociation collective volontaire menée de bonne foi entre les employés et l'employeur.

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Generally speaking, determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries. The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.

93 De façon générale, pour déterminer si une mesure gouvernementale ayant des répercussions sur le processus de négociation collective protégé par la *Charte* constitue une atteinte substantielle, il faut examiner successivement deux questions. D'abord, il faut déterminer l'importance que les aspects touchés revêtent pour le processus de négociation collective et, plus particulièrement, la mesure dans laquelle la capacité des syndiqués d'agir d'une seule voix en vue de réaliser des objectifs communs est compromise. Puis, on doit étudier l'impact de la mesure sur le droit collectif à une consultation et à une négociation menée de bonne foi.

Both inquiries are necessary. If the matters affected do not substantially impact on the process of collective bargaining, the measure does not violate s. 2(*d*) and, indeed, the employer may be under no duty to discuss and consult. There will be no need to consider process issues. If, on the other hand, the changes substantially touch on collective bargaining, they will still not violate s. 2(*d*) if they preserve a process of consultation and good faith negotiation.

94 Les deux examens s'imposent. Si les aspects touchés n'ont pas de répercussions importantes sur le processus de négociation collective, la mesure n'enfreint pas l'al. 2*d*) et il se peut effectivement que l'employeur n'ait pas l'obligation de tenir des discussions et des consultations. Il ne sera alors pas nécessaire d'examiner les questions relatives au processus. Par ailleurs, les modifications qui ont une profonde incidence sur la négociation collective ne contreviendront pas non plus à l'al. 2*d*) si elles préservent le processus de consultation et de négociation menée de bonne foi.

Turning to the first inquiry, the essential question is whether the subject matter of a particular instance of collective bargaining is such that interfering with bargaining over that issue will affect the ability of unions to pursue common goals collectively. It may help to clarify why the importance of the subject matter of bargaining is relevant to the s. 2(*d*) inquiry. As we have stated, one requirement for finding a breach of s. 2(*d*) is that the state has "precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals" (*Dunmore*, at para. 16 (emphasis deleted)). Interference with collective bargaining over matters of lesser importance to the union and its capacity to pursue collective goals in concert may be of some significance to workers. However, interference with collective bargaining over these less important matters is more likely to fall short of discouraging the capacity of union members to come together and pursue common goals in

95 Dans le cadre du premier examen, il convient essentiellement de déterminer si l'objet d'une négociation collective particulière est d'importance telle que l'ingérence dans la négociation de cette question nuirait à la capacité des syndicats de poursuivre collectivement des objectifs communs. Il peut être utile de préciser pourquoi l'importance de la question faisant l'objet de la négociation doit être prise en compte lors de cette vérification. Comme nous l'avons déjà dit, pour conclure à une violation de l'al. 2*d*) il faut notamment que l'État ait « empêché l'activité en raison de sa nature associative, décourageant ainsi la poursuite collective d'objectifs communs » (*Dunmore*, par. 16 (soulignement omis)). L'ingérence dans la négociation collective des sujets de moindre importance pour le syndicat et pour le maintien de sa capacité de poursuivre collectivement des objectifs communs peut avoir un certain degré d'importance pour les travailleurs. Toutefois, il reste plus probable que

concert. Therefore, if the subject matter is of lesser importance to the union, then it is less likely that the s. 2(*d*) right to bargain collectively is infringed. The importance of an issue to the union and its members is not itself determinative, but will bear on the "single inquiry" prescribed in *Dunmore* as it applies in the particular context of collective bargaining: does interference with collective bargaining over certain subject matter affect the ability of the union members to come together and pursue common goals? The more important the matter, the more likely that there is substantial interference with the s. 2(*d*) right. Conversely, the less important the matter to the capacity of union members to pursue collective goals, the less likely that there is substantial interference with the s. 2(*d*) right to collective bargaining.

96 While it is impossible to determine in advance exactly what sorts of matters are important to the ability of union members to pursue shared goals in concert, some general guidance may be apposite. Laws or state actions that prevent or deny meaningful discussion and consultation about working conditions between employees and their employer may substantially interfere with the activity of collective bargaining, as may laws that unilaterally nullify significant negotiated terms in existing collective agreements. By contrast, measures affecting less important matters such as the design of uniform, the lay out and organization of cafeterias, or the location or availability of parking lots, may be far less likely to constitute significant interference with the s. 2(*d*) right of freedom of association. This is because it is difficult to see how interfering with collective bargaining over these matters undermines the capacity of union members to pursue shared goals in concert. Thus, an interference with collective bargaining over these

l'interférence dans la négociation collective de ces sujets de moindre importance ne découragerait pas véritablement les syndiqués d'unir leurs efforts et de poursuivre collectivement des objectifs communs. Par conséquent, lorsque le sujet de la négociation porte moins à conséquence pour le syndicat, l'atteinte au droit à un processus de négociation collective prévu par l'al. 2*d*) devient moins probable. L'importance qu'un sujet revêt pour le syndicat et ses membres ne possède pas de caractère déterminant en soi, mais elle influera sur la réponse que recevra la « seule question » à laquelle il faut répondre selon *Dunmore*, dans le contexte particulier de la négociation collective : l'ingérence dans la négociation collective d'un certain sujet nuit-elle à la capacité des syndiqués d'unir leurs efforts et de poursuivre des objectifs communs? Plus le sujet de la négociation importe, plus probable deviendra l'existence d'une atteinte substantielle au droit garanti par l'al. 2*d*). Par contre, moins une question a d'incidences sur la capacité des syndiqués de poursuivre des objectifs communs, moins vraisemblable devient la présence d'une atteinte substantielle au droit de négociation collective prévu à l'al. 2*d*).

Bien que la détermination à l'avance des sujets qui influeront sur la capacité des syndiqués de poursuivre collectivement des objectifs communs reste impossible, il peut s'avérer utile de donner des orientations sur cette question. Les lois ou les actes de l'État qui empêchent ou interdisent la tenue de véritables discussions et consultations entre employés et employeur au sujet des conditions de travail risquent d'interférer de manière substantielle dans l'activité de négociation collective, tout comme les lois qui invalident unilatéralement des stipulations d'importance significative que prévoient des conventions collectives en vigueur. Par contre, les mesures relatives à des sujets moins importants comme la conception des uniformes, l'aménagement et l'organisation des cafétérias ou bien l'emplacement ou la quantité des espaces de stationnement offerts demeurent beaucoup moins susceptibles de constituer une atteinte substantielle au droit à la liberté d'association garanti par l'al. 2*d*). En effet, on concevrait difficilement qu'une

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issues is less likely to meet the requirements set out in *Dunmore* for a breach of s. 2(*d*).

ingérence dans la négociation collective de telles questions pourrait empêcher les syndiqués de poursuivre collectivement des objectifs communs. Ainsi, il devient moins probable, selon le critère énoncé dans *Dunmore*, qu'une interférence dans la négociation collective de ces questions constitue une atteinte à l'al. 2*d*).

Where it is established that the measure impacts on subject matter important to collective bargaining and the capacity of the union members to come together and pursue common goals, the need for the second inquiry arises: does the legislative measure or government conduct in issue respect the fundamental precept of collective bargaining — the duty to consult and negotiate in good faith? If it does, there will be no violation of s. 2(*d*), even if the content of the measures might be seen as being of substantial importance to collective bargaining concerns, since the process confirms the associational right of collective bargaining.

97 S'il est établi que la mesure a des incidences sur un sujet d'importance pour le droit à un processus de négociation collective et pour la capacité des syndiqués d'unir leurs efforts et de poursuivre des objectifs communs, on doit alors passer au second examen, pour déterminer si la mesure législative ou la conduite de l'État en cause respectent le précepte fondamental de la négociation collective — l'obligation de consulter et de négocier de bonne foi. Dans l'affirmative, on ne conclura pas à une violation de l'al. 2*d*), même si la mesure, en elle-même, peut sembler de grande importance pour le processus de négociation collective, car le processus confirme le droit associatif des employés à un processus de négociation collective.

Consideration of the duty to negotiate in good faith which lies at the heart of collective bargaining may shed light on what constitutes improper interference with collective bargaining rights. It is worth referring again to principle H of the ILO principles concerning collective bargaining, which emphasizes the need for good faith in upholding the right to collective bargaining and in the course of collective bargaining. Principle H thus states:

98 L'examen de l'obligation de négocier de bonne foi, qui se trouve au cœur de la négociation collective, permet de mieux cerner la notion d'ingérence indue dans le droit de négociation collective. Il vaut la peine de se référer de nouveau au principe H de l'OIT sur la négociation collective, qui souligne la nécessité de la bonne foi pour faire respecter le droit de négociation collective et son importance dans le déroulement des négociations collectives. Ce principe H est ainsi formulé :

> The principle of good faith in collective bargaining implies recognizing representative organizations, endeavouring to reach an agreement, engaging in genuine and constructive negotiations, avoiding unjustified delays in negotiation and mutually respecting the commitments entered into, taking into account the results of negotiations in good faith.

> Le principe de la bonne foi dans la négociation collective implique les points suivants : reconnaître les organisations représentatives, faire des efforts pour parvenir à un accord, procéder à des négociations véritables et constructives, éviter des retards injustifiés dans la négociation et respecter réciproquement les engagements pris et les résultats obtenus grâce à des négociations de bonne foi.

Consistent with this, the *Canada Labour Code* and legislation from all provinces impose on employers and unions the right and duty to bargain in good faith (see generally Adams, at pp. 10-91 and 10-92). The duty to bargain in good faith under

99 Conformément à ce principe, le *Code canadien du travail* et les lois de chaque province confèrent le droit et imposent l'obligation aux employeurs et aux syndicats de négocier de bonne foi (voir, en général, Adams, p. 10-91 et 10-92). L'obligation de négocier

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labour codes is essentially procedural and does not dictate the content of any particular agreement achieved through collective bargaining. The duty to bargain is aimed at bringing the parties together to meet and discuss, but as illustrated by Senator Walsh, chairman of the Senate committee hearing on the *Wagner Act*, the general rule is that: "The bill does not go beyond the office door." (Remarks of Senator Walsh, 79 Cong. Rec. 7659; see F. Morin, J.-Y. Brière and D. Roux, *Le droit de l'emploi au Québec* (3rd ed. 2006), at pp. 1026-27.)

de bonne foi prévue dans les codes du travail possède une nature essentiellement procédurale et ne dicte pas le contenu des ententes susceptibles d'être conclues à l'issue d'une négociation collective. Elle vise à réunir les parties autour de la table pour discuter mais, comme l'illustrent ces remarques du sénateur Walsh, président du comité sénatorial sur la *Loi Wagner*, selon la règle générale : [TRADUCTION] « La loi ne fait que conduire les représentants syndicaux à la porte de l'employeur. » (Remarques du sénateur Walsh, 79 Cong. Rec. 7659; voir F. Morin, J.-Y. Brière et D. Roux, *Le droit de l'emploi au Québec* (3e éd. 2006), p. 1026-1027.)

100 A basic element of the duty to bargain in good faith is the obligation to actually meet and to commit time to the process (Carter et al., at p. 301). As explained by Adams:

> The failure to meet at all is, of course, a breach of the duty. . . . A refusal to meet unless certain procedural preconditions are met is also a breach of the duty.
>
> . . .
>
> A failure to make the commitment of time and preparation required to attempt to conclude an agreement is a failure to make reasonable efforts. [pp. 10-101 and 10-106]

L'un des éléments fondamentaux de l'obligation de négocier de bonne foi consiste en l'obligation de tenir des rencontres et de consacrer du temps au processus (Carter et autres, p. 301). Comme l'explique Adams :

> [TRADUCTION] L'absence de toute rencontre constitue, évidemment, un manquement à l'obligation [. . .] Sauf dans les cas où certaines conditions préalables sont remplies, le refus d'assister à une rencontre constitue également un manquement à l'obligation.
>
> . . .
>
> Ne pas s'engager à consacrer le temps et la préparation nécessaires pour tenter de conclure une entente équivaut à ne pas fournir des efforts raisonnables. [p. 10-101 et 10-106]

101 The parties have a duty to engage in meaningful dialogue and they must be willing to exchange and explain their positions. They must make a reasonable effort to arrive at an acceptable contract (Adams, at p. 10-107; Carrothers, Palmer and Rayner, at p. 453). As Cory J. said in *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369:

> In the context of the duty to bargain in good faith a commitment is required from each side to honestly strive to find a middle ground between their opposing interests. Both parties must approach the bargaining table with good intentions. [para. 41]

Les parties ont l'obligation d'établir un véritable dialogue : elles doivent être disposées à échanger et expliquer leurs positions. Elles doivent faire un effort raisonnable pour arriver à un contrat acceptable (Adams, p. 10-107; Carrothers, Palmer et Rayner, p. 453). Comme l'a indiqué le juge Cory dans *Royal Oak Mines Inc. c. Canada (Conseil des relations du travail)*, [1996] 1 R.C.S. 369 :

> Dans le contexte du devoir de négocier de bonne foi, chaque partie doit s'engager à chercher honnêtement à trouver un compromis. Les deux parties doivent se présenter à la table des négociations avec de bonnes intentions. [par. 41]

102 Nevertheless, the efforts that must be invested to attain an agreement are not boundless. "[T]he

Néanmoins, les parties ne sont pas tenues à des efforts illimités pour parvenir à une entente.

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parties may reach a point in the bargaining process where further discussions are no longer fruitful. Once such a point is reached, a breaking off of negotiations or the adoption of a 'take it or leave it' position is not likely to be regarded as a failure to bargain in good faith" (Carter et al., at p. 302).

The duty to bargain in good faith does not impose on the parties an obligation to conclude a collective agreement, nor does it include a duty to accept any particular contractual provisions (Gagnon, LeBel and Verge, at pp. 499-500). Nor does the duty to bargain in good faith preclude hard bargaining. The parties are free to adopt a "tough position in the hope and expectation of being able to force the other side to agree to one's terms" (*Canadian Union of Public Employees v. Labour Relations Board (Nova Scotia)*, [1983] 2 S.C.R. 311, at p. 341).

In principle, the duty to bargain in good faith does not inquire into the nature of the proposals made in the course of collective bargaining; the content is left to the bargaining forces of the parties (Carter et al., at p. 300). However, when the examination of the content of the bargaining shows hostility from one party toward the collective bargaining process, this will constitute a breach of the duty to bargain in good faith. In some circumstances, even though a party is participating in the bargaining, that party's proposals and positions may be "inflexible and intransigent to the point of endangering the very existence of collective bargaining" (*Royal Oak Mines*, at para. 46). This inflexible approach is often referred to as "surface bargaining". This Court has explained the distinction between hard bargaining, which is legal, and surface bargaining, which is a breach of the duty to bargain in good faith:

> It is often difficult to determine whether a breach of the duty to bargain in good faith has been committed. Parties to collective bargaining rarely proclaim that their aim is to avoid reaching a collective agreement. The jurisprudence recognizes a crucial distinction between "hard bargaining" and "surface bargaining" . . . . Hard bargaining is not a violation of the duty to

[TRADUCTION] « Les parties engagées dans la négociation peuvent en arriver à un point où la poursuite des discussions serait vaine. Dans ce cas, la décision de rompre les négociations ou d'adopter l'attitude "à prendre ou à laisser" ne serait probablement pas considérée comme allant à l'encontre des négociations de bonne foi » (Carter et autres, p. 302).

103 L'obligation de négocier de bonne foi n'impose pas la conclusion d'une convention collective ni l'acceptation de clauses contractuelles particulières (Gagnon, LeBel et Verge, p. 499-500). Elle n'empêche pas non plus la négociation serrée. Les parties restent libres d'adopter une « ligne dure dans l'espoir de pouvoir forcer l'autre partie à accepter les conditions qui lui sont offertes » (*Syndicat canadien de la Fonction publique c. Conseil des relations du travail (Nouvelle-Écosse)*, [1983] 2 R.C.S. 311, p. 341).

104 En principe, la vérification de l'exécution de l'obligation de négocier de bonne foi ne s'étend pas au contrôle du contenu des propositions présentées dans le cadre de la négociation collective; leur contenu demeure fonction du rapport de force entre les parties (Carter et autres, p. 300). Toutefois, lorsque l'examen du contenu démontre qu'une partie manifeste de l'hostilité envers le processus de négociation collective, l'existence de cette hostilité constitue un manquement à l'obligation de négocier de bonne foi. Dans certaines circonstances, même si une partie participe à la négociation, les propositions et positions qu'elle présente peuvent être « inflexible[s] et intransigeante[s] au point de mettre en péril l'existence même de la négociation collective » (*Royal Oak Mines*, par. 46). Cette attitude d'inflexibilité est souvent décrite sous le vocable de « négociation de façade ». La Cour a expliqué la distinction entre la négociation serrée, qui est légale, et la négociation de façade, qui contrevient à l'obligation de négocier de bonne foi :

> Il est souvent difficile de déterminer s'il y a eu violation de l'obligation de négocier de bonne foi. Les parties à des négociations collectives reconnaissent rarement vouloir éviter de conclure une convention collective. La jurisprudence reconnaît une différence importante entre la « négociation serrée » et la « négociation de façade » [. . .] La négociation serrée ne constitue pas

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bargain in good faith. It is the adoption of a tough position in the hope and expectation of being able to force the other side to agree to one's terms. Hard bargaining is not a violation of the duty because there is a genuine intention to continue collective bargaining and to reach agreement. On the other hand, one is said to engage in "surface bargaining" when one pretends to want to reach agreement, but in reality has no intention of signing a collective agreement and hopes to destroy the collective bargaining relationship. It is the improper objectives which make surface bargaining a violation of the Act. The dividing line between hard bargaining and surface bargaining can be a fine one.

une violation de l'obligation de négocier de bonne foi. C'est l'adoption d'une ligne dure dans l'espoir de pouvoir forcer l'autre partie à accepter les conditions qui lui sont offertes. La négociation serrée n'est pas une violation de l'obligation parce qu'elle comporte une intention véritable de poursuivre les négociations collectives et de conclure une convention. Par contre, on dit qu'une partie pratique la « négociation de façade » lorsqu'elle feint de vouloir conclure une convention alors qu'en réalité elle n'a pas l'intention de signer une convention collective et elle souhaite détruire les rapports de négociation collective. La négociation de façade est une infraction à la Loi à cause de ses objectifs irréguliers. La ligne de démarcation entre la négociation serrée et la négociation de façade peut être ténue.

(*Canadian Union of Public Employees*, at p. 341; see also *Royal Oak Mines*, at para. 46.)

(*Syndicat canadien de la Fonction publique*, p. 341; voir également *Royal Oak Mines*, par. 46.)

105 Even though the employer participates in all steps of the bargaining process, if the nature of its proposals and positions is aimed at avoiding the conclusion of a collective agreement or at destroying the collective bargaining relationship, the duty to bargain in good faith will be breached: see *Royal Oak Mines*. To the words of Senator Walsh, that collective bargaining does not go beyond the office door, we would add that, on occasion, courts are nevertheless allowed to look into what is going on in the room, to ensure that parties are bargaining in good faith.

Même s'il participe à toutes les étapes du processus de négociation, lorsque ses propositions et positions visent à éviter de conclure une convention collective ou à détruire les rapports de négociation collective, l'employeur manque à son obligation de négocier de bonne foi : voir *Royal Oak Mines*. Aux propos du sénateur Walsh, selon lesquels la loi ne fait que conduire les représentants syndicaux à la porte de l'employeur, nous ajoutons que parfois les tribunaux peuvent néanmoins vérifier ce qui se passe derrière cette porte pour s'assurer que les parties négocient de bonne foi.

106 In Canada, unlike in the United States, the duty to bargain in good faith applies regardless of the subject matter of collective bargaining. Under Canadian labour law, all conditions of employment attract an obligation to bargain in good faith unless the subject matter is otherwise contrary to the law and could not legally be included in a collective agreement (Adams, at pp. 10-96 and 10-97; J.-P. Villaggi, "La convention collective et l'obligation de négocier de bonne foi: les leçons du droit du travail" (1996), 26 *R.D.U.S.* 355, at pp. 360-61). However, the refusal to discuss an issue merely on the periphery of the negotiations does not necessarily breach the duty to bargain in good faith (Carter et al., at p. 302).

Au Canada, contrairement aux États-Unis, l'obligation de négocier de bonne foi s'applique sans égard à l'objet de la négociation collective. Selon le droit canadien du travail, l'obligation de négocier de bonne foi porte sur toutes les conditions de travail à moins que leur objet soit contraire à la loi et que leur inclusion dans une convention collective soit prohibée (Adams, p. 10-96 et 10-97; J.-P. Villaggi, « La convention collective et l'obligation de négocier de bonne foi : les leçons du droit du travail » (1996), 26 *R.D.U.S.* 355, p. 360-361). Toutefois, le refus de traiter d'une question se trouvant seulement à la périphérie des négociations ne constitue pas nécessairement un manquement à l'obligation de négocier de bonne foi (Carter et autres, p. 302).

107 In considering whether the legislative provisions impinge on the collective right to good faith

Pour déterminer si des dispositions législatives empiètent sur le droit collectif à une consultation et

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negotiations and consultation, regard must be had for the circumstances surrounding their adoption. Situations of exigency and urgency may affect the content and the modalities of the duty to bargain in good faith. Different situations may demand different processes and timelines. Moreover, failure to comply with the duty to consult and bargain in good faith should not be lightly found, and should be clearly supported on the record. Nevertheless, there subsists a requirement that the provisions of the Act preserve the process of good faith consultation fundamental to collective bargaining. That is the bottom line.

à une négociation menées de bonne foi, il faut tenir compte des circonstances de leur adoption. Une situation d'urgence est susceptible d'influer sur le contenu et les modalités de l'obligation de négocier de bonne foi. Différentes situations peuvent commander différents processus et échéanciers. De plus, on se gardera de tirer à la légère, en l'absence d'un dossier bien étayé, une conclusion d'atteinte à l'obligation de consulter et de négocier de bonne foi. Néanmoins, il reste que les dispositions de la Loi doivent préserver le processus de consultation menée de bonne foi, qui est fondamental en matière de négociation collective. C'est ce qui importe.

Even where a s. 2(*d*) violation is established, that is not the end of the matter; limitations of s. 2(*d*) may be justified under s. 1 of the *Charter*, as reasonable limits demonstrably justified in a free and democratic society. This may permit interference with the collective bargaining process on an exceptional and typically temporary basis, in situations, for example, involving essential services, vital state administration, clear deadlocks and national crisis.

108 Même lorsqu'une atteinte à l'al. 2*d*) est établie, l'examen de la question ne s'arrête pas là : il demeure possible que les restrictions imposées au droit garanti par l'al. 2*d*) constituent, en vertu de l'article premier de la *Charte*, des limites raisonnables dont la justification peut se démontrer dans le cadre d'une société libre et démocratique. Exceptionnellement et généralement de façon temporaire, une interférence dans le processus de négociation collective reste donc permise, par exemple dans des situations mettant en cause des services essentiels ou des aspects vitaux de l'administration des affaires de l'État, ou dans le cas d'une impasse manifeste ou d'une crise nationale.

In summary, s. 2(*d*) may be breached by government legislation or conduct that substantially interferes with the collective bargaining process. Substantial interference must be determined contextually, on the facts of the case, having regard to the importance of the matter affected to the collective activity, and to the manner in which the government measure is accomplished. Important changes effected through a process of good faith negotiation may not violate s. 2(*d*). Conversely, less central matters may be changed more summarily, without violating s. 2(*d*). Only where the matter is both important to the process of collective bargaining, and has been imposed in violation of the duty of good faith negotiation, will s. 2(*d*) be breached.

109 En résumé, une loi ou un acte gouvernemental qui constitue une ingérence substantielle dans le processus de négociation collective peut contrevenir à l'al. 2*d*). La question de l'existence d'une atteinte substantielle doit être tranchée selon le contexte de chaque cas d'espèce, compte tenu de l'importance des sujets visés pour l'activité collective et de la manière dont la mesure a été mise en œuvre. Il se peut que des changements importants apportés dans le cadre d'un processus de négociation menée de bonne foi ne contreviennent pas à l'al. 2*d*). À l'inverse, il arrivera que des changements à propos de sujets de moindre importance ne portent pas atteinte à l'al. 2*d*). L'atteinte à l'al. 2*d*) ne surviendra que dans le cas où seront en cause à la fois un sujet d'importance pour le processus de négociation collective et une mesure imposée sans égard à l'obligation de négocier de bonne foi.

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(4) Application of the Law to the Facts at Bar

110 Having established that there is a right to bargain collectively under the protection of freedom of association in s. 2(*d*) of the *Charter*, and identified its scope, we must now apply it to the facts of this case. Ultimately, we conclude that ss. 6(2), 6(4) and 9 of the Act are unconstitutional because they infringe the right to collective bargaining protected under s. 2(*d*) and cannot be saved under s. 1. The remainder of Part 2 of the Act (consisting of ss. 3, 4, 5, 7, 8 and 10) does not violate the right to collective bargaining and withstands constitutional scrutiny under s. 2(*d*).

(a) *Does the Act Infringe the Right to Bargain Collectively Under Section 2(d) of the Charter?*

111 The question before us is whether particular provisions of the Act violate the procedural right to collective bargaining by significantly interfering with meaningful collective bargaining. In this context, examples of acts that may have such an impact are: failure to consult, refusal to bargain in good faith, taking important matters off the table and unilaterally nullifying negotiated terms.

112 On the analysis proposed above, two questions suggest themselves. First, does the measure interfere with collective bargaining, in purpose or effect? Secondly, if the measure interferes with collective bargaining, is the impact, evaluated in terms of the matters affected and the process by which the measure was implemented, significant enough to substantially interfere with the associational right of collective bargaining, so as to breach the s. 2(*d*) right of freedom of association?

(i) Does the Act Interfere with Collective Bargaining?

113 Sections 4 to 10 of the Act have the potential to interfere with collective bargaining in two ways:

(4) Application du droit aux faits de l'espèce

Ayant établi qu'existe un droit à un processus de négociation collective protégé par la liberté d'association garantie à l'al. 2*d*) de la *Charte* et défini sa portée, nous devons maintenant l'appliquer aux faits de l'espèce. En dernière analyse, nous concluons que les par. 6(2) et (4) ainsi que l'art. 9 de la loi sont inconstitutionnels parce qu'ils portent atteinte au droit à un processus de négociation collective protégé par l'al. 2*d*) et ne sauraient se justifier en vertu de l'article premier. Les autres dispositions de la partie 2 de la Loi (à savoir les art. 3, 4, 5, 7, 8 et 10) ne portent pas atteinte au droit de négociation collective et passent avec succès l'épreuve d'une contestation constitutionnelle fondée sur l'al. 2*d*).

a) *La Loi porte-t-elle atteinte au droit à un processus de négociation collective visé par l'al. 2d) de la Charte?*

Il s'agit de décider si certaines dispositions de la Loi violent le droit procédural de négociation collective en entravant de manière significative la tenue de véritables négociations collectives. Dans ce contexte, on retiendra comme exemples d'actions susceptibles d'avoir cet effet des gestes comme les suivants : l'omission de consulter, le refus de négocier de bonne foi, le retrait d'importants sujets de négociation et l'annulation unilatérale de conditions négociées.

L'analyse proposée ci-dessus commande l'examen de deux questions. Premièrement, la mesure entrave-t-elle — par son effet ou par son objet — l'exercice du droit à un processus de négociation collective? Deuxièmement, dans l'affirmative, compte tenu de l'importance de ses répercussions, évaluées en fonction des sujets visés et de son application, l'atteinte au droit d'association lié à la négociation collective est-elle substantielle et constitue-t-elle donc une atteinte au droit à la liberté d'association garantie par l'al. 2*d*)?

(i) La Loi constitue-t-elle une ingérence dans la négociation collective?

Les articles 4 à 10 de la Loi sont susceptibles d'entraver l'exercice du droit à un processus de

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first, by invalidating existing collective agreements and consequently undermining the past bargaining processes that formed the basis for these agreements; and second, by prohibiting provisions dealing with specified matters in future collective agreements and thereby undermining future collective bargaining over those matters. Future restrictions on the content of collective agreements constitute an interference with collective bargaining because there can be no real dialogue over terms and conditions that can never be enacted as part of the collective agreement.

négociation collective de deux manières. D'abord, ils invalident les conventions collectives existantes et, par conséquent, ébranlent la validité des processus de négociation antérieurs qui ont servi de fondement à la conclusion de ces conventions. Ensuite, ils interdisent dans des prochaines conventions collectives la conclusion de clauses qui portent sur des questions précisées dans la Loi, ce qui compromet les prochaines négociations collectives sur ces questions. Les restrictions futures au contenu des conventions collectives constituent une ingérence dans la négociation collective parce qu'il ne saurait se créer de véritable dialogue sur des conditions d'emploi qui ne peuvent être intégrées dans une convention collective.

We pause to reiterate briefly that the right to bargain collectively protects not just the act of making representations, but also the right of employees to have their views heard in the context of a meaningful process of consultation and discussion. This rebuts arguments made by the respondent that the Act does not interfere with collective bargaining because it does not explicitly prohibit health care employees from making collective representations. While the language of the Act does not technically prohibit collective representations to an employer, the right to collective bargaining cannot be reduced to a mere right to make representations. The necessary implication of the Act is that prohibited matters cannot be adopted into a valid collective agreement, with the result that the process of collective bargaining becomes meaningless with respect to them. This constitutes interference with collective bargaining.

114 En passant, nous rappelons brièvement que le droit à un processus de négociation collective protège non seulement la présentation de revendications collectives, mais aussi le droit des employés de se faire entendre par le canal de consultations et discussions véritables. Ce constat permet d'écarter les arguments de l'intimée selon lesquels la Loi n'entrave pas la négociation collective parce qu'elle n'interdit pas expressément aux employés du secteur de la santé de présenter des revendications collectives. Bien qu'en principe le texte de la Loi n'interdise pas les revendications collectives auprès de l'employeur, le droit de négociation collective ne saurait se limiter à la simple possibilité de présenter des revendications. La Loi prévoit, par implication nécessaire, que certains sujets ne peuvent faire partie du contenu d'une convention collective valide; le processus de négociation collective perd donc tout son sens à leur égard. Il s'agit là d'une atteinte au droit à un processus de négociation collective.

A more detailed examination of Part 2 of the Act suggests that some of the provisions substantially interfere with the process of collective bargaining. They affect matters of substantial importance to employees, and they fail to safeguard the basic processes of collective bargaining. In proceeding through this analysis, it is critical to bear in mind the relationship between ss. 4 to 9 and s. 10 of the Act, which has the effect of voiding provisions of any collective agreement to the extent that these provisions are inconsistent with Part 2 of the Act.

115 Un examen plus poussé de la partie 2 de la Loi fait ressortir que certaines dispositions entravent de façon substantielle le processus de négociation collective. Elles touchent des sujets d'une grande importance pour les employés et ne préservent pas les aspects fondamentaux du processus de négociation collective. Dans cette analyse, il est essentiel de retenir l'impact de l'interaction entre les art. 4 à 9 et l'art. 10 de la Loi, qui entraîne l'annulation de clauses de conventions collectives dans la mesure de leur incompatibilité avec la partie 2 de la Loi.

1. *Sections 4 and 5*

116 Sections 4 and 5 deal with transfer and reassignment of employees. Their effect was summarized by Garson J. at trial:

> Sections 4 and 5 of [the Act] give health sector employers the right to reorganize the delivery of their services. Pursuant to these sections, employers have the right to transfer functions, services and employees to another health sector employer or within a worksite. The Regulation sets out employee transfer rights and obligations. For example employees must not be transferred outside of their geographic location without their consent. Employees who decline transfers in such circumstances are entitled to lay-off notice and the limited bumping rights available under the Act. Employees who decline transfers within their geographic region, however, will be deemed to have resigned 30 days after the refusal. [para. 38]

117 Sections 4 and 5 altered the provisions for transfer and reassignment, as they existed in some collective agreements prior to the Act. Specific rights in existing collective agreements that employees lost when ss. 4 and 5 were enacted included: a requirement that the employer consider enumerated criteria in making hiring decisions, a guarantee that temporary assignments would not exceed four months, some protections for seniority, and the right to refuse a transfer if the employee has other employment options with the original employer under the collective agreement.

118 However, through the *Health Sector Labour Adjustment Regulation*, B.C. Reg. 39/2002, referred to in s. 4, protections similar in part to what the employees had under existing collective agreements were preserved. Notably, the regulation provided employees with a right to refuse being transferred outside of their geographic location without their consent, and a right to reasonable relocation expenses (see s. 2(1)(a) and (b)). These were substantially similar to entitlements that some employees

1. *Articles 4 et 5*

Les articles 4 et 5 traitent des transferts et des nouvelles affectations imposés aux employés. Au procès, la juge Garson a résumé leur effet en ces termes :

> [TRADUCTION] Les articles 4 et 5 de la Loi donnent aux employeurs du secteur de la santé le droit de réorganiser la prestation de leurs services. En vertu de ces dispositions, les employeurs ont le droit de transférer des fonctions, des services et des employés à un autre employeur du secteur de la santé ou dans un même lieu de travail. Le Règlement prévoit les droits et obligations des employés dans le cadre d'un transfert. Par exemple, les employés ne peuvent pas être transférés à l'extérieur de leur territoire géographique sans leur consentement. Les employés qui refusent d'être transférés dans de telles circonstances ont droit à un avis de mise en disponibilité et aux droits de supplantation restreints que leur accorde la Loi. Les employés qui refusent toutefois d'être transférés à l'intérieur de leur territoire géographique sont réputés avoir démissionné trente (30) jours après la notification de leur refus. [par. 38]

Les articles 4 et 5 ont modifié les dispositions relatives aux transferts et nouvelles affectations qui figuraient dans certaines conventions collectives avant l'adoption de la Loi. Une fois les art. 4 et 5 en vigueur, les employés ont perdu des droits que leur garantissaient les conventions collectives existantes, notamment : l'exigence qu'au moment de la prise des décisions d'embauche l'employeur tienne compte de certains critères énumérés, la garantie que les affectations temporaires n'excéderaient pas quatre mois, une protection partielle de l'ancienneté et le droit de l'employé de refuser d'être transféré s'il conserve d'autres possibilités d'emploi chez l'employeur initial en vertu de la convention collective.

Cependant, le *Health Sector Labour Adjustment Regulation*, B.C. Reg. 39/2002, mentionné à l'art. 4 a permis de maintenir des protections analogues en partie à celles dont bénéficiaient les employés selon les conventions collectives existantes. En particulier, ce règlement leur accordait le droit de refuser d'être transférés hors de leur lieu géographique, sans leur consentement, et le droit à des dépenses de réinstallation raisonnables (voir les al. 2(1)a) et b)). Ces droits étaient essentiellement analogues à ceux

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previously had under their collective agreements. Thus although ss. 4 and 5 of the Act (together with s. 10) nullified some of the employee's entitlements under existing collective agreements, they appear to have preserved the substance of the central aspects of the provisions of existing collective agreements that dealt with those questions. We therefore conclude that ss. 4 and 5 may have had some impact on prior collective agreements, although the impact was not great.

Nevertheless, the effect of ss. 4 and 5, in conjunction with s. 10, is to render *future* collective bargaining over transfers and reassignments largely meaningless, since collective bargaining cannot alter the employer's right to make transfers and reassignments. Section 10 of the Act would render void any terms inconsistent with ss. 4 and 5. Because it is meaningless to bargain over an issue which cannot ever be included in a collective agreement, ss. 4 and 5, considered together with s. 10, interfere with future collective bargaining.

dont jouissaient déjà certains employés en vertu de leur convention collective. Ainsi, même si les art. 4 et 5 de la Loi (combinés avec l'art. 10) annulent des droits reconnus aux employés par les conventions existantes, ils semblent avoir maintenu, pour l'essentiel, les aspects cruciaux des clauses des conventions collectives existantes qui traitaient de ces questions. Nous concluons donc que les art. 4 et 5 peuvent avoir eu un certain effet, si faible fût-il, sur les conventions collectives antérieures.

119 Toutefois, les art. 4 et 5, appliqués conjointement avec l'art. 10, videraient de sens, pour l'essentiel, les *futures* négociations collectives sur les transferts et les nouvelles affectations, car la négociation collective ne peut modifier le droit de l'employeur de procéder à des transferts et de nouvelles affectations. En effet, l'art. 10 de la Loi rendrait nulle toute stipulation incompatible avec les art. 4 et 5. Comme il ne sert à rien de négocier une question qui ne pourrait jamais être intégrée dans une convention collective, les art. 4 et 5, pris en considération avec l'art. 10, entravent les prochaines négociations collectives.

2. *Section 6*

Section 6(2) gives the employer increased power to contract out non-clinical services. Prior to the enactment of the Act, all collective agreements in the health care sector contained provisions restricting the right of management to contract out work. These provisions were inconsistent with s. 6(2) when that section was passed. The effect of s. 6(2), together with s. 10, is to invalidate these provisions in prior collective agreements. Further, s. 6(4), in conjunction with s. 10, invalidates any provision of a collective agreement that requires an employer to consult with a trade union prior to contracting outside the bargaining unit. For example, s. 17.12 of the Facilities Subsector Collective Agreement, which limits the ways in which the employer can contract out, is made void by ss. 6(4) and 10.

2. *Article 6*

120 Le paragraphe 6(2) accorde à l'employeur un pouvoir plus étendu pour sous-traiter des services non cliniques. Avant l'adoption de la Loi, les conventions collectives du secteur de la santé comportaient toutes des clauses limitant le droit de la direction de recourir à la sous-traitance. Ces dernières sont devenues incompatibles avec le par. 6(2) après son entrée en vigueur. Cette disposition, conjuguée avec l'art. 10, entraîne la nullité des stipulations des conventions collectives antérieures sur ces questions. Par ailleurs, le par. 6(4), conjointement avec l'art. 10, invalide les clauses de conventions collectives qui obligent l'employeur à consulter le syndicat avant de procéder à des activités de sous-traitance à l'extérieur de l'unité de négociation. Par exemple, la clause 17.12 de la convention collective du sous-secteur des installations, qui prévoit les circonstances précises permettant à l'employeur de recourir à la sous-traitance, devient nulle par le jeu du par. 6(4) et de l'art. 10.

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121 The combined effect of ss. 6(2), 6(4) and 10 is to forbid the incorporation into future collective agreements of provisions protecting employees from contracting out, or the inclusion of a provision requiring the employer to consult with the union. The prohibition on including certain provisions in a collective agreement related to contracting out is reflected in explicit language in s. 6(2), that "[a] collective agreement . . . must not contain a provision" dealing with certain aspects of contracting out. The prohibition both repudiates past collective bargaining relating to the issue of contracting out and makes future collective bargaining over this issue meaningless. It follows that ss. 6(2) and 6(4) have the effect of interfering with collective bargaining.

122 Sections 6(3), 6(5) and 6(6) deal with a different but related issue, namely, the status of employees and the recognition of successorship rights where business is contracted out by the original employer. Section 6(3) sets out a more onerous definition of the employer-employee relationship under the *Labour Relations Code*, R.S.B.C. 1996, c. 244, making it less likely that a health sector employer will still be considered the "true" employer owing duties to the union and its members if work is contracted out. Sections 6(5) and 6(6) prevent employees from retaining their collective bargaining rights with the subcontractor, as they would otherwise have done under ss. 35 and 38 of the *Labour Relations Code* if work was contracted out.

123 Although some might see ss. 6(3), 6(5) and 6(6) as harsh provisions aimed solely at employees of the health care sector, these sections simply modify the protections available under the *Labour Relations Code* and do not deal with entitlements of employees based on collective bargaining. Consequently, ss. 6(3), 6(5) and 6(6) do not interfere with collective bargaining and do not infringe the protection over collective bargaining offered by s. 2(*d*).

L'application combinée des par. 6(2) et (4) et de l'art. 10 interdit l'intégration dans les futures conventions collectives de clauses protégeant les employés contre la sous-traitance ou obligeant l'employeur à consulter les syndicats avant de procéder à celle-ci. L'interdiction des stipulations relatives à la sous-traitance est expressément prévue au par. 6(2), selon lequel [TRADUCTION] « les conventions collectives [. . .] ne doivent prévoir aucune clause » relative à certains aspects de la sous-traitance. L'interdiction met de côté le résultat des négociations collectives antérieures sur la sous-traitance et prive de sens les négociations collectives à venir sur ces questions. Les paragraphes 6(2) et (4) interfèrent donc avec le droit à un processus de négociation collective.

Les paragraphes 6(3), (5) et (6) traitent d'une question différente mais connexe, soit le statut des employés et la reconnaissance d'un droit de transmission au nouvel employeur, dans le cas où l'employeur initial recourt à la sous-traitance. Le paragraphe 6(3) adopte une définition plus stricte de la relation employeur-employés que le *Labour Relations Code*, R.S.B.C. 1996, ch. 244. Ce changement rend moins probable que l'employeur du secteur de la santé reste considéré comme le « véritable » employeur débiteur des obligations envers le syndicat et ses membres en cas de sous-traitance. Par ailleurs, selon les par. 6(5) et (6), les employés perdent leur droit de négocier collectivement avec le sous-entrepreneur, droit qui leur aurait été autrement reconnu en vertu des art. 35 et 38 du *Labour Relations Code* en cas de sous-traitance.

Il se peut que certains considèrent les par. 6(3), (5) et (6) comme des dispositions sévères visant uniquement les employés du secteur de la santé, mais il s'agit simplement de modifications aux protections prévues au *Labour Relations Code* qui ne touchent pas aux droits issus de négociations collectives reconnus aux employés. C'est pourquoi ces dispositions ne constituent pas une ingérence dans la négociation collective ni une atteinte à la protection que confère l'al. 2*d*) à la négociation collective.

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3. *Sections 7 and 8 — Job Security Programs*

Sections 7 and 8 deal with job security programs. Section 7 abolishes the Employment Security and Labour Force Adjustment Agreement ("ESLA"), a program giving employees of the health sector one year of training, assistance and financial support. This program was administered by the Healthcare Labour Adjustment Society ("HLAA"), which is also abolished under the Act.

The ESLA did not arise out of collective bargaining but, rather, was imposed by the government on health sector employers pursuant to the recommendations of an inquiry committee. Since neither the ESLA nor the HLAA was the outcome of a collective bargaining process, modifying them cannot constitute an interference with past bargaining processes. Further, since the ESLA and HLAA rely heavily on the authority of the government for their existence, and are outside of the power of health sector employees and employers, there is no potential for future collective bargaining over matters relating to either the ESLA and HLAA. Since there can be no future collective bargaining relating to the ESLA or the HLAA, there can be no interference with future collective bargaining over these matters either. It follows that neither s. 7 nor s. 8 has the purpose or effect of interfering with collective bargaining, past or future.

4. *Section 9 — Layoff and Bumping*

Section 9, which applies only to collective agreements up until December 31, 2005, deals with layoff and bumping. During the currency of this section, collective agreements could not contain provisions dealing with certain aspects of layoff and bumping. With respect to layoff, no collective agreement could restrict the right of health care employers to lay off employees (s. 9(a)), nor require them to meet conditions before giving layoff notice (s. 9(b)), nor provide notice beyond the 60 days guaranteed under

3. *Articles 7 et 8 — Programmes de sécurité d'emploi*

124 Les articles 7 et 8 traitent des programmes de sécurité d'emploi. L'article 7 abolit l'Employment Security and Labour Force Adjustment Agreement (« ESLA »), programme qui permet aux employés du secteur de la santé de bénéficier d'une année de formation, d'aide pour obtenir un nouvel emploi et de soutien financier. La Healthcare Labour Adjustment Society (« HLAA »), également abolie par la Loi, administrait ce programme.

125 L'ESLA n'était pas une création du régime de négociation collective, mais a plutôt été imposée par le gouvernement aux employeurs du secteur de la santé par suite des recommandations d'une commission d'enquête. Puisque ni l'ESLA ni la HLAA ne résultent d'une négociation collective, leur modification ne saurait constituer une ingérence dans les processus de négociation antérieurs. En outre, puisque l'ESLA et la HLAA doivent essentiellement leur existence à des décisions gouvernementales et qu'elles ne relèvent pas des pouvoirs des employés et employeurs du secteur de la santé, les questions les concernant ne risquent pas de faire l'objet de prochaines négociations collectives. Comme l'ESLA ou la HLAA ne peuvent pas faire l'objet de négociations collectives à l'avenir, on ne se retrouve pas devant une situation d'ingérence dans le processus de négociation collective au sujet de ces questions. Ni l'article 7 ni l'art. 8 n'ont pour objet ou effet de permettre une ingérence dans les négociations collectives, antérieures ou à venir.

4. *Article 9 — Mise en disponibilité et supplantation*

126 L'article 9, qui s'applique seulement aux conventions collectives jusqu'au 31 décembre 2005, traite de la mise en disponibilité et de la supplantation. Pendant la durée d'application de cette disposition, les conventions collectives ne pouvaient comporter de clauses sur certains aspects de la mise en disponibilité et de la supplantation. Pour ce qui est de la mise en disponibilité, les conventions collectives ne pouvaient pas restreindre le pouvoir des employeurs du secteur de la santé de mettre en disponibilité un

the *Labour Relations Code* (s. 9(c)). With respect to bumping, no collective agreement could contain a provision providing an employee with bumping options other than those set out in regulations pursuant to the Act (s. 9(d)).

127 Section 9 made collective bargaining over specified aspects of layoff and bumping meaningless and also invalidated parts of collective agreements dealing with these issues, up to December 31, 2005. This constituted interference with both past and future collective bargaining, albeit an interference limited to the period between the enactment of the Act and December 31, 2005.

128 We conclude that ss. 4, 5, 6(2), 6(4) and 9, in conjunction with s. 10, interfere with the process of collective bargaining, either by disregarding past processes of collective bargaining, by pre-emptively undermining future processes of collective bargaining, or both. This requires us to determine whether these changes substantially interfere with the associational right of the employees to engage in collective bargaining on workplace matters and terms of employment.

(ii) Was the Interference Substantial, so as to Constitute a Breach of Freedom of Association?

129 To amount to a breach of the s. 2(*d*) freedom of association, the interference with collective bargaining must compromise the essential integrity of the process of collective bargaining protected by s. 2(*d*). Two inquiries are relevant here. First, substantial interference is more likely to be found in measures impacting matters central to the freedom of association of workers, and to the capacity of their associations (the unions) to achieve common goals

employé (al. 9a)), ni les obliger à satisfaire à certaines exigences avant de donner un préavis de mise en disponibilité (al. 9b)), ou à donner un préavis d'un délai supérieur à celui de 60 jours garanti par le *Labour Relations Code* (al. 9c)). Quant à la supplantation, les conventions collectives ne pouvaient prévoir de clause offrant à l'employé, en cas de supplantation, des choix autres que ceux prescrits par règlement (al. 9d)).

L'article 9 vidait ainsi de sens la négociation collective de certains aspects de la mise en disponibilité et de la supplantation et invalidait certaines parties de conventions collectives portant sur ces questions, jusqu'au 31 décembre 2005. Cette disposition constitue alors une ingérence dans les processus de négociation collective, antérieurs et à venir, quoique cette ingérence se limite à la période allant de l'adoption de la Loi jusqu'au 31 décembre 2005.

Nous concluons donc que les art. 4, 5 et 9 et les par. 6(2) et (4), appliqués conjointement avec l'art. 10, constituent une ingérence dans le processus de négociation collective, soit en mettant de côté les processus de négociation collective antérieurs, soit en compromettant à l'avance l'intégrité des futurs processus de négociation collective sur ce sujet, ou les deux à la fois. Il nous faut déterminer si ces modifications entravent de façon substantielle l'exercice du droit associatif des employés de participer à un processus de négociation collective des questions concernant le milieu de travail et les conditions de travail.

(ii) L'ingérence est-elle substantielle, au point de constituer une atteinte à la liberté d'association?

Pour constituer une atteinte à la liberté d'association garantie par l'al. 2*d*), l'ingérence dans la négociation collective doit compromettre l'intégrité fondamentale du processus de négociation collective protégé par l'al. 2*d*). Deux vérifications s'imposent en l'espèce. Premièrement, on se trouve plus vraisemblablement devant une situation d'ingérence substantielle dans le cas de mesures affectant des sujets d'une importance capitale pour la

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by working in concert. This suggests an inquiry into the nature of the affected right. Second, the manner in which the right is curtailed may affect its impact on the process of collective bargaining and ultimately freedom of association. To this end, we must inquire into the process by which the changes were made and how they impact on the voluntary good faith underpinning of collective bargaining. Even where a matter is of central importance to the associational right, if the change has been made through a process of good faith consultation it is unlikely to have adversely affected the employees' right to collective bargaining. Both inquiries, as discussed earlier, are essential.

liberté d'association des travailleurs et la capacité de leurs associations (les syndicats) de réaliser des objectifs communs en travaillant de concert. Cela suppose alors une analyse de la nature du droit touché par la mesure. Deuxièmement, la manière dont le droit est restreint peut avoir une incidence sur le processus de négociation collective et ultimement sur la liberté d'association. À cette fin, il faut examiner le processus de réalisation des changements et leurs effets sur le caractère volontaire et de bonne foi du processus de négociation collective. Même si le sujet revêt une importance primordiale pour le droit d'association, il est peu probable que la modification, si elle est apportée dans le cadre d'une consultation menée de bonne foi, porte atteinte au droit des employés de négocier collectivement. Comme nous l'avons déjà expliqué, les deux vérifications sont essentielles.

1. *The Importance of the Provisions*

The provisions dealing with contracting out (ss. 6(2) and 6(4)), layoffs (ss. 9(a), 9(b) and 9(c)) and bumping (s. 9(d)) deal with matters central to the freedom of association. Restrictions in collective agreements limiting the employer's discretion to lay off employees affect the employees' capacity to retain secure employment, one of the most essential protections provided to workers by their union. Similarly, limits in collective agreements on the management rights of employers to contract out allow workers to gain employment security. Finally, bumping rights are an integral part of the seniority system usually established under collective agreements, which is a protection of significant importance to the union. "Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process." (*Re United Electrical Workers, Local 512, and Tung-Sol of Canada Ltd.* (1964), 15 L.A.C. 161, at p. 162; see D. J. M. Brown and D. M. Beatty, *Canadian Labour Arbitration* (4th ed. (loose-leaf), vol. 2, para. 6:0000, at p. H6-1.) Viewing the Act's interference with these essential rights in the context of the case as a whole, we conclude that its interference with collective bargaining over matters pertaining to contracting out, layoff conditions

1. *L'importance des dispositions*

130 Les dispositions concernant la sous-traitance (par. 6(2) et (4)), la mise en disponibilité (al. 9a), b) et c)) et la supplantation (al. 9d)) portent sur des questions d'une importance capitale pour la liberté d'association. Les restrictions aux conventions collectives qui limitent le pouvoir discrétionnaire de l'employeur de mettre en disponibilité affectent la capacité des employés de conserver un emploi stable, l'une des protections les plus essentielles qu'un syndicat obtient pour les employés. De même, les clauses de conventions collectives restreignant le droit de la direction de recourir à la sous-traitance permettent aux travailleurs de bénéficier de la sécurité d'emploi. Enfin, les droits de supplantation font partie intégrante du régime d'ancienneté normalement prévu dans les conventions collectives et, à ce titre, représentent une protection d'une importance considérable pour les syndicats. [TRADUCTION] « L'ancienneté constitue l'un des avantages les plus importants et de la plus vaste envergure que le mouvement syndical ait réussi à obtenir pour ses membres par la négociation collective. » (*Re United Electrical Workers, Local 512, and Tung-Sol of Canada Ltd.* (1964), 15 L.A.C. 161, p. 162; voir D. J. M. Brown et D. M. Beatty, *Canadian Labour Arbitration* (4e éd. (feuilles mobiles)), vol. 2, par. 6:0000, p. H6-1.) En évaluant dans

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and bumping constitutes substantial interference with the s. 2(*d*) right of freedom of association.

131 The same cannot be said of the transfers and reassignments covered under ss. 4 and 5 of the Act. These provisions, as discussed above, are concerned with relatively minor modifications to in-place schemes for transferring and reassigning employees. Significant protections remained in place. It is true that the Act took these issues off the collective bargaining table for the future. However, on balance ss. 4 and 5 cannot be said to amount to a substantial interference with the union's ability to engage in collective bargaining so as to attract the protection under s. 2(*d*) of the *Charter*.

2. *The Process of Interference with Collective Bargaining Rights*

132 Having concluded that the subject matter of ss. 6(2), 6(4) and 9 of the Act is of central importance to the unions and their ability to carry on collective bargaining, we must now consider whether those provisions preserve the processes of collective bargaining. Together, these two inquiries will permit us to assess whether the law at issue here constitutes significant interference with the collective aspect of freedom of association, which *Dunmore* recognized.

133 This inquiry refocuses our attention squarely and exclusively on how the provisions affect the process of good faith bargaining and consultation. In this case, we are satisfied that ss. 6(2), 6(4) and 9 interfere significantly with the ability of those bound by them to engage in the associational activity of collective bargaining.

134 It is true that the government was facing a situation of exigency. It was determined to come to grips

une perspective globale à quel point la loi entrave l'exercice de ces droits essentiels, nous concluons que son ingérence dans la négociation collective au sujet de la sous-traitance ainsi que des conditions de mise en disponibilité et de la supplantation constitue une atteinte substantielle au droit à la liberté d'association garanti par l'al. 2*d*).

On ne saurait tirer une conclusion identique à propos des transferts et des nouvelles affectations que visent les art. 4 et 5 de la Loi. Comme nous l'avons vu, ces dispositions apportent des modifications relativement mineures aux régimes existants de transfert et de nouvelle affectation des employés. D'importantes protections subsistaient. Il est vrai que la Loi retirait désormais ces questions de la table des négociations collectives. Cependant, tout bien considéré, on ne peut pas affirmer que les art. 4 et 5 entravent de façon substantielle la capacité du syndicat d'engager des négociations collectives et qu'il s'agisse d'un cas donnant droit à la protection prévue à l'al. 2*d*) de la *Charte*.

2. *L'ingérence dans les droits de négociation collective*

Ayant conclu que les sujets visés par les par. 6(2) et (4) et l'art. 9 de la Loi revêtent une importance capitale pour les syndicats et à l'égard de leur capacité de négocier collectivement, nous devons maintenant décider si ces dispositions respectent le droit à un processus de négociation collective. Considérées conjointement, ces deux vérifications nous permettront de déterminer si la loi en cause constitue une ingérence substantielle dans l'aspect collectif du droit d'association, reconnu par *Dunmore*.

Cet examen ramène notre attention directement et exclusivement sur la façon dont les dispositions influent sur le processus de consultation et de négociation menée de bonne foi. En l'espèce, nous sommes convaincus que les par. 6(2) et (4) et l'art. 9 entravent de façon substantielle la capacité des employés visés par ces dispositions d'exercer l'activité associative liée à la négociation collective.

Il est vrai que le gouvernement se trouvait dans une situation d'urgence. Il était déterminé à

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with the spiralling cost of health care in British Columbia. This determination was fuelled by the laudable desire to provide quality health services to the people of British Columbia. Concerns such as these must be taken into account in assessing whether the measures adopted disregard the fundamental s. 2(*d*) obligation to preserve the processes of good faith negotiation and consultation with unions.

The difficulty, however, is that the measures adopted by the government constitute a virtual denial of the s. 2(*d*) right to a process of good faith bargaining and consultation. The absolute prohibition on contracting out in s. 6(2), as discussed, eliminates any possibility of consultation. Section 6(4) puts the nail in the coffin of consultation by making void any provisions in a collective agreement imposing a requirement to consult before contracting out. Section 9, in like fashion, effectively precludes consultation with the union prior to laying off or bumping.

We conclude that ss. 6(2), 6(4) and 9 of the legislation constitute a significant interference with the right to bargain collectively and hence violate s. 2(*d*) of the *Charter*. The remaining issue is whether these infringements can be saved under s. 1 of the *Charter*, as limits that are reasonable and justifiable in a free and democratic society.

(b) *Are the Violations of Section 2(d) Justified Under Section 1?*

Section 1 provides:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The analysis for assessing whether or not a law violating the *Charter* can be saved as a reasonable

s'attaquer à la montée en flèche du coût des soins de santé en Colombie-Britannique. Cette volonté se fondait sur le désir louable de fournir des services de santé de qualité à la population de la Colombie-Britannique. Il faut tenir compte des préoccupations de cet ordre pour déterminer si les mesures adoptées vont à l'encontre de l'obligation fondamentale qu'impose l'al. 2*d*) de respecter un processus de consultation et de négociation menée de bonne foi avec les syndicats.

135 Le problème se situe toutefois dans le fait que les mesures adoptées par le gouvernement constituent pratiquement une négation du droit garanti par l'al. 2*d*) à un processus de consultation et de négociation menée de bonne foi. Comme nous l'avons noté, l'interdiction absolue de recourir à la sous-traitance, prévue au par. 6(2), écarte toute possibilité de consultation. Le paragraphe 6(4) met fin à toute consultation en rendant inopérante toute clause de convention collective qui oblige à consulter avant une opération de sous-traitance. De même, l'art. 9 interdit effectivement de consulter un syndicat avant une mise en disponibilité ou une supplantation.

136 Nous concluons que les par. 6(2) et (4) et l'art. 9 de la Loi constituent des atteintes substantielles au droit à un processus de négociation collective et portent donc atteinte à l'al. 2*d*) de la *Charte*. Il reste à déterminer si ces atteintes peuvent se justifier au sens de l'article premier de la *Charte* du fait qu'elles constituent des limites raisonnables dont la justification peut se démontrer dans le cadre d'une société libre et démocratique.

b) *Les atteintes à l'al. 2d) sont-elles justifiées au sens de l'article premier?*

137 L'article premier dispose :

> La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

138 L'arrêt *Oakes* a établi la méthode d'analyse qui permet de déterminer si une loi contraire à la

limit under s. 1 is set out in *Oakes*. A limit on *Charter* rights must be prescribed by law to be saved under s. 1. Once it is determined that the limit is prescribed by law, then there are four components to the *Oakes* test for establishing that the limit is reasonably justifiable in a free and democratic society (*Oakes*, at pp. 138-40). First, the objective of the law must be pressing and substantial. Second, there must be a rational connection between the pressing and substantial objective and the means chosen by the law to achieve the objective. Third, the impugned law must be minimally impairing. Finally, there must be proportionality between the objective and the measures adopted by the law, and more specifically, between the salutary and deleterious effects of the law (*Oakes*, at p. 140; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 889).

Charte peut se justifier comme limite raisonnable au sens de l'article premier. La restriction des droits garantis par la *Charte* doit être imposée par une règle de droit pour être justifiée au sens de l'article premier. Si tel est le cas, il faut alors vérifier la présence des quatre éléments que comporte la méthode d'analyse de l'arrêt *Oakes* pour établir qu'elle constitue une limite raisonnable dont la justification peut se démontrer dans le cadre d'une société libre et démocratique (*Oakes*, p. 138-140). En premier lieu, l'objectif de la loi doit être urgent et réel. Ensuite, il doit exister un lien rationnel entre l'objectif urgent et réel et les moyens choisis par le législateur pour atteindre cet objectif. Puis, la loi contestée ne doit porter qu'une atteinte minimale au droit garanti. Enfin, il doit y avoir proportionnalité entre l'objectif et les mesures adoptées dans la loi et, plus particulièrement, entre les effets bénéfiques de la loi et ses effets préjudiciables (*Oakes*, p. 140; *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835, p. 889).

139 The s. 1 analysis focuses on the particular context of the law at issue. Contextual factors to be considered include the nature of the harm addressed, the vulnerability of the group protected, ameliorative measures considered to address the harm, and the nature and importance of the infringed activity: *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, and *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, 2004 SCC 33. This said, the basic template of *Oakes* remains applicable, and each of the elements required by that test must be satisfied. The government bears the onus of establishing each of the elements of the *Oakes* test and hence of showing that a law is a reasonable limit on *Charter* rights on a balance of probabilities (see *Oakes*, at pp. 136-37).

L'analyse fondée sur l'article premier est axée sur le contexte de la règle de droit en cause. Parmi les facteurs contextuels à considérer figurent la nature du préjudice visé, la vulnérabilité du groupe protégé, les mesures d'amélioration envisagées pour remédier au préjudice, ainsi que la nature et l'importance de l'activité protégée : *Thomson Newspapers Co. c. Canada (Procureur général)*, [1998] 1 R.C.S. 877, et *Harper c. Canada (Procureur général)*, [2004] 1 R.C.S. 827, 2004 CSC 33. Cela dit, le modèle de base de *Oakes* demeure applicable, et il faut satisfaire à chacune des exigences de cette méthode d'analyse. Le gouvernement a le fardeau d'établir chacun des éléments que prévoit l'arrêt *Oakes* pour réussir à démontrer qu'une règle de droit constitue, selon la prépondérance des probabilités, une restriction raisonnable des droits garantis par la *Charte* (voir *Oakes*, p. 136-137).

140 In this case, the infringement of the appellants' right to bargain collectively is unquestionably prescribed by law, since the interference with collective bargaining is set out in legislation. The question is whether the remaining elements of the *Oakes* test are made out, such that the law is a reasonable

En l'espèce, il est incontestable que l'atteinte au droit des appelants de négocier collectivement découle d'une mesure législative, car l'ingérence dans la négociation collective est prévue dans la Loi. Il faut alors se demander si les autres éléments du critère *Oakes* sont établis, de sorte

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limit on the appellants' right to collective bargaining under s. 2(*d*).

We find that the intrusions on collective bargaining represented by ss. 6(2), 6(4) and 9 are not minimally impairing, and therefore cannot be saved as a reasonable and justifiable limit in a free and democratic society. We turn now to the *Oakes* test to explain this conclusion.

(i) Does the Act Pursue a Pressing and Substantial Objective?

The first step of the *Oakes* test requires the government to establish that the limit on *Charter* rights was undertaken in pursuit of an objective "of sufficient importance to warrant overriding a constitutionally protected right or freedom" (*Big M Drug Mart*, at p. 352). At minimum, the objective must relate to concerns which are pressing and substantial in a free and democratic society.

The government set out its objectives for enacting the Act as follows:

> The objective of the *Act* is to improve the delivery of health care services by enabling health authorities to focus resources on the delivery of clinical services, by enhancing the ability of health employers and authorities to respond quickly and effectively to changing circumstances, and by enhancing the accountability of decision-makers in public health care.

(Respondent's Factum, at para. 144)

These are pressing and substantial objectives. We agree with the respondent that the health care crisis in British Columbia is an important contextual factor in support of the conclusion that these objectives are pressing and substantial (*ibid.*). We also agree with the respondent that this Court's recent ruling in *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35, that governments are constitutionally obliged to provide

que la loi constitue une restriction raisonnable du droit de négociation collective des appelants selon l'al. 2*d*).

141 Nous concluons que les ingérences dans la négociation collective représentées par les par. 6(2) et (4) et l'art. 9 ne constituent pas des atteintes minimales au droit protégé par la *Charte* et qu'elles ne sauraient donc se justifier en tant que limites raisonnables dont le bien-fondé peut se démontrer dans le cadre d'une société libre et démocratique. Nous allons maintenant expliquer cette conclusion en appliquant la méthode d'analyse de l'arrêt *Oakes*.

(i) La Loi poursuit-elle un objectif urgent et réel?

142 La première étape de la méthode d'analyse *Oakes* oblige le gouvernement à établir que la limite imposée aux droits garantis par la *Charte* s'inscrit dans la poursuite d'un objectif « suffisamment importan[t] pour justifier la suppression d'un droit ou d'une liberté garantis par la Constitution » (*Big M Drug Mart*, p. 352). L'objectif doit au moins se rapporter à des préoccupations urgentes et réelles dans une société libre et démocratique.

143 Le gouvernement a formulé en ces termes les objectifs sur lesquels repose l'adoption de la Loi :

> [TRADUCTION] La *Loi* vise à améliorer la prestation des services de santé en permettant aux autorités sanitaires de concentrer les ressources sur la prestation des services cliniques, en rendant les employeurs du secteur de la santé et les autorités sanitaires plus aptes à réagir rapidement et efficacement aux changements de circonstances, et en accroissant l'obligation de rendre compte des décideurs dans le système de santé public.

(Mémoire de l'intimée, par. 144)

144 Il s'agit là d'objectifs urgents et réels. Nous convenons avec l'intimée que la crise dans le secteur de la santé en Colombie-Britannique constitue un facteur contextuel important à l'appui de la conclusion que ce sont des objectifs urgents et réels (*ibid.*). Nous reconnaissons également avec elle que la décision rendue récemment par la Cour dans *Chaoulli c. Québec (Procureur général)*, [2005] 1 R.C.S. 791, 2005 CSC 35, selon laquelle

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public health care of a reasonable standard within a reasonable time, at least in some circumstances, reinforces the importance of the objectives, particularly of the main objective of delivering improved health care services (Respondent's Factum, at para. 141).

145 The appellants argue that the objectives behind the legislation are not pressing and substantial on two bases. First, they contend that the objective is framed too broadly and is not linked to the specific harm that the legislation is aimed at addressing. Second, they argue that the evidence suggests that the true objective behind the Act is to increase the rights of management, and to save costs, which constitute a suspect basis for finding a pressing and substantial objective. (See *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381, 2004 SCC 66, at para. 72, and *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, at para. 109.)

146 We reject the argument that the government's objective is stated too broadly. The government states its objective in terms of one main objective (improving health care delivery), pursued by way of several sub-objectives (enabling health authorities to focus resources on clinical services, enhancing the ability of health employers and authorities to respond quickly to changing circumstances, and enhancing the accountability of decision-makers in public health care). Even if it is accepted that the main objective is somewhat broad, the more precise aims of the government are made clear in the sub-objectives. Therefore, the objective is not stated too broadly.

147 The appellants' contention that cutting costs and increasing the power of management are also objectives of the legislation has merit. The record indicates that at least part of the government's intention in enacting the Act was to cut costs and increase the rights of management (Appellants' Factum

les gouvernements ont l'obligation constitutionnelle de fournir des soins de santé publics de qualité raisonnable dans un délai raisonnable, du moins dans certaines circonstances, renforce l'importance des objectifs, surtout de l'objectif principal, soit l'amélioration de la prestation des services de santé (mémoire de l'intimée, par. 141).

Les appelants contestent que les objectifs visés par la loi ne sont ni urgents ni réels et ce, pour deux raisons. Premièrement, l'objectif est formulé en termes trop généraux et n'a aucun lien avec le préjudice que la loi vise précisément à corriger. Deuxièmement, la preuve tend à indiquer que l'objectif véritable de la Loi est d'accroître les droits de la direction et non de réduire les coûts du système de santé, ce qui met en doute la réalité du fondement nécessaire pour conclure à un objectif urgent et réel. (Voir *Terre-Neuve (Conseil du Trésor) c. N.A.P.E.*, [2004] 3 R.C.S. 381, 2004 CSC 66, par. 72, et *Nouvelle-Écosse (Workers' Compensation Board) c. Martin*, [2003] 2 R.C.S. 504, 2003 CSC 54, par. 109.)

Nous rejetons l'argument que l'objectif du gouvernement est formulé en termes trop généraux. Le gouvernement définit son objectif comme étant un objectif principal unique (améliorer la prestation de services de santé), poursuivi au moyen de plusieurs sous-objectifs (permettre aux autorités sanitaires de concentrer les ressources sur la prestation des services cliniques, rendre les employeurs du secteur de la santé et les autorités sanitaires plus aptes à réagir rapidement aux changements de circonstances, et accroître l'obligation de rendre compte des décideurs dans le système de santé public). Même en admettant que l'objectif principal soit formulé en termes plutôt généraux, les objectifs précis du gouvernement paraissent clairement énoncés dans les sous-objectifs. L'objectif n'est donc pas exprimé d'une manière trop générale.

La prétention des appelants selon laquelle la loi vise également à réduire les coûts et à accroître le pouvoir de la direction est fondée. Il ressort du dossier qu'en adoptant la Loi, le gouvernement visait, du moins en partie, à la fois à réduire les coûts et à accroître les droits de la direction (mémoire des

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(Reply), at paras. 8 and 14). To the extent that the objective of the law was to cut costs, that objective is suspect as a pressing and substantial objective under the authority in *N.A.P.E.* and *Martin*, indicating that "courts will continue to look with strong scepticism at attempts to justify infringements of *Charter* rights on the basis of budgetary constraints" (*N.A.P.E.*, at para. 72; see also *Martin*). Nor, on the facts of this case, is it clear that increasing management power is an objective that is "pressing and substantial in a free and democratic society". However, this does not detract from the fact that the government has established other pressing and substantial objectives.

(ii) Is There a Rational Connection Between the Means Adopted by the Act and the Pressing and Substantial Objectives?

The second stage of the *Oakes* analysis requires the government to establish that there is a rational connection between the pressing and substantial objective and the means chosen by the government to achieve the objective. In other words, the government must establish, on the balance of probabilities, that the means adopted in the Act are rationally connected to achieving its pressing and substantial objectives. This element of the *Oakes* test has been described in this Court as "not particularly onerous" (see *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69, at para. 228, cited in *Trociuk v. British Columbia (Attorney General)*, [2003] 1 S.C.R. 835, 2003 SCC 34, at para. 34).

Broadly speaking, the means adopted by the Act include: modifying the scheme of bumping rights, winding up the HLAA and ESLA, and loosening restrictions on the employer's capacity to contract out non-clinical services, transfer and reassign employees, and lay off employees. Although the evidence does not conclusively establish that the means adopted by the Act achieve the government's objectives, it is at least logical and reasonable to conclude so. We therefore move to the determinative inquiry of minimal impairment.

appelants (réplique), par. 8 et 14). Dans la mesure où l'objectif de la loi est de réduire les coûts, cet objectif demeure sujet à caution en tant qu'objectif urgent et réel selon *N.A.P.E.* et *Martin*, d'après lesquels « les tribunaux continueront de faire montre d'un grand scepticisme à l'égard des tentatives de justifier, par des restrictions budgétaires, des atteintes à des droits garantis par la *Charte* » (*N.A.P.E.*, par. 72; voir aussi *Martin*). Par ailleurs, d'après les faits de l'espèce, il ne ressort pas clairement que l'accroissement du pouvoir de la direction constitue un objectif « urgent et réel dans une société libre et démocratique ». Cela étant, il demeure que le gouvernement a établi d'autres objectifs urgents et réels, comme nous l'avons vu.

(ii) Existe-t-il un lien rationnel entre les moyens adoptés dans la Loi et les objectifs urgents et réels?

148 La deuxième étape de la méthode d'analyse *Oakes* exige du gouvernement qu'il établisse l'existence d'un lien rationnel entre l'objectif urgent et réel et les moyens qu'il choisit pour atteindre cet objectif. En d'autres termes, il doit démontrer, selon la prépondérance des probabilités, que les moyens choisis dans la Loi conservent un lien rationnel avec la réalisation des objectifs urgents et réels qu'elle poursuit. La Cour a affirmé que cet élément du critère *Oakes* n'était « pas particulièrement exigeant » (voir *Little Sisters Book and Art Emporium c. Canada (Ministre de la Justice)*, [2000] 2 R.C.S. 1120, 2000 CSC 69, par. 228, cité dans *Trociuk c. Colombie-Britannique (Procureur général)*, [2003] 1 R.C.S. 835, 2003 CSC 34, par. 34).

149 En général, parmi les moyens adoptés dans la Loi figurent la modification du régime concernant les droits de supplantation, la liquidation de la HLAA et de l'ESLA, et l'assouplissement des restrictions à la capacité de l'employeur de sous-traiter des services non cliniques, de procéder à des transferts et à de nouvelles affectations, et de mettre des employés en disponibilité. Bien que la preuve n'établisse pas de façon concluante que les moyens adoptés dans la Loi permettent la réalisation des objectifs du gouvernement, une telle conclusion est au moins logique et raisonnable. Nous passons donc à l'examen déterminant de l'atteinte minimale.

(iii) Does the Act Minimally Impair the *Charter* Rights of the Appellants?

150 At the third stage of the *Oakes* test, the court is directed to inquire whether the impugned law minimally impairs the *Charter* right (*Oakes*, at p. 139, citing *Big M Drug Mart*, at p. 352). The government need not pursue the least drastic means of achieving its objective. Rather, a law will meet the requirements of the third stage of the *Oakes* test so long as the legislation "falls within a range of reasonable alternatives" which could be used to pursue the pressing and substantial objective (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160).

151 We conclude that the requirement of minimal impairment is not made out in this case. The government provides no evidence to support a conclusion that the impairment was minimal. It contents itself with an assertion of its legislative goal — "to enhance management flexibility and accountability in order to make the health care system sustainable over the long term", — adding that "the *Act* is a measured, reasonable, and effective response to this challenge, and . . . satisfies the minimal impairment requirement" (Respondent's Factum, at para. 147). In the absence of supportive evidence, we are unable to conclude that the requirement of minimal impairment is made out in this case.

152 The provisions at issue bear little evidence of a search for a minimally impairing solution to the problem the government sought to address.

153 Section 6(2) forbids any provision "that in any manner restricts, limits or regulates the right of a health sector employer to contract outside of the collective agreement". It gives the employers absolute power to contract out of collective agreements. There is no need or incentive to consult with the union or the employees before sending the work they normally perform to an outside contractor. To forbid any contracting out clause completely and unconditionally strikes us as not minimally

(iii) La Loi porte-t-elle atteinte de façon minimale aux droits garantis aux appelants par la *Charte*?

À la troisième étape de la méthode d'analyse *Oakes*, le tribunal est tenu de vérifier si la loi contestée constitue une atteinte minimale au droit garanti par la *Charte* (*Oakes*, p. 139, citant *Big M Drug Mart*, p. 352). Le gouvernement n'a pas besoin de recourir aux moyens les moins radicaux pour parvenir à son objectif. La loi satisfait plutôt aux exigences de la troisième étape si elle « se situe à l'intérieur d'une gamme de mesures raisonnables » pouvant servir à la réalisation de l'objectif urgent et réel (*RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199, par. 160).

Nous concluons qu'il n'a pas été satisfait à l'exigence de l'atteinte minimale en l'espèce. Le gouvernement n'a présenté aucune preuve à l'appui de la conclusion que l'atteinte restait minimale. Il se contente d'invoquer son objectif législatif — [TRADUCTION] « donner à la direction plus de latitude et accroître son obligation de rendre compte afin d'assurer à long terme la viabilité du système de santé », — ajoutant que [TRADUCTION] « la *Loi* constitue un moyen modéré, raisonnable et efficace de surmonter cette difficulté et [. . .] satisfait à l'exigence de l'atteinte minimale » (mémoire de l'intimée, par. 147). Faute de preuve nécessaire, nous ne pouvons conclure qu'il a été satisfait à l'exigence de l'atteinte minimale en l'espèce.

La teneur des dispositions en cause ne laisse pas facilement croire qu'on ait cherché la solution la moins attentatoire possible au problème que le gouvernement voulait régler.

Ainsi le par. 6(2) interdit toute clause [TRADUCTION] « qui, de quelque manière que ce soit, restreint, limite ou réglemente le droit d'un employeur du secteur de la santé de sous-traiter [. . .] hors du cadre défini par la convention collective ». Il donne à l'employeur le pouvoir absolu de sous-traiter hors du cadre défini par la convention collective. L'employeur n'est pas tenu de consulter le syndicat ou les employés avant de sous-traiter le travail que ces derniers exécutent normalement, et

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impairing. A more refined provision, for example, permitting contracting out after meaningful consultation with the union, might be envisaged.

il n'est pas incité à le faire non plus. L'interdiction complète et inconditionnelle de toute stipulation régissant la sous-traitance ne nous paraît pas constituer une atteinte minimale. On pourrait envisager, à titre d'exemple, une clause plus nuancée qui permettrait de recourir à la sous-traitance après une véritable consultation du syndicat.

Section 6(4) makes void a provision in a collective agreement to consult before contracting out. The bite of s. 6(4) is arguably small; given the employer's absolute power to contract out under s. 6(2), there would appear to be no reason for an employer to agree to such a clause in any event. However, insofar as it hammers home the policy of no consultation under any circumstances, it can scarcely be described as suggesting a search for a solution that preserves collective bargaining rights as much as possible, given the legislature's goal.

154 De son côté, le par. 6(4) rend inopérante toute clause de convention collective qui oblige à consulter avant de recourir à la sous-traitance. On peut soutenir que le par. 6(4) a peu d'effets; en raison du pouvoir absolu de recourir à la sous-traitance que le par. 6(2) confère à l'employeur, il semble que celui-ci n'ait aucune raison de souscrire à une telle clause de toute façon. Toutefois, dans la mesure où cette disposition met fortement l'accent sur la politique de non-consultation en toute circonstance, on ne saurait guère affirmer qu'il tend à indiquer qu'on a cherché une solution qui protège dans la mesure du possible le droit à la négociation collective, compte tenu de l'objectif du législateur.

Section 9 evinces a similar disregard for the duty to consult the union, in this case before making changes to the collective agreement's layoff and bumping rules. It is true that s. 9 was temporally limited, being in force only to December 31, 2005. However, this is scant comfort to employees who may have been laid off or bumped before this date, without the benefit of a union to represent them on the issue.

155 Par ailleurs, l'art. 9 traduit une volonté de rejet analogue de toute obligation de consulter le syndicat, en l'espèce avant de modifier les règles de la convention collective applicables à la mise en disponibilité et à la supplantation. Il est vrai que l'art. 9 était limité dans le temps, s'appliquant seulement jusqu'au 31 décembre 2005. Toutefois, cette limitation n'apporte aucun réconfort aux employés mis en disponibilité ou supplantés avant cette date, sans qu'un syndicat ait pu les représenter à ce sujet.

An examination of the record as to alternatives considered by the government reinforces the conclusion that the impairment in this case did not fall within the range of reasonable alternatives available to the government in achieving its pressing and substantial objective of improving health care delivery. The record discloses no consideration by the government of whether it could reach its goal by less intrusive measures, and virtually no consultation with unions on the matter.

156 L'examen du dossier quant aux solutions envisagées par le gouvernement renforce la conclusion que l'atteinte portée au droit constitutionnel en l'espèce n'entre pas dans la catégorie des mesures raisonnables dont disposait le gouvernement pour atteindre son objectif urgent et réel d'améliorer la prestation des services de santé. Selon le dossier, le gouvernement ne s'est pas demandé s'il pourrait atteindre son objectif par des mesures moins attentatoires et il n'a guère consulté les syndicats à ce sujet.

Legislators are not bound to consult with affected parties before passing legislation. On the other

157 Le législateur n'est pas tenu de consulter les parties visées avant d'adopter une mesure législative.

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hand, it may be useful to consider, in the course of the s. 1 justification analysis, whether the government considered other options or engaged consultation with the affected parties, in choosing to adopt its preferred approach. The Court has looked at pre-legislative considerations in the past in the context of minimal impairment. This is simply evidence going to whether other options, in a range of possible options, were explored.

158 In this case, the only evidence presented by the government, including the sealed evidence, confirmed that a range of options were on the table. One was chosen. The government presented no evidence as to why this particular solution was chosen and why there was no consultation with the unions about the range of options open to it.

159 The evidence establishes that there was no meaningful consultation prior to passing the Act on the part of either the government or the HEABC (as employer). The HEABC neither attempted to renegotiate provisions of the collective agreements in force prior to the adoption of Bill 29, nor considered any other way to address the concerns noted by the government relating to labour costs and the lack of flexibility in administrating the health care sector. The government also failed to engage in meaningful bargaining or consultation prior to the adoption of Bill 29 or to provide the unions with any other means of exerting meaningful influence over the outcome of the process (for example, a satisfactory system of labour conciliation or arbitration). Union representatives had repeatedly expressed a desire to consult with government regarding specific aspects of the Act, and had conveyed to the government that the matters to be dealt with under the Act were of particular significance to them. Indeed, the government had indicated willingness to consult on prior occasions. Yet, in this case, consultation never took place. The only evidence of consultation is a brief telephone conversation between a member of the government and a union representative within

Par contre, il peut être utile de se demander, dans le cadre de l'analyse de la justification fondée sur l'article premier, si le gouvernement a envisagé d'autres solutions ou consulté les parties visées, en choisissant d'adopter la méthode qu'il privilégiait. Par le passé, la Cour a déjà examiné ce genre de facteurs prélégislatifs dans le contexte de l'étude de l'atteinte minimale. Ce type de preuve permet tout simplement d'étudier quelles options à l'intérieur d'une gamme de choix possibles ont été prises en considération.

En l'espèce, les seuls éléments de preuve présentés par le gouvernement, y compris ceux qu'on retrouve dans la preuve produite sous scellés, confirmaient qu'une gamme de solutions ont été présentées. L'une d'entre elles a été choisie. Le gouvernement n'a offert aucune preuve expliquant pourquoi il a retenu la solution particulière en discussion dans ce dossier ni pourquoi il n'a pas consulté les syndicats au sujet de la gamme de solutions qui s'offraient à lui.

La preuve établit l'absence de véritable consultation avant l'adoption de la Loi par le gouvernement et par la HEABC (en tant qu'employeur). La HEABC n'a pas tenté de renégocier les clauses de conventions collectives en vigueur avant l'adoption du projet de loi 29 et ni envisagé d'autres façons de dissiper les préoccupations exprimées par le gouvernement au sujet des coûts de main-d'œuvre et du manque de souplesse dans l'administration du secteur de la santé. Par ailleurs, le gouvernement n'a pas procédé à de véritables négociations ou consultations avant l'adoption du projet de loi 29 et ni offert aux syndicats d'autres moyens d'influer utilement sur l'issue du processus (par exemple, un système satisfaisant de conciliation ou d'arbitrage). Les représentants syndicaux ont indiqué à maintes reprises qu'ils voulaient discuter avec le gouvernement de certains aspects de la Loi et ils l'ont informé que les questions à traiter sous le régime de la Loi revêtaient une importance particulière pour eux. En fait, le gouvernement avait déjà indiqué qu'il était disposé à procéder à des consultations. Cependant les consultations n'ont jamais eu lieu en l'espèce. La seule preuve de consultation consiste en une brève conversation téléphonique entre un

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the half hour before the Act (then Bill 29) went to the legislature floor and limited to informing the union of the actions that the government intended to take.

This was an important and significant piece of labour legislation. It had the potential to affect the rights of employees dramatically and unusually. Yet it was adopted with full knowledge that the unions were strongly opposed to many of the provisions, and without consideration of alternative ways to achieve the government objective, and without explanation of the government's choices.

We conclude that the government has not shown that the Act minimally impaired the employees' s. 2(*d*) right of collective bargaining. It is unnecessary to consider the proportionality between the pressing and substantial government objectives and the means adopted by the law to achieve these objectives. We find that the offending provisions of the Act (ss. 6(2), 6(4) and 9) cannot be justified as reasonable limits under s. 1 of the *Charter* and are therefore unconstitutional.

B. *Does the Act Violate Section 15 Equality Rights?*

Having established that ss. 6(2), 6(4) and 9 are unconstitutional on the basis that they infringe the right to bargain collectively in s. 2(*d*), we must consider whether the remainder of Part 2 of the Act violates the guarantee of equality under s. 15 of the *Charter.*

Section 15(1) of the *Charter* provides:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

membre du gouvernement et un représentant syndical dans la demi-heure précédant le dépôt de la Loi (alors projet de loi 29) devant la législature et qui s'est limitée à informer le syndicat des mesures que le gouvernement entendait prendre.

160 Ce projet de loi représentait une importante mesure législative dans le domaine du travail. Il était susceptible d'avoir un effet dramatique et exceptionnel sur les droits des employés. Pourtant le gouvernement l'a adopté en sachant parfaitement que les syndicats s'opposaient fortement à de nombreuses dispositions de ce projet, sans envisager d'autres moyens qui lui auraient permis d'atteindre son objectif et sans expliquer ses choix.

161 Nous concluons que le gouvernement n'a pas établi que la Loi ne portait qu'une atteinte minimale au droit de négociation collective reconnu aux employés par l'al. 2*d*). Il est inutile alors de s'interroger sur la proportionnalité entre les objectifs urgents et réels du gouvernement et les moyens adoptés par la loi pour réaliser ces objectifs. Nous estimons que les dispositions attentatoires de la Loi (par. 6(2) et (4) et art. 9) ne peuvent se justifier en tant que limites raisonnables au sens de l'article premier de la *Charte* et que, de ce fait, elles sont inconstitutionnelles.

B. *La Loi viole-t-elle les droits à l'égalité garantis par l'art. 15 de la Charte?*

162 Après avoir établi que les par. 6(2) et (4) et l'art. 9 sont inconstitutionnels parce qu'ils portent atteinte à un processus de négociation collective garanti à l'al. 2*d*), nous devons maintenant déterminer si les autres dispositions de la partie 2 de la Loi portent aussi atteinte aux droits à l'égalité garantis par l'art. 15 de la *Charte*.

163 Le paragraphe 15(1) de la *Charte* dispose :

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

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164 At issue is whether the Act violates s. 15 of the *Charter*, and more specifically, that the Act discriminates against health care workers based on a number of interrelated enumerated and analogous grounds including: sex, employment in the health care sector, and status as non-clinical workers.

165 The courts below found no discrimination contrary to s. 15 of the *Charter*. We would not disturb these findings. Like the courts below, we conclude that the distinctions made by the Act relate essentially to segregating different sectors of employment, in accordance with the long-standing practice in labour regulation of creating legislation specific to particular segments of the labour force, and do not amount to discrimination under s. 15 of the *Charter*. The differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, and not to the persons they are. Nor does the evidence disclose that the Act reflects the stereotypical application of group or personal characteristics. Without minimizing the importance of the distinctions made by the Act to the lives and work of affected health care employees, the differential treatment based on personal characteristics required to get a discrimination analysis off the ground is absent here.

166 Accordingly, we see no reason to depart from the view of the trial judge that these effects on health care workers, however painful, do not, on the evidence adduced in this case, constitute discrimination under s. 15 of the *Charter*.

167 In summary, we find that the impugned Act does not violate s. 15 of the *Charter*. Therefore, there is no need to consider potential reasonable justification under s. 1.

Il faut alors déterminer si la Loi porte atteinte à l'art. 15 de la *Charte* et, plus particulièrement, si elle établit contre les travailleurs du secteur de la santé une discrimination fondée sur plusieurs motifs énumérés ou analogues interreliés, notamment le sexe, l'occupation d'un emploi dans le secteur de la santé et le statut des travailleurs du secteur des services non cliniques.

Les tribunaux d'instance inférieure ont conclu à l'absence de discrimination interdite par l'art. 15 de la *Charte*. Nous sommes d'avis de ne pas modifier ces conclusions. Comme les tribunaux d'instance inférieure, nous concluons que les distinctions créées par la Loi tiennent essentiellement aux différences qui existent entre les secteurs d'emploi, en raison des pratiques suivies de longue date selon lesquelles la réglementation en matière de travail est établie par des mesures législatives propres à chaque secteur du marché du travail, et qu'elles ne constituent pas de la discrimination au sens de l'art. 15 de la *Charte*. La différenciation et les effets préjudiciables de la loi envers certains groupes de travailleurs tiennent essentiellement au genre de travail qu'ils exécutent et non à leur personne. La preuve ne révèle pas non plus que la Loi reflète une application stéréotypée de caractéristiques personnelles ou de groupe. Sans minimiser l'importance des distinctions de la Loi qui marquent la vie et le travail des employés visés du secteur de la santé, en l'espèce il ne s'agit pas de traitements différents fondés sur des caractéristiques personnelles justifiant qu'on amorce l'analyse de la question de la discrimination.

Par conséquent, rien ne justifie que la Cour s'écarte du point de vue de la juge de première instance, selon qui les effets de la législation sur les travailleurs du secteur des services de santé, si pénibles qu'ils risquent de s'avérer pour eux, ne constituent pas, au vu de la preuve soumise en l'espèce, de la discrimination au sens de l'art. 15 de la *Charte*.

En résumé, nous estimons que la Loi contestée ne va pas à l'encontre de l'art. 15 de la *Charte*. Il n'est donc pas nécessaire d'examiner si des limites raisonnables pourraient être justifiées en vertu de l'article premier.

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IV. Conclusions and Disposition

For the above reasons, we allow the appeal in part, with costs. We conclude that ss. 6(2), 6(4) and 9 of the Act are unconstitutional. However, we suspend this declaration for a period of 12 months to allow the government to address the repercussions of this decision. We would answer the constitutional questions as follows:

1. Does Part 2 of the *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2, in whole or in part, infringe s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes, in part. Sections 6(2), 6(4) and 9 infringe s. 2(*d*).

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

3. Does Part 2 of the *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2, in whole or in part, infringe s. 15 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is not necessary to answer this question.

The following are the reasons delivered by

DESCHAMPS J. (dissenting in part) — The future of our health care system is a matter of serious concern across the country. Sharply escalating health care costs combined with an aging population have

IV. Conclusions et dispositif

168 Pour les motifs exposés précédemment, nous sommes d'avis d'accueillir le pourvoi en partie, avec dépens. Nous concluons que les par. 6(2) et (4) et l'art. 9 de la Loi sont inconstitutionnels. Toutefois, nous suspendons la prise d'effet de cette déclaration pour 12 mois afin de permettre au gouvernement d'examiner les répercussions de la présente décision. Nous sommes d'avis de répondre aux questions constitutionnelles de la façon suivante :

1. La partie 2 de la *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, ch. 2, en tout ou en partie, viole-t-elle l'al. 2*d*) de la *Charte canadienne des droits et libertés*?

Réponse : Oui, en partie. Les paragraphes 6(2) et (4) et l'art. 9 enfreignent l'al. 2*d*).

2. Dans l'affirmative, cette violation constitue-t-elle une limite raisonnable qui est prescrite par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique, au sens de l'article premier de la *Charte canadienne des droits et libertés*?

Réponse : Non.

3. La partie 2 de la *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, ch. 2, en tout ou en partie, viole-t-elle l'art. 15 de la *Charte canadienne des droits et libertés*?

Réponse : Non.

4. Dans l'affirmative, cette violation constitue-t-elle une limite raisonnable qui est prescrite par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique, au sens de l'article premier de la *Charte canadienne des droits et libertés*?

Réponse : Il n'est pas nécessaire de répondre à cette question.

Version française des motifs rendus par

169 LA JUGE DESCHAMPS (dissidente en partie) — L'avenir de notre système de santé préoccupe beaucoup les Canadiens. La croissance vertigineuse des coûts des soins de santé combinée au vieillissement

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spurred governments to attempt to find new ways to ensure that health care services will be available to those who need them. When, in doing so, a government makes a policy decision that infringes a *Charter* right, it is required to justify its choice as a reasonable limit on the protected right.

170 I am in general agreement with the Chief Justice and LeBel J. concerning the scope of freedom of association under s. 2(*d*) of the *Canadian Charter of Rights and Freedoms* in the collective bargaining context. I also agree that no claim of discrimination contrary to s. 15 of the *Charter* has been established. However, I part company with my colleagues over their analysis relating to both the infringement of s. 2(*d*) and the justification of the infringement under s. 1 of the *Charter.*

171 The interpretation that the Court is now giving to s. 2(*d*) of the *Charter* is a major step forward in the recognition of collective activities. However, the importance of this advance should not overshadow the justification analysis under s. 1 of the *Charter.* Throughout the litigation, the government of British Columbia has maintained that in the event that Part 2 of the *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2 ("Act"), is found to have infringed the *Charter*, the infringement will be justified under s. 1. I find that ss. 4, 5, 6(2), 6(4) and 9 of the Act infringe s. 2(*d*) of the *Charter*, but in my view only s. 6(4) of the Act is not demonstrably justified in a free and democratic society.

I. Relevant Constitutional and Statutory Provisions

172 It will be helpful to recall the constitutional and statutory provisions that are at issue:

Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject

de la population a incité les gouvernements à trouver de nouvelles façons de s'assurer que les personnes qui ont besoin des services de santé y ont accès. Lorsque, dans la poursuite d'un tel objectif, un gouvernement prend une décision de politique générale qui a pour effet de porter atteinte à un droit garanti par la *Charte*, il doit justifier son choix en démontrant que la mesure constitue une limite raisonnable au droit protégé.

Je souscris de manière générale aux motifs de la Juge en chef et du juge LeBel au sujet de l'étendue de la liberté d'association garantie par l'al. 2*d*) de la *Charte canadienne des droits et libertés* en matière de négociation collective. Je conviens aussi que rien ne permet de conclure qu'il y a en l'espèce discrimination au sens de l'art. 15 de la *Charte*. Toutefois, je ne souscris pas à l'analyse de mes collègues quant à l'atteinte à l'al. 2*d*) et quant à la justification de l'atteinte selon l'article premier de la *Charte*.

L'interprétation que la Cour donne en l'espèce à l'al. 2*d*) de la *Charte* constitue une étape importante dans la reconnaissance des activités collectives. L'importance de cette avancée ne devrait pas toutefois éclipser l'analyse de la justification selon l'article premier de la *Charte*. Tout au long du litige, le gouvernement de la Colombie-Britannique a maintenu que, si la partie 2 de la *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, ch. 2 (« Loi »), enfreint la *Charte*, cette atteinte est justifiée au sens de l'article premier. Je conclus que les art. 4 et 5, les par. 6(2) et (4) ainsi que l'art. 9 de la Loi contreviennent à l'al. 2*d*) de la *Charte*, mais j'estime que seul le par. 6(4) de la Loi comporte une limite dont la justification ne peut se démontrer dans le cadre d'une société libre et démocratique.

I. Les dispositions constitutionnelles et législatives pertinentes

Il est utile de reproduire les dispositions constitutionnelles et législatives en cause :

Charte canadienne des droits et libertés

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne

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only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

. . .

(*d*) freedom of association.

Health and Social Services Delivery Improvement Act, S.B.C. 2002, c. 2

Right to reorganize service delivery

4 (1) A health sector employer has the right to reorganize the delivery of its services by transferring functions or services within a worksite or to another worksite within the region or to another health sector employer, including, but not limited to, partnerships or joint ventures with other health sector employers or subsidiaries.

(2) A health sector employer has the right to transfer

(a) functions or services that are to be performed or provided by another health sector employer under subsection (1) to that other health sector employer, and

(b) functions or services that are to be performed or provided at another worksite in the region to that other worksite.

(3) If a function or service is transferred to another health sector employer or within or to a worksite under this section, an employee who performs that function or service may be transferred to that employer or within or to that worksite in accordance with the regulations.

Multi-worksite assignment rights

5 A health sector employer

(a) has a right to assign an employee within or to any worksite of that employer or to a

peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

2. Chacun a les libertés fondamentales suivantes :

. . .

d) liberté d'association.

Health and Social Services Delivery Improvement Act, S.B.C. 2002, ch. 2

[TRADUCTION]

Droit de réorganiser la prestation des services

4 (1) L'employeur du secteur de la santé a le droit de réorganiser la prestation de ses services en transférant des fonctions ou services soit dans le même lieu de travail soit dans un autre lieu de travail de la même région soit à un autre employeur du secteur de la santé, notamment une société de personnes ou une coentreprise formée avec d'autres employeurs du secteur de la santé, ou une filiale.

(2) L'employeur du secteur de la santé a le droit de transférer :

a) les fonctions ou services qui doivent être exécutés ou fournis par un autre employeur du secteur de la santé visé au paragraphe (1) à cet autre employeur;

b) les fonctions ou services qui doivent être exécutés ou fournis par un autre lieu de travail de la même région à cet autre lieu de travail.

(3) Dans le cas où une fonction ou un service est transféré à un autre employeur du secteur de la santé, dans le même lieu de travail ou dans un lieu de travail de la même région conformément au présent article, l'employé qui exécute cette fonction ou ce service peut être transféré à cet employeur, à ce même lieu de travail ou à un lieu de travail de la même région de la manière prévue aux règlements.

Droits liés aux affectations dans différents lieux de travail

5 L'employeur du secteur de la santé :

a) a le droit d'affecter un employé dans le même lieu de travail ou dans un autre lieu

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worksite operated by another health sector employer for a period not exceeding that set out in the regulations and under conditions specified in the regulations, and

(b) must post any position pursuant to the collective agreement if the employer requires the successful candidate for that position to work on a regular ongoing basis at more than one worksite of that employer as a condition of employment in that position.

Contracting outside of the collective agreement for services

6 (1) In this section:

"acute care hospital" means a hospital or part of a hospital designated by regulation;

"designated health services professional" means

(a) a nurse licensed under the *Nurses (Registered) Act*,

(b) a person who is a member of a health profession designated under the *Health Professions Act* on the date on which this section comes into force, or

(c) a person in an occupation or job classification designated by regulation;

"non-clinical services" means services other than medical, diagnostic or therapeutic services provided by a designated health services professional to a person who is currently admitted to a bed in an inpatient unit in an acute care hospital, and includes any other services designated by regulation.

(2) A collective agreement between HEABC and a trade union representing employees in the health sector must not contain a provision that in any manner restricts, limits or regulates the right of a health sector employer to contract outside of the collective agreement for the provision of non-clinical services.

(3) The labour relations board or an arbitrator appointed under the Code or under a

de travail relevant de son autorité ou dans un lieu de travail relevant de l'autorité d'un autre employeur du secteur de la santé pour une durée ne dépassant pas celle prévue par règlement et aux conditions qui y sont fixées;

b) doit afficher les postes conformément à la convention collective si le poste visé requiert comme condition d'emploi que le candidat retenu travaille sur une base régulière pour une durée indéfinie à plus d'un lieu de travail relevant de son autorité.

Sous-traitance

6 (1) Les définitions qui suivent s'appliquent au présent article :

« hôpital de soins actifs » L'hôpital ou la partie d'hôpital désigné par règlement;

« professionnel de la santé désigné » Selon le cas :

a) infirmier autorisé en vertu de la *Nurses (Registered) Act*;

b) membre d'une profession de la santé désignée dans le cadre de la *Health Professions Act* à la date d'entrée en vigueur du présent article;

c) personne dont la classification professionnelle ou la classification de poste est désignée par règlement;

« services non cliniques » Services autres que les services médicaux, thérapeutiques, ou de diagnostic dispensés par un professionnel de la santé désigné au patient hospitalisé dans un hôpital de soins actifs. Sont compris dans ces services les autres services désignés par règlement.

(2) Les conventions collectives entre la HEABC et les syndicats représentant les employés du secteur de la santé ne peuvent prévoir aucune clause qui, de quelque manière que ce soit, restreint, limite ou réglemente le droit de l'employeur du secteur de la santé de sous-traiter des services non cliniques hors du cadre défini par la convention collective.

(3) À moins que les personnes visées aux alinéas a) et b) ne fassent entièrement partie de

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collective agreement must not declare a person who

(a) provides services under a contract between a health sector employer and an employer that is not a health sector employer, and

(b) is an employee of the employer that is not a health sector employer

to be an employee of the health sector employer unless the employee is fully integrated with the operations and under the direct control of the health sector employer.

(4) A provision in a collective agreement requiring an employer to consult with a trade union prior to contracting outside of the collective agreement for the provision of non-clinical services is void.

(5) A collective agreement does not bind, and section 35 of the Code does not apply to, a person who contracts with a health sector employer.

(6) A health sector employer must not be treated under section 38 of the Code as one employer with any other health sector employer or a contractor.

Employment Security and Labour Force Adjustment Agreement

7 (1) A party to ESLA is not required to carry out a term of ESLA on or after the coming into force of this section.

(2) A party to a collective agreement is not required to carry out any part of a provision that is based on or derived from ESLA in the collective agreement.

(3) ESLA does not apply for the purposes of the interpretation or application of the collective agreement.

Healthcare Labour Adjustment Society

8 (1) In this section, "**HLAA**" means The Healthcare Labour Adjustment Society of

l'organisation et ne relèvent directement de l'employeur du secteur de la santé, elles ne sont pas reconnues comme employés du secteur de la santé par la commission des relations du travail ou un arbitre nommé en vertu du Code ou d'une convention collective :

a) les personnes qui dispensent des services dans le cadre d'un contrat entre un employeur du secteur de la santé et un employeur ne relevant pas de ce secteur;

b) l'employé qui travaille pour une personne autre qu'un employeur du secteur de la santé.

(4) Sont nulles les clauses de conventions collectives qui obligent l'employeur à consulter le syndicat avant de sous-traiter des services non cliniques hors du cadre défini par la convention collective.

(5) La personne qui conclut un contrat avec un employeur du secteur de la santé n'est pas liée par les conventions collectives et n'est pas visée par l'article 35 du Code.

(6) La désignation d'employeur commun prévue à l'article 38 du Code ne peut s'appliquer à l'employeur du secteur de la santé qui assure une activité avec un autre employeur du secteur de la santé ou un entrepreneur.

Employment Security and Labour Force Adjustment Agreement

7 (1) Les parties à l'ESLA ne sont pas tenues d'appliquer l'ESLA à compter de l'entrée en vigueur du présent article.

(2) Les parties à une convention collective ne sont pas tenues d'appliquer les clauses, ou parties de clauses de la convention collective qui relèvent ou proviennent de l'ESLA.

(3) L'ESLA ne s'applique pas pour l'interprétation ou l'application de la convention collective.

Healthcare Labour Adjustment Society

8 (1) Pour l'application du présent article, « **HLAA** » s'entend de la Healthcare Labour Adjustment

British Columbia incorporated under the *Society Act*.

(2) The minister may appoint an administrator for HLAA.

(3) The administrator appointed under subsection (2) replaces the directors of HLAA and may exercise all the rights and duties of directors under the *Society Act*.

(4) The administrator must ensure that HLAA's programs and activities operate only to the extent necessary to honour obligations to employees of health sector employers who were laid off under ESLA and to honour existing financial commitments made to health sector or other employers for reimbursement under one of HLAA's programs.

(5) The minister may direct the administrator to offer programs and activities beyond those in subsection (4).

(6) The administrator is responsible for winding up HLAA in accordance with the *Society Act*.

(7) The administrator may wind up HLAA when its obligations under subsections (4) and (5) are complete.

(8) The administrator must complete his or her duties under this section within one year from the date on which he or she is appointed.

(9) Any money remaining in HLAA at the time it is wound up must be paid into the Health Special Account referred to in the *Health Special Account Act*.

Layoff and bumping

9 For the period ending December 31, 2005, a collective agreement must not contain a provision that

(a) restricts or limits a health sector employer from laying off an employee,

(b) subject to paragraph (c), requires a health sector employer to meet conditions before giving layoff notice,

Society of British Columbia, société constituée en vertu de la *Society Act*.

(2) Le ministre peut nommer un administrateur à la HLAA.

(3) L'administrateur visé au paragraphe (2) remplace les directeurs de la HLAA et peut exercer toutes les attributions que la *Society Act* confère aux directeurs.

(4) L'administrateur doit s'assurer que les programmes et activités de la HLAA sont utilisés uniquement dans la mesure nécessaire pour lui permettre de s'acquitter de ses obligations envers les employés du secteur de la santé mis à pied aux termes de l'ESLA et pour lui permettre de respecter les engagements financiers qu'il a pris envers les employeurs du secteur de la santé ou d'autres employeurs pour effectuer les remboursements prévus à l'un des programmes de la HLAA.

(5) Le ministre peut enjoindre à l'administrateur d'offrir des programmes et activités autres que ceux mentionnés au paragraphe (4).

(6) L'administrateur est tenu de liquider la HLAA conformément aux dispositions de la *Society Act*.

(7) L'administrateur peut liquider la HLAA une fois que toutes les obligations prévues aux paragraphes (4) et (5) auront été remplies.

(8) L'administrateur doit s'acquitter des obligations qui lui sont confiées en application du présent article dans l'année qui suit la date de sa nomination.

(9) Tout solde appartenant à la HLAA au moment de sa liquidation est versé dans le Health Special Account mentionné dans la *Health Special Account Act*.

Mise en disponibilité et supplantation

9 Pour la période se terminant le 31 décembre 2005, les conventions collectives ne peuvent prévoir aucune clause qui, selon le cas :

a) restreint ou limite le pouvoir de l'employeur du secteur de la santé de mettre en disponibilité;

b) sous réserve de l'alinéa c), oblige l'employeur du secteur de la santé à répondre à certaines conditions avant de donner un préavis de mise en disponibilité;

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(c) requires a health sector employer to provide more than 60 days' notice of layoff to an employee directly or indirectly affected and to the trade union representing the employee, or

(d) provides an employee with bumping options other than the bumping options set out in the regulations.

Part prevails over collective agreements

10 (1) A collective agreement that conflicts or is inconsistent with this Part is void to the extent of the conflict or inconsistency.

(2) A provision of a collective agreement that

(a) requires a health sector employer to negotiate with a trade union to replace provisions of the agreement that are void as a result of subsection (1), or

(b) authorizes or requires the labour relations board, an arbitrator or any person to replace, amend or modify provisions of the agreement that are void as a result of subsection (1),

is void to the extent that the provision relates to a matter prohibited under this Part.

c) oblige l'employeur du secteur de la santé à donner un préavis de mise en disponibilité de plus de 60 jours à l'employé directement ou indirectement visé et au syndicat qui le représente;

d) offre à l'employé des choix quant à la supplantation autres que ceux prescrits par règlement.

La présente partie l'emporte sur les conventions collectives

10 (1) Sont inopérantes les clauses de conventions collectives qui entrent en conflit ou sont incompatibles avec la présente partie.

(2) Sont inopérantes, dans la mesure où elles portent sur l'une des interdictions prévues à la présente partie les clauses de conventions collectives qui :

a) soit obligent l'employeur du secteur de la santé à négocier avec le syndicat en vue du remplacement d'une clause rendue inopérante par application du paragraphe (1);

b) soit autorisent la commission des relations du travail, l'arbitre ou toute autre personne à remplacer ou modifier une clause rendue inopérante par application du paragraphe (1), ou lui imposent cette obligation.

II. Analysis

I will begin by discussing s. 2(*d*) of the *Charter* in the context of legislation that interferes with collective bargaining where the government is not acting as a party to a collective bargaining process but is, as in this case, performing its legislative function. I will then examine the alleged infringement of s. 2(*d*) in the case at bar. Next, turning to s. 1 of the *Charter*, I will review the contextual approach, after which I will assess the impugned legislative measures.

A. *Freedom of Association and Collective Bargaining Under the Charter*

I am in agreement with the following key propositions stated by the majority concerning the scope of s. 2(*d*) of the *Charter*:

II. Analyse

173 J'examinerai d'abord l'al. 2*d*) de la *Charte* dans le contexte d'une loi qui entrave une négociation collective où le gouvernement agit non en tant que partie au processus de négociation collective, mais, comme c'est le cas en l'espèce, en tant que législateur. J'aborderai ensuite l'atteinte alléguée à l'al. 2*d*) en l'espèce, après quoi, en ce qui concerne l'article premier de la *Charte*, je procéderai à l'analyse contextuelle. Je terminerai en évaluant les dispositions contestées.

A. *Liberté d'association et négociation collective sous le régime de la Charte*

174 Je souscris aux grands principes suivants que la majorité a formulés au sujet de la portée de l'al. 2*d*) de la *Charte* :

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(1) 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;

(2) the right is to a process of collective bargaining — it does not guarantee a certain substantive or economic outcome or access to any particular statutory regime; and

(3) the right places constraints on the exercise of legislative powers in respect of the collective bargaining process.

175 However, I have concerns with the majority's test for determining whether a government measure amounts to an infringement of s. 2(*d*). According to my colleagues, the test involves two inquiries, the first into the importance of the matter for the union and the employees, and the second into the impact of the measure on the collective right to good faith negotiation and consultation. They summarize it as follows (at para. 93):

> Generally speaking, determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries. The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.

176 The majority focus on "substantial" interference with a collective bargaining process and purport to do so on the basis of this Court's decision in *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94 (majority reasons at paras. 19, 35 and 90). However, the "substantial interference" standard cannot be adopted in this case simply because it was mentioned in *Dunmore*.

(1) Le droit constitutionnel de négocier collectivement vise à protéger la capacité des travailleurs de participer à des activités associatives et leur capacité d'agir collectivement pour réaliser des objectifs communs concernant des questions liées au milieu de travail et leurs conditions de travail.

(2) Il s'agit d'un droit à un processus de négociation collective — il ne garantit pas l'atteinte de résultats quant au fond de la négociation ou à ses effets économiques ni l'accès à un régime légal précis.

(3) Le droit en cause restreint le pouvoir de légiférer en matière de négociation collective.

Je suis toutefois préoccupée par la grille d'analyse que la majorité suggère pour déterminer si une mesure gouvernementale enfreint l'al. 2*d*). Selon mes collègues, l'analyse implique deux temps : le premier porte sur l'importance que revêt la question pour le syndicat et les employés et le second concerne l'impact de la mesure sur le droit collectif à une consultation et à une négociation menée de bonne foi. Voici comment ils résument la grille d'analyse (par. 93) :

> De façon générale, pour déterminer si une mesure gouvernementale ayant des répercussions sur le processus de négociation collective protégé par la *Charte* constitue une atteinte substantielle, il faut examiner successivement deux questions. D'abord, il faut déterminer l'importance que les aspects touchés revêtent pour le processus de négociation collective et, plus particulièrement, la mesure dans laquelle la capacité des syndiqués d'agir d'une seule voix en vue de réaliser des objectifs communs est compromise. Puis, on doit étudier l'impact de la mesure sur le droit collectif à une consultation et à une négociation menée de bonne foi.

La majorité met l'accent sur les entraves « substantielles » au processus de négociation collective, disant se fonder sur *Dunmore c. Ontario (Procureur général)*, [2001] 3 R.C.S. 1016, 2001 CSC 94 (motifs de la majorité, par. 19, 35 et 90). Cependant, la norme de l'« entrave substantielle » ne peut être adoptée en l'espèce du simple fait qu'elle est mentionnée dans *Dunmore*. Il est

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It is necessary to look closely at the principles applied in that case. The concept of "substantial interference" was introduced by Bastarache J. in *Dunmore* because that case dealt with whether the government had a positive obligation to extend to a claimant the benefits of a particular statutory regime from which he or she was excluded. Requiring "substantial interference" was presented as one of the considerations circumscribing "the possibility of challenging underinclusion under s. 2 of the *Charter*" (para. 24). The term referred to the heavier burden on a claimant attempting to make a case of underinclusion that had been established by the Court in *Haig v. Canada*, [1993] 2 S.C.R. 995, *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, and *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989. The use of the "substantial interference" criterion is explained in para. 25 of *Dunmore*. The following excerpt captures its essence:

> In my view, the evidentiary burden in these cases is to demonstrate that exclusion from a statutory regime permits a substantial interference with the exercise of protected s. 2(*d*) activity. [Emphasis deleted.]

Since the present appeal does not involve a claim of underinclusive legislation, but an obligation that the state not interfere in a collective bargaining process, I cannot agree with imposing a "substantial interference" standard.

Moreover, the first inquiry of the majority's test ("the importance of the matter affected to the process of collective bargaining" (para. 93)) is focused on the substance of the workplace issue rather than on interference with the collective bargaining process, which is what the constitutionally guaranteed right protects against. Since there is no constitutional protection for the substantive outcome of a collective bargaining process, I consider that the matter affected is not the threshold issue when a claim is being evaluated under s. 2(*d*) of the *Charter*. Rather, the primary focus of the inquiry should be whether the legislative measures infringe the ability of workers to act in common in relation to workplace issues. However, I recognize that the significance of the matter may be relevant. In some cases,

nécessaire d'examiner de près les principes appliqués dans cet arrêt. Le juge Bastarache a introduit dans *Dunmore* la notion d'« entrave substantielle » parce qu'il s'agissait dans cette affaire de décider si le gouvernement avait l'obligation positive d'accorder à un demandeur le bénéfice des avantages prévus par un régime légal précis dont il était exclu. L'exigence d'« entrave substantielle » a été présentée comme étant l'une des considérations qui délimitent « la possibilité de contester la non-inclusion sur le fondement de l'art. 2 de la *Charte* » (par. 24). Cette expression est utilisée pour décrire le fardeau additionnel dont le demandeur doit s'acquitter pour prouver la non-inclusion conformément aux arrêts *Haig c. Canada*, [1993] 2 R.C.S. 995, *Assoc. des femmes autochtones du Canada c. Canada*, [1994] 3 R.C.S. 627, et *Delisle c. Canada (Sous-procureur général)*, [1999] 2 R.C.S. 989. L'emploi du critère de l'« entrave substantielle » est expliqué au par. 25 de *Dunmore*. Il est bien illustré dans l'extrait suivant :

> La charge de preuve consiste à mon avis à démontrer que l'exclusion du régime légal permet une entrave substantielle à l'exercice de l'activité protégée par l'al. 2*d*). [Soulignement omis.]

177 Étant donné que le litige, en l'espèce, porte non pas sur la portée trop limitative de la loi, mais sur l'obligation de l'État de ne pas entraver un processus de négociation collective, je ne peux être d'accord pour qu'on applique la norme de l'« entrave substantielle ».

178 De plus, le premier critère que comporte l'analyse de la majorité (« l'importance que les aspects touchés revêtent pour le processus de négociation collective » (par. 93)) est axé sur la substance de la question liée au milieu de travail plutôt que sur l'entrave au processus de négociation collective, qui seul fait l'objet de la garantie constitutionnelle. Étant donné que le résultat concret obtenu à l'issue d'un processus de négociation collective ne bénéficie d'aucune protection constitutionnelle, je considère que la substance du droit n'est pas la première question qu'il faut se poser pour l'évaluation de la demande selon l'al. 2*d*) de la *Charte*. Il faudrait plutôt vérifier en premier lieu si les mesures législatives entravent la capacité des travailleurs d'agir de concert pour ce qui est des questions liées au

it may be helpful to consider whether the matter affected is of so little significance that the right to a collective bargaining process is not infringed and, accordingly, the purpose of freedom of association is not engaged. Nevertheless, I remain unconvinced that the importance of the workplace issue should "play a key role" in the infringement analysis.

179 With respect to the second inquiry ("the manner in which the measure impacts on the collective right to good faith negotiation and consultation" (para. 93)), I am concerned with the way this test is restated and applied in the majority's reasons. For example, rather than focussing on the impact on the right, the majority refer to "the manner in which the government measure is accomplished" (para. 109), "the process by which the measure was implemented" (para. 112) and "the process by which the changes were made" (para. 129). With respect, these formulations imply a duty to consult that is inconsistent with the proposition that "[l]egislators are not bound to consult with affected parties before passing legislation" (para. 157), one with which I fully agree. Another concern is that the majority consider the "circumstances" surrounding the adoption of the legislative provisions, such as the spiralling health care costs faced by the government, at the stage of determining whether s. 2(*d*) is infringed. In my view, those considerations are entirely relevant to the s. 1 justification analysis, but are irrelevant where the issue is whether freedom of association is infringed.

180 Given these concerns, I find it more appropriate to rely on a somewhat different test than the one suggested by the majority, although the test I propose is built on the same foundation as theirs (see majority's reasons, at para. 96). I am adjusting their test to take into consideration the fact that what is in issue is a positive infringement, not underinclusiveness, and that what is under scrutiny is legislation, not government action. My test can be stated as follows:

milieu de travail. Je reconnais que l'importance de la question en jeu peut être un facteur pertinent. Ainsi, dans certains cas, il peut être utile d'examiner si le peu d'importance qu'elle revêt fait en sorte qu'il n'y a pas atteinte au droit à un processus de négociation collective et que l'objet de la liberté d'association ne trouve donc pas application. Quoi qu'il en soit, je ne suis pas convaincue que l'importance de l'intérêt en jeu doive jouer un rôle primordial dans l'analyse de l'atteinte.

Pour ce qui est du second critère (« l'impact de la mesure sur le droit collectif à une consultation et à une négociation menée de bonne foi » (par. 93)), je suis préoccupée par la façon dont il est réitéré et appliqué dans les motifs de la majorité. Par exemple, au lieu de se concentrer sur l'impact que la mesure peut avoir sur le droit, la majorité mentionne qu'il faut examiner « la manière dont la mesure a été mise en œuvre » (par. 109), « son application » (par. 112) et « le processus de réalisation des changements » (par. 129). Soit dit en tout respect, ces énoncés impliquent une obligation de consultation qui va à l'encontre de la thèse que « [l]e législateur n'est pas tenu de consulter les parties visées avant d'adopter une mesure législative » (par. 157), thèse à laquelle je souscris. Autre sujet de préoccupation : la majorité considère les « circonstances » de l'adoption des mesures législatives, par exemple la montée en flèche des coûts des soins de santé à laquelle le gouvernement doit faire face, à l'étape où il doit déterminer s'il y a eu atteinte à l'al. 2*d*). À mon avis, ces considérations sont directement pertinentes pour l'analyse de la justification au sens de l'article premier, mais ne permettent pas de déterminer s'il y a atteinte ou non à la liberté d'association.

Vu ces préoccupations, je crois plus approprié de me fonder sur une grille d'analyse quelque peu différente, tout en m'inspirant de la formulation de la majorité (voir les motifs de la majorité, par. 96). J'adapte l'analyse pour tenir compte du fait qu'il s'agit d'évaluer une ingérence positive, non la portée limitative, et un texte législatif, non une action gouvernementale. La grille d'analyse que je propose peut être ainsi libellée :

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Laws or state actions that prevent or deny meaningful discussion and consultation about significant workplace issues between employees and their employer may interfere with the activity of collective bargaining, as may laws that unilaterally nullify negotiated terms on significant workplace issues in existing collective agreements.

Les lois ou les actes de l'État qui empêchent ou interdisent la tenue de véritables discussions et consultations entre employés et employeur au sujet d'importantes questions liées au milieu de travail peuvent interférer dans l'activité de négociation collective, tout comme les lois qui invalident unilatéralement des stipulations négociées à propos d'importantes questions liées au milieu de travail que prévoient des conventions collectives en vigueur.

This test still involves two inquiries. The first is into whether the process of negotiation between employers and employees or their representatives is interfered with in any way, and the second into whether the interference concerns a significant issue in the labour relations context. An approach under which interference with the process is considered first has the merit of focussing attention on the constitutionally protected right itself, rather than having the court indirectly protect the substance of clauses in collective agreements. Only if the court determines that there has been interference with a process of negotiation should it turn to the second inquiry and consider whether the issues involved are significant, in order to ensure that the scope of s. 2(*d*) is not interpreted so as to exceed its purpose. In this way, not all workplace issues, but only significant ones, are relevant to s. 2(*d*). I agree with the majority that the "protection does not cover all aspects of 'collective bargaining', as that term is understood in the statutory labour relations regimes that are in place across the country" (para. 19). There may be matters covered by collective agreements that do not warrant constitutional protection — it is not every workplace issue that triggers s. 2(*d*) protection, but only those of significance.

181 Cette grille d'analyse comporte aussi deux temps. Premièrement, il faut déterminer s'il y a eu entrave de quelque façon que ce soit au processus de négociation entre employeur et employés ou leurs représentants. Deuxièmement, il faut déterminer si l'entrave concerne une question importante dans le contexte des relations du travail. Le fait d'examiner d'abord l'entrave au processus a le mérite de permettre de concentrer toute l'attention sur le droit protégé par la Constitution, au lieu de protéger indirectement la substance des clauses de conventions collectives. C'est seulement lorsque le tribunal conclut qu'il y a entrave au processus de négociation qu'il peut procéder à la seconde étape et vérifier si les questions en cause sont importantes, afin de s'assurer que l'al. 2*d*) n'est pas interprété de manière à ce que sa portée dépasse son objet. Ainsi, sont pertinentes pour l'analyse fondée sur l'al. 2*d*) non pas toutes les questions liées au milieu de travail, mais seulement celles qui sont importantes. Je conviens avec la majorité que la « protection ne couvre pas tous les aspects de la "négociation collective" au sens où ce terme est employé dans les régimes légaux des relations du travail applicables dans tout le pays » (par. 19). Bon nombre de sujets qui peuvent faire l'objet de conventions collectives ne justifient pas la protection de la Constitution. Toutes les questions liées au milieu de travail ne déclenchent pas la mise en œuvre de la protection de l'al. 2*d*); seules celles qui sont importantes ont cet effet.

Thus, legislation that alters terms of a collective agreement bearing on significant workplace issues, or that precludes negotiations on significant workplace issues that would normally be negotiable, will interfere with the collective bargaining process. Such legislative measures nullify negotiations that

182 Ainsi, une loi qui a pour effet de modifier une convention collective portant sur d'importantes questions liées au milieu de travail ou qui exclut de la négociation d'importantes questions liées au milieu de travail qui seraient normalement négociables constitue une ingérence dans le processus

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have already taken place or prevent future negotiations on the topics they cover.

183 Even though I disagree with significant aspects of the majority's test for determining whether an infringement has occurred, I agree, for the reasons set out below, that certain provisions of the Act infringe s. 2(*d*) of the *Charter.*

B. *Infringement of Section 2(d) of the Charter*

184 This case concerns a claim that legislation enacted by the government of British Columbia interferes with the collective bargaining process, both because it unilaterally nullifies significant terms in existing collective agreements and because it precludes future collective bargaining on certain issues. The relevant collective bargaining process in this case involves, on the one hand, the Health Employers Association of British Columbia ("HEABC"), whose members are both public and private sector employers, and, on the other hand, health care unions. I will deal first with the provisions that do not infringe s. 2(*d*) of the *Charter*, before turning to those that do.

185 Sections 3 and 6(1) of the Act, which are definition provisions, and s. 10, which is an interpretative clause that operates only in conjunction with other provisions, do not need to be reviewed independently. Moreover, I agree with the majority that ss. 6(3), 6(5) and 6(6) of the Act do not infringe s. 2(*d*) of the *Charter.* They do not interfere with the collective bargaining process, but merely modify entitlements under a statutory scheme, which is within the legislature's authority. Similarly, for the reasons given by the majority, I agree that ss. 7 and 8 of the Act, which deal with statutory job security programs, do not infringe s. 2(*d*) of the *Charter.* They do not relate to a collective bargaining process, past or future.

de négociation collective. Des mesures législatives de cette nature rendent sans effet les négociations ayant déjà eu lieu ou excluent, pour l'avenir, la tenue de négociations sur les sujets qu'elles visent.

Bien que je sois en désaccord avec d'importants aspects de la grille d'analyse que la majorité élabore pour déterminer s'il y a entrave, je conviens, pour les motifs énoncés ci-dessous, que certaines dispositions de la Loi enfreignent l'al. 2*d*) de la *Charte*.

B. *Infraction à l'al. 2d) de la Charte*

En l'espèce, les appelants soutiennent qu'une loi adoptée par le gouvernement de la Colombie-Britannique constitue une ingérence dans le processus de négociation collective parce qu'elle annule de façon unilatérale d'importantes conditions prévues dans des conventions collectives existantes et qu'elle exclut, pour l'avenir, la négociation collective de certaines questions. Le processus de négociation collective en cause concerne, d'une part, la Health Employers Association of British Columbia (« HEABC »), composée d'employeurs des secteurs public et privé, et, d'autre part, des syndicats du secteur de la santé. Je vais d'abord traiter des dispositions qui ne contreviennent pas à l'al. 2*d*) de la *Charte*, puis de celles qui l'enfreignent.

Il n'y a pas lieu d'examiner de façon indépendante l'art. 3 et le par. 6(1) de la Loi, qui sont des dispositions définitoires, ni l'art. 10, qui est une disposition interprétative s'appliquant uniquement conjointement avec d'autres dispositions. De plus, comme la majorité, j'estime que les par. 6(3), (5) et (6) de la Loi ne contreviennent pas à l'al. 2*d*) de la *Charte*. Ils ne constituent pas une ingérence dans le processus de négociation collective; ils ne font que modifier des droits conférés dans le cadre d'un régime légal, ce qui est du ressort de l'assemblée législative. De même, pour les motifs exposés par la majorité, je conviens que les art. 7 et 8 de la Loi, qui concernent des programmes de sécurité d'emploi, n'enfreignent pas l'al. 2*d*) de la *Charte*. Ils ne visent pas un processus de négociation collective, passé ou futur.

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Sections 4 and 5 of the Act deal with the transfer and assignment of employees. Certain existing collective agreement provisions establish when an employee may refuse a transfer and how assignments are to take place. Similarly, existing collective agreements contain provisions relating to contracting out, which is dealt with in ss. 6(2) and 6(4) of the Act, and to layoffs and bumping, which are dealt with in s. 9 of the Act.

Therefore, ss. 4 and 5 of the Act (in conjunction with s. 10) nullify some existing terms of collective agreements and limit the scope of future negotiations; they prevent workers from engaging in associational activities on transfers and assignments. The majority appear to consider such provisions as importing "relatively innocuous administrative changes" (para. 12). However, I have some difficulty with discounting the importance of these working conditions by regarding them as insignificant. I prefer to consider the impact of the *Health Sector Labour Adjustment Regulation*, B.C. Reg. 39/2002 ("Regulation"), at the justification stage. Accordingly, I find that these provisions infringe s. 2(*d*) of the *Charter.*

I agree with the majority that ss. 6(2) and 6(4) of the Act (in conjunction with s. 10) explicitly "repudiat[e] past collective bargaining relating to the issue of contracting out and mak[e] future collective bargaining over this issue meaningless" (para. 121). These provisions nullify past collective bargaining relating to contracting out, thereby rendering the process nugatory, and preclude future collective bargaining on the issue. They concern a significant issue of employment security, and negotiating such issues is one of the purposes of associational activities in the workplace. I also agree with the majority that s. 9 of the Act (in conjunction with s. 10) interferes with collective bargaining in that it makes "collective bargaining over specified aspects of layoff and bumping meaningless and also invalidate[s] parts of collective agreements dealing with these issues" (para. 127). Section 9 deals with significant workplace issues related to the purpose of s. 2(*d*): layoff provisions give union members a degree of support at times when their

186 Les articles 4 et 5 de la Loi traitent des transferts et affectations des employés. Certaines clauses de conventions collectives existantes déterminent quand l'employé peut refuser un transfert et comment se font les affectations. De même, des conventions collectives en vigueur comportent des clauses traitant de la sous-traitance (par. 6(2) et (4) de la Loi), et de la mise en disponibilité et la supplantation (art. 9 de la Loi).

187 Par conséquent, les art. 4 et 5 de la Loi (appliqués conjointement avec l'art. 10) annulent des stipulations de conventions collectives existantes et limitent la portée des négociations futures; ils empêchent les travailleurs de se livrer à des activités associatives concernant les transferts et les affectations. La majorité semble considérer que ces dispositions entraînent des « changements administratifs relativement inoffensifs » (par. 12). Pour ma part, j'ai de la difficulté à minimiser l'importance des conditions de travail en question. Je préfère conserver pour l'étape de la justification l'évaluation de la portée du *Health Sector Labour Adjustment Regulation*, B.C. Reg. 39/2002 (« Règlement »). J'estime donc que ces dispositions contreviennent à l'al. 2*d*) de la *Charte.*

188 Je conviens toutefois avec la majorité que les par. 6(2) et (4) de la Loi (appliqués conjointement avec l'art. 10) « met[tent] de côté le résultat des négociations collectives antérieures sur la sous-traitance et prive[nt] de sens les négociations collectives à venir sur ces questions » (par. 121). Ces dispositions rendent nulles les négociations collectives antérieures sur la sous-traitance et du même coup en rendent le processus inopérant; elles excluent aussi, pour l'avenir, la négociation collective de cette question. Elles traitent d'une importante question touchant la sécurité d'emploi, et la négociation des questions de cette nature est l'un des objets des activités associatives en milieu de travail. Je conviens également avec la majorité que l'art. 9 de la Loi (appliqué conjointement avec l'art. 10) entrave la négociation collective du fait qu'il « vid[e] [. . .] de sens la négociation collective de certains aspects de la mise en disponibilité et de la supplantation et invalid[e] certaines parties de conventions collectives portant sur ces questions » (par. 127). L'article

livelihoods may be in jeopardy; bumping rights implicate seniority rights, and seniority is a cornerstone of employees' rights in most collective agreements. Therefore, I find that ss. 6(2), 6(4) and 9 also infringe s. 2(*d*) of the *Charter.*

189 Having stated my view regarding the infringement of s. 2(*d*) of the *Charter* in this case, I will now discuss the applicable legal framework for the s. 1 analysis.

C. *Contextual Approach Required in the Section 1 Analysis*

190 Over the past decade, my colleague Bastarache J. has been at the forefront of articulating the basis for and operation of the contextual approach to s. 1 in a trilogy of judgments of this Court that have garnered majority support. This jurisprudence is a major contribution towards a full and proper understanding of the s. 1 analysis. Several considerations are important to highlight in reviewing this case law.

191 First, in *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at paras. 87-88, Bastarache J. described the importance of considering contextual factors:

> The analysis under s. 1 of the *Charter* must be undertaken with a close attention to context. This is inevitable as the test devised in *R. v. Oakes*, [1986] 1 S.C.R. 103, requires a court to establish the objective of the impugned provision, which can only be accomplished by canvassing the nature of the social problem which it addresses. Similarly, the proportionality of the means used to fulfil the pressing and substantial objective can only be evaluated through a close attention to detail and factual setting. In essence, context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a *Charter* right.

9 concerne d'importantes questions liées au milieu de travail qui touchent à l'objet de l'al. 2*d*) : les dispositions sur la mise en disponibilité assurent aux syndiqués un certain soutien à un moment où leur gagne-pain peut être compromis; le droit de supplantation implique des droits d'ancienneté, et l'ancienneté est une pierre d'assise des droits des employés dans la plupart des conventions collectives. Par conséquent, j'estime que les par. 6(2) et (4) et l'art. 9 enfreignent aussi l'al. 2*d*) de la *Charte*.

Ayant décrit comment, à mon sens, il y a eu atteinte à l'al. 2*d*) de la *Charte* en l'espèce, j'aborde maintenant le cadre juridique de l'analyse fondée sur l'article premier.

C. *Approche contextuelle dans l'analyse fondée sur l'article premier*

Au cours de la dernière décennie, mon collègue le juge Bastarache s'est employé, dans une trilogie d'arrêts qui ont reçu l'appui de la majorité de la Cour, à définir aussi bien les fondements de l'approche contextuelle de l'article premier que son application. Cette jurisprudence constitue une contribution importante à une compréhension complète et équilibrée de l'analyse fondée sur l'article premier. Il ressort de son examen plusieurs points qui méritent d'être relevés.

Premièrement, dans *Thomson Newspapers Co. c. Canada (Procureur général)*, [1998] 1 R.C.S. 877, par. 87-88, le juge Bastarache souligne l'importance de tenir compte des facteurs contextuels :

> L'analyse fondée sur l'article premier doit être réalisée en accordant une grande attention au contexte. Cette démarche est incontournable car le critère élaboré dans *R. c. Oakes*, [1986] 1 R.C.S. 103, exige du tribunal qu'il dégage l'objectif de la disposition contestée, ce qu'il ne peut faire que par un examen approfondi de la nature du problème social en cause. De même, la proportionnalité des moyens utilisés pour réaliser l'objectif urgent et réel visé ne peut être évaluée qu'en s'attachant étroitement au détail et au contexte factuel. Essentiellement, le contexte est l'indispensable support qui permet de bien qualifier l'objectif de la disposition attaquée, de décider si cet objectif est justifié et d'apprécier si les moyens utilisés ont un lien suffisant avec l'objectif valide pour justifier une atteinte à un droit garanti par la *Charte*.

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Characterizing the context of the impugned provision is also important in order to determine the type of proof which a court can demand of the legislator to justify its measures under s. 1. . . .

Second, Bastarache J. recently summarized the relevant contextual factors discussed in *Thomson Newspapers*, *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, 2004 SCC 33, and *R. v. Bryan*, [2007] 1 S.C.R. 527, 2007 SCC 12, as follows: "(i) the nature of the harm and the inability to measure it, (ii) the vulnerability of the group protected, (iii) subjective fears and apprehension of harm, and (iv) the nature of the infringed activity": *Bryan*, at para. 10. He had noted in *Thomson Newspapers* (at para. 90) that these factors "do not represent categories of standard of proof which the government must satisfy, but are rather factors which go to the question of whether there has been a demonstrable justification". It is not surprising that the factors considered in this trilogy of cases were so similar, since all the cases in the trilogy concerned alleged infringements of freedom of expression in the law relating to federal elections. I am of the view that, in cases on topics other than freedom of expression, a contextual approach necessarily implies that the factors may be adjusted to take into consideration differences between claims of justification under s. 1 of the *Charter*.

Third, in this Court's recent decision in *Bryan*, Bastarache J., again writing for the majority, explained that "only once the objectives of the impugned provision are stated can we turn to an examination of the context of those objectives to determine the nature and sufficiency of the evidence required under s. 1" (para. 11).

Fourth, in *Harper*, Bastarache J. explicitly noted that there is a link between the contextual factors and the degree of deference owed to the government in evaluating s. 1 of the *Charter*:

On balance, the contextual factors favour a deferential approach to Parliament in determining whether the

Il importe également de qualifier le contexte de la disposition contestée pour déterminer le type de preuve que le tribunal peut demander au législateur d'apporter pour justifier ses mesures au regard de l'article premier. . .

192 Deuxièmement, le juge Bastarache a récemment résumé les facteurs contextuels pertinents dont il est question dans *Thomson Newspapers*, *Harper c. Canada (Procureur général)*, [2004] 1 R.C.S. 827, 2004 CSC 33, et *R. c. Bryan*, [2007] 1 R.C.S. 527, 2007 CSC 12 : « (i) la nature du préjudice et l'incapacité d'en mesurer l'ampleur, (ii) la vulnérabilité du groupe protégé, (iii) les craintes subjectives et l'appréhension du préjudice, et (iv) la nature de l'activité protégée » : *Bryan*, par. 10. Il a noté dans *Thomson Newspapers* (par. 90) que ces facteurs « ne sont pas des catégories de norme de preuve auxquelles le gouvernement doit satisfaire, mais bien des facteurs touchant la question de savoir s'il y a une justification démontrable ». Il n'est pas surprenant que les facteurs considérés dans cette trilogie soient très similaires, étant donné qu'il s'agissait dans tous ces cas d'atteintes alléguées à la liberté d'expression découlant de lois électorales fédérales. À mon avis, dans les cas d'atteinte autre que celle à la liberté d'expression, une approche contextuelle implique nécessairement qu'on peut adapter les facteurs de manière à prendre en compte les différentes justifications avancées sur le fondement de l'article premier de la *Charte*.

193 Troisièmement, dans *Bryan*, récemment rendu par la Cour, le juge Bastarache, de nouveau au nom de la majorité, a précisé que « ce n'est qu'après avoir énoncé les objectifs de la disposition contestée que nous pouvons examiner leur contexte de façon à définir la nature et le caractère suffisant de la preuve que requiert l'article premier » (par. 11).

194 Quatrièmement, dans *Harper*, le juge Bastarache a clairement fait observer qu'il existe un lien entre les facteurs contextuels et le degré de déférence dont il faut faire preuve envers le gouvernement dans le cadre de l'évaluation fondée sur l'article premier de la *Charte* :

Somme toute, les facteurs contextuels militent en faveur d'une attitude empreinte de déférence envers

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third party advertising expense limits are demonstrably justified in a free and democratic society. Given the difficulties in measuring this harm, a reasoned apprehension that the absence of third party election advertising limits will lead to electoral unfairness is sufficient. [para. 88]

le Parlement dans l'examen de la question de savoir si le plafonnement des dépenses publicitaires faites par les tiers est justifié dans le cadre d'une société libre et démocratique. Vu les difficultés que présente l'évaluation du préjudice, l'existence d'une appréhension raisonnée que l'absence d'une telle limitation serait source d'iniquité électorale suffit. [par. 88]

195 Therefore, the trilogy underlines several features of the contextual approach. First, context infuses every aspect of the proportionality stage of the framework developed in *R. v. Oakes*, [1986] 1 S.C.R. 103, thereby avoiding tunnel vision in the analysis. Second, as the context varies with the nature of the claims, the factors need to be adapted accordingly. Third, the objective has to be identified before turning to the context; only then will it be possible to determine the nature of the evidence that is required and whether the evidence that has been adduced is sufficient. Finally, the contextual factors have a specific effect on the overall degree of deference that will be afforded to the government in determining whether the measures it has adopted are demonstrably justified in a free and democratic society.

Par conséquent, la trilogie souligne plusieurs caractéristiques de l'approche contextuelle. Premièrement, le contexte joue un rôle à chaque étape de l'analyse de proportionnalité établie dans *R. c. Oakes*, [1986] 1 R.C.S. 103, évitant ainsi que l'analyse soit bloquée par des œillères. Deuxièmement, comme le contexte varie selon la nature des litiges, il faut adapter les facteurs en conséquence. Troisièmement, il faut définir l'objectif avant d'aborder le contexte; ce n'est qu'alors qu'il sera possible de déterminer la nature de la preuve à présenter et décider si la preuve présentée est suffisante. Enfin, le contexte influe particulièrement sur le degré de déférence dont le tribunal fera preuve à l'égard du gouvernement lorsqu'il s'agira de décider si les mesures qu'il a adoptées constituent des limites dont la justification peut se démontrer dans le cadre d'une société libre et démocratique.

196 While the majority agree that a contextual approach to s. 1 is appropriate, they do not apply it in their justification analysis. In my view, the majority do not give context the importance it deserves. Instead, my colleagues adopt an axiological approach that does not lend itself to the justification analysis: see, e.g., S. Bernatchez, "La procéduralisation contextuelle et systémique du contrôle de constitutionnalité à la lumière de l'affaire *Sauvé*" (2006), 20 *N.J.C.L.* 73, at pp. 87-90. This is apparent from their sweeping statements concerning possible justification claims, such as the following (at para. 108):

La majorité convient que l'approche contextuelle de l'article premier est appropriée, mais elle ne l'applique pas dans son analyse de la justification. À mon avis, elle ne donne pas au contexte l'importance qu'il mérite. Mes collègues adoptent plutôt une approche axiologique, qui ne se prête pas à l'analyse de la justification : voir S. Bernatchez, « La procéduralisation contextuelle et systémique du contrôle de constitutionnalité à la lumière de l'affaire *Sauvé* » (2006), 20 *R.N.D.C.* 73, p. 87-90. Cette lacune ressort de leurs généralisations concernant d'éventuelles justifications, dont la suivante (par. 108) :

> Even where a s. 2(*d*) violation is established, that is not the end of the matter; limitations of s. 2(*d*) may be justified under s. 1 of the *Charter*, as reasonable limits demonstrably justified in a free and democratic society. This may permit interference with the collective bargaining process on an exceptional and typically temporary basis, in situations, for example, involving

> Même lorsqu'une atteinte à l'al. 2*d*) est établie, l'examen de la question ne s'arrête pas là : il demeure possible que les restrictions imposées au droit garanti par l'al. 2*d*) constituent, en vertu de l'article premier de la *Charte*, des limites raisonnables dont la justification peut se démontrer dans le cadre d'une société libre et démocratique. Exceptionnellement et généralement de

essential services, vital state administration, clear deadlocks and national crisis. [Emphasis added.]

façon temporaire, une interférence dans le processus de négociation collective reste donc permise, par exemple dans des situations mettant en cause des services essentiels ou des aspects vitaux de l'administration des affaires de l'État, ou dans le cas d'une impasse manifeste ou d'une crise nationale. [Je souligne.]

With respect, it is my view that these statements prejudge the s. 1 analysis by limiting justification to exceptional and temporary measures. This is inconsistent with the Court's s. 1 jurisprudence. It is the first time that a standard of exceptional and temporary circumstances has been applied to justification.

Soit dit en tout respect, j'estime que cet énoncé préjuge de l'analyse fondée sur l'article premier en limitant la justification aux mesures exceptionnelles et temporaires. Cette approche est incompatible avec la jurisprudence de la Cour relative à l'article premier. C'est la première fois que le critère de justification est celui d'une situation exceptionnelle et temporaire.

D. *Contextual Analysis*

D. *Analyse contextuelle*

197 In the trilogy of *Thomson Newspapers*, *Harper* and *Bryan*, this Court refined the criteria of the contextual approach under s. 1 of the *Charter*, emphasizing the notion that "courts ought to take a natural attitude of deference toward Parliament when dealing with election laws" (*Bryan*, at para. 9). It is now incumbent on us in the instant case to identify the relevant criteria and to adapt them to a context in which health care legislation is at issue. As was mentioned in *Bryan*, we must begin by identifying the objectives of the impugned provisions before turning to the specific contextual factors.

197 Dans la trilogie *Thomson Newspapers*, *Harper* et *Bryan*, la Cour a mis au point les critères de l'approche contextuelle sous le régime de l'article premier de la *Charte* en mettant l'accent sur la notion que « les tribunaux doivent naturellement faire preuve de déférence envers le Parlement lorsqu'il est question des lois électorales » (*Bryan*, par. 9). Il nous incombe maintenant de dégager les critères pertinents en les adaptant pour les besoins de l'espèce parce qu'il s'agit de lois relatives aux soins de santé. Comme il est mentionné dans *Bryan*, il faut au départ, avant d'examiner les facteurs contextuels, identifier les objectifs des dispositions contestées.

(1) Objectives of the Impugned Provisions

(1) Objectifs des dispositions contestées

198 In its factum, the government states the objectives it was pursuing as follows: "to respond to growing demands on services, to reduce structural barriers to patient care, and to improve planning and accountability, so as to achieve long term sustainability" (para. 4). Two restructuring priorities flowed from these objectives: "adopting new health service models to maintain the level and quality of publicly delivered health services within the new financial mandate, and improving value for money" (para. 5).

198 Dans son mémoire, le gouvernement énonce les objectifs qu'il poursuivait : [TRADUCTION] « répondre aux besoins croissants en matière de services, réduire les obstacles structurels qui limitent l'accès aux soins, améliorer la planification et accroître l'obligation de rendre compte, de façon à assurer la viabilité à long terme du système » (par. 4). Deux priorités liées à la restructuration découlent de ces objectifs : [TRADUCTION] « élaboration de nouveaux modèles en matière de services de santé pour maintenir le niveau et la qualité des services de santé publics dans le nouveau cadre financier et meilleure utilisation des deniers publics » (par. 5).

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199 In addition to these general objectives, the record provides further insights into the objectives of the specific impugned provisions. All of them were designed to "[p]rovide a more seamless and flexible health care delivery system" and "[d]evelop more cost-effective and efficient ways of delivering health services in order to improve patient care and reduce costs" (Respondent's Record, at pp. 52, 55, 59 and 84). Facilitating the reorganization of health care service delivery was a specific goal of ss. 4 (transfers) and 9 (layoff and bumping) (*ibid.*, at pp. 52 and 84). One objective of s. 5 of the Act (multi-worksite assignment rights) was "improved use of human resources . . . [in order] to deal with fluctuations in workload" (*ibid.*, at p. 55). Finally, the contracting-out provisions in s. 6 of the Act were intended to "[a]llow fair competition on hospital contracts and provide better value to taxpayers" (*ibid.*, at p. 59).

En plus de ces objectifs généraux, le dossier fournit des précisions quant aux objets des dispositions contestées. Elles visent toutes à [TRADUCTION] « offrir un système de santé plus cohérent et flexible » et à « mettre en place des méthodes de travail permettant d'offrir des services de santé à moindre coût et de façon plus efficace, de manière à améliorer les soins aux patients et à réduire les coûts » (dossier de l'intimée, p. 52, 55, 59 et 84). Les articles 4 (transferts) et 9 (mise en disponibilité et supplantation) ont été adoptés dans le but précis de faciliter la réorganisation de la prestation des services de santé (*ibid.*, p. 52 et 84). L'article 5 de la Loi (droits liés aux affectations dans différents lieux de travail) visait notamment à [TRADUCTION] « améliorer l'utilisation des ressources humaines [. . .] pour tenir compte des fluctuations de la charge de travail » (*ibid.*, p. 55). Enfin, l'art. 6 de la Loi, qui concerne la sous-traitance, visait à [TRADUCTION] « s'assurer que les contrats hospitaliers sont assujettis à une saine concurrence et que les contribuables en ont plus pour leur argent » (*ibid.*, p. 59).

200 I agree with the majority that the objectives of Part 2 of the Act are important ones and would add that the objectives of the impugned provisions are also important. The health care system is under serious strain and is, as will be discussed below, facing a crisis of sustainability. There is little hope that it can survive in its current form. Patients depend on the availability of health care services of a reasonable standard within a reasonable time: *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35, at para. 112. Having discussed the objectives of Part 2 of the Act and the specific impugned provisions, I will now consider the relevant contextual factors in detail.

Je conviens avec la majorité que les objectifs de la partie 2 de la Loi sont importants et, à cela, j'ajoute que les objectifs des dispositions contestées le sont également. Le système de santé est mis à rude épreuve et, comme nous le verrons plus loin, est en crise. Il est peu probable qu'il puisse survivre dans sa forme actuelle. Les patients doivent pouvoir compter sur l'accès à des services de santé de qualité raisonnable, et ce, dans un délai raisonnable : *Chaoulli c. Québec (Procureur général)*, [2005] 1 R.C.S. 791, 2005 CSC 35, par. 112. Après avoir examiné les objectifs de la partie 2 de la Loi et les dispositions contestées, je vais maintenant aborder en détail les facteurs contextuels pertinents.

(2) Contextual Factors

(2) Facteurs contextuels

201 Several contextual factors have been advanced for the s. 1 analysis. I will apply the guiding principles that were adopted in the elections trilogy, making adjustments to adapt them to the health care context.

Plusieurs facteurs contextuels ont été avancés pour l'analyse fondée sur l'article premier. J'appliquerai les grands principes énoncés dans la trilogie des arrêts sur les élections, en faisant les adaptations nécessaires pour tenir compte du contexte des soins de santé.

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(a) *Nature of the Harm*

In *Harper*, the nature of the harm that the impugned legislation was intended to address was electoral unfairness (para. 79). In the instant case, the nature of the harm that Part 2 of the Act is designed to address is a crisis of sustainability in health care. There is substantial evidence in the record that the delivery of services in British Columbia's health care system was unsustainable at the time the Act was introduced and that the Act was part of the government's approach in attempting to address the situation.

A growing and aging population, costly emerging high-end technology and drugs, and complexity in disease patterns have caused an explosion in the demand for health services in British Columbia and elsewhere in Canada. In British Columbia, health care costs have been rising three times faster than the rate of economic growth in the province. In a submission to the International Labour Office, the government referred to "unsustainable pressures on the budget that needed to be addressed", given that "health and education expenditures by the province represented 64.4 per cent of the total expenditure in 2001-02": International Labour Office, Committee on Freedom of Association, Report No. 330, Cases Nos. 2166, 2173, 2180 and 2196, "Complaints against the Government of Canada concerning the Province of British Columbia", *I.L.O. Official Bulletin*, vol. LXXXVI, 2003, Series B, No. 1, at para. 267. As a result, the government submitted that:

> The health care system in British Columbia is facing a crisis of sustainability, as the costs of health care will continue to rise, and a crisis of service, as the demands on the system exceed its capacity to provide service.

(Respondent's Record, at p. 1040)

By far the largest share of health care costs are those relating to labour: "[a]pproximately 80% of healthcare costs are labour costs — the major-

a) *Nature du préjudice*

202 Dans *Harper*, le préjudice auquel la loi contestée était destinée à remédier était l'iniquité électorale (par. 79). En l'espèce, la partie 2 de la Loi vise à remédier à la crise à laquelle le système de santé fait face. Le dossier comporte des éléments de preuve substantiels démontrant que le système de santé de la Colombie-Britannique n'était pas viable à l'époque de la présentation de la Loi et que celle-ci faisait partie de la stratégie du gouvernement de corriger la situation.

203 La croissance et le vieillissement de la population, le coût élevé des nouvelles technologies et des nouveaux médicaments de pointe ainsi que de la complexité du profil des maladies expliquent l'explosion de la demande des services de santé en Colombie-Britannique et dans les autres provinces du Canada. En Colombie-Britannique, les coûts des soins de santé ont enregistré une croissance trois fois plus rapide que l'économie de la province. Dans ses observations au Bureau international du Travail, le gouvernement mentionne les « pressions insoutenables sur le budget, qui devaient être prises en compte » étant donné que « les dépenses de santé et d'éducation de la province représentaient 64,4 pour cent des dépenses totales en 2001-02 » : Bureau international du Travail, Comité de la liberté syndicale, Rapport n^{o} 330, cas n^{os} 2166, 2173, 2180 et 2196, « Plaintes contre le gouvernement du Canada concernant la province de la Colombie-Britannique », *Bulletin officiel du B.I.T.*, vol. LXXXVI, 2003, série B, n^{o} 1, par. 267. Voici ce que le gouvernement de la Colombie-Britannique a donc fait valoir :

> [TRADUCTION] Le système de santé de la Colombie-Britannique traverse une crise de viabilité, car les coûts des soins de santé continueront d'augmenter; il en est de même de la prestation des services, car la demande excède la capacité du système.

(Dossier de l'intimée, p. 1040)

204 La majeure partie des coûts des soins de santé sont liés à la main-d'œuvre : [TRADUCTION] « environ 80 % des coûts des soins de santé sont

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ity being unionized labour costs" (Appellants' Supplementary Record, at p. 7). In breaking these costs down further, the government presented evidence that health support workers in British Columbia receive higher wages than in other jurisdictions:

> Support workers are particularly highly paid in comparison with their counterparts in other provinces, with starting and maximum wages on average 34% and 28% higher than the national average.

(Respondent's Record, at p. 1044; see also pp. 199 and 207.)

205 Based on this evidence, I consider the crisis of sustainability in the province's health care system, which this Act and the impugned provisions were designed to address, to be a contextual factor that is of the utmost importance to the s. 1 analysis in the case at bar.

(b) *Vulnerability of the Protected Group*

206 In *Harper*, the impugned legislation was designed to protect "the Canadian electorate by ensuring that it is possible to hear from all groups and thus promote a more informed vote" (para. 80), as well as candidates and political parties to ensure that they "have an equal opportunity to present their positions to the electorate" (para. 81). In the instant case, the primary group that Part 2 of the Act is designed to protect is composed of persons in need of health care. The government submits that the Act "advances the interests of health care users, who are a vulnerable group" (Respondent's Factum, at para. 143).

207 In the years before the Act came into force, labour relations in British Columbia's health sector were volatile and, at times, acrimonious. The interests and demands of health care unions were pursued not just at the bargaining table, but also by means of political advertising and lobbying (Respondent's Record, at p. 1033). As late as the summer of 2001, nurses and paramedics were engaged in partial strike action. Legislation was

imputables à la main-d'œuvre — dont la majorité est syndiquée » (dossier supplémentaire des appelants, p. 7). En ventilant davantage ces coûts, le gouvernement a présenté une preuve suivant laquelle le personnel de soutien du secteur de la santé est mieux rémunéré en Colombie-Britannique que dans les autres provinces :

> [TRADUCTION] Les membres du personnel de soutien sont particulièrement bien payés comparativement à leurs homologues des autres provinces, leur salaire à l'embauchage et leur salaire maximal étant en moyenne 34 % et 28 % plus élevés que la moyenne nationale.

(Dossier de l'intimée, p. 1044; voir également p. 199 et 207.)

Compte tenu de la preuve susmentionnée, j'estime que le problème de la viabilité du système de santé de la province, auquel la Loi et les dispositions contestées visaient à remédier, est en l'espèce un facteur contextuel de la plus haute importance pour l'analyse fondée sur l'article premier.

b) *Vulnérabilité du groupe protégé*

Dans *Harper*, la loi contestée cherchait à protéger « les électeurs canadiens en leur permettant d'entendre tous les groupes et, de ce fait, de voter de manière plus éclairée » (par. 80) ainsi que les candidats et les partis politiques pour qu'ils aient « une chance égale de présenter leurs positions à l'électorat » (par. 81). En l'espèce, le principal groupe que la partie 2 de la Loi vise à protéger se compose des personnes ayant besoin de soins de santé. Le gouvernement fait valoir que la Loi [TRADUCTION] « défend les intérêts des utilisateurs des services de santé, qui constituent un groupe vulnérable » (mémoire de l'intimée, par. 143).

Dans les années qui ont précédé l'entrée en vigueur de la Loi, les relations du travail dans le secteur de la santé de la Colombie-Britannique étaient instables et, parfois, acrimonieuses. Les syndicats de ce secteur ne se limitaient pas seulement à la table des négociations pour défendre leurs intérêts et faire valoir leurs demandes; ils recouraient aussi à la publicité politique et au lobbying (dossier de l'intimée, p. 1033). À l'été 2001,

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enacted by the government, first to impose a "cooling off" period, and then to end the strikes and impose collective agreements (*ibid*., at p. 1039). The government submits that "[c]ontrolling public health care labour costs through collective bargaining is difficult, if not impossible. The public depends on access to health care, and cannot go elsewhere during a labour dispute for these services, as they typically can when a labour dispute involves a private sector business" (Respondent's Factum, at para. 35).

les infirmiers et les ambulanciers paramédicaux ont entamé une grève partielle. Le gouvernement a d'abord ordonné par voie législative une [TRADUCTION] « période de réflexion », puis a adopté une loi pour mettre fin aux grèves et imposer des conventions collectives (*ibid*., p. 1039). Le gouvernement soutient qu'il [TRADUCTION] « est difficile, voire impossible, de contrôler les coûts de main-d'œuvre du système de santé public dans le cadre de la négociation collective. La population dépend du système de santé et ne peut se tourner ailleurs pendant un conflit de travail, comme elle pourrait normalement le faire s'il s'agissait d'un conflit de travail dans le secteur privé » (mémoire de l'intimée, par. 35).

In *Chaoulli*, the majority of this Court were critical of years of failure by the Quebec government to act to improve that province's deteriorating public health care system; patients may face serious, and even grave, consequences where the health care system fails to provide services of a reasonable standard within a reasonable time (paras. 97, 105 and 112). Accordingly, this Court cannot ignore patients' needs in considering the constitutionality of health care reforms that are designed to make the system more viable and efficient.

208 Dans *Chaoulli*, la majorité de la Cour a reproché au gouvernement du Québec d'avoir tardé pendant des années à agir pour remédier à la détérioration du système de santé public de la province; les patients risquent d'avoir à faire face à de sérieuses, et même graves, conséquences s'ils n'ont pas accès dans un délai raisonnable à des services de santé de qualité raisonnable (par. 97, 105 et 112). En conséquence, la Cour ne peut ignorer les besoins des patients lorsqu'elle examine la constitutionnalité des réformes des services de santé destinées à rendre le système plus viable et plus efficace.

In my view, the vulnerability of health care users and their constitutionally protected rights are relevant contextual factors to be considered in determining whether the impugned legislative provisions are demonstrably justified under s. 1.

209 À mes yeux, la vulnérabilité des utilisateurs du système de santé et les droits que leur garantit la Constitution sont des facteurs contextuels pertinents qu'il faut prendre en considération pour déterminer si les dispositions contestées constituent des limites dont la justification peut se démontrer au sens de l'article premier.

(c) *Apprehension of Harm and Ameliorative Measures Considered*

c) *Appréhension du préjudice et mesures d'amélioration envisagées*

In *Harper*, the Court considered the Canadian electorate's subjective fears and apprehension of harm with respect to electoral unfairness as part of the contextual approach (paras. 82-83). This factor thus served to link the nature of the harm to the vulnerability of the group. In the instant case, two factors that led to the adoption of the Act were concerns over the need to respond to the province's

210 Dans *Harper*, en procédant à l'analyse contextuelle, la Cour a pris en compte les craintes subjectives et l'appréhension du préjudice de l'électorat canadien au sujet de l'iniquité électorale (par. 82-83). Ce facteur a donc permis d'établir un lien entre la nature du préjudice et la vulnérabilité du groupe. En l'espèce, les deux facteurs qui ont mené à l'adoption de la Loi sont les préoccupations

health care crisis and the government's evaluation of other alternatives.

211 Governments across the country have been attempting to develop measures to reform the health care system that will address concerns about its sustainability. On introducing the Act, the Minister responsible for it, the Honourable Graham Bruce, stated: "The reality is that our health system has been on a fast track to collapse. We've got to get the situation under control so we can meet the needs of the patients and the needs of the people of British Columbia." (British Columbia, *Debates of the Legislative Assembly*, vol. 2, No. 29, 2nd Sess., 37th Parl., January 26, 2002, at p. 909) In fact, as outlined below in the discussion on minimal impairment, the government considered numerous measures to address this harm.

212 As this Court recognized in *Chaoulli*, at para. 94, "courts must show deference . . . [where there is] an ongoing situation in which the government makes strategic choices with future consequences that a court is not in a position to evaluate". In the case at bar, the various alternatives considered by the government to address concerns about the viability of the province's health care system constitute a contextual factor that is relevant to the s. 1 analysis.

(d) *Nature of the Affected Activity*

213 In *Harper*, the affected activity was expression under s. 2(*b*) of the *Charter*. The Court considered the nature of that activity in the electoral context in order to determine the degree of constitutional protection that ought to be afforded it. The instant case concerns the freedom of association of union members under s. 2(*d*) of the *Charter* in the health care context. Since the activity of collective bargaining involves both employees (through their union representatives) and their employer (in this case, the HEABC), the interests of each of them are relevant contextual factors. Additionally, since the claim in this case is against the government of

concernant la nécessité de résoudre la crise secouant le système de santé de la province et la prise en considération par le gouvernement des solutions de rechange.

Plusieurs gouvernements provinciaux ont tenté de réformer les systèmes de santé pour répondre aux inquiétudes concernant leur viabilité. En présentant la Loi, le ministre responsable, l'honorable Graham Bruce, a déclaré : [TRADUCTION] « Le fait est que notre système de santé court à sa perte. Nous devons prendre la situation en main pour pouvoir répondre aux besoins des patients et de la population de la Colombie-Britannique. » (Colombie-Britannique, *Debates of the Legislative Assembly*, vol. 2, n^{o} 29, 2^{e} sess., 37^{e} lég., 26 janvier 2002, p. 909) En fait, comme nous le verrons plus loin dans le cadre de l'analyse de l'atteinte minimale, le gouvernement a envisagé nombre de mesures pour redresser ce préjudice.

Comme la Cour l'a reconnu dans *Chaoulli*, par. 94, « les tribunaux doivent faire preuve de déférence [. . .] lorsqu'il s'agit d'une situation en cours et que le gouvernement fait des choix stratégiques qui ont des conséquences futures qu'un tribunal n'est pas en mesure d'évaluer ». En l'espèce, les diverses solutions de rechange que le gouvernement a envisagées pour répondre aux préoccupations relatives à la viabilité du système de santé de la province constituent un facteur contextuel pertinent pour l'analyse fondée sur l'article premier.

d) *Nature de l'activité protégée*

Dans *Harper*, l'activité protégée était l'expression, visée par l'al. 2*b*) de la *Charte*. La Cour a évalué la nature de cette activité dans le contexte électoral pour déterminer le degré de protection constitutionnelle qui doit lui être accordée. Le présent pourvoi concerne la liberté d'association des syndiqués, garantie par l'al. 2*d*) de la *Charte*, dans le contexte des soins de santé. Étant donné que l'activité de négociation collective implique la participation à la fois des employés (par l'entremise de leurs syndicats) et de l'employeur (en l'espèce, la HEABC), les intérêts de ces deux parties constituent des facteurs contextuels pertinents. De plus,

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British Columbia, its position must be taken into account to ensure that the entire context in which the Act was adopted is considered.

(i) The Employees' Perspective

Although s. 2(*d*) of the *Charter* protects only the collective bargaining process, the substance of the negotiated provisions is what matters to employees. For them, collective bargaining is a means to an end. Employees bargain, through their union representatives, on matters that are of varying degrees of importance to them.

Sections 4 and 5 of the Act affect a worker's ability to keep the same job description and position in the same institution. Section 6(2) of the Act could affect the ability of workers to maintain their present employment and "to gain employment security". Section 6(4) takes this a step further by signalling to the union that even consultation on contracting out would be a waste of time. With respect to s. 9 of the Act, it affects the seniority regime that is valued by unions and their members, as well as an employee's ability to retain secure employment. There is no question that some of the issues concerned here, such as restrictions on contracting out and mobility, are high priorities for most unions and workers. However, this is not necessarily the case for all the impugned provisions. For example, the revised rules for transfer and assignment set out in ss. 4 and 5 might be considered less important, given that employees retain their employment.

(ii) The HEABC's Perspective

The HEABC is not a party to this appeal, but its perspective — as disclosed in the record — both as an employer and as an administrator of the health care system, is nevertheless a relevant contextual factor. In August 2001, the HEABC, in a briefing document prepared for the government, identified numerous provisions in the main

comme la plainte en l'espèce vise le gouvernement de la Colombie-Britannique, il faut tenir compte de sa position pour que soit pris en considération tout le contexte de l'adoption de la Loi.

(i) Le point de vue des employés

214 Certes, l'alinéa 2*d*) de la *Charte* protège uniquement le processus de négociation collective, mais ce qui importe pour les employés, c'est la substance des clauses négociées. Pour eux, la négociation collective est un moyen d'atteindre une fin. Les employés négocient par l'entremise de leurs représentants syndicaux, des questions qui sont pour eux d'importance variable.

215 Les articles 4 et 5 de la Loi touchent à la capacité du travailleur de conserver la même description de tâches et le même poste au sein d'un même établissement. Le paragraphe 6(2) de la Loi risque de compromettre la capacité des travailleurs de conserver leur emploi actuel et [TRADUCTION] « d'obtenir la sécurité d'emploi ». À ce sujet, le par. 6(4) va plus loin en indiquant au syndicat que même des consultations sur la question de la sous-traitance seraient une perte de temps. L'article 9 de la Loi, quant à lui, touche au régime d'ancienneté, si cher aux syndicats et à leurs membres, et à la capacité de l'employé de conserver un emploi stable. Il ne fait aucun doute que certaines des questions, telles les restrictions à la sous-traitance et à la mobilité, sont prioritaires pour la plupart des syndicats et leurs membres. Toutefois, ce n'est pas nécessairement le cas de toutes les dispositions contestées. Par exemple, les changements apportés aux règles concernant le transfert et l'affectation prévus aux art. 4 et 5 peuvent revêtir moins d'importance puisque les employés conservent leur emploi.

(ii) Le point de vue de la HEABC

216 La HEABC n'est pas partie au pourvoi, mais son point de vue — selon le dossier — tant à titre d'employeur que d'administrateur du système de santé demeure un facteur contextuel pertinent. En août 2001, dans un document d'information préparé à l'intention du gouvernement, la HEABC a attiré l'attention sur de nombreuses clauses des principales

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health sector collective agreements that, in its view, had to be changed "to enable health employers to seek greater efficiencies in operating B.C.'s health care system" (*Briefing Document — Collective Agreement Efficiencies* (2001), at p. 1).

217 In that document, written just five months before the Act was introduced, the HEABC outlined changes that it desired to 33 aspects of existing collective agreements. Most of the provisions that found their way into Part 2 of the Act appear among these recommendations, such as: eliminating restrictions on contracting out, removing barriers to cross-site mobility and transfers, eliminating the Healthcare Labour Adjustment Agency, making bumping less disruptive and changing layoff requirements.

218 However, the HEABC also called for numerous other changes to health sector collective agreements that went well beyond those that were ultimately adopted in Part 2 of the Act, such as: removing pay equity adjustments, adjusting vacation levels and reducing vacation entitlements, ensuring enhanced accountability for union leaves, reducing the amount of paid and unpaid time off for union-related business, requiring the unions to reimburse the employer for one half of the expense of paying union representatives to represent the union at committee meetings, amending various job classifications, allowing banked overtime only at the employer's discretion, and taking unspecified measures to "reduce" the number of employees on sick leave, workers' compensation and long-term disability.

219 I find that it is a relevant contextual factor both that the government, in adopting the impugned

conventions collectives qui, à son avis, devraient être modifiées [TRADUCTION] « pour permettre aux employeurs du secteur de la santé de faire fonctionner le système de santé de la Colombie-Britannique de façon plus efficace » (*Briefing Document — Collective Agreement Efficiencies* (2001), p. 1).

Dans ce document, rédigé seulement cinq mois avant la présentation de la Loi, la HEABC exposait les modifications qu'elle souhaitait voir apporter à 33 aspects des conventions collectives en vigueur. La plupart des mesures prévues à la partie 2 de la Loi figurent au nombre des recommandations de la HEABC, notamment l'abolition des restrictions à la sous-traitance, l'élimination des obstacles concernant les transferts et affectations dans différents lieux de travail et, l'élimination de la Healthcare Labour Adjustment Agency, la diminution des perturbations dues aux supplantations et la modification des exigences en matière de mise en disponibilité.

Toutefois, la HEABC demandait aussi qu'on apporte de nombreuses autres modifications aux conventions collectives du secteur de la santé qui allaient bien au-delà de celles qui ont en fin de compte été adoptées dans la partie 2 de la Loi : notamment l'élimination des rajustements au titre de l'équité salariale, le nivellement des vacances et la réduction des droits au titre des vacances, l'établissement de normes de reddition de compte plus rigoureuses concernant les congés pour activité syndicale, la réduction des congés pour fonctions syndicales payés et non payés, le remboursement de la moitié des sommes payées par l'employeur aux représentants syndicaux participant au nom du syndicat à des réunions de comités, la modification de diverses classifications de postes, ainsi que l'adoption de mesures visant à laisser l'accumulation des heures supplémentaires à la discrétion de l'employeur et de mesures générales visant à « réduire » le nombre d'employés en congé de maladie ou bénéficiant du régime des accidents du travail ou du régime d'invalidité à long terme.

Au titre des facteurs contextuels, il faut selon moi retenir qu'en adoptant les dispositions contestées de

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provisions of the Act, was reacting to the HEABC's recommendations on how to improve the health care system and that it elected *not* to pursue many of the avenues proposed by the HEABC that might have affected *Charter* rights directly and substantially (such as removing pay equity adjustments, and measures that would affect the union's ability to effectively represent employees).

la Loi le gouvernement donnait suite aux recommandations de la HEABC visant à améliorer le système de santé et qu'il a choisi de *ne pas* adopter bon nombre de solutions proposées par la HEABC qui étaient susceptibles de porter atteinte, directement et de façon importante, aux droits garantis par la *Charte* (par exemple, des mesures visant à supprimer les rajustements au titre de l'équité salariale ou ayant pour effet de compromettre la capacité du syndicat de représenter efficacement les employés).

(iii) The Government's Perspective

(iii) Le point de vue du gouvernement

220 The government submits that the Act is part of a broader program to restructure health care in the province and that its "general philosophy about the proper boundaries of publicly provided health services as between clinical services and non-clinical services" is a relevant contextual factor in the s. 1 analysis (Respondent's Factum, at para. 142). It is worth noting that the HEABC, as the employer, remains constant, whereas governments come and go as they are elected and defeated. New governments are sometimes elected on the basis of promises to reform social programs, and the need to reform the health care system is one of the most serious challenges that has ever been faced. Legislation is one of the principal tools available to governments to set policy and restructure programs. However, the terms and the duration of collective agreements that are in force when a new government takes office may operate as a severe constraint on efforts to reform programs that depend on unionized labour, such as the public health care system.

220 Le gouvernement soutient avoir adopté la Loi dans le cadre d'un programme global de restructuration des services de santé de la province et a fait valoir que sa [TRADUCTION] « philosophie générale concernant ce qui différencie, parmi les services de santé publics, les services cliniques des services non cliniques » est un facteur contextuel pertinent dans le cadre de l'analyse fondée sur l'article premier (mémoire de l'intimée, par. 142). Il est utile de rappeler que la HEABC assume son rôle d'employeur sur une base permanente alors que les gouvernements se succèdent au gré des élections. Les nouveaux gouvernements sont parfois élus parce qu'ils ont promis de réformer des programmes sociaux, et la réforme nécessaire du système de santé compte parmi les plus grands défis que les gouvernements aient jamais eu à relever. La législation est un des principaux outils dont disposent les gouvernements pour mettre en place des politiques et restructurer des programmes. Toutefois, les stipulations et la durée des conventions collectives qui sont en vigueur quand un nouveau gouvernement prend le pouvoir peuvent restreindre considérablement les efforts de réforme des programmes qui, comme c'est le cas des services de santé, font appel à une main-d'œuvre syndiquée.

221 The political background to the introduction of the Act at issue in the case at bar is thus a relevant contextual factor. This is particularly so given that the reform of the province's health care system was part of a shift in the government's philosophy towards health care delivery after a decisive election on May 16, 2001. Some eight months

221 Le contexte politique de la présentation de la Loi constitue donc en l'espèce un facteur contextuel pertinent. En l'espèce, cela est d'autant plus important que la réforme du système de santé de la province marquait, après l'élection décisive du 16 mai 2001, une nouvelle orientation gouvernementale pour la prestation des services de santé.

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later, in introducing the Act, the Minister of Skills Development and Labour characterized it as "a fundamental restructuring of the size and scope of government that reflects our New Era commitments, the core services review, and taxpayers' priorities" (Respondent's Record, at p. 337). The Act was therefore part of a much larger shift in the government's approach to the role of government services at a time of a crisis of sustainability, and of labour tensions, in the health care sector.

(3) Summary on Contextual Factors

222 While the nature of some of the working conditions that are likely to be affected tends to favour a less deferential approach, substantial deference must be shown in determining whether the measures adopted in this case are justified under s. 1 in light of the crisis of sustainability in the health care sector, the vulnerability of patients, whose rights are constitutional in nature, the recommendations of the HEABC as an employer and as an administrator of the health care system, and the highly political context of health care reform in British Columbia.

E. *Section 1 Justification Analysis*

223 The majority set out the applicable framework from *Oakes* for determining whether s. 1 of the *Charter* has been satisfied. I substantially agree with them that the impugned provisions in the case at bar are prescribed by law, that they were enacted in pursuit of a pressing and substantial objective, and that the measures taken are rationally connected with the objective being pursued. However, for the reasons that follow, I find that ss. 4, 5, 6(2) and 9 of the Act satisfy the *Oakes* test and are saved by s. 1 of the *Charter.* While I agree that s. 6(4) of the Act fails the minimal impairment test and thus is not justified under s. 1 of the *Charter*, I arrive

Environ huit mois plus tard, en présentant la Loi, le ministre de la Formation professionnelle et du Travail a déclaré qu'il s'agissait [TRADUCTION] « d'une restructuration en profondeur touchant la taille de l'administration publique et sa vocation, qui tient compte de nos nouveaux engagements, d'une étude sur les services essentiels et des priorités des contribuables » (dossier de l'intimée, p. 337). La Loi faisait donc partie d'un profond virage dans l'approche du gouvernement en ce qui concerne le rôle des services gouvernementaux à une époque où le secteur de la santé connaît une crise de viabilité et des tensions dans les relations du travail.

(3) Résumé concernant les facteurs contextuels

La nature de certaines conditions de travail susceptibles d'être touchées milite en faveur d'une approche moins déférente. Cependant, compte tenu du problème de viabilité du système de santé, de la vulnérabilité des patients, dont les droits sont de nature constitutionnelle, des recommandations de la HEABC en tant qu'employeur et administrateur du système de santé, et du contexte hautement politique de la réforme des services de santé en Colombie-Britannique, la Cour doit faire preuve d'une grande déférence lorsqu'il s'agit de déterminer si les mesures adoptées en l'espèce sont justifiées au sens de l'article premier.

E. *Analyse de la justification fondée sur l'article premier*

La majorité énonce le cadre d'analyse applicable proposé dans *Oakes* pour déterminer si les exigences de l'article premier de la *Charte* ont été remplies. Je souscris pour l'essentiel à ses conclusions suivant lesquelles les dispositions contestées en l'espèce sont prescrites par une règle de droit, qu'elles ont pour but d'atteindre un objectif urgent et réel et qu'il existe un lien rationnel entre les mesures prises et l'objectif poursuivi. Cependant, pour les motifs qui suivent, je conclus que les art. 4 et 5, le par. 6(2) et l'art. 9 de la Loi satisfont au critère *Oakes* et peuvent se justifier au sens de l'article premier de la *Charte*. Je conviens par ailleurs,

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at this conclusion for different reasons than those given by the majority.

(1) Minimal Impairment Test

Under this Court's approach to the minimal impairment test, the government bears the burden of justifying the infringement of a *Charter* right, but deference is owed to its choice of means to attain its legitimate objectives. In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160, McLachlin J. (as she then was) stated: "If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement". Expanding on this in *Harper* at paras. 110-11, Bastarache J. held that "the impugned measures need not be the least impairing option. The contextual factors speak to the degree of deference to be accorded to the particular means chosen by Parliament to implement a legislative purpose".

Measures adopted by a government may be part of a broader legislative, administrative and operational response. They may further objectives in ways that would not otherwise be possible. As Dickson C.J. held in *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 784-85:

> It may be that a number of courses of action are available in the furtherance of a pressing and substantial objective, each imposing a varying degree of restriction upon a right or freedom. In such circumstances, the government may legitimately employ a more restrictive measure, either alone or as part of a larger programme of action, if that measure is not redundant, furthering the objective in ways that alternative responses could not, and is in all other respects proportionate to a valid s. 1 aim.

mais pour des motifs autres que ceux énoncés par la majorité, que le par. 6(4) de la Loi ne satisfait pas au critère de l'atteinte minimale et qu'il n'est donc pas justifié selon l'article premier de la *Charte*.

(1) Le critère de l'atteinte minimale

224 Selon l'approche de la Cour quant au critère de l'atteinte minimale, il incombe au gouvernement de justifier l'atteinte à un droit garanti par la *Charte*, mais il faut faire preuve de retenue à l'égard des moyens qu'il a choisis pour atteindre ses objectifs légitimes. Dans *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199, par. 160, la juge McLachlin (maintenant Juge en chef) a précisé : « [s]i la loi se situe à l'intérieur d'une gamme de mesures raisonnables, les tribunaux ne concluront pas qu'elle a une portée trop générale simplement parce qu'ils peuvent envisager une solution de rechange qui pourrait être mieux adaptée à l'objectif et à la violation ». Poussant cette notion dans *Harper*, par. 110-111, le juge Bastarache a conclu qu'« il n'est pas nécessaire que les mesures contestées représentent la solution la moins attentatoire. Les facteurs contextuels concernent le degré de déférence dont il faut faire montre à l'égard des moyens particuliers choisis par le Parlement pour réaliser un objectif législatif ».

225 Certaines mesures prises par un gouvernement font partie d'une solution plus vaste qui comporte des volets législatif, administratif et opérationnel. Elles peuvent favoriser la réalisation d'objectifs de façons qui seraient autrement impossibles. Comme le juge en chef Dickson l'a dit dans *R. c. Keegstra*, [1990] 3 R.C.S. 697, p. 784-785 :

> Il se peut en effet qu'il y ait plusieurs moyens d'atteindre un objectif urgent et réel, dont chacun impose un degré plus ou moins grand de restriction à un droit ou à une liberté. Dans ces circonstances, le gouvernement peut légitimement recourir à une mesure plus restrictive, soit isolément soit dans le cadre d'un plan d'action plus étendu, pourvu que cette mesure ne fasse pas double emploi, qu'elle permette de réaliser l'objectif de façons qui seraient impossibles par le biais d'autres mesures, et qu'elle soit à tous autres égards proportionnée à un objectif légitime aux fins de l'article premier.

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226 This jurisprudence demonstrates that minimal impairment is a spectrum of constitutionally justifiable activity whose outer limits are defined by the courts on the basis of relevant contextual factors.

(2) Proportionate Effects Test

227 The purpose of the final stage of the *Oakes* analysis is to evaluate the proportionality between the government's objective and the measures it has adopted. This stage requires an assessment of the benefits and the harmful effects of the measures. In *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 768, Dickson C.J. held with respect to the limiting measures that "their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights". See also *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 889. In other words, the court must ask "whether the Charter infringement is too high a price to pay for the benefit of the law": P. W. Hogg, *Constitutional Law of Canada* (student ed. 2002), at p. 801.

228 Having set out the relevant contextual factors and the minimal impairment and proportionate effects tests, I can now apply them to the impugned provisions in the case at bar.

(3) Application to the Impugned Provisions

229 The government chose, in performing its legislative function, to enact the *Health and Social Services Delivery Improvement Act*, Part 2 of which was designed to improve the delivery of health care in the province and to ensure the sustainability of this vitally important social program. Sections 4 and 5 affect agreements resulting from past collective bargaining and make future collective bargaining on transfer and multi-worksite assignments meaningless. Section 6(2) provides that prohibitions on contracting out in health sector collective agreements are void, and prevents future collective bargaining on this subject. Under s. 6(4), provisions

Cette jurisprudence démontre que l'atteinte minimale admet un éventail d'activités constitutionnellement justifiables, dont les limites sont définies par les tribunaux compte tenu des facteurs contextuels pertinents.

(2) Analyse de la proportionnalité

La dernière étape de l'analyse fondée sur *Oakes* a pour but d'évaluer s'il y a proportionnalité entre l'objectif du gouvernement et les mesures qu'il a adoptées. Cette étape requiert de comparer les avantages et les effets préjudiciables de ces mesures. Dans *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713, p. 768, le juge en chef Dickson a affirmé à propos des mesures restrictives que « leurs effets ne doivent pas empiéter sur les droits individuels ou collectifs au point que l'objectif législatif, si important soit-il, soit néanmoins supplanté par l'atteinte aux droits ». Voir également *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835, p. 889. Autrement dit, le tribunal doit décider [TRADUCTION] « si la violation de la *Charte* constitue un prix trop élevé à payer pour avoir droit au bénéfice de la loi » : P. W. Hogg, *Constitutional Law of Canada* (éd. pour étudiants 2002), p. 801.

Ayant établi les facteurs contextuels pertinents ainsi que la grille d'analyse de l'atteinte minimale et de la proportionnalité, je vais maintenant les appliquer aux dispositions contestées en l'espèce.

(3) Application aux dispositions contestées

Le gouvernement, agissant en tant que législateur, a choisi d'édicter la *Health and Social Services Delivery Improvement Act*, dont la partie 2 était destinée à améliorer la prestation des services de santé dans la province et à assurer la viabilité de ce programme social d'importance vitale. Les articles 4 et 5 touchent des ententes résultant de négociations collectives antérieures et vident de sens les futures négociations collectives concernant les transferts et affectations dans différents lieux de travail. Le paragraphe 6(2) dispose que les interdictions de sous-traitance qui figurent dans les conventions collectives du secteur de la santé

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in such agreements that require an employer to consult with the affected union before contracting out are void. Section 9 modifies layoff and bumping provisions in such agreements. Each of these provisions of the Act has been found above to infringe s. 2(*d*) of the *Charter*. Bearing in mind the deference owed to the government in the instant case under the contextual approach, these impugned provisions may now be assessed to determine whether they satisfy the minimal impairment and proportionate effects tests. If they do, they will be justified under s. 1 of the *Charter*.

(a) *Minimal Impairment Analysis*

The record shows that the government considered a range of alternatives in seeking to address the crisis of sustainability in the province's health care system. Several options that required government intervention were considered, and their advantages and disadvantages were identified. These options included the following (see Respondent's Record, at pp. 13, 14, 16 and 17):

(a) imposing an across-the-board wage reduction for all unionized health care employees (see also Appellants' Record, at p. 1870);

(b) removing pay equity adjustments for "Facilities" employees;

(c) increasing the work week from 36 to 37.5 hours per week without a pay increase (see also Respondent's Record, at pp. 28-30);

(d) changing the employer's share of health and welfare premiums from 100% to 50%;

(e) changing the governance structures of regional health authorities;

(f) imposing differentiated compensatory and job security terms for new hires;

sont sans effet et empêche la tenue de négociations collectives à ce sujet. Selon le par. 6(4), les clauses des conventions qui obligent l'employeur à consulter le syndicat avant de sous-traiter sont inopérantes. L'article 9 modifie les clauses concernant la mise en disponibilité et la supplantation. J'ai déjà conclu que toutes les dispositions contestées de la Loi contreviennent à l'al. 2*d*) de la *Charte*. En gardant à l'esprit la déférence dont il faut faire preuve ici à l'égard du gouvernement compte tenu de l'approche contextuelle, je vérifie maintenant si elles remplissent les critères de l'atteinte minimale et de la proportionnalité. Si c'est le cas, elles sont justifiées selon l'article premier de la *Charte*.

a) *Analyse de l'atteinte minimale*

230 Il ressort du dossier que le gouvernement a examiné une gamme de solutions en vue de résoudre la crise de viabilité que traverse le système de santé de la province. Il a envisagé plusieurs solutions nécessitant l'intervention de l'État et relevé leurs avantages et désavantages. Citons notamment les options suivantes (dossier de l'intimée, p. 13, 14, 16 et 17) :

a) imposer une réduction salariale à tous les employés syndiqués du secteur de la santé (voir aussi le dossier des appelants, p. 1870);

b) supprimer les rajustements au titre de l'équité salariale dans le cas des employés du secteur des installations;

c) augmenter la semaine de travail en la faisant passer de 36 à 37,5 heures, sans majoration salariale (voir aussi le dossier de l'intimée, p. 28-30);

d) modifier la part des cotisations de l'employeur à l'assurance-maladie et en matière d'assistance sociale en la faisant passer de 100 % à 50 %;

e) modifier le mode d'administration des régies régionales de la santé;

f) imposer des régimes de rémunération et de sécurité d'emploi différents aux nouveaux employés;

(g) removing the requirement in collective agreements to provide 12 months of employment security following the end of a contractual layoff notice period; and

(h) voiding collective agreement language that prohibits contracting out, while maintaining the unions' ability to advocate against contracting out on the basis of a business rationale.

231 The government also submitted that the Act was linked to the findings of several federal and provincial health care commissions and — with respect for the majority's view to the contrary — did in fact explain how the measures it had adopted would help it achieve its objectives:

> As a result of these studies, various options for reform were identified. One set of options focussed on reducing existing restrictions on management's ability to change service delivery. These included: eliminating restrictions on contracting out of services; eliminating the "enhanced consultation", long notice periods and the employment security process required by ESLA; reducing lengthy bumping chains; and reducing restrictions on transfer of services and employees from one site to another. The other set of options focussed on directly reducing compensation for health sector workers. These included wage rollbacks, wage freezes, return to a 37.5 hour work week, reduction in holidays, elimination of pay equity increases, reduction or elimination of sick bank payouts. While the latter set of options would save money in the short term, the government concluded that these options could not advance the goal of creating a different framework for conduction business [*sic*] or contribute to long-term sustainability. The former set of options furthered both of these objectives. [Emphasis added.]

(Respondent's Record, at pp. 1045-46)

232 While some of the options put forward by the HEABC and considered by the government were ultimately adopted in Part 2 of the Act, many were examined and rejected. It is notable that the rejected options included alternatives that could have affected other *Charter* rights directly and substantially, such as removing pay equity adjustments,

g) supprimer dans les conventions collectives l'exigence d'accorder une garantie d'emploi de 12 mois après l'expiration de l'avis de mise en disponibilité fourni en vertu d'une convention;

h) annuler les clauses des conventions collectives interdisant la sous-traitance, tout en permettant aux syndicats de continuer à s'y opposer pour des raisons d'ordre économique.

Le gouvernement a aussi fait valoir que la Loi tient compte des conclusions de plusieurs commissions fédérales et provinciales des soins de santé et — contrairement à la déclaration de la majorité — il a en fait expliqué comment les mesures qu'il avait adoptées l'aideraient à réaliser ses objectifs :

> [TRADUCTION] Par suite de ces études, diverses options de réforme ont été envisagées. Une série d'options visait à réduire les restrictions à la capacité des gestionnaires de modifier la prestation des services. Parmi ces options, figuraient les suivantes : abolir les restrictions à la sous-traitance, éliminer les « consultations élargies », les longs préavis et le processus de sécurité d'emploi prévu dans l'ESLA, réduire les longues séries de supplantations, et diminuer les restrictions aux transferts de services et d'employés d'un lieu de travail à un autre. L'autre série d'options visait directement à réduire la rémunération des travailleurs de la santé, notamment en prévoyant des baisses de salaire forcées, des gels de salaire, le retour à la semaine de travail de 37,5 heures, la réduction du nombre de congés payés, l'élimination des augmentations de salaire au titre de l'équité salariale, et la réduction ou l'abolition des indemnités pour congés de maladie accumulés. Certes, la dernière série de mesures aurait permis de réaliser des économies à court terme, mais le gouvernement a conclu qu'elles n'auraient pas pour effet de modifier le cadre dans lequel les services sont offerts et qu'elles n'auraient pas assuré la viabilité à long terme du système. La première série d'options, quant à elle, servait ces deux objectifs. [Je souligne.]

(Dossier de l'intimée, p. 1045-1046)

Si certaines des options préconisées par la HEABC et envisagées par le gouvernement ont en définitive été intégrées dans la partie 2 de la Loi, bon nombre ont été rejetées après examen. Il convient de noter que parmi les solutions rejetées figurent des mesures qui, directement et de manière substantielle, auraient pu porter atteinte à d'autres

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which could have infringed the equality rights provided for in s. 15 of the *Charter*. In addition, many of the other rejected alternatives — such as imposing an across-the-board wage reduction, increasing the work week without a pay increase, changing the employer's share of health and welfare premiums, and imposing different compensation and security terms for new hires — would have interfered with the collective bargaining process and may also have infringed s. 2(*d*) of the *Charter*. Others — such as those affecting union leave and the payment of union representatives — could have affected the union's ability to represent employees effectively. The record shows that many of these rejected alternatives were not pursued at the time because the government believed that they would not meet its objective of improving the delivery of health care services. In particular, the government found that many of the options, while offering short-term cost savings, would not facilitate the longer-term structural reforms that were necessary to ensure the sustainability of service delivery for patients.

droits garantis par la *Charte*, notamment l'élimination des rajustements au titre de l'équité salariale, qui aurait pu porter atteinte aux droits à l'égalité prévus à l'art. 15 de la *Charte*. De plus, de nombreuses autres mesures rejetées — p. ex. imposer une réduction générale des salaires, augmenter la semaine de travail sans majoration salariale, modifier la part des cotisations de l'employeur à l'assurance-maladie et en matière d'aide sociale, et imposer des régimes de rémunération et de sécurité d'emploi différents aux nouveaux employés — auraient constitué une ingérence dans le processus de négociation collective et auraient également pu contrevenir à l'al. 2*d*) de la *Charte*. D'autres options, dont les mesures relatives aux congés pour activité syndicale et celles concernant la rémunération des représentants syndicaux, auraient pu toucher la capacité des syndicats de représenter efficacement les employés. Il ressort du dossier que nombre de ces solutions n'ont pas été retenues parce que le gouvernement croyait qu'elles allaient à l'encontre de son objectif d'améliorer la prestation des services de santé. En particulier, il jugeait que bien des options en question, même si elles permettaient de réaliser des économies à court terme, ne faciliteraient pas une réforme structurelle à long terme, nécessaire pour la viabilité de la prestation des services aux patients.

The government chose to enact legislation as part of its "multi-faceted policy initiative" (Respondent's Factum, at para. 21). In applying the minimal impairment test, it is important to consider whether the impugned legislation or state action directly targets the *Charter* rights of an identifiable individual or group of individuals, or whether its effect infringes a *Charter* right of a more amorphous class of persons. Generally speaking, the former situation suggests that the adopted measure is more drastic than in the latter situation. For example, in *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6, the majority found that an absolute prohibition by a school board against a student's wearing a kirpan infringed the student's freedom of religion under s. 2(*a*) of the *Charter* and that the infringement was not saved by s. 1. In

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Le gouvernement a choisi d'adopter une loi dans le cadre de son [TRADUCTION] « initiative stratégique à multiples facettes » (mémoire de l'intimée, par. 21). Il importe, dans l'application du critère de l'atteinte minimale, de déterminer si la loi ou l'acte de l'État contestés visent directement les droits que la *Charte* garantit à une personne ou un groupe de personnes identifiables ou s'ils ont simplement pour effet de porter atteinte à un droit que la *Charte* reconnaît à une catégorie moins définie de personnes. Dans le premier cas, la mesure adoptée affecte généralement le groupe de façon drastique. Par exemple, dans *Multani c. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 R.C.S. 256, 2006 CSC 6, la majorité de la Cour a conclu que l'interdiction absolue faite par une commission scolaire à un élève de porter le kirpan allait à l'encontre de sa liberté de religion garantie par l'al. 2*a*)

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that case, the individual student was singled out by the administrative decision maker who refused to allow him "to wear his kirpan to school [even if] he complied with certain conditions to ensure that it was sealed inside his clothing" (para. 3). Further, "there was no evidence of any violent incidents involving kirpans in Quebec schools" (para. 8).

de la *Charte* et que cette atteinte ne pouvait se justifier au sens de l'article premier. Dans cette affaire, l'autorité décisionnelle administrative visait spécifiquement l'élève en question et refusait de lui permettre « de porter son kirpan à l'école [même si] certaines conditions visant à le sceller à l'intérieur de ses vêtements [étaient] respectées » (par. 3). De plus, « la preuve n'a révélé aucun exemple d'incident de violence avec un kirpan dans les écoles au Québec » (par. 8).

234 In the instant case, it cannot be said that the legislation intentionally targeted the s. 2(*d*) rights of health sector union members or that it was aimed at an identifiable group. This finding flows largely from the fact that in its jurisprudence, this Court had not previously held that employees have a right to a process of collective bargaining. For the reasons given by the majority, the foundations of that case law have been displaced, and it is now appropriate for us to recognize such a right. Nor can it be said that the government disregarded rights that employees were then recognized to have or to have targeted such rights. Rather, the goal was "to respond to growing demands on services, to reduce structural barriers to patient care, and to improve planning and accountability, so as to achieve long term sustainability" (Respondent's Factum, at para. 4).

En l'espèce, on ne peut prétendre que la loi visait intentionnellement les droits reconnus par l'al. 2*d*) aux travailleurs syndiqués du secteur de la santé ou qu'elle ciblait un groupe identifiable. Cela tient en grande partie au fait que, dans sa jurisprudence, la Cour ne reconnaissait pas aux travailleurs le droit à un processus de négociation collective. Comme l'explique la majorité, les principes sur lesquels se fondait la jurisprudence ont évolué et il y a maintenant lieu de reconnaître l'existence d'un tel droit. On ne peut non plus affirmer que le gouvernement n'a pas tenu compte des droits alors reconnus aux employés ou que sa loi ciblait ces droits. L'objectif était plutôt le suivant : [TRADUCTION] « répondre aux besoins croissants en matière de services, réduire les obstacles structurels qui limitent l'accès aux soins, améliorer la planification et accroître l'obligation de rendre compte, de façon à assurer la viabilité à long terme du système » (mémoire de l'intimée, par. 4).

235 I thus accept that other alternatives would not have enabled the government to achieve its objectives and that Part 2 of the Act was not aimed directly at the *Charter* rights of the affected employees. I will now consider the specific impugned provisions.

J'accepte donc que les autres options n'auraient pas permis au gouvernement d'atteindre ses objectifs et que la partie 2 de la Loi ne visait pas directement les droits que la *Charte* garantit aux employés concernés. Je vais maintenant examiner les dispositions contestées elles-mêmes.

(i) Sections 4 and 5 of the Act (Transfer and Assignments)

(i) Articles 4 et 5 de la Loi (transferts et affectations)

236 Section 4 of the Act was specifically designed to facilitate the reorganization of health care service delivery by enabling employers to transfer functions or services to another worksite or to another health sector employer within a region. As for s. 5, it relates to the *temporary* assignment of an

L'article 4 de la Loi visait spécifiquement à faciliter la réorganisation des services de santé en permettant aux employeurs de transférer des fonctions ou services dans un autre lieu de travail ou à un autre employeur du secteur de la santé dans la même région. Quant à l'art. 5, il porte sur

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employee to another worksite or another employer. Employees do not lose their employment as a result of these provisions. Furthermore, as the majority noted, the Regulation adopted pursuant to the Act mitigates the impact of ss. 4 and 5 on employees (para. 118). These provisions are important to a timely restructuring of the health care system. For example, without s. 4, a transfer of functions or services to another worksite would likely result in disruption and delays if affected employees were to exercise bumping, layoff and recall rights (Respondent's Record, at p. 52). Nonetheless, s. 5(b) specifically requires that the collective agreement's provisions on posting a position be complied with where the assignment is to be on an ongoing basis. These provisions are thus carefully tailored so as to ensure that the government's objective is attained while infringing s. 2(*d*) as little as possible.

l'affectation *temporaire* de l'employé dans un autre lieu de travail ou chez un autre employeur. Les employés ne perdent pas leur emploi du fait de ces dispositions. De plus, comme l'indique la majorité, le Règlement pris en application de la Loi atténue l'impact des art. 4 et 5 sur les employés (par. 118). Ces dispositions sont importantes pour que la restructuration du système de santé puisse être faite en temps utile. Par exemple, sans l'art. 4, un transfert de fonctions ou de services dans un autre lieu de travail pourrait entraîner des perturbations ou des retards si les employés touchés devaient exercer leurs droits relatifs à la supplantation, à la mise en disponibilité et au rappel au travail (dossier de l'intimée, p. 52). Néanmoins, dans le cas d'une affectation pour une durée indéfinie, le par. 5b) exige expressément que les clauses de la convention collective relatives à l'affichage soient respectées. Ces dispositions ont donc été soigneusement conçues de façon à permettre au gouvernement d'atteindre son objectif tout en enfreignant le moins possible l'al. 2*d*).

(ii) Sections 6(2) and 6(4) of the Act (Contracting Out)

Sections 6(2) and 6(4) were adopted to enable health sector employers to contract out certain non-clinical services in order to "[d]evelop more cost-effective and efficient ways of delivering non-clinical health services in order to improve patient care and reduce costs" (Respondent's Record, at p. 59). Section 6(2) has the effect of repudiating collective agreement provisions that in "any manner restric[t], limi[t] or regulat[e] the right of a health sector employer to contract outside of the collective agreement for the provision of non-clinical services", and prevents such provisions from being agreed to in the future. Section 6(4) voids provisions in collective agreements that require employers to consult with unions before contracting out non-clinical services.

(ii) Les paragraphes 6(2) et (4) de la Loi (sous-traitance)

237 Les paragraphes 6(2) et (4) visent à permettre aux employeurs du secteur de la santé de sous-traiter des services non cliniques afin de [TRADUCTION] « mettre en place des méthodes permettant de fournir les services non cliniques de façon moins coûteuse et plus efficace, afin d'améliorer les soins aux patients et de réduire les coûts » (dossier de l'intimée, p. 59). Le paragraphe 6(2) a pour effet d'annuler toute clause de convention collective qui [TRADUCTION] « de quelque manière que ce soit, restreint, limite ou réglemente le droit de l'employeur du secteur de la santé de sous-traiter des services non cliniques » et il interdit de convenir de telles clauses à l'avenir. Le paragraphe 6(4) rend inopérantes les clauses de conventions collectives qui obligent l'employeur à consulter le syndicat avant de sous-traiter des services non cliniques.

The chambers judge, Garson J., found that s. 6(2) of the Act "does not restrict the ability of unions, including the plaintiff unions, to organize employees of outside contractors" ((2003), 19 B.C.L.R. (4th) 37, 2003 BCSC 1379, at para. 24).

238 La juge Garson, siégeant en son cabinet, a conclu que le par. 6(2) de la Loi [TRADUCTION] « ne restreint pas la capacité des syndicats, y compris les demandeurs, de recruter des employés des sous-traitants » ((2003), 19 B.C.L.R. (4th) 37, 2003

Moreover, it is notable that contracting out is not obligatory. Rather, what s. 6(2) does is prohibit collective agreement clauses preventing contracting out. Thus, although union density may be lower when work is contracted out, there is still substantial room for *all* employees providing non-clinical services to exercise their right to freedom of association and to engage in a process of collective bargaining, even when certain of those services are contracted out.

239 An impact assessment of the Act by the Ministry of Health dated January 24, 2002 explained that the contracting-out provisions "[w]ill allow employers to control costs while focusing on care delivery" (Appellants' Supplementary Record, at p. 17). The government added that:

> Eliminating contracting-out restrictions on non-clinical services, in particular, was seen as necessary to inject an "air of reality" into compensation for these services, and to empower health authorities to appropriately allocate scarce resources as between support services and clinical services involving direct patient care and health programs.

(Respondent's Record, at p. 1046)

In negotiating, the parties can avoid contracting out by agreeing to working conditions that are more consistent with those that apply when work is contracted out. The provision thus brings some competition into the bargaining process. Without s. 6(2) of the Act, the government would be effectively prohibited from making a policy decision to restructure non-clinical health services in the province, because existing collective agreements would block such a decision, without any further discussion.

240 The history of labour relations in the province, discussed above, strongly suggests that the terms set out in s. 6(2) could not have been successfully negotiated by the HEABC and the health sector unions. Moreover, in the context of the province's health care crisis, removing prohibitions on contracting out in collective agreements furthered the

BCSC 1379, par. 24). De plus, il importe de souligner que la sous-traitance n'est pas obligatoire. Sont plutôt interdites les clauses qui empêchent la sous-traitance. Ainsi, bien que la densité syndicale risque d'être plus faible en cas de sous-traitance, la liberté d'association de *tous* les employés affectés aux services non cliniques est loin d'être compromise et il demeure tout à fait possible de participer au processus de négociation collective, même si certains de ces services sont sous-traités.

Dans une étude des répercussions de la Loi, datée du 24 janvier 2002, le ministère de la Santé explique que les dispositions relatives à la sous-traitance [TRADUCTION] « permettront aux employeurs de limiter les coûts tout en se concentrant sur la fourniture des soins de santé » (dossier supplémentaire des appelants, p. 17). Le gouvernement a ajouté :

> [TRADUCTION] On a estimé que l'élimination des restrictions à la sous-traitance des services non cliniques était tout particulièrement nécessaire pour ramener le coût de ces services à un niveau ayant une « apparence de réalité » et pour permettre aux autorités sanitaires de répartir judicieusement leurs ressources limitées entre les services de soutien et les services cliniques directement liés à la fourniture des soins et aux programmes de santé.

(Dossier de l'intimée, p. 1046)

Les parties peuvent éviter la sous-traitance en convenant, lors des négociations, de conditions de travail s'apparentant à celles qui sont applicables au travail sous-traité. La disposition insuffle ainsi une certaine concurrence dans le processus de négociation. Sans le par. 6(2) de la Loi, le gouvernement n'aurait en fait pas le droit, sans plus de discussions, de prendre de décision de politique générale visant la restructuration des services de santé non cliniques de la province, en raison de conventions collectives en vigueur.

L'histoire des relations du travail en Colombie-Britannique, dont il a été question plus haut, tend nettement à indiquer que la HEABC et les syndicats du secteur de la santé n'auraient pas pu négocier une clause comme le par. 6(2). De plus, dans le cadre de la crise qui sévissait dans le secteur de la santé en Colombie-Britannique, les autres options

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government's objective in ways that alternative responses could not. Furthermore, the alternative measures considered by the government were problematic in that many may have directly affected other *Charter* rights. For these reasons, in my view, s. 6(2) of the Act satisfies the minimal impairment test.

The same cannot be said about s. 6(4) of the Act. The only evidence in the record that may be relevant to the minimal impairment analysis in respect of s. 6(4) comes from the HEABC, which made representations to the government with respect to "enhanced consultation" between the HEABC, as the employer, and the relevant unions:

> The supposed purpose of the language was to allow the unions' input prior to the finalization of employer decisions affecting union members. The reality has proven to be constant union attempts to move from an "input" model to a "co-management" model and the use of the language to block or delay management initiatives. Many Employers have indicated that Labour Adjustment Committees and the Enhanced Consultation models are significant barriers to any innovative changes Employers want to make to the health system.
>
> (*Briefing Document — Collective Agreement Efficiencies*, at p. 4)

In that document, the HEABC was in my view expressing to the government its frustration with the "enhanced consultation" model that has been adopted in the past for other management initiatives. However, there is no constitutional entitlement to such consultation prior to contracting out. A far more direct, or time-limited, consultation between the HEABC and the affected unions might be possible. It is notable that during oral argument before this Court, even counsel for the government submitted that it would be desirable to hold consultations before contracting out.

Accordingly, I consider that the government has failed to establish by evidence, inference or common

n'auraient pas, de la même façon que l'élimination des interdictions en matière de sous-traitance figurant dans les conventions collectives, permis au gouvernement d'atteindre son objectif. Au surplus, les autres mesures que le gouvernement avait envisagées étaient problématiques parce que bon nombre d'entre elles auraient pu toucher directement d'autres droits garantis par la *Charte*. Pour ces motifs, le par. 6(2) de la Loi satisfait, à mon avis, au critère de l'atteinte minimale.

241 Il en va autrement du par. 6(4) de la Loi. La seule preuve au dossier susceptible d'être utile pour l'évaluation de cette disposition sous l'angle du critère de l'atteinte minimale émane de la HEABC, qui a fait des observations au gouvernement au sujet des « consultations élargies » entre la HEABC, agissant à titre d'employeur, et les syndicats concernés :

> [TRADUCTION] Le but présumé de la clause était de permettre aux syndicats de donner leur point de vue avant que l'employeur arrête une décision touchant les membres du syndicat. Dans les faits, les syndicats ont constamment tenté de passer du modèle « axé sur la consultation » au modèle de « cogestion » et ils ont tenté d'utiliser la clause pour empêcher ou retarder les initiatives de la direction. Bon nombre d'employeurs ont indiqué que les comités d'adaptation de la main-d'œuvre et les consultations élargies freinent considérablement les changements novateurs que les employeurs souhaitent apporter au système de santé.
>
> (*Briefing Document — Collective Agreement Efficiencies*, p. 4)

À mon avis, dans ce document la HEABC fait part de sa frustration au gouvernement au sujet du modèle des « consultations élargies » adopté par le passé à l'égard d'autres initiatives de la direction. Toutefois, la Constitution ne garantit pas de telles consultations avant la sous-traitance. Des consultations beaucoup plus circonscrites ou limitées dans le temps entre la HEABC et les syndicats concernés pourraient être possibles. Il convient de noter que, devant la Cour, même l'avocat du gouvernement a indiqué qu'il serait souhaitable de procéder à des consultations avant la sous-traitance.

242 Par conséquent, j'estime que le gouvernement n'a pas démontré, que ce soit par la preuve, par

sense that the employers' ability to contract out would be restricted unreasonably by a requirement to consult with the relevant unions beforehand. While s. 6(4) does not, strictly speaking, prohibit consultations on contracting out, declaring that any clause in a collective agreement providing for consultation is void is an invitation to employers not to consult. Consultation is never harmful unless truly exigent circumstances do not allow time for it, or it is rendered moot because recent consultations have made further discussions unnecessary.

inférence ou en se fondant sur le bon sens, qu'on limiterait de façon déraisonnable la capacité de l'employeur de sous-traiter en exigeant qu'il consulte au préalable les syndicats concernés. Bien que le par. 6(4) n'interdise pas, à proprement parler, la tenue de consultations sur la sous-traitance, en déclarant que les clauses de conventions collectives prévoyant la tenue de consultations sont nulles, on incite les employeurs à ne pas consulter. Les consultations ne sont jamais néfastes, à moins que l'urgence réelle d'une situation rende la chose impossible ou que des consultations récentes rendent inutile la poursuite des discussions.

(iii) Section 9 of the Act (Layoff and Bumping)

(iii) Article 9 de la Loi (mise en disponibilité et supplantation)

243 Section 9 of the Act is designed "to allow for the timely reorganization and restructuring of health care services" (Respondent's Record, at p. 84) by modifying, for the period ending December 31, 2005, provisions of collective agreements relating to layoffs and bumping.

L'article 9 de la Loi vise à [TRADUCTION] « permettre la réorganisation et la restructuration en temps utile des services de santé » (dossier de l'intimée, p. 84) en modifiant, pour la période se terminant le 31 décembre 2005, les clauses relatives à la mise en disponibilité et à la supplantation des conventions collectives.

244 There is evidence in the record that bumping and layoff restrictions can significantly delay the restructuring of health care service delivery. In its impact assessment of the Act dated January 24, 2002, the Ministry of Health stated the following about the bumping and layoff provisions:

Il ressort de la preuve au dossier que les restrictions en matière de supplantation et de mise en disponibilité peuvent retarder considérablement la restructuration des services de santé. Dans son étude d'impact de la Loi, datée du 24 janvier 2002, le ministère de la Santé affirme au sujet des dispositions concernant la supplantation et la mise en disponibilité :

> Employers need the ability to lay people off quickly and efficiently. Current bumping provisions create endless chains. Numerous employees are affected and considerable time transpires before anyone is actually laid-off. New bumping provisions in the Regulations still allow for bumping but reduces its affect and inherent delays.
>
> (Appellants' Supplementary Record, at p. 17)

> [TRADUCTION] Les employeurs doivent être en mesure de mettre des employés en disponibilité rapidement et efficacement. Les dispositions actuelles sur la supplantation créent d'interminables réactions en chaîne. De nombreux employés sont touchés et il s'écoule un grand laps de temps avant que quiconque ne soit effectivement mis en disponibilité. Sans interdire la supplantation, les nouvelles dispositions réglementaires en atténuent les effets et réduisent les délais.
>
> (Dossier supplémentaire des appelants, p. 17)

The record contains several examples of the disruption that bumping can cause in the workplace. In one particularly clear example, the elimination of a data entry clerk position in July 1996 resulted

Le dossier comporte plusieurs exemples de la perturbation que la supplantation peut causer en milieu de travail. L'un est particulièrement clair : l'élimination d'un poste de commis à la saisie de données

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in a chain of eight people in total bumping each other, and the last person in the chain was not placed in a position until four years later, in July 2000 (Respondent's Record, at p. 86; see also p. 118). The HEABC advised the government that "[d]isplacement and bumping is disruptive to staff directly affected by the displacement, and those involved in the bumping chain. This disruption impacts on the quality of program delivery and occupies unnecessary administrative time. The bumping process needs to be expedited" (*Briefing Document — Collective Agreement Efficiencies*, at p. 6).

One feature of s. 9 that is relevant to the minimal impairment analysis is that it is a sunset provision. The Act came into force on January 28, 2002, and s. 9 ceased to operate on December 31, 2005. Section 9 impaired the collective bargaining process in respect of layoffs and bumping, but was limited by a time period approximating the mandate of the government, which had been elected some eight months previously. This suggests that it was closely tied to the health care reform being implemented, and that it was adopted as a transitional measure. The majority state that "this is scant comfort to employees who may have been laid off or bumped before this date, without the benefit of a union to represent them on the issue" (para. 155). With respect, there is nothing in the Act that prevents the union from representing an employee who is laid off as a result of the operation of s. 9. Furthermore, s. 9 did not ban bumping or layoff provisions in collective agreements, which are not, *per se*, constitutionally protected. Rather, it imposed by legislative means attenuated terms for layoffs and bumping in place of those agreed to in the collective bargaining process. As with ss. 4 and 5 of the Act, the impact of s. 9(d) on workers was minimized by safeguards provided for in s. 5 of the Regulation made under the Act. There is sufficient evidence that s. 9 of the Act enabled the government to meet its objectives of making the health care system more sustainable and improving service to patients in ways that other alternatives would not permit. As with s. 6(2), the history of labour relations in the province strongly

en juillet 1996 a donné lieu à une série de huit supplantations, et ce n'est que quatre ans plus tard, soit en juillet 2000, que la dernière personne de la série a été affectée à un poste (dossier de l'intimée, p. 86; voir aussi p. 118). La HEABC a indiqué au gouvernement que [TRADUCTION] « les déplacements et les supplantations ont des effets perturbateurs sur les employés directement touchés par le déplacement et sur ceux qui sont visés par la série de supplantations qui s'ensuit. Ces perturbations se répercutent sur la qualité des services et accaparent inutilement le temps consacré à l'administration. Il faut accélérer le processus de supplantation » (*Briefing Document — Collective Agreement Efficiencies*, p. 6).

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Un aspect de l'art. 9 qui est pertinent pour l'analyse de l'atteinte minimale est qu'on a prévu que son effet n'est que temporaire. La Loi est entrée en vigueur le 28 janvier 2002 et l'art. 9 a cessé de s'appliquer le 31 décembre 2005. L'article 9 entravait le processus de négociation collective des questions relatives à la mise en disponibilité et à la supplantation, mais son application était assujettie à un délai correspondant approximativement à la durée du mandat du gouvernement, qui avait été élu environ huit mois auparavant. Il est donc permis d'inférer que l'art. 9 est étroitement lié à la réforme du système de santé et qu'il s'agissait d'une mesure transitoire. La majorité affirme que « cette limitation n'apporte aucun réconfort aux employés mis en disponibilité ou supplantés avant cette date, sans qu'un syndicat ait pu les représenter à ce sujet » (par. 155). Soit dit en tout respect, rien dans la Loi n'empêche le syndicat de représenter un employé qui est mis en disponibilité par suite de l'application de l'art. 9. De plus, cette disposition n'interdisait pas l'incorporation de clauses relatives à la supplantation et à la mise en disponibilité dans les conventions collectives, qui intrinsèquement ne bénéficient pas de la protection constitutionnelle. Elle visait plutôt à atténuer les conditions relatives à la mise en disponibilité et à la supplantation en remplaçant celles convenues lors du processus de négociation collective. Comme pour les art. 4 et 5 de la Loi, l'impact de l'al. 9d) sur les travailleurs est minimisé par les garanties prévues par l'art. 5 du Règlement adopté

suggests that the terms set out in s. 9 could not have been successfully negotiated by the HEABC and the health sector unions. Therefore, in my view, it satisfies the minimal impairment test as a transitional clause that represents government policy and is carefully circumscribed.

sous le régime de la Loi. La preuve justifie qu'on conclue que l'art. 9 de la Loi a permis au gouvernement d'atteindre ses objectifs — accroître la viabilité du système de santé et améliorer les services aux patients — d'une façon que d'autres solutions ne lui auraient pas permis de le faire. Tout comme pour le par. 6(2), l'histoire des relations du travail en Colombie-Britannique tend nettement à indiquer que les conditions prévues à l'art. 9 n'auraient pu être négociées par la HEABC et les syndicats du secteur de la santé. Cette disposition satisfait donc, à mon avis, au critère de l'atteinte minimale. Il s'agit d'une mesure transitoire qui représente une politique gouvernementale et elle est soigneusement circonscrite.

(b) *Proportionate Effects Analysis*

b) *L'analyse de la proportionnalité*

246 Sections 4, 5, 6(2) and 9 of the Act have been fashioned to facilitate the restructuring of the province's health care system in order to improve service delivery and sustainability. Are the effects of the measures proportionate? In its submission to the International Labour Office, the government emphasized the link between the Act and the health care challenges it was facing:

Les articles 4 et 5, le par. 6(2) et l'art. 9 de la Loi sont destinés à faciliter la restructuration du système de santé de la province afin d'améliorer les services et d'accroître la viabilité du système. Les effets des mesures sont-ils proportionnés? Dans ses observations au Bureau international du Travail, le gouvernement a souligné le lien entre la Loi et les défis auxquels il était confronté dans le domaine de la santé :

> Any restrictions on collective bargaining or on the right to strike were exceptional measures, enacted in view of the difficult economic and fiscal situation, in the context of protracted and difficult labour disputes, which could have serious consequences in the health and education sectors.
>
> ("Complaints against the Government of Canada concerning the Province of British Columbia", at para. 269)

> Toutes les restrictions à la négociation collective ou au droit de grève étaient des mesures exceptionnelles, décidées en raison de la situation économique et fiscale difficile, dans un contexte de conflits du travail longs et tendus, qui auraient pu avoir de sérieuses conséquences dans les secteurs de l'éducation et de la santé.
>
> (« Plaintes contre le gouvernement du Canada concernant la province de la Colombie-Britannique », par. 269)

It is now necessary to consider whether the benefits of the impugned measures outweigh their negative consequences in terms of the infringement of s. 2(*d*) of the *Charter.*

Il faut maintenant déterminer si les effets bénéfiques des mesures contestées l'emportent sur leurs conséquences négatives, à savoir leur atteinte à l'al. 2*d*) de la *Charte*.

(i) Sections 4 and 5 of the Act (Transfer and Assignments)

(i) Articles 4 et 5 de la Loi (transferts et affectations)

247 In my view, ss. 4 and 5 of the Act do not have a serious impact on employees and, what is more, the

Selon moi, les art. 4 et 5 de la Loi n'entraînent pas de sérieuses conséquences pour les employés

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measures provided for in s. 5 are only temporary. As noted earlier, the intrusiveness of the revised transfer and assignment process under ss. 4 and 5 is limited, given that employees retain their employment. Conversely, the benefit of these provisions is to open the door to improvements to the health care system by providing flexibility for the restructuring process. Thus, I am satisfied that they are a proportionate response to the crisis of sustainability in health care.

et, de plus, les mesures prévues par l'art. 5 ne sont que temporaires. Comme je l'ai déjà souligné, les modifications que les art. 4 et 5 apportent au processus de transfert et d'affectation sont peu attentatoires, vu que les employés conservent leur emploi. Par contre, ces dispositions ont l'avantage de permettre des améliorations au système de santé en apportant la souplesse nécessaire à la restructuration. Ainsi, je suis convaincue qu'il s'agit d'une réponse proportionnée à la crise de viabilité dans le système de santé.

(ii) Sections 6(2) and 6(4) of the Act (Contracting Out)

(ii) Paragraphes 6(2) et (4) de la Loi (sous-traitance)

248 Section 6(2) of the Act does not prevent employees providing contracted-out non-clinical services from exercising their right to freedom of association in a collective bargaining process. Moreover, the intention in enacting it was to facilitate the long-term reform of health care delivery, as opposed to simply seeking short-term cost savings or imposing a heavier burden on taxpayers (who are also potential health care users). Although s. 6(2) does interfere with collective bargaining on contracting out, it strikes an appropriate balance between the government's objectives and the freedom of association of employees. Therefore, the infringement resulting from s. 6(2) of the Act is justified under s. 1 of the *Charter.*

248 Le paragraphe 6(2) de la Loi n'empêche pas les employés en sous-traitance affectés à la prestation des services non cliniques d'exercer leur droit à la liberté d'association dans le cadre d'un processus de négociation collective. L'adoption de cette disposition avait aussi pour but de faciliter la réforme à long terme du système de santé, plutôt que de simplement réaliser des économies à court terme ou imposer un plus lourd fardeau aux contribuables (qui sont également des bénéficiaires potentiels des services de santé). Même si le par. 6(2) entrave la négociation collective en matière de sous-traitance, il permet d'établir un juste équilibre entre les objectifs du gouvernement et la liberté d'association des employés. Par conséquent, l'atteinte au par. 6(2) de la Loi est justifiée selon l'article premier de la *Charte*.

249 While I have already found that s. 6(4) fails the minimal impairment test, I would add that taking consultation, which is an important component of the collective bargaining process, off the table is also a disproportionate measure. The benefit of s. 6(4), that of reducing the pressure on employers to consult with unions before contracting out, is nominal. The marginal benefits of this provision are outweighed by the deleterious effects of denying consultation to affected unions. Accordingly, s. 6(4) fails to satisfy s. 1 of the *Charter* and is unconstitutional.

249 J'ai déjà conclu que le par. 6(4) ne satisfait pas au critère de l'atteinte minimale, mais j'ajouterais que l'interdiction de tenir des consultations — lesquelles représentent une composante importante du processus de négociation collective — est aussi une mesure disproportionnée. L'avantage du par. 6(4) — réduction des pressions exercées sur l'employeur pour qu'il consulte le syndicat avant de sous-traiter — est négligeable. Les effets préjudiciables que cause aux syndicats concernés le refus de consulter l'emportent sur les minces avantages que comporte cette disposition. En conséquence, le par. 6(4) ne satisfait pas à l'exigence de l'article premier de la *Charte* et il est inconstitutionnel.

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(iii) Section 9 of the Act (Layoff and Bumping)

250 Finally, s. 9 is consistent with the government's objectives relating to systemic reform, which I have found to be entitled to deference, and the cost of its enactment is limited interference with the collective bargaining process. The negative effects of the infringement are minimal because it is time-limited, and while bumping and layoff protections are attenuated, they are not abolished. The procedural infringement is thus outweighed by the evidence that layoff and bumping provisions in collective agreements would place serious obstacles in the way of the timely restructuring of the health care system. Timely restructuring simply could not take place unless such barriers were removed. Accordingly, s. 9 of the Act is a proportionate response, and the infringement is justified under s. 1 of the *Charter.*

III. Conclusion

251 In addressing the crisis of sustainability in health care, governments face a difficult public policy challenge with no end in sight in the immediate future. As alternatives are considered, competing rights and interests arise. Government must be accorded deference to enable them to navigate these difficult waters. At the same time, this Court must ensure that the path they take is respectful of the constitutional rights of those who are affected by it, and that any infringement of those rights is demonstrably justified.

252 In the case at bar, the freedom of association of health care employees has been infringed in several instances, because provisions of the legislation enacted by the government interfere with their right to a process of collective bargaining with the employer. It is the collective bargaining process that is constitutionally protected, not the content of the actual provisions of the collective agreements. In my view, the government has established that

(iii) Article 9 de la Loi (mise en disponibilité et supplantation)

Enfin, l'art. 9 est compatible avec l'objectif gouvernemental de réforme systémique — qui, à mon avis, appelle à la déférence — et son adoption se fait au prix d'une ingérence limitée dans le processus de négociation collective. Les effets négatifs de l'ingérence sont minimaux du fait qu'elle est limitée dans le temps et que les protections en matière de supplantation et de mise en disponibilité ne sont pas abolies, même si elles se trouvent restreintes. Ainsi, la preuve que les clauses relatives à la mise en disponibilité et à la supplantation dans les conventions collectives entraveraient sérieusement la restructuration en temps utile du système de santé prime l'atteinte procédurale. La restructuration en temps utile ne pourrait tout simplement pas se faire sans l'élimination de ces obstacles. Par conséquent, l'art. 9 de la Loi représente une réponse proportionnée, et l'atteinte est justifiée au sens de l'article premier de la *Charte*.

III. Conclusion

Devant le problème de la viabilité du système de santé, les gouvernements sont confrontés à un immense défi de politique générale, qui ne semble pas pouvoir être relevé dans un proche avenir. Dans l'examen de diverses options, surgissent des droits et des intérêts opposés. Il faut faire preuve de déférence envers le gouvernement pour qu'il puisse naviguer dans ces eaux difficiles. En même temps, la Cour doit veiller à ce que l'approche retenue respecte les droits constitutionnels de ceux qui sont touchés et à ce que les atteintes à ces droits soient des restrictions dont la justification peut se démontrer dans tous les cas.

En l'espèce, la Loi constitue à plusieurs égards une atteinte à la liberté d'association des employés du secteur de la santé parce que plusieurs de ses dispositions portent atteinte à leur droit à un processus de négociation collective avec l'employeur. C'est le processus de négociation collective qui bénéficie de la protection de la Constitution, et non le contenu des clauses de conventions collectives. À mon avis, le gouvernement a établi que quatre

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four of the five infringements, namely those resulting from ss. 4, 5, 6(2) and 9 of the Act, are constitutionally justified. However, I find that s. 6(4) of the Act fails the minimal impairment and proportionate effects tests and thus is not saved under s. 1 of the *Charter.*

APPENDIX

Health and Social Services Delivery Improvement Act, S.B.C. 2002, c. 2

Part 2 – Health Sector

Definitions

3 In this Part:

"**bumping**" means the exercise of a right of one employee to displace another employee who is on the same seniority list under a collective agreement;

"**collective agreement**" means a collective agreement between HEABC and a trade union or an association of trade unions in an appropriate bargaining unit;

"**ESLA**" means the Employment Security and Labour Force Adjustment Agreement, issued as part of the recommendations of the Industrial Inquiry Commissioner on May 8, 1996 and included in whole or in part in one or more collective agreements between HEABC and trade unions representing employees in appropriate bargaining units, and includes any collective agreement provisions arising from ESLA, including Part 4 and Schedule 1 of the Recommendations of the Industrial Inquiry Commissioner;

"**HEABC**" means the Health Employers Association of British Columbia established under section 6 of the *Public Sector Employers Act*;

"**health sector**" means all members of HEABC whose employees are unionized and includes their unionized employees;

"**health sector employer**" means an employer in the health sector;

des cinq atteintes, à savoir celles qui découlent des art. 4, 5 et 9 et du par. 6(2) de la Loi, sont justifiées sur le plan constitutionnel. Par contre, j'estime que le par. 6(4) de la Loi ne satisfait pas aux critères de l'atteinte minimale et de la proportionnalité et, par conséquent, il ne peut se justifier au sens de l'article premier de la *Charte*.

ANNEXE

Health and Social Services Delivery Improvement Act, S.B.C. 2002, ch. 2

[TRADUCTION]

Partie 2 – Secteur de la santé

Définitions

3 Les définitions qui suivent s'appliquent à la présente partie.

« convention collective » Convention collective conclue entre la HEABC et un syndicat ou une association de syndicats dans une unité de négociation visée.

« employeur du secteur de la santé » Employeur ayant des salariés dans le secteur de la santé.

« ESLA » L'Employment Security and Labour Force Adjustment Agreement inscrite le 8 mai 1996 dans les recommandations du commissaire d'enquête sur les relations du travail et intégrée, en tout ou en partie, dans les conventions collectives entre la HEABC et les syndicats représentant les employés faisant partie des unités de négociations visées. Sont assimilées à l'ESLA les clauses de conventions collectives issues de l'ESLA, y compris la partie 4 et l'annexe 1 des recommandations du commissaire d'enquête sur les relations du travail.

« HEABC » La Health Employers Association of British Columbia formée en vertu de l'article 6 de la *Public Sector Employers Act.*

« lieu de travail » Installation, agence, centre, programme, organisation ou endroit où l'employé est appelé à travailler.

« secteur de la santé » Les membres de la HEABC dont les employés sont syndiqués et leurs employés syndiqués.

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"**worksite**" means a facility, agency, centre, program, organization or location at or from which an employee is assigned to work.

« supplantation » Droit que peut exercer un employé pour évincer de son poste un autre employé qui fait partie de la même liste d'ancienneté prévue à la convention collective.

Right to reorganize service delivery

4 (1) A health sector employer has the right to reorganize the delivery of its services by transferring functions or services within a worksite or to another worksite within the region or to another health sector employer, including, but not limited to, partnerships or joint ventures with other health sector employers or subsidiaries.

(2) A health sector employer has the right to transfer

(a) functions or services that are to be performed or provided by another health sector employer under subsection (1) to that other health sector employer, and

(b) functions or services that are to be performed or provided at another worksite in the region to that other worksite.

(3) If a function or service is transferred to another health sector employer or within or to a worksite under this section, an employee who performs that function or service may be transferred to that employer or within or to that worksite in accordance with the regulations.

Droit de réorganiser la prestation des services

4 (1) L'employeur du secteur de la santé a le droit de réorganiser la prestation de ses services en transférant des fonctions ou services soit dans le même lieu de travail soit dans un autre lieu de travail de la même région soit à un autre employeur du secteur de la santé, notamment une société de personnes ou une coentreprise formée avec d'autres employeurs du secteur de la santé, ou une filiale.

(2) L'employeur du secteur de la santé a le droit de transférer :

a) les fonctions ou services qui doivent être exécutés ou fournis par un autre employeur du secteur de la santé visé au paragraphe (1) à cet autre employeur;

b) les fonctions ou services qui doivent être exécutés ou fournis par un autre lieu de travail de la même région à cet autre lieu de travail.

(3) Dans le cas où une fonction ou un service est transféré à un autre employeur du secteur de la santé, dans le même lieu de travail ou dans un lieu de travail de la même région conformément au présent article, l'employé qui exécute cette fonction ou ce service peut être transféré à cet employeur, à ce même lieu de travail ou à un lieu de travail de la même région de la manière prévue aux règlements.

Multi-worksite assignment rights

5 A health sector employer

(a) has a right to assign an employee within or to any worksite of that employer or to a worksite operated by another health sector employer for a period not exceeding that set out in the regulations and under conditions specified in the regulations, and

(b) must post any position pursuant to the collective agreement if the employer requires the successful candidate for that position

Droits liés aux affectations dans différents lieux de travail

5 L'employeur du secteur de la santé :

a) a le droit d'affecter un employé dans le même lieu de travail ou dans un autre lieu de travail relevant de son autorité ou dans un lieu de travail relevant de l'autorité d'un autre employeur du secteur de la santé pour une durée ne dépassant pas celle prévue par règlement et aux conditions qui y sont fixées;

b) doit afficher les postes conformément à la convention collective si le poste visé requiert comme condition d'emploi que le

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to work on a regular ongoing basis at more than one worksite of that employer as a condition of employment in that position.

Contracting outside of the collective agreement for services

6 (1) In this section:

"acute care hospital" means a hospital or part of a hospital designated by regulation;

"designated health services professional" means

(a) a nurse licensed under the *Nurses (Registered) Act*,

(b) a person who is a member of a health profession designated under the *Health Professions Act* on the date on which this section comes into force, or

(c) a person in an occupation or job classification designated by regulation;

"non-clinical services" means services other than medical, diagnostic or therapeutic services provided by a designated health services professional to a person who is currently admitted to a bed in an inpatient unit in an acute care hospital, and includes any other services designated by regulation.

(2) A collective agreement between HEABC and a trade union representing employees in the health sector must not contain a provision that in any manner restricts, limits or regulates the right of a health sector employer to contract outside of the collective agreement for the provision of non-clinical services.

(3) The labour relations board or an arbitrator appointed under the Code or under a collective agreement must not declare a person who

(a) provides services under a contract between a health sector employer and an employer that is not a health sector employer, and

(b) is an employee of the employer that is not a health sector employer

to be an employee of the health sector employer unless the employee is fully integrated with the

candidat retenu travaille sur une base régulière pour une durée indéfinie à plus d'un lieu de travail relevant de son autorité.

Sous-traitance

6 (1) Les définitions qui suivent s'appliquent au présent article :

« hôpital de soins actifs » L'hôpital ou la partie d'hôpital désigné par règlement;

« professionnel de la santé désigné » Selon le cas :

a) infirmier autorisé en vertu de la *Nurses (Registered) Act*;

b) membre d'une profession de la santé désignée dans le cadre de la *Health Professions Act* à la date d'entrée en vigueur du présent article;

c) personne dont la classification professionnelle ou la classification de poste est désignée par règlement;

« services non cliniques » Services autres que les services médicaux, thérapeutiques, ou de diagnostic dispensés par un professionnel de la santé désigné au patient hospitalisé dans un hôpital de soins actifs. Sont compris dans ces services les autres services désignés par règlement.

(2) Les conventions collectives entre la HEABC et les syndicats représentant les employés du secteur de la santé ne peuvent prévoir aucune clause qui, de quelque manière que ce soit, restreint, limite ou réglemente le droit de l'employeur du secteur de la santé de sous-traiter des services non cliniques hors du cadre défini par la convention collective.

(3) À moins que les personnes visées aux alinéas a) et b) ne fassent entièrement partie de l'organisation et ne relèvent directement de l'employeur du secteur de la santé, elles ne sont pas reconnues comme employés du secteur de la santé par la commission des relations du travail ou un arbitre nommé en vertu du Code ou d'une convention collective :

a) les personnes qui dispensent des services dans le cadre d'un contrat entre un employeur du secteur de la santé et un employeur ne relevant pas de ce secteur;

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operations and under the direct control of the health sector employer.

(4) A provision in a collective agreement requiring an employer to consult with a trade union prior to contracting outside of the collective agreement for the provision of non-clinical services is void.

(5) A collective agreement does not bind, and section 35 of the Code does not apply to, a person who contracts with a health sector employer.

(6) A health sector employer must not be treated under section 38 of the Code as one employer with any other health sector employer or a contractor.

Employment Security and Labour Force Adjustment Agreement

7 (1) A party to ESLA is not required to carry out a term of ESLA on or after the coming into force of this section.

(2) A party to a collective agreement is not required to carry out any part of a provision that is based on or derived from ESLA in the collective agreement.

(3) ESLA does not apply for the purposes of the interpretation or application of the collective agreement.

Healthcare Labour Adjustment Society

8 (1) In this section, "**HLAA**" means The Healthcare Labour Adjustment Society of British Columbia incorporated under the *Society Act*.

(2) The minister may appoint an administrator for HLAA.

(3) The administrator appointed under subsection (2) replaces the directors of HLAA and may exercise all the rights and duties of directors under the *Society Act*.

(4) The administrator must ensure that HLAA's programs and activities operate only to the extent necessary to honour obligations to employees of health sector employers who were laid off under ESLA and to honour existing financial commitments made to health sector or other employers

b) l'employé qui travaille pour une personne autre qu'un employeur du secteur de la santé.

(4) Sont nulles les clauses de conventions collectives qui obligent l'employeur à consulter le syndicat avant de sous-traiter des services non cliniques hors du cadre défini par la convention collective.

(5) La personne qui conclut un contrat avec un employeur du secteur de la santé n'est pas liée par les conventions collectives et n'est pas visée par l'article 35 du Code.

(6) La désignation d'employeur commun prévue à l'article 38 du Code ne peut s'appliquer à l'employeur du secteur de la santé qui assure une activité avec un autre employeur du secteur de la santé ou un entrepreneur.

Employment Security and Labour Force Adjustment Agreement

7 (1) Les parties à l'ESLA ne sont pas tenues d'appliquer l'ESLA à compter de l'entrée en vigueur du présent article.

(2) Les parties à une convention collective ne sont pas tenues d'appliquer les clauses, ou parties de clauses de la convention collective qui relèvent ou proviennent de l'ESLA.

(3) L'ESLA ne s'applique pas pour l'interprétation ou l'application de la convention collective.

Healthcare Labour Adjustment Society

8 (1) Pour l'application du présent article, « **HLAA** » s'entend de la Healthcare Labour Adjustment Society of British Columbia, société constituée en vertu de la *Society Act*.

(2) Le ministre peut nommer un administrateur à la HLAA.

(3) L'administrateur visé au paragraphe (2) remplace les directeurs de la HLAA et peut exercer toutes les attributions que la *Society Act* confère aux directeurs.

(4) L'administrateur doit s'assurer que les programmes et activités de la HLAA sont utilisés uniquement dans la mesure nécessaire pour lui permettre de s'acquitter de ses obligations envers les employés du secteur de la santé mis à pied aux termes de l'ESLA et pour lui permettre

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for reimbursement under one of HLAA's programs.

(5) The minister may direct the administrator to offer programs and activities beyond those in subsection (4).

(6) The administrator is responsible for winding up HLAA in accordance with the *Society Act*.

(7) The administrator may wind up HLAA when its obligations under subsections (4) and (5) are complete.

(8) The administrator must complete his or her duties under this section within one year from the date on which he or she is appointed.

(9) Any money remaining in HLAA at the time it is wound up must be paid into the Health Special Account referred to in the *Health Special Account Act*.

Layoff and bumping

9 For the period ending December 31, 2005, a collective agreement must not contain a provision that

(a) restricts or limits a health sector employer from laying off an employee,

(b) subject to paragraph (c), requires a health sector employer to meet conditions before giving layoff notice,

(c) requires a health sector employer to provide more than 60 days' notice of layoff to an employee directly or indirectly affected and to the trade union representing the employee, or

(d) provides an employee with bumping options other than the bumping options set out in the regulations.

Part prevails over collective agreements

10 (1) A collective agreement that conflicts or is inconsistent with this Part is void to the extent of the conflict or inconsistency.

de respecter les engagements financiers qu'il a pris envers les employeurs du secteur de la santé ou d'autres employeurs pour effectuer les remboursements prévus à l'un des programmes de la HLAA.

(5) Le ministre peut enjoindre à l'administrateur d'offrir des programmes et activités autres que ceux mentionnés au paragraphe (4).

(6) L'administrateur est tenu de liquider la HLAA conformément aux dispositions de la *Society Act*.

(7) L'administrateur peut liquider la HLAA une fois que toutes les obligations prévues aux paragraphes (4) et (5) auront été remplies.

(8) L'administrateur doit s'acquitter des obligations qui lui sont confiées en application du présent article dans l'année qui suit la date de sa nomination.

(9) Tout solde appartenant à la HLAA au moment de sa liquidation est versé dans le Health Special Account mentionné dans la *Health Special Account Act*.

Mise en disponibilité et supplantation

9 Pour la période se terminant le 31 décembre 2005, les conventions collectives ne peuvent prévoir aucune clause qui, selon le cas :

a) restreint ou limite le pouvoir de l'employeur du secteur de la santé de mettre en disponibilité;

b) sous réserve de l'alinéa c), oblige l'employeur du secteur de la santé à répondre à certaines conditions avant de donner un préavis de mise en disponibilité;

c) oblige l'employeur du secteur de la santé à donner un préavis de mise en disponibilité de plus de 60 jours à l'employé directement ou indirectement visé et au syndicat qui le représente;

d) offre à l'employé des choix quant à la supplantation autres que ceux prescrits par règlement.

La présente partie l'emporte sur les conventions collectives

10 (1) Sont inopérantes les clauses de conventions collectives qui entrent en conflit ou sont incompatibles avec la présente partie.

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(2) A provision of a collective agreement that

(a) requires a health sector employer to negotiate with a trade union to replace provisions of the agreement that are void as a result of subsection (1), or

(b) authorizes or requires the labour relations board, an arbitrator or any person to replace, amend or modify provisions of the agreement that are void as a result of subsection (1),

is void to the extent that the provision relates to a matter prohibited under this Part.

Appeal allowed in part with costs, DESCHAMPS J. *dissenting in part.*

Solicitors for the appellants: Arvay Finlay, Vancouver.

Solicitors for the respondent: Heenan Blaikie, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the Confederation of National Trade Unions: Pepin et Roy, Montréal.

Solicitors for the intervener the Canadian Labour Congress: Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener Michael J. Fraser on his own behalf and on behalf of United Food and Commercial Workers Union Canada: Cavalluzzo Hayes Shilton McIntyre & Cornish, Toronto.

Solicitors for the intervener the British Columbia Teachers' Federation: Noonan Hewson Law Office, Vernon.

(2) Sont inopérantes, dans la mesure où elles portent sur l'une des interdictions prévues à la présente partie les clauses de conventions collectives qui :

a) soit obligent l'employeur du secteur de la santé à négocier avec le syndicat en vue du remplacement d'une clause rendue inopérante par application du paragraphe (1);

b) soit autorisent la commission des relations du travail, l'arbitre ou toute autre personne à remplacer ou modifier une clause rendue inopérante par application du paragraphe (1), ou lui imposent cette obligation.

Pourvoi accueilli en partie avec dépens, la juge DESCHAMPS *est dissidente en partie.*

Procureurs des appelants : Arvay Finlay, Vancouver.

Procureurs de l'intimée : Heenan Blaikie, Vancouver.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général du Nouveau-Brunswick : Procureur général du Nouveau-Brunswick, Fredericton.

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Edmonton.

Procureurs de l'intervenante la Confédération des syndicats nationaux : Pepin & Roy, Montréal.

Procureurs de l'intervenant le Congrès du travail du Canada : Sack Goldblatt Mitchell, Toronto.

Procureurs de l'intervenant Michael J. Fraser, en son propre nom et au nom de United Food and Commercial Workers Union Canada : Cavalluzzo Hayes Shilton McIntyre & Cornish, Toronto.

Procureurs de l'intervenante British Columbia Teachers' Federation : Noonan Hewson Law Office, Vernon.

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2011 SCC 20 (CanLII)

Attorney General of Ontario *Appellant*

v.

Michael J. Fraser on his own behalf and on behalf of the United Food and Commercial Workers Union Canada, Xin Yuan Liu, Julia McGorman and Billie-Jo Church *Respondents*

and

Attorney General of Canada, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of British Columbia, Attorney General of Alberta, Ontario Federation of Agriculture, Federally Regulated Employers — Transportation and Communications, Conseil du patronat du Québec Inc., Mounted Police Members' Legal Fund, Canadian Employers Council, Coalition of BC Businesses, British Columbia Agriculture Council, Justicia for Migrant Workers, Industrial Accident Victims Group of Ontario, Canadian Labour Congress, Canadian Police Association and Canadian Civil Liberties Association *Interveners*

Indexed as: Ontario (Attorney General) *v.* Fraser

2011 SCC 20

File No.: 32968.

2009: December 17; 2011: April 29.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Freedom of association — Collective bargaining rights — Separate labour relations legislation governing agricultural

Procureur général de l'Ontario *Appelant*

c.

Michael J. Fraser en son propre nom et au nom de l'Union internationale des travailleurs et travailleuses unis de l'alimentation et du commerce — Canada, Xin Yuan Liu, Julia McGorman et Billie-Jo Church *Intimés*

et

Procureur général du Canada, procureur général du Québec, procureur général du Nouveau-Brunswick, procureur général de la Colombie-Britannique, procureur général de l'Alberta, Fédération de l'agriculture de l'Ontario, Employeurs des transports et communications de régie fédérale, Conseil du patronat du Québec Inc., Fonds de recours juridique des membres de la Gendarmerie, Conseil canadien des employeurs, Coalition of BC Businesses, British Columbia Agriculture Council, Justicia for Migrant Workers, Industrial Accident Victims Group of Ontario, Congrès du travail du Canada, Association canadienne des policiers et Association canadienne des libertés civiles *Intervenants*

Répertorié : Ontario (Procureur général) *c.* Fraser

2011 CSC 20

N° du greffe : 32968.

2009 : 17 décembre; 2011 : 29 avril.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit constitutionnel — Charte des droits — Liberté d'association — Droits de négociation collective — Législation distincte en matière de relations du travail

workers in Ontario — Whether s. 2(d) requires legislature to provide a particular form of collective bargaining rights to agricultural workers, in order to secure effective exercise of associational rights — If so, whether legislation infringes freedom of association by failing to safeguard the exercise of collective bargaining rights — Whether infringement justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 2(d) — Agricultural Employees Protection Act, 2002, S.O. 2002, c. 16 — Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A, s. 3(b.1).

Constitutional law — Charter of Rights — Equality rights — Separate labour relations legislation governing agricultural workers in Ontario — Whether the Agricultural Employees Protection Act, 2002 violates workers' right to equality under s. 15 of the Charter by excluding workers from the protections accorded to workers in other sectors — If so, whether infringement justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 15 — Agricultural Employees Protection Act, 2002, S.O. 2002, c. 16 — Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A, s. 3(b.1).

In 2002, the Ontario legislature enacted the *Agricultural Employees Protection Act, 2002* ("*AEPA*") which excluded farm workers from the *Labour Relations Act* ("*LRA*"), but crafted a separate labour relations regime for farm workers. The *AEPA* was a response to *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, which found that the previous legislative scheme violated s. 2(*d*) of the *Canadian Charter of Rights and Freedoms* and declared it constitutionally invalid. It grants farm workers the rights to form and join an employees' association, to participate in its activities, to assemble, to make representations to their employers through their association on their terms and conditions of employment, and the right to be protected against interference, coercion and discrimination in the exercise of their rights. The employer must give an association the opportunity to make representations respecting terms and conditions of employment, and it must listen to those representations or read them. The *AEPA* tasks a tribunal with hearing and deciding disputes about the application of the Act.

After limited efforts to use the new protections under the *AEPA*, a constitutional challenge was mounted on the basis the Act infringed farm workers' rights under ss. 2(*d*) and 15 of the *Charter* by failing to provide effective protection for the right to organize

régissant les travailleurs agricoles en Ontario — L'article 2d) oblige-t-il le législateur à accorder aux travailleurs agricoles des droits de négociation collective d'un type particulier pour permettre un exercice réel de leur liberté d'association? — Dans l'affirmative, la législation porte-t-elle atteinte à la liberté d'association parce qu'elle ne protège pas l'exercice des droits de négociation collective? — Cette atteinte se justifie-t-elle? — Charte canadienne des droits et libertés, art. 1, 2d) — Loi de 2002 sur la protection des employés agricoles, L.O. 2002, ch. 16 — Loi de 1995 sur les relations de travail, L.O. 1995, ch. 1, ann. A, art. 3b.1).

Droit constitutionnel — Charte des droits — Droit à l'égalité — Législation distincte en matière de relations de travail régissant les travailleurs agricoles en Ontario — La Loi de 2002 sur la protection des employés agricoles porte-t-elle atteinte au droit à l'égalité des travailleurs garanti à l'art. 15 de la Charte en leur refusant les mesures de protection reconnues aux travailleurs d'autres secteurs? — Dans l'affirmative, cette atteinte se justifie-t-elle? — Charte canadienne des droits et libertés, art. 1, 15 — Loi de 2002 sur la protection des employés agricoles, L.O. 2002, ch. 16 — Loi de 1995 sur les relations de travail, L.O. 1995, ch. 1, ann. A, art. 3b.1).

En 2002, l'Ontario a adopté la *Loi de 2002 sur la protection des employés agricoles* (« *LPEA* »), qui exclut les travailleurs agricoles de la *Loi sur les relations de travail* (« *LRT* »), mais crée pour eux un régime de relations du travail particulier. La *LPEA* a été adoptée en réaction à l'arrêt *Dunmore c. Ontario (Procureur général)*, 2001 CSC 94, [2001] 3 R.C.S. 1016, dans lequel notre Cour a statué que le texte de loi antérieur contrevenait à l'al. 2*d*) de la *Charte canadienne des droits et libertés* et l'a déclaré inconstitutionnel. Elle confère aux travailleurs agricoles le droit de former une association et d'y adhérer, de participer à ses activités, de se réunir, de présenter à l'employeur par l'entremise de leur association des observations relatives à leurs conditions d'emploi et d'exercer leurs droits sans crainte d'ingérence, de contrainte ou de discrimination. L'employeur doit donner à une association d'employés l'occasion de présenter des observations au sujet des conditions d'emploi et il est tenu de les écouter ou de les lire. La *LPEA* confie à un tribunal la fonction d'entendre et de régler tout litige relatif à l'application de la Loi.

Après quelques démarches pour se prévaloir des nouvelles mesures de protection de la *LPEA*, on a contesté la validité constitutionnelle de cette loi au motif qu'elle portait atteinte aux droits des travailleurs agricoles garantis par l'al. 2*d*) et par l'art. 15 de la *Charte*, en ce

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and bargain collectively and by excluding farm workers from the protections accorded to workers in other sectors. In 2006, the Ontario Superior Court dismissed the application. The Court of Appeal allowed the appeal and declared the *AEPA* to be constitutionally invalid. It rendered its decision after the release of *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391.

Held (Abella J. dissenting): The appeal should be allowed and the action dismissed.

Per McLachlin C.J. and LeBel, Binnie, Fish and Cromwell JJ.: Section 2(*d*) of the *Charter* protects the right to associate to achieve collective goals. This requires a process of engagement that permits employee associations to make representations to employers, which employers must consider and discuss in good faith. Laws or state actions that substantially interfere with the ability to achieve workplace goals through collective actions have the effect of negating the right of free association and therefore constitute a limit on the s. 2(*d*) right of free association, which renders the law or action unconstitutional unless justified under s. 1 of the *Charter.*

Bargaining activities protected by s. 2(*d*) in the labour relations context include good faith bargaining on important workplace issues. It requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation. Good faith negotiation under s. 2(*d*) requires the parties to meet and engage in meaningful dialogue; 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. What s. 2(*d*) guarantees in the labour relations context is a meaningful process.

The decision in *Health Services* follows directly from the principles enunciated in *Dunmore*. Section 2(*d*), interpreted purposively and in light of Canada's values and commitments, protects associational collective activity in furtherance of workplace goals. The

qu'elle ne protégeait pas véritablement le droit de s'associer et de négocier collectivement et refusait aux travailleurs agricoles les mesures de protection reconnues aux travailleurs d'autres secteurs. En 2006, la Cour supérieure de justice de l'Ontario a rejeté la demande. La Cour d'appel a accueilli l'appel et déclaré la *LPEA* inconstitutionnelle. Elle s'est prononcée après l'arrêt *Health Services and Support — Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, 2007 CSC 27, [2007] 2 R.C.S. 391.

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli et l'action est rejetée.

La juge en chef McLachlin et les juges LeBel, Binnie, Fish et Cromwell : L'alinéa 2*d*) de la *Charte* protège le droit de s'associer pour atteindre des objectifs collectifs. Cette protection constitutionnelle demande l'établissement d'un processus de dialogue où l'association d'employés peut présenter des observations à l'employeur, qui doit en prendre connaissance et en discuter de bonne foi. Une loi ou une action de l'État qui entrave substantiellement la capacité de réaliser des objectifs liés au travail grâce à des actions concertées fait obstacle à l'exercice du droit de libre association. Une telle loi ou action restreint donc la liberté d'association garantie à l'al. 2*d*) et devient de ce fait inconstitutionnelle, sauf justification au regard de l'article premier de la *Charte*.

Les activités de négociation en contexte de relations du travail protégées par l'al. 2*d*) comprennent la négociation de bonne foi de questions importantes liées à l'exécution des fonctions. Ce droit implique que l'employeur et les employés se rencontrent et négocient de bonne foi en vue de réaliser leur objectif commun d'accommodement par des moyens pacifiques et productifs. La négociation de bonne foi découlant de l'al. 2*d*) exige que les parties se rencontrent et qu'elles engagent un véritable dialogue; elle n'impose pas de processus particulier; elle n'oblige pas les parties à conclure une convention ou à accepter des clauses particulières; elle ne garantit pas un mécanisme légal de règlement des différends permettant de dénouer les impasses; elle ne protège que le droit à un processus général de négociation collective, et non le droit de revendiquer un modèle particulier de relations du travail ou un mode particulier de négociation. L'alinéa 2*d*) garantit, dans le contexte des relations du travail, le droit à un processus véritable.

La décision rendue dans *Health Services* découle directement des principes énoncés dans *Dunmore*. Lorsqu'on l'interprète téléologiquement et dans la perspective des valeurs canadiennes et des engagements internationaux du Canada, l'al. 2*d*) protège l'activité

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right is not merely a paper right, but a right to a process that permits meaningful pursuit of those goals. The principles within *Dunmore* and *Health Services* represent good law, should not be overturned and provide resolution in this appeal.

The seriousness of overturning recent precedents of this Court, representing the considered views of firm majorities, cannot be overstated. The arguments advanced in favour of overturning *Health Services* do not meet the high threshold for reversing a precedent of this Court as it is grounded in precedent, consistent with Canadian values, consistent with Canada's international commitments and consistent with this Court's purposive and generous interpretation of other *Charter* guarantees. *Health Services* was consistent with previous cases on the issue of individual and collective rights. It recognized, as did previous jurisprudence, that s. 2(*d*) is an individual right. It also recognized, as did previous cases, that to meaningfully uphold this individual right, s. 2(*d*) may properly require legislative protection of group or collective activities. The approach to deference to Parliament and legislatures advanced in *Health Services* is also consistent with this Court's general jurisprudence. Deference should inform the determination of whether a legislative scheme satisfies the requirements of the *Charter*, as articulated by the courts. The unworkability of *Health Services* has not been established. There is no concrete evidence that the principles enunciated in *Dunmore* and *Health Services* are unworkable or have led to intolerable results. It is premature to argue that the holding in *Health Services*, rendered four years ago, is unworkable in practice.

The Ontario legislature is not required to provide a particular form of collective bargaining rights to agricultural workers, in order to secure the effective exercise of their associational rights. In this case, the Court of Appeal has overstated the ambit of the s. 2(*d*) right. The affirmation of the right to collective bargaining is not an affirmation of a particular type of collective bargaining, such as the Wagner model which is dominant in Canada. What s. 2(*d*) protects is the right to associate to achieve collective goals. Laws or government action that substantially interfere with the ability to achieve collective goals have the effect of limiting freedom of association, by making it pointless. It is in this derivative sense that s. 2(*d*) protects a right to collective bargaining. Legislatures are not constitutionally required, in all cases and for all industries, to enact laws that

associative exercée collectivement pour atteindre des objectifs liés au travail. Le droit ne possède pas seulement un caractère théorique; il commande un processus qui permet véritablement la poursuite de ces objectifs. Les principes établis dans *Dunmore* et *Health Services* sont fondés en droit, ne doivent pas être écartés et permettent de régler le sort du présent pourvoi.

On ne saurait trop insister sur la gravité du renversement d'arrêts récents de la Cour qui expriment l'avis réfléchi de majorités claires. Les arguments invoqués en faveur de la rupture avec *Health Services* ne satisfont pas aux conditions strictes imposées pour le renversement d'un précédent de notre Cour, car cet arrêt prend appui dans les décisions antérieures, il est compatible avec les valeurs canadiennes, il respecte les engagements internationaux du Canada et il s'inscrit dans la foulée de l'interprétation téléologique et généreuse des autres garanties constitutionnelles. *Health Services* s'inscrit dans la lignée d'arrêts antérieurs portant sur les droits individuels et collectifs. Il reconnaît comme eux que l'al. 2*d*) confère un droit individuel. Il reconnaît aussi, comme eux, que l'al. 2*d*) peut à bon droit imposer une protection législative de l'activité collective pour assurer l'exercice véritable du droit individuel. La déférence envers le Parlement et les législatures préconisée dans *Health Services* se situe également dans le droit fil de la jurisprudence générale de notre Cour. Il faut maintenir une attitude de déférence au moment de déterminer si un régime législatif satisfait aux exigences de la *Charte* établies par les tribunaux. L'inapplicabilité de *Health Services* n'est pas établie. Rien ne démontre concrètement que les principes dégagés dans *Dunmore* et *Health Services* seraient inapplicables ou qu'ils auraient entraîné des résultats inadmissibles. Il est prématuré de conclure à l'inapplicabilité pratique de l'arrêt *Health Services* rendu il y a quatre ans.

Le législateur ontarien n'est pas obligé d'accorder aux travailleurs agricoles des droits de négociation collective d'un type particulier pour permettre un exercice réel de leur liberté d'association. En l'espèce, la Cour d'appel surestime la portée du droit protégé à l'al. 2*d*). La reconnaissance du droit de négociation collective n'est pas la consécration d'un type particulier de système de négociation collective, comme le modèle Wagner qui prédomine au Canada. L'alinéa 2*d*) protège le droit de s'associer afin de réaliser des objectifs collectifs. La loi ou la mesure de l'État qui entrave substantiellement la capacité de réaliser des objectifs collectifs a pour effet de restreindre la liberté d'association en la privant de sens. C'est dans ce sens dérivé que l'al. 2*d*) protège le droit de négociation collective. La Constitution n'exige pas que les législateurs, dans

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set up a uniform model of labour relations imposing a statutory duty to bargain in good faith, statutory recognition of the principles of exclusive majority representation and a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements. What is protected is associational activity, not a particular process or result.

Farm workers in Ontario are entitled to meaningful processes by which they can pursue workplace goals. The right of an employees' association to make representations to the employer and have its views considered in good faith is a derivative right under s. 2(*d*) of the *Charter*, necessary to meaningful exercise of the right to free association. The *AEPA* provides a process that satisfies this constitutional requirement. Under the *AEPA*, the right of employees' associations to make representations to their employers is set out in s. 5 and provides that the employer shall listen to oral representations, and read written representations, and acknowledge having read them.

The *AEPA* does not expressly refer to a requirement that the employer consider employee representations in good faith; however, by implication, it includes such a requirement. Any ambiguity in s. 5 should be resolved by interpreting it as imposing a duty on agricultural employers to consider employee representations in good faith, as a statute should be interpreted in a way that gives meaning and purpose to its provisions and Parliament and legislatures are presumed to intend to comply with the *Charter*. There can only be one purpose for requiring the employer to listen to or read employee representations — to assure that the employer will in fact consider the employee representations. No labour relations purpose is served merely by *pro forma* listening or reading. To fulfill the purpose of reading or listening, the employer must consider the submission. Moreover, the employer must do so in good faith: consideration with a closed mind would render listening or reading the submission pointless. Comments made in the legislature during the debate on this legislation that the *AEPA* was not intended to extend collective bargaining to agricultural workers may be understood as an affirmation that the Act did not institute the dominant Wagner model of collective bargaining, or bring agricultural workers within the ambit of the *LRA*, not that the *AEPA* intended to deprive farm workers of the protections of collective bargaining that s. 2(*d*) grants. The *AEPA* does not breach s. 2(*d*) of the *Charter*.

tous les cas et pour tous les secteurs d'activité, adoptent des lois établissant un modèle uniforme de relations du travail qui imposerait l'obligation de négocier de bonne foi, reconnaîtrait les principes du monopole syndical et du vote majoritaire et prévoirait un mécanisme pour dénouer les impasses des négociations et résoudre les différends relatifs à l'interprétation ou à l'application d'une convention collective. C'est l'activité associative qui est protégée, et non un processus ou un résultat particulier.

Les travailleurs agricoles de l'Ontario ont droit à un processus véritable leur permettant de réaliser des objectifs liés au travail. Le droit d'une association d'employés de présenter des observations à l'employeur et de les voir prises en compte de bonne foi est dérivé de la liberté garantie à l'al. 2*d*) de la *Charte* et il est nécessaire à l'exercice véritable du droit de libre association. La *LPEA* prévoit un processus qui satisfait à cette exigence constitutionnelle. Dans la *LPEA*, le droit d'une association d'employés de formuler des observations à l'intention de l'employeur est prévu à l'art. 5, qui dispose que l'employeur écoute les observations présentées oralement et lit celles formulées par écrit, puis informe l'association qu'il les a lues.

La *LPEA* n'exige pas expressément de l'employeur qu'il examine de bonne foi les revendications de ses employés; toutefois, l'obligation lui en est faite implicitement. Il faut résoudre toute ambiguïté du libellé de l'art. 5 en tenant pour acquis qu'il oblige l'employeur agricole à examiner de bonne foi les observations de ses employés, étant donné qu'une loi doit s'interpréter de manière que ses dispositions aient un sens et un objet et que le Parlement et les législatures sont présumés vouloir respecter la *Charte*. Une seule explication peut être trouvée à l'obligation imposée à l'employeur d'écouter ou de lire les observations présentées par les employés : s'assurer que l'employeur considère effectivement ces observations. Une simple obligation d'écoute ou de lecture passive ne permettra pas de réaliser cet objectif. Pour s'acquitter de son obligation, l'employeur doit examiner les observations. De plus, il doit le faire de bonne foi : une attitude fermée rend l'examen sans objet. On peut déduire des commentaires qui ont été présentés à l'Assemblée législative au cours des débats sur la *LPEA* et qui précisaient qu'elle ne vise pas l'application de la négociation collective aux travailleurs agricoles, que la *LPEA* n'instaure pas le modèle Wagner, prédominant en matière de négociation collective, et ne fait pas bénéficier les travailleurs agricoles du régime de la *LRT*. Ils ne signifient pas que la *LPEA* voulait priver ces employés du droit de négociation collective garanti à l'al. 2*d*). La *LPEA* ne porte pas atteinte à la liberté garantie à l'al. 2*d*) de la *Charte*.

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Section 5 of the *AEPA*, correctly interpreted, protects not only the right of employees to make submissions to employers on workplace matters, but also the right to have those submissions considered in good faith by the employer. It follows that s. 5 of the *AEPA* does not violate s. 2(*d*) of the *Charter*. The *AEPA* contemplates a meaningful exercise of the right of association, and provides a tribunal for the resolution of disputes. Section 11 of the *AEPA* specifically empowers the Agriculture, Food and Rural Affairs Appeal Tribunal to make a determination that there has been a contravention of the Act, and to grant an order or remedy with respect to that contravention. The Tribunal may be expected to interpret its powers, in accordance with its mandate, purposively, in an effective and meaningful way. Labour tribunals enjoy substantial latitude when applying their constituent statutes to the facts of a given case.

It is unnecessary to consider the s. 1 arguments. The s. 15 discrimination claim, like the s. 2(*d*) claim, cannot succeed. It is clear that the regime established by the *AEPA* does not provide all the protections that the *LRA* extends to many other workers. However, a formal legislative distinction does not establish discrimination under s. 15. What s. 15 contemplates is substantive discrimination that impacts on individuals stereotypically or in ways that reinforce existing prejudice and disadvantage. The *AEPA* provides a special labour regime for agricultural workers. However, on the record, it has not been established that the regime utilizes unfair stereotypes or perpetuates existing prejudice and disadvantage. Until the regime established by the *AEPA* is tested, it cannot be known whether it inappropriately disadvantages farm workers. The claim is premature.

Per Charron and Rothstein JJ.: Section 2(*d*) protects the liberty of individuals to associate and engage in associational activities. It protects the freedom of workers to come together, to form a bargaining position and to present a common and united front to their employers. It does not protect a right to collective bargaining nor does it impose duties on others, such as the duty to bargain in good faith on employers. To the extent that *Health Services* constitutionalized collective bargaining, it was not correctly decided. It should be overturned thus disposing of the constitutional challenge in this case.

This Court may overrule its own precedents, but it should only do so where there are compelling reasons. The question in every case involves a balancing: Do the

L'article 5 de la *LPEA*, s'il est correctement interprété, protège non seulement le droit des employés de présenter à l'employeur des observations relatives au travail, mais aussi celui de les voir prises en considération de bonne foi par l'employeur. L'article 5 de la *LPEA* ne contrevient donc pas à l'al. 2*d*) de la *Charte*. La *LPEA* a pour objet l'exercice véritable du droit de s'associer et elle prévoit un tribunal pour le règlement des différends. L'article 11 de la *LPEA* habilite expressément le Tribunal d'appel de l'agriculture, de l'alimentation et des affaires rurales à déterminer s'il y a eu infraction à la Loi et à rendre des ordonnances réparatrices. De plus, on peut s'attendre à ce que, conformément à son mandat, le Tribunal interprète téléologiquement ses pouvoirs de façon qu'ils soient efficaces et utiles. Les tribunaux du travail jouissent d'une grande latitude pour appliquer leur loi constitutive aux faits particuliers des affaires dont ils sont saisis.

Il n'y a pas lieu d'examiner les prétentions relatives à l'article premier. À l'instar de la demande fondée sur l'al. 2*d*), le moyen alléguant la discrimination au sens de l'art. 15 de la *Charte* ne peut être accueilli. Certes, le régime créé par la *LPEA* ne confère pas toutes les protections que la *LRT* offre à de nombreux autres travailleurs. Toutefois, une distinction législative formelle ne permet pas d'établir la discrimination visée à l'art. 15, à savoir la discrimination réelle qui, en raison de l'application de stéréotypes, a des incidences sur des individus ou a pour effet de renforcer des préjugés ou des désavantages existants. La *LPEA* crée un régime de relations du travail spécialement pour les travailleurs agricoles. Cependant, le dossier n'établit pas que le régime repose sur des stéréotypes inéquitables ou qu'il perpétue des préjugés ou des désavantages existants. Tant qu'il n'a pas été mis à l'épreuve, on ne peut savoir si le régime de la *LPEA* défavorise indûment les travailleurs agricoles. Le recours demeure prématuré.

Les juges Charron et Rothstein : L'alinéa 2*d*) protège la liberté des individus de s'associer et d'exercer des activités associatives. Il protège la liberté des travailleurs de s'unir, de mettre au point une position de négociation et de présenter un front commun à l'employeur. Il ne protège pas le droit à la négociation collective ni n'impose d'obligations à autrui, comme celle de négocier de bonne foi qui incomberait à l'employeur. Dans la mesure où elle constitutionnalise la négociation collective, la décision dans l'affaire *Health Services* est erronée. Il faut rompre avec cet arrêt, ce qui permettrait de résoudre le litige constitutionnel en l'espèce.

Notre Cour peut écarter ses propres précédents, mais ne devrait le faire que si des raisons impérieuses le justifient. La question qui se pose chaque fois appelle

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reasons in favour of following a precedent — such as certainty, consistency, predictability and institutional legitimacy — outweigh the need to overturn a precedent that is sufficiently wrong? In this case, compelling reasons exist for overturning *Health Services*: the error in *Health Services* concerns a question of constitutional law and is not susceptible to being corrected in a lasting way by the legislative branch; *Health Services* strayed significantly from other sound precedents, including *Dunmore*, with respect to the purpose of *Charter* protection for freedom of association; the constitutionalization of collective bargaining, as envisaged in *Health Services*, is not workable without other elements of modern labour legislation in place; and there has been intense academic criticism of *Health Services*.

Health Services was an express break with prior decisions of this Court on s. 2(*d*), including *Dunmore*. This break came when the majority of the Court found that s. 2(*d*) required that government legislate to facilitate collective goals which an association was formed to pursue, rather than protecting the freedom of association itself. In *Dunmore*, the requirement that government provide legislation to protect workers was anchored in the proposition that certain workers could not associate without government intervention. The majority in *Health Services* focussed on the goals of an association and the enhancement of those goals, rather than the ability of the claimants to associate (which they already had done). An application of the actual holding in *Dunmore* would have asked only if the government substantially interfered with the ability to associate.

Health Services erred in concluding that s. 2(*d*) protects collective bargaining and obliges parties to bargain in good faith for five reasons. First, *Health Services* departed from sound principles established in this Court's precedents on the nature and scope of s. 2(*d*). The purpose of s. 2(*d*) is to protect individuals rather than groups *per se*. *Health Services* reinterpreted an individual freedom as giving rise to collective rights with no individual rights foundation. This reinterpretation of the scope of s. 2(*d*) was a departure from previous jurisprudence that is not justified by the purpose of the *Charter* guarantee.

Second, s. 2(*d*) protects freedoms not rights. According to *Health Services*, if s. 2(*d*) protected only the ability of workers to make collective representations

une mise en balance : les motifs qui justifient le respect d'un précédent — comme la certitude, la cohérence, la prévisibilité et la légitimité institutionnelle — l'emportent-ils sur la nécessité d'écarter un précédent dont le caractère erroné le justifie? C'est le cas en l'espèce : l'erreur commise dans *Health Services* touche une question de droit constitutionnel et n'est pas susceptible d'être corrigée de façon durable par le législateur. *Health Services* s'écarte sensiblement de bonnes décisions, dont *Dunmore*, concernant l'objet de la protection constitutionnelle de la liberté d'association; la protection constitutionnelle de la négociation collective au sens où l'entend notre Cour dans l'arrêt *Health Services* ne peut s'appliquer indépendamment d'autres éléments de la législation moderne du travail; les auteurs critiquent vivement l'arrêt *Health Services*.

L'arrêt *Health Services* constituait une rupture expresse d'avec les décisions antérieures de la Cour sur l'al. 2*d*), notamment *Dunmore*. Cette rupture est survenue lorsque les juges majoritaires de notre Cour ont conclu que l'al. 2*d*) obligeait le gouvernement à légiférer pour faciliter la réalisation des objectifs communs que visait la formation d'une association, plutôt que pour protéger la liberté d'association elle-même. Dans *Dunmore*, la nécessité pour le gouvernement de protéger les travailleurs par une loi découlait de la prémisse que certains travailleurs ne pouvaient pas s'associer sans une intervention gouvernementale. Dans *Health Services*, les juges majoritaires ont insisté sur les objectifs d'une association et la valorisation de ces objectifs, plutôt que sur la capacité des demandeurs de s'associer (ce qu'ils avaient déjà fait). En appliquant la véritable conclusion de l'arrêt *Dunmore*, la Cour aurait décidé uniquement si le gouvernement entravait de façon substantielle la capacité de s'associer.

Dans *Health Services*, la formation majoritaire de la Cour conclut à tort que l'al. 2*d*) protège la négociation collective et oblige les parties à négocier de bonne foi, et ce, pour cinq raisons. Premièrement, l'arrêt *Health Services* rompt avec les principes valables établis dans les décisions antérieures de la Cour sur la nature et la portée de l'al. 2*d*). L'alinéa 2*d*) vise à protéger les individus et non les groupements comme tels. Dans *Health Services*, les juges majoritaires réinterprètent une liberté individuelle et concluent qu'elle fait naître des droits collectifs sans assise individuelle. Sa nouvelle interprétation de la portée de l'al. 2*d*) constitue un abandon de la jurisprudence antérieure qui n'est pas justifié par l'objet de la garantie constitutionnelle.

Deuxièmement, l'al. 2*d*) protège des libertés, et non des droits. Suivant l'arrêt *Health Services*, si l'al. 2*d*) protégeait uniquement la possibilité pour les

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and did not impose a duty on the employer to bargain in good faith, it would fail to protect the right to collective bargaining. This proposition transformed s. 2(*d*) from a freedom into a positive right by imposing an obligation to act on third parties (i.e. the employer). A right to collective bargaining is also not derivative of a freedom — it is a standalone right created by the Court, not by the *Charter*. A derivative right is one that is necessary to allow individuals to exercise a fundamental freedom. No individual employee has a right to require an employer to meet and make a reasonable effort to arrive at an acceptable employment contract. To grant a right to collective bargaining under s. 2(*d*) purportedly as derivative of the freedom of association is not consistent with the approach taken by this Court in its derivative rights jurisprudence in relation to the *Charter*.

Third, s. 2(*d*) does not empower the Court to privilege certain associations over others. The Court's earlier cases did exhibit a content-neutral approach to freedom of association in the sense that they did not claim to privilege particular associations. *Health Services* erred in saying that these approaches were not purposive. *Health Services* suggested that a "generic" approach to defining freedom of association is inappropriate because different groups must have different freedoms. However, the context that is relevant to a purposive interpretation of *Charter* freedoms is not the context of the individuals who happen to be exercising that freedom in a given case. Rather, a purposive interpretation of s. 2(*d*) requires that one place freedom of association in its linguistic, philosophic and historical contexts. The origins of the concept, the words used to describe it, and the philosophical principles on which it relies will define the scope of s. 2(*d*) protection. The extent of that protection should not change depending on who is exercising their s. 2(*d*) rights. The protection of fundamental freedoms should not involve the Court adjudicating the relative values of the way in which individuals exercise those freedoms. Just as this Court has not adjudicated the relative value of a religion or its tenets under s. 2(*a*) or assessed the relative value or content of a given exercise of freedom of expression under s. 2(*b*), so too should this Court not privilege some associations over others under s. 2(*d*).

Fourth, s. 2(*d*) does not afford constitutional protection to contracts. Although *Health Services* purported to constitutionalize the process of collective bargaining rather than its fruits, it in fact granted constitutional

travailleurs de présenter des revendications collectives et n'obligeait pas l'employeur à négocier de bonne foi, il ne protégerait pas le droit à la négociation collective. En imposant à un tiers (l'employeur) une obligation, cette proposition fait de la liberté garantie à l'al. 2*d*) un droit positif. Le droit à la négociation collective n'est pas un droit dérivé d'une liberté — il s'agit d'un droit autonome créé par la Cour, et non par la *Charte*. Un droit dérivé n'existe que s'il est nécessaire pour l'exercice d'une liberté fondamentale. Un employé individuel n'a pas le droit d'obliger son employeur à le rencontrer et à faire un effort raisonnable pour arriver à un contrat de travail acceptable. Reconnaître le droit à la négociation collective sur le fondement de l'al. 2*d*) au motif qu'il dériverait de la liberté d'association est incompatible avec la jurisprudence de notre Cour en matière de droits dérivés de libertés garanties par la *Charte*.

Troisièmement, l'al. 2*d*) n'autorise pas la Cour à favoriser certaines associations. Dans les décisions antérieures, la Cour interprète la liberté d'association de manière neutre quant à sa nature en ce qu'elle ne favorise pas d'associations en particulier. Dans *Health Services*, elle affirme à tort que cette démarche n'est pas téléologique. Les juges majoritaires dans *Health Services* laissent entendre qu'il ne convient pas d'interpréter la liberté d'association de manière « générale », car des groupes différents doivent avoir des libertés différentes. Cependant, le contexte pertinent pour l'interprétation téléologique d'une liberté garantie par la *Charte* ne correspond pas à celui dans lequel des individus exercent cette liberté dans un cas donné. L'interprétation téléologique de l'al. 2*d*) exige plutôt que l'on situe la liberté d'association dans ses contextes linguistique, philosophique et historique. Les origines du concept, les termes utilisés pour le définir et les principes philosophiques sur lesquels il repose circonscrivent la protection qu'offre l'al. 2*d*). L'étendue de cette protection ne devrait pas varier en fonction de celui qui exerce ses droits. En matière de protection des libertés fondamentales, la Cour doit se garder d'attribuer une valeur relative à la manière dont un individu exerce une liberté. Comme elle s'abstient de se prononcer sur la valeur relative d'une religion ou de ses préceptes pour l'application de l'al. 2*a*) et de déterminer la valeur relative ou la teneur d'un exercice donné de la liberté d'expression garantie à l'al. 2*b*), elle ne doit pas favoriser un type d'association plutôt qu'un autre pour l'application de l'al. 2*d*).

Quatrièmement, l'al. 2*d*) ne confère pas de protection constitutionnelle aux contrats. La formation majoritaire dans *Health Services* dit constitutionnaliser le processus de la négociation collective, et non ses

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protection to the collective agreements on the basis that they were the fruits of that process.

Fifth, s. 2(*d*) should be interpreted in such a way as to afford deference to the legislative branch in the field of labour relations. *Health Services* erred in removing decision-making power on this question from Parliament and the provincial legislatures. While the courts are responsible for safeguarding the ability of individuals to do collectively that which they have the right to do as individuals, the judiciary is ill-equipped to engage in fine adjustments to the balance of power between labour and management in the labour relations context.

Moreover, the reasons advanced in *Health Services* for extending protection to collective bargaining under s. 2(*d*) — Canadian labour history, Canada's international obligations, and *Charter* values — do not support conferring a constitutional right to collective bargaining and imposing a duty on employers to engage in collective bargaining.

The argument that a right to collective bargaining which includes a duty on employers to bargain in good faith is a pre-statutory feature of Canadian labour law, made in *Health Services*, contradicts established accounts of the history of labour relations in Canada and has recently been the subject of intense academic criticism. While the duty to bargain in good faith may be a fundamental precept of the Wagner model of collective bargaining, it is not a fundamental precept of collective bargaining as it was understood before the introduction of the *Wagner Act* or as it is still understood today in many parts of the world.

Nor does international law support constitutionalizing collective bargaining rights. In *Health Services*, the majority relied on the proposition that collective bargaining is an integral component of the freedom of association under international law. The majority relied in particular on ILO Convention No. 87. In doing so, it committed two errors. While Canada has ratified ILO Convention No. 87, that Convention deals only with freedom of association and does not at any point specifically discuss collective bargaining. The majority also conflated two distinct ILO Conventions by citing Convention No. 87 but using words from Convention No. 98. Canada has not ratified Convention No. 98 and has no obligations under that Convention. Even if Convention No. 98 were applicable to Canada, *Health Services* would still have erred in relying on that Convention to constitutionalize a version of collective

fruits, mais dans les faits, cet arrêt confère une protection constitutionnelle aux conventions collectives parce qu'elles sont issues de ce processus.

Cinquièmement, dans le domaine des relations du travail, l'al. 2*d*) commande une interprétation déférente à l'endroit du législateur. Dans *Health Services*, la formation majoritaire a eu tort de dépouiller le Parlement et les législatures provinciales de leur pouvoir décisionnel en la matière. Bien qu'il appartienne aux tribunaux de protéger la faculté des individus de faire collectivement ce qu'ils ont le droit de faire individuellement, ils ne sont pas en mesure d'apporter de subtils réglages à l'équilibre des rapports de force entre syndicats et patronat en matière de relations du travail.

En outre, les motifs invoqués dans *Health Services* pour faire bénéficier la négociation collective de la protection de l'al. 2*d*) — l'histoire des relations du travail au Canada, les obligations internationales du pays et les valeurs consacrées par la *Charte* — ne justifient ni la constitutionnalisation du droit à la négociation collective ni l'obligation des employeurs d'y participer.

La thèse avancée dans *Health Services* selon laquelle le droit à la négociation collective, qui oblige l'employeur à négocier de bonne foi, caractérisait le droit canadien du travail avant l'adoption de lois en la matière contredit des versions établies de l'histoire des relations du travail au Canada et elle a récemment fait l'objet de vives critiques de la part d'auteurs. Bien qu'elle puisse constituer le précepte fondamental de la négociation collective suivant le modèle Wagner, l'obligation de négocier de bonne foi n'est pas un précepte fondamental de la négociation collective au sens où on l'entendait avant l'adoption de la *Loi Wagner* ni au sens où on l'entend encore de nos jours dans de nombreuses parties du monde.

Le droit international n'appuie pas la constitutionnalisation du droit de négocier collectivement. Selon une proposition formulée par la formation majoritaire dans *Health Services*, la négociation collective fait partie intégrante de la liberté d'association reconnue en droit international. La majorité s'appuie en particulier sur la Convention n^{o} 87 de l'OIT. Ce faisant, elle commet deux erreurs. Le Canada a bien ratifié la Convention n^{o} 87 de l'OIT, mais celle-ci porte sur la liberté d'association sans faire aucunement mention de la négociation collective. En outre, la formation majoritaire confond deux conventions distinctes de l'OIT, car elle se reporte à la Convention n^{o} 87, mais utilise en fait le texte de la Convention n^{o} 98. Or, le Canada n'a pas ratifié la Convention n^{o} 98, de sorte qu'elle ne le soumet à aucune obligation. Même si la Convention n^{o} 98 s'appliquait au Canada, dans *Health Services*, la formation majoritaire

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bargaining that includes a duty to bargain in good faith. While Convention No. 98 provides protection for a process of collective bargaining, it conceives of collective bargaining as being a process of "voluntary negotiation" that is fundamentally distinct from the model of collective bargaining incorporated in the Wagner model. Convention No. 98 does not contemplate the imposition of a duty on parties to bargain in good faith.

Nor did invoking *Charter* values in *Health Services* support constitutionalizing collective bargaining rights. *Health Services* maintained that the recognition of a good faith collective bargaining right is consistent with and promotes other *Charter* rights, freedoms and values: namely, human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy. A duty to bargain in good faith may achieve those ends. However, either the *Charter* requires something or it does not. The role of the Court is to determine what the *Charter* requires and what it does not and then apply the requirements it finds to the case before it. It is not to simply promote, as much as possible, values that some subjectively think underpin the *Charter* in a general sense. As s. 2(*d*) is silent on questions of economic and social policy, this Court may not intervene on such matters in the absence of a legislative or constitutional grant of authority.

Finally, the majority's approach to collective bargaining in particular and s. 2(*d*) in general articulated in *Health Services* is unworkable. It extends constitutional protection to the duty to bargain in good faith without importing other aspects of the Wagner framework and by purporting to protect the process of collective bargaining without also protecting its fruits, neither of which is tenable. For a duty to bargain in good faith not to be an illusory benefit, there must be both a way of dealing with bargaining impasses as well as an effective remedy for persistent breaches of a duty to bargain in good faith. The first requires that there be some default mechanism for resolving the dispute in case an impasse is reached — such as striking or binding arbitration — while the second may require, in extreme circumstances, the imposition by an arbitrator of particular terms of a collective agreement. Each of these goes well beyond protection of a mere process and results in the protection of a particular substantive outcome. The majority's inability to separate substance and process, and the consequent constitutionalization of collective bargaining terms demonstrates the unworkability of the

aurait tout de même tort de s'appuyer sur elle pour constitutionnaliser la négociation collective entendue au sens où l'employeur est tenu de négocier de bonne foi. Bien que la Convention nº 98 protège le processus de négociation collective, elle y voit un processus « volontaire » fondamentalement distinct de celui que prévoit le modèle Wagner. La Convention nº 98 n'oblige pas les parties à négocier de bonne foi.

Le fait que des valeurs consacrées par la *Charte* aient été invoquées dans *Health Services* n'a pas pour effet d'appuyer la constitutionnalisation du droit à la négociation collective. Selon la formation majoritaire dans *Health Services*, la reconnaissance du droit à la négociation collective de bonne foi s'intègre dans la logique, voire la défense, des autres droits, libertés et valeurs consacrés par la *Charte*, à savoir la dignité humaine, l'égalité, la liberté, le respect de l'autonomie de la personne et la mise en valeur de la démocratie. L'obligation de négocier de bonne foi peut certes permettre d'atteindre ces objectifs, mais ou bien la *Charte* exige une chose, ou bien elle ne l'exige pas. Le rôle de la Cour est de déterminer ce que la *Charte* exige ou pas et d'appliquer ensuite les exigences, s'il en est, aux faits dont elle est saisie. Il ne s'agit pas simplement de promouvoir, autant que faire se peut, les valeurs perçues subjectivement par certains comme les assises de la *Charte* en général. Comme l'al. 2*d*) ne prévoit rien au sujet de la politique économique et sociale, notre Cour ne peut s'immiscer dans ce domaine lorsque ni la loi ni la Constitution ne l'y autorisent.

Finalement, dans *Health Services*, l'interprétation par la majorité des juges de la négociation collective en particulier et de l'al. 2*d*) en général est inapplicable en pratique. La formation majoritaire accorde la protection constitutionnelle à l'obligation de négocier de bonne foi sans inclure d'autres volets du modèle Wagner et elle entend protéger le processus de négociation collective sans protéger aussi ses fruits; l'un et l'autre sont indéfendables. Pour que l'obligation de négocier de bonne foi ne confère pas seulement un avantage illusoire, il faut à la fois un mécanisme pour sortir les négociations de l'impasse et une réparation en cas de manquements répétés à cette obligation. Ainsi, un mécanisme doit s'appliquer automatiquement pour mettre fin à une impasse — comme la grève ou l'arbitrage exécutoire. Également, dans les cas extrêmes de manquements, un arbitre pourra imposer l'inclusion de conditions précises dans la convention collective. Chacun de ces éléments va bien au-delà du seul processus et aboutit à la protection d'une issue concrète particulière. L'incapacité de la majorité à dissocier substance et processus, et la constitutionnalisation qui s'ensuit de conditions de la

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distinction between substance and process asserted in *Health Services*.

The *AEPA* does not violate s. 2(*d*) of the *Charter*. By enacting the *AEPA*, the legislature precisely addressed this Court's ruling in *Dunmore*. The text, context and purpose of the *AEPA* clearly demonstrate that the legislature intentionally opted not to include a duty on employers to engage in collective bargaining with employee associations. Section 5 of the *AEPA* cannot be read as imposing a duty to bargain in good faith. The words of s. 5 are unambiguous: they provide employee associations the opportunity to make representations to an employer. The only obligation on an employer is to provide the employee association with the opportunity to make representations and to listen if they are oral or read and acknowledge them if they are written. To find otherwise, would be to ignore the grammatical and ordinary meaning of the words, and the purpose of the *AEPA*, and would create ambiguity where none exists. Moreover, nothing in the explicit purpose in s. 1 of the *AEPA* or the clear words of the Minister who introduced the *AEPA* support the view that agricultural employees have a right to require agricultural employers to engage in collective bargaining.

As for the issues under s. 15, the category of agricultural worker does not rise to the level of an immutable (or constructively immutable) personal characteristic of the sort that would merit protection against discrimination under s. 15.

Per Deschamps J.: The holding in *Health Services* does not have the broad scope being attributed to it by the majority in the case at bar. The issue here is not, whether the *AEPA* provides a process that satisfies the right of an employees' association to make representations to the employer and have its views considered in good faith. The duty to act in good faith is part and parcel of a web of statutory components. It should not be found to be a constitutional requirement in the instant case. The expanded definition of freedom of association that resulted from *Health Services* has no bearing on the protection the Ontario legislature must provide to agricultural workers.

The effect of *Health Services* is that freedom of association includes the freedom to engage in associational activities and the ability of employees to act in common to reach shared goals related to workplace issues and terms of employment. This delineation of the scope of freedom of association does not entail a more expansive protection than the legislative framework mandated by

négociation collective font ressortir l'inapplicabilité pratique de la distinction entre la substance et le processus établie dans l'arrêt *Health Services*.

La *LPEA* ne contrevient pas à l'al. 2*d*) de la *Charte*. La *LPEA* donne précisément suite à l'arrêt *Dunmore*. Il ressort du texte, du contexte et de l'objet de cette loi que le législateur a délibérément choisi de ne pas obliger l'employeur à négocier avec une association d'employés. L'interprétation de l'art. 5 de la *LPEA* ne permet pas de conclure qu'il impose une obligation de négocier de bonne foi. Le libellé de l'art. 5 ne comporte aucune ambiguïté : il donne à une association d'employés l'occasion de présenter ses observations à l'employeur. Ce dernier est uniquement contraint à donner à l'association d'employés l'occasion de présenter des observations et à les écouter lorsqu'elles sont présentées oralement ou à les lire et à informer l'association qu'il les a lues lorsqu'elles sont présentées par écrit. Affirmer le contraire revient à faire fi du sens ordinaire et grammatical des mots et de l'objet de la *LPEA* et à créer de toutes pièces de l'ambiguïté. Qui plus est, rien dans l'objet énoncé à l'article premier de la *LPEA* ni dans les propos de la ministre ayant présenté la *LPEA* ne permet de conclure que des employés agricoles peuvent exiger de leur employeur qu'il négocie avec eux collectivement.

Quant aux arguments relatifs à l'art. 15, la fonction de travailleur agricole ne confère pas une caractéristique personnelle immuable (ou considérée comme immuable) justifiant la protection contre la discrimination garantie à l'art. 15.

La juge Deschamps : La décision rendue dans *Health Services* n'a pas la vaste portée que lui attribuent les juges majoritaires en l'espèce. Le litige ne réside pas dans la question de savoir si la *LPEA* prévoit un processus qui respecte le droit d'une association d'employés de présenter des observations à l'employeur et de les voir prises en compte de bonne foi. Si l'obligation d'agir de bonne foi s'inscrit dans un faisceau de dispositions législatives, il ne saurait être question en l'espèce de la tenir pour constitutionnelle. L'élargissement de la définition de liberté d'association résultant des conclusions prononcées dans *Health Services* n'a aucune incidence sur la protection que le législateur ontarien doit accorder aux employés agricoles.

Suivant l'arrêt *Health Services*, la liberté d'association englobe la liberté de participer à des activités associatives et la faculté des employés d'agir de concert pour réaliser des objectifs communs concernant le travail et les conditions d'emploi. Définie de la sorte, la liberté d'association ne nécessite pas une protection plus grande que celle prévue par le cadre législatif dont la Cour ordonne

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Dunmore for the agricultural workers. The *AEPA* complies with this Court's conclusion in *Dunmore* and it complies with the *Charter.*

Even though labour law provides tools that help reduce economic inequality, not all aspects of labour law are protected by the *Charter.* Economic equality is not an "equality right" for the purposes of s. 15 of the *Charter. Dunmore* was based on the notion that the *Charter* does not ordinarily oblige the government to take action to facilitate the exercise of a fundamental freedom. Recognition was given to the dichotomy between positive and negative rights. To get around the general rule, a framework was established for cases in which the vulnerability of a group justified resorting to government support.

To redress economic inequality, it would be more faithful to the design of the *Charter* to open the door to the recognition of more analogous grounds under s. 15. Each *Charter* protection should not be interpreted in a formalistic manner. Rather, if the law needs to move away from *Dunmore*'s distinction between positive and negative rights, this should not be accomplished by conflating freedom of association with the right to equality or any other *Charter* right that may be asserted by a litigant. An analysis based on principles grounding the protection of rights and freedoms offers a better prospect of judicial consistency than one based on the more amorphous notion of "Canadian values".

Per Abella J. (dissenting): The *AEPA* violates s. 2(*d*) of the *Charter* because it does not protect, and was never intended to protect, collective bargaining rights. The *AEPA*, enacted in 2002, was the government's good faith implementation of this Court's 2001 decision in *Dunmore*, which defined the scope of s. 2(*d*) as being the right to organize and make representations. *Health Services*, decided in 2007, expanded that scope to include protection for a process of collective bargaining, including the duty to consult and negotiate in good faith. The applicable legal principles are therefore those set out in *Health Services* and the *AEPA* must be assessed against the revised constitutional standard.

The *AEPA* has virtually no language that indicates protection for a process of collective bargaining. It requires only that an employer "listen" if representations are made orally, or, if made in writing, "acknowledge" that the representations have been read. No response, discussions, or negotiations are required. Moreover, when the legislation was introduced, the government's intention to exclude any protection for collective bargaining rights from the legislation was unequivocally expressed by the Minister of Agriculture

l'adoption dans l'arrêt *Dunmore* pour régir les employés agricoles. La *LPEA* respecte les principes énoncés dans l'arrêt *Dunmore* et est conforme à la *Charte*.

Même si le droit du travail offre des outils qui contribuent à atténuer la disparité des revenus, tous ses aspects ne bénéficient pas de la protection de la *Charte*. L'égalité économique ne constitue pas l'un des « droits à l'égalité » garantis à l'art. 15 de la *Charte*. L'arrêt *Dunmore* est fondé sur le principe voulant que, généralement, la *Charte* n'oblige pas l'État à agir pour faciliter l'exercice d'une liberté fondamentale. La dichotomie droits positifs/droits négatifs y est reconnue. Pour contourner la règle générale, une grille d'analyse a été établie pour les cas où la vulnérabilité d'un groupe justifierait le recours à un soutien étatique.

Pour remédier à une inégalité économique, il serait plus conforme à la structure de la *Charte* de reconnaître de nouveaux motifs analogues à ceux énumérés à l'art. 15. Il ne faut pas interpréter de manière formaliste chacune des garanties de la *Charte*. S'il est nécessaire de s'éloigner de la distinction entre droits positifs et droits négatifs utilisée dans *Dunmore*, il ne faudrait pas pour autant confondre droit à l'égalité et liberté d'association, ou tout autre droit protégé par la *Charte* susceptible d'être invoqué par une partie à un litige. L'analyse prenant appui sur les principes qui structurent la protection des droits et des libertés permet plus de cohérence judiciaire que celle qui repose sur la notion floue de « valeurs canadiennes ».

La juge Abella (dissidente) : La *LPEA* contrevient à l'al. 2*d*) de la *Charte* car elle ne protège pas les droits de négociation collective, et n'a jamais eu pour objet de les protéger. Le gouvernement a édicté la *LPEA* de bonne foi, en 2002, pour donner suite à l'arrêt *Dunmore*, rendu en 2001, dans lequel la Cour avait statué que l'al. 2*d*) protégeait le droit de s'organiser et de présenter des observations. En 2007, l'arrêt *Health Services* a étendu cette protection au processus de négociation collective, qui inclut notamment l'obligation de consulter et de négocier de bonne foi. Les principes de droit applicables sont par conséquent ceux qui ont été établis dans *Health Services* et la validité de la *LPEA* doit être examinée en fonction de cette norme constitutionnelle redéfinie.

Le libellé de la *LPEA* est pratiquement dépourvu de termes susceptibles de traduire une protection quelconque conférée au processus de négociation collective. Cette loi oblige seulement l'employeur à « écouter » les observations présentées oralement ou à « informer » l'association d'employés qu'il a lu celles qui lui ont été présentées par écrit. Elle n'exige de sa part aucune réponse, discussion ou négociation. En outre, lors du dépôt du projet de loi, la ministre de l'Agriculture et de l'Alimentation a exprimé on ne peut plus clairement l'intention

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and Food. This clarity of statutory language and legislative intent cannot be converted by the interpretive process into a completely different scheme.

For agricultural workers, the meaningful exercise of the right to collective bargaining requires two additional components. The first is a statutory enforcement mechanism with a mandate to resolve bargaining disputes. Since it is not a contravention of the *AEPA* to refuse to engage in a good faith process to make reasonable efforts to arrive at a collective agreement, the Tribunal is without jurisdiction to grant a remedy for any violations of s. 2(*d*) rights. The second essential element is a requirement that the employer bargain only with the representative selected by a majority of the employees in the bargaining unit. This concept, known as majoritarian exclusivity, has been a central and defining principle of labour relations in Canada since 1944. Given the singular employment disadvantage of agricultural workers, the absence of statutory protection for exclusivity effectively nullifies the ability of agricultural workers to have a unified and therefore more cogent voice in attempting to mitigate and ameliorate their working conditions.

The absence of these statutory protections cannot be justified under s. 1 of the *Charter*. The objectives of the rights limitation — the failure to provide agricultural workers with the necessary statutory protections to exercise the right to bargain collectively — were to protect the family farm and farm production/viability. The minimal impairment branch of the *Oakes* test is determinative in this case. The complete absence of any statutory protection for a process of collective bargaining in the *AEPA* cannot be said to be minimally impairing of the s. 2(*d*) right. The rights limitation is not even remotely tailored to either government objective; it is, in fact, not tailored at all. Preventing all agricultural workers from access to a process of collective bargaining in order to protect family farms, no matter their size or nature of the agricultural enterprise, harms the s. 2(*d*) right in its entirety, not minimally. It is worth noting too that all provinces except Alberta give agricultural workers the same collective bargaining rights as other employees. There is no evidence that this has harmed the economic viability of farming in those provinces, or that the nature of farming in Ontario uniquely justifies a severely restrictive rights approach.

du gouvernement d'exclure toute protection des droits de négociation collective. Le processus d'interprétation ne saurait transformer le libellé clair du texte législatif et l'intention du législateur en un régime complètement différent.

L'exercice véritable du droit à la négociation collective par les travailleurs agricoles suppose deux autres composantes. D'une part, il doit exister une voie de droit prévue par la loi pour la résolution des différends. Le refus de participer de bonne foi à un processus de négociation et de faire des efforts raisonnables pour arriver à une convention collective ne constituant pas une contravention à la *LPEA*, le Tribunal n'est pas compétent pour ordonner une réparation en cas de violation des droits que garantit l'al. 2*d*). D'autre part, l'employeur doit négocier uniquement avec le représentant choisi par la majorité des employés de l'unité de négociation. Ce concept du monopole syndical conféré par un vote majoritaire est un principe déterminant et d'importance capitale dans les relations du travail au Canada depuis 1944. Compte tenu de la situation professionnelle particulière désavantageuse des travailleurs agricoles, l'absence de reconnaissance légale du monopole syndical a pour effet de les priver de la capacité d'avoir une voix unie et puissante pour tenter d'alléger et d'améliorer leurs conditions de travail.

L'absence de ces protections dans la loi n'est pas justifiée au regard de l'article premier de la *Charte*. Les objectifs de cette limitation des droits — c.-à-d. du fait de ne pas accorder aux travailleurs agricoles les protections légales nécessaires à l'exercice de leur droit de négociation collective — étaient de protéger la ferme familiale ainsi que la productivité et la viabilité des exploitations agricoles. Le critère de l'atteinte minimale du test de l'arrêt *Oakes* est déterminant en l'espèce. L'absence dans la loi de toute protection du processus de négociation collective ne peut pas être considérée comme une atteinte minimale au droit garanti par l'al. 2*d*). Cette restriction n'est pas, ne serait-ce qu'un tant soit peu, adaptée à la réalisation de l'un ou l'autre objectif de l'État; en fait, elle n'est pas adaptée du tout. Priver tous les travailleurs agricoles d'un processus de négociation collective pour protéger les fermes familiales, sans égard à la taille ou à la nature de l'exploitation agricole, porte atteinte au droit garanti par l'al. 2*d*) dans sa totalité, non minimalement. Il convient de souligner que dans chaque province, sauf en Alberta, les travailleurs agricoles bénéficient des mêmes droits de négociation collective que d'autres employés. Rien ne démontre que cette situation a nui à la viabilité économique des exploitations agricoles dans ces provinces ni que la nature particulière de l'agriculture en Ontario justifie une restriction aussi draconienne.

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(QL), 2008 CarswellOnt 6726, setting aside a decision of Farley J. (2006), 79 O.R. (3d) 219, 263 D.L.R. (4th) 425, 137 C.R.R. (2d) 123, 2006 CLLC ¶220-009, [2006] O.J. No. 45 (QL), 2006 CarswellOnt 55. Appeal allowed and action dismissed, Abella J. dissenting.

Robin K. Basu and *Shannon M. Chace*, for the appellant.

Paul J. J. Cavalluzzo and *Fay C. Faraday*, for the respondents.

Anne M. Turley, for the intervener the Attorney General of Canada.

Michel Déom and *Geneviève Lessard*, for the intervener the Attorney General of Quebec.

Gaétan Migneault and *Michelle Brun-Coughlan*, for the intervener the Attorney General of New Brunswick.

Neena Sharma, for the intervener the Attorney General of British Columbia.

Roderick S. Wiltshire, for the intervener the Attorney General of Alberta.

John D. R. Craig and *Jodi Gallagher*, for the intervener the Ontario Federation of Agriculture.

Roy L. Heenan and *Thomas Brady*, for the intervener the Federally Regulated Employers — Transportation and Communications.

Robert Dupont, *Pascale Gauthier* and *Jean H. Lafleur*, for the intervener Conseil du patronat du Québec Inc.

Brad Elberg and *Kelly Henriques*, for the intervener the Mounted Police Members' Legal Fund.

Augustus G. Lilly, *Q.C.*, and *Stephen F. Penney*, for the intervener the Canadian Employers Council.

Peter A. Gall, *Q.C.*, *Donald R. Munroe*, *Q.C.*, and *Andrea L. Zwack*, for the interveners

4543 (QL), 2008 CarswellOnt 6726, qui a annulé une décision du juge Farley (2006), 79 O.R. (3d) 219, 263 D.L.R. (4th) 425, 137 C.R.R. (2d) 123, 2006 CLLC ¶220-009, [2006] O.J. No. 45 (QL), 2006 CarswellOnt 55. Pourvoi accueilli et action rejetée, la juge Abella est dissidente.

Robin K. Basu et *Shannon M. Chace*, pour l'appelant.

Paul J. J. Cavalluzzo et *Fay C. Faraday*, pour les intimés.

Anne M. Turley, pour l'intervenant le procureur général du Canada.

Michel Déom et *Geneviève Lessard*, pour l'intervenant le procureur général du Québec.

Gaétan Migneault et *Michelle Brun-Coughlan*, pour l'intervenant le procureur général du Nouveau-Brunswick.

Neena Sharma, pour l'intervenant le procureur général de la Colombie-Britannique.

Roderick S. Wiltshire, pour l'intervenant le procureur général de l'Alberta.

John D. R. Craig et *Jodi Gallagher*, pour l'intervenante la Fédération de l'agriculture de l'Ontario.

Roy L. Heenan et *Thomas Brady*, pour l'intervenant les Employeurs des transports et communications de régie fédérale.

Robert Dupont, *Pascale Gauthier* et *Jean H. Lafleur*, pour l'intervenant le Conseil du patronat du Québec Inc.

Brad Elberg et *Kelly Henriques*, pour l'intervenant le Fonds de recours juridique des membres de la Gendarmerie.

Augustus G. Lilly, *c.r.*, et *Stephen F. Penney*, pour l'intervenant le Conseil canadien des employeurs.

Peter A. Gall, *c.r.*, *Donald R. Munroe*, *c.r.*, et *Andrea L. Zwack*, pour les intervenants Coalition

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the Coalition of BC Businesses and the British Columbia Agriculture Council.

Selwyn A. Pieters and *Adrian A. Smith*, for the interveners Justicia for Migrant Workers and the Industrial Accident Victims Group of Ontario.

Steven Barrett and *Ethan Poskanzer*, for the intervener the Canadian Labour Congress.

Ian J. Roland and *Michael Fenrick*, for the intervener the Canadian Police Association.

Joshua S. Phillips and *Antony Singleton*, for the intervener the Canadian Civil Liberties Association.

of BC Businesses et British Columbia Agriculture Council.

Selwyn A. Pieters et *Adrian A. Smith*, pour les intervenants Justicia for Migrant Workers et Industrial Accident Victims Group of Ontario.

Steven Barrett et *Ethan Poskanzer*, pour l'intervenant le Congrès du travail du Canada.

Ian J. Roland et *Michael Fenrick*, pour l'intervenante l'Association canadienne des policiers.

Joshua S. Phillips et *Antony Singleton*, pour l'intervenante l'Association canadienne des libertés civiles.

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The judgment of McLachlin C.J. and Binnie, LeBel, Fish and Cromwell JJ. was delivered by

Version française du jugement de la juge en chef McLachlin et des juges Binnie, LeBel, Fish et Cromwell rendu par

THE CHIEF JUSTICE AND LEBEL J. —

LA JUGE EN CHEF ET LE JUGE LEBEL —

I. Introduction

[1] This appeal raises anew the issue of the constitutionality of the labour relations regime that applies to farm workers in Ontario. Most Canadian provinces have brought the farming sector under their general labour relations laws, with some exceptions and restrictions. Except for a very

[1] Dans le présent pourvoi, notre Cour doit de nouveau se prononcer sur la constitutionnalité du régime de relations du travail applicable aux travailleurs agricoles en Ontario. Dans la plupart des provinces, le secteur agricole relève de la législation générale du travail, à quelques exceptions et

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short period of time, Ontario has always excluded farms and farm workers from the application of its *Labour Relations Act* (currently *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A) ("*LRA*"). In the present appeal, our Court must determine whether Ontario's latest attempt to frame a separate labour relations regime for the farming sector respects the constitutional guarantee of freedom of association, or violates it by failing to safeguard the exercise of collective bargaining rights. The *Agricultural Employees Protection Act, 2002*, S.O. 2002, c. 16 ("*AEPA*" or "Act"), was a response to this Court's decision in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, which found that the previous legislative scheme violated s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*.

[2] We are of the view that the *AEPA* has not been shown to be unconstitutional. Section 2(*d*) of the *Charter* protects the right to associate to achieve collective goals. Laws or state actions that substantially interfere with the ability to achieve workplace goals through collective actions have the effect of negating the right of free association and therefore constitute a limit on the s. 2(*d*) right of free association, which renders the law or action unconstitutional unless it is justified under s. 1 of the *Charter*. This requires a process of engagement that permits employee associations to make representations to employers, which employers must consider and discuss in good faith.

[3] The law here at issue, the *AEPA*, properly interpreted, meets these requirements, and is not unconstitutional. We would therefore allow the appeal.

[4] Before moving to the analysis of the issues raised by the appeal, it will be useful to review the factual background and the jurisprudential developments that gave rise to this case.

limitations près. Cependant, sauf pendant un très court laps de temps, le législateur ontarien a toujours soustrait les entreprises et les travailleurs agricoles à l'application de sa *Loi sur les relations de travail* (l'actuelle *Loi de 1995 sur les relations de travail*, L.O. 1995, ch. 1, ann. A) (« *LRT* »). Notre Cour doit aujourd'hui déterminer si la plus récente tentative d'établissement d'un régime distinct pour le secteur agricole respecte la liberté d'association garantie par la Constitution ou si elle y porte atteinte, parce qu'elle ne protège pas l'exercice du droit de négociation collective. La *Loi de 2002 sur la protection des employés agricoles*, L.O. 2002, ch. 16 (« *LPEA* » ou « Loi »), a été adoptée en réaction à l'arrêt *Dunmore c. Ontario (Procureur général)*, 2001 CSC 94, [2001] 3 R.C.S. 1016, dans lequel notre Cour a statué que le texte de loi antérieur contrevenait à l'al. 2*d*) de la *Charte canadienne des droits et libertés*.

[2] À notre avis, l'inconstitutionnalité de la *LPEA* n'est pas démontrée. L'alinéa 2*d*) de la *Charte* protège le droit de s'associer pour atteindre des objectifs collectifs. Une loi ou une action de l'État qui entrave substantiellement la capacité de réaliser des objectifs liés au travail grâce à des actions concertées fait obstacle à l'exercice du droit de libre association. Une telle loi ou action restreint donc la liberté d'association et devient de ce fait inconstitutionnelle, sauf justification au regard de l'article premier. Cette exigence constitutionnelle demande l'établissement d'un processus de dialogue où l'association d'employés peut présenter des observations à l'employeur, qui doit en prendre connaissance et en discuter de bonne foi.

[3] Correctement interprétée, la loi visée en l'espèce, la *LPEA*, satisfait à cette exigence et n'est pas inconstitutionnelle. Nous sommes donc d'avis d'accueillir le pourvoi.

[4] Un rappel des faits et de l'évolution jurisprudentielle qui se trouvent à l'origine du litige s'impose avant l'analyse des questions que soulève le pourvoi.

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II. Background

A. *The Exclusion of the Farming Sector From the LRA and the Impact of Dunmore*

[5] Prior to 1994, indeed since 1943, farm workers had been excluded from the general labour relations regime established by the *LRA*. In 1994, the Ontario legislature enacted the *Agricultural Labour Relations Act, 1994*, S.O. 1994, c. 6 ("*ALRA*"), which extended trade union and collective bargaining rights to agricultural workers. A year later, the legislature repealed the *ALRA* in its entirety and again excluded farm workers from the labour relations regime set out in the *ALRA* (*Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1 ("*LRESLAA*")). The *LRESLAA* was challenged on the basis that it infringed the guarantees of freedom of association under s. 2(*d*) and equality under s. 15 of the *Charter*. In *Dunmore*, a majority of this Court found a breach of s. 2(*d*). It held that the claimants were substantially unable to organize without protective legislation, and declared the law to be unconstitutional. This had the effect of nullifying the exclusion of farm workers from the *LRA*, but this Court suspended the declaration of invalidity for 18 months. The majority concluded it was not necessary to deal with the s. 15 challenge.

[6] In response, the Ontario legislature enacted the *AEPA* in 2002, which came into force on June 17, 2003. In brief, the *AEPA* excluded farm workers once again from the *LRA*, but crafted a labour relations regime for farm workers in Ontario. It granted them the rights to form and join an employees' association, to participate in its activities, to assemble, to make representations to their employers through their association on their terms and conditions of employment, and the right to be protected against interference, coercion and discrimination in the exercise of their rights (s. 1(2)). The employer must give an association the opportunity to make representations respecting terms and conditions of employment, and it must listen to those representations or read them (s. 5). The *AEPA* tasks

II. Contexte

A. *La non-application de la LRT au secteur agricole et l'incidence de l'arrêt Dunmore*

[5] Avant 1994 — depuis 1943 en fait —, le régime général de la *LRT* ne s'appliquait pas aux travailleurs agricoles. La *Loi de 1994 sur les relations de travail dans l'agriculture*, L.O. 1994, ch. 6, a accordé aux travailleurs agricoles le droit à la syndicalisation et à la négociation collective. Un an plus tard, elle était abrogée en entier, et les travailleurs agricoles perdaient le bénéfice de l'application du régime de relations du travail qu'elle prévoyait (*Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l'emploi*, L.O. 1995, ch. 1 (« *LMLRTE* »)). La *LMLRTE* a été contestée au motif qu'elle portait atteinte à la liberté d'association et au droit à l'égalité garantis respectivement à l'al. 2*d*) et à l'art. 15 de la *Charte*. Dans l'arrêt *Dunmore*, la Cour a conclu à la majorité qu'elle ne respectait pas l'al. 2*d*), parce que les demandeurs se trouvaient substantiellement dans l'incapacité de s'associer sans protection légale. Elle a déclaré la loi inconstitutionnelle, annulant par le fait même l'exception de la *LRT* qui soustrayait les travailleurs agricoles à son application, mais elle a accordé au législateur un sursis d'application de 18 mois. La majorité a jugé qu'il n'était pas nécessaire d'examiner l'argument fondé sur l'art. 15.

[6] En 2002, à la suite de cet arrêt, l'Ontario a adopté la *LPEA*, qui est entrée en vigueur le 17 juin 2003. En bref, la *LPEA* rétablit l'exception de la *LRT* visant les travailleurs agricoles ontariens, mais elle crée pour eux un régime de relations du travail particulier. Elle leur confère le droit de former une association et d'y adhérer, de participer à ses activités, de se réunir, de présenter à l'employeur, par l'entremise de leur association, des observations relatives à leurs conditions d'emploi et d'exercer leurs droits sans crainte d'ingérence, de contrainte ou de discrimination (par. 1(2)). Par ailleurs, l'employeur doit donner à une association d'employés l'occasion de présenter des observations au sujet des conditions d'emploi et il est tenu de les écouter ou de les lire (art. 5). La *LPEA* confie au

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a tribunal, the Agriculture, Food and Rural Affairs Appeal Tribunal, with hearing and deciding disputes about the application of the Act (ss. 2 and 11). After limited efforts to use the new protections of the *AEPA*, the respondents mounted a constitutional challenge to its validity.

B. *The Constitutional Challenge to the AEPA*

[7] The respondents argue that three more protections are required to meet the requirements of s. 2(*d*) of the *Charter*: (1) statutory protection for majoritarian exclusivity, meaning that each bargaining unit is represented by a single bargaining agent; (2) an *LRA*-type statutory mechanism to resolve bargaining impasses and interpret collective agreements; and (3) a statutory duty to bargain in good faith. The respondents argue that the Court's recent decision in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, entitles them to laws offering these protections.

[8] The four individual farm workers in this case (three of them respondents and an affiant) worked at Rol-Land Farms Ltd., a large industrial-type mushroom farm in Kingsville, Ontario. In 2002, after this Court's decision in *Dunmore*, Xin Yuan Liu and other workers at Rol-Land approached the United Food and Commercial Workers Union Canada ("UFCW") to represent them and bargain on their behalf. By the spring of 2003, 70 percent of the workers at Rol-Land had joined the union.

[9] Rol-Land refused to recognize the UFCW as the employees' representative. The UFCW then filed an application for certification with the Ontario Labour Relations Board, under the *LRA*. In the ensuing vote, the workers voted 132 to 45 in favour of certification. The resolution of the application has been kept on hold, pending the outcome of this appeal. After the vote, the UFCW

Tribunal d'appel de l'agriculture, de l'alimentation et des affaires rurales la fonction d'entendre et de régler tout litige relatif à l'application de la Loi (par. 2 et art. 11). Après quelques démarches pour se prévaloir des nouvelles mesures de protection de la *LPEA*, les intimés ont contesté sa validité constitutionnelle.

B. *La contestation constitutionnelle de la LPEA*

[7] Les intimés soutiennent que trois autres mesures de protection sont nécessaires pour assurer le respect de l'al. 2*d*) de la *Charte* : (1) la consécration légale du principe du monopole syndical conféré par un vote majoritaire suivant lequel chaque unité de négociation est représentée par un seul agent négociateur, (2) un mécanisme légal analogue à celui de la *LRT* pour dénouer l'impasse des négociations et interpréter une convention collective et (3) l'obligation légale de négocier de bonne foi. Les intimés soutiennent que le récent arrêt *Health Services and Support — Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, 2007 CSC 27, [2007] 2 R.C.S. 391, leur reconnaît le droit à des dispositions qui offrent ces protections.

[8] Les quatre travailleurs agricoles visés en l'espèce (trois intimés et un déposant) travaillaient pour Rol-Land Farms Ltd., une grande champignonnière de type industriel exploitée à Kingsville, en Ontario. En 2002, dans la foulée de l'arrêt *Dunmore*, Xin Yuan Liu et d'autres travailleurs de Rol-Land ont pris contact avec un syndicat, l'Union internationale des travailleurs et travailleuses unis de l'alimentation et du commerce — Canada (la « TUAC »), pour qu'il les représente et négocie en leur nom. Au printemps 2003, 70 p. cent des travailleurs de l'entreprise avaient adhéré au syndicat.

[9] Rol-Land ayant refusé de reconnaître sa qualité de représentant des employés, le syndicat a déposé une demande d'accréditation à la Commission des relations de travail de l'Ontario sous le régime de la *LRT*. Lors d'un scrutin subséquent, les travailleurs ont voté en faveur de l'accréditation à 132 voix contre 45. La Commission a sursis à sa décision jusqu'à l'issue du présent

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wrote to Rol-Land requesting a meeting to commence negotiations toward a contract for the workers. Rol-Land did not respond to the letter. The respondents assert that the owner of Rol-Land told a meeting of workers that the union would never be recognized (R.F., at para. 58).

[10] The UFCW also attempted to bargain collectively on behalf of employees at Platinum Produce, an industrial greenhouse operating in Chatham, Ontario. While the employer expressed doubt that the UFCW could be an employees' association under the *AEPA*, it gave the union an opportunity to make brief presentations. The meeting lasted approximately 15 minutes. The employer's position was that the company was not required to bargain with the union and the meeting was not to be considered collective bargaining towards a collective agreement.

[11] The UFCW subsequently presented Platinum Produce's counsel with a draft collective agreement setting out proposed terms. That meeting lasted approximately five minutes. The employer has not responded to the proposals or to other proposed meeting dates. There have been no further meetings or communications about terms and conditions of work.

[12] The respondents did not attempt to pursue remedies under the *AEPA*. Specifically, no recourse was made to the Tribunal set up under the Act to deal with complaints. Rather, the respondents sought a declaration that s. 3(b.1) of the *LRA*, which provides that the *LRA* does not apply to farm workers, and that the *AEPA* as a whole were unconstitutional. In brief, they submitted that these laws breached s. 2(*d*) of the *Charter* by failing to provide effective protection for the right to organize and bargain collectively and violated s. 15 by excluding farm workers from the protections accorded to workers in other sectors.

pourvoi. Après le scrutin, le syndicat a écrit à Rol-Land pour convenir d'une réunion en vue d'entreprendre la négociation d'une convention collective. Rol-Land n'a pas répondu à sa lettre. Les intimés affirment que lors d'une assemblée des travailleurs, le propriétaire de l'entreprise a déclaré que le syndicat ne serait jamais reconnu (m.i., par. 58).

[10] La TUAC a également tenté de négocier une convention collective au nom des employés de Platinum Produce, une entreprise exploitant des serres industrielles à Chatham, en Ontario. Même si l'employeur a dit douter que le syndicat puisse constituer une association d'employés au sens de la *LPEA*, il lui a donné l'occasion de présenter de brèves observations. La réunion a duré une quinzaine de minutes. L'employeur a alors nié l'existence de l'obligation de négocier avec le syndicat et affirmé que la réunion ne devait pas être considérée comme une séance de négociation collective en vue de la conclusion d'une convention collective.

[11] La TUAC a par la suite présenté à l'avocat de Platinum Produce une ébauche de convention collective renfermant ses propositions. La rencontre a duré environ cinq minutes. L'employeur n'a donné suite ni à ces propositions ni à celle de convenir d'un calendrier de rencontres. Il n'y a eu aucune réunion ou communication subséquente au sujet des conditions de travail.

[12] Les intimés n'ont pas tenté d'exercer les recours prévus dans la *LPEA*. Plus précisément, ils ne se sont pas adressés au Tribunal créé par la Loi pour statuer sur les plaintes. Ils ont plutôt demandé un jugement déclarant inconstitutionnels l'al. 3b.1) de la *LRT* — qui exclut l'application de la *LRT* aux travailleurs agricoles — et la *LPEA* dans son ensemble. En résumé, ils soutenaient que ces lois violaient l'al. 2*d*) de la *Charte* en ce qu'elles ne protégeaient pas véritablement le droit de s'associer et de négocier collectivement, et qu'elles contrevenaient à l'art. 15 en refusant aux travailleurs agricoles les mesures de protection reconnues aux travailleurs d'autres secteurs.

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III. Judicial History

A. *Ontario Superior Court of Justice (2006), 79 O.R. (3d) 219 (the Applications Judge)*

[13] The chambers judge, Farley J., heard the application before the judgment of this Court in *Health Services*. He proceeded on the assumption that s. 2(*d*) did not protect collective bargaining. He dismissed the application on the ground that the *AEPA* met the minimum constitutional requirements necessary to protect the freedom to organize. He began by adopting the comments made by Sharpe J. at the trial level of *Dunmore* and finding that agricultural workers "are 'poorly paid, face difficult working conditions, have low levels of skills and education, low status and limited employment mobility'" (paras. 23 and 33). But he was of the view that the *AEPA* did not prevent them from attempting to form employees' associations. He stated:

> There is nothing in the *AEPA* which would prevent the UFCW or any other union from attempting to organize agricultural workers into an employees' association, recognizing that such an employees' association would not thereby automatically have the right to strike nor the right to bargain collectively. See discussion in Peter W. Hogg, *Constitutional Law of Canada*, looseleaf, vol. 2 (Toronto: Carswell, 1997) at p. 41-5/6 (2002). The *AEPA* provides that the employees' association may make representations to an employer concerning the terms and conditions of employment (s. 5 *AEPA*). These representations may be made by someone who is not a member of the association (s. 5(2)) so that a "union staffer" could perform that function. The representation may be made orally or in writing (s. 5(5)). One must read s. 5(6) and (7) in a purposive way in context. Thus while the employer need only give the association a written acknowledgment that the employer has read the written representations (s. 5(7)), it is implicit in the making of an oral representation that the recipient is hearing the oral representations as the employer has a duty to listen and the association speaker will have the opportunity then and there to enquire whether the recipient has heard the representations. As well the concept of listening and reading respectively involves the aspect of comprehending and considering the representations. Perhaps unfortunately there is no specific requirement that the employer respond to the substance of the representations; however, it should be noted that this would then involve the parties in a form of collective bargaining. [para. 19]

III. Historique judiciaire

A. *Cour supérieure de justice de l'Ontario (2006), 79 O.R. (3d) 219 (le juge des requêtes)*

[13] Le juge Farley, chargé d'entendre les requêtes, a entendu la demande avant l'arrêt *Health Services* de notre Cour. Étant d'avis que l'al. 2*d*) ne protège pas la négociation collective, il a rejeté la demande au motif que la *LPEA* satisfaisait minimalement aux exigences découlant de la protection constitutionnelle de la liberté d'association. Faisant siens les commentaires formulés par le juge Sharpe en première instance dans *Dunmore*, il a conclu que les travailleurs agricoles [TRADUCTION] « sont "mal rémunérés, [qu']ils ont des conditions de travail difficiles, une formation et une instruction limitées, un statut peu élevé et une mobilité d'emploi restreinte" » (par. 23 et 33), mais que la *LPEA* ne les empêche pas de tenter de former des associations d'employés :

> [TRADUCTION] Aucune disposition de la *LPEA* n'empêche la TUAC ou tout autre syndicat de tenter de regrouper des travailleurs agricoles au sein d'une association d'employés, étant entendu qu'une telle association ne jouirait automatiquement ni du droit de grève ni du droit de négociation collective. Voir Peter W. Hogg, *Constitutional Law of Canada*, feuilles mobiles, vol. 2 (Toronto : Carswell, 1997), à la p. 41-5/6 (2002). La *LPEA* dispose qu'une association d'employés peut présenter à l'employeur des observations au sujet des conditions d'emploi (art. 5). Les observations peuvent être présentées par une personne qui n'est pas membre de l'association (par. 5(2)), de sorte qu'un « permanent syndical » pourrait s'acquitter de cette tâche. Les observations peuvent être formulées oralement ou par écrit (par. 5(5)). L'interprétation téléologique et contextuelle s'impose à l'égard des par. 5(6) et (7). Ainsi, bien que l'employeur n'ait qu'à informer l'association par écrit qu'il a lu les observations écrites (par. 5(7)), la présentation d'observations orales suppose que leur destinataire les entend, car l'employeur a l'obligation d'écouter et le représentant de l'association aura alors l'occasion de lui demander s'il les a bien entendues. En outre, les notions d'écoute et de lecture font respectivement intervenir l'élément de la compréhension et celui de l'examen. Il est peut-être malheureux que l'employeur ne soit pas expressément tenu de répondre aux observations elles-mêmes, mais force est de constater qu'une telle obligation engagerait les parties dans une sorte de négociation collective. [par. 19]

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[14] With respect to the particular statutory protections in the *AEPA*, Farley J. found that they met the minimum required standards. He found that they confer the power to organize (s. 1); protection against denial of access to property (s. 7); protection against employer interference with trade union activity (s. 8); protection against discrimination (s. 9); protection against intimidation and coercion (s. 10); protection against alteration of working conditions during the certification process (ss. 9-10); protection against coercion of witnesses (s. 10); and removal of Board notices (s. 10). He allowed that it would have been preferable to have mirrored the provisions of the *LRA* more precisely "to eliminate possible fears" that employers might alter working conditions to hinder associational activities (para. 18). However, he felt that the answer to these concerns lay with the Tribunal, which had not been asked to deal with the workers' complaints. He stated:

> If the Tribunal felt that it was for some jurisdictional reason constrained from negatively sanctioning such activity, then one would presume that the applicants or others of a like mind together with the UFCW would have a strong case to bring back in this regard. One would think it better to see how the Tribunal operates in fact before condemning it as powerless to deal with such abuses. This wait and see pragmatic approach is desirable with respect to possible concerns about lack of labour relations expertise/experience on the part of the specified panel roster of the Tribunal. There has been no use of the mechanics of the *AEPA* as to bringing a case before the Tribunal; the applicants stated that it would be fruitless to bring a useless application before a useless Tribunal. I am of the view that this condemnation is premature. A successful application would do one of several things: be effective positively as to action; or morally give the wrongdoing employer a "bloody nose"; or if truly an empty process, it would demonstrate the need for strengthening by legislative amendment. See also *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, . . . at p. 1099 . . . where Sopinka J. for the court stated: "This Court has been vigilant to ensure that a proper factual foundation exists before measuring legislation against the provisions of the *Charter*, particularly where the effects of impugned legislation are the subject of the attack." [para. 18]

Farley J. also dismissed the discrimination claim brought under s. 15 of the *Charter.*

[14] Par ailleurs, le juge Farley a décidé que les mesures de protection particulières prévues par la *LPEA* satisfont aux normes minimales. Selon lui, la Loi confère le pouvoir de former une association (art. 1) et elle protège contre le refus de l'employeur de donner accès à sa propriété (art. 7), son ingérence dans les activités syndicales (art. 8), la discrimination (art. 9), l'intimidation et la contrainte (art. 10), la modification des conditions de travail pendant le processus d'accréditation (art. 9 et 10), la contrainte de témoins (art. 10) et l'enlèvement d'avis dont l'affichage est exigé par la Commission (art. 10). Il reconnaît qu'il aurait été préférable de reprendre les dispositions de la *LRT* plus précisément [TRADUCTION] « pour écarter la crainte possible » qu'un employeur puisse modifier des conditions de travail afin de gêner des activités associatives (par. 18). Il estime cependant qu'il appartenait au Tribunal — qui n'a pas été saisi des plaintes des travailleurs — de se prononcer sur ces questions. Il ajoute :

> [TRADUCTION] Si pour quelque raison liée à sa compétence, le Tribunal estimait ne pas pouvoir condamner de tels actes, les demandeurs ou d'autres personnes partageant leurs vues et la TUAC auraient vraisemblablement une solide cause d'action à faire valoir en justice à cet égard. Il semble préférable de voir comment le Tribunal s'acquitte de sa tâche dans les faits avant de le déclarer inapte à réprimer de tels abus. Il vaut mieux faire preuve de pragmatisme et laisser sa chance au coureur malgré d'éventuels doutes concernant l'expérience des membres du Tribunal en matière de relations du travail. La procédure qu'établit la *LPEA* pour saisir le Tribunal n'a pas été suivie, les demandeurs estimant qu'il ne servait à rien de présenter une demande inutile à un tribunal inefficace. À mon avis, cette condamnation était prématurée. Une demande accueillie produit l'un ou l'autre des résultats suivants : faire effectivement avancer les choses ou infliger un « revers » moral à l'employeur fautif ou, s'il s'agit véritablement d'un processus vain, démontrer la nécessité de son resserrement par voie législative. Voir également *Danson c. Ontario (Procureur général)*, [1990] 2 R.C.S. 1086, [. . .] à la p. 1099, [. . .] où le juge Sopinka dit au nom de la Cour : « Notre Cour a toujours veillé soigneusement à ce qu'un contexte factuel adéquat existe avant d'examiner une loi [au] regard des dispositions de la *Charte*, surtout lorsque le litige porte sur les effets de la loi contestée. » [par. 18]

Le juge Farley a rejeté par ailleurs le moyen de discrimination fondé sur l'art. 15 de la *Charte*.

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B. *Ontario Court of Appeal, 2008 ONCA 760, 92 O.R. (3d) 481 (Winkler C.J.O. and Cronk and Watt JJ.A.)*

[15] The Court of Appeal allowed the appeal and declared the *AEPA* to be constitutionally invalid. It rendered its decision after the judgment of our Court in *Health Services*. Winkler C.J.O., for the court, held that the *AEPA* substantially impaired the ability of agricultural workers to meaningfully exercise the right to bargain collectively, which was protected by s. 2(*d*) of the *Charter*. The Act protected the right to organize, and it was premature to conclude that the statutory protections against employer intimidation were inadequate. However, it did not provide the "minimum" statutory protections required to enable agricultural workers to exercise their right to bargain collectively in a meaningful way, namely: "(1) a statutory duty to bargain in good faith; (2) statutory recognition of the principles of exclusivity and majoritarianism; and (3) a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements" (para. 80). The court noted that the "primary difficulty has been that the union has been unsuccessful in engaging employers, who have no statutory duty to bargain in good faith" (para. 98). Having found that the *AEPA* infringes s. 2(*d*) of the *Charter*, the Court of Appeal considered whether the infringement could be saved as "reasonable and demonstrably justified" under s. 1 of the *Charter*, and found it could not. The legislation impaired the right more than necessary, despite the challenges facing legislators in the agricultural domain, which is a complex mix of family farms and larger industrial operations. It concluded that "the wholesale exclusion of agricultural employees from a collective bargaining scheme is not adequately tailored to meet the objective of protecting the family farm" (para. 129).

[16] The Court of Appeal ordered the government "to provide agricultural workers with sufficient

B. *Cour d'appel de l'Ontario, 2008 ONCA 760, 92 O.R. (3d) 481 (le juge en chef Winkler et les juges Cronk et Watt)*

[15] La Cour d'appel a accueilli l'appel et déclaré la *LPEA* inconstitutionnelle. Elle s'est prononcée après l'arrêt *Health Services* de notre Cour. Le juge en chef Winkler a statué avec l'appui de ses collègues que la *LPEA* rend essentiellement impossible l'exercice véritable, par les travailleurs agricoles, du droit de négociation collective protégé à l'al. 2*d*) de la *Charte*. À son avis, la Loi protège le droit d'association et il est prématuré de conclure à l'insuffisance de ses mesures de protection contre l'intimidation patronale. Cependant, elle ne prévoit pas les mesures de protection qui s'imposent minimalement pour que les travailleurs agricoles puissent exercer véritablement leur droit de négociation collective, à savoir : [TRADUCTION] « (1) l'obligation de négocier de bonne foi, (2) la reconnaissance des principes du monopole syndical et du vote majoritaire et (3) un mécanisme permettant de dénouer l'impasse des négociations et de résoudre un différend relatif à l'interprétation ou à l'application d'une convention collective » (par. 80). Elle fait observer que la « principale difficulté tient à ce que le syndicat n'a pas réussi à obtenir le concours des employeurs, qui ne sont pas légalement tenus de négocier de bonne foi » (par. 98). Après avoir conclu que la *LPEA* porte atteinte à l'al. 2*d*) de la *Charte*, la Cour d'appel s'est demandé si l'atteinte est « raisonnable et si sa justification peut se démontrer » au sens de l'article premier de la *Charte*. Elle conclut par la négative. Le législateur entrave l'exercice du droit plus qu'il n'est nécessaire, même s'il doit tenir compte des contraintes propres à l'agriculture, un secteur d'activité complexe constitué à la fois de fermes familiales et de grandes exploitations industrielles. La Cour d'appel a alors décidé que « l'exclusion en bloc des employés agricoles d'un régime de négociation collective ne constitue pas une mesure conçue adéquatement pour atteindre l'objectif de la protection des fermes familiales » (par. 129).

[16] La Cour d'appel a ordonné au gouvernement [TRADUCTION] « d'accorder aux travailleurs

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protections to enable them to exercise their right to bargain collectively, in accordance with these reasons" (para. 138). It suspended this order for 12 months to give the legislature an opportunity to respond. The Court of Appeal dismissed the claim under s. 15 of the *Charter*. Its judgment was appealed to this Court.

IV. Analysis

A. *Issues: Does the AEPA Violate Sections 2(d) and 15 of the Charter?*

[17] The issue is whether the failure of the Ontario government to enact a positive statutory framework for agricultural workers modelled after the Ontario *LRA* violates s. 2(*d*) of the *Charter* in a manner that cannot be justified by s. 1. If so, the *AEPA* is invalid under s. 52 of the *Constitution Act, 1982*, and the Ontario legislature is obliged to bring the Act into harmony with the *Charter*. The respondents have also raised the issue of whether the *AEPA* violates their right to equality under s. 15 of the *Charter*. As the main question in this appeal remains the interpretation and application of s. 2(*d*), we will first consider this issue and then turn to s. 15.

B. *Freedom of Association (Section 2(d))*

[18] In view of the conflicting approaches to the guarantee of freedom of association in the labour context put before us, it may be useful to canvas the jurisprudence and set out the principles that guide the analysis of s. 2(*d*). The respondents' claim largely turns on the interpretation of our Court's judgments in *Dunmore* and *Health Services*. The ultimate question is whether s. 2(*d*), properly understood and applied, requires the Ontario legislature to provide a particular form of collective bargaining rights to agricultural workers, in order to secure the effective exercise of their associational rights. To resolve this question, we will first consider the development of this Court's jurisprudence in this area of the law.

agricoles une protection suffisante pour qu'ils puissent exercer leur droit de négociation collective, conformément aux présents motifs » (par. 138). Afin de permettre au législateur de donner suite à la décision, elle a suspendu l'exécution de celle-ci pendant une période de 12 mois. Elle a aussi rejeté le moyen de discrimination fondé sur l'art. 15 de la *Charte*. Son jugement est porté en appel devant notre Cour.

IV. Analyse

A. *Questions en litige : La LPEA porte-t-elle atteinte à l'al. 2d) et à l'art. 15 de la Charte?*

[17] Notre Cour doit déterminer si le législateur ontarien a porté à la liberté garantie par l'al. 2*d*) de la *Charte* une atteinte qui ne peut être justifiée au sens de l'article premier en omettant de créer à l'intention des travailleurs agricoles un régime analogue à celui établi par la *LRT*. Dans l'affirmative, la *LPEA* est invalide par application de l'art. 52 de la *Loi constitutionnelle de 1982*, et le législateur ontarien est tenu de l'harmoniser avec la *Charte*. Les intimés soulèvent par ailleurs la question de la conformité de la *LPEA* au droit à l'égalité garanti à l'art. 15 de la *Charte*. Comme le principal objet du litige demeure l'interprétation et l'application de l'al. 2*d*), nous examinons d'abord celui-ci, puis nous nous penchons sur l'art. 15.

B. *Liberté d'association (l'al. 2d))*

[18] Vu les thèses opposées qui s'affrontent en l'espèce concernant la garantie de la liberté d'association au travail, il peut se révéler utile d'analyser la jurisprudence et de dégager les principes qui président à l'interprétation de l'al. 2*d*). En effet, le sort des prétentions des intimés dépend en grande partie de l'interprétation des arrêts *Dunmore* et *Health Services* de notre Cour. Il faut essentiellement déterminer si l'al. 2*d*), bien interprété et appliqué, oblige le législateur ontarien à accorder aux travailleurs agricoles des droits de négociation collective d'un type particulier pour permettre un exercice réel de leur liberté d'association. Pour trancher, nous devons d'abord examiner l'évolution de la jurisprudence de notre Cour dans ce domaine du droit.

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(1) Freedom of Association in the Labour Context: The Jurisprudential Background

(a) *The Early Cases*

[19] The first set of cases to consider s. 2(*d*) of the *Charter*, known as the Trilogy, were *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (the "*Alberta Reference*"); *PSAC v. Canada*, [1987] 1 S.C.R. 424; *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460. The majority of the Court held that s. 2(*d*) did not protect the right to strike, the issue in the cases. In arriving at this conclusion, members expressed a number of views on the guarantee of freedom of association.

[20] McIntyre J. stated that "like most other fundamental rights", the right to freedom of association has no single purpose or value. Rather, reflecting the social nature of human beings, it protected the right to associate with others "both to satisfy [their] desire for social intercourse and to realize common purposes" (*Alberta Reference*, at p. 395). In the same case, Dickson C.J. (dissenting) stated: "What freedom of association seeks to protect is not associational activities *qua* particular activities, but the freedom of individuals to interact with, support, and be supported by, their fellow humans in the varied activities in which they choose to engage" (p. 366).

[21] Three of the six Justices sitting on the Trilogy opined in *obiter* that s. 2(*d*) does not protect collective bargaining (*Alberta Reference*, at p. 390, *per* Le Dain J.; *PSAC*, at p. 453, *per* McIntyre J.). The reasons given included that collective bargaining is a "modern right", that its recognition would go against the principle of judicial restraint, that s. 2(*d*) protects only individual rights, and that s. 2(*d*) was not intended to protect the goals or objects of organizations (*Alberta Reference*, at p. 391, *per* Le Dain J.; pp. 397 and 407, *per* McIntyre J.).

(1) Liberté d'association au travail : le contexte jurisprudentiel

a) *Les premiers jugements*

[19] Les premiers arrêts portant sur l'al. 2*d*) de la *Charte* et formant ce qu'il est convenu d'appeler la « trilogie » sont les décisions rendues dans les affaires *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313 (le « *Renvoi relatif à l'Alberta* »), *AFPC c. Canada*, [1987] 1 R.C.S. 424, et *SDGMR c. Saskatchewan*, [1987] 1 R.C.S. 460. Les juges majoritaires de la Cour y décident que l'al. 2*d*) ne protège pas le droit de grève en cause dans ces affaires. Tout en concluant ainsi, ils expriment des opinions diverses sur la garantie de la liberté d'association.

[20] Le juge McIntyre affirme qu'« à l'instar de la plupart des autres droits fondamentaux », la liberté d'association n'a pas un objet ou une valeur unique. Elle traduit plutôt la nature sociale de l'être humain et protège le droit de s'associer à autrui « à la fois pour satisfaire son besoin de relations sociales et pour réaliser des fins communes » (*Renvoi relatif à l'Alberta*, p. 395). Dans le même arrêt, le juge en chef Dickson (dissident) opine pour sa part : « Ce que la liberté d'association vise à protéger, ce ne sont pas les activités de l'association en tant qu'activités particulières, mais la liberté des individus d'interagir avec d'autres êtres humains, de les aider et d'être aidés par eux dans les diverses activités qu'ils choisissent d'exercer » (p. 366).

[21] Trois des six juges appelés à statuer dans la trilogie expriment en obiter que l'al. 2*d*) ne protège pas la négociation collective (*Renvoi relatif à l'Alberta*, p. 390, le juge Le Dain; *AFPC*, p. 453, le juge McIntyre). Parmi les motifs qu'ils invoquent, mentionnons les suivants : le droit de négociation collective constitue un « droit contemporain », sa reconnaissance va à l'encontre du principe de la déférence judiciaire, l'al. 2*d*) ne protège que des droits individuels et sa raison d'être n'est pas de protéger les objectifs d'une association (*Renvoi relatif à l'Alberta*, p. 391, le juge Le Dain; p. 397 et 407, le juge McIntyre).

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[22] The Trilogy was endorsed in *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 ("*PIPSC*"). Sopinka J., stated in his reasons which appeared to be accepted by the other judges on this point: (1) "s. 2(*d*) protects the freedom to establish, belong to and maintain an association"; (2) "s. 2(*d*) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association"; (3) "s. 2(*d*) protects the exercise in association of the constitutional rights and freedoms of individuals"; and (4) "s. 2(*d*) protects the exercise in association of the lawful rights of individuals" (p. 402).

[23] Nine years later, in *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, the Court once again revisited s. 2(*d*). The issue was whether exclusion of RCMP members from public bargaining associations, as opposed to their own association, violated s. 2(*d*). The majority of the Court, *per* Bastarache J., held it did not, on the ground that s. 2(*d*) does not give the right to belong to a particular group. Bastarache J. added that there is no general obligation for the government to provide a particular legislative framework for employees to exercise their collective rights, i.e. a different framework than already provided for RCMP members.

[24] In dissent, Cory and Iacobucci JJ. pointed out that the appeal was not concerned with the right to strike or to bargain collectively (*Delisle*, at para. 51). The only issue was whether the statutory framework interfered with the right to associate with other public servants in pursuance of their mutual interests. They were of the view that s. 2(*d*) was violated because the impugned laws in purpose and effect interfered with the formation of employee associations. They noted that employees are a vulnerable group in our society, and their ability to form and join an employee association is crucially linked to their economic and social well-being (paras. 67-68).

[22] L'arrêt *Institut professionnel de la Fonction publique du Canada c. Territoires du Nord-Ouest (Commissaire)*, [1990] 2 R.C.S. 367 (« *IPFPC* ») reprend les principes établis dans la trilogie. Dans ses motifs, auxquels les autres juges semblent avoir souscrit sur ce point, le juge Sopinka a affirmé ce qui suit : (1) « l'al. 2*d*) protège la liberté de constituer une association, de la maintenir et d'y appartenir », (2) « l'al. 2*d*) ne protège pas une activité pour le seul motif que cette activité est un objet fondamental ou essentiel d'une association »; (3) « l'al. 2*d*) protège l'exercice collectif des droits et libertés individuels consacrés par la Constitution »; et (4) « l'al. 2*d*) protège l'exercice collectif des droits légitimes des individus » (p. 402).

[23] Neuf ans plus tard, dans *Delisle c. Canada (Sous-procureur général)*, [1999] 2 R.C.S. 989, la Cour se penche à nouveau sur l'al. 2*d*). Elle doit décider si l'exclusion des membres de la GRC du régime public de négociation collective, par opposition à l'appartenance à leur propre association, porte atteinte à l'al. 2*d*). Au nom des juges majoritaires, le juge Bastarache conclut par la négative, car cette disposition ne garantit pas le droit d'appartenir à un groupe en particulier. Il ajoute que l'État n'a pas l'obligation générale d'offrir à ses employés un cadre législatif particulier pour l'exercice de leurs droits collectifs, c'est-à-dire un autre cadre que celui déjà en place pour les membres de la GRC.

[24] Dissidents, les juges Cory et Iacobucci soulignent que le pourvoi ne porte ni sur le droit de grève ni sur le droit de négociation collective (par. 51). À leur avis, la Cour doit uniquement décider si le cadre législatif établi compromet le droit des intéressés de s'associer à d'autres fonctionnaires pour défendre leurs intérêts communs. À leurs yeux, l'al. 2*d*) n'est pas respecté, car les dispositions contestées, par leur objet et leur effet, entravent la formation d'associations d'employés. Ils relèvent que les employés visés constituent un groupe vulnérable dans notre société et que leur capacité de mettre une association sur pied et d'en faire partie joue un rôle critique dans la préservation de leur bien-être financier et social (par. 67-68).

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[25] In summary, the early cases affirmed that the core protection of s. 2(*d*) focusses on the right of individuals to act in association with others to pursue common objectives and goals. There was some suggestion (Sopinka J.'s fourth point in *PIPSC*) that only individual goals were protected. (This proposition, as we shall see, was rejected in *Dunmore*.) While three judges in the Trilogy expressed the view that s. 2(*d*) did not protect collective bargaining, the only question at issue in those cases was whether individuals had a right to strike, and the question of collective bargaining was not conclusively resolved by a majority of the Court.

(b) *Dunmore*

[26] This Court's decision in *Dunmore* marked a new stage in the development of s. 2(*d*) jurisprudence in the field of labour relations. It raised the question of whether s. 2(*d*) requires the government to provide a legislative framework which enables employees to associate to obtain workplace goals in a meaningful process.

[27] The Ontario legislature had repealed legislation which gave farm workers a measure of protection, leaving them entirely outside the Province's labour relations scheme. The evidence established that attempts to organize were persistently frustrated by employers. The farm workers came to court seeking protection of their basic right to associate. They sought the right to organize into employee associations. For this, they contended, they needed legislation that endorsed their constitutional right to associate and protected them from employer interference.

[28] Bastarache J., for the majority of the Court, began the analysis in *Dunmore* by emphasizing the need for a purposive approach to s. 2(*d*) — "one which aims to protect the full range of associational activity contemplated by the *Charter* and to honour Canada's obligations under international human rights law" (para. 13).

[25] En résumé, il ressort des premières décisions que l'al. 2*d*) protégerait essentiellement le droit des individus de s'associer avec d'autres en vue de réaliser des objectifs communs. Certains commentaires ont laissé entendre (quatrième proposition du juge Sopinka dans *IPFPC*) que seuls les objectifs individuels étaient protégés. (Cette opinion, nous le verrons, a été rejetée dans *Dunmore*.) Dans la trilogie, trois juges affirment que l'al. 2*d*) ne protège pas la négociation collective. Toutefois, la seule question en litige dans ces affaires était celle de l'existence du droit de grève des salariés, de sorte que la Cour ne se prononce pas à la majorité et de manière définitive sur la question de la négociation collective.

b) *L'arrêt Dunmore*

[26] Cette affaire marque un tournant dans l'évolution de la jurisprudence de la Cour relative à l'application de l'al. 2*d*) dans le domaine des relations du travail. Il fallait déterminer si cette disposition obligeait l'État à créer un cadre législatif qui permette véritablement aux employés de s'associer en vue d'atteindre des objectifs liés au travail.

[27] Le législateur ontarien avait abrogé une loi qui offrait une certaine protection aux travailleurs agricoles, en les laissant totalement à l'écart du régime de relations du travail de la province. Suivant la preuve, les employeurs faisaient systématiquement échec aux tentatives d'organisation des employés. Les travailleurs agricoles se sont adressés aux tribunaux pour faire protéger leur liberté fondamentale d'association. Revendiquant le droit de former des associations d'employés, ils soutenaient que l'exercice de ce droit exigeait l'adoption d'une loi reconnaissant leur liberté constitutionnelle de s'associer et les protégeant contre l'ingérence patronale.

[28] Dans *Dunmore*, au nom des juges majoritaires, le juge Bastarache entreprend l'analyse en s'attachant à la nécessité d'une interprétation téléologique de l'al. 2*d*), « une analyse orientée vers la protection de toute la gamme d'activités associatives visées par la *Charte* et le respect des obligations du Canada dans le cadre du droit international

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After a full review of the jurisprudence, he stated:

> . . . the activities for which the appellants seek protection [association for the purposes of achieving workplace goals in the labour relations context] fall squarely within the freedom to organize, that is, the freedom to collectively embody the interests of individual workers. [para. 30]

[29] Bastarache J. went on to hold that in order to realize the purposes of s. 2(*d*), the right to organize must extend to "the exercise of certain collective activities, such as making majority representations to one's employer". He explained:

> These activities are guaranteed by the purpose of s. 2(*d*), which is to promote the realization of individual potential through relations with others, and by international labour jurisprudence, which recognizes the inevitably collective nature of the freedom to organize. [para. 30]

[30] The affirmation that s. 2(*d*) protection extends to collective activities that only a group can carry out, required rejection of Sopinka J.'s fourth proposition in *PIPSC*, which suggested that s. 2(*d*) only protected the right to further individual goals. Bastarache J. pointed out that certain activities are, when performed by a group, "qualitatively" different from those activities performed solely by an individual. He recognized that "trade unions develop needs and priorities that are distinct from those of their members individually" (*Dunmore*, at para. 17). As a result "certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning" (*ibid.*).

[31] In the result, Bastarache J. concluded that the absence of legislative protection for farm workers to organize in order to achieve workplace goals made meaningful association to achieve workplace goals impossible and therefore constituted a substantial interference with the right to associate guaranteed by s. 2(*d*) of the *Charter*. He found that the absence of legislative support discredited the organizing efforts of agricultural workers and had a chilling effect on their constitutional right to associate. He

des droits de la personne » (par. 13). À l'issue d'un examen exhaustif de la jurisprudence, il affirme :

> . . . les activités dont les appelants demandent la protection [association aux fins de réaliser des objectifs liés au travail dans le contexte des relations du travail] relèvent tout à fait de la liberté syndicale, soit la liberté de défendre collectivement les intérêts des travailleurs individuels. [par. 30]

[29] Le juge Bastarache ajoute que, devant les objectifs de l'al. 2*d*), le droit de s'associer doit englober « l'exercice de certaines activités collectives, comme la défense des intérêts de la majorité auprès de l'employeur ». Il explique :

> Ces activités sont protégées par l'objet de l'al. 2*d*), qui est de favoriser l'épanouissement personnel au moyen des relations avec autrui, et dans le cadre des arrêts internationaux en matière de droit du travail, qui reconnaissent la nature nécessairement collective de la liberté syndicale. [par. 30]

[30] Puis, la conclusion selon laquelle l'al. 2*d*) protège les activités collectives que seul un groupe peut exercer entraîne le rejet de la quatrième proposition du juge Sopinka dans *IPFPC* qui restreignait l'application de cette disposition à la protection du droit de poursuivre des objectifs individuels. Le juge Bastarache signale que, lorsqu'elles sont exercées par un groupe, certaines activités sont « qualitativement » différentes de celles auxquelles un individu se livre seul. Il reconnaît que « les besoins et priorités des syndicats tendent à se distinguer de ceux de leurs membres individuels », de sorte que « certaines activités collectives doivent être reconnues pour que la liberté de constituer et de maintenir une association ait un sens » (*Dunmore*, par. 17).

[31] Le juge Bastarache décide donc que l'omission du législateur de protéger les travailleurs agricoles désireux de s'associer pour réaliser des objectifs liés au travail rend à toutes fins utiles impossible l'association à cette fin et entrave de ce fait substantiellement l'exercice du droit garanti à l'al. 2*d*) de la *Charte*. À son avis, l'absence de protection légale déconsidère les tentatives d'association des travailleurs agricoles et paralyse l'exercice de leur droit constitutionnel de s'associer. Il estime

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concluded that farm workers in Ontario were substantially incapable of exercising their fundamental freedom to associate without a protective regime (para. 35). Quoting L'Heureux-Dubé J. in *Delisle*, Bastarache J. affirmed that

> the right to freedom of association must take into account the nature and importance of labour associations as institutions that work for the betterment of working conditions and the protection of the dignity and collective interests of workers in a fundamental aspect of their lives: employment. [Emphasis deleted; para. 37.]

[32] 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.

[33] It is worth pausing at this juncture to summarize the propositions that led the majority of the Court in *Dunmore* to these conclusions.

- Section 2(*d*), interpreted purposively, guarantees freedom of associational activity in the pursuit of individual and common goals.

- The common goals protected extend to some collective bargaining activities, including the right to organize and to present submissions to the employer.

- What is required is a process that permits the meaningful pursuit of these goals. No particular outcome is guaranteed. However, the legislative framework must permit a process that makes it possible to pursue the goals in a meaningful way.

que, en l'absence d'un régime de protection, les travailleurs agricoles de l'Ontario sont essentiellement dans l'impossibilité d'exercer leur liberté fondamentale d'association (par. 35). Citant la juge L'Heureux-Dubé dans l'arrêt *Delisle*, il ajoute :

> . . . la liberté d'association doit être interprétée en fonction de la nature et de l'importance des associations de travailleurs en tant qu'institutions œuvrant pour l'amélioration des conditions de travail et pour la protection de la dignité et des intérêts collectifs des travailleurs dans un aspect fondamental de leur vie : l'emploi. [Soulignement supprimé; par. 37.]

[32] Après l'arrêt *Dunmore*, nul ne pouvait contester que l'exercice véritable et substantiel du droit de s'associer pour réaliser des objectifs liés au travail bénéficiait de la protection constitutionnelle accordée à la liberté d'association et que ce droit englobait la réalisation d'objectifs collectifs et non seulement individuels. Nul ne pouvait non plus douter que la loi (ou l'absence d'un cadre législatif) qui rendait essentiellement impossible cette démarche collective restreignait l'exercice de la liberté d'association. Enfin, la garantie devait indéniablement être interprétée de manière généreuse et téléologique, conformément aux valeurs canadiennes et aux engagements internationaux du Canada.

[33] Il convient à ce stade de résumer les postulats sur lesquels les juges majoritaires de la Cour fondent ces conclusions dans *Dunmore*.

- Interprété téléologiquement, l'al. 2*d*) garantit la liberté d'exercer une activité associative dans le dessein d'atteindre des objectifs individuels et communs.

- Les objectifs communs protégés s'entendent notamment de certaines activités de négociation collective, dont la formation d'une association et la présentation d'observations à l'employeur.

- Un processus doit permettre la poursuite véritable de ces objectifs. Nul résultat précis n'est garanti. Toutefois, le cadre législatif doit autoriser un processus qui rend possible la poursuite des objectifs, et ce, de manière véritable.

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- The *effect* of a process that renders impossible the meaningful pursuit of collective goals is to substantially interfere with the exercise of the right to free association, in that it negates the very purpose of the association and renders it effectively useless. This constitutes a limit under s. 2(*d*) which is unconstitutional unless justified by the state under s. 1 of the *Charter*. (This is an application of the settled rule that a law or government act that in purpose *or effect* constrains exercise of a right constitutes a limitation for purposes of s. 1: see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.)

- The remedy for the resultant breach of s. 2(*d*) is to order the state to rectify the legislative scheme to make possible meaningful associational activity in pursuit of common workplace goals.

(c) *Health Services: Its Impact*

[34] *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. Relying on *Dunmore*, the majority of the Court in *Health Services*, *per* McLachlin C.J. and LeBel J., held that legislation and government actions that repealed existing collective agreements and substantially interfered with the possibility of meaningful collective bargaining in the future constituted a limit on the s. 2(*d*) right of freedom of association.

[35] The claimants were various unions and their members working in the health services industry of British Columbia. The industry was highly unionized and had negotiated collective agreements regarding salaries, benefits and working conditions. The government, directly or indirectly, was the employer. The government wanted to reduce

- Le processus qui rend impossible la poursuite véritable d'objectifs collectifs a pour *effet* d'entraver substantiellement l'exercice du droit de libre association en ce qu'il fait obstacle à l'objet même de l'association et la rend de fait inutile. Il s'agit d'une restriction de la liberté reconnue à l'al. 2*d*), d'où son inconstitutionnalité, sauf justification par l'État en application de l'article premier de la *Charte*. (Il s'agit de l'application de la règle établie selon laquelle la loi ou la mesure gouvernementale qui, par son objet *ou son effet*, entrave l'exercice d'un droit constitue une restriction aux fins de l'article premier : voir *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927.)

- La réparation pour la violation qui s'ensuit de l'al. 2*d*) consiste à ordonner à l'État de modifier le régime législatif de manière à rendre possible l'exercice véritable d'une activité associative vouée à la réalisation d'objectifs communs liés au travail.

c) *L'incidence de l'arrêt Health Services*

[34] Suivant l'arrêt *Dunmore*, pour que l'État soit contraint d'adopter des dispositions protégeant les demandeurs, ceux-ci doivent établir qu'il leur est essentiellement impossible d'exercer leur liberté d'association. La Cour ne définit cependant pas la portée du droit d'association protégé à l'al. 2*d*) dans le contexte de la négociation collective. Toutefois, dans *Health Services*, les juges majoritaires de la Cour, sous notre plume, s'appuient sur l'arrêt *Dunmore* pour statuer que la loi ou la mesure de l'État qui a pour effet d'annuler des conventions collectives existantes et de rendre essentiellement impossible toute véritable négociation collective ultérieure constitue une restriction de la liberté d'association garantie à l'al. 2*d*).

[35] Dans cette affaire, s'étaient portés demandeurs des syndicats et leurs membres travaillant dans le secteur des services de santé de la Colombie-Britannique, où le taux de syndicalisation était très élevé et où les salaires, les avantages sociaux et les conditions de travail étaient déterminés par des conventions collectives négociées.

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costs by changing the structure of its employees' working arrangements in ways that would have been impermissible under the existing collective agreements. It chose to do so, not through collective bargaining to the end of altering those collective agreements, but by the simple expedient of legislation. In short, the government used its legislative powers to effectively nullify the collective agreements to its benefit, and to the detriment of its employees. The legislation not only conflicted with existing collective agreements, but also precluded collective bargaining in the future on a number of issues and conditions of employment. (See R. K. Basu, "Revolution and Aftermath: *B.C. Health Services* and Its Implications" (2008), 42 *S.C.L.R.* (2d) 165, at p. 177; see also M. Coutu, L. L. Fontaine and G. Marceau, *Droit des rapports collectifs du travail au Québec* (2009), at p. 144.)

[36] The unions responded by bringing an action claiming that the government had breached s. 2(*d*) by legislatively interfering with freedom of association. They further claimed that the government had done so in circumstances that could not be justified under s. 1 of the *Charter*. *Health Services* thus put directly in issue the right to collective bargaining. The claimants did not seek the enactment of associational protections. Rather, they asserted that s. 2(*d*) protected a right to collective bargaining and that the government had violated the constitutional guarantee of freedom of association by legislating to both overturn existing contracts and preclude effective collective bargaining in the future. The unions lost at trial and on appeal but succeeded in this Court.

[37] While *Health Services* concerned the actions of a government employer nullifying collective bargaining arrangements with unions representing its own employees, the Court rested its decision on a more general discussion of s. 2 of the *Charter*. Applying the principles of interpretation established in *Dunmore*, a majority of the Court held that s. 2(*d*) includes "a process of collective action to achieve workplace goals" (para. 19). This

L'État, leur employeur direct ou indirect, entendait diminuer les coûts du système de santé en apportant à l'organisation du travail de ses employés des changements que n'autorisaient pas les conventions collectives en vigueur. Au lieu de recourir à la négociation collective pour obtenir la modification des conventions collectives, il a simplement légiféré. En somme, l'État a exercé son pouvoir législatif pour annuler unilatéralement les conventions collectives à son avantage et au détriment de ses employés. En plus d'être incompatible avec les conventions collectives applicables, la loi interdisait la négociation collective ultérieure au sujet d'un certain nombre de conditions d'emploi et de questions connexes. (Voir R. K. Basu, « Revolution and Aftermath : *B.C. Health Services* and Its Implications » (2008), 42 *S.C.L.R.* (2d) 165, p. 177; voir aussi M. Coutu, L. L. Fontaine et G. Marceau, *Droit des rapports collectifs du travail au Québec* (2009), p. 144.)

[36] Les syndicats ont réagi en s'adressant aux tribunaux, pour le motif que l'État avait contrevenu à l'al. 2*d*) et porté atteinte à la liberté d'association par voie législative. Ils prétendaient en outre que les circonstances dans lesquelles la mesure législative avait été prise n'offraient pas de justification au sens de l'article premier de la *Charte*. L'affaire mettait donc directement en jeu le droit de négociation collective. Les demandeurs ne revendiquaient pas l'adoption de mesures protégeant l'activité associative. Ils faisaient plutôt valoir que l'al. 2*d*) protégeait le droit de négociation collective et que l'État n'avait pas respecté la garantie constitutionnelle de la liberté d'association en légiférant pour à la fois annuler des contrats existants et empêcher toute véritable négociation collective ultérieure. Déboutés en première instance et en appel, les syndicats ont obtenu gain de cause devant notre Cour.

[37] Dans l'affaire *Health Services*, si le litige découlait de mesures prises par un employeur public pour annuler des conventions collectives négociées avec des syndicats représentant ses propres employés, notre Cour a toutefois fondé sa décision sur une analyse plus générale de l'art. 2 de la *Charte*. Les juges majoritaires ont appliqué les principes d'interprétation dégagés dans *Dunmore* pour conclure que l'al. 2*d*) protège « une action collective

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process requires the parties to meet and bargain in good faith on issues of fundamental importance in the workplace (para. 90). By legislating to undo the existing collective bargaining arrangements and by hampering future collective bargaining on important workplace issues, the British Columbia government had "substantially interfered" with the s. 2(*d*) right of free association, and had failed to justify the resultant limitation on the exercise of the right under s. 1 of the *Charter* (paras. 129-61).

[38] The decision in *Health Services* follows directly from the principles enunciated in *Dunmore*. Section 2(*d*), interpreted purposively and in light of Canada's values and commitments, protects associational collective activity in furtherance of workplace goals. The right is not merely a paper right, but a right to a process that permits meaningful pursuit of those goals. The claimants had a right to pursue workplace goals and collective bargaining activities related to those goals. The government employer passed legislation and took actions that rendered the meaningful pursuit of these goals impossible and effectively nullified the right to associate of its employees. This constituted a limit on the exercise of s. 2(*d*), and was thus unconstitutional unless justified under s. 1 of the *Charter.*

[39] While the majority decision in *Health Services* sits firmly within the principles the Court had earlier set out in *Dunmore*, in its discussion of the s. 2(*d*) right the Court went on to explain in greater detail what the government must permit in order to avoid the charge of substantial interference with the s. 2(*d*) right in the context of collective action in pursuit of workplace goals. In *Dunmore*, Bastarache J. stated that "the effective exercise of these freedoms may require . . . the exercise of certain collective activities, such as making majority representations to one's employer" (para. 30). It remained uncertain what other collective activities might be protected.

visant à atteindre des objectifs liés au [. . .] travail » (par. 19), une démarche qui oblige les parties à négocier de bonne foi au sujet de questions liées au travail revêtant une importance fondamentale (par. 90). Par l'adoption d'une loi pour réduire à néant des conventions collectives et empêcher à l'avenir la négociation collective d'importantes questions relatives au travail, la Colombie-Britannique avait « considérablement entravé » l'exercice du droit de libre association garanti à l'al. 2*d*) et n'avait pas justifié cette restriction au sens de l'article premier de la *Charte* (par. 129-161).

[38] La décision rendue dans cette affaire découle directement des principes énoncés dans *Dunmore*. Lorsqu'on l'interprète téléologiquement et dans la perspective des valeurs canadiennes et des engagements internationaux du Canada, l'al. 2*d*) protège l'activité associative exercée collectivement pour atteindre des objectifs liés au travail. Le droit ne possède pas seulement un caractère théorique; il commande un processus qui permet véritablement la poursuite de ces objectifs. Les demandeurs avaient le droit de poursuivre des objectifs liés au travail et de se livrer à des activités de négociation collective pour les atteindre. L'État employeur a légiféré et pris des mesures de manière à rendre impossible la poursuite véritable de tels objectifs et à supprimer dans les faits le droit de ses employés de s'associer. Il a ainsi restreint l'exercice de la liberté garantie à l'al. 2*d*), ce qui était inconstitutionnel, sauf justification au regard de l'article premier de la *Charte*.

[39] Même si, dans *Health Services*, les juges majoritaires s'en tiennent fermement aux principes établis précédemment par la Cour dans *Dunmore*, lorsqu'ils analysent le droit conféré à l'al. 2*d*), ils précisent davantage ce que l'État doit permettre afin de ne pas entraver substantiellement l'exercice de ce droit dans le contexte d'une action concertée visant la réalisation d'objectifs liés au travail. Dans *Dunmore*, le juge Bastarache affirme au par. 30 que « l'exercice réel de ces libertés peut exiger [. . .] l'exercice de certaines activités collectives, comme la défense des intérêts de la majorité auprès de l'employeur ». Restait à déterminer quelles autres activités collectives pouvaient être protégées.

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[40] The majority of the Court in *Health Services* affirmed that bargaining activities protected by s. 2(*d*) in the labour relations context include good faith bargaining on important workplace issues (para. 94; see also paras. 93, 130 and 135). This is not limited to a mere right to make representations to one's employer, but requires the employer to engage in a process of consideration and discussion to have them considered by the employer. In this sense, collective bargaining is protected by s. 2(*d*). The majority stated:

> Thus the employees' right to collective bargaining imposes corresponding duties on the employer. It requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation. [para. 90]

[41] By way of elaboration on what constitutes good faith negotiation, the majority of the Court stated:

- Section 2(*d*) requires the parties to meet and engage in meaningful dialogue. They must avoid unnecessary delays and make a reasonable effort to arrive at an acceptable contract (paras. 98, 100-101);
- Section 2(*d*) does not impose a particular process. Different situations may demand different processes and timelines (para. 107);
- Section 2(*d*) does not require the parties to conclude an agreement or accept any particular terms and does not guarantee a legislated dispute resolution mechanism in the case of an impasse (paras. 102-3);
- Section 2(*d*) 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" (para. 91).

[42] The Court in *Health Services* emphasized that s. 2(*d*) does not require a particular model

[40] Dans *Health Services*, la Cour à la majorité confirme que les activités de négociation en contexte de relations du travail protégées par l'al. 2*d*) comprennent la négociation de bonne foi de questions importantes liées à l'exécution des fonctions (par. 94; voir aussi par. 93, 130 et 135). Il ne suffit pas de pouvoir présenter des observations à l'employeur, mais ce dernier est également tenu de les prendre en considération dans le cadre d'un processus d'examen et d'échange. L'alinéa 2*d*) protège la négociation collective dans ce sens. Les juges majoritaires affirment à ce propos :

> Le droit des employés de négocier collectivement impose donc à l'employeur des obligations correspondantes. Il implique que l'employeur et les employés se rencontrent et négocient de bonne foi en vue de réaliser leur objectif commun d'accommodement par des moyens pacifiques et productifs. [par. 90]

[41] Puis, en explicitant la notion de négociation de bonne foi, les juges majoritaires ajoutent :

- l'alinéa 2*d*) exige que les parties se rencontrent et qu'elles engagent un véritable dialogue; elles doivent éviter les retards inutiles et faire un effort raisonnable pour arriver à un contrat acceptable (par. 98, 100-101);
- il n'impose pas de processus particulier; différentes situations peuvent commander différents processus et échéanciers (par. 107);
- il n'oblige pas les parties à conclure une convention ou à accepter des clauses particulières ni ne garantit un mécanisme légal de règlement des différends permettant de dénouer les impasses (par. 102-103);
- il ne protège que le « droit [. . .] à un processus général de négociation collective et non le droit de revendiquer un modèle particulier de relations du travail ou une méthode particulière de négociation » (par. 91).

[42] Dans *Health Services*, la Cour insiste sur le fait que l'al. 2*d*) n'impose ni un modèle particulier

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of bargaining, nor a particular outcome. What s. 2(*d*) guarantees in the labour relations context is a meaningful process. A process which permits an employer not even to consider employee representations is not a meaningful process. To use the language of *Dunmore*, it is among those "collective activities [that] must be recognized if the freedom to form and maintain an association is to have any meaning" (para. 17). Without such a process, the purpose of associating in pursuit of workplace goals would be defeated, resulting in a significant impairment of the exercise of the right to freedom of association. One way to interfere with free association in pursuit of workplace goals is to ban employee associations. Another way, just as effective, is to set up a system that makes it impossible to have meaningful negotiations on workplace matters. Both approaches in fact limit the exercise of the s. 2(*d*) associational right, and both must be justified under s. 1 of the *Charter* to avoid unconstitutionality.

de négociation, ni un résultat déterminé. En effet, cette disposition garantit, dans le contexte des relations du travail, le droit à un processus véritable. Dans cette optique, on ne saurait tenir pour véritable un processus qui permet à l'employeur de ne même pas prendre en compte les observations de ses employés. Pour reprendre les termes employés dans l'arrêt *Dunmore*, le processus garanti fait partie de ces « activités collectives [qui] doivent être reconnues pour que la liberté de constituer et de maintenir une association ait un sens » (par. 17). À défaut d'un tel processus, l'association aux fins de réaliser des objectifs liés au travail perd sa raison d'être, ce qui entrave substantiellement l'exercice de la liberté d'association. On peut entraver l'exercice de la liberté d'association voué à la réalisation d'objectifs liés au travail en frappant d'interdiction la formation d'associations d'employés. On peut le faire tout aussi efficacement en établissant un système qui rend impossible la négociation véritable de questions liées au travail. Les deux méthodes restreignent en fait l'exercice du droit d'association garanti à l'al. 2*d*), et toutes deux doivent faire l'objet d'une justification au regard de l'article premier de la *Charte* pour échapper à une conclusion d'inconstitutionnalité.

[43] In summary, *Health Services* applied the principles developed in *Dunmore* and explained more fully what is required to avoid interfering with associational activity in pursuit of workplace goals and undermining the associational right protected by s. 2(*d*). Its suggestion that this requires a good faith process of consideration by the employer of employee representations and of discussion with their representatives is hardly radical. It is difficult to imagine a meaningful collective process in pursuit of workplace aims that does not involve the employer at least considering, in good faith, employee representations. The protection for collective bargaining in the sense affirmed in *Health Services* is quite simply a necessary condition of meaningful association in the workplace context.

[43] En résumé, l'arrêt *Health Services* applique les principes établis dans *Dunmore* et précise davantage les mesures nécessaires pour éviter d'entraver l'activité associative visant la réalisation d'objectifs liés au travail et de compromettre le droit d'association protégé à l'al. 2*d*). L'opinion exprimée dans l'arrêt *Health Services*, selon laquelle l'employeur doit dès lors prendre part de bonne foi à un processus d'examen des observations des employés et d'échange avec les représentants de ces derniers, ne saurait être considérée comme radicale. Il demeure en effet difficile de concevoir qu'une véritable démarche collective visant la réalisation d'objectifs liés au travail ne prévoie pas à tout le moins que l'employeur examine de bonne foi les observations des employés. La protection de la négociation collective au sens entendu dans l'arrêt *Health Services* constitue tout simplement une condition essentielle à l'exercice véritable de la liberté d'association au travail.

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(d) *The Issue on This Appeal*

[44] Against this background, we return to the issue in this case. The Court of Appeal held that *Health Services* constitutionalizes a full-blown Wagner system of collective bargaining, and concluded that since the *AEPA* did not provide such a model, absent s. 1 justification, it is unconstitutional. The court appears to have understood the affirmation of the right to collective bargaining in *Health Services* as an affirmation of a particular type of collective bargaining, the Wagner model which is dominant in Canada.

[45] With respect, this overstates the ambit of the s. 2(*d*) right as described in *Health Services*. First, as discussed, the majority in *Health Services* unequivocally stated that s. 2(*d*) does not guarantee a particular model of collective bargaining or a particular outcome (para. 91).

[46] Second, and more fundamentally, the logic of *Dunmore* and *Health Services* is at odds with the view that s. 2(*d*) protects a particular kind of collective bargaining. As discussed earlier, what s. 2(*d*) protects is *the right to associate to achieve collective goals*. Laws or government action that make it impossible to achieve collective goals *have the effect* of limiting freedom of association, by making it pointless. It is in this derivative sense that s. 2(*d*) protects a right to collective bargaining: see *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815 ("*CLA*"), where the right to access government information was held to be "a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government" (para. 30). However, no particular type of bargaining is protected. In every case, the question is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals.

d) *La question en litige dans le présent pourvoi*

[44] C'est sur cette toile de fond que nous revenons à la question en litige en l'espèce. La Cour d'appel décide que l'arrêt *Health Services* constitutionnalise en vérité le modèle Wagner de négociation collective, et comme la *LPEA* n'établit pas un régime inspiré de ce modèle, elle conclut que, sauf justification en application de l'article premier, elle est inconstitutionnelle. Elle paraît voir dans la reconnaissance du droit de négociation collective la consécration d'un type particulier de système de négociation collective, soit le modèle Wagner, qui prédomine au Canada.

[45] À notre avis, la Cour d'appel surestime la portée du droit protégé à l'al. 2*d*) suivant l'arrêt *Health Services*. Rappelons d'abord que les juges majoritaires statuent sans équivoque que cet alinéa ne garantit ni l'application d'un modèle particulier de négociation collective, ni l'obtention d'un résultat donné (par. 91).

[46] En second lieu, et de manière plus fondamentale, la logique qui sous-tend les arrêts *Dunmore* et *Health Services* n'admet pas l'idée que l'al. 2*d*) protège un type particulier de négociation collective. Comme nous l'avons vu précédemment, cet alinéa protège *le droit de s'associer afin de réaliser des objectifs collectifs*. La loi ou la mesure de l'État qui rend impossible la réalisation d'objectifs collectifs *a pour effet* de restreindre la liberté d'association en la privant de sens. C'est dans ce sens dérivé que l'al. 2*d*) protège le droit de négociation collective : voir *Ontario (Sûreté et Sécurité publique) c. Criminal Lawyers' Association*, 2010 CSC 23, [2010] 1 R.C.S. 815 (« *CLA* »), où la Cour statue que le droit d'accès à des renseignements gouvernementaux constitue « un droit dérivé qui peut intervenir lorsqu'il constitue une condition qui doit nécessairement être réalisée pour qu'il soit possible de s'exprimer de manière significative sur le fonctionnement du gouvernement » (par. 30). Cependant, aucun type particulier de négociation n'est protégé. La question demeure celle de savoir si la loi ou la mesure gouvernementale contestée rend impossible l'action collective visant la réalisation d'objectifs liés au travail.

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[47] It follows that *Health Services* does not support the view of the Ontario Court of Appeal in this case that legislatures are constitutionally required, in all cases and for all industries, to enact laws that set up a uniform model of labour relations imposing a statutory duty to bargain in good faith, statutory recognition of the principles of exclusive majority representation and a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements (C.A. reasons, at para. 80). What is protected is associational activity, not a particular process or result. If it is shown that it is impossible to meaningfully exercise the right to associate due to substantial interference by a law (or absence of laws: see *Dunmore*) or by government action, a limit on the exercise of the s. 2(*d*) right is established, and the onus shifts to the state to justify the limit under s. 1 of the *Charter.*

[48] The resolution of this appeal does not rest on stark reliance on a particular conception of collective bargaining. Rather, it requires us to return to the principles that underlie the majority rulings in *Dunmore* and *Health Services*. The question here, as it was in those cases, is whether the legislative scheme (the *AEPA*) renders association in pursuit of workplace goals impossible, thereby substantially impairing the exercise of the s. 2(*d*) associational right.

(e) *Response to Justice Deschamps*

[49] Justice Deschamps adopts a narrow interpretation of the majority reasons in *Health Services*, stating that they merely recognized "that freedom of association includes the freedom to engage in associational activities and the ability of employees to act in common to reach shared goals related to workplace issues and terms of employment" (para. 308). In her view, it was unnecessary for the majority in that case to consider the duty to negotiate in good faith, and consequently argues that the passages of the majority judgment that discussed this duty were in *obiter.*

[47] Dès lors, l'arrêt *Health Services* n'étaye pas l'opinion de la Cour d'appel de l'Ontario en l'espèce, selon laquelle la Constitution exige que les législateurs, dans tous les cas et pour tous les secteurs d'activité, adoptent des lois établissant un modèle uniforme de relations du travail. Selon la Cour d'appel, ce modèle imposerait l'obligation de négocier de bonne foi, reconnaîtrait les principes du monopole syndical et du vote majoritaire et prévoirait un mécanisme pour dénouer les impasses des négociations et résoudre les différends relatifs à l'interprétation ou à l'application d'une convention collective (motifs de la C.A., par. 80). Or, c'est l'activité associative qui est protégée, et non un processus ou un résultat particulier. S'il est démontré qu'une loi (ou l'absence de loi : voir *Dunmore*) ou une action de l'État rend impossible en l'entravant substantiellement l'exercice véritable du droit d'association, la restriction du droit garanti à l'al. 2*d*) est établie. Il appartient alors à l'État de justifier cette restriction en application de l'article premier de la *Charte*.

[48] Pour régler le sort du présent pourvoi, il n'est donc pas nécessaire d'adhérer sans réserve à une conception particulière de la négociation collective. Il suffit de revenir aux principes qui étayent les décisions majoritaires dans *Dunmore* et *Health Services*. Comme dans ces affaires, il faut se demander si le régime législatif (la *LPEA*) rend impossible l'association vouée à la réalisation d'objectifs liés au travail, entravant ainsi substantiellement l'exercice de la liberté d'association garantie à l'al. 2*d*).

e) *Réponse aux motifs de la juge Deschamps*

[49] La juge Deschamps interprète de manière restrictive les motifs majoritaires de la Cour dans *Health Services*. Elle affirme qu'ils reconnaissent seulement que « la liberté d'association englobe la liberté de participer à des activités associatives et la faculté des employés d'agir de concert pour réaliser des objectifs communs concernant le travail et les conditions d'emploi » (par. 308). Selon elle, il n'était pas nécessaire, dans cette affaire, que les juges majoritaires se penchent sur l'obligation de négocier de bonne foi, et les passages de leurs motifs qui s'y rapportent constituent donc des remarques incidentes.

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[50] However, such a narrow interpretation of the majority reasons in *Health Services* would not support the holding in that case. If s. 2(*d*) merely protected the right to act collectively and to make collective representations, the legislation at issue in that case would have been constitutional. The legislation in that case violated s. 2(*d*) since it undermined the ability of workers to engage in meaningful collective bargaining, which the majority defined as good faith negotiations (para. 90). The majority underlined that

> the right to bargain collectively protects not just the act of making representations, but also the right of employees to have their views heard in the context of a meaningful process of consultation and discussion. This rebuts arguments made by the respondent that the Act does not interfere with collective bargaining because it does not explicitly prohibit health care employees from making collective representations. While the language of the Act does not technically prohibit collective representations to an employer, the right to collective bargaining cannot be reduced to a mere right to make representations. [Emphasis added; para. 114.]

[51] In our view, the majority decision in *Health Services* should be interpreted as holding what it repeatedly states: that workers have a constitutional right to make collective representations and to have their collective representations considered in good faith.

(f) *Response to Justice Rothstein*

[52] Justice Rothstein argues that *Health Services* represents a radical departure from previous jurisprudence and was wrongly decided.

[53] The central argument of our colleague is that s. 2(*d*) of the *Charter* does not protect collective bargaining. He understands the majority decision in *Health Services* to have constitutionalized collective bargaining. That, he says, is wrong in principle, inconsistent with the Court's prior jurisprudence, and unworkable in practice.

[54] Our colleague appears to interpret *Health Services* as establishing directly or indirectly a

[50] Or, cette interprétation étroite des motifs majoritaires dans *Health Services* ne justifierait pas la décision rendue dans cette affaire. Si l'alinéa 2*d*) ne protégeait que le droit d'agir de concert et de formuler des observations collectives, la loi en cause dans ce dossier aurait été déclarée constitutionnelle. En effet, la loi contestée portait atteinte à l'al. 2*d*), puisqu'elle compromettait la capacité des travailleurs d'entreprendre une véritable négociation collective, que les juges majoritaires définissent comme une négociation de bonne foi (par. 90). Ces derniers soulignent en outre ce qui suit :

> [L]e droit à un processus de négociation collective protège non seulement la présentation de revendications collectives, mais aussi le droit des employés de se faire entendre par le canal de consultations et discussions véritables. Ce constat permet d'écarter les arguments de l'intimée selon lesquels la Loi n'entrave pas la négociation collective parce qu'elle n'interdit pas expressément aux employés du secteur de la santé de présenter des revendications collectives. Bien qu'en principe le texte de la Loi n'interdise pas les revendications collectives auprès de l'employeur, le droit de négociation collective ne saurait se limiter à la simple possibilité de présenter des revendications. [Nous soulignons; par. 114.]

[51] À notre sens, il faut interpréter les motifs majoritaires dans *Health Services* à partir de ce qu'ils affirment à maintes reprises : les travailleurs ont le droit constitutionnel de formuler des revendications collectives et de les voir prises en considération de bonne foi.

f) *Réponse aux motifs du juge Rothstein*

[52] Le juge Rothstein soutient que l'arrêt *Health Services* rompt radicalement avec la jurisprudence antérieure et que la décision est erronée.

[53] Selon le principal argument de notre collègue, l'al. 2*d*) de la *Charte* ne protège pas la négociation collective. Il considère que dans l'arrêt *Health Services*, les juges majoritaires constitutionnalisent la négociation collective, ce qui, selon lui, demeure foncièrement incompatible avec les décisions antérieures de notre Cour et inapplicable dans les faits.

[54] Notre collègue paraît considérer que l'arrêt *Health Services* consacre directement ou

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Wagner model of labour relations. The actual holding of *Health Services*, as discussed above, was more modest. *Health Services* affirms a derivative right to collective bargaining, understood in the sense of a process that allows employees to make representations and have them considered in good faith by employers, who in turn must engage in a process of meaningful discussion. The logic that compels this conclusion, following settled *Charter* jurisprudence, is that the effect of denying these rights is to render the associational process effectively useless and hence to substantially impair the exercise of the associational rights guaranteed by s. 2(*d*). No particular bargaining model is required.

[55] Rothstein J. calls for *Health Services* to be overturned. But his views also imply overturning *Dunmore*, on which *Health Services* rests. Rothstein J. states that "the essence of freedom of association is that it enables individuals to do in association what they could do as individuals" (para. 197). This echoes the model of s. 2(*d*) adopted by the plurality in *PIPSC*, and rejected by Bastarache J. in *Dunmore*. For the reasons that follow, we remain of the view that *Dunmore* and *Health Services* represent good law and should not be overruled.

(i) The Caution Required in Overturning Precedent

[56] Our colleague correctly recognizes at the outset of his reasons that overturning a precedent of this Court is a step not to be lightly undertaken. We would note that as we understand the law (see above), rejection of *Health Services* implies rejection of *Dunmore* as well, since the two cases rest on the same fundamental logic.

[57] The seriousness of overturning two recent precedents of this Court, representing the considered views of firm majorities, cannot be overstated. This is particularly so given their recent vintage. *Health Services* was issued only four years ago, and, when this appeal was argued, only two years had passed.

indirectement un modèle Wagner de relations du travail. Or, son effet reste plus modeste, comme nous l'expliquons précédemment. En effet, il reconnaît un droit dérivé de négociation collective, c'est-à-dire le droit à un processus qui permet aux employés de formuler des observations et d'obtenir leur examen de bonne foi par l'employeur, qui doit en outre participer à un dialogue véritable à leur sujet. La logique qui mène à cette conclusion, compte tenu de la jurisprudence constitutionnelle établie, veut que l'absence de tels droits rende inutile le processus associatif et entrave de ce fait substantiellement l'exercice de la liberté d'association garantie à l'al. 2*d*). Aucun modèle particulier de négociation n'est imposé.

[55] Le juge Rothstein propose de renverser l'arrêt *Health Services*. Or, sa thèse implique également la nécessité d'écarter *Dunmore*, sur lequel prend appui *Health Services*. Il affirme que « la liberté d'association permet essentiellement à l'individu de faire de concert avec d'autres ce qu'il pourrait accomplir seul » (par. 197). Il reprend en cela le point de vue des juges majoritaires dans *IPFPC*, que rejette le juge Bastarache dans *Dunmore*. Pour les motifs exposés ci-après, nous demeurons d'avis que les arrêts *Dunmore* et *Health Services* sont fondés en droit et ne doivent pas être écartés.

(i) La prudence nécessaire avant de renverser un précédent

[56] Au début de ses motifs, notre collègue reconnaît à juste titre qu'il ne convient pas d'écarter un précédent de la Cour à la légère. En raison de notre interprétation du droit applicable (voir les motifs qui précèdent), nous devons souligner qu'écarter l'arrêt *Health Services* emporterait aussi le rejet de *Dunmore*, puisque les deux jugements reposent sur la même logique fondamentale.

[57] On ne saurait trop insister sur la gravité du renversement de deux arrêts récents de la Cour qui expriment l'avis réfléchi de majorités claires. Leur caractère récent milite d'autant plus contre leur abandon. *Health Services* a été prononcé il y a seulement quatre ans, et lorsque le présent pourvoi a été entendu, seulement deux ans s'étaient écoulés.

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[58] Rothstein J. suggests that since *Health Services* deals with constitutional law, the Court should be more willing to overturn it (paras. 141-43). In our respectful view, this argument is not persuasive. The constitutional nature of a decision is not a primary consideration when deciding whether or not to overrule, but at best a final consideration in difficult cases. Indeed, the fact that *Health Services* relates to a constitutional *Charter* right may militate in favour of upholding this past decision. As Binnie J. stated on behalf of a unanimous Court in *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, "[t]he Court should be particularly careful before reversing a precedent where the effect is to diminish *Charter* protection" (para. 44). Justice Rothstein's proposed interpretation of s. 2(*d*) of the *Charter* would diminish the scope of the s. 2(*d*) right.

[59] We note as well that, while the Court in this case was asked to clarify the ambit of *Health Services*, it was not asked to overrule it. British Columbia, the respondent in *Health Services*, stated explicitly that it was "not here contesting this Court's conclusion that s. 2(d) protects a process of collective bargaining" (Factum of the Attorney General of British Columbia, at para. 18). Absent notice to the profession and interested persons, overruling *Health Services* seems to us procedurally inappropriate.

[60] In our view, the arguments advanced by our colleague against *Health Services* do not meet the high threshold for reversing a precedent of this Court.

(ii) The Arguments on Jurisprudence

[61] Justice Rothstein argues that *Health Services* represents a marked departure from prior jurisprudence. We do not agree.

[62] We have already discussed this jurisprudence in detail and need not repeat the discussion

[58] Le juge Rothstein laisse entendre que la Cour devrait se montrer plus disposée à écarter l'arrêt *Health Services* parce qu'il porte sur le droit constitutionnel (par. 141-143). En toute déférence, cet argument ne nous convainc pas. Lorsqu'il s'agit de renverser un précédent, sa nature constitutionnelle ne constitue pas une considération primordiale et elle n'est considérée tout au plus qu'en dernier lieu dans les cas épineux. Du reste, le fait que *Health Services* porte sur un droit constitutionnel garanti par la *Charte* peut militer en faveur de son maintien. Comme le dit le juge Binnie avec l'accord de tous ses collègues dans l'arrêt *R. c. Henry*, 2005 CSC 76, [2005] 3 R.C.S. 609, « la Cour doit se montrer particulièrement prudente avant d'écarter un précédent lorsque ce revirement a pour effet d'affaiblir une protection offerte par la *Charte* » (par. 44). L'interprétation que préconise le juge Rothstein réduirait la portée du droit reconnu à l'al. 2*d*).

[59] Nous faisons également observer que, dans le présent pourvoi, on demande à la Cour de clarifier la portée de l'arrêt *Health Services*, et non de l'écarter. La province de la Colombie-Britannique, intimée dans cette affaire, disait expressément [TRADUCTION] « ne pas contester en l'espèce la conclusion de la Cour selon laquelle l'al. 2d) protège un processus de négociation collective » (mémoire du procureur général de la Colombie-Britannique, par. 18). À défaut d'un avis au milieu juridique et aux intéressés, il nous paraîtrait inopportun sur le plan procédural de renverser l'arrêt *Health Services*.

[60] Selon nous, les arguments invoqués par notre collègue pour contester la validité de cet arrêt ne satisfont pas aux conditions strictes imposées pour le renversement d'un précédent de notre Cour.

(ii) L'argumentation de nature jurisprudentielle

[61] Le juge Rothstein soutient aussi que l'arrêt *Health Services* se démarque nettement de la jurisprudence antérieure. Nous ne sommes pas d'accord.

[62] Nous avons déjà examiné ces décisions antérieures en détail et point n'est besoin d'y revenir. En

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here. In brief, the early cases did not consider the issue. Nothing said in them, however, negates the current state of the law, except for the fourth proposition in *PIPSC*, which was corrected in *Dunmore* to recognize that s. 2(*d*) extends to collective, as distinct from individual goals. *Dunmore*, as discussed above, established the proposition that legislative regimes that make meaningful pursuit of workplace goals impossible significantly impair the exercise of the s. 2(*d*) right to free expression and constitute a limit on the right which is unconstitutional unless justified by the state under s. 1. *Health Services*, far from being an "express break" with prior jurisprudence, is grounded in the principles earlier enunciated in *Dunmore*.

résumé, les précédents ne portent pas sur la question en litige. Toutefois, ils ne comportent aucun élément qui contredise l'état actuel du droit, sauf la quatrième proposition formulée dans *IPFPC*, puis rectifiée dans *Dunmore* de façon à reconnaître que l'al. 2*d*) protège les objectifs collectifs en plus des objectifs individuels. Rappelons que dans *Dunmore*, notre Cour statue qu'un régime législatif qui rend impossible l'exercice véritable du droit de poursuivre des objectifs liés au travail entrave substantiellement l'exercice de la liberté d'expression et apporte à ce droit une restriction inconstitutionnelle si elle n'est pas justifiée par l'État en application de l'article premier. Loin de constituer un revirement jurisprudentiel, l'arrêt *Health Services* s'appuie sur les principes énoncés précédemment dans *Dunmore*.

(iii) Purpose of Section 2(*d*): Individual Versus Collective Rights

(iii) L'objet de l'al. 2d) : droits individuels et droits collectifs

[63] Our colleague argues that the recognition of a constitutional right to collective bargaining in *Health Services* is not supported by the purpose of s. 2(*d*), because it improperly assigns a collective dimension to individual rights. The collective dimension of individual rights was recognized by Dickson C.J., dissenting in *Alberta Reference*, stating that s. 2(*d*) protects group activity for which activity there is "no analogy involving individuals" such as the right to bargain collectively (pp. 367-70). The Court in *Dunmore* modified the fourth proposition in the earlier case of *PIPSC*. As Bastarache J. there stated, "certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning".

[63] Notre collègue soutient que l'objet de l'al. 2*d*) n'appuie pas la thèse qu'un droit de négociation collective de nature constitutionnelle a été reconnu dans *Health Services* car elle attribue à tort une dimension collective à un droit individuel. Or, cette dimension collective a été reconnue dans le *Renvoi relatif à l'Alberta*, où le juge en chef Dickson, dissident, affirme que l'al. 2*d*) protège aussi l'activité collective à l'égard de laquelle il n'existe « aucune analogie comportant des individus » comme la négociation collective (p. 367-370). De plus, dans *Dunmore*, la Cour modifie la quatrième proposition de la décision antérieure *IPFPC*. Comme le souligne le juge Bastarache, « certaines activités collectives doivent être reconnues pour que la liberté de constituer et de maintenir une association ait un sens ».

[64] Consistent with this framework, the majority decision in *Health Services* framed s. 2(*d*) as an *individual right* ("the right of employees", para. 87 (emphasis added)) that *may require the protection of group activity* (see also paras. 19 and 89). The fundamental inquiry is whether the state action would *substantially impair* the ability of "union members to pursue shared goals in concert" (para. 96 (emphasis added)). As in *Dunmore*, the majority

[64] En respectant ce cadre d'analyse, dans l'arrêt *Health Services*, les juges majoritaires statuent que l'al. 2*d*) confère un *droit individuel* (« le droit [des] employés », par. 87 (nous soulignons)) qui *peut exiger la protection d'une activité collective* (voir aussi les par. 19 et 89). La question fondamentale en jeu demeure celle de déterminer si l'acte de l'État *entraverait substantiellement* la capacité des « syndiqués de poursuivre collectivement des

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concluded that the realization of the individual right required a capacity to act in common, which may give rise to a need to protect group activities and, as a consequence, to recognize group rights.

[65] In summary, *Health Services* was consistent with the previous cases on the issue of individual and collective rights. It recognized, as did previous jurisprudence, that s. 2(*d*) is an individual right. But it also recognized, as did previous cases, that to meaningfully uphold this individual right, s. 2(*d*) may properly require legislative protection of group or collective activities.

[66] Rothstein J. also emphasizes that "[i]ndividuals who are not members of an association . . . have no constitutional right to oblige their employers to bargain" (paras. 179 and 187). In our view, this outcome is not anomalous. It follows logically from the fact that collective bargaining is a derivative right, a "necessary precondition" to the meaningful exercise of the constitutional guarantee of freedom of association: see *CLA*, at para. 30. Where there is no reliance on freedom of association, there is no derivative right to require employers to bargain.

(iv) The Argument That Section 2(*d*) Is a Freedom, Not a Right

[67] Our colleague argues that by requiring a process that allows for meaningful dialogue on workplace matters, *Health Services* wrongly converts a negative freedom into a positive right. This bright line between freedoms and rights seems to us impossible to maintain. Just as freedom of expression implies correlative rights, so may freedom of association. The freedom to do a thing, when guaranteed by the Constitution interpreted purposively, implies a right to do it. The *Charter* cannot be subdivided into two kinds of guarantees — freedoms and rights.

objectifs communs » (par. 96 (nous soulignons)). Comme dans l'arrêt *Dunmore*, les juges majoritaires concluent que la mise en œuvre du droit individuel suppose la faculté d'agir de concert, ce qui peut nécessiter la protection d'activités collectives et, par conséquent, la reconnaissance de droits collectifs.

[65] En résumé, *Health Services* s'inscrit dans la lignée des arrêts antérieurs portant sur les droits individuels et collectifs. Il reconnaît comme eux que l'al. 2*d*) confère un droit individuel. Cependant, la Cour reconnaît aussi dans ce jugement, comme elle l'avait fait dans d'autres affaires, que l'al. 2*d*) peut à bon droit imposer une protection législative de l'activité collective pour assurer l'exercice véritable du droit individuel.

[66] Le juge Rothstein ajoute par ailleurs que « l'individu qui n'est pas membre d'une association ne bénéficie pas du droit constitutionnel d'exiger de son employeur qu'il négocie avec lui » (par. 179 et 187). À notre avis, cette conséquence n'a rien d'anormale. Elle découle logiquement du fait que le droit à la négociation collective est un droit dérivé, une « condition qui doit nécessairement être réalisée » pour permettre l'exercice véritable de la liberté d'association garantie par la Constitution : voir *CLA*, par. 30. Dans les cas où la liberté d'association ne peut être invoquée, le droit dérivé permettant d'exiger que l'employeur négocie ne saurait exister.

(iv) La thèse voulant que l'al. 2*d*) confère une liberté et non un droit

[67] Notre collègue fait également valoir qu'en imposant un processus qui permet un véritable dialogue sur les questions liées au travail, *Health Services* transforme à tort une liberté négative en un droit positif. Cette distinction nette entre une liberté et un droit nous paraît intenable. La liberté d'expression emporte des droits corrélatifs, la liberté d'association aussi. Lorsqu'elle est garantie par la Constitution interprétée de manière téléologique, la liberté d'accomplir un acte implique le droit d'accomplir cet acte. La *Charte* ne saurait prévoir deux catégories distinctes de garanties, d'une part les libertés, d'autre part les droits.

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[68] The majority in both *Dunmore* and *Health Services* held that freedom to associate may require the state to take positive steps. Bastarache J. in *Dunmore* underlined that "it may be asked whether the distinction between positive and negative state obligations ought to be nuanced in the context of labour relations" (para. 20). He further noted that

> history has shown, and Canada's legislatures have uniformly recognized, that a posture of government restraint in the area of labour relations will expose most workers not only to a range of unfair labour practices, but potentially to legal liability under common law inhibitions on combinations and restraints of trade. . . . In this context, it must be asked whether, in order to make the freedom to organize meaningful, s. 2(*d*) of the *Charter* imposes a positive obligation on the state to extend protective legislation to unprotected groups. [para. 20]

[69] This Court has consistently rejected a rigid distinction between "positive" freedoms and "negative" rights in the *Charter*. For example, it recently held that s. 2(*b*) may require the government to disclose documents to the public in order to enable meaningful discourse: *CLA*, at para. 37. As stated by L'Heureux-Dubé J. in *Haig v. Canada*, [1993] 2 S.C.R. 995:

> The distinctions between "freedoms" and "rights", and between positive and negative entitlements, are not always clearly made, nor are they always helpful. One must not depart from the context of the purposive approach articulated by this Court in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295. Under this approach, a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required. This might, for example, take the form of legislative intervention aimed at preventing certain conditions which muzzle expression, or ensuring public access to certain kinds of information. [p. 1039]

[70] A purposive protection of freedom of association may require the state to act positively to protect the ability of individuals to engage in fundamentally important collective activities, just as

[68] Tant dans *Dunmore* que dans *Health Services*, les juges majoritaires décident que la liberté de s'associer peut imposer à l'État l'obligation de prendre des mesures concrètes. Dans *Dunmore*, le juge Bastarache souligne qu'« on peut se demander si la distinction entre obligations positives et négatives de l'État doit être nuancée dans le contexte des relations de travail » (par. 20). Il ajoute que

> [l]'histoire a montré, et les législateurs canadiens ont uniformément reconnu, qu'une attitude de retenue de la part du gouvernement dans le domaine des relations de travail expose la plupart des travailleurs non seulement à diverses pratiques déloyales de travail, mais peut aussi engager leur responsabilité juridique en common law pour coalition ou restriction du commerce. [. . .] Dans ce contexte, il faut se demander si, pour que la liberté syndicale ait un sens, l'al. 2*d*) de la *Charte* impose à l'État l'obligation positive d'étendre la protection légale à des groupes non protégés. [par. 20]

[69] Notre Cour s'est toujours refusée à établir une distinction rigide entre les libertés « positives » et les droits « négatifs » consacrés par la *Charte*. Par exemple, elle a récemment statué que l'al. 2*b*) peut exiger de l'État qu'il communique des documents au public afin d'assurer un débat véritable : *CLA*, par. 37. Comme le souligne la juge L'Heureux-Dubé dans l'arrêt *Haig c. Canada*, [1993] 2 R.C.S. 995 :

> Les distinctions entre « libertés » et « droits » et entre droits positifs et droits négatifs ne sont pas toujours nettes ni utiles. On ne doit pas s'éloigner du contexte de l'approche fondée sur l'objet énoncée par notre Cour dans l'arrêt *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295. Suivant cette approche, il pourrait se présenter une situation dans laquelle il ne suffirait pas d'adopter une attitude de réserve pour donner un sens à une liberté fondamentale, auquel cas une mesure gouvernementale positive s'imposerait peut-être. Celle-ci pourrait, par exemple, revêtir la forme d'une intervention législative destinée à empêcher la manifestation de certaines conditions ayant pour effet de museler l'expression, ou à assurer l'accès du public à certains types de renseignements. [p. 1039]

[70] Tout comme l'interprétation téléologique de la liberté d'expression peut obliger l'État à divulguer des documents pour permettre un débat public significatif, l'interprétation téléologique de la

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a purposive interpretation of freedom of expression may require the state to disclose documents to permit meaningful discussion.

[71] With respect, we also do not agree that the structure of the *Charter* reflects a rigid distinction between freedoms and rights. Rothstein J.'s reasons state that "[w]hen the *Charter* uses the term 'right', as it does in ss. 7 to 12, either a positive entitlement is introduced, or a right to be free of some restriction or prohibition (i.e. a freedom) is introduced" (para. 192).

[72] In fact, many of the rights in ss. 7 to 12 do not entitle individuals to any form of state action. Rather these provisions guarantee a mixture of negative and positive rights. For instance, s. 9 protects "the right not to be arbitrarily detained or imprisoned" and s. 12 protects "the right not to be subjected to any cruel and unusual treatment or punishment". But s. 10 also protects a right to counsel and imposes a corresponding duty on police officers to facilitate the exercise of this right. See also *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 107, referring to "the s. 12 guarantee of freedom from cruel and unusual treatment" (emphasis added).

[73] It may also be observed that *Health Services* does not impose constitutional duties on private employers, but on governments as employers and parliaments and legislatures as law makers, in accordance with s. 32 of the *Charter*. Rather, the majority held that individuals have a right against the state to a process of collective bargaining in good faith, and that this right requires the state to impose statutory obligations on employers. As held by Cory and Iacobucci JJ. in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, one must "distinguish between 'private activity' and 'laws that regulate private activity'. The former is not subject to the *Charter*, while the latter obviously is" (para. 66). If workers are incapable of exercising their right to collective bargaining, they may only bring a *Charter* claim

liberté d'association et de la protection qu'elle offre peut obliger l'État à prendre des mesures concrètes pour permettre aux individus de prendre part à des activités collectives d'importance fondamentale.

[71] En toute déférence, nous ne pouvons déduire de la manière dont elle est conçue que la *Charte* établit une distinction rigide entre les libertés et les droits. Le juge Rothstein dit que « [l]orsque la *Charte* emploie le terme "droit" aux art. 7 à 12, elle reconnaît soit un droit positif, soit un droit d'échapper à quelque limitation ou interdiction (c.-à-d., une liberté) » (par. 192).

[72] En fait, bon nombre des droits conférés aux art. 7 à 12 ne comportent pas de garantie d'un type particulier d'action de l'État. Ces dispositions reconnaissent plutôt un ensemble diversifié de droits négatifs et positifs. À titre d'exemple, l'art. 9 reconnaît à chacun le « droit à la protection contre la détention ou l'emprisonnement arbitraires ». L'article 12 confère le « droit à la protection contre tous traitements ou peines cruels et inusités ». Mais l'art. 10 protège également le droit à l'assistance d'un avocat et impose aux policiers l'obligation concomitante de faciliter l'exercice de ce droit. Voir aussi *Charkaoui c. Canada (Citoyenneté et Immigration)*, 2007 CSC 9, [2007] 1 R.C.S. 350, par. 107, où la Cour renvoie à la garantie contre tous traitements ou peines cruels et inusités que prévoit l'art. 12.

[73] On peut également faire observer que *Health Services* n'impose pas d'obligations constitutionnelles aux employeurs du secteur privé, mais plutôt aux gouvernements à titre d'employeurs ainsi qu'au Parlement et aux assemblées législatives en qualité de législateurs, conformément à l'art. 32 de la *Charte*. Les juges majoritaires reconnaissent ainsi que les individus possèdent, vis-à-vis de l'État, le droit à un processus de négociation collective de bonne foi et que ce droit demande à l'État d'imposer des obligations légales aux employeurs. Comme le relèvent les juges Cory et Iacobucci dans l'arrêt *Vriend c. Alberta*, [1998] 1 R.C.S. 493, il faut faire une distinction « entre l'"activité privée" et la "loi qui régit l'activité privée". La première n'est pas assujettie à la *Charte*, alors que la seconde l'est

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against the government and not their employer, and they must show a state action.

(v) The Argument That *Health Services* Privileges Particular Associations

[74] Our colleague argues that the effect of *Health Services* is to privilege some associations over others, by interpreting s. 2(*d*) in a way that is not content-neutral. Broadly put, the argument appears to be that, by considering the goals of a particular association, one moves beyond pure associational activity into a court-based selection of what goals are acceptable and what goals are not.

[75] Yet consideration of goals cannot be avoided. One of the basic principles of *Charter* interpretation is that rights must be interpreted in a purposive way — having regard for the purposes, or goals, they serve. Thus, in the *Alberta Reference*, McIntyre J. described the core of s. 2(*d*) protection as being association "both to satisfy [a] desire for social intercourse and to realize common purposes" (p. 395 (emphasis added)). *Dunmore* resolved the issue, not by saying that the s. 2(*d*) right must be content-neutral, but by asserting that it must be interpreted in conjunction with Canada's values and international human rights and labour law commitments. In our view, this is the preferable approach. A content-neutral right is too often a meaningless right.

(vi) The Argument That *Health Services* Gives Contracts Priority Over Statutes

[76] Our colleague argues that *Health Services* gives constitutional status to contracts, privileging them over statutes. The argument is based on the

manifestement » (par. 66). Les travailleurs qui sont dans l'impossibilité d'exercer leur droit de négociation collective ne peuvent que poursuivre l'État, et non leur employeur, sur le fondement de la *Charte*, et ils doivent faire la preuve d'une action de l'État.

(v) L'argument selon lequel *Health Services* favorise certaines associations

[74] Notre collègue prétend que l'arrêt *Health Services* favorise certaines associations par rapport à d'autres parce que la Cour y interprète l'al. 2*d*) d'une manière qui n'est pas neutre quant à la nature de la liberté exercée. D'un point de vue général, il paraît soutenir qu'en considérant les objectifs d'une association en particulier, on passe de la protection de l'activité associative pure à un processus de détermination judiciaire des objectifs associatifs admissibles ou inadmissibles.

[75] Or, l'examen des objectifs ne peut être évité. L'un des principes fondamentaux d'interprétation de la *Charte* veut que les droits doivent être interprétés de manière téléologique, c'est-à-dire au regard des objectifs qui les sous-tendent ou de leur raison d'être. Dans le *Renvoi relatif à l'Alberta*, le juge McIntyre affirme que l'al. 2*d*) protège essentiellement le droit de s'associer à autrui « à la fois pour satisfaire son besoin de relations sociales et pour réaliser des fins communes » (p. 395 (nous soulignons)). Dans *Dunmore*, la Cour tranche la question non pas en affirmant que le droit conféré à l'al. 2*d*) doit être interprété de manière neutre quant à la nature de la liberté exercée, mais en statuant que son interprétation doit tenir compte des valeurs canadiennes ainsi que du droit international des droits de la personne et des engagements internationaux du pays en droit du travail. À notre avis, cette démarche est plus opportune. Trop souvent, un droit interprété sans égard à son objet demeure vide de sens.

(vi) L'argument selon lequel *Health Services* donne priorité au contrat sur la loi

[76] Selon le juge Rothstein, *Health Services* reconnaît une valeur constitutionnelle au contrat en le faisant primer la loi. Il considère que pour

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view that *Health Services* holds that breach of collective agreements violates s. 2(*d*). In fact, as discussed above, this was not the finding in *Health Services*. The majority in *Health Services* held that the unilateral nullification of significant contractual terms, by the government that had entered into them or that had overseen their conclusion, coupled with effective denial of future collective bargaining, undermines the s. 2(*d*) right to associate, not that labour contracts could never be interfered with by legislation.

(vii) The Argument That *Health Services* Removes Judicial Deference to the Legislation

[77] Our colleague argues that *Health Services* undercuts the judicial deference courts have paid in the past to the legislature in labour relations. We observe at the outset that this argument rests on the premise — repeatedly rejected in *Health Services* — that the Court was constitutionally enshrining the Wagner model of labour relations. In fact this is not what *Health Services* held.

[78] As stated in *Health Services*, "[i]t may well be appropriate for judges to defer to legislatures on policy matters expressed in particular laws" (para. 26). What *Health Services* rejected was a judicial "no go" zone for an entire right on the ground that it may involve the courts in policy matters: creating such a *Charter*-free zone would "push deference too far" (*ibid.*). This Court reached a similar conclusion in *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083, at paras. 62-63.

[79] The approach to deference advanced in *Health Services* is consistent with this Court's general jurisprudence. Deference should inform the determination of whether Parliament's scheme satisfies the requirements of the *Charter*, as articulated by the courts. See P. Macklem, "Developments in Employment Law: The 1990-91 Term" (1992),

la Cour, le non-respect d'une convention collective emporte celui de l'al. 2*d*). Pourtant, nous l'avons déjà dit, *Health Services* n'a jamais comporté une telle conclusion. En effet, les juges majoritaires dans cet arrêt décident que l'annulation unilatérale de clauses contractuelles importantes dont l'État avait convenu ou dont il avait coordonné la conclusion, de pair avec l'exclusion dans les faits de toute négociation collective ultérieure, compromet l'exercice du droit de s'associer garanti à l'al. 2*d*), non qu'un contrat de travail ne peut jamais être modifié par voie législative.

(vii) L'argument selon lequel *Health Services* supprime la déférence des tribunaux envers le législateur

[77] Notre collègue affirme que *Health Services* sape la déférence que les tribunaux manifestaient jusqu'alors envers le législateur dans le domaine des relations du travail. Signalons d'emblée que son argument a pour prémisse — maintes fois rejetée dans *Health Services* —, que la Cour y constitutionnalise le modèle Wagner de relations du travail, ce qui n'est pas le cas en réalité.

[78] Comme il est indiqué dans l'arrêt *Health Services*, « il se peut fort bien que les juges aient raison de s'en remettre aux législateurs pour résoudre les questions de politique générale énoncées dans des lois particulières » (par. 26). Ce qui a été rejeté dans cet arrêt c'est la prétention selon laquelle un droit serait entièrement « à l'abri des interventions judiciaires » au motif que celles-ci entraîneraient les tribunaux dans le domaine de la politique générale. Selon eux, une telle soustraction à l'application de la *Charte* « pousse trop loin le principe de la déférence judiciaire » (*ibid.*). Notre Cour tire la même conclusion dans *T.U.A.C., section locale 1518 c. KMart Canada Ltd.*, [1999] 2 R.C.S. 1083, aux par. 62-63.

[79] La déférence préconisée dans *Health Services* se situe dans le droit fil de la jurisprudence générale de notre Cour. Il faut maintenir une attitude de déférence au moment de déterminer si une loi du Parlement satisfait aux exigences de la *Charte* établies par les tribunaux (voir P. Macklem, « Developments in Employment Law :

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3 *S.C.L.R.* (2d) 227, at pp. 239-41. Conversely, the courts should not rely on deference to narrow the meaning of *Charter* rights in the first place. Doing so would abdicate the courts' duty as the "final arbiters of constitutionality in Canada" (*Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 31).

[80] In *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 S.C.R. 209, the reasons of both LeBel J. and Bastarache J. (dissenting) rejected the view that deference to Parliament on labour relations created a *Charter*-free zone of legislative action, although there was disagreement on the scope of s. 2(*d*) and the application of the *Charter*. The reasons of LeBel J., written on behalf of a minority of the Court in finding no violation of s. 2(*d*), acknowledged the existence of a jurisprudential policy of non-intervention in labour relations. However, LeBel J. also stated that "the jurisprudence of this Court has never held that labour laws are immune to *Charter* review" (para. 162).

[81] Rothstein J. argues that courts should consider deference to Parliament in determining the scope of s. 2(*d*). This approach is inconsistent with this Court's decision in *Dunmore*. While Rothstein J. adopts the approach of McIntyre J. in the *Alberta Reference*, this Court has since distanced itself from this view. In *Dunmore*, Bastarache J. referred to McIntyre J.'s discussion of deference under s. 1, rather than in outlining the scope of s. 2(*d*): para. 57; see also *Delisle*, *per* Cory and Iacobucci JJ., dissenting; *KMart Canada Ltd.*, at paras. 62-63, in which Cory J. referred to this passage from McIntyre J.'s reasons under s. 1 in a freedom of expression case. Deference to legislatures properly plays a part, not in defining the nature and scope of a constitutional right, but within the margin of appreciation that the *Oakes* analytical process acknowledges, particularly at the minimal impairment stage.

The 1990-91 Term » (1992), 3 *S.C.L.R.* (2d) 227, p. 239-241). Les tribunaux ne doivent pas pour autant invoquer la déférence pour restreindre au départ la portée de droits garantis par la *Charte*, car ils se déroberaient alors à leurs obligations en tant qu'« arbitre[s] ultime[s] [. . .] en matière de constitutionnalité au Canada » (*Nouvelle-Écosse (Workers' Compensation Board) c. Martin*, 2003 CSC 54, [2003] 2 R.C.S. 504, par. 31).

[80] Ainsi, dans l'arrêt *R. c. Advance Cutting & Coring Ltd.*, 2001 CSC 70, [2001] 3 R.C.S. 209, en dépit de leur désaccord sur la portée de l'al. 2*d*) et l'application de la *Charte*, tant le juge LeBel que le juge Bastarache (dissident) rejettent l'idée que la déférence envers le législateur en matière de relations du travail soustrait l'action législative à l'application de la *Charte*. Le juge LeBel, au nom des juges minoritaires selon lesquels il n'y avait pas violation de l'al. 2*d*), reconnaît l'existence d'un principe de non-intervention judiciaire dans les relations du travail. Cependant, il ajoute que « les arrêts de notre Cour n'ont jamais conclu que les lois du travail se trouvaient à l'abri d'un examen fondé sur la *Charte* » (par. 162).

[81] Le juge Rothstein soutient que les tribunaux doivent tenir compte de la déférence qui s'impose envers le Parlement pour déterminer la portée de l'al. 2*d*). Cette prétention est incompatible avec la décision de notre Cour dans *Dunmore*. Notre collègue adhère ainsi au point de vue exprimé par le juge McIntyre dans le *Renvoi relatif à l'Alberta*, mais notre Cour s'est dissociée de celui-ci depuis. Dans *Dunmore*, le juge Bastarache renvoie à l'analyse du juge McIntyre concernant la déférence en fonction de l'article premier plutôt qu'aux fins de déterminer la portée de l'al. 2*d*) : par. 57; voir également *Delisle*, les juges Cory et Iacobucci, dissidents, et *KMart Canada Ltd.*, par. 62-63, où le juge Cory reprend ce passage des motifs du juge McIntyre pour l'application de l'article premier dans une affaire de liberté d'expression. La déférence envers le législateur joue comme il se doit non pas dans la définition de la nature et de la portée d'un droit constitutionnel, mais bien dans l'appréciation que permet le cadre d'analyse établi dans l'arrêt *Oakes*, spécialement à l'étape de l'atteinte minimale.

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(viii) The Argument of Unworkability

[82] Rothstein J. argues that *Health Services* is unworkable and therefore must be overturned (para. 256).

[83] The short answer to this argument is that unworkability has not been established. Winkler C.J.O. speculates that more will be required to make *Health Services* work, and academics have weighed in with great passion, some in favour of the decision, some against it. But there is no concrete evidence that the principles enunciated in *Dunmore* and *Health Services* are unworkable or have led to intolerable results. It is premature to argue that the holding in *Health Services*, rendered four years ago, is unworkable in practice. In *Henry*, in holding this Court's decision in *R. v. Mannion*, [1986] 2 S.C.R. 272, to be unworkable 19 years after it was delivered, Binnie J. noted that the unworkability of that decision "only emerged over time as the courts have struggled to work with the distinction between impeachment of credibility and incrimination" (para. 45).

[84] Rothstein J. argues that the distinction drawn in *Health Services* between substantive and procedural rights is unworkable. Again, we must disagree. In our colleague's view, the procedural right to collective activity under s. 2(*d*) would impinge on the substantive right to a concluded collective agreement rejected in *Health Services*. However, substantive impact does not invalidate a procedural right. All procedures affect outcomes, but that does not mean that all procedural rights are unworkable. The *Charter* may protect collective bargaining and not the fruits of that process.

[85] Rothstein J. also suggests that more is required to transform the principles in *Health Services* into a full-blown labour relations scheme. This, however, does not establish unworkability. It is not the role of this Court to specify in advance

(viii) L'argument de l'inapplicabilité

[82] Le juge Rothstein affirme également que l'arrêt *Health Services* est inapplicable et qu'il y a donc lieu de l'écarter (par. 256).

[83] La réponse lapidaire à cet argument est que l'inapplicabilité n'est pas établie. Le juge en chef Winkler avance l'hypothèse que des ajouts seraient nécessaires pour rendre l'arrêt *Health Services* applicable, et des auteurs se prononcent avec ferveur, certains en faveur de la décision, d'autres contre. Or, rien ne démontre concrètement que les principes dégagés dans *Dunmore* et *Health Services* seraient inapplicables ou qu'ils auraient entraîné des résultats inadmissibles. Il est prématuré de conclure à l'inapplicabilité pratique de l'arrêt *Health Services* rendu il y a quatre ans. Dans *Henry*, le juge Binnie déclare inapplicable l'arrêt *R. c. Mannion*, [1986] 2 R.C.S. 272, 19 ans après son prononcé, en soulignant que l'inapplicabilité s'est manifestée « graduellement, au fur et à mesure que les tribunaux ont essayé de trouver tant bien que mal des façons d'appliquer la distinction entre attaquer la crédibilité de l'accusé et l'incriminer » (par. 45).

[84] Pour le juge Rothstein, la distinction établie dans *Health Services* entre droit substantiel et droit procédural n'est pas applicable. Encore une fois, nous ne pouvons partager son avis. Notre collègue estime que le droit procédural à l'activité collective protégé à l'al. 2*d*) empiète sur le droit substantiel à la conclusion d'une convention collective pourtant écarté dans *Health Services*. Cependant, l'incidence sur le droit substantiel n'invalide pas le droit procédural. La procédure influe toujours sur le résultat, mais tout droit procédural n'est pas inapplicable pour autant. La *Charte* peut protéger la négociation collective, mais non le fruit de ce processus.

[85] Le juge Rothstein laisse par ailleurs entendre que des additions seraient nécessaires pour transformer les principes de l'arrêt *Health Services* en un véritable régime de relations du travail, ce qui ne prouve toutefois pas son inapplicabilité. En

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precisely which model of labour relations the legislature should adopt. Instead, its role is to outline the boundaries within which the legislature must operate, and to assess if the scheme developed by legislators satisfies this test.

(ix) The Argument on Academic Criticism

[86] Justice Rothstein argues that academic criticism supports the view that *Health Services* should be overturned. While he agrees that criticism of a judgment is not sufficient to justify overruling it, he asserts that it is reason for the Court to "take notice".

[87] The first point to note is that the decisions that Rothstein J. relies on, the Trilogy and *PIPSC*, were themselves the subject of intense academic criticism (see, e.g., Macklem, at p. 240: "the combined effect of the Labour Trilogy and *P.I.P.S.* is a national embarrassment"; see also D. Beatty and S. Kennett, "Striking Back: Fighting Words, Social Protest and Political Participation in Free and Democratic Societies" (1988), 67 *Can. Bar Rev.* 573; A. C. Hutchinson and A. Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988), 38 *U.T.L.J.* 278; R. Elliot, "Developments in Constitutional Law: The 1989-90 Term" (1991), 2 *S.C.L.R.* (2d) 83). The real question is whether the academic criticism raises concerns not identified in *Health Services* that would justify overruling it.

[88] Moreover, as our colleague acknowledges, there was a range of opinions expressed about the decision in *Health Services*. As is often the case, some commentators agree, while others disagree in whole or in part. A number of comments approved of the shift away from the Trilogy in favour of a broader and more contextual understanding of freedom of association: see, e.g., C. Brunelle, "La liberté d'association se porte mieux: un commentaire de l'arrêt *Health Services*", in *Conférence des juristes de l'État 2009: XVIII^e Conférence* (2009), 237; P. Verge, "L'affirmation constitutionnelle de la liberté d'association: une nouvelle vie

effet, il ne revient pas à la Cour de préciser d'avance le modèle de relations du travail que devrait adopter le législateur. Il lui appartient plutôt de déterminer la marge de manœuvre dont dispose ce dernier, puis de décider si le régime établi satisfait aux exigences.

(ix) L'argument fondé sur les critiques des auteurs

[86] Le juge Rothstein fait valoir que les critiques des auteurs le confortent dans l'idée qu'il faut rompre avec *Health Services*. Même s'il convient que la critique d'un jugement ne saurait justifier son renversement, notre collègue prétend qu'il faut cependant que notre Cour en « prenne acte ».

[87] Signalons d'abord que les précédents invoqués par le juge Rothstein — la trilogie et *IPFPC* — ont eux aussi été fortement critiqués (voir, p. ex., Macklem, p. 240, où il dit que [TRADUCTION] « l'effet combiné de la trilogie et d'*IPFPC* crée un malaise à l'échelle nationale »; voir aussi D. Beatty et S. Kennett, « Striking Back : Fighting Words, Social Protest and Political Participation in Free and Democratic Societies » (1988), 67 *R. du B. can.* 573; A. C. Hutchinson et A. Petter, « Private Rights/Public Wrongs : The Liberal Lie of the Charter » (1988), 38 *U.T.L.J.* 278; R. Elliot, « Developments in Constitutional Law : The 1989-90 Term » (1991), 2 *S.C.L.R.* (2d) 83). Il convient plutôt de se demander si la doctrine relève des problèmes non abordés dans *Health Services* qui justifieraient le renversement de cet arrêt.

[88] De plus, ainsi que le reconnaît notre collègue, des opinions variées ont été exprimées à l'égard de l'arrêt *Health Services*. Comme cela se produit souvent, certains auteurs l'approuvent, d'autres sont totalement ou partiellement en désaccord avec elle. Un certain nombre de commentaires appuient l'abandon de la trilogie au bénéfice d'une conception plus large et plus contextuelle de la liberté d'association : voir, p. ex., C. Brunelle, « La liberté d'association se porte mieux : un commentaire de l'arrêt *Health Services* », dans *Conférence des juristes de l'État 2009 : XVIII^e Conférence* (2009), 237; P. Verge, « L'affirmation

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pour l'autonomie collective?" (2010), 51 *C. de D.* 353. Indeed, some commentators fault this Court's decision for not going far enough in protecting collective bargaining and related issues: see, e.g., P. Verge, "La Cour suprême, le 'droit' à la négociation collective et le 'droit' de grève" (2006), 66 *R. du B.* 391; P. Verge, "Inclusion du droit de grève dans la liberté générale et constitutionnelle d'association: justification et effets" (2009), 50 *C. de D.* 267; J. Cameron, "The Labour Trilogy's Last Rites: *B.C. Health* and a Constitutional Right to Strike" (2009-2010), 15 *C.L.E.L.J.* 297; J. Cameron, "Due Process, Collective Bargaining, and s. 2(d) of the *Charter*: A Comment on *B.C. Health Services*" (2006-2007), 13 *C.L.E.L.J.* 233.

constitutionnelle de la liberté d'association : une nouvelle vie pour l'autonomie collective? » (2010), 51 *C. de D.* 353. Certains auteurs reprochent même à la Cour de ne pas aller assez loin dans la protection de la négociation collective et d'autres questions connexes : voir notamment P. Verge, « La Cour suprême, le "droit" à la négociation collective et le "droit" de grève » (2006), 66 *R. du B.* 391; P. Verge, « Inclusion du droit de grève dans la liberté générale et constitutionnelle d'association : justification et effets » (2009), 50 *C. de D.* 267; J. Cameron, « The Labour Trilogy's Last Rites : *B.C. Health* and a Constitutional Right to Strike » (2009-2010), 15 *C.L.E.L.J.* 297; J. Cameron, « Due Process, Collective Bargaining, and s. 2(d) of the *Charter* : A Comment on *B.C. Health Services* » (2006-2007), 13 *C.L.E.L.J.* 233.

(x) The Argument on Canadian Labour History

[89] Rothstein J. takes issue with the discussion of Canadian labour history in *Health Services*, pointing out that hostility to collective bargaining is part of Canadian labour law history. We agree with this obvious fact, which was largely true until the Second World War, which is indeed referred to in the majority reasons in *Health Services*.

[90] The relevant question from the perspective of interpreting s. 2(*d*) of the *Charter* is not whether courts in the past have undermined collective bargaining, but rather whether Canadian society's *understanding* of freedom of association, viewed broadly, includes the right to collective bargaining in the minimal sense of good faith exchanges affirmed in *Health Services*. Whether that right has been consistently guaranteed by the legal system does not resolve the issue before us, the content of the s. 2(*d*) guarantee. *Charter* guarantees must be given a generous and purposive interpretation. While the practice of courts pre-*Charter* may assist in interpreting *Charter* guarantees, it does not freeze them forever in a pre-*Charter* vice.

(x) L'argument fondé sur l'évolution du droit du travail au Canada

[89] Le juge Rothstein conteste l'historique des relations du travail au Canada que dresse la Cour dans *Health Services* et il souligne l'hostilité dont la négociation collective a fait historiquement l'objet au pays. Nous convenons de ce fait manifeste, généralement observable jusqu'à la Seconde Guerre mondiale, et les juges majoritaires le mentionnent effectivement dans *Health Services*.

[90] Pour interpréter l'al. 2*d*) de la *Charte*, il ne faut pas se demander si les tribunaux ont déjà sapé les régimes de négociation collective dans le passé, mais bien si la *conception* que se fait la société canadienne de la liberté d'association, considérée largement, englobe le droit de négociation collective, compris dans le sens d'un droit minimal strict à des échanges de bonne foi reconnu dans *Health Services*. D'ailleurs on ne réglera pas le problème posé devant notre Cour, soit le contenu de la garantie constitutionnelle de l'al. 2*d*), en se demandant si notre système juridique a toujours garanti ce droit. Les garanties constitutionnelles doivent faire l'objet d'une interprétation généreuse et téléologique. La jurisprudence antérieure à la *Charte* peut être utile à leur interprétation, mais elle n'immobilise pas ces garanties dans une vision antérieure à la *Charte*.

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(xi) The Argument on International Law

[91] Rothstein J. takes issue with the majority's conclusion in *Health Services* that international law supports a finding that s. 2(*d*) includes a right to collective bargaining.

[92] The majority in *Health Services* discussed both "Canada's *current* international law commitments and the current state of international thought on human rights" (para. 78 (underlining added)). *Charter* rights *must* be interpreted in light of Canadian values and Canada's international and human rights commitments. In *Dunmore*, Bastarache J. emphasized the relevance of these in interpreting s. 2(*d*) in the context.

[93] The fundamental question from the perspective of s. 2(*d*) is whether Canada's international obligations support the view that collective bargaining is constitutionally protected in the minimal sense discussed in *Health Services*. The majority in *Health Services* relied on three documents that Canada has endorsed: the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, and the International Labour Organization's ("ILO's") *Convention (No. 87) concerning freedom of association and protection of the right to organise*, 68 U.N.T.S. 17 ("Convention No. 87").

[94] The decision rendered by the ILO Committee on Freedom of Association ("CFA"), in the conflict between the employees of the B.C. health services and the government of British Columbia, concerned the very conflict that formed the factual background of the decision in *Health Services*. After applying Convention No. 87 and noting that Canada had not ratified *Convention (No. 98) concerning the application of the principles of the right to organise and to bargain collectively*, 96 U.N.T.S. 257 ("Convention No. 98"), the CFA concluded that

(xi) L'argument fondé sur le droit international

[91] Le juge Rothstein exprime également son désaccord avec l'avis des juges majoritaires dans *Health Services* selon lequel le droit international permet de conclure que l'al. 2*d*) inclut un droit à la négociation collective.

[92] Dans cet arrêt, les juges majoritaires se penchent à la fois sur « les engagements *actuels* du Canada en vertu du droit international et [sur] l'opinion internationale qui prévaut actuellement en matière de droits de la personne » (par. 78 (nous soulignons)). Les droits constitutionnels *doivent* être interprétés à la lumière des valeurs canadiennes et des engagements internationaux du pays en matière de droits de la personne. Ainsi, dans *Dunmore*, le juge Bastarache insiste sur la pertinence de ces éléments pour interpréter l'al. 2*d*) eu égard au contexte.

[93] La question fondamentale qui se pose alors sous l'angle de l'al. 2*d*) consiste à rechercher si les obligations internationales du Canada permettent de conclure que la négociation collective bénéficie de la protection constitutionnelle au sens strict entendu dans *Health Services*. Dans cet arrêt, les juges majoritaires s'appuient sur trois instruments internationaux entérinés par le Canada : le *Pacte international relatif aux droits économiques, sociaux et culturels*, 993 R.T.N.U. 3, le *Pacte international relatif aux droits civils et politiques*, 999 R.T.N.U. 171, et la *Convention (n^o^ 87) concernant la liberté syndicale et la protection du droit syndical*, 68 R.T.N.U. 17 (« Convention n^o^ 87 ») de l'Organisation internationale du Travail (« OIT »).

[94] La décision du Comité de la liberté syndicale de l'OIT (« CLS ») dans le conflit opposant les employés des services de santé de la Colombie-Britannique et le gouvernement de la province visait le différend même qui est à l'origine de l'arrêt *Health Services*. Après avoir appliqué la Convention n^o^ 87 et avoir indiqué que le Canada n'avait pas ratifié la *Convention (n^o^ 98) concernant l'application des principes du droit d'organisation et de négociation collective*, 96 R.T.N.U. 257 (« Convention n^o^ 98 »), le CLS conclut que

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the action of the government of British Columbia violated the employees' right to freedom of association. It stated that the unilateral cancellation of collective agreements "may have a detrimental effect on workers' interests in unionization, since members and potential members could consider it useless to join an organization the main objective of which is to represent its members in collective bargaining, if the results of bargaining are constantly cancelled by law" (Report No. 330 (2003), vol. LXXXVI, Series B, No. 1, at para. 304).

[95] Rothstein J. argues that Convention No. 98 (which is not binding on Canada) does not support "a version of collective bargaining that includes a duty to bargain in good faith" (para. 249). While voluntariness is a component of the international model of collective bargaining — as noted by the majority in *Health Services* (para. 77, citing B. Gernigon, A. Odero and H. Guido, "ILO principles concerning collective bargaining" (2000), 139 *Intern'l Lab. Rev.* 33, at pp. 51-52) — the ILO Committee of Experts has not found compulsory collective bargaining to be contrary to international norms. The 1994 Report of the Committee of Experts discussed the domestic schemes that compelled employers to bargain with unions, listing Canada, and approvingly stated that such schemes illustrated "the principle that employers and trade unions should negotiate in good faith and endeavour to reach an agreement" (Committee of Experts on the Application of Conventions and Recommendations, *Freedom of Association and Collective Bargaining* (1994), at para. 243). This is precisely the general principle that *Health Services* endorses.

(xii) The Argument on *Charter* Values

[96] Rothstein J. argues that the majority in *Health Services* erred in relying on the underlying values of the *Charter* when interpreting the scope of s. 2(*d*) rather than on the text of the *Charter* itself (paras. 252-54). We can only respond that a value-oriented approach to the broadly worded

la mesure du gouvernement de la province porte atteinte à la liberté d'association des employés. Il affirme que l'annulation unilatérale de conventions collectives « peut saper la confiance des salariés dans la valeur de l'appartenance à un syndicat, les membres ou les adhérents potentiels étant ainsi incités à considérer qu'il est inutile d'adhérer à une organisation dont le but principal est de représenter ses membres dans les négociations collectives, si les résultats de ces dernières sont souvent annulés par voie législative » (Rapport n^{o} 330 (2003), vol. LXXXVI, série B, n^{o} 1, par. 304).

[95] Le juge Rothstein soutient que la Convention n^{o} 98 (qui ne lie pas le Canada) n'étaye pas la thèse d'une « négociation collective entendue au sens où l'employeur est tenu de négocier de bonne foi » (par. 249). Bien que le caractère volontaire de ce processus soit inhérent à la notion internationale de négociation collective — comme le signalent les juges majoritaires dans *Health Services* (par. 77, citant B. Gernigon, A. Odero et H. Guido, « Les principes de l'OIT sur la négociation collective » (2000), 139 *Rev. int. trav.* 37, p. 51-52) —, la Commission d'experts de l'OIT ne conclut pas que la négociation collective obligatoire contrevient aux normes internationales. Dans son rapport de 1994, la commission examine les régimes nationaux, dont celui du Canada, qui obligent l'employeur à négocier avec un syndicat et elle relève avec satisfaction qu'ils illustrent le « principe selon lequel employeurs et syndicats doivent négocier de bonne foi en s'efforçant d'arriver à un accord » (Commission d'experts pour l'application des conventions et recommandations, *Liberté syndicale et négociation collective* (1994), par. 243). Tel est précisément le principe général repris dans *Health Services*.

(xii) L'argument fondé sur les valeurs de la *Charte*

[96] Selon le juge Rothstein, dans *Health Services*, les juges majoritaires ont tort de s'appuyer sur les valeurs qui sous-tendent la *Charte* plutôt que sur le texte lui-même de celle-ci lorsqu'ils interprètent la portée de l'al. 2*d*) (par. 252-254). Nous répondons simplement qu'interpréter en fonction des valeurs

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guarantees of the *Charter* has been repeatedly endorsed by *Charter* jurisprudence over the last quarter century.

(xiii) Conclusion

[97] Notwithstanding the comprehensive reasons of our colleague, we conclude that *Health Services* is grounded in precedent, consistent with Canadian values, consistent with Canada's international commitments and consistent with this Court's purposive and generous interpretation of other *Charter* guarantees. In our view, it should not be overturned.

(2) Application: Have the Respondents Established a Breach of Section 2(*d*)?

[98] The essential question is whether the *AEPA* makes meaningful association to achieve workplace goals effectively impossible, as was the case in *Dunmore*. If the *AEPA* process, viewed in terms of its effect, makes good faith resolution of workplace issues between employees and their employer effectively impossible, then the exercise of the right to meaningful association guaranteed by s. 2(*d*) of the *Charter* will have been limited, and the law found to be unconstitutional in the absence of justification under s. 1 of the *Charter*. The onus is on the farm workers to establish that the *AEPA* interferes with their s. 2(*d*) right to associate in this way.

[99] As discussed above, the right of an employees' association to make representations to the employer and have its views considered in good faith is a derivative right under s. 2(*d*) of the *Charter*, necessary to meaningful exercise of the right to free association. The question is whether the *AEPA* provides a process that satisfies this constitutional requirement.

[100] Under the *AEPA*, the right of employees' associations to make representations to their employers is set out in s. 5. The relevant sections are ss. 5(1), (5), (6) and (7):

de la *Charte* les garanties formulées dans celle-ci de manière générale est conforme à la jurisprudence constitutionnelle des 25 dernières années.

(xiii) Conclusion

[97] En dépit des motifs détaillés de notre collègue, nous arrivons à la conclusion que l'arrêt *Health Services* prend appui dans les décisions antérieures, qu'il est compatible avec les valeurs canadiennes, qu'il respecte les engagements internationaux du Canada et qu'il s'inscrit dans la foulée de l'interprétation téléologique et généreuse des autres garanties constitutionnelles, en sorte qu'il n'y a pas lieu selon nous de l'écarter.

(2) Application : Les intimés ont-ils établi l'atteinte à l'al. 2*d*)?

[98] La Cour doit essentiellement se demander si, à l'instar des textes législatifs considérés dans *Dunmore*, la *LPEA* rend de fait impossible l'association véritable en vue de réaliser des objectifs liés au travail. Si, considéré sous l'angle de son effet, le processus de la *LPEA* rend effectivement impossible le règlement de bonne foi des différends liés au travail opposant employés et employeurs, on se trouve devant une restriction du droit d'association véritable garanti à l'al. 2*d*) de la *Charte* et la loi est inconstitutionnelle sauf justification au regard de l'article premier de la *Charte*. Il incombe aux travailleurs agricoles d'établir que la *LPEA* porte ainsi atteinte à leur droit constitutionnel de s'associer.

[99] Rappelons que le droit d'une association d'employés de présenter des observations à l'employeur et de les voir prises en compte de bonne foi est dérivé de la liberté garantie à l'al. 2*d*) de la *Charte* et qu'il est nécessaire à l'exercice véritable du droit de libre association. Il faut alors rechercher si la *LPEA* prévoit un processus qui satisfait à cette exigence constitutionnelle.

[100] Dans la *LPEA*, le droit d'une association d'employés de formuler des observations à l'intention de l'employeur est prévu à l'art. 5, dont voici les paragraphes pertinents :

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5. (1) The employer shall give an employees' association a reasonable opportunity to make representations respecting the terms and conditions of employment of one or more of its members who are employed by that employer.

. . .

(5) The employees' association may make the representations orally or in writing.

(6) The employer shall listen to the representations if made orally, or read them if made in writing.

(7) If the representations are made in writing, the employer shall give the association a written acknowledgment that the employer has read them.

[101] Sections 5(6) and (7) are critical. They provide that the employer shall listen to oral representations, and read written representations, and acknowledge having read them. They do not expressly refer to a requirement that the employer consider employee representations in good faith. Nor do they rule it out. By implication, they include such a requirement.

[102] Three considerations lead us to conclude that any ambiguity in ss. 5(6) and (7) should be resolved by interpreting them as imposing a duty on agricultural employers to consider employee representations in good faith.

[103] The first consideration is the principle that a statute should be interpreted in a way that gives meaning and purpose to its provisions. This requires us to ask what the purpose of the requirements in ss. 5(6) and (7) is. There can only be one purpose for requiring the employer to listen to or read employee representations — to assure that the employer will in fact consider the employee representations. No labour relations purpose is served merely by *pro forma* listening or reading. To fulfill the purpose of reading or listening, the employer must consider the submission. Moreover, the employer must do so in good faith: consideration with a closed mind would render listening or reading the submission pointless.

5. (1) Un employeur donne à une association d'employés une occasion raisonnable de présenter des observations au sujet des conditions d'emploi d'un ou de plusieurs de ses membres qui sont employés par cet employeur.

. . .

(5) L'association d'employés peut présenter ses observations oralement ou par écrit.

(6) L'employeur écoute les observations qui lui sont présentées oralement et lit celles qui lui sont présentées par écrit.

(7) Si les observations lui sont présentées par écrit, l'employeur informe l'association d'employés par écrit qu'il les a lues.

[101] Les paragraphes 5(6) et (7) revêtent une importance cruciale. Ils disposent que l'employeur écoute les observations présentées oralement et qu'il lit celles formulées par écrit, puis qu'il informe l'association qu'il les a lues. Ils n'exigent pas expressément de l'employeur qu'il examine de bonne foi les revendications de ses employés. Ils ne l'excluent pas non plus. L'obligation lui en est faite implicitement.

[102] Trois raisons nous incitent à conclure qu'il faut résoudre toute ambiguïté du libellé des par. 5(6) et (7) en tenant pour acquis que les dispositions obligent l'employeur agricole à examiner de bonne foi les observations de ses employés.

[103] La première découle du principe qu'une loi doit s'interpréter de manière que ses dispositions aient un sens et un objet. Il nous faut donc déterminer la raison d'être des exigences énoncées aux par. 5(6) et (7). Une seule explication peut être trouvée à l'obligation imposée à l'employeur d'écouter ou de lire les observations présentées par les employés : s'assurer que l'employeur considère effectivement ces observations. Une simple obligation d'écoute ou de lecture passive ne permettra pas de réaliser cet objectif. Pour s'acquitter de son obligation, l'employeur doit examiner les observations. De plus, il doit le faire de bonne foi : une attitude fermée rend l'examen sans objet.

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[104] The second consideration is that Parliament and legislatures are presumed to intend to comply with the *Charter*: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078, *per* Lamer J. (as he then was), dissenting in part; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at para. 33. At the time the *AEPA* was adopted *Dunmore* had pronounced that the *Charter* requires meaningful exercise of the right to associate in pursuit of workplace goals. Since *Health Services*, it has been clear that this requires employers to consider employee representations in good faith. Any ambiguity in the *AEPA* should be resolved accordingly.

[105] The third consideration is the expressed intention of the Minister in debates on the legislation. When introducing the legislation, she stated:

> The government is advised that the Supreme Court of Canada decision regarding Dunmore versus Ontario obligates the government to extend legislative protections to agricultural workers. It obligates us to do this to ensure that employees have the right to form and join associations, as well as have the protection necessary to ensure that the freedom of association is meaningful. The government of Ontario will meet these obligations.

(Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, No. 46A, 3rd Sess., 37th Parl., October 22, 2002, at p. 2340 (emphasis added))

[106] The government must, on the words of its Minister, have intended the legislation to achieve whatever is required to ensure meaningful exercise of freedom of association. As discussed above, meaningful exercise of the right to free association in the workplace context requires good faith consideration of employee representations. As pointed out by the respondents, the Minister also stated that the *AEPA* was not intended to "extend collective bargaining to agricultural workers". However, this may be understood as an affirmation that the *AEPA* did not institute the dominant Wagner model of collective bargaining, or bring agricultural workers within the ambit of the *LRA*, not that the Minister

[104] La deuxième raison tient à la présomption selon laquelle le Parlement et les législatures veulent respecter la *Charte* : *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038, p. 1078, le juge Lamer (plus tard Juge en chef), dissident en partie; *R. c. Sharpe*, 2001 CSC 2, [2001] 1 R.C.S. 45, par. 33. Lors de l'adoption de la *LPEA*, la Cour avait statué, dans *Dunmore*, que la *Charte* exigeait l'exercice véritable du droit de s'associer dans la poursuite d'objectifs liés au travail. Depuis l'arrêt *Health Services*, il est clair que l'employeur doit de ce fait examiner de bonne foi les observations de ses employés. Il faut résoudre en conséquence toute ambiguïté de la *LPEA*.

[105] La troisième raison se retrouve dans l'intention exprimée par la ministre responsable lorsque le projet de loi a été débattu. Voici ce qu'elle a déclaré en le présentant :

> [TRADUCTION] Le gouvernement est informé que la décision de la Cour suprême du Canada dans Dunmore contre l'Ontario l'oblige à accorder une protection légale aux travailleurs agricoles. Il nous faut donc faire en sorte que ces employés jouissent du droit de former des associations et d'y adhérer, ainsi que de la protection voulue pour que leur liberté d'association ait un sens. Le gouvernement de l'Ontario satisfera à ces obligations.

(Assemblée législative de l'Ontario, *Journal des débats (Hansard)*, nº 46A, 3e sess., 37e lég., 22 octobre 2002, p. 2340 (nous soulignons))

[106] À la lecture des propos tenus par la ministre, on doit conclure que le gouvernement a dû vouloir accomplir tout ce qui était nécessaire pour assurer l'exercice véritable de la liberté d'association. Comme nous l'affirmons précédemment, l'exercice véritable du droit de libre association dans le contexte du travail rend obligatoire l'examen de bonne foi des demandes formulées par les employés. Les intimés signalent que la ministre précise en outre que la *LPEA* ne vise pas [TRADUCTION] « l'application de la négociation collective aux travailleurs agricoles ». On peut cependant en déduire que la *LPEA* n'instaure pas le modèle Wagner, prédominant en matière de

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intended to deprive farm workers of the protections of collective bargaining that s. 2(*d*) grants.

[107] These considerations lead us to conclude that s. 5 of the *AEPA*, correctly interpreted, protects not only the right of employees to make submissions to employers on workplace matters, but also the right to have those submissions considered in good faith by the employer. It follows that s. 5 of the *AEPA* does not violate s. 2(*d*) of the *Charter*.

[108] It is argued that the record thus far under the *AEPA* gives little reason to think that the *AEPA* process will in fact lead to good faith consideration by employers. The evidence shows that the respondents attempted to engage employers in collective bargaining activities on a few occasions. On each occasion the employer ignored or rebuffed further engagement. The employers have refused to recognize their association and have either refused to meet and bargain with it or have not responded to the demands of the respondents.

[109] This history, scant as it is, does not establish that the *AEPA* violates s. 2(*d*). Indeed, the union has not made a significant attempt to make it work. As just discussed, properly interpreted, it does not violate s. 2(*d*). Moreover, the process has not been fully explored and tested. The *AEPA*, as Farley J. noted, contemplates a meaningful exercise of the right of association, and provides a tribunal for the resolution of disputes.

[110] Farley J. expressed cautious hope that the Tribunal created by the Act would prove efficacious and that the relief claimed might be granted:

One would think it better to see how the Tribunal operates in fact before condemning it as powerless to deal with such abuses. . . . I am of the view that this condemnation is premature. A successful application would do one of several things: be effective positively

négociation collective, ou qu'elle ne fait pas bénéficier les travailleurs agricoles du régime de la *LRT*. Toutefois, ces commentaires ne signifient pas que la ministre voulait priver ces employés du droit de négociation collective garanti à l'al. 2*d*).

[107] Pour ces raisons, nous concluons que l'art. 5 de la *LPEA*, s'il est correctement interprété, protège non seulement le droit des employés de présenter à l'employeur des observations relatives au travail, mais aussi celui de les voir prises en considération de bonne foi par le destinataire. L'article 5 de la *LPEA* ne porte donc pas atteinte à l'al. 2*d*) de la *Charte*.

[108] Les intimés plaident qu'à ce jour, les faits donnent peu de raisons de croire que le processus établi par la *LPEA* mènera vraiment à un examen de bonne foi par l'employeur. La preuve révèle que les intimés ont tenté à quelques reprises de négocier collectivement avec leurs employeurs, mais qu'à chaque fois, ces derniers ont fait la sourde oreille ou refusé de négocier plus avant. Les employeurs ont refusé de reconnaître l'association et ils ont soit écarté toute rencontre en vue de négocier avec elle, soit omis de répondre aux demandes des intimés.

[109] La brève histoire de ces tentatives ne saurait établir que la *LPEA* contrevient à l'al. 2*d*). En effet, le syndicat n'a pas fait d'efforts significatifs pour faire fonctionner ce nouveau régime. Nous le répétons, correctement interprétée, la *LPEA* respecte l'al. 2*d*). En outre, le processus qu'elle prévoit n'a pas été pleinement exploré et mis à l'épreuve. Comme le signale le juge Farley, la *LPEA* a pour objet l'exercice véritable du droit de s'associer et elle crée un tribunal pour le règlement des différends.

[110] Le juge Farley exprime avec prudence l'espoir que le Tribunal créé par la Loi se révèle efficace et que la réparation demandée puisse être accordée :

[TRADUCTION] Il semble préférable de voir comment le Tribunal s'acquitte de sa tâche dans les faits avant de le déclarer inapte à réprimer de tels abus. [. . .] À mon avis, cette condamnation est prématurée. Une demande accueillie produit l'un ou l'autre des résultats suivants :

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as to action; or morally give the wrongdoing employer a "bloody nose"; or if truly an empty process, it would demonstrate the need for strengthening by legislative amendment. [para. 18]

[111] Farley J. accordingly found that the complaint was premature:

. . . it would seem to me to be a premature and unfair complaint that the Tribunal charged under the *AEPA* with dealing with complaints — namely the Agriculture, Food and Rural Affairs Appeal Tribunal — is bereft of expertise in labour relations given its bipartite composition of labour and agricultural experienced personnel. That Tribunal should be given a fair opportunity to demonstrate its ability to appropriately handle the function given to it by the *AEPA*. [para. 28]

[112] Section 11 of the *AEPA* specifically empowers the Tribunal to make a determination that there has been a contravention of the Act, and to grant an order or remedy with respect to that contravention. The Tribunal may be expected to interpret its powers, in accordance with its mandate, purposively, in an effective and meaningful way. Labour tribunals enjoy substantial latitude when applying their constituent statutes to the facts of a given case. As stated by the Ontario Labour Relations Board in *Adams Mine, Cliffs of Canada Ltd. v. United Steelworkers of America* (1982), 1 C.L.R.B.R. (N.S.) 384:

The Act does not spell out each and every right and obligation of labour and management. This Board is left with the task of applying the Act's general language in the light of an infinite variety of circumstances which may arise. A rigid scheme of regulation is avoided and flexibility is provided although all within the limitations necessary to effectuate the dominant purpose of the Act. [pp. 399-400]

[113] We conclude the *AEPA* does not breach s. 2(*d*) of the *Charter*. It is therefore unnecessary to consider the s. 1 arguments that the respondents' demands for full *LRA* protections would be inappropriate because of the diverse nature of the agricultural sector, ranging from small family operations to larger commercial establishments.

faire véritablement avancer les choses ou infliger un « revers » moral à l'employeur fautif ou encore, s'il s'agit véritablement d'un processus vain, démontre la nécessité d'une modification législative visant à le resserrer. [par. 18]

[111] Il conclut donc que la plainte est prématurée :

[TRADUCTION] . . . il me paraît prématuré et injuste d'affirmer que le Tribunal chargé par la *LPEA* de l'audition des plaintes — le Tribunal d'appel de l'agriculture, de l'alimentation et des affaires rurales — n'a pas d'expertise en relations du travail étant donné qu'il est bipartite et compte à la fois des membres provenant du monde du travail et des membres issus du milieu de l'agriculture. Il convient de donner au Tribunal la possibilité raisonnable de montrer qu'il peut s'acquitter adéquatement de la fonction que lui confie la *LPEA*. [par. 28]

[112] L'article 11 de la *LPEA* habilite expressément le Tribunal à déterminer s'il y a eu infraction à la Loi et à rendre des ordonnances réparatrices. De plus, le Tribunal pourrait, conformément à son mandat, interpréter téléologiquement ses pouvoirs de façon qu'ils soient efficaces et utiles. Les tribunaux du travail jouissent d'une grande latitude pour appliquer leur loi constitutive aux faits particuliers des affaires dont ils sont saisis. Comme le souligne la Commission des relations de travail de l'Ontario dans *Adams Mine, Cliffs of Canada Ltd. c. United Steelworkers of America* (1982), 1 C.L.R.B.R. (N.S.) 384 :

[TRADUCTION] La Loi n'énumère pas chacun des droits et des obligations des employés et de la direction. Il revient à la Commission d'appliquer le libellé général de la Loi en fonction de la myriade de situations qui peuvent se présenter. On évite ainsi d'appliquer un cadre réglementaire rigide et on recourt à la souplesse, mais compte tenu des limitations que rend nécessaires la réalisation de l'objectif principal de la Loi. [p. 399-400]

[113] Nous concluons que la *LPEA* ne porte pas atteinte à la liberté garantie à l'al. 2*d*) de la *Charte*. Il n'y a donc pas lieu d'examiner au regard de l'article premier la prétention des intimés selon laquelle la nature multiforme du secteur agricole, qui englobe tant de petites exploitations familiales que de grandes exploitations commerciales, ne permet pas de faire bénéficier les intimés de toute la protection qu'offre la *LRT*.

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C. *Section 15 of the Charter*

[114] As an alternative to their claim under s. 2(*d*), the respondents contend that Ontario has violated their equality rights under s. 15 of the *Charter* by excluding them from the statutory protections accorded to workers in other sectors. They argue that status as an agricultural worker is analogous to the enumerated grounds of discrimination in s. 15(1) because their occupation is a fundamental aspect of their identity.

[115] Farley J., writing in 2006, found that the situation of farm workers had not changed appreciably since *Dunmore*, in 2001, where this Court wrote with sympathy of the vulnerable position of these workers and the need for greater labour protections. The Ontario legislature attempted to respond to the concerns expressed in *Dunmore* by enacting the *AEPA*.

[116] The s. 15 discrimination claim, like the s. 2(*d*) claim, cannot succeed on the record before us. It is clear that the regime established by the *AEPA* does not provide all the protections that the *LRA* extends to many other workers. However, a formal legislative distinction does not establish discrimination under s. 15. What s. 15 contemplates is substantive discrimination that impacts on individuals stereotypically or in ways that reinforce existing prejudice and disadvantage: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 17. The *AEPA* provides a special labour regime for agricultural workers. However, on the record before us, it has not been established that the regime utilizes unfair stereotypes or perpetuates existing prejudice and disadvantage. Until the regime established by the *AEPA* is tested, it cannot be known whether it inappropriately disadvantages farm workers. The claim is premature.

V. Conclusion

[117] The decision that we render today is another step in the resolution of the issues surrounding the

C. *Article 15 de la Charte*

[114] Subsidiairement, les intimés soutiennent que l'Ontario a porté atteinte au droit à l'égalité garanti à l'art. 15 de la *Charte* en leur refusant la protection légale dont jouissent les travailleurs des autres secteurs. Ils plaident que le fait d'être travailleur agricole constitue un motif de discrimination analogue à ceux énumérés au par. 15(1), car leur fonction définit essentiellement leur identité.

[115] Dans son jugement datant de 2006, le juge Farley estime que la situation des travailleurs agricoles n'a pas changé notablement depuis l'affaire *Dunmore*, en 2001, dans laquelle la Cour statue en se montrant sensible à la vulnérabilité de ces travailleurs et à la nécessité de mieux les protéger. Par l'adoption de la *LPEA*, le législateur ontarien a tenté de donner suite aux préoccupations de la Cour dans l'arrêt *Dunmore*.

[116] À l'instar de la demande fondée sur l'al. 2*d*), le moyen alléguant la discrimination au sens de l'art. 15 de la *Charte* ne peut être accueilli au vu du dossier. Certes, le régime créé par la *LPEA* ne confère pas toutes les protections que la *LRT* offre à de nombreux autres travailleurs. Toutefois, une distinction législative formelle ne permet pas d'établir la discrimination visée à l'art. 15, à savoir la discrimination réelle qui, en raison de l'application de stéréotypes, a des incidences sur des individus ou a pour effet de renforcer des préjugés ou des désavantages existants : *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143; *R. c. Kapp*, 2008 CSC 41, [2008] 2 R.C.S. 483, par. 17. La *LPEA* crée un régime de relations du travail spécialement pour les travailleurs agricoles. Cependant, le dossier n'établit pas que le régime repose sur des stéréotypes inéquitables ou qu'il perpétue des préjugés ou des désavantages existants. Tant qu'il n'a pas été mis à l'épreuve, on ne peut savoir si le régime de la *LPEA* défavorise indûment les travailleurs agricoles. Le recours demeure prématuré.

V. Conclusion

[117] En statuant dans la présente affaire, notre Cour franchit une autre étape dans le règlement des

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organizational challenges faced by farm workers in Ontario. We hope that all concerned proceed on the basis that s. 2(*d*) of the *Charter* confirms a right to collective bargaining, defined as "a process of collective action to achieve workplace goals", requiring engagement by both parties. Like all *Charter* rights, this right must be interpreted generously and purposively. The bottom line may be simply stated: Farm workers in Ontario are entitled to meaningful processes by which they can pursue workplace goals.

[118] We would allow the appeal and dismiss the action. We would answer the constitutional questions as follows:

1. Does the *Agricultural Employees Protection Act, 2002*, S.O. 2002, c. 16, infringe s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?

No.

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

It is not necessary to answer this question.

3. Does s. 3(b.1) of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, infringe s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?

No.

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

It is not necessary to answer this question.

5. Does the *Agricultural Employees Protection Act, 2002*, S.O. 2002, c. 16, infringe s. 15 of the *Canadian Charter of Rights and Freedoms*?

No.

questions entourant le droit des travailleurs agricoles de l'Ontario d'exercer leur droit d'association. Il faut espérer que tous les intéressés partiront du principe que l'al. 2*d*) de la *Charte* confirme un droit de négociation collective, à savoir « une action collective visant à atteindre des objectifs liés au [. . .] travail », et une obligation des deux parties de participer au processus. Comme tous ceux garantis par la *Charte*, ce droit doit faire l'objet d'une interprétation généreuse et téléologique. L'essentiel se résume simplement : les travailleurs agricoles de l'Ontario ont droit à un processus véritable leur permettant de réaliser des objectifs liés au travail.

[118] Nous sommes d'avis d'accueillir le pourvoi et de rejeter l'action. Nous sommes également d'avis de répondre comme suit aux questions constitutionnelles :

1. La *Loi de 2002 sur la protection des employés agricoles*, L.O. 2002, ch. 16, contrevient-elle à l'al. 2*d*) de la *Charte canadienne des droits et libertés*?

Non.

2. Dans l'affirmative, cette contravention constitue-t-elle une limite raisonnable prescrite par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique au sens de l'article premier de la *Charte canadienne des droits et libertés*?

Il n'est pas nécessaire de répondre à cette question.

3. L'alinéa 3b.1) de la *Loi de 1995 sur les relations de travail*, L.O. 1995, ch. 1, ann. A, contrevient-il à l'al. 2*d*) de la *Charte canadienne des droits et libertés*?

Non.

4. Dans l'affirmative, cette contravention constitue-t-elle une limite raisonnable prescrite par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique au sens de l'article premier de la *Charte canadienne des droits et libertés*?

Il n'est pas nécessaire de répondre à cette question.

5. *La Loi de 2002 sur la protection des employés agricoles*, L.O. 2002, ch. 16, contrevient-elle à l'art. 15 de la *Charte canadienne des droits et libertés*?

Non.

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6. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

It is not necessary to answer this question.

7. Does s. 3(b.1) of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, infringe s. 15 of the *Canadian Charter of Rights and Freedoms*?

No.

8. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

It is not necessary to answer this question.

In the circumstances, we order no costs on this appeal or in the courts below.

The reasons of Charron and Rothstein JJ. were delivered by

ROTHSTEIN J. —

I. Introduction

[119] I have had the opportunity to read the reasons of the Chief Justice and LeBel J. in this appeal. I agree with them that the appeal should be allowed and the action dismissed. However, I disagree with their interpretation of s. 2(*d*) of the *Canadian Charter of Rights and Freedoms* with respect to collective bargaining.

[120] The Chief Justice and LeBel J. have accurately set out the background, the constitutional challenge and the judicial history in this case. While I agree with what they have written in these respects, I respectfully disagree with the reasons for their decision.

[121] The reasons of the Chief Justice and LeBel J. are based upon the majority decision in *Health*

6. Dans l'affirmative, cette contravention constitue-t-elle une limite raisonnable prescrite par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique au sens de l'article premier de la *Charte canadienne des droits et libertés*?

Il n'est pas nécessaire de répondre à cette question.

7. L'alinéa 3b.1) de la *Loi de 1995 sur les relations de travail*, L.O. 1995, ch. 1, ann. A, contrevient-il à l'art. 15 de la *Charte canadienne des droits et libertés*?

Non.

8. Dans l'affirmative, cette contravention constitue-t-elle une limite raisonnable prescrite par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique au sens de l'article premier de la *Charte canadienne des droits et libertés*?

Il n'est pas nécessaire de répondre à cette question.

Vu les circonstances, aucuns frais ne sont adjugés dans le présent pourvoi, ni devant les juridictions inférieures.

Version française des motifs des juges Charron et Rothstein rendus par

LE JUGE ROTHSTEIN —

I. Introduction

[119] J'ai eu l'occasion de lire les motifs de la Juge en chef et du juge LeBel dans la présente affaire. Je conviens avec eux qu'il y a lieu d'accueillir le pourvoi et de rejeter l'action. Toutefois, je ne souscris pas à leur interprétation de l'al. 2*d*) de la *Charte canadienne des droits et libertés* en ce qui concerne la négociation collective.

[120] La Juge en chef et le juge LeBel font correctement état du contexte, de la contestation constitutionnelle et de l'historique judiciaire. J'approuve ce qu'ils écrivent à cet égard mais, en toute déférence, je ne peux souscrire aux motifs qui sous-tendent leur décision.

[121] Les motifs de la Juge en chef et du juge LeBel prennent appui sur l'arrêt *Health Services*

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Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27, [2007] 2 S.C.R. 391 ("*Health Services*"). The majority in *Health Services* found that s. 2(*d*) of the *Charter* confers constitutional status on collective bargaining. It concluded that collective bargaining as protected by s. 2(*d*) "requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation" (para. 90). It further found that the requirement to bargain in good faith imposes a duty on employers to meet with employees and make a "reasonable effort to arrive at an acceptable contract" (para. 101).

[122] Following the reasons in *Health Services*, the Chief Justice and LeBel J. in this case say that s. 2(*d*) protects a right to collective bargaining, which includes "a process of engagement that permits employee associations to make representations to employers, which employers must consider and discuss in good faith" (para. 2). According to them, there is no doubt that because of s. 2(*d*) employers "must engage in a process of meaningful discussion" because "the effect of denying these rights is to render the associational process effectively useless" (para. 54).

[123] The term collective bargaining may have different meanings in other contexts, which I discuss in further detail below. For the sake of clarity, throughout these reasons, I will use the term to refer to the entitlements and obligations that the Chief Justice and LeBel J. view as being encompassed by s. 2(*d*), as quoted in paras. 121 and 122 above.

[124] I respectfully disagree with the Chief Justice and LeBel J. that collective bargaining enjoys constitutional status under the s. 2(*d*) freedom of association. I do not agree that s. 2(*d*) requires the state to impose a complex set of statutorily defined reciprocal rights and duties on employers and workers associations, including a duty to bargain in good faith.

and Support — Facilities Subsector Bargaining Assn. c. Colombie-Britannique, 2007 CSC 27, [2007] 2 R.C.S. 391 (« *Health Services* »). Dans cet arrêt, les juges majoritaires concluent que l'al. 2*d*) de la *Charte* confère une valeur constitutionnelle à la négociation collective. Selon eux, la négociation collective ainsi protégée à l'al. 2*d*) « implique que l'employeur et les employés se rencontrent et négocient de bonne foi en vue de réaliser leur objectif commun d'accommodement par des moyens pacifiques et productifs » (par. 90). Ils concluent également que l'exigence de négocier de bonne foi oblige l'employeur à rencontrer ses employés et à faire un « effort raisonnable pour arriver à un contrat acceptable » (par. 101).

[122] Conformément aux motifs des juges majoritaires dans *Health Services*, la Juge en chef et le juge LeBel affirment en l'espèce que l'al. 2*d*) protège un droit à la négociation collective, qui comprend « un processus de dialogue où l'association d'employés peut présenter des observations à l'employeur, qui doit en prendre connaissance et en discuter de bonne foi » (par. 2). Selon eux, il ne fait aucun doute qu'en raison de l'al. 2*d*), l'employeur « doit [. . .] participer à un dialogue véritable » parce que « l'absence de tels droits ren[d] inutile le processus associatif » (par. 54).

[123] Le terme « négociation collective » peut avoir un sens différent dans d'autres contextes. J'y reviendrai. Par souci de clarté, tout au long des présents motifs, j'utilise le terme pour parler des droits et des obligations qui, de l'avis de la Juge en chef et du juge LeBel, sont visés à l'al. 2*d*), comme je l'indique aux par. 121 et 122 qui précèdent.

[124] En toute déférence, je ne peux convenir avec la Juge en chef et le juge LeBel que la négociation collective bénéficie de la protection constitutionnelle au titre de la liberté d'association garantie à l'al. 2*d*). Je ne crois pas que cet alinéa exige de l'État qu'il impose aux employeurs et aux associations de travailleurs un ensemble de droits et d'obligations réciproques définis par la loi, dont l'obligation de négocier de bonne foi.

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[125] In my view, s. 2(*d*) protects the liberty of individuals to associate and engage in associational activities. Therefore, s. 2(*d*) protects the freedom of workers to form self-directed employee associations in an attempt to improve wages and working conditions. What s. 2(*d*) does not do, however, is impose duties on others, such as the duty to bargain in good faith on employers.

[126] A constitutionally imposed duty to bargain in good faith strengthens the position of organized labour *vis-à-vis* employers. I express no opinion on the desirability of such an outcome for agricultural employees in Ontario. My point is only that courts are ill-suited to determine what is a matter of labour relations policy. Such policy decisions require a balancing of differing interests rather than an application of legal principles. Courts do not have the necessary expertise, or institutional capacity, to undertake a process which should involve consulting with and receiving representations from the various interested stakeholders and coming to an informed decision after balancing the necessary policy considerations. The decision to impose a duty of collective bargaining should be made by the legislature, and not by the court.

[127] Since the majority reasons are an application of the findings in *Health Services* to the circumstances of this appeal, the initial question that is raised is whether *Health Services* was correctly decided. As I have already suggested, and as I will explain below, I would find that *Health Services* was not correctly decided, to the extent that it constitutionalizes collective bargaining.

[128] In my opinion, overruling *Health Services* would dispose of the constitutional challenge in this case. The respondents' (Fraser's) argument that the *Agricultural Employees Protection Act, 2002*, S.O. 2002, c. 16 ("*AEPA*"), violates the *Charter* because it does not protect a right to collective bargaining would have no basis. I therefore turn first to the question of whether it would be appropriate that *Health Services* be overruled.

[125] À mon sens, l'al. 2*d*) protège la liberté des individus de s'associer et d'exercer des activités associatives. Par conséquent, l'alinéa protège la liberté des travailleurs de former des associations autonomes en vue d'améliorer salaires et conditions de travail. Toutefois, il n'impose pas d'obligations à autrui, comme celle de négocier de bonne foi qui incomberait à l'employeur.

[126] Reconnaître une obligation constitutionnelle de négocier de bonne foi favorise les associations d'employés par rapport aux employeurs. Je ne me prononce pas sur le caractère souhaitable d'un tel résultat pour les employés agricoles de l'Ontario. Je signale seulement qu'il ne convient pas de laisser aux tribunaux le soin de trancher une question qui relève des politiques relatives aux relations du travail, car il leur faudrait pour cela mettre en balance des intérêts divergents, et non appliquer des principes juridiques. Les tribunaux n'ont ni l'expertise ni les moyens organisationnels requis pour consulter les divers intéressés, examiner leurs observations et arriver à une décision éclairée après avoir soupesé les considérations de principe pertinentes. La décision d'imposer une obligation de négocier de bonne foi doit être prise par le législateur, et non par une cour de justice.

[127] Puisque, dans leurs motifs, les juges majoritaires appliquent aux circonstances de l'espèce les conclusions tirées dans l'arrêt *Health Services*, il faut d'abord se demander si la décision rendue dans cette affaire est fondée. Je l'ai déjà laissé entendre — et j'y reviendrai —, j'estime que, dans l'affaire *Health Services*, la décision est erronée dans la mesure où elle constitutionnalise la négociation collective.

[128] À mon sens, rompre avec l'arrêt *Health Services* permettrait de résoudre le litige constitutionnel en l'espèce. La thèse des intimés (Fraser) selon laquelle la *Loi de 2002 sur la protection des employés agricoles*, L.O. 2002, ch. 16 (« *LPEA* »), contrevient à la *Charte* en ce qu'elle ne protège pas le droit à la négociation collective n'aurait plus aucun fondement. Par conséquent, je me penche d'abord sur la question de savoir s'il convient d'écarter l'arrêt *Health Services*.

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II. When Should Precedent Be Overturned?

[129] The authorities are abundant that this Court may overrule its own decisions, and indeed it has done so on numerous occasions: see *R. v. Bernard*, [1988] 2 S.C.R. 833, at p. 849, *per* Dickson C.J. in dissent; *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at p. 1353, *per* Lamer C.J. for the majority; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. Robinson*, [1996] 1 S.C.R. 683.

[130] However, in order to overrule its own precedent, the Court must be satisfied, based upon substantial reasons, that the precedent was wrongly decided. It is not appropriate simply because of a change in the composition of the Court that precedent should be overturned, because of the views of newly appointed judges. There must be compelling reasons to justify overruling: *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 665; *Hamstra (Guardian ad litem of) v. British Columbia Rugby Union*, [1997] 1 S.C.R. 1092, at paras. 18-19; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 44.

[131] This Court's most recent pronouncement on the question of overruling was in *Henry*. Writing for the Court, Justice Binnie first noted at para. 44 that the Court's practice is against departing from precedent unless there are compelling reasons to do so. However, he also recognized that "while rare, departures [from precedent] do occur". He further noted that constitutional decisions, including *Charter* decisions, are not immutable and may be overruled, though he held that "[t]he Court should be particularly careful before reversing a precedent where the effect is to diminish *Charter* protection."

[132] The values of certainty and consistency, which are served by adherence to precedent, are important to the orderly administration of justice in a system based upon the rule of law. Therefore, judges must proceed with caution when deciding to overrule a prior decision. The caution and care with which a judge must approach the question of overruling was articulated well by Gibbs J.

II. À quelles conditions peut-on rompre avec un arrêt antérieur?

[129] Notre Cour a maintes fois statué qu'elle pouvait écarter ses propres décisions, ce qu'elle a d'ailleurs fait à de nombreuses reprises : voir *R. c. Bernard*, [1988] 2 R.C.S. 833, p. 849, le juge en chef Dickson, dissident; *R. c. Chaulk*, [1990] 3 R.C.S. 1303, p. 1353, le juge en chef Lamer, au nom des juges majoritaires; *R. c. B. (K.G.)*, [1993] 1 R.C.S. 740; *R. c. Robinson*, [1996] 1 R.C.S. 683.

[130] Pour qu'un arrêt antérieur puisse être écarté, de sérieux motifs doivent toutefois convaincre la Cour qu'il a été rendu à tort. Il ne suffit pas que les juges actuels — nommés depuis — opinent différemment pour que l'on puisse rompre avec un précédent. Des raisons impérieuses doivent justifier la rupture d'avec l'arrêt antérieur : *R. c. Salituro*, [1991] 3 R.C.S. 654, p. 665; *Hamstra (Tuteur à l'instance de) c. British Columbia Rugby Union*, [1997] 1 R.C.S. 1092, par. 18-19; *R. c. Henry*, 2005 CSC 76, [2005] 3 R.C.S. 609, par. 44.

[131] L'arrêt le plus récent dans lequel la Cour se prononce sur le sujet est *Henry*. Avec l'appui de ses collègues, le juge Binnie y souligne d'abord au par. 44 qu'il est contraire à la pratique de la Cour de rompre avec un précédent, sauf raisons impérieuses. Toutefois, il reconnaît également qu'« il lui arrive effectivement de s'en écarter, même si elle le fait rarement ». Il ajoute que même si les décisions constitutionnelles, y compris celles fondées sur la *Charte*, ne sont pas immuables et peuvent être répudiées, « la Cour doit se montrer particulièrement prudente avant d'écarter un précédent lorsque ce revirement a pour effet d'affaiblir une protection offerte par la *Charte* ».

[132] La certitude et la cohérence, que favorise le respect des précédents, importent pour la bonne administration de la justice dans un régime fondé sur la primauté du droit. Les tribunaux doivent donc être prudents lorsqu'ils sont appelés à écarter une décision antérieure. Dans l'arrêt *Queensland c. Commonwealth* (1977), 139 C.L.R. 585, à la p. 599, le juge Gibbs de la Haute Cour d'Australie fait bien

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of the High Court of Australia in *Queensland v. Commonwealth* (1977), 139 C.L.R. 585, at p. 599:

No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court.

[133] What the courts are doing when deciding whether to overrule a precedent is a balancing exercise between two important values: correctness and certainty. A court must ask whether it is preferable to adhere to an incorrect precedent to maintain certainty or to correct the error. Indeed, because judicial discretion is being exercised, the courts have set down, and academics have suggested, a plethora of criteria for courts to consider in deciding between upholding precedent and correcting error.

[134] In *Bernard*, Dickson C.J. in dissent, identified four reasons for overruling an earlier precedent, at pp. 850-61:

1. Decisions that predate the *Charter* and fail to reflect *Charter* values;

2. Subsequent developments in the law that undermine the validity of the precedent;

3. A prior decision that creates uncertainty contrary to the underlying values of clarity and certainty that lie behind *stare decisis*;

4. A prior decision that operates against the accused by expanding the scope of criminal liability beyond its normal limits.

These factors were subsequently adopted by the majority in *Chaulk* as a non-exhaustive list of considerations relevant to deciding whether to overrule an earlier precedent (p. 1353).

état de la prudence et de la circonspection dont il convient alors de faire preuve :

[TRADUCTION] Nul juge ne peut ignorer les décisions et le raisonnement de ses prédécesseurs et arriver à ses propres conclusions comme si la jurisprudence n'existait pas, ou qu'une décision cessait d'être opposable dès l'ajournement d'une session. Contrairement au législateur, le juge ne peut entreprendre une réforme qui réduit à néant les décisions antérieures et les principes établis précédemment. Ce n'est qu'après avoir examiné la décision antérieure de la cour le plus attentivement et le plus respectueusement possible, et après avoir dûment considéré les circonstances, que le juge peut faire primer sa propre opinion sur elle.

[133] Le tribunal appelé à décider s'il convient ou non d'écarter un précédent met en balance deux valeurs importantes : la décision correcte et la certitude. Il doit se demander s'il vaut mieux suivre une décision incorrecte dans l'intérêt de la certitude ou corriger l'erreur. Comme cette pondération suppose l'exercice du pouvoir discrétionnaire, tribunaux et auteurs ont proposé l'application d'une pléthore de critères.

[134] Dans l'arrêt *Bernard*, le juge en chef Dickson, dissident, relève aux p. 850 à 861 quatre motifs justifiant la rupture d'avec un précédent :

1. la décision est antérieure à la *Charte* et n'est pas conforme aux valeurs consacrées par celle-ci;

2. l'évolution subséquente du droit remet en question la validité du précédent;

3. la décision antérieure crée de l'incertitude, allant ainsi à l'encontre des valeurs de clarté et de certitude que suppose le principe du *stare decisis*;

4. la décision antérieure joue contre l'accusé en accroissant sa responsabilité criminelle au-delà des limites normales.

Dans l'arrêt subséquent *Chaulk*, les juges majoritaires voient dans ces éléments une énumération non exhaustive des considérations présidant à la décision d'écarter ou non un précédent (p. 1353).

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[135] More recently, in *Henry*, Binnie J. identified the following reasons for overturning an earlier precedent, at paras. 45-46:

1. The prior decision departed from the purpose of a *Charter* provision as articulated in an earlier precedent;

2. Experience shows that the prior decision is unworkable as its application is unnecessarily complex and technical;

3. The prior decision is contrary to sound principle;

4. The prior decision results in unfairness.

[136] The Supreme Court of the United States has also grappled with identifying the appropriate principles governing when courts should overrule precedent. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), O'Connor, Kennedy and Souter JJ., writing for a majority of the court on this point, held that when the court considers whether to overrule an earlier case, "its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case" (p. 854). To this end, they articulated four factors to be considered in deciding whether to overrule precedent, at pp. 854-55:

1. Has the rule proved to be intolerable because it defies workability?

2. Is the rule subject to a reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation?

3. Have related principles of law developed as to have left the old rule no more than a remnant of abandoned doctrine?

4. Have facts so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification?

[135] Plus récemment, dans l'arrêt *Henry*, le juge Binnie établit que les motifs suivants justifient la rupture d'avec un précédent (par. 45-46) :

1. la décision antérieure n'est pas conforme à l'objet d'une disposition de la *Charte* défini dans un précédent;

2. la décision est inapplicable en pratique, car son application s'est révélée inutilement complexe et formaliste;

3. elle est contraire à des principes valables;

4. elle est contraire à l'équité.

[136] La Cour suprême des États-Unis a elle aussi tenté de déterminer les principes applicables à l'abandon d'un précédent. Dans l'arrêt *Planned Parenthood of Southeastern Pennsylvania c. Casey*, 505 U.S. 833 (1992), les juges O'Connor, Kennedy et Souter, au nom des juges majoritaires sur ce point, concluent que le tribunal qui examine s'il y a lieu d'écarter une décision antérieure [TRADUCTION] « tient habituellement compte d'une série de considérations de prudence et de pragmatisme pour s'assurer que l'abandon d'une décision antérieure est compatible avec l'idéal de la primauté du droit et pour soupeser les coûts respectifs de la confirmation de la décision et de son abandon » (p. 854). À cette fin, ils exposent aux p. 854 et 855 quatre questions que le tribunal doit se poser avant d'écarter ou non un précédent :

1. L'inapplicabilité pratique de la règle la rend-elle intolérable?

2. La règle est-elle à ce point suivie que sa répudiation entraînerait un préjudice singulier et ajouterait de ce fait l'iniquité à ses autres coûts?

3. Des principes de droit connexes ont-ils vu le jour de sorte que l'ancienne règle ne soit plus que le vestige d'une doctrine abandonnée?

4. La situation a-t-elle changé ou est-elle perçue différemment au point de priver l'ancienne règle d'application ou de justification substantielle?

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[137] Professor Debra Parkes has summarized eight criteria suggested by Professor B. V. Harris as follows:

1. Can the precedent be distinguished?
2. Was it decided *per incuriam*?
3. Is the precedent unworkable?
4. Are new reasons advanced not considered in the earlier case?
5. Does the law now view the precedent to be wrong?
6. Do the values underlying error correction or doing justice outweigh the values of adherence to *stare decisis*?
7. Would error be swiftly corrected by the legislature in non-constitutional cases?
8. Are foundational principles of human and civil rights involved?

See D. Parkes, "Precedent Unbound? Contemporary Approaches to Precedent in Canada" (2006), 32 *Man. L.J.* 135, at p. 149, citing B. V. Harris, "Final Appellate Courts Overruling Their Own 'Wrong' Precedents: The Ongoing Search for Principle" (2002), 118 *L.Q.R.* 408.

[138] If a precedent has overruled prior cases, two sets of precedents exist, an original precedent and a new precedent, although one has been overruled. In such cases it will be more important to carefully scrutinize the new precedent to determine if it has strayed from sound prior decisions and whether it would be preferable to return to the original, and more sound, decisions. In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), O'Connor J. confronted this type of situation. She stated, at p. 231:

Remaining true to an "intrinsically sounder" doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently

[137] La professeure Debra Parkes résume comme suit les huit critères proposés par le professeur B. V. Harris :

1. Peut-on établir une distinction d'avec le précédent?
2. S'agit-il d'une décision rendue *per incuriam*?
3. Le précédent est-il inapplicable en pratique?
4. De nouveaux motifs qui n'ont pas été examinés avant le prononcé de la décision antérieure sont-ils invoqués?
5. Les tribunaux considèrent-ils désormais qu'il s'agit d'une décision erronée?
6. Les valeurs justifiant que l'erreur soit corrigée ou que justice soit rendue l'emportent-elles sur celles liées au respect du *stare decisis*?
7. L'erreur serait-elle rapidement corrigée par le législateur dans une affaire de nature non constitutionnelle?
8. Des principes fondamentaux touchant aux droits de la personne et du citoyen sont-ils en cause?

Voir D. Parkes, « Precedent Unbound? Contemporary Approaches to Precedent in Canada » (2006), 32 *Man. L.J.* 135, p. 149, citant B. V. Harris, « Final Appellate Courts Overruling Their Own "Wrong" Precedents : The Ongoing Search for Principle » (2002), 118 *L.Q.R.* 408.

[138] Lorsqu'un précédent en a écarté un autre, deux précédents existent — l'ancien et le nouveau —, même si l'un des deux a été abandonné. Il est alors plus important d'analyser attentivement le nouveau pour déterminer s'il s'est écarté de bonnes décisions antérieures et s'il est préférable de rétablir les décisions initiales jugées meilleures. Aux prises avec ce genre de situation dans l'affaire *Adarand Constructors, Inc. c. Pena*, 515 U.S. 200 (1995), la juge O'Connor affirme ce qui suit à la p. 231 :

[TRADUCTION] Il est plus conforme au principe du *stare decisis* de rester fidèle à une doctrine « intrinsèquement plus juste » établie dans des décisions antérieures que

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decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error and would likely make the unjustified break from previously established doctrine complete.

Thus, where there exist earlier precedents from which the precedent at issue itself departed, it may be justifiable, based on the values underlying *stare decisis*, for the Court to return to the earlier precedents.

[139] The criteria discussed in the above cases and articles may, depending on the circumstances of each case, be relevant in deciding whether overruling is appropriate. However, these criteria do not represent an exhaustive list of considerations or requirements. Rather, such criteria function as "guidelines to assist th[e] Court in exercising its discretion": *Chaulk*, at p. 1353, *per* Lamer C.J. Fundamentally, the question in every case involves a balancing: Do the reasons in favour of following a precedent — such as certainty, consistency, predictability and institutional legitimacy — outweigh the need to overturn a precedent that is sufficiently wrong that it should not be upheld and perpetuated?

[140] In the case of *Health Services*, I am of the opinion that the following considerations are relevant and justify overruling.

[141] First, the error in *Health Services* concerns a question of constitutional law. Thus, not only does it go to one of the foundational principles of our legal system, but it is not susceptible to being corrected in a lasting way by the legislative branch. While s. 33 of the *Charter* may allow Parliament or the legislatures to suspend, temporarily, the force of this Court's ruling, history over the last two decades demonstrates that resort to s. 33 by legislatures has been exceedingly rare. *Health Services* will, if left to stand, set out abiding principles of constitutional law. Only the Court may correct this error in fundamental principle. As noted in *Planned Parenthood*, it is "common wisdom that the rule of *stare decisis* is not an 'inexorable command,' and certainly it is not such in every constitutional case" (p. 854). The jurisprudence of this

de suivre une décision plus récente qui rompt avec ces décisions antérieures. Dans le second cas, on aggrave simplement l'erreur récente et on scelle la rupture injustifiée d'avec la doctrine établie antérieurement.

Ainsi, lorsque le précédent en cause a rompu avec des décisions antérieures, le tribunal peut être justifié par les valeurs qui sous-tendent le *stare decisis* de rétablir celles-ci.

[139] Selon les circonstances de l'espèce, les critères énoncés dans les décisions et les articles susmentionnés peuvent servir à déterminer s'il y a lieu ou non d'écarter un précédent. Toutefois, il ne s'agit pas d'une énumération exhaustive de considérations à prendre en compte ou d'exigences à satisfaire, mais plutôt de « principes directeurs qui doivent guider [la] Cour dans l'exercice de son pouvoir discrétionnaire » : *Chaulk*, p. 1353, le juge en chef Lamer. Fondamentalement, la question qui se pose chaque fois appelle une mise en balance : les motifs qui justifient le respect d'un précédent — comme la certitude, la cohérence, la prévisibilité et la légitimité institutionnelle — l'emportent-ils sur la nécessité d'écarter un précédent dont le caractère erroné justifie qu'il ne soit ni confirmé ni perpétué?

[140] Je suis d'avis que les considérations qui suivent s'appliquent à *Health Services* et qu'elles justifient qu'on écarte cet arrêt.

[141] Premièrement, l'erreur commise touche une question de droit constitutionnel. Ainsi, non seulement elle vise l'un des principes fondamentaux de notre système de droit, mais elle n'est pas susceptible d'être corrigée de façon durable par le législateur. Bien que le Parlement ou les législatures puissent s'autoriser de l'art. 33 de la *Charte* pour suspendre temporairement l'application d'un jugement de notre Cour, c'est une avenue qu'ils ont très rarement empruntée au cours des deux dernières décennies. L'arrêt *Health Services*, s'il demeure opposable, établit des principes de droit constitutionnel obligatoires. Seule notre Cour peut corriger cette erreur qui entache un principe fondamental. Comme il est indiqué dans l'arrêt *Planned Parenthood*, [TRADUCTION] « on convient généralement que le principe du *stare decisis* ne crée

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Court contains similar observations. Because the *Charter* involves the most fundamental principles underlying our law, it is particularly important that its provisions be correctly interpreted.

[142] The Chief Justice and LeBel J. say that the constitutional nature of *Health Services* should only be a final consideration with respect to overruling difficult cases (para. 58). In my respectful view, and as my reasons will endeavour to demonstrate, there are no shortage of reasons to believe that *Health Services* is problematic on other grounds.

[143] Relying on *Henry*, my colleagues also warn that this Court should be wary of overruling *Health Services* because doing so might have the potential to diminish *Charter* protection (para. 58, citing *Henry*, at para. 44). They say that this consideration "militate[s] in favour of upholding" *Health Services* (para. 58). However, the Court cannot be oblivious to errors in prior decisions. When considering overruling, the Court must balance correctness and certainty. If there is a potential diminishment arising from correcting prior error, that is a reason to be cautious, not a reason to forego correcting prior error altogether. Arguably, as *Health Services* itself strayed from prior precedent, returning to those prior precedents would promote certainty. However, even if certainty would favour retaining *Health Services*, in this case the need for a constitutionally correct answer is paramount.

[144] Second, as I have indicated, *Health Services* strayed significantly from earlier sound precedents with respect to the purpose of *Charter* protection for freedom of association. The constitutional guarantee of freedom of association is premised on the recognition that individuals may be better able to secure their interests and achieve their goals if they may join with others in their *attempt* to do so. From this, two propositions necessarily follow:

pas une "règle implacable", surtout pas dans toute affaire constitutionnelle » (p. 854). On relève des observations analogues dans la jurisprudence de notre Cour. Puisque la *Charte* énonce les principes les plus fondamentaux de notre droit, la justesse de son interprétation importe particulièrement.

[142] Suivant la Juge en chef et le juge LeBel, la nature constitutionnelle de l'arrêt *Health Services* ne doit être considérée qu'en dernier lieu lorsqu'il s'agit d'écarter un précédent dans un cas épineux (par. 58). À mon humble avis, et comme je m'efforce de le démontrer dans les présents motifs, il existe suffisamment de raisons de croire que l'arrêt *Health Services* est problématique sous d'autres rapports.

[143] S'appuyant sur *Henry*, mes collègues estiment également que la Cour doit se garder d'écarter *Health Services*, car cela risquerait d'atténuer la protection qu'offre la *Charte* (par. 58, citant *Henry*, par. 44). Ils affirment que cette considération « peut militer en faveur de son maintien » (par. 58). Toutefois, nous ne pouvons faire fi de l'erreur qui entache des décisions antérieures. Lorsqu'elle envisage la possibilité d'écarter un précédent, notre Cour doit mettre en balance deux éléments : la décision correcte et la certitude. La possibilité que la correction de l'erreur diminue la protection qu'offre la *Charte* justifie la prudence, mais non l'abstention totale de corriger l'erreur. Puisque l'arrêt *Health Services* s'écarte lui-même d'un précédent antérieur, on pourrait soutenir que le rétablissement de ce dernier favoriserait la certitude. Et même si la certitude militait en faveur de la confirmation de l'arrêt *Health Services*, la nécessité d'une réponse constitutionnellement juste l'emporterait en l'espèce.

[144] Deuxièmement, et je le répète, *Health Services* s'écarte sensiblement de bonnes décisions antérieures concernant l'objet de la protection constitutionnelle de la liberté d'association. Cette garantie constitutionnelle reconnaît à la base qu'un individu peut être plus en mesure de défendre ses intérêts et d'atteindre ses objectifs s'il lui est permis de s'associer à d'autres *en vue* d'y parvenir. De cette prémisse découlent nécessairement deux

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(a) that s. 2(*d*) was intended to secure *the individual's* freedom to coordinate his or her actions with others and enjoy the benefits that flow naturally from that coordination; and (b) that s. 2(*d*) was not intended to promote or guarantee the *outcomes* for which the association was formed. The ruling in *Health Services* contradicts both of these central tenets. By constitutionalizing collective bargaining, *Health Services* created a group right that vests in the employee association rather than individual workers, and confers substantive outcomes for which the association was formed. It has therefore moved away from the sound principles established by earlier precedents of this Court.

[145] Third, the constitutionalization of collective bargaining, as envisaged in *Health Services* and by the Chief Justice and LeBel J. in this case, is unworkable. On a practical level, the right to collective bargaining asserted by my colleagues is not workable without other elements of modern labour legislation in place. As Winkler C.J.O. recognized at the Court of Appeal, if it is to be effective, the right to collective bargaining will be hard pressed to perform its function without reinforcement from the other aspects of labour legislation that he identified (2008 ONCA 760, 92 O.R. (3d) 481). As a matter of principle, the distinction between substance and process on which the ruling in *Health Services* (and of the Chief Justice and LeBel J. in this case) is premised cannot be sustained. The process is itself a desirable outcome for the association of workers, and will result in substantive concessions by the employer. Thus, both principle and practicality militate against sustaining the ruling in *Health Services*.

[146] Fourth, there has been intense academic criticism of *Health Services*, including by Professor Eric Tucker, who was himself cited by the majority in support of its decision. See B. Etherington, "The B.C. *Health Services and Support* Decision — The Constitutionalization of a Right to Bargain Collectively in Canada: Where Did It Come From and Where Will It Lead?" (2009), 30 *Comp. Lab. L. & Pol'y J.* 715, at pp. 734-39. I recognize that

corollaires : a) l'al. 2*d*) vise à garantir la liberté *de l'individu* de joindre ses efforts à ceux d'autrui et de profiter des avantages qui découlent naturellement de cette concertation, et b) l'al. 2*d*) ne vise pas à favoriser ou à garantir le *résultat* escompté de l'association. L'arrêt *Health Services* va à l'encontre de ces deux propositions essentielles. En constitutionnalisant la négociation collective, les juges majoritaires dans cette affaire ont créé un droit collectif qui bénéficie à l'association de salariés plutôt qu'aux travailleurs individuels et qui donne droit au résultat concret visé par la formation de l'association. Ils se sont donc écartés des principes valables établis par notre Cour dans ses décisions antérieures.

[145] Troisièmement, la protection constitutionnelle de la négociation collective au sens où l'entendent la majorité dans l'arrêt *Health Services* et la Juge en chef et le juge LeBel en l'espèce, est inapplicable en pratique. Dans les faits, le droit de négocier collectivement que font valoir mes collègues ne peut s'appliquer indépendamment d'autres éléments de la législation moderne du travail. Comme le reconnaît le juge en chef Winkler de la Cour d'appel, le droit de négocier collectivement peut difficilement atteindre son objectif sans l'appui des autres volets de la législation du travail dont il fait mention (2008 ONCA 760, 92 O.R. (3d) 481). Par principe, la distinction entre la substance et le processus sur laquelle fait fond l'arrêt *Health Services* (ainsi que la Juge en chef et le juge LeBel en l'espèce) ne peut être maintenue. Le processus est en soi un résultat souhaitable pour l'association de travailleurs, et il amènera l'employeur à faire des concessions sur la substance. Tant les principes que l'effet réel militent donc contre la confirmation de l'arrêt *Health Services*.

[146] Quatrièmement, les auteurs, dont le professeur Eric Tucker — que les juges majoritaires citent à l'appui de leur décision —, critiquent vivement l'arrêt *Health Services*. Voir B. Etherington, « The B.C. *Health Services and Support* Decision — The Constitutionalization of a Right to Bargain Collectively in Canada : Where Did It Come From and Where Will It Lead? » (2009), 30 *Comp. Lab. L. & Pol'y J.* 715, p. 734-739. Je reconnais

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there is also academic commentary agreeing with the results of *Health Services*, as pointed out by the Chief Justice and LeBel J. (at para. 88). The existence of such commentary is not unexpected given the highly contentious and polarizing nature of labour relations. However, as I will explain, while some agree with the result, the academic criticism of concern here targets the reasoning of the majority in *Health Services*.

[147] Even some of the authors who support the results of *Health Services* and who are cited by my colleagues are critical of aspects of the reasoning employed by the majority of the Court to achieve those results. For example, Professor Jamie Cameron, in "Due Process, Collective Bargaining, and s. 2(d) of the *Charter*: A Comment on *B.C. Health Services*" (2006-2007), 13 *C.L.E.L.J.* 233, while supportive of the results of *Health Services*, criticized the decision because "*B.C. Health Services* relied on a concept of entitlement that was so heavily and exclusively contextualized to collective bargaining that the decision lost contact with the underlying values which have anchored s. 2(d) since the *Labour Trilogy*" (p. 262; see also pp. 240 and 259).

[148] I reiterate that in light of such academic criticism, it is appropriate for this Court to take notice and acknowledge the errors that have been identified.

[149] My colleagues say that it is "procedurally inappropriate" to overrule *Health Services* because none of the parties have expressly asked this Court to do so (para. 59). However, the substance of the arguments of the appellants and interveners supporting them are in effect a claim that *Health Services* should be overruled. The appellants and interveners supporting them all say that in this case there should be no obligation on agricultural employers to engage in compulsory collective bargaining. In my opinion, it is not possible to agree that there is no such obligation without overruling *Health Services*.

que certains auteurs adhèrent aux conclusions de la formation majoritaire dans l'arrêt *Health Services*, ce que ne manquent pas de faire remarquer la Juge en chef et le juge LeBel (par. 88). Ces divergences d'opinions n'ont rien pour surprendre étant donné le terreau fertile en litiges et en clivages que représentent les relations du travail. Toutefois, comme je l'explique ci-après, certains observateurs souscrivent à l'issue dans *Health Services*, mais les critiques qui nous intéressent en l'espèce portent sur le raisonnement des juges majoritaires dans cette affaire.

[147] Même certains des auteurs qui appuient l'issue dans *Health Services* — et que citent mes collègues — critiquent en partie le raisonnement des juges majoritaires qui sous-tend cette décision. Par exemple, dans « Due Process, Collective Bargaining, and s. 2(d) of the *Charter* : A Comment on *B.C. Health Services* » (2006-2007), 13 *C.L.E.L.J.* 233, la professeure Jamie Cameron, bien qu'elle soit d'accord sur le dispositif dans *Health Services*, déplore que la décision [TRADUCTION] « prenne appui sur un droit considéré, sur le plan conceptuel, si excessivement et uniquement en fonction de la négociation collective qu'il y a rupture avec les valeurs qui sous-tendent l'al. 2d) depuis la trilogie en droit du travail » (p. 262; voir également p. 240 et 259).

[148] Je maintiens qu'au vu de ces critiques, il convient que notre Cour prenne acte des erreurs relevées et les reconnaisse.

[149] Selon mes collègues, il serait « inopportun sur le plan procédural » de rompre avec l'arrêt *Health Services* puisqu'aucune des parties ne nous l'a expressément demandé (par. 59). La substance des arguments des appelants et des intervenants qui les appuient démontre toutefois qu'ils demandent effectivement à la Cour de rompre avec cet arrêt. Ces derniers disent tous qu'en l'espèce, l'employeur agricole ne devrait pas être obligé de négocier avec ses employés regroupés en association. À mon avis, il n'est pas possible d'accepter que cette obligation n'existe pas sans rompre avec l'arrêt *Health Services*.

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[150] Further, as Deschamps J. observes, "an employer's duty to bargain in good faith was not even raised" in *Health Services* (at para. 297), and while the parties in *Health Services* "recognized that under most Canadian labour law statutes, employers had an obligation to bargain in good faith, the claimants were not seeking a declaration characterizing this obligation as a constitutional one" (para. 304). Despite this issue not having been raised in *Health Services*, the majority in that case did not find it "procedurally inappropriate" to find that "collective bargaining imposes corresponding duties on the employer" and "requires both employer and employees to meet and to bargain in good faith " (para. 90).

[151] Lastly, while the foregoing factors all support overruling *Health Services*, as the Chief Justice and LeBel J. point out, it is fundamental that it be demonstrated that *Health Services* was decided in error. The balance of these reasons endeavours to explain why *Health Services* was erroneously decided.

III. The Explicit Break With Precedent in *Health Services*

A. *Introduction*

[152] Prior to explaining why *Health Services* erred in finding that s. 2(*d*) of the *Charter* protects collective bargaining, I will briefly refer to *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, which was consistent with this Court's jurisprudence prior to *Health Services* on the contours of s. 2(*d*) in the labour law context. I do this to underline the explicit break from that jurisprudence in *Health Services*. This break came when a majority of this Court found that s. 2(*d*) required that government legislate to facilitate collective goals which an association was formed to pursue, rather than protecting the freedom of association itself. This finding went beyond the rule in *Dunmore* which mandated legislative protection only where such protection was necessary to the freedom to associate.

[150] En outre, comme le fait remarquer la juge Deschamps, « l'obligation de l'employeur de négocier de bonne foi n'avait même pas été alléguée » dans *Health Services* (par. 297), et si dans cette affaire les parties « reconnaissaient que la plupart des lois canadiennes du droit du travail obligent l'employeur à négocier de bonne foi, [. . .] ils ne demandaient pas à la Cour de déclarer que cette obligation avait un fondement constitutionnel » (par. 304). Même si la question n'avait pas été soulevée dans *Health Services*, les juges de la majorité n'ont pas estimé qu'il serait « inopportun sur le plan procédural » de conclure que le droit des employés de « négocier collectivement impose [. . .] à l'employeur des obligations correspondantes » et « implique que l'employeur et les employés se rencontrent et négocient de bonne foi » (par. 90).

[151] Enfin, même si tous les éléments susmentionnés justifient la mise au rancart de l'arrêt *Health Services*, comme le font remarquer la Juge en chef et le juge LeBel, il faut absolument démontrer que la décision est entachée d'une erreur. C'est ce que je tente de faire ci-après.

III. La rupture expresse d'avec la jurisprudence dans *Health Services*

A. *Introduction*

[152] Avant d'expliquer en quoi, dans *Health Services*, les juges majoritaires ont eu tort de conclure que l'al. 2*d*) de la *Charte* protège la négociation collective, je reviens brièvement sur l'arrêt *Dunmore c. Ontario (Procureur général)*, 2001 CSC 94, [2001] 3 R.C.S. 1016, qui était conforme à la jurisprudence de notre Cour antérieure à *Health Services* quant à la portée de l'al. 2*d*) en droit du travail. Je tiens ici à souligner la rupture expresse d'avec cette jurisprudence dans *Health Services*. Cette rupture est survenue lorsque la majorité des juges a conclu que l'al. 2*d*) obligeait le gouvernement à légiférer pour faciliter la réalisation des objectifs communs que visait la formation d'une association, plutôt que pour protéger la liberté d'association elle-même. Cette conclusion allait au-delà de la règle établie dans *Dunmore*, qui n'exigeait une protection législative qui si elle était nécessaire à la liberté d'association.

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[153] The Chief Justice and LeBel J. present an alternative interpretation which suggests that *Health Services* "follows directly from the principles enunciated in *Dunmore*" (para. 38). With respect, I do not agree with this interpretation because it does not follow from the words and findings in *Dunmore*. In *Dunmore*, the requirement that government provide legislation to protect workers was anchored in the proposition that certain workers could not associate without government intervention. This concept was embodied by the idea that the lack of legislation was a "substantial interference" to the ability to form an association (para. 25 (emphasis deleted)). Deschamps J. describes *Dunmore* as holding that agricultural workers "were substantially unable to exercise their constitutional right [to associate] without the support of a legislative framework" (para. 307). This characterization is in line with the words of Bastarache J. who himself noted the distinction between forming an association and enhancing and facilitating the goals of that association:

> . . . a group that proves capable of associating despite its exclusion from a protective regime will be unable to meet the evidentiary burden required of a *Charter* claim. In such a case, inclusion in a statutory regime cannot be said to safeguard, but rather to enhance, the exercise of a fundamental freedom. [para. 39]

[154] *Health Services*, in contrast, was not focussed on ensuring that government did not interfere with the right of individuals to form an association. Indeed the action was brought by existing associations. Instead, the decision in *Health Services* centred on the purported need to constitutionalize collective bargaining in order for the association to be "meaningful". The majority concluded that without a legislated right to collective bargaining, and without constitutional protection of terms of the collective agreement in that case, the formation of an association was meaningless.

[155] This sentiment was an express break from *Dunmore* because the majority in *Health Services* focussed on the goals of an association and the *enhancement* of those goals, rather than the ability of the claimants to associate (which they already

[153] La Juge en chef et le juge LeBel proposent une autre interprétation suivant laquelle *Health Services* « découle directement des principes énoncés dans *Dunmore* » (par. 38). En toute déférence, je ne puis accepter cette interprétation, car elle s'écarte des propos et des conclusions de notre Cour. Dans *Dunmore*, la nécessité pour le gouvernement de protéger les travailleurs par une loi découlait de la prémisse qu'il fallait une intervention gouvernementale pour que certains travailleurs puissent s'associer. Cette notion tenait à l'idée que l'absence d'une loi constituait une « entrave substantielle » à la capacité de former une association (par. 25 (soulignement omis)). Selon la juge Deschamps, la Cour a conclu dans *Dunmore* « qu'il leur [les employés agricoles] était essentiellement impossible d'exercer leur droit constitutionnel sans l'appui de la loi » (par. 307). Cette caractérisation est conforme au propos du juge Bastarache, qui a lui-même signalé la distinction entre former une association et faciliter la réalisation de ses objectifs :

> . . . le groupe qui réussit à s'associer malgré son exclusion d'un régime de protection ne peut s'acquitter de la charge de la preuve qui lui incombe pour établir l'atteinte à la *Charte*. Dans ce cas, l'inclusion dans le régime légal ne protège pas seulement, mais améliore, l'exercice d'une liberté fondamentale. [par. 39]

[154] Dans *Health Services* par contre, il ne s'agissait pas de s'assurer que le gouvernement n'entrave pas le droit de former une association. De fait, ce sont des associations qui avaient intenté l'action. La décision des juges majoritaires dans cette affaire portait plutôt sur l'opportunité d'inscrire dans la Constitution la négociation collective pour que l'association ait un « sens ». La majorité des juges a conclu que la formation d'une association perdait tout son sens si une loi n'assurait pas le droit à la négociation collective et si, en l'instance, les termes de la convention collective n'étaient pas constitutionnellement protégés.

[155] Ce sentiment constituait une rupture expresse d'avec l'arrêt *Dunmore* puisque dans *Health Services*, les juges majoritaires ont insisté sur les objectifs d'une association et la *valorisation* de ces objectifs, plutôt que sur la capacité

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had done). Constitutionalizing collective bargaining therefore cannot be said to safeguard the ability to associate, but instead is concerned with "enhanc[ing] the exercise of a fundamental freedom", which cannot form the basis of a *Charter* claim (*Dunmore*, at para. 39). This express break from *Dunmore* is found in the reasons of the Chief Justice and LeBel J., where they suggest that providing associational protections in the *AEPA* without also enshrining good faith bargaining would "render the associational process effectively useless" (para. 54). This break from *Dunmore* is also recognized in the reasons of my colleague Abella J., where she observes that *Health Services* resulted in "creating a completely different jurisprudential universe" from that found in the previous "*Dunmore* 'right to organize' template" (paras. 324-25).

[156] It is this shift from protecting what is necessary to exercise the freedom to associate, to constitutionalizing the goals of an association — that is, negotiating a collective agreement — which results in *Health Services* being inconsistent with the ruling in *Dunmore*. The majority in *Health Services* found that the freedom of association is meaningless unless the government also imposes a duty on employers to bargain in good faith, and protects the fruits of that bargaining process. The focus shifted in *Health Services* from protecting the right to associate to enhancing the goals of the association. This was an express break from *Dunmore*.

B. *The Jurisprudential Background Prior to Health Services*

[157] This Court first examined the scope of the *Charter*'s guarantee of freedom of association in a series of three cases that came to be known as the "labour law trilogy" ("Trilogy"): *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (the "*Alberta Reference*"); *PSAC v. Canada*, [1987] 1 S.C.R. 424; and *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460. The specific issue in those cases was whether s. 2(*d*) protected the right to strike. However, the members of the Court took the opportunity to consider, at length,

des demandeurs de s'associer (ce qu'ils avaient déjà fait). On ne saurait donc affirmer que la constitutionnalisation de la négociation collective protège la capacité de s'associer; elle vise plutôt « [l'amélioration de] l'exercice d'une liberté fondamentale », qui ne peut donner lieu à une demande fondée sur la *Charte* (*Dunmore*, par. 39). Cette rupture expresse d'avec l'arrêt *Dunmore* se trouve dans les motifs de la Juge en chef et du juge LeBel, selon qui inclure à la *LPEA* la protection associative sans inclure aussi la négociation de bonne foi « rend[rait] inutile le processus associatif » (par. 54). Dans ses motifs, ma collègue la juge Abella reconnaît elle aussi cette rupture avec l'arrêt *Dunmore* lorsqu'elle fait remarquer que *Health Services* « a créé un univers jurisprudentiel entièrement différent » du « "droit de s'organiser" reconnu dans *Dunmore* » (par. 324-325).

[156] C'est en raison de ce passage, de la protection de ce qui est nécessaire à l'exercice de la liberté d'association à la constitutionnalisation des objectifs d'une association — soit la négociation d'une convention collective —, que *Health Services* est incompatible avec *Dunmore*. Dans *Health Services*, les juges majoritaires ont conclu que la liberté d'association n'a de sens que si le gouvernement impose également à l'employeur l'obligation de négocier de bonne foi et s'il protège le résultat de la négociation. Notre Cour a donc mis l'accent non plus sur le droit de s'associer mais sur la valorisation de l'objectif que vise l'association. C'est là la rupture expresse d'avec l'arrêt *Dunmore*.

B. *Le contexte jurisprudentiel avant l'arrêt Health Services*

[157] Notre Cour examine pour la première fois la portée de la liberté d'association garantie par la *Charte* dans trois arrêts formant la « trilogie en droit du travail » (« trilogie ») : *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313 (le « *Renvoi relatif à l'Alberta* »); *AFPC c. Canada*, [1987] 1 R.C.S. 424; *SDGMR c. Saskatchewan*, [1987] 1 R.C.S. 460. La question précise à trancher dans ces arrêts était celle de savoir si l'al. 2*d*) protégeait le droit de grève, mais les juges de la Cour ont saisi l'occasion

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the purpose and scope of the protections afforded by s. 2(*d*). The bulk of the substantive analysis is found in the *Alberta Reference*.

[158] While the Court was divided on the result in those cases, there was nonetheless agreement on a number of core principles concerning the purpose and scope of s. 2(*d*). With respect to the purpose of granting constitutional protection to freedom of association, the following comment by McIntyre J. reflects a general consensus amongst the members of the Court:

> While freedom of association like most other fundamental rights has no single purpose or value, at its core rests a rather simple proposition: the attainment of individual goals, through the exercise of individual rights, is generally impossible without the aid and cooperation of others. "Man, as Aristotle observed, is a 'social animal, formed by nature for living with others', associating with his fellows both to satisfy his desire for social intercourse and to realize common purposes." [p. 395]

[159] In addition, the Court was agreed that s. 2(*d*) protects an individual right to enter into an association and does not create group rights that vest in the association itself. In the words of Dickson C.J. (dissenting):

> What freedom of association seeks to protect is not associational activities *qua* particular activities, but the freedom of individuals to interact with, support, and be supported by, their fellow humans in the varied activities in which they choose to engage. But this is not an unlimited constitutional license for all group activity. The mere fact that an activity is capable of being carried out by several people together, as well as individually, does not mean that the activity acquires constitutional protection from legislative prohibition or regulation. [p. 366]

McIntyre J. struck a similar note:

> In considering the constitutional position of freedom of association, it must be recognized that while it advances many group interests and, of course, cannot be exercised alone, it is nonetheless a freedom belonging to the individual and not to the group formed through its exercise. [p. 397]

d'examiner en détail l'objet et la portée des garanties offertes à l'al. 2*d*). L'analyse de fond se retrouve pour l'essentiel dans le *Renvoi relatif à l'Alberta*.

[158] La Cour était partagée sur l'issue de ces affaires, mais ses juges s'entendaient néanmoins sur un certain nombre de principes essentiels concernant l'objet et la portée de l'al. 2*d*). S'agissant de la raison d'être de la constitutionnalisation de la liberté d'association, le juge McIntyre formule la remarque suivante, qui reflète le consensus général au sein de la Cour :

> Bien que, à l'instar de la plupart des autres droits fondamentaux, la liberté d'association n'ait pas un objet ou une valeur unique, elle repose essentiellement sur une proposition assez simple : pour l'individu, la réalisation de certains objectifs par l'exercice de ses droits individuels est généralement impossible sans l'aide et la coopération d'autrui. [TRADUCTION] « L'homme, comme l'a fait observer Aristote, est un "animal social façonné par la nature pour vivre en groupe", qui s'associe à ses semblables à la fois pour satisfaire son besoin de relations sociales et pour réaliser des fins communes. » [p. 395]

[159] De plus, la Cour convient que l'al. 2*d*) protège le droit individuel de former une association, mais qu'il ne confère pas de droit collectif à l'association même. Selon le juge en chef Dickson, dissident dans cette affaire :

> Ce que la liberté d'association vise à protéger, ce ne sont pas les activités de l'association en tant qu'activités particulières, mais la liberté des individus d'interagir avec d'autres êtres humains, de les aider et d'être aidés par eux dans les diverses activités qu'ils choisissent d'exercer. Mais ce n'est pas là une autorisation constitutionnelle illimitée pour toute activité collective. Le simple fait qu'une activité puisse être exercée par plusieurs personnes ensemble, aussi bien qu'individuellement, ne signifie pas que cette activité se voit conférer une protection constitutionnelle contre toute interdiction ou réglementation législative. [p. 366]

Le juge McIntyre ajoute dans la même veine :

> En considérant la situation constitutionnelle de la liberté d'association, il faut reconnaître que, bien qu'elle assure la promotion de nombreux intérêts collectifs et, naturellement, qu'elle ne puisse être exercée seule, il s'agit néanmoins d'une liberté qui appartient à l'individu et non aux groupes formés grâce à son exercice. [p. 397]

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[160] In *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 ("*PIPSC*"), the core areas of agreement in the *Alberta Reference* were later summarized by Sopinka J. in a passage that has since been frequently cited:

> Upon considering the various judgments in the *Alberta Reference*, I have come to the view that four separate propositions concerning the coverage of the s. 2(*d*) guarantee of freedom of association emerge from the case: first, that s. 2(*d*) protects the freedom to establish, belong to and maintain an association; second, that s. 2(*d*) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association; third, that s. 2(*d*) protects the exercise in association of the constitutional rights and freedoms of individuals; and fourth, that s. 2(*d*) protects the exercise in association of the lawful rights of individuals. [pp. 401-2]

[161] These four propositions were later endorsed by majorities of the Court in *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, and *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989. In the latter case, a majority of the Court ruled that s. 2(*d*) does not entitle workers to any particular set of statutory protections for their associative activities, such as those providing for a right to collective bargaining.

[162] The proposition that s. 2(*d*) does not confer a right to collective bargaining was once again endorsed by a majority of the Court in *Dunmore*. However, in that case the Court recognized that Sopinka J.'s four propositions, while valid, might not exhaust the entire scope of protection afforded by s. 2(*d*) (para. 16).

[163] Bastarache J. explained that the core of s. 2(*d*) protection is to prohibit the state from interfering with an activity because of its associational nature. Relying on comments made by Dickson C.J. in the *Alberta Reference*, he noted that Sopinka J.'s fourth proposition, which protects "the exercise in association of the lawful rights of individuals", suffers from a potential weakness. That proposition will, in general, serve as a useful test

[160] Dans l'arrêt *Institut professionnel de la Fonction publique du Canada c. Territoires du Nord-Ouest (Commissaire)*, [1990] 2 R.C.S. 367 (« *IPFPC* »), le juge Sopinka résume les principaux éléments de consensus dégagés dans le *Renvoi relatif à l'Alberta*, et ses propos sont fréquemment cités depuis :

> Après avoir examiné les différents motifs de jugement dans le *Renvoi relatif à l'Alberta*, j'arrive à la conclusion qu'il se dégage quatre propositions différentes quant à l'étendue de la liberté d'association garantie par l'al. 2*d*) : premièrement, l'al. 2*d*) protège la liberté de constituer une association, de la maintenir et d'y appartenir; deuxièmement, l'al. 2*d*) ne protège pas une activité pour le seul motif que cette activité est un objet fondamental ou essentiel d'une association; troisièmement, l'al. 2*d*) protège l'exercice collectif des droits et libertés individuels consacrés par la Constitution; et quatrièmement, l'al. 2*d*) protège l'exercice collectif des droits légitimes des individus. [p. 401-402]

[161] Ces quatre propositions ont ultérieurement été reprises par les juges majoritaires de la Cour dans les arrêts *Office canadien de commercialisation des œufs c. Richardson*, [1998] 3 R.C.S. 157, et *Delisle c. Canada (Sous-procureur général)*, [1999] 2 R.C.S. 989. Dans l'arrêt *Delisle*, la formation majoritaire statue que l'al. 2*d*) n'accorde pas aux activités associatives des employés des protections particulières, comme celle conférant un droit à la négociation collective.

[162] Dans *Dunmore* les juges majoritaires de la Cour confirment encore une fois que l'al. 2*d*) ne confère pas de droit à la négociation collective. Or, dans cet arrêt, la Cour reconnaît que malgré leur validité, les quatre propositions du juge Sopinka ne rendent peut-être pas entièrement compte de la protection qu'offre l'al. 2*d*) (par. 16).

[163] Le juge Bastarache explique que l'objet essentiel de la protection prévue à l'al. 2*d*) est d'empêcher l'État de faire obstacle à une activité à cause de sa nature associative. S'appuyant sur les remarques du juge en chef Dickson dans le *Renvoi relatif à l'Alberta*, il indique que la quatrième proposition du juge Sopinka, qui protège « l'exercice collectif des droits et libertés individuels », peut comporter une faille. La proposition sert en général

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in determining whether the state has targeted the associational aspect of an activity rather than the activity itself. If the state has outlawed an activity at both the individual and the group level, it is likely that this is because the activity itself is deemed to be harmful or problematic. By contrast, if the state permits an individual to engage in an activity but has outlawed the performance of that activity in concert with others, this will generally indicate that the state has targeted the activity solely because of its associational nature. Thus, Sopinka J.'s fourth proposition assists in isolating the true intent or effect of a measure when determining whether it infringes a person's freedom of association (paras. 16-18).

[164] However, there may be cases in which the state has directly targeted the associational aspects of an activity which are not captured by Sopinka J.'s fourth proposition. An activity performed on a group level may be "qualitatively" different from what an individual can undertake in isolation, such that no direct comparison or analogy is possible. If one were to interpret the fourth proposition as requiring a strict analogy between the collective activity and its individual counterpart, a state restriction on such "qualitatively" different activities would not be considered to inhibit freedom of association and would therefore pass muster under s. 2(*d*). Recognizing this, *Dunmore* attenuated the requirement of an individual analogue. If it can be demonstrated that a restriction on a group activity is an attack on the associational nature of the activity, a s. 2(*d*) claim may yet succeed even if no direct analogy can be made between the group activity and a lawful individual counterpart.

[165] This observation about how "qualitatively" different activities exist was aimed at explaining why certain activities which did not have an individual analogue must be protected in order to protect the freedom to form an association. The disposition in *Dunmore* turned on whether the lack of protection for agricultural employees was a "substantial interference" to the ability of workers to *form an association* (paras. 22-23). To suggest, in

à déterminer si l'État vise le caractère associatif de l'activité plutôt que l'activité elle-même. Si l'État interdit l'exercice tant individuel que collectif d'une activité, c'est vraisemblablement parce que l'activité est tenue pour préjudiciable ou problématique. En revanche, s'il permet à l'individu d'exercer une activité, mais qu'il lui interdit de le faire de concert avec d'autres, on peut généralement conclure que l'activité tombe sous le couperet de l'État uniquement en raison de sa nature associative. Ainsi, la quatrième proposition du juge Sopinka permet de discerner la raison d'être ou l'effet véritable d'une mesure aux fins de déterminer si elle porte atteinte à la liberté d'association d'une personne (par. 16-18).

[164] Toutefois, il peut arriver que l'État vise directement les aspects associatifs d'une activité qui échappent à la quatrième proposition du juge Sopinka. Une activité exercée collectivement peut être « qualitativement » différente d'une activité exercée individuellement, de sorte qu'aucune comparaison ou analogie directe ne soit possible. Si l'on concluait que la quatrième proposition exige une analogie stricte entre l'activité collective et l'activité correspondante individuelle, la limitation par l'État d'une activité « qualitativement » différente ne serait pas jugée attentatoire à la liberté d'association et serait donc tenue pour acceptable au regard de l'al. 2*d*). Dans l'arrêt *Dunmore*, la Cour le reconnaît et atténue l'exigence d'une activité individuelle analogue. Le demandeur qui peut démontrer que, en limitant une activité collective, l'État s'en prend à la nature associative de celle-ci, peut avoir gain de cause sur le fondement de l'al. 2*d*) même s'il est impossible d'établir une analogie directe entre l'activité collective et son équivalent individuel légitime.

[165] Par cette remarque à propos de l'existence d'activités « qualitativement » différentes, le juge Bastarache voulait expliquer pourquoi il est nécessaire de protéger certaines activités n'ayant pas une activité individuelle analogue afin de protéger la liberté de former une association. Dans *Dunmore*, il fallait déterminer si l'absence de protection des employés agricoles constituait une « atteinte substantielle » à la capacité des travailleurs de *former*

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hindsight, that "[a]fter *Dunmore*, there could be no doubt that [s. 2(*d*)] extends to realization of collective, as distinct from individual, goals" as the Chief Justice and LeBel J. say at para. 32 (emphasis added), is to substantially overstate the holding in *Dunmore*.

C. *An Express Break With Precedent in Health Services*

[166] While the basic framework set down in the Trilogy had stood for some 20 years, the Court decided to break with this line of precedent in *Health Services*. In that case, the majority held that s. 2(*d*) protects a right to collective bargaining and imposes a duty on employers to bargain in good faith. Such a right could not be accommodated within the framework set down by the Trilogy and followed in subsequent cases, and so the majority opted to overturn that line of precedents altogether.

[167] The overarching reason advanced for rejecting the Trilogy's interpretation of s. 2(*d*) was that it reflected a "decontextualized" rather than "purposive" approach to *Charter* interpretation: *Health Services*, at para. 30. The majority in *Health Services* found that insufficient attention had been paid to the close connection between freedom of association and labour relations (specifically trade unionism), and that the intimate ties between the two implied that s. 2(*d*) should be held to protect a broader set of entitlements than the Trilogy's approach could support. Under this view, the main problem with the Trilogy's approach was that it did not extend a right to "collective bargaining", the protection of which was, in the majority's view, a central purpose of freedom of association (para. 86).

[168] In extending constitutional protection to collective bargaining, the majority in *Health Services* viewed this constitutional right as including an obligation on parties to bargain in good faith. The majority in *Health Services* described the protection afforded under s. 2(*d*) as follows, at para. 90:

une association (par. 22-23). En laissant entendre après coup, au par. 32, que, « [a]près l'arrêt *Dunmore*, nul ne pouvait contester que [l'al. 2*d*)] englobait la réalisation d'objectifs collectifs et non seulement individuels » (je souligne), la Juge en chef et le juge LeBel élargissent indûment la portée de la décision dans *Dunmore*.

C. *Revirement jurisprudentiel dans Health Services*

[166] Alors que le cadre général établi dans la trilogie s'appliquait depuis quelque 20 ans, la Cour a décidé de lui tourner le dos. Dans l'arrêt *Health Services*, les juges majoritaires concluent que l'al. 2*d*) protège le droit à la négociation collective et oblige l'employeur à négocier de bonne foi. Comme ce droit ne peut s'inscrire dans le cadre issu de la trilogie et appliqué depuis, les juges majoritaires opèrent un revirement jurisprudentiel.

[167] Dans *Health Services*, le principal motif pour lequel la formation majoritaire rejette la portée que la trilogie reconnaît à l'al. 2*d*) est qu'il s'agit d'une interprétation « insensible [au] contexte », et non « téléologique », de la *Charte* (par. 30). Les juges concluent que l'on n'a pas tenu suffisamment compte du lien étroit entre la liberté d'association et les relations du travail (à savoir le syndicalisme), et qu'en raison des liens étroits qui existent entre les deux, on doit considérer que la protection offerte par l'al. 2*d*) est plus grande que celle susceptible d'être reconnue sur le fondement de la trilogie. De ce point de vue, la principale faille de la trilogie est qu'elle ne reconnaît pas un droit à la « négociation collective », dont la protection est, selon la majorité, inhérente à la liberté d'association (par. 86).

[168] Dans *Health Services*, lorsqu'ils accordent la protection constitutionnelle à la négociation collective, les juges majoritaires considèrent que ce droit constitutionnel oblige les parties à négocier de bonne foi. Ils décrivent comme suit la protection offerte par l'al. 2*d*) :

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. . . the state must not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith. Thus the employees' right to collective bargaining imposes corresponding duties on the employer. It requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation.

In fact, the majority went so far as to say that "the duty to consult and negotiate in good faith" is "the fundamental precept of collective bargaining" (para. 97).

[169] The decision in *Health Services* purported to impose two limitations on this right. First, the right was said not to cover all aspects of "collective bargaining", as that term is understood in the statutory labour relations regimes based upon the Wagner model that are in place across the country. The Wagner model refers to Canadian variants of the *National Labor Relations Act*, 49 Stat. 449 (1935) (the "*Wagner Act*"), which was enacted into law in the United States during the Depression. By the end of the 1930s, most Canadian provinces had passed legislation incorporating the main objectives of the *Wagner Act*. The Wagner model has four legislative hallmarks: explicit recognition of the right of employees to belong to a trade union of their choice; protections against employer coercion or interference with organizing activities, known as unfair labour practices provisions; a duty upon employers to bargain in good faith with their employees' unions; and a dispute resolution mechanism for resolving impasses: see G. W. Adams, *Canadian Labour Law* (2nd ed. (loose-leaf)), vol. 1, at p. 1-11.

[170] Second, it was said not to be aimed at securing a particular outcome in a labour dispute, or guaranteeing access to any particular statutory scheme: see *Health Services*, at para. 19. Nonetheless, the majority held that the process of good faith collective bargaining demands that unions and employers engage with each other and "make a reasonable effort to arrive at an acceptable contract": *Health Services*, at para. 101.

. . . l'État doit s'abstenir d'empêcher un syndicat d'exercer une véritable influence sur les conditions de travail par l'entremise d'un processus de négociation collective menée de bonne foi. Le droit des employés de négocier collectivement impose donc à l'employeur des obligations correspondantes. Il implique que l'employeur et les employés se rencontrent et négocient de bonne foi en vue de réaliser leur objectif commun d'accommodement par des moyens pacifiques et productifs. [par. 90]

En fait, les juges majoritaires vont jusqu'à affirmer que « l'obligation de consulter et de négocier de bonne foi » constitue « le précepte fondamental de la négociation collective » (par. 97).

[169] Dans l'arrêt *Health Services*, la formation majoritaire de notre Cour dit apporter deux nuances à ce droit à la négociation collective. Premièrement, selon elle, le droit ne vise pas tous les aspects de la « négociation collective » au sens des législations du travail fondées sur le modèle Wagner et appliquées au pays. Le modèle Wagner fait référence aux variantes canadiennes de la *National Labor Relations Act*, 49 Stat. 449 (1935) (la « *Loi Wagner* »), adoptée aux États-Unis pendant la Dépression. À la fin des années 1930, la plupart des provinces canadiennes avaient adopté une loi reprenant les principaux objectifs de la *Loi Wagner*. Les lois inspirées du modèle Wagner possèdent quatre caractéristiques : la reconnaissance expresse du droit de l'employé d'appartenir au syndicat de son choix, la protection contre la coercition ou l'ingérence de l'employeur dans les activités associatives (pratiques déloyales de travail), l'obligation de l'employeur de négocier de bonne foi avec le syndicat de ses employés et un mécanisme de résolution des différends pour dénouer les impasses : voir G. W. Adams, *Canadian Labour Law* (2e éd. (feuilles mobiles)), vol. 1, p. 1-11.

[170] Deuxièmement, dans *Health Services*, les juges majoritaires précisent que le droit ne vise pas l'obtention d'un résultat particulier lors d'un conflit de travail ni l'accès garanti à un régime législatif précis (par. 19). Néanmoins, ils concluent que le processus de négociation collective de bonne foi exige que le syndicat et l'employeur se rencontrent et fassent « un effort raisonnable pour arriver à un contrat acceptable » (par. 101).

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[171] The Chief Justice and LeBel J. say that *Health Services* "follows directly" from the finding in *Dunmore*, because the government action in that case "rendered the meaningful pursuit of [workplace goals and collective bargaining activities] impossible and effectively nullified the right to associate of its employees" (para. 38). However, as I have discussed above, this conflates two arguments. The first is that restrictions on the ability to *associate*, either directly or because the government interfered with an activity because of its "associational nature", are unconstitutional, which *was* the finding in *Dunmore*. The second is that governments are required to provide legislation which enhances the ability of an existing association to pursue its goal of negotiating a collective agreement, which was the finding in *Health Services*, but was contrary to *Dunmore*. As noted above, an application of the actual holding in *Dunmore* would have asked only if the government substantially interfered with the ability to associate.

[171] La Juge en chef et le juge LeBel affirment que l'arrêt *Health Services* « découle directement » de la décision dans *Dunmore* car dans cette affaire, la mesure gouvernementale a eu pour effet de « rendre impossible la poursuite véritable [des objectifs liés au travail et des activités de négociation collective et de] supprimer dans les faits le droit de ses employés de s'associer » (par. 38). Toutefois, comme je l'ai expliqué, cette affirmation confond deux arguments. Suivant le premier argument, les restrictions à la capacité de *s'associer*, imposées directement ou par une mesure de l'État qui empêche une activité du fait de sa « nature associative », sont inconstitutionnelles; telle *était* la conclusion dans *Dunmore*. Suivant le deuxième argument, les gouvernements sont tenus d'adopter une loi qui favorise la capacité d'associations existantes de poursuivre l'objectif de négocier des conventions collectives, et c'était la conclusion dans *Health Services*, mais elle était contraire à *Dunmore*. Comme je l'ai dit, en appliquant la véritable conclusion de l'arrêt *Dunmore*, la Cour aurait décidé uniquement si le gouvernement entravait de façon substantielle la capacité de s'associer.

IV. Section 2(*d*) of the *Charter* Does Not Protect Collective Bargaining

IV. L'alinéa 2*d*) de la *Charte* ne protège pas la négociation collective

[172] I now turn to the fundamental question in this case: namely, whether *Health Services* was wrong to constitutionalize collective bargaining. In my respectful view, *Health Services* was indeed wrong. The problems relating to this aspect of *Health Services* can be grouped into three categories.

[172] Je me penche maintenant sur la question fondamentale soulevée en l'espèce : dans l'arrêt *Health Services*, la formation majoritaire constitutionnalise-t-elle à tort la négociation collective? J'estime en toute déférence que c'est le cas. Les problèmes que pose à cet égard l'arrêt *Health Services* sont de trois types.

[173] First, the collective bargaining right recognized in *Health Services* is inconsistent with the purpose of s. 2(*d*). As I will explain, the interpretation of s. 2(*d*) adopted by the majority in *Health Services* is unsound in principle for a number of reasons, and the correct conceptual framework for s. 2(*d*) is that established by the Trilogy and applied in subsequent cases. Section 2(*d*) does not protect a right to collective bargaining.

[173] Premièrement, le droit à la négociation collective reconnu dans *Health Services* est incompatible avec l'objet de l'al. 2*d*). Comme je l'explique plus loin, dans cet arrêt, l'interprétation de cet alinéa par les juges majoritaires n'est pas fondée eu égard aux principes applicables, et ce, pour nombre de raisons, et le bon cadre conceptuel est celui établi dans la trilogie et appliqué par la suite. L'alinéa 2*d*) ne protège pas le droit à la négociation collective.

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[174] Second, the reasons advanced in *Health Services* for protecting collective bargaining under s. 2(*d*) do not support that conclusion. The majority in *Health Services* found that the history of Canadian labour law, international law, and *Charter* values all pointed in favour of extending the guarantee of freedom of association to include collective bargaining. While all of those factors support constitutional recognition of the freedom of workers to associate, they do not support the right to collective bargaining.

[175] Third, the approach to collective bargaining in particular, and s. 2(*d*) in general, articulated in *Health Services* raises significant problems relating to workability. In my view, the framework established in *Health Services* is both inherently unstable and is a vehicle for the imposition of judicial policy preferences.

[176] I now address each of these problems in turn.

A. *The Collective Bargaining Right Recognized in Health Services Is Inconsistent With the Purpose of Section 2(d)*

[177] There are five reasons why the collective bargaining right recognized by *Health Services* is inconsistent with the purpose of s. 2(*d*). First, the analysis in *Health Services* improperly assigned collective dimensions to an individual right. Second, *Health Services* assigned positive obligations to the essentially negative freedom of association. Third, the reasons in *Health Services* replaced a content-neutral approach to s. 2(*d*) freedom and adopted an approach to s. 2(*d*) which privileges certain associations over others. Fourth, *Health Services* elevated contracts — collective bargaining agreements — above statutes and disrupted the ordinary hierarchy of laws. Fifth, the analysis in *Health Services* departs from a long-standing principle of judicial deference in the field of labour relations.

[174] Deuxièmement, les motifs avancés par la majorité dans *Health Services* pour faire bénéficier la négociation collective de la protection prévue à l'al. 2*d*) n'appuient pas sa conclusion. La formation majoritaire conclut que l'histoire du droit du travail au Canada, le droit international et les valeurs consacrées dans la *Charte* militent tous en faveur de l'élargissement de la protection de la liberté d'association de façon qu'elle englobe la négociation collective. Or, bien que tous ces éléments appuient la reconnaissance constitutionnelle de la liberté des travailleurs de s'associer, ils n'appuient pas le droit à la négociation collective.

[175] Troisièmement, dans l'arrêt *Health Services*, la conception de la négociation collective en particulier et de l'al. 2*d*) en général soulève des problèmes importants d'applicabilité pratique. À mon sens, le cadre établi est intrinsèquement précaire et permet aux tribunaux d'imposer leurs préférences d'ordre politique.

[176] Je me penche maintenant sur chacun de ces problèmes.

A. *Le droit à la négociation collective reconnu dans Health Services est incompatible avec l'objet de l'al. 2d)*

[177] Le droit à la négociation collective reconnu dans l'arrêt *Health Services* est incompatible avec l'objet de l'al. 2*d*) pour cinq raisons. Premièrement, dans son analyse, la majorité attribue à tort une dimension collective à un droit individuel. Deuxièmement, elle accole des obligations positives à la liberté de s'associer, alors que celle-ci est essentiellement négative. Troisièmement, dans ses motifs, la formation majoritaire substitue à une interprétation neutre quant à la nature de la liberté exercée une interprétation de la liberté garantie à l'al. 2*d*) qui privilégie certaines associations. Quatrièmement, elle élève le contrat — la convention collective — au-dessus de la loi et inverse la hiérarchie habituelle des sources du droit. Cinquièmement, son analyse rompt avec un principe appliqué depuis longtemps dans le domaine des relations du travail : la déférence des tribunaux envers le législateur.

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(1) Section 2(*d*) Protects Individual Interests, Not Group Interests

(a) *Individual Freedoms Versus Collective Rights*

[178] First, *Health Services* reinterpreted an individual freedom as giving rise to collective rights with no individual rights foundation. This reinterpretation of the scope of s. 2(*d*) was a departure from previous jurisprudence that is not justified by the purpose of the *Charter* guarantee. The series of cases beginning with the *Alberta Reference* established that the freedom of association is an individual freedom which is intended to prevent the government from interfering with associations by treating groups differently than it treats individuals.

[179] *Health Services* expanded s. 2(*d*) to protect collective rights which meant that individuals who are members of specific groups now enjoy greater constitutional rights than those who are not. In particular, following *Health Services*, workers' associations enjoy a robust right to bargain because employers are constitutionally obligated to bargain with their association. Individuals who are not members of an association, on the other hand, have no constitutional right to oblige their employers to bargain.

[180] While the *Charter* may protect certain collective rights, freedom of association does not fall into that category. Where a particular *Charter* guarantee extends greater rights to a group than to an individual, that effect is made clear in the text of the particular guarantee. For example, the right to minority language education in ss. 23(1) and 23(2) is subject to there being a sufficient number of eligible children to warrant public expenditures on minority language education (s. 23(3)). In this way, the guarantee in s. 23 is predicated on the existence of a group. Minority language educational rights thus have a "unique collective aspect even though the rights are granted to individuals" (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 28, *per*

(1) L'alinéa 2*d*) protège des intérêts individuels, et non collectifs

a) *Libertés individuelles versus droits collectifs*

[178] Premièrement, dans *Health Services*, les juges majoritaires réinterprètent une liberté individuelle et concluent qu'elle fait naître des droits collectifs sans assise individuelle. Leur nouvelle interprétation de la portée de l'al. 2*d*) constitue un abandon de la jurisprudence antérieure qui n'est pas justifié par l'objet de la garantie constitutionnelle. Le *Renvoi relatif à l'Alberta* et les arrêts rendus dans sa foulée ont établi que la liberté d'association est une liberté individuelle qui vise à empêcher l'État d'entraver l'activité associative en traitant les groupements différemment des individus.

[179] L'arrêt *Health Services* élargit la portée de l'al. 2*d*) afin de protéger des droits collectifs, de sorte que les individus qui sont membres de certains groupements bénéficient désormais de droits constitutionnels plus importants que ceux qui n'en sont pas membres. Plus particulièrement, une association de travailleurs bénéficie d'un droit important de négociation, car la Constitution oblige l'employeur à négocier avec elle. En revanche, l'individu qui n'est pas membre d'une association ne bénéficie pas du droit constitutionnel d'exiger de son employeur qu'il négocie avec lui.

[180] Bien que la *Charte* puisse protéger certains droits collectifs, la liberté d'association ne fait pas partie de ces droits. La garantie constitutionnelle qui confère des droits plus étendus à un groupement qu'à un individu le précise clairement dans son libellé. Par exemple, le droit à l'instruction dans la langue de la minorité garanti aux par. 23(1) et (2) s'exerce uniquement lorsque le nombre d'enfants admissibles est suffisant pour justifier le financement public (par. 23(3)). Partant, la garantie prévue à l'art. 23 repose sur l'existence d'un groupe. Ainsi, « l'exercice de ces droits individuels [droits à l'instruction dans la langue de la minorité] [se voient conférer] une dimension collective particulière » (*Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, 2003 CSC 62, [2003] 3 R.C.S. 3,

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Iacobucci and Arbour JJ.). Similarly, s. 35(1) of the *Constitution Act, 1982* recognizes the "existing aboriginal and treaty rights of the aboriginal peoples". Treaty rights, being rights established in a treaty between a group of aboriginals and the Crown, undoubtedly have a collective dimension to them insofar as they vest rights in a particular group. See, e.g., *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207, at paras. 10-11. By contrast, s. 2(*d*) provides that "[e]veryone has . . . freedom of association". This language supports an interpretation of s. 2(*d*) as an individual freedom. See P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at pp. 37-1 and 37-2.

(b) *Qualitative Differences Between Individuals and Associations Do Not Change the Individual Nature of Freedom of Association*

[181] The Chief Justice and LeBel J. say that *Health Services* was "consistent with the previous cases on the issue of individual and collective rights" (para. 65). I must respectfully disagree. McIntyre J. in the *Alberta Reference* made the point, which is the point that I make in my reasons, that freedom of association protects the right of groups to engage in activities that are lawful or constitutionally protected for individuals. The reliance on a purposive approach to interpretation advanced by the majority in *Health Services* opens the door to s. 2(*d*) being interpreted as a generalized group right as opposed to an individual right, which is an interpretation that is not consistent with this Court's prior jurisprudence. My colleagues' reference to the interpretation of s. 2(*d*) advanced by Dickson C.J. in the *Alberta Reference*, was not a position accepted by the majority and, as my reasons point out, by constitutionalizing the right to bargain collectively *Health Services* departed from the position of the majority in that case.

[182] As I will now explain, although in *Dunmore*, s. 2(*d*) was found to protect group activity that was

par. 28, les juges Iacobucci et Arbour). De même, le par. 35(1) de la *Loi constitutionnelle de 1982* reconnaît « [l]es droits existants — ancestraux ou issus de traités — des peuples autochtones ». Un droit issu de traité, c'est-à-dire qui découle d'un traité intervenu entre un groupe d'Autochtones et la Couronne, revêt incontestablement une dimension collective dans la mesure où il est conféré à un groupe particulier. Voir, p. ex., l'arrêt *R. c. Powley*, 2003 CSC 43, [2003] 2 R.C.S. 207, par. 10-11. Par contre, l'al. 2*d*) dispose que « [c]hacun a [. . .] la liberté d'association », ce qui étaye l'interprétation voulant qu'il protège une liberté individuelle. Voir P. W. Hogg, *Constitutional Law of Canada* (5e éd. suppl.), vol. 2, p. 37-1 et 37-2.

b) *Malgré les différences qualitatives entre activités individuelles et activités associatives, la liberté d'association demeure de nature individuelle*

[181] La Juge en chef et le juge LeBel affirment que l'arrêt *Health Services* « s'inscrit dans la lignée des arrêts antérieurs portant sur les droits individuels et collectifs » (par. 65), ce dont je ne peux malheureusement convenir. Dans le *Renvoi relatif à l'Alberta*, le juge McIntyre fait valoir — comme je le fais en l'espèce — que la liberté d'association protège le droit d'un groupement de se livrer à des activités qui, lorsqu'elles sont le fait d'individus, sont légitimes ou jouissent d'une protection constitutionnelle. L'interprétation téléologique privilégiée par les juges majoritaires dans l'arrêt *Health Services* permet de considérer que l'al. 2*d*) confère un droit collectif généralisé plutôt qu'un droit individuel, ce qui va à l'encontre de la jurisprudence de notre Cour antérieure à cet arrêt. L'interprétation de l'al. 2*d*) préconisée par le juge en chef Dickson dans le *Renvoi relatif à l'Alberta* et à laquelle font référence mes collègues n'a pas été retenue par les juges majoritaires. De plus, comme je le soutiens dans les présents motifs, en constitutionnalisant le droit de négocier collectivement, l'arrêt *Health Services* rompt avec l'opinion majoritaire dans cette affaire.

[182] Comme je l'explique ci-après, même si, dans l'arrêt *Dunmore*, la Cour conclut que l'al. 2*d*)

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"qualitatively" different from individual activity, s. 2(*d*) cannot be used to give groups greater constitutional protection than individuals.

[183] The majority in *Health Services*, in rejecting the view that s. 2(*d*) only protects those activities that may be lawfully pursued on the individual level, said that *Dunmore* had overtaken the notion that freedom of association applies only to activities capable of performance by individuals. *Dunmore* cannot be interpreted in such a manner. In *Dunmore*, Bastarache J. explained that to limit s. 2(*d*) to activities that are performable by individuals might render futile certain fundamental initiatives, since some collective activities may, by their very nature, be incapable of being performed by an individual. As I explained above, in the view of Bastarache J., certain activities are, when performed by a group, "qualitatively" different from those activities performed solely by an individual, and this qualitative difference may merit constitutional protection for the collective activity (*Dunmore*, at para. 17). With respect, *Dunmore* does not stand for the proposition that such qualitative differences open the door to the notion of group rights entirely unconnected to individual rights.

[184] I accept that there may be qualitative differences between individuals acting alone and individuals acting in concert. Professor Langille refers to the example of choir singing. See B. Langille, "The Freedom of Association Mess: How We Got into It and How We Can Get out of It" (2009), 54 *McGill L.J.* 177 ("Freedom of Association"), at p. 185. While he ultimately believes that the choir metaphor should not apply to determine the scope of s. 2(*d*) rights, in my opinion the metaphor is apt in explaining the limited type of qualitatively different group activities that may be protected by s. 2(*d*). A group of individuals singing together in a choir can produce musical effects, such as harmonies and counterpoint, that an individual singing alone cannot. Such effects are not just an accumulation of individual voices singing in exactly the

protège l'activité collective « qualitativement » différente de l'activité individuelle, cette disposition ne saurait accorder aux groupements une plus grande protection constitutionnelle qu'aux individus.

[183] Dans l'arrêt *Health Services*, rejetant la thèse selon laquelle l'al. 2*d*) protège uniquement les activités qui peuvent légitimement être exercées à l'échelle individuelle, les juges majoritaires affirment que l'arrêt *Dunmore* rend désuète l'idée que la liberté d'association s'applique aux seules activités susceptibles d'exercice individuel. L'arrêt *Dunmore* ne peut être interprété de cette manière. Le juge Bastarache y explique que faire bénéficier de la protection de l'al. 2*d*) seulement les activités qui peuvent être accomplies individuellement viderait de leur sens des actes fondamentaux, puisque certaines activités collectives ne peuvent, de par leur nature, être accomplies individuellement. J'ai déjà expliqué que pour le juge Bastarache, lorsqu'elles sont exercées par un groupe, certaines activités sont « qualitativement » différentes de celles exercées uniquement par un individu, et cette différence qualitative peut emporter la protection constitutionnelle de l'activité collective (*Dunmore*, par. 17). En toute déférence, l'arrêt *Dunmore* n'appuie pas la proposition voulant que ces différences qualitatives ouvrent la voie à une notion de droit collectif non arrimé à un droit individuel.

[184] Je reconnais qu'il peut y avoir des différences qualitatives entre individus agissant seuls et individus agissant collectivement. Dans « The Freedom of Association Mess : How We Got into It and How We Can Get out of It » (2009), 54 *R.D. McGill* 177 (« Freedom of Association »), p. 185, le professeur B. Langille donne l'exemple d'une chorale. Bien qu'il précise que cette métaphore ne saurait servir à circonscrire la portée des droits garantis à l'al. 2*d*), elle permet à mon avis d'illustrer le genre restreint d'activités collectives qualitativement différentes susceptibles de bénéficier de la protection offerte par cette disposition. Un groupe d'individus chantant ensemble dans une chorale peut produire des effets musicaux, tels une harmonie et un contrepoint, qui ne peuvent être obtenus d'un individu chantant seul. Il ne s'agit pas uniquement

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same way. Rather, they produce a musical effect that is fundamentally different from what a lone individual can produce. In other words, the whole is not merely the sum of its parts. The ability to create such effects through the coordination of individual action is one reason why freedom of association is protected. I believe that *Dunmore* found that s. 2(*d*) may protect voluntary collective activity which is "qualitatively" different from individual activity in this limited way.

[185] In my view, the question is not whether the activity is susceptible of being performed, *in exactly the same manner*, by an individual acting alone. A choir singing harmony may produce sound that is qualitatively distinct from an individual voice, but it is nonetheless *produced* by a group of individuals voluntarily singing together. One individual is free to sing in one octave, another is free to sing in another octave. A harmony may result if they choose to perform these individual activities in concert with one another. And if the state were to outlaw harmony, it would be attacking the individuals' ability to do side by side at the same time what each may do apart. Thus, while harmony arising out of choir singing may have no direct individual analogue, a legislative attack on harmony would be an attack on the association itself, and should not be permitted under s. 2(*d*). Section 2(*d*) may recognize qualitative differences between individual and group activity, without altering the individual nature of freedom of association.

[186] While s. 2(*d*) protects "qualitatively" different activities which are an emergent result of free individual organization, it does not impose a constitutional obligation on government to *create* out of whole cloth a set of qualitative differences that make the group more powerful than it otherwise would be, even if such differences would enhance its ability to achieve its goals.

[187] *Health Services* did not purport to give constitutional force to a right to *individuals* to compel employers to bargain in good faith with them. Individuals who are not members of an association

de juxtaposer les voix d'individus chantant exactement de la même façon, mais bien de produire un effet musical foncièrement différent de celui pouvant être obtenu d'un individu seul. Autrement dit, le tout ne résulte pas simplement de la somme de ses parties. La possibilité d'obtenir de tels effets grâce à la coordination d'actes individuels est l'une des raisons pour lesquelles la liberté d'association est protégée. J'estime que suivant l'arrêt *Dunmore*, l'al. 2*d*) peut protéger l'activité collective volontaire qui est « qualitativement » différente de l'activité individuelle dans cette seule mesure.

[185] À mon sens, la question n'est pas de savoir si l'activité peut être exercée *exactement de la même façon* par un individu seul. Si une chorale qui chante en harmonie peut produire un son qualitativement distinct de celui produit par une personne qui chante seule, il demeure que ce son est *produit* par un groupe d'individus chantant volontairement ensemble. Un individu peut chanter une octave plus haut et un autre, une octave plus bas. Il y aura harmonie s'ils décident d'unir leurs voix. Si l'État voulait bannir l'harmonie, il empêcherait les individus de faire côte à côte et en même temps ce qu'ils peuvent faire séparément. Partant, bien que l'harmonie créée par la chorale n'ait aucun équivalent individuel direct, rendre illégale l'harmonie reviendrait à frapper d'illégalité l'association elle-même, ce que ne devrait pas permettre l'al. 2*d*). Cette disposition peut reconnaître la différence qualitative entre une activité individuelle et une activité collective, mais la liberté d'association demeure néanmoins foncièrement individuelle.

[186] L'alinéa 2*d*) protège l'activité « qualitativement » différente à laquelle donne lieu l'association libre d'individus, mais il n'impose pas à l'État l'obligation constitutionnelle de *créer* de toutes pièces un ensemble de différences qualitatives qui rendent le groupe plus puissant qu'il ne le serait autrement, même si ces différences accroîtraient sa faculté d'atteindre son objectif.

[187] Dans l'arrêt *Health Services*, la formation majoritaire n'entendait pas constitutionnaliser un droit qui permet à *l'individu* d'obliger son employeur à négocier de bonne foi avec lui.

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have no such right. Thus, the constitutional right to compel employers to bargain in good faith with associations must be a unique group right, not an activity emergent from an individual right.

(2) Section 2(*d*) Protects Freedoms Rather Than Rights

[188] Second, the majority concluded in *Health Services* that s. 2(*d*) imposes a duty to bargain in good faith. It explained this conclusion at para. 90 finding that "the employees' right to collective bargaining imposes corresponding duties on the employer" requiring "both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation".

[189] Thus, *Health Services* stands for the proposition that the right to collective bargaining includes an entitlement to have "meaningful" influence over working conditions. In other words, the right includes an assurance that a real dialogue will take place between an employee association and the employer. Such assurance can only be provided if the employer is under a duty to engage with representations made by the association and make a good faith attempt to bargain to pursue the goal of accommodation. In the absence of such a duty, the employer would be free to refuse to negotiate with the employee association. Thus, according to *Health Services*, if s. 2(*d*) protected only the ability of workers to make collective representations and did not impose a duty on the employer to bargain in good faith, it would fail to protect the right to collective bargaining.

[190] In my view, this proposition suffers from an important defect: it transforms s. 2(*d*) from a freedom into a "positive" right by imposing an obligation to act on third parties (i.e. the employer). There is a difference between saying that an individual has the *freedom* or *liberty* to do something, on the one hand, and saying that he or she has the *right* to do it, on the other. A person is free or at

L'individu qui n'est pas membre d'une association ne bénéficie pas d'un tel droit. Le droit constitutionnel d'obliger l'employeur à négocier de bonne foi avec une association doit donc être purement collectif et sans lien avec une activité découlant de l'exercice d'un droit individuel.

(2) L'alinéa 2*d*) protège des libertés plutôt que des droits

[188] Deuxièmement, dans l'arrêt *Health Services*, la majorité des juges conclut que l'al. 2*d*) impose l'obligation de négocier de bonne foi. Elle explique cette conclusion au par. 90 en disant que le droit des « employés de négocier collectivement impose [. . .] à l'employeur des obligations correspondantes » exigeant « que l'employeur et les employés se rencontrent et négocient de bonne foi en vue de réaliser leur objectif commun d'accommodement par des moyens pacifiques et productifs ».

[189] Suivant cet arrêt, le droit à la négociation collective englobe donc l'influence « véritable » sur les conditions de travail. Autrement dit, il assure un vrai dialogue entre l'association d'employés et l'employeur. Cette assurance ne peut être offerte que si l'employeur est tenu de donner suite aux revendications de l'association et de tenter de bonne foi de négocier en vue de réaliser l'objectif d'accommodement. Sans une telle obligation, l'employeur serait libre de refuser de négocier avec l'association d'employés. Partant, suivant l'arrêt *Health Services*, si l'al. 2*d*) protégeait uniquement la possibilité pour les travailleurs de présenter des revendications collectives et n'obligeait pas l'employeur à négocier de bonne foi, il ne protégerait pas le droit à la négociation collective.

[190] À mon sens, cette proposition présente une faille importante : en imposant à un tiers (c.-à-d., l'employeur) une obligation, elle fait de la liberté garantie à l'al. 2*d*) un droit « positif ». Il y a une différence entre, d'une part, reconnaître à l'individu la *liberté* de faire quelque chose et, d'autre part, lui reconnaître le *droit* de faire quelque chose. L'individu est libre dès lors qu'il ne rencontre ni

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liberty when there is an absence of obstacles or impediments. Nothing further is required beyond this absence. However, to say that a person has a "right" is to imply something further. It suggests that a claim can be made on someone else in order to be *provided with* the object of the right.

[191] It is possible to describe a freedom in terms of rights, but this may only serve to blur the distinction between what is being protected in either case. A freedom exists to protect a sphere of autonomy, an area within which the individual will encounter no obstacles. A right, on the other hand, exists to provide an individual with a claim to some specific thing. Generally, a freedom can be described as a right only if it is recognized that the right is "negative" in character, that is, only if it is described as an entitlement to be free of restriction or prohibition.

[192] An example of how a freedom can sometimes be described using the word "right" can be found by examining ss. 7 to 12 of the *Charter*. When the *Charter* uses the term "right", as it does in ss. 7 to 12, either a positive entitlement is introduced, or a right to be free of some restriction or prohibition (i.e. a freedom) is introduced. For the positive rights, an individual is given a right to some form of state action, e.g. to be advised of a right to counsel upon arrest. For the negative rights, the individual is given a right to be free from some form of restriction or prohibition, e.g. a right not to be arbitrarily detained or imprisoned. As discussed above, the right to be free of a restriction or a prohibition is a description that encompasses the "negative" character of the right, and is simply another way to describe a freedom.

[193] The Chief Justice and LeBel J. suggest that my reasons seek to maintain the "consistently rejected . . . rigid distinction" between freedoms and positive rights (para. 69). Referring to *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815 ("*CLA*"), by way of analogy, they say that in some circumstances a *Charter* freedom, such as freedom of expression under s. 2(*b*), "may require the government to disclose documents to the public in

obstacle ni entrave. La liberté n'exige rien de plus. Toutefois, le « droit » suppose davantage : son titulaire peut l'exercer vis-à-vis d'autrui afin d'*être pourvu* de son objet.

[191] On peut définir une liberté en fonction de droits, mais on risque alors de n'arriver qu'à brouiller la distinction entre ce qui est protégé par l'un et par l'autre. La liberté existe pour protéger une sphère d'autonomie où l'individu ne se heurtera à aucun obstacle. En revanche, le droit conféré à l'individu lui permet de réclamer une chose précise. En règle générale, une liberté ne peut être assimilée à un droit que lorsque la nature « négative » de celui-ci est reconnue, c'est-à-dire uniquement lorsque la liberté s'entend du droit d'échapper à toute limitation ou interdiction.

[192] Les articles 7 à 12 de la *Charte* offrent l'exemple de la liberté qui peut parfois être qualifiée de « droit ». Lorsque la *Charte* emploie le terme « droit » aux art. 7 à 12, elle reconnaît soit un droit positif, soit un droit d'échapper à quelque limitation ou interdiction (c.-à-d., une liberté). Dans le cas d'un droit positif, l'individu se voit conférer le droit à certaines mesures de la part de l'État, comme celui d'être informé du droit à l'assistance d'un avocat en cas d'arrestation. Dans le cas d'un droit négatif, l'individu se voit conférer le droit d'échapper à une forme de limitation ou d'interdiction, par exemple le droit de ne pas être arbitrairement détenu ou emprisonné. Je le rappelle, le droit d'échapper à une limitation ou interdiction illustre la forme « négative » du droit et se veut simplement une autre façon de décrire une liberté.

[193] La Juge en chef et le juge LeBel laissent entendre que je préconise ici « une distinction rigide » entre liberté et droit positif, une distinction que la Cour « s'est toujours refusée à établir » (par. 69). Renvoyant par analogie à l'arrêt *Ontario (Sûreté et Sécurité publique) c. Criminal Lawyers' Association*, 2010 CSC 23, [2010] 1 R.C.S. 815 (« *CLA* »), ils affirment que dans certaines circonstances, une liberté constitutionnelle, comme la liberté d'expression garantie à l'al. 2*b*) de la

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order to enable meaningful discourse" (para. 69). Therefore, they say s. 2(*d*) of the *Charter* "may require the state to act positively to protect the ability of individuals to engage in fundamentally important collective activities" (para. 70). While I would agree that in "exceptional circumstances" (*Dunmore*, at para. 21; *Delisle*, at para. 33) a *Charter* freedom may require positive state action, I do not agree that *CLA* is an apt analogy.

[194] Creating positive rights in exceptional circumstances does not dilute the coherence of the distinction between freedoms and rights. This is because those positive rights will only be granted when they are genuinely derivative of a freedom. A derivative right is one that is *necessary* to allow individuals to exercise a fundamental freedom. In *CLA*, the right to access government information was considered to be "a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government" (para. 30 (emphasis added)). This Court has found that a derivative right must be "inextricably tied to" (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 ("*CBC*"), at para. 23) a "necessary precondition" (*Dunmore*, at para. 42) and "clearly within the ambit of the freedom" (*CBC*, at para. 23). However, the core of any derivative right is that without that right individuals will not be able to exercise their *Charter* freedom.

[195] By its very nature, a derivative right must be necessary to the exercise of a freedom, not constitute a stand-alone right itself. Therefore the ability to exercise the freedom itself must be looked to in order to determine whether any proposed right is genuinely derivative. For example, in *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, news organizations were arguing that they should have s. 2(*b*) protection for confidential sources. In rejecting this argument, this Court said that this

Charter, « peut exiger de l'État qu'il communique des documents au public afin d'assurer un débat véritable » (par. 69). Par conséquent, l'al. 2*d*) de la *Charte* « peut obliger l'État à prendre des mesures concrètes pour permettre aux individus de prendre part à des activités collectives d'importance fondamentale » (par. 70). Je concède que dans des « circonstances exceptionnelles » (*Dunmore*, par. 21; *Delisle*, par. 33) une liberté garantie par la *Charte* peut obliger l'État à prendre des mesures positives, mais je ne crois pas que l'arrêt *CLA* constitue un bon élément de comparaison.

[194] La création d'un droit positif dans des circonstances exceptionnelles ne rend pas moins cohérente la distinction entre liberté et droit, car un droit positif n'est accordé que s'il découle véritablement d'une liberté. Le droit dérivé est celui qui est *nécessaire* pour permettre à l'individu d'exercer une liberté fondamentale. Dans l'arrêt *CLA*, le droit d'accès à des renseignements gouvernementaux est considéré comme « un droit dérivé qui peut intervenir lorsqu'il constitue une condition qui doit nécessairement être réalisée pour qu'il soit possible de s'exprimer de manière significative sur le fonctionnement du gouvernement » (par. 30 (je souligne)). Dans des arrêts antérieurs, la Cour conclut qu'un droit dérivé doit être « inextricablement lié » à la liberté (*Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480 (« *SRC* »), par. 23), qu'il doit être une « condition préalable nécessaire » à son exercice (*Dunmore*, par. 42) et qu'il doit relever « clairement de la liberté » (*SRC*, par. 23). Toutefois, la raison d'être essentielle du droit dérivé est que, sans lui, l'individu ne peut pas exercer la liberté que lui garantit la *Charte*.

[195] Par sa nature même, le droit dérivé doit être nécessaire à l'exercice d'une liberté, et non constituer un droit autonome. Par conséquent, il faut se pencher sur la faculté d'exercer une liberté pour déterminer si un droit allégué est véritablement dérivé. Par exemple, dans l'affaire *R. c. National Post*, 2010 CSC 16, [2010] 1 R.C.S. 477, où des organes de presse faisaient valoir que leurs sources confidentielles devaient bénéficier de la protection de l'al. 2*b*), la Cour rejette cette prétention en

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position was "built on the premise that protection of confidential sources should be treated as if it were an enumerated *Charter* right or freedom" but that "is not so" (*National Post*, at para. 38). In *CBC* a positive right of access to courts was sought in order to allow journalists to report on court proceedings. La Forest J., writing for the Court, stated that "courts . . . must be open to public scrutiny and to public criticism of their operations" (*CBC*, at para. 20). Without the derivative right of access to the courts, it would be impossible for the public (and journalists) to offer criticism in the exercise of their s. 2(*b*) freedom of the press.

[196] In *Dunmore*, a right was derived from s. 2(*d*) which required positive governmental action that was "necessary for [employees] to exercise their constitutional freedom to form and maintain associations" (para. 67 (emphasis added)).

[197] A right to collective bargaining is not a derivative right in the sense in which it has been recognized in *CLA*, *CBC* and *Dunmore*. As discussed above, the essence of freedom of association is that it enables individuals to do in association what they could do as individuals. *Dunmore* is consistent with this principle, in the manner that I have just described. By contrast, collective bargaining is not emergent from an activity that an individual alone could do. Rather, as described in *Health Services*, it imposes a duty on employers to meet with employees and make a "reasonable effort to arrive at an acceptable contract" (para. 101). No individual employee has a right to require an employer to meet and make a reasonable effort to arrive at an acceptable employment contract, which is the right for an employee association created by *Health Services*.

[198] The Chief Justice and LeBel J. say that collective bargaining is a derivative right because it is a "necessary precondition" to make their choice to associate meaningful. Understood this way, compulsory collective bargaining does not enable association. Rather, it is entirely concerned with

affirmant qu'elle a pour « prémisse que la protection des sources confidentielles devrait être traitée comme s'il s'agissait d'un droit ou d'une liberté expressément visé par la *Charte* », ce qui « n'est pas le cas » (par. 38). Dans l'affaire *SRC*, le droit positif d'assister au déroulement de procédures judiciaires était allégué au motif que les journalistes devaient pouvoir en rendre compte. Le juge La Forest dit au nom de la Cour qu'il faut que « le public puisse faire l'examen critique des tribunaux et de leur fonctionnement » (par. 20). Sans le droit dérivé d'accéder aux tribunaux, il serait impossible au public (et aux journalistes) de formuler des critiques dans l'exercice de leur liberté de presse garantie à l'al. 2*b*).

[196] Dans l'affaire *Dunmore*, un droit dérivé de l'al. 2*d*) exigeait de l'État une mesure positive « nécessaire [aux employés] pour exercer leur liberté constitutionnelle de constituer et de maintenir des associations » (par. 67 (je souligne)).

[197] Le droit à la négociation collective n'est pas un droit dérivé au sens des arrêts *CLA*, *SRC* et *Dunmore*. Je le rappelle, la liberté d'association permet essentiellement à l'individu de faire de concert avec d'autres ce qu'il pourrait accomplir seul. *Dunmore* est compatible avec ce principe tel que je l'ai exposé. Par contre, la négociation collective ne découle pas d'une activité susceptible d'être le fait d'un individu seul. Au contraire, comme le disent les juges majoritaires dans *Health Services*, elle oblige l'employeur à rencontrer ses employés et à faire « un effort raisonnable pour arriver à un contrat acceptable » (par. 101). Un employé individuel n'a pas le droit d'obliger son employeur à le rencontrer et à faire un effort raisonnable pour arriver à un contrat de travail acceptable. C'est pourtant ce droit que l'arrêt *Health Services* crée au bénéfice de l'association d'employés.

[198] La Juge en chef et le juge LeBel affirment que la négociation collective est un droit dérivé parce qu'elle constitue une « condition qui doit nécessairement être réalisée » pour donner un sens à leur choix de s'associer. Vue sous cet angle, la négociation collective obligatoire n'habilite pas

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enhancing the ability of employee associations, once formed, to pursue their goals and provide them with a more favourable bargaining position.

[199] There is no reason to think that individual employees would not have the exact same desire for a more favourable bargaining position. Every day in Canada there are individuals who enter into employment contracts with their employers. Those individuals might also benefit if their employers were compelled to negotiate their employment contracts with them. However, individuals do not have a constitutionally mandated right to compel their employers to negotiate over an employment contract with them simply because no such right exists in the *Charter*. Because no individual has the right to compel an employer to negotiate in good faith over an employment contract, collective bargaining is not emergent from an activity that an individual alone could do.

[200] Accordingly, a right to collective bargaining is not derivative of a freedom as described in *CLA*, *CBC* and *Dunmore*. It is a stand-alone right created by the Court, not by the *Charter*.

[201] Thus, to grant a right to collective bargaining under s. 2(*d*) purportedly as derivative of the freedom of association would not be consistent with the approach taken by this Court in its derivative rights jurisprudence in relation to the *Charter*. Such a derivative right will arise only where it is a "necessary precondition" to the exercise of the freedom (*CLA*, at para. 30). This careful approach is necessary to adhere to the distinction between *Charter* rights and freedoms and prevents transforming freedoms into rights.

[202] Viewed in this light, it is clear that s. 2(*d*) is intended to protect a sphere of individual autonomy or liberty, and not to enhance by state action the capacity of individuals to do a particular activity more effectively or to guarantee that any particular endeavour for which association might take place will succeed.

l'acte d'association. Elle sert plutôt uniquement à accroître la capacité de l'association, une fois formée, de poursuivre ses objectifs et lui offre une position de négociation plus favorable.

[199] Rien ne permet de penser que l'employé individuel ne souhaiterait pas tout autant se voir offrir une position de négociation plus favorable. Chaque jour, au Canada, des individus passent des contrats de travail avec leur employeur. Ces individus y gagneraient au change si l'employeur était obligé de négocier avec eux le contrat de travail. Toutefois, aucun individu n'a le droit constitutionnel d'obliger l'employeur à négocier avec lui son contrat de travail, et ce simplement parce qu'aucun droit de la sorte n'existe dans la *Charte*. Parce qu'aucun individu n'a le droit d'obliger l'employeur à négocier de bonne foi un contrat de travail, la négociation collective ne découle pas d'une activité susceptible d'être le fait d'un individu seul.

[200] Par conséquent, le droit à la négociation collective n'est pas un droit dérivé d'une liberté au sens des arrêts *CLA*, *SRC* et *Dunmore*. Il s'agit d'un droit autonome créé par la Cour, et non par la *Charte*.

[201] Reconnaître le droit à la négociation collective sur le fondement de l'al. 2*d*) au motif qu'il dériverait de la liberté d'association est donc incompatible avec la jurisprudence de notre Cour en matière de droits dérivés de libertés garanties par la *Charte*. Le droit dérivé reconnu ne naît que s'il constitue une « condition qui doit nécessairement être réalisée » pour l'exercice de la liberté (*CLA*, par. 30). Cette prudence s'impose pour le maintien de la distinction entre droits et libertés garantis par la *Charte* et elle empêche qu'une liberté ne devienne un droit.

[202] Considéré sous cet angle, l'al. 2*d*) vise clairement à protéger une sphère d'autonomie ou de liberté individuelle, et non à accroître par une mesure de l'État la faculté qu'a un individu d'exercer plus efficacement une activité particulière ni à garantir la réalisation d'un objectif visé par la formation d'une association.

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(3) Section 2(*d*) Does Not Privilege Some Associations Over Others

[203] A third error in the approach to s. 2(*d*) in *Health Services* is that it conceives of s. 2(*d*) as privileging some associations over others. I cannot agree with an approach to s. 2(*d*) which requires this Court to decide which associations and associational objectives are worthy of constitutional protection and which are not.

[204] *Health Services* rejected the grounds advanced in earlier decisions for excluding collective bargaining from the *Charter*'s guarantee of freedom of association on the basis that they did not "withstand principled scrutiny" (para. 22). The majority in *Health Services* held that the "overarching" problem with these earlier decisions, particularly the *Alberta Reference* and *PIPSC*, was that they had pursued a "decontextualized", as opposed to a "purposive", approach to freedom of association that had ignored the differences between organizations and treated all organizations in the same way: "Whatever the organization — be it trade union or book club — its freedoms were treated as identical" (para. 30). Having decided that the objects of trade unions were meritorious of protection, the majority decided that the protection of trade unions' objects required the recognition of the duty to bargain in good faith.

[205] These earlier cases did indeed exhibit a content-neutral approach to freedom of association in the sense that they did not claim to privilege particular associations. *Health Services* erred in saying that these approaches were not purposive.

[206] The purposive approach to *Charter* interpretation was explained by Dickson J. (as he then was) in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 ("*Big M*"), at p. 344:

> The meaning of a right or freedom guaranteed by the *Charter* [is] to be ascertained by an analysis of the purpose of such a guarantee; it [is] to be understood, in other words, in the light of the interests it [is] meant to protect.

(3) L'alinéa 2*d*) ne favorise pas certaines associations par rapport à d'autres

[203] Dans l'arrêt *Health Services*, la formation majoritaire commet une troisième erreur en interprétant l'al. 2*d*) au bénéfice de certains types d'association par rapport à d'autres. Je ne saurais souscrire à une interprétation de l'al. 2*d*) qui nous oblige à décider quelles associations et quels objectifs associatifs valent ou non d'être protégés par la Constitution.

[204] Dans l'arrêt *Health Services*, la majorité des juges écarte les motifs invoqués auparavant pour refuser que la liberté d'association garantie par la *Charte* englobe la négociation collective, et ce, parce qu'ils ne « résistent pas à un examen fondé sur les principes pertinents » (par. 22). Pour elle, le problème « le plus sérieux » que posent les décisions antérieures, en particulier le *Renvoi relatif à l'Alberta* et *IPFPC*, est qu'on y recourt à une interprétation « insensible [au] contexte » au lieu d'une interprétation « téléologique » de la liberté d'association, sans tenir compte des différences entre les organisations et en les traitant toutes de la même manière : « [q]uelle que soit l'association — un syndicat ou un club de lecture —, on a traité ses libertés de manière identique » (par. 30). Elle décide alors que les objectifs d'un syndicat justifient une protection, puis elle conclut qu'il faut donc reconnaître l'obligation de négocier de bonne foi.

[205] Dans les décisions antérieures, la Cour interprète effectivement la liberté d'association de manière neutre quant à sa nature en ce qu'elle ne favorise pas d'associations en particulier. Dans *Health Services*, la majorité affirme à tort que cette démarche n'est pas téléologique.

[206] Dans l'arrêt *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295 (« *Big M* »), p. 344, le juge Dickson (plus tard Juge en chef) explique en quoi consiste l'interprétation téléologique de la *Charte* :

> Le sens d'un droit ou d'une liberté garantis par la *Charte* doit être vérifié au moyen d'une analyse de l'objet d'une telle garantie; en d'autres termes, ils doivent s'interpréter en fonction des intérêts qu'ils visent à protéger.

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In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter.* The interpretation should be, as the judgment in [*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145] emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts. [Emphasis in original.]

[207] The kind of "context" to which the reasons in *Health Services* refer is very different from that being discussed here. *Health Services* suggested that a "generic" approach to defining freedom of association is inappropriate because different groups must have different freedoms: the needs of a book club are not the same as those of a trade union, and assuming them to be entitled to precisely the same thing under s. 2(*d*) would be a mistake (para. 30). However, the "context" that is relevant to a purposive interpretation of *Charter* freedoms is not the context of the individuals who happen to be exercising that freedom in a given case. Rather, a purposive interpretation of s. 2(*d*) requires that one place *freedom of association* in its linguistic, philosophic and historical contexts. The origins of the concept, the words used to describe it, and the philosophical principles on which it relies will define the scope of s. 2(*d*) protection. The extent of that protection should not change depending on the particular *factual* context or circumstances in which s. 2(*d*) is being applied.

[208] In the *Alberta Reference*, both Dickson C.J. and McIntyre J. did in fact adopt a purposive approach to interpreting the *Charter*'s guarantee of freedom of association (pp. 363 and 393-94). It was not their failure to apply such an approach that led to the conclusion that all associations must receive

À mon avis, il faut faire cette analyse et l'objet du droit ou de la liberté en question doit être déterminé en fonction de la nature et des objectifs plus larges de la *Charte* elle-même, des termes choisis pour énoncer ce droit ou cette liberté, des origines historiques des concepts enchâssés et, s'il y a lieu, en fonction du sens et de l'objet des autres libertés et droits particuliers qui s'y rattachent selon le texte de la *Charte*. Comme on le souligne dans l'arrêt [*Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145], l'interprétation doit être libérale plutôt que formaliste et viser à réaliser l'objet de la garantie et à assurer que les citoyens bénéficient pleinement de la protection accordée par la *Charte*. En même temps, il importe de ne pas aller au-delà de l'objet véritable du droit ou de la liberté en question et de se rappeler que la *Charte* n'a pas été adoptée en l'absence de tout contexte et que, par conséquent, comme l'illustre l'arrêt de [notre] Cour *Law Society of Upper Canada c. Skapinker*, [1984] 1 R.C.S. 357, elle doit être située dans ses contextes linguistique, philosophique et historique appropriés. [Soulignement dans l'original.]

[207] Le « contexte » auquel renvoie *Health Services* est d'un type très différent. Les juges majoritaires laissent entendre qu'il ne convient pas d'interpréter la liberté d'association de manière « générale », car des groupes différents doivent avoir des libertés différentes : les besoins d'un club de lecture ne sont pas ceux d'un syndicat, et il serait erroné de leur accorder la même protection en application de l'al. 2*d*) (par. 30). Cependant, le « contexte » pertinent pour l'interprétation téléologique d'une liberté garantie par la *Charte* ne correspond pas à celui dans lequel des individus exercent cette liberté dans un cas donné. L'interprétation téléologique de l'al. 2*d*) exige plutôt que l'on situe la *liberté d'association* dans ses contextes linguistique, philosophique et historique. Les origines du concept, les termes utilisés pour le définir et les principes philosophiques sur lesquels il repose circonscrivent la protection qu'offre l'al. 2*d*). L'étendue de cette protection ne devrait pas varier en fonction du contexte *factuel* ou des circonstances de l'application de l'alinéa dans un cas précis.

[208] Dans le *Renvoi relatif à l'Alberta*, le juge en chef Dickson et le juge McIntyre adoptent tous deux une interprétation téléologique de la liberté d'association garantie par la *Charte* (p. 363, 393-394). Ce n'est pas l'omission de recourir à une telle approche qui les fait conclure que les associations

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identical freedoms under s. 2(*d*). Rather, it was the application of that approach that correctly led them to recognize that a guarantee protecting a fundamental freedom to associate must be interpreted in a content-neutral fashion as between different associations.

[209] The protection of fundamental freedoms should not involve the Court in adjudicating the relative values of the way in which individuals exercise those freedoms. Just as this Court has not adjudicated on the relative value of a religion or its tenets under s. 2(*a*) or assessed the relative value or content of a given exercise of freedom of expression under s. 2(*b*), so too should this Court not privilege some associations over others under s. 2(*d*): *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 50.

[210] Another example of a content-neutral approach can be found in *Big M* where this Court found:

> In my view, however, as I read the *Charter*, it mandates that the legislative preservation of a Sunday day of rest should be secular, the diversity of belief and non-belief, the diverse socio-cultural backgrounds of Canadians make it constitutionally incompetent for the federal Parliament to provide legislative preference for any one religion at the expense of those of another religious persuasion. [Emphasis added; p. 351.]

Big M considered the purpose of the *Charter*, recognized the Christian underpinning of the impugned law, and concluded that by imposing "a sectarian Christian ideal, the *Lord's Day Act* works a form of coercion inimical to the spirit of the *Charter* and the dignity of all non-Christians" (p. 337). Dickson J.'s words in *Big M* expressly say that there is no constitutional basis to prefer one religion over others.

[211] In an article critical of the *Health Services* decision, Professor Langille describes as "chilling" the suggestion that the Court should "weig[h] the harm of banning book clubs as compared to banning collective bargaining and relegat[e] the

bénéficient toutes de libertés identiques suivant l'al. 2*d*). C'est plutôt cette approche qui les amène à juste titre à reconnaître que la liberté fondamentale protégée doit être interprétée de manière neutre, sans égard à la nature de l'association en cause.

[209] En matière de protection des libertés fondamentales, la Cour doit se garder d'attribuer une valeur relative à la manière dont un individu exerce une liberté. Comme dans l'arrêt *Syndicat Northcrest c. Amselem*, 2004 CSC 47, [2004] 2 R.C.S. 551, par. 50, où elle s'abstient de se prononcer sur la valeur relative d'une religion ou de ses préceptes pour l'application de l'al. 2*a*) et de déterminer la valeur relative ou la teneur d'un exercice donné de la liberté d'expression garantie à l'al. 2*b*), elle ne doit pas favoriser un type d'association plutôt qu'un autre pour l'application de l'al. 2*d*).

[210] Un autre exemple d'interprétation neutre quant à la nature de la liberté exercée figure dans *Big M*, où notre Cour est arrivée à la conclusion suivante :

> Toutefois, je suis d'avis que la *Charte* édicte que toute loi visant à maintenir le repos dominical doit avoir un caractère laïque et, étant donné la diversité des formes que prennent la croyance et l'incroyance ainsi que les différences socio-culturelles des Canadiens, le Parlement fédéral n'a pas compétence en vertu de la Constitution pour adopter une loi privilégiant une religion au détriment d'une autre. [Je souligne; p. 351.]

Dans cet arrêt, la Cour tient compte de l'objet de la *Charte*, reconnaît l'assise chrétienne de la loi contestée et conclut qu'en imposant « un idéal sectaire chrétien, la *Loi sur le dimanche* exerce une forme de coercition contraire à l'esprit de la *Charte* et à la dignité de tous les non-chrétiens » (p. 337). Le juge Dickson dit expressément qu'aucune disposition constitutionnelle ne permet de favoriser une religion par rapport à une autre.

[211] Dans un article où il critique l'arrêt *Health Services*, le professeur Langille trouve [TRADUCTION] « inquiétant » que la Cour puisse « soupeser le préjudice que causerait l'interdiction des clubs de lecture par comparaison à celui

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former to a lower level of concern": "Freedom of Association", at p. 185. He goes on to state:

> We should begin with a reminder that this is, after all, a constitution that is being interpreted. It is an entrenched bill of rights and freedoms. The *Charter* value of freedom of association is a basic one. It applies to all Canadians, and the role of the Court is to interpret it in a principled way. There is, in my view, not one freedom of association for Nova Scotia and another for Ontario, nor one for students and one for tenants, nor one for the service sector and another for the manufacturing sector. If there were, this freedom would not be a matter of fundamental justice. It would be, to use the Court's word, "contextual". [p. 202]

[212] Like Professor Langille, I question whether the approach advocated in *Health Services* accords with a purposive interpretation of *Charter* rights. In *Health Services*, the majority appeared to be inquiring into the purpose of an activity to see if it merits constitutional protection. This approach requires judges to select among a range of objects and activities on the basis of their general "importance" to society rather than their connection to the freedom to associate. It is inappropriate for the Court to engage in this sort of inquiry in defining the scope of a constitutional right. It would be assessing whether, as a matter of policy, a given activity merits constitutional protection. In my view, the purpose of s. 2(*d*) is to protect associational activity against precisely such value judgments. A "contextual" approach of the sort proposed in *Health Services* would in fact be contrary to the purpose of s. 2(*d*) as it requires the judiciary to engage in these value judgments itself: see R. K. Basu, "Revolution and Aftermath: *B.C. Health Services* and Its Implications" (2008), 42 *S.C.L.R.* (2d) 165, at pp. 186-87. In *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 S.C.R. 209, LeBel J. recognized that such a role would be inappropriate for the Court and would take the Court beyond the scope of s. 2(*d*):

> If this constitutional guarantee were to apply to the widest range of associations with the most diverse

qu'infligerait l'interdiction de la négociation collective et accorder moins d'importance au premier » : « Freedom of Association », p. 185. Il ajoute :

> [TRADUCTION] Nous devons d'abord nous rappeler qu'il s'agit après tout d'interpréter la Constitution, des droits et des libertés constitutionnalisés. La liberté d'association garantie par la *Charte* est fondamentale. Elle s'applique à tous les Canadiens, et la Cour doit l'interpréter de manière rationnelle. À mon sens, il n'y a pas une liberté d'association en Nouvelle-Écosse et une autre en Ontario, ni une pour les étudiants et une autre pour les locataires, non plus qu'une liberté d'association pour le secteur des services et une autre pour le secteur manufacturier. Si c'était le cas, cette liberté ne participerait pas de la justice fondamentale. Elle serait, pour reprendre les propos de la Cour, « contextuelle ». [p. 202]

[212] Comme le professeur Langille, je me demande si l'interprétation préconisée dans l'arrêt *Health Services* s'inscrit bien dans une interprétation téléologique des droits garantis par la *Charte*. La majorité des juges paraît s'attacher à l'objectif de l'activité pour déterminer si sa protection constitutionnelle est justifiée. Elle doit alors opérer un choix parmi une gamme d'objectifs et d'activités eu égard à leur « importance » générale pour la société et non en fonction de leur lien avec la liberté d'association. Il ne convient pas que la Cour se livre à ce genre d'examen pour définir l'étendue d'un droit constitutionnel, car sa démarche revient alors à se demander si, pour des raisons de politique générale, une activité donnée a droit à la protection constitutionnelle. À mon avis, l'al. 2*d*) vise précisément à soustraire l'activité associative à un tel jugement de valeur. L'interprétation « contextuelle » préconisée dans l'arrêt *Health Services* est en fait contraire à l'objet de l'al. 2*d*) puisqu'elle oblige le tribunal à porter lui-même un tel jugement de valeur : voir R. K. Basu, « Revolution and Aftermath : *B.C. Health Services* and Its Implications » (2008), 42 *S.C.L.R.* (2d) 165, p. 186-187. Dans l'arrêt *R. c. Advance Cutting & Coring Ltd.*, 2001 CSC 70, [2001] 3 R.C.S. 209, le juge LeBel reconnaît que la démarche est inopportune et qu'elle outrepasse la portée de l'al. 2*d*) :

> Si cette garantie constitutionnelle devait s'appliquer à l'éventail le plus vaste d'associations ayant les objets

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objects and activities, extending constitutional protection to a legislative creation like collective bargaining might have unforeseeable consequences and widen the sphere of constitutional protection to undefined and unknowable activities, well beyond the proper domain of s. 2(*d*). [para. 180]

[213] My colleagues say that the "consideration of goals [of a particular association] cannot be avoided" as *Charter* rights "must be interpreted in a purposive way — having regard for the purposes, or goals, they serve" (para. 75). They say that a "content-neutral right is too often a meaningless right" (*ibid.*). Based on my colleagues' approach, meaningful freedom of association requires the state to coerce employers into negotiating in good faith with employee associations.

[214] However, as I have just discussed, their approach would require the courts to focus on the purposes of a particular association rather than the purpose of freedom of association found in the *Charter* itself. Their approach diverges from the purposive approach to *Charter* interpretation explained in *Big M*. Rather than focussing on the linguistic, philosophic and historical contexts of the right itself, their approach focusses on the particular aims and goals of the association in question. The inquiry shifts from a consideration of the purpose and context of the *Charter*, to a consideration of what activities the courts believe are normatively and subjectively more important. The result of the approach in *Health Services* was that the goal of employee associations — imposing the obligation of collective bargaining on employers — is constitutionally entrenched, while the goals of other associations were not. It is difficult to see how this result can be anything other than a judicial endorsement of the importance of collective bargaining over other unconstitutionalized associational activities.

[215] A content-neutral approach does not allow for constitutional protection of collective bargaining and no constitutional protection of the aims and objects of other associations. Short of protecting all

et les activités les plus variés, le fait d'étendre la protection constitutionnelle à une création du législateur comme la négociation collective pourrait entraîner des conséquences imprévisibles et élargir le domaine de la protection constitutionnelle à des activités non définies et impossibles à connaître, bien au-delà de l'application légitime de l'al. 2*d*). [par. 180]

[213] Selon mes collègues, « l'examen des objectifs [d'une association donnée] ne peut être évité », car les droits garantis par la *Charte* « doivent être interprétés de manière téléologique, c'est-à-dire au regard des objectifs qui les sous-tendent ou de leur raison d'être » (par. 75). À leur avis, « [t]rop souvent, un droit interprété sans égard à son objet demeure vide de sens » (*ibid.*). Si l'on suit le raisonnement de mes collègues, la véritable liberté d'association exige de l'État qu'il force les employeurs à négocier de bonne foi avec les associations d'employés.

[214] Toutefois, comme je l'explique précédemment, leur démarche appellerait les tribunaux à s'attarder davantage aux objectifs d'une certaine association qu'à ceux de la liberté d'association garantie par la *Charte* même. Leur démarche diffère de la méthode téléologique d'interprétation de la *Charte* expliquée dans *Big M*. Plutôt que de s'arrêter aux contextes linguistique, philosophique et historique du droit, leur démarche est axée sur les objectifs de l'association en question. L'analyse n'invite alors plus les tribunaux à s'attarder à l'objectif et au contexte de la *Charte* mais à déterminer les activités qui revêtent à leurs yeux une plus grande importance normative et subjective. Il découle de la démarche adoptée dans *Health Services* que le but des associations d'employés — obliger les employeurs à négocier — est constitutionnalisé, alors que celui d'autres associations ne l'est pas. Il est difficile de voir dans ce résultat autre chose qu'une préférence accordée à la négociation collective eu égard à son importance par rapport à d'autres activités associatives non protégées par la Constitution.

[215] Une interprétation neutre quant à la nature de la liberté exercée ne permet pas d'accorder une protection constitutionnelle à la négociation collective et de la refuser aux objectifs

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aims and objects of associations, s. 2(*d*) cannot be interpreted in a fashion which is neutral as between different associations while imposing a duty of collective bargaining on employers and groups of employees.

et à la raison d'être d'autres associations. S'il ne protège pas tous les objectifs et les raisons d'être des associations, l'al. 2*d*) ne peut à la fois être interprété de manière neutre vis-à-vis de celles-ci et imposer aux employeurs et aux groupements d'employés l'obligation de négocier collectivement.

(4) Section 2(*d*) Does Not Give Constitutional Status to Contracts

[216] A fourth difficulty with the collective bargaining right in *Health Services* is that it places contracts above statutes in the traditional hierarchy of laws. Although *Health Services* purported to constitutionalize the process of collective bargaining rather than its fruits, it in fact granted constitutional protection to the collective agreements on the basis that they were the fruits of that process. In *Health Services*, the challenged legislation had the effect of invalidating portions of existing collective agreements and consequently "undermining the past bargaining processes that formed the basis for these agreements" (para. 113). This was found to violate s. 2(*d*) (para. 136).

[217] In response to this argument, the Chief Justice and LeBel J. write that *Health Services* did not hold that "labour contracts could never be interfered with by legislation" (para. 76). However, if as *Health Services* holds, it is unconstitutional for a statute to legislatively nullify "significant contractual terms", then it must logically follow that those "significant contractual terms" have been elevated above statutes. The actual effect of *Health Services* is quite the opposite from what my colleagues assert it to be.

[218] My view is consistent with that of Professor Hogg who observed that "[t]his ruling elevated collective agreements above statutes in the hierarchy of laws, and granted them virtually the same status as the provisions of the Charter itself" (p. 44-9). Indeed, in the *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123

(4) L'alinéa 2*d*) ne confère pas de valeur constitutionnelle au contrat

[216] Le droit à la négociation collective reconnu dans *Health Services* soulève une quatrième difficulté : il élève le contrat au-dessus de la loi dans la hiérarchie traditionnelle des sources de droit. La formation majoritaire y dit constitutionnaliser le processus de la négociation collective, et non ses fruits, mais dans les faits, elle confère une protection constitutionnelle à la convention collective parce qu'elle est issue de ce processus. La loi contestée avait pour effet d'invalider en partie des conventions collectives existantes, de sorte qu'elle « ébranl[ait] la validité des processus de négociation antérieurs qui [avaient] servi de fondement à la conclusion de ces conventions » (par. 113), ce qui, pour la Cour, portait atteinte à l'al. 2*d*) (par. 136).

[217] La Juge en chef et le juge LeBel répliquent à cet argument que, dans *Health Services*, les juges majoritaires ne statuent pas « qu'un contrat de travail ne peut jamais être modifié par voie législative » (par. 76). Toutefois, s'il est inconstitutionnel qu'une loi annule par voie législative des « clauses contractuelles importantes », comme l'affirment les juges majoritaires dans *Health Services*, il s'ensuit logiquement que ces clauses contractuelles s'élèvent au-dessus de la loi. J'estime que le véritable effet de cet arrêt est tout à fait opposé à celui que lui attribuent mes collègues.

[218] Je suis de l'avis du professeur Hogg lorsqu'il fait observer que, [TRADUCTION] « [d]ans son jugement, la Cour élève la convention collective au-dessus de la loi dans la hiérarchie des sources de droit et lui reconnaît pratiquement la même valeur qu'aux dispositions de la Charte elle-même » (p. 44-9). D'ailleurs, dans le *Renvoi relatif à l'art. 193*

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(the "*Prostitution Reference*"), at p. 1171, Justice Lamer (as he then was) explicitly rejected the idea that a constitutional guarantee safeguarding freedom of contract was included under the Canadian *Charter*.

(5) Courts Have Afforded the Legislature Significant Deference in the Application of Section 2(*d*) to the Field of Labour Relations

[219] A final difficulty with the approach to s. 2(*d*) taken in *Health Services* is that it explicitly rejected judicial deference by judges towards the legislature in labour relations. Indeed, the majority indicated that Courts had previously taken an "overbroad view" of judicial deference (para. 26). While judicial deference has its limits, the general approach of judicial deference in the field of labour relations is well supported by precedent and is sound in principle. I am of the view that the reasons for judicial deference strongly militate against constitutionalizing the right to collective bargaining. In my respectful opinion, the majority erred in *Health Services* by removing decision-making power on this question from Parliament and the provincial legislatures.

[220] For nearly twenty years between the Trilogy and *Health Services*, a majority of this Court was consistently of the view that judges should defer to legislators on labour relations matters. As discussed by LeBel J. at paras. 156-62 of *Advance Cutting & Coring*, this position stemmed from a recognition that the management of labour relations requires a delicate exercise in reconciling conflicting values and interests and that the political, social and economic considerations that this exercise raises lie largely beyond the expertise of the courts. This position was also in line with history. The law of collective bargaining, as it has developed in Canada since the Depression and the Second World War, as well as union and employer conflicts like strikes and lockouts, have

et à l'al. 195.1(1)c) du Code criminel (Man.), [1990] 1 R.C.S. 1123 (le « *Renvoi sur la prostitution* »), p. 1171, le juge Lamer (plus tard Juge en chef) rejette expressément l'idée que la *Charte* canadienne puisse protéger la liberté contractuelle.

(5) Les tribunaux font preuve d'une grande déférence à l'endroit du législateur lorsqu'ils appliquent l'al. 2*d*) dans le domaine des relations du travail

[219] Enfin, l'interprétation de l'al. 2*d*) dans *Health Services* pose une dernière difficulté en ce que la formation majoritaire rejette explicitement le principe de la déférence judiciaire envers le législateur dans le domaine des relations du travail. En effet, les juges majoritaires indiquent que les tribunaux ont auparavant attribué une « portée excessive » au principe de la déférence judiciaire (par. 26). La déférence judiciaire comporte certes des limites, mais son application générale dans les relations du travail est bien établie par la jurisprudence et justifiée sur le plan des principes. Je suis d'avis que les motifs justifiant la déférence judiciaire militent fermement contre la constitutionnalisation du droit à la négociation collective. À mon humble avis, dans *Health Services*, la formation majoritaire a eu tort de dépouiller le Parlement et les législatures provinciales de leur pouvoir décisionnel en la matière.

[220] Pendant la période de presque vingt ans qui s'est écoulée entre la trilogie et l'arrêt *Health Services*, la majorité des juges de notre Cour est demeurée d'avis que les tribunaux doivent respecter la volonté du législateur dans le domaine des relations du travail. Comme le dit le juge LeBel dans l'arrêt *Advance Cutting & Coring*, par. 156-162, cela s'expliquait par la reconnaissance du fait que la gestion des relations du travail exige la conciliation de valeurs et d'intérêts divergents — une entreprise délicate — et que les considérations politiques, sociales et économiques que met en jeu cette entreprise débordent largement le champ d'expertise des tribunaux. Cette attitude déférente tenait également à l'histoire. Le droit régissant la négociation collective, eu égard à son évolution au

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been subject to legislative control based on government policy rather than judicial intervention.

[221] Beginning with the decisions in the labour Trilogy and continuing through *PIPSC*, *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, *Delisle*, and *Advance Cutting & Coring*, this Court has consistently deferred to elected legislatures on issues of labour relations. In *Advance Cutting & Coring*, Justice LeBel, writing for himself and Gonthier and Arbour JJ., described the Court's deferential approach as a "non-intervention policy" (para. 160). LeBel J. upheld the legislative regime at issue in the appeal:

> The question at stake in this appeal should thus be left to the political process. Such a solution would be consistent with the jurisprudential attitude of the Court that was summarized above. It retains a balance in the application of the *Charter*. It leaves the legal management of labour relations to Parliament and legislatures as well as to the parties to labour agreements, as the majority of the Court has held consistently since the labour law trilogy of 1987. . . . This limited and prudent approach to court interventions in the field of labour relations reflects a proper understanding of the functions of courts and legislatures. [Emphasis added; para. 239.]

The principle of deference provides a reason for choosing a more restrained version of s. 2(*d*) when the Court is faced with competing visions of what s. 2(*d*) protects.

[222] My colleagues imply that my view on deference creates a "judicial 'no go' zone" or creates a "*Charter*-free zone" for labour relations (paras. 78-80). That is not a correct understanding of my position. Clearly if legislatures, for example, chose to enact legislation that permitted discrimination in labour relations or precluded the ability to form an employee association, that legislation would be subject to judicial review for being non-compliant with the *Charter*. In matters of labour relations,

Canada depuis la Dépression et la Seconde guerre mondiale, de même que les conflits opposant syndicats et employeurs, comme les grèves et les lock-out, ont fait l'objet de mesures législatives fondées sur la politique gouvernementale plutôt que de décisions judiciaires.

[221] Dans la trilogie en droit du travail, puis dans les arrêts *IPFPC*, *Lavigne c. Syndicat des employés de la fonction publique de l'Ontario*, [1991] 2 R.C.S. 211, *Delisle* et *Advance Cutting & Coring*, notre Cour s'en remet systématiquement aux législateurs élus pour ce qui concerne les relations du travail. Dans l'arrêt *Advance Cutting & Coring*, le juge LeBel, avec l'appui des juges Gonthier et Arbour, qualifie la retenue dont fait preuve la Cour de « principe de non-intervention » (par. 160) et il confirme le régime législatif contesté dans le pourvoi :

> Il faut donc laisser au processus politique le soin de régler la question en jeu dans le pourvoi. Une telle solution serait conforme à l'attitude jurisprudentielle de notre Cour qui a été résumée précédemment. Elle conserve l'équilibre dans l'application de la *Charte*. Elle laisse la gestion légale des relations du travail au Parlement et aux législatures de même qu'aux parties aux conventions collectives, comme les juges majoritaires de notre Cour le concluent continuellement depuis la trilogie de 1987 en droit du travail. [. . .] Cette démarche restrictive et prudente en matière d'intervention des tribunaux dans le domaine des relations du travail reflète une bonne compréhension des fonctions des tribunaux et de celles des législatures. [Je souligne; par. 239.]

Le principe de la déférence justifie la Cour d'interpréter l'al. 2*d*) de façon plus étroite lorsqu'elle se voit présenter des thèses opposées quant aux droits que protège cet alinéa.

[222] Mes collègues sous-entendent que mon avis sur la déférence met les questions relatives aux relations du travail « à l'abri des interventions judiciaires » ou les « soustrait [. . .] à l'application de la *Charte* » (par. 78-80). Ils interprètent mal ma position. De toute évidence, si le législateur adoptait par exemple une loi autorisant la discrimination dans les relations du travail ou faisant obstacle à la constitution d'une association d'employés, cette loi ferait l'objet d'un contrôle judiciaire pour

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the *Charter* still applies. If my colleagues believe that my view on deference creates a "*Charter*-free zone", they have misunderstood my reasons.

[223] In my opinion, the principle of judicial deference in the field of labour relations is rooted in two underlying concerns. The first of these is that the Court is ill-equipped to carry out the requisite balancing of interests in the labour relations context. Since McIntyre J.'s comments in the *Alberta Reference*, this Court has recognized that labour relations are an "extremely sensitive subject" premised on "a political and economic compromise between organized labour — a very powerful socio-economic force — on the one hand, and the employers of labour — an equally powerful socio-economic force — on the other" (p. 414). While the courts are responsible for safeguarding the ability of individuals to do collectively that which they have the right to do as individuals, the judiciary is ill-equipped to engage in fine adjustments to the balance of power between labour and management.

[224] The Chief Justice and LeBel J. write that this Court has "distanced itself" from the approach of McIntyre J. in the *Alberta Reference*, and now deals with deference under s. 1, rather than in outlining the scope of s. 2(*d*) (para. 81). With respect, I think this point is debatable. While that may have been the approach adopted by the majority in *Dunmore*, there are a number of examples of this Court dealing with deference at the s. 2(*d*) stage of the analysis. For example, LeBel J. dealt with deference at the s. 2(*d*) stage of the analysis in *Advance Cutting & Coring*. Another example is *Delisle*, where Bastarache J. for the majority (writing on behalf of Gonthier, McLachlin (as she then was), and Major JJ.), dealt with the concept of deference under the s. 2(*d*) stage of the analysis. Bastarache J. wrote that he shared the opinion of McIntyre J. in the *Alberta Reference*, writing that "[f]reedom of association does not include the right to establish a particular type of association defined in a particular statute; this kind of recognition would unduly

non-conformité à la *Charte*. La *Charte* ne cesse pas de s'appliquer en matière de relations du travail. Si mes collègues croient que mon avis au sujet de la déférence a pour effet de soustraire quoi que ce soit à l'application de la *Charte*, ils ont mal compris mes motifs.

[223] À mon avis, dans le domaine des relations du travail, le principe de la déférence judiciaire s'applique pour deux raisons. Premièrement, la Cour n'est pas en mesure de se livrer à la pondération d'intérêts nécessaire dans ce contexte. Depuis que le juge McIntyre a formulé ses remarques dans le *Renvoi relatif à l'Alberta*, notre Cour a reconnu que les relations du travail sont un « sujet [. . .] extrêmement délicat » qui repose sur « un compromis politique et économique entre d'une part, le syndicalisme, qui constitue une force socio-économique fort puissante, et d'autre part, le patronat, qui constitue une force socio-économique tout aussi puissante » (p. 414). Bien qu'il appartienne aux tribunaux de protéger la faculté des individus de faire collectivement ce qu'ils ont le droit de faire individuellement, ils ne sont pas en mesure d'apporter de subtils réglages à l'équilibre des rapports de force entre syndicats et patronat.

[224] La Juge en chef et le juge LeBel écrivent que « notre Cour s'est dissociée » de l'approche préconisée par le juge McIntyre dans le *Renvoi relatif à l'Alberta* et analyse la déférence en fonction de l'article premier plutôt qu'aux fins de déterminer la portée de l'al. 2*d*) (par. 81). À mon humble avis, j'estime que cela se discute. C'est peut-être la démarche adoptée par les juges majoritaires dans *Dunmore*, mais la Cour a, à plusieurs reprises, étudié la question de la déférence dans le cadre de l'analyse fondée sur l'al. 2*d*). Par exemple, dans *Advance Cutting & Coring*, le juge LeBel se penche sur la déférence à cette étape. De plus, dans l'arrêt *Delisle*, le juge Bastarache, au nom des juges majoritaires (les juges Gonthier, McLachlin (maintenant Juge en chef) et Major), examine la notion de déférence à l'étape de l'analyse que commande l'al. 2*d*). Il dit partager l'opinion du juge McIntyre dans le *Renvoi relatif à l'Alberta*, à savoir que la « liberté d'association ne comprend pas le droit de former un type particulier d'association défini par

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limit the ability of Parliament or a provincial legislature to regulate labour relations" (*Delisle*, at para. 33).

[225] The second underlying concern justifying judicial deference in the area of labour relations is that courts should avoid extending constitutional protection to a particular statutory model of labour relations. Different statutory models of labour relations may be appropriate in different socio-economic contexts, and the courts should avoid defining as a matter of constitutional law the particular framework according to which all Canadian labour relations must be structured for the indefinite future. Parliament and the provincial legislatures should not be precluded from fashioning appropriate labour relations regimes that are responsive to the relevant socio-economic contexts.

[226] In *Health Services*, this Court departed from a long-standing course of judicial deference in the field of labour relations. The majority intervened to adjust aspects of the balance of power between unions, employers and individual employees, and, as a consequence, constitutionalized prominent features of the Wagner model under s. 2(*d*) of the *Charter*, namely collective bargaining.

[227] Although the majority insisted that it was not enshrining a particular model of labour relations, and the Chief Justice and LeBel J. say that such a conclusion was "repeatedly rejected" (para. 77), I believe that such a conclusion is inescapable. As my colleague Deschamps J. observes, the duty to negotiate in good faith enshrined by *Health Services* "is one of the hallmarks of the Wagner model and that inevitably entails a number of statutory components" (para. 304). Professor Hogg writes:

The majority . . . claimed that it was not constitutionalizing "a particular model of labour relations". But that is exactly what it was doing: North American labour relations regimes are based on the American Wagner Act of

une loi particulière; une telle reconnaissance limiterait indûment la possibilité du Parlement ou d'une législature de réglementer les relations du travail » (*Delisle*, par. 33).

[225] La seconde raison justifiant la déférence tient à ce que les tribunaux doivent s'abstenir de constitutionnaliser un modèle législatif particulier de relations du travail. Différents modèles peuvent convenir dans différents contextes socio-économiques, et les tribunaux doivent se garder de définir constitutionnellement le cadre particulier appelé à régir l'ensemble des relations du travail au Canada pendant une période indéterminée. On ne doit pas empêcher le Parlement et les législatures provinciales de concevoir des régimes adaptés à des contextes socio-économiques donnés.

[226] Dans l'arrêt *Health Services*, la majorité de notre Cour tourne le dos à la tradition de déférence que les tribunaux manifestaient dans le domaine des relations du travail. Elle intervient pour rajuster certains aspects de l'équilibre des rapports de force entre syndicats, employeurs et employés individuels, de telle sorte qu'elle constitutionnalise, par application de l'al. 2*d*) de la *Charte*, un volet important du modèle Wagner, à savoir la négociation collective.

[227] Même si la formation majoritaire se défend bien de constitutionnaliser un modèle particulier de relations du travail — la Juge en chef et le juge LeBel indiquent qu'une telle conclusion a été « maintes fois rejetée » (par. 77) —, je crois que cette conclusion est incontournable. Comme le fait observer ma collègue la juge Deschamps, l'obligation de négocier de bonne foi constitutionnalisée par *Health Services* est « une caractéristique propre au modèle Wagner et [. . .] emporte forcément la reconnaissance d'un certain nombre d'éléments d'origine législative » (par. 304). Le professeur Hogg écrit à ce sujet :

[TRADUCTION] Les juges majoritaires [. . .] prétendent ne pas constitutionnaliser « un modèle particulier de relations du travail », mais c'est exactement ce qu'ils font : les régimes de relations du travail en Amérique

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1935. The Wagner model of compulsory collective bargaining with a single union compulsorily representing all members of a bargaining unit has not been adopted outside the United States and Canada, and, even in the United States, compulsory arbitration or other wage-setting mechanisms often replace collective bargaining in the public sector. Presumably, only compulsory collective bargaining on the Wagner model will now pass muster in Canada. The majority even claimed that the Court had been wrong in the past to exercise "judicial restraint in interfering with government regulation of labour relations". But, without any clear prescription in the Charter, there is much to be said for leaving the regulation of labour relations to elected legislative bodies (and the sanction of the ballot box). [p. 44-8]

du Nord sont fondés sur la *Loi Wagner* adoptée en 1935 aux États-Unis. La négociation collective obligatoire avec un seul syndicat représentant obligatoirement tous les membres d'une unité de négociation (le modèle Wagner) n'a pas de pendant en dehors des États-Unis et du Canada. Qui plus est, aux États-Unis, le recours obligatoire à l'arbitrage ou à d'autres mécanismes d'établissement des salaires remplace souvent la négociation collective dans le secteur public. Vraisemblablement, seule la négociation collective obligatoire inspirée du modèle Wagner est désormais reconnue au Canada. Les juges majoritaires affirment même que la Cour a eu tort dans le passé d'exercer une « retenue judiciaire [pour ne pas entraver] la réglementation gouvernementale des relations du travail ». Or, sans prescription claire de la Charte, il y a bien des raisons de laisser aux corps législatifs élus (et à la sanction des électeurs) le soin de réglementer les relations du travail. [p. 44-8]

[228] As Professor Langille points out, examination of the different labour relations regimes of the roughly 180 that compose the International Labour Organization ("ILO"), reveals a range of ways a government might choose to structure labour relations: see B. Langille, "Why Are Canadian Judges Drafting Labour Codes — And Constitutionalizing the Wagner Act Model?" (2009-2010), 15 *C.L.E.L.J.* 101, at p. 107. By way of illustration, bargaining between employers' associations and trade unions is entirely voluntary in Germany; specifically, there is no obligation on employers' association to bargain in good faith, as there is in North American labour relations regimes: see generally K. G. Dau-Schmidt, "Labor Law and Industrial Peace: A Comparative Analysis of the United States, the United Kingdom, Germany, and Japan Under the Bargaining Model" (2000), 8 *Tul. J. Int'l & Comp. L.* 117.

[228] Comme le signale le professeur Langille, l'examen des divers régimes de relations du travail existant dans les quelque 180 états qui forment l'Organisation internationale du Travail (l'« OIT ») révèle la diversité des modes de gestion des relations du travail pour lesquels peut opter un gouvernement : voir B. Langille, « Why are Canadian Judges Drafting Labour Codes — And Constitutionalizing the Wagner Act Model? » (2009-2010), 15 *C.L.E.L.J.* 101, p. 107. À titre d'exemple, en Allemagne, la négociation entre les associations d'employeurs et les syndicats est entièrement volontaire; plus précisément, les associations d'employeurs ne sont nullement tenues de négocier de bonne foi, contrairement à ce que prévoient les régimes de relations du travail en Amérique du Nord : voir en général K. G. Dau-Schmidt, « Labor Law and Industrial Peace : A Comparative Analysis of the United States, the United Kingdom, Germany, and Japan Under the Bargaining Model » (2000), 8 *Tul. J. Int'l & Comp. L.* 117.

[229] More fundamentally, the fact that the Wagner model of collective bargaining is currently the dominant mode of resolving labour relations issues today does not mean that this will always be the case. Peter A. Gall sounded this note of caution in the early years of the *Charter*:

[229] Plus fondamentalement, même si le modèle Wagner axé sur la négociation collective constitue actuellement le principal mode de règlement des différends dans le domaine des relations du travail, sa pérennité n'est pas pour autant assurée. Peter A. Gall faisait la mise en garde suivante peu après l'entrée en vigueur de la *Charte* :

Collective bargaining is extremely important in our society and has been for some time now. But will it

[TRADUCTION] La négociation collective joue un rôle extrêmement important dans notre société, et ce, depuis

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always be so? Can we confidently predict that 50 or even 20 years from now collective bargaining will still be the primary activity of trade unions? Or will we have adopted some other technique for setting terms and conditions of employment, such as full-scale interest arbitration or greater reliance on legislated standards. If we cannot reject this out of hand, and I do not think we can, then we must seriously question whether collective bargaining is the kind of activity that warrants constitutional status. The Charter enshrines the fundamental principles of individual liberty. The activities of man may change over time, but these principles remain constant. Collective bargaining does not have this same timeless quality, and, accordingly, we should be leery of giving it constitutional protection under the concept of freedom of association.

("Freedom of Association and Trade Unions: A Double-Edged Constitutional Sword", in J. M. Weiler and R. M. Elliot, eds., *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (1986), 245, at p. 248)

[230] For these reasons, I am of the view that recognizing a constitutional right to collective bargaining, as did *Health Services*, represents an imprudent departure from the course of judicial deference.

B. *The Reasons Advanced in Health Services Do Not Support Constitutionalizing Collective Bargaining Under Section 2(d) of the Charter*

[231] In the previous section, I pointed to five reasons why the approach to s. 2(*d*) adopted in *Health Services* is inconsistent with both precedent and principle relating to the purpose of s. 2(*d*). In this section, I address the reasons advanced by the majority in *Health Services* for providing s. 2(*d*) protection to collective bargaining. As I understand *Health Services*, these reasons were advanced to demonstrate that collective bargaining is a fundamental right that justifies it being constitutionalized. With respect, I do not think these reasons withstand scrutiny.

un certain temps maintenant. Mais en sera-t-il toujours ainsi? Pouvons-nous prédire avec certitude que dans 50 ou même 20 ans, la négociation collective sera toujours l'activité première des syndicats? Aurons-nous plutôt recours à quelque autre moyen de fixer les conditions d'emploi, comme l'arbitrage intégral d'intérêts ou un recours plus important à des normes législatives? Si nous ne pouvons écarter cette hypothèse du revers de la main, et je ne pense pas que nous le puissions, nous devons alors nous demander sérieusement si la négociation collective constitue le genre d'activité qui justifie une protection constitutionnelle. La Charte consacre les principes fondamentaux de la liberté individuelle. Les activités de l'homme peuvent changer avec le temps, mais ces principes demeurent constants. La négociation collective n'a pas cette même qualité d'être de tous les temps et, en conséquence, nous devons hésiter à lui accorder une protection constitutionnelle au nom de la liberté d'association.

(« Freedom of Association and Trade Unions : A Double-Edged Constitutional Sword », dans J. M. Weiler et R. M. Elliot, dir., *Litigating the Values of a Nation : The Canadian Charter of Rights and Freedoms* (1986), 245, p. 248)

[230] C'est pourquoi j'estime qu'en reconnaissant le droit constitutionnel à la négociation collective dans *Health Services*, les juges majoritaires dérogent inconsidérément au principe de la déférence judiciaire.

B. *Les motifs avancés dans Health Services ne justifient pas la constitutionnalisation de la négociation collective en application de l'al. 2d) de la Charte*

[231] Dans la partie précédente, je donne cinq raisons pour lesquelles l'interprétation de l'al. 2*d*) par la majorité dans *Health Services* est incompatible avec la jurisprudence et les principes établis en ce qui concerne l'objet de cet alinéa. Dans la présente partie, j'examine les raisons qu'invoquent les juges majoritaires dans cet arrêt pour accorder à la négociation collective la protection de l'al. 2*d*). Si je comprends bien, ces raisons sont censées établir que le droit à la négociation collective est fondamental, ce qui justifie la constitutionnalisation. À mon humble avis, je ne crois pas qu'elles résistent à l'examen.

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[232] *Health Services* rests its conclusion that s. 2(*d*) of the *Charter* contains a right of collective bargaining on four propositions, which the majority outlines at para. 20:

> First, a review of the s. 2(*d*) jurisprudence of this Court reveals that the reasons evoked in the past for holding that the guarantee of freedom of association does not extend to collective bargaining can no longer stand. Second, an interpretation of s. 2(*d*) that precludes collective bargaining from its ambit is inconsistent with Canada's historic recognition of the importance of collective bargaining to freedom of association. Third, collective bargaining is an integral component of freedom of association in international law, which may inform the interpretation of *Charter* guarantees. Finally, interpreting s. 2(*d*) as including a right to collective bargaining is consistent with, and indeed, promotes, other *Charter* rights, freedoms and values. [Emphasis added.]

In this section each of these contentions is addressed.

(1) The Continuing Validity of Past Precedents on the Scope of Section 2(*d*)

[233] I have already dealt with the substance of the first proposition in the course of explaining why *Health Services* was wrong to overrule the approach to s. 2(*d*) of the *Charter* embodied in the prior jurisprudence, and I need not discuss it further here.

(2) Canadian Labour History Does Not Support Constitutionalizing Collective Bargaining Rights

[234] The second reason advanced by the majority in *Health Services* is that collective bargaining has historically been recognized in Canada as an integral component of freedom of association (para. 25). The view that a right to collective bargaining which includes a duty on employers to bargain in good faith is a pre-statutory feature of Canadian labour law contradicts established accounts of the history of labour relations in Canada.

[232] Dans l'arrêt *Health Services*, la conclusion que l'al. 2*d*) de la *Charte* protège le droit à la négociation collective repose sur quatre propositions, que les juges majoritaires formulent comme suit au par. 20 :

> Premièrement, l'examen de la jurisprudence de la Cour sur l'al. 2*d*) révèle que les raisons invoquées par le passé pour expliquer que le droit à la liberté d'association ne s'étendait pas à la négociation collective ne valent plus. Deuxièmement, une interprétation de l'al. 2*d*) qui exclut la négociation collective de son champ d'application ne se concilie pas avec le fait que le Canada a toujours reconnu l'importance de ce processus en matière de liberté d'association. Troisièmement, la négociation collective fait partie intégrante de la liberté d'association selon le droit international, qui peut inspirer l'interprétation des garanties reconnues par la *Charte*. Enfin, interpréter l'al. 2*d*) comme comprenant le droit de négociation collective s'intègre dans la logique, voire la défense, des autres droits, libertés et valeurs consacrés par la *Charte*. [Je souligne.]

J'examine ci-après chacune de ces prétentions.

(1) Les décisions antérieures relatives à la portée de l'al. 2*d*) demeurent valables

[233] Je me suis déjà prononcé sur la teneur de la première proposition en expliquant pourquoi, dans *Health Services*, la formation majoritaire écarte à tort l'interprétation judiciaire antérieure de l'al. 2*d*) de la *Charte*. Je n'ai donc pas à la considérer plus avant.

(2) L'histoire des relations du travail au Canada n'appuie pas la constitutionnalisation du droit à la négociation collective

[234] Suivant la deuxième raison avancée par les juges majoritaires dans *Health Services*, au Canada, on a toujours considéré que la négociation collective faisait partie intégrante de la liberté d'association (par. 25). L'idée que le droit à la négociation collective, qui oblige l'employeur à négocier de bonne foi, caractérisait le droit canadien du travail avant l'adoption de lois en la matière contredit des versions établies de l'histoire des relations du travail au Canada.

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[235] The labour history offered in *Health Services* in support of this argument is inconsistent with a number of historical accounts of the development of labour law in Canada and has recently been the subject of intense academic criticism. See E. Tucker, "The Constitutional Right to Bargain Collectively: The Ironies of Labour History in the Supreme Court of Canada" (2008), 61 *Labour* 151; Langille, "Freedom of Association", at pp. 191-92; and Etherington, at pp. 726-27. For a historical account, see, e.g., J. Fudge and E. Tucker, *Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900-1948* (2001); J. Fudge, "'Labour is Not a Commodity': The Supreme Court of Canada and the Freedom of Association" (2004), 67 *Sask. L. Rev.* 425.

[236] Professor Tucker, whose account of the development of labour relations was invoked in support of the judicial history in *Health Services*, characterizes the majority's historical claims as "flawed" and describes the use of his and other historians' work as "ironic", in the sense that it was used "to support a narrative that is inconsistent with the interpretation of that work (without acknowledging that difference of view)" (p. 168). He writes that the majority's historical analysis fails to support the historical proposition that it seeks to defend, "namely that 'Association for purposes of collective bargaining has long been recognized as a fundamental Canadian right which predated the *Charter*'" (p. 166).

[237] One of the problems in *Health Services* is that the term "collective bargaining" is used throughout *Health Services* without it being acknowledged that, from a historical perspective, there are two meanings that can be ascribed to the term. On the one hand, the term "collective bargaining" refers to self-directed activities engaged in by workers without the benefit of statutory enhancements or protection, i.e. workers organizing in order to attempt collective engagement with their employer in the hopes of obtaining better pay and working conditions. See Tucker, at p. 166.

[235] L'histoire des relations du travail à laquelle renvoient les juges majoritaires dans l'arrêt *Health Services* à l'appui de cette thèse ne concorde pas avec plusieurs exposés historiques sur l'évolution du droit du travail au Canada et elle a récemment fait l'objet de vives critiques de la part d'auteurs. Voir E. Tucker, « The Constitutional Right to Bargain Collectively : The Ironies of Labour History in the Supreme Court of Canada » (2008), 61 *Le Travail* 151; Langille, « Freedom of Association », p. 191-192; Etherington, p. 726-727; pour un exposé historique, voir, p. ex., J. Fudge et E. Tucker, *Labour Before the Law : The Regulation of Workers' Collective Action in Canada, 1900-1948* (2001); J. Fudge, « "Labour is Not a Commodity" : The Supreme Court of Canada and the Freedom of Association » (2004), 67 *Sask. L. Rev.* 425.

[236] Le professeur Tucker, dont les écrits sur l'évolution des relations du travail sont cités à l'appui de l'historique dressé dans *Health Services*, estime [TRADUCTION] « erronées » les affirmations historiques de la formation majoritaire et « ironique » l'utilisation de ses travaux et de ceux d'autres historiens, en ce que ces travaux sont invoqués « à l'appui d'un exposé incompatible avec leur interprétation (et sans reconnaître cette divergence de vues) » (p. 168). Il écrit que l'analyse historique des juges majoritaires n'étaye pas la proposition qu'ils défendent, [TRADUCTION] « à savoir que "le droit de s'associer avec d'autres en vue de la négociation collective est reconnu depuis longtemps comme un droit fondamental au Canada, qui existait d'ailleurs avant l'adoption de la *Charte*" » (p. 166).

[237] L'un des problèmes que pose l'arrêt *Health Services* tient au fait que la formation majoritaire y emploie le terme « négociation collective » tout au long de ses motifs sans reconnaître que, d'un point de vue historique, deux sens peuvent lui être attribués. D'une part, il renvoie à l'activité autonome des travailleurs exercée sans l'appui ou la protection de la loi, c'est-à-dire l'association des travailleurs en vue de conclure une convention collective avec l'employeur dans l'espoir d'obtenir de meilleurs salaires et conditions de travail. Voir Tucker, p. 166.

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[238] On the other hand, the term is used as shorthand for a particular kind of statutorily enabled activity. "Collective bargaining", in the age of the Wagner model, refers to a complex package of reciprocal rights and duties imposed on employers and workers alike.

[239] The dominance of the Wagner model of labour relations in Canada has caused the term "collective bargaining" to become virtually synonymous with a specific set of legislatively imposed obligations, including the requirement of a duty to bargain in good faith. However, collective bargaining, in its original and most basic form, did not involve or require the existence of statutory obligations.

[240] In its decision in *Health Services*, the majority did not distinguish between the Wagner form of collective bargaining and the non-statutory form when stating that the "right" to collective bargaining had a long history in Canada. This is manifested in the majority's statement, for example, that "the duty to consult and negotiate in good faith" is "the fundamental precept of collective bargaining" (para. 97). While the *duty* to bargain in good faith may be a fundamental precept of the Wagner model of collective bargaining, it is not a fundamental precept of the concept of collective bargaining as it was understood before the introduction of the *Wagner Act* or as it is still understood today in many parts of the world.

[241] It is true that there is a long-standing practice of Canadian workers associating for the purpose of bargaining collectively with their employers. Likewise, it is true that at least since the *Trade Unions Act* of 1872 workers enjoyed a legal freedom to *associate* for the purpose of bargaining collectively with their employers without being prosecuted or sued for simply doing so.

[242] However, the *legal rights* of organization, which imposed duties of non-interference on employers, and collective bargaining, which imposed good faith duties of negotiation on

[238] D'autre part, le terme s'entend pour désigner de façon abrégée un type particulier d'activité permise par la loi. À l'ère du modèle Wagner, la « négociation collective » renvoie à un ensemble complexe de droits et d'obligations réciproques attribués aux employeurs comme aux travailleurs.

[239] À cause de la prédominance du modèle Wagner dans les relations de travail au Canada, on assimile désormais la « négociation collective » à un ensemble précis d'obligations imposées par la loi, dont celle de négocier de bonne foi. Or, dans sa forme initiale la plus élémentaire, la négociation collective n'impliquait aucunement l'existence d'obligations légales.

[240] Dans l'arrêt *Health Services*, la formation majoritaire ne fait pas de distinction entre la négociation collective selon le modèle Wagner et celle qui échappe à la loi lorsqu'elle affirme que le « droit » de négociation collective existe depuis longtemps au Canada. En effet, elle affirme par exemple que « l'obligation de consulter et de négocier de bonne foi » est « le précepte fondamental de la négociation collective » (par. 97). Bien qu'elle puisse constituer le précepte fondamental de la négociation collective suivant le modèle Wagner, l'*obligation* de négocier de bonne foi n'est pas le précepte fondamental de la négociation collective au sens où on l'entendait avant l'adoption de la *Loi Wagner* ni au sens où on l'entend encore de nos jours dans de nombreuses parties du monde.

[241] Certes, les travailleurs canadiens s'associent depuis longtemps aux fins de négocier collectivement avec leur employeur. De même, il est vrai que depuis au moins l'*Acte des Associations ouvrières, 1872*, ils bénéficient légalement de la liberté de *s'associer* en vue de négocier collectivement avec leur employeur sans courir le risque d'être poursuivis lorsqu'ils s'en prévalent.

[242] Cependant, le *droit* d'association dont découle l'obligation de non-entrave de l'employeur, et le *droit* à la négociation collective, dont découle l'obligation de l'employeur de négocier de bonne

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employers, *did not* exist prior to their enactment in statutes:

> The establishment of a legal right for workers to associate for the purposes of forming a trade union, in the sense that employers are subject to a concomitant duty not to interfere with their organizing, however, can only be traced to the freedom of trade union association legislation passed in the 1930s, while the legal right for workers to bargain collectively, in the sense that employers have a positive duty to participate in a process of good faith negotiation with their workers' chosen representatives, first appeared in British Columbia and Nova Scotia statutes enacted in 1937, but only became generalized for private sector workers in the 1940s and for public sector workers in the 1960s and 70s.
>
> Thus while the court is on firm historical ground when it states in paragraph 66 that collective bargaining (understood here as a social practice) has long been recognized in Canada (in the sense that it could neither be repressed nor ignored) and that "historically it emerges as the most significant collective activity through which freedom of association is expressed in the labour context," its further claim that a procedural *right* to collective bargaining has *long* been recognized as *fundamental* in Canada prior to 1982 is deeply problematic as a statement of historical fact.

(Tucker, at p. 166 (emphasis in original))

[243] Professor Langille also takes the position that Canada's labour history does not reveal an acceptance by our common law courts or our legislatures of a concept of freedom of association that included an obligation on the part of employers to engage in collective bargaining: "Beyond any doubt, there was no duty imposed on an employer to bargain with a union — even if, contrary to all legal indications, there was an effectively protected right to belong to a union and to participate in a strike" ("Freedom of Association", at p. 191).

[244] Not only did courts not recognize such a bargaining right in the period before the adoption of the Wagner model in Canada, but they often issued injunctions against labour's attempts to bargain collectively. Professor Etherington writes:

foi, *n*'existaient *pas* avant l'adoption de lois les conférant :

> [TRADUCTION] Toutefois, l'établissement du droit des travailleurs de s'associer en vue de former un syndicat, de sorte que l'employeur ait l'obligation concomitante de ne pas entraver leur association, n'est attribuable qu'aux dispositions sur la liberté d'association des syndicats adoptées dans les années 1930, alors que le droit des travailleurs de négocier collectivement, qui impose à l'employeur l'obligation positive de participer de bonne foi à un processus de négociation avec les représentants élus des travailleurs, a vu le jour pour la première fois dans des lois de la Colombie-Britannique et de la Nouvelle-Écosse adoptées en 1937, mais ne s'est répandu dans le secteur privé qu'en 1940 et dans le secteur public que dans les années 1960 et 1970.
>
> Ainsi, la cour s'appuie sur des données historiques solides pour affirmer au paragraphe 66 que la négociation collective (entendue au sens de pratique sociale) est reconnue depuis longtemps au Canada (c.-à-d. qu'elle ne pouvait être ni réprimée ni ignorée) et que « son histoire démontre qu'elle représente la plus importante activité collective par le truchement de laquelle la liberté d'association s'exprime dans le contexte des relations du travail ». Or, son affirmation portant que le *droit* procédural à la négociation collective était tenu pour *fondamental* au Canada *longtemps* avant 1982 comporte d'importantes difficultés du point de vue historique.

(Tucker, p. 166 (en italique dans l'original))

[243] Le professeur Langille estime également que l'histoire du droit du travail au Canada ne révèle pas la reconnaissance par nos cours de justice ou nos législateurs d'une notion de liberté d'association comportant l'obligation de l'employeur de prendre part à une négociation collective : [TRADUCTION] « Sans aucun doute, l'employeur n'était pas tenu de négocier avec le syndicat — même si, contrairement à toutes les données juridiques, le droit d'appartenir à un syndicat et de participer à une grève était garanti dans les faits » (« Freedom of Association », p. 191).

[244] Non seulement les tribunaux n'ont pas reconnu le droit à la négociation avant l'adoption du modèle Wagner au Canada, mais ils ont souvent décerné des injonctions contre des travailleurs qui tentaient de négocier collectivement. Le professeur Etherington écrit ce qui suit :

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. . . prior to the adoption of statutes in Canada modeled on the Wagner Act, the best our unions could hope for was a laissez-faire attitude that would allow them to use strikes to force employers to bargain. More often than not during that period they were even disappointed in that hope by courts that were too willing to use their injunctive powers at common law to prevent unions from taking collective economic action against employers to compel them to bargain collectively. In that context, it may be a hollow claim to even assert that our law or society recognized access to collective bargaining in any sense as a fundamental right or freedom, but it is clearly not accurate to assert that it recognized a legal right to engage in collective bargaining that included an obligation on the part of employers also to engage in bargaining when approached by unions. [Emphasis added; p. 727.]

[245] The Chief Justice and LeBel J. take issue with my focus on whether, historically, the right to collective bargaining was consistently guaranteed by the legal system, noting that the question should instead be "whether Canadian society's *understanding* of freedom of association, viewed broadly, includes the right to collective bargaining in the minimal sense of good faith exchanges affirmed in *Health Services*" (para. 90 (emphasis in original)). With respect, this bare assertion, without any evidence or explanation as to what Canadian society's understanding of freedom of association actually is, does not rehabilitate the flawed historical analysis in *Health Services*.

[246] In light of the consistent academic criticisms, I cannot accept the majority's assertion in *Health Services* that the Wagner model statutes did not create a modern right to bargain collectively but only "afforded it protection" (para. 25). While the legal freedom to enter into voluntary collective negotiations may have been a fundamental freedom prior to legislation based on the *Wagner Act*, these statutes did in fact constitute a substantial innovation over the *status quo ante* with respect to various labour rights, including the duty of employers to bargain in good faith.

[TRADUCTION] . . . avant l'adoption au Canada de lois inspirées de la Loi Wagner, nos syndicats pouvaient tout au plus espérer qu'un laissez-faire leur permettrait de recourir à la grève et de forcer l'employeur à négocier. Plus souvent qu'autrement, même cet espoir était balayé par des tribunaux qui ne demandaient qu'à exercer le pouvoir que leur conférait la common law de décerner une injonction pour empêcher un syndicat de prendre quelque mesure économique collective contre un employeur pour le contraindre à négocier avec lui. Dans ce contexte, s'il peut être hasardeux d'affirmer simplement que notre droit ou notre société voyait dans la négociation collective l'exercice d'une liberté ou d'un droit fondamental, il est carrément erroné d'affirmer que le droit ou la société reconnaissait l'existence d'un droit à la négociation collective qui obligeait l'employeur à négocier lorsqu'un syndicat l'y invitait. [Je souligne; p. 727.]

[245] La Juge en chef et le juge LeBel me reprochent d'attacher trop d'importance à la question de savoir si, historiquement, le droit à la négociation collective a toujours été garanti par le système juridique. Selon eux, il faut plutôt se demander « si la *conception* que se fait la société canadienne de la liberté d'association, considérée largement, englobe le droit de négociation collective, compris dans le sens d'un droit minimal strict à des échanges de bonne foi reconnu dans *Health Services* » (par. 90 (en italique dans l'original)). En toute déférence, cette simple affirmation, dénuée de toute preuve ou explication quant à la conception que se fait réellement la société canadienne de la liberté d'association, ne peut racheter l'analyse historique erronée effectuée dans l'arrêt *Health Services*.

[246] Vu les critiques récurrentes des auteurs, je ne saurais convenir avec les juges majoritaires dans l'arrêt *Health Services* que les lois fondées sur le modèle Wagner n'ont pas créé le droit contemporain de négociation collective, mais lui ont seulement « conféré une protection » (par. 25). Il se peut que la liberté d'entreprendre volontairement des négociations collectives ait constitué une liberté fondamentale avant l'adoption des lois inspirées de la *Loi Wagner*, mais ces lois ont de fait constitué une innovation substantielle par rapport au *statu quo ante* quant à différents droits dans le domaine du travail, y compris l'obligation de l'employeur de négocier de bonne foi.

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(3) International Law Does Not Support Constitutionalizing Collective Bargaining Rights

[247] The third proposition the majority relied on in *Health Services* was that collective bargaining is an integral component of the freedom of association under international law. The majority relied in particular on ILO *Convention (No. 87) concerning freedom of association and protection of the right to organise*, 68 U.N.T.S. 17 ("Convention No. 87"), in support of the position that collective bargaining is protected under international law. In doing so, it committed two errors.

[248] First, in discussing protection for collective bargaining under international law, the majority conflated two distinct ILO Conventions. While Canada has ratified ILO Convention No. 87, that Convention deals with freedom of association and does not at any point specifically discuss collective bargaining. The majority in *Health Services* cites an extended passage from an article by B. Gernigon, A. Odero and H. Guido, "ILO principles concerning collective bargaining" (2000), 139 *Intern'l Lab. Rev.* 33, to elaborate on the scope of protection for collective bargaining under international law. However, in that article the authors are actually discussing the scope of ILO *Convention (No. 98) concerning the application of the principles of the right to organise and bargain collectively*, 96 U.N.T.S. 257 ("Convention No. 98"), which deals more specifically with collective bargaining. As my colleagues acknowledge, Canada has not ratified Convention No. 98. This means that Canada has no obligations under that Convention as outlined in the ILO Constitution: see *Constitution of the International Labour Organisation*, 15 U.N.T.S. 40, Art. 19(5)(*e*); B. A. Langille, "Can We Rely on the ILO?" (2006-2007), 13 *C.L.E.L.J.* 273. It is therefore inappropriate to interpret the scope of Canada's obligations on the basis of that Convention.

[249] Second, even if Convention No. 98 were applicable to Canada, the majority in *Health Services* would still have erred in relying on that Convention to constitutionalize a version of

(3) Le droit international n'appuie pas la constitutionnalisation du droit de négocier collectivement

[247] Suivant la troisième proposition formulée par la formation majoritaire dans l'arrêt *Health Services*, la négociation collective fait partie intégrante de la liberté d'association reconnue en droit international. La majorité s'appuie en particulier sur la *Convention (nº 87) concernant la liberté syndicale et la protection du droit syndical*, 68 R.T.N.U. 17 (« Convention nº 87 »), pour conclure que le droit international protège la négociation collective et, ce faisant, elle commet deux erreurs.

[248] D'abord, en analysant la protection de la négociation collective au regard du droit international, la formation majoritaire confond deux conventions distinctes de l'OIT. Le Canada a bien ratifié la Convention nº 87 de l'OIT, mais celle-ci porte sur la liberté d'association sans faire aucunement mention de la négociation collective. Dans l'arrêt *Health Services*, la majorité cite longuement l'article de B. Gernigon, A. Odero et H. Guido intitulé « Les principes de l'OIT sur la négociation collective » (2000), 139 *Rev. int. trav.* 37, pour développer sur la portée de la protection conférée à la négociation collective en droit international. Or, dans cet article, les auteurs analysent en fait la portée de la *Convention (nº 98) concernant l'application des principes du droit d'organisation et de négociation collective*, 96 R.T.N.U. 257 (« Convention nº 98 »), laquelle porte plus précisément sur la négociation collective. Comme le reconnaissent mes collègues la Juge en chef et le juge LeBel, le Canada n'a pas ratifié la Convention nº 98, de sorte qu'elle ne le soumet à aucune obligation suivant la Constitution de l'OIT : voir l'al. 19(5)*e*) de la *Constitution de l'Organisation internationale du Travail*, 15 R.T.N.U. 41; B. A. Langille, « Can We Rely on the ILO? » (2006-2007), 13 *C.L.E.L.J.* 273. Il est donc fautif d'interpréter la portée des obligations du Canada sur le fondement de cette convention.

[249] Ensuite, même si la Convention nº 98 s'appliquait au Canada, dans *Health Services*, la formation majoritaire aurait tout de même tort de s'appuyer sur elle pour constitutionnaliser la

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collective bargaining that includes a duty to bargain in good faith. While Convention No. 98 provides protection for a process of collective bargaining, it conceives of collective bargaining as being a process of "voluntary negotiation" that is fundamentally distinct from the model of collective bargaining incorporated in the Wagner model: see ILO Convention No. 98, Art. 4. More specifically, Convention No. 98 does not contemplate the imposition of a duty on parties to bargain in good faith: Langille, "Can We Rely on the ILO?", at pp. 291-92. Indeed, Gernigon et al. express this point in the article relied on by the majority in *Health Services*:

> The voluntary nature of collective bargaining is explicitly laid down in Article 4 of Convention No. 98 and, according to the Committee on Freedom of Association, is "a fundamental aspect of the principles of freedom of association" (ILO, 1996a, para. 844). Thus, the obligation to promote collective bargaining excludes recourse to measures of compulsion. During the preparatory work for Convention No. 154, the Committee on Collective Bargaining agreed upon an interpretation of the term "promotion" (of collective bargaining) in the sense that it "should not be capable of being interpreted in a manner suggesting an obligation for the State to intervene to impose collective bargaining", thereby allaying the fear expressed by the Employer members that the text of the Convention could imply the obligation for the State to take compulsory measures (ILO, 1981, p. 22/6).
>
> The Committee on Freedom of Association, following this line of reasoning, has stated that nothing in Article 4 of Convention No. 98 places a duty on a government to enforce collective bargaining with a given organization by compulsory means, and that such an intervention by a government would clearly alter the nature of bargaining (ILO, 1996a, para. 846).
>
> It cannot therefore be deduced from the ILO's Conventions on collective bargaining that there is a formal obligation to negotiate or to achieve a result (an agreement). [Emphasis added; pp. 40-41.]

[250] The majority in *Health Services* was in error when it concluded that international law pointed to compulsory collective bargaining (paras. 69-79). My colleagues say that international norms are *not inconsistent* with compulsory collective bargaining (para. 95). While this is true, it does not assist

négociation collective entendue au sens où l'employeur est tenu de négocier de bonne foi. Bien que la Convention nº 98 protège le processus de négociation collective, elle y voit un processus « volontaire » fondamentalement distinct de celui que prévoit le modèle Wagner : voir l'art. 4 de la Convention nº 98 de l'OIT. Plus précisément, la Convention nº 98 ne prévoit pas l'imposition d'une obligation de négocier de bonne foi : Langille, « Can We Rely on the ILO? », p. 291-292. Gernigon et ses coauteurs le précisent en effet dans l'article cité par la majorité dans *Health Services* :

> L'article 4 de la convention nº 98 prévoit expressément le caractère volontaire de la négociation collective qui « constitue un aspect fondamental des principes de la liberté syndicale » (BIT, 1996a, paragr. 844). Ainsi, la nécessité de promouvoir la négociation collective exclut le recours à la contrainte : lorsque la Conférence internationale du Travail a élaboré la convention nº 154, il fut entendu [que le terme « promotion » (de la négociation collective) ne serait pas interprété de manière « à sous-entendre que l'État est tenu d'intervenir pour obliger les parties à négocier collectivement », pour dissiper la crainte des employeurs membres que le texte de la convention pourrait insinuer que l'État soit obligé de prendre des mesures de contrainte] à cette fin (BIT, 1981, p. 22/7).
>
> Le Comité de la liberté syndicale a estimé, à cet égard, qu'aucune disposition de l'article 4 de la convention nº 98 n'impose à aucun gouvernement l'obligation de recourir à des mesures de contraintes pour obliger les parties à négocier avec une organisation déterminée, mesures qui auraient clairement pour effet de transformer le caractère de telles négociations (BIT, 1996a, paragraphes 845 et 846).
>
> Ainsi donc, on ne peut déduire des conventions de l'OIT concernant la négociation collective l'obligation formelle de négocier ni celle d'obtenir un résultat (c'est-à-dire un accord). [Je souligne; p. 44-45.]

[250] Dans *Health Services*, la formation majoritaire estime à tort que le droit international permet de conclure au caractère obligatoire de la négociation collective (par. 69-79). La Juge en chef et le juge LeBel affirment avec raison que la négociation collective obligatoire *ne contrevient pas* aux

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with the interpretation of s. 2(*d*). Many positions — including a freedom of association which includes voluntary collective bargaining — are equally, if not more, consistent with international norms. However, the majority in *Health Services* said more than this. It said that Canada's obligations and those international norms imply compulsory collective bargaining more than they imply voluntary associations (para. 72). With respect, international law does not support that conclusion.

(4) *Charter* Values Cannot Be Invoked to Support Constitutionalizing Collective Bargaining Rights

[251] In its fourth proposition, the majority maintained that the recognition of a good faith collective bargaining right is consistent with and promotes other *Charter* rights, freedoms and values: namely, human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy: see *Health Services*, at para. 81. The majority said that the right promotes human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby to gain a measure of control over a major aspect of their lives, that it enhances equality because it palliates the historical inequality between employers and employees, and that it achieves a form of workplace democracy and ensures the rule of law in the workplace by giving workers a voice to influence the establishment of rules that control major aspects of their lives (paras. 82-85).

[252] A duty to bargain in good faith may achieve those ends. However, either the *Charter* requires something or it does not. The Chief Justice and LeBel J. say that a "value-oriented approach . . . has been repeatedly endorsed by *Charter* jurisprudence over the last quarter century" (para. 96). That may be so, however this value-oriented

normes internationales (par. 95), mais cela n'est d'aucun secours pour interpréter l'al. 2*d*). Nombre de points de vue — dont celui voulant que la négociation collective volontaire soit comprise dans la liberté d'association — sont tout aussi conformes, sinon plus, aux normes internationales. Cependant, dans *Health Services*, les juges majoritaires vont plus loin : les obligations du Canada et les normes internationales permettent davantage de conclure au caractère obligatoire de la négociation collective qu'au caractère volontaire de l'association (par. 72). En toute déférence, j'estime que le droit international n'étaye pas cette conclusion.

(4) Les valeurs consacrées par la *Charte* ne peuvent être invoquées à l'appui de la constitutionnalisation du droit à la négociation collective

[251] La quatrième proposition formulée par la formation majoritaire dans *Health Services* veut que la reconnaissance du droit à la négociation collective de bonne foi s'intègre dans la logique, voire la défense, des autres droits, libertés et valeurs consacrés par la *Charte*, à savoir la dignité humaine, l'égalité, la liberté, le respect de l'autonomie de la personne et la mise en valeur de la démocratie (par. 81). La majorité dit qu'un tel droit favorise la dignité humaine, la liberté et l'autonomie des travailleurs en donnant à ces derniers la possibilité d'influer sur l'établissement de règles dans le milieu de travail et d'acquérir de ce fait un certain pouvoir sur un pan important de leur vie, qu'il favorise l'égalité en palliant l'inégalité de toujours entre employeurs et employés et qu'il permet d'atteindre une certaine démocratie au travail et d'y assurer la primauté du droit en donnant aux travailleurs voix au chapitre pour l'établissement des règles qui régissent des facettes importantes de leur vie (par. 82-85).

[252] L'obligation de négocier de bonne foi peut certes permettre d'atteindre ces objectifs, mais ou bien la *Charte* exige une chose, ou bien elle ne l'exige pas. Aux dires de la Juge en chef et du juge LeBel, « interpréter en fonction des valeurs de la *Charte* les garanties formulées dans celle-ci [. . .] est conforme à la jurisprudence

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approach is a means by which courts interpret the *Charter* — a process, as I will now explain, that must begin with the words of the *Charter* itself and must be bound by the normal constraints of legal reasoning and analysis. As Mr. Justice Robert J. Sharpe and Professor Kent Roach say, "[t]he task of *Charter* interpretation has structure and discipline. The first source is obvious — the language of the *Charter* itself" (*The Charter of Rights and Freedoms* (4th ed. 2009), at p. 59). The role of the Court is to determine what the *Charter* requires and what it does not and then apply the requirements it finds to the case before it. It is not to simply promote, as much as possible, values that some subjectively think underpin the *Charter* in a general sense.

[253] I agree with the words of Iacobucci J. in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 62, where he wrote "to the extent this Court has recognized a '*Charter* values' interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations" (emphasis deleted). The Court cannot employ a *Charter* values argument to interpret the *Charter* itself so broadly that the interpretation is no longer plausible. As Dickson J. observed, "it is important not to overshoot the actual purpose of the right or freedom in question" (*Big M*, at p. 344). This means, as Professor Hogg says, that even though this Court has adopted a progressive, purposive approach to interpreting the Constitution, courts are not liberated from the "normal constraints of interpretation" (p. 15-50).

[254] Section 2(*d*) protects the freedom to associate. It does not purport to guarantee the "collective goals" (reasons of the Chief Justice and LeBel J., at para. 46) of the association once formed. The

constitutionnelle des 25 dernières années » (par. 96). Soit, mais c'est suivant cette démarche axée sur les valeurs que les tribunaux interprètent la *Charte* — une démarche qui, comme je vais l'expliquer, doit prendre pour point de départ le libellé de la *Charte* même et être circonscrite par les contraintes normales que constituent le raisonnement et l'analyse juridiques. Comme le disent le juge Robert J. Sharpe et le professeur Kent Roach [TRADUCTION] : « L'interprétation de la *Charte* exige structure et discipline. La première source est évidente — le libellé de la *Charte* même » (*The Charter of Rights and Freedoms* (4e éd. 2009), p. 59). Le rôle de la Cour est de déterminer ce que la *Charte* exige ou pas et d'appliquer ensuite les exigences, s'il en est, aux faits dont elle est saisie. Il ne s'agit pas simplement de promouvoir, autant que faire se peut, les valeurs perçues subjectivement par certains comme les assises de la *Charte* en général.

[253] Je fais miens les propos suivants du juge Iacobucci dans l'arrêt *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559, par. 62 : « dans la mesure où notre Cour a reconnu un principe d'interprétation fondé sur le respect des "valeurs de la *Charte*", ce principe ne s'applique uniquement qu'en cas d'ambiguïté véritable, c'est-à-dire lorsqu'une disposition législative se prête à des interprétations divergentes mais par ailleurs tout aussi plausibles l'une que l'autre » (soulignement omis). La Cour ne peut exciper de ces valeurs pour se livrer à une interprétation de la *Charte* elle-même qui est si extensive qu'elle cesse d'être plausible. Comme le fait observer le juge Dickson dans l'arrêt *Big M*, « il importe de ne pas aller au-delà de l'objet véritable du droit ou de la liberté en question » (p. 344). Dès lors, selon le professeur Hogg, même si notre Cour a adopté une approche progressive et téléologique pour interpréter la Constitution, les tribunaux demeurent soumis aux [TRADUCTION] « règles habituelles d'interprétation » (p. 15-50).

[254] L'alinéa 2*d*) protège la liberté d'association; il ne vise pas à garantir les « objectifs collectifs » (motifs de la Juge en chef et du juge LeBel, par. 46) de l'association une fois celle-ci formée.

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majority's interpretation in *Health Services* is not plausible because it created a free-standing right to the objectives of employee associations; it created a right which "requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation" and make a "reasonable effort to arrive at an acceptable contract" (paras. 90 and 101). To suggest that s. 2(*d*) protects the right to equal bargaining power with one's employer or "a form of workplace democracy" takes it far outside its linguistic, philosophical and historical context (para. 85).

[255] I agree that one's work is fundamental to one's identity and well-being and that exerting control over one's working conditions is a desirable goal. However, even assuming that such considerations militate in favour of legislative intervention to empower workers and employee associations, the fact remains that our Constitution leaves the determination as to whether, and to what extent, such intervention is appropriate to Parliament and the provincial legislatures. Section 2(*d*) is silent on such matters and this Court may not intervene into questions of economic and social policy in the absence of a legislative or constitutional grant of authority.

C. *The Approach in Health Services Is Unworkable*

[256] Beyond *Health Services*' errors as to the nature of s. 2(*d*) and its reasons for constitutionalizing a duty to bargain in good faith, the collective bargaining right itself is unworkable for two reasons. First, as found by the Ontario Court of Appeal, the right to collective bargaining imposed by *Health Services* is unworkable unless it is supported by at least two additional elements of Wagner model collective bargaining. Second, the attempt to draw a distinction between the process of good faith bargaining and the fruits of such bargaining is unworkable, as *Health Services* itself demonstrates.

L'interprétation préconisée par les juges majoritaires dans *Health Services* n'est pas plausible parce qu'elle crée un droit autonome aux objectifs d'une association d'employés; elle crée un droit qui « implique que l'employeur et les employés se rencontrent et négocient de bonne foi en vue de réaliser leur objectif commun d'accommodement par des moyens pacifiques et productifs » et fassent « un effort raisonnable pour arriver à un contrat acceptable » (par. 90 et 101). Laisser entendre que l'al. 2*d*) protège le droit de négocier d'égal à égal avec l'employeur ou « une forme de démocratie [. . .] en milieu de travail » (par. 85) fait fi des contextes linguistique, philosophique et historique de la disposition.

[255] Je conviens que le travail soit fondamental à l'identité et au bien-être d'une personne et que le fait d'avoir son mot à dire sur ses conditions de travail puisse être un objectif souhaitable. Toutefois, à supposer même que ces considérations militent en faveur d'une mesure législative ayant pour effet de renforcer la position des associations de travailleurs et d'employés, il demeure que notre Constitution laisse au Parlement et aux législatures provinciales le soin de décider de l'opportunité et de la portée d'une telle mesure. L'alinéa 2*d*) ne prévoit rien à ce sujet, et notre Cour ne peut s'immiscer dans le domaine de la politique économique et sociale lorsque ni la loi ni la Constitution ne l'y autorisent.

C. *L'inapplicabilité pratique de l'approche retenue dans Health Services*

[256] Indépendamment des erreurs commises dans cet arrêt quant à la nature de l'al. 2*d*) et aux motifs de constitutionnaliser l'obligation de négocier de bonne foi, le droit à la négociation collective est lui-même inapplicable en pratique pour deux raisons. Premièrement, comme le conclut la Cour d'appel de l'Ontario, le droit à la négociation collective qu'impose *Health Services* n'est applicable en pratique que s'il est étayé par au moins deux autres éléments du modèle Wagner. Deuxièmement, la distinction que l'on tente d'établir entre le processus de négociation de bonne foi et le résultat d'une telle négociation ne tient pas, ce qui ressort de l'arrêt lui-même.

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(1) The Problem of Constitutionalizing One Part of the Wagner Model

[257] In the court below in this appeal, an experienced and eminent labour lawyer and now Chief Justice of Ontario, Winkler C.J.O., took the view that a constitutional right to meaningful collective bargaining must extend to two additional aspects: the principle of majoritarian exclusivity and a mechanism for resolving bargaining impasses and disputes regarding the interpretation and administration of collective agreements. Accordingly, he ordered legislation that would extend the missing protections to agricultural workers:

> If legislation is to provide for meaningful collective bargaining, it must go further than simply stating the principle and must include provisions that ensure that the right can be realized. At a minimum, the following statutory protections are required to enable agricultural workers to exercise their right to bargain collectively in a meaningful way: (1) a statutory duty to bargain in good faith; (2) statutory recognition of the principles of exclusivity and majoritarianism; and (3) a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements. [Emphasis added; para. 80.]

Abella J. in her reasons finds that a right to collective bargaining for agricultural workers must include an enforcement and compliance mechanism to resolve bargaining disputes (para. 339) and the statutory recognition of majoritarian exclusivity (para. 343).

[258] Winkler C.J.O. explained that these elements were necessary to a workable system of good faith collective bargaining. He justified adding the mechanism for resolving bargaining impasses by explaining that the bargaining process would be "jeopardized" if the parties had no recourse to a dispute resolution mechanism when faced with fruitless bargaining (para. 82).

[259] Indeed, when a duty is imposed on a party by law, it must be accompanied by sanctions or means of enforcement if there is non-compliance

(1) Le problème de la constitutionnalisation d'un volet du modèle Wagner

[257] Ancien avocat chevronné et émérite en droit du travail, le juge en chef Winkler, de la Cour d'appel de l'Ontario, opine en l'espèce qu'un droit constitutionnel à la négociation collective véritable doit s'accompagner du principe du monopole syndical conféré par un vote majoritaire, ainsi que d'un mécanisme permettant de dénouer les impasses dans les négociations et de résoudre les différends relatifs à l'interprétation ou à l'application d'une convention collective. Il appelle donc à l'adoption d'une loi qui accorde aux travailleurs agricoles les protections qui font défaut :

> [TRADUCTION] La loi censée accorder le droit à la négociation collective véritable doit non seulement formuler le principe, mais aussi renfermer des dispositions garantissant que ce droit pourra être exercé. Elle doit à tout le moins prévoir les mesures de protection suivantes pour que les travailleurs agricoles puissent exercer véritablement leur droit à la négociation collective : (1) l'obligation de négocier de bonne foi, (2) la reconnaissance des principes du monopole syndical et du vote majoritaire et (3) un mécanisme permettant de dénouer les impasses dans les négociations et de résoudre les différends relatifs à l'interprétation ou à l'application d'une convention collective. [Je souligne; par. 80.]

La juge Abella estime pour sa part que le droit à la négociation collective conféré aux travailleurs agricoles doit s'accompagner d'un mécanisme permettant d'assurer l'exécution du contrat et de résoudre les différends (par. 339) et de la consécration légale du monopole syndical conféré par un vote majoritaire (par. 343).

[258] Le juge en chef Winkler explique que ces éléments sont nécessaires à l'applicabilité pratique d'un système de négociation collective de bonne foi. Il justifie l'ajout d'un mécanisme de règlement des différends par le fait que le processus de négociation serait [TRADUCTION] « compromis » si les parties ne disposaient d'aucune issue lorsque les négociations sont dans un cul-de-sac (par. 82).

[259] En effet, lorsque la loi impose une obligation à une partie, elle doit prévoir une sanction ou un moyen d'exécution pour le cas où l'obligation

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with the duty. Without sanctions or means of enforcement, compliance with the duty would be, to all intents and purposes, voluntary. This would hardly meet the requirement, according to the Chief Justice and LeBel J., that collective bargaining be mandatory.

[260] Winkler C.J.O. also explained that a collective bargaining process that lacks the feature of majoritarian exclusivity would be "impractical" and lead to "chaos":

> It is impractical to expect employers to engage in good faith bargaining discussions when confronted with a process that does not eradicate the possibility of irreconcilable demands from multiple employee representatives, purporting to simultaneously represent employees in the same workplace with similar job functions. It is not overstating the point to say that to avoid chaos in the workplace to the detriment of the employer and employees alike, it is essential that a representative organization be selected on a majoritarian basis and imbued with exclusive bargaining rights. [para. 92]

[261] Winkler C.J.O.'s concerns present a significant problem that the Chief Justice and LeBel J. do not address in their reasons. They limit constitutionalization to collective bargaining imposing a duty on employers to bargain in good faith. The reasons of the Chief Justice and LeBel J. provide no explanation for why Winkler C.J.O. is wrong. As the majority in *Doucet-Boudreau* said in discussing minority language educational rights: "A purposive approach to remedies in a *Charter* context gives modern vitality to the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy" (para. 25). I cannot agree that a right can be workable without the imposition of an appropriate remedy.

[262] The Chief Justice and LeBel J. say that "[i]t is premature to argue that the holding in *Health Services*, rendered four years ago, is unworkable in practice" (para. 83). They say that it takes time before the unworkability of a decision emerges. I disagree. Winkler C.J.O.'s conclusion that a constitutional right to meaningful collective bargaining

ne serait pas respectée. À défaut d'une sanction ou d'un moyen d'exécution, le respect de l'obligation devient à toutes fins utiles volontaire, ce qui ne satisfait pas à l'exigence voulant, selon la Juge en chef et le juge LeBel, que le processus de négociation collective soit obligatoire.

[260] Le juge en chef Winkler explique également que sans le principe du monopole syndical conféré par un vote majoritaire, le processus de négociation collective est [TRADUCTION] « irréaliste » et mène au « chaos » :

> [TRADUCTION] Il est irréaliste qu'un employeur négocie de bonne foi dans le cadre d'un processus qui n'exclut pas la possibilité de demandes inconciliables présentées par différents représentants qui prétendent simultanément représenter des employés exerçant des fonctions similaires dans un même lieu de travail. Il n'est pas exagéré de dire que pour éviter un chaos qui nuirait tant à l'employeur qu'aux employés, il est essentiel que l'organisation représentative soit élue à la majorité et investie de droits exclusifs de négociation. [par. 92]

[261] Dans leurs motifs, la Juge en chef et le juge LeBel ne tiennent pas compte du grave problème que soulèvent les préoccupations du juge en chef Winkler. Ils ne constitutionnalisent que la négociation collective imposant à l'employeur l'obligation de négocier de bonne foi. Ils n'avancent aucun élément pour réfuter les propos du juge en chef Winkler. Comme l'affirment les juges majoritaires dans l'arrêt *Doucet-Boudreau* au sujet des droits à l'instruction dans la langue de la minorité : « L'interprétation téléologique des réparations dans le contexte de la *Charte* actualise l'ancienne maxime *ubi jus, ibi remedium*, là où il y a un droit, il y a un recours » (par. 25). Je ne saurais convenir qu'un droit est applicable en pratique lorsqu'il peut être bafoué sans qu'il soit possible d'obtenir une réparation appropriée.

[262] Selon la Juge en chef et le juge LeBel, « [i]l est prématuré de conclure à l'inapplicabilité pratique de l'arrêt *Health Services* rendu il y a quatre ans » (par. 83). À leur avis, l'inapplicabilité pratique d'un arrêt ne se fait jour qu'après un certain temps. Je ne suis pas d'accord avec eux. La conclusion du juge en chef Winkler selon

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must include constitutionalizing elements of the Wagner model provides strong support for the proposition that, without these protections, compulsory collective bargaining is unworkable.

(2) The Untenable Distinction Between Substance and Process

[263] Unworkability also arises from the majority's instruction in *Health Services* to protect the process of collective bargaining without also protecting its substantive fruits. In *Health Services*, the majority posited that this distinction was entirely possible (para. 29). In my view, this distinction is unworkable because it is impossible to divorce the process of collective bargaining from its substantive outcomes. There are three reasons.

[264] First, as I have already discussed, *Health Services* itself did not respect this distinction since the majority granted constitutional protection to "significant" terms of the collective agreements at issue in that very case. The majority found that the challenged B.C. legislation breached s. 2(*d*) not just by limiting future bargaining but also by invalidating existing collective agreements and consequently undermining the past bargaining process that formed the basis for these agreements. Therefore, the application of the collective bargaining right in *Health Services* had the result of protecting the substance of those agreements.

[265] Second, the duty to bargain in good faith cannot be described as only a "procedural" guarantee, as the Chief Justice and LeBel J. do in this case and as the majority did in *Health Services*. Recognizing an employee association and requiring the employer to engage in collective bargaining are themselves substantive outcomes for which workers organize. In a labour context, as in other contexts, certain "procedures" are favoured because they are more likely to produce a certain outcome.

laquelle la constitutionnalisation du droit à une véritable négociation collective doit emporter la constitutionnalisation d'autres éléments du modèle Wagner appuie fortement la proposition voulant que la négociation collective obligatoire soit inapplicable en pratique sans ces garanties.

(2) La distinction indéfendable entre la substance et le processus

[263] L'inapplicabilité pratique découle aussi de la décision majoritaire dans *Health Services* de protéger le processus de négociation collective sans étendre cette protection à ses résultats concrets, les juges majoritaires estimant que la distinction est tout à fait possible (par. 29). À mon sens, cette distinction crée un problème insurmontable, car il est impossible de dissocier le processus de négociation collective de son résultat concret, et ce, pour trois raisons.

[264] Premièrement, je le répète, dans *Health Services*, la majorité des juges fait elle-même fi de cette distinction puisqu'elle confère la protection constitutionnelle à d'« importantes » conditions des conventions collectives en cause. Elle conclut que les dispositions législatives britanno-colombiennes contestées contreviennent à l'al. 2*d*), car non seulement elles limitent les négociations ultérieures, mais elles invalident aussi les conventions collectives existantes et, par conséquent, ébranlent la validité des processus de négociation antérieurs qui ont servi de fondement à la conclusion de ces conventions. L'application du droit à la négociation collective a donc pour effet de protéger la teneur de ces conventions.

[265] Deuxièmement, on ne peut qualifier l'obligation de négocier de bonne foi de simple garantie à caractère « procédural » comme le font la Juge en chef et le juge LeBel en l'espèce et les juges majoritaires dans *Health Services*. Les travailleurs s'unissent dans le but même de faire reconnaître leur association d'employés et d'obliger l'employeur à négocier avec elle. Dans le contexte des relations du travail comme dans d'autres, certaines « procédures » sont privilégiées parce qu'elles ont plus de chances de produire un certain résultat.

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[266] The very requirement that the parties engage in collective bargaining tips the economic balance between parties in favour of the workers and, as such, constitutes a particular outcome. Consequently, the act of engaging in the process itself constitutes a concession on the part of the employer. Were it not so, organized labour would have little reason to demand constitutional protection for the "right" to engage in a process of collective bargaining.

[267] In addition to providing the substantive benefit of requiring employers to meet with workers, the duty to bargain in good faith brings other, more specific substantive benefits. As the term is understood in Canadian labour law, the duty to bargain in good faith prohibits an employer from flat out refusing to bargain with the union or from only going to a few cursory meetings: Adams, vol. 2, at p. 10-122. However, it also goes much beyond that. Depending on the circumstances, the duty to bargain in good faith can prohibit an employer from refusing to include or discuss the inclusion of standard industry terms in a collective agreement or, conversely, insisting on the inclusion of a term to the point of impasse: see Adams, vol. 2, at pp. 10-111 to 10-112; *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369, at para. 45, *per* Cory J. It also obligates employers to disclose material information to unions in advance of negotiations: Adams, vol. 2, at pp. 10-124 to 10-128. All of these aspects of the duty to bargain in good faith change these measures and constrain the range of negotiating positions available to the employer and thus have a substantive impact on the terms of employment.

[268] Finally, for a duty to bargain in good faith not to be an illusory benefit, there must be both a way of dealing with bargaining impasses as well as an effective remedy for persistent breaches of a duty to bargain in good faith. The first requires that there be some default mechanism for resolving the dispute in case an impasse is reached — such as striking or binding arbitration — while the second may require, in extreme circumstances, the imposition by an arbitrator of particular terms of

[266] L'obligation même faite aux parties de prendre part à une négociation collective fait pencher la balance économique en faveur des travailleurs et constitue donc un certain résultat. C'est pourquoi en prenant part à la négociation collective, l'employeur fait une concession. Si ce n'était pas le cas, les associations d'employés ne réclameraient pas la protection constitutionnelle du « droit » d'entreprendre un processus de négociation collective.

[267] En plus de conférer l'avantage non négligeable de contraindre l'employeur à rencontrer ses employés, l'obligation de négocier de bonne foi confère d'autres avantages importants plus précis. L'obligation de négocier de bonne foi, au sens où l'entend le droit du travail canadien, empêche l'employeur de refuser catégoriquement de négocier avec le syndicat ou de se contenter d'assister à quelques brèves rencontres : Adams, vol. 2, p. 10-122. Toutefois, elle va aussi beaucoup plus loin. Selon les circonstances, elle peut empêcher l'employeur de refuser d'inclure dans la convention collective des conditions courantes dans le secteur d'activité, voire d'en discuter ou, à l'inverse, d'insister jusqu'à l'impasse pour ajouter une condition : voir Adams, vol. 2, p. 10-111 à 10-112; *Royal Oak Mines Inc. c. Canada (Conseil des relations du travail)*, [1996] 1 R.C.S. 369, par. 45, le juge Cory. Elle contraint également l'employeur à communiquer des renseignements importants aux syndicats avant les négociations : Adams, vol. 2, p. 10-124 à 10-128. Toutes ces facettes de l'obligation de négocier de bonne foi changent la donne à cet égard et réduisent la marge de manœuvre de l'employeur lors des négociations; elles ont donc une grande incidence sur les conditions d'emploi.

[268] Enfin, pour que l'obligation de négocier de bonne foi ne confère pas seulement un avantage illusoire, il faut à la fois un mécanisme pour sortir les négociations de l'impasse et une réparation en cas de manquements répétés à cette obligation. Ainsi, un mécanisme doit s'appliquer automatiquement pour mettre fin à une impasse — comme la grève ou l'arbitrage exécutoire. Également, dans les cas extrêmes de manquements, un arbitre pourra imposer l'inclusion de conditions précises dans la

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a collective agreement: W. B. Rayner, *Canadian Collective Bargaining Law* (2nd ed. 2007), at pp. 349-55. Each of these goes well beyond a mere process and results in the protection of a particular substantive outcome.

[269] The majority's inability to separate substance and process, and the consequent constitutionalization of collective bargaining terms demonstrates the unworkability of the distinction between substance and process asserted in *Health Services*. This unworkability is further underlined by the fact that the collective bargaining itself is an outcome for which parties organize and does affect substantive outcomes. For these reasons, as well as the unenforceability of the bare right to good faith bargaining, the ruling in *Health Services* is unworkable.

V. The *Charter* Protects a Voluntary Association of Workers Whose Objectives Are to Improve Wages and Working Conditions

[270] As I have explained through these reasons, I do not accept that s. 2(*d*) protects a right to collective bargaining. I am, however, of the view that s. 2(*d*) does protect a voluntary association of workers who wish to use their associational freedoms to come together and attempt to improve their wages and working conditions.

[271] Under Canadian law, an individual is generally free to bargain with an employer over terms of employment. Because such individual bargaining is generally lawful, it necessarily follows that the decision of individuals to band together to approach their employer must necessarily be protected. The free decisions of individuals to do in association what they can lawfully do alone lies at the very heart of s. 2(*d*) protection, and it therefore follows that s. 2(*d*) must protect the decision of individuals to come together, to form a bargaining position and to present a common and united front to an employer.

[272] However, s. 2(*d*) does not provide greater legal protection to individuals acting in concert

convention collective : W. B. Rayner, *Canadian Collective Bargaining Law* (2e éd. 2007), p. 349-355. Chacun de ces éléments va bien au-delà du seul processus et aboutit à la protection d'une issue concrète particulière.

[269] L'incapacité de la majorité à dissocier substance et processus, et la constitutionnalisation qui s'ensuit de conditions de la négociation collective font ressortir l'inapplicabilité pratique de la distinction entre la substance et le processus établie dans l'arrêt *Health Services*. Cette inapplicabilité pratique ressort également du fait que la négociation collective en soi constitue un résultat auquel tendent les parties en s'associant et influe sur les résultats concrets. Pour ces motifs, et vu l'impossibilité de faire respecter seulement le droit à la négociation de bonne foi, l'arrêt *Health Services* mène à un cul-de-sac.

V. La *Charte* protège l'association volontaire des travailleurs aux fins d'améliorer salaires et conditions de travail

[270] Comme je l'explique tout au long des présents motifs, je ne conviens pas que l'al. 2*d*) protège un droit à la négociation collective. Je suis toutefois d'avis qu'il protège l'association volontaire de travailleurs désireux d'exercer leur liberté associative pour s'unir et tenter d'améliorer leurs salaires et conditions de travail.

[271] En droit canadien, un individu est généralement libre de négocier ses conditions de travail avec un employeur. Puisque la négociation individuelle est généralement licite, il s'ensuit nécessairement que la décision d'individus de s'unir pour s'adresser à l'employeur doit être protégée. Les décisions libres d'individus de faire ensemble ce qu'ils peuvent légalement faire seuls sont au cœur même de la protection prévue à l'al. 2*d*), de sorte que cet alinéa doit protéger la décision des individus de s'unir, de mettre au point une position de négociation et de présenter un front commun à l'employeur.

[272] Cependant, l'al. 2*d*) n'accorde pas une protection juridique plus grande aux individus qui

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than is afforded to individuals acting alone. While greater economic clout or political power may flow from the very act of association in a way that makes the associational activity "qualitatively" different from the individual activity, the legal rights and freedoms granted to individuals acting in association under s. 2(*d*) are nonetheless limited to the same rights and freedoms afforded to individuals acting alone.

[273] While s. 2(*d*) protects the ability of workers to come together and to organize with a view to engaging in collective bargaining with an employer, s. 2(*d*) does not impose any obligation on an employer to actually negotiate with a group of employees. In the individual case, there is generally no legal obligation on an employer to negotiate with the employee. It is entirely permissible for an employer, in the course of negotiating a new contract with an employee, to make a "take it or leave it" offer to an employee, which the employee may then accept or reject. Such individual agreements are generally left to voluntary negotiation in accordance with the law of contract, subject only to requirements set out in employment standards legislation and other statutes. Thus, just as an employer can decline to meet or negotiate with an individual, so can an employer decline to meet or negotiate with a group of employees.

[274] In my view, a proper application of s. 2(*d*) provides protection for voluntary associations of workers, but such protection does not involve the constitutionalization of a duty on employers to engage in collective bargaining. Such an approach is, in my view, consistent with the purpose and scope of s. 2(*d*), the principle of judicial deference in labour relations, and Canada's labour history and international obligations.

VI. Summary

[275] Given the length of these reasons thus far, I now provide a summary of the principles discussed above before proceeding to apply these principles in the present case:

agissent de concert qu'à ceux qui agissent individuellement. Bien que le fait même de s'associer puisse accroître le pouvoir économique ou politique, et rendre ainsi l'activité associative « qualitativement » différente de l'activité individuelle, les droits et libertés que garantit l'al. 2*d*) aux individus agissant de concert se limitent à ceux qui sont garantis aux individus agissant seuls.

[273] Même s'il protège la faculté des travailleurs de s'associer en vue de négocier collectivement avec leur employeur, l'al. 2*d*) n'oblige pas ce dernier à négocier avec un groupe d'employés. Dans le cas d'un individu agissant seul, l'employeur n'est généralement pas obligé de négocier avec l'employé. L'employeur qui négocie un nouveau contrat avec un employé peut en toute légalité lui faire une offre « à prendre ou à laisser », que l'employé peut accepter ou refuser. En général, une telle entente individuelle est négociée de plein gré conformément au droit contractuel, sous réserve uniquement des exigences prévues par la loi, notamment en matière de normes d'emploi. Partant, comme l'employeur peut refuser de rencontrer un individu ou de négocier avec lui, il peut tout aussi bien refuser de rencontrer un groupe d'employés ou de négocier avec lui.

[274] Selon moi, appliqué correctement, l'al. 2*d*) protège l'association volontaire de travailleurs, mais de cette protection ne découle pas une obligation constitutionnelle de l'employeur de prendre part à la négociation collective. Cette conclusion me paraît compatible avec l'objet et la portée de l'al. 2*d*), avec le principe de la déférence judiciaire en droit du travail, ainsi qu'avec l'histoire des relations du travail au Canada et les obligations internationales de notre pays.

VI. Résumé

[275] Vu la longueur des présents motifs, je résume les principes examinés précédemment avant de les appliquer à la présente espèce :

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1. This Court may overrule its own precedents, but it should only do so where there are compelling reasons for doing so. In this case, such compelling reasons exist. *Health Services* involves *Charter* rights that are not susceptible to legislative correction, overruled a line of prior sound decisions, is unworkable and has been the subject of intense academic criticism.

2. *Health Services* erred for three reasons in concluding that s. 2(*d*) protects collective bargaining and obliges parties to bargain in good faith:

   a. First, *Health Services* departed from sound principles established in this Court's precedents on the nature and scope of s. 2(*d*); specifically, it departed from the following five characteristics of s. 2(*d*):

      i. The purpose of s. 2(*d*) is to protect individuals rather than groups *per se*.

      ii. Section 2(*d*) protects freedoms not rights.

      iii. Section 2(*d*) does not empower the Court to privilege certain associations over others.

      iv. Section 2(*d*) does not afford constitutional protection to contracts.

      v. Section 2(*d*) is to be interpreted in such a way as to afford deference to the legislative branch in the field of labour relations.

   b. Second, the reasons advanced in *Health Services* for protecting collective bargaining under s. 2(*d*) — Canadian labour history, Canada's international obligations, and *Charter* values — do not support conferring a constitutional right to collective bargaining and imposing a

1. Notre Cour peut écarter ses propres précédents, mais ne devrait le faire que si des raisons impérieuses le justifient. C'est le cas en l'espèce. L'arrêt *Health Services* porte sur des droits garantis par la *Charte* qui ne peuvent être modifiés par voie législative, il renverse un courant jurisprudentiel valable, il est inapplicable en pratique et il est vivement critiqué par les auteurs.

2. Dans *Health Services*, la formation majoritaire conclut à tort que l'al. 2*d*) protège la négociation collective et oblige les parties à négocier de bonne foi, et ce, pour trois raisons :

   a. Premièrement, l'arrêt *Health Services* rompt avec les principes valables établis dans les décisions antérieures de la Cour sur la nature et la portée de l'al. 2*d*); plus précisément, il rompt avec les cinq caractéristiques suivantes de cet alinéa :

      i. L'alinéa 2*d*) vise à protéger les individus et non les groupements comme tels.

      ii. Il protège des libertés, et non des droits.

      iii. Il n'autorise pas la Cour à favoriser certaines associations.

      iv. Il ne confère pas de protection constitutionnelle aux contrats.

      v. Dans le domaine des relations du travail, il commande une interprétation déférente à l'endroit du législateur.

   b. Deuxièmement, les motifs invoqués dans *Health Services* pour faire bénéficier la négociation collective de la protection de l'al. 2*d*) — l'histoire des relations du travail au Canada, les obligations internationales du pays et les valeurs consacrées par la *Charte* — ne justifient

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duty on employers to engage in collective bargaining.

c. Third, the majority's approach to collective bargaining in particular and s. 2(*d*) in general articulated in *Health Services* is unworkable. It extends constitutional protection to the duty to bargain in good faith without importing other aspects of the Wagner framework, and by purporting to protect the process of collective bargaining without also protecting its fruits, neither of which is tenable.

3. Section 2(*d*) protects the ability of individuals to form associations and to do in association what they can lawfully do alone. Because individuals are generally free to bargain with their employer individually, it follows that s. 2(*d*) must protect the decision of individuals to come together, to form a bargaining position and to present a common and united front to their employers. However, just as an employer is not obliged to bargain with an individual employee, s. 2(*d*) does not oblige an employer to bargain with a group of employees.

VII. Application to the Present Case

[276] I agree with the conclusions of the Chief Justice and LeBel J. that the *AEPA* does not violate s. 2(*d*) of the *Charter*, but for the reasons I have given. Section 2(*d*) does not confer a right of collective bargaining; nor does it impose a duty on employers to meet with employees and "consider employee representations in good faith" (para. 104). I agree with Farley J. ((2006), 79 O.R. (3d) 219) that the *AEPA* satisfies all of the concerns raised in *Dunmore*.

[277] On a plain reading of the provisions of the *AEPA* it provides all of the protections which were imposed by this Court in *Dunmore*, but goes no

ni la constitutionnalisation du droit à la négociation collective ni l'obligation des employeurs d'y participer.

c. Troisièmement, dans *Health Services*, l'interprétation par la majorité des juges de la négociation collective en particulier et de l'al. 2*d*) en général est inapplicable en pratique. La formation majoritaire accorde la protection constitutionnelle à l'obligation de négocier de bonne foi sans inclure d'autres volets du modèle Wagner et elle entend protéger le processus de négociation collective sans protéger aussi ses fruits; l'un et l'autre sont indéfendables.

3. L'alinéa 2*d*) protège la faculté des individus de former des associations et de faire collectivement ce qu'ils peuvent légalement faire individuellement. Parce que l'individu est généralement libre de négocier seul avec l'employeur, l'al. 2*d*) protège la décision d'individus de s'unir, de mettre au point une position de négociation et de présenter un front commun à l'employeur. Toutefois, l'employeur n'étant pas obligé de négocier avec un employé individuel, l'al. 2*d*) ne l'oblige pas non plus à négocier avec un groupement d'employés.

VII. Application à l'espèce

[276] Je souscris aux conclusions de la Juge en chef et du juge LeBel portant que la *LPEA* ne contrevient pas à l'al. 2*d*) de la *Charte*, mais pour les motifs que j'énonce précédemment. L'alinéa 2*d*) ne confère pas de droit à la négociation collective et n'oblige pas l'employeur à rencontrer les employés et à « examiner de bonne foi les observations de ses employés » (par. 104). Je conviens avec le juge Farley ((2006), 79 O.R. (3d) 219) que la *LPEA* répond à toutes les préoccupations soulevées dans l'arrêt *Dunmore*.

[277] Il appert à la lecture de la *LPEA* qu'elle prévoit toutes les garanties qu'avait exigées la Cour dans l'arrêt *Dunmore*, sans plus. Ce texte législatif

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further. It does not provide any right to collective bargaining, or other incidents of *Wagner Act* collective bargaining. Indeed up to this point, the parties and the courts have all proceeded on the basis that the *AEPA* did not include a duty of collective bargaining. The claimants chose to bring this case because in their view, the *AEPA* did not include provisions to enforce a duty of collective bargaining on agricultural employers. Based on this Court's ruling in *Dunmore* that s. 2(*d*) did not create a right of collective bargaining, Farley J. ruled that the *AEPA* did not violate the *Charter*. *Health Services* subsequently expanded the scope of s. 2(*d*) to constitutionalize the right to collective bargaining. Thus the Court of Appeal was obliged to and did find that the *AEPA* was no longer *Charter* compliant. Both of these conclusions were entirely consistent with the text of the *AEPA* and the parties' understanding that the *AEPA* did not include a duty of collective bargaining on agricultural employers.

ne confère aucun droit à la négociation collective ni ne reprend d'autres éléments relatifs à cette activité issus de la *Loi Wagner*. En effet, jusqu'à maintenant, les parties et les tribunaux saisis ont tous considéré que la *LPEA* n'imposait pas d'obligation de négocier collectivement. Les demandeurs ont intenté leur recours parce que, selon eux, la *LPEA* ne comprend aucune disposition qui contraigne l'employeur agricole à la négociation collective. S'appuyant sur la conclusion de notre Cour dans l'arrêt *Dunmore*, à savoir que l'al. 2*d*) ne crée pas de droit à la négociation collective, le juge Farley statue que la *LPEA* ne contrevient pas à la *Charte*. Dans l'arrêt *Health Services*, subséquent à *Dunmore*, la majorité des juges élargit la portée de l'al. 2*d*) afin de constitutionnaliser le droit à la négociation collective. Dès lors, la Cour d'appel n'avait d'autre choix que de conclure que la *LPEA* n'était plus conforme à la *Charte*. Ces deux conclusions correspondaient en tous points au libellé de la *LPEA* et à l'interprétation des parties selon laquelle la Loi n'oblige pas l'employeur du secteur agricole à négocier avec ses employés regroupés au sein d'une association.

[278] By enacting the *AEPA*, the legislature precisely addressed this Court's ruling in *Dunmore*. The text, context and purpose of the *AEPA* clearly demonstrate that the legislature intentionally opted not to include a duty on employers to engage in collective bargaining with employee associations.

[278] La *LPEA* donne précisément suite à l'arrêt *Dunmore*. Il ressort du texte, du contexte et de l'objet de cette loi que le législateur a délibérément choisi de ne pas obliger l'employeur à négocier avec une association d'employés.

[279] Nonetheless, the Chief Justice and LeBel J. say that s. 5 of the *AEPA* can be read as imposing a duty to bargain in good faith (para. 107), which would render the statute constitutional. They argue that the words of s. 5 are ambiguous and that the interpretive tools of purposive interpretation, the presumption of consistency with the *Charter*, and reference to legislative debates lead to this conclusion. Like my colleagues Deschamps J. and Abella J., I cannot agree.

[279] Néanmoins, selon la Juge en chef et le juge LeBel, l'interprétation de l'art. 5 de la *LPEA* permet de conclure qu'il impose une obligation de négocier de bonne foi (par. 107), qui aurait pour effet de rendre la loi constitutionnelle. Ils font valoir une ambiguïté dans le libellé de cette disposition et soutiennent que les outils d'interprétation que sont la méthode téléologique, la présomption de conformité à la *Charte* et les débats législatifs appuient une telle conclusion. Comme mes collègues les juges Deschamps et Abella, je ne suis pas de cet avis.

[280] The words of s. 5 are unambiguous. The relevant portions of s. 5 are subsections (1), (5), (6) and (7).

[280] Le libellé de l'art. 5 ne comporte aucune ambiguïté. Les paragraphes (1), (5), (6) et (7) de l'art. 5 sont pertinents :

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5. (1) The employer shall give an employees' association a reasonable opportunity to make representations respecting the terms and conditions of employment of one or more of its members who are employed by that employer.

. . .

(5) The employees' association may make the representations orally or in writing.

(6) The employer shall listen to the representations if made orally, or read them if made in writing.

(7) If the representations are made in writing, the employer shall give the association a written acknowledgment that the employer has read them.

These words could not be clearer: they provide employee associations the opportunity to make representations to an employer. The only obligation on an employer is to provide the employee association with the opportunity to make representations and to listen if they are oral or read and acknowledge them if they are written.

[281] The words "listen to" or "read" and "give the association a written acknowledgment" are not ambiguous. This Court's approach to statutory interpretation has long held that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, citing Elmer Driedger in *Construction of Statutes* (2nd ed. 1983)). To say that the words "listen to" or "read" and "give the association a written acknowledgment" are ambiguous would be to ignore the grammatical and ordinary sense of the words, and the purpose of the *AEPA*, and would manufacture ambiguity where none exists.

[282] Professor Sullivan observes that "[i]t is presumed that the ordinary meaning of legislation is the most appropriate or 'intended' meaning" unless there is a reason to reject that meaning (*Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 34). As Professor

5. (1) Un employeur donne à une association d'employés une occasion raisonnable de présenter des observations au sujet des conditions d'emploi d'un ou de plusieurs de ses membres qui sont employés par cet employeur.

. . .

(5) L'association d'employés peut présenter ses observations oralement ou par écrit.

(6) L'employeur écoute les observations qui lui sont présentées oralement et lit celles qui lui sont présentées par écrit.

(7) Si les observations lui sont présentées par écrit, l'employeur informe l'association d'employés par écrit qu'il les a lues.

Le texte de l'art. 5 ne pourrait être plus clair : il donne à une association d'employés l'occasion de présenter ses observations à l'employeur. Ce dernier est uniquement contraint à donner à l'association d'employés l'occasion de présenter des observations et à les écouter lorsqu'elles sont présentées oralement ou à les lire et à informer l'association qu'il les a lues lorsqu'elles sont présentées par écrit.

[281] L'emploi des mots « écouter », « lire » et « informer l'association d'employés par écrit » est non équivoque. En matière d'interprétation législative, la Cour suit de longue date le principe selon lequel « il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur » (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21, citant Elmer Driedger dans son ouvrage *Construction of Statutes* (2e éd. 1983)). Affirmer que les mots « écouter », « lire » et « informer l'association d'employés par écrit » sont ambigus revient à faire fi de leur sens ordinaire et grammatical et de l'objet de la *LPEA* et à créer de toutes pièces de l'ambiguïté.

[282] Comme le fait remarquer le professeur Sullivan [TRADUCTION] « [i]l est présumé que le sens ordinaire de la loi est le plus approprié, ou le sens "recherché" », à moins qu'une raison ne justifie de l'écarter (*Sullivan and Driedger on the Construction of Statutes* (4e éd. 2002), p. 34).

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Hogg, A. A. Bushell Thornton and W. K. Wright, write in "*Charter* Dialogue Revisited — Or 'Much Ado About Metaphors'" (2007), 45 *Osgoode Hall L.J.* 1, at p. 12:

> A broader general rule, requiring the courts to stretch the plausible interpretation of a statute in order to bring it into conformity with the *Charter*, "would wrongly upset the dialogic balance." When a statute is unambiguous, courts should give effect to the clearly expressed legislative intent, even if it leads to the conclusion that the statute was unconstitutional and should be struck down for breach of the *Charter.*

In this case, there is nothing in the *AEPA* that suggests that there is a reason to depart from the ordinary and grammatical sense of the words.

[283] It is true, as my colleagues say, that the words "listen to" and "read" and "give the association a written acknowledgment" neither impose nor preclude a duty to bargain in good faith. However, this does not lead to ambiguity. A duty to bargain in good faith, as discussed above, is a term of art in labour law that carries with it a complex series of reciprocal rights and obligations (see Adams, vol. 2, at pp. 10-111 to 10-112, 10-122, and 10-124 to 10-128). Where good faith bargaining is protected by statute it is explicitly included: see, e.g., s. 17 of the Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, which requires that parties "shall bargain in good faith and make every reasonable effort to make a collective agreement". To simply imply the existence of a set of statutory rights by the absence of a well-known term of art stretches the interpretive exercise beyond its breaking point.

[284] The Chief Justice and LeBel J. say that "[t]here can only be one purpose for requiring the employer to listen to or read employee representations — to assure that the employer will in fact consider the employee representations" (para. 103). They argue that this leads to the conclusion that s. 5 includes a duty on employers to engage in collective bargaining with employee associations.

Le professeur Hogg, A. A. Bushell Thornton et W. K. Wright écrivent dans « *Charter* Dialogue Revisited — Or "Much Ado About Metaphors" » (2007), 45 *Osgoode Hall L.J.* 1, p. 12 :

> [TRADUCTION] Une règle générale élargie, obligeant les tribunaux à prêter à une loi une interprétation d'une plausibilité douteuse afin d'en assurer la conformité à la *Charte*, « perturberait à tort l'équilibre dialogique ». En l'absence d'ambiguïté, les tribunaux doivent donner effet à l'intention manifeste du législateur, même si cela doit mener à la conclusion que la loi est inconstitutionnelle et devrait être invalidée pour contravention à la *Charte*.

En l'espèce, rien dans la *LPEA* ne justifie que l'on s'écarte du sens ordinaire et grammatical des mots.

[283] Il est vrai, et je partage l'avis de mes collègues à ce sujet, que les mots « écouter », « lire » et « informer l'association d'employés par écrit » n'ont pour effet ni d'imposer, ni d'exclure une obligation de négocier de bonne foi. Cependant, il n'en découle pas d'ambiguïté. L'obligation de négocier de bonne foi, une notion appartenant au droit du travail, emporte une série de droits et d'obligations réciproques (voir Adams, vol. 2, p. 10-111 à 10-112, 10-122, et 10-124 à 10-128). Les lois qui reconnaissent l'obligation de négocier de bonne foi la prévoient expressément : par exemple, voir l'art. 17 de la *Loi de 1995 sur les relations de travail* de l'Ontario, L.O. 1995, ch. 1, ann. A, aux termes duquel les parties « négocient de bonne foi et font des efforts raisonnables afin de parvenir à une convention collective ». Supposer simplement qu'une loi crée un ensemble de droits si l'on n'y trouve pas un terme technique bien connu repousse l'exercice d'interprétation au-delà des limites permises.

[284] De l'avis de la Juge en chef et du juge LeBel, « [u]ne seule explication peut être trouvée à l'obligation imposée à l'employeur d'écouter ou de lire les observations présentées par les employés [. . .] [L]'employeur doit examiner les observations » (par. 103). Ce qui leur permet de conclure que l'art. 5 oblige l'employeur à participer à la négociation collective avec l'association d'employés.

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[285] The purpose of the *AEPA* is set out expressly in s. 1:

1. (1) The purpose of this Act is to protect the rights of agricultural employees while having regard to the unique characteristics of agriculture, including, but not limited to, its seasonal nature, its sensitivity to time and climate, the perishability of agricultural products and the need to protect animal and plant life.

(2) The following are the rights of agricultural employees referred to in subsection (1):

1. The right to form or join an employees' association.

2. The right to participate in the lawful activities of an employees' association.

3. The right to assemble.

4. The right to make representations to their employers, through an employees' association, respecting the terms and conditions of their employment.

5. The right to protection against interference, coercion and discrimination in the exercise of their rights.

[286] Nothing in the explicit s. 1 purpose supports the view that agricultural employees have a right to require agricultural employers to engage in collective bargaining.

[287] My colleagues ask what purpose there could be to requiring employers to listen to or read employee representations if not to respond to them. The answer is that the purpose is what the words say it is — to give employees the opportunity to more effectively put forward their representations by allowing them to do so collectively, rather than acting individually. Given the unique nature of the agricultural industry as recognized in s. 1, an employer is at liberty to respond or not. With respect, my colleagues interpretation of the words, "listen to" or "read" or "give the association a written acknowledgment" as including a duty on employers to engage in collective bargaining does not accord with the purpose as expressed by the plain language of the *AEPA*.

[285] La *LPEA* énonce expressément son objet à l'article premier :

1. (1) La présente loi a pour objet de protéger les droits des employés agricoles tout en tenant compte des caractéristiques propres à l'agriculture, notamment son caractère saisonnier, sa vulnérabilité au temps et au climat, la nature périssable des produits agricoles et la nécessité de protéger la vie animale et végétale.

(2) Les droits des employés agricoles visés au paragraphe (1) sont les suivants :

1. Le droit de former une association d'employés ou d'adhérer à une telle association.

2. Le droit de participer aux activités légitimes d'une association d'employés.

3. Le droit de réunion.

4. Le droit de présenter des observations à leurs employeurs, par l'intermédiaire d'une association d'employés, au sujet de leurs conditions d'emploi.

5. Le droit d'exercer leurs droits sans crainte d'ingérence, de contrainte ou de discrimination.

[286] Aucun élément de l'article premier ne permet de conclure que des employés agricoles peuvent exiger de leur employeur qu'il négocie avec eux collectivement.

[287] Mes collègues se demandent à quoi bon exiger de l'employeur qu'il écoute ou lise les observations des employés si ce n'est pour qu'il y réponde. Le libellé de la loi est clair — donner aux employés l'occasion de faire valoir leurs observations plus efficacement en leur permettant de le faire collectivement plutôt qu'individuellement. Compte tenu des caractéristiques propres au secteur agricole reconnues à l'article premier, l'employeur a la liberté de répondre ou non. Malgré le respect que je dois à mes collègues, leur interprétation selon laquelle les mots « écouter », « lire » et « informer l'association d'employés par écrit » obligent l'employeur à prendre part à la négociation collective ne respecte pas l'intention qui se dégage du libellé clair de la *LPEA*.

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[288] Finally, the Chief Justice and LeBel J. say that when the government of Ontario introduced the *AEPA* it intended the legislation to provide protection for collective bargaining. They base their view on a statement made by the Minister (at the time) that the Act was meant to meet the obligations set by this Court in *Dunmore*. They say because the Minister used the word "meaningful" she intended that the *AEPA* would protect collective bargaining, as the majority of this Court deemed necessary in *Health Services*. They say this despite the fact that *Health Services* had not yet been written or even argued before this Court. They say this despite an explicit statement made by the Minister, which they quote at para. 106, that stated that the *AEPA* was not intended to "extend collective bargaining to agricultural workers". They suggest that the Minister was only disclaiming *Wagner Act* collective bargaining, rather than collective bargaining as they frame the term (*ibid*.).

[289] As with the words of the *AEPA*, I read the words of the Minister plainly as presented. The comments quoted by the Chief Justice and LeBel J. indicate that the *AEPA* was intended to meet the obligations in *Dunmore*, which did not include an obligation on employers to engage in collective bargaining. Given the absence of any requirement for collective bargaining in either *Dunmore* or the *AEPA* the Minister's comments support a plain reading of s. 5 as imposing only a duty to "listen to" or "read" the representations and "give the association a written acknowledgment" if the representations are made in writing.

[290] As the Chief Justice and LeBel J. are of the view that agricultural employers in Ontario have a duty of collective bargaining, the appropriate remedy would have to be a declaration that the *AEPA* is unconstitutional in its present form and expressly reading in words empowering the Agriculture, Food and Rural Affairs Appeal Tribunal to order employers to engage in collective bargaining. With respect, my colleagues' approach goes beyond the normal constraints of statutory interpretation; it amounts to an implied reading into the *AEPA* the duty of collective bargaining without declaring the

[288] Enfin, la Juge en chef et le juge LeBel affirment que le législateur ontarien a adopté la *LPEA* pour protéger le processus de négociation collective. Ils se fondent sur une déclaration de la ministre responsable (de l'époque) selon laquelle cette loi devait respecter les exigences énoncées par la Cour dans *Dunmore*. Selon eux, en précisant qu'il fallait que la liberté [TRADUCTION] « ait un sens », la ministre voulait protéger la négociation collective, comme la formation majoritaire l'avait jugé nécessaire dans *Health Services*. Ils tiennent ce propos malgré le fait que *Health Services* n'avait pas encore été rendu, ni même plaidé dans notre Cour, et malgré la déclaration explicite de la ministre, qu'ils citent au par. 106, voulant que la *LPEA* ne vise pas [TRADUCTION] « l'application de la négociation collective aux travailleurs agricoles ». Ils laissent entendre que la ministre excluait la conception de la négociation collective découlant de la *Loi Wagner*, et non la négociation collective au sens où ils l'entendent (*ibid*.).

[289] À mon avis, les termes employés par la ministre, comme ceux de la *LPEA*, sont énoncés clairement. Les passages cités par la Juge en chef et le juge LeBel révèlent que la *LPEA* visait à traduire les obligations imposées par l'arrêt *Dunmore*, qui n'astreignait pas l'employeur à prendre part à la négociation collective. Puisque ni cet arrêt, ni la *LPEA* ne prévoient une telle obligation, les remarques de la ministre appuient une interprétation littérale de l'art. 5, à savoir que l'employeur doit seulement « écouter » ou « lire » les revendications et « informe[r] l'association d'employés par écrit » si elles sont présentées par écrit.

[290] Dans la mesure où la Juge en chef et le juge LeBel estiment que l'employeur agricole, en Ontario, est tenu de négocier avec ses employés collectivement, la réparation appropriée devrait être de déclarer inconstitutionnelle la *LPEA* dans son libellé actuel et d'ajouter expressément un texte autorisant le Tribunal d'appel de l'agriculture, de l'alimentation et des affaires rurales à obliger l'employeur à négocier avec ses employés collectivement. En toute déférence, j'estime que la démarche de mes collègues va au-delà des règles habituelles d'interprétation; elle revient à inscrire dans la

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Act unconstitutional. The remedial approach of the Chief Justice and LeBel J. is, in my respectful view, entirely novel and unprecedented.

[291] As I have explained earlier, the proper judicial approach in matters of labour relations law is deference to the legislature. The imposition of a duty to bargain in good faith, like many other aspects of labour relations law, has the potential to reshape the economic landscape of entire industries by strengthening the position of organized labour. Such an outcome may be desirable, but the courts are not well suited to determining whether or not it is. Decisions of this kind require a balancing of interests rather than the application of legal principles, and they are best made after having consulted with and receiving representations from the various stakeholders whose livelihoods and economic interests are likely to be affected. Courts do not have the expertise or the institutional capacity to undertake such a process and thus are not well equipped to make an informed decision. If a duty to bargain in good faith is to be imposed, it should be by the legislature and not the court.

[292] The Chief Justice and LeBel J. say that the freedom to engage in a coordinated attempt to negotiate with one's employer is "meaningless" if it is not backed up by a reciprocal duty on the part of the employer. I cannot agree. The right to make representations in association is not meaningless. It is meaningful because of the increased persuasive weight carried by collective representations rather than individual representations. Indeed political parties are formed on this precise premise. As Le Dain J. noted in the *Alberta Reference*, at p. 391:

> . . . the freedom to work for the establishment of an association, to belong to an association, to maintain it, and to participate in its lawful activity without penalty or reprisal is not to be taken for granted. . . . It is a freedom that has been suppressed in varying degrees from time to time by totalitarian regimes.

LPEA l'obligation implicite de négocier collectivement sans déclarer la loi inconstitutionnelle. À mon humble avis, la réparation que préconisent la Juge en chef et le juge LeBel est tout à fait nouvelle et inédite.

[291] Comme je l'explique précédemment, les tribunaux doivent faire preuve de déférence à l'endroit du législateur en matière de relations de travail. L'imposition d'une obligation de négocier de bonne foi, comme bien d'autres volets du droit du travail, risque de modifier le contexte économique de secteurs d'activité en entier en renforçant la position des associations d'employés. Un tel résultat est peut-être souhaitable, mais les tribunaux ne sont pas à même d'en décider. Ce genre de décision nécessite une pondération d'intérêts plutôt qu'une application de principes juridiques, et il est préférable de trancher après consultation des divers intéressés dont le gagne-pain et les intérêts économiques sont susceptibles d'être touchés, et après examen de leurs observations. Les tribunaux n'ont ni l'expertise ni les moyens organisationnels requis pour entreprendre une telle démarche et ils ne sont donc pas à même d'arriver à une décision éclairée. Si l'obligation de négocier de bonne foi doit être imposée, elle doit l'être par le législateur et non par une cour de justice.

[292] La Juge en chef et le juge LeBel affirment que la liberté de tenter collectivement de négocier avec l'employeur est « vide de sens » si elle ne se double pas d'une obligation réciproque faite à ce dernier. Je ne suis pas d'accord. Le droit de s'associer pour présenter des observations n'est pas dépourvu de sens. Au contraire, il est réel, car les observations présentées collectivement ont une plus grande force persuasive que celles présentées individuellement, ce qui explique d'ailleurs l'existence de partis politiques. Comme le fait observer le juge Le Dain dans le *Renvoi relatif à l'Alberta*, p. 391 :

> . . . la liberté de travailler à la constitution d'une association, d'appartenir à une association, de la maintenir et de participer à ses activités licites sans faire l'objet d'une peine ou de représailles ne doit pas être tenue pour acquise. [. . .] C'est une liberté qui a été plus ou moins supprimée à l'occasion par des régimes totalitaires.

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[293] Canadians are accustomed to sound government and the respect for our personal liberties. For this reason, basic freedoms that are essential to the preservation of an open and democratic society may come to be taken for granted and their constitutional protection thought of as meaningless. However, freedom, unconstrained by oppressive government, is, indeed, more than meaningful. It is invaluable.

[294] Accordingly, on the matter of s. 2(*d*) of the *Charter*, I find that I cannot agree with the Chief Justice and LeBel J.

[295] I am in agreement with the Chief Justice and LeBel J. as to their disposition of the issues under s. 15. On the record before this Court, the category of "agricultural worker" does not rise to the level of an immutable (or constructively immutable) personal characteristic of the sort that would merit protection against discrimination under s. 15.

VIII. Conclusion

[296] For these reasons, I would dispose of the constitutional questions in the same way as the Chief Justice and LeBel J., allow the appeal and restore the judgment of Farley J.

The following are the reasons delivered by

[297] Deschamps J. — Canadian labour law is not static. Over the years, some of the changes in this field have been reflected in judicial decisions, such as those on freedom of association under s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*. *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, fed expectations, but it also caused some bewilderment. More importantly, it generated an unnecessary debate about whether a duty to bargain in good faith has been imposed on employers. I will begin by demonstrating why, in my view, the case at bar can and should be resolved on the basis of the answers this Court actually gave to the questions raised in *Health Services*, in which

[293] Bon gouvernement et respect des libertés individuelles vont de soi pour les Canadiens. C'est pourquoi il peut arriver que les libertés fondamentales essentielles à la préservation d'une société ouverte et démocratique ne soient pas appréciées à leur juste valeur et que leur protection constitutionnelle paraisse dépourvue de sens. Toutefois, la liberté dont l'exercice n'est pas entravé par un gouvernement oppressif est non seulement réelle, elle est inestimable.

[294] Par conséquent, en ce qui concerne l'al. 2*d*) de la *Charte*, je ne peux me rallier à mes collègues la Juge en chef et le juge LeBel.

[295] Je souscris à leur décision quant à ce qui relève de l'application de l'art. 15. Au vu du dossier, la fonction de « travailleur agricole » ne confère pas une caractéristique personnelle immuable (ou considérée comme immuable) justifiant la protection contre la discrimination garantie à l'art. 15.

VIII. Conclusion

[296] Pour ces motifs, je suis d'avis de répondre aux questions constitutionnelles de la même manière que l'ont fait la Juge en chef et le juge LeBel, d'accueillir le pourvoi et de rétablir la décision du juge Farley.

Version française des motifs rendus par

[297] La juge Deschamps — Le droit canadien du travail n'est pas immuable. Au fil des ans, son évolution est reflétée dans la jurisprudence, par exemple dans les décisions portant sur la liberté d'association garantie par l'al. 2*d*) de la *Charte canadienne des droits et libertés*. L'arrêt *Health Services and Support — Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, 2007 CSC 27, [2007] 2 R.C.S. 391, a nourri des attentes, mais il a aussi causé un certain étonnement. Mais surtout, il a suscité un débat inutile quant à savoir si l'employeur avait désormais l'obligation de négocier de bonne foi. Je vais d'abord démontrer pourquoi, à mon avis, le présent litige peut et devrait être tranché à partir des réponses effectivement

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the issue of an employer's duty to bargain in good faith was not even raised. I will then briefly explain why I am of the view that the analytical framework articulated by the Court in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, should be limited to the context of that case.

I. Interpreting *Health Services*

[298] When the case at bar was heard by the Ontario Superior Court of Justice ((2006), 79 O.R. (3d) 219), this Court's judgment in *Health Services* had not yet been released. The issue put to Farley J. at that time was whether the *Agricultural Employees Protection Act, 2002*, S.O. 2002, c. 16 ("*AEPA*"), was consistent with this Court's decision in *Dunmore*. *Health Services* was released after Farley J.'s judgment, but before the Court of Appeal heard the appeal in the case at bar (2008 ONCA 760, 92 O.R. (3d) 481). As a result of comments made by the majority in *Health Services*, the case proceeded down a completely different path in the Court of Appeal, where the issue was whether union exclusivity, majoritarianism and mechanisms for resolving bargaining impasses and disputes — all parts of the "Wagner model" on which Canadian labour law statutes are based — were required by the *Charter*.

[299] At first glance, the Ontario Court of Appeal's affirmative response to this question is so far removed from any conclusion reached in *Health Services* that it seems surprising. After all, the majority in *Health Services* made it crystal clear that no specific model of labour relations is protected by s. 2(*d*) of the *Charter*, as they said: ". . . the right is to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method" (para. 91). By so stating, the majority of this Court were indicating that the Wagner model is not enshrined in the *Charter*. However, considering the predominance of the Wagner model in Canadian labour law, it is easy to see how Winkler C.J.O. reached

données par notre Cour aux questions soulevées dans *Health Services*, un dossier où l'obligation de l'employeur de négocier de bonne foi n'avait même pas été alléguée. Ensuite, j'expliquerai brièvement les raisons pour lesquelles j'estime qu'il faut limiter l'application du cadre analytique établi par la Cour dans l'arrêt *Dunmore c. Ontario (Procureur général)*, 2001 CSC 94, [2001] 3 R.C.S. 1016, au contexte de cette affaire.

I. Interprétation de l'arrêt *Health Services*

[298] Le juge Farley de la Cour supérieure de justice de l'Ontario ((2006), 79 O.R. (3d) 219) a entendu l'affaire avant que notre Cour ait rendu l'arrêt *Health Services*. Il était alors appelé à décider si la *Loi de 2002 sur la protection des employés agricoles*, L.O. 2002, ch. 16 (« *LPEA* »), était conforme à l'arrêt *Dunmore*. Le jugement dans l'affaire *Health Services* a été rendu après la décision du juge Farley, mais avant l'audition devant la Cour d'appel dans la présente affaire (2008 ONCA 760, 92 O.R. (3d) 481). En raison de certaines observations des juges majoritaires dans *Health Services*, le débat en Cour d'appel a pris une tournure complètement différente. Le débat a porté sur la question de déterminer si la *Charte* consacre le monopole d'un syndicat et le vote majoritaire et si elle exige des mécanismes permettant de dénouer les impasses et de résoudre les différends — trois éléments du « modèle Wagner » qui constitue l'assise des lois du travail au Canada.

[299] Au premier coup d'œil, la réponse affirmative de la Cour d'appel de l'Ontario a si peu à voir avec quelque conclusion tirée dans *Health Services* qu'elle en est surprenante. Après tout, il ressort on ne peut plus clairement de cet arrêt que l'al. 2*d*) de la *Charte* ne protège pas un modèle particulier de relations du travail. Pour reprendre les propos des juges majoritaires dans cette affaire : « [l'al. 2*d*)] confère le droit de participer à un processus général de négociation collective et non le droit de revendiquer un modèle particulier de relations du travail ou une méthode particulière de négociation » (par. 91). Ils précisent donc que la *Charte* ne consacre pas le modèle Wagner. Or, vu la prédominance de ce modèle en droit canadien du travail, on peut

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the conclusion that the majority in *Health Services* must have been contemplating exclusivity, majoritarianism and mechanisms for resolving bargaining impasses and disputes at the same time as they discussed the duty to bargain in good faith. In my view, the holding in *Health Services* does not have the broad scope being attributed to it by the majority in the case at bar and, in particular, does not extend to imposing a duty on employers to bargain in good faith. I find that the *AEPA* is consistent with this Court's conclusion in *Dunmore* and would therefore allow the appeal, but for different reasons than the majority.

[300] My reading of *Health Services* is that it represents a step forward in the recognition of collective activities: joining individual voices through collective bargaining to achieve common goals is protected by the *Charter.* In that case, I endorsed the view, which I still hold, that:

(1) 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;

(2) the right is to a process of collective bargaining — it does not guarantee a certain substantive or economic outcome or access to any particular statutory regime; and

(3) the right places constraints on the exercise of legislative powers in respect of the collective bargaining process. [para. 174]

[301] This incremental interpretation of s. 2(*d*) of the *Charter* was sufficient to dispose of the questions raised in *Health Services* and is also sufficient to dispose of those raised in this appeal. It leaves it up to the legislatures to make the difficult policy choices that must be made in order to achieve economic balance in labour law. This interpretation is also consistent with the restraint courts show in resolving the issues raised by the parties before them. The approach should not differ in cases involving constitutional interpretation.

facilement expliquer la conclusion du juge en chef Winkler, à savoir que les juges majoritaires dans *Health Services*, lorsqu'ils ont examiné l'obligation de négocier de bonne foi, ont dû envisager le monopole d'un syndicat, le vote majoritaire et les mécanismes permettant de dénouer les impasses et de résoudre les différends. À mon avis, la décision rendue dans *Health Services* n'a pas la vaste portée que lui attribuent les juges majoritaires en l'espèce, et, tout particulièrement, elle n'a pas pour effet d'étendre aux employeurs l'obligation de négocier de bonne foi. J'estime que la *LPEA* respecte la conclusion de la Cour dans *Dunmore* et je suis aussi d'avis d'accueillir l'appel, mais pour d'autres motifs que les juges majoritaires.

[300] Selon moi, l'arrêt *Health Services* représente une étape importante dans la reconnaissance des activités collectives : la *Charte* protège le regroupement de voix individuelles par la négociation collective en vue de la réalisation d'objectifs communs. J'y exprimais l'avis suivant, auquel j'adhère toujours :

(1) Le droit constitutionnel de négocier collectivement vise à protéger la capacité des travailleurs de participer à des activités associatives et leur capacité d'agir collectivement pour réaliser des objectifs communs concernant des questions liées au milieu de travail et leurs conditions de travail.

(2) Il s'agit d'un droit à un processus de négociation collective — il ne garantit pas l'atteinte de résultats quant au fond de la négociation ou à ses effets économiques ni l'accès à un régime légal précis.

(3) Le droit en cause restreint le pouvoir de légiférer en matière de négociation collective. [par. 174]

[301] Cette interprétation évolutive de l'al. 2*d*) de la *Charte* suffisait pour trancher le litige dans *Health Services*, et elle suffit aussi en l'espèce. Elle laisse le soin au législateur de faire les choix politiques difficiles qui s'imposent pour établir un équilibre entre les forces économiques qui s'opposent en droit du travail. Elle est également empreinte de la déférence dont font preuve les tribunaux pour trancher les questions que soulèvent les parties, une déférence qui demeure de mise en matière d'interprétation constitutionnelle.

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[302] As the majority in the instant case note (at para. 80), in *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 S.C.R. 209, LeBel J. acknowledged the existence of a judicial policy of non-intervention in labour relations. He made the following comment in that case:

> Looking back over nearly 20 years of the application of the *Charter*, it is clear that this Court has been reluctant to accept that the whole field of labour relations should fall under the constitutional guarantee of s. 2(*d*). The law of collective bargaining, as it has developed in Canada since the Depression beginning in 1929 and the Second World War, as well as union and employer conflicts like strikes and lockouts, have been left largely to legislative control based on government policy. Laws restricting the choice of a bargaining agent or forbidding strikes and lockouts were deemed not to engage the guarantee of freedom of association as such. The social and economic balance between employers and their collective unionized employees was viewed as a question of policy making and management of sharply conflicting interests. Thus, it was thought more appropriate to leave the resolution of such conflicts and the policy choices they required to the political process. [para. 156]

Where the economic balance is concerned, I share the view expressed by LeBel J. in *Advance Cutting*:

> Legislatures are entitled to a substantial, though not absolute, degree of latitude and deference, to settle social and economic policy issues (*RJR-MacDonald*, at para. 134, *per* McLachlin J.). Courts should be mindful to avoid second-guessing legislatures on controversial and complex political choices (*M. v. H.*, [1999] 2 S.C.R. 3, at para. 79, *per* Cory and Iacobucci JJ.). As discussed above, the jurisprudence acknowledges that legislative policy-making in the domain of labour relations is better left to the political process, as a general rule. [para. 257]

[303] An approach to constitutional interpretation similar to the one I set out above would have ensured a softer landing for *Health Services*. I readily acknowledge that the commentary on that decision was not unanimous. The Chief Justice and LeBel J. refer to the authors whose comments were mostly favourable, while Rothstein J. refers to those who were mostly unfavourable. I disagree

[302] Comme le font remarquer les juges majoritaires dans le présent dossier (par. 80), dans *R. c. Advance Cutting & Coring Ltd.*, 2001 CSC 70, [2001] 3 R.C.S. 209, le juge LeBel reconnaît l'existence d'un principe de non-intervention des tribunaux dans les relations du travail :

> Il ressort clairement de l'examen de l'application de la *Charte*, sur près de 20 ans, que notre Cour hésite à accepter que l'ensemble du domaine des relations du travail soit visé par la garantie constitutionnelle de l'al. 2*d*). Le droit de la négociation collective, tel qu'il a évolué au Canada, depuis la Dépression qui commença en 1929 et la Seconde Guerre mondiale, de même que les conflits entre syndicats et employeurs, comme les grèves et les lock-out, ont été laissés dans une large mesure au contrôle du législateur, fondé sur les orientations de la politique gouvernementale. Les lois restreignant le choix de l'agent négociateur ou interdisant les grèves et les lock-out étaient réputées ne pas mettre en jeu la garantie de liberté d'association en soi. L'équilibre social et économique entre les employeurs et leurs employés syndiqués était considéré comme un problème d'élaboration de politiques publiques et de gestion d'intérêts nettement divergents. On a donc jugé préférable de laisser au processus politique le règlement de ces conflits et les choix de politique que ceux-ci exigeaient. [par. 156]

Au sujet de l'équilibre économique, je fais mienne l'opinion du juge LeBel dans ce même arrêt :

> Le législateur a droit à un degré de latitude et de retenue important, mais pas absolu, de la part des tribunaux pour régler les questions de politique sociale et économique (*RJR-MacDonald*, par. 134, le juge McLachlin). Les tribunaux doivent se garder de se substituer, après coup, aux législateurs relativement à leurs choix politiques controversés et complexes (*M. c. H.*, [1999] 2 R.C.S. 3, par. 79, les juges Cory et Iacobucci). Comme je l'ai mentionné précédemment, la jurisprudence reconnaît qu'il vaut généralement mieux laisser au processus politique le soin d'élaborer les principes directeurs en matière de législation dans le domaine des relations du travail. [par. 257]

[303] Si dans *Health Services* les juges majoritaires avaient eu recours à une interprétation constitutionnelle semblable à celle que je décris ci-dessus, leur décision n'aurait pas suscité tant de controverse. Je reconnais d'emblée que les critiques dont a fait l'objet la décision ne sont pas unanimes. La Juge en chef et le juge LeBel renvoient aux auteurs dont les commentaires sont favorables dans l'ensemble, et le

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with the expansive approach taken by the majority in the case at bar and with the use they make of *Health Services*. A more prudent approach, one that would be consistent with this Court's jurisprudence on s. 2(*d*) and with the issues the Court actually considered in that case, would be to restrict the *ratio* of *Health Services* to the questions actually raised and the answers actually given in that case.

[304] In *Health Services*, the claimants asked this Court to declare that the government had interfered with their right to unite to achieve common goals. While they recognized that under most Canadian labour law statutes, employers had an obligation to bargain in good faith, the claimants were not seeking a declaration characterizing this obligation as a constitutional one. Neither the British Columbia Supreme Court nor the Court of Appeal dealt with a duty on employers to bargain in good faith, because this subject was quite simply not raised. Indeed, it was in its legislative capacity — not as an employer — that the government had interfered with the employee's rights. Therefore, the majority in *Health Services* did not need to comment on or make findings in respect of whether the government, as an employer, had a duty to negotiate in good faith. There was thus no need to *impose* a *Charter*-based *duty* to bargain on employers. *A fortiori*, there was no need to import, together with this duty, the *good faith* element that is one of the hallmarks of the Wagner model and that inevitably entails a number of statutory components. I cannot therefore agree with the majority in the case at bar that *Health Services* imposes constitutional duties "on governments as employers" (para. 73).

[305] All that was required by the questions raised in *Health Services* was a finding that since the employees had a constitutional right to engage in associational activities and act in common to reach common goals, the legislature could not interfere with their right (i) by prohibiting them from

juge Rothstein, à ceux dont les opinions sont pour la plupart défavorables. Je ne peux souscrire à l'interprétation large que préconisent les juges majoritaires en l'espèce, ni à leur application de l'arrêt *Health Services*. Une approche plus prudente, compatible avec la jurisprudence de la Cour relative à l'al. 2*d*) et axée sur le véritable objet du litige dans cette affaire, consiste à s'en tenir à la décision rendue à l'égard des questions effectivement soulevées dans *Health Services*.

[304] Dans *Health Services*, les appelants demandaient à notre Cour de déclarer que l'État avait entravé l'exercice de leur droit de s'unir en vue d'atteindre des objectifs communs. Certes, ils reconnaissaient que la plupart des lois canadiennes du droit du travail obligent l'employeur à négocier de bonne foi, mais ils ne demandaient pas à la Cour de déclarer que cette obligation avait un fondement constitutionnel. En fait, ni la Cour suprême de la Colombie-Britannique, ni la Cour d'appel n'ont abordé la question de l'obligation de l'employeur de négocier de bonne foi, car elle ne leur avait pas été soumise. En effet, dans *Health Services*, c'était à titre de législateur — et non d'employeur — que l'État avait entravé l'exercice des droits des employés. Par conséquent, les juges majoritaires n'étaient pas requis de commenter ou de tirer des conclusions concernant la question de savoir si, en tant qu'employeur, l'État avait l'obligation de négocier de bonne foi. Il n'était donc pas nécessaire d'*imposer* à l'employeur une *obligation* de négocier fondée sur la *Charte*. Il n'était, à plus forte raison, pas nécessaire de préciser qu'il s'agissait d'une obligation de négocier de *bonne foi*, une caractéristique propre au modèle Wagner et qui emporte forcément la reconnaissance d'un certain nombre d'éléments d'origine législative. C'est pourquoi je ne puis convenir avec les juges majoritaires en l'espèce que l'arrêt *Health Services* impose des obligations constitutionnelles « aux gouvernements à titre d'employeurs » (par. 73).

[305] Tout ce qui était requis par les questions posées dans *Health Services* était de conclure que, vu le droit constitutionnel des employés de participer à des activités associatives et d'agir collectivement pour réaliser des objectifs communs, le législateur ne pouvait entraver le droit des employés

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addressing certain issues in the collective bargaining process; and (ii) by cancelling negotiated provisions in the agreements and thereby rendering the process meaningless. By enacting legislation that had prohibited the negotiation of certain issues in the course of *Charter*-protected associational activities and rendering useless the efforts expended to achieve a negotiated agreement on certain subjects, the legislature had interfered with their right. This conclusion did not depend on the employer's being under a duty to bargain in good faith.

[306] In the case at bar, the issue is similar to the one in *Health Services* in that it concerns legislative action, but it is not, as the Chief Justice and LeBel J. put it, whether the "*AEPA* provides a process that satisfies" "the right of an employees' association to make representations to the employer and have its views considered in good faith" (para. 99). Although the right of employees to have their views considered in good faith may well flow from certain comments made in *Health Services*, they do not flow from the issues raised in that case. The duty to act in good faith is part and parcel of a web of statutory components. It should not be found to be a constitutional requirement in the instant case.

[307] To frame the issue in this case, the *AEPA* must be situated in its context. The *AEPA* is the response of the Ontario legislature to this Court's decision in *Dunmore*. In that case, agricultural workers had been excluded from the general statutory regime and had suffered from the statute's underinclusiveness. The expanded definition of "freedom of association" that resulted from *Health Services* has no bearing on the protection the Ontario legislature must provide to agricultural workers. The reason is that *Dunmore* purported to impose on the Ontario legislature an obligation to provide agricultural workers with more than what had until then been considered to be included in the scope of the constitutionally protected right to associate. Indeed, the decision in *Dunmore*, which was consistent with *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, at para. 10, was based on the premise that s. 2(*d*) "exists independently of any legislative framework". However,

(i) par l'interdiction de la négociation collective de certaines questions et (ii) par l'annulation des dispositions des conventions collectives qui prive de sens ce processus. En adoptant une loi qui soustrayait certaines questions à l'activité associative par ailleurs protégée par la *Charte* et en rendant futiles les efforts déployés pour négocier certains sujets, le législateur avait effectivement porté atteinte au droit des employés. Or, pour conclure en ce sens, nul n'était besoin de déterminer si l'employeur avait l'obligation de négocier de bonne foi.

[306] La présente affaire est analogue à *Health Services* en ce sens qu'elle porte sur l'action législative, mais la Juge en chef et le juge LeBel ont tort de considérer que le litige réside dans la question de savoir si « la *LPEA* prévoit un processus » qui respecte « le droit d'une association d'employés de présenter des observations à l'employeur et de les voir prises en compte de bonne foi » (par. 99). Le droit des employés à l'examen de bonne foi de leurs revendications par l'employeur peut peut-être s'inférer de remarques formulées dans l'arrêt *Health Services*, mais pas des réponses aux questions qui y étaient soulevées. Si l'obligation d'agir de bonne foi s'inscrit dans un faisceau de dispositions législatives, il ne saurait être question en l'espèce de la tenir pour constitutionnelle.

[307] Pour cerner la question en litige en l'espèce, il faut replacer la *LPEA* dans son contexte. Par l'adoption de cette loi, le législateur ontarien donnait suite à la décision de notre Cour dans l'affaire *Dunmore*. Dans cette affaire, les travailleurs agricoles avaient été exclus de la législation générale du travail et en subissaient un préjudice. L'élargissement de la définition de « liberté d'association » résultant des conclusions prononcées dans *Health Services* n'a aucune incidence sur la protection que le législateur ontarien doit accorder aux employés agricoles. En effet, l'arrêt *Dunmore* avait pour objet d'imposer à la législature ontarienne l'obligation d'offrir à cette catégorie de travailleurs une protection supérieure à celle que l'on considérait jusqu'alors découler de la liberté d'association garantie par la Constitution. L'arrêt *Dunmore*, qui s'inscrivait dans la foulée de l'arrêt *Delisle c. Canada (Sous-procureur général)*, [1999] 2 R.C.S. 989, au par. 10, avait effectivement pour prémisse que l'al. 2*d*) « existe en dehors de

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it was held that agricultural workers should be afforded greater protection because they were vulnerable and were substantially unable to exercise their constitutional right without the support of a legislative framework.

[308] As I explained above, in my view, the effect of *Health Services* is that freedom of association includes the freedom to engage in associational activities and the ability of employees to act in common to reach shared goals related to workplace issues and terms of employment. This delineation of the scope of freedom of association does not entail a more expansive protection than the legislative framework mandated by *Dunmore* for the agricultural workers. Therefore, if the *AEPA* complies with *Dunmore*, it will necessarily comply with the *Charter*. To answer the question in the case at bar, there is no need to import a duty to bargain in good faith. I cannot therefore agree with the statement of the majority in the case at bar that, "[s]ince *Health Services*, it has been clear that [a meaningful exercise of the right to associate] requires employers to consider employee representations in good faith" (para. 104).

[309] I would be remiss were I not to mention the observation of the majority in *Health Services* (at para. 88) that, owing to s. 32 of the *Charter*, "a private employer is not bound" by s. 2(*d*) seems to have been lost in the case at bar. The requirement created by the majority in the instant case (at para. 73) that the legislature "impose statutory obligations on employers" to conduct good faith negotiations cannot be found in *Health Services*. As a result of this new requirement, Parliament and the legislatures will now, subject to justification under s. 1 of the *Charter*, have a constitutional obligation to ensure that their Wagner-based labour legislation includes *all* employees. The irony of this result is that no such obligation was sought by the claimants either in *Dunmore* or in *Health Services*, the very cases on which the majority now rely to support their statement in this appeal.

tout cadre législatif ». Or, les employés agricoles avaient besoin d'une protection accrue parce qu'ils étaient vulnérables et qu'il leur était essentiellement impossible d'exercer leur droit constitutionnel sans l'appui de la loi.

[308] Comme je l'ai expliqué ci-dessus, suivant l'arrêt *Health Services*, la liberté d'association englobe la liberté de participer à des activités associatives et la faculté des employés d'agir de concert pour réaliser des objectifs communs concernant le travail et les conditions d'emploi. Définie de la sorte, la liberté d'association ne nécessite pas une protection plus grande que celle prévue par le cadre législatif dont la Cour ordonne l'adoption dans l'arrêt *Dunmore* pour régir les employés agricoles. Par conséquent, si la *LPEA* respecte les principes énoncés dans l'arrêt *Dunmore*, elle est forcément conforme à la *Charte*. Il n'est pas nécessaire d'intégrer quelque obligation de négocier de bonne foi pour statuer en l'espèce. C'est pourquoi je ne peux souscrire à l'énoncé des juges majoritaires selon lesquels « [d]epuis l'arrêt *Health Services*, il est clair que l'employeur doit [du fait de l'exercice véritable du droit de s'associer] examiner de bonne foi les observations de ses employés » (par. 104).

[309] Je ne saurais passer sous silence l'observation des juges majoritaires dans *Health Services* selon laquelle, vu l'application de l'art. 32 de la *Charte*, « [u]n employeur du secteur privé n'est pas lié par l'al. 2*d*) » (par. 88). La remarque semble omise du raisonnement qu'ils tiennent en l'espèce. L'affirmation des juges majoritaires dans le présent dossier (par. 73) qu'il incombe aux législateurs d'imposer à tous les employeurs de négocier de bonne foi ne trouve aucun fondement dans *Health Services*. Au vu de cette obligation nouvelle, les législateurs fédéral et provinciaux devraient dorénavant, pour respecter la Constitution, faire en sorte que leur législation axée sur le modèle Wagner s'applique à *tous* les employés, sauf justification au regard de l'article premier. Le résultat est ironique dans la mesure où nul n'avait demandé la reconnaissance d'une telle obligation dans les affaires *Dunmore* et *Health Services*, celles-là mêmes qu'invoquent aujourd'hui les juges majoritaires en se prononçant en l'espèce.

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[310] If Parliament and the legislatures are required to impose, in their statutory schemes, a duty on employers to bargain in good faith, this duty will apply to all public and private sector employees. *Dunmore*, which concerned the exclusion of a group of employees who required assistance to exercise their constitutional right to associate, will now apply to all Canadian employees regardless of whether they need such support to exercise their s. 2(*d*) right (see *Delisle*). This being so, the Court will be making a policy decision in the place of Parliament and the legislatures. I would prefer to exercise restraint in such a case.

[311] Because my interpretation of *Health Services* is based on the questions that were actually raised in that case and the answers the Court actually gave to those questions, I am of the view that in the instant case, the *AEPA* has not been proven to violate the employees' right to associate. Section 1 of the *AEPA* lists the rights of agricultural employees as follows: (1) the right to form or join an employees' association; (2) the right to participate in the lawful activities of an employees' association; (3) the right to assemble; (4) the right to make representations to their employers, through an employees' association, respecting the terms and conditions of their employment; and (5) the right to protection against interference, coercion and discrimination in the exercise of their rights. Farley J. pointed out that *Dunmore* did not require the "legislation . . . to incorporate a complete panoply of collective bargaining rights" (para. 22) and found that the impugned legislation met the standards established in *Dunmore*. I agree with Farley J., and I respectfully disagree with the Court of Appeal's interpretation.

[312] Since *Dunmore* remains central to this appeal, I must comment briefly on the approach taken in that case.

II. Approach From *Dunmore*

[313] In *Health Services* (at para. 176), I voiced concerns about the majority's adoption of a criterion

[310] Si les législateurs fédéral et provinciaux doivent prévoir dans leur régime législatif respectif l'obligation de l'employeur de négocier de bonne foi, tous les employés, du secteur public et du secteur privé, peuvent en demander le respect. L'arrêt *Dunmore*, rendu à l'égard d'un groupe d'employés exclus de la législation générale du travail et qui avaient besoin de soutien pour exercer leur droit constitutionnel de s'associer, vaut désormais pour tous les employés canadiens, peu importe qu'ils aient besoin ou non de l'appui de l'État pour exercer la liberté que leur garantit l'al. 2*d*) (voir *Delisle*). De ce fait, les juges majoritaires prennent une décision politique qui devrait revenir aux législateurs fédéral et provinciaux. Je préférerais m'en abstenir en l'espèce.

[311] Comme j'interprète l'arrêt *Health Services* en fonction des questions effectivement soulevées et tranchées dans ce dossier, j'estime qu'il n'est pas démontré en l'espèce que la *LPEA* contrevient au droit des employés de s'associer. L'article premier de la *LPEA* énumère ainsi les droits des travailleurs agricoles : (1) le droit de former une association d'employés ou d'adhérer à une telle association; (2) le droit de participer aux activités légitimes d'une association d'employés; (3) le droit de réunion; (4) le droit de présenter des observations à leurs employeurs, par l'intermédiaire d'une association d'employés, au sujet de leurs conditions d'emploi; (5) le droit d'exercer leurs droits sans crainte d'ingérence, de contrainte ou de discrimination. Le juge Farley souligne que l'arrêt *Dunmore* n'exige pas que [TRADUCTION] « la loi comprenne toute la panoplie des droits de négociation collective » (par. 22). À son avis, la loi contestée respecte cet arrêt. Je suis d'accord avec lui et, avec respect pour leur opinion, je rejette l'interprétation des juges de la Cour d'appel.

[312] Comme l'arrêt *Dunmore* demeure au cœur du présent pourvoi, il me paraît utile de commenter brièvement l'approche dans ce dossier.

II. L'approche de l'arrêt *Dunmore*

[313] Dans *Health Services* (par. 176), j'ai émis des réserves au sujet de l'emprunt, par les juges

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used in *Dunmore* to determine whether the government had infringed a *Charter* right. Even though both cases are based on compelling facts, principles should not be imported from one context into another that is not analogous to it. As I explained above, a similar unwarranted importation of principles can be observed in the case at bar. But there is more.

[314] It is helpful to recall that, as noted by Judy Fudge, "[a]t issue in *Dunmore* was the total exclusion of agricultural workers in Ontario from any form of labour legislation that protected them against employer retaliation from joining and participating in a trade union. The union did not ask for collective bargaining rights" ("The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the *Health Services and Support* case in Canada and Beyond" (2008), 37 *Indus. L.J.* 25, at p. 30).

[315] *Dunmore* was obviously a difficult case. At its heart was the economic inequality being suffered by agricultural workers. While labour law is to some extent always about economic inequality, this issue does not occupy the forefront of every battle. *Health Services* was not primarily about economic inequality — it concerned legislative interference with both existing and future collective agreements. Although economic inequality has the potential to undermine the peaceful foundations of democratic societies, economic equality is not an "equality right" for the purposes of s. 15 of the *Charter*. In addition, even though labour law provides tools that help reduce economic inequality, not all aspects of labour law are protected by the *Charter* (see *Health Services*, at para. 19). Finally, employment status is not, at least not at this time, regarded as an analogous ground for the purposes of s. 15 of the *Charter*.

[316] *Dunmore* was based on the distinction between positive and negative rights. In my view,

majoritaires, d'une norme employée dans l'arrêt *Dunmore* pour déterminer si une mesure gouvernementale contrevient à un droit garanti par la *Charte*. Même si, dans les deux affaires, les faits paraissaient irrésistibles, il n'était pas justifié de transposer d'une affaire à l'autre des principes énoncés pour des problèmes différents. Comme je l'ai expliqué ci-dessus, le présent dossier comporte une autre transposition indue. Mais ce n'est pas tout.

[314] Pour reprendre les propos utiles de Judy Fudge, [TRADUCTION] « [d]ans *Dunmore*, le litige portait sur l'exclusion totale des employés agricoles ontariens du régime légal de relations du travail qui aurait pu les protéger contre les représailles de leur employeur s'ils avaient adhéré à un syndicat et participé à ses activités. Le syndicat ne demandait pas de droits de négociation collective » (« The Supreme Court of Canada and the Right to Bargain Collectively : The Implications of the *Health Services and Support* case in Canada and Beyond » (2008), 37 *Indus. L.J.* 25, p. 30).

[315] À l'évidence, l'affaire *Dunmore* était délicate, car elle avait pour origine l'inégalité économique des employés agricoles. Si, dans une certaine mesure, la question de l'égalité économique est toujours en cause en droit du travail, elle n'occupe pas l'avant-scène dans chaque conflit. En effet, *Health Services* n'intéressait pas principalement l'inégalité économique, mais portait sur l'atteinte par voie législative aux conventions collectives existantes et ultérieures. Même si l'inégalité économique est susceptible de miner les fondements pacifiques de nos sociétés démocratiques, l'égalité économique ne constitue pas l'un des « droits à l'égalité » garantis à l'art. 15 de la *Charte*. En outre, même si le droit du travail offre des outils qui contribuent à atténuer la disparité des revenus, tous ses aspects ne bénéficient pas de la protection de la *Charte* (voir *Health Services*, par. 19). Enfin, la situation professionnelle n'est pas reconnue — du moins pas pour l'instant — comme un motif analogue à ceux énumérés à l'art. 15 de la *Charte*.

[316] L'arrêt *Dunmore* repose sur la distinction entre droits positifs et droits négatifs. À mon sens,

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using this distinction as a basis for finding that s. 2(*d*) has been infringed involves some difficulty. Both the commentary and the case law provide sufficient justification for exercising caution before adopting an approach that relies on the positive-negative distinction, particularly when the claim concerns state action or inaction. Stephen Holmes and Cass R. Sunstein express this eloquently in *The Cost of Rights: Why Liberty Depends on Taxes* (1999), at pp. 43-44:

> Individuals enjoy rights, in a legal as opposed to a moral sense, only if the wrongs they suffer are fairly and predictably redressed by their government. This simple point goes a long way toward disclosing the inadequacy of the negative rights/positive rights distinction. What it shows is that all legally enforced rights are necessarily positive rights.
>
> . . . That is to say, personal liberty cannot be secured merely by limiting government interference with freedom of action and association. No right is simply a right to be left alone by public officials.

This brings to mind Cory and Iacobucci JJ.'s response in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at para. 56, to an argument that was analogous to the positive-negative rights dichotomy:

> It is said, however, that this case is different because the challenge centres on the legislature's failure to extend the protection of a law to a particular group of people. This position assumes that it is only a positive act rather than an omission which may be scrutinized under the *Charter*. In my view, for the reasons that will follow, there is no legal basis for drawing such a distinction.

[317] Distinguishing between the freedom to exercise a right without state interference and the right to exercise a freedom unhampered by state action or inaction diverts the discussion from the substance of the actual protection afforded by the *Charter*. In our society, government activity is pervasive and unavoidable: see S. Bandes, "The Negative Constitution: A Critique" (1990), 88 *Mich. L. Rev.* 2271, at p. 2285, and *Greater Vancouver Transportation Authority v. Canadian Federation*

il est périlleux de recourir à cette distinction pour déterminer s'il y a atteinte à l'al. 2*d*). La doctrine et la jurisprudence nous justifient amplement de faire preuve de prudence avant de s'engager dans une démarche fondée sur une telle distinction, en particulier lorsqu'une action ou une omission de l'État est en cause. Stephen Holmes et Cass R. Sunstein l'affirment d'ailleurs avec éloquence dans *The Cost of Rights : Why Liberty Depends on Taxes* (1999), p. 43-44 :

> [TRADUCTION] L'individu ne jouit d'un droit, au sens juridique et non moral, que lorsque le préjudice qu'il subit est susceptible de réparation équitable par l'État. Ce seul énoncé fait ressortir les lacunes de la distinction entre droits positifs et droits négatifs. Il montre que tout droit légalement susceptible d'exécution est forcément positif.
>
> . . . On ne peut donc faire respecter la liberté personnelle en empêchant seulement l'État d'entraver la liberté d'action et d'association. Le droit de ne pas être importuné par un représentant de l'État n'existe tout simplement pas.

Ces propos rappellent l'accueil que les juges Cory et Iacobucci, dans l'arrêt *Vriend c. Alberta*, [1998] 1 R.C.S. 493, par. 56, réservent à une thèse semblable à celle fondée sur la distinction entre droits positifs et droits négatifs :

> On prétend toutefois que la présente affaire se distingue parce que la contestation porte essentiellement sur le fait que le législateur n'a pas accordé la protection d'une loi à un groupe de personnes en particulier. Les tenants de cette théorie tiennent pour acquis que seule l'action positive, par opposition à l'omission, peut faire l'objet d'un examen fondé sur la *Charte*. Pour les motifs exposés ci-après, j'estime qu'une telle distinction n'a aucun fondement juridique.

[317] Distinguer entre la liberté d'exercer un droit et le droit d'exercer une liberté, sans entrave active ou passive de l'État, risque de détourner le débat de la teneur réelle de la garantie constitutionnelle. Dans notre société, l'État est omniprésent : voir S. Bandes, « The Negative Constitution : A Critique » (1990), 88 *Mich. L. Rev.* 2271, p. 2285, et *Greater Vancouver Transportation Authority c. Fédération canadienne des étudiantes et étudiants — Section Colombie-*

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of Students — British Columbia Component, 2009 SCC 31, [2009] 2 S.C.R. 295, at para. 34.

[318] *Dunmore* was concerned with economic inequality. It was based on the notion that the *Charter* does not ordinarily oblige the government to take action to facilitate the exercise of a fundamental freedom. Recognition was given to the dichotomy between positive and negative rights. To get around the general rule, a somewhat convoluted framework was established for cases in which the vulnerability of a group justified resorting to government support. I agree with B. Langille, "The Freedom of Association Mess: How We Got into It and How We Can Get out of It" (2009), 54 *McGill L.J.* 177, that this detour appears to have been an artifice designed to sidestep the limits placed on the recognition of analogous grounds for the purposes of s. 15.

[319] To redress economic inequality, it would be more faithful to the design of the *Charter* to open the door to the recognition of more analogous grounds under s. 15, as L'Heureux-Dubé J. proposed in *Dunmore*. Such an approach is preferable to relying on a distinction that does not rest on a solid foundation. This, of course, would entail a sea change in the interpretation of s. 15 of the *Charter*. The majority in the instant case resist such a change, referring to "Canadian values" and to the need to take a "generous and purposive" approach when interpreting *Charter* rights (at paras. 32, 90, 92 and 97), but to ensure consistency with the approach of the majority in *Health Services* (at paras. 81-96), they refer to equality in the s. 2(*d*) context without mentioning s. 15. My point here is not that each *Charter* protection should be interpreted in a formalistic manner. Rather, it is that if the law needs to move away from *Dunmore*'s distinction between positive and negative rights, this should not be accomplished by conflating freedom of association with the right to equality or any other *Charter* right that may be asserted by a litigant. An analysis based on principles grounding the protection of rights and freedoms offers a better prospect of judicial consistency than one based on the more amorphous notion of "Canadian values".

Britannique, 2009 CSC 31, [2009] 2 R.C.S. 295, par. 34.

[318] Dans l'affaire *Dunmore*, l'inégalité économique était en cause. Cette décision est fondée sur une règle voulant que, généralement, la *Charte* n'oblige pas l'État à agir pour faciliter l'exercice d'une liberté fondamentale. La dichotomie droits positifs/droits négatifs y est reconnue. Pour contourner la règle générale, une grille d'analyse quelque peu alambiquée a été établie pour les cas où la vulnérabilité d'un groupe justifierait le recours à un soutien étatique. Je suis d'accord avec B. Langille (« The Freedom of Association Mess : How We Got into It and How We Can Get out of It » (2009), 54 *R.D. McGill* 177), que le recours à cette distinction constituait un moyen détourné de faire fi des décisions judiciaires qui délimitent les motifs analogues à ceux prévus à l'art. 15.

[319] Pour remédier à une inégalité économique, il serait plus conforme à la structure de la *Charte* de reconnaître de nouveaux motifs analogues comme la juge L'Heureux-Dubé le fait dans l'arrêt *Dunmore*. Une telle approche serait préférable à l'adoption d'une distinction dénuée d'assise solide. Or cela supposerait de modifier radicalement notre approche de l'interprétation de l'art. 15 de la *Charte*. Réfractaires à pareil changement, les juges majoritaires en l'espèce, excipant des « valeurs canadiennes » et de la nécessité d'une interprétation « généreuse et téléologique » des droits conférés par la *Charte* (par. 32, 90, 92 et 97) et soucieux de respecter la démarche de la majorité dans *Health Services* (par. 81-96), renvoient à des notions d'égalité pour l'application de l'al. 2*d*) sans faire mention de l'art. 15. Je ne suggère pas qu'il faille interpréter de manière formaliste chacune des garanties de la *Charte*. Je veux simplement signaler que, s'il est nécessaire de s'éloigner de la distinction entre droits positifs et droits négatifs utilisée dans *Dunmore*, il ne faudrait pas pour autant confondre droit à l'égalité et liberté d'association, ou tout autre droit protégé par la *Charte* susceptible d'être invoqué par une partie à un litige. L'analyse prenant appui sur les principes qui structurent la protection des droits et des libertés permet plus de cohérence judiciaire que celle qui repose sur la notion floue de « valeurs canadiennes ».

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[320] For these reasons, I would allow the appeal and restore Farley J.'s judgment.

The following are the reasons delivered by

[321] ABELLA J. (dissenting) — I fully endorse the Chief Justice and LeBel J.'s discussion of *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391. I agree with them that by including protection for the process of collective bargaining, *Health Services* enhanced the scope of s. 2(*d*) of the *Canadian Charter of Rights and Freedoms* beyond the formalism assigned to it by this Court's 1987 labour Trilogy (*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *PSAC v. Canada*, [1987] 1 S.C.R. 424; and *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460). I am also in agreement with their criticisms of Rothstein J.'s decision to reconsider the correctness of *Health Services* on his own motion, in the absence of a request from any of the parties that he do so, and without an opportunity for them to address the issue.

[322] With the greatest respect, however, I do not agree that the *Agricultural Employees Protection Act, 2002*, S.O. 2002, c. 16 ("*AEPA*"), meets the new *Health Services* standard. I have great difficulty with stretching the interpretive process in a way that converts clear statutory language and express legislative intention into a completely different scheme. The *AEPA* does not protect, and was never intended to protect, collective bargaining rights.

Background

[323] The *AEPA* was enacted in 2002 to respond to this Court's 2001 decision in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, which held that s. 2(*d*) protected the right to *organize*. *Dunmore* was decided in accordance with the labour Trilogy, the then operative s. 2(*d*) paradigm. The Trilogy was widely taken as standing for the proposition that s. 2(*d*) did not include

[320] Pour ces motifs, je suis d'avis d'accueillir l'appel et de rétablir la décision du juge Farley.

Version française des motifs rendus par

[321] LA JUGE ABELLA (dissidente) — Je souscris entièrement à l'analyse que font la Juge en chef et le juge LeBel de l'arrêt *Health Services and Support — Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, 2007 CSC 27, [2007] 2 R.C.S. 391. Je conviens avec eux que cet arrêt, en conférant au processus de négociation collective la protection de l'al. 2*d*) de la *Charte canadienne des droits et libertés*, a élargi la portée de cette disposition au-delà du formalisme que lui avait attribué la trilogie de décisions en droit du travail rendues par la Cour en 1987 (*Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313; *AFPC c. Canada*, [1987] 1 R.C.S. 424; *SDGMR c. Saskatchewan*, [1987] 1 R.C.S. 460). J'adhère également à leur critique de la décision du juge Rothstein de revenir de son propre chef sur le bien-fondé de l'arrêt *Health Services*, sans y être invité par les parties et sans que celles-ci aient eu l'occasion de présenter des observations à ce sujet.

[322] Toutefois, en toute déférence, je ne peux convenir que la *Loi de 2002 sur la protection des employés agricoles*, L.O. 2002, ch. 16 (« *LPEA* »), respecte la nouvelle norme établie dans *Health Services*. J'ai beaucoup de difficulté à « étirer » le processus d'interprétation d'une façon qui transforme le libellé clair du texte législatif et l'intention explicite du législateur en un régime complètement différent. La *LPEA* ne protège pas les droits de négociation collective, et n'a jamais eu pour objet de les protéger.

Contexte

[323] La *LPEA* a été adoptée en 2002 pour donner suite à l'arrêt *Dunmore c. Ontario (Procureur général)*, 2001 CSC 94, [2001] 3 R.C.S. 1016, dans lequel notre Cour avait statué, l'année précédente, que l'al. 2*d*) protège le droit de *s'organiser*. L'affaire *Dunmore* a été tranchée en conformité avec la trilogie en droit du travail, le paradigme existant alors pour l'application de

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protection for collective bargaining (*Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367). The Trilogy was not challenged in *Dunmore*, and Bastarache J., writing for the majority, was explicit that he was not addressing whether collective bargaining was protected under s. 2(*d*). What *was* protected, in his view, was the following:

> . . . I conclude that at minimum the statutory freedom to organize in . . . the [*Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A] ought to be extended to agricultural workers, along with protections judged essential to its meaningful exercise, such as freedom to assemble, to participate in the lawful activities of the association and to make representations, and the right to be free from interference, coercion and discrimination in the exercise of these freedoms. [Emphasis added; para. 67.]

[324] It is not surprising, therefore, that the 2002 *AEPA* contains no reference to a protection which made no appearance on the constitutional stage until 2007. Or that the trial judge's decision in 2006 in the case before us, applied the *Dunmore* "right to organize" template and found the legislation compliant with s. 2(*d*) ((2006), 79 O.R. (3d) 219).

[325] But by the time the Court of Appeal heard this case in 2008, *Health Services* had been decided, creating a completely different jurisprudential universe. That was the new s. 2(*d*) universe Winkler C.J.O. applied to the *AEPA* (2008 ONCA 760, 92 O.R. (3d) 481). He found the legislation wanting. I agree with him.

Analysis

[326] In granting constitutional protection to the process of collective bargaining under s. 2(*d*), *Health Services* found the duty to consult and negotiate in good faith to be a "fundamental precept" (para. 97). This does not guarantee that a collective agreement will be achieved, but good faith bargaining does require that the parties meet, engage in a meaningful dialogue, and make reasonable

l'al. 2*d*). Suivant l'interprétation largement répandue de la trilogie, l'al. 2*d*) ne protège pas la négociation collective (*Institut professionnel de la Fonction publique du Canada c. Territoires du Nord-Ouest (Commissaire)*, [1990] 2 R.C.S. 367). La trilogie n'a pas été contestée dans *Dunmore*, et le juge Bastarache, au nom de la majorité, a indiqué expressément qu'il ne se prononçait pas sur la question de savoir si l'al. 2*d*) protège le droit à la négociation collective. Voici son avis sur ce qui *est* protégé par cette disposition :

> . . . je conclus que, au minimum, doit être reconnu aux travailleurs agricoles le droit de se syndiquer prévu à [la *Loi de 1995 sur les relations de travail*, L.O. 1995, ch. 1, ann. A], avec les garanties jugées essentielles à son exercice véritable, comme la liberté de se réunir, de participer aux activités légitimes de l'association et de présenter des revendications, et la protection de l'exercice de ces libertés contre l'ingérence, les menaces et la discrimination. [Je souligne; par. 67.]

[324] Il n'est donc pas surprenant que la *LPEA* de 2002 ne fasse aucunement mention d'une protection qui n'est apparue sur la scène constitutionnelle qu'en 2007. Ou qu'en 2006, le juge de première instance dans la présente affaire ait appliqué le modèle du « droit de s'organiser » reconnu dans *Dunmore* et ait conclu que la loi respectait l'al. 2*d*) ((2006), 79 O.R. (3d) 219).

[325] Or, quand la Cour d'appel a examiné l'affaire, en 2008, l'arrêt *Health Services* avait été rendu et avait créé un univers jurisprudentiel entièrement différent. C'est ce nouvel univers entourant l'al. 2*d*) que le juge en chef de l'Ontario a appliqué à la *LPEA* (2008 ONCA 760, 92 O.R. (3d) 481). Le juge en chef Winkler a estimé cette loi déficiente. Je suis du même avis.

Analyse

[326] En accordant la protection constitutionnelle de l'al. 2*d*) au processus de négociation collective, dans *Health Services*, la Cour a jugé que l'obligation de consulter et de négocier de bonne foi constitue un « précepte fondamental » (par. 97). Des négociations collectives menées de bonne foi ne garantissent pas qu'une convention collective sera effectivement conclue, mais elles exigent que les parties

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efforts to arrive at a collective agreement (paras. 90 and 101). *Health Services* confirmed that this involves not only the employees' collective right, as confirmed in *Dunmore*, to organize and make representations, but also a corollary duty on the part of employers to meaningfully discuss, consult, and consider these representations:

> . . . the right to bargain collectively protects not just the act of making representations, but also the right of employees to have their views heard in the context of a meaningful process of consultation and discussion. . . . [T]he right to collective bargaining cannot be reduced to a mere right to make representations. [Emphasis added; para. 114.]

(See also para. 101.)

[327] This requirement of meaningful dialogic consultation has long been recognized in collective bargaining regimes: *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369, at para. 41; *U.E.W. and DeVilbiss Ltd.*, [1976] 2 C.L.R.B.R. 101 (Ont.); George W. Adams, *Canadian Labour Law* (2nd ed. (loose-leaf)), vol. 2, at paras. 10.1710 and 10.1870-10.1920; Donald D. Carter et al., *Labour Law in Canada* (5th ed. 2002), at paras. 621-22; Wesley B. Rayner, *Canadian Collective Bargaining Law* (2nd ed. 2007), at pp. 333-34; Elisheva (Elika) Barak-Ussoskin, "Collaboration in the Tripartite System: The Right to be Consulted and the Duty to Consult", in A. Höland et al., eds., *Employee Involvement in a Globalising World: Liber Amicorum Manfred Weiss* (2005), 439, at p. 445.

[328] If we then turn to the relevant language of the *AEPA* and its description of what is required of an employer, we find the following:

> **5.** (1) The employer shall give an employees' association a reasonable opportunity to make representations respecting the terms and conditions of employment of one or more of its members who are employed by that employer.
>
> . . .

se rencontrent, établissent un véritable dialogue et fassent un effort raisonnable pour arriver à une convention collective (par. 90 et 101). L'arrêt *Health Services* a confirmé qu'un tel exercice fait intervenir non seulement le droit collectif des employés de s'organiser et de présenter leurs revendications, qui a été reconnu dans *Dunmore*, mais également une obligation corrélative de l'employeur de participer à un exercice véritable de consultations, de discussions et d'examen de leurs revendications :

> . . . le droit à un processus de négociation collective protège non seulement la présentation de revendications collectives, mais aussi le droit des employés de se faire entendre par le canal de consultations et discussions véritables. [. . .] [L]e droit de négociation collective ne saurait se limiter à la simple possibilité de présenter des revendications. [Je souligne; par. 114.]

(Voir également le par. 101.)

[327] Cette obligation de consultation sous forme de dialogue véritable est reconnue depuis longtemps dans les régimes de négociation collective : *Royal Oak Mines Inc. c. Canada (Conseil des relations du travail)*, [1996] 1 R.C.S. 369, par. 41; *U.E.W. and DeVilbiss Ltd.*, [1976] 2 C.L.R.B.R. 101 (Ont.); George W. Adams, *Canadian Labour Law* (2e éd. (feuilles mobiles)), vol. 2, par. 10.1710 et 10.1870-10.1920; Donald D. Carter et autres, *Labour Law in Canada* (5e éd. 2002), par. 621-622; Wesley B. Rayner, *Canadian Collective Bargaining Law* (2e éd. 2007), p. 333-334; Elisheva (Elika) Barak-Ussoskin, « Collaboration in the Tripartite System : The Right to be Consulted and the Duty to Consult », dans A. Höland et autres, dir., *Employee Involvement in a Globalising World : Liber Amicorum Manfred Weiss* (2005), 439, p. 445.

[328] Si l'on se reporte aux dispositions pertinentes de la *LPEA*, voici les obligations auxquelles l'employeur est tenu :

> **5.** (1) Un employeur donne à une association d'employés une occasion raisonnable de présenter des observations au sujet des conditions d'emploi d'un ou de plusieurs de ses membres qui sont employés par cet employeur.
>
> . . .

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(5) The employees' association may make the representations orally or in writing.

(6) The employer shall listen to the representations if made orally, or read them if made in writing.

(7) If the representations are made in writing, the employer shall give the association a written acknowledgment that the employer has read them.

[329] The process created by these provisions is the following: an employees' association is entitled to make representations, either orally or in writing, about the terms and conditions of employment. If the representations are made orally, the employer is required to "listen" to them. If they are made in writing, the employer must "read" them and give the "employees' association" a written acknowledgment that the representations have been read. That is the full extent of the employer's duties — to listen, to read, and to acknowledge receipt. No response is required.

[330] If we compare these duties under the *AEPA* to the linguistic markers set out in *Health Services*, we find that the following language is missing in action: "negotiate", "meet", "good faith", "engage", "exchange", "dialogue", "consultation", "discussions", "consideration", "accommodation" and "union". Nor does the key word "bargaining" appear.

[331] Noting the absence in the *AEPA* of *Health Services*' collective bargaining vocabulary is not a criticism of the government's motives. The *AEPA* was the government's good faith — and, as the trial judge found, successful — implementation of how *Dunmore* had defined the scope of s. 2(*d*) in 2001. This does not, however, assist in determining whether it complies with the *revised* scope described in *Health Services*. The Ontario government obviously cannot be held responsible for the redefinition of s. 2(*d*) that intervened between the enactment and appellate review of the *AEPA*, but neither can courts disregard the applicable law because of its infelicitous timing. Since the applicable law for s. 2(*d*) is now found in *Health Services*, the *AEPA* must be scrutinized for compliance with

(5) L'association d'employés peut présenter ses observations oralement ou par écrit.

(6) L'employeur écoute les observations qui lui sont présentées oralement et lit celles qui lui sont présentées par écrit.

(7) Si les observations lui sont présentées par écrit, l'employeur informe l'association d'employés par écrit qu'il les a lues.

[329] Ces dispositions créent le processus suivant : une association d'employés peut présenter des observations oralement ou par écrit au sujet des conditions d'emploi. Si les observations sont présentées oralement, l'employeur les « écoute ». Si elles lui sont présentées par écrit, l'employeur les « lit » et informe par écrit « l'association d'employés » qu'il les a lues. Voilà en quoi consistent les obligations de l'employeur — écoute, lecture et confirmation de lecture. Aucune réponse de sa part n'est exigée.

[330] En comparant les obligations imposées par la *LPEA* aux repères linguistiques qui figurent dans l'arrêt *Health Services*, on constate que les termes suivants manquent à l'appel : « négocier », « rencontrer », « bonne foi », « participer », « échanger », « dialogue », « consultations », « discussions », « considérations », « accommodement » et « syndicat ». Le mot-clé « négociation » n'y figure pas non plus.

[331] Souligner l'absence dans la *LPEA* du vocabulaire des négociations collectives n'est pas une critique des motivations du gouvernement. Le gouvernement a édicté la *LPEA* de bonne foi — et avec succès, selon le juge de première instance — pour tenir compte de la portée de l'al. 2*d*), telle que l'a définie l'arrêt *Dunmore* en 2001. Toutefois, cela ne nous aide pas à déterminer si la loi respecte l'al. 2*d*) en fonction de sa portée *redéfinie* par *Health Services*. On ne saurait certes tenir rigueur au gouvernement de l'Ontario du fait que la portée de l'al. 2*d*) a été élargie entre l'adoption de la *LPEA* et le contrôle de sa validité par la Cour d'appel. Néanmoins, les tribunaux ne peuvent pas ignorer une règle de droit applicable, qui intervient à un moment malheureux. Comme ce sont désormais les

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its principles. And since, on its face, *no* bargaining or consultation is required by the *AEPA*, let alone the good faith bargaining *Health Services* set out as a minimal constitutional protection, the *AEPA* violates s. 2(*d*) of the *Charter*.

[332] Not only is there clarity of language, there is also clarity of purpose. The government's intentions to exclude collective bargaining were forthright. The then Minister of Agriculture and Food, the Honourable Helen Johns, was unequivocal when she introduced the legislation in confirming that the legislation included *no* right to collective bargaining:

> However, I need to make one thing very clear here. While an agricultural employee may join an association that is a union, the proposed legislation does not extend collective bargaining to agricultural workers.

(Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, No. 46A, October 22, 2002, at p. 2339 (emphasis added))

This was based on the legislative goal of complying only with the rights required by *Dunmore*, rights which, as the Minister correctly noted, addressed only the "right to associate", not the "right to collectively bargain":

> I'd like to say that the Supreme Court was very clear. They said that agricultural workers across the province had the right to associate. They did not say that they had the right to collectively bargain.

(Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, No. 43A, October 16, 2002, at p. 2128 (emphasis added))

[333] Judging from their conduct, the parties involved in this appeal seem to have accepted there were no protections for the process and enforcement of collective bargaining in the *AEPA*. The United Food and Commercial Workers Union

principes établis dans *Health Services* qui régissent l'application de l'al. 2*d*), il faut vérifier la conformité de la *LPEA* à cet arrêt. Or, le texte même de la loi ne révèle *aucune* obligation de négociation ou de consultation — et encore moins l'obligation de négocier de bonne foi qui, selon *Health Services*, constitue la protection constitutionnelle minimale. Par conséquent, la *LPEA* contrevient à l'al. 2*d*) de la *Charte*.

[332] Non seulement le texte de la loi est clair, mais son objet l'est également. Le gouvernement n'a pas caché son intention d'exclure la négociation collective. La ministre de l'Agriculture et de l'Alimentation de l'époque, l'honorable Helen Johns, a confirmé on ne peut plus clairement, lors du dépôt du projet de loi, qu'il ne prévoyait *aucun* droit à la négociation collective :

> [TRADUCTION] Cependant, je dois préciser une chose. Bien qu'un employé agricole puisse adhérer à une association constituée en syndicat, le projet de loi ne donne pas aux travailleurs agricoles le droit de négociation collective.

(Assemblée législative de l'Ontario, *Journal des débats (Hansard)*, nº 46A, 22 octobre 2002, p. 2339 (je souligne))

Cette affirmation reposait sur l'objectif du gouvernement de se conformer seulement aux droits reconnus dans l'arrêt *Dunmore*. Or, comme l'a indiqué correctement la ministre, ces droits se limitaient au droit « de s'associer », et n'incluaient pas le « droit de négociation collective » :

> [TRADUCTION] Permettez-moi de dire que la Cour suprême a été très claire. Les juges ont reconnu aux travailleurs agricoles de la province entière le droit de s'associer. Ils ne leur ont pas reconnu le droit de négociation collective.

(Assemblée législative de l'Ontario, *Journal des débats (Hansard)*, nº 43A, 16 octobre 2002, p. 2128 (je souligne))

[333] À en juger par leurs actes, les parties visées dans le présent pourvoi semblent avoir accepté que rien dans la *LPEA* ne protège le processus de négociation collective ni son application. L'Union internationale des travailleurs et travailleuses

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Canada represented workers at Rol-Land Farms Ltd. After a vote in which an overwhelming majority voted in favour of certification, the union wrote to Rol-Land requesting a meeting to begin negotiations. The owner of Rol-Land Farms did not respond to the letter and refused to recognize the union. The same union also represented employees at Platinum Produce, where the employer gave the union the opportunity to make brief oral representations, but said it had no obligation to bargain towards a collective agreement. The meeting lasted 15 minutes.

[334] In the years since the *AEPA* was enacted in 2002, there is no evidence of a single successfully negotiated collective agreement or even of any negotiations. I appreciate that statutory interpretation does not draw on the perceptions of the statute's intended consumers, but where, as here, there is perfect harmony between statutory language, legislative intention, and public perception, the usual interpretative tools are vindicated.

[335] In addition to finding a violation of s. 2(*d*) based on the explicit failure, by text and by design, to include even a hint of a process of collective bargaining, let alone a duty to engage in meaningful and good faith efforts to arrive at a collective agreement, I also agree with Winkler C.J.O. that for agricultural workers, the absence of a statutory enforcement mechanism and of majoritarian exclusivity is an infringement of s. 2(*d*).

[336] *Health Services* recognized that s. 2(*d*) of the *Charter* obliged the state, either as employer or as legislator, to protect the process of collective bargaining (para. 88). The content of that protection will of course mean different things in different contexts. The determinative question will inevitably be, as Bastarache J. said in *Dunmore*, what protections are "essential" to the "meaningful exercise" of the right.

unis de l'alimentation et du commerce — Canada représentait les travailleurs de Rol-Land Farms Ltd. À l'issue d'un vote massif en faveur de l'accréditation, le syndicat a écrit à Rol-Land pour solliciter une rencontre afin d'entamer les négociations. Le propriétaire de Rol-Land Farms n'a pas répondu à cette lettre et a refusé de reconnaître le syndicat. Ce même syndicat représentait également les employés de Platinum Produce, où l'employeur lui a donné l'occasion de présenter de brèves observations oralement, mais a affirmé ne pas être tenu de négocier en vue de la conclusion d'une convention collective. La rencontre a duré 15 minutes.

[334] Depuis l'adoption de la *LPEA* en 2002, rien n'indique qu'une convention collective ait été conclue, ni même que des négociations aient eu lieu. Je suis consciente du fait que l'interprétation législative ne saurait s'appuyer sur les perceptions des personnes visées par la mesure législative, mais lorsque le texte de la loi, l'intention du législateur et la perception du public sont en parfaite harmonie, comme c'est le cas en l'espèce, la valeur des outils d'interprétation habituels se trouve confirmée.

[335] En plus de conclure que la loi ne se conforme pas à l'al. 2*d*) en raison de l'absence manifeste, tant dans le texte que dans l'économie de la loi, de la moindre évocation d'un processus de négociation collective, et encore moins d'une obligation quelconque de participer de bonne foi à des efforts véritables en vue de conclure une convention collective, je partage l'avis du juge en chef Winkler qu'elle y contrevient, à l'égard des travailleurs agricoles, parce qu'elle n'établit aucune voie de droit et ne reconnaît pas le monopole syndical conféré par un vote majoritaire.

[336] L'arrêt *Health Services* a reconnu que l'al. 2*d*) de la *Charte* oblige l'État, à titre d'employeur ou de législateur, à protéger le processus de négociation collective (par. 88). La teneur de cette protection varie évidemment selon le contexte. Comme l'a dit le juge Bastarache dans *Dunmore*, la question déterminante est inévitablement celle de savoir quelles sont les garanties « essentielles à [l']exercice véritable » du droit.

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[337] The right at issue in *Dunmore* was the right to organize. Bastarache J. concluded that this required ancillary protection for the freedom to assemble, to participate in the lawful activities of the "employees' association" and to make representations, along with the right to be free from interference, coercion and discrimination in the exercise of those freedoms (para. 67). All of these protections found their way into the *AEPA*, which is why the trial judge gave it his stamp of constitutional approval.

[338] Now, as a result of *Health Services*, we are dealing with a right to a process of good faith collective bargaining and consultation. What protections are essential for the meaningful exercise of this right for agriculture workers?

[339] For a start, there is no point to having a right only in theory. Unless it is realizable, it is meaningless. There must therefore be an enforcement mechanism not only to resolve bargaining disputes, but to ensure compliance if and when a bargain is made.

[340] At the moment, there is in fact a statutory mechanism in place for the enforcement of the *AEPA* — the Agriculture, Food and Rural Affairs Appeal Tribunal. But the fact that this Tribunal exists is, by itself, of no consequence if it cannot address the rights constitutionally guaranteed by *Health Services*.

[341] Section 11 of the *AEPA* gives the Tribunal authority to grant a remedy for a contravention of the *AEPA*. But it is not a contravention of the *AEPA* to refuse to engage in a good faith process to make reasonable efforts to arrive at a collective agreement. It is therefore not part of the Tribunal's mandate. No mandate, no jurisdiction; no jurisdiction, no remedy.

[342] It strikes me as fundamentally contrary to our jurisprudence to invite the Tribunal to interpret

[337] L'arrêt *Dunmore* portait sur le droit de s'organiser. Le juge Bastarache a conclu que l'exercice de ce droit nécessitait les garanties accessoires relatives à la liberté de se réunir, de participer aux activités légitimes de « l'association d'employés » et de présenter des revendications, et ce, sans protection contre l'ingérence, les menaces et la discrimination dans l'exercice de ces libertés (par. 67). Comme la *LPEA* incluait toutes ces libertés et protections, le juge de première instance en a confirmé la validité constitutionnelle.

[338] Maintenant, suivant l'arrêt *Health Services*, c'est le droit à un processus de négociation collective et de consultation mené de bonne foi qui est en cause. Il faut donc déterminer quelles garanties sont essentielles à l'exercice véritable de ce droit par les travailleurs agricoles.

[339] Soulignons tout d'abord qu'il ne sert à rien de reconnaître un droit en théorie seulement. Un droit qui ne peut être exercé concrètement est privé de sens. Il doit donc exister une voie de droit qui permette non seulement de résoudre les différends au cours des négociations, mais aussi d'assurer le respect de la convention, le cas échéant.

[340] À l'heure actuelle, la loi prévoit effectivement une voie de droit pour l'application de la *LPEA*, devant le Tribunal d'appel de l'agriculture, de l'alimentation et des affaires rurales. Or, la simple existence de ce tribunal ne donne rien s'il ne peut garantir le respect des droits qui, selon *Health Services*, sont protégés par la Constitution.

[341] L'article 11 de la *LPEA* habilite le Tribunal à accorder une réparation en cas de contravention à la *LPEA*. Cependant, le refus de participer de bonne foi à un processus de négociation et de faire des efforts raisonnables pour arriver à une convention collective ne constitue pas une contravention à la *LPEA*. Par conséquent, cette situation n'est pas prévue dans le mandat du Tribunal. Or, sans mandat, pas de compétence et sans compétence, pas de réparation.

[342] Il me semble fondamentalement contraire à la jurisprudence de la Cour d'inviter le Tribunal

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its home statute in a way that contradicts the clear statutory language and legislative intent. If, on the other hand, the *AEPA* had included the protections set out in *Health Services*, the Tribunal would certainly have the authority to address and remedy any bargaining disputes and would therefore comply with what is required by s. 2(*d*).

[343] This brings us finally to whether the process of good faith bargaining for agricultural workers requires that the employer bargain only with the union selected by a majority of the employees in the bargaining unit. This is known as the principle of majoritarian exclusivity, a routine protection in Canada's labour laws. In the context of this case, and given the unique vulnerability of agriculture workers, I agree with Winkler C.J.O. that statutory recognition of such exclusivity is essential for them to exercise their bargaining rights meaningfully.

[344] As long ago as 1944, when labour ministers from across Canada agreed to the principles which found their way into the model *The Industrial Relations and Disputes Investigation Act*, S.C. 1948, c. 54, majoritarian exclusivity was a central protection. Most provinces quickly aligned their legislation with these principles (Adams, vol. 1, at paras. 1.240-1.250).

[345] With the exception of specific public services and the construction industry in Quebec (*An Act respecting labour relations, vocational training and workforce management in the construction industry*, R.S.Q., c. R-20), majoritarian exclusivity has remained a defining principle of the Canadian labour relations model (Rayner, at p. 16; Carter et al., at para. 574).

[346] The reason for the protection is grounded in common sense and the pre-1944 experience. A lack of exclusivity allows an employer to promote rivalry and discord among multiple employee

à interpréter sa loi constitutive d'une manière qui contredit le libellé clair de la loi et l'intention manifeste du législateur. Si, par contre, la *LPEA* contenait les garanties décrites dans *Health Services*, le Tribunal aurait certainement le pouvoir d'examiner et de régler les différends concernant les négociations, de sorte que la loi serait conforme à l'al. 2*d*).

[343] Ce qui nous amène finalement à la question de savoir si, dans le cas des travailleurs agricoles, le processus de négociation de bonne foi exige de l'employeur qu'il négocie uniquement avec le syndicat choisi par la majorité des employés de l'unité de négociation. Il s'agit du principe du monopole syndical conféré par un vote majoritaire, une garantie courante dans les lois en droit du travail au Canada. Dans le contexte de la présente affaire, et compte tenu de la vulnérabilité particulière des travailleurs agricoles, je partage l'avis du juge en chef Winkler que la reconnaissance, par la loi, d'un tel monopole est essentielle pour que ces travailleurs puissent exercer véritablement leurs droits de négociation.

[344] Déjà en 1944, quand les ministres du travail de tout le pays se sont entendus sur les principes qui ont donné naissance à la loi type intitulée *Loi sur les relations industrielles et sur les enquêtes visant les différends du travail*, S.C. 1948, ch. 54, le monopole syndical conféré par un vote majoritaire constituait une garantie d'importance capitale. La plupart des provinces ont rapidement intégré ces principes dans leur législation (Adams, vol. 1, par. 1.240-1.250).

[345] Sauf dans certains services publics et dans le secteur de la construction au Québec (*Loi sur les relations du travail, la formation professionnelle et la gestion de la main-d'œuvre dans l'industrie de la construction*, L.R.Q., ch. R-20), le monopole syndical conféré par un vote majoritaire est demeuré un principe déterminant du modèle canadien des relations du travail (Rayner, p. 16; Carter et autres, par. 574).

[346] Cette protection est dictée par le bon sens et justifiée par la situation qui existait avant 1944. Sans monopole syndical, l'employeur peut susciter des rivalités et semer la discorde parmi les

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representatives in order to "divide and rule the work force", using tactics like engaging in direct negotiations with individual employees to undercut "the credibility of the union . . . at the bargaining table" (Paul Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (1980), at p. 126; see also Adams, vol. 1, at para. 3.1750).

[347] Rol-Land Farms, for example, unrestrained by the legal requirement to bargain only with one bargaining agent, sponsored its own "employee association" in direct competition with the union that had the workers' majority support. That is precisely the kind of conduct that Bora Laskin identified in 1944 as the flaw in Canada's then existing labour legislation, namely that "it neither compelled employers to bargain collectively with the duly chosen representatives of their employees nor did it prohibit them from fostering company-dominated unions" ("Recent Labour Legislation in Canada" (1944), 22 *Can. Bar Rev.* 776, at p. 781). It also led Canada's labour ministers that same year to include exclusivity among what were considered to be indispensable protections for collective bargaining rights.

[348] The inevitable splintering of unified representation resulting from the absence of statutory protection for exclusivity is particularly undermining for particularly vulnerable employees. Professor David M. Beatty vividly observed that agricultural workers are "among the most economically exploited and politically neutralized individuals in our society":

> Because they are heavily drawn from a migrant and immigrant population, these workers face even more serious obstacles to effective participation in the political process. . . . Denying agricultural workers the benefits of [collective bargaining] means that the legal processes which enable much of the rest of our workforce to be involved in decision-making at the workplace in a realistic way are unavailable to the farm workers. Thus a group of workers who are already

multiples représentants des employés dans le but de [TRADUCTION] « diviser pour régner sur la main-d'œuvre », par diverses tactiques, comme négocier directement avec certains employés en vue de miner « la crédibilité du syndicat [. . .] à la table de négociation » (Paul Weiler, *Reconcilable Differences : New Directions in Canadian Labour Law* (1980), p. 126; voir également Adams, vol. 1, par. 3.1750).

[347] Rol-Land Farms, par exemple, qui n'était pas soumise à l'obligation légale de négocier avec un seul agent négociateur, a soutenu sa propre « association d'employés » en concurrence directe avec le syndicat qui bénéficiait de l'appui de la majorité des employés. C'est exactement le genre de conduite qu'a dénoncée Bora Laskin, en 1944, comme le point faible de la législation qui régissait alors le droit du travail au Canada, déplorant qu'elle [TRADUCTION] « n'oblige pas les employeurs à négocier avec les représentants dûment choisis de leurs employés, ni ne leur interdit de soutenir des syndicats dominés par l'employeur » (« Recent Labour Legislation in Canada » (1944), 22 *R. du B. can.* 776, p. 781). Cet état de fait a également amené les ministres canadiens du travail à inclure, cette année-là, le monopole syndical parmi les garanties indispensables à l'exercice des droits de négociation collective.

[348] L'inévitable scission de l'unité de représentation en l'absence de reconnaissance légale du monopole syndical est particulièrement grave pour les employés les plus vulnérables. Le professeur David M. Beatty a fait remarquer, en termes éloquents, que les travailleurs agricoles comptent [TRADUCTION] « parmi les personnes les plus exploitées sur le plan économique et les plus démunies sur le plan politique au sein de notre société » :

> [TRADUCTION] Parce qu'ils proviennent en grande partie de populations migrantes ou immigrantes, ces travailleurs éprouvent d'autant plus de difficultés à participer véritablement au processus politique. [. . .] En privant les travailleurs agricoles des avantages que confère [la négociation collective], on met hors de leur portée les processus juridiques qui permettent au gros de la population active de participer de manière réaliste à la prise de décisions en milieu de travail. Ainsi,

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among the least powerful are given even less opportunity than the rest of us to participate in the formulation and application of the rules governing their working conditions.

(*Putting the Charter to Work: Designing a Constitutional Labour Code* (1987), at p. 89)

See also Task Force on Labour Relations, *Canadian Industrial Relations: The Report of Task Force on Labour Relations* (1968) (the "Woods Report"), at p. 86.

[349] These conclusions were echoed by the trial judge in *Dunmore*, Sharpe J., whose observations were endorsed in this Court by Bastarache J.:

Distinguishing features of agricultural workers are their political impotence, their lack of resources to associate without state protection and their vulnerability to reprisal by their employers; as noted by Sharpe J., agricultural workers are "poorly paid, face difficult working conditions, have low levels of skill and education, low status and limited employment mobility" . . . . [para. 41]

[350] The conditions of singular employment disadvantage for workers in the agricultural sector, as the trial judge in this case acknowledged, remain operative today. Permitting multiple representatives of disparate individuals or groups in such a workplace effectively nullifies the ability of its workers to have a unified and therefore more cogent voice in attempting to mitigate and ameliorate their relentlessly arduous working conditions.

[351] I acknowledge that different models of labour relations exist globally, some of which do not recognize the principle of majoritarian exclusivity (Clyde W. Summers, "Exclusive Representation: A Comparative Inquiry into a 'Unique' American Principle" (1998), 20 *Comp. Lab. L. & Pol'y J.* 47; Roy J. Adams, "Prospects for Labour's Right to Bargain Collectively After *B.C. Health Services*" (2009), 59 *U.N.B.L.J.* 85). These models, however, have been developed in entirely different historical contexts and systems of collective bargaining and have yet to be seriously road-tested in the Canadian

un groupe de travailleurs qui comptent déjà parmi les plus impuissants ont encore moins que les autres l'occasion de participer à l'établissement et à l'application des règles régissant leurs conditions de travail.

(*Putting the Charter to Work : Designing a Constitutional Labour Code* (1987), p. 89)

Voir également Équipe spécialisée en relations de travail, *Les relations du travail au Canada : Rapport de l'Équipe spécialisée en relations de travail* (1968) (le "Rapport Woods"), p. 96.

[349] Ces conclusions ont été reprises par le juge de première instance dans l'affaire *Dunmore*, le juge Sharpe, dont les remarques ont été approuvées par le juge Bastarache :

Les travailleurs agricoles n'ont ni pouvoir politique, ni ressources pour se regrouper sans la protection de l'État, et ils sont vulnérables face aux représailles patronales; comme le fait observer le juge Sharpe, les travailleurs agricoles [TRADUCTION] « sont mal rémunérés, ils ont des conditions de travail difficiles, une formation et une instruction limitées, un statut peu élevé et une mobilité d'emploi restreinte » . . . [par. 41]

[350] La situation professionnelle particulière désavantageuse des travailleurs agricoles perdure, comme l'a reconnu le juge de première instance dans la présente affaire. Permettre la représentation de personnes ou groupes distincts par divers agents au sein d'un tel milieu de travail a pour effet de priver ces travailleurs de la capacité d'avoir une voix unie et puissante, pour tenter d'alléger et d'améliorer leurs conditions de travail ardues et incessantes.

[351] Je reconnais qu'il existe différents modèles de relations du travail de par le monde, dont certains ne consacrent pas le principe du monopole syndical conféré par un vote majoritaire (Clyde W. Summers, « Exclusive Representation : A Comparative Inquiry into a "Unique" American Principle » (1998), 20 *Comp. Lab. L. & Pol'y J.* 47; Roy J. Adams, « Prospects for Labour's Right to Bargain Collectively After *B.C. Health Services* » (2009), 59 *R.D. U.N.-B.* 85). Toutefois, ces modèles sont issus de contextes historiques et de systèmes de négociation collective complètement différents

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context outside of the construction industry in Quebec. This is not to say that there is no room for innovation in the modalities of the Canadian labour relations model. But to "innovate" by eliminating a fundamental protection for the most vulnerable of workers is nullification, not innovation.

[352] Can the absence of these statutory protections be justified under s. 1 of the *Charter*? In my view they cannot.

[353] Chief Justice Winkler found that the relevant objectives of the rights limitation — the failure to provide agricultural workers with the necessary statutory protections to exercise the right to bargain collectively — were "to protect the family farm and farm production/viability" (para. 122).

[354] These were found by this Court to be pressing and substantial objectives in *Dunmore* and are conceded to reach the necessary threshold in our case.

[355] Even assuming that there is a rational connection between at least the second objective and the limitation, I see the minimal impairment branch of the *Oakes* test as being determinative. Under this step we ask whether there are "less harmful means of achieving the legislative goal" (*Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 53). The *AEPA* has an absolute exclusion of any protection for a process of collective bargaining: all agricultural workers, in all sectors of agriculture, no matter the size and nature of the agricultural enterprise, are precluded from exercising their s. 2(*d*) rights. If the government has impeded those rights more than is reasonably necessary to achieve its stated objectives, then this absolute exclusion is not constitutionally justified.

[356] The first governmental objective of the absolute exclusion is the protection of family farms.

et n'ont jamais été sérieusement mis à l'essai au Canada, hormis dans le secteur de la construction au Québec. Je ne veux pas dire par là qu'il n'y a pas place à l'innovation dans les modalités du modèle des relations du travail au Canada. Toutefois, « innover » en retirant une protection fondamentale aux travailleurs les plus vulnérables ne serait pas innovateur, mais dévastateur.

[352] L'absence de ces protections dans la loi peut-elle se justifier au regard de l'article premier de la *Charte*? Je ne le crois pas.

[353] Le juge en chef Winkler a conclu que les objectifs pertinents de cette limitation des droits — c'est-à-dire du fait de ne pas accorder aux travailleurs agricoles les protections légales nécessaires à l'exercice de leur droit de négociation collective — étaient [TRADUCTION] « de protéger la ferme familiale ainsi que la productivité et la viabilité des exploitations agricoles » (par. 122).

[354] Notre Cour a jugé qu'il s'agissait d'objectifs urgents et réels dans *Dunmore* et il est admis qu'ils satisfont à ce critère en l'espèce.

[355] Même à supposer qu'il existe un lien rationnel entre la restriction du droit et, au moins, le second objectif, le critère de l'atteinte minimale du test de l'arrêt *Oakes* est, à mon avis, déterminant. À cette étape, la question qui se pose est la suivante : « [E]xiste-t-il des moyens moins préjudiciables de réaliser l'objectif législatif? » (*Alberta c. Hutterian Brethren of Wilson Colony*, 2009 CSC 37, [2009] 2 R.C.S. 567, par. 53). Le régime de la *LPEA* crée une exclusion absolue du processus de négociation collective : elle empêche tous les travailleurs agricoles, dans tous les secteurs agricoles, peu importe la taille et la nature de l'entreprise agricole, d'exercer leurs droits garantis par l'al. 2*d*). Si le gouvernement a restreint ces droits plus qu'il n'était raisonnablement nécessaire pour réaliser les objectifs déclarés de la loi, l'exclusion absolue ne peut se justifier sur le plan constitutionnel.

[356] Le premier objectif de cette exclusion absolue est la protection de la ferme familiale. Est-ce

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Is a one-size-fits-all exclusion responsive to protecting family farms? It seems to me clear that less harmful means than outright exclusion are readily available to achieve the objective. Two provinces, for example, Quebec and New Brunswick, have specific exemptions for farms employing less than three (*Labour Code*, R.S.Q., c. C-27, s. 21) or five (*Industrial Relations Act*, R.S.N.B. 1973, c. I-4, s. 1(5)(*a*)) workers.

[357] It is also worth remembering that we are dealing with a highly diversified sector, only some of which consists of family farms. As Bastarache J. noted, there is an "increasing trend . . . towards corporate farming and complex agribusiness" (*Dunmore*, at para. 62). Rol-Land Farms, for example, is a mushroom farm that employs between 270-300 workers. The nature of this kind of farm, as described in *Wellington Mushroom Farm*, [1980] O.L.R.B. Rep. 813, does "not differ in any material respect from a typical manufacturing plant" (para. 29). The description in the reasons of Vice-Chairman R. O. MacDowell is telling:

> There is no close involvement with the family farm. The production process is not seasonal, but rather, resembles a production cycle. The labour force is neither casual nor transitory. The operation is of considerable size, employing close to 200 employees in a single location with a "factory atmosphere"; and the company is much less economically vulnerable than many other employers to which *The Labour Relations Act* applies. [para. 25]

[358] Preventing *all* agricultural workers from access to a process of collective bargaining in order to protect family farms, no matter their size or character, is the antithesis of minimal impairment. Such a limitation harms the s. 2(*d*) right in its entirety, not minimally.

[359] The other government objective is more general — the protection of the viability of farms and agricultural production. It is instructive to consider the 1992 recommendations of the

qu'une telle exclusion est sensée pour protéger la ferme familiale? Il me semble évident que d'autres moyens moins préjudiciables qu'une exclusion absolue pourraient facilement permettre la réalisation de cet objectif. Dans deux provinces, par exemple, soit le Québec et le Nouveau-Brunswick, des exemptions ont été prévues pour les fermes comptant respectivement moins de trois employés (*Code du travail*, L.R.Q., ch. C-27, art. 21) et moins de cinq employés (*Loi sur les relations industrielles*, L.R.N.-B. 1973, ch. I-4, al. 1(5)*a*)).

[357] Il convient aussi de rappeler qu'il s'agit d'un secteur très diversifié, dont les fermes familiales ne représentent qu'une partie. Comme le juge Bastarache le fait remarquer, l'agriculture « évolue de plus en plus vers l'exploitation commerciale et l'agro-industrie » (*Dunmore*, par. 62). Par exemple, la champignonnière Rol-Land Farms compte de 270 à 300 employés. Selon la description figurant dans *Wellington Mushroom Farm*, [1980] O.L.R.B. Rep. 813, la nature de ce type de ferme [TRADUCTION] « ne diffère pas, sur un point important, d'une usine ordinaire » (par. 29). Voici la description révélatrice qu'en fait le vice-président R. O. MacDowell :

> [TRADUCTION] Cette entreprise ne ressemble en rien à une ferme familiale. La production n'est pas saisonnière, mais étalée selon un cycle de production. La main-d'œuvre n'est ni occasionnelle, ni migrante. L'exploitation est de taille considérable et emploie près de 200 employés dans un seul lieu où règne une « atmosphère d'usine »; et cette entreprise est beaucoup moins vulnérable sur le plan économique que bon nombre d'autres employeurs visés par la *Loi sur les relations de travail*. [par. 25]

[358] Priver *tous* les travailleurs agricoles d'un processus de négociation collective pour protéger les fermes familiales, sans égard à la taille ou à la nature de l'exploitation agricole, est l'antithèse d'une atteinte minimale. Une telle restriction porte atteinte au droit garanti par l'al. 2*d*) dans sa totalité, non minimalement.

[359] Le second objectif du gouvernement est plus général — protéger la productivité et la viabilité des exploitations agricoles. Il est utile de prendre connaissance des recommandations présentées

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Ontario government's consultative Task Force on Agricultural Labour Relations, composed of representatives from the agricultural community, organized labour, farm workers and government (*Report to the Minister of Labour* (June 1992); *Second Report to the Minister of Labour* (November 1992)). The Task Force's recommendations in its two reports are germane not because they should be seen as binding, but because they demonstrate that there are "less harmful means" than an absolute exclusion to achieve the government's objective of protecting agricultural production and viability.

[360] The Task Force considered whether — and how — agricultural workers should be entitled to bargain collectively, given the unique characteristics of the agricultural sector. It concluded that "all persons employed in agriculture and horticulture" should be able to engage in collective bargaining, including those on family or smaller farms, but in accordance with a separate labour relations scheme that is "sufficiently modified" to reflect the "particular needs" of the agricultural sector (First Report, at pp. 7-8).

[361] The "single most critical issue" raised by farm owners before the Task Force was the "threat of work stoppage" (First Report, at p. 3). In response to this and many other submissions, the Task Force recommended that all forms of work stoppage be prohibited and replaced by a dispute resolution process that:

- emphasizes the preference for negotiated settlements between the parties.
- provides a conciliation and mediation service to assist the parties in reaching a negotiated settlement.
- provides an arbitration process for the final and binding resolution of all outstanding matters

en 1992 par le Groupe d'étude sur les relations de travail dans le secteur agricole (« groupe d'étude »), constitué par le gouvernement ontarien et composé de représentants du secteur agricole, du gouvernement, des syndicats et des travailleurs agricoles (*Report to the Minister of Labour* (juin 1992); *Second Report to the Minister of Labour* (novembre 1992)). Sans avoir force obligatoire, les recommandations formulées par le groupe d'étude dans ses deux rapports sont tout de même pertinentes en ce sens qu'elles démontrent qu'il existe des « moyens moins préjudiciables » qu'une exclusion absolue d'atteindre ce second objectif de l'État, savoir protéger la productivité et la viabilité des exploitations agricoles.

[360] Le groupe d'étude a examiné la question de savoir si les travailleurs agricoles devaient se voir conférer le droit de négocier collectivement, étant donné les caractéristiques propres au secteur agricole, et, dans l'affirmative, selon quelles modalités. Il est arrivé à la conclusion que [TRADUCTION] « toutes les personnes employées dans les secteurs agricole et horticole », même celles participant à l'exploitation d'une ferme familiale ou de petite taille, devraient pouvoir participer à un processus de négociation collective, mais selon un régime de relations de travail distinct « suffisamment modifié » pour répondre aux « besoins particuliers » du secteur agricole (rapport du mois de juin, p. 7-8).

[361] La [TRADUCTION] « question la plus critique » soulevée par les exploitants agricoles devant le groupe d'étude était la « menace d'un arrêt de travail » (rapport du mois de juin, p. 3). En réponse à cette considération et à de nombreuses autres, le groupe d'étude a recommandé que toute forme d'arrêt de travail soit interdit et remplacé par un processus de règlement des différends qui

[TRADUCTION]

- favorise expressément la conclusion d'un règlement négocié par les parties;
- offre aux parties des services de conciliation et de médiation pour les aider à parvenir à un règlement par la négociation;
- offre aux parties un processus d'arbitrage pour le règlement définitif et exécutoire des points

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> between the parties following exhaustion of the negotiation process. [First Report, at p. 10]

It also recommended that there be an Agricultural Labour Relations Act, to be administered by a separate Board (Second Report, at p. 17).

[362] The government adopted these recommendations in the *Agricultural Labour Relations Act, 1994*, S.O. 1994, c. 6 ("*ALRA*"). The *ALRA* included protection for collective bargaining, including exclusivity, but prohibited work stoppages (ss. 3, 10 and 11). The inherent compromise in that legislation is reflected in its preamble:

> It is in the public interest to extend collective bargaining rights to employees and employers in the agriculture and horticulture industries.
>
> However, the agriculture and horticulture industries have certain unique characteristics that must be considered in extending those rights. Those unique characteristics include seasonal production, climate sensitivity, time sensitivity, and perishable nature of agriculture and horticulture products, and the need for maintenance of continuous processes to ensure the care and survival of animal and plant life.

[363] The *ALRA* was repealed in 1995 (c. 1, s. 80). Thereafter, agricultural workers were left only with their pre-existing exclusion from the Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, creating the spark that ignited *Dunmore*.

[364] And since s. 1 of the *Charter* directs us to compare how other democratic governments limit a particular right, it is also helpful to look at how other Canadian jurisdictions deal with agricultural workplaces. Except in Alberta, agricultural workers in every province have the same collective bargaining rights as other employees, including exclusivity (*Labour Relations Code*, R.S.B.C. 1996, c. 244, s. 1; *The Trade Union Act*, R.S.S. 1978, c. T-17, s. 2; *The Labour Relations Act*, R.S.M. 1987, c. L10, s. 1; *Labour Code* (Que.), s. 21; *Industrial*

> encore en litige entre les parties une fois qu'elles ont épuisé le processus de négociation. [rapport du mois de juin, p. 10]

Il a également recommandé l'adoption d'une loi sur les relations de travail dans l'agriculture, dont une commission des relations de travail distincte assurerait l'application (rapport du mois de novembre, p. 17).

[362] Le gouvernement a donné suite à ces recommandations en adoptant la *Loi de 1994 sur les relations de travail dans l'agriculture*, L.O. 1994, ch. 6 (« *LRTA* »). Cette loi reconnaissait le droit à la négociation collective, y compris le principe du monopole syndical, mais interdisait les arrêts de travail (art. 3, 10 et 11). Le préambule de ce texte illustre bien le compromis qui le sous-tend :

> Il est dans l'intérêt public d'étendre le droit à la négociation collective aux employés et employeurs des industries agricole et horticole.
>
> Toutefois, les industries agricole et horticole possèdent certaines caractéristiques particulières dont il faut tenir compte en étendant ce droit, notamment le caractère saisonnier de la production, la sensibilité au climat et au facteur temps, la nature périssable des produits agricoles et horticoles et la nécessité de maintenir des procédés continus afin de garantir le soin et la survie des animaux et des végétaux.

[363] La *LRTA* a été abrogée en 1995 (ch. 1, art. 80). Aucun régime particulier ne s'appliquait plus aux travailleurs agricoles hormis l'exclusion figurant dans la *Loi de 1995 sur les relations de travail* de l'Ontario, L.O. 1995, ch. 1, ann. A. C'est cette étincelle qui a mis le feu aux poudres dans l'affaire *Dunmore*.

[364] Par ailleurs, comme l'article premier de la *Charte* nous invite à un examen comparatif des restrictions à un droit particulier imposées dans d'autres sociétés démocratiques, il me paraît utile d'examiner les mesures prises dans d'autres ressorts canadiens à l'égard du secteur agricole. Dans chaque province, sauf en Alberta, les travailleurs agricoles bénéficient des mêmes droits de négociation collective que d'autres employés, y compris le monopole syndical (*Labour Relations Code*, R.S.B.C. 1996, ch. 244, art. 1; *The Trade Union Act*,

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Relations Act (N.B.), s. 1(5)(*a*); *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 2(1); *Labour Act*, R.S.P.E.I. 1988, c. L-1, s. 7; *Labour Relations Act*, R.S.N.L. 1990, c. L-1, s. 2(1); *Labour Relations Code*, R.S.A. 2000, c. L-1, s. 4(2)(e)).

[365] Reviewing the consequences of the near-universality of extending bargaining rights to Canadian agricultural workers, the 1992 Task Force concluded that the availability of the right to bargain collectively in these provinces has not "had a significant negative impact on farm economics" (First Report, at p. 3). This state of national affairs clearly does not preclude the government from offering a s. 1 justification unique to Ontario, but it has not, and perhaps realistically cannot, explain why Ontario's farming interests are *so* different as to warrant a complete exclusion rather than less intrusive means of achieving its objectives.

[366] The agricultural sector undoubtedly faces significant economic challenges, but so do many others, in none of which are employees deprived of access to a process of collective bargaining.

[367] The government has therefore not justified why achieving protection for agricultural viability and production requires so uniquely draconian a restriction on s. 2(*d*) rights. The limitation is, in fact, like its relationship to protecting family farms, not even remotely tailored to meet the government's objective in a less intrusive way. It is, in fact, not tailored at all. As Winkler C.J.O. concluded:

> . . . the legislature made no attempt to engage in a line-drawing exercise . . . to tailor a collective bargaining system that recognizes the challenges facing the agricultural sector. [para. 135]

R.S.S. 1978, ch. T-17, art. 2; *Loi sur les relations du travail*, L.R.M. 1987, ch. L10, art. 1; *Code du travail* (Qc), art. 21; *Loi sur les relations industrielles* (N.-B.), al. 1(5)*a*); *Trade Union Act*, R.S.N.S. 1989, ch. 475, par. 2(1); *Labour Act*, R.S.P.E.I. 1988, ch. L-1, art. 7; *Labour Relations Act*, R.S.N.L. 1990, ch. L-1, par. 2(1); *Labour Relations Code*, R.S.A. 2000, ch. L-1, al. 4(2)e)).

[365] Ayant examiné les conséquences de l'extension des droits de négociation à la quasi-totalité des travailleurs agricoles canadiens, le groupe d'étude de 1992 a conclu que le droit de négocier collectivement conféré par ces provinces n'avait pas [TRADUCTION] « eu une incidence négative importante sur l'économie agricole » (rapport du mois de juin, p. 3). Cette réalité nationale ne prive évidemment pas le gouvernement ontarien de la possibilité de faire valoir, au regard de l'article premier, une justification propre à l'Ontario, mais il n'a pas expliqué — et ne pourrait peut-être pas en fait expliquer — en quoi les intérêts agricoles de cette province sont *si* différents qu'ils justifient l'exclusion totale, plutôt que des moyens moins attentatoires d'atteindre ses objectifs.

[366] Le secteur agricole fait assurément face à d'importantes difficultés sur le plan économique, mais c'est aussi le cas de nombreux autres secteurs d'activités. Or, dans aucun de ces autres secteurs, on n'empêche les travailleurs de participer à un processus de négociation collective.

[367] Le gouvernement n'a donc pas démontré en quoi une restriction aussi draconienne des droits garantis par l'al. 2*d*) est nécessaire pour protéger la viabilité et la productivité des exploitations agricoles. Cette restriction, en fait, comme dans son rapport avec la protection des fermes familiales, n'est pas, ne serait-ce qu'un tant soit peu, adaptée à la réalisation de l'objectif de l'État par un moyen moins attentatoire. En effet, elle n'est pas adaptée du tout. Pour reprendre les propos du juge en chef Winkler :

> [TRADUCTION] . . . le législateur n'a même pas tenté de tracer des limites [. . .] pour établir un système de négociation collective adapté aux difficultés que doit surmonter le secteur agricole. [par. 135]

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[368] On the other hand, it bears repeating that the *AEPA* was designed before *Health Services* was decided. The government could hardly be expected to tailor its legislation in accordance with a bargaining regime it had neither a duty nor an intention to implement at the time. Nonetheless, the fact is that *Health Services* intervened and changed the microscope under which the *AEPA* was scrutinized. And under the new lens, the complete absence of any statutory protection for a process of collective bargaining in the *AEPA* cannot be said to be minimally impairing of the s. 2(*d*) right.

[369] I would therefore dismiss the appeal without costs.

[368] Par contre, il faut rappeler que la rédaction de la *LPEA* a précédé l'arrêt *Health Services*. On aurait difficilement pu demander au législateur d'adapter sa loi à un régime de négociation qu'il n'avait ni l'obligation, ni l'intention, de mettre sur pied à l'époque. Néanmoins, le fait demeure que l'arrêt *Health Services* a été rendu depuis et qu'il a changé le microscope servant à scruter la *LPEA*. Et sous la nouvelle lentille, l'absence dans la loi de toute protection du processus de négociation collective ne peut pas être considérée comme une atteinte minimale au droit garanti par l'al. 2*d*).

[369] Par conséquent, je suis d'avis de rejeter le pourvoi sans dépens.

APPENDIX

Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A

3. This Act does not apply,

. . .

(b.1) to an employee within the meaning of the *Agricultural Employees Protection Act, 2002*;

Agricultural Employees Protection Act, 2002, S.O. 2002, c. 16

1. (1) The purpose of this Act is to protect the rights of agricultural employees while having regard to the unique characteristics of agriculture, including, but not limited to, its seasonal nature, its sensitivity to time and climate, the perishability of agricultural products and the need to protect animal and plant life.

(2) The following are the rights of agricultural employees referred to in subsection (1):

1. The right to form or join an employees' association.
2. The right to participate in the lawful activities of an employees' association.
3. The right to assemble.
4. The right to make representations to their employers, through an employees' association, respecting the terms and conditions of their employment.

ANNEXE

Loi de 1995 sur les relations de travail, L.O. 1995, ch. 1, ann. A

3. La présente loi ne s'applique pas, selon le cas :

. . .

b.1) à l'employé au sens de la *Loi de 2002 sur la protection des employés agricoles*;

Loi de 2002 sur la protection des employés agricoles, L.O. 2002, ch. 16

1. (1) La présente loi a pour objet de protéger les droits des employés agricoles tout en tenant compte des caractéristiques propres à l'agriculture, notamment son caractère saisonnier, sa vulnérabilité au temps et au climat, la nature périssable des produits agricoles et la nécessité de protéger la vie animale et végétale.

(2) Les droits des employés agricoles visés au paragraphe (1) sont les suivants :

1. Le droit de former une association d'employés ou d'adhérer à une telle association.
2. Le droit de participer aux activités légitimes d'une association d'employés.
3. Le droit de réunion.
4. Le droit de présenter des observations à leurs employeurs, par l'intermédiaire d'une association d'employés, au sujet de leurs conditions d'emploi.

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5. The right to protection against interference, coercion and discrimination in the exercise of their rights.

2. (1) In this Act,

. . .

"employees' association" means an association of employees formed for the purpose of acting in concert;

. . .

5. (1) The employer shall give an employees' association a reasonable opportunity to make representations respecting the terms and conditions of employment of one or more of its members who are employed by that employer.

(2) For greater certainty, an employees' association may make its representations through a person who is not a member of the association.

(3) For the purposes of subsection (1), the following considerations are relevant to the determination of whether a reasonable opportunity has been given:

1. The timing of the representations relative to planting and harvesting times.

2. The timing of the representations relative to concerns that may arise in running an agricultural operation, including, but not limited to, weather, animal health and safety and plant health.

3. Frequency and repetitiveness of the representations.

(4) Subsection (3) shall not be interpreted as setting out a complete list of relevant considerations.

(5) The employees' association may make the representations orally or in writing.

(6) The employer shall listen to the representations if made orally, or read them if made in writing.

(7) If the representations are made in writing, the employer shall give the association a written acknowledgment that the employer has read them.

. . .

5. Le droit d'exercer leurs droits sans crainte d'ingérence, de contrainte ou de discrimination.

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

. . .

« association d'employés » Association d'employés formée pour agir de concert.

. . .

5. (1) Un employeur donne à une association d'employés une occasion raisonnable de présenter des observations au sujet des conditions d'emploi d'un ou de plusieurs de ses membres qui sont employés par cet employeur.

(2) Il est entendu que l'association d'employés peut présenter ses observations par l'intermédiaire d'une personne qui n'en est pas membre.

(3) Pour l'application du paragraphe (1), les éléments suivants sont pertinents lorsqu'il s'agit d'établir si une occasion raisonnable a été donnée :

1. Le moment où les observations sont présentées par rapport aux dates de plantation et de récolte.

2. Le moment où les observations sont présentées par rapport aux préoccupations qui peuvent surgir pendant la gestion d'une exploitation agricole, notamment les conditions atmosphériques, la santé et la sécurité des animaux ainsi que la santé des végétaux.

3. La fréquence et la répétitivité des observations.

(4) Le paragraphe (3) ne doit pas s'interpréter comme donnant une liste complète d'éléments pertinents.

(5) L'association d'employés peut présenter ses observations oralement ou par écrit.

(6) L'employeur écoute les observations qui lui sont présentées oralement et lit celles qui lui sont présentées par écrit.

(7) Si les observations lui sont présentées par écrit, l'employeur informe l'association d'employés par écrit qu'il les a lues.

. . .

2011 SCC 20 (CanLII)

8. No employer, employers' organization or person acting on behalf of an employer or an employers' organization shall interfere with the formation, selection or administration of an employees' association, the representation of employees by an employees' association or the lawful activities of an employees' association, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

9. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

(a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of an employees' association or was or is exercising any other right under this Act;

(b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of an employees' association or exercising any other right under this Act; or

(c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of an employees' association or to cease to exercise any other right under this Act.

10. No person, employees' association, employers' organization or other entity shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of an employees' association or of an employers' organization or to refrain from exercising any right under this Act or from performing any obligations under this Act.

. . .

18. The *Labour Relations Act, 1995* does not apply to employees or employers in agriculture.

8. Un employeur, une association patronale ou une personne qui agit pour leur compte ne doit pas s'ingérer dans la formation, le choix ou l'administration d'une association d'employés, la représentation des employés par une telle association ou les activités légitimes d'une telle association. Toutefois, l'employeur demeure libre d'exprimer son point de vue, pourvu qu'il ne recoure pas à la contrainte, à l'intimidation, à des menaces ou à des promesses, ni n'abuse de son influence.

9. Un employeur, une association patronale ou une personne qui agit pour leur compte ne doit pas, selon le cas :

a) refuser d'employer ou de continuer d'employer une personne ou faire preuve de discrimination envers une personne en ce qui concerne l'emploi ou une condition d'emploi parce qu'elle était ou est membre d'une association d'employés ou qu'elle exerçait ou exerce un autre droit que lui confère la présente loi;

b) imposer ou proposer d'imposer, dans un contrat de travail, une condition qui vise à restreindre le droit d'un employé ou d'une personne qui cherche un emploi de devenir membre d'une association d'employés ou d'exercer un autre droit que lui confère la présente loi;

c) chercher, par la menace de congédiement ou par toute autre forme de menace, ou par l'imposition d'une peine pécuniaire ou autre, ou par un autre moyen quelconque à obliger un employé à devenir ou à ne pas devenir, à continuer ou à cesser d'être membre, dirigeant ou agent d'une association d'employés ou à cesser d'exercer un autre droit que lui confère la présente loi.

10. Une personne, une association d'employés, une association patronale ou une autre entité ne doit pas chercher par l'intimidation ou la contrainte à obliger quiconque à devenir ou à ne pas devenir, à continuer ou à cesser d'être membre d'une association d'employés ou d'une association patronale ou à s'abstenir d'exercer un droit que lui confère la présente loi ou de s'acquitter des obligations que lui impose celle-ci.

. . .

18. La *Loi de 1995 sur les relations de travail* ne s'applique pas aux employés et employeurs du domaine de l'agriculture.

2011 SCC 20 (CanLII)

Appeal allowed and action dismissed, ABELLA J. *dissenting.*

Solicitor for the appellant: Attorney General of Ontario, Toronto.

Solicitors for the respondents: Cavalluzzo Hayes Shilton McIntyre & Cornish, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the Ontario Federation of Agriculture: Heenan Blaikie, Toronto.

Solicitors for the intervener the Federally Regulated Employers — Transportation and Communications: Heenan Blaikie, Montréal.

Solicitors for the intervener Conseil du patronat du Québec Inc.: Heenan Blaikie, Montréal.

Solicitors for the intervener the Mounted Police Members' Legal Fund: Heenan Blaikie, Toronto.

Solicitors for the intervener the Canadian Employers Council: Stewart McKelvey, St. John's.

Solicitors for the interveners the Coalition of BC Businesses and the British Columbia Agriculture Council: Heenan Blaikie, Vancouver.

Pourvoi accueilli et action rejetée, la juge ABELLA *est dissidente.*

Procureur de l'appelant : Procureur général de l'Ontario, Toronto.

Procureurs des intimés : Cavalluzzo Hayes Shilton McIntyre & Cornish, Toronto.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Ottawa.

Procureur de l'intervenant le procureur général du Québec : Procureur général du Québec, Québec.

Procureur de l'intervenant le procureur général du Nouveau-Brunswick : Procureur général du Nouveau-Brunswick, Fredericton.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Vancouver.

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Edmonton.

Procureurs de l'intervenante la Fédération de l'agriculture de l'Ontario : Heenan Blaikie, Toronto.

Procureurs de l'intervenant les Employeurs des transports et communications de régie fédérale : Heenan Blaikie, Montréal.

Procureurs de l'intervenant le Conseil du patronat du Québec Inc. : Heenan Blaikie, Montréal.

Procureurs de l'intervenant le Fonds de recours juridique des membres de la Gendarmerie : Heenan Blaikie, Toronto.

Procureurs de l'intervenant le Conseil canadien des employeurs : Stewart McKelvey, St. John's.

Procureurs des intervenants Coalition of BC Businesses et British Columbia Agriculture Council : Heenan Blaikie, Vancouver.

2011 SCC 20 (CanLII)

Solicitors for the interveners Justicia for Migrant Workers and the Industrial Accident Victims Group of Ontario: Pieters Law Office, Toronto.

Solicitors for the intervener the Canadian Labour Congress: Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Canadian Police Association: Paliare, Roland, Rosenberg, Rothstein, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Green & Chercover, Toronto.

Procureurs des intervenants Justicia for Migrant Workers et Industrial Accident Victims Group of Ontario : Pieters Law Office, Toronto.

Procureurs de l'intervenant le Congrès du travail du Canada : Sack Goldblatt Mitchell, Toronto.

Procureurs de l'intervenante l'Association canadienne des policiers : Paliare, Roland, Rosenberg, Rothstein, Toronto.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : Green & Chercover, Toronto.

2011 SCC 20 (CanLII)

2016 SCC 49 (CanLII)

British Columbia Teachers' Federation, on behalf of all members of the British Columbia Teachers' Federation *Appellant*

v.

Her Majesty the Queen in Right of the Province of British Columbia *Respondent*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Manitoba, Attorney General of Saskatchewan, Centrale des syndicats du Québec, Canadian Labour Congress, Canadian Association of Counsel to Employers, National Union of Public and General Employees, Public Service Alliance of Canada, Professional Institute of the Public Service of Canada, Association of Canadian Financial Officers, Association of Justice Counsel, Canadian Association of Professional Employees and Coalition of Ontario Teacher Affiliates *Interveners*

British Columbia Teachers' Federation, au nom de tous les membres de la British Columbia Teachers' Federation *Appelante*

c.

Sa Majesté la Reine du chef de la province de la Colombie-Britannique *Intimée*

et

Procureur général du Canada, procureur général de l'Ontario, procureure générale du Québec, procureur général du Manitoba, procureur général de la Saskatchewan, Centrale des syndicats du Québec, Congrès du travail du Canada, Association canadienne des avocats d'employeurs, National Union of Public and General Employees, Alliance de la fonction publique du Canada, Institut professionnel de la fonction publique du Canada, Association canadienne des agents financiers, Association des juristes de justice, Association canadienne des employés professionnels et Coalition of Ontario Teacher Affiliates *Intervenants*

Indexed as: British Columbia Teachers' Federation *v.* British Columbia

2016 SCC 49

File No.: 36500.

2016: November 10.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

Répertorié : British Columbia Teachers' Federation *c.* Colombie-Britannique

2016 CSC 49

N° du greffe : 36500.

2016 : 10 novembre.

Présents : La juge en chef McLachlin et les juges Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown et Rowe.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Freedom of association — Right to collective bargaining — Province adopting legislation nullifying certain terms of public school teachers' collective agreement and preventing

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Charte des droits — Liberté d'association — Droit de négocier collectivement — Adoption par la province de dispositions législatives annulant certaines modalités de la convention collective

2016 SCC 49 (CanLII)

similar terms from being renegotiated or included in collective agreement until specific date — Prior to adoption of legislation, teachers consulted by province and collective bargaining taking place but no agreement reached — Teachers challenging constitutionality of legislation — Trial judge declaring legislation unconstitutional for infringing teachers' freedom of association and finding that province failed to consult in good faith — Majority of Court of Appeal allowing appeal, holding that legislation constitutional since consultations and collective bargaining leading up to legislation afforded teachers meaningful process in which to advance their collective aspirations, and that province consulted in good faith — Dissenting judge concluding that trial judge's finding that legislation unconstitutional must be upheld, that trial judge made no appealable error in finding that province did not consult in good faith, and that infringement of freedom of association not justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 2(d) — Education Improvement Act, S.B.C. 2012, c. 3.

des enseignants des écoles publiques et empêchant jusqu'à une date précise la renégociation de modalités similaires ou l'intégration de telles modalités dans la convention collective — Consultations des enseignants menées par la province et tenue de négociations collectives avant l'adoption des dispositions législatives sans qu'une entente intervienne — Contestation par les enseignants de la constitutionnalité des dispositions législatives — Décision de la juge du procès déclarant les dispositions législatives inconstitutionnelles parce qu'attentatoires à la liberté d'association des enseignants et concluant à l'absence de consultations de bonne foi par la province — Décision des juges majoritaires de la Cour d'appel accueillant l'appel et concluant d'une part à la constitutionnalité des dispositions législatives au motif que les consultations et négociations collectives ayant précédé l'adoption des mesures législatives ont constitué pour les enseignants un processus véritable leur permettant de faire valoir leurs aspirations collectives, et d'autre part à la tenue de consultations de bonne foi par la province — Décision du juge dissident portant que la conclusion de la juge du procès selon laquelle les dispositions législatives sont inconstitutionnelles doit être confirmée, que la conclusion de cette dernière selon laquelle la province n'a pas consulté de bonne foi les intéressés n'est entachée d'aucune erreur susceptible d'appel et que l'atteinte au droit d'association n'est pas justifiable — Charte canadienne des droits et libertés, art. 1, 2d) — Education Improvement Act, S.B.C. 2012, c. 3.

APPEAL from a judgment of the British Columbia Court of Appeal (Bauman C.J.B.C. and Donald, Newbury, Saunders and Harris JJ.A.), 2015 BCCA 184, 71 B.C.L.R. (5th) 223, 371 B.C.A.C. 204, 636 W.A.C. 204, 384 D.L.R. (4th) 385, 338 C.R.R. (2d) 270, 2015 CLLC ¶220-044, [2015] 9 W.W.R. 211, [2015] B.C.J. No. 825 (QL), 2015 CarswellBC 1113 (WL Can.), setting aside a decision of Griffin J., 2014 BCSC 121, 54 B.C.L.R. (5th) 286, 299 C.R.R. (2d) 106, 2014 CLLC ¶220-019, [2014] 3 W.W.R. 672, [2014] B.C.J. No. 91 (QL), 2014 CarswellBC 182 (WL Can.). Appeal allowed, Côté and Brown JJ. dissenting.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (le juge en chef Bauman et les juges Donald, Newbury, Saunders et Harris), 2015 BCCA 184, 71 B.C.L.R. (5th) 223, 371 B.C.A.C. 204, 636 W.A.C. 204, 384 D.L.R. (4th) 385, 338 C.R.R. (2d) 270, 2015 CLLC ¶220-044, [2015] 9 W.W.R. 211, [2015] B.C.J. No. 825 (QL), 2015 CarswellBC 1113 (WL Can.), qui a infirmé une décision de la juge Griffin, 2014 BCSC 121, 54 B.C.L.R. (5th) 286, 299 C.R.R. (2d) 106, 2014 CLLC ¶220-019, [2014] 3 W.W.R. 672, [2014] B.C.J. No. 91 (QL), 2014 CarswellBC 182 (WL Can.). Pourvoi accueilli, les juges Côté et Brown sont dissidents.

John Rogers, *Q.C.*, *Diane MacDonald*, *Michael Sobkin* and *Steven Rogers*, for the appellant.

John Rogers, *c.r.*, *Diane MacDonald*, *Michael Sobkin* et *Steven Rogers*, pour l'appelante.

Karen A. Horsman, *Q.C.*, *Eva L. Ross* and *Keith Evans*, for the respondent.

Karen A. Horsman, *c.r.*, *Eva L. Ross* et *Keith Evans*, pour l'intimée.

Kathryn Hucal, for the intervener the Attorney General of Canada.

Robin K. Basu, *Rochelle S. Fox* and *Michael S. Dunn*, for the intervener the Attorney General of Ontario.

Written submissions only by *Caroline Renaud* and *Gabrielle Saint-Martin Deaudelin*, for the intervener the Attorney General of Quebec.

Deborah Carlson, for the intervener the Attorney General of Manitoba.

Barbara Mysko, for the intervener the Attorney General of Saskatchewan.

Matthew Gapmann, *Claudine Morin* and *Nathalie Léger*, for the intervener Centrale des syndicats du Québec.

Steven Barrett and *Ethan Poskanzer*, for the intervener the Canadian Labour Congress.

Donald J. Jordan, *Q.C.*, and *Jeffrey W. Beedell*, for the intervener the Canadian Association of Counsel to Employers.

Paul Champ and *Bijon Roy*, for the intervener the National Union of Public and General Employees.

Andrew Astritis and *Andrew Raven*, for the intervener the Public Service Alliance of Canada.

Colleen Bauman and *Peter Engelmann*, for the interveners the Professional Institute of the Public Service of Canada et al.

Paul J. J. Cavalluzzo and *Adrienne Telford*, for the intervener the Coalition of Ontario Teacher Affiliates.

The judgment of the Court was delivered orally by

[1] THE CHIEF JUSTICE — The majority of the Court would allow the appeal, substantially for the

Kathryn Hucal, pour l'intervenant le procureur général du Canada.

Robin K. Basu, *Rochelle S. Fox* et *Michael S. Dunn*, pour l'intervenant le procureur général de l'Ontario.

Argumentation écrite seulement par *Caroline Renaud* et *Gabrielle Saint-Martin Deaudelin*, pour l'intervenante la procureure générale du Québec.

Deborah Carlson, pour l'intervenant le procureur général du Manitoba.

Barbara Mysko, pour l'intervenant le procureur général de la Saskatchewan.

Matthew Gapmann, *Claudine Morin* et *Nathalie Léger*, pour l'intervenante la Centrale des syndicats du Québec.

Steven Barrett et *Ethan Poskanzer*, pour l'intervenant le Congrès du travail du Canada.

Donald J. Jordan, *c.r.*, et *Jeffrey W. Beedell*, pour l'intervenante l'Association canadienne des avocats d'employeurs.

Paul Champ et *Bijon Roy*, pour l'intervenant National Union of Public and General Employees.

Andrew Astritis et *Andrew Raven*, pour l'intervenante l'Alliance de la fonction publique du Canada.

Colleen Bauman et *Peter Engelmann*, pour les intervenants l'Institut professionnel de la fonction publique du Canada et autres.

Paul J. J. Cavalluzzo et *Adrienne Telford*, pour l'intervenante Coalition of Ontario Teacher Affiliates.

Version française du jugement de la Cour rendu oralement par

[1] LA JUGE EN CHEF — À la majorité, la Cour est d'avis d'accueillir l'appel, essentiellement pour

2016 SCC 49 (CanLII)

reasons of Justice Donald. Justices Côté and Brown would dissent and dismiss the appeal, substantially for the reasons of the majority in the Court of Appeal.

Judgment accordingly.

Solicitor for the appellant: British Columbia Teachers' Federation, Vancouver.

Solicitor for the respondent: Attorney General of British Columbia, Vancouver.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina.

Solicitors for the intervener Centrale des syndicats du Québec: Barabé Casavant, Montréal.

Solicitors for the intervener the Canadian Labour Congress: Goldblatt Partners, Toronto.

Solicitors for the intervener the Canadian Association of Counsel to Employers: Harris & Company, Vancouver; Gowling WLG (Canada) Inc., Ottawa.

Solicitors for the intervener the National Union of Public and General Employees: Champ and Associates, Ottawa.

les motifs du juge Donald. Les juges Côté et Brown sont dissidents et rejetteraient le pourvoi, principalement pour les motifs exposés par les juges majoritaires de la Cour d'appel.

Jugement en conséquence.

Procureur de l'appelante : British Columbia Teachers' Federation, Vancouver.

Procureur de l'intimée : Procureur général de la Colombie-Britannique, Vancouver.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Toronto.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenante la procureure générale du Québec : Procureure générale du Québec, Québec.

Procureur de l'intervenant le procureur général du Manitoba : Procureur général du Manitoba, Winnipeg.

Procureur de l'intervenant le procureur général de la Saskatchewan : Procureur général de la Saskatchewan, Regina.

Procureurs de l'intervenante la Centrale des syndicats du Québec : Barabé Casavant, Montréal.

Procureurs de l'intervenant le Congrès du travail du Canada : Goldblatt Partners, Toronto.

Procureurs de l'intervenante l'Association canadienne des avocats d'employeurs : Harris & Company, Vancouver; Gowling WLG (Canada) Inc., Ottawa.

Procureurs de l'intervenant National Union of Public and General Employees : Champ and Associates, Ottawa.

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Solicitors for the intervener the Public Service Alliance of Canada: Raven, Cameron, Ballantyne & Yazbeck, Ottawa.

Solicitors for the interveners the Professional Institute of the Public Service of Canada et al.: Goldblatt Partners, Ottawa.

Solicitors for the intervener the Coalition of Ontario Teacher Affiliates: Cavalluzzo Shilton McIntyre Cornish, Toronto.

Procureurs de l'intervenante l'Alliance de la fonction publique du Canada : Raven, Cameron, Ballantyne & Yazbeck, Ottawa.

Procureurs des intervenants l'Institut professionnel de la fonction publique du Canada et autres : Goldblatt Partners, Ottawa.

Procureurs de l'intervenante Coalition of Ontario Teacher Affiliates : Cavalluzzo Shilton McIntyre Cornish, Toronto.

2016 SCC 49 (CanLII)

IN THE MATTER OF A REFERENCE under section 27(1) of the *Judicature Act*, being chapter J-1 of the Revised Statutes of Alberta, 1980;

AND IN THE MATTER OF the validity of compulsory arbitration provisions found in the *Public Service Employee Relations Act*, the *Labour Relations Act*, and the *Police Officers Collective Bargaining Act*, being chapters P-33, L-1.1 and P-12.05 of the Revised Statutes of Alberta, 1980 respectively;

AND IN THE MATTER OF the exclusion of certain employees from units for collective bargaining

between

Alberta Union of Provincial Employees, Canadian Union of Public Employees and Alberta International Fire Fighters Association *Appellants*

and

Attorney General of Manitoba *Intervener for the appellants*

v.

Attorney General for Alberta *Respondent*

and

Attorney General of Canada, Attorney General for Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of British Columbia, Attorney General of Prince Edward Island, Attorney General for Saskatchewan and Attorney General of Newfoundland *Interveners for the respondent*

INDEXED AS: REFERENCE RE *PUBLIC SERVICE EMPLOYEE RELATIONS ACT* (ALTA.)

File No.: 19234.

1985: June 27, 28; 1987: April 9.

DANS L'AFFAIRE D'UN RENVOI fondé sur le paragraphe 27(1) de la *Judicature Act*, R.S.A. 1980, chap. J-1;

ET DANS L'AFFAIRE DE la validité des dispositions sur l'arbitrage obligatoire contenues dans la *Public Service Employee Relations Act*, la *Labour Relations Act* et la *Police Officers Collective Bargaining Act*, R.S.A. 1980, chap. P-33, L-1.1 et P-12.05, respectivement;

ET DANS L'AFFAIRE DE l'exclusion de certains salariés des unités de négociation collective

entre

Alberta Union of Provincial Employees, Syndicat canadien de la fonction publique et Alberta International Fire Fighters Association *Appelants*

et

Le procureur général du Manitoba *Intervenant pour les appelants*

c.

Le procureur général de l'Alberta *Intimé*

et

Le procureur général du Canada, le procureur général de l'Ontario, le procureur général du Québec, le procureur général de la Nouvelle-Écosse, le procureur général de la Colombie-Britannique, le procureur général de l'Île-du-Prince-Édouard, le procureur général de la Saskatchewan et le procureur général de Terre-Neuve *Intervenants pour l'intimé*

RÉPERTORIÉ: RENVOI RELATIF À LA *PUBLIC SERVICE EMPLOYEE RELATIONS ACT* (ALB.)

N° du greffe: 19234.

1985: 27, 28 juin; 1987: 9 avril.

1987 CanLII 88 (SCC)

Present: Dickson C.J. and Beetz, McIntyre, Chouinard*, Wilson, Le Dain and La Forest JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Charter of Rights — Freedom of association — Scope of protection in labour relations context — Provincial legislation prohibiting strikes and lockouts — Legislation providing for arbitration — Whether provincial legislation violated s. 2(d) of the Charter — If so, whether such violation justifiable under s. 1 of the Charter — Public Service Employee Relations Act, R.S.A. 1980, c. P-33, ss. 48, 49, 50, 55, 93, 94 — Labour Relations Act, R.S.A. 1980 (Supp.), c. L-1.1, ss. 117.1, 117.2, 117.3, 117.8 — Police Officers Collective Bargaining Act, S.A. 1983, c. P-12.05, ss. 2(2), 3, 9, 10, 15.

The Lieutenant Governor in Council of Alberta, in accordance with s. 27(1) of the *Judicature Act* of that province, referred to the Alberta Court of Appeal several constitutional questions which raised two main issues: (1) whether the provisions of the *Public Service Employee Relations Act*, the *Labour Relations Act* and the *Police Officers Collective Bargaining Act* of Alberta, which prohibit strikes and impose compulsory arbitration to resolve impasses in collective bargaining, were inconsistent with the *Canadian Charter of Rights and Freedoms*; and (2) whether the provisions of the Acts relating to the conduct of the arbitration and which limit the arbitrability of certain items and require the arbitration board to consider certain factors in making the arbitration award were inconsistent with the *Charter*. The first Act applied to public service employees, the second to firefighters and hospital employees and the third to police officers. The majority of the Court of Appeal of Alberta answered the first issue in the negative and declined to answer the second issue. This appeal is to determine whether the Alberta legislation violates the guarantee of freedom of association in s. 2(*d*) of the *Charter* and, if so, whether such violation can be justified under s. 1.

Held (Dickson C.J. and Wilson J. dissenting): The appeal should be dismissed.

Per Beetz, Le Dain and La Forest JJ.: The challenged provisions of the *Public Service Employee Relations Act*, the *Labour Relations Act* and the *Police Officers Collective Bargaining Act* were not inconsistent with the *Charter*. The constitutional guarantee of freedom of association in s. 2(*d*) of the *Charter* does not include, in

* Chouinard J. took no part in the judgment.

Présents: Le juge en chef Dickson et les juges Beetz, McIntyre, Chouinard*, Wilson, Le Dain et La Forest.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit constitutionnel — Charte des droits — Liberté d'association — Portée de la protection dans le domaine des relations de travail — Législation provinciale interdisant les grèves et les lock-out — Recours à l'arbitrage prescrit par la législation — La législation provinciale viole-t-elle l'art. 2d) de la Charte? — Dans l'affirmative, cette violation est-elle justifiable en vertu de l'article premier de la Charte? — Public Service Employee Relations Act, R.S.A. 1980, chap. P-33, art. 48, 49, 50, 55, 93, 94 — Labour Relations Act, R.S.A. 1980 (Supp.), chap. L-1.1, art. 117.1, 117.2, 117.3, 117.8 — Police Officers Collective Bargaining Act, S.A. 1983, chap. P-12.05, art. 2(2), 3, 9, 10, 15.

Le lieutenant-gouverneur en conseil de l'Alberta, conformément au par. 27(1) de la *Judicature Act* de cette province, a soumis à la Cour d'appel de l'Alberta plusieurs questions constitutionnelles qui soulèvent deux points principaux: (1) Les dispositions de la *Public Service Employee Relations Act*, de la *Labour Relations Act* et de la *Police Officers Collective Bargaining Act* de l'Alberta, qui interdisent le recours aux grèves et imposent l'arbitrage obligatoire pour résoudre les impasses dans la négociation collective, sont-elles incompatibles avec la *Charte canadienne des droits et libertés*; et (2) les dispositions de ces lois se rapportant à l'arbitrage, qui limitent les points qui peuvent y être soumis et qui obligent le tribunal d'arbitrage à tenir compte de certains facteurs quand il rend sa sentence, sont-elles incompatibles avec la *Charte*. La première de ces lois s'applique aux employés de la fonction publique, la seconde aux pompiers et aux employés d'hôpitaux et la troisième aux agents de police. La Cour d'appel de l'Alberta à la majorité a répondu à la première question par la négative et a refusé de répondre à la seconde. Le présent pourvoi a pour objet de décider si la législation albertaine viole la liberté d'association garantie à l'al. 2*d*) de la *Charte* et, dans l'affirmative, si cette violation peut être justifiée en vertu de l'article premier.

Arrêt (le juge en chef Dickson et le juge Wilson sont dissidents): Le pourvoi est rejeté.

Les juges Beetz, Le Dain et La Forest: Les dispositions contestées de la *Public Service Employee Relations Act*, de la *Labour Relations Act* et de la *Police Officers Collective Bargaining Act* ne sont pas incompatibles avec la *Charte*. La garantie constitutionnelle de la liberté d'association que l'on trouve à l'al. 2*d*) de la

* Le juge Chouinard n'a pas pris part au jugement.

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nation without the support of persons with similar values, so too is he or she, in isolation, incapable of resisting domination, over the long term, in many other aspects of life.

Freedom of association is protected in s. 2(*d*) under the rubric of "fundamental" freedoms. In my view, the "fundamental" nature of freedom of association relates to the central importance to the individual of his or her interaction with fellow human beings. The purpose of the constitutional guarantee of freedom of association is, I believe, to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends. In the famous words of Alexis de Tocqueville in *Democracy in America* (1945), vol. 1, at p. 196:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears ... almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.

As social beings, our freedom to act with others is a primary condition of community life, human progress and civilized society. Through association, individuals have been able to participate in determining and controlling the immediate circumstances of their lives, and the rules, mores and principles which govern the communities in which they live. As John Stuart Mill stated, "if public spirit, generous sentiments, or true justice and equality are desired, association, not isolation, of interests, is the school in which these excellences are nurtured". (*Principles of Political Economy* (1893), vol. 2, at p. 352.)

Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through

portance de diverses collectivités dans la poursuite d'objectifs éducatifs, linguistiques, culturels et sociaux tout autant que politiques. Tout comme l'individu est incapable de s'opposer à la domination politique sans l'appui de personnes qui partagent des valeurs semblables, de même, seul, il est incapable à long terme de s'opposer à la domination dans de nombreux autres aspects de la vie.

La liberté d'association est garantie à l'al. 2*d*) sous la rubrique des libertés «fondamentales». À mon avis, la nature «fondamentale» de la liberté d'association est liée à l'importance primordiale que revêt pour l'individu l'interaction avec ses semblables. À mon sens, la garantie constitutionnelle de la liberté d'association vise à reconnaître la nature sociale profonde des entreprises humaines et à protéger l'individu contre tout isolement imposé par l'État dans la poursuite de ses fins. Pour reprendre les termes célèbres d'Alexis de Tocqueville dans *De la Démocratie en Amérique* (1951), tome 1, à la p. 305:

> Après la liberté d'agir seul, la plus naturelle à l'homme est celle de combiner ses efforts avec les efforts de ses semblables et d'agir en commun. Le droit d'association [...] paraît donc presque aussi inaliénable de sa nature que la liberté individuelle. Le législateur ne saurait vouloir le détruire sans attaquer la société elle-même.

En tant qu'êtres sociaux, notre liberté d'agir collectivement est une condition première de la vie communautaire, du progrès humain et d'une société civilisée. En s'associant, les individus ont été en mesure de participer à la détermination et au contrôle des conditions immédiates de leur vie et des règles, mœurs et principes qui régissent les collectivités dans lesquelles ils vivent. Comme l'a affirmé John Stuart Mill: [TRADUCTION] «si le civisme, les sentiments généreux ou la véritable justice et l'égalité sont souhaités, l'association, non pas l'isolement, des intérêts, est l'école où s'apprennent ces principes d'excellence». (*Principles of Political Economy* (1893), vol. 2, à la p. 352.)

La liberté d'association est on ne peut plus essentielle dans les circonstances où l'individu risque d'être lésé par les actions de quelque entité plus importante et plus puissante comme le gouvernement ou un employeur. L'association a tou-

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which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict. T. I. Emerson, "Freedom of Association and Freedom of Expression" (1964), 74 *Yale L.J.* 1 at p. 1, states that:

> More and more the individual, in order to realize his own capacities or to stand up to the institutionalized forces that surround him, has found it imperative to join with others of like mind in pursuit of common objectives.

What freedom of association seeks to protect is not associational activities *qua* particular activities, but the freedom of individuals to interact with, support, and be supported by, their fellow humans in the varied activities in which they choose to engage. But this is not an unlimited constitutional license for all group activity. The mere fact that an activity is capable of being carried out by several people together, as well as individually, does not mean that the activity acquires constitutional protection from legislative prohibition or regulation.

I believe that Bayda C.J.S. was right in holding that s. 2(*d*) normally embraces the liberty to do collectively that which one is permitted to do as an individual, a proposition which one American writer, Reena Raggi perceives to be the cornerstone of freedom of association:

> The basic principle for which recognition will be sought in the formulation of an independent constitutional right of association is that whatever action a person can pursue as an individual, freedom of association must ensure he can pursue with others. Only such a principle assures man that, in his struggle to be independent of government control, he will not be crippled simply because on occasion he strives to achieve that independence with the help of others.

("An Independent Right to Freedom of Association" (1977), 12 *Harv. C.R.-C.L.L. Rev.* 1, at p. 15.)

jours été le moyen par lequel les minorités politiques, culturelles et raciales, les groupes religieux et les travailleurs ont tenté d'atteindre leurs buts et de réaliser leurs aspirations; elle a permis à ceux qui, par ailleurs, auraient été vulnérables et inefficaces de faire face, à armes plus égales, à la puissance et à la force de ceux avec qui leurs intérêts interagissaient et, peut-être même, entraient en conflit. T. I. Emerson écrit ceci dans «Freedom of Association and Freedom of Expression» (1964), 74 *Yale L.J.* 1, à la p. 1:

> [TRADUCTION] De plus en plus l'individu, afin de se réaliser lui-même ou de résister aux forces institutionnalisées qui l'entourent, s'est senti obligé de s'unir avec ceux qui partagent ses idées dans la poursuite d'objectifs communs.

Ce que la liberté d'association vise à protéger, ce ne sont pas les activités de l'association en tant qu'activités particulières, mais la liberté des individus d'interagir avec d'autres êtres humains, de les aider et d'être aidés par eux dans les diverses activités qu'ils choisissent d'exercer. Mais ce n'est pas là une autorisation constitutionnelle illimitée pour toute activité collective. Le simple fait qu'une activité puisse être exercée par plusieurs personnes ensemble, aussi bien qu'individuellement, ne signifie pas que cette activité se voit conférer une protection constitutionnelle contre toute interdiction ou réglementation législative.

Je crois que le juge en chef Bayda a eu raison de conclure que l'al. 2*d*) englobe normalement la liberté de faire collectivement ce qu'il est permis de faire en tant qu'individu, une conception qu'un auteur américain, Reena Raggi, considère comme la pierre angulaire de la liberté d'association:

> [TRADUCTION] Le principe de base qui devrait être reconnu dans la formulation d'un droit constitutionnel indépendant d'association est que quelle que soit l'action qu'un individu peut exercer en tant que tel, la liberté d'association doit lui permettre de l'exercer avec d'autres. Seul un tel principe assure à l'homme que, dans sa lutte pour être indépendant de tout contrôle gouvernemental, il ne sera pas paralysé simplement parce qu'à l'occasion il tente d'atteindre cette indépendance avec l'aide d'autrui.

(«An Independent Right to Freedom of Association» (1977), 12 *Harv. C.R.-C.L.L. Rev.* 1, à la p. 15.)

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However, it is not in my view correct to regard this proposition as the exclusive touchstone for determining the presence or absence of a violation of s. 2(*d*). Certainly, if a legislature permits an individual to enjoy an activity which it forecloses to a collectivity, it may properly be inferred that the legislature intended to prohibit the collective activity because of its collective or associational aspect. Conversely, one may infer from a legislative proscription which applies equally to individuals and groups that the purpose of the legislation was a *bona fide* prohibition of a particular activity because of detrimental qualities inhering in the activity (e.g., criminal conduct), and not merely because of the fact that the activity might sometimes be done in association. The proposition articulated by Bayda C.J.S. is therefore a useful test of legislative purpose in some circumstances. There will, however, be occasions when no analogy involving individuals can be found for associational activity, or when a comparison between groups and individuals fails to capture the essence of a possible violation of associational rights. This is precisely the situation in this case. There is no individual equivalent to a strike. The refusal to work by one individual does not parallel a collective refusal to work. The latter is qualitatively rather than quantitatively different. The overarching consideration remains whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits. The legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature.

Toutefois, il n'est pas juste, à mon avis, de considérer cette proposition comme la pierre de touche exclusive qui permet de déterminer la présence ou l'absence d'une violation de l'al. 2*d*). Il est certain que si un organe législatif autorise un individu à exercer une activité qu'il interdit à la collectivité, on peut à bon droit en déduire que l'organe législatif a voulu interdire l'activité collective en raison de son aspect collectif. À l'inverse, on peut déduire d'une interdiction législative qui s'applique également aux individus et aux groupes que l'objet de la loi constitue une interdiction de bonne foi d'une activité particulière en raison de ses aspects nuisibles intrinsèques (par exemple, le comportement criminel), et non simplement parce qu'il peut arriver que l'activité soit exercée collectivement. La proposition articulée par le juge en chef Bayda constitue donc un critère utile pour vérifier l'objet d'une loi dans certaines circonstances. Il y a cependant des cas où aucune analogie comportant des individus ne peut être trouvée pour une activité collective ou bien où la comparaison entre des groupes et des individus ne permet pas de saisir l'essence d'une éventuelle violation des droits d'association. C'est précisément le cas en l'espèce. Il n'y a pas d'équivalent individuel à une grève. Le refus de travailler par un individu ne correspond nullement à un refus collectif de travailler. Ce dernier est différent au point de vue qualitatif plutôt que quantitatif. Le facteur primordial demeure la question de savoir si un texte législatif ou un acte administratif porte atteinte à la liberté des personnes de se joindre à d'autres personnes et de poursuivre avec elles des objectifs communs. L'objectif d'une loi qui a pour effet de la rendre invalide est la tentative d'interdire un comportement collectif en raison de sa nature concertée ou collective.

I wish to refer to one further concern. It has been suggested that associational activity for the pursuit of economic ends should not be accorded constitutional protection. If by this it is meant that something as fundamental as a person's livelihood or dignity in the workplace is beyond the scope of constitutional protection, I cannot agree. If, on the other hand, it is meant that concerns of an exclusively pecuniary nature are excluded from such protection, such an argument would merit careful

Je voudrais mentionner un dernier point. On a laissé entendre que l'activité collective à des fins économiques ne devrait pas bénéficier d'une garantie constitutionnelle. Si, par cela, on entend qu'une question aussi fondamentale que les conditions de vie ou la dignité de l'individu au travail ne sont pas du domaine de la garantie constitutionnelle, je ne saurais en convenir. Si, par ailleurs, on entend par là que des préoccupations de nature exclusivement pécuniaire échappent à cette garantie, l'argument

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consideration. In the present case, however, we are concerned with interests which go far beyond those of a merely pecuniary nature.

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self respect. In exploring the personal meaning of employment, Professor David M. Beatty, in his article "Labour is Not a Commodity", in *Studies in Contract Law* (1980), has described it as follows, at p. 324:

> As a vehicle which admits a person to the status of a contributing, productive, member of society, employment is seen as providing recognition of the individual's being engaged in something worthwhile. It gives the individual a sense of significance. By realizing our capabilities and contributing in ways society determines to be useful, employment comes to represent the means by which most members of our community can lay claim to an equal right of respect and of concern from others. It is this institution through which most of us secure much of our self-respect and self-esteem.

The role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers. The capacity to bargain collectively has long been recognized as one of the integral and primary functions of associations of working people. While trade unions also fulfil other important social, political and charitable functions, collective bargaining remains vital to the capacity of individual employees to participate in ensuring fair wages, health and safety protections, and equitable and humane working conditions. As Professor Paul Weiler explains in *Reconcilable Differences: New*

mérite d'être examiné soigneusement. En l'espèce cependant, nous avons affaire à des intérêts qui vont beaucoup plus loin que ceux de nature purement pécuniaire.

Le travail est l'un des aspects les plus fondamentaux de la vie d'une personne, un moyen de subvenir à ses besoins financiers et, ce qui est tout aussi important, de jouer un rôle utile dans la société. L'emploi est une composante essentielle du sens de l'identité d'une personne, de sa valorisation et de son bien-être sur le plan émotionnel. C'est pourquoi, les conditions dans lesquelles une personne travaille sont très importantes pour ce qui est de façonner l'ensemble des aspects psychologiques, émotionnels et physiques de sa dignité et du respect qu'elle a d'elle-même. En recherchant ce que signifie pour l'individu le fait d'avoir un emploi, le professeur David M. Beatty, dans son article intitulé «Labour is Not a Commodity», dans *Studies in Contract Law* (1980), donne la description suivante, à la p. 324:

> [TRADUCTION] En tant que véhicule qui permet à l'individu d'atteindre le statut de membre utile et productif de la société, l'emploi est perçu comme permettant de reconnaître qu'il s'adonne à une activité valable. Il lui donne le sens de son importance. Par la réalisation de nos aptitudes et par l'apport d'une contribution que la société juge utile, l'emploi finit par représenter le moyen par lequel la plupart des membres de notre collectivité peuvent prétendre à un droit égal au respect et à la considération des autres. C'est par cette institution que la plupart d'entre nous acquérons, pour une grande part, le respect de soi et la dignité personnelle.

L'association a toujours joué un rôle vital dans la protection des besoins et des intérêts essentiels des travailleurs. Au cours de l'histoire, les travailleurs se sont associés pour surmonter leur vulnérabilité individuelle face à l'employeur. La capacité de négocier collectivement a depuis longtemps été reconnue comme l'une des fonctions intégrantes et premières des associations de travailleurs. Certes les syndicats ont aussi d'autres fonctions importantes sur les plans social, politique et charitable, mais la négociation collective demeure essentielle à la capacité de chaque salarié, à titre individuel, de participer au processus qui leur assurera des salaires justes, la santé et la sécurité ainsi que des conditions de travail humaines et équitables.

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Directions in Canadian Labour Law (1980), at p. 31:

An apt way of putting it is to say that good collective bargaining tries to subject the employment relationship and the work environment to the "rule of law". Many theorists of industrial relations believe that this function of protecting the employee from the abuse of managerial power, thereby enhancing the dignity of the worker as a person, is the primary value of collective bargaining, one which entitles the institution to positive encouragement from the law.

Professor Weiler goes on to characterize collective bargaining as "intrinsically valuable as an experience in self-government" (p. 33), and writes at p. 32:

. . . collective bargaining is the most significant occasion upon which most of these workers ever participate in making social decisions about matters that are salient to their daily lives. That is the essence of collective bargaining.

A similar rationale for endorsing collective bargaining was advanced in the *Woods Task Force Report on Canadian Industrial Relations* (1968), at p. 96:

296. One of the most cherished hopes of those who originally championed the concept of collective bargaining was that it would introduce into the work place some of the basic features of the political democracy that was becoming the hallmark of most of the western world. Traditionally referred to as industrial democracy, it can be described as the substitution of the rule of law for the rule of men in the work place.

Closely related to collective bargaining, at least in our existing industrial relations context, is the freedom to strike. A. W. R. Carrothers, E. E. Palmer and W. B. Rayner, *Collective Bargaining Law in Canada* (2nd ed. 1986), describe the requisites of an effective system of collective bargaining as follows at p. 4:

What are the requirements of an effective system of collective bargaining? From the point of view of employees, such a system requires that they be free to

Comme le professeur Paul Weiler l'explique dans son ouvrage intitulé *Reconcilable Differences: New Directions in Canadian Labour Law* (1980), à la p. 31:

[TRADUCTION] Une bonne façon de présenter les choses consiste à dire qu'une bonne négociation collective tente d'assujettir le rapport entre employeur et employés et le milieu du travail à la «primauté du droit». Bien des théoriciens en matière de relations industrielles croient que cette fonction de protection de l'employé contre les abus de la direction, qui rehausse par le fait même la dignité du travailleur en tant que personne humaine, est la valeur primordiale qui s'attache à la négociation collective, celle qui justifie que l'institution soit encouragée positivement par le droit.

Le professeur Weiler qualifie alors la négociation collective de [TRADUCTION] «intrinsèquement valable comme expérience en matière d'autonomie» (p. 33), et il écrit, à la p. 32:

[TRADUCTION] . . . la négociation collective est l'occasion la plus importante pour la plupart de ces travailleurs de participer à une prise de décisions sociales dans des domaines qui touchent à leur vie quotidienne. C'est là l'essence de la négociation collective.

Une raison semblable d'approuver la négociation collective a été avancée par le *Rapport de l'Équipe spécialisée en relations de travail* (1968), le rapport Woods, à la p. 107:

296. L'un des grands espoirs des pionniers de la négociation collective était qu'elle fit passer dans les lieux de travail quelques-uns des aspects fondamentaux de cette démocratie politique qui était en train de devenir le cachet du monde occidental. C'est ce que, traditionnellement, on a appelé la démocratie économique, et on peut la décrire comme étant la substitution de la raison juridique aux passions humaines sur le lieu de travail.

Le droit de grève est étroitement lié à la négociation collective, tout au moins dans notre contexte actuel de relations de travail. À la page 4 de l'ouvrage intitulé *Collective Bargaining Law in Canada* (2nd ed. 1986), A. W. R. Carrothers, E. E. Palmer et W. B. Rayner décrivent ainsi les conditions indispensables à un système efficace de négociation collective:

[TRADUCTION] Que faut-il pour disposer d'un système de négociation collective efficace? Du point de vue des salariés, un tel système requiert qu'ils soient libres

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Information and Privacy Commissioner of Alberta *Appellant*

v.

United Food and Commercial Workers, Local 401 *Respondent*

- and -

Attorney General of Alberta *Appellant*

v.

United Food and Commercial Workers, Local 401 *Respondent*

and

Attorney General of Canada, Attorney General of Ontario, Privacy Commissioner of Canada, Canadian Civil Liberties Association, British Columbia Civil Liberties Association, Information and Privacy Commissioner of Ontario, Coalition of British Columbia Businesses, Merit Canada, Information and Privacy Commissioner of British Columbia, and Alberta Federation of Labour *Interveners*

Information and Privacy Commissioner of Alberta *Appelant*

c.

Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 401 *Intimé*

- et -

Procureur général de l'Alberta *Appelant*

c.

Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 401 *Intimé*

et

Procureur général du Canada, procureur général de l'Ontario, commissaire à la protection de la vie privée du Canada, Association canadienne des libertés civiles, Association des libertés civiles de la Colombie-Britannique, commissaire à l'information et à la protection de la vie privée de l'Ontario, Coalition of British Columbia Businesses, Merit Canada, Information and Privacy Commissioner of British Columbia, et Alberta Federation of Labour *Intervenants*

Indexed as: Alberta (Information and Privacy Commissioner) *v.* United Food and Commercial Workers, Local 401

2013 SCC 62

File No.: 34890.

2013: June 11; 2013: November 15.

Répertorié : Alberta (Information and Privacy Commissioner) *c.* Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 401

2013 CSC 62

N° du greffe : 34890.

2013 : 11 juin; 2013 : 15 novembre.

2013 SCC 62 (CanLII)

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Charter of rights — Freedom of expression — Labour relations — Privacy — Union video-taping and photographing individuals crossing its picket line for use in its labour dispute — Whether legislation restricting the collection, use and disclosure of personal information violates union's expressive right under s. 2(b) of Charter and, if so, whether violation is justified — Canadian Charter of Rights and Freedoms, ss. 1, 2(b) — Personal Information Protection Act, S.A. 2003, c. P-6.5 — Personal Information Protection Act Regulation, Alta. Reg. 366/2003.

During a lawful strike lasting 305 days, both the Union and the employer video-taped and photographed individuals crossing the picketline. The Union posted signs in the area of the picketing stating that images of persons crossing the picketline might be placed on a website. Several individuals who were recorded crossing the picketline filed complaints with the Alberta Information and Privacy Commissioner. The Commissioner appointed an Adjudicator to decide whether the Union had contravened the *Personal Information Protection Act* (*PIPA*). The Adjudicator concluded that the Union's collection, use and disclosure of the information was not authorized by *PIPA*. On judicial review, *PIPA* was found to violate the Union's rights under s. 2(*b*) of the *Charter*. The Court of Appeal agreed and granted the Union a constitutional exemption from the application of *PIPA*.

Held: The appeal is substantially dismissed.

PIPA establishes a general rule that organizations cannot collect, use or disclose personal information without consent. None of *PIPA*'s exemptions permit the Union to collect, use and disclose personal information for the purpose of advancing its interests in a labour dispute. The central issue is whether *PIPA* achieves a constitutionally acceptable balance between the interests of individuals in controlling the collection, use and disclosure of their personal information and a union's freedom of expression.

Présents : La juge en chef McLachlin et les juges LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit constitutionnel — Charte des droits — Liberté d'expression — Relations de travail — Droit à la vie privée — Syndicat filme et photographie des personnes franchissant sa ligne de piquetage pour se servir des enregistrements dans le cadre du conflit de travail en cours — La loi qui restreint la collecte, l'utilisation et la communication de renseignements personnels porte-t-elle atteinte au droit à la liberté d'expression du syndicat protégé par l'art. 2b) de la Charte et, dans l'affirmative, l'atteinte est-elle justifiée? — Charte canadienne des droits et libertés, art. 1, 2b) — Personal Information Protection Act, S.A. 2003, ch. P-6.5 — Personal Information Protection Act Regulation, Alta. Reg. 366/2003.

À l'occasion d'une grève légale qui a duré 305 jours, tant le syndicat que l'employeur ont enregistré des vidéos et pris des photos de personnes en train de franchir la ligne de piquetage. Le syndicat a installé des affiches à l'intérieur de la zone de piquetage annonçant que les images des personnes qui franchissaient la ligne étaient susceptibles d'être publiées sur un site Web. Plusieurs des personnes filmées ou photographiées en train de franchir la ligne de piquetage ont déposé une plainte auprès du commissaire à l'information et à la protection de la vie privée de l'Alberta. Ce dernier a désigné une arbitre chargée de décider si le syndicat avait contrevenu à la *Personal Information Protection Act* (*PIPA*). L'arbitre a conclu que la collecte, l'utilisation et la communication des renseignements par le syndicat n'étaient pas autorisées par la *PIPA*. Lors d'un contrôle judiciaire, il a été jugé que la *PIPA* portait atteinte aux droits du syndicat protégés par l'al. 2*b*) de la *Charte*. La Cour d'appel s'est dite d'accord et a accordé au syndicat une exemption constitutionnelle quant à l'application de la *PIPA*.

Arrêt : Le pourvoi est rejeté en grande partie.

La *PIPA* pose comme règle générale que les organisations ne peuvent recueillir, utiliser ou communiquer des renseignements personnels sans le consentement des intéressés. Aucune des exceptions prévues par la *PIPA* ne permet au syndicat de recueillir, d'utiliser ou de communiquer des renseignements personnels en vue de faire valoir ses intérêts dans le cadre d'un conflit de travail. La question principale est celle de savoir si la *PIPA* atteint un équilibre acceptable sur le plan constitutionnel entre,

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To the extent that *PIPA* restricts collection for legitimate labour relations purposes, it is in breach of s. 2(*b*) of the *Charter* and cannot be justified under s. 1.

The purpose of *PIPA* is to enhance an individual's control over his or her personal information by restricting the collection, use and disclosure of personal information without that individual's consent. The objective of providing an individual with this measure of control is intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values.

But the *Act* does not include any mechanisms by which a union's constitutional right to freedom of expression may be balanced with the interests protected by the legislation. This Court has long recognized the fundamental importance of freedom of expression in the context of labour disputes. *PIPA* prohibits the collection, use, or disclosure of personal information for many legitimate, expressive purposes related to labour relations. Picketing represents a particularly crucial form of expression with strong historical roots. *PIPA* imposes restrictions on a union's ability to communicate and persuade the public of its cause, impairing its ability to use one of its most effective bargaining strategies in the course of a lawful strike. This infringement of the right to freedom of expression is disproportionate to the government's objective of providing individuals with control over the personal information that they expose by crossing a picketline. It is therefore not justified under s. 1 of the *Charter*.

Given the comprehensive and integrated structure of the statute, the Government of Alberta and the Information and Privacy Commissioner requested that the Court not select specific amendments, requesting instead that the entire statute be declared invalid so that the legislature can consider the *Act* as a whole. The declaration of invalidity is therefore granted but is suspended for a period of 12 months to give the legislature the opportunity to decide how best to make the legislation constitutionally compliant.

Cases Cited

Referred to: *Order P2010-003; Synergen Housing Co-op Ltd.*, 2010 CanLII 98626; *Lavigne v. Canada*

d'une part, le droit des personnes d'exercer un droit de regard sur la collecte, l'utilisation et la communication des renseignements personnels les concernant et, d'autre part, la liberté d'expression d'un syndicat. Dans la mesure où la *PIPA* empêche la collecte de renseignements personnels à des fins légitimes de relations du travail, elle viole l'al. 2*b*) de la *Charte* et cette violation ne saurait se justifier au sens de l'article premier.

La *PIPA* vise à renforcer le droit de regard d'une personne sur les renseignements personnels la concernant en restreignant leur collecte, leur utilisation et leur communication sans son consentement. L'objectif de fournir à une personne ce droit de regard est intimement lié à son autonomie, à sa dignité et à son droit à la vie privée, des valeurs sociales dont l'importance va de soi.

Mais la *Loi* ne prévoit aucun mécanisme permettant de trouver un équilibre entre les intérêts qu'elle protège et le droit constitutionnel du syndicat à la liberté d'expression. La Cour reconnaît depuis longtemps l'importance fondamentale que revêt la liberté d'expression dans le contexte des conflits de travail. La *PIPA* interdit la collecte, l'utilisation et la communication de renseignements personnels qui serviraient de nombreux objectifs expressifs légitimes relatifs aux relations de travail. Le piquetage constitue une forme d'expression particulièrement vitale et fermement ancrée dans l'histoire. La *PIPA* restreint la faculté du syndicat de communiquer avec le public et de le convaincre du bien-fondé de sa cause, compromettant ainsi sa capacité de recourir à une de ses stratégies de négociation les plus efficaces au cours d'une grève légale. Cette atteinte au droit à la liberté d'expression est disproportionnée par rapport à l'objectif du gouvernement d'accorder aux personnes un droit de regard sur les renseignements personnels qu'elles exposent en franchissant une ligne de piquetage. Cette atteinte n'est donc pas justifiée au sens de l'article premier de la *Charte*.

Compte tenu de l'économie exhaustive et intégrée de la *Loi*, le gouvernement de l'Alberta et le commissaire à l'information et à la protection de la vie privée ont demandé à ce que la Cour ne fasse pas un tri parmi des modifications précises, mais qu'elle déclare plutôt l'invalidité de la totalité de la *Loi* de sorte que la législature puisse en traiter comme d'un tout. La déclaration d'invalidité est donc prononcée, mais suspendue pendant 12 mois afin de donner à la législature le temps nécessaire pour décider de la meilleure façon de rendre la loi constitutionnelle.

Jurisprudence

Arrêts mentionnés : *Order P2010-003; Synergen Housing Co-op Ltd.*, 2010 CanLII 98626; *Lavigne*

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(Office of the Commissioner of Official Languages), 2002 SCC 53, [2002] 2 S.C.R. 773; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13, [2006] 1 S.C.R. 441; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156; *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Great Atlantic & Pacific Co. of Canada*, [1994] O.L.R.B. Rep. March 303; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Schachter v. Canada*, [1992] 2 S.C.R. 679.

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c. Canada (Commissariat aux langues officielles), 2002 CSC 53, [2002] 2 R.C.S. 773; *Dagg c. Canada (Ministre des Finances)*, [1997] 2 R.C.S. 403; *Cie H.J. Heinz du Canada ltée c. Canada (Procureur général)*, 2006 CSC 13, [2006] 1 R.C.S. 441; *S.D.G.M.R., section locale 558 c. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 CSC 8, [2002] 1 R.C.S. 156; *T.U.A.C., section locale 1518 c. KMart Canada Ltd.*, [1999] 2 R.C.S. 1083; *Ontario (Procureur général) c. Fraser*, 2011 CSC 20, [2011] 2 R.C.S. 3; *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313; *Great Atlantic & Pacific Co. of Canada*, [1994] O.L.R.B. Rep. March 303; *R. c. Morgentaler*, [1988] 1 R.C.S. 30; *Schachter c. Canada*, [1992] 2 R.C.S. 679.

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Hunt, Chris D. L. « Conceptualizing Privacy and Elucidating its Importance : Foundational Considerations for the Development of Canada's Fledgling Privacy Tort » (2011), 37 *Queen's L.J.* 167.

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Glenn Solomon, *Q.C.*, and *Robert W. Armstrong*, for the appellant the Information and Privacy Commissioner of Alberta.

Roderick Wiltshire, for the appellant the Attorney General of Alberta.

Gwen J. Gray, *Q.C.*, and *Vanessa Cosco*, for the respondent.

Sean Gaudet, for the intervener the Attorney General of Canada.

Rochelle S. Fox and *Sara Weinrib*, for the intervener the Attorney General of Ontario.

Mahmud Jamal, *Patricia Kosseim*, *Regan Morris* and *Kirk Shannon*, for the intervener the Privacy Commissioner of Canada.

MacNeil, Michael. « Unions and the *Charter* : The Supreme Court of Canada and Democratic Values » (2003), 10 *C.L.E.L.J.* 3.

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POURVOI contre un arrêt de la Cour d'appel de l'Alberta (les juges Slatter, McDonald et Read (*ad hoc*)), 2012 ABCA 130, 57 Alta. L.R. (5th) 249, 522 A.R. 197, 544 W.A.C. 197, 349 D.L.R. (4th) 654, 258 C.R.R. (2d) 110, 33 Admin. L.R. (5th) 321, [2012] 6 W.W.R. 211, 2012 CLLC ¶210-025, [2012] A.J. No. 427 (QL), 2012 CarswellAlta 760, qui a accueilli en partie (seulement dans la mesure où la réparation a été modifiée) une décision de la juge Goss, 2011 ABQB 415, 53 Alta. L.R. (5th) 235, 509 A.R. 150, 339 D.L.R. (4th) 279, 32 Admin. L.R. (5th) 107, [2012] 4 W.W.R. 324, 2011 CLLC ¶210-055, [2011] A.J. No. 940 (QL), 2011 CarswellAlta 1486, qui a infirmé une décision de l'Information and Privacy Commissioner, Order P2008-008, 2009 CanLII 90942. Pourvoi rejeté en grande partie.

Glenn Solomon, *c.r.*, et *Robert W. Armstrong*, pour l'appelant Information and Privacy Commissioner of Alberta.

Roderick Wiltshire, pour l'appelant le procureur général de l'Alberta.

Gwen J. Gray, *c.r.*, et *Vanessa Cosco*, pour l'intimé.

Sean Gaudet, pour l'intervenant le procureur général du Canada.

Rochelle S. Fox et *Sara Weinrib*, pour l'intervenant le procureur général de l'Ontario.

Mahmud Jamal, *Patricia Kosseim*, *Regan Morris* et *Kirk Shannon*, pour l'intervenant le commissaire à la protection de la vie privée du Canada.

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Patricia D. S. Jackson and *Sarah Whitmore*, for the intervener the Canadian Civil Liberties Association.

Lindsay M. Lyster, for the intervener the British Columbia Civil Liberties Association.

William S. Challis, for the intervener the Information and Privacy Commissioner of Ontario.

Simon Ruel, for the interveners the Coalition of British Columbia Businesses and Merit Canada.

Written submissions only by *Nitya Iyer*, for the intervener the Information and Privacy Commissioner of British Columbia.

David Williams and *Kristan McLeod*, for the intervener the Alberta Federation of Labour.

The judgment of the Court was delivered by

ABELLA AND CROMWELL JJ. —

Overview

[1] This appeal requires the Court to determine whether Alberta's *Personal Information Protection Act* unjustifiably limits a union's right to freedom of expression in the context of a lawful strike. At issue is whether the *Act* achieves a constitutionally acceptable balance between the interests of individuals in controlling the collection, use and disclosure of their personal information and a union's freedom of expression.

[2] The dispute in this case arose when the United Food and Commercial Workers, Local 401 recorded and photographed individuals crossing its picketline for use in its labour dispute. Several individuals whose images were captured complained to the Information and Privacy Commissioner of Alberta that the Union's activities contravened the *Personal Information Protection Act*, S.A. 2003, c. P-6.5

Patricia D. S. Jackson et *Sarah Whitmore*, pour l'intervenante l'Association canadienne des libertés civiles.

Lindsay M. Lyster, pour l'intervenante l'Association des libertés civiles de la Colombie-Britannique.

William S. Challis, pour l'intervenant le commissaire à l'information et à la protection de la vie privée de l'Ontario.

Simon Ruel, pour les intervenantes Coalition of British Columbia Businesses et Merit Canada.

Argumentation écrite seulement par *Nitya Iyer*, pour l'intervenant Information and Privacy Commissioner of British Columbia.

David Williams et *Kristan McLeod*, pour l'intervenante Alberta Federation of Labour.

Version française du jugement de la Cour rendu par

LES JUGES ABELLA ET CROMWELL —

Vue d'ensemble

[1] Dans le présent pourvoi, la Cour doit déterminer si la *Personal Information Protection Act* de l'Alberta restreint indûment le droit d'un syndicat à la liberté d'expression dans le cadre d'une grève légale. Il s'agit de savoir si la *Loi* atteint un équilibre acceptable sur le plan constitutionnel entre, d'une part, le droit des personnes d'exercer un droit de regard sur la collecte, l'utilisation et la communication des renseignements personnels les concernant et, d'autre part, la liberté d'expression d'un syndicat.

[2] Le litige dont il est question en l'espèce a pris naissance lorsque le syndicat des Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 401 (« syndicat ») a enregistré des vidéos et pris des photos de personnes en train de franchir sa ligne de piquetage, en vue de s'en servir par la suite dans le cadre de son conflit de travail. Plusieurs des personnes dont les images

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("*PIPA*"), which restricts the collection, use and disclosure of personal information by a range of organizations. Those individuals were successful, prompting an application for judicial review on the basis that the legislation infringed the Union's right to freedom of expression under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* and that this infringement was not justified under s. 1.

[3] In our view, the legislation violates s. 2(*b*) because its impact on freedom of expression in the labour context is disproportionate and the infringement is not justified under s. 1.

Facts

[4] The Union represents employees at the Palace Casino at West Edmonton Mall in Alberta. In 2006, during a lawful strike which lasted 305 days, both the Union and a security company hired by the employer video-taped and photographed the picketline near the main entrance to the Casino. The Union posted signs in the area of the picketing stating that images of persons crossing the picketline might be placed on a website called www.casinoscabs.ca.

[5] Several individuals who were recorded crossing the picketline filed complaints with the Alberta Information and Privacy Commissioner under *PIPA*. The Vice-President of the Casino complained that he was photographed or video-taped and that two pictures of him were used on a poster displayed at the picketline with the text: "This is [x's] Police Mugshot." Images of his head were also used in union newsletters and strike leaflets with captions intended to be humorous. Another complainant, a member of the public, testified that cameras were trained on the entrance to the Casino where he would regularly

avaient été captées se sont plaintes au commissaire à l'information et à la protection de la vie privée de l'Alberta (« commissaire ») que les activités du syndicat contrevenaient à la *Personal Information Protection Act*, S.A. 2003, ch. P-6.5 (« *PIPA* » ou « *Loi* »), qui restreint la faculté d'un certain nombre d'organismes de recueillir, d'utiliser et de communiquer des renseignements personnels. Ces personnes ayant obtenu gain de cause, le syndicat a formulé une demande de contrôle judiciaire dans laquelle il a allégué que la loi en question portait atteinte à la liberté d'expression que lui garantit l'al. 2*b*) de la *Charte canadienne des droits et libertés* et que cette atteinte n'était pas justifiée au sens de l'article premier.

[3] À notre avis, non seulement la *Loi* viole-t-elle l'al. 2*b*) parce que ses répercussions sur la liberté d'expression dans le contexte du travail sont démesurées, mais l'atteinte qu'elle cause n'est pas justifiée au sens de l'article premier.

Les faits

[4] Le syndicat représente les employés du Palace Casino du West Edmonton Mall, situé en Alberta. En 2006, à l'occasion d'une grève légale qui a duré 305 jours, tant le syndicat qu'une agence de sécurité engagée par l'employeur ont enregistré des vidéos et pris des photos de la ligne de piquetage dressée près de l'entrée principale du casino. Le syndicat a installé des affiches à l'intérieur de la zone de piquetage annonçant que les images des personnes qui franchissaient la ligne étaient susceptibles d'être publiées sur le site Web www.casinoscabs.ca.

[5] Plusieurs des personnes filmées ou photographiées en train de franchir la ligne de piquetage ont déposé une plainte, en application de la *PIPA*, auprès du commissaire à l'information et à la protection de la vie privée de l'Alberta. Le vice-président du casino s'est plaint d'avoir été photographié ou filmé sur bande vidéo, et du fait que deux photos de lui s'étaient retrouvées sur une affiche exhibée à la ligne de piquetage et portant la mention : [TRADUCTION] « Photos signalétiques de la police de [x] ». Des images de son visage se sont également retrouvées sur des tracts et des

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meet friends. A third complainant testified that she had been photographed and video-taped while working near the Casino entrance. No recordings of the complainants were placed on the website.

[6] The Commissioner appointed an Adjudicator to decide whether the Union, in collecting, using and disclosing personal information about individuals without their consent had contravened *PIPA*. In Alberta, the *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3, and accompanying regulations prevent the Commissioner from deciding questions of constitutional law. As a result, the Adjudicator lacked jurisdiction to consider the Union's arguments on the constitutionality of *PIPA* or its application to the Union's activities. The Adjudicator accepted the Union's evidence that it is common practice in Alberta for both employers and unions to video-tape and photograph picketlines and that the Union did so for the following reasons:

- informing the public about the strike, including through pamphlets, newsletters and a website;
- informing picketing Union members about the strike, including through pamphlets, newsletters and a website;
- dissuading people from crossing the picketline;
- acting as a deterrent to violence from non-picketers;
- gathering evidence should it become relevant to an investigation or legal proceeding (both of

bulletins d'information du syndicat avec des légendes qui se voulaient humoristiques. Un autre plaignant, un simple citoyen, a expliqué qu'il y avait des caméras à l'entrée du casino, là où il rencontrait fréquemment des amis. Une troisième plaignante a affirmé avoir été photographiée et filmée sur bande vidéo alors qu'elle travaillait près de l'entrée du casino. Aucune image des plaignants n'a été publiée sur le site Web.

[6] Le commissaire a désigné une arbitre chargée de décider si le syndicat avait contrevenu à la *PIPA* en recueillant, utilisant et communiquant des renseignements personnels sans le consentement des personnes à qui ils se rapportent. En Alberta, l'*Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, ch. A-3, et ses règlements d'application empêchent le commissaire de trancher des questions de droit constitutionnel. L'arbitre n'avait donc pas compétence pour examiner les arguments du syndicat quant à la constitutionnalité de la *PIPA* ou quant à son application aux activités du syndicat. L'arbitre a accepté les éléments de preuve du syndicat suivant lesquels il est courant en Alberta que les employeurs et les syndicats enregistrent sur bande vidéo et photographient ce qui se passe sur les lignes de piquetage. Elle a ajouté que le syndicat l'avait fait pour les raisons suivantes :

- informer le public au sujet de la grève, notamment au moyen de tracts, de bulletins d'information et d'un site Web;
- informer les membres du syndicat qui faisaient du piquetage au sujet de la grève, notamment au moyen de tracts, de bulletins d'information et d'un site Web;
- dissuader quiconque de franchir la ligne de piquetage;
- s'en servir comme moyen pour dissuader les personnes ne faisant pas de piquetage de recourir à la violence;
- recueillir des éléments de preuve qui pourraient s'avérer utiles lors d'une enquête ou d'une

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altercations as well as to show long periods of peaceful picketing);

- creating material for use as a training tool for Union members;
- providing material to other unions for educational purposes;
- supporting morale on the picket line with the use of humour;
- responding to similar activity on the part of the employer; and
- deterring theft of Union property.

(*Order P2008-008; United Food and Commercial Workers, Local 401*, 2009 CanLII 90942 (AB OIPC), at para. 20)

The Adjudicator concluded that "many of these purposes also promoted the underlying purpose of the strike — that of achieving a resolution to the labour dispute [in favour] of the Union": para. 20. The Adjudicator concluded that the Union's collection, use and disclosure of private information was for an expressive purpose. As she put it, "one of the primary purposes of the Union's information collection was to dissuade people from crossing the picket line": para. 51. She also concluded that she was not aware of, and had not been referred to, any provisions of *PIPA* that would authorize collection, use and disclosure of personal information for that purpose: para. 67. She rejected the Union's claim that it was covered by the "journalistic purposes" exemption because its activities were also aimed at resolving the labour dispute in its favour. The "journalistic purposes" exemption in the *Act* therefore did not apply to the extent that the information was collected, used or disclosed for other purposes. The Union's ancillary argument — that the collection, use and disclosure of personal information was authorized under another exemption — a possible investigation or legal proceeding — was accepted, but was not

instance judiciaire (tant en ce qui concerne les altercations que pour faire la preuve des longues périodes de piquetage paisible);

- créer du matériel didactique pouvant servir à la formation des membres du syndicat;
- offrir du matériel éducatif aux autres syndicats;
- appuyer le moral des syndiqués sur la ligne de piquetage en recourant à l'humour;
- réagir aux mesures semblables prises par l'employeur;
- dissuader le vol de biens appartenant au syndicat.

(*Order P2008-008; United Food and Commercial Workers, Local 401*, 2009 CanLII 90942 (OIPC Alb.), par. 20)

L'arbitre a conclu que [TRADUCTION] « bon nombre des objectifs en question favorisaient également l'atteinte de l'objectif fondamental de la grève, soit celui de parvenir à un règlement du conflit de travail en faveur du syndicat » (par. 20). L'arbitre a aussi conclu que la collecte, l'utilisation et la communication de renseignements personnels par le syndicat visaient un objectif de nature expressive. À cet égard, elle a affirmé qu'« en recueillant les renseignements en question, le syndicat visait notamment à dissuader les gens de franchir la ligne de piquetage » (par. 51). L'arbitre a également conclu qu'elle ne connaissait, et qu'on ne lui avait cité, aucune disposition de la *PIPA* autorisant la collecte, l'utilisation et la communication de renseignements personnels à cette fin (par. 67). Elle a rejeté l'argument du syndicat suivant lequel ce dernier était protégé par l'exception relative aux « fins journalistiques », puisque ses activités visaient également à résoudre le conflit de travail en sa faveur. Pour elle, l'exception relative aux « fins journalistiques » prévue par la *Loi* ne s'appliquait donc pas, dès lors que les renseignements avaient été recueillis, utilisés ou communiqués à d'autres fins. L'argument accessoire du syndicat suivant lequel la collecte,

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sufficient to exempt the Union's activity from *PIPA* for any other purpose. The Union was ordered to stop collecting the personal information for any purposes other than a possible investigation or legal proceeding and to destroy any personal information it had in its possession that had been obtained in contravention of the *Act*.

[7] On judicial review, the Union argued that the provisions of *PIPA* that prevent it from collecting, using and disclosing personal information obtained from its lawful picketline infringed s. 2(*b*) of the *Charter* (2011 ABQB 415, 53 Alta. L.R. (5th) 235). The chambers judge found that the Union's activity had expressive content and that there was no reason to exclude it from the protection of s. 2(*b*). She found that *PIPA*, as interpreted by the Adjudicator, directly limited the Union's freedom of expression by preventing the Union from collecting, using, and disclosing personal information obtained about individuals while they were in public view. She also concluded that the breach could not be justified under s. 1.

[8] The Court of Appeal was of the view that the real issue in the case was whether it was justifiable to restrain expression in support of labour relations and collective bargaining activities (2012 ABCA 130, 57 Alta. L.R. (5th) 249). It concluded that *PIPA* was overbroad. The privacy interest at stake was minor since the complainants were in a public place, crossing a picketline, and had notice that images were being collected. On the other side of the balance was the right of workers to engage in collective bargaining and of the Union to communicate with the public: para. 74. The Court of Appeal agreed with the chambers judge that there was a breach of s. 2(*b*) that could not be saved under s. 1

l'utilisation et la communication des renseignements personnels étaient autorisées par une autre exception — soit celle relative à la tenue d'une éventuelle enquête ou à l'introduction d'une éventuelle instance judiciaire — a été accepté, mais cela n'était pas suffisant pour soustraire ses activités à l'application de la *PIPA* à toute autre fin. Le syndicat a donc reçu l'ordre de cesser de recueillir des renseignements personnels à toute autre fin qu'une éventuelle enquête ou instance judiciaire ainsi que de détruire tout renseignement personnel qu'il avait en sa possession et qui avait été obtenu en contravention de la *Loi*.

[7] Lors du contrôle judiciaire, le syndicat a fait valoir que les dispositions de la *PIPA* qui l'empêchaient de recueillir, d'utiliser et de communiquer des renseignements personnels obtenus sur sa ligne de piquetage licite contrevenaient à l'alinéa 2*b*) de la *Charte* (2011 ABQB 415, 53 Alta. L.R. (5th) 235). La juge en son cabinet a conclu que les activités du syndicat comportaient un contenu expressif et qu'il n'y avait aucune raison de les soustraire à la protection de l'al. 2*b*). Elle a affirmé que, selon l'interprétation que l'arbitre lui en avait donnée, la *PIPA* restreignait directement la liberté d'expression du syndicat en lui interdisant de recueillir, d'utiliser et de communiquer des renseignements personnels concernant des personnes alors qu'elles étaient à la vue du public. Elle a également conclu que cette violation ne pouvait se justifier au sens de l'article premier.

[8] La Cour d'appel s'est dite d'avis que la véritable question en litige était celle de savoir s'il était justifié de restreindre l'expression favorable aux activités se rapportant à des relations de travail et à une négociation collective (2012 ABCA 130, 57 Alta. L.R. (5th) 249). Elle a conclu que la *PIPA* avait une portée trop large. En effet, d'une part, le droit au respect de la vie privée en jeu était mineur, puisque les plaignants se trouvaient dans un lieu public, qu'ils franchissaient une ligne de piquetage et qu'ils étaient avisés que des images étaient recueillies. D'autre part, il fallait tenir compte du droit des travailleurs de négocier collectivement et de celui du syndicat de communiquer avec le public

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and it therefore granted the Union a constitutional exemption from the application of *PIPA*.

Analysis

[9] The stated constitutional questions in this case are:

1. Do the *Personal Information Protection Act*, S.A. 2003, c. P-6.5, and the *Personal Information Protection Act Regulation*, Alta. Reg. 366/2003, violate s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* insofar as they restrict a union's ability to collect, use or disclose personal information during the course of a lawful strike?

2. If so, is the infringement a reasonable limit prescribed by law, which can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

[10] We turn first to the question of whether *PIPA* limits freedom of expression. This case arises in the specific factual context that was before the Adjudicator, but the challenge is to *PIPA* as a whole. While there was some debate about whether particular aspects of the conduct engaged in by the Union were protected by s. 2(*b*), there can be no doubt, in our view, that *PIPA* limits expressive activity that is so protected. The reviewing judge and the Court of Appeal both recognized that the collection, use and disclosure of personal information by the Union in the context of picketing during a lawful strike is inherently expressive. We agree.

[11] As the parties conceded, freedom of expression under s. 2(*b*) is clearly engaged by the Union's activities. The Union collected personal information by recording the picketline. One of the primary

(par. 74). La Cour d'appel s'est aussi dite d'accord avec la juge en son cabinet pour conclure que la violation de l'al. 2*b*) ne pouvait être justifiée au sens de l'article premier et elle a donc accordé au syndicat une exemption constitutionnelle quant à l'application de la *PIPA*.

Analyse

[9] Les questions constitutionnelles énoncées en l'espèce sont les suivantes :

1. La *Personal Information Protection Act*, S.A. 2003, ch. P-6.5, et le *Personal Information Protection Act Regulation*, Alta. Reg. 366/2003, portent-ils atteinte aux droits protégés par l'al. 2*b*) de la *Charte canadienne des droits et libertés* dans la mesure où ils limitent la capacité d'un syndicat de recueillir, d'utiliser ou de communiquer des renseignements personnels pendant une grève légale?

2. Dans l'affirmative, cette atteinte constitue-t-elle une limite raisonnable, prescrite par une règle de droit, dont la justification peut être démontrée dans une société libre et démocratique au sens de l'article premier de la *Charte canadienne des droits et libertés*?

[10] Examinons d'abord la question de savoir si la *PIPA* restreint la liberté d'expression. La présente affaire est survenue dans le contexte factuel précis qui a été soumis à l'arbitre, mais c'est la *PIPA* dans son ensemble qui est contestée. Bien qu'il y ait eu un certain débat quant à la question de savoir si des aspects particuliers des agissements du syndicat étaient protégés par l'al. 2*b*), il nous apparaît incontestable que la *PIPA* restreint les activités expressives ainsi protégées. La juge saisie de la demande de contrôle judiciaire ainsi que la Cour d'appel ont toutes deux reconnu que la collecte, l'utilisation et la communication, par le syndicat, de renseignements personnels dans le contexte d'un piquetage au cours d'une grève légale constituaient intrinsèquement des activités expressives. Nous sommes du même avis.

[11] Comme l'ont admis les parties, les activités du syndicat font manifestement intervenir la liberté d'expression protégée par l'al. 2*b*). Le syndicat a recueilli des renseignements personnels en filmant

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purposes for the Union's *collection* of personal information was, as the Adjudicator recognized, to dissuade people from crossing the picketline: para. 51; Goss J., at paras. 31-34; Court of Appeal, at para. 64. Recording conduct related to picketing and, in particular, recording a lawful picketline and any individuals who crossed it, is expressive activity: its purpose was to persuade individuals to support the Union. So too is recording and potentially using or distributing recordings of persons crossing the picketline for deterring people from crossing the picketline and informing the public about the strike.

et photographiant la ligne de piquetage. Comme l'a reconnu l'arbitre, en *recueillant* des renseignements personnels, le syndicat visait notamment à dissuader quiconque de franchir la ligne de piquetage (par. 51; motifs de la juge Goss, par. 31-34; motifs de la Cour d'appel, par. 64). Le fait de filmer et de photographier des actes relatifs au piquetage, plus particulièrement relatifs à une ligne de piquetage légale et à toute personne qui la franchit, est une activité expressive : il s'agit de persuader des personnes d'appuyer le syndicat. Il en est de même du fait de filmer ou de prendre des photos ainsi que de potentiellement utiliser ou distribuer les enregistrements montrant des personnes en train de franchir la ligne de piquetage : dans ce cas, il s'agit de dissuader quiconque de faire de même et de renseigner le public sur la grève.

[12] To understand how *PIPA* limited the Union's expressive activities, it is helpful to review the legislation in some detail.

[12] Pour comprendre comment la *PIPA* restreint les activités expressives du syndicat, il est utile d'examiner la loi en question de façon assez détaillée.

[13] Alberta's *PIPA* was inspired by the federal *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("*PIPEDA*"). Both pieces of legislation are part of an international movement towards giving individuals better control over their personal information: Éloïse Gratton, *Understanding Personal Information: Managing Privacy Risks* (2013), at pp. 6 ff. *PIPEDA* generally applies to private sector organizations engaged in commercial activities in any province. It does not apply, however, if the Governor in Council determines that there is comparable protection in place in the province, as is the case with respect to *PIPA* in Alberta: *PIPEDA*, s. 26(2)(*b*); Michel W. Drapeau and Marc-Aurèle Racicot, *Protection of Privacy in the Canadian Private and Health Sectors 2013* (2012), at p. AB-3.

[13] La *PIPA* de l'Alberta s'inspire d'une loi fédérale, la *Loi sur la protection des renseignements personnels et les documents électroniques*, L.C. 2000, ch. 5 (« *LPRPDÉ* »). Ces deux lois s'inscrivent dans une tendance internationale vers la reconnaissance d'un plus grand droit de regard des personnes sur les renseignements personnels les concernant (Éloïse Gratton, *Understanding Personal Information : Managing Privacy Risks* (2013), p. 6 et suiv.). La *LPRPDÉ* s'applique de manière générale aux organisations du secteur privé qui se livrent à des activités commerciales dans une province. Elle ne s'applique toutefois pas si le gouverneur en conseil estime qu'il existe déjà une protection comparable dans la province en question, comme c'est le cas avec la *PIPA* en Alberta (*LPRPDÉ*, al. 26(2)*b*); Michel W. Drapeau et Marc-Aurèle Racicot, *Protection of Privacy in the Canadian Private and Health Sectors 2013* (2012), p. AB-3).

[14] *PIPA*'s stated purpose is almost identical to that of the *PIPEDA*. *PIPA*'s purpose is explicitly set out in s. 3, which states that it is

[14] L'objectif déclaré de la *PIPA* est presque identique à celui de la *LPRPDÉ* et est explicitement énoncé à son art. 3 :

to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes

[TRADUCTION] . . . régir la collecte, l'utilisation et la communication de renseignements personnels d'une

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both the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for purposes that are reasonable.

[15] The scope of *PIPA* is, however, considerably broader than that of *PIPEDA*. Unlike *PIPEDA*, *PIPA*'s limitations on the collection, use and disclosure of personal information are not restricted to those activities undertaken for commercial purposes. Instead, *PIPA* establishes a general rule that organizations cannot collect, use or disclose personal information without consent: s. 7(1). Except as provided for by *PIPA*, it "applies to every organization and in respect of all personal information": s. 4(1). The term "organization" includes a corporation, an unincorporated association, a trade union, a partnership, or an individual acting in a commercial capacity: s. 1(1)(i). The term "personal information" is defined broadly to mean "information about an identifiable individual": s. 1(1)(k). The Commissioner has made it clear that personal information includes information that is not "private", so that "personal information does not lose its character as personal information if the information is widely or publicly known": *Order P2010-003; Synergen Housing Co-op Ltd.*, 2010 CanLII 98626 (AB OIPC), at para. 17.

[16] The breadth of *PIPA* is mitigated by a series of exemptions. The most relevant include the following. First, through a restriction on the definition of "organization", *PIPA* excludes from its application individuals acting in a "personal or domestic capacity": ss. 1(1)(i) and 4(3)(a). Second, s. 56(2) and (3) operate together so that *PIPA* does not apply to a non-profit organization unless that organization collects, uses, or discloses information in connection with a commercial activity. Third, the application provision indicates that *PIPA* does

manière qui tient compte à la fois du droit des individus à la protection des renseignements personnels qui les concernent et du besoin des organisations de recueillir, d'utiliser ou de communiquer des renseignements personnels à des fins raisonnables.

[15] La *PIPA* a toutefois une portée beaucoup plus large que la *LPRPDÉ*. En effet, contrairement aux mesures prévues par cette dernière, les restrictions que prévoit la *PIPA* quant à la collecte, à l'utilisation et à la communication des renseignements personnels ne visent pas uniquement les activités ayant des fins commerciales. La *PIPA* pose plutôt comme règle générale que les organisations ne peuvent recueillir, utiliser ou communiquer des renseignements personnels sans le consentement des intéressés (par. 7(1)). Sauf dans la mesure prévue par la *PIPA*, celle-ci [TRADUCTION] « s'applique à toute organisation et à l'égard de tout renseignement personnel » (par. 4(1)). Le mot « organisation » s'entend notamment des personnes morales, des associations non constituées en personne morale, des organisations syndicales, des sociétés de personnes et des personnes physiques agissant dans le cadre d'une activité commerciale (al. 1(1)i)). L'expression « renseignements personnels » est définie de façon large comme « tout renseignement concernant une personne identifiable » (al. 1(1)k)). Le commissaire a bien précisé que les renseignements personnels comprennent ceux qui ne sont pas « privés », de sorte que [TRADUCTION] « les renseignements ne perdent pas leur caractère de renseignements personnels s'ils sont largement diffusés ou connus du public » (*Order P2010-003; Synergen Housing Co-op Ltd.*, 2010 CanLII 98626 (OIPC Alb.), par. 17).

[16] Une série d'exceptions limite cependant la portée de la *PIPA*. En voici certaines des plus pertinentes. Premièrement, en limitant la portée de la définition du mot « organisation », la *Loi* exclut de son champ d'application les personnes qui agissent [TRADUCTION] « à titre personnel ou familial » (al. 1(1)i) et al. 4(3)a)). Deuxièmement, compte tenu de l'effet combiné des par. 56(2) et (3), la *PIPA* ne s'applique pas aux organismes sans but lucratif à moins que ceux-ci ne recueillent, utilisent ou communiquent des renseignements dans le cadre

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not apply in certain circumstances, including when information is collected, used, or disclosed for "artistic or literary purposes and for no other purpose" (s. 4(3)(b)) or when it is collected, used or disclosed for "journalistic purposes *and for no other purpose*" (s. 4(3)(c)). Finally, *PIPA* creates an exception to the consent requirement where the collection, use or disclosure of the information is reasonable for the purposes of an investigation or a legal proceeding (ss. 14(d), 17(d), 20(f) and (m)) or the information is "publicly available as prescribed or otherwise determined by the regulations" (ss. 14(e), 17(e) and 20(j)). The term "publicly available" is narrowly defined in s. 7 of the *Personal Information Protection Act Regulation*, Alta. Reg. 366/2003, to mean information that is available: in a telephone or business directory (or other similar registry); in a record of a quasi-judicial body; or in a magazine, book, or newspaper.

d'une activité commerciale. Troisièmement, les dispositions de la *Loi* relatives à son champ d'application précisent qu'elle ne s'applique pas dans certaines circonstances, notamment lorsque les renseignements sont recueillis, utilisés ou communiqués « à des fins artistiques ou littéraires et à aucune autre fin » (al. 4(3)b)) ou « à des fins journalistiques *et à aucune autre fin* » (al. 4(3)c)). Enfin, la *PIPA* prévoit une exception à l'exigence du consentement lorsque la collecte, l'utilisation ou la communication des renseignements est raisonnable à des fins relatives à une enquête ou à une instance judiciaire (al. 14d), 17d), 20f) et 20m)) ou lorsque les renseignements sont « accessibles au public selon ce qui est prescrit ou autrement prévu par règlement » (al. 14e), 17e) et 20j)). L'article 7 du *Personal Information Protection Act Regulation*, Alta. Reg. 366/2003, donne une définition étroite de l'expression [TRADUCTION] « accessibles au public », en précisant qu'il s'agit de renseignements que l'on peut obtenir en consultant un annuaire téléphonique ou commercial (ou tout autre répertoire semblable), les registres d'un organisme quasi judiciaire ou encore un magazine, un livre ou un journal.

[17] Given the Adjudicator's finding that none of these exemptions applied to allow the Union to collect, use and disclose personal information for the purpose of advancing its interests in a labour dispute, we conclude without difficulty that it restricts freedom of expression.

[17] Vu la conclusion de l'arbitre suivant laquelle aucune des exceptions susmentionnées ne s'appliquait de manière à permettre au syndicat de recueillir, d'utiliser et de communiquer des renseignements personnels en vue de faire valoir ses intérêts dans le cadre d'un conflit de travail, nous n'avons aucune difficulté à conclure que la *Loi* restreint la liberté d'expression du syndicat.

[18] This brings us to the s. 1 analysis. At this stage, we must determine whether *PIPA* serves a pressing and substantial objective and, if so, whether its provisions are rationally connected to that objective, whether it impairs the right to freedom of expression no more than is necessary, and whether its effects are proportionate to the government's objective. While *PIPA* is rationally connected to a pressing and substantial objective, its broad limitations on freedom of expression are not demonstrably justified because its limitations on expression are disproportionate to the benefits the legislation seeks to promote.

[18] Cela nous amène à l'analyse fondée sur l'article premier. À cette étape-ci, il nous faut déterminer si la *PIPA* vise un objectif urgent et réel et, dans l'affirmative, si ses dispositions sont rationnellement liées à cet objectif, si cet objectif porte atteinte au droit à la liberté d'expression au-delà de ce qui est nécessaire et si ses effets sont proportionnels à l'objectif du gouvernement. Bien que la *PIPA* soit rationnellement liée à un objectif urgent et réel, la justification des restrictions considérables qu'elle impose à la liberté d'expression ne peut se démontrer parce que ces restrictions sont disproportionnées par rapport aux bienfaits qu'elle cherche à promouvoir.

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[19] There is no dispute that *PIPA* has a pressing and substantial objective. The purpose of *PIPA* is explicitly set out in s. 3, as previously noted, which states:

3 The purpose of this Act is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for purposes that are reasonable.

The focus is on providing an individual with some measure of control over his or her personal information: Gratton, at pp. 6 ff. The ability of individuals to control their personal information is intimately connected to their individual autonomy, dignity and privacy. These are fundamental values that lie at the heart of a democracy. As this Court has previously recognized, legislation which aims to protect control over personal information should be characterized as "quasi-constitutional" because of the fundamental role privacy plays in the preservation of a free and democratic society: *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, at para. 24; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paras. 65-66; *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, [2006] 1 S.C.R. 441, at para. 28.

[20] *PIPA*'s objective is increasingly significant in the modern context, where new technologies give organizations an almost unlimited capacity to collect personal information, analyze it, use it and communicate it to others for their own purposes. There is also no serious question that *PIPA* is rationally connected to this important objective. As the Union acknowledges, *PIPA* directly addresses the objective by imposing broad restrictions on the collection, use and disclosure of personal information. However, in our view, these broad restrictions are not justified because they are disproportionate to the benefits the legislation seeks to promote. In other words, "the *Charter* infringement is too high a price to pay for the benefit of the law":

[19] Il est acquis aux débats que la *PIPA* vise un objectif urgent et réel. Son objet est explicitement énoncé à l'art. 3 qui, comme nous l'avons déjà signalé, prévoit que :

[TRADUCTION] **3** La présente loi a pour objet de régir la collecte, l'utilisation et la communication de renseignements personnels d'une manière qui tient compte à la fois du droit des individus à la protection des renseignements personnels qui les concernent et du besoin des organisations de recueillir, d'utiliser ou de communiquer des renseignements personnels à des fins raisonnables.

La *Loi* cherche d'abord et avant tout à conférer aux personnes un certain droit de regard sur les renseignements personnels les concernant (Gratton, p. 6 et suiv.). Or, la faculté d'une personne d'exercer un tel droit est intimement liée à son autonomie, à sa dignité et à son droit à la vie privée. Il s'agit de valeurs fondamentales qui se situent au cœur de toute démocratie. Ainsi que la Cour l'a déjà reconnu, une loi qui vise à protéger un droit de regard sur des renseignements personnels devrait être qualifiée de « quasi constitutionnelle » en raison du rôle fondamental que joue le respect de la vie privée dans le maintien d'une société libre et démocratique (*Lavigne c. Canada (Commissariat aux langues officielles)*, [2002] 2 R.C.S. 773, par. 24; *Dagg c. Canada (Ministre des Finances)*, [1997] 2 R.C.S. 403, par. 65-66; *Cie H.J. Heinz du Canada ltée c. Canada (Procureur général)*, [2006] 1 R.C.S. 441, par. 28).

[20] L'objectif visé par la *PIPA* gagne en importance à l'ère moderne, où les nouvelles technologies fournissent aux organisations une capacité quasi illimitée de recueillir des renseignements personnels, de les analyser, de les utiliser et de les communiquer à autrui pour leurs propres fins. En outre, on ne peut sérieusement mettre en doute l'existence d'un lien rationnel entre la *PIPA* et cet objectif important. Comme le reconnaît le syndicat, la *Loi* aborde de front cet objectif en restreignant considérablement la collecte, l'utilisation et la communication des renseignements personnels. Ces restrictions considérables nous paraissent toutefois injustifiées parce qu'elles sont disproportionnées par rapport aux bienfaits que la loi cherche à

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Peter W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at p. 38-43.

[21] The beneficial effects of *PIPA*'s goal are demonstrable. *PIPA* seeks to enhance an individual's control over his or her personal information by restricting who can collect, use and disclose personal information without that individual's consent and the scope of such collection, use and disclosure. *PIPA* and legislation like it reflect an emerging recognition that the list of those who may access and use personal information has expanded dramatically and now includes many private sector actors. *PIPA* seeks to regulate the use of personal information and thereby to protect informational privacy, the foundational principle of which is that "all information about a person is in a fundamental way his own, for him to communicate or retain . . . as he sees fit": Report of a Task Force established jointly by the Department of Communications/ Department of Justice, *Privacy and Computers* (1972), at p. 13.

[22] Insofar as *PIPA* seeks to safeguard informational privacy, it is "quasi-constitutional" in nature: *Lavigne*, at para. 24; *Dagg*, at paras. 65-66; *H.J. Heinz*, at para. 28. The importance of the protection of privacy in a vibrant democracy cannot be overstated: see John D. R. Craig, "Invasion of Privacy and *Charter* Values: The Common-Law Tort Awakens" (1997), 42 *McGill L.J.* 355, at pp. 360-61. As Chris D. L. Hunt writes in "Conceptualizing Privacy and Elucidating its Importance: Foundational Considerations for the Development of Canada's Fledgling Privacy Tort" (2011), 37 *Queen's L.J.* 167, at p. 217, "[d]emocracy depends on an autonomous, self-actualized citizenry that is free to formulate and express unconventional views. If invasions of privacy inhibit individuality and produce conformity, democracy itself suffers."

promouvoir. Autrement dit, [TRADUCTION] « la violation de la *Charte* constitue un prix trop élevé à payer pour avoir droit au bénéfice de la loi » (Peter W. Hogg, *Constitutional Law of Canada* (5e éd. suppl.), vol. 2, p. 38-43).

[21] Les effets bénéfiques de l'objet visé par la *PIPA* peuvent être démontrés. En effet, la *PIPA* vise à renforcer le droit de regard d'une personne sur les renseignements personnels la concernant, en précisant qui peut les recueillir, les utiliser et les communiquer sans son consentement, et en limitant la portée de leur collecte, de leur utilisation et de leur communication. La *PIPA* et les lois similaires témoignent de la nouvelle reconnaissance du fait que le nombre de personnes et d'entités susceptibles de consulter et d'utiliser des renseignements personnels a considérablement augmenté et que de nombreux acteurs du secteur privé figurent aujourd'hui parmi elles. La *PIPA* vise à réglementer l'utilisation des renseignements personnels et à protéger par le fait même leur caractère privé, un objectif fondé sur le principe selon lequel « l'information de caractère personnel est propre à l'intéressé, qui est libre de la communiquer ou de la taire comme il l'entend » (Rapport du Groupe d'étude établi conjointement par le ministère des Communications et le ministère de la Justice, *L'ordinateur et la vie privée* (1972), p. 13).

[22] Dans la mesure où elle vise à faire respecter le caractère privé des renseignements personnels, la *PIPA* est de nature « quasi constitutionnelle » (*Lavigne*, par. 24; *Dagg*, par. 65-66; *H.J. Heinz*, par. 28). On ne saurait trop insister sur l'importance de protéger la vie privée dans une démocratie dynamique (voir John D. R. Craig, « Invasion of Privacy and *Charter* Values : The Common-Law Tort Awakens » (1997), 42 *R.D. McGill* 355, p. 360-361). Comme l'affirme Chris D. L. Hunt dans « Conceptualizing Privacy and Elucidating its Importance : Foundational Considerations for the Development of Canada's Fledgling Privacy Tort » (2011), 37 *Queen's L.J.* 167, p. 217, [TRADUCTION] « [l]a démocratie a besoin de citoyens autonomes qui se réalisent et qui sont libres de formuler et d'exprimer des opinions non conformistes. Si les atteintes à la vie privée gênent l'individualité et entraînent le conformisme, c'est la démocratie elle-même qui en souffre. »

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[23] *PIPA* also seeks to avoid the potential harm that flows from the permanent storage or unlimited dissemination of personal information through the Internet or other forms of technology without an individual's consent.

[24] Finally, as discussed above, the objective of providing an individual with some measure of control over his or her personal information is intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values.

[25] The price *PIPA* exacts, however, is disproportionate to the benefits it promotes. *PIPA* limits the collection, use and disclosure of personal information other than with consent without regard for the nature of the personal information, the purpose for which it is collected, used or disclosed, and the situational context for that information. As the Adjudicator recognized in her decision, *PIPA* does not provide any way to accommodate the expressive purposes of unions engaged in lawful strikes. Indeed, the *Act* does not include any mechanisms by which a union's constitutional right to freedom of expression may be balanced with the interests protected by the legislation. As counsel for the Commissioner conceded during oral submissions, *PIPA* contains a general prohibition of the Union's use of personal information (absent consent or deemed consent) to further its collective bargaining objectives. As a result, *PIPA* deems virtually all personal information to be protected regardless of context.

[26] But the extent to which significant values were actually impaired in the context of this case must be kept in context. The personal information was collected by the Union at an open political demonstration where it was readily and publicly observable. Those crossing the picketline would reasonably expect that their image could be caught and disseminated by others such as journalists, for example. Moreover, the personal information collected, used and disclosed by the Union was

[23] La *PIPA* vise également à éviter la survenance du préjudice pouvant découler de la conservation permanente ou de la diffusion illimitée de renseignements personnels par Internet ou d'autres technologies sans le consentement de l'intéressé.

[24] Enfin, comme nous l'avons vu, l'objectif de fournir à une personne un certain droit de regard sur les renseignements personnels la concernant est intimement lié à son autonomie, à sa dignité et à son droit à la vie privée, des valeurs sociales dont l'importance va de soi.

[25] En revanche, la *PIPA* a des conséquences disproportionnées par rapport aux bienfaits qu'elle promeut. En effet, elle restreint la collecte, l'utilisation et la communication de renseignements personnels effectuées en l'absence du consentement de l'intéressé sans égard à la nature de ces renseignements, à l'objectif de leur collecte, utilisation ou communication et au contexte dans lequel ils se situent. Ainsi que l'arbitre l'a reconnu dans sa décision, la *PIPA* ne prévoit aucune façon de tenir compte des objectifs expressifs visés par les syndicats qui se livrent à des grèves légales. En effet, elle ne prévoit aucun mécanisme permettant de trouver un équilibre entre le droit constitutionnel du syndicat à la liberté d'expression et les intérêts qu'elle protège. Ainsi que l'avocat du commissaire l'a admis au cours de son plaidoyer, la *PIPA* interdit globalement au syndicat d'utiliser des renseignements personnels — à défaut de consentement réel ou présumé — pour favoriser la réalisation de ses objectifs en matière de négociation collective. Par conséquent, selon la *PIPA*, pratiquement tous les renseignements personnels méritent d'être protégés, peu importe le contexte.

[26] Il faut toutefois situer dans son contexte la mesure dans laquelle on a effectivement porté atteinte à des valeurs importantes en l'espèce. Le syndicat a recueilli les renseignements personnels lors d'une manifestation politique publique au cours de laquelle le public pouvait facilement les observer. Les personnes franchissant la ligne de piquetage pouvaient raisonnablement s'attendre à être filmées ou photographiées et à ce que leur image soit diffusée par autrui, notamment des journalistes. En

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limited to images of individuals crossing a picketline and did not include intimate biographical details. No intimate details of the lifestyle or personal choices of the individuals were revealed.

outre, les seuls renseignements personnels recueillis, utilisés et communiqués par le syndicat étaient des images de personnes franchissant une ligne de piquetage et ne comprenaient aucune information biographique intime. Aucun détail intime concernant le mode de vie ou les choix personnels des intéressés n'a été dévoilé.

[27] It goes without saying that by appearing in public, an individual does not automatically forfeit his or her interest in retaining control over the personal information which is thereby exposed. This is especially true given the developments in technology that make it possible for personal information to be recorded with ease, distributed to an almost infinite audience, and stored indefinitely. Nevertheless, *PIPA*'s restrictions operate in the context of a case like this one to impede the formulation and expression of views on matters of significant public interest and importance.

[27] Il va sans dire qu'en apparaissant en public, une personne ne renonce pas nécessairement à son droit de regard sur les renseignements personnels ainsi exposés. Cela est particulièrement vrai compte tenu des avancées technologiques permettant d'enregistrer aisément des renseignements personnels, de les diffuser à un auditoire presque illimité et de les conserver indéfiniment. Malgré cela, les restrictions prévues par la *PIPA* s'appliquent, dans le contexte d'un cas comme celui qui nous occupe, pour entraver la formulation et l'expression d'opinions sur d'importantes questions d'intérêt public majeur.

[28] *PIPA*'s deleterious effects weigh heavily in the balance. What is of the utmost significance in our view is that *PIPA* prohibits the collection, use, or disclosure of personal information for many legitimate, expressive purposes related to labour relations. These purposes include ensuring the safety of union members, attempting to persuade the public not to do business with an employer and bringing debate on the labour conditions with an employer into the public realm. These objectives are at the core of protected expressive activity under s. 2(*b*).

[28] Les effets néfastes de la *PIPA* pèsent fortement dans la balance. Ce qui importe le plus, selon nous, c'est que la *PIPA* interdit la collecte, l'utilisation ou la communication de renseignements personnels qui serviraient de nombreux objectifs expressifs légitimes relatifs aux relations de travail. Parmi ces objectifs, mentionnons ceux consistant à assurer la sécurité des membres du syndicat, la tentative de convaincre le public de s'abstenir de faire affaire avec un employeur donné et le fait de transporter sur la place publique le débat sur les conditions de travail imposées par un employeur. Ces objectifs se situent au cœur même des activités expressives protégées par l'al. 2*b*).

[29] This Court has long recognized the fundamental importance of freedom of expression in the context of labour disputes: *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156 ("*Pepsi*"), at para. 33. In *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083 ("*KMart*"), Cory J., writing for the Court, held that "[f]or employees, freedom of expression becomes not only an important but an *essential* component of labour relations": para. 25 (emphasis added).

[29] La Cour reconnaît depuis longtemps l'importance fondamentale que revêt la liberté d'expression dans le contexte des conflits de travail (*S.D.G.M.R., section locale 558 c. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 R.C.S. 156 (« *Pepsi* »), par. 33). Dans l'arrêt *T.U.A.C., section locale 1518 c. KMart Canada Ltd.*, [1999] 2 R.C.S. 1083 (« *KMart* »), le juge Cory a affirmé, au nom de la Cour, que « [p]our les employés, la liberté d'expression devient une composante non seulement importante, mais *essentielle* des relations du travail » (par. 25 (nous soulignons)).

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[30] Expressive activity in the labour context is directly related to the *Charter* protected right of workers to associate to further common workplace goals under s. 2(*d*) of the *Charter*: *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3, at para. 38. As the International Labour Organization observed, "[t]he exercise of freedom of association and collective bargaining is dependent on the maintenance of fundamental civil liberties, in particular, . . . freedom of opinion and expression": *Report of the Director-General: Freedom of association in practice: Lessons learned* (2008), at para. 34.

[31] A person's employment and the conditions of their workplace can inform their identity, emotional health, and sense of self-worth: *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 368. As McLachlin C.J. and LeBel J. recognized in *Pepsi*, free expression on these issues therefore "contributes to self-understanding, as well as to the ability to influence one's working and non-working life": para. 34.

[32] Free expression in the labour context can also play a significant role in redressing or alleviating the presumptive imbalance between the employer's economic power and the relative vulnerability of the individual worker: *Pepsi*, at para. 34. It is through their expressive activities that unions are able to articulate and promote their common interests, and, in the event of a labour dispute, to attempt to persuade the employer.

[33] Finally, in the labour context, freedom of expression can enhance broader societal interests. As this Court found in *Pepsi*, the free flow of expression by unions and their members during a labour dispute plays an important role in bringing issues relating to labour conditions into the public arena for discussion and debate: paras. 34-35. As this Court emphasized in *Pepsi*, free expression provides "an avenue for unions to promote collective bargaining issues as public ones to be played out in civic society, rather than being confined to a narrow realm of individualized economic disputes": Michael MacNeil, "Unions

[30] Les activités expressives dans le contexte du travail se rattachent directement au droit des travailleurs, protégé par l'al. 2*d*) de la *Charte*, de s'associer pour atteindre des objectifs communs liés au travail (*Ontario (Procureur général) c. Fraser*, [2011] 2 R.C.S. 3, par. 38). Ainsi que l'a fait observer l'Organisation internationale du travail; « [l]'exercice de la liberté d'association et du droit de négociation collective repose sur la défense des libertés civiles fondamentales et notamment des suivantes : droit à [. . .] la liberté d'opinion, d'expression » (*Rapport du directeur général : Liberté d'association : enseignements tirés de la pratique* (2008), par. 34).

[31] L'emploi d'une personne et ses conditions de travail sont susceptibles de façonner son identité, sa santé psychologique et sa perception de sa valeur personnelle (*Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313, p. 368)). Ainsi que la juge en chef McLachlin et le juge LeBel l'ont reconnu dans l'arrêt *Pepsi*, la libre expression d'opinions sur ces questions « contribue [donc] à la compréhension de soi ainsi qu'à la capacité d'influencer sa vie au travail et sa vie en dehors du travail » (par. 34).

[32] Dans le contexte du travail, la liberté d'expression peut également jouer un rôle important pour éliminer ou atténuer l'inégalité présumée entre le pouvoir économique de l'employeur et la vulnérabilité relative du travailleur (*Pepsi*, par. 34). C'est grâce à leurs activités expressives que les syndicats sont en mesure de formuler et de promouvoir leurs intérêts communs et, en cas de conflit de travail, de tenter d'infléchir l'employeur.

[33] Enfin, dans le contexte du travail, la liberté d'expression est susceptible de favoriser des intérêts collectifs plus larges. Ainsi que l'a jugé la Cour dans l'arrêt *Pepsi*, la liberté d'expression des syndicats et de leurs membres durant un conflit de travail contribue largement à transporter sur la place publique le débat sur les conditions de travail (par. 34-35). Comme l'a souligné la Cour dans le même arrêt, la liberté d'expression [TRADUCTION] « offre aux syndicats un moyen de favoriser un débat public sur des questions de négociation collective au sein de la société civile en faisant en sorte que

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and the *Charter*: The Supreme Court of Canada and Democratic Values" (2003), 10 *C.L.E.L.J.* 3, at p. 24.

[34] Since the Second World War, the Canadian government has recognized that unions have a role to play in the Canadian economy and society more broadly: George W. Adams, *Canadian Labour Law* (2nd ed. (loose-leaf)), vol. 1, at pp. 1-11 to 1-16. This recognition includes a general acceptance that workers have the right to associate and bargain collectively and that when collective bargaining breaks down, unions and employers may, in certain circumstances, legitimately exert economic sanctions in order to facilitate resolution of the dispute in their favour: Wesley B. Rayner, *Canadian Collective Bargaining Law* (2nd ed. 2007), at pp. 2 and 457.

[35] Within the labour context, picketing represents a particularly crucial form of expression with strong historical roots. Strikes and picketlines have been used by Canadian unions to exert economic pressure and bargain with employers for over a century: affidavit of Dr. Jeffery M. Taylor, A.R., vol. IV, at p. 35. The use of picketlines is an invaluable tool in the economic arsenal of workers in the collective bargaining process: Rayner, at p. 483. As Judith McCormack, then Chair of the Ontario Labour Relations Board, explained in *Great Atlantic & Pacific Co. of Canada*, [1994] O.L.R.B. Rep. March 303:

> Picketing is . . . part of a group of economic sanctions which are considered key to the scheme of collective bargaining as a whole. While such sanctions are not frequently resorted to in the overall landscape of collective bargaining, it is axiomatic that the underlying threat of such economic conflict is what drives the vast majority of uneventful negotiations and contract settlements. [para. 35]

[36] The effectiveness of picketlines is dependent on the ability of the union to try to convince the

ces questions ne soient plus confinées au domaine étroit des conflits économiques individualisés » (Michael MacNeil, « Unions and the *Charter* : The Supreme Court of Canada and Democratic Values » (2003), 10 *C.L.E.L.J.* 3, p. 24).

[34] Depuis la Seconde Guerre mondiale, le gouvernement canadien reconnaît que les syndicats ont un rôle à jouer au sein de l'économie canadienne et de la société en général (George W. Adams, *Canadian Labour Law* (2e éd. (feuilles mobiles)), vol. 1, p. 1-11 à 1-16). On en est ainsi venu à accepter de façon générale que les travailleurs ont le droit de s'associer et de négocier collectivement et que, en cas de rupture des négociations collectives, les syndicats et les employeurs peuvent, dans certains cas, exercer légitimement des sanctions économiques pour faciliter le règlement du différend en leur faveur (Wesley B. Rayner, *Canadian Collective Bargaining Law* (2e éd. 2007), p. 2 et 457).

[35] Dans le contexte du travail, le piquetage constitue une forme d'expression particulièrement vitale et fermement ancrée dans l'histoire. Les syndicats canadiens recourent aux grèves et aux lignes de piquetage pour exercer des pressions économiques et négocier avec les employeurs depuis plus d'un siècle (affidavit de Jeffery M. Taylor, d.a., vol. IV, p. 35). Le recours aux lignes de piquetage constitue un outil d'une valeur inestimable dans l'arsenal économique des travailleurs au cours des négociations collectives (Rayner, p. 483). Ainsi que Judith McCormack, qui était alors présidente de la Commission des relations de travail de l'Ontario, l'a expliqué dans la décision *Great Atlantic & Pacific Co. of Canada*, [1994] O.L.R.B. Rep. March 303 :

> [TRADUCTION] La mise en place de piquets de grève fait [. . .] partie d'une série de sanctions économiques qui sont considérées comme un élément essentiel du régime de négociations collectives dans son ensemble. Bien qu'on ne recoure pas fréquemment à ce type de sanctions en matière de négociation collective, il est évident que c'est la menace sous-jacente des conflits économiques qui explique le dénouement sans histoire de la grande majorité des négociations ainsi que la conclusion également sans histoire des conventions collectives. [par. 35]

[36] L'efficacité des lignes de piquetage dépend de la capacité du syndicat de convaincre le public

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public not to cross the picketline and do business with the employer. Cory J. recognized the significance of the role of public opinion in *KMart*, where he observed that "it is often the weight of public opinion which will determine the outcome of the dispute": para. 46. In some cases, this goal may be achieved simply by making others aware of the labour dispute. In others, however, a union may achieve its goal by putting pressure on those who intend to cross the picketline. The imposition of public or economic pressure has come to be accepted as a legitimate price to pay to encourage the parties to resolve their dispute. As McLachlin C.J. and LeBel J. observed in *Pepsi*, strikes are not tea parties: para. 90. This Court has acknowledged that such pressure is permissible as long as it does not rise to the level of a tortious or criminal act: *Pepsi*, at paras. 96 and 101-7.

de ne pas les franchir et de s'abstenir de faire affaire avec l'employeur. Le juge Cory a reconnu l'importance de l'opinion publique dans l'arrêt *KMart*, où il a fait observer que « c'est souvent le poids de l'opinion publique qui détermine l'issue [du] conflit » (par. 46). Dans certains cas, on peut atteindre cet objectif simplement en faisant connaître l'existence du conflit de travail. Dans d'autres, toutefois, le syndicat peut atteindre son objectif en exerçant des pressions sur les personnes qui ont l'intention de franchir la ligne de piquetage. On en est venu à accepter que l'exercice de pressions publiques ou économiques constitue un prix légitime à payer pour inciter les parties à régler leur différend. Comme la juge en chef McLachlin et le juge LeBel l'ont fait observer dans l'arrêt *Pepsi*, une grève n'est pas une partie de plaisir (par. 90). La Cour a reconnu que cette pression était permise dès lors qu'elle ne dégénère pas au point de donner lieu à un acte délictueux ou criminel (*Pepsi*, par. 96 et 101-107).

[37] *PIPA* imposes restrictions on a union's ability to communicate and persuade the public of its cause, impairing its ability to use one of its most effective bargaining strategies in the course of a lawful strike. In our view, this infringement of the right to freedom of expression is disproportionate to the government's objective of providing individuals with control over personal information that they expose by crossing a picketline.

[37] La *PIPA* restreint la faculté du syndicat de communiquer avec le public et de le convaincre du bien-fondé de sa cause, compromettant ainsi sa capacité de recourir à une de ses stratégies de négociation les plus efficaces au cours d'une grève légale. À notre avis, cette atteinte au droit à la liberté d'expression est disproportionnée par rapport à l'objectif du gouvernement d'accorder aux personnes un droit de regard sur les renseignements personnels qu'elles exposent en franchissant une ligne de piquetage.

[38] This conclusion does not require that we condone all of the Union's activities. The breadth of *PIPA*'s restrictions makes it unnecessary to examine the precise expressive activity at issue in this case. It is enough to note that, like privacy, freedom of expression is not an absolute value and both the nature of the privacy interests implicated and the nature of the expression must be considered in striking an appropriate balance. To the extent that *PIPA* restricted the Union's collection, use and disclosure of personal information for legitimate labour relations purposes, the *Act* violates s. 2(*b*) of the *Charter* and cannot be justified under s. 1.

[38] Cette conclusion ne nous oblige pas à cautionner toutes les activités du syndicat. Vu l'ampleur des restrictions imposées par la *Loi*, il n'est pas nécessaire d'examiner l'activité expressive précise en litige dans la présente affaire. Il suffit de souligner qu'à l'instar de la protection de la vie privée, la liberté d'expression n'est pas une valeur absolue et qu'on doit tenir compte à la fois de la nature des droits à la vie privée en jeu et de celle de l'expression pour atteindre un juste équilibre entre eux. Dans la mesure où la *PIPA* empêchait le syndicat de recueillir, d'utiliser et de communiquer des renseignements personnels à des fins légitimes de relations du travail, la *Loi* viole l'al. 2*b*) de la *Charte* et cette violation ne saurait se justifier au sens de l'article premier.

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[39] Accordingly, we would answer the constitutional questions as follows:

1. Do the *Personal Information Protection Act*, S.A. 2003, c. P-6.5, and the *Personal Information Protection Act Regulation*, Alta. Reg. 366/2003, violate s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* insofar as they restrict a union's ability to collect, use or disclose personal information during the course of a lawful strike?

Answer: Yes.

2. If so, is the infringement a reasonable limit prescribed by law, which can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

[40] Both the Information and Privacy Commissioner of Alberta and the Attorney General of Alberta stated in oral argument that if they were unsuccessful, they would prefer that *PIPA* be struck down in its entirety. We agree. Given the comprehensive and integrated structure of the statute, we do not think it is appropriate to pick and choose among the various amendments that would make *PIPA* constitutionally compliant: *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 80; *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 707.

[41] We would therefore declare *PIPA* to be invalid but suspend the declaration of invalidity for a period of 12 months to give the legislature time to decide how best to make the legislation constitutional. Rather than sustain the constitutional exemption ordered by the Court of Appeal, we would simply quash the Adjudicator's order.

[42] The Union is entitled to its costs.

[39] Par conséquent, nous sommes d'avis de répondre comme suit aux questions constitutionnelles :

1. La *Personal Information Protection Act*, S.A. 2003, ch. P-6.5, et le *Personal Information Protection Act Regulation*, Alta. Reg. 366/2003, portent-ils atteinte aux droits protégés par l'al. 2*b*) de la *Charte canadienne des droits et libertés* dans la mesure où ils limitent la capacité d'un syndicat de recueillir, d'utiliser ou de communiquer des renseignements personnels pendant une grève légale?

Réponse : Oui.

2. Dans l'affirmative, cette atteinte constitue-t-elle une limite raisonnable, prescrite par une règle de droit, dont la justification peut être démontrée dans une société libre et démocratique au sens de l'article premier de la *Charte canadienne des droits et libertés*?

Réponse : Non.

[40] Tant le commissaire à l'information et à la protection de la vie privée que le procureur général de l'Alberta ont affirmé lors des débats que s'ils n'obtenaient pas gain de cause, ils préféreraient que la *PIPA* soit invalidée en entier. Nous sommes du même avis. Compte tenu de l'économie exhaustive et intégrée de la *Loi*, il ne nous paraît pas approprié de faire un tri parmi les diverses modifications qui rendraient la *PIPA* conforme à la Constitution (*R. c. Morgentaler*, [1988] 1 R.C.S. 30, p. 80; *Schachter c. Canada*, [1992] 2 R.C.S. 679, p. 707).

[41] Nous sommes par conséquent d'avis de déclarer la *PIPA* invalide, mais de suspendre cette déclaration d'invalidité pendant 12 mois afin de donner à la législature albertaine le temps nécessaire pour décider de la meilleure façon de rendre la loi constitutionnelle. Nous sommes en outre d'avis d'annuler simplement l'ordonnance de l'arbitre plutôt que de confirmer l'exemption constitutionnelle décrétée par la Cour d'appel.

[42] Le syndicat a droit à ses dépens devant toutes les cours.

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Appeal substantially dismissed with costs.

Solicitors for the appellant the Information and Privacy Commissioner of Alberta: Jensen Shawa Solomon Duguid Hawkes, Calgary.

Solicitor for the appellant the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the respondent: Chivers Carpenter, Edmonton.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the intervener the Privacy Commissioner of Canada: Osler, Hoskin & Harcourt, Toronto; Office of the Privacy Commissioner of Canada, Ottawa.

Solicitors for the intervener the Canadian Civil Liberties Association: Torys, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Moore, Edgar, Lyster, Vancouver.

Solicitor for the intervener the Information and Privacy Commissioner of Ontario: Information and Privacy Commissioner of Ontario, Toronto.

Solicitors for the interveners the Coalition of British Columbia Businesses and Merit Canada: Heenan Blaikie, Ottawa.

Solicitors for the intervener the Information and Privacy Commissioner of British Columbia: Lovett Westmacott, Vancouver.

Solicitors for the intervener the Alberta Federation of Labour: Chivers Carpenter, Edmonton.

Pourvoi rejeté en grande partie avec dépens.

Procureurs de l'appelant Information and Privacy Commissioner of Alberta : Jensen Shawa Solomon Duguid Hawkes, Calgary.

Procureur de l'appelant le procureur général de l'Alberta : Procureur général de l'Alberta, Edmonton.

Procureurs de l'intimé : Chivers Carpenter, Edmonton.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Toronto.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureurs de l'intervenant le commissaire à la protection de la vie privée du Canada : Osler, Hoskin & Harcourt, Toronto; Commissariat à la protection de la vie privée du Canada, Ottawa.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : Torys, Toronto.

Procureurs de l'intervenante l'Association des libertés civiles de la Colombie-Britannique : Moore, Edgar, Lyster, Vancouver.

Procureur de l'intervenant le commissaire à l'information et à la protection de la vie privée de l'Ontario : Commissaire à l'information et à la protection de la vie privée de l'Ontario, Toronto.

Procureurs des intervenantes Coalition of British Columbia Businesses et Merit Canada : Heenan Blaikie, Ottawa.

Procureurs de l'intervenant Information and Privacy Commissioner of British Columbia : Lovett Westmacott, Vancouver.

Procureurs de l'intervenante Alberta Federation of Labour : Chivers Carpenter, Edmonton.

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Paul Conway *Appellant*

v.

Her Majesty The Queen and Person in charge of the Centre for Addiction and Mental Health *Respondents*

and

Attorney General of Canada, Ontario Review Board, Mental Health Legal Committee and Mental Health Legal Advocacy Coalition, British Columbia Review Board, Criminal Lawyers' Association and David Asper Centre for Constitutional Rights, and Community Legal Assistance Society *Interveners*

Indexed as: R. *v.* Conway

2010 SCC 22

File No.: 32662.

2009: October 22; 2010: June 11.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Remedies — Accused not criminally responsible by reason of mental disorder detained in mental health facility — Accused alleging violations of his constitutional rights and seeking absolute discharge as remedy under s. 24(1) of Canadian Charter of Rights and Freedoms — Accused also seeking as remedy order directing mental health facility to provide him with particular treatment — Whether Review Board has jurisdiction to grant remedies under s. 24(1) of Charter — If so, whether accused entitled to remedies sought — Criminal Code, R.S.C. 1985, c. C-46, ss. 672.54, 672.55.

Constitutional law — Charter of Rights — Remedies — Court of competent jurisdiction — Remedial

Paul Conway *Appelant*

c.

Sa Majesté la Reine et Responsable du Centre de toxicomanie et de santé mentale *Intimés*

et

Procureur général du Canada, Commission ontarienne d'examen, Mental Health Legal Committee et Mental Health Legal Advocacy Coalition, British Columbia Review Board, Criminal Lawyers' Association et David Asper Centre for Constitutional Rights, et Community Legal Assistance Society *Intervenants*

Répertorié : R. *c.* Conway

2010 CSC 22

N° du greffe : 32662.

2009 : 22 octobre; 2010 : 11 juin.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit constitutionnel — Charte des droits — Réparations — Accusé non responsable criminellement pour cause de troubles mentaux détenu dans un établissement de santé mentale — Accusé ayant allégué la violation de ses droits constitutionnels et demandé sa libération inconditionnelle en guise de réparation fondée sur l'art. 24(1) de la Charte canadienne des droits et libertés — Accusé ayant également demandé, à titre de réparation, qu'il soit ordonné à l'établissement de santé mentale de lui offrir un traitement en particulier — La commission d'examen a-t-elle compétence pour accorder des réparations en application de l'art. 24(1) de la Charte? — Dans l'affirmative, l'accusé a-t-il droit aux réparations demandées? — Code criminel, L.R.C. 1985, ch. C-46, art. 672.54, 672.55.

Droit constitutionnel — Charte des droits — Réparations — Tribunal compétent — Pouvoir de réparation

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jurisdiction of administrative tribunals under s. 24(1) of Canadian Charter of Rights and Freedoms — New approach.

Criminal law — Mental disorder — Review Board — Remedial jurisdiction under Canadian Charter of Rights and Freedoms — Accused not criminally responsible by reason of mental disorder detained in mental health facility — Accused alleging violations of his constitutional rights and seeking absolute discharge as remedy under s. 24(1) of Canadian Charter of Rights and Freedoms at his disposition hearing before Review Board — Board concluding accused was a threat to public safety and not entitled to absolute discharge under Criminal Code — Whether Review Board has jurisdiction to grant absolute discharge as remedy under s. 24(1) of Charter — If so, whether accused entitled to remedy sought — Criminal Code, R.S.C. 1985, c. C-46, s. 672.54.

Administrative law — Boards and tribunals — Jurisdiction — Remedial jurisdiction of administrative tribunals under s. 24(1) of Canadian Charter of Rights and Freedoms — New approach.

In 1984, C was found not guilty by reason of insanity on a charge of sexual assault with a weapon. Since the verdict, he has been detained in mental health facilities and diagnosed with several mental disorders. Prior to his annual review hearing before the Ontario Review Board in 2006, C alleged that the mental health centre where he was being detained had breached his rights under the *Canadian Charter of Rights and Freedoms*. He sought an absolute discharge as a remedy under s. 24(1) of the *Charter*. The Board unanimously concluded that C was a threat to public safety, who would, if released, quickly return to police and hospital custody. This made him an unsuitable candidate for an absolute discharge under s. 672.54(*a*) of the *Criminal Code*, which provides that an absolute discharge is unavailable to any patient who is a "significant threat to the safety of the public". The Board therefore ordered that C remain in the mental health centre. The Board further concluded that it had no jurisdiction to consider C's *Charter* claims. A majority in the Court of Appeal upheld the Board's conclusion that it was not a court of competent jurisdiction for the purpose of granting an absolute discharge under s. 24(1) of the *Charter*. However, the Court of Appeal unanimously concluded that it was unreasonable for the Board not to address the

des tribunaux administratifs suivant l'art. 24(1) de la Charte canadienne des droits et libertés — Nouvelle démarche.

Droit criminel — Troubles mentaux — Commission d'examen — Pouvoir de réparation suivant la Charte canadienne des droits et libertés — Accusé non responsable criminellement pour cause de troubles mentaux détenu dans un établissement de santé mentale — Accusé ayant allégué la violation de ses droits constitutionnels et demandé sa libération inconditionnelle en guise de réparation fondée sur l'art. 24(1) de la Charte canadienne des droits et libertés lors de l'audience tenue par la commission d'examen — Commission d'examen concluant que l'accusé mettrait en péril la sécurité du public et n'a pas droit à la libération inconditionnelle suivant le Code criminel — La commission d'examen avait-elle le pouvoir d'accorder la libération inconditionnelle à titre de réparation fondée sur l'art. 24(1) de la Charte? — Dans l'affirmative, l'accusé avait-il droit à la réparation demandée? — Code criminel, L.R.C. 1985, ch. C-46, art. 672.54.

Droit administratif — Organismes et tribunaux administratifs — Compétence — Pouvoir de réparation des tribunaux administratifs suivant l'art. 24(1) de la Charte canadienne des droits et libertés — Nouvelle démarche.

Accusé d'agression sexuelle armée, C a été déclaré non coupable pour cause d'aliénation mentale en 1984. Depuis lors, il a été détenu dans des établissements psychiatriques et on lui a diagnostiqué plusieurs troubles mentaux. Avant l'examen annuel de son cas par la Commission ontarienne d'examen en 2006, C a allégué que le centre de santé mentale où il était détenu avait violé les droits que lui conférait la *Charte canadienne des droits et libertés*. Il a demandé sa libération inconditionnelle à titre de réparation sur le fondement du par. 24(1) de la *Charte*. La Commission a conclu à l'unanimité que C représentait un risque pour la sécurité du public et que, s'il était libéré, il se retrouverait rapidement sous garde policière, puis à l'hôpital. Il n'était donc pas admissible à la libération inconditionnelle, l'al. 672.54*a*) du *Code criminel* écartant celle-ci dans le cas d'un patient qui représente « un risque important pour la sécurité du public ». La Commission a donc ordonné que C demeure détenu au centre de santé mentale. Elle a par ailleurs conclu qu'elle ne pouvait pas examiner les demandes de C prenant appui sur la *Charte*. Les juges majoritaires de la Cour d'appel ont confirmé sa conclusion selon laquelle elle n'avait pas compétence pour accorder une libération inconditionnelle sur le fondement du par. 24(1) de la *Charte*. La Cour d'appel a

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a legislative intention that constitutional questions be considered and decided by the ATQ, but the structure of the ATQ is not determinative. This is evidenced by the recent decisions of this Court in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, and *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. [para. 28]

In *Okwuobi*, the Administrative Tribunal of Québec was found to have the jurisdiction to decide questions of law. The presumption in favour of constitutional jurisdiction was therefore triggered and was not rebutted.

[77] These cases confirm that administrative tribunals with the authority to decide questions of law and whose *Charter* jurisdiction has not been clearly withdrawn have the corresponding authority — and duty — to consider and apply the Constitution, including the *Charter*, when answering those legal questions. As McLachlin J. observed in *Cooper*:

[E]very tribunal charged with the duty of deciding issues of law has the concomitant power to do so. The fact that the question of law concerns the effect of the *Charter* does not change the matter. The *Charter* is not some holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals. [para. 70]

The Merger

[78] The jurisprudential evolution leads to the following two observations: first, that administrative tribunals with the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn, have the authority to resolve constitutional questions that are linked to matters properly before them. And secondly,

l'étendue de la compétence de cet organisme, la structure quasi judiciaire du TAQ, déjà abordée brièvement, peut témoigner de la volonté du législateur de conférer au TAQ le pouvoir d'examiner et de trancher les questions constitutionnelles. Cette conclusion se dégage de l'examen des arrêts récents de notre Cour *Nouvelle-Écosse (Workers' Compensation Board) c. Martin*, [2003] 2 R.C.S. 504, 2003 CSC 54, et dans *Paul c. Colombie-Britannique (Forest Appeals Commission)*, [2003] 2 R.C.S. 585, 2003 CSC 55. [par. 28]

Dans l'arrêt *Okwuobi*, notre Cour arrive à la conclusion que le Tribunal administratif du Québec avait le pouvoir de trancher des questions de droit. Par conséquent, la compétence constitutionnelle était présumée, et cette présomption n'était pas réfutée.

[77] Ces arrêts confirment que le tribunal administratif investi du pouvoir de trancher des questions de droit et dont la compétence pour appliquer la *Charte* n'est pas clairement écartée a le pouvoir — et le devoir — correspondant d'examiner et d'appliquer la Constitution, y compris la *Charte*, pour se prononcer sur ces questions de nature juridique. Comme le fait observer la juge McLachlin dans l'arrêt *Cooper* :

[T]out tribunal qui est appelé à trancher des questions de droit dispose des pouvoirs afférents à cette tâche. Le fait que la question de droit porte sur les effets de la *Charte* ne change rien. La *Charte* n'est pas un texte sacré que seuls les initiés des cours supérieures peuvent aborder. C'est un document qui appartient aux citoyens, et les lois ayant des effets sur les citoyens ainsi que les législateurs qui les adoptent doivent s'y conformer. Les tribunaux administratifs et les commissions qui ont pour tâche de trancher des questions juridiques ne sont pas soustraits à cette règle. Ces organismes déterminent les droits de beaucoup plus de justiciables que les cours de justice. Pour que les citoyens ordinaires voient un sens à la *Charte*, il faut donc que les tribunaux administratifs en tiennent compte dans leurs décisions. [par. 70]

La fusion

[78] L'évolution de la jurisprudence appelle les deux observations suivantes. D'abord, un tribunal administratif possédant le pouvoir de trancher des questions de droit et dont la compétence constitutionnelle n'est pas clairement écartée peut résoudre une question constitutionnelle se rapportant à une affaire dont il est régulièrement saisi. En second

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they must act consistently with the *Charter* and its values when exercising their statutory functions. It strikes me as somewhat unhelpful, therefore, to subject every such tribunal from which a *Charter* remedy is sought to an inquiry asking whether it is "competent" to grant a particular remedy within the meaning of s. 24(1).

[79] Over two decades of jurisprudence has confirmed the practical advantages and constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available, without the need for bifurcated proceedings between superior courts and administrative tribunals (*Douglas College*, at pp. 603-4; *Weber*, at para. 60; *Cooper*, at para. 70; *Martin*, at para. 29). The denial of early access to remedies is a denial of an appropriate and just remedy, as Lamer J. pointed out in *Mills*, at p. 891. And a scheme that favours bifurcating claims is inconsistent with the well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized statutory jurisdiction (*Weber*; *Regina Police Assn.*; *Quebec (Commission des droits de la personne et des droits de la jeunesse)*; *Quebec (Human Rights Tribunal)*; *Vaughan*; *Okwuobi*. See also *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 49.).

[80] If, as in the *Cuddy Chicks* trilogy, expert and specialized tribunals with the authority to decide questions of law are in the best position to decide constitutional questions when a remedy is sought under s. 52 of the *Constitution Act, 1982*, there is no reason why such tribunals are not also in the best position to assess constitutional questions when a remedy is sought under s. 24(1) of the *Charter*. As McLachlin J. said in *Weber*, "[i]f an arbitrator can find a law violative of the *Charter*, it would seem he or she can determine whether conduct in the administration of the collective agreement violates the *Charter* and likewise grant remedies"

lieu, il doit agir conformément à la *Charte* et aux valeurs qui la sous-tendent en s'acquittant de ses fonctions légales. Il m'apparaît donc quelque peu inutile de soumettre tout tribunal de ce type auquel réparation est demandée sur le fondement de la *Charte* à un examen visant à déterminer s'il est « compétent » au sens du par. 24(1) pour accorder la réparation sollicitée.

[79] Depuis plus de deux décennies, la jurisprudence confirme les avantages pratiques et le fondement constitutionnel de la solution qui consiste à permettre aux Canadiens de faire valoir les droits et les libertés que leur garantit la *Charte* devant le tribunal qui est le plus à leur portée sans qu'ils aient à fractionner leur recours et saisir à la fois une cour supérieure et un tribunal administratif (*Douglas College*, p. 603-604; *Weber*, par. 60; *Cooper*, par. 70; *Martin*, par. 29). Comme le signale le juge Lamer dans l'arrêt *Mills*, empêcher le demandeur d'obtenir rapidement réparation équivaut à lui refuser une réparation convenable et juste (p. 891). Et le régime qui favorise le fractionnement des recours est incompatible avec le principe bien établi selon lequel un tribunal administratif se prononce sur toutes les questions, y compris celles de nature constitutionnelle, dont le caractère essentiellement factuel relève de la compétence spécialisée que lui confère la loi (*Weber*; *Regina Police Assn.*; *Québec (Commission des droits de la personne et des droits de la jeunesse)*; *Québec (Tribunal des droits de la personne)*; *Vaughan*; *Okwuobi*. Voir également l'arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, par. 49.).

[80] Si, comme dans les affaires de la trilogie *Cuddy Chicks*, le tribunal spécialisé doté du pouvoir de se prononcer sur des questions de droit est le mieux placé pour trancher une question constitutionnelle lorsque réparation est sollicitée sur le fondement de l'art. 52 de la *Loi constitutionnelle de 1982*, rien ne s'oppose à ce qu'il soit également le mieux placé pour se pencher sur une question constitutionnelle lorsque réparation est demandée en application du par. 24(1) de la *Charte*. Dans l'arrêt *Weber*, la juge McLachlin dit que « [s]i un arbitre peut conclure qu'une loi porte atteinte à la *Charte*, il semble qu'il puisse déterminer si un

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(para. 61). I agree with the submission of both the Ontario Review Board and the British Columbia Review Board that in both types of cases, the analysis is the same.

[81] Building on the jurisprudence, therefore, when a remedy is sought from an administrative tribunal under s. 24(1), the proper initial inquiry is whether the tribunal can grant *Charter* remedies generally. To make this determination, the first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law. If it does, and unless it is clearly demonstrated that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction, the tribunal is a court of competent jurisdiction and can consider and apply the *Charter* — and *Charter* remedies — when resolving the matters properly before it.

[82] Once the threshold question has been resolved in favour of *Charter* jurisdiction, the remaining question is whether the tribunal can grant the particular remedy sought, given the relevant statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent. On this approach, what will always be at issue is whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. Relevant considerations in discerning legislative intent will include those that have guided the courts in past cases, such as the tribunal's statutory mandate, structure and function (*Dunedin*).

Application to This Case

[83] The question before the Court is whether the Ontario Review Board is authorized to provide certain remedies to Mr. Conway under s. 24(1) of the *Charter*. Before the Board, Mr. Conway sought an absolute discharge. At the hearing before this Court, and for the first time, he requested additional remedies dealing with his conditions of detention: an

comportement dans l'administration de la convention collective viole la *Charte* et également accorder des réparations » (par. 61). Je conviens avec la Commission ontarienne d'examen et la commission d'examen de la Colombie-Britannique que, dans les deux cas, l'analyse est la même.

[81] Au vu de la jurisprudence, lorsque réparation est demandée à un tribunal administratif en application du par. 24(1), il convient donc de déterminer initialement si le tribunal peut accorder des réparations sur le fondement de la *Charte* en général. À cette fin, il faut d'abord se demander si le tribunal administratif a le pouvoir exprès ou tacite de trancher une question de droit. Si tel est le cas et qu'il n'est pas clairement établi que le législateur a voulu soustraire l'application de la *Charte* à la compétence du tribunal en cause, ce dernier est un tribunal compétent et peut examiner et appliquer la *Charte*, y compris les réparations qu'elle prévoit, lorsqu'il statue dans une affaire dont il est régulièrement saisi.

[82] Une fois tranchée cette question préliminaire et reconnue la compétence fondée sur la *Charte*, il reste à déterminer si le tribunal administratif peut accorder la réparation précise demandée eu égard au régime législatif applicable. Il est alors nécessaire de cerner l'intention du législateur. Dès lors, la question qui se pose toujours est celle de savoir si la réparation demandée est de celles que le législateur a voulu que le tribunal administratif en cause puisse accorder eu égard au cadre législatif établi. Les éléments pertinents à considérer pour déterminer l'intention du législateur englobent ceux retenus par les tribunaux dans le passé, dont le mandat légal, la structure et la fonction du tribunal administratif (*Dunedin*).

Application aux faits de l'espèce

[83] Notre Cour doit déterminer si la Commission ontarienne d'examen a le pouvoir d'accorder certaines réparations à M. Conway en application du par. 24(1) de la *Charte*. M. Conway a demandé sa libération inconditionnelle à la Commission. À l'audience devant notre Cour, il a sollicité pour la première fois d'autres mesures de réparation

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Cuddy Chicks Limited *Appellant*

v.

Ontario Labour Relations Board and United Food and Commercial Workers International Union, Local 175 *Respondents*

and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General for Saskatchewan, Canada Employment and Immigration Commission and Marcelle Tétreault-Gadoury *Interveners*

INDEXED AS: CUDDY CHICKS LTD. *v.* ONTARIO (LABOUR RELATIONS BOARD)

File No.: 21675.

1990: November 7; 1991: June 6.

Present: Lamer C.J. and Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Administrative tribunals — Jurisdiction — Board granted power to consider questions of law — Whether Board can make constitutional determination regarding its own enabling legislation — Canadian Charter of Rights and Freedoms, s. 24(1) — Constitution Act, 1982, s. 52 — Labour Relations Act, R.S.O. 1980, c. 228, ss. 2(b), 106(1), 124.

Administrative law — Boards — Jurisdiction — Board granted power to consider questions of law — Whether Board can make constitutional determination regarding its own enabling legislation — Canadian Charter of Rights and Freedoms, s. 24(1) — Constitution Act, 1982, s. 52 — Labour Relations Act, R.S.O. 1980, c. 228, ss. 2(b), 106(1), 124.

Respondent union filed an application for certification before the Ontario Labour Relations Board relating

Cuddy Chicks Limited *Appelante*

c.

La Commission des relations de travail de l'Ontario et l'Union internationale des travailleurs unis de l'alimentation et du commerce, section locale 175 *Intimées*

et

Le procureur général du Canada, le procureur général de l'Ontario, le procureur général de la Saskatchewan, la Commission de l'emploi et de l'immigration du Canada et Marcelle Tétreault-Gadoury *Intervenants*

RÉPERTORIÉ: CUDDY CHICKS LTD. *c.* ONTARIO (COMMISSION DES RELATIONS DE TRAVAIL)

N° du greffe: 21675.

1990: 7 novembre; 1991: 6 juin.

Présents: Le juge en chef Lamer et les juges Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin et Stevenson.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit constitutionnel — Tribunaux administratifs — Compétence — La Commission a compétence pour examiner des questions de droit — La Commission peut-elle se prononcer sur la constitutionnalité de sa propre loi habilitante? — Charte canadienne des droits et libertés, art. 24(1) — Loi constitutionnelle de 1982, art. 52 — Loi sur les relations de travail, L.R.O. 1980, ch. 228, art. 2b), 106(1), 124.

Droit administratif — Commissions — Compétence — La Commission a compétence pour examiner des questions de droit — La Commission peut-elle se prononcer sur la constitutionnalité de sa propre loi habilitante? — Charte canadienne des droits et libertés, art. 24(1) — Loi constitutionnelle de 1982, art. 52 — Loi sur les relations de travail, L.R.O. 1980, ch. 228, art. 2b), 106(1), 124.

Le syndicat intimé a déposé une demande d'accréditation devant la Commission des relations de travail de

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to employees at the chicken hatchery of Cuddy Chicks Ltd. Section 2(*b*) of the *Labour Relations Act*, however, provided that the Act did not apply to persons employed in agriculture and the appellant maintained that the employees in question should be so designated. On filing the application, the union gave notice that it would request the Board to hold s. 2(*b*) invalid as being contrary to ss. 2(*d*) and 15 of the *Canadian Charter of Rights and Freedoms* if the employees were found to be agricultural employees.

Prior to the commencement of the hearing, Cuddy Chicks disputed the jurisdiction of the Board to subject its enabling statute to *Charter* scrutiny. At that point, a separate hearing was convened to determine whether the panel had jurisdiction to entertain the *Charter* issues raised by the Union. The first panel found the employees to be in the agricultural sector so that the Act did not apply. A majority of the panel then held that the Board had jurisdiction to rule on the *Charter* issue because the Board was a "court of competent jurisdiction" within the meaning of s. 24(1) of the *Charter* and because s. 52 of the *Constitution Act, 1982* imposed an obligation on the Board to ensure that the law it applies is consistent with the supreme law of Canada. The Board, under s. 106(1) of the Act, has jurisdiction to decide questions of law relevant to the proceedings before it.

The Divisional Court held that the Board had jurisdiction to deal with the *Charter* issue. A majority of the Court of Appeal held that s. 52(1) of the *Constitution Act, 1982* conferred jurisdiction on the Board to decide the constitutionality of its enabling statute. At issue here were: (1) whether s. 52 of the *Constitution Act, 1982* conferred the right and duty on an administrative agency such as the OLRB to decide the constitutional validity of its enabling statute; (2) whether the OLRB had the jurisdiction to decide the constitutional validity of s. 2(*b*) of its enabling statute by applying the *Charter* as part of its duty to consider statutes bearing on proceedings before it; and, (3) whether the OLRB was a "court of competent jurisdiction" under s. 24(1) of the *Charter*.

Held: The appeal should be dismissed.

Per Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ.: An administrative

l'Ontario relativement aux employés du couvoir de Cuddy Chicks Ltd. L'alinéa 2*b*) de la *Loi sur les relations de travail* précise toutefois que la Loi ne s'applique pas aux personnes qui sont employées à l'agriculture, et l'appelante a soutenu que les employés en question étaient des ouvriers agricoles. En déposant la demande, le syndicat a donné avis que si l'on jugeait que les employés étaient des ouvriers agricoles, il demanderait à la Commission de déclarer l'al. 2*b*) invalide parce que contraire à l'al. 2*d*) et à l'art. 15 de la *Charte canadienne des droits et libertés*.

Avant l'audition de la question, Cuddy Chicks a contesté la compétence de la Commission de se prononcer sur la conformité de sa loi habilitante avec la *Charte*. À ce moment, une audience distincte a été convoquée afin de déterminer si la formation était habilitée à être saisie des questions relatives à la *Charte* soulevées par le syndicat. La première formation a conclu que les employés en cause étaient employés à l'agriculture, de sorte que la Loi ne s'appliquait pas. La formation a ensuite conclu à la majorité que la Commission avait la compétence nécessaire pour se prononcer sur la question relative à la *Charte* parce qu'elle était «un tribunal compétent» au sens du par. 24(1) de la *Charte* et parce que l'art. 52 de la *Loi constitutionnelle de 1982* impose à la Commission l'obligation de s'assurer que la loi qu'elle applique est conforme à la loi suprême du Canada. Selon le par. 106(1) de la Loi, la Commission a compétence pour trancher les questions de droit soulevées à l'occasion d'une affaire qui lui est soumise.

La Cour divisionnaire a conclu que la Commission avait compétence pour trancher la question ayant trait à la *Charte*. La Cour d'appel à la majorité a statué que le par. 52(1) de la *Loi constitutionnelle de 1982* conférait à la Commission la compétence nécessaire pour décider de la constitutionnalité de sa loi habilitante. Les questions en litige étaient les suivantes: (1) l'art. 52 de la *Loi constitutionnelle de 1982* confère-t-il à un organisme administratif tel que la CRTO le droit et l'obligation de décider de la validité constitutionnelle de sa loi habilitante, (2) la CRTO a-t-elle compétence pour décider de la validité constitutionnelle de l'al. 2*b*) de sa loi habilitante en appliquant la *Charte* dans le cadre de l'obligation qui lui est faite d'examiner les lois ayant une incidence sur les procédures dont elle est saisie, et (3) la CRTO est-elle un «tribunal compétent» au sens du par. 24(1) de la *Charte*.

Arrêt: Le pourvoi est rejeté.

Le juge en chef Lamer et les juges La Foret, Sopinka, Gonthier, Cory, McLachlin et Stevenson: Le tribunal

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tribunal which has been given the power to interpret law holds a concomitant power to determine whether that law is constitutionally valid. It must respect the Constitution as the supreme law because of the principle of supremacy of the Constitution confirmed by s. 52(1) of the *Constitution Act, 1982*.

Section 52(1) of the *Constitution Act, 1982* neither specifies which bodies may rule on *Charter* questions nor confers jurisdiction on an administrative tribunal. Jurisdiction over the whole of the matter—the parties, subject matter and remedy sought—must have expressly or impliedly been conferred on the tribunal by its enabling statute or otherwise. An administrative tribunal, however, need not be a court of competent jurisdiction within the meaning of s. 24(1) of the *Charter* in order to have the necessary authority to subject its enabling statute to *Charter* scrutiny. The relevant inquiry in this case was not whether the tribunal was a "court" but whether the legislature intended to confer on the tribunal the power to interpret and apply the *Charter*.

In conducting this inquiry, it first must be determined whether the tribunal has jurisdiction over the whole of the matter before it. Here, the issue centred on the Board's jurisdiction over the subject matter and remedy. The subject matter was not simply an application for certification, which fell squarely within the Board's authority, but one requiring the Board to subject s. 2(*b*) of the Act to *Charter* scrutiny in order to determine whether the application for certification was properly before it. Similarly, the remedy of certification required the Board to refuse to give effect to s. 2(*b*) of the Act because of inconsistency with the *Charter*. The authority to apply the *Charter* had to be found in the Board's enabling statute because the subject matter and remedy were premised on the application of the *Charter*.

The Act expressly, and without reservation, granted the Board the authority to decide points of law and to determine questions of law and fact relating to its own jurisdiction. This authority with respect to questions of law encompasses the question of whether a law violates the *Charter*. The Board therefore had the authority to rule on the constitutionality of s. 2(*b*) of its enabling statute in the course of considering the Union's application for certification.

administratif à qui l'on a conféré le pouvoir d'interpréter la loi a aussi le pouvoir concomitant de déterminer si la loi est constitutionnelle. Il doit respecter la Constitution en tant que loi suprême en raison du principe de la primauté de la Constitution confirmé par le par. 52(1) de la *Loi constitutionnelle de 1982*.

Le paragraphe 52(1) de la *Loi constitutionnelle de 1982* ne précise pas les organismes qui peuvent étudier les questions relatives à la *Charte*, ni ne confère compétence aux tribunaux administratifs. La compétence sur l'ensemble de la question—soit les parties, l'objet du litige et la réparation recherchée—doit avoir été conférée au tribunal expressément ou implicitement par sa loi constitutive ou autrement. Un tribunal administratif n'a toutefois pas à être un tribunal compétent au sens du par. 24(1) de la *Charte* pour avoir l'autorité nécessaire pour examiner sa loi habilitante à la lumière de la *Charte*. En l'espèce, la question pertinente ne consiste pas à savoir si le tribunal administratif est un «tribunal» au sens du par. 24(1), mais plutôt si le législateur entendait conférer au tribunal le pouvoir d'interpréter et d'appliquer la *Charte*.

En examinant cette question, il faut d'abord déterminer si le tribunal a compétence à l'égard de l'ensemble de l'affaire qui lui est soumise. La question portait en l'espèce sur la compétence de la Commission à l'égard de l'objet du litige et de la réparation recherchée. L'objet n'était pas simplement une demande d'accréditation, laquelle relevait sans aucun doute de la compétence de la Commission, mais une demande qui exigeait que la Commission examine l'al. 2*b*) de la Loi à la lumière de la *Charte* afin de déterminer si la demande d'accréditation lui était régulièrement soumise. De la même façon, en raison de la réparation recherchée, soit l'accréditation, la Commission devait refuser de donner effet à l'al. 2*b*) de la Loi compte tenu de son manque de conformité avec la *Charte*. Puisque l'objet du litige et la réparation supposent l'application de la *Charte*, le pouvoir d'appliquer celle-ci doit se trouver dans la loi habilitante de la Commission.

La Loi confère expressément et sans réserve à la Commission le pouvoir de trancher des questions de droit et celui de trancher des questions de droit et de fait visant sa propre compétence. Ce pouvoir à l'égard des questions de droit peut s'étendre à la question de savoir si une loi viole la *Charte*. La Commission était donc habilitée à statuer sur la constitutionnalité de l'al. 2*b*) de sa loi habilitante, dans le cadre de la demande d'accréditation du syndicat.

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The jurisdiction of the Board is limited in at least one crucial respect: it can expect no curial deference with respect to constitutional decisions. Further, a formal declaration of invalidity is not a remedy which is available to the Board. Instead, the Board simply treats any impugned provision as invalid for the purposes of the matter before it. Given that this is not tantamount to a formal declaration of invalidity, which is a remedy exercisable only by the superior courts, the ruling of the Board on a *Charter* issue does not constitute a binding legal precedent but is limited in its applicability to the matter in which it arises.

Per Wilson and L'Heureux-Dubé JJ.: The reasons of La Forest J. were concurred with subject to the qualification that the absence of legislative authority to deal with the *Charter* issue in the governing statute is not necessarily determinative of a tribunal's jurisdiction, since the authority and obligation to apply the law may be grounded elsewhere.

Cases Cited

By La Forest J.

Considered: *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; **referred to**: *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733; *The Queen v. Ontario Labour Relations Board, Ex parte Dunn* (1963), 39 D.L.R. (2d) 346; *Canada Labour Relations Board v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147; *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031.

By Wilson J.

Referred to: *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *McLeod v. Egan*, [1975] 1 S.C.R. 517; *Mills v. The Queen*, [1986] 1 S.C.R. 863.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(*d*), 15, 24(1).
Constitution Act, 1982, s. 52(1).

La compétence de la Commission est restreinte au moins sur un point essentiel: elle ne peut s'attendre à aucune retenue judiciaire à l'égard de ses décisions en matière constitutionnelle. En outre, une déclaration formelle d'invalidité n'est pas une réparation qui s'offre à la Commission. Celle-ci considère plutôt simplement comme invalide la disposition contestée, aux fins de l'affaire dont elle est saisie. Comme cela n'équivaut pas à une déclaration formelle d'invalidité, réparation que seules les cours supérieures peuvent accorder, l'affirmation de la Commission à l'égard d'une question relative à la *Charte* ne constitue pas un précédent judiciaire impératif, mais elle se limite dans son application à l'affaire dont elle procède.

Les juges Wilson et L'Heureux-Dubé: Il est souscrit aux motifs du juge La Forest, avec toutefois la réserve suivante: l'absence d'autorisation d'examiner la question relative à la *Charte* dans la loi habilitante n'est pas nécessairement concluante quant à la compétence d'un tribunal puisque le pouvoir et l'obligation d'appliquer le droit peuvent se trouver ailleurs.

Jurisprudence

Citée par le juge La Forest

Arrêt considéré: *Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570; **arrêts mentionnés**: *Mills c. La Reine*, [1986] 1 R.C.S. 863; *Tétreault-Gadoury c. Canada (Commission de l'emploi et de l'immigration)*, [1991] 2 R.C.S. 22; *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227; *Northern Telecom Canada Ltée c. Syndicat des travailleurs en communication du Canada*, [1983] 1 R.C.S. 733; *The Queen v. Ontario Labour Relations Board, Ex parte Dunn* (1963), 39 D.L.R. (2d) 346; *Conseil canadien des relations de travail c. Paul L'Anglais Inc.*, [1983] 1 R.C.S. 147; *Four B Manufacturing Ltd. c. Travailleurs unis du vêtement d'Amérique*, [1980] 1 R.C.S. 1031.

Citée par le juge Wilson

Arrêts mentionnés: *Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570; *McLeod c. Egan*, [1975] 1 R.C.S. 517; *Mills c. La Reine*, [1986] 1 R.C.S. 863.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 2*d*), 15, 24(1).
Labour Code, R.S.B.C. 1979, ch. 212.

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Labour Code, R.S.B.C. 1979, c. 212.
Labour Relations Act, R.S.O. 1980, c. 228, ss. 2(*b*), 106(1), 124.

APPEAL from a judgment of the Ontario Court of Appeal (1989), 70 O.R. (2d) 179, 62 D.L.R. (4th) 125, 35 O.A.C. 94, 44 C.R.R. 75, 89 C.L.L.C. ¶14,051, 39 Admin. L.R. 48, dismissing an appeal from a judgment of the Divisional Court (1988), 66 O.R. (2d) 284, 32 O.A.C. 7, 88 C.L.L.C. ¶14,053, 33 Admin. L.R. 304, dismissing an appeal from a judgment of the Ontario Labour Relations Board. Appeal dismissed.

George W. Adams, Q.C., Patrick E. Hurley and *Ralph N. Nero*, for the appellant.

Stephen T. Goudge, Q.C., and *Christopher M. Dassios*, for the respondent Ontario Labour Relations Board.

Douglas J. Wray, for the respondent United Food and Commercial Workers International Union, Local 175.

Gaspard Côté, Q.C., and *Carole Bureau*, for the interveners Canada Employment and Immigration Commission and the Attorney General of Canada.

Robert E. Charney, for the intervener the Attorney General for Ontario.

Robert G. Richards and *Ross MacNab*, for the intervener the Attorney General for Saskatchewan.

Jean-Guy Ouellet and *Gilbert Nadon*, for the intervener Marcelle Tétreault-Gadoury.

The judgment of Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ. was delivered by

LA FOREST J.—This appeal concerns the jurisdiction of the Ontario Labour Relations Board to determine the constitutionality of a provision of its enabling statute, the *Labour Relations Act*, R.S.O. 1980, c. 228, in the course of proceedings before it.

Loi constitutionnelle de 1982, art. 52(1).
Loi sur les relations de travail, L.R.O. 1980, ch. 228, art. 2*b*), 106(1), 124.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1989), 70 O.R. (2d) 179, 62 D.L.R. (4th) 125, 35 O.A.C. 94, 44 C.R.R. 75, 89 C.L.L.C. ¶14,051, 39 Admin. L.R. 48, qui a rejeté un appel contre un jugement de la Cour divisionnaire (1988), 66 O.R. (2d) 284, 32 O.A.C. 7, 88 C.L.L.C. ¶14,053, 33 Admin. L.R. 304, qui avait rejeté un appel contre une décision de la Commission des relations de travail de l'Ontario. Pourvoi rejeté.

George W. Adams, c.r., Patrick E. Hurley et *Ralph N. Nero*, pour l'appelante.

Stephen T. Goudge, c.r., et *Christopher M. Dassios*, pour l'intimée la Commission des relations de travail de l'Ontario.

Douglas J. Wray, pour l'intimée l'Union internationale des travailleurs unis de l'alimentation et du commerce, section locale 175.

Gaspard Côté, c.r., et *Carole Bureau*, pour les intervenantes la Commission de l'emploi et de l'immigration du Canada et le procureur général du Canada.

Robert E. Charney, pour l'intervenant le procureur général de l'Ontario.

Robert G. Richards et *Ross MacNab*, pour l'intervenant le procureur général de la Saskatchewan.

Jean-Guy Ouellet et *Gilbert Nadon*, pour l'intervenante Marcelle Tétreault-Gadoury.

Version française du jugement du juge en chef Lamer et des juges La Forest, Sopinka, Gonthier, Cory, McLachlin et Stevenson rendu par

LE JUGE LA FOREST—Le présent pourvoi porte sur la compétence de la Commission des relations de travail de l'Ontario de décider de la constitutionnalité d'une disposition de sa loi habilitante, la *Loi sur les relations de travail*, L.R.O. 1980, ch. 228, dans le cadre d'une procédure dont elle est saisie.

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Facts

In April 1987, the United Food and Commercial Workers International Union, Local 175, filed an application for certification before the Ontario Labour Relations Board (OLRB) relating to employees at the chicken hatchery of Cuddy Chicks Limited. Section 2(*b*) of the *Labour Relations Act* states that the Act does not apply "to a person employed in agriculture". On filing the application, the Union gave notice that, if the employees were found to be agricultural employees, it would request the Board to hold s. 2(*b*) invalid as being contrary to ss. 2(*d*) and 15 of the *Canadian Charter of Rights and Freedoms*. The position of Cuddy Chicks was that the employees in question were agricultural employees.

Prior to the commencement of the hearing into this matter, Cuddy Chicks disputed the jurisdiction of the Board to subject its enabling statute to *Charter* scrutiny. At that point, in February 1988, a separate hearing was convened to determine whether the panel had jurisdiction to entertain the *Charter* issues raised by the Union. The decision of this second panel was reserved. The hearing by the first panel proceeded in March and April 1988. At the conclusion of this hearing, the panel unanimously held that the employees at the Cuddy Chicks hatchery were employed in agriculture, and therefore the Act did not apply. A majority of the panel then held that the Board had jurisdiction to rule on the *Charter* issue because, in the majority's view, the Board is a "court of competent jurisdiction" within the meaning of s. 24(1) of the *Charter* and because s. 52 of the *Constitution Act, 1982* imposes an obligation on the Board to ensure that the law it applies is consistent with the supreme law of Canada. Under s. 106(1) of the Act, the Board has jurisdiction to decide questions of law relevant to the proceedings before it:

106.—(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision

Les faits

En avril 1987, l'Union internationale des travailleurs unis de l'alimentation et du commerce, section locale 175, a déposé une demande d'accréditation devant la Commission des relations de travail de l'Ontario (CRTO) relativement aux employés du couvoir de Cuddy Chicks Limited. L'alinéa 2*b*) de la *Loi sur les relations de travail* précise que la Loi ne s'applique pas «à la personne qui est employée à l'agriculture». En déposant la demande, le syndicat a donné avis que si l'on jugeait que les employés étaient des ouvriers agricoles, il demanderait à la Commission de déclarer l'al. 2*b*) invalide parce que contraire à l'al. 2*d*) et à l'art. 15 de la *Charte canadienne des droits et libertés*. Selon Cuddy Chicks, les employés en question étaient des ouvriers agricoles.

Avant l'audition de la question, Cuddy Chicks a contesté la compétence de la Commission de se prononcer sur la conformité de sa loi habilitante avec les dispositions de la *Charte*. À ce moment, en février 1988, une audience distincte a été convoquée afin de déterminer si la formation de la Commission était habilitée à être saisie des questions relatives à la *Charte* soulevées par le syndicat. La décision de cette seconde formation a été mise en délibéré. L'audience devant la première formation s'est déroulée en mars et avril 1988. À la conclusion de cette audience, la formation a conclu à l'unanimité que les employés du couvoir Cuddy Chicks étaient employés à l'agriculture, et que par conséquent la Loi ne s'appliquait pas. La formation a ensuite conclu à la majorité que la Commission avait la compétence nécessaire pour se prononcer sur la question relative à la *Charte* parce que, à son avis, la Commission est un «tribunal compétent» au sens du par. 24(1) de la *Charte*, et parce que l'art. 52 de la *Loi constitutionnelle de 1982* impose à la Commission l'obligation de s'assurer que la loi qu'elle applique est conforme à la loi suprême du Canada. Selon le par. 106(1) de la Loi, la Commission a compétence pour trancher les questions de droit soulevées à l'occasion d'une affaire qui lui est soumise:

106 (1) La Commission a compétence exclusive pour exercer les pouvoirs que lui confère la présente loi ou qui lui sont conférés en vertu de celle-ci et trancher toutes les questions de fait ou de droit soulevées à l'oc-

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of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

Judicial History

Divisional Court

The Divisional Court held that the Board had jurisdiction to deal with the *Charter* issue, on three grounds. First, the Board was a court of competent jurisdiction under s. 24(1) of the *Charter*, since it had jurisdiction over the parties, subject matter and remedy and thus met the test set out in *Mills v. The Queen*, [1986] 1 S.C.R. 863. Second, it had jurisdiction to consider *Charter* issues under s. 52(1) of the *Constitution Act, 1982*. The court noted that prior to the *Charter*, labour boards were held competent to determine constitutional questions, such decisions being subject always to judicial review. The third basis on which the court found jurisdiction in the Board was the common law duty of labour boards to construe external statutes in the course of rendering decisions on labour matters before them.

Court of Appeal (Grange, Finlayson and McKinlay JJ.A.) (1989), 70 O.R. (2d) 179

A majority of the Court of Appeal (Grange and McKinlay JJ.A.) held that s. 52(1) of the *Constitution Act, 1982* conferred jurisdiction on the Board to decide the constitutionality of its enabling statute. In construing the *Charter* in favour of the Union in the present case, the Board would not be issuing a declaration of invalidity, but merely including agricultural workers within its broad jurisdiction under the Act to certify unions. Accordingly, a remedy was available in the ordinary course of proceedings, and resort to s. 24 of the *Charter* was unnecessary. It was also

casion d'une affaire qui lui est soumise. Ses décisions ont force de chose jugée. Toutefois, la Commission peut à l'occasion, si elle estime que la mesure est opportune, réviser, modifier ou annuler ses propres décisions, ordonnances, directives ou déclarations.

L'historique judiciaire

Cour divisionnaire

La Cour divisionnaire a conclu que la Commission avait compétence pour trancher la question ayant trait à la *Charte* pour trois motifs. Premièrement, la Commission est un tribunal compétent au sens du par. 24(1) de la *Charte*, puisqu'elle a compétence à l'égard des parties, de l'objet du litige et de la réparation recherchée, et que par conséquent elle respecte les conditions énoncées dans l'arrêt *Mills c. La Reine*, [1986] 1 R.C.S. 863. Deuxièmement, elle est habilitée à se prononcer sur des questions relatives à la *Charte* en vertu du par. 52(1) de la *Loi constitutionnelle de 1982*. La cour a souligné qu'avant l'avènement de la *Charte*, les commissions des relations du travail étaient considérées compétentes à se prononcer sur des questions constitutionnelles, leurs décisions étant toujours susceptibles de contrôle judiciaire. Le troisième motif pour lequel la cour a conclu à la compétence de la Commission tient à l'obligation imposée par la common law aux commissions des relations du travail d'interpréter des lois externes lorsqu'elles ont à se prononcer en matière de conflit de travail.

La Cour d'appel (les juges Grange, Finlayson et McKinlay) (1989), 70 O.R. (2d) 179

La Cour d'appel à la majorité (les juges Grange et McKinlay) a statué que le par. 52(1) de la *Loi constitutionnelle de 1982* conférait à la Commission la compétence nécessaire pour décider de la constitutionnalité de sa loi habilitante. En interprétant la *Charte* de façon favorable au syndicat en l'espèce, la Commission ne prononcerait pas une déclaration d'invalidité; tout au plus ferait-elle relever les ouvriers agricoles de la compétence générale que lui accorde la Loi en matière d'accréditation des syndicats. Par conséquent, une réparation s'offrait dans le cours ordinaire des procédures, et le recours à l'art. 24 de la *Charte* était inutile. Il était aussi inutile

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unnecessary to address the issue of common law duty.

Finlayson J.A. in dissent held that the Board was not a court of competent jurisdiction under s. 24(1) of the *Charter*. While it had jurisdiction over the union and employer, as well as the remedy of certification, once the Board determined that the employees at the Cuddy Chicks hatchery were agricultural employees, it had no jurisdiction over the subject matter of the application and exhausted its jurisdictional competence. McKinlay J.A. agreed that the Board was not a court of competent jurisdiction, although in her view, it was unnecessary to decide that issue.

As to whether s. 52 of the *Constitution Act, 1982* alone confers authority on the Board to apply the *Charter*, Finlayson J.A. held that although that provision does give the Board the authority to apply the *Charter*, it does not give it jurisdiction to strike down, ignore or treat as inoperative any provision of its enabling statute by reference to the *Charter*.

Following its unsuccessful appeals in the Ontario courts, Cuddy Chicks obtained leave to appeal to this Court. Interventions were filed by the Attorneys General for Ontario and Saskatchewan. In addition, the parties to *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, an appeal which originally was to be heard together with the present appeal, were permitted to intervene by order of the Chief Justice.

Issues

The issues as framed by the parties are as follows:

1. Did the Ontario Court of Appeal err in holding that s. 52 of the *Constitution Act, 1982* conferred the right and duty on an administrative agency such as the OLRB to decide the constitutional validity of its enabling statute?

d'examiner la question de l'obligation imposée par la common law.

Le juge Finlayson, dissident, a conclu que la Commission n'était pas un tribunal compétent au sens du par. 24(1) de la *Charte*. Bien qu'elle ait eu compétence à l'égard du syndicat et de l'employeur ainsi qu'à l'égard de la réparation, c'est-à-dire de l'accréditation, dès lors que la Commission avait déterminé que les employés du couvoir Cuddy Chicks étaient des ouvriers agricoles, elle n'avait pas compétence à l'égard de l'objet de la demande et elle se trouvait avoir épuisé sa compétence. Le juge McKinlay a convenu que la Commission n'était pas un tribunal compétent, bien qu'à son avis, il était inutile de trancher cette question.

Quant à la question de savoir si l'art. 52 de la *Loi constitutionnelle de 1982* à lui seul confère à la Commission la compétence nécessaire pour appliquer la *Charte*, le juge Finlayson a statué que, même si cette disposition donne effectivement à la Commission le pouvoir d'appliquer la *Charte*, elle ne l'habilite pas à invoquer la *Charte* pour annuler, écarter ou considérer comme inopérante une disposition de sa loi habilitante.

Après avoir été déboutée de ses appels par les cours de l'Ontario, Cuddy Chicks a reçu l'autorisation de se pourvoir devant notre Cour. Les procureurs généraux de l'Ontario et de la Saskatchewan sont intervenus. De plus, les parties dans l'affaire *Tétreault-Gadoury c. Canada (Commission de l'emploi et de l'immigration)*, [1991] 2 S.C.R. 22, un pourvoi qui devait à l'origine être entendu en même temps que le présent pourvoi, ont été autorisées à intervenir par ordre du Juge en chef.

Les questions en litige

Les questions en litige sont exposées comme suit par les parties:

1. La Cour d'appel de l'Ontario a-t-elle commis une erreur lorsqu'elle a conclu que l'art. 52 de la *Loi constitutionnelle de 1982* conférait à un organisme administratif tel que la CRTO le droit et l'obligation de décider de la validité constitutionnelle de sa loi habilitante?

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2. Did the Ontario Court of Appeal err in holding that the OLRB has the jurisdiction to decide the constitutional validity of s. 2(*b*) of its enabling statute by applying the *Charter* as part of a duty it has to consider statutes bearing on proceedings before it?

3. Was the Ontario Court of Appeal correct in holding that the OLRB was not a "court of competent jurisdiction" under s. 24(1) of the *Charter*?

Discussion

The essential issue before this Court is whether and on what basis the Board has jurisdiction to determine the constitutional validity of s. 2(*b*) of the *Labour Relations Act*, its enabling statute. This Court was not called upon to decide the substantive issue of whether s. 2(*b*) of the Act violates the *Charter*.

The power of an administrative tribunal to consider *Charter* issues was addressed recently by this Court in *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570. That case concerned the jurisdiction of an arbitration board, appointed by the parties under a collective agreement in conjunction with the British Columbia *Labour Code*, to determine the constitutionality of a mandatory retirement provision in the collective agreement. In ruling that the arbitrator did have such jurisdiction, this Court articulated the basic principle that an administrative tribunal which has been conferred the power to interpret law holds a concomitant power to determine whether that law is constitutionally valid. This conclusion ensues from the principle of supremacy of the Constitution, which is confirmed by s. 52(1) of the *Constitution Act, 1982*:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Distilled to its basics, the rationale for recognizing jurisdiction in the arbitrator in the *Douglas College* case is that the Constitution, as the supreme law,

2. La Cour d'appel de l'Ontario a-t-elle commis une erreur en concluant que la CRTO avait compétence pour décider de la validité constitutionnelle de l'al. 2*b*) de sa loi habilitante en appliquant la *Charte* dans le cadre de l'obligation qui lui est faite d'examiner les lois ayant une incidence sur les procédures dont elle est saisie?

3. La Cour d'appel de l'Ontario a-t-elle eu raison de conclure que la CRTO n'était pas un «tribunal compétent» au sens du par. 24(1) de la *Charte*?

Analyse

La question essentielle dont est saisie notre Cour consiste à savoir si la Commission a compétence pour décider de la validité constitutionnelle de l'al. 2*b*) de la *Loi sur les relations de travail*, sa loi habilitante et, si tel est le cas, en vertu de quoi. Notre Cour n'a pas été appelée à se prononcer sur la question de fond consistant à savoir si l'al. 2*b*) de la Loi viole la *Charte*.

Notre Cour a récemment étudié, dans l'arrêt *Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570, le pouvoir des tribunaux administratifs d'examiner les questions relatives à la *Charte*. Cette affaire portait sur la compétence d'un conseil d'arbitrage, nommé par les parties en vertu d'une convention collective et conformément au *Labour Code* de la Colombie-Britannique, de se prononcer sur la constitutionnalité d'une disposition de la convention collective visant la retraite obligatoire. En statuant que l'arbitre avait la compétence voulue, notre Cour a énoncé le principe fondamental selon lequel le tribunal administratif à qui l'on a conféré le pouvoir d'interpréter la loi a aussi le pouvoir concomitant de déterminer si la loi est constitutionnelle. Cette conclusion découle du principe de la primauté de la Constitution, qui est confirmé par le par. 52(1) de la *Loi constitutionnelle de 1982*:

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

Réduite à ses éléments essentiels, la raison pour laquelle on a décidé, dans l'arrêt *Douglas College*, que l'arbitre avait compétence, est que la Constitu-

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must be respected by an administrative tribunal called upon to interpret law. In addition, the practical advantages of having constitutional issues decided at first instance by an expert tribunal confirm if not compel this conclusion. Practical considerations were canvassed at length in *Douglas College* and I need not repeat that discussion here. I would simply note the relevance of such considerations to the determination of whether, in the end, it makes sense for an administrative tribunal to decide whether a particular law is invalid because it violates the *Charter*.

It is essential to appreciate that s. 52(1) does not function as an independent source of an administrative tribunal's jurisdiction to address constitutional issues. Section 52(1) affirms in explicit language the supremacy of the Constitution but is silent on the jurisdictional point *per se*. In other words, s. 52(1) does not specify which bodies may consider and rule on *Charter* questions, and cannot be said to confer jurisdiction on an administrative tribunal. Rather, jurisdiction must have expressly or impliedly been conferred on the tribunal by its enabling statute or otherwise. This fundamental principle holds true regardless of the nature of the issue before the administrative body. Thus, a tribunal prepared to address a *Charter* issue must already have jurisdiction over the whole of the matter before it, namely, the parties, subject matter and remedy sought. While this analytical framework mirrors the requirements for a court of competent jurisdiction under s. 24(1) of the *Charter* as outlined in *Mills v. The Queen*, *supra*, as was the case in *Douglas College*, it is unnecessary to have recourse to s. 24(1) to determine whether the Board has jurisdiction over *Charter* issues. An administrative tribunal need not meet the definition of a court of competent jurisdiction in s. 24(1) of the *Charter* in order to have the necessary authority to subject its enabling statute to *Charter* scrutiny. In the present case, the relevant inquiry is not whether the tribunal is a "court" but whether the legislature intended to

tion, en sa qualité de loi suprême, doit être respectée par les tribunaux administratifs appelés à interpréter la loi. De plus, les avantages pratiques qu'il y a à faire décider des questions constitutionnelles en première instance par des tribunaux spécialisés confirment sinon imposent cette conclusion. L'arrêt *Douglas College* a longuement passé en revue les considérations d'ordre pratique, et je n'ai pas à répéter ici cette étude. Je me contenterai de souligner la pertinence de ces considérations lorsqu'il s'agit de déterminer si, en définitive, il est logique qu'un tribunal administratif décide si une loi particulière est invalide parce qu'elle viole la *Charte*.

Il est essentiel de se rendre compte que le par. 52(1) ne fournit pas aux tribunaux administratifs une source distincte de compétence à l'égard des questions constitutionnelles. En effet le par. 52(1), s'il affirme de façon explicite la primauté de la Constitution, reste silencieux sur la question de compétence comme telle. En d'autres termes, le par. 52(1) ne précise pas les organismes qui peuvent étudier les questions relatives à la *Charte* et statuer à leur égard, et on ne peut dire qu'il confère compétence aux tribunaux administratifs. La compétence du tribunal, doit plutôt lui avoir été conférée expressément ou implicitement par sa loi constitutive ou autrement. Ce principe fondamental demeure, quelle que soit la nature de la question dont est saisi le tribunal administratif. Ainsi, le tribunal administratif qui s'apprête à étudier une question ayant trait à la *Charte* doit déjà avoir compétence à l'égard de l'ensemble de la question qui lui est soumise, c'est-à-dire à l'égard des parties, de l'objet du litige et de la réparation recherchée. Bien que cette perspective analytique reflète les conditions nécessaires à l'existence d'un tribunal compétent au sens du par. 24(1) de la *Charte* telles qu'elles sont exposées dans l'arrêt *Mills c. La Reine*, précité, il n'est pas nécessaire, tout comme dans l'arrêt *Douglas College*, d'avoir recours au par. 24(1) pour déterminer si la Commission a compétence à l'égard des questions ayant trait à la *Charte*. Un tribunal administratif n'a pas à répondre à la définition d'un tribunal compétent au sens du par. 24(1) de la *Charte* pour détenir l'autorité nécessaire pour examiner la conformité de sa loi habilitante à la lumière de la *Charte*. En l'espèce, la question pertinente ne consiste pas à savoir si le tribunal administratif est un

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confer on the tribunal the power to interpret and apply the *Charter*.

Application to this Case

It first must be determined whether the Board has jurisdiction over the whole of the matter before it. It is clear that it has jurisdiction over the employer and the union. The issue here centres on its jurisdiction over the subject matter and remedy. The subject matter before the Board cannot be characterized simply as an application for certification, which would certainly fall within the authority of the Board. This is an application which requires the Board to subject s. 2(*b*) of the Act to *Charter* scrutiny in order to determine whether the application for certification is properly before it. Similarly, the remedy of certification requires the Board to refuse to give effect to s. 2(*b*) of the Act because of inconsistency with the *Charter*. Since the subject matter and remedy in this case are premised on the application of the *Charter*, the authority to apply the *Charter* must be found in the Board's enabling statute.

Section 106(1) of the *Labour Relations Act* stipulates that the Board has exclusive jurisdiction "to determine all questions of fact or law that arise in any matter before it . . . ." The legislature expressly, and without reservation, conferred authority on the Board to decide points of law. In addition, the Act confers powers on the Board to determine questions of law and fact relating to its own jurisdiction. Section 124, for example, gives it authority to decide if a matter is arbitrable. The issue, then, is whether this authority with respect to questions of law can encompass the question of whether a law violates the *Charter*. It is clear to me that a *Charter* issue must constitute a question of law; indeed, the *Charter* is part of the supreme law of Canada. This comports with the view expressed in *Douglas College* that the statutory authority of the arbitrator in that case to interpret any "Act" must include the authority to interpret the *Charter*. In the result, the Board has the authority to apply the *Charter* and to rule on the constitutionality

«tribunal» au sens du par. 24(1) de la *Charte*, mais plutôt si le législateur entendait conférer au tribunal le pouvoir d'interpréter et d'appliquer la *Charte*.

Application à l'espèce

Il faut d'abord déterminer si la Commission a compétence à l'égard de l'ensemble de l'affaire qui lui est soumise. Il est clair qu'elle a compétence à l'égard de l'employeur et du syndicat. La question porte en l'espèce sur sa compétence à l'égard de l'objet du litige et de la réparation recherchée. L'objet du litige dont la Commission est saisie ne peut être simplement qualifié de demande d'accréditation, laquelle relèverait sans aucun doute de sa compétence. Il s'agit en l'espèce d'une demande qui exige que la Commission examine l'al. 2*b*) de la Loi à la lumière de la *Charte* afin de déterminer si la demande d'accréditation lui est régulièrement soumise. De la même façon, en raison de la réparation recherchée, soit l'accréditation, la Commission doit refuser de donner effet à l'al. 2*b*) de la Loi compte tenu de son manque de conformité avec la *Charte*. Puisque l'objet du litige et la réparation en l'espèce supposent l'application de la *Charte*, le pouvoir d'appliquer celle-ci doit se trouver dans la loi habilitante de la Commission.

Le paragraphe 106(1) de la *Loi sur les relations de travail* dit que la Commission a compétence exclusive pour «trancher toutes les questions de fait ou de droit soulevées à l'occasion d'une affaire qui lui est soumise . . .». Le législateur a expressément, et sans réserve, conféré à la Commission le pouvoir de trancher des questions de droit. En outre, la Loi confère à la Commission le pouvoir de trancher des questions de droit et de fait visant sa propre compétence. L'article 124, par exemple, lui donne le pouvoir de décider si une question peut être soumise à l'arbitrage. Il s'agit alors de déterminer si ce pouvoir à l'égard des questions de droit peut s'étendre à la question de savoir si une loi viole la *Charte*. Il me paraît évident qu'une question concernant la *Charte* est une question de droit; en effet, la *Charte* fait partie de la loi suprême du Canada. Ceci va de pair avec l'opinion exprimée dans l'arrêt *Douglas College* selon laquelle le pouvoir conféré à l'arbitre par la loi d'interpréter toute «loi» devait comprendre celle d'interpréter la

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of s. 2(*b*) of its enabling statute, in the course of the Union's application for certification.

Practical Considerations

The discussion of practical considerations in the *Douglas College* decision entailed an analysis of the institutional characteristics of administrative tribunals, such as their narrow range of expertise and the speed with which they deal with matters, in relation to the fundamental and often complex nature of *Charter* issues. This analysis concerned administrative tribunals in general, and the ultimate conclusion that practical concerns favour the finding of jurisdiction in administrative tribunals holds in the present case. My purpose here is not to rehearse that comprehensive discussion, but simply to identify those considerations which are more pronounced in the particular case of the Board.

The overarching consideration is that labour boards are administrative bodies of a high calibre. The tripartite model which has been adopted almost uniformly across the country combines the values of expertise and broad experience with acceptability and credibility. In *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at pp. 235-36, Dickson J. (as he then was) characterized the particular competence of labour boards as follows:

> The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law; but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

It must be emphasized that the process of *Charter* decision making is not confined to abstract ruminations on constitutional theory. In the case of *Charter* matters which arise in a particular regulatory context,

Charte. La Commission est donc habilitée à appliquer la *Charte* et à statuer sur la constitutionnalité de l'al. 2*b*) de sa loi habilitante, dans le cadre de la demande d'accréditation du syndicat.

Considérations d'ordre pratique

L'analyse des considérations d'ordre pratique dans l'arrêt *Douglas College* comportait l'analyse des caractéristiques institutionnelles des tribunaux administratifs, comme leur champ restreint d'expertise et la rapidité avec laquelle ils traitent des questions dont ils sont saisis, par rapport à la nature fondamentale et souvent complexe des questions ayant trait à la *Charte*. Cette analyse visait les tribunaux administratifs en général, et la conclusion finale selon laquelle les considérations d'ordre pratique militent en faveur de l'existence de la compétence des tribunaux administratifs est valable en l'espèce. Mon propos n'est pas ici de reprendre cette analyse globale, mais simplement de relever les considérations qui sont les plus pertinentes dans le cas particulier de la Commission.

La considération primordiale est que les commissions des relations du travail sont des organismes administratifs de haut calibre. Le modèle tripartite qui a été adopté presque uniformément dans tout le pays allie l'expertise et la vaste expérience avec l'acceptabilité et la crédibilité. Dans l'arrêt *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227, aux pp. 235 et 236, le juge en chef Dickson (alors juge puîné) a qualifié comme suit la compétence particulière des commission des relations du travail:

> La commission est un tribunal spécialisé chargé d'appliquer une loi régissant l'ensemble des relations de travail. Aux fins de l'administration de ce régime, une commission n'est pas seulement appelée à constater des faits et à trancher des questions de droit, mais également à recourir à sa compréhension du corps jurisprudentiel qui s'est développé à partir du système de négociation collective, tel qu'il est envisagé au Canada, et à sa perception des relations de travail acquise par une longue expérience dans ce domaine.

Il faut souligner que le processus consistant à rendre des décisions à la lumière de la *Charte* ne se limite pas à des ruminations abstraites sur la théorie constitutionnelle. Lorsque des questions relatives à la

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the ability of the decision maker to analyze competing policy concerns is critical. Therefore, while Board members need not have formal legal training, it remains that they have a very meaningful role to play in the resolution of constitutional issues. The informed view of the Board, as manifested in a sensitivity to relevant facts and an ability to compile a cogent record, is also of invaluable assistance. This is evidenced clearly by the weight which the judiciary has given the factual record provided by labour boards in division of powers cases; see, for example, *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733.

Charte sont soulevées dans un contexte de réglementation donné, la capacité du décisionnaire d'analyser des considérations de principe opposées est fondamentale. Par conséquent, bien que les membres de la Commission n'aient pas à avoir une formation juridique professionnelle, il n'en reste pas moins qu'ils ont à jouer un rôle très significatif dans la détermination de questions constitutionnelles. Le point de vue éclairé de la Commission, qui se traduit par l'attention qu'elle accorde aux faits pertinents et sa capacité de compiler un dossier convaincant, est aussi d'une aide inestimable. On le constate clairement au poids que les juges ont accordé au dossier des faits fournis par les commissions des relations du travail en matière de partage des pouvoirs; voir par exemple l'arrêt *Northern Telecom Canada Ltée c. Syndicat des travailleurs en communication du Canada*, [1983] 1 R.C.S. 733.

That having been said, the jurisdiction of the Board is limited in at least one crucial respect: it can expect no curial deference with respect to constitutional decisions. Furthermore, a formal declaration of invalidity is not a remedy which is available to the Board. Instead, the Board simply treats any impugned provision as invalid for the purposes of the matter before it. Given that this is not tantamount to a formal declaration of invalidity, a remedy exercisable only by the superior courts, the ruling of the Board on a *Charter* issue does not constitute a binding legal precedent, but is limited in its applicability to the matter in which it arises.

Cela étant dit, la compétence de la Commission est restreinte au moins sur un point essentiel: elle ne peut s'attendre à aucune retenue judiciaire à l'égard de ses décisions en matière constitutionnelle. En outre, une déclaration formelle d'invalidité n'est pas une réparation qui s'offre à la Commission. Celle-ci considère plutôt simplement comme invalide la disposition contestée, aux fins de l'affaire dont elle est saisie. Comme cela n'équivaut pas à une déclaration formelle d'invalidité, réparation que seules les cours supérieures peuvent accorder, l'affirmation de la Commission à l'égard d'une question relative à la *Charte* ne constitue pas un précédent judiciaire impératif, mais elle se limite dans son application à l'affaire dont elle procède.

An additional practical consideration which bears mention here is whether the Attorney General of the province will participate in proceedings before an administrative tribunal. Before the courts, a provision to obtain this participation exists. Finlayson J.A. commented that this sort of participation may be inappropriate in the case of tribunals established by government, but at the same time the lack of participation of the Attorney General unfairly places the burden of defending legislation on the parties. However, the Attorney General for Ontario expressed a willingness to intervene and make submissions in appropriate cases, and has in the past done so before

Une autre considération d'ordre pratique qu'il convient de mentionner ici, est la question de savoir si le procureur général de la province participera aux procédures devant un tribunal administratif. Cette participation est prévue dans le cas des cours de justice. Le juge Finlayson a remarqué que cette sorte de participation pourrait être irrégulière dans le cas de tribunaux établis par un gouvernement, mais en même temps la non-participation du procureur général impose injustement aux parties l'obligation de défendre un texte législatif. Cependant, le procureur général de l'Ontario s'est montré prêt à intervenir et à faire des observations dans les cas appropriés, ce

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the Board on issues of federalism under the *Constitution Act, 1867*. To the extent that the Attorney General will intervene, the relative disadvantage of administrative tribunals versus courts is lessened.

It is apparent, then, that an expert tribunal of the calibre of the Board can bring its specialized expertise to bear in a very functional and productive way in the determination of *Charter* issues which make demands on such expertise. In the present case, the experience of the Board is highly relevant to the *Charter* challenge to its enabling statute, particularly at the s. 1 stage where policy concerns prevail. At the end of the day, the legal process will be better served where the Board makes an initial determination of the jurisdictional issue arising from a constitutional challenge. In such circumstances, the Board not only has the authority but a duty to ascertain the constitutional validity of s. 2(*b*) of the *Labour Relations Act*.

This view also makes sense within the larger context of Canadian constitutional jurisprudence. The capacity of labour boards to consider constitutional questions relating to their own jurisdiction has long been recognized. An early expression of this principle is found in *The Queen v. Ontario Labour Relations Board, Ex parte Dunn* (1963), 39 D.L.R. (2d) 346 (Ont. H.C.), a case which was cited by Estey J. in *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, *supra*, at p. 756, in support of the jurisdictional competence of labour boards in constitutional matters:

McRuer C.J.H.C., in giving judgment, made reference at p. 307 to the limited but important role to be played by the administrative agency in the determination of the constitutional questions:

> The Board cannot judicially determine constitutional questions but it has power to entertain an objection to its jurisdiction on constitutional grounds and to have the grounds of the objection stated.

qu'il a d'ailleurs fait dans le passé devant la Commission à l'égard de questions de fédéralisme sous le régime de la *Loi constitutionnelle de 1867*. Dans la mesure où le procureur général interviendra, le désavantage relatif des tribunaux administratifs comparativement aux cours de justice se trouve réduit.

Il est donc évident qu'un tribunal spécialisé du calibre de la Commission peut appliquer son expertise de façon très fonctionnelle et productive à trancher les questions relatives à la *Charte* qui requièrent cette expertise. En l'espèce, l'expérience de la Commission est très pertinente dans une contestation de sa loi habilitante fondée sur la *Charte*, particulièrement à l'étape de l'article premier, où prédominent les considérations de principe. En définitive, le processus judiciaire sera mieux servi si la Commission rend une décision initiale sur la question de la compétence soulevée par une contestation d'ordre constitutionnel. Dans ces circonstances, la Commission a non seulement le pouvoir, mais aussi l'obligation, de s'assurer du caractère constitutionnel de l'al. 2*b*) de la *Loi sur les relations de travail*.

Ce point de vue s'insère harmonieusement dans le contexte plus général de la jurisprudence constitutionnelle canadienne. En effet, on a depuis longtemps reconnu la capacité des commissions des relations du travail de se prononcer sur les questions constitutionnelles ayant trait à leur propre compétence. L'une des premières expressions de ce principe se trouve à l'arrêt *The Queen v. Ontario Labour Relations Board, Ex parte Dunn* (1963), 39 D.L.R. (2d) 346 (H.C. Ont.), une décision que le juge Estey a citée dans l'arrêt *Northern Telecom Canada Ltée c. Syndicat des travailleurs en communication du Canada*, précité, à la p. 756, à l'appui de la compétence des commissions des relations du travail en matière constitutionnelle:

Dans ses motifs, le juge en chef McRuer de la Haute Cour mentionne à la p. 307 le rôle restreint, mais important, que cet organisme administratif est appelé à jouer dans la détermination de questions constitutionnelles:

> [TRADUCTION] Le Conseil ne peut se prononcer comme tribunal sur des questions constitutionnelles, mais il a le pouvoir d'entendre une opposition à sa compétence fondée sur des motifs constitutionnels et d'obtenir une décision sur ces motifs, sous forme d'exposé de cause.

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See also *Canada Labour Relations Board v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147, and *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031.

What these cases speak to is not only the fundamental nature of the Constitution, but also the legal competence of labour boards and the value of their expertise at the initial stages of complex constitutional deliberations. These practical considerations have compelled the courts to recognize a power, albeit a carefully limited one, in labour tribunals to deal with constitutional issues involving their own jurisdiction. Such considerations are as compelling in the case of *Charter* challenges to a tribunal's enabling statute. Therefore, to extend this "limited but important role" of labour boards to the realm of the *Charter* is simply a natural progression of a well established principle.

Disposition

In the application for certification brought by the Union, the Board had jurisdiction over the parties, subject matter and remedy. In the exercise of this jurisdiction, it was required to respect the supremacy of the Constitution as expressed in s. 52(1) of the *Constitution Act, 1982* and had a duty to subject its enabling statute to *Charter* scrutiny. It is unnecessary to consider whether the Board is a court of competent jurisdiction within the meaning of s. 24(1) of the *Charter*.

I would dismiss the appeal with costs.

The reasons of Wilson and L'Heureux-Dubé JJ. were delivered by

WILSON J.—In my concurring reasons in *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, I agreed with my colleague Justice La Forest that an Arbitration Board appointed by the parties under the *Labour Code*, R.S.B.C. 1979, c. 212, had jurisdiction, by virtue of s. 52(1) of the *Constitution Act, 1982*, to determine the *Charter*

Voir aussi les arrêts *Conseil canadien des relations du travail c. Paul L'Anglais Inc.*, [1983] 1 R.C.S. 147, et *Four B Manufacturing Ltd. c. Travailleurs unis du vêtement d'Amérique*, [1980] 1 R.C.S. 1031.

Ces arrêts traitent non seulement de la nature fondamentale de la Constitution, mais aussi de la compétence décisionnelle des commissions des relations du travail et de la valeur de leur expertise aux étapes initiales de délibérations constitutionnelles complexes. Ces considérations d'ordre pratique ont amené les tribunaux à reconnaître le pouvoir, certes soigneusement restreint, des tribunaux des relations du travail de se prononcer sur des questions constitutionnelles ayant trait à leur propre compétence. Ces considérations sont tout aussi contraignantes dans le cas de la contestation, sur le plan de la *Charte*, de la loi habilitante d'un tribunal administratif. Par conséquent, l'extension du «rôle restreint, mais important» des commissions des relations du travail au domaine de la *Charte* n'est que la progression naturelle d'un principe bien établi.

Dispositif

En ce qui concerne la demande d'accréditation faite par le syndicat, la Commission avait compétence à l'égard des parties, de l'objet du litige et de la réparation recherchée. Dans l'exercice de cette compétence, elle était tenue de respecter la primauté de la Constitution exprimée au par. 52(1) de la *Loi constitutionnelle de 1982*, et elle avait aussi l'obligation de s'interroger sur la conformité de sa loi habilitante à la *Charte*. Il n'est pas nécessaire d'étudier la question de savoir si la Commission est un tribunal compétent au sens du par. 24(1) de la *Charte*.

Je suis d'avis de rejeter le pourvoi avec dépens.

Version française des motifs des juges Wilson et L'Heureux-Dubé rendus par

LE JUGE WILSON—Dans mes motifs concordants de l'arrêt *Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570, j'ai partagé l'opinion de mon collègue le juge La Forest qu'un conseil d'arbitrage nommé par les parties en vertu du *Labour Code*, R.S.B.C. 1979, ch. 212, avait compétence, en application du par. 52(1) de la *Loi constitu-*

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issue raised by the grievance and that it was not necessary in that case to determine whether the Board was a "court of competent jurisdiction" within the meaning of s. 24(1) of the *Canadian Charter of Rights and Freedoms*. I added the following qualification to my concurrence at pp. 606-7:

I would, however, prefer to leave open the question whether a tribunal may have such jurisdiction even in the absence of specific provisions in the governing legislation and in the collective agreement such as those heavily relied on by my colleague.

In the present appeal my colleague has re-stated the position he took in *Douglas College* that the authority to apply the *Charter* must be found in the tribunal's enabling statute and he has found once again that its jurisdiction is found there, that the broad jurisdiction conferred on the Board by s. 106(1) of the *Labour Relations Act*, R.S.O. 1980, c. 228, includes the authority to interpret the *Charter*.

In concurring with my colleague in the present appeal I would accordingly wish once again to add the qualification which I added to my concurrence in *Douglas College*. The absence of legislative authority to deal with the *Charter* issue in the governing statute is not, in my view, necessarily determinative of a tribunal's jurisdiction, since the authority and obligation to apply the law may be grounded elsewhere: *McLeod v. Egan*, [1975] 1 S.C.R. 517. Additionally, it may be necessary to proceed to s. 24(1) of the *Charter* and decide whether, on the basis of the tests set out in *Mills v. The Queen*, [1986] 1 S.C.R. 863, the tribunal is a court of competent jurisdiction to decide a *Charter* issue arising in the context of the relief claimed.

Appeal dismissed with costs.

Solicitors for the appellant: Fasken, Campbell, Godfrey, Toronto.

Solicitors for the respondent Ontario Labour Relations Board: Gowling, Strathy & Henderson, Toronto.

tionnelle de 1982, pour se prononcer sur la question relative à la *Charte* soulevée par le grief et qu'il n'était pas nécessaire dans ce pourvoi-là de déterminer si le conseil était un «tribunal compétent» au sens du par. 24(1) de la *Charte canadienne des droits et libertés*. Aux pages 606 et 607, j'ai ajouté la réserve suivante à mon opinion concordante:

Je préfère cependant ne pas me prononcer sur la question de savoir si un tribunal peut avoir cette compétence même en l'absence de dispositions précises dans la loi habilitante et dans la convention collective comme celles sur lesquelles mon collègue s'est fortement appuyé.

Dans le présent pourvoi, mon collègue a réitéré la position qu'il avait adoptée dans *Douglas College* selon laquelle le pouvoir d'appliquer la *Charte* doit se trouver dans la loi habilitante du tribunal et il a conclu de nouveau que sa compétence se trouve là et que la vaste compétence conférée à la Commission par la *Loi sur les relations de travail*, L.R.O. 1980, ch. 228, comprend le pouvoir d'interpréter la *Charte*.

En partageant l'opinion de mon collègue dans le présent pourvoi, je désire donc encore une fois ajouter la réserve dont j'ai assorti mon opinion concordante dans l'arrêt *Douglas College*. À mon avis, l'absence d'autorisation d'examiner la question relative à la *Charte* dans la loi habilitante n'est pas nécessairement concluante quant à la compétence d'un tribunal puisque le pouvoir et l'obligation d'appliquer le droit peuvent se trouver ailleurs: *McLeod c. Egan*, [1975] 1 R.C.S. 517. De plus, il peut être nécessaire de recourir au par. 24(1) de la *Charte* et de décider si, sur le fondement des critères établis dans l'arrêt *Mills c. La Reine*, [1986] 1 R.C.S. 863, le tribunal est un tribunal compétent pour se prononcer sur une question relative à la *Charte* qui se pose dans le contexte du redressement demandé.

Pourvoi rejeté avec dépens.

Procureurs de l'appelante: Fasken, Campbell, Godfrey, Toronto.

Procureurs de l'intimée la Commission des relations de travail de l'Ontario: Gowling, Strathy & Henderson, Toronto.

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Solicitors for the respondent United Food and Commercial Workers International Union, Local 175: Caley & Wray, Toronto.

Solicitor for the interveners Canada Employment and Immigration Commission and the Attorney General of Canada: John C. Tait, Ottawa.

Solicitor for the intervener the Attorney General for Ontario: The Attorney General for Ontario, Toronto.

Solicitor for the intervener the Attorney General for Saskatchewan: Brian Barrington-Foote, Regina.

Solicitors for the intervener Marcelle Tétreault-Gadoury: Campeau, Ouellet, Nadon & Lussier, Montréal.

Procureurs de l'intimée l'Union internationale des travailleurs unis de l'alimentation et du commerce, section locale 175: Caley & Wray, Toronto.

Procureur des intervenantes la Commission de l'emploi et de l'immigration du Canada et le procureur général du Canada: John C. Tait, Ottawa.

Procureur de l'intervenant le procureur général de l'Ontario: Le procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général de la Saskatchewan: Brian Barrington-Foote, Regina.

Procureurs de l'intervenante Marcelle Tétreault-Gadoury: Campeau, Ouellet, Nadon & Lussier, Montréal.

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COUR D'APPEL

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CANADA
PROVINCE DE QUÉBEC
GREFFE DE MONTRÉAL

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ASSOCIATION DES CADRES DE LA SOCIÉTÉ DES CASINOS DU QUÉBEC
APPELANTE – mise en cause
c.

SOCIÉTÉ DES CASINOS DU QUÉBEC INC.
INTIMÉE – demanderesse
et
TRIBUNAL ADMINISTRATIF DU TRAVAIL
MIS EN CAUSE – défendeur
et
PROCUREUR GÉNÉRAL DU QUÉBEC
MIS EN CAUSE – mis en cause

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ARRÊT

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Remarques préliminaires :

[1] Comme le résumait l'auteur Chartier au début d'un article publié il y a près de 60 ans, peu après l'entrée en vigueur du Code du travail[1] :

> Quelques notions qu'on entretienne sur le syndicalisme de cadres, il convient de le situer, comme concept et comme fait, dans le contexte plus large de la réalité sociale, économique, politique et juridique du milieu même dans lequel on souhaite ou redoute son épanouissement.[2]

[2] Les points de vue doctrinaux sur l'à-propos de l'exclusion des cadres de la définition de « salarié » contenue dans le *C.t.*[3] et, par-là, de leur exclusion du régime de relations de travail « de droit commun »[4] qu'il a instauré, ne datent donc pas d'hier. D'autres commentaires et critiques formulés au fil des ans, qui demeurent d'actualité, permettent aussi de placer cette problématique dans sa juste perspective sociojuridique.

[3] Ainsi, comme l'observent les auteurs, les structures traditionnelles de l'autorité, du processus décisionnel et de la relation entre « la direction » et « l'exécution » au sein des organisations, qui ont donné lieu aux compartiments étanches *direction vs travailleurs* instaurés par le modèle Wagner des relations de travail des années 1930, repris chez nous dans la *Loi des relations ouvrières*[5] de 1944, puis dans le *C.t.* de 1964, ont éclaté. De ce fait, les deux catégories essentielles et distinctives de l'époque, soit « les travailleurs et la direction; ceux qui obéissent et exécutent, d'une part, et ceux qui commandent, à quelque niveau que ce soit, d'autre part »[6], ont subi d'importantes mutations et sont aujourd'hui plus diffuses[7]. Or, l'exclusion de tous les niveaux de cadres

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1 *Code du travail*, S.R.Q. 1964, c. 141.

2 Roger Chartier, « Le syndicalisme de cadres et la législation québécoise du travail », (1965) 20 *R.I.* 278, p. 278.

3 Aujourd'hui contenue à l'article 1*l*) 1° du *Code du travail*, RLRQ, c. C-27.

4 *Québec (Procureur général) c Confédération des syndicats nationaux (CSN)*, 2011 QCCA 1247, paragr. 87, demande d'autorisation d'appel à la Cour suprême rejetée, 10 mai 2012, nº 34479.

5 *Loi des relations ouvrières*, reproduite dans S.R.Q. 1941, c. 162A, mais édictée dans S.Q. 1944, c. 30.

6 Roger Chartier, « Le syndicalisme de cadres et la législation québécoise du travail », *supra*, note 2, p. 280.

7 Sur ce thème, outre l'article précité de l'auteur Chartier, voir notamment Claude Daoust, « Le Bill 36 et le syndicalisme de cadres », (1970) 25 *R.I.* 617; Jacques Desmarais, « Les idées de réforme sur la syndicalisation au Québec depuis 1964 », dans Jacques Bélanger *et al.* (dir.), *La syndicalisation dans le secteur privé au Québec*, Sainte-Foy, Presses de l'Université Laval, 1983, 101, p. 103; Dominic Roux et Pierre Verge, « L'affirmation des principes de la liberté syndicale, de la négociation collective et du droit de grève selon le droit international et le droit du travail canadien : deux solitudes? », (2011) 333 *Développements récents en droit du travail* 121, p. 138-139.

de la définition de « salarié » à l'article 1*l*) 1° *C.t.* maintient cette conception traditionnelle des relations de travail que l'auteur Cardin décrivait quant à lui de la façon suivante :

> Qui dit « personnel de cadres » dit nécessairement « participants à la direction », cette dernière fonction étant considérée comme un tout homogène et indivisible, n'admettant aucune différenciation sur le plan des statuts et des intérêts particuliers qui peuvent en découler. C'est un bloc monolithique s'étendant de la haute direction aux détenteurs de la moindre parcelle d'autorité dans l'entreprise : contremaîtres, chefs de groupe, etc., et s'opposant à l'autre bloc, celui de la main-d'œuvre composée uniquement des purs exécutants.[8]
>
> [Soulignements ajoutés]

[4] De façon tout aussi pertinente, l'auteur Blouin soulignait quant à lui que « le schéma des titres » de « gérant, surintendant, contremaître ou représentant de l'employeur dans ses relations avec ses salariés », énoncé à l'origine à l'article 1*m*) 1° *C.t.* de 1964 et repris mot pour mot à l'article 1*l*) 1° actuel, « ne fait que reproduire les principes d'organisation des entreprises à l'époque de la production industrielle »[9].

[5] Cette conception traditionnelle et les divergences de vues qu'elle a suscitées au fil des ans ressortent aussi de l'extrait suivant de l'opinion presque quadragénaire du juge Montgomery dans l'arrêt *Syndicat des cadres des hôpitaux de la région de Montréal (C.S.N.) c. Hôpital du Sacré-Cœur de Montréal*[10], formulée à l'aube de l'entrée en vigueur de la *Charte canadienne des droits et libertés*[11] et de la liberté d'association qu'elle enchâsse à son alinéa 2*d*) :

> With all respect for Judge Brière, I agree with the judge in the Superior Court that he was exceeding his jurisdiction by attempting to legislate and to set up a new category of "cadres inférieurs et subalternes". Such a category is not contemplated by the Labour Code; an employee may not "hunt with the hounds and run with the hare".
>
> [Soulignement ajouté]

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8 Jean-Réal Cardin, « Une montée inéluctable en économie moderne : le syndicalisme de cadres », (1964) 1:6 *Cadres*, p. 7, cité par Roger Chartier, « Le syndicalisme de cadres et la législation québécoise du travail », *supra*, note 2, p. 280.

9 Rodrigue Blouin, « La qualification des cadres hiérarchiques par le Code du travail », (1975) 30 *R.I*. 478, p. 483.

10 *Syndicat des cadres des hôpitaux de la région de Montréal (C.S.N.) c. Hôpital du Sacré-Cœur de Montréal*, [1983] C.A. 144. 1983 CanLII 3454.

11 *Charte canadienne des droits et libertés*, partie I de la *Loi constitutionnelle de 1982*, constituant l'annexe B de la *Loi de 1982 sur le Canada* (R.-U.), 1982, c. 11.

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[6] Enfin, plus près de nous, le professeur Fernand Morin soulevait quant à lui les interrogations légitimes suivantes :

> C'est ainsi que les cadres, soit le personnel d'encadrement et qui, selon la structure hiérarchique de chaque entreprise, représentent l'employeur, mais à des degrés divers, sont exclus du régime. Selon le principe d'unicité de direction, chacune de ces personnes-cadres agit en raison d'une délégation de pouvoir et les actes posés à ce titre sont réputés être ceux de l'employeur pour les fins de la gestion de l'entreprise. En raison de cette logique organisationnelle, il n'était pas souhaitable qu'à l'occasion de l'élaboration des conditions de travail, ces mêmes personnes-cadres et lesquelles sont néanmoins juridiquement des salariés selon l'article 2085 *C.c.Q.*, soient en situation de conflit d'intérêts entre les autres salariés et leurs propres mandants. On voulut les maintenir du côté où ils se trouvent à l'occasion de l'exercice de leurs fonctions propres de cadres. […]
>
> Il demeure néanmoins possible que le débat reprenne si une association de cadres entendait être accréditée pour représenter exclusivement des salariés-cadres auprès de leur employeur commun. C'est alors qu'il nous faudrait aborder de front ces deux autres questions :
>
> > 1re question : L'expression de « …représentant de l'employeur dans ses relations avec ses salariés » (art. 1, para. L, al.1 C.t.) constitue-t-elle une exclusion absolue ou relative, c'est-à-dire ne visant que les salariés qui sont sous la direction d'un cadre?
> >
> > 2e question : Si le cadre est un salarié au sens du Code civil (art. 2085 *C.c.Q.*) et que la liberté d'association lui est garantie à ce dernier titre par la Charte comme le reconnaît maintenant l'arrêt *Health*, comment alors justifier une exclusion aussi radicale alors qu'une exception « relative » pourrait suffire?[12]
>
> [Soulignements ajoutés]

[7] Le présent appel fournit l'occasion de porter à ces perspectives et aux questionnements qu'elles soulèvent l'attention renouvelée qu'ils méritent, vu tout particulièrement la protection accordée à la liberté d'association dans les textes quasi constitutionnel[13] et constitutionnel[14] des années 70 et 80, d'une part, et l'évolution de la finalité et de la portée de cette liberté selon la jurisprudence la plus récente de la Cour suprême, d'autre part. Comme l'observait la juge Deschamps dans son opinion concourante dans l'arrêt *Ontario (Procureur général) c. Fraser* : « Le droit canadien du travail n'est pas immuable »[15].

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12 Fernand Morin, *L'élaboration du droit de l'emploi au Québec : ses sources législatives et judiciaires*, Montréal, Wilson & Lafleur, 2011, p. 197-198.

13 *Charte des droits et libertés de la personne*, RLRQ, c. C-12, art. 3.

14 *Charte canadienne des droits et libertés*, *supra*, note 11, al. 2*d*).

15 *Ontario (Procureur général) c. Fraser*, 2011 CSC 20, paragr. 297.

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[8] L'appelante (« l'Association ») se pourvoit en l'espèce contre un jugement rendu le 5 novembre 2018 par la Cour supérieure, district de Montréal (l'honorable Chantal Lamarche)[16].

[9] Ce jugement accueille le pourvoi en contrôle judiciaire de l'intimée (« l'Employeur ») et infirme la décision interlocutoire rendue le 7 décembre 2016 par le Tribunal administratif du travail mis en cause (le « TAT »)[17], laquelle déclare constitutionnellement inopérante à l'égard des membres de l'Association, et aux fins de l'examen de la requête en accréditation déposée par cette dernière, l'exclusion des cadres de la définition de « salarié » prévue à l'article 1*l*) 1° du *C.t.* :

1. Dans le présent code, à moins que le contexte ne s'y oppose, les termes suivants signifient: […]	**1.** In this Code, unless the context requires otherwise, the following expressions mean […]
l) «salarié» : une personne qui travaille pour un employeur moyennant rémunération, cependant ce mot ne comprend pas:	*l*) "employee" : a person who works for an employer and for remuneration, but the word does not include:
1° une personne qui, au jugement du Tribunal, est employée à titre de gérant, surintendant, contremaître ou représentant de l'employeur dans ses relations avec ses salariés;	(1) a person who, in the opinion of the Tribunal, is employed as manager, superintendent, foreman or representative of the employer in his relations with his employees;
[…]	[…]

[Soulignements ajoutés]

[10] Le cœur de l'appel consiste à déterminer si la juge a erré dans l'exercice de son pouvoir de contrôle en infirmant les conclusions du TAT, selon lesquelles :

(i) l'exclusion contenue à l'article 1*l*) 1° *C.t.* porte atteinte à la liberté d'association garantie aux membres de l'Association par l'alinéa 2*d*) de la *Charte canadienne des droits et libertés*[18] (la « *Charte canadienne* ») et par l'article 3 de la *Charte des droits et libertés de la personne*[19] (la « *Charte québécoise* »);

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16 *Société des casinos du Québec inc. c. Tribunal administratif du travail*, 2018 QCCS 4781 [« jugement entrepris »].

17 *Association des cadres de la Société des casinos du Québec et Société des casinos du Québec inc.,* 2016 QCTAT 6870 [« décision du TAT »].

18 *Charte canadienne des droits et libertés*, *supra*, note 11.

19 *Charte des droits et libertés de la personne*, *supra*, note 13.

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(ii) le procureur général du Québec (le « PGQ ») a échoué à démontrer que cette atteinte est justifiée suivant l'article premier de la *Charte canadienne* et l'article 9.1 de la *Charte québécoise*; et,

(iii) dans les circonstances, la réparation appropriée consiste à déclarer l'exclusion en litige inopérante à l'égard des membres de l'Association aux fins de l'analyse de la requête en accréditation déposée par cette dernière.

[11] La Cour conclut que l'appel est bien fondé et qu'il y a lieu d'infirmer le jugement de la Cour supérieure et de rétablir la décision du TAT. La Cour suspendra toutefois la déclaration relative au caractère inopérant de l'exclusion en litige pour une période de 12 mois afin de permettre au gouvernement, le cas échéant, de prendre les mesures qu'il pourrait juger appropriées.

[12] Une revue du contexte sera d'abord utile à la compréhension de cette conclusion et des motifs qui la sous-tendent.

1. Le contexte

[13] Les motifs du TAT comptent 443 paragraphes. Près de 300 ont trait à la preuve documentaire et testimoniale, dont une partie importante est reproduite dans dossier d'appel. Le jugement entrepris compte quant à lui 269 paragraphes, dont près d'une centaine concerne la preuve ou l'appréciation qu'en a faite le TAT.

[14] Au vu de l'ensemble, la Cour est d'avis que les faits essentiels pour trancher l'appel sont les suivants. D'autres, plus spécifiques, seront par ailleurs abordés plus après lors de l'analyse des questions en litige.

1.1. L'Employeur, l'Association et leurs relations

[15] **L'Employeur**, une société créée en 1992, est une filiale de la Société des loteries du Québec (« Loto-Québec »). Il est responsable de la gestion de quatre casinos, soit ceux de Montréal (le « Casino » aux fins du présent arrêt), de Charlevoix, du Lac-Leamy et de Mont-Tremblant.

[16] Il est dirigé en tout temps pertinent par un président des « opérations », de qui relève un directeur général pour chaque casino. Chacun de ces directeurs généraux, dans son milieu, est en retour le supérieur hiérarchique immédiat d'un directeur des jeux, notamment.

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[17] Les opérations de chaque casino sont par ailleurs divisées en trois secteurs de jeux, soit : le secteur des tables de jeux (ex : les tables de « roulette »), celui des machines à sous[20] et celui des salons de poker.

[18] La description générale que donne le TAT de la structure organisationnelle des secteurs de jeux au Casino n'est pas contestée :

> [110] La structure organisationnelle dans le secteur des jeux du Casino se décline en cinq paliers de direction : le directeur général, le directeur des jeux, deux chefs de service, les chefs d'opérations, les superviseurs des opérations (**SDO**). Le cinquième palier est constitué des cadres de premier niveau, visés par la présente requête. Ils supervisent les croupiers, qui sont des employés syndiqués.
>
> [111] Les SDO doivent s'assurer du bon déroulement des activités, notamment du respect des règles du jeu, et veiller au Service à la clientèle. Au moment des audiences, chaque SDO est affecté à une équipe de croupiers, dont le nombre varie entre deux et cinq. Les SDO sont, en quelque sorte, « les yeux et les oreilles de l'employeur sur le plancher ».
>
> […]
>
> [315] En l'espèce, les personnes en cause sont des cadres de premier niveau, dans une organisation qui comprend cinq paliers ou plus de gestion. Ils sont souvent issus eux-mêmes du groupe qu'ils supervisent. Tout en étant « les yeux et les oreilles de l'employeur sur le plancher », ils ne bénéficient pas de la relation privilégiée que peuvent entretenir les cadres de niveaux supérieurs avec l'entreprise. Ils ne participent pas aux orientations de l'entreprise. Ils ne jouent pas non plus de rôle stratégique dans les relations du travail : ils ne négocient pas les conventions collectives; ils en assurent l'application dans le quotidien des activités. En résumé, les cadres de premier niveau sont véritablement entre « l'arbre et l'écorce ».
>
> [Soulignements ajoutés; caractères gras dans l'original]

[19] Les superviseurs des opérations (« SDO ») du secteur des tables de jeux auxquels réfère le TAT, membres de l'Association, sont aussi désignés par cette dernière et l'Employeur comme des « chefs de table » ou « cadres de premier niveau », comme on le verra plus loin.

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20 Qui comprend le Keno, une forme de bingo.

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[20] Comme l'ont confirmé les parties lors de l'audience, il n'a pas été contesté que les SDO exercent certaines fonctions leur conférant un statut de cadre, ce qui a conduit le TAT[21] et la Cour supérieure[22] à leur reconnaître ce statut[23].

[21] **L'Association** fut quant à elle constituée en 1997 en vertu de *la Loi sur les syndicats professionnels*[24]*,* et ce, en réaction à une modification unilatérale par l'Employeur des horaires de travail des SDO[25]. Dès ses débuts, l'objectif de l'Association est d'assurer sa reconnaissance par l'Employeur afin de pouvoir représenter ces derniers et négocier leurs conditions de travail.

[22] Lors de l'audience devant le TAT, l'Association compte parmi ses membres 250, ou 70 %, des SDO affectés au secteur des tables de jeux du Casino et, de ce fait, la majorité des SDO du Casino tous secteurs de jeux confondus. L'Employeur considère toutefois chaque secteur séparément, de sorte qu'il ne reconnaît pas de caractère représentatif à l'Association eu égard aux SDO des secteurs des machines à sous et des tables de poker.

[23] Le 19 septembre 2001, à la suite du refus de l'Employeur de convenir d'une entente écrite concernant, entre autres, le prélèvement à la source des cotisations des SDO dès l'embauche ainsi que la bonification de certaines de leurs conditions de travail[26], ce dernier et l'Association concluent un « Protocole d'entente » (le « Protocole ») comportant quatre articles[27].

[24] L'article 1 reconnaît l'Association comme « représentant les chefs de table » du Casino qui en sont membres, mais assujettit son caractère représentatif à l'égard des autres SDO à l'assentiment de l'Employeur. Il prévoit aussi la tenue de rencontres en « comité conjoint […] aux fins de discussions et d'échanges sur les préoccupations des parties, […] dans la recherche de solutions gagnant-gagnant », les « données, études et autre documents pertinents disponibles et nécessaires à la discussion et à la compréhension des divers sujets » étant fournis par l'Employeur. L'article précise enfin

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21 Décision du TAT, paragr. 113, notamment.

22 Jugement entrepris, paragr. 7.

23 Au début de l'audience, la Cour a souligné aux parties que le TAT et la Cour supérieure n'étaient pas liés par leur admission commune concernant le statut de cadre des SDO. Il incombait particulièrement au premier, vu le libellé de l'article 1*l*) 1° *C.t.*, de juger, sur la base d'une preuve, contestée ou non, si tel était réellement le cas. Dans le cas contraire, il eût sans doute été indiqué de lui retourner le dossier afin qu'il exerce sa juridiction, et que les paliers ultérieurs de révision et d'appel exercent ensuite la leur. Compte tenu des observations des parties, de leur admission commune et des constats du TAT et de la Cour supérieure à ce sujet, la Cour a conclu que l'appel peut être tranché sur la base du dossier tel que constitué.

24 *Loi sur les syndicats professionnels*, RLRQ, c. S-40.

25 Décision du TAT, paragr. 114.

26 *Id.*, paragr. 120-121.

27 Pièce R-1-1 devant le TAT.

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que les conditions de travail « des chefs de table et des cadres de premier niveau sont généralement précisées » dans un *Manuel des employés*.

[25] L'article 2 précise que l'Employeur « s'appuie » sur le « sens des responsabilités » des chefs de table, ainsi que sur « leur loyauté institutionnelle et leur engagement soutenu », et que l'Association sera consultée « préalablement à la détermination ou à la modification » de leurs conditions de travail.

[26] L'article 3 prévoit quant à lui que l'Employeur fera parvenir annuellement à l'Association la liste de ses membres, et qu'il prélèvera la cotisation de ces derniers à même leur paie.

[27] Finalement, l'article 4 prévoit la libération avec solde de deux représentants de l'Association aux fins de rencontres avec les représentants de l'Employeur, de trois représentants pour les fins des rencontres annuelles de l'Association, mais ajoute que cette dernière remboursera à l'Employeur, « sur réception », la facture que ce dernier lui transmettra pour le salaire ainsi que « toutes les contributions monétaires » payés aux « représentants ainsi libérés ».

[28] Ce Protocole ne prévoit par ailleurs aucun mécanisme de règlement des différends, aucune date d'échéance, ni aucune obligation pour les parties d'en renégocier les termes, au besoin ou à dates fixes. Le TAT a incidemment conclu de la preuve que malgré les nombreuses demandes de l'Association à cette fin, l'Employeur et Loto-Québec ont toujours refusé d'actualiser ou d'apporter des modifications au Protocole. Cette conclusion trouve appui dans la preuve et n'est d'ailleurs pas remise en question par la juge[28].

1.2. La plainte au Comité sur la liberté syndicale de l'Organisation internationale du Travail et ses suites

[29] Vu les échecs rencontrés dans ses démarches auprès de l'Employeur en vue d'une mise en œuvre concertée de certains principes contenus dans le Protocole, l'Association se joint le 18 mars 2003 à d'autres associations de cadres[29] pour le dépôt d'une plainte auprès du Comité sur la liberté syndicale (le « Comité ») de l'Organisation internationale du Travail (« OIT »)[30]. Elles y allèguent :

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28 Jugement entrepris, paragr. 217 et 219 *in fine*.

29 Soit la Confédération nationale des cadres du Québec, l'Association des cadres supérieurs de la santé et des services sociaux et l'Association des directeurs et directrices de succursales de la Société des alcools du Québec.

30 Le Comité de la liberté syndicale est l'une des instances mises sur pied par le Bureau international du Travail de l'OIT pour recevoir les plaintes relatives à la liberté syndicale : Michel Coutu *et al*., *Droit des rapports collectifs au Québec*, 3e éd., vol. 1 « Le régime général », Montréal, Yvon Blais, 2019, p. 133, no 61.

> […] qu'elles ne jouissent pas d'une protection législative adéquate du droit d'association contre les ingérences des employeurs, qu'elles ne peuvent négocier collectivement les conditions de travail des cadres québécois, qu'elles ne disposent pas d'un mécanisme de règlement des différends du travail en l'absence du droit de recourir à la grève, et que l'exclusion des cadres du régime général du droit du travail collectif du Québec est fondamentalement discriminatoire.[31]

[30] Le 23 avril 2004, le gouvernement du Québec transmet ses observations à l'OIT.

[31] Le 25 novembre 2004, le Comité conclut ce qui suit concernant notamment la situation des SDO, puis présente ses recommandations au conseil d'administration du Bureau international du Travail (« BIT ») :

> […]
>
> 463. Au vu de tous ces éléments, le comité demande au gouvernement d'amender les dispositions pertinentes du Code du travail du Québec afin que les cadres jouissent du droit de bénéficier du régime général de droit du travail collectif et de constituer des associations jouissant des mêmes droits, prérogatives et voies de recours que les autres « associations de salariés ».
>
> 464. Les conclusions du comité concernant les autres aspects de la plainte découlent, mutatis mutandis, de la conclusion ci-dessus.
>
> 465. S'agissant de la reconnaissance des associations et de leurs droits de négociation collective, le comité note que, dans le cadre du régime actuel, les associations plaignantes jouissent d'une réelle forme de reconnaissance de leurs employeurs respectifs et participent à l'élaboration des conditions de travail de leurs membres. Ces dispositions d'ordre contractuel constituent un embryon de reconnaissance juridique, non consacrée toutefois dans un texte législatif. Les exemples donnés par les associations plaignantes démontrent que la reconnaissance est précaire, variable selon les employeurs et les établissements de travail, et que les conditions de travail ne sont pas codifiées dans de véritables conventions collectives assorties de droits et de garanties qui vont de pair. Cette précarité et l'incertitude qui en découle sur le plan des relations professionnelles sont dues à l'absence d'une véritable reconnaissance juridique des cadres comme « salariés » et de leurs associations, au sens du Code du travail, avec tous les droits afférents.
>
> 466. S'agissant du règlement des différends collectifs, en raison de leur exclusion du Code du travail, les cadres ne bénéficient pas de mécanismes et recours généraux établis par le Code (conciliation; arbitrage; grève). Le comité rappelle à cet égard que le droit de grève est un des moyens essentiels dont disposent les travailleurs et leurs organisations pour promouvoir leurs intérêts économiques et

[31] Bureau international du Travail, « Rapport nº 335 où le comité demande à être informé de l'évolution de la situation », cas nº 2257 (Comité de la liberté syndicale), *291e réunion du Conseil d'administration du BIT*, Genève, novembre 2004.

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sociaux. […] Ce droit peut être restreint, voire interdit : dans la fonction publique uniquement pour les fonctionnaires qui exercent des fonctions d'autorité au nom de l'état; dans les services essentiels au sens strict du terme, c'est-à-dire ceux dont l'interruption mettrait en danger, dans l'ensemble ou dans une partie de la population, la vie, la sécurité ou la santé de la personne. […] Il ressort des éléments de preuve soumis que les membres des associations plaignantes ne sont pas des fonctionnaires et que les fonctions des membres d'au moins deux des associations plaignantes ne sauraient entrer dans la définition restrictive des services essentiels : les chefs de table des casinos, membres de l'ACSCQ, et les directeurs de succursale de SAQ, membres de l'ADDS/SAQ. […] En conséquence, le comité demande au gouvernement de prendre les mesures voulues pour faire en sorte que les cadres concernés jouissent, comme les autres travailleurs, de mécanismes de négociation collective et de règlements des différends conformes aux principes de la liberté syndicale.

467. En ce qui concerne les mesures de protection contre les actes d'ingérence et de contrôle par l'employeur, il ressort des allégations que cette protection laisse à désirer : tentative de restreindre les facilités accordées pour s'occuper des activités des associations; demandes de libération refusées; consultation directe de cadres outrepassant leurs associations; employeurs locaux découragent des cadres d'adhérer aux associations; refus de prélever des cotisations; traitement différencié dans le choix des associations admises à participer paritairement à l'administration des régimes d'assurance. De l'avis du comité, toutes ces actions ne peuvent avoir pour effet, en dernière analyse, que d'amener les membres actuels et potentiels des associations à s'interroger sur l'utilité d'y adhérer, puisque la négociation collective et ses incidents ne sont pas encadrés par le Code et qu'il n'existe pas de véritable protection juridique contre des actes qui seraient punissables aux termes du Code s'ils étaient posés contre des salariés couverts par le régime général de relations professionnelles. Les dispositions du Code criminel mentionnées par le gouvernement à cet égard ne sont pas appliquées par une juridiction spécialisée (tel un commissaire du travail ou un tribunal du travail) et n'offrent pas le même degré de protection étant donné le fardeau et le degré de preuve nécessaires. En conséquence, le comité demande au gouvernement d'amender la législation et de prendre les mesures voulues pour faire en sorte que les cadres concernés jouissent, comme les autres travailleurs visés par le Code du travail, de recours et de mécanismes de protection contre les actes d'ingérence et de domination des employeurs, conformément aux principes de la liberté syndicale.

[…]

470. Au vu des conclusions qui précèdent, le comité invite le Conseil d'administration à approuver les recommandations suivantes :

> a) Le comité demande au gouvernement d'amender le Code du travail du Québec afin que les cadres aient le droit de bénéficier du régime général de droit du travail collectif et de constituer des organisations jouissant des mêmes droits, prérogatives et voies de recours que les autres

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> organisations de travailleurs, notamment en ce qui concerne les mécanismes de négociation collective et de règlement des différends et la protection contre les actes de domination et d'ingérence des employeurs, le tout conformément aux principes de la liberté syndicale.
>
> b) Le comité demande au gouvernement de le tenir informé de l'évolution de la situation sur tous les aspects mentionnés ci-dessus et notamment des mesures prises pour mettre la législation en conformité avec les principes de la liberté syndicale.
>
> c) Le comité attire l'attention de la Commission d'experts pour l'application des conventions et recommandations sur les aspects législatifs du présent cas.[32]
>
> [Soulignements ajoutés]

[32] À la suite du dépôt de la plainte, puis des recommandations du Comité, diverses communications ont lieu entre ce dernier, le BIT, le gouvernement québécois, certaines instances politiques provinciales et les associations plaignantes dans le but de faire progresser les demandes de ces dernières.

[33] En mars 2005, le gouvernement met en place un comité interministériel afin d'étudier les recommandations du Comité, ce qui mènera notamment à l'adoption, le 5 septembre 2007, d'un projet de *Guide de bonne gouvernance*[33] visant la situation des cadres des secteurs publics et parapublics, mais qui n'est pas imposé aux sociétés d'État ou à leurs filiales, vu le degré d'autonomie qui leur est reconnu. Ainsi, dans sa lettre du 12 décembre 2007, transmise en copie conforme à l'Association notamment, le secrétaire associé du Sous-secrétariat aux ressources humaines et aux relations de travail du Conseil du trésor écrit :

> […], le gouvernement du Québec n'a pas l'intention d'imposer aux employeurs externes des secteurs publics et parapublics […] une quelconque forme de reconnaissance d'une association de cadres pour fins de relations de travail.
>
> Comme vous le savez certainement, le gouvernement du Québec a récemment clarifié les éléments de gouvernance des sociétés d'État concernant les pouvoirs de leurs conseils d'administration en matière de gestion des ressources humaines (Loi sur la gouvernance, 2006, chapitre 59). Ce faisant, il contreviendrait à cette décision s'il s'immisçait dans la gestion des ressources humaines de ces organismes en leur imposant la reconnaissance d'associations de cadres. Quand [sic] aux autres employeurs du Québec (municipalité, filiale d'une société d'État), leur indépendance en matière de gestion des ressources humaines permet

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32 *Ibid*.

33 Ce projet de Guide n'a pas été reproduit dans le dossier d'appel.

> difficilement au gouvernement une action coercitive à leur égard en leur imposant la reconnaissance de telles associations de cadres.
>
> […]
>
> [Soulignement ajouté]

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[34] Le 2 mai 2008, lors d'une rencontre avec le directeur général du Casino, ce dernier informe les représentants de l'Association que l'Employeur ne voit pas la nécessité ou l'intérêt de permettre d'intégrer d'autres cadres de premier niveau et, par analogie avec la situation alors en cours avec les croupiers syndiqués, qu'il sera toujours refusé à l'Association de « faire front commun » pour les négociations[34].

[35] Au mois de novembre suivant, après des discussions qui apparaissaient d'abord prometteuses, le directeur des ressources humaines confirme à l'Association le refus de l'Employeur que d'autres SDO que ceux affectés aux tables de jeux puissent y adhérer et ajoute qu'il n'a pas mandat de renégocier le Protocole et que, s'il l'avait, ce serait pour « enlever des choses plutôt que d'en donner »[35].

[36] Par la suite, l'Association constate qu'aucun progrès n'est réalisé dans sa situation malgré des discussions avec des interlocuteurs de l'Employeur, de Loto-Québec et du gouvernement, lesquels se renvoient parfois la balle, en plus de changer fréquemment[36].

1.3. Les procédures

[37] Le 10 novembre 2009, l'Association dépose une requête en accréditation auprès de la Commission des relations du travail[37] (« CRT ») en vertu des articles 25 et suivants du *C.t.* Elle demande notamment de lui déclarer « inopposable constitutionnellement », ainsi qu'à ses membres, l'exclusion des cadres de la définition de « salarié » contenue à l'article 1*l*) 1° *C.t.*, et ce, en raison de l'atteinte qu'elle porte à la liberté d'association garantie par les *Chartes*. Le groupe d'employés visé par cette requête est décrit comme suit :

> Les cadres de premier niveau (Classe 4 et 4a) du secteur des jeux notamment ceux offerts aux tables de jeux, aux machines à sous/Keno, aux salons de poker et à tout autre système de loterie de même nature, aux fins de l'exploitation d'un casino d'état à l'établissement de l'employeur situé au 1, avenue du Casino, Montréal (Québec).

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34 Selon le procès-verbal de cette réunion (pièce R-I-12), préparé par l'Association, mais n'ayant pas fait l'objet de corrections par l'Employeur; décision du TAT, paragr. 169-170.

35 Décision du TAT, paragr. 172.

36 Décision du TAT, paragr. 395-396 et jugement entrepris, paragr. 219 et 221, notamment.

37 Telle qu'alors désignée, devenue le TAT en 2016 : *Loi instituant le Tribunal administratif du Travail*, RLRQ, c. T-15.1, art. 261.

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[38] Le 24 novembre 2009, l'Employeur soulève l'irrecevabilité de cette requête. Il invoque l'absence de compétence de la CRT pour se prononcer sur l'accréditation de non-salariés et, en conséquence, sur la question constitutionnelle soulevée.

[39] Le 26 novembre 2009, l'Association transmet un premier avis au PGQ en vertu de l'article 95 de l'ancien *Code de procédure civile*.

[40] Le 14 avril 2010, la CRT rejette la requête en irrecevabilité de l'Employeur[38].

[41] Le 23 janvier 2012, la Cour supérieure accueille le pourvoi en contrôle judiciaire de l'Employeur à l'encontre de cette décision[39], jugement qui sera infirmé par l'arrêt de notre Cour confirmant la compétence de la CRT[40].

[42] Le 23 avril 2012, l'Association demande au ministre de déférer à l'arbitrage, en vertu de l'article 59 *C.t.*, une mésentente portant sur la modification des horaires de travail et une réduction significative des heures de travail de ses membres. L'Employeur conteste la compétence de l'arbitre au moyen d'une nouvelle requête en irrecevabilité, que l'arbitre rejette, décision qui sera cette fois confirmée par la Cour supérieure[41], ainsi que par notre Cour[42].

[43] Dans son deuxième rapport de suivi d'octobre 2013, le Comité de l'OIT prend note des informations reçues jusqu'à ce jour, « regrette profondément » que, selon l'Association, aucun progrès n'a été réalisé « alors que plus de neuf années se sont écoulées » depuis ses recommandations et « prie le gouvernement de le tenir informé de l'évolution des procédures judiciaires concernant le processus de certification de l'ACSQ et de la contestation de la constitutionnalité » de l'exclusion des cadres de la définition de salarié contenue dans le *Code du travail*[43].

[44] En août 2014, l'Association dépose une nouvelle plainte en vertu de l'article 59 *C.t*. Elle allègue l'abolition unilatérale par l'Employeur d'un horaire de travail reconnu jusque-là à ses membres et en demande le rétablissement.

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38 *Association des cadres de la Société des casinos du Québec et Société des casinos du Québec inc.*, 2010 QCCRT 187, requête en révision judiciaire accueillie par *Société des casinos du Québec c. Cloutier*, 2012 QCCS 112, infirmée par *Association des cadres de la Société des casinos du Québec c. Société des casinos du Québec*, 2014 QCCA 603.

39 *Société des casinos du Québec c. Cloutier*, 2012 QCCS 112, infirmée par *Association des cadres de la Société des casinos du Québec c. Société des casinos du Québec*, 2014 QCCA 603.

40 *Association des cadres de la Société des casinos du Québec c. Société des casinos du Québec*, 2014 QCCA 603.

41 *Société des casinos du Québec c. Malette*, 2015 QCCS 4645, confirmée par *Société des casinos du Québec c. Association des cadres de la Société des casinos du Québec*, 2017 QCCA 877.

42 *Société des casinos du Québec c. Association des cadres de la Société des casinos du Québec*, 2017 QCCA 877.

43 Bureau international du Travail, « Rapport nº 370 Suites données aux recommandations du comité et du Conseil d'administration », cas nº 2257 (Comité de la liberté syndicale), Genève, octobre 2013.

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[45] Le 16 octobre 2014, l'Association notifie au PGQ un avis modifié annonçant son intention de faire déclarer constitutionnellement inopposable aux cadres visés par sa requête en accréditation l'exclusion prévue à l'article 1*l*) 1° *C.t.*, au motif que cette disposition les empêche de la voir reconnue comme leur « agent négociateur exclusif » et qu'elle les prive en conséquence de leur droit à la négociation collective de leurs conditions de travail.

[46] Les parties conviennent alors de procéder sur la question constitutionnelle de façon préliminaire. La nécessité d'aborder le fond de la requête en accréditation de l'Association sera en effet tributaire de la réponse finale qui y sera donnée.

[47] Le 19 octobre 2015, l'Association dépose une autre plainte en vertu de l'article 59 *C.t.*, invoquant cette fois une modification unilatérale par l'Employeur des facilités de stationnement dont bénéficiaient jusque-là ses membres à proximité du Casino.

[48] Le 7 décembre 2016, le TAT rend la décision en litige. Il conclut que l'exclusion des cadres de la définition de « salarié » contenue à l'article 1*l*) 1° *C.t.* porte atteinte à la liberté d'association garantie aux SDO par les *Chartes* et déclare que cette exclusion est inopérante à leur égard et aux fins de l'examen de la requête en accréditation de l'Association.

[49] Le 6 janvier 2017, l'Employeur saisit la Cour supérieure d'un pourvoi en contrôle judiciaire à l'encontre de cette décision.

[50] Le jugement entrepris, cassant la décision du TAT et déclarant l'exclusion en litige « applicable, valide et opérante constitutionnellement », est rendu le 5 novembre 2018.

[51] Faute de contestation de la part de l'Employeur ou du PGQ, la demande de permission d'appeler de l'Association est accordée le 23 janvier 2019[44].

2. La décision du TAT

[52] La décision du TAT témoigne d'une analyse minutieuse des principes applicables et de la preuve.

[53] Le TAT revoit aussi de façon détaillée le statut sociojuridique des associations de cadres, d'abord au niveau international[45], puis ailleurs au Canada[46] et finalement au Québec[47]. À ce sujet, après avoir considéré les arguments des parties quant à sa force

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[44] *Association des cadres de la société des casinos du Québec inc. c. Société des casinos du Québec inc.*, 2019 QCCA 90, paragr. 2 (Mainville, j.c.a.).

[45] Décision du TAT, paragr. 14-24.

[46] *Id*., paragr. 25-29.

[47] *Id*., paragr. 30-61.

probante, le TAT conclut que le rapport de l'expert Coutu sur la syndicalisation des cadres au Québec est utile et probant dans son ensemble[48].

[54] Le TAT décrit ensuite la situation de l'Employeur[49] et de l'Association[50] sur le plan organisationnel, puis relate l'historique de leurs interactions en différentes étapes, soit celles relatives à la conclusion du Protocole[51], aux tentatives de l'appliquer de façon concertée[52], aux différentes démarches de l'Association auprès de l'Employeur, et parfois de Loto-Québec, afin de tenter de solutionner des mésententes liées (i) à la négation de son caractère représentatif, (ii) au refus de l'Employeur de consigner les accords entre les parties dans un document d'entente exécutoire, (iii) à certaines conditions de travail[53], incluant des décisions ou des modifications unilatérales de certaines conditions de travail[54], et aux différends ayant opposé les parties postérieurement au dépôt de la requête en accréditation[55].

[55] Le TAT retient notamment de la preuve que :

- malgré des demandes de l'Association en ce sens, l'Employeur et Loto-Québec ont toujours refusé de modifier ou compléter l'un ou l'autre des articles du Protocole, celui-ci étant ainsi demeuré inchangé depuis sa conclusion en 2001[56];

- malgré des demandes répétées de l'Association, basées notamment sur le pourcentage global majoritaire d'adhésion des SDO, son caractère représentatif et la détermination du groupe pour lequel elle peut, ou non, être reconnue relèvent de la discrétion de l'Employeur[57];

- l'Employeur a mis sur pied un comité sur les horaires de travail; il a décidé de sa composition et a invité à y siéger des SDO affectés au secteur des tables de jeux, mais non membres de l'Association, confirmant ainsi son refus de considérer cette dernière comme la porte-parole de l'ensemble des SDO des tables de jeux, malgré que 70 % de ceux-ci en soient membres[58];

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48 *Id.*, paragr. 62-66 et 70.
49 *Id.*, paragr. 105-113.
50 *Id.*, paragr. 114-118.
51 *Id.*, paragr. 119-125.
52 *Id.*, paragr. 126-154.
53 Ex : congés sans soldes et à traitement différé, primes, prélèvement à la source des cotisations des nouveaux membres de l'Association, délai de préavis requis pour la prise de vacances, participation de l'Association aux comités du régime de retraite et des assurances collectives; sur le tout, voir décision du TAT, paragr. 155 à 177.
54 Décision du TAT, paragr. 166, notamment.
55 *Id.*, paragr. 178-186.
56 *Id.*, paragr. 181-182 et 400, particulièrement.
57 *Id.*, paragr. 311 et 385-392.
58 *Id.*, paragr. 137 et 391.

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- l'Employeur a refusé de prélever à la source les cotisations des SDO qui sont membres en règle de l'Association, mais affectés aux secteurs des machines à sous ou des salons de poker, plutôt qu'à celui des tables de jeux;

- si certaines demandes de l'Association ont été satisfaites au terme de rencontres tenues avec des représentants de l'Employeur, d'autres ont été refusées, ce dernier ayant le dernier mot et bénéficiant d'un levier déterminant lors des échanges, soit l'absence « de tout mécanisme en cas de litige »[59];

- l'Employeur refuse « soigneusement » de qualifier de « négociations » les échanges entre lui et l'Association[60] concernant les conditions de travail des SDO membres de l'Association, ou de consigner les accords pouvant en résulter dans une entente formelle ou un autre type de document écrit conjoint et exécutoire;

- ces conditions de travail sont plutôt incluses dans des documents préparés par l'Employeur, par exemple, en 2004, dans un *Guide des conditions de travail* du personnel cadre diffusé sans consultation préalable de l'Association[61];

- l'Association n'est pas invitée par l'Employeur à négocier les échelles salariales prévues annuellement dans le *Manuel des employés,* non plus que les augmentations de salaires et les bonis, dont les règles d'octroi ont été déterminées unilatéralement en 2010;

- en 2008, contrairement aux représentants d'autres groupes d'employés, l'Association n'a pas été invitée à participer à une réunion du comité du régime de retraite du personnel cadre, le passage en 2009 d'un régime à cotisations déterminées à un régime à prestations déterminées n'ayant pas été précédé de discussions avec elle[62];

- le régime d'assurances collectives fut aussi modifié à la même époque, sans consultation préalable[63];

- en 2012, un comité consultatif sur les horaires de travail 2013-2014 fut mis sur pied et sa proposition fut acceptée par l'Employeur, mais ce processus ne fut toutefois pas reconduit les années suivantes, les horaires mis en place en 2013-2014 ayant de plus été retirés pour les années ultérieures, sans consultation préalable;

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59 *Id*., paragr. 133.
60 *Id.*, paragr. 318.
61 *Id.*, paragr. 139.
62 *Id*., paragr. 144 et 392.
63 *Ibid.*

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- contrairement à ce que prévoyait le *Manuel des employés*, en 2015 l'Employeur a unilatéralement déplacé à plusieurs kilomètres de distance les espaces de stationnement gratuits mis à la disposition des SDO et jusque-là situés à proximité du Casino;

- le régime de relations de travail en place n'assure aucune protection contre l'ingérence ou l'entrave de l'Employeur à l'égard du caractère représentatif de l'Association[64];

- l'Association est incapable de négocier collectivement les conditions de travail de ses membres vu le déséquilibre du rapport de force existant entre les parties[65].

[56] Le TAT résume ensuite les prétentions des parties[66] et expose le droit applicable en matière de liberté d'association, tel qu'il découle particulièrement des arrêts *APMO*[67]*, Meredith c. Canada (Procureur général)* (« *Meredith* »)[68] et *Saskatchewan Federation of Labour c. Saskatchewan* (« *Saskatchewan* »)[69], rendus en 2015 par la Cour suprême[70].

[57] Ses conclusions factuelles concernant le statut des SDO visés par la requête en accréditation de l'Association sont résumées de la façon suivante :

> [315] En l'espèce, les personnes en cause sont des cadres de premier niveau, dans une organisation qui comprend cinq paliers ou plus de gestion. Ils sont souvent issus eux-mêmes du groupe qu'ils supervisent. Tout en étant « les yeux et les oreilles de l'employeur sur le plancher », ils ne bénéficient pas de la relation privilégiée que peuvent entretenir les cadres de niveaux supérieurs avec l'entreprise. Ils ne participent pas aux orientations de l'entreprise. Ils ne jouent pas non plus de rôle stratégique dans les relations du travail : ils ne négocient pas les conventions collectives; ils en assurent l'application dans le quotidien des activités. En résumé, les cadres de premier niveau sont véritablement entre « l'arbre et l'écorce ».

[58] Sur cette toile de fond, le TAT formule ainsi la question centrale dont il est saisi :

> [295] L'exclusion du statut de cadre de la définition de « *salarié* » du Code porte-t-elle atteinte à la liberté d'association garantie par l'alinéa 2*d*) de la Charte canadienne et par l'article 3 de la Charte québécoise des personnes visées par la requête en accréditation?

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64 *Id*., paragr. 311.
65 *Id.*, paragr. 319-320 et 325-327, notamment.
66 *Id.*, paragr. 187-208.
67 *Association de la police montée de l'Ontario c. Canada (Procureur général)*, 2015 CSC 1 [« *APMO* »].
68 *Meredith c. Canada (Procureur général)*, 2015 CSC 2.
69 *Saskatchewan Federation of Labour c. Saskatchewan*, 2015 CSC 4.
70 Décision du TAT, paragr. 209-242.

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[59] Procédant ensuite à appliquer « la méthode d'analyse établi[e] par la Cour suprême dans l'arrêt *Big M Drug Mart* et suivie dans l'arrêt *APMO* »[71], le TAT conclut essentiellement :

a) que l'**objet** de l'exclusion des cadres de la définition de « salarié » contenue dans le *C.t.* est d'empêcher ces derniers de négocier collectivement[72];

b) que, néanmoins, puisqu'« on ne se trouve pas dans un cas où il y a négation complète de la liberté d'association », il est nécessaire d'évaluer les effets de l'atteinte pour déterminer « si ceux-ci constituent une entrave substantielle »[73];

c) que les **effets** de l'exclusion en litige sur la représentativité et l'indépendance de l'Association ainsi que sur sa capacité et celle de ses membres de négocier collectivement les conditions de travail, incluant la possibilité de recourir à la grève, entravent substantiellement l'établissement d'un véritable processus de négociation collective[74].

[60] Le TAT précise par ailleurs qu'il aurait aussi conclu à la violation de la liberté d'association garantie aux SDO s'il avait plutôt appliqué le cadre analytique de l'arrêt rendu par la Cour suprême en 2007 dans *Baier c. Alberta*[75], puisque, vu l'exclusion législative en litige, l'État est responsable de l'entrave substantielle au droit des SDO et de l'Association à un véritable processus de négociation collective « en regard des conventions internationales applicables au Canada », étant donné son refus de respecter ses engagements et de donner suite aux recommandations du Comité sur la liberté syndicale de l'OIT[76].

[61] Puis, ayant ainsi conclu que l'exclusion en litige porte atteinte à la liberté d'association garantie aux membres de l'Association par les *Chartes*, le TAT conclut que le PGQ n'a pas démontré que cette atteinte est justifiée suivant l'article premier de la *Charte canadienne* et le test de l'arrêt *Oakes*[77], lequel est aussi applicable à la justification prévue à l'article 9.1 de la *Charte québécoise*[78].

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71 *Id*., paragr. 298 [renvoi omis].
72 *Id*., paragr. 301, 304, 306 et 440.
73 *Id.*, paragr. 306.
74 *Id*., paragr. 307-348 et 440.
75 *Baier c. Alberta*, 2007 CSC 31.
76 Décision du TAT, paragr. 350-364.
77 *R. c. Oakes*, [1986] 1 R.C.S. 103.
78 Décision du TAT, paragr. 443, notamment.

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[62] Enfin, sur la question de la réparation appropriée, le TAT rappelle qu'il ne tranche pas la requête en accréditation, mais qu'il décide uniquement de la question constitutionnelle incidente[79]. Il conclut des enseignements de la Cour suprême[80] qu'il ne peut prononcer une déclaration d'inconstitutionnalité générale et en suspendre les effets, mais seulement déclarer le caractère inopérant de l'exclusion en litige aux fins spécifiques de l'examen de la requête en accréditation dont il est saisi[81].

[63] Le TAT rejette par ailleurs la demande du PGQ de suspendre les effets de sa décision, et ce, pour les motifs suivants :

> [437] Les associations demanderesses[82] ont obtenu, en 2004, une décision du Comité de la liberté syndicale qui recommande au gouvernement de modifier le Code afin d'en soustraire l'exclusion visant la notion de cadre. Malgré des appels répétés des instances internationales et des associations de cadres, le gouvernement n'a pas agi. Les arrêts de la Cour suprême en matière de liberté d'association en relations du travail ont souligné la place du droit international et la force persuasive des décisions du comité depuis plusieurs années. Il n'apparait donc pas opportun de priver plutôt les associations demanderesses de leur droit fondamental à la liberté d'association.
>
> [438] De plus, si les requêtes en accréditation sont accueillies, les associations demanderesses pourront effectivement bénéficier du régime du Code. Ce faisant, le Tribunal ne leur accorde pas un régime particulier, pour les raisons déjà expliquées. S'il suspendait les effets de sa décision, c'est alors qu'il présumerait que les associations demanderesses ont droit à un tel régime particulier. Il ne lui appartient pas de décider si d'autres mesures auraient pu être choisies pour les cadres ni de présumer que le législateur le fera, d'autant qu'il n'a pas choisi cette voie après la décision du Comité de la liberté syndicale.
>
> [Renvoi ajouté]

3. Le jugement entrepris

[64] Le jugement de la Cour supérieure est lui aussi fort étoffé.

[65] La juge, qui ne bénéficiait pas des enseignements de l'arrêt *Vavilov*[83], conclut à la lumière de l'arrêt *Dunsmuir*[84] et de la jurisprudence de notre Cour[85] que la norme de contrôle de la décision correcte s'applique à la question constitutionnelle tranchée par le

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79 *Id*., paragr. 430.
80 *Cuddy Chicks Ltd. C. Ontario (Commission des relations de travail)*, [1991] 2 R.C.S. 5, p. 17.
81 Décision du TAT, paragr. 431-438.
82 À l'origine, le TAT était aussi saisi d'une requête en accréditation visant certains employés cadres de la société d'état Hydro-Québec; les parties dans ce dossier ont toutefois convenu d'un règlement.
83 *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Vavilov*, 2019 CSC 65.
84 *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9.
85 Jugement entrepris, paragr. 38-43.

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TAT. Elle précise toutefois qu'elle doit faire preuve de déférence à l'égard des conclusions factuelles qui sous-tendent son analyse[86].

[66] La juge observe ensuite que le cadre analytique applicable au litige varie selon que l'on considère la démarche de l'Association comme une demande de déclarer inconstitutionnelle l'ingérence de l'État, auquel cas « seule la question de l'entrave substantielle doit être décidée »[87], ou comme une demande d'intervention positive de l'État[88], auquel cas le cadre d'analyse de l'arrêt *Baier* s'impose[89].

[67] Rejetant les arguments de l'Association au contraire, la juge retient que cette dernière recherche une intervention **positive** de l'État, soit son assujettissement et celui de ses membres au *Code du travail*, par l'élimination législative de l'exclusion des cadres de la définition de salarié à l'article 1*l*) 1°[90]. Le cadre d'analyse doit en conséquence être celui développé par la Cour suprême[91] dans les arrêts *Dunmore*[92]/*Baier* [93]*.*

[68] La juge conclut donc que le TAT a erré en droit en choisissant plutôt le cadre analytique de l'arrêt *APMO*[94]*,* applicable selon elle dans le cas de revendication d'un droit **négatif**. Elle estime toutefois que cette erreur n'est pas déterminante, puisque le TAT a aussi, de façon subsidiaire, examiné les faits selon les critères énoncés dans les arrêts *Dunmore*/*Baier*[95].

[69] Procédant à appliquer ce cadre d'analyse, elle conclut :

a) **que le TAT a rendu une décision correcte** en concluant que l'appelante recherchait l'exercice du droit de ses membres à un véritable processus de négociation collective, une composante essentielle de la liberté d'association qui existe indépendamment du *Code du travail*[96]*,* et non « l'accès à un régime légal précis »[97];

b) **que le TAT a toutefois erré** en concluant que l'objet de l'exclusion des cadres de la définition de « salarié » contenue dans l'article 1*l*) 1° *C.t.* était de les priver de leur droit à une véritable négociation collective de leurs

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86 *Id.*, paragr. 44.
87 Jugement entrepris, paragr. 63.
88 *Id*., paragr. 62.
89 *Id.*, paragr. 64; *Baier* c. *Alberta*, *supra*, note 75, et *Dunmore c. Ontario (Procureur général)*, 2001 CSC 94.
90 Jugement entrepris, paragr. 72.
91 Jugement entrepris, paragr. 70-71 et 82.
92 *Dunmore c. Ontario (Procureur général)*, *supra*, note 89.
93 *Baier c. Alberta, supra*, note 75.
94 *APMO*, *supra*, note 67.
95 Jugement entrepris, paragr. 83; Décision du TAT, paragr. 380.
96 Jugement entrepris, paragr. 94.
97 *Id.*, paragr. 100.

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conditions de travail[98], ces derniers pouvant en effet négocier collectivement à l'extérieur des balises du *C.t.*;

c) **que le TAT a aussi erré** en concluant que l'exclusion en litige a pour effet d'empêcher les membres de l'Association de jouir d'une reconnaissance véritable de cette dernière[99], sa reconnaissance par l'Employeur sur une base volontaire ne résultant pas en une entrave substantielle à la liberté d'association[100];

d) **que le TAT a aussi erré** en retenant que l'absence d'accès à un tribunal spécialisé en matière de relations de travail dans l'éventualité d'une mésentente sur le Protocole, ou encore pour faire sanctionner la négociation de mauvaise foi ou l'ingérence de l'Employeur, constitue une entrave substantielle à la liberté d'association donnant ouverture à des recours devant les tribunaux de droit commun, notamment pour obtenir réparation en vertu des articles 3 et 49 de la *Charte québécoise*[101];

e) **que le TAT a encore erré** en concluant que les membres de l'Association ne bénéficient pas du droit de grève puisque leur exclusion du régime du *C.t.* ne les empêche pas de se livrer à un arrêt de travail concerté dans le cadre de la négociation de leurs conditions de travail : « il n'existe pas de loi leur interdisant de faire la grève »[102];

f) **que le TAT a aussi erré**, ou décidé de façon prématurée, en concluant, d'une part, que les membres de l'Association ne bénéficient d'aucun mécanisme efficace de résolution de conflit, alors qu'ils n'ont jamais exercé de recours devant les tribunaux de droit commun en vertu des *Chartes* pour se plaindre de négociation de mauvaise foi ou d'entrave de la part de l'Employeur et, d'autre part, que les membres ne bénéficient d'aucun mécanisme de protection en cas de grève, alors qu'il n'ont jamais exercé ce droit[103];

g) que, néanmoins, **le TAT n'a pas erré** en concluant, au vu de l'historique de la relation entre les parties, que certains agissements de l'Employeur « ne cadrent pas avec la notion de véritable négociation collective de bonne foi, composante essentielle [de] la liberté d'association »[104], que les

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98 *Id*., paragr. 136, aussi 118-119 et 122-130.
99 *Id*., paragr. 143-145; sur le même thème, voir aussi les paragr. 161, 166, 177, 180 et 186.
100 *Id.*, paragr. 152, 153 et 165-166.
101 *Id*., paragr. 184-185 et 192-193.
102 *Id*., paragr. 228.
103 *Id*., paragr. 231 et 236 plus particulièrement.
104 *Id*., paragr. 222; i.e. modifications unilatérales de conditions de travail par l'Employeur sans aviser l'Association (paragr. 206-207 et 209), et « sans même respecter l'obligation minimale de consultation qu'a accepté la Société dans le protocole » (paragr. 215), refus de l'Employeur de négocier, voire

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modifications unilatérales et sans consultation préalable de certaines conditions de travail importantes « sape[nt] le processus de véritable négociation »[105] et que ces faits et gestes constituent une « entrave substantielle à la liberté d'association des SDO »[106];

h) **que le TAT a toutefois erré** en se demandant « si l'État est responsable du refus de modifier le *Code du travail*, comme le recommande le Comité de liberté syndicale », plutôt que de vérifier s'il « est responsable du fait que les SDO ne peuvent […] exercer leur liberté d'association »[107];

i) **que le TAT a de ce fait erré** ensuite dans l'analyse du dernier critère de l'arrêt *Baier* en concluant que l'État est « responsable de la violation de la liberté d'association des SDO »[108], alors que cette violation découle plutôt exclusivement des faits et gestes de nature privée de l'Employeur[109].

[70] Étant donné que la juge conclut que l'entrave substantielle à la liberté d'association des membres de l'Association ne découle pas de l'exclusion, par l'État, « des cadres de l'application du *Code du* travail »[110], mais uniquement de ce que l'Employeur « n'offre pas à ses SDO »[111], elle s'abstient de procéder à l'analyse du test de justification en vertu de l'article premier de la *Charte canadienne* et de l'arrêt *Oakes*[112], accueille le pourvoi en contrôle judiciaire de l'Employeur, casse la décision du TAT et, à la demande du PGQ, déclare « applicable, valide et opérante constitutionnellement l'exclusion prévue à l'article 1l) 1°du *Code du travail* »[113].

4. Les questions en litige

[71] L'Association et l'Employeur diffèrent d'opinion sur les questions que soulève l'appel, chacun en proposant respectivement trois et six, dont deux subsidiaires dans le cas de l'Employeur. Quant au PGQ, il en identifie essentiellement deux. De plus, ces questions, ou l'argumentation des parties quant aux unes ou aux autres, se recoupent.

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même d'aborder, certains sujets comme les salaires, les mouvements de main-d'œuvre, les bonis et la modification du Protocole (paragr. 216-217), quantité d'interlocuteurs différents et à plusieurs niveaux impliqués dans les discussions (paragr. 221 et 223).

105 *Id*., paragr. 213.
106 *Id*., paragr. 148 et 223.
107 *Id*., paragr. 243.
108 *Id*., paragr. 244.
109 *Id*., paragr. 248, 254 et 261.
110 *Id*., paragr. 248.
111 *Id*., paragr. 254.
112 *Id*., paragr. 264.
113 *Id*., paragr. 273.

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[72] Selon la Cour, l'issue de l'appel dépend essentiellement des réponses aux questions suivantes :

4.1 La Cour supérieure a-t-elle erré en confirmant la décision du TAT selon laquelle l'avis transmis au PGQ par l'Association en vertu de l'article 95 de l'ancien Code de procédure civile[114] était suffisant et recevable relativement à l'argument constitutionnel fondé sur l'entrave substantielle au droit de grève?

4.2 La Cour supérieure, siégeant en contrôle judiciaire, a-t-elle correctement identifié les normes de contrôle applicables?

4.3 La Cour supérieure a-t-elle bien appliqué les normes de contrôle en infirmant l'analyse constitutionnelle du TAT et la conclusion en découlant selon laquelle l'exclusion des cadres de la définition de « salarié » contenue à l'article 1l) 1° C.t. porte atteinte à la liberté d'association garantie aux SDO membres de l'Association?

4.4 Dans la négative, le TAT a-t-il commis une erreur révisable en concluant que cette atteinte n'est pas justifiée suivant l'article premier de la Charte canadienne et l'article 9.1 de la Charte québécoise?

4.5 Si l'atteinte n'est pas justifiée, le TAT a-t-il commis une erreur révisable dans le choix de la réparation appropriée en déclarant l'exclusion en litige inopérante à l'égard de l'Association et des employés visés par la requête en accréditation?

5. Analyse

5.1 La Cour supérieure a-t-elle erré en confirmant la décision du TAT selon laquelle l'avis transmis au PGQ par l'Association en vertu de l'article 95 de l'ancien Code de procédure civile était suffisant et recevable relativement à l'argument constitutionnel fondé sur l'entrave substantielle au droit de grève?

[73] La Cour supérieure conclut ceci aux paragraphes 46 et 56 à 59 du jugement entrepris :

> [46] La PGQ soulève l'insuffisance de l'avis transmis par l'ACSCQ en vertu de l'article 76 C.p.c. tout comme elle soulève cet argument devant le TAT.

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[114] Devenu, lors de l'instruction devant la juge, les articles 76 et 77 du n.*C.p.c.*

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> […]
>
> [56] La PGQ soutient que l'absence de référence spécifique au droit de grève l'empêche de faire la preuve nécessaire devant le TAT. Or, le fardeau de démontrer une entrave substantielle à la liberté d'association incluant le droit de grève repose sur les épaules de l'ACSCQ et dans son argumentation, la PGQ invoque que l'ACSCQ n'a pas administré de preuve quant à une entrave substantielle au droit de grève pour les SDO. La PGQ fait même ressortir que la preuve démontre que les cadres ne recherchent pas à obtenir le droit de faire la grève.
>
> [57] Le Tribunal retient donc que la PGQ n'a pas été empêchée de présenter son argumentation à cet égard et il constate qu'elle n'a pas demandé au TAT la permission de présenter une preuve voyant ce nouvel argument soulevé lors des plaidoiries. La PGQ a préféré s'en remettre à un argument procédural.
>
> [58] Le Tribunal considère qu'à la lumière de ces faits particuliers, accepter l'argument de la PGQ serait faire preuve d'un trop grand rigorisme.
>
> [59] Sans égard à la norme de contrôle applicable, le Tribunal estime que le TAT n'a commis aucune erreur en considérant que l'avis à la PGQ était conforme à l'article 77 C.p.c.
>
> [Renvois omis]

[74] Sans en faire une question en litige dans son mémoire, le PGQ mentionne au paragraphe 79 de son argumentation qu'il soutient toujours que cet argument est irrecevable puisqu'il a été soulevé tardivement lors des plaidoiries devant le TAT et, par conséquent, qu'il ne respectait pas les exigences « des articles 76 et 77 » du *Code de procédure civile.* Lors de l'audience, il ne revient pas sur ce moyen, avec raison.

[75] En effet, au vu de ses interventions devant eux, et selon la jurisprudence de la Cour[115], le TAT[116] et la Cour supérieure étaient justifiés de rejeter ce moyen, sans qu'il soit nécessaire ici d'en dire davantage.

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115 *9022-1672 Québec inc. c. Québec (Direction générale des poursuites pénales*), 2009 QCCA 1696, paragr. 52-55, demande d'autorisation d'appel à la Cour suprême rejetée, 18 février 2010, nº 33420; *Thibault c. Collège des médecins du Québec*, 1998 CanLII 13224, p. 8-9 de l'opinion du juge Baudouin pour la Cour (C.A.).

116 Décision du TAT, paragr. 338 et 339.

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5.2 La Cour supérieure a-t-elle bien identifié les normes de contrôle applicables?

[76] Depuis l'arrêt *Agraira*[117], le rôle de la Cour lors de l'appel d'un jugement rendu en matière de contrôle judiciaire est bien connu. L'arrêt *Vavilov*[118] n'y a rien changé.

[77] La Cour doit vérifier si le juge réviseur a choisi la norme de contrôle appropriée et, le cas échéant, s'il l'a appliquée correctement[119]. À cette fin, « en se "met[tant] à la place" du tribunal d'instance inférieure », la Cour se concentre sur la décision administrative[120], soit, en l'espèce, la décision du TAT.

[78] Cela étant, la juge n'a pas erré en concluant que la norme de la décision correcte s'applique à l'analyse constitutionnelle effectuée par le TAT[121]. Elle n'a pas erré non plus en soulignant qu'elle devait néanmoins faire preuve de déférence à l'égard des conclusions d'ordre factuel qui sous-tendent cette analyse[122]. En effet, les cours de révision doivent s'abstenir « d'apprécier à nouveau la preuve examinée par le décideur » et l'absence de déférence à cet égard n'est possible qu'en cas « de circonstances exceptionnelles »[123], par exemple lorsque le décideur s'est fondamentalement mépris sur la preuve qui lui a été soumise ou n'en a pas tenu compte[124]. Ces principes sont d'autant plus importants qu'en matière constitutionnelle les conclusions de fait du décideur administratif peuvent s'avérer déterminantes au stade de l'appel[125].

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117 *Agraira c. Canada (Sécurité publique et protection civile)*, 2013 CSC 36; réaffirmé dans *Office régional de la santé du Nord c. Horrocks*, 2021 CSC 42, paragr. 10.

118 *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Vavilov*, *supra*, note 83.

119 *Agraira c. Canada (Sécurité publique et protection civile)*, *supra*, note 117, paragr. 47; voir aussi *Bombardier Aéronautique inc. c Commission des normes, de l'équité, de la santé et de la sécurité au travail*, 2020 QCCA 315, paragr. 21; *Syndicat de l'enseignement de Champlain c. Commission scolaire Marie-Victorin*, 2020 QCCA 135, paragr. 36-37.

120 *Merck Frosst Canada Ltée c. Canada (Santé)*, 2012 CSC 3, paragr. 247 (la juge Deschamps, dissidente mais reprise avec approbation sur ce point par la Cour suprême dans *Agraira c. Canada (Sécurité publique et protection civile)*, *supra*, note 117, paragr. 46; voir aussi *Lebrun c. Syndicat des enseignants et enseignantes du Cégep de Limoilou, local 103*, 2020 QCCA 1649, paragr. 9; *Parmalat Canada inc. c. Bulhoes*, 2018 QCCA 830, paragr. 29.

121 *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Vavilov*, *supra*, note 83, paragr. 17; *Consolidated Fastfrate inc. c. Western Canada Council of Teamsters*, 2009 CSC 53, paragr. 26; *Procureur général du Québec c. Association canadienne des télécommunications sans fil*, 2021 QCCA 730, paragr. 62.

122 Jugement entrepris, paragr. 44*; Consolidated Fastfrate Inc. c. Western Canada Council of Teamsters, supra*, note 121, paragr. 26*; Lévis (Ville) c. Fraternité des policiers de Lévis inc*., 2007 CSC 14, paragr. 19; *Autobus Transco (1988) inc. c. Syndicat de Autobus Terremont ltée*. *(CSN)* 2020 QCCA 1787, paragr. 44, 45 et 47.

123 *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Vavilov*, *supra*, note 83, paragr. 125.

124 *Id.*, paragr. 126.

125 Voir à ce sujet *Canada (Procureur général) c. PHS Community Services Society,* 2011 CSC 44, paragr. 27.

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[79] Cette retenue à l'égard des constats de fait qui sous-tendent l'analyse du décideur administratif revêt une importance accrue en l'espèce alors que, comme l'ont souligné la juge en chef McLachlin et le juge LeBel pour la majorité dans l'arrêt *AMPO*[126] : « Comme pour tous les examens fondés sur l'al. 2*d*), l'analyse requise est contextuelle »[127].

[80] Ces normes et principes étant posés, passons maintenant à la question qui est au cœur de l'appel.

*5.3 La Cour supérieure a-t-elle bien appliqué les normes de contrôle en infirmant l'analyse constitutionnelle du TAT et la conclusion en découlant selon laquelle l'exclusion des cadres de la définition de « salarié » contenue à l'article 1***l)** *1° C.t. porte atteinte à la liberté d'association garantie aux SDO membres de l'Association?*

[81] Avant de répondre plus loin à la présente question (**partie 5.3.6** ci-après), une brève revue de l'historique législatif et de certains propos tenus lors des débats parlementaires ayant entouré l'exclusion des cadres de la notion de salarié dans le régime des relations de travail instauré par le *C.t.* est opportune (**partie 5.3.1**). Il ne s'agit pas ici d'interpréter l'exclusion législative elle-même, mais de tenter de mieux cerner le « début de l'histoire »[128]. On rappellera ensuite le texte de certains articles de conventions internationales d'intérêt, puis des dispositions constitutionnelles et quasi constitutionnelles domestiques pertinentes (**partie 5.3.2**). La Cour poursuivra en revoyant les grandes lignes de l'évolution de la jurisprudence de la Cour suprême portant sur la liberté d'association (**partie 5.3.3**), puis la justesse des conclusions de la juge concernant le cadre analytique applicable en l'espèce **(partie 5.3.4**). La Cour conclura son analyse en identifiant certaines erreurs révisables commises par la juge dans l'exercice de son pouvoir de contrôle (**partie 5.3.5**).

5.3.1 L'exclusion en litige : un historique législatif

[82] Les paragraphes *a*), *b*), *d*) et *l*) 1° de l'actuel article 1 du *C.t.* sont ainsi libellés :

1. Dans le présent code, à moins que le contexte ne s'y oppose, les termes suivants signifient:	**1.** In this Code, unless the context requires otherwise, the following expressions mean
a) «association de salariés» : un groupement de salariés constitué en syndicat professionnel, union, fraternité ou autrement et ayant pour	(*a*) "association of employees" : a group of employees constituted as a professional syndicate, union, brotherhood or otherwise, having as

[126] *APMO*, *supra*, note 67.

[127] *Id.*, paragr. 93 [soulignement ajouté].

[128] Stéphane Beaulac et Frédéric Bérard, *Précis d'interprétation législative*, 2e éd., Montréal, LexisNexis, 2014, p. 51, cité récemment par la Cour dans *Fédération des transporteurs par autobus c. Société de transport du Saguenay*, 2021 QCCA 1303, paragr. 51.

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buts l'étude, la sauvegarde et le développement des intérêts économiques, sociaux et éducatifs de ses membres et particulièrement la négociation et l'application de conventions collectives;	its objects the study, safeguarding and development of the economic, social and educational interests of its members and particularly the negotiation and application of collective agreements;
b) «association accréditée» : l'association reconnue par décision du Tribunal comme représentant de l'ensemble ou d'un groupe des salariés d'un employeur;	(*b*) "certified association" : the association recognized by decision of the Tribunal as the representative of all or some of the employees of an employer;
[…]	[…]
d) «convention collective» : une entente écrite relative aux conditions de travail conclue entre une ou plusieurs associations accréditées et un ou plusieurs employeurs ou associations d'employeurs;	(*d*) "collective agreement" : an agreement in writing respecting conditions of employment made between one or more certified associations and one or more employers or employers' associations;
[…]	[…]
l) «salarié» : une personne qui travaille pour un employeur moyennant rémunération, cependant ce mot ne comprend pas:	*l*) "employee" : a person who works for an employer and for remuneration, but the word does not include:
1° une personne qui, au jugement du Tribunal, est employée à titre de gérant, surintendant, contremaître ou représentant de l'employeur dans ses relations avec ses salariés;	(1) a person who, in the opinion of the Tribunal, is employed as manager, superintendent, foreman or representative of the employer in his relations with his employees;

[Soulignements ajoutés]

[83] Comme l'explique l'auteur Blouin, l'exclusion des employés cadres de la notion de « salarié » n'a pas été introduite au Québec par le *Code du travail* entré en vigueur au milieu des années 60[129], mais remonte à la *Loi des relations ouvrières*[130] des années 40 :

> Pour la compréhension du *Code du travail*, il faut au départ se rappeler que l'arrière-plan qui permet de donner la mesure exacte de l'intention du législateur en matière d'aménagement des rapports collectifs du travail, n'est pas

[129] *Code du travail*, *supra*, note 1.
[130] *Loi des relations ouvrières*, *supra*, note 5.

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> fondamentalement le contexte historique qui prévalait à l'époque de l'adoption du Code, mais celui de la *Loi des relations ouvrières.* Le Code ne représente en effet que la synthèse de cette dernière Loi et des autres lois adoptées parallèlement. Il est resté sous la coupe de la *Loi des relations ouvrières* en ce qui regarde l'économie et la philosophie sous-tendant l'ordonnancement juridique des relations collectives du travail. Jusqu'à l'adoption de la *Loi des relations ouvrières*, les rapports de travail étaient demeurés le plus souvent sur le plan strictement individuel. La transposition fondamentale de ces rapports sur le plan collectif a été conçue par la Loi, puis reprise par le Code, dans et pour une économie à caractère libéral et en fonction notamment d'une préoccupation majeure et fondamentale : réprimer les abus engendrés par le système des rapports individuels de travail en rétablissant l'équilibre des parties à la négociation *mais en moulant cet équilibre en fonction de la réalité administrative des entreprises de l'époque*.[131]
>
> [Soulignement ajouté; italiques dans l'original; renvois omis]

[84] Cela dit, dans la *Loi des relations ouvrières* de 1944, l'exclusion des cadres de la notion de salarié découlait de l'article 2*a*) 1° :

2. Dans la présente loi et son application, à moins que le contexte ne s'y oppose, les termes suivants ont le sens qui leur est donné ci-après :	**2.** In this act and in its application, unless the context requires otherwise, the following words and expressions have the meaning hereinafter given to them:
a) "salarié" signifie : tout apprenti, manœuvre ou ouvrier non spécialisé, ouvrier qualifié ou compagnon, artisan, commis ou employé qui travaille individuellement, en équipe ou en société; cependant, ce mot ne comprend pas :	*a*. "employee" means any apprentice, unskilled labourer or workman, skilled workman or journeyman, artisan, clerk or employee, working individually or in a crew or in partnership; but it does not include:
1° les personnes employées à titre de gérant, surintendant, contremaître ou représentant de l'employeur dans ses relations avec ses salariés;	1. persons employed as manager, superintendent, foreman, or representative of an employer in his relations with his employees;
[…]	[…]

[Soulignements ajoutés]

[131] Rodrigue Blouin, « La qualification des cadres hiérarchiques par le Code du travail », *supra*, note 9, p. 482.

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[85] Les débats de l'Assemblée législative lors de l'étude et de l'adoption de cet article sont brefs et peu révélateurs, si ce n'est qu'ils permettent de confirmer l'importation dans la loi des principes sous-jacents de ce qui est connu comme le *Wagner Act*[132] américain de 1935, du nom du sénateur qui l'a présenté :

> M. Duplessis (Trois-Rivières): La loi actuelle s'inspire-t-elle de la loi Wagner en force aux États-Unis?
>
> L'honorable M. Perrier (Terrebonne): Oui, j'admets que le gouvernement s'est inspiré, dans certaines parties, de la loi Wagner des États-Unis en préparant le présent projet de loi.[133]
>
> [Soulignements ajoutés]

[86] La loi Wagner contient effectivement les définitions suivantes :

> Sec. 2. When used in this Act —
>
> (1) […]
>
> (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.
>
> (3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.
>
> […]
>
> RIGHTS OF EMPLOYEES
>
> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own

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132 *National Labor Relations Act*, ch. 372, 49 Stat. 449 (1935).

133 Assemblée nationale, ***Débats de l'Assemblée législative***, 21e lég., 5e sess., 1er février 1944, p. 81 (M. Duplessis et H. Perrier). Voir aussi la doctrine qui mentionne que « [l]e *Wagner Act* américain de 1935 […] représente la source d'inspiration de la loi [des relations ouvrières] » : Michel Coutu *et al.*, *Droit des rapports collectifs au Québec*, *supra*, note 30, no 37, p. 93.

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> choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.[134]
>
> [Soulignements ajoutés]

[87] La loi Wagner fut par ailleurs modifiée en 1947, ajoutant le terme de « supervisor » au paragraphe 3 des définitions contenues à l'article 2 et y ajoutant le paragraphe (11) :

> Sec. 2. When used in this Act —
>
> […]
>
> (3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual employed as supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or any other person who is not an employer as herein defined.
>
> […]
>
> (11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.
>
> […][135]
>
> [Soulignements ajoutés]

[88] Puis, dans le *Code du travail* québécois adopté en 1964, l'exclusion, identique dans sa formulation à celle qui nous occupe en l'espèce, est prévue à l'article 1*m*) 1°:

1. Dans le présent code, à moins que le contexte ne s'y oppose, les termes suivants signifient :	**1.** In this code, unless the context requires otherwise, the following expressions mean:
[…]	[…]

---

134 *National Labor Relations Act*, ch. 372, 49 Stat. 449 (1935).

135 *National Labor Relations Act*, ch. 120, 61 Stat. 137 (1947).

m) « salarié » – une personne qui travaille pour un employeur moyennant rémunération, cependant ce mot ne comprend pas :	(*m*) "employee" – a person who works for an employer and for remuneration, but the word does not include:
1° une personne qui, au jugement de la Commission, est employée à titre de gérant, surintendant, contremaître ou représentant de l'employeur dans ses relations avec ses salariés;	(1) a person who, in the opinion of the Board, is employed as a manager, superintendent, foreman or representative of the employer in his relations with his employees;
[…]	[…]

[Soulignements ajoutés]

[89] Le TAT note ceci quant aux amendements apportés subséquemment au *Code du travail* :

> [35] En 1969, le Code est amendé et la reconnaissance volontaire d'association abolie. Pour contrer l'effet de cette abolition sur les associations déjà reconnues de la Ville de Montréal et d'Hydro-Québec, le gouvernement adopte en 1970 un amendement au Code. L'article 20, tel qu'il existait alors, maintient les accréditations pour les associations reconnues volontairement par leur employeur. Le SPIVM et le SPHIQ, ainsi que l'Association des contremaitres employés par la Ville de Montréal, qui ne regroupe, elle, que des employés cadres, sont considérés comme accrédités.
>
> [36] Lors des débats parlementaires entourant cet amendement, la syndicalisation des cadres est abordée plus largement. Le ministre du Travail de l'époque, Pierre Laporte, se dit ouvert à examiner cette question.
>
> [Renvois omis]

[90] Les extraits des débats parlementaires auxquels réfère le TAT révèlent en effet ce qui suit :

> M. LAPORTE: […] Le code du travail a été amendé, en 1969, pour éliminer toutes les associations de boutique. On a utilisé un processus légal pour dire que les associations reconnues qui pouvaient théoriquement négocier avec l'employeur, sans que l'employeur ne soit obligé de négocier avec elles, étaient éliminées pour reconnaître les associations accréditées par l'organisme désigné pour le faire.
>
> Quand on l'a amendé, on a oublié qu'il y avait deux associations, qui n'étaient pas des associations de boutique, qui avaient une présence très importante, c'étaient celles de l'Hydro-Québec et la ville de Montréal, les ingénieurs. Elles ont été éliminées, ces deux associations, parce qu'il faut qu'on soit un employé au sens du code du travail, pour être reconnu. Les cadres ne sont pas des employés au sens du code du travail.

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On a donc, involontairement, en 1969, éliminé deux associations qui avaient déjà négocié et obtenu des conventions collectives avec la ville de Montréal et avec l'Hydro. Ce que nous voulons, cette année, c'est simplement dire que les associations des employés de la ville de Montréal et de l'Hydro sont reconnues au sens du code du travail, celles qui ont négocié, en 1968, des conventions collectives, afin qu'on ne retourne pas ces deux groupes d'employés à la loi de la jungle, qui était celle qui prévalait avant et qui pourrait peut-être faire l'affaire de certaines gens.

[…]

M. BURNS:

[…]

[…] Je demande au ministre du Travail d'être aussi audacieux que son prédécesseur et dans un avenir très rapproché, de penser à une législation du travail pour le syndicalisme des cadres, le syndicalisme relativement nouveau des professionnels, des gens de la direction. […]

Je pense qu'il faudra repenser cela le plus tôt possible, dès la prochaine session c'est le vœu que j'exprime pour élargir la définition de salarié ou pour nous donner enfin une loi du syndicalisme des cadres. Dans ces circonstances, M. le Président, ce sont les quelques remarques que j'avais à formuler et nous serons d'accord avec le principe de ce bill.

[…]

La crainte qui se présente à nos yeux en lisant ce texte, c'est que, comme il n'y a pas actuellement de dispositions législatives relativement au syndicalisme des cadres et comme l'accréditation que cette Chambre s'apprête à donner à ces deux groupes ne vaudrait que jusqu'au 1er janvier 1972, on peut se demander ce qui arrivera de ces deux syndicats si une loi sur le syndicalisme des cadres adaptée aux problèmes de ces deux syndicats d'ingénieurs n'est pas édictée à la date mentionnée, soit au 1er janvier 1972. […]

[…]

M. LAPORTE: […], nous avons chez nous, à l'étude, certains projets quant au syndicalisme des cadres. Le député de Maisonneuve étant à la fois un homme renseigné sur ces problèmes et raisonnable, admet que ce n'est pas facile.

M. BURNS: Vous voulez me vendre une idée, là?

M. LAPORTE: Je ne vous prépare pas, je ne vous conditionne pas. […] Est-ce que nous aurons réussi, d'ici deux ans, à nous entendre, le conseil des ministres, les syndicalistes, les employeurs, sur une législation, sur le syndicalisme des cadres? Je l'espère. Je n'en suis pas certain parce qu'il y a des écueils considérables qui

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> débordent la province de Québec et qui peuvent intéresser des problèmes canadiens et, que ceci nous plaise ou ne nous plaise pas, des problèmes nord-américains. Si nous avons réussi, d'ici 1972 et c'est un défi que je me fixe à moi dans le bill à trouver un texte de loi qui puisse ordonner le syndicalisme des cadres, aucun problème, tout le monde à ce moment-là sera couvert. […]
>
> Si nous n'avons pas réussi, d'ici 1972, si Dieu me prête vie et si le premier ministre me conserve dans le poste que j'occupe, peut-être serai-je encore ministre du Travail, à ce moment-là, disons que je m'engage personnellement à demander la prolongation de cette loi qui est limitée à 1972. Je crois que la ville de Montréal et l'Hydro-Québec ont autre chose à faire que de retourner à la loi de la jungle avec leur syndicat qui inclut certains fonctionnaires cadres. […][136]
>
> [Soulignements ajoutés]

[91] Puis, en 1971, le ministre du Travail de l'époque faisait suite aux engagements précités pris par son prédécesseur :

> M. COURNOYER: […]
>
> Ce bill, qui est très court, n'annonce rien. Il ne fait que donner ou maintenir une permission de facto reconnue par la loi d'une façon spéciale l'an dernier. Il la maintient, cette fois-ci, pour une période indéterminée jusqu'à ce que d'autres législations générales soient applicables aux cadres ou aux professionnels à l'emploi non seulement de d'Hydro et de la ville de Montréal, mais d'autres compagnies ou d'autres organismes gouvernementaux ou para-gouvernementaux.
>
> Je ne peux dire à quelle époque ce projet de loi peut venir. Je n'ai qu'un projet de loi ici, c'est celui qui prolonge une reconnaissance de facto déjà consentie par les deux organismes en question à des syndicats d'ingénieurs qui pouvaient comporter des cadres dans leur sein. Si vous vous en souvenez, on en a parlé longtemps. Il s'agissait d'un accident, semble-t-il, de la nouvelle rédaction du code du travail qui avait aboli tous les syndicats reconnus et ordonnait une accréditation nouvelle par le commissaire-enquêteur pour tous les syndicats, y compris les syndicats d'ingénieurs de la ville de Montréal et les syndicats d'ingénieurs de l'Hydro-Québec.
>
> Ce bill a donc pour effet, au moins pour le moment, de permettre que les négociations qui avaient eu cours auparavant entre le syndicat des ingénieurs et l'Hydro-Québec ou le syndicat des ingénieurs et la ville de Montréal se fassent sur la même base qu'elles se faisaient avant que le code du travail, par radiation, ne détruise la reconnaissance de facto consentie par les deux organismes en question. C'est donc une prolongation, tout simplement, du bill de l'an passé qui avait été adopté par mon prédécesseur pour permettre justement la même

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[136] Assemblée nationale, *Journal des débats*, 29e lég., 1ère sess., fasc. n° 19, 16 juillet 1970, p. 1201-1204 (P. Laporte et R. Burns).

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> négociation d'une convention collective chez les ingénieurs à l'emploi de l'Hydro et de la ville de Montréal.
>
> […]
>
> M. LE PRESIDENT: L'honorable député de Sainte-Marie.
>
> M. TREMBLAY (Sainte-Marie): […]
>
> On prolonge cette loi, mais cela ne règle pas le cas des ingénieurs de la ville de Québec, par exemple; cela règle tout simplement le cas des ingénieurs de la ville de Montréal et de l'Hydro-Québec. Nous voterons nécessairement pour ce projet de loi, mais avec l'espoir que le ministre nous présentera, dans un avenir assez rapproché, une loi qui amenderait le code du travail afin de permettre à tout le personnel de cadre de toutes les associations de la province de Québec de se syndiquer et de négocier des conventions collectives de travail. Nous voterons donc pour ce projet de loi. Merci.[137]
>
> [Soulignements ajoutés]

[92] Bien que législateur québécois n'ait pas adopté de loi par la suite afin que toutes les associations de cadres soient « couvertes », pour reprendre les termes du ministre Laporte, par le régime de relations de travail du *C.t.*, comme l'observe le TAT aux paragraphes 51 et 52 de sa décision, les associations, ou syndicats, des contremaîtres de la Ville de Montréal, d'une part, et des ingénieurs cadres regroupés au sein du Syndicat professionnel des ingénieurs d'Hydro-Québec, d'autre part, lesquels faisaient l'objet d'une reconnaissance volontaire de l'employeur avant 1969, ont été reconnus par voie législative. D'autres associations de cadres ont été reconnues par décret[138].

[93] Cela dit, la Cour reviendra plus en détail sur les enseignements de la Cour suprême concernant la portée et la finalité de la liberté d'association. Il suffit ici de rappeler que dans *Saskatchewan*, un arrêt qui, comme le soulignait récemment le juge Morissette, a opéré un « net revirement jurisprudentiel »[139], la juge Abella résumait comme suit les attributs essentiels de cette liberté :

> [24] […] De pair avec le droit de s'associer, de s'exprimer par l'entremise de l'agent négociateur de leur choix et de négocier collectivement avec leur employeur par l'entremise de cet agent, le droit de grève des salariés est indispensable à la protection du processus véritable de négociation collective pour l'application de l'al. 2*d*). […][140]

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137 Assemblée nationale, *Journal des débats*, 29e lég., 2e sess., fasc. n° 69, 6 juillet 1971, p. 3064-3065 (J. Cournoyer et J.-N. Tremblay).

138 Décision du TAT, paragr. 53-58.

139 *Procureur général du Québec c. Les avocats et notaires de l'État québécois*, 2021 QCCA 559, paragr. 67 et 69, demande d'autorisation d'appel à la Cour suprême rejetée, 14 octobre 2021, no 39695.

140 *Saskatchewan Federation of Labour c. Saskatchewan*, *supra*, note 69.

[Soulignements ajoutés]

5.3.2 Les conventions internationales et les dispositions constitutionnelles et quasi constitutionnelles domestiques

[94] D'emblée, il est pertinent de rappeler que le Canada est membre de l'OIT. Le préambule de la Constitution de l'Organisation internationale du Travail[141] énonce, parmi les moyens susceptibles d'améliorer la condition des travailleurs et d'assurer la paix, « l'affirmation du principe de la liberté syndicale ».

[95] La *Convention (n°87) sur la liberté syndicale et la protection du droit syndical*[142] a été ratifiée par le Canada en 1972. Ses articles 1, 2 et 11 édictent ce qui suit :

> 1. Tout Membre de l'Organisation internationale du Travail pour lequel la présente convention est en vigueur s'engage à donner effet aux dispositions suivantes.
>
> 2. Les travailleurs et les employeurs, sans distinction d'aucune sorte, ont le droit, sans autorisation préalable, de constituer des organisations de leur choix, ainsi que celui de s'affilier à ces organisations, à la seule condition de se conformer aux statuts de ces dernières.
>
> […]
>
> 11. Tout Membre de l'Organisation internationale du Travail pour lequel la présente convention est en vigueur s'engage à prendre toutes mesures nécessaires et appropriées en vue d'assurer aux travailleurs et aux employeurs le libre exercice du droit syndical.
>
> [Soulignement ajouté]

[96] La *Convention (n°98) sur le droit d'organisation et de négociation collective*[143] , qui a été ratifiée par le Canada en 2017, prévoit notamment ce qui suit :

> **Article 2**
>
> 1. Les organisations de travailleurs et d'employeurs doivent bénéficier d'une protection adéquate contre tous actes d'ingérence des unes à l'égard des autres,

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141 *Constitution de l'Organisation internationale du Travail*, 28 juin 1919, *Traité de Versailles partie XIII*, entré en vigueur le 16 mai 1920, préambule, en ligne : https://www.ilo.org/dyn/normlex/fr/f?p=1000:62:0::NO::P62_ LIST_ENTRIE_ID:2453907 (page consultée le 26 janvier 2022).

142 *Convention (nº 87) sur la liberté syndicale et la protection du droit syndical*, 9 juillet 1948, 68 R.T.N.U. 17, entrée en vigueur le 4 juillet 1950, ratifiée par le Canada le 23 mars 1972.

143 *Convention (n°98) sur le droit d'organisation et de négociation collective*, 1er juillet 1949, 96 R.T.N.U. 25, entrée en vigueur le 18 juillet 1951, ratifiée par le Canada le 14 juin 2017.

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> soit directement, soit par leurs agents ou membres, dans leur formation, leur fonctionnement et leur administration.
>
> 2. Sont notamment assimilées à des actes d'ingérence au sens du présent article des mesures tendant à provoquer la création d'organisations de travailleurs dominées par un employeur ou une organisation d'employeurs, ou à soutenir des organisations de travailleurs par des moyens financiers ou autrement, dans le dessein de placer ces organisations sous le contrôle d'un employeur ou d'une organisation d'employeurs.

[97] Le *Pacte international relatif aux droits économiques, sociaux et culturels*[144], adopté par l'Assemblée générale des Nations Unies le 16 décembre 1966, entré en vigueur le 3 janvier 1976 et auquel a aussi adhéré le Canada prévoit quant à lui à son article 8 que :

> **Article 8**
>
> 1. Les États parties au présent Pacte s'engagent à assurer:
>
> a) Le droit qu'a toute personne de former avec d'autres des syndicats et de s'affilier au syndicat de son choix, sous la seule réserve des règles fixées par l'organisation intéressée, en vue de favoriser et de protéger ses intérêts économiques et sociaux. L'exercice de ce droit ne peut faire l'objet que des seules restrictions prévues par la loi et qui constituent des mesures nécessaires, dans une société démocratique, dans l'intérêt de la sécurité nationale ou de l'ordre public, ou pour protéger les droits et les libertés d'autrui;
>
> b) Le droit qu'ont les syndicats de former des fédérations ou des confédérations nationales et le droit qu'ont celles-ci de former des organisations syndicales internationales ou de s'y affilier.
>
> c) Le droit qu'ont les syndicats d'exercer librement leur activité, sans limitations autres que celles qui sont prévues par la loi et qui constituent des mesures nécessaires, dans une société démocratique, dans l'intérêt de la sécurité nationale ou de l'ordre public, ou pour protéger les droits et les libertés d'autrui;
>
> d) Le droit de grève, exercé conformément aux lois de chaque pays.
>
> 2. Le présent article n'empêche pas de soumettre à des restrictions légales l'exercice de ces droits par les membres des forces armées, de la police ou de la fonction publique.
>
> 3. Aucune disposition du présent article ne permet aux États parties à la Convention de 1948 de l'Organisation internationale du Travail concernant la liberté syndicale et la protection du droit syndical de prendre des mesures

[144] *Pacte international relatif aux droits économiques, sociaux et culturels*, 16 décembre 1966, 993 R.T.N.U. 3, entré en vigueur le 3 janvier 1976, ratifié par le Canada le 19 mai 1976.

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> législatives portant atteinte — ou d'appliquer la loi de façon à porter atteinte — aux garanties prévues dans ladite convention.
>
> [Soulignements ajoutés]

[98] Le *Pacte international relatif aux droits civils et politiques*[145] adopté par l'Assemblée générale des Nations Unies le 19 décembre 1966, entré en vigueur le 23 mars 1976 et auquel le Canada a adhéré, édicte ce qui suit à ses articles 2 et 22 :

> **Article 2**
>
> 1. Les États parties au présent Pacte s'engagent à respecter et à garantir à tous les individus se trouvant sur leur territoire et relevant de leur compétence les droits reconnus dans le présent Pacte, sans distinction aucune, notamment de race, de couleur, de sexe, de langue, de religion, d'opinion politique ou de toute autre opinion, d'origine nationale ou sociale, de fortune, de naissance ou de toute autre situation.
>
> 2. Les États parties au présent Pacte s'engagent à prendre, en accord avec leurs procédures constitutionnelles et avec les dispositions du présent Pacte, les arrangements devant permettre l'adoption de telles mesures d'ordre législatif ou autre, propres à donner effet aux droits reconnus dans le présent Pacte qui ne seraient pas déjà en vigueur.
>
> 3. Les États parties au présent Pacte s'engagent à:
>
> a) Garantir que toute personne dont les droits et libertés reconnus dans le présent Pacte auront été violés disposera d'un recours utile, alors même que la violation aurait été commise par des personnes agissant dans l'exercice de leurs fonctions officielles;
>
> b) Garantir que l'autorité compétente, judiciaire, administrative ou législative, ou toute autre autorité compétente selon la législation de l'État, statuera sur les droits de la personne qui forme le recours et développer les possibilités de recours juridictionnel;
>
> c) Garantir la bonne suite donnée par les autorités compétentes à tout recours qui aura été reconnu justifié.
>
> […]

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145 *Pacte international relatif aux droits civils et politiques*, 19 décembre 1966, 999 R.T.N.U. 171, entré en vigueur le 23 mars 1976, ratifié par le Canada le 19 mai 1976.

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> **Article 22**
>
> 1. Toute personne a le droit de s'associer librement avec d'autres, y compris le droit de constituer des syndicats et d'y adhérer pour la protection de ses intérêts.
>
> 2. L'exercice de ce droit ne peut faire l'objet que des seules restrictions prévues par la loi et qui sont nécessaires dans une société démocratique, dans l'intérêt de la sécurité nationale, de la sûreté publique, de l'ordre public, ou pour protéger la santé ou la moralité publiques ou les droits et les libertés d'autrui. Le présent article n'empêche pas de soumettre à des restrictions légales l'exercice de ce droit par les membres des forces armées et de la police.
>
> 3. Aucune disposition du présent article ne permet aux États parties à la Convention de 1948 de l'Organisation internationale du Travail concernant la liberté syndicale et la protection du droit syndical de prendre des mesures législatives portant atteinte — ou d'appliquer la loi de façon à porter atteinte — aux garanties prévues dans ladite convention.
>
> [Soulignements ajoutés]

[99] Enfin, la *Déclaration relative aux principes et droits fondamentaux au travail*[146]*,* adoptée le 18 juin 1998 par la Conférence internationale du Travail, organe plénier de l'OIT[147], contient à son article 2(a) la déclaration que :

> 2. […] l'ensemble des Membres, même lorsqu'ils n'ont pas ratifié les conventions en question, ont l'obligation, du seul fait de leur appartenance à l'Organisation, de respecter, promouvoir et réaliser, de bonne foi et conformément à la Constitution, les principes concernant les droits fondamentaux qui sont l'objet desdites conventions, à savoir:
>
> (a) la liberté d'association et la reconnaissance effective du droit de négociation collective;
>
> […]

[100] En lien manifeste avec ces instruments internationaux, l'alinéa 2*d*) de la *Charte canadienne* et l'article 3 de la *Charte québécoise* prévoient ce qui suit :

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146 Conférence internationale du Travail, *Déclaration relative aux principes et droits fondamentaux au travail*, 86e sess., Genève, 18 juin 1998, en ligne : https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--fr/index.htm (page consultée le 26 janvier 2022).

147 Isabelle Duplessis, « La Déclaration de l'OIT relative aux principes et droits fondamentaux au travail, Une nouvelle réforme de régulation efficace? », (2004) 59 *R.I.* 52, p. 52.

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[*Charte canadienne*] **Libertés fondamentales** **2.** Chacun a les libertés fondamentales suivantes :	**Fundamental Freedoms** **2.** Everyone has the following fundamental freedoms:
[…]	[…]
d) liberté d'association.	(*d*) freedom of association.
[*Charte québécoise*] **3**. Toute personne est titulaire des libertés fondamentales telles la liberté de conscience, la liberté de religion, la liberté d'opinion, la liberté d'expression, la liberté de réunion pacifique et la liberté d'association.	**3.** Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

[Soulignements ajoutés]

5.3.3 La finalité et la portée de la liberté d'association : évolution jurisprudentielle

[101] On ne saurait mieux faire ici que de reprendre les principaux extraits du résumé que la juge en chef McLachlin et le juge LeBel faisaient en 2015, dans l'arrêt *AMPO,* de l'évolution de la jurisprudence de la Cour suprême sur la liberté d'association :

> A. *Évolution de la jurisprudence sur l'al. 2d) vers une interprétation téléologique et contextuelle*
>
> [30] La jurisprudence sur la liberté d'association garantie par l'al. 2*d*) de la *Charte* — qui s'est principalement développée en matière de relations de travail […] — se divise en deux périodes importantes. La première s'est caractérisée par une interprétation restrictive de la liberté d'association. La seconde a, pour sa part, graduellement privilégié une interprétation généreuse et fondée sur l'objet de la garantie constitutionnelle.
>
> [31] Dans ce qu'on appelle désormais la « trilogie en droit du travail », la Cour a conclu à la majorité que l'al. 2*d*) ne garantit ni le droit de négocier collectivement ni celui de faire la grève (*Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313 (« Renvoi relatif à l'Alberta »); *AFPC c. Canada*, [1987] 1 R.C.S. 424et *SDGMR c. Saskatchewan*, [1987] 1 R.C.S. 460).
>
> […]

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[41] Pour résumer, et malgré des dissidences notables, on peut affirmer que, pendant cette première période, les juges majoritaires de la Cour ont donné à la liberté d'association une interprétation étroite qui ne protégeait que la simple constitution de l'association et l'exercice collectif des libertés individuelles. Cette interprétation a prédominé pendant un certain temps. […]

[42] Parallèlement aux affaires mentionnées précédemment, la Cour a examiné « l'envers » de la liberté d'association, soit celle de ne pas s'associer : *Lavigne c. Syndicat des employés de la fonction publique de l'Ontario* […]; *R. c. Advance Cutting & Coring Ltd.* […]; confirmé par *Bernard c. Canada (Procureur général)*, […]. Or, les arrêts *Lavigne* et *Advance Cutting* sont importants parce qu'ils ont appliqué à l'al. *2d)* l'interprétation téléologique. […]

[43] Ces décisions ont marqué l'amorce du virage de la Cour vers une interprétation plus généreuse et fondée sur l'objet visé de l'al. 2*d*), interprétation confirmée de manière catégorique dans l'arrêt *Dunmore c. Ontario (Procureur général)* […].

[44] En raison de l'importance accrue qui avait été accordée à l'aspect collectif de la liberté d'association et à son interprétation téléologique, l'arrêt *Health Services*[148] a expressément reconnu que l'al. 2*d*) garantit le droit de négocier collectivement. Les sept juges qui ont entendu ce pourvoi ont tous convenu que, selon une interprétation téléologique de l'al. 2*d*), le droit des employés de participer à un processus de négociation collective devait bénéficier d'une protection constitutionnelle :

> Selon les principes élaborés dans *Dunmore* et dans cette perspective historique et internationale, le droit constitutionnel de négocier collectivement vise à protéger la capacité des travailleurs de participer à des activités associatives et leur capacité d'agir collectivement pour réaliser des objectifs communs concernant des questions liées au milieu de travail et leurs conditions de travail. (Par. 89, la juge en chef McLachlin et le juge LeBel; voir aussi le par. 174, la juge Deschamps.)

[45] Enfin, dans l'arrêt *Fraser*[149], la Cour a réaffirmé que l'al. 2*d*) confère le droit de participer à un processus de négociation collective, c'est-à-dire de former une association véritable en vue de réaliser des objectifs relatifs au travail. Ce droit à un processus véritable s'entend des droits des employés de s'associer, de formuler des revendications collectives auprès de l'employeur et de les voir prises en considération de bonne foi :

> En effet, [l'al. 2*d*)] garantit, dans le contexte des relations du travail, le droit à un processus véritable. Dans cette optique, on ne saurait tenir pour véritable un processus qui permet à l'employeur de ne même pas prendre en compte les observations de ses employés. [...] À défaut d'un tel processus, l'association aux fins de réaliser des objectifs liés au travail perd sa raison d'être, ce qui entrave substantiellement l'exercice de la liberté d'association. On peut entraver l'exercice de la liberté d'association voué

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148 *Health Services and Support - Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, 2007 CSC 27.

149 *Ontario (Procureur général) c. Fraser*, *supra*, note 15.

> à la réalisation d'objectifs liés au travail en frappant d'interdiction la formation d'associations d'employés. On peut le faire tout aussi efficacement en établissant un système qui rend impossible la négociation véritable de questions liées au travail. [par. 42]
>
> [46] En résumé, après une période initiale marquée par une réticence à reconnaître toute la portée de la liberté d'association en matière de relations de travail, la jurisprudence a évolué vers une approche généreuse de cette liberté. Cette approche visait essentiellement à encourager l'épanouissement individuel et la réalisation collective des objectifs humains, dans le respect des valeurs démocratiques, à la lumière des « origines historiques des concepts enchâssés » dans l'al. 2*d*) (*R. c. Big M Drug Mart Ltd* […]).
>
> [Soulignements ajoutés]

[102] En janvier 2015, la Cour suprême rend trois arrêts concernant la portée de la liberté d'association : l'arrêt précité *APMO*[150] et l'arrêt *Meredith*[151], puis, deux semaines plus tard, l'arrêt *Saskatchewan*[152].

[103] L'arrêt ***Meredith*** revêt moins d'importance aux fins qui nous occupent dans la mesure où la constitutionnalité du régime global de relations de travail de la GRC n'était pas en cause.

[104] L'arrêt ***APMO*** concerne quant à lui la constitutionnalité de l'imposition d'un régime non syndical de relations du travail aux membres de la GRC, rendue possible par l'exclusion de ces derniers du régime de négociation collective prévu par la *Loi sur les relations de travail dans la fonction publique*[153]. Avant d'arriver aux questions soulevées, les juges majoritaires procèdent à une synthèse des considérations devant guider les tribunaux appelés à se prononcer sur la portée de l'al. 2*d*). Les trois catégories d'activités protégées par la liberté d'association sont ainsi résumées :

> (1) le droit de s'unir à d'autres et de constituer des associations;
>
> (2) le droit de s'unir à d'autres pour exercer d'autres droits constitutionnels; et,
>
> (3) le droit de s'unir à d'autres pour faire face, à armes plus égales, à la puissance et à la force d'autres groupes ou entités.[154]

150 *APMO*, *supra*, note 67.
151 *Meredith c. Canada (Procureur général)*, *supra*, note 68.
152 *Saskatchewan Federation of Labour c. Saskatchewan*, *supra*, note 69.
153 *APMO*, *supra*, note 67.
154 *Id.*, paragr. 66.

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[105] Après avoir expliqué les enseignements à retenir des arrêts *Health Services* et *Fraser*[155], la majorité récapitule en soulignant qu'essentiellement l'al. 2*d*) protège contre une entrave substantielle au droit à un processus véritable de négociation collective[156] et que :

> [80] […] Portera donc atteinte au droit à un processus véritable de négociation collective **tout régime législatif** qui prive les employés de protections adéquates dans leurs interactions avec l'employeur de manière à créer une entrave substantielle à leur capacité de véritablement mener des négociations collectives.
>
> [Caractères gras et soulignement ajouté]

[106] La majorité poursuit en expliquant qu'un processus véritable de négociation collective se reconnaît à deux caractéristiques principales : « […] il offre aux employés une liberté de choix et une indépendance suffisantes pour leur permettre de décider de leurs intérêts collectifs et de véritablement les réaliser »[157].

[107] Au bout du compte, la Cour conclut que l'exclusion des membres de la GRC de la définition de « fonctionnaire » contenue au paragr. 2(1) de la *Loi sur les relations de travail dans la fonction publique* fédérale[158] (« *LRTFP* »), dont l'objet était d'entraver leur liberté d'association et qui avait permis leur assujettissement à un régime différent du cadre général applicable à la fonction publique fédérale[159], constituait une entrave substantielle à cette liberté et contrevenait donc à l'al. 2*d*) de la *Charte canadienne*[160].

[108] La Cour précise par ailleurs que bien qu'il eût été suffisant de conclure à une violation de l'alinéa 2*d*) sur le seul fondement des *objets* de l'exclusion législative et de l'imposition aux membres de la GRC d'un régime de relations de travail particulier, elle aurait aussi conclu à une violation de la liberté d'association en raison des *effets* de ce régime[161].

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155 *Id.*, paragr. 67-79.
156 *Id*., paragr. 80.
157 *Id.,* paragr. 81 [soulignements ajoutés].
158 *Loi sur les relations de travail dans la fonction publique*, S.C. 1966-67, ch. 72, art. 2*e*), *g*), *j*), « fonctionnaire », remplacée par la *Loi sur les relations de travail dans la fonction publique*, édictée par la *Loi sur la modernisation de la fonction publique*, L.C. 2003, ch. 22, art. 2, paragr. 2(1) « fonctionnaire » al. *d*).
159 En l'occurrence, le Programme des représentants des relations fonctionnelles (« PRRF »), instauré par le *Règlement de la Gendarmerie royale du Canada*, DORS/88-361.
160 *APMO*, *supra*, note 67, paragr. 29-131 et 136.
161 *Id*., paragr. 111 et 121.

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[109] Dans l'arrêt ***Saskatchewan****,* la Cour a confirmé que le droit de grève est indispensable au processus de négociation collective protégé par l'alinéa 2*d*) de la *Charte canadienne* : « sans le droit de grève, [TRADUCTION] "le droit constitutionnel de négocier collectivement perd tout son sens" »[162].

[110] La majorité, sous la plume de la juge Abella, établit par ailleurs qu'afin de déterminer s'il y a ou non atteinte à l'al. 2*d*), le test consiste à vérifier « si, dans un cas donné, l'entrave législative au droit de grève équivaut ou non à une entrave substantielle à la négociation collective »[163].

[111] La juge Abella rappelle aussi la pertinence du droit international du travail aux fins de cerner les obligations du Canada en cette matière, ce qu'avait souligné la Cour avec insistance dans l'arrêt *Health Services*[164] en 2007 :

> [69] Même si, à strictement parler, elles n'ont pas d'effet obligatoire, les décisions du Comité de la liberté syndicale ont une force persuasive considérable et elles ont été citées avec approbation et largement reprises à l'échelle mondiale par les cours de justice, les tribunaux administratifs et d'autres décideurs, y compris notre Cour […]. Le Comité de la liberté syndicale a vu s'accroître avec le temps la pertinence et le caractère persuasif de ses décisions dans l'usage et dans la pratique et, au sein de l'OIT, c'est à lui principalement qu'il a incombé de délimiter le droit de grève […].
>
> [70] Le Canada est également partie au *Pacte international relatif aux droits civils et politiques*, 999 R.T.N.U. 171 (*PIDCP*), auquel sont incorporées la *Convention (n^{o} 87)* et les obligations qu'elle crée (voir le paragraphe 3 de l'article 22; […].
>
> [71] Par ailleurs, un consensus se dégage à l'échelle internationale en ce qui concerne la nécessité du droit de grève pour une négociation collective véritable. La Cour européenne des droits de l'homme partage désormais cet avis. […]
>
> [Soulignement ajouté]

[112] En résumé, les principes d'interprétation internationaux et les éléments essentiels suivants de la liberté d'association reconnue par l'alinéa 2*d*) de la *Charte canadienne* ressortent de la jurisprudence de la Cour suprême :

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162 *Saskatchewan Federation of Labour c. Saskatchewan*, *supra*, note 69, paragr. 24.

163 *Id*., paragr. 78 [soulignement ajouté].

164 *Health Services and Support – Facilities Subsector Bargaining Assn. c Colombie-Britannique*, *supra*, note 148, paragr. 20 et 69-79.

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- il faut *présumer* que la *Charte canadienne* accorde une protection au moins aussi grande que les instruments internationaux ratifiés par le Canada en matière de droits de la personne[165];

- pour l'interprétation de l'al. 2*d*), les textes internationaux les plus utiles sont le *Pacte international relatif aux droits économiques, sociaux et culturels*, le *Pacte international relatif aux droits civils et politiques* et la *Convention (nº 87) sur la liberté syndicale et la protection du droit syndical*[166];

- l'al. 2*d*) protège le droit des salariés de prendre part à un processus véritable de négociation collective;

- ce processus véritable comprend le droit des salariés de se regrouper en vue d'atteindre des objectifs liés au travail, de faire des représentations collectives à leur employeur et de les voir prises en compte de bonne foi, ce qui comprend l'accès à une voie de recours efficace pour le cas où l'employeur ne négocierait pas de bonne foi;

- un processus de négociation collective ne peut être véritable lorsque les salariés n'ont pas la liberté de choix et l'indépendance voulues pour décider de leurs intérêts collectifs et les poursuivre;

- le droit de grève constitue un élément essentiel d'un processus véritable de négociation collective. Il n'est pas seulement dérivé du droit à la négociation collective, il en constitue une composante indispensable.

5.3.4 Le cadre d'analyse applicable en l'espèce : les arrêts Dunmore/Baier et APMO

[113] La détermination du cadre analytique applicable en l'espèce vise à permettre de trancher une question constitutionnelle et constitue donc une question de droit[167].

[114] La juge de la Cour supérieure conclut d'abord que la décision du TAT de recourir au cadre d'analyse indiqué par la Cour suprême dans l'arrêt *APMO* est incorrecte[168]. Selon elle, le TAT devait plutôt recourir au cadre d'analyse de l'arrêt *Baier,* applicable dans les cas où le demandeur revendique un « droit positif », soit une intervention positive de l'État.

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165 *Id.*, paragr. 70.
166 *Id.*, paragr. 71.
167 *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Vavilov*, *supra*, note 83, paragr. 17.
168 Jugement entrepris, paragr. 82.

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[115] Procédant néanmoins ensuite à réviser l'analyse effectuée par le TAT selon l'arrêt *Baier*, exercice que ce dernier a effectué de façon subsidiaire, la juge conclut qu'il a erré sur le dernier critère en déterminant que l'État est responsable de l'incapacité des membres de l'Association d'entreprendre et de mener un véritable processus de négociation collective avec l'Employeur.

[116] Avec égards, la Cour est d'avis qu'elle a tort sur les deux points.

[117] D'abord, rappelons en quoi consistent les cadres analytiques des arrêts *Dunmore*/*Baier*, d'une part, et *APMO*, d'autre part.

[118] Dans l'arrêt *Dunmore* rendu en 2001[169], la Cour suprême se prononçait sur l'exclusion des travailleurs agricoles du régime légal des relations de travail de l'Ontario. Le juge Bastarache, pour la majorité, rappelle d'abord le fardeau de la partie qui invoque une violation de l'al. 2*d*) et aborde ensuite la question de la responsabilité de l'État au regard de la liberté garantie, avec ce qui appert être la première introduction de la distinction *liberté vs droit*, ou *droit négatif vs droit positif* dans la jurisprudence de la Cour portant sur la liberté d'association :

> 13 Pour établir l'atteinte à l'al. 2*d*) de la *Charte*, les appelants doivent prouver **premièrement** que les activités considérées font partie de celles qu'il protège et, **deuxièmement**, que les dispositions contestées, par leur objet ou leur effet, compromettent ces activités […]. Après l'examen du contenu de la liberté d'association, je délimiterai la responsabilité de l'État découlant de l'al. 2*d*) de la *Charte*. Plus précisément, j'examinerai s'il oblige seulement l'État à respecter les libertés syndicales ou s'il l'oblige aussi à les protéger en interdisant les actes attentatoires de personnes privées. […]
>
> […]
>
> 19 Après l'examen du contenu de la liberté syndicale, il faut déterminer l'étendue de la responsabilité de l'État vis-à-vis de cette liberté. On qualifie généralement cette responsabilité de « **négative** » par nature, en ce sens que le Parlement et les législatures provinciales sont seulement tenus de s'abstenir de toute intervention portant atteinte (par son objet ou son effet) à une activité associative protégée. À l'inverse, la *Charte* n'oblige pas l'État à prendre des mesures **positives** pour préserver ou faciliter l'exercice de libertés fondamentales.
>
> [Soulignements et caractères gras ajoutés]

[169] *Dunmore c. Ontario (Procureur général)*, *supra*, note 89.

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[119] C'est à l'aune de cette approche que le juge Bastarache formule de la façon suivante ce qui deviendra, comme on le verra plus après, la troisième étape du cadre analytique formulé par le juge Rothstein dans l'arrêt *Baier*[170] :

> 26 À supposer qu'il existe un fondement probatoire, la troisième question est de savoir si l'État peut vraiment être tenu responsable de toute incapacité d'exercer une liberté fondamentale. […]
>
> [Soulignement ajouté]

[120] Le juge Bastarache précise ensuite ce qui suit, avant de trancher au final, pour la majorité, « qu'il est raisonnable de conclure que l'exclusion des travailleurs agricoles de la *LRT* porte substantiellement atteinte à leur liberté fondamentale de s'organiser »[171] :

> 27 L'idée que la non-inclusion peut porter atteinte à la liberté d'association est non seulement implicite dans la jurisprudence canadienne relative à la *Charte*, mais elle est aussi compatible avec le droit international des droits de la personne. […]
>
> 28 En somme, bien qu'il soit généralement souhaitable de limiter l'examen des cas de non-inclusion au par. 15(1), cela ne vaut pas lorsque la non-inclusion emporte la négation effective d'une liberté fondamentale comme la liberté d'association. Ces cas ne seront pas monnaie courante : ils sont limités par l'art. 32 de la *Charte*, qui exige un minimum d'action gouvernementale pour que la *Charte* puisse s'appliquer, ainsi que par les facteurs examinés plus haut. Cependant, une demande d'inclusion ne devrait pas être automatiquement rejetée à l'issue d'une analyse fondée sur l'al. 2*d*) : selon les circonstances, la liberté d'association peut, par exemple, interdire l'exclusion sélective d'un groupe de la protection nécessaire à la formation et au maintien d'une association, même s'il n'existe en soi aucun droit constitutionnel à une telle protection de la loi. En ce sens, la charge de preuve imposée par l'al. 2*d*) de la *Charte* diffère de celle imposée par le par. 15(1) : ce dernier met l'accent sur les effets de la non-inclusion sur la dignité humaine […], alors que l'al. 2*d*) vise les effets de la non-inclusion sur la capacité d'exercer une liberté fondamentale. La distinction ressort du libellé même de la *Charte* et est confirmée par la jurisprudence postérieure de notre Cour […].
>
> [Soulignements ajoutés]

[121] Six ans plus tard, dans l'arrêt *Baier*[172], une affaire mettant en cause la liberté d'expression garantie par l'alinéa 2*b*) de la *Charte canadienne*, le juge Rothstein emprunte à *Dunmore* pour élaborer un cadre d'analyse faisant appel plus expressément à une polarisation des droits et libertés garantis par la *Charte canadienne* :

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170 *Baier c. Alberta*, *supra*, note 75.
171 *Dunmore c. Ontario (Procureur général)*, *supra*, note 89, paragr. 48.
172 *Baier c. Alberta*, *supra*, note 75.

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> [30] Dans les cas où le gouvernement qui défend une mesure contestée sur le fondement de la Charte plaide — ou que l'auteur de la demande fondée sur la Charte concède — que **les droits positifs** revendiqués sont demandés en vertu de l'al. 2*b*), le tribunal doit procéder comme suit. **Dans un premier temps**, il doit se demander si l'activité pour laquelle le demandeur réclame la protection de l'al. 2*b*) est une forme d'expression. Dans l'affirmative, le tribunal doit, **dans un deuxième temps**, décider si le demandeur revendique **un droit positif** à une mesure gouvernementale **ou simplement le droit d'être protégé contre l'ingérence du gouvernement**. Enfin, **troisièmement**, s'il s'agit d'une demande d'intervention **positive**, les trois conditions énoncées dans *Dunmore* doivent être prises en considération : **(1)** la demande doit reposer sur des libertés fondamentales garanties par la *Charte* plutôt que sur l'accès à un régime légal précis; **(2)** le demandeur doit démontrer que l'exclusion du régime légal constitue une entrave substantielle à l'exercice de l'activité protégée par l'al. 2*b*) ou que l'objet de l'exclusion était de faire obstacle à une telle activité; **(3)** l'État doit pouvoir être tenu responsable de toute incapacité d'exercer une liberté fondamentale. Si le demandeur ne peut satisfaire à ces critères, la demande fondée sur l'al. 2*b*) sera rejetée. Si les trois conditions sont remplies, l'al. 2*b*) a été violé et le tribunal procédera alors à l'analyse fondée sur l'article premier.[173]
>
> [Soulignements et caractères gras ajoutés]

[122] Dans l'arrêt ***AMPO***[174], rendu en 2015, la Cour suprême ne reprend pas ce cadre d'analyse multifactoriel, mais examine plutôt la validité constitutionnelle des dispositions en litige sous l'angle de l'entrave substantielle à la liberté d'association :

> [80] Pour récapituler, l'al. 2*d*) protège contre une entrave substantielle au droit à un processus véritable de négociation collective. Historiquement, les travailleurs se sont associés pour « faire face, à armes plus égales, à la puissance et à la force de ceux avec qui leurs intérêts interagissaient et, peut-être même, entraient en conflit », c'est-à-dire leur employeur […]. La garantie prévue à l'al. 2*d*) de la *Charte* ne peut faire abstraction du déséquilibre des forces en présence dans le contexte des relations du travail. Le permettre reviendrait à ne pas tenir compte « des origines historiques des concepts enchâssés » à l'al. 2*d*) […]. Portera donc atteinte au droit à un processus véritable de négociation collective **tout régime législatif** qui prive les employés de protections adéquates dans leurs interactions avec l'employeur de manière à créer une entrave substantielle à leur capacité de véritablement mener des négociations collectives.
>
> [Soulignements et caractères gras ajoutés]

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173 *Id.*, paragr. 30.

174 *APMO*, *supra*, note 67.

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[123] *AMPO* ne recourt donc pas à la distinction *droit positif vs droit négatif* et à la question de la responsabilité de l'État dans l'analyse de l'existence ou non d'une entrave substantielle à la capacité des personnes ou de l'organisation concernées de mener de véritables négociations collectives.

[124] De même, cet arrêt référant aux principes énoncés dans l'arrêt *Big M Drug Mart*[175], il est opportun de rappeler que le juge Dickson, dont la dissidence dans le *Renvoi relatif à l'Alberta* jettera les bases de la trilogie de 2015 de la Cour suprême sur la portée de la liberté d'association, y écrivait ce qui suit pour la majorité, sans référence au caractère *positif* ou *négatif* du droit ou de la liberté constitutionnels en jeu :

> 80. […] À mon avis, l'objet et l'effet d'une loi sont tous les deux importants pour déterminer sa constitutionnalité; un objet inconstitutionnel ou un effet inconstitutionnel peuvent l'un et l'autre rendre une loi invalide. Toute loi est animée par un but que le législateur compte réaliser. Ce but se réalise par les répercussions résultant de l'opération et de l'application de la loi. L'objet et l'effet respectivement, au sens du but de la loi et de ses répercussions ultimes, sont nettement liés, voire inséparables. On s'est souvent référé aux effets projetés et aux effets réels pour évaluer l'objet de la loi et ainsi sa validité.
>
> […]
>
> 88. […] Donc, si, de par ses répercussions, une loi qui a un objet valable porte atteinte à des droits et libertés, il serait encore possible à un plaideur de tirer argument de ses effets pour la faire déclarer inapplicable, voire même invalide. […].
>
> [Soulignements ajoutés]

[125] Dans l'arrêt *Fraser*[176], la juge en chef McLachlin et le juge LeBel émettent d'ailleurs des réserves sur la distinction entre droits ou libertés positives et négatives aux fins de l'analyse de la liberté d'association, relevant au surplus celles formulées par le juge Bastarache lui-même dans *Dunmore* :

> [68] […] Dans *Dunmore*, le juge Bastarache souligne qu'« on peut se demander si la distinction entre obligations positives et négatives de l'État doit être nuancée dans le contexte des relations de travail » (par. 20). Il ajoute que
>
> > L'histoire a montré, et les législateurs canadiens ont uniformément reconnu, qu'une attitude de retenue de la part du gouvernement dans le domaine des relations de travail expose la plupart des travailleurs non seulement à diverses pratiques déloyales de travail, mais peut aussi engager leur responsabilité juridique en common law pour coalition ou restriction du commerce [...] Dans ce contexte, il faut se demander si, pour

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175 *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295.

176 *Ontario (Procureur général) c. Fraser*, *supra*, note 15.

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> que la liberté syndicale ait un sens, l'al. 2*d)* de la *Charte* impose à l'État l'obligation positive d'étendre la protection légale à des groupes non protégés. [par. 20]

[69] Notre Cour s'est toujours refusé à établir une distinction rigide entre les libertés « positives » et les droits « négatifs » consacrés par la *Charte*. […] Comme le souligne la juge L'Heureux Dubé dans l'arrêt *Haig c. Canada* […] :

> Les distinctions entre « libertés » et « droits » et entre droits positifs et droits négatifs ne sont pas toujours nettes ni utiles. On ne doit pas s'éloigner du contexte de l'approche fondée sur l'objet énoncée par notre Cour dans l'arrêt *R. c. Big M Drug Mart Ltd.*, […]. Suivant cette approche, il pourrait se présenter une situation dans laquelle il ne suffirait pas d'adopter une attitude de réserve pour donner un sens à une liberté fondamentale, auquel cas une mesure gouvernementale positive s'imposerait peut-être. Celle-ci pourrait, par exemple, revêtir la forme d'une intervention législative destinée à empêcher la manifestation de certaines conditions ayant pour effet de museler l'expression, ou à assurer l'accès du public à certains types de renseignements. […]

[…]

[71] En toute déférence, nous ne pouvons déduire de la manière dont elle est conçue que la *Charte* établit une distinction rigide entre les libertés et les droits. […][177]

[Soulignements ajoutés]

[126] La juge Deschamps abonde dans le même sens dans ses motifs concourants :

> [316] L'arrêt *Dunmore* repose sur la distinction entre droits positifs et droits négatifs. À mon sens, il est périlleux de recourir à cette distinction pour déterminer s'il y a atteinte à l'al. 2*d*). La doctrine et la jurisprudence nous justifient amplement de faire preuve de prudence avant de s'engager dans une démarche fondée sur une telle distinction, en particulier lorsqu'une action ou une omission de l'État est en cause. […]
>
> [317] Distinguer entre la liberté d'exercer un droit et le droit d'exercer une liberté, sans entrave active ou passive de l'État, risque de détourner le débat de la teneur réelle de la garantie constitutionnelle. […]
>
> [Soulignement ajouté]

[127] Il importe toutefois de noter que, tout récemment, dans l'arrêt *Toronto (Cité) c. Ontario (Procureur général)*[178] (« *Toronto* »), une affaire en matière de liberté d'expression où elle aborde et applique l'arrêt *Baier,* la Cour suprême reprend la distinction entre libertés positives et négatives et laisse la porte ouverte à la possibilité que le cadre analytique élaboré dans *Baier* puisse être appliqué aussi aux fins d'analyse

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177 *Ontario (Procureur général) c. Fraser*, *supra*, note 15, paragr. 68-69 et 71.

178 *Toronto (Cité) c. Ontario (Procureur général)*, 2021 CSC 34.

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de la validité constitutionnelle de dispositions ou mesures adoptées dans le contexte de relations de travail. Les juges Wagner et Brown ont rendu jugement pour une majorité de cinq[179], les quatre juges dissidents s'étant exprimés sous la plume de la juge Abella[180].

[128] L'issue du pourvoi dépendant de la portée à donner à la liberté d'expression garantie par l'al. 2*b*) de la *Charte*[181], la majorité revoit d'abord les enseignements de l'arrêt *Baier* :

> [16] En outre, et ce qui revêt une importance particulière dans le présent pourvoi, l'al. 2b) a été interprété comme « impos[ant] d'une manière générale [...] une obligation négative et non une obligation positive de protection ou d'aide » (*Baier*, par. 20 (nous soulignons), […]). Une revendication est à juste titre qualifiée de négative lorsque le demandeur cherche à « ne pas être assujett[i] à des dispositions législatives ou à des mesures gouvernementales supprimant une activité expressive qu'i[l] serai[t] autrement libr[e] d'exercer » (*Baier*, par. 35 (nous soulignons)). De telles revendications de droit fondées sur l'al. 2b) sont examinées selon le cadre d'analyse établi par notre Cour dans l'arrêt *Irwin Toy*.
>
> […]
>
> [18] Pour déterminer si, en l'espèce, la province a restreint l'exercice d'un droit protégé par l'al. 2b), il est donc central de qualifier la revendication comme il se doit en décidant si elle porte sur **un droit positif ou négatif**. Dans l'arrêt *Baier*, notre Cour a soustrait les demandes visant un droit positif du cadre d'analyse énoncé dans l'arrêt *Irwin Toy* et les a soumises à un seuil plus élevé. Cela est nécessaire, étant donné la facilité avec laquelle les demandeurs peuvent généralement démontrer une restriction à la liberté d'expression en suivant le test établi dans l'arrêt *Irwin Toy*. Un seuil élevé pour les demandes visant un droit positif réduit les circonstances dans lesquelles un gouvernement ou une législature doit légiférer ou agir autrement pour soutenir la liberté d'expression. […]
>
> [19] Le cadre d'analyse établi dans l'arrêt *Baier* n'est donc pas limité, comme le suggère notre collègue, à « traiter du caractère non inclusif de régimes légaux » (par. 148). Notre Cour n'aurait pu exprimer plus clairement dans cette décision que ce cadre s'applique là « où le gouvernement qui défend une mesure contestée sur le fondement de la *Charte* plaide — ou que l'auteur de la demande fondée sur la *Charte* concède — que les droits positifs revendiqués sont demandés en vertu de l'al. 2*b*) » (par. 30). S'il en était autrement — c'est-à-dire si l'arrêt *Baier* ne s'appliquait qu'aux causes relatives à la sous-inclusion —, les revendications visant la création ou l'extension de tribunes par voie législative seraient examinées à la lumière du test fixé dans cet arrêt tandis que celles visant la préservation de ces mêmes tribunes le seraient suivant le test prescrit par l'arrêt *Irwin Toy*. Cela serait illogique. La portée de l'arrêt *Baier* va au-delà des causes de sous-inclusion

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179 Le juge en chef Wagner et les juges Moldaver, Côté, Brown et Rowe.

180 Les juges Abella, Karakatsanis, Martin et Kasirer.

181 *Toronto (Cité) c. Ontario (Procureur général)*, *supra*, note 178, paragr. 14.

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> ou d'exclusion, et elle limite catégoriquement « l'obligation [de l'État] de mettre une tribune donnée à la disposition de citoyens » […]. Cela reflète la séparation des pouvoirs. En effet, il est préférable de laisser aux ordres élus de l'État le soin de décider s'il convient de concevoir une tribune d'origine législative ou réglementaire et la façon de le faire.
>
> [20] Il ne faudrait pas extrapoler de nos propos que l'al. 2*b*) accorde un droit qui est totalement positif ou totalement négatif. De nombreux droits reconnus par la Constitution ont des dimensions à la fois positives et négatives, et le cadre d'analyse établi par l'arrêt *Baier* reconnaît expressément qu'il en est ainsi pour ceux protégés par l'al. 2b). La distinction entre les dimensions positive et négative des droits demeure toutefois importante lorsqu'il s'agit d'examiner la nature de *l'obligation* que la revendication cherche à faire porter par l'État : [TRADUCTION] « ... les dimensions positives d'un droit exigent que le gouvernement agisse de certaines façons, alors que ses dimensions négatives exigent de lui qu'il s'abstienne d'agir de certaines façons » […].
>
> [Soulignements et caractères gras ajoutés; italiques dans l'original]

[129] Une fois ces principes exposés, la majorité ajoute les commentaires qui suivent, lesquels revêtent davantage de pertinence pour les fins qui nous occupent :

> [21] Le présent pourvoi offre donc l'occasion de confirmer et de clarifier l'application de l'arrêt *Baier* aux revendications visant un droit positif fondées sur l'al. 2b). Cet arrêt demeure valable dans le contexte de l'al. 2b). Il adopte en outre un cadre d'analyse établi pour la première fois dans l'arrêt *Dunmore*, qui a lui-même tranché une revendication fondée sur l'al. 2d) (liberté d'association). **Il n'est pas nécessaire de décider en l'espèce si l'arrêt *Dunmore* demeure applicable aux revendications fondées sur l'al. 2d) (la question n'est pas tranchée, étant donné les arrêts rendus par notre Cour dans *Ontario (Procureur général) c. Fraser*,** […]**, et *Association de la police montée de l'Ontario c. Canada (Procureur général)*,** […]. En l'espèce, il nous suffit de confirmer que l'arrêt *Baier* offre un cadre d'analyse utile et nécessaire dans le contexte des revendications visant un droit positif fondées sur l'al. 2b) […].
>
> [Soulignement et caractères gras ajoutés]

[130] Qu'en retenir aux fins qui nous occupent, alors que le plus haut tribunal au pays a laissé ouverte la question de la validité du cadre analytique de l'arrêt *Baier* dans le cadre de revendications qui mettent plutôt en cause la liberté d'association? Le questionnement est d'autant plus pertinent que, bien que dans l'arrêt *Baier* le juge Rothstein dresse un parallèle avec les propos du juge Bastarache dans *Dunmore*, rendu celui-là en matière de liberté d'association, dans *AMPO* la juge en chef McLachlin et le juge LeBel ont souligné que « [l]e droit d'association ne représente pas simplement un droit dérivé des

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autres droits et libertés garantis par la constitution. Au contraire, il constitue un droit distinct doté d'un contenu autre […] »[182].

[131] Les quatre juges dissidents dans l'arrêt *Toronto*, sous la plume de la juge Abella, mettent d'ailleurs en garde contre une utilisation extensive du cadre d'analyse de l'arrêt *Baier* :

> [149] De plus, l'application du cadre d'analyse prescrit par l'arrêt *Baier* a été circonscrite à ses circonstances particulières par l'arrêt subséquent de la Cour, *Greater Vancouver Transportation Authority c. Fédération canadienne des étudiantes et étudiants — Section Colombie-Britannique*, [2009] 2 R.C.S. 295. S'exprimant pour une majorité de 7 juges contre 1, la juge Deschamps a expliqué que l'arrêt *Baier* « résume les critères permettant de déterminer les quelques circonstances dans lesquelles l'al. 2*b*) exige du gouvernement qu'il mette à la disposition d'une personne ou d'un groupe de personnes un mode d'expression ou une "tribune" dont l'accès est trop restreint » (par. 30). Elle a aussi mis en garde contre l'idée d'élargir la portée de l'arrêt *Baier* au-delà de ses limites strictes :
>
> > Interprét[é] hors contexte, [l'arrêt *Baier*] pourrai[t] dans bien des cas transformer une affaire de liberté d'expression en une revendication de droit positif. L'expression dans un endroit ou un espace public suppose nécessairement quelque appui ou habilitation de la part du gouvernement. L'existence de rues, de parcs et d'autres lieux publics tient souvent à une loi ou à une mesure gouvernementale. S'il suffisait que l'État appuie ou permette l'activité expressive pour que soit justifié l'examen sous l'angle de la revendication d'un droit positif, on pourrait soutenir que la demande d'accès à un parc public par des manifestants devrait être considérée en fonction du cadre d'analyse de l'arrêt *Baier*, car pour accéder à la demande, l'État devrait permettre l'expression par la mise à disposition du moyen requis (le lieu). Ce serait mal interpréter l'arrêt *Baier*.
> >
> > Interprété globalement, l'arrêt *Baier* indique clairement que le fait d'appuyer ou de permettre l'activité expressive doit être relié à une demande faite à l'État de donner accès à un mode d'expression en particulier. En effet, dans cet arrêt, la Cour *distingue* entre *imposer à* l'État *l'obligation de mettre une tribune donnée à la disposition de citoyens* et *protéger la liberté d'expression sous-jacente de ceux qui ont la faculté de se prévaloir d'une tribune* (par. 42). [Italique ajouté; par. 34-35.]
>
> […]
>
> [152] Quoi qu'il en soit, la distinction entre droits positifs et droits négatifs est une lorgnette qui n'aide pas à trancher les demandes présentées en vertu de la *Charte*. Pendant près de quatre décennies de litiges fondés sur la *Charte*, notre Cour a reconnu que les droits et les libertés ont des aspects à la fois positifs et négatifs. Cette reconnaissance a mené la Cour à adopter une interprétation téléologique uniforme relativement aux revendications portant sur les droits, que la revendication porte sur la liberté à l'égard de l'ingérence du gouvernement afin d'exercer un droit, ou sur le droit *à* l'action gouvernementale afin d'y avoir accès. Pour paraphraser Gertrude Stein, un droit est un droit […]. Le seuil ne varie pas

[182] *APMO*, *supra*, note 67, paragr. 49 [soulignement ajouté].

> selon la nature de la revendication portant sur un droit. Chaque droit a sa propre portée définitionnelle et est susceptible de faire l'objet de l'analyse de la proportionnalité suivant l'article premier de la *Charte*.[183]
>
> [Renvoi omis; italiques dans l'original; soulignements ajoutés]

[132] Enfin, en note de bas de page à la phrase précitée « [c]ette reconnaissance a mené la Cour à adopter une interprétation téléologique uniforme relativement aux revendications portant sur les droits, que la revendication porte sur la liberté à l'égard de l'ingérence *du* gouvernement afin d'exercer un droit, ou sur le droit *à* l'action gouvernementale afin d'y avoir accès »[184], la juge Abella précise :

> La même norme juridique s'est appliquée à des demandes visant : la **liberté d'association protégée par l'al. 2d)** (*Health Services and Support — Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, [2007] 2 R.C.S. 391 (droit de négocier collectivement); *Ontario (Procureur général) c. Fraser*, [2011] 2 R.C.S. 3 (droit à des négociations menées de bonne foi); *Association de la police montée de l'Ontario c. Canada (Procureur général)*, [2015] 1 R.C.S. 3 (droit aux protections imposées par la loi en matière de négociations collectives)); […], pour ne donner que quelques exemples.
>
> [Caractères gras dans l'original; soulignements ajoutés]

[133] Bien que ces commentaires fassent partie des motifs de la minorité, on est fondé à y voir une indication supplémentaire que la distinction entre droit positif et droit négatif et le cadre analytique de l'arrêt *Baier* ne sont pas nécessairement opportuns en matière de liberté d'association.

[134] Ces questions n'ayant toutefois pas été tranchées définitivement par la Cour suprême, et la distinction demeurant donc d'actualité, la façon de solutionner l'incertitude découle des deux raisonnements suivants et, surtout, du fait qu'ils mènent tous deux à la même conclusion.

[135] D'une part, si la distinction entre revendication négative *vs* positive est pertinente, il est raisonnable de conclure que celle de l'Association est *négative* puisqu'elle cherche à ce que ses membres ne soient pas assujettis à l'exclusion prévue à l'article 1*l*) 1° du *C.t.* D'autant plus qu'on ne parle pas en l'espèce d'un régime législatif d'application restreinte, mais du régime de relations de travail instauré par le *Code du travail,* lequel, comme l'a souligné la Cour suprême dans un autre arrêt, constitue « l'expression concrète et le mécanisme législatif de mise en œuvre de la liberté d'association en milieu de travail au Québec »[185]. Encore plus clairement, notre Cour a observé dans *Québec*

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183 *Toronto (Cité) c. Ontario (Procureur général)*, *supra*, note 178, paragr. 149 et 152.
184 *Toronto (Cité) c. Ontario (Procureur général)*, supra, note 178, paragr. 152.
185 *Plourde c. Compagnie Wal-Mart du Canada Inc.*, 2009 CSC 54, paragr. 56.

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(Procureur général) c. Confédération des syndicats nationaux (CSN)[186] que le régime des rapports collectifs du travail prévu par le *Code du travail* « est en quelque sorte le régime de droit commun »[187]. Dans ce contexte, selon la majorité dans l'arrêt *Toronto*, le test de l'arrêt *Baier* n'est pas indiqué. Celui de l'arrêt *Irwin Toy* étant spécifique aux revendications fondées sur la liberté d'expression, il faut plutôt recourir au critère de l'entrave substantielle sur lequel la Cour suprême a insisté dans *APMO.*

[136] D'autre part, si la distinction est inutile et que l'interprétation téléologique de la liberté d'association doit primer, c'est encore le critère de l'entrave substantielle de l'arrêt *APMO*, lui-même cohérent avec les arrêts *Health Services* et *Fraser,* qui doit nous guider.

[137] Ainsi, en concentrant notre attention sur l'approche adoptée par la Cour suprême dans ces arrêts, le test de l'entrave substantielle adopté en premier lieu par le TAT était correct. On peut le reformuler de l'une ou l'autre des façons suivantes, lesquelles découlent des enseignements des arrêts *AMPO* et *Health Services* :

- Est-ce que le régime législatif contesté « prive les employés de protections adéquates dans leurs interactions avec l'employeur de manière à créer une entrave substantielle à leur capacité de véritablement mener des négociations collectives »[188]? ou, dit autrement,

- Est-ce que « la loi ou l'acte de l'État [contesté] a […] pour effet d'entraver de façon substantielle l'activité de négociation collective, décourageant ainsi la poursuite collective d'objectifs communs »[189]?

[138] Ce cadre analytique minimise au surplus le risque, comme le soulignait la juge Deschamps dans son opinion concourante dans l'arrêt *Fraser*[190]*,* « de détourner le débat de la teneur réelle de la garantie constitutionnelle »[191].

5.3.5 Les erreurs révisables commises par la Cour supérieure dans l'exercice de son pouvoir de contrôle judiciaire

[139] L'application des principes vus précédemment et du cadre d'analyse approprié aux faits nécessite d'abord de déterminer ceux dont il faut tenir compte. Or, pour les fins de cet exercice, la Cour est d'avis que la juge a erré en s'immisçant dans l'appréciation de la preuve, ce volet étant de l'entier ressort du TAT, pour en tirer ses propres

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186 *Québec (Procureur général) c. Confédération des syndicats nationaux (CSN)*, *supra*, note 4.
187 *Id.*, paragr. 87.
188 *APMO*, *supra*, note 67, paragr. 80.
189 *Health Services and Support - Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, *supra*, note 148, paragr. 90.
190 *Ontario (Procureur général) c. Fraser*, *supra*, note 15.
191 *Id.*, paragr. 317.

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conclusions, différentes de celles du tribunal spécialisé. Aucune « circonstance exceptionnelle »[192] ne le justifiait.

[140] Malgré sa conclusion voulant que l'objet de l'exclusion en litige viole l'alinéa 2*d*) de la *Charte canadienne*, le TAT a jugé opportun d'en examiner les effets[193]. Il en a conclu que ceux-ci constituent une entrave substantielle à la mise en place d'un véritable processus de négociation collective entre les parties compte tenu de leurs impacts négatifs sur **(i)** la représentativité et l'indépendance de l'Association face à l'Employeur et sa capacité à négocier collectivement les conditions de travail de ses membres, **(ii)** la capacité des SDO de procéder à un arrêt concerté de travail dans le cadre de négociations et **(iii)** leur non-accès à un mécanisme efficace de règlement des différends en cas d'ingérence ou de manquement de l'Employeur à son obligation de négocier de bonne foi, ou en cas de grève.

[141] Tel que déjà mentionné, bien que la norme de contrôle applicable par la Cour supérieure fût celle de la décision correcte, ces constats et conclusions relèvent de l'expertise spécialisée du TAT, de son appréciation globale de la preuve, trouvent appui dans cette dernière et commandent la déférence[194].

[142] Cela étant, la juge a conclu avec raison que le TAT n'a pas erré en déterminant que les modifications unilatérales de conditions de travail par l'Employeur sans aviser l'Association[195], son non-respect de l'obligation de consultation prévue dans le Protocole[196], son refus de négocier et même d'aborder certains sujets comme les salaires, les mouvements de main-d'œuvre, les bonis et la modification du Protocole[197] et le nombre d'interlocuteurs différents impliqués à plusieurs niveaux dans les discussions entre les parties[198] « ne cadrent pas avec la notion de véritables négociations collectives de bonne foi »[199], qu'ils « sape[nt] le processus de véritable négociation »[200] et que le tout constitue une « entrave substantielle à la liberté d'association des SDO »[201].

[143] Toutefois, la juge a erré en déterminant que le TAT a lui-même erré en concluant que l'impossibilité pour les SDO de bénéficier d'une reconnaissance véritable de l'Association, leur non-accès à un tribunal ou à un mécanisme de règlement spécialisé pour faire sanctionner l'ingérence, l'entrave ou la négociation de mauvaise foi de l'Employeur, ou pour requérir la protection de leurs droits de retour au travail en cas de

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192 *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Vavilov*, *supra*, note 83, paragr. 125.
193 Décision du TAT, paragr. 306.
194 *Mouvement laïque québécois c. Saguenay (Ville)*, 2015 CSC 16, paragr. 46.
195 Jugement entrepris, paragr. 206-207 et 209.
196 *Id*., paragr. 215.
197 *Id*., paragr. 216-217.
198 *Id*., paragr. 221 et 223.
199 *Id*., paragr. 222.
200 *Id*., paragr. 213.
201 *Id*., paragr. 148 et 223.

grève dans le cadre de la négociation collective sont des effets de l'exclusion en litige et qu'ils constituent eux aussi une entrave substantielle à la liberté d'association des SDO.

[144] Ce cumul de conclusions de la juge justifie l'intervention de la Cour. Tout dans ces constats du TAT pointe vers une entrave substantielle et donc, en droit, vers une atteinte à la liberté d'association. La conclusion contraire de la juge constitue une immixtion dans la compétence du tribunal spécialisé, alors que son appréciation de la preuve et ses conclusions de fait méritent déférence et, qu'au bout du compte, ces dernières sont non seulement intelligibles et raisonnables, mais aussi correctes.

a) Les conclusions du TAT concernant la représentativité et l'indépendance de l'Association face à l'Employeur

[145] La juge s'est dite d'avis que le TAT a erré « en décidant que [l'Association] a démontré, de manière prépondérante, que les SDO ne peuvent jouir d'une reconnaissance véritable de leur association »[202]. Ce faisant, elle s'immisce indûment dans l'appréciation de la preuve par le tribunal spécialisé. Les conclusions de ce dernier **(i)** que la reconnaissance de l'Association à titre de représentante des SDO est faite sur une base volontaire par l'Employeur, **(ii)** que son caractère représentatif et l'identification des SDO pour lesquels elle est reconnue relèvent de la discrétion de ce dernier et selon ses conditions[203], **(iii)** qu'il a le dernier mot en cas de désaccord sur les personnes qu'elle peut représenter et **(iv)** qu'il n'existe aucune protection ni aucun recours contre l'ingérence ou l'entrave de l'Employeur dans les démarches visant la représentativité[204], entraînant de ce fait un réel déséquilibre du rapport de force entre les parties[205], trouvent appui dans la preuve et méritent déférence.

[146] D'autant plus que leur justesse est supportée par les enseignements suivants de la Cour suprême dans l'arrêt *APMO* :

> [82] La négociation collective représente un aspect fondamental de la société canadienne qui « favorise la dignité humaine, la liberté et l'autonomie des travailleurs en leur donnant l'occasion d'exercer une influence sur l'adoption des règles régissant leur milieu de travail et, de ce fait, d'exercer un certain contrôle sur un aspect d'importance majeure de leur vie, à savoir leur travail » (*Health Services*, par. 82). En termes simples, son objectif consiste à protéger l'autonomie collective des employés contre le pouvoir supérieur de l'administration et à maintenir un équilibre entre les parties. Cet équilibre s'établit grâce à la liberté de choix et à l'indépendance accordées aux employés dans le cadre de ce processus de relations de travail.

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202 Jugement entrepris, paragr. 143.
203 Décision du TAT, paragr. 385, 387 et 389.
204 Décision du TAT, paragr. 311.
205 *Id*., paragr. 320 et 395.

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[…]

a) *Liberté de choix de l'employé*

[85] L'objectif de la négociation collective n'est pas atteint si le processus qui l'entoure entrave le droit des employés de choisir ce qui est dans leur intérêt et comment ils devraient défendre ce dernier. La liberté de choix requise par la *Charte* doit permettre aux employés de participer réellement au choix de leurs objectifs collectifs. Ce droit de participer au processus collectif s'avère essentiel pour protéger la capacité des employés de faire valoir leurs propres intérêts, […].

[…]

b) *Indépendance à l'égard de la direction*

[88] L'objectif de la négociation collective n'est pas atteint si l'employeur domine ou influence le processus qui l'entoure. C'est pourquoi un processus véritable de négociation collective protège le droit des employés de former des associations qui sont indépendantes de la direction, et d'y adhérer […]. À l'instar de la liberté de choix, l'indépendance dans le contexte de la négociation collective n'est pas absolue. L'indépendance requise par la *Charte* aux fins de la négociation collective est celle qui fait correspondre les activités de l'association aux intérêts de ses membres.

[89] Tout comme le choix, l'indépendance à l'égard de l'employeur garantit que les activités de l'association reflètent les intérêts des employés, ce qui respecte la nature et l'objet du processus de négociation collective et en assure le bon fonctionnement. À l'inverse, un manque d'indépendance signifie que les employés ne sont peut-être pas en mesure de faire valoir leurs propres intérêts, mais qu'ils doivent choisir parmi ceux que l'employeur les autorise à défendre. Au nombre des facteurs à considérer dans l'examen de l'indépendance, mentionnons la liberté de modifier l'acte constitutif et les règles de l'association, la liberté de choisir les représentants de celle-ci ainsi que le contrôle sur l'administration financière et sur les activités que l'association décide de mener.

[90] L'indépendance et la liberté de choix forment des règles complémentaires pour déterminer si un régime de relations de travail respecte les exigences de la Constitution. Le respect de la *Charte* s'évalue en fonction des *degrés* d'indépendance et de liberté de choix garantis par le régime de relations de travail, en portant une attention particulière au contexte global du régime. Les degrés de liberté de choix et d'indépendance accordés ne devraient pas être examinés isolément, mais plutôt globalement, toujours dans le but de déterminer si les employés sont en mesure de s'associer en vue de réaliser véritablement des objectifs collectifs relatifs au travail.

[Soulignements ajoutés; italiques dans l'original]

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b) Les conclusions du TAT concernant le non-accès à un mécanisme spécialisé de règlement des différends

[147] Si, comme on l'a vu, la juge reconnaît que le TAT n'a pas erré en tirant de la preuve que certains agissements de l'Employeur « ne cadrent pas avec la notion de véritable négociation collective de bonne foi, composante essentielle à la liberté d'association »[206], et que ses modifications unilatérales de certaines conditions de travail importantes sapent le processus de véritable négociation[207], le tout constituant « une entrave substantielle à la liberté d'association des SDO »[208], elle conclut néanmoins que le TAT a erré en déterminant que les SDO ne peuvent bénéficier d'un véritable processus de négociation collective vu l'absence de recours auprès d'un tribunal spécialisé en droit du travail afin d'assurer avec diligence le respect de l'obligation de négociation de bonne foi de l'Employeur[209].

[148] Ce faisant, malgré les constats factuels du TAT qu'elle retient pourtant, la juge en tire une conclusion erronée en droit.

[149] La Cour suprême a en effet reconnu à plusieurs reprises que le règlement rapide, définitif et exécutoire des conflits de travail par des arbitres et autres tribunaux spécialisés revêt une importance fondamentale, tant pour les parties que pour l'ensemble de la société[210] : « Il s'agit d'une exigence fondamentale de la paix dans le domaine des relations industrielles, paix qui est importante pour les parties et l'ensemble de la société »[211]. Dans l'arrêt *Dayco (Canada) Ltd. c. TCA-Canada*[212], le juge Cory soulignait quant à lui la nécessité de résoudre les conflits de travail « de manière expéditive » et « l'importance vitale » des tribunaux du travail à cette fin[213]. Le commentaire vise autant le mécanisme de règlement de griefs découlant de l'application d'une entente collective de travail que celui permettant de solutionner les différends liés à la négociation de cette dernière, à plus forte raison lorsque les employés concernés ne peuvent chercher à équilibrer le rapport de force en exerçant leur droit de grève de façon collective et efficace.

[150] Ainsi, en se disant d'avis que l'Association et ses membres peuvent de façon adéquate chercher réparation devant les tribunaux de droit commun en invoquant les *Chartes* pour faire sanctionner l'ingérence ou la violation par l'Employeur de son obligation de négocier de bonne foi, la juge omet de considérer les exigences procédurales et les délais propres aux instances introduites devant les tribunaux de droit

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206 Jugement entrepris, paragr. 222.
207 *Id.* paragr. 113.
208 *Id.*, paragr. 148 et 223.
209 Décision du TAT, paragr. 328, 334 et 336 en particulier et jugement entrepris, paragr. 147.
210 *Parry Sound (District), Conseil d'administration des services sociaux c. S.E.E.F.P.O., section locale 324*, 2003 CSC 42, paragr. 50; *Blanchard c. Control Data Canada Ltée*, [1984] 2 R.C.S. 476, p. 489 citant *Heustis c. Commission d'énergie électrique du Nouveau-Brunswick*, [1979] 2 R.C.S. 768, p. 781.
211 *Conseil de l'éducation de Toronto (Cité) c. F.E.E.E.S.O., district 15*, [1997] 1 R.C.S. 487, paragr. 36.
212 *Dayco (Canada) Ltd. c. TCA-Canada*, [1993] 2 R.C.S. 230.
213 *Id*., p. 306-307.

commun, par rapport à la plus grande simplicité et à la rapidité qui caractérisent le règlement des conflits devant les tribunaux spécialisés du travail.

[151] En sus qu'il s'agit là de faits sociaux qui s'entremêlent aux faits en litige, dont l'appréciation relevait du TAT au premier chef et à l'égard desquels la juge devait faire preuve de déférence[214], on voit aussi difficilement, ce que sous-tend la position de la juge, comment la Cour supérieure pourrait, vu l'exclusion des cadres de la définition de salarié du *C.t.* et l'absence de tout autre régime législatif ou réglementaire de relations de travail, ordonner des réparations pratiques et efficaces permettant d'assurer un véritable processus de négociation collective si, par exemple, l'employeur refuse de négocier ou ne négocie pas de bonne foi. Sur le même thème, comment pourrait-elle forcer l'employeur à négocier avec une association plutôt qu'une autre?

c) Les conclusions du TAT concernant l'exercice du droit de grève

[152] La juge ne remet pas en question les conclusions de fait du TAT concernant les effets de l'exclusion en litige sur le droit de grève des SDO, mais elle commet une erreur de droit en n'y appliquant pas le critère juridique approprié.

[153] En effet, elle conclut que les SDO ne sont pas empêchés de « se livrer à un arrêt de travail dans le cadre d'un processus de négociation de leurs conditions de travail, puisqu'il n'existe pas de loi leur interdisant de faire la grève »[215]. Elle conclut ni plus ni moins ainsi que seule une *impossibilité* de faire la grève pourrait constituer une entrave substantielle à leur capacité de mener de véritables négociations collectives et entraîner ainsi une violation de l'alinéa 2*d*) de la *Charte canadienne*. Outre que sa conclusion selon laquelle les SDO peuvent exercer leur droit de grève de façon efficace est mal fondée en droit au regard de la preuve, son approche que seule une *interdiction*, ou *impossibilité*, de faire la grève constitue une entrave est similaire à celle adoptée par la Cour d'appel de l'Ontario dans l'affaire *AMPO*, laquelle avait conclu qu'il n'était pas « effectivement impossible » pour les membres de la GRC d'exercer véritablement leurs droits garantis par l'alinéa 2*d*).

[154] Or, la Cour suprême a infirmé cette approche. Les juges McLachlin et LeBel, commentant, d'une part, l'à-propos d'un tel critère du « effectivement impossible » et, d'autre part, les motifs dissidents du juge Rothstein, précisaient ce qui suit :

> [72] L'équilibre nécessaire à la poursuite véritable d'objectifs relatifs au travail peut être rompu de maintes façons. […] Quelle que soit la nature de la restriction, il faut essentiellement déterminer si les mesures en question perturbent l'équilibre des rapports de force entre les employés et l'employeur que l'al. 2*d*) vise à établir, de telle sorte qu'elles interfèrent de façon substantielle avec un processus véritable de négociation collective (*Health Services*, par. 90).

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214 *Canada (Procureur général) c. Bedford*, 2013 CSC 72, paragr. 49-56.

215 Jugement entrepris, paragr. 228 [soulignement ajouté].

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[73] À l'encontre de cette conception, le procureur général du Canada soutient, en se fondant sur l'arrêt *Fraser*, que la négociation collective est tout au plus un « droit dérivé » du droit fondamental ou « essentiel » de s'associer (l'approche constitutive). Il s'ensuit, selon lui, que la négociation collective n'est protégée que si l'acte de l'État rend *effectivement impossible* l'association en vue de régler des questions relatives au travail. En l'espèce, affirme le procureur général, cette impossibilité n'existe pas, parce que le PRRF constitue un moyen pour les membres de s'associer à des fins relatives au travail. La Cour d'appel a accepté cette thèse. Nous ne sommes pas d'accord. […]

[…]

[75] Dans ces passages des arrêts *Fraser* et *Health Services*, la Cour utilise des termes comme « impossible » et « supprimer dans les faits » pour décrire **l'effet** de certains régimes législatifs (**notamment les exclusions prévues par la loi**) et non pas le critère juridique permettant de conclure à une violation de l'al. 2*d*). […] Comme l'ont expliqué en outre les juges majoritaires dans *Fraser*, on ne peut « douter que la loi (ou l'absence d'un cadre législatif) qui rendait essentiellement impossible » l'atteinte d'objectifs collectifs relatifs au travail « restreignait l'exercice de la liberté d'association » (par. 32 (nous soulignons)). **Manifestement, de tels passages ne fixent pas comme seuil pour conclure à l'existence d'une atteinte à la liberté d'association, la démonstration qu'il soit « essentiellement impossible » de poser certains gestes.** Ces passages démontrent plutôt que les juges majoritaires dans *Fraser* ont adopté le *test juridique* de l'entrave substantielle pour conclure à une atteinte au droit d'association.

[76] En dissidence dans la présente affaire, le juge Rothstein souligne que les juges majoritaires dans *Fraser* « mentionnent le critère de l'impossibilité — substantielle ou effective — à pas moins de douze reprises, en en retraçant les origines aux arrêts *Dunmore* et *Health Services* [...] (voir *Fraser*, par. 31-34, 38, 42, 46-48, 62 et 98) » (par. 213 (en italique dans l'original)). Dans presque tous les cas (voir les par. 31-33, 38, 42, 46-48, 62 et 98), l'« impossibilité » renvoie expressément à l'*effet* de la loi ou à l'absence d'un cadre législatif. Aux paragraphes 31, 33, 47-48 et 62, **les juges majoritaires affirment expressément que le critère d'entrave ou d'atteinte substantielle constitue la norme applicable pour conclure à une violation de l'al. 2*d*).** Enfin, les juges majoritaires dans *Fraser* ont confirmé la conclusion de *Health Services* selon laquelle « [l]a question fondamentale en jeu demeure celle de déterminer si l'acte de l'État *entraverait substantiellement* la capacité des "syndiqués de poursuivre collectivement des objectifs communs" (par. 96) » […].

[77] Cela dit, nous convenons que certains passages de *Fraser* semblent compliquer inutilement l'analyse en renvoyant à la fois à l'impossibilité effective (en tant qu'effet de certaines mesures gouvernementales) et à l'entrave ou atteinte substantielle (en tant que critère applicable pour conclure à une violation de l'al. 2*d*)). Cependant, pour les motifs que nous venons d'exposer, ces renvois devraient être interprétés conformément aux motifs des juges majoritaires dans

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> *Fraser*, lus dans leur intégralité, ainsi qu'aux précédents établis par la Cour dans *Dunmore* et *Health Services*. De façon plus générale, leur interprétation doit respecter l'interprétation téléologique et généreuse donnée par la Cour à l'al. 2*d*), et qui a été expliquée précédemment.
>
> [Soulignements et caractères gras ajoutés]

[155] Dans son opinion dissidente dans le *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*[216], laquelle a posé les premiers jalons importants de la jurisprudence récente de la Cour suprême sur la liberté d'association[217], le juge Dickson observait quant à lui que le refus de travailler par un individu ne correspond nullement à un refus *collectif* de travailler, lequel est en effet différent au point de vue qualitatif plutôt que quantitatif[218].

[156] Enfin, 15 ans plus tard, dans l'arrêt *Saskatchewan*[219], la Cour suprême confirmait que le droit de grève participe de façon essentielle au véritable processus de négociation collective inhérent à la liberté d'association :

> [24] Je me range à l'avis du juge de première instance. De pair avec le droit de s'associer, de s'exprimer par l'entremise de l'agent négociateur de leur choix et de négocier collectivement avec leur employeur par l'entremise de cet agent, le droit de grève des salariés est indispensable à la protection du processus véritable de négociation collective pour l'application de l'al. 2*d*). Comme le fait observer le juge, sans le droit de grève, [TRADUCTION] « le droit constitutionnel de négocier collectivement perd tout son sens ».
>
> […]
>
> [46] Il importe toutefois de souligner que la reconnaissance du droit de grève n'est pas propre au seul modèle *Wagner*; elle est de la plupart des modèles de relations de travail. Et lorsque l'histoire montre l'importance de la grève pour le bon fonctionnement d'un modèle de relations de travail en particulier, comme c'est le cas du modèle fondé sur la *Loi Wagner*, on ne doit pas s'étonner que la suppression du droit de grève légal soit considérée comme une entrave substantielle à la négociation collective véritable. En effet, on reconnaît depuis longtemps que le pouvoir des travailleurs de cesser collectivement le travail aux fins de la négociation de leurs conditions de travail — le droit de grève, en somme — constitue une composante essentielle de la poursuite, par les travailleurs, d'objectifs liés au travail. […]
>
> [Soulignements ajoutés]

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216 *Renvoi relatif à la Public Service Employee Relations Act (Alb.),* [1987] R.C.S. 313.

217 Voir par exemple les emprunts fréquents des juges McLachlin et LeBel à cette dissidence dans leur opinion pour la majorité dans l'arrêt *APMO*, *supra*, note 67, aux paragr. 35, 36, 51 à 55, 57 et 105.

218 *Id.*, p. 367.

219 *Saskatchewan Federation of Labour c. Saskatchewan*, *supra*, note 69.

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[157] En somme, les constats de fait et mixtes de fait et de droit suivants du TAT étant fondés sur la preuve et relevant de son champ d'expertise, la juge devait s'abstenir d'y substituer les siens :

> [345] En dehors de la législation qui l'encadre, un employé, seul ou de façon concertée avec d'autres, qui cesse de fournir sa prestation de travail, est passible de se voir imposer des mesures disciplinaires, voire d'être congédié. De plus, on ne peut faire fi du fait que les personnes en cause sont justement des cadres, représentants de l'employeur, qui, de par leur statut et leur culture, peuvent être réticentes à recourir à de tels moyens de pression dans l'état actuel des choses.
>
> [346] L'exclusion du régime général a pour effet de priver les cadres de pouvoir exercer le droit de grève. Or, c'est le moyen par excellence qui permet d'assurer une participation véritable au processus de négociation collective et d'établir un rapport de force entre les parties. […] En l'espèce, il est supprimé, sans être remplacé par un autre mécanisme.
>
> [347] Or, la preuve a démontré l'incapacité des deux associations demanderesses à rétablir un rapport de force et à négocier pour leurs membres sur des objets d'importance. Les employeurs en cause ont toujours le dernier mot et ne sont passibles d'aucune forme de pression.
>
> [348] La suppression du droit de grève, sans autre mécanisme, constitue alors une entrave substantielle au droit à la négociation collective de l'ACSCQ […].

5.3.6 Application : réponse à la présente question

[158] Outre ses interventions non déférentes à l'égard de certains des constats du TAT, relevées dans la sous-section 5.3.5 qui précède, la juge, bien qu'elle retienne que ce dernier n'a pas erré en concluant de la preuve que les modifications unilatérales de certaines conditions de travail par l'Employeur, sans même aviser l'Association et sans respecter l'obligation de consultation convenue dans le Protocole, son refus de négocier les salaires, les mouvements de main-d'œuvre, les bonis et toute modification du Protocole « sape[nt] le processus de véritable négociation »[220] et constituent « une entrave substantielle à la liberté d'association des SDO »[221], conclut néanmoins que le TAT a commis une erreur en axant son analyse de ces entraves substantielles « eu égard aux droits et recours prévus au *Code du travail* et non par rapport à l'alinéa 2d) la *Charte canadienne* »[222].

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220 Jugement entrepris, paragr. 213.
221 *Id.*, paragr. 148 et 223.
222 *Id.*, paragr. 144.

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[159] Dans leur jugement pour la Cour dans l'arrêt *Health Services*[223], la juge en chef McLachlin et le juge LeBel rappelaient un « principe clair » : « les mesures gouvernementales qui diminuent considérablement la capacité des individus de s'associer dans le but de promouvoir leurs intérêts en matière de relations du travail portent atteinte à la liberté d'association garantie par l'al. 2*d*) de la *Charte* »[224].

[160] Or, comme on l'a vu précédemment à la lecture de certains des débats parlementaires entourant l'adoption de l'exclusion en litige et les amendements subséquents au *C.t.* de 1964 qui y sont reliés, le gouvernement de l'époque savait pertinemment que l'exclusion des cadres du régime de relations de travail instauré par le *Code* avait pour effet de les priver de la « couverture » offerte par les mécanismes de protection du processus de négociation collective qu'il contient et de les soumettre à ce qu'il considérait être la « loi de la jungle ». Il n'y a là qu'un pas à franchir pour conclure en l'espèce que l'exclusion « orchestre, encourage ou tolère d'une manière substantielle la violation »[225] par l'Employeur de la liberté d'association des SDO.

[161] L'exclusion législative en litige a ainsi pour effet d'imposer aux SDO un isolement qui entrave de façon substantielle leur poursuite des fins de la liberté d'association qui leur est garantie par les *Chartes.* Comme le notait le juge Dickson dans le *Renvoi relatif à la Public Service Employee Relations Act (Alb.),* la garantie constitutionnelle vise précisément à protéger l'individu contre un tel isolement imposé par l'État[226]. Le juge Bastarache, faisant siennes au surplus plusieurs des observations du juge Dickson, abondait dans le même sens dans l'arrêt *Dunmore* en notant que « s'il n'existe pas de droit constitutionnel à la protection légale [offerte par un régime de relations de travail particulier], l'exclusion sélective d'un groupe de ce type de législation peut avoir des effets substantiels sur l'exercice d'une liberté fondamentale »[227].

[162] En l'espèce, la preuve permettait au TAT de conclure que l'exclusion sans nuances des cadres de la définition de « salarié » du *C.t.*, doublée du refus de l'État de donner suite aux recommandations du Comité de l'OIT, fondées elles-mêmes sur des normes internationales en droit du travail auxquelles le Canada a adhéré, constitue en grande partie le terreau et le fondement des nombreux faits et gestes de l'Employeur qui, tant de l'avis du TAT que de celui de la juge, traduisent une négation des droits de l'Association et de ses membres à un véritable processus de négociation collective.

[163] En définitive, les conclusions du TAT voulant que l'exclusion des SDO de la définition de « salarié » de l'article 1*l*) 1° du *C.t.* contribue à entraver substantiellement leur droit à un régime permettant une véritable négociation collective de leurs relations

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223 *Health Services and Support – Facilities Subsector Bargaining Assn. c. Colombie-Britannique*, *supra*, note 148.
224 *Id.*, paragr. 35.
225 *Dunmore c. Ontario (Procureur général)*, *supra*, note 89, paragr. 26.
226 *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, *supra*, note 216, p. 365.
227 *Dunmore c. Ontario (Procureur général)*, *supra*, note 89, paragr. 35.

de travail avec l'Employeur et, de ce fait, leur liberté d'association, reposent sur une juste considération des principes juridiques applicables, d'une part, et trouvent appui dans la preuve, d'autre part.

[164] Cela ne fait pas pour autant en sorte que le législateur québécois doive nécessairement, par voie législative, inclure dans la définition de « salarié » du *C.t.* les personnes « qui, au jugement du tribunal »[228] seraient des cadres de premier niveau ou d'un niveau permettant autrement de les considérer au même titre que des « salariés ». Les commentaires suivants des juges McLachlin et LeBel dans l'arrêt *AMPO* peuvent en effet trouver application en l'espèce, avec les adaptations qui s'imposent :

> [136] Nous concluons que l'objet de l'exclusion prévue au par. 2(1) de la *LRTFP* actuelle constitue une entrave substantielle à la liberté d'association. […]
>
> [137] Cette conclusion ne signifie pas que le législateur doit inclure la GRC dans le régime de la *LRTFP* actuelle. Comme nous l'avons vu, l'al. 2*d*) de la *Charte* n'impose pas un modèle particulier de relations du travail. Notre conclusion quant à la constitutionnalité de l'exclusion prévue par la *LRTFP* actuelle signifie seulement que le législateur ne doit pas entraver substantiellement le droit des membres de cette organisation à un processus véritable de négociation collective, à moins que cette entrave puisse être justifiée au regard de l'article premier de la *Charte*. Par exemple, le gouvernement fédéral peut toujours examiner d'autres processus de négociations collectives qui seraient plus adaptés au contexte particulier dans lequel les membres de la GRC s'acquittent de leurs fonctions.
>
> [Soulignements ajoutés]

[165] En terminant, bien que ce ne soit pas nécessaire pour trancher la présente question vu la suffisance du seul test de l'entrave substantielle pour le faire, un mot s'impose néanmoins sur la conclusion de la juge voulant que l'entrave substantielle à la capacité de l'Association et de ses membres de mener de véritables négociations collectives découle exclusivement des faits, gestes et omissions purement privés de l'Employeur, et dont l'État n'est pas responsable.

[166] D'emblée, il convient de remarquer que, pour d'aucuns, le terme « responsable » connote, à tout le moins intuitivement, l'idée de « faute » ou de « négligence » de l'État. Or, selon la Cour, la démonstration d'un tel niveau de responsabilité n'est pas nécessaire. Ainsi, le juge Bastarache soulignait ce qui suit dans l'arrêt *Dunmore* :

> 26 […] On prétend en l'espèce que l'incapacité de constituer une association résulte d'une action privée et que l'inclusion obligatoire dans un régime légal irait à l'encontre de l'arrêt *Dolphin Delivery*, précité. Il faut toutefois signaler que, depuis cet arrêt, l'interprétation de l'« action gouvernementale » par notre Cour a évolué et qu'elle pourrait encore se modifier compte tenu de l'évolution des valeurs qui

[228] Art. 1*l*) 1° *C.t.*

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> sous-tendent la Charte. Par exemple, notre Cour a maintes fois rappelé que la participation de personnes privées à la violation de libertés fondamentales ne met pas l'État à l'abri d'un contrôle judiciaire fondé sur la *Charte*; cette participation doit être considérée comme un élément du contexte factuel dans lequel la loi est examinée […]. En outre, notre Cour a souvent statué, dans le contexte du par. 15(1), que la *Charte* peut obliger l'État à élargir le champ d'application d'une loi lorsque sa portée trop limitative permet à une personne privée de porter atteinte à des droits et libertés fondamentaux […]. Enfin, on a laissé entendre que la *Charte* devrait s'appliquer à toute loi qui « permet » à une personne privée de nuire à une activité protégée par l'art. 2, étant donné que, dans certains cas, la simple faculté donnée peut avoir pour effet d'encourager ou d'appuyer l'acte en cause […]. Si l'on applique ces principes généraux à l'al. 2*d*), ce n'est pas un grand bond en avant de dire que le défaut d'inclure une personne dans un régime de protection peut positivement permettre la restriction de l'activité que le régime vise à protéger. La raison en est que la mesure gouvernementale de portée trop limitative devient suspecte non seulement dans la mesure où elle est discriminatoire à l'endroit d'une catégorie non protégée, mais aussi dans la mesure où elle orchestre, encourage ou tolère d'une manière substantielle la violation de libertés fondamentales.
>
> […]
>
> 29 […] De même, il faut se rappeler la raison pour laquelle la *Charte* s'applique à une loi limitative. Une fois que l'État a décidé de réglementer une relation d'ordre privé, comme celle entre employeur et employé, je crois qu'il est trop formaliste d'assigner cette relation à un « domaine privé » qui échappe au contrôle fondé sur la *Charte*. Selon le doyen P. W. Hogg, [TRADUCTION] « l'effet de la restriction de l'action gouvernementale est qu'il existe un domaine privé à l'intérieur duquel les personnes ne sont pas obligées de souscrire aux valeurs de "l'État" et à l'intérieur duquel les normes constitutionnelles n'interviennent pas. Les limites de ce domaine sont établies non pas par une définition a priori de ce qui est "privé", mais par l'absence d'intervention gouvernementale, législative ou autre » (voir *Constitutional Law of Canada* (éd. feuilles mobiles), p. 34-27). […][229]
>
> [Soulignements ajoutés]

[167] La juge en chef McLachlin et le juge LeBel abondaient dans le même sens dans l'arrêt *Fraser*[230] :

> [73] On peut également faire observer que *Health Services* n'impose pas d'obligations constitutionnelles aux employeurs du secteur privé, mais plutôt aux gouvernements à titre d'employeurs ainsi qu'au Parlement et aux assemblées législatives en qualité de législateurs, conformément à l'art. 32 de la *Charte*. Les juges majoritaires reconnaissent ainsi que les individus possèdent, vis-à-vis de l'État, le droit à un processus de négociation collective de bonne foi et que ce droit

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229 *Dunmore c. Ontario (Procureur général)*, *supra*, note 89, paragr. 26 et 29.

230 *Ontario (Procureur général) c. Fraser*, *supra*, note 15.

> demande à l'État d'imposer des obligations légales aux employeurs. Comme le relèvent les juges Cory et Iacobucci dans l'arrêt *Vriend c. Alberta*, […], il faut faire une distinction « entre l'"activité privée" et la "loi qui régit l'activité privée". La première n'est pas assujettie à la *Charte*, alors que la seconde l'est manifestement » (par. 66). Les travailleurs qui sont dans l'impossibilité d'exercer leur droit de négociation collective ne peuvent que poursuivre l'État, et non leur employeur, sur le fondement de la *Charte*, et ils doivent faire la preuve d'une action de l'État.
>
> [Soulignements ajoutés]

[168] En l'espèce, on peut, sans crainte de se tromper, considérer que l'exclusion expresse de tous les cadres de la définition de « salarié » à l'article 1*l*) 1° *C.t.* constitue une telle « action de l'État ».

[169] La conclusion de la juge que l'atteinte à la liberté d'association garantie aux membres de l'Association relève exclusivement de la Société, et que l'État y est de ce fait totalement étranger, est aussi difficilement compatible avec le fait que l'Employeur est une filiale de Loto-Québec et les liens qui existent entre cette dernière et l'État.

[170] En effet, Loto-Québec, dont les membres du conseil d'administration sont nommés par le gouvernement[231], jouit des droits et privilèges d'un mandataire de l'État[232], est désignée comme une « entreprise du gouvernement » dans la *Loi sur l'administration financière*[233] et est visée par la *Loi sur la gouvernance des sociétés d'État*[234].

5.4 Dans la négative, le TAT a-t-il commis une erreur révisable en concluant que cette atteinte n'est pas justifiée suivant l'article premier de la Charte canadienne et l'article 9.1 de la Charte québécoise?

[171] Alors que la Cour supérieure ne se prononce pas sur la question, vu sa conclusion ultime que l'exclusion en litige ne porte pas en soi atteinte à la liberté d'association des SDO, le TAT conclut qu'elle n'est pas justifiable selon le test développé dans l'arrêt *Oakes*[235].

[172] Plus précisément, le TAT conclut à la première étape du test qu'il n'a pas été démontré que l'objectif invoqué par le PGQ pour justifier l'exclusion en litige, soit éviter l'ingérence de l'employeur, par l'intermédiaire des cadres, dans les affaires collectives des employés syndiqués, et éviter les situations de conflits d'intérêts dans lesquelles les

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231 *Loi sur la Société des loteries du Québec*, RLRQ, c. S-13.1, art. 6.2, 9, 9.1 et 9.2.
232 *Id.*, art. 4.
233 *Loi sur l'administration financière*, RLRQ, c. A-6.001, art. 2 al. 3 et Annexe 3.
234 *Loi sur la gouvernance des sociétés d'État*, RLRQ, c. G-1.02, art. 2 et Annexe 1.
235 *R. c. Oakes*, *supra*, note 77.

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cadres pourraient se retrouver, ou encore les conséquences d'un arrêt de travail de ces derniers, était réel et urgent lors de l'adoption de l'exclusion législative[236].

[173] Puis, à supposer même que le caractère réel et urgent des objectifs précités aurait été démontré, le TAT rejette l'argument du PGQ concernant l'existence d'un lien rationnel entre ces objectifs et l'exclusion[237].

[174] Enfin, le TAT tranche que l'atteinte portée à la liberté d'association par l'exclusion en litige n'est pas la plus minimale possible. L'exclusion ne comporte en effet aucune nuance quant aux niveaux des cadres exclus de la notion de « salarié » ni aucune distinction quant à leur rang dans l'entreprise, la nature de leurs fonctions et leur participation, ou non, aux négociations avec les groupes syndiqués[238].

[175] Qu'en est-il?

[176] L'article 1 de la *Charte canadienne* et l'article 9.1 de la *Charte québécoise* sont ainsi libellés :

[*Charte canadienne*] **Droits et libertés au Canada** **1** La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.	**Rights and freedoms in Canada** **1** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
[*Charte québécoise*] **9.1** Les libertés et droits fondamentaux s'exercent dans le respect des valeurs démocratiques, de la laïcité de l'État, de l'ordre public et du bien-être général des citoyens du Québec. La loi peut, à cet égard, en fixer la portée et en aménager l'exercice.	**9.1** In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, State laicity, public order and the general well-being of the citizens of Québec. In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

[236] Décision du TAT, paragr. 405-410.
[237] *Id*., paragr. 411-422.
[238] *Id.*, paragr. 423.

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[177] L'exercice de pondération à effectuer sous l'article 9.1 de la *Charte québécoise* obéit par ailleurs au même test de justification que celui développé dans l'arrêt *Oakes* concernant l'article premier de la *Charte canadienne*[239].

[178] Dans le récent arrêt *Procureur général du Québec c. Gallant*[240], le juge Moore résumait ainsi pour la Cour le cadre analytique du test de justification :

> [182] La démarche que commande cette grille d'analyse est bien connue. Dans un premier temps, l'État doit démontrer que la mesure attentatoire est prescrite par une règle de droit et poursuit un objectif urgent et réel. Dans un deuxième temps, le gouvernement doit établir que, dans la poursuite de cet objectif, la mesure attentatoire ne porte pas atteinte de façon disproportionnée au droit en cause. Cette deuxième partie de la grille d'analyse de l'arrêt *Oakes* comporte trois volets. L'État doit ainsi successivement démontrer (1) que l'atteinte a un lien rationnel avec l'objectif poursuivi; (2) que les moyens choisis pour réaliser cet objectif portent le moins possible atteinte au droit en cause; et (3) que les avantages de la mesure attentatoire l'emportent sur ses effets préjudiciables.
>
> [183] La norme de preuve applicable à chacune de ces étapes est celle de la prépondérance des probabilités. L'appréciation doit suivre une approche contextualisée prenant en compte, notamment, la vulnérabilité du groupe que le législateur entend protéger et la nature de l'activité à laquelle il est porté atteinte.
>
> [Soulignements ajoutés; renvois omis]

[179] Par ailleurs, dans l'arrêt *RJR – MacDonald Inc. c. Canada (Procureur général)*[241], la juge McLachlin rappelait que le respect dû par les tribunaux aux choix du législateur lors de l'analyse du test de justification de l'article premier comporte ses limites :

> 136 Cependant, comme pour le contexte, il faut prendre soin de ne pas pousser trop loin la notion du respect. Le respect porté ne doit pas aller jusqu'au point de libérer le gouvernement de l'obligation que la *Charte* lui impose de démontrer que les restrictions qu'il apporte aux droits garantis sont raisonnables et justifiables. Le Parlement a son rôle: choisir la réponse qui convient aux problèmes sociaux dans les limites prévues par la Constitution. Cependant, les tribunaux ont aussi un rôle: déterminer de façon objective et impartiale si le choix du Parlement s'inscrit dans les limites prévues par la Constitution. Les tribunaux n'ont pas plus le droit que le Parlement d'abdiquer leur responsabilité. Les tribunaux se trouveraient à diminuer leur rôle à l'intérieur du processus constitutionnel à affaiblir la structure des droits sur lesquels notre constitution et notre nation sont fondées, s'ils portaient le

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239 *Chaoulli c. Québec (Procureur général)*, 2005 CSC 35, paragr. 47-48, citant *Ford c. Québec (Procureur général)*, [1988] 2 R.C.S. 712, p. 769-771.

240 *Procureur général du Québec c. Gallant,* 2021 QCCA 1701*;* voir aussi *Frank c. Canada (Procureur général),* 2019 CSC 1, paragr. 38-39.

241 *RJR – MacDonald Inc. c. Canada (Procureur général),* [1995] 3 R.C.S. 199; sur le même thème, voir *Chaoulli c. Québec (Procureur général)*, *supra*, note 239, paragr. 87 (motifs de la j. Deschamps).

> respect jusqu'au point d'accepter le point de vue du Parlement simplement pour le motif que le problème est sérieux et la solution difficile.
>
> [Soulignements ajoutés]

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[180] En l'espèce, la Cour est d'avis qu'il n'y a rien à redire au constat du TAT, selon lequel le bât blesse de façon déterminante à l'étape du critère de l'atteinte minimale, ce qui le justifiait de conclure que le PGQ a échoué à satisfaire le test de justification :

> [423] L'exclusion des cadres du régime d'accréditation général est faite sans aucune distinction quant à leur rang dans l'entreprise, la nature de leurs fonctions, le fait qu'ils aient ou non accès à de l'information confidentielle, leur participation aux négociations avec les groupes syndiqués et ainsi de suite.
>
> [424] Cette exclusion ne se limite pas non plus à interdire que les cadres fassent partie de la même unité que le reste des employés. C'est pourtant un modèle possible afin de prévenir les conflits d'intérêts, modèle choisi pour les policiers municipaux et récemment pour les enquêteurs de la CCQ dans le cadre de la lutte contre la corruption dans l'industrie de la construction.
>
> [425] Plusieurs autres modèles, adoptés par le législateur en regard de groupes particuliers, tel qu'il ressort de la revue des régimes spécifiques faite précédemment, permettent une atteinte moins grande à la liberté d'association.
>
> [426] Qui plus est, des exemples au Québec, au Canada et au niveau international démontrent la possibilité pour des cadres d'être syndiqués sans pour autant que cela ne nuise à leur rôle au sein de l'entreprise.[242]

[181] En fait, le PGQ n'a pas établi « que la mesure en cause restreint le droit aussi peu que cela est raisonnablement possible aux fins de la réalisation de l'objectif législatif »[243], ou autrement dit, qu'il n'existe pas de « moyens moins préjudiciables de réaliser l'objectif législatif »[244]. Il n'a en conséquence pas démontré que l'atteinte est justifiée au regard de l'article premier de la *Charte canadienne* et de l'article 9.1 de la *Charte québécoise*.

[182] Si, comme l'a écrit un auteur peu après l'entrée en vigueur du *Code du travail,* cette loi, comme les autres « est censée représenter aussi fidèlement que possible, quoique avec un certain retard, la volonté commune et les "mœurs" d'une société »[245], force est de constater, d'une part, que l'exclusion sans nuance de tous les niveaux de cadres de la définition de salariés apparaît clairement être en porte-à-faux avec l'évolution de la liberté d'association suivant la jurisprudence récente de la Cour suprême et, d'autre part, que le PGQ a échoué à démontrer que ce déséquilibre demeure justifié.

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242 Décision du TAT, paragr. 423-426.

243 *Frank c. Canada (Procureur général)*, *supra*, note 240, paragr. 66.

244 *Alberta c. Hutterian Brethen of Wilson Colony*, 2009 CSC 37, paragr. 53; au même effet, *RJR – MacDonald inc. Canada (Procureur general)*, *supra*, note 240, paragr. 160.

245 Roger Chartier, *Le syndicalisme de cadres et la législation québécoise du travail*, *supra*, note 2, p. 282.

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À plus forte raison lorsque, usant de comparables comme cela peut être utile en ces matières[246], on tient compte des éléments additionnels suivants, dont certains sont traités dans le rapport de l'expert Coutu, que le TAT a estimé « utile et probant dans son ensemble » et que les sources pertinentes et le droit applicable permettent de confirmer :

- à la suite du dépôt du rapport Woods[247] en 1968, le *Code canadien du travail* fut modifié en profondeur en 1972[248];

- le Conseil canadien des relations de travail de l'époque s'est inspiré du rapport Woods pour faire droit à la syndicalisation des cadres de premier niveau[249];

- cette orientation fut maintenue par l'actuel Conseil canadien des relations industrielles[250];

- en Ontario l'exclusion de la définition d'« employee » du *Labour Relations Act*[251] des personnes exerçant des *managerial functions* ne comprend pas les cadres subalternes affectés à des tâches de surveillance[252];

- au Manitoba, le *Labour Relations Act*[253] n'exclut de la définition d'« employee » à l'article 1 que les cadres qui « perform[s] management functions primarily » ou qui sont employés « in a confidential capacity in matters relating to labour relations » [soulignement ajouté];

- suivant cette définition, le *Labour Board* de cette province a constamment reconnu le droit à la syndicalisation des cadres exerçant des fonctions de « front-line supervisors »[254].

5.5 Si l'atteinte n'est pas justifiée, le TAT a-t-il commis une erreur révisable dans le choix de la réparation appropriée en déclarant l'exclusion en litige inopérante à l'égard de l'Association et des employés visés par la requête en accréditation?

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246 *Procureur général du Québec c. Gallant, supra*, note 239, paragr. 218.
247 Canada, *Les relations de travail au Canada : Rapport de l'Équipe spécialisée en relations de travail*, Ottawa, Bureau du Conseil privé, 1968.
248 Pièce R-4 devant le TAT, Rapport de l'expert Me Michel Coutu, 20 octobre 2014, p. 13.
249 *Ibid*.
250 *Ibid*.
251 *Labour Relations Act, 1995*, 1995 S.O. c.1, art. 1(3)(*b*).
252 Pièce R-4 devant le TAT, *supra*, note 248, p. 14 et note de bas de page 62.
253 *Labour Relations Act,* C.C.S.M., c. L10.
254 *Manitoba Government and General Employees' Union v. Southern Health – Santé Sud*, 2015 CanLII 37991, paragr. 16g) (Manitoba Labour Board).

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[183] Le TAT a conclu qu'il n'était pas opportun dans les circonstances de risquer de priver plus longtemps les SDO visés par la requête en accréditation de leur liberté d'association en suspendant les effets de sa décision de déclarer inopérante à leur égard l'exclusion prévue à l'article 1*l*) 1° *C.t.*[255]*.*

[184] Comme l'observait la Cour dans l'arrêt *Procureur général du Québec c. Descheneaux*[256], suspendre la prise d'effet d'une déclaration d'invalidité constitutionnelle d'une loi est une mesure sérieuse et extraordinaire, car elle a pour effet de maintenir en vigueur une loi inconstitutionnelle et de permettre que se perpétue pendant la suspension une situation qui a été jugée contraire aux principes consacrés dans la *Charte*, en violation des droits constitutionnels des individus concernés. Ces observations sont aussi applicables à une déclaration du caractère inopérant d'une disposition législative, une conséquence qui découle du premier paragraphe de l'article 52 de la *Charte canadienne* :

52 (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.	**52** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[185] Le PGQ a requis de la Cour, par voie de conclusion subsidiaire, qu'elle suspende les effets d'une déclaration d'invalidité de l'exclusion en litige, si telle est la conclusion à laquelle elle devait en arriver. Il a réitéré cette demande lors de l'audience, suggérant une période de suspension de 18 mois afin de permettre au législateur d'évaluer les solutions possibles.

[186] Certes, lorsqu'on l'analyse en vase clos, la réparation ordonnée par le TAT apparaît « convenable et juste eu égard aux circonstances »[257] dont il était saisi.

[187] Néanmoins, les ramifications du présent arrêt dépassent les seules circonstances des parties au litige et la seule requête en accréditation dont était saisi le TAT.

[188] Bien qu'il s'agît dans cette affaire d'une question d'invalidité constitutionnelle proprement dite, dans l'arrêt *Descheneaux*, la Cour a observé, revue jurisprudentielle à l'appui, qu'« [e]n règle générale la suspension d'une déclaration d'invalidité constitutionnelle d'une disposition législative n'excède pas 12 mois, sauf si des circonstances particulières justifient de l'étendre à 18 mois »[258].

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255 Décision du TAT, paragr. 436-438.

256 *Procureure générale du Canada c. Descheneaux*, 2017 QCCA 1238.

257 *Id.*, paragr. 35-36, citant *Doucet-Boudreau c. Nouvelle-Écosse (Ministre de l'Éducation)*, 2003 CSC 62, paragr. 50.

258 *Id.*, paragr. 73.

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[189] En l'espèce, considérant l'effet potentiel du présent arrêt sur le régime québécois des relations de travail des cadres en général, ou de cadres dont la situation, « au jugement du Tribunal »[259] alors saisi, s'apparenterait à celle des SDO en l'espèce, la Cour estime approprié de suspendre pour une période de 12 mois le caractère inopérant de l'exclusion décidé par le TAT.

POUR CES MOTIFS, LA COUR :

[190] **ACCUEILLE** l'appel;

[191] **INFIRME** le jugement de la Cour supérieure;

[192] **REJETTE** le pourvoi en contrôle judiciaire;

[193] **RÉTABLIT** la décision du Tribunal administratif du travail, sous réserve de l'ajout de la conclusion suivante :

[194] **SUSPEND** pour une période de 12 mois à compter du présent arrêt les effets de la déclaration du TAT concernant le caractère inopérant de l'exclusion prévue à l'article 1*l*) 1° du *Code du travail*;

[195] Avec les frais de justice.

GUY GAGNON, J.C.A.

MARIE-JOSÉE HOGUE, J.C.A.

MICHEL BEAUPRÉ, J.C.A.

Me Frédéric Antoine Tremblay
Me Jean-Luc Dufour
POUDRIER BRADET AVOCATS
Pour l'appelante

Me Jean Leduc
LORANGER MARCOUX
Pour l'intimée

[259] Art. 1*l*) 1° *C.t.*

Me Marie-France Bernier
BERNIER CHARBONNEAU
Pour le Tribunal administratif du travail

Me Michel Déom
Me Samuel Chayer
BERNARD, ROY (JUSTICE-QUÉBEC)
Pour le Procureur général du Québec

Date d’audience : 17 mars 2021

2022 QCCA 180 (CanLII)

Donald Martin *Appellant*

v.

Workers' Compensation Board of Nova Scotia and Attorney General of Nova Scotia *Respondents*

and

Nova Scotia Workers' Compensation Appeals Tribunal, Ontario Network of Injured Workers Groups, Canadian Labour Congress, Attorney General of Ontario, Attorney General of British Columbia and Workers' Compensation Board of Alberta *Interveners*

and between

Ruth A. Laseur *Appellant*

v.

Workers' Compensation Board of Nova Scotia and Attorney General of Nova Scotia *Respondents*

and

Nova Scotia Workers' Compensation Appeals Tribunal, Ontario Network of Injured Workers Groups, Canadian Labour Congress, Attorney General of Ontario, Attorney General of British Columbia and Workers' Compensation Board of Alberta *Interveners*

INDEXED AS: NOVA SCOTIA (WORKERS' COMPENSATION BOARD) *v.* MARTIN; NOVA SCOTIA (WORKERS' COMPENSATION BOARD) *v.* LASEUR

Donald Martin *Appelant*

c.

Workers' Compensation Board de la Nouvelle-Écosse et procureur général de la Nouvelle-Écosse *Intimés*

et

Workers' Compensation Appeals Tribunal de la Nouvelle-Écosse, Ontario Network of Injured Workers Groups, Congrès du travail du Canada, procureur général de l'Ontario, procureur général de la Colombie-Britannique et Workers' Compensation Board de l'Alberta *Intervenants*

et entre

Ruth A. Laseur *Appelante*

c.

Workers' Compensation Board de la Nouvelle-Écosse et procureur général de la Nouvelle-Écosse *Intimés*

et

Workers' Compensation Appeals Tribunal de la Nouvelle-Écosse, Ontario Network of Injured Workers Groups, Congrès du travail du Canada, procureur général de l'Ontario, procureur général de la Colombie-Britannique et Workers' Compensation Board de l'Alberta *Intervenants*

RÉPERTORIÉ : NOUVELLE-ÉCOSSE (WORKERS' COMPENSATION BOARD) *c.* MARTIN; NOUVELLE-ÉCOSSE (WORKERS' COMPENSATION BOARD) *c.* LASEUR

2003 SCC 54 (CanLII)

Neutral citation: 2003 SCC 54.

File Nos.: 28372, 28370.

2002: December 9; 2003: October 3.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Administrative law — Workers' Compensation Appeals Tribunal — Jurisdiction — Charter issues — Constitutional validity of provisions of Appeals Tribunal's enabling statute — Whether Appeals Tribunal has jurisdiction to apply Canadian Charter of Rights and Freedoms — Workers' Compensation Act, S.N.S. 1994-95, c. 10, s. 10B — Functional Restoration (Multi-Faceted Pain Services) Program Regulations, N.S. Reg. 57/96.

Constitutional law — Charter of Rights — Equality rights — Workers' compensation legislation excluding chronic pain from purview of regular workers' compensation system and providing in lieu of benefits normally available to injured workers four-week functional restoration program beyond which no further benefits are available — Whether legislation infringes s. 15(1) of Canadian Charter of Rights and Freedoms — If so, whether infringement justifiable under s. 1 of Charter — Workers' Compensation Act, S.N.S. 1994-95, c. 10, s. 10B — Functional Restoration (Multi-Faceted Pain Services) Program Regulations, N.S. Reg. 57/96.

Administrative law — Boards and tribunals — Jurisdiction — Constitutional issues — Powers of administrative tribunals to determine questions of constitutional law — Appropriate test.

The appellants, L and M, both suffer from the disability of chronic pain attributable to a work-related injury. M worked as a foreman and sustained a lumbar sprain. In the following months, he returned to work several times, but recurring pain required him to stop. He attended a work conditioning and hardening program. During this period, the Workers' Compensation Board of Nova Scotia provided him with temporary disability benefits and rehabilitation

Référence neutre : 2003 CSC 54.

N^{os} du greffe : 28372, 28370.

2002 : 9 décembre; 2003 : 3 octobre.

Présents : La juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel et Deschamps.

EN APPEL DE LA COUR D'APPEL DE LA NOUVELLE-ÉCOSSE

Droit administratif — Workers' Compensation Appeals Tribunal — Compétence — Questions relatives à la Charte — Constitutionnalité de certaines dispositions de la loi habilitante du tribunal d'appel — Le tribunal d'appel a-t-il compétence pour appliquer la Charte canadienne des droits et libertés? — Workers' Compensation Act, S.N.S. 1994-95, ch. 10, art. 10B — Functional Restoration (Multi-Faceted Pain Services) Program Regulations, N.S. Reg. 57/96.

Droit constitutionnel — Charte des droits — Droits à l'égalité — Loi sur l'indemnisation des accidentés du travail excluant la douleur chronique du champ d'application du régime habituel d'indemnisation des accidentés du travail et remplaçant les prestations auxquelles ont normalement droit les accidentés du travail par un programme de rétablissement fonctionnel d'une durée de quatre semaines, après quoi aucun autre avantage n'est disponible — La loi viole-t-elle l'art. 15(1) de la Charte canadienne des droits et libertés? — Dans l'affirmative, la violation est-elle justifiable au regard de l'article premier de la Charte? — Workers' Compensation Act, S.N.S. 1994-95, ch. 10, art. 10B — Functional Restoration (Multi-Faceted Pain Services) Program Regulations, N.S. Reg. 57/96.

Droit administratif — Organismes et tribunaux administratifs — Compétence — Questions de droit constitutionnel — Pouvoirs des tribunaux administratifs de trancher des questions de droit constitutionnel — Critère applicable.

Les appelants, L et M, sont tous les deux atteints d'une incapacité due à la douleur chronique à la suite de la lésion liée au travail qu'ils ont subie chacun. M occupait un poste de contremaître et a subi une entorse lombaire. Au cours des mois suivants, il est retourné au travail à maintes reprises, mais il a dû cesser de travailler à cause d'une douleur récurrente. Il a suivi un programme de conditionnement au travail et de renforcement. Pendant cette période, la Workers'

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the case, it becomes necessary to determine whether a *prima facie* violation of a *Charter* right is justified under s. 1. In this respect, the factual findings and record compiled by an administrative tribunal, as well as its informed and expert view of the various issues raised by a constitutional challenge, will often be invaluable to a reviewing court: see *Douglas College*, *supra*, at pp. 604-5. As La Forest J. correctly observed in *Cuddy Chicks*, *supra*, at pp. 16-17:

> It must be emphasized that the process of *Charter* decision making is not confined to abstract ruminations on constitutional theory. In the case of *Charter* matters which arise in a particular regulatory context, the ability of the decision maker to analyze competing policy concerns is critical. . . . The informed view of the Board, as manifested in a sensitivity to relevant facts and an ability to compile a cogent record, is also of invaluable assistance.

31 Third, administrative tribunal decisions based on the *Charter* are subject to judicial review on a correctness standard: see *Cuddy Chicks*, *supra*, at p. 17. An error of law by an administrative tribunal interpreting the Constitution can always be reviewed fully by a superior court. In addition, the constitutional remedies available to administrative tribunals are limited and do not include general declarations of invalidity. A determination by a tribunal that a provision of its enabling statute is invalid pursuant to the *Charter* is not binding on future decision makers, within or outside the tribunal's administrative scheme. Only by obtaining a formal declaration of invalidity by a court can a litigant establish the general invalidity of a legislative provision for all future cases. Therefore, allowing administrative tribunals to decide *Charter* issues does not undermine the role of the courts as final arbiters of constitutionality in Canada.

proposée. Cela est d'autant plus vrai lorsque, comme c'est souvent le cas, il devient nécessaire de décider si l'atteinte *prima facie* à un droit garanti par la *Charte* est justifiée au sens de l'article premier. À cet égard, les conclusions de fait d'un tribunal administratif et le dossier qu'il établit, de même que la perception éclairée qu'il a, à titre d'organisme spécialisé, des différentes questions que soulève une contestation constitutionnelle, seront souvent extrêmement utiles à la cour qui procède au contrôle judiciaire : voir *Douglas College*, précité, p. 604-605. Comme le juge La Forest l'a fait observer, à juste titre, dans l'arrêt *Cuddy Chicks*, précité, p. 16-17 :

> Il faut souligner que le processus consistant à rendre des décisions à la lumière de la *Charte* ne se limite pas à des ruminations abstraites sur la théorie constitutionnelle. Lorsque des questions relatives à la *Charte* sont soulevées dans un contexte de réglementation donné, la capacité du décisionnaire d'analyser des considérations de principe opposées est fondamentale. [. . .] Le point de vue éclairé de la Commission, qui se traduit par l'attention qu'elle accorde aux faits pertinents et sa capacité de compiler un dossier convaincant, est aussi d'une aide inestimable.

Troisièmement, les décisions d'un tribunal administratif fondées sur la *Charte* sont assujetties au contrôle judiciaire suivant la norme de la décision correcte : voir *Cuddy Chicks*, précité, p. 17. L'erreur de droit qu'un tribunal administratif commet en interprétant la Constitution peut toujours faire l'objet d'un contrôle complet par une cour supérieure. En outre, les réparations constitutionnelles relevant des tribunaux administratifs sont limitées et n'incluent pas les déclarations générales d'invalidité. La décision d'un tribunal administratif qu'une disposition de sa loi habilitante est invalide au regard de la *Charte* ne lie pas les décideurs qui se prononceront ultérieurement dans le cadre ou en dehors du régime administratif de ce tribunal. Ce n'est qu'en obtenant d'une cour de justice une déclaration formelle d'invalidité qu'une partie peut établir, pour l'avenir, l'invalidité générale d'une disposition législative. En conséquence, permettre aux tribunaux administratifs de trancher des questions relatives à la *Charte* ne mine pas le rôle d'arbitre ultime que les cours de justice jouent en matière de constitutionnalité au Canada.

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In *Douglas College*, *supra*, La Forest J. expressly considered and rejected several general arguments made against recognizing that administrative tribunals that have jurisdiction to decide questions of law possess a concomitant jurisdiction to apply the *Charter*. He noted that some authors had pointed to practical concerns with respect to the desirability of such adjudication, such as the lack of legal expertise of some administrative tribunals, the differences between their rules of procedure and evidence and those followed by courts, and the need to maintain the accessibility and timeliness of their procedures. Nevertheless, La Forest J. concluded, at p. 603, that these considerations, "though not without weight, should [not] dissuade this Court from adopting what has now become the clearly dominant view in the courts of this country". Nor, in my view, should such practical considerations surreptitiously find their way back into the courts' analysis of a particular tribunal's jurisdiction despite a clear expression of legislative intent to endow it with authority to decide questions of law, including constitutional issues. I now turn to the rules governing this analysis.

Dans l'arrêt *Douglas College*, précité, le juge La Forest a expressément examiné et rejeté plusieurs arguments généraux défavorables à la reconnaissance pour les tribunaux administratifs d'une compétence pour appliquer la *Charte* concomitante à celle qui leur est attribuée pour trancher des questions de droit. Il a souligné que certains auteurs avaient évoqué des considérations pratiques relativement au caractère souhaitable d'une telle fonction juridictionnelle, dont l'absence d'expertise juridique de la part de certains tribunaux administratifs, les différences entre leurs règles de procédure et de preuve et celles des cours de justice, et la nécessité de maintenir leur accessibilité et leur célérité. Le juge La Forest a néanmoins conclu, à la p. 603, que ces considérations, « qui ont pourtant un certain poids, [ne] devraient [pas] dissuader notre Cour d'adopter ce qui est maintenant le courant clairement prédominant chez les tribunaux de notre pays ». À mon sens, les cours de justice ne doivent pas non plus permettre que ces considérations pratiques refassent subrepticement surface dans leur analyse de la compétence d'un tribunal administratif, malgré l'intention manifeste du législateur d'investir ce tribunal du pouvoir de trancher des questions de droit, y compris des questions de droit constitutionnel. Je vais maintenant examiner les règles applicables à cette analyse.

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2. The Applicable Law

In view of the policy considerations outlined above, this Court has adopted a general approach for the determination of whether a particular administrative tribunal or agency can decline to apply a provision of its enabling statute on the ground that the provision violates the *Charter*. This approach rests on the principle that, since administrative tribunals are creatures of Parliament and the legislatures, their jurisdiction must in every case "be found in a statute and must extend not only to the subject matter of the application and the parties, but also to the remedy sought": *Douglas College*, *supra*, at p. 595; see also *Cuddy Chicks*, *supra*, at pp. 14-15. When a case brought before an administrative tribunal involves a challenge to the constitutionality of a provision of its enabling statute, the tribunal is asked to interpret the relevant *Charter* right, apply it to the impugned

2. Les règles de droit applicables

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À la lumière des considérations de politique générale exposées précédemment, notre Cour a adopté une approche générale pour décider si un tribunal ou organisme administratif peut refuser d'appliquer une disposition de sa loi habilitante pour le motif qu'elle viole la *Charte*. Cette approche repose sur le principe selon lequel, étant donné que les tribunaux administratifs sont des créations du Parlement et des législatures, leur compétence doit toujours « se trouver dans une loi et [. . .] s'étendre non seulement à l'objet du litige et aux parties, mais également à la réparation demandée » (*Douglas College*, précité, p. 595; voir également *Cuddy Chicks*, précité, p. 14-15). Lorsqu'il est saisi d'une affaire où l'on conteste la constitutionnalité d'une disposition de sa loi habilitante, le tribunal administratif est appelé à interpréter le droit pertinent garanti par la *Charte*, à

2003 SCC 54 (CanLII)

2005 SCC 16 (CanLII)

Ikechukwu Okwuobi *Appellant*

v.

Attorney General of Quebec and François Legault, in his capacity as Minister of Education *Respondents*

and between

Edwidge Casimir *Appellant*

v.

Attorney General of Quebec and François Legault, in his capacity as Minister of Education *Respondents*

and between

Consuelo Zorrilla *Appellant*

v.

Attorney General of Quebec *Respondent*

Ikechukwu Okwuobi *Appelant*

c.

Procureur général du Québec et François Legault, ès qualités de ministre de l'Éducation *Intimés*

et entre

Edwidge Casimir *Appelante*

c.

Procureur général du Québec et François Legault, ès qualités de ministre de l'Éducation *Intimés*

et entre

Consuelo Zorrilla *Appelante*

c.

Procureur général du Québec *Intimé*

INDEXED AS: OKWUOBI *v.* LESTER B. PEARSON SCHOOL BOARD; CASIMIR *v.* QUEBEC (ATTORNEY GENERAL); ZORRILLA *v.* QUEBEC (ATTORNEY GENERAL)

RÉPERTORIÉ : OKWUOBI *c.* COMMISSION SCOLAIRE LESTER-B.-PEARSON; CASIMIR *c.* QUÉBEC (PROCUREUR GÉNÉRAL); ZORRILLA *c.* QUÉBEC (PROCUREUR GÉNÉRAL)

Neutral citation: 2005 SCC 16.

Référence neutre : 2005 CSC 16.

File No.: 29299.

2004: March 22; 2005: March 31.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

Nº du greffe : 29299.

2004 : 22 mars; 2005 : 31 mars.

Présents : La juge en chef McLachlin et les juges Major, Bastarache, Binnie, LeBel, Deschamps et Fish.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Administrative law — Administrative Tribunal of Québec — Jurisdiction in respect of minority language education claims — Remedial powers — Eligibility for public instruction in English in Quebec — Claimants bypassing administrative appeal process and seeking injunctive and declaratory relief in Superior Court — Whether claimants must follow administrative

Droit administratif — Tribunal administratif du Québec — Compétence relative aux demandes d'enseignement dans la langue de la minorité — Pouvoirs de réparation — Admissibilité à fréquenter une école publique anglaise au Québec — Demandeurs contournant le processus d'appel administratif et demandant à la Cour supérieure une injonction et un jugement déclaratoire —

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formal declaration of invalidity. Second, it lacks jurisdiction to grant injunctive relief, although the appellants acknowledge that the ATQ may issue a safeguard order under s. 74 of the *Act respecting administrative justice*.

42 As for the English school boards, the appellants argue that it is evident from the provisions of the *Charter of the French language* that they are not parties before the ATQ. Only the parents and the Minister of Education are parties. The appellants thus argue that in circumstances where rights-holders seek to enforce their right to have their children receive public instruction in English by way of an order against an English school board, the ATQ is powerless to issue such an order.

43 The respondents counter that the ATQ has all the remedial powers necessary to exercise its jurisdiction. Section 74 vests the Tribunal and its members with "all the powers necessary for the performance of their duties; they may, in particular, make any order they consider appropriate to safeguard the rights of the parties". The respondents cite, as one particular manifestation of this broad remedial power, the power granted under s. 107 of the *Act respecting administrative justice* to make a motion before a member of the Tribunal to suspend the execution of a contested decision by reason of urgency or serious and irreparable harm:

107. A proceeding before the Tribunal does not suspend the execution of the contested decision, unless a provision of law provides otherwise or, upon a motion heard and judged by preference, a member of the Tribunal orders otherwise by reason of urgency or of the risk of serious and irreparable harm.

If the law provides that the proceeding suspends the execution of the decision, or if the Tribunal issues such an order, the proceeding shall be heard and judged by preference.

44 We are in substantial agreement with the respondents. On the question of remedies, the appellants correctly point out that the ATQ cannot issue a formal declaration of invalidity. This is not, in our opinion, a reason to bypass the exclusive jurisdiction of the Tribunal. As this Court stated in *Martin*, the

demandées. D'une part, il ne peut prononcer de déclaration formelle d'invalidité. D'autre part, il ne pourrait accorder une injonction, bien que les appelants reconnaissent la capacité du TAQ à prononcer des ordonnances de sauvegarde en application de l'art. 74 de la *Loi sur la justice administrative*.

Ainsi, les appelants plaident qu'il ressort clairement des dispositions de la *Charte de la langue française* que les conseils scolaires ne sont pas des parties à l'instance devant le TAQ. Seuls les parents et le ministre de l'Éducation possèdent cette qualité. Les appelants soutiennent alors que le TAQ n'a pas le pouvoir de prononcer les ordonnances nécessaires — dans les cas où des titulaires de droits à l'éducation en langue anglaise cherchent à exercer ces droits par voie judiciaire.

Les intimés répondent que le TAQ possède tous les pouvoirs de réparation nécessaires à l'exercice de sa compétence. L'article 74 investit le Tribunal et ses membres de « tous les pouvoirs nécessaires à l'exercice de leurs fonctions; ils peuvent notamment rendre toutes ordonnances qu'ils estiment propres à sauvegarder les droits des parties ». Les intimés citent comme exemple particulier de ce pouvoir général de réparation le pouvoir reconnu par l'art. 107 de la *Loi sur la justice administrative* de statuer sur une requête présentée devant un membre du Tribunal en vue de suspendre l'exécution de la décision contestée en raison d'une urgence ou d'un risque de préjudice sérieux et irréparable :

107. Un recours formé devant le Tribunal ne suspend pas l'exécution de la décision contestée, à moins qu'une disposition de la loi ne prévoie le contraire ou que, sur requête instruite et jugée d'urgence, un membre du Tribunal n'en ordonne autrement en raison de l'urgence ou du risque d'un préjudice sérieux et irréparable.

Si la loi prévoit que le recours suspend l'exécution de la décision ou si le Tribunal rend une telle ordonnance, le recours est instruit et jugé d'urgence.

Nous sommes d'accord pour l'essentiel avec les intimés. Sur la question des réparations, les appelants soulignent à bon droit que le TAQ ne peut prononcer une déclaration formelle d'invalidité. À notre avis, ce motif ne suffit pas pour passer outre à la compétence exclusive du Tribunal. Ainsi que notre Cour

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constitutional remedies available to administrative tribunals are indeed limited and do not include general declarations of invalidity (para. 31). Nor is a determination by a tribunal that a particular provision is invalid pursuant to the *Canadian Charter* binding on future decision makers. As Gonthier J. noted, at para. 31: "Only by obtaining a formal declaration of invalidity by a court can a litigant establish the general invalidity of a legislative provision for all future cases."

l'a décidé dans l'arrêt *Martin*, les réparations constitutionnelles relevant des tribunaux administratifs demeurent effectivement limitées et n'incluent pas les déclarations générales d'invalidité (par. 31). La décision d'un tribunal administratif concluant à l'invalidité d'une disposition législative au regard de la *Charte canadienne* ne lie pas non plus les décideurs qui se prononceront ultérieurement. Comme l'a fait observer le juge Gonthier au par. 31 : « [c]e n'est qu'en obtenant d'une cour de justice une déclaration formelle d'invalidité qu'une partie peut établir, pour l'avenir, l'invalidité générale d'une disposition législative. »

That said, a claimant can nevertheless bring a case involving a challenge to the constitutionality of a provision before the ATQ. If the ATQ finds a breach of the *Canadian Charter* and concludes that the provision in question is not saved under s. 1, it may disregard the provision on constitutional grounds and rule on the claim as if the impugned provision were not in force (*Martin*, at para. 33). Such a ruling would, however, be subject to judicial review on a correctness standard, meaning that the Superior Court could fully review any error in interpretation and application of the *Canadian Charter*. In addition, the remedy of a formal declaration of invalidity could be sought by the claimant at this stage of the proceedings.

45 Cela dit, un demandeur jouit du droit de soumettre au TAQ une affaire qui soulève la constitutionnalité d'une disposition. Si ce tribunal conclut qu'il y a violation de la *Charte canadienne* et que la disposition en question n'est pas sauvegardée au regard de l'article premier, il peut refuser d'appliquer la disposition pour des motifs constitutionnels et statuer sur la demande comme si elle n'était pas en vigueur (*Martin*, par. 33). Une telle décision resterait cependant susceptible d'un contrôle judiciaire selon la norme de la décision correcte. Dans ce contexte, la Cour supérieure pourrait examiner intégralement toute erreur commise dans l'interprétation et l'application de la *Charte canadienne*. De plus, le demandeur aurait droit de demander une déclaration formelle d'invalidité à cette étape de l'instance.

It should also be noted on the topic of remedies that, while it is true that only the Superior Court or a judge thereof may issue an injunction (this will be discussed further below), the ATQ has nevertheless been granted a broad remedial power under ss. 74 and 107 of the *Act respecting administrative justice*. The broad wording of s. 74 indicates an intention on the part of the Quebec legislature to grant the ATQ the remedial authority needed to safeguard the rights of the parties. The appellants, or any other claimants before the ATQ, should attempt to exhaust the remedies available from the ATQ rather than arguing that the absence of a particular remedy requires them to circumvent the administrative process entirely.

46 Il importe également de souligner au sujet des réparations que, s'il est vrai qu'une injonction ne peut émaner que de la Cour supérieure ou l'un de ses juges (nous traiterons davantage de cette question ci-après), les art. 74 et 107 de la *Loi sur la justice administrative* ont attribué au TAQ un pouvoir de réparation très étendu. Le libellé général de l'art. 74 témoigne de l'intention du législateur québécois d'accorder au TAQ les pouvoirs de réparation nécessaires pour sauvegarder les droits des parties. Les appelants, ou tout autre demandeur qui s'adresse au TAQ, devraient donc tenter d'épuiser les recours que leur offre le TAQ au lieu de prétendre que l'absence d'un recours en particulier les oblige à contourner tout le processus administratif.

IN THE MATTER OF an application under section 83.28 of the *Criminal Code*

INDEXED AS: APPLICATION UNDER S. 83.28 OF THE *CRIMINAL CODE* (RE)

Neutral citation: 2004 SCC 42.

File No.: 29872.

2003: December 10, 11; 2004: June 23.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ.

ON APPEAL FROM THE BRITISH COLUMBIA SUPREME COURT

Constitutional law — Charter of Rights — Liberty — Fundamental justice — Self-incrimination — Terrorism — Investigative hearings — Whether Criminal Code provision allowing order for gathering of information and investigative hearing infringes s. 7 of Canadian Charter of Rights and Freedoms — Criminal Code, R.S.C. 1985, c. C-46, s. 83.28.

Constitutional law — Judicial independence — Impartiality — Investigation of terrorism offences — Whether Criminal Code provision allowing order for gathering of information and investigative hearing infringes principles of judicial independence and impartiality — Constitution Act, 1867, Preamble — Criminal Code, R.S.C. 1985, c. C-46, s. 83.28.

Criminal law — Terrorism — Investigative hearings — Retrospectivity — Criminal Code amended to provide for investigative hearings for purposes of gathering information on terrorism offences — Whether provision for investigative hearings applicable to incidents that occurred prior to its enactment — Whether provision procedural in substance and effect — Whether presumption of immediate effect rebutted — Criminal Code, R.S.C. 1985, c. C-46, s. 83.28.

Criminal law — Terrorism — Investigative hearings — Independence of Crown — Criminal Code amended to provide for investigative hearings for purposes of gathering information on terrorism offences — Whether independence of Crown counsel compromised by judicial

DANS L'AFFAIRE d'une demande fondée sur l'article 83.28 du *Code criminel*

RÉPERTORIÉ : DEMANDE FONDÉE SUR L'ART. 83.28 DU *CODE CRIMINEL* (RE)

Référence neutre : 2004 CSC 42.

Nº du greffe : 29872.

2003 : 10, 11 décembre; 2004 : 23 juin.

Présents : La juge en chef McLachlin et les juges Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps et Fish.

EN APPEL DE LA COUR SUPRÊME DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Charte des droits — Liberté — Justice fondamentale — Auto-incrimination — Terrorisme — Investigations — La disposition du Code criminel qui permet de rendre une ordonnance autorisant la recherche de renseignements et la tenue d'une investigation contrevient-elle à l'art. 7 de la Charte canadienne des droits et libertés? — Code criminel, L.R.C. 1985, ch. C-46, art. 83.28.

Droit constitutionnel — Indépendance judiciaire — Impartialité — Enquête relative à des infractions de terrorisme — La disposition du Code criminel qui permet de rendre une ordonnance autorisant la recherche de renseignements et la tenue d'une investigation viole-t-elle les principes de l'indépendance et de l'impartialité judiciaires? — Loi constitutionnelle de 1867, préambule — Code criminel, L.R.C. 1985, ch. C-46, art. 83.28.

Droit criminel — Terrorisme — Investigations — Rétrospectivité — Code criminel modifié de manière à prévoir la tenue d'investigations destinées à obtenir des renseignements relatifs à des infractions de terrorisme — La disposition prévoyant les investigations peut-elle s'appliquer à des faits survenus avant son adoption? — Cette disposition est-elle de nature procédurale sur le plan du fond et de ses effets? — La présomption de prise d'effet immédiate est-elle réfutée? — Code criminel, L.R.C. 1985, ch. C-46, art. 83.28.

Droit criminel — Terrorisme — Investigations — Indépendance du ministère public — Code criminel modifié de manière à prévoir la tenue d'investigations destinées à obtenir des renseignements relatifs à des infractions de terrorisme — Le processus d'investigation judiciaire

2004 SCC 42 (CanLII)

investigative hearing process — Criminal Code, R.S.C. 1985, c. C-46, s. 83.28.

Criminal law — Terrorism — Investigative hearings — Whether purpose of investigative hearing was pre-trial discovery of evidence.

M and B were jointly charged with several offences in relation to the explosion of Air India Flight 182 and the intended explosion of Air India Flight 301. Shortly after the beginning of their trial, the Crown brought an *ex parte* application seeking an order that a Named Person, a potential Crown witness at the Air India trial, attend a judicial investigative hearing for examination pursuant to s. 83.28 of the *Criminal Code*, which is one of the new provisions added to the *Code* as a result of the enactment of the *Anti-terrorism Act* in 2001. The application judge granted the order and set a number of terms and conditions to govern the conduct of the judicial investigative hearing, among others, the hearing was to be conducted *in camera* and notice of the hearing was not to be given to the accused in the Air India trial, to the press or to the public. Counsel for the accused, who fortuitously became aware of the order, informed the application judge that they wished to make submissions. Counsel for the Named Person also applied to challenge the constitutional validity of s. 83.28. The constitutional challenge and the application to set aside the order were heard *in camera*. The judge presiding at the hearing concluded that the order was validly issued and s. 83.28 was constitutionally sound. Given the unusual circumstances of this case, she varied the order to permit counsel for the accused to attend at the investigative hearing and examine the Named Person under the proviso that they leave the hearing if information unrelated to the trial was elicited. They were also prohibited from disclosing any information or evidence obtained at the hearing to the public or to the accused. The judgment was sealed until the conclusion of the hearing or any contrary order of the court. Since there is no provision in the *Criminal Code* for an appeal of a s. 83.28 order to a provincial court of appeal, the Named Person successfully sought leave to appeal to this Court.

Held (Binnie, LeBel and Fish JJ. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and Iacobucci, Major and Arbour JJ.: The purpose of the *Anti-terrorism Act* is to prosecute

compromet-il l'indépendance de l'avocat du ministère public? — Code criminel, L.R.C. 1985, ch. C-46, art. 83.28.

Droit criminel — Terrorisme — Investigations — L'investigation avait-elle pour objet d'obtenir la communication préalable d'éléments de preuve?

M et B ont été accusés conjointement de plusieurs infractions liées à l'explosion du vol 182 d'Air India et à celle qui était censée se produire à bord du vol 301 d'Air India. Peu après l'ouverture de leur procès, le ministère public a présenté, en l'absence de toute autre partie, une demande d'ordonnance enjoignant à une personne désignée, susceptible d'être assignée comme témoin à charge au procès Air India, de se présenter à une investigation pour subir un interrogatoire conformément à l'art. 83.28 du *Code criminel*, qui est l'une des nouvelles dispositions ajoutées au *Code* à la suite de l'adoption de la *Loi antiterroriste* en 2001. Le juge saisi de la demande a accordé l'ordonnance et a assujetti l'investigation judiciaire à un certain nombre de modalités prévoyant notamment qu'elle se déroulerait à huis clos et qu'aucun préavis ne serait donné aux accusés du procès Air India, à la presse et au public. Les avocats des accusés qui ont appris par hasard l'existence de l'ordonnance ont avisé le juge qui l'avait rendue qu'ils souhaitaient présenter des observations. L'avocat de la personne désignée a également demandé l'autorisation de contester la constitutionnalité de l'art. 83.28. L'audition de la contestation de la constitutionnalité et de la demande d'annulation de l'ordonnance s'est déroulée à huis clos. La juge présidant l'investigation a conclu que l'ordonnance était valide et que l'art. 83.28 était conforme à la Constitution. Compte tenu des circonstances inhabituelles de la présente affaire, elle a modifié l'ordonnance de manière à permettre aux avocats des accusés de se présenter à l'investigation pour y interroger la personne désignée, à la condition qu'ils quittent la salle d'audience si des renseignements n'ayant rien à voir avec le procès étaient dévoilés. Il leur était également interdit de divulguer au public ou aux accusés tout renseignement ou élément de preuve obtenu lors de l'investigation. Le jugement a été mis sous scellés jusqu'à la fin de l'investigation ou jusqu'à ce que le tribunal en décide autrement. Étant donné qu'aucune disposition du *Code criminel* ne permet d'interjeter devant une cour d'appel provinciale un appel contre une ordonnance fondée sur l'art. 83.28, la personne désignée a demandé et obtenu l'autorisation de se pourvoir devant notre Cour.

Arrêt (les juges Binnie, LeBel et Fish sont dissidents) : Le pourvoi est rejeté.

La juge en chef McLachlin et les juges Iacobucci, Major et Arbour : La *Loi antiterroriste* a pour objet

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and prevent terrorism offences. Although terrorism necessarily changes the context in which the rule of law must operate, it does not call for the abdication of law. The challenge for democracies in the battle against terrorism is to balance an effective response with fundamental democratic values that respect the importance of human life, liberty and the rule of law. Subject to interpretive comments, s. 83.28 of the *Criminal Code* meets that challenge.

The meaning of s. 83.28 is ambiguous in two respects: (1) the role of counsel for the witness at the judicial investigative hearing, and (2) the threshold of relevance and admissibility applicable in that hearing where information, as opposed to evidence, is sought. A broad and purposive interpretation of s. 83.28, which accords with the presumption of constitutionality, resolves both of these ambiguities. Read narrowly, ss. 83.28(9) and 83.28(8) seem to restrict counsel to objections on specified grounds, but read purposively with s. 83.28(12), s. 83.28 suggests a more fulsome participation by counsel since the relevancy requirement in s. 83.28(12) also attaches to the questioning of the named person. The purposive approach is supported by the wide ambit given to the judiciary under ss. 83.28(5)(*e*) and 83.28(7) to set or vary the terms and conditions of an order. This broad power enables the judge to respond flexibly to the specific circumstances of each application and ensures that constitutional and common law rights and values are respected. As to the threshold for relevance and admissibility, when viewed purposively, the judicial investigative proceeding can be regarded as a criminal proceeding. The common law evidentiary principles clearly apply as does the *Canada Evidence Act*. More importantly, the judge is present to ensure that the procedure is carried out in accordance with constitutional protections.

Section 83.28 is presumed to have immediate effect and to apply retrospectively because it effects only procedural change and does not create or impinge upon substantive rights. It is *prima facie* procedural because it outlines the process by which hearings are to be carried out. The reference in s. 83.28(4) to "terrorism offence" does not transform the procedural nature of s. 83.28 into a substantive one. Furthermore, a judicial investigative hearing remains procedural even though it may

de prévenir et de punir les infractions de terrorisme. Quoiqu'il modifie nécessairement le contexte dans lequel doit s'appliquer le principe de la primauté du droit, le terrorisme ne commande pas la renonciation à ce principe. Le défi que les démocraties sont appelées à relever dans la lutte contre le terrorisme consiste à prendre des mesures qui soient à la fois efficaces et conformes aux valeurs démocratiques fondamentales qui attachent de l'importance à la vie et à la liberté de l'être humain, ainsi qu'au respect de la primauté du droit. Sous réserve de commentaires portant sur son interprétation, l'art. 83.28 du *Code criminel* résiste à l'examen de sa constitutionnalité.

L'article 83.28 est ambigu à deux égards : (1) le rôle que l'avocat du témoin est appelé à jouer au cours de l'investigation judiciaire, et (2) le critère préliminaire de pertinence et d'admissibilité applicable à l'investigation lorsque l'on recherche des renseignements et non pas des éléments de preuve. L'interprétation large et téléologique de l'art. 83.28 — qui est conforme à la présomption de constitutionnalité — permet d'éliminer ces deux ambiguïtés. Si on leur donne une interprétation stricte, les par. 83.28(9) et 83.28(8) ne semblent autoriser l'avocat qu'à formuler des objections pour des motifs précis, mais si on l'interprète de manière téléologique de concert avec le par. 83.28(12), l'art. 83.28 laisse entrevoir une participation plus complète de l'avocat, étant donné que l'exigence d'utilité contenue au par. 83.28(12) s'applique également à l'interrogatoire de la personne désignée. L'interprétation téléologique est étayée par la grande latitude dont le juge dispose — en vertu de l'al. 83.28(5)*e*) et du par. 83.28(7) — pour établir ou modifier les modalités d'une ordonnance. Grâce à ce pouvoir général, le juge dispose, dans chaque cas, de la latitude nécessaire pour tenir compte du contexte particulier dans lequel s'applique la disposition et pour assurer le respect des droits et des valeurs reconnus par la Constitution et la common law. En ce qui concerne le critère préliminaire de pertinence et d'admissibilité, selon une interprétation téléologique, l'investigation judiciaire peut être considérée comme une instance criminelle. Les principes de common law en matière de preuve s'appliquent manifestement, de même que la *Loi sur la preuve au Canada*. Qui plus est, la présence du juge vise à assurer un déroulement conforme aux garanties constitutionnelles.

L'article 83.28 est présumé prendre effet immédiatement et s'appliquer rétrospectivement parce qu'il traduit seulement une évolution procédurale et ne crée pas des droits substantiels ou n'empiète pas sur ces droits. Il est de nature procédurale à première vue, car il expose la façon de procéder à une investigation judiciaire. La mention d'une « infraction de terrorisme », au par. 83.28(4), ne fait pas passer de procédurale à substantielle la nature de l'art. 83.28. De plus, bien qu'elle puisse permettre

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generate information pertaining to an offence. Lastly, the presumption of immediate effect of s. 83.28 has not been rebutted. No contrary intent of Parliament has been evinced, and providing under s. 83.28(4)(*a*) and (*b*) that judicial hearings may apply before and after the commission of a terrorism offence indicates parliamentary intent that it may apply retrospectively.

Section 83.28 of the *Code* does not violate s. 7 of the *Charter*. Although statutory compulsion to testify and the consequences for a named person of failing to comply with s. 83.28 both clearly engage liberty interests under s. 7, s. 83.28 does not infringe the right against self-incrimination. The right against self-incrimination is a principle of fundamental justice from which three procedural safeguards have emerged in relation to criminal law: use immunity, derivative use immunity and constitutional exemption. Section 83.28(10) provides both use and absolute derivative use immunity and a constitutional exemption is provided by the principle that testimonial compulsion is precluded where its predominant purpose is to determine penal liability. Section 83.28(10), however, provides these safeguards only in criminal proceedings whereas the international scope of terrorism and terrorism investigation raises concerns about the use of information gathered under s. 83.28(10) in extradition or deportation hearings and by foreign authorities. In order to meet the s. 7 requirements, the procedural safeguards found in s. 83.28 must necessarily be extended to those proceedings. The hearing judge must thus make and, if necessary, vary the terms of an order to properly provide use and derivative immunity in extradition or deportation proceedings.

Judges acting under s. 83.28 do not lack institutional independence or impartiality, nor are they co-opted into performing an executive function. Section 83.28 requires the judge to act judicially, in accordance with constitutional norms and the historic role of the judiciary in criminal proceedings. A broad and purposive interpretation of s. 83.28 is consistent with the judiciary's role, which in this context is to protect the integrity of the investigation and the interests of the named person. Judges bring the full weight of their authority to the hearing to provide all the constitutional guarantees of the *Charter*, and a failure to do so will constitute on the part of a hearing judge

d'obtenir des renseignements relatifs à une infraction, l'investigation judiciaire reste de nature procédurale. Enfin, la présomption de prise d'effet immédiate de l'art. 83.28 n'a pas été réfutée. Le législateur n'a exprimé aucune intention contraire, et le fait que les al. 83.28(4)*a*) et *b*) prévoient la possibilité de procéder à une investigation judiciaire avant et après la commission d'une infraction de terrorisme indique que le législateur a voulu que cette disposition puisse s'appliquer rétrospectivement.

L'article 83.28 du *Code* ne contrevient pas à l'art. 7 de la *Charte*. Bien que la contrainte légale à témoigner et les conséquences du défaut d'une personne désignée de se conformer à l'art. 83.28 fassent intervenir clairement, dans les deux cas, le droit à la liberté garanti par l'art. 7, l'art. 83.28 ne porte pas atteinte au droit de ne pas s'incriminer. Le droit de ne pas s'incriminer est un principe de justice fondamentale à l'origine de trois garanties procédurales en matière de droit criminel : l'immunité contre l'utilisation de la preuve, l'immunité contre l'utilisation de la preuve dérivée et l'exemption constitutionnelle. Le paragraphe 83.28(10) accorde l'immunité contre l'utilisation de la preuve et l'immunité absolue contre l'utilisation de la preuve dérivée, et l'exemption constitutionnelle découle du principe selon lequel la contrainte à témoigner est interdite lorsqu'elle a pour objet prédominant d'établir la responsabilité pénale. Cependant, le par. 83.28(10) prévoit que ces garanties ne s'appliquent que dans le cadre de poursuites criminelles, alors que la portée internationale du terrorisme et des enquêtes sur le terrorisme suscite des craintes que des renseignements obtenus en vertu du par. 83.28(10) soient utilisés dans des audiences en matière d'extradition ou d'expulsion, ou encore par des autorités étrangères. Pour satisfaire aux exigences de l'art. 7, il faut nécessairement appliquer à ces procédures les garanties procédurales de l'art. 83.28. Le juge qui préside l'investigation doit établir et modifier, si nécessaire, les modalités de l'ordonnance de manière à accorder, comme il se doit, l'immunité contre l'utilisation de la preuve et l'immunité contre l'utilisation de la preuve dérivée dans les procédures d'extradition ou d'expulsion.

Les juges qui agissent en vertu de l'art. 83.28 ne sont pas dépourvus d'indépendance ou d'impartialité institutionnelle, et ne se voient pas permettre d'exercer une fonction exécutive. L'article 83.28 exige que le juge agisse de façon judiciaire, conformément aux normes constitutionnelles et au rôle traditionnel que le pouvoir judiciaire joue en matière criminelle. L'interprétation large et téléologique de l'art. 83.28 est compatible avec le rôle du pouvoir judiciaire qui, dans le présent contexte, consiste à préserver l'intégrité de l'investigation et les droits de la personne désignée. Les juges mettent à contribution, à ces investigations, toute l'autorité qu'ils possèdent

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a reviewable error. A reasonable and informed person, viewing the relevant statutory provisions in their full historical context, would conclude that the court or tribunal is independent. The conclusion in the *Vancouver Sun* appeal that hearings are presumptively to be in open court also supports a conclusion that the judiciary is independent and impartial.

Nor is the independence of Crown counsel compromised by the investigative hearing process. The core content of Crown independence is the maintenance of objectivity throughout the process, but since the application of Crown objectivity is highly contextual, it fails to meet the criteria for recognition as a principle of fundamental justice under s. 7. By bringing Crown counsel into the judicial investigative hearing process, the legislature intended that the Crown would conduct itself according to its proper role as an officer of the court and its duty of impartiality in the public interest.

The purpose of the hearing in this case was to investigate a terrorism offence and not to obtain pre-trial discovery. No reviewable error arises from the hearing judge's conclusion that the Crown met its onus to demonstrate in good faith that the hearing's purpose was investigative. However, because the judicial investigative hearing was sought in the midst of an ongoing trial and in total secrecy, some pre-trial advantage might have been given to the Crown. The ruling in the *Vancouver Sun* appeal that there is a presumption favouring open hearings and the participation of counsel would have overcome these concerns.

Section 11(*d*) of the *Charter* does not apply because the Named Person is not an accused. In light of the conclusion on openness in the *Vancouver Sun* appeal and the previous comments on the scope and operation of s. 83.28, there is no need to decide whether the participation of counsel for the accused was an appropriate condition under s. 83.28(5)(*e*).

Per Bastarache and Deschamps JJ.: Subject to the following comments, the reasons of Iacobucci and Arbour JJ. are agreed with. First, where a judicial investigative hearing is closed, the independence or impartiality of

pour offrir toutes les garanties constitutionnelles de la *Charte*, et ceux qui omettent de le faire commettent une erreur donnant lieu à révision. Une personne raisonnable et renseignée qui examinerait les dispositions législatives pertinentes dans leur contexte historique complet conclurait que le tribunal judiciaire ou administratif est indépendant. La conclusion, dans le pourvoi *Vancouver Sun*, qu'il existe une présomption de publicité à l'égard des investigations étaye également la conclusion que le pouvoir judiciaire est indépendant et impartial.

Le processus d'investigation judiciaire ne compromet pas non plus l'indépendance de l'avocat du ministère public. Le maintien de l'objectivité du début à la fin des procédures est au cœur de l'indépendance du ministère public, mais étant donné que son application dépend fortement du contexte, le principe de l'objectivité du ministère public ne remplit pas les conditions requises pour pouvoir être considéré comme un principe de justice fondamentale prévu à l'art. 7. En faisant participer les avocats du ministère public au processus d'investigation judiciaire, le législateur a voulu que le ministère public se conforme au rôle qu'il doit jouer en tant qu'officier de justice et à son obligation d'agir impartialement dans l'intérêt public.

En l'espèce, l'investigation avait pour objet d'enquêter sur une infraction de terrorisme et non de procéder à un interrogatoire préalable. En concluant que le ministère public s'est acquitté de son obligation de démontrer de bonne foi que l'investigation visait la conduite d'une enquête, la juge présidant l'investigation n'a commis aucune erreur donnant lieu à révision. Cependant, du fait que l'investigation judiciaire a été sollicitée au milieu d'un procès et dans le plus grand secret, il se pourrait que le ministère public ait bénéficié de quelque avantage émanant d'une procédure préalable au procès. La décision, dans le pourvoi *Vancouver Sun*, qu'il existe une présomption qui favorise la publicité des investigations et la participation des avocats aurait permis d'apaiser ces craintes.

L'alinéa 11*d*) de la *Charte* ne s'applique pas étant donné que la personne désignée n'est pas inculpée. Compte tenu de la conclusion tirée dans le pourvoi *Vancouver Sun* relativement à la publicité des procédures et des commentaires faits antérieurement au sujet de la portée et de l'application de l'art. 83.28, il n'est pas nécessaire de déterminer si la participation des avocats des accusés était une modalité indiquée au sens de l'al. 83.28(5)*e*).

Les juges Bastarache et Deschamps : Les motifs des juges Iacobucci et Arbour sont acceptés sous réserve des commentaires suivants. Premièrement, lorsqu'une investigation judiciaire est terminée, l'indépendance ou

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the judiciary will not be compromised, as several other factors promote independence and impartiality. The subsequent release of the information disclosed during these proceedings promotes the accountability of the judiciary. Second, the hearing judge made neither a palpable nor an overriding error in her assessment of the facts and her approach was correct in principle. The participation of counsel for the accused was sufficient to overcome any concern regarding the practical effect of the hearing on the Air India trial. Lastly, there is no evidence that the hearing judge erred in concluding that counsel for the accused could participate in the hearing.

Per Binnie J.: Section 83.28 of the *Criminal Code*, when correctly interpreted and properly applied, is constitutionally valid.

Per Binnie, LeBel and Fish JJ. (dissenting): The Crown's resort to s. 83.28 of the *Criminal Code* in this case was at least in part for an inappropriate purpose, namely, to bootstrap the prosecution's case in the Air India trial by subjecting an uncooperative witness, the Named Person, to a mid-trial examination for discovery before a judge other than the Air India trial judge. The Named Person had been equally uncooperative with the defence, and in the circumstances resort to the s. 83.28 procedure was unfair to the accused M and B and an abuse of process.

The terrorism offence being investigated under s. 83.28 is also the subject matter of the criminal charges against M and B. The Named Person was scheduled to testify for the prosecution, but because the Crown proceeded by direct indictment, neither the prosecution nor the defence had a preliminary look at this witness. Section 83.28 was not designed to serve as a sort of halfway house between a preliminary hearing and a direct indictment. Clearly one purpose of the s. 83.28 hearing was to provide the Crown with a transcript of the Named Person's compelled testimony under oath that would otherwise be unobtainable. This restored to the Crown some of the advantage it had lost in opting for the direct indictment, while not giving the defence a comparable opportunity to examine potential witnesses of its choosing. The Crown sought to keep the defence (and the Air India trial judge) in a state of ignorance of even the existence of the s. 83.28 proceedings.

The conditions imposed on the initial order and the lack of notice to the judge in the Air India trial of what

l'impartialité du pouvoir judiciaire n'est pas compromise étant donné que plusieurs autres facteurs en favorisent le maintien. La diffusion subséquente des renseignements divulgués pendant ces procédures favorise la responsabilité des juges. Deuxièmement, la juge présidant l'investigation n'a commis aucune erreur manifeste ou dominante dans son appréciation des faits, et l'approche qu'elle a adoptée était correcte en principe. La participation des avocats des accusés était suffisante pour apaiser toute crainte relative à l'effet concret de l'investigation sur le procès Air India. Enfin, rien ne prouve que la juge présidant l'investigation a commis une erreur en concluant que les avocats des accusés pouvaient participer à l'investigation.

Le juge Binnie : L'article 83.28 du *Code criminel*, interprété et appliqué correctement, est conforme à la Constitution.

Les juges Binnie, LeBel et Fish (dissidents) : Le recours du ministère public à l'art. 83.28 du *Code criminel* visait, en partie du moins, un objectif inapproprié, à savoir étoffer la preuve à charge dans le procès Air India en faisant subir, au milieu du procès, au témoin peu coopératif qu'était la personne désignée, un interrogatoire devant un autre juge que le juge du procès Air India. La personne désignée s'était également montrée peu coopérative avec la défense et, dans les circonstances, le recours à la procédure prévue par l'art. 83.28 était inéquitable pour les accusés M et B et constituait un abus de procédure.

L'infraction de terrorisme faisant l'objet de l'investigation fondée sur l'art. 83.28 est également visée par les accusations criminelles portées contre M et B. La personne désignée devait témoigner pour la poursuite, mais étant donné que le ministère public a choisi de procéder par mise en accusation directe, ni la poursuite ni la défense n'ont pu jeter un coup d'œil préliminaire sur ce témoin. L'article 83.28 n'est pas conçu pour servir de moyen terme entre l'enquête préliminaire et la mise en accusation directe. Il est évident que l'un des objets de l'investigation fondée sur l'art. 83.28 était de fournir au ministère public une transcription du témoignage que la personne désignée serait contrainte de livrer sous serment et qui serait impossible à obtenir autrement. Cela a permis au ministère public de récupérer certains des avantages perdus en optant pour la mise en accusation directe, sans que la défense n'aie une possibilité comparable d'interroger les témoins qu'elle pourrait vouloir assigner. Le ministère public cherchait à cacher à la défense (et au juge du procès Air India) l'existence même des procédures fondées sur l'art. 83.28.

Les modalités de l'ordonnance initiale et l'omission d'aviser le juge du procès Air India de ce qu'on

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was afoot gave the Crown a significant advantage. The connection between the Air India trial and the s. 83.28 hearing was plain and obvious and it was the responsibility of all concerned to ensure that the fair trial rights of M and B were not prejudiced. The defects in the initial s. 83.28 order were not cured by the amendments made by the hearing judge. The issue is not just whether the hearing judge ameliorated the original terms (which she did) but whether the hearing should have proceeded at all in the time frame sought by the Crown.

If the Crown's dominant concern had been the "ongoing investigation", as was held by the hearing judge, the prosecution could have called the Named Person to testify at any time after the Air India trial started over a year ago. That would have enabled the s. 83.28 hearing to proceed free of constraints imposed by the ongoing Air India trial.

In any event, an "improper purpose" test is too narrow. The effects of a resort to s. 83.28 are also important. The prejudicial effect on the defence in this case could be eliminated by a delay of the s. 83.28 hearing until after the Named Person had testified at the Air India trial or the Crown had indicated that the Named Person would not be called as a prosecution witness. To proceed sooner would be an abuse of the s. 83.28 process.

Per LeBel and Fish JJ. (dissenting): Section 83.28 of the *Criminal Code* compromises the institutional dimension of judicial independence and should be declared unconstitutional. Judicial independence has two dimensions, namely individual independence, which attaches to the individual judge, and institutional independence, which attaches to courts as institutions and ensures the separation of powers. Although a judge may be independent in fact and act with the utmost impartiality, judicial independence will not exist if the court of which he or she is a member is not independent of the other branches of government on an institutional level. In this case, s. 83.28 requires judges to preside over police investigations; as such investigations are the responsibility of the executive branch, this cannot but leave a reasonable, well-informed person with the impression that judges have become allies of the executive branch. First, s. 83.28 does not give the hearing judge the necessary tools to effectively play his or her role as protector of the fundamental rights of the person being examined. Second, if it were possible to conclude that the judge could effectively rule on

s'apprêtait à faire ont conféré un avantage important au ministère public. Il y avait un lien clair et net entre le procès Air India et l'investigation fondée sur l'art. 83.28, et il incombait à tous les intéressés de s'assurer que le droit à un procès équitable des accusés M et B ne soit pas bafoué. Les modifications apportées par la juge présidant l'investigation n'ont pas remédié aux lacunes de l'ordonnance initiale fondée sur l'art. 83.28. Il ne s'agit pas simplement de savoir si la juge présidant l'investigation a amélioré les modalités originales (ce qu'elle a fait), mais encore faut-il décider s'il y avait lieu que l'investigation se déroule selon l'échéancier sollicité par le ministère public.

Si le principal souci du ministère public avait été de faire progresser l'« enquête en cours », comme l'a conclu la juge ayant présidé l'investigation, la poursuite aurait pu assigner la personne désignée à témoigner en tout temps après l'ouverture du procès Air India, il y a plus d'un an. L'investigation fondée sur l'art. 83.28 aurait ainsi été dépourvue de toute contrainte émanant du procès Air India en cours.

Quoi qu'il en soit, le critère de l'« objet illégitime » est trop strict. L'incidence du recours à l'art. 83.28 est également importante. En l'espèce, le report de l'investigation prévue par l'art. 83.28 jusqu'à ce que la personne désignée ait témoigné au procès Air India, ou que le ministère public ait indiqué qu'il ne l'assignerait pas comme témoin à charge, aurait permis d'éliminer l'incidence préjudiciable sur la défense. Procéder plus tôt à l'investigation constituerait un abus de la procédure prévue par l'art. 83.28.

Les juges LeBel et Fish (dissidents) : L'article 83.28 du *Code criminel* porte atteinte à l'indépendance judiciaire dans sa dimension institutionnelle et devrait être déclaré inconstitutionnel. L'indépendance judiciaire comporte deux dimensions, l'une individuelle qui s'attache au juge, et l'autre institutionnelle qui s'attache aux tribunaux en tant qu'institutions et qui assure la séparation des pouvoirs étatiques. Bien qu'un juge puisse être indépendant de fait et se conduire avec la plus rigoureuse impartialité, l'indépendance judiciaire n'existera que si le tribunal auquel il appartient est indépendant des autres organes du gouvernement sur le plan institutionnel. En l'espèce, l'art. 83.28, en vertu duquel les juges sont de fait amenés à présider des enquêtes policières qui relèvent de l'exercice du pouvoir exécutif, ne peut qu'entraîner chez la personne raisonnable et bien informée une perception que les juges sont devenus alliés du pouvoir exécutif. Premièrement, l'art. 83.28 ne donne pas au juge qui préside l'enquête les outils dont il a besoin pour exercer efficacement son rôle de protecteur des droits fondamentaux de la personne interrogée.

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certain objections during the investigation, the fluidity and vagueness of the investigation procedure would still give too much discretion to the judge. A judge's individual perception of his or her role will necessarily affect the nature and conduct of the examination. Some judges will be more inclined than others to protect the fundamental rights of the person being examined. Third, in enacting s. 83.28, Parliament gave increased powers to the executive branch to enable it to investigate acts of terrorism effectively. A reasonable person might for this reason conclude that Parliament intended to use the judiciary to make the prevention and suppression of such acts more effective. The judge's duties under s. 83.28 are unlike any of the duties traditionally discharged by the judiciary. The judge takes part in and facilitates the police investigation without having real power to act as a neutral arbiter. Finally, the public's perception that the judicial and the executive branches do not act separately in an investigation under s. 83.28 will be heightened when the investigation is held *in camera*.

Deuxièmement, même s'il était possible de conclure que le juge pourrait réussir à trancher certaines objections lors de l'interrogatoire, la fluidité et l'imprécision de la procédure d'enquête laissent une trop grande discrétion au juge. La perception individuelle que le juge se fera de son rôle affectera nécessairement la nature et le déroulement de l'interrogatoire. Certains juges seront plus enclins que d'autres à protéger les droits fondamentaux de la personne interrogée. Troisièmement, en édictant l'art. 83.28, le législateur vise à donner plus de pouvoirs à l'exécutif afin qu'il puisse enquêter efficacement sur les actes de terrorisme. La personne raisonnable pourrait donc conclure que le législateur prévoit utiliser le pouvoir judiciaire pour prévenir et réprimer plus efficacement de tels actes. La fonction du juge, en vertu de l'art. 83.28, ne s'apparente à aucun autre rôle habituel du pouvoir judiciaire. Il participe à l'enquête policière, qu'il facilite, sans détenir un pouvoir réel d'agir à titre d'arbitre neutre. Enfin, la perception du public selon laquelle les pouvoirs judiciaire et exécutif n'agissent pas de manière séparée lors d'une investigation tenue en vertu de l'art. 83.28 s'accentuera davantage lorsque les investigations seront tenues à huis clos.

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v. Canada (Attorney General), [2004] 1 S.C.R. 76, 2004 SCC 4; *R. v. Jarvis*, [2002] 3 S.C.R. 757, 2002 SCC 73; *R. v. Jones*, [1994] 2 S.C.R. 229; *R. v. White*, [1999] 2 S.C.R. 417; *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *Ell v. Alberta*, [2003] 1 S.C.R. 857, 2003 SCC 35; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13; *R. v. Lippé*, [1991] 2 S.C.R. 114; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *Therrien (Re)*, [2001] 2 S.C.R. 3, 2001 SCC 35; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76; *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12; *Boucher v. The Queen*, [1955] S.C.R. 16; *Lemay v. The King*, [1952] 1 S.C.R. 232; *Proulx v. Quebec (Attorney General)*, [2001] 3 S.C.R. 9, 2001 SCC 66; *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33.

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3 R.C.S. 571, 2003 CSC 74; *Canadian Foundation for Children, Youth and the Law c. Canada (Procureur général)*, [2004] 1 R.C.S. 76, 2004 CSC 4; *R. c. Jarvis*, [2002] 3 R.C.S. 757, 2002 CSC 73; *R. c. Jones*, [1994] 2 R.C.S. 229; *R. c. White*, [1999] 2 R.C.S. 417; *États-Unis c. Burns*, [2001] 1 R.C.S. 283, 2001 CSC 7; *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 3, 2002 CSC 1; *Beauregard c. Canada*, [1986] 2 R.C.S. 56; *Ell c. Alberta*, [2003] 1 R.C.S. 857, 2003 CSC 35; *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3; *Renvoi : Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486; *Mackin c. Nouveau-Brunswick (Ministre des Finances)*, [2002] 1 R.C.S. 405, 2002 CSC 13; *R. c. Lippé*, [1991] 2 R.C.S. 114; *Valente c. La Reine*, [1985] 2 R.C.S. 673; *Therrien (Re)*, [2001] 2 R.C.S. 3, 2001 CSC 35; *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *R. c. Mentuck*, [2001] 3 R.C.S. 442, 2001 CSC 76; *R. c. Regan*, [2002] 1 R.C.S. 297, 2002 CSC 12; *Boucher c. The Queen*, [1955] R.C.S. 16; *Lemay c. The King*, [1952] 1 R.C.S. 232; *Proulx c. Québec (Procureur général)*, [2001] 3 R.C.S. 9, 2001 CSC 66; *Ruby c. Canada (Solliciteur général)*, [2002] 4 R.C.S. 3, 2002 CSC 75; *Housen c. Nikolaisen*, [2002] 2 R.C.S. 235, 2002 CSC 33.

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APPEAL from a judgment of the British Columbia Supreme Court, [2003] B.C.J. No. 1749 (QL), 2003 BCSC 1172, upholding the constitutional validity of s. 83.28 of the *Criminal Code* and the validity of an order for a judicial investigative hearing but varying its terms. Appeal dismissed, Binnie, LeBel and Fish JJ. dissenting.

Brian A. Crane, *Q.C.*, *Howard Rubin* and *Kenneth Westlake*, for the appellant the "Named Person".

Bernard Laprade and *George Dolhai*, for the respondent the Attorney General of Canada.

Alexander Budlovsky and *Mary T. Ainslie*, for the respondent the Attorney General of British Columbia.

William B. Smart, *Q.C.*, and *Brock Martland*, for the respondent Ripudaman Singh Malik.

Michael A. Code and *Jonathan Dawe*, for the respondent Ajaib Singh Bagri.

Michael Bernstein and *Sandy Tse*, for the intervener the Attorney General of Ontario.

John B. Laskin and *Frank Cesario*, for the intervener the Canadian Civil Liberties Association.

Marie Henein and *Jennifer Gleitman*, for the intervener the Federation of Law Societies of Canada.

Jenkins, David. « In Support of Canada's Anti-Terrorism Act : A Comparison of Canadian, British, and American Anti-Terrorism Law » (2003), 66 *Sask. L. Rev.* 419.

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POURVOI contre un jugement de la Cour suprême de la Colombie-Britannique, [2003] B.C.J. No. 1749 (QL), 2003 BCSC 1172, confirmant la constitutionnalité de l'art. 83.28 du *Code criminel* et la validité d'une ordonnance enjoignant la tenue d'une investigation judiciaire, mais en modifiant les modalités. Pourvoi rejeté, les juges Binnie, LeBel et Fish sont dissidents.

Brian A. Crane, *c.r.*, *Howard Rubin* et *Kenneth Westlake*, pour l'appelante la « personne désignée ».

Bernard Laprade et *George Dolhai*, pour l'intimé le procureur général du Canada.

Alexander Budlovsky et *Mary T. Ainslie*, pour l'intimé le procureur général de la Colombie-Britannique.

William B. Smart, *c.r.*, et *Brock Martland*, pour l'intimé Ripudaman Singh Malik.

Michael A. Code et *Jonathan Dawe*, pour l'intimé Ajaib Singh Bagri.

Michael Bernstein et *Sandy Tse*, pour l'intervenant le procureur général de l'Ontario.

John B. Laskin et *Frank Cesario*, pour l'intervenante l'Association canadienne des libertés civiles.

Marie Henein et *Jennifer Gleitman*, pour l'intervenante la Fédération des ordres professionnels de juristes du Canada.

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Gregory P. Delbigio, for the intervener the Canadian Bar Association.

Robert S. Anderson and *Ludmila B. Herbst*, for the interveners The Vancouver Sun, The National Post and Global Television Network Inc.

The judgment of McLachlin C.J. and Iacobucci, Major and Arbour JJ. was delivered by

IACOBUCCI AND ARBOUR JJ. —

I. Introduction

This appeal is a companion to *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, 2004 SCC 43 (the "media appeal"), released concurrently.

This appeal raises for the first time in this Court fundamental questions about the constitutional validity of provisions of the *Anti-terrorism Act*, S.C. 2001, c. 41 (the "Act"), which were adopted as amendments to the *Criminal Code*, R.S.C. 1985, c. C-46 (the "*Code*"). The Act is a legislative component of Canada's response to the enormous tragedy of the September 11, 2001 terrorist attacks in the United States. Many other countries, including the United States and the United Kingdom, similarly responded with legislation: D. Jenkins, "In Support of Canada's Anti-Terrorism Act: A Comparison of Canadian, British, and American Anti-Terrorism Law" (2003), 66 *Sask. L. Rev.* 419.

The specific issues relate to the constitutional validity of s. 83.28 of the *Code*, the "judicial investigative hearing" provision, under which the appellant was ordered to attend and be compelled to answer questions. We use "appellant" here to refer to the "Named Person", who is the subject of the s. 83.28 order and brought the appeal to this Court.

Subject to the interpretive comments we make about the section and its operation, we find the impugned provision to pass constitutional muster. However, at the outset, we believe it important to set

Gregory P. Delbigio, pour l'intervenante l'Association du Barreau canadien.

Robert S. Anderson et *Ludmila B. Herbst*, pour les intervenants The Vancouver Sun, The National Post et Global Television Network Inc.

Version française du jugement de la juge en chef McLachlin et des juges Iacobucci, Major et Arbour rendu par

LES JUGES IACOBUCCI ET ARBOUR —

I. Introduction

1 Le présent pourvoi et le pourvoi *Vancouver Sun (Re)*, [2004] 2 R.C.S. 332, 2004 CSC 43 (le « pourvoi relatif aux médias »), sont connexes et leurs motifs sont déposés simultanément.

2 La Cour est saisie, pour la première fois, de questions fondamentales relatives à la constitutionnalité des dispositions de la *Loi antiterroriste*, L.C. 2001, ch. 41 (la « Loi »), adoptées sous forme de modifications du *Code criminel*, L.R.C. 1985, ch. C-46 (le « *Code* »). La Loi est l'aspect législatif de la réaction du Canada à l'effroyable tragédie des attaques terroristes survenues aux États-Unis, le 11 septembre 2001. De nombreux autres pays, dont les États-Unis et le Royaume-Uni, ont également réagi par voie législative : D. Jenkins, « In Support of Canada's Anti-Terrorism Act : A Comparison of Canadian, British, and American Anti-Terrorism Law » (2003), 66 *Sask. L. Rev.* 419.

3 Les questions soulevées concernent la constitutionnalité de l'art. 83.28 du *Code*, la disposition régissant l'« investigation judiciaire » à laquelle l'appelant a reçu l'ordre de se présenter afin de répondre à des questions. Dans les présents motifs, nous utilisons le terme « appelant » pour renvoyer à la « personne visée » (ou « personne désignée ») par l'ordonnance rendue en vertu de l'art. 83.28, qui a formé le pourvoi devant la Cour.

4 Sous réserve de commentaires portant sur son interprétation et son application, nous concluons que la disposition contestée résiste à l'examen de sa constitutionnalité. Toutefois, nous croyons qu'il

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forth some background considerations in this appeal and the media appeal.

5 The challenge for democracies in the battle against terrorism is not whether to respond, but rather how to do so. This is because Canadians value the importance of human life and liberty, and the protection of society through respect for the rule of law. Indeed, a democracy cannot exist without the rule of law. So, while Cicero long ago wrote "*inter arma silent leges*" (the laws are silent in battle) (*Pro Milone* 14), we, like others, must strongly disagree: see A. Barak, "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002), 116 *Harv. L. Rev.* 16, at pp. 150-51.

6 Although terrorism necessarily changes the context in which the rule of law must operate, it does not call for the abdication of law. Yet, at the same time, while respect for the rule of law must be maintained in the response to terrorism, the Constitution is not a suicide pact, to paraphrase Jackson J.: *Terminiello v. Chicago*, 337 U.S. 1 (1949), at p. 37 (in dissent).

7 Consequently, the challenge for a democratic state's answer to terrorism calls for a balancing of what is required for an effective response to terrorism in a way that appropriately recognizes the fundamental values of the rule of law. In a democracy, not every response is available to meet the challenge of terrorism. At first blush, this may appear to be a disadvantage, but in reality, it is not. A response to terrorism within the rule of law preserves and enhances the cherished liberties that are essential to democracy. As eloquently put by President Aharon Barak of the Israeli Supreme Court:

> This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of

est important, au départ, d'énoncer certains facteurs contextuels du présent pourvoi et de celui relatif aux médias.

Le défi que les démocraties sont appelées à relever dans la lutte contre le terrorisme n'est pas de savoir si elles doivent réagir, mais plutôt comment elles doivent le faire. Cela s'explique par l'importance que les Canadiens et les Canadiennes attachent à la vie et à la liberté de l'être humain, ainsi qu'à la protection de la société grâce au respect de la primauté du droit. En effet, l'existence même d'une démocratie repose sur la primauté du droit. Par ailleurs, bien que Cicéron ait jadis écrit, dans *Pro Milone* 14, que « *inter arma silent leges* » (les lois se taisent quand les armes parlent), nous devons, comme bien d'autres, être en profond désaccord : voir A. Barak, « Foreword : A Judge on Judging : The Role of a Supreme Court in a Democracy » (2002), 116 *Harv. L. Rev.* 16, p. 150-151.

Quoiqu'il modifie nécessairement le contexte dans lequel doit s'appliquer le principe de la primauté du droit, le terrorisme ne commande pas la renonciation à ce principe. Mais en même temps, s'il est vrai que la réaction au terrorisme doit respecter la primauté du droit, il reste que la Constitution n'est pas un pacte de suicide, pour paraphraser le juge Jackson, dissident, dans l'arrêt *Terminiello c. Chicago*, 337 U.S. 1 (1949), p. 37.

Par conséquent, le défi qu'un État démocratique doit relever en réagissant au terrorisme consiste à prendre des mesures qui soient à la fois efficaces et conformes aux valeurs fondamentales de la primauté du droit. Dans une démocratie, tout n'est pas permis pour contrer le terrorisme. Ce qui peut sembler être un désavantage, au premier abord, n'en est pas un en réalité. La réaction au terrorisme, qui respecte la primauté du droit, protège et renforce les libertés précieuses qui sont essentielles à une démocratie. Comme l'a affirmé avec éloquence le président Aharon Barak de la Cour suprême d'Israël :

> [TRADUCTION] Tel est le destin d'une démocratie : dans un régime démocratique, la fin ne justifie pas tous les moyens et il n'est pas possible non plus de recourir à toutes les méthodes utilisées par l'ennemi. Il arrive parfois qu'une démocratie doive se battre en ayant une main

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individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties.

(H.C. 5100/94, *Public Committee Against Torture in Israel v. Israel*, 53(4) P.D. 817, at p. 845, cited in Barak, *supra*, at p. 148.)

Although the constitutionality of a legislative approach to terrorism will ultimately be determined by the judiciary in its role as the arbiter of constitutional disputes for the country, we must not forget that the legislative and executive branches also desire, as democratic agents of the highest rank, to seek solutions and approaches that conform to fundamental rights and freedoms.

II. The Background

We recognize that there is an overlap between the facts and procedural history of this appeal and that of the media appeal. It is nonetheless helpful to fully canvass the facts in each appeal to aid in the understanding of the context in which the issues are raised.

A. *The Facts and Procedural History*

The invocation of the legislative provision at the focus of this appeal, s. 83.28 of the *Code*, relates to two alleged acts of terrorism, both of which occurred on June 23, 1985. An explosion killed two baggage handlers, and injured four others, at the Narita Airport in Japan, as baggage was being transferred onto Air India Flight 301. A second explosion occurred just under one hour later, causing Air India Flight 182 to crash off the west coast of Ireland. All 329 passengers and crew perished in the explosion.

On February 4, 1988, the first accused, Inderjit Singh Reyat, was arrested in England. He was extradited to Canada on December 13, 1989, where he

attachée derrière le dos. Elle est néanmoins en position de force. Le maintien de la primauté du droit et la reconnaissance des libertés individuelles représentent un aspect important de sa conception de la sécurité. En définitive, ils accroissent son enthousiasme et son dynamisme et lui permettent de venir à bout de ses difficultés.

(H.C. 5100/94, *Public Committee Against Torture in Israel v. Israel*, 53(4) P.D. 817, p. 845, cité dans Barak, *loc. cit.*, p. 148.)

8 Même si, en définitive, ce sont les tribunaux, en tant qu'arbitres des différends constitutionnels au Canada, qui se prononceront sur la constitutionnalité d'une approche législative destinée à contrer le terrorisme, il ne faut pas oublier qu'en leur qualité d'agents démocratiques du plus haut rang les pouvoirs législatif et exécutif souhaitent, eux aussi, trouver des solutions et des approches conformes aux droits et libertés fondamentaux.

II. Le contexte

9 Nous reconnaissons que les faits et l'historique des procédures judiciaires du présent pourvoi recoupent ceux du pourvoi relatif aux médias. Il est néanmoins utile de procéder à un examen complet des faits de chacun de ces pourvois pour bien comprendre le contexte dans lequel les questions en litige sont soulevées.

A. *Les faits et l'historique des procédures judiciaires*

10 La disposition législative qui est au cœur du présent pourvoi, à savoir l'art. 83.28 du *Code*, est invoquée relativement à deux actes de terrorisme qui auraient été commis le 23 juin 1985. Une explosion survenue à l'aéroport Narita au Japon, pendant un transfert de bagages sur le vol 301 d'Air India, a causé la mort de deux bagagistes en plus de blesser quatre autres personnes. Un peu moins d'une heure plus tard, une deuxième explosion a provoqué l'écrasement du vol 182 d'Air India au large de la côte ouest de l'Irlande. Les 329 passagers et membres d'équipage qui se trouvaient à bord ont tous péri dans l'explosion.

11 Le 4 février 1988, le premier accusé, Inderjit Singh Reyat, était arrêté en Angleterre. Le 13 décembre 1989, il a été extradé vers le Canada afin

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faced numerous charges relating to the explosion at Narita Airport. On May 10, 1991, he was convicted on seven counts, concerning manslaughter and the acquisition, possession, and use of explosive substances: *R. v. Reyat*, [1991] B.C.J. No. 2006 (QL) (S.C.).

12 Ripudaman Singh Malik and Ajaib Singh Bagri were jointly charged with several offences in relation to both explosions and the intended explosion of Air India Flight 301 on October 27, 2000. On March 8, 2001, a direct indictment was filed against the accused, Mr. Malik and Mr. Bagri. Mr. Reyat was tried in relation to the bombing of Air India Flight 182, and a new indictment was filed on June 5, 2001, adding Mr. Reyat as a third accused.

13 On February 10, 2003, Mr. Reyat pleaded guilty to a new indictment charging him with aiding or abetting the construction of the explosive that was placed on Air India Flight 182 and the manslaughter of the 329 passengers and crew. He was sentenced to five years imprisonment in addition to time already spent in custody.

14 On February 24, 2003, Mr. Malik and Mr. Bagri re-elected to have their case tried by judge alone. The trial of Mr. Malik and Mr. Bagri (the "Air India Trial") began on April 28, 2003 and continues to date.

15 Shortly thereafter, on May 6, 2003, the Crown brought an *ex parte* application seeking an order that the appellant attend for examination pursuant to s. 83.28 of the *Code*. Dohm A.C.J. of the British Columbia Supreme Court granted the application and issued an order for the gathering of information on the basis of an affidavit by a member of the RCMP's Air India Task Force.

16 Dohm A.C.J. set a number of terms and conditions to govern the conduct of the judicial

de répondre à de nombreuses accusations se rapportant à l'explosion survenue à l'aéroport Narita. Le 10 mai 1991, il a été déclaré coupable relativement à sept chefs d'accusation d'homicide involontaire coupable et d'acquisition, de possession et d'usage de substances explosives : *R. c. Reyat*, [1991] B.C.J. No. 2006 (QL) (C.S.).

Le 27 octobre 2000, Ripudaman Singh Malik et Ajaib Singh Bagri ont été accusés conjointement de plusieurs infractions liées aux deux explosions et à celle qui était censée se produire à bord du vol 301 d'Air India. Le 8 mars 2001, les accusés, MM. Malik et Bagri, ont fait l'objet d'une mise en accusation directe. Monsieur Reyat a subi son procès relativement à l'attentat à la bombe commis contre le vol 182 d'Air India et, le 5 juin 2001, un nouvel acte d'accusation ajoutant M. Reyat comme troisième accusé a été déposé.

Le 10 février 2003, M. Reyat a plaidé coupable à la suite du dépôt d'un nouvel acte d'accusation l'inculpant d'avoir aidé ou encouragé à fabriquer la bombe placée à bord du vol 182 d'Air India, ainsi que d'avoir commis un homicide involontaire coupable relativement aux 329 passagers et membres d'équipage. Il a été condamné à cinq ans d'emprisonnement, en plus du temps qu'il avait passé en détention avant d'être condamné.

Le 24 février 2003, MM. Malik et Bagri ont choisi de subir leur procès devant un juge seul. Le procès de MM. Malik et Bagri (le « procès Air India ») a commencé le 28 avril 2003 et se poursuit toujours.

Peu après, le 6 mai 2003, le ministère public a présenté, en l'absence de toute autre partie, une demande d'ordonnance enjoignant à l'appelant de se présenter pour subir un interrogatoire conformément à l'art. 83.28 du *Code*. Le juge en chef adjoint Dohm de la Cour suprême de la Colombie-Britannique a accueilli la demande et a rendu une ordonnance autorisant la recherche de renseignements, sur la foi de l'affidavit d'un membre du groupe de travail de la GRC sur l'écrasement de l'avion d'Air India.

Le juge en chef adjoint Dohm a assujetti l'investigation judiciaire à un certain nombre de

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investigative hearing: (1) it was to be conducted *in camera*; (2) the appellant was entitled to counsel; (3) examination was to be undertaken by the Attorney General; (4) the appellant was required to answer questions and produce items ordered to be produced subject to privilege or other non-disclosure considerations; (5) the appellant was prohibited from disclosing any information or evidence obtained at the hearing; and (6) notice was not to be given to the accused in the Air India Trial, to the press, or to the public. Upon service of the order, the appellant was to be informed of the right to retain and instruct counsel and that a failure to attend or remain in attendance at the hearing may result in the issuance of an arrest warrant.

modalités : (1) l'investigation devait se dérouler à huis clos; (2) l'appelant avait droit à un avocat; (3) l'interrogatoire devait être effectué par le procureur général; (4) l'appelant était tenu de répondre aux questions et de remettre les articles exigés par l'ordonnance, sous réserve de considérations relatives au droit applicable en matière de divulgation ou de privilèges; (5) il était interdit à l'appelant de divulguer tout renseignement ou élément de preuve obtenu lors de l'investigation; (6) aucun préavis ne serait donné aux accusés du procès Air India, à la presse et au public. Au moment de la signification de l'ordonnance, l'appelant devait être informé de son droit d'engager un avocat et de lui donner des instructions, et qu'un mandat d'arrestation pourrait être décerné contre lui s'il omettait de se présenter ou de demeurer présent à l'investigation.

The order required the appellant to attend at an examination on May 20, 2003. At some point prior to that date, counsel for Mr. Malik and Mr. Bagri fortuitously became aware of the order and advised Dohm A.C.J. that they wished to make submissions. The appellant retained counsel, and on June 16, 2003, Dohm A.C.J. was advised that the appellant wished to challenge the constitutional validity of s. 83.28 of the *Code*. Dohm A.C.J. directed that Holmes J. hear all submissions jointly in seven days time. The constitutional challenge to s. 83.28 and the application to set aside Dohm A.C.J.'s order commenced on June 23, 2003.

17 L'ordonnance enjoignait à l'appelant de se présenter pour subir un interrogatoire le 20 mai 2003. Quelque temps avant cette date, les avocats de MM. Malik et Bagri ont appris par hasard l'existence de l'ordonnance et ont informé le juge en chef adjoint Dohm qu'ils souhaitaient présenter des observations. L'appelant a retenu les services d'un avocat et, le 16 juin 2003, le juge en chef adjoint Dohm a été avisé que l'appelant souhaitait contester la constitutionnalité de l'art. 83.28 du *Code*. Le juge en chef adjoint Dohm a ordonné que, sept jours plus tard, la juge Holmes entende toutes les observations en même temps. L'audition de la contestation de la constitutionnalité de l'art. 83.28 et de la demande d'annulation de l'ordonnance du juge en chef adjoint Dohm a commencé le 23 juin 2003.

The application to set aside the order was dismissed, and Holmes J. issued reasons on July 21, 2003. The order was varied, however, to permit counsel for Mr. Malik and Mr. Bagri to attend at the judicial investigative hearing and examine the appellant under the proviso that they leave the hearing if information unrelated to the trial was elicited. The amended order further prohibited the accused from attending the hearing. Counsel were prohibited from disclosing any information or evidence obtained at the hearing to the public

18 La demande d'annulation de l'ordonnance a été rejetée et la juge Holmes a déposé ses motifs de jugement le 21 juillet 2003. L'ordonnance a cependant été modifiée de manière à permettre aux avocats de MM. Malik et Bagri de se présenter à l'investigation judiciaire et d'interroger l'appelant, à la condition qu'ils quittent la salle d'audience si des renseignements n'ayant rien à voir avec le procès étaient dévoilés. L'ordonnance modifiée interdisait en outre aux accusés de se présenter à l'investigation. Il était interdit aux avocats de divulguer au

and to the accused. The reasons for judgment were sealed.

19 Upon application, Holmes J. stayed the judicial investigative hearing on July 22, 2003 until September 2, 2003, so that the appellant could seek leave to appeal to this Court. The appeal is brought under s. 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, as there is no provision in the *Code* for an appeal of a s. 83.28 order to a provincial court of appeal. On that date, Holmes J. delivered, in open court, a synopsis of her reasons for judgment, dated July 21, 2003. She also stated that the examination of the appellant under s. 83.28 had not yet begun, and that the judicial investigative hearing had been adjourned pending leave to appeal to this Court.

20 On August 11, 2003, leave was granted for an appeal to this Court from the decision of Holmes J. The appeal was heard on December 10 and 11, 2003, and was held, in its entirety, in open court, subject to terms and conditions stated by the Chief Justice at the outset. During oral argument, counsel refrained from revealing the appellant's identity, and any material supporting the order for the judicial investigative hearing. Moreover, the appeal was not broadcast, contrary to the usual practice of the Court.

B. *The Decision of Holmes J.*

21 In the publicly released synopsis of her reasons for judgment dated July 21, 2003, Holmes J. explained that the *in camera* proceedings she presided over concerned the interpretation, application, and constitutionality of s. 83.28 of the *Code*, the provision which provides for judicial investigative hearings in relation to terrorism offences: [2003] B.C.J. No. 1749 (QL), 2003 BCSC 1172. She stated that an order under s. 83.28 had been issued on May 6, 2003, requiring the appellant to attend for examination by the agent of the Attorney General, on the basis that the ordering judge had reasonable grounds for believing that a terrorism offence had occurred,

public et aux accusés tout renseignement ou élément de preuve obtenu lors de l'investigation. Les motifs du jugement ont été mis sous scellés.

Le 22 juillet 2003, la juge Holmes a accueilli une demande de suspension de l'investigation judiciaire jusqu'au 2 septembre 2003, afin de permettre à l'appelant de présenter à la Cour une demande d'autorisation de pourvoi. Le pourvoi est fondé sur l'art. 40 de la *Loi sur la Cour suprême*, L.R.C. 1985, ch. S-26, étant donné qu'aucune disposition du *Code* ne permet d'interjeter devant une cour d'appel provinciale un appel contre une ordonnance rendue en vertu de l'art. 83.28. Ce jour-là, au cours d'une audience publique, la juge Holmes a fait un résumé de ses motifs de jugement du 21 juillet 2003. Elle a aussi affirmé que l'appelant n'avait pas encore été interrogé en vertu de l'art. 83.28 et que l'investigation judiciaire avait été suspendue jusqu'à ce que la Cour ait statué sur sa demande d'autorisation de pourvoi.

Le 11 août 2003, la Cour a autorisé la tenue du pourvoi formé contre la décision de la juge Holmes. Les 10 et 11 décembre 2003, elle a entendu en audience publique la totalité du pourvoi, sous réserve des modalités fixées, au départ, par la Juge en chef. Au cours des plaidoiries, les avocats se sont abstenus de révéler l'identité de l'appelant et de dévoiler tout document produit à l'appui de l'ordonnance d'investigation judiciaire. De plus, le pourvoi n'a pas été télédiffusé, contrairement à la pratique habituelle de la Cour.

B. *La décision de la juge Holmes*

Dans le résumé — qu'elle a fait publiquement — de ses motifs de jugement du 21 juillet 2003, la juge Holmes a expliqué que les procédures à huis clos qu'elle avait présidées concernaient l'interprétation, l'application et la constitutionnalité de l'art. 83.28 du *Code*, qui prévoit la tenue d'investigations judiciaires pour les infractions de terrorisme : [2003] B.C.J. No. 1749 (QL), 2003 BCSC 1172. Elle a affirmé que le juge qui, le 6 mai 2003, s'était fondé sur l'art. 83.28 pour rendre une ordonnance enjoignant à l'appelant de se présenter pour subir un interrogatoire mené par le représentant du procureur général avait des motifs

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and that information in relation to that offence was likely to be obtained as a result of the judicial investigative hearing. Holmes J. further explained that the appellant is neither an accused, nor a suspect in the underlying terrorism offence. She stated that the terrorism offence under investigation was the two related Air India explosions discussed in the facts above.

raisonnables de croire qu'une infraction de terrorisme avait été commise et qu'il était probable que l'investigation judiciaire permettrait d'obtenir des renseignements relatifs à l'infraction. La juge Holmes a, en outre, expliqué que l'appelant n'est ni accusé ni soupçonné d'avoir commis l'infraction de terrorisme en cause. À son avis, l'infraction de terrorisme visée par l'investigation était liée aux deux explosions connexes des avions d'Air India mentionnées dans les faits exposés plus haut.

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Holmes J. canvassed six main issues, namely: (1) whether the order for the hearing could be validly issued in relation to a terrorism offence alleged to have been committed before s. 83.28 came into force; (2) whether the order in question was sufficiently specific; (3) whether s. 83.28 and the order violate the right to silence of the person required to attend for examination, including the right against self-incrimination; (4) whether s. 83.28 and the order breach the accused's fair trial rights by providing for pre-trial or mid-trial preparation or discovery for the Crown that is not available to the defence; (5) whether s. 83.28 interferes with the independence and impartiality of the judiciary; and (6) whether, if the order is valid and the judicial investigative hearing is to proceed, counsel for the accused are entitled to participate, and if so, to what extent.

22 La juge Holmes a examiné six questions principales, à savoir : (1) L'ordonnance d'investigation pouvait-elle être validement rendue à l'égard d'une infraction de terrorisme qui aurait été commise avant l'entrée en vigueur de l'art. 83.28? (2) L'ordonnance en cause était-elle suffisamment précise? (3) L'article 83.28 et l'ordonnance portent-ils atteinte au droit de garder le silence de la personne tenue de se présenter pour subir un interrogatoire, notamment à son droit de ne pas s'incriminer? (4) L'article 83.28 et l'ordonnance porte-t-ils atteinte au droit des accusés à un procès équitable en permettant au ministère public, sans que la défense ne puisse elle-même le faire, de se préparer ou d'obtenir une communication de renseignements avant le procès ou au milieu de celui-ci? (5) L'article 83.28 compromet-il l'indépendance et l'impartialité du pouvoir judiciaire? (6) Si l'ordonnance est valide et que l'investigation judiciaire doit avoir lieu, les avocats des accusés peuvent-ils y participer et, dans l'affirmative, jusqu'à quel point?

Having considered each of these issues, Holmes J. concluded both that the order was validly issued and constitutionally sound. She determined further that while the participation of counsel at a judicial investigative hearing would be inappropriate in most cases, it was not inappropriate in this particular case, given the unusual circumstances. Consequently, counsel for the accused, as well as the Attorney General were entitled to examine the appellant. Holmes J. further stated that the hearing was subject to restrictions regarding the privacy and other rights and interests of the appellant, as well as regarding the integrity of the investigation.

23 Après avoir examiné chacune de ces questions, la juge Holmes a conclu que l'ordonnance était à la fois valide et constitutionnelle. Elle a décidé que, même si la participation des avocats à une investigation judiciaire est inappropriée dans la plupart des cas, elle ne l'était pas en l'espèce en raison des circonstances inhabituelles de l'affaire. Par conséquent, les avocats des accusés ainsi que le procureur général avaient le droit d'interroger l'appelant. La juge Holmes a ajouté que l'investigation était assujettie à des restrictions visant à protéger le droit à la vie privée et les autres droits et intérêts de l'appelant, ainsi qu'à préserver l'intégrité de l'enquête.

24 Holmes J. found additionally that, while the examination conducted under the order may have incidental effects on the continuing trial of the accused, the procedure was resorted to predominantly to further an ongoing investigation. Accordingly, she stated that her detailed reasons for judgment dated July 21, 2003 would remain sealed until the conclusion of the hearing or any contrary order of the court.

III. Relevant Constitutional and Legislative Provisions

25 The relevant constitutional and legislative provisions are set forth in the appendix.

IV. Issues

26 The following constitutional questions were stated by the Chief Justice on August 28, 2003:

1. Does s. 83.28 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

2. If so, is the infringement a reasonable limit, prescribed by law, as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

3. Does s. 83.28 of the *Criminal Code* infringe the principles of judicial independence and impartiality guaranteed by s. 11(*d*) of the *Charter*?

4. If so, is the infringement a reasonable limit, prescribed by law, as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

5. Does s. 83.28 of the *Criminal Code* infringe the principles of independence and impartiality established by the Preamble to the *Constitution Act, 1867*?

27 This appeal also raises the following additional issues:

1. Can s. 83.28 of the *Criminal Code* be applied retrospectively where the terrorism offences were committed in 1985, before the *Anti-terrorism Act* came into force?

La juge Holmes a, en outre, conclu que, même si l'interrogatoire effectué en vertu de l'ordonnance pouvait avoir une incidence sur le déroulement du procès des accusés, le recours à cette procédure visait avant tout à faire progresser une enquête en cours. Elle a donc déclaré que ses motifs de jugement détaillés du 21 juillet 2003 resteraient sous scellés jusqu'à la fin de l'investigation ou jusqu'à ce que le tribunal en décide autrement.

III. Les dispositions constitutionnelles et législatives pertinentes

Les dispositions constitutionnelles et législatives pertinentes sont énoncées dans l'annexe.

IV. Questions en litige

La Juge en chef a formulé les questions constitutionnelles suivantes, le 28 août 2003 :

1. L'article 83.28 du *Code criminel*, L.R.C. 1985, ch. C-46, viole-t-il l'art. 7 de la *Charte canadienne des droits et libertés*?

2. Dans l'affirmative, cette violation constitue-t-elle une limite raisonnable prescrite par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique, au sens de l'article premier de la *Charte*?

3. L'article 83.28 du *Code criminel* viole-t-il les principes d'indépendance et d'impartialité judiciaires garantis par l'al. 11*d*) de la *Charte*?

4. Dans l'affirmative, cette violation constitue-t-elle une limite raisonnable prescrite par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique, au sens de l'article premier de la *Charte*?

5. L'article 83.28 du *Code criminel* viole-t-il les principes d'indépendance et d'impartialité judiciaires établis dans le préambule de la *Loi constitutionnelle de 1867*?

Le présent pourvoi soulève en outre les questions supplémentaires suivantes :

1. L'article 83.28 du *Code criminel* peut-il s'appliquer rétrospectivement dans le cas où l'infraction de terrorisme a été commise en 1985, avant l'entrée en vigueur de la *Loi antiterroriste*?

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2. Can s. 83.28 be used for the purpose of pre-trial discovery of the evidence of the named person, a witness under subpoena by the Crown to attend and give evidence at the Air India trial?

3. Was the order of Holmes J. contrary to s. 83.28 in that the order:

   a) permitted the attendance at the *in camera* hearing of counsel for the accused Bagri and Malik;

   b) permitted each defence counsel to cross-examine the witness in addition to counsel for the Crown;

   c) required defence counsel to undertake not to disclose to the accused information received at the judicial investigative hearing?

V. Analysis

A. *Introduction*

The following recital to the Act expresses the basic issue before us in this case, namely the tension between responding to terrorism in the interest of national security and respect for the *Charter*'s rights and freedoms:

> WHEREAS the Parliament of Canada, recognizing that terrorism is a matter of national concern that affects the security of the nation, is committed to taking comprehensive measures to protect Canadians against terrorist activity while continuing to respect and promote the values reflected in, and the rights and freedoms guaranteed by, the *Canadian Charter of Rights and Freedoms*;

The provisions in the Act deal with a multitude of matters related to judicial investigative hearings, procedures, seizures, arrests, recognizance, detention, reporting and other topics: see S. A. Cohen, "Safeguards in and Justifications for Canada's New *Anti-terrorism Act*" (2002-2003), 14 *N.J.C.L.* 99;

2. L'article 83.28 peut-il être utilisé pour les besoins de la communication préalable au procès de la preuve de la personne désignée, que le ministère public avait assignée à se présenter et à témoigner au procès Air India?

3. L'ordonnance de la juge Holmes contrevenait-elle à l'art. 83.28 du fait

   a) qu'elle autorisait la présence, à l'audience à huis clos, des avocats des accusés Bagri et Malik;

   b) qu'elle autorisait chaque avocat de la défense, en plus de l'avocat du ministère public, à contre-interroger le témoin;

   c) qu'elle obligeait les avocats de la défense à promettre de ne pas divulguer aux accusés les renseignements obtenus au cours de l'investigation judiciaire?

V. Analyse

A. *Introduction*

28 Le passage suivant du préambule de la Loi expose la question fondamentale dont nous sommes saisis en l'espèce, à savoir celle de la tension qui existe entre les mesures prises, au nom de la sécurité nationale, pour lutter contre le terrorisme, et le respect des droits et libertés garantis par la *Charte* :

> Attendu :
>
> . . .
>
> que le Parlement du Canada, reconnaissant que le terrorisme est une question d'intérêt national qui touche la sécurité de la nation, s'engage à prendre des mesures exhaustives destinées à protéger les Canadiens contre les activités terroristes tout en continuant à promouvoir et respecter les droits et libertés garantis par la *Charte canadienne des droits et libertés* et les valeurs qui la sous-tendent;

29 Les dispositions de la Loi traitent d'une multitude de questions liées aux investigations judiciaires, aux procédures, aux saisies, aux arrestations, ainsi qu'aux engagements, à la détention, aux comptes rendus et à d'autres sujets : voir S. A. Cohen, « Safeguards in and Justifications for

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M. L. Friedland, "Police Powers in Bill C-36", in R. J. Daniels, P. Macklem and K. Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (2001), 269. What we are faced with here are questions of both statutory and constitutional interpretation as applied to the facts of this case. As this is the first case under the anti-terrorism provisions, it is prudent to sound some cautionary notes before embarking upon our analysis.

30 To begin with, although specific provisions of the Act are directly before us, there are other sections that may be implicated on which we do not wish to pronounce absent a factual foundation. As well, we intend to decide only what is necessary to resolve the specific dispute in issue. We hope otherwise, but there will likely be other cases to arise for further elucidation, and we prefer to await that development.

31 In addition, context in the law is of vital importance and that is certainly the case with respect to terrorism. What we say in these reasons is influenced by the adjudicative facts we have before us. Although constitutional opinion on legislative facts is a different exercise, again, we wish to emphasize how important it is to examine the particular factual setting of each case prior to determining the legally required result.

32 The issues on appeal are complex and, in many instances, interrelated. In the discussion that follows, we first consider the statutory and constitutional interpretation of s. 83.28. Next, we then discuss the retrospective application of the provision, the s. 7 right against self-incrimination, and the independence of the judiciary. We then turn to the use of the judicial investigative hearing as a tool for pre-trial discovery and its relationship with s. 11(*d*) of the *Charter* and the Preamble to the *Constitution Act, 1867*. Finally, we discuss the role of the Crown

Canada's New *Anti-terrorism Act* » (2002-2003), 14 *N.J.C.L.* 99; M. L. Friedland, « Police Powers in Bill C-36 », dans R. J. Daniels, P. Macklem et K. Roach, dir., *The Security of Freedom : Essays on Canada's Anti-Terrorism Bill* (2001), 269. En l'espèce, nous sommes appelés à répondre à des questions d'interprétation tant législative que constitutionnelle à la lumière des faits de la présente affaire. Étant donné qu'il s'agit du premier cas visé par les dispositions en matière d'antiterrorisme, il est prudent de faire certaines mises en garde avant d'entreprendre notre analyse.

Pour commencer, bien que certaines dispositions précises de la Loi soient directement soumises à notre attention, il se peut que d'autres dispositions soient en cause, sur lesquelles nous ne souhaitons pas nous prononcer en l'absence de fondement factuel. De même, nous entendons nous prononcer uniquement sur ce qui est nécessaire pour régler le différend dont il est question en l'espèce. Bien que nous ne le souhaitions pas, il se présentera probablement d'autres cas qui nécessiteront des explications supplémentaires, et nous préférons attendre qu'ils se présentent pour apporter ces explications.

De plus, le contexte a certes en matière de terrorisme la même importance vitale qu'il a en droit. Les propos que nous tenons dans les présents motifs sont influencés par les faits en litige qui nous ont été soumis. Bien que la formulation d'une opinion constitutionnelle sur des faits législatifs soit un tout autre exercice, nous tenons, là encore, à souligner qu'il importe d'examiner le contexte factuel particulier de chaque affaire pour déterminer le résultat que commande la loi.

Les questions soulevées dans le présent pourvoi sont complexes et, dans biens des cas, liées entre elles. Dans l'analyse qui suit, nous examinons d'abord la question de l'interprétation constitutionnelle et législative de l'art. 83.28. Puis, nous traitons de l'application rétrospective de cette disposition, du droit de ne pas s'incriminer garanti par l'art. 7 et de l'indépendance du pouvoir judiciaire. Nous abordons ensuite la question du recours à l'investigation judiciaire en tant qu'outil d'interrogatoire préalable, et du lien qu'il a avec l'al. 11*d*) de la *Charte*

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and the implications of the participation of counsel at the hearing.

et le préambule de la *Loi constitutionnelle de 1867*. Enfin, nous analysons le rôle du ministère public et les conséquences de la participation des avocats à l'investigation.

B. *Statutory and Constitutional Interpretation Generally*

B. *L'interprétation législative et constitutionnelle en général*

Before assessing the constitutionality of s. 83.28, it is necessary to determine the scope of the provision. This appeal marks the first known instance where the s. 83.28 judicial investigative hearing power has been invoked. While the judicial investigative hearing process has features akin to income tax and bankruptcy investigations, public inquiries, proceedings under the *Mutual Legal Assistance in Criminal Matters Act*, R.S.C. 1985, c. 30 (4th Supp.) ("*MLACMA*"), and coroner's inquests, the provision in its entirety represents a new addition to the Canadian legal landscape.

33 Avant d'apprécier la constitutionnalité de l'art. 83.28, il est nécessaire de déterminer la portée de cet article. Il s'agit en l'espèce du premier cas connu où il est question du pouvoir, conféré par l'art. 83.28, d'ordonner la tenue d'une investigation judiciaire. Bien que le processus d'investigation judiciaire s'apparente, à certains égards, aux enquêtes en matière de faillite et d'impôt sur le revenu, aux enquêtes publiques, aux procédures fondées sur la *Loi sur l'entraide juridique en matière criminelle*, L.R.C. 1985, ch. 30 (4e suppl.) (« *LEJMC* »), et aux enquêtes du coroner, la disposition représente, dans son ensemble, une nouveauté dans le paysage juridique canadien.

The modern principle of statutory interpretation requires that the words of the legislation be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. This is the prevailing and preferred approach to statutory interpretation: see, e.g., *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26. The modern approach recognizes the multi-faceted nature of statutory interpretation. Textual considerations must be read in concert with legislative intent and established legal norms.

34 De nos jours, le principe qui s'applique en matière d'interprétation législative veut que les termes d'une loi soient interprétés [TRADUCTION] « dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur » : E. A. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87. Cette méthode d'interprétation législative est privilégiée et la plus répandue : voir, par exemple, *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21; *R. c. Sharpe*, [2001] 1 R.C.S. 45, 2001 CSC 2, par. 33; *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42, par. 26. L'approche contemporaine tient compte de la nature diversifiée de l'interprétation législative. Les considérations relatives au texte doivent être interprétées de concert avec l'intention du législateur et les normes juridiques établies.

Underlying this approach is the presumption that legislation is enacted to comply with constitutional norms, including the rights and freedoms enshrined in the *Charter*: R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 367. This presumption acknowledges the centrality of constitutional values in the

35 Cette approche est fondée sur la présomption que le texte législatif édicté respecte les normes constitutionnelles, y compris les droits et libertés consacrés par la *Charte* : R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4e éd. 2002), p. 367. Cette présomption reconnaît le rôle crucial des valeurs constitutionnelles dans le

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legislative process, and more broadly, in the political and legal culture of Canada. Accordingly, where two readings of a provision are equally plausible, the interpretation which accords with *Charter* values should be adopted: see *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at p. 660; *R. v. Lucas*, [1998] 1 S.C.R. 439, at para. 66; and *Sharpe*, *supra*, at para. 33.

36 In light of these principles, we consider the purpose of the impugned s. 83.28 and the powers that are conferred by its application.

C. *The Scope of Section 83.28*

37 The Act was crafted as omnibus legislation with the effect of amending 16 statutes, including the *Code*, and implementing two separate United Nations Conventions concerning the financing of terrorism and the suppression of terrorist bombings, respectively. The legislation was introduced in Parliament on October 15, 2001, shortly after the events that unfolded in the United States on September 11, 2001. The Preamble to the Act, Parliamentary debates, and notes presented before the Special Senate Committee convened for discussion of Bill C-36 and before the House of Commons Justice and Human Rights Committee, provide insight into the purpose of the Act in general, and of s. 83.28 in particular. Where divergent views on the purpose of an Act are expressed, or where the scope of the purpose is called into question, extrinsic materials such as Hansard and other government publications may be used to elucidate meaning: *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21, at para. 25; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 45; *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31, at para. 17.

38 The Preamble to the Act speaks to the "challenge of eradicating terrorism", the requirement for the "strengthening of Canada's capacity to suppress, investigate and incapacitate terrorist activity", and the need for legislation to "prevent

processus législatif et, de façon plus générale, dans la culture politique et juridique canadienne. Par conséquent, lorsqu'une disposition peut être interprétée de deux manières également plausibles, il y a lieu d'adopter l'interprétation qui est conforme aux valeurs de la *Charte* : voir *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038, p. 1078; *R. c. Nova Scotia Pharmaceutical Society*, [1992] 2 R.C.S. 606, p. 660; *R. c. Lucas*, [1998] 1 R.C.S. 439, par. 66; *Sharpe*, précité, par. 33.

C'est en fonction de ces principes que nous examinons l'objet de la disposition contestée, à savoir l'art. 83.28, et les pouvoirs qu'elle confère lorsqu'elle s'applique.

C. *La portée de l'art. 83.28*

La Loi a été rédigée sous forme de loi d'ensemble ayant pour effet de modifier 16 textes législatifs, dont le *Code*, et de mettre en œuvre deux conventions des Nations Unies concernant, respectivement, la répression du financement du terrorisme et celle des attentats terroristes à l'explosif. Elle a été déposée au Parlement le 15 octobre 2001, peu après les événements survenus aux États-Unis le 11 septembre 2001. Le préambule de la Loi, les débats parlementaires, les notes soumises au Comité sénatorial spécial sur le projet de loi C-36 et au Comité de la justice et des droits de la personne de la Chambre des communes permettent de saisir l'objet de la Loi en général et celui de l'art. 83.28 en particulier. Lorsque des opinions divergentes sont exprimées au sujet de l'objet de la Loi ou que la portée de cet objet est mise en cause, des documents extrinsèques comme le Hansard et les autres publications gouvernementales peuvent aider à en comprendre le sens : *Global Securities Corp. c. Colombie-Britannique (Securities Commission)*, [2000] 1 R.C.S. 494, 2000 CSC 21, par. 25; *R. c. Gladue*, [1999] 1 R.C.S. 688, par. 45; *Renvoi relatif à la Loi sur les armes à feu (Can.)*, [2000] 1 R.C.S. 783, 2000 CSC 31, par. 17.

Le préambule de la Loi parle de l'« éradication [du terrorisme qui] pose un défi », de la nécessité d'« [accroître] la capacité du Canada de réprimer, de détecter et de désamorcer les activités terroristes » et des mesures législatives nécessaires pour

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and suppress the financing, preparation, facilitation and commission of acts of terrorism". In Parliamentary debate at the introduction of Bill C-36, the Minister of Justice expressed the three main objectives of the legislation as suppressing the existence of terrorist groups, providing new investigative tools, and providing a tougher sentencing regime to incapacitate terrorists and terrorist groups: *House of Commons Debates*, vol. 137 1st Sess., 37th Parl., October 15, 2001, at p. 6048. In a similar vein, the Minister of Justice expressed the need for an enhanced legislative structure in response to terrorism before the Special Senate Committee: *Proceedings of the Special Senate Committee on Subject Matter of Bill C-36*, Issue No. 4, 1st Sess., 37th Parl., October 29, 2001, at pp. 4:4 *et seq.*

« prévenir et supprimer le financement, la préparation et la commission d'actes de terrorisme ». Au cours des débats ayant entouré le dépôt du projet de loi C-36 à la Chambre des communes, la ministre de la Justice a précisé que les trois principaux objectifs de la mesure législative étaient de mettre fin à l'existence des groupes terroristes, de fournir de nouveaux outils d'enquête et de prévoir un régime de peines plus sévères en vue de mettre hors d'état de nuire les terroristes et les groupes terroristes : *Débats de la Chambre des communes*, vol. 137, 1re sess., 37e lég., 15 octobre 2001, p. 6048. Dans le même ordre d'idées, elle a affirmé, devant le Comité sénatorial spécial, qu'il était nécessaire de renforcer la structure législative afin de lutter contre le terrorisme : *Délibérations du Comité sénatorial spécial sur la teneur du projet de loi C-36*, fascicule no 4, 1re sess., 37e lég., 29 octobre 2001, p. 4:4 et suiv.

It was suggested in submissions that the purpose of the Act should be regarded broadly as the protection of "national security". However, we believe that this characterization has the potential to go too far and would have implications that far outstrip legislative intent. The discussions surrounding the legislation, and the legislative language itself clearly demonstrate that the Act purports to provide means by which terrorism may be prosecuted and prevented. As we cautioned above, courts must not fall prey to the rhetorical urgency of a perceived emergency or an altered security paradigm. While the threat posed by terrorism is certainly more tangible in the aftermath of global events such as those perpetrated in the United States, and since then elsewhere, including very recently in Spain, we must not lose sight of the particular aims of the legislation. Notably, the Canadian government opted to enact specific criminal law and procedure legislation and did not make use of exceptional powers, for example under the *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.), or invoke the notwithstanding clause at s. 33 of the *Charter*.

39

Dans les observations soumises, on a indiqué qu'il faut généralement considérer que la Loi a pour objet d'assurer la « sécurité nationale ». Nous croyons toutefois que cette qualification risque d'aller trop loin et d'avoir des conséquences dépassant de beaucoup l'intention du législateur. Il ressort clairement des discussions l'ayant entouré et de son propre langage législatif que la Loi est censée fournir des moyens de prévenir et de punir les actes de terrorisme. Comme l'indique notre mise en garde ci-dessus, les tribunaux ne doivent pas se laisser influencer par une rhétorique issue d'une perception d'urgence ou d'une nouvelle conception de la sécurité. Quoique la menace du terrorisme soit certainement plus réelle au lendemain d'événements d'envergure mondiale comme ceux survenus aux États-Unis et ailleurs, par la suite, y compris ceux survenus tout récemment en Espagne, il ne faut pas perdre de vue les objectifs particuliers de la mesure législative. Le gouvernement du Canada a choisi notamment d'édicter des dispositions législatives particulières touchant le droit criminel et la procédure en matière criminelle, plutôt que de recourir à des pouvoirs exceptionnels comme ceux conférés par la *Loi sur les mesures d'urgence*, L.R.C. 1985, ch. 22 (4e suppl.), ou d'invoquer la disposition de dérogation contenue à l'art. 33 de la *Charte*.

40 We conclude that the purpose of the Act is the prosecution and prevention of terrorism offences.

41 Section 83.28 provides for a two-stage process, whereby an order for the gathering of information from a named individual is first issued, and an examination of the individual so named is subsequently held. The provision provides a series of parameters which govern the judicial investigative hearing. At its core, s. 83.28 permits the investigation of terrorism offences, at both a pre- and post-charge stage through testimonial compulsion on the part of the named witness. Consequently, the purpose of the provision is to confer greater investigative powers upon the state in its investigation of terrorism offences.

42 The procedure is initiated at the behest of a peace officer who, with the Attorney General's consent, applies to a judge for an order for the gathering of information: s. 83.28(2) and (3). The judge may so order, and thereby initiate the hearing, if he or she is satisfied (a) that there are reasonable grounds to believe either that a terrorism offence has been committed and that information concerning the offence or concerning the whereabouts of a suspect is likely to be obtained; or (b) that there are reasonable grounds to believe that a terrorism offence will be committed, that there are reasonable grounds to believe that the witness has direct and material information relating to the terrorism offence or in relation to the whereabouts of a suspect, and reasonable prior attempts have been made to obtain that information from the witness: s. 83.28(4). The scope of the order will ultimately dictate the parameters of the subsequent hearing.

43 Pursuant to s. 83.28(5), the judge may (a) order the examination, under oath or not, of the person named in the order (the "named person"); (b) order the named person to attend for the examination and to remain in attendance until excused by the presiding judge; (c) order the named person to bring to the examination anything in their possession or control and produce it to the presiding judge; (d) designate

Nous concluons que la Loi a pour objet de prévenir et de punir les infractions de terrorisme.

L'article 83.28 établit une procédure en deux étapes en vertu de laquelle une ordonnance autorisant la recherche de renseignements auprès d'une personne désignée est d'abord rendue et un interrogatoire de cette personne est ensuite effectué. La disposition assujettit l'investigation judiciaire à une série de paramètres. Essentiellement, l'art. 83.28 permet d'enquêter sur des infractions de terrorisme, avant et après le dépôt d'accusations, en contraignant à témoigner la personne visée par l'ordonnance. Par conséquent, la disposition a pour objet d'investir l'État de pouvoirs d'enquête plus étendus lorsqu'il est question d'une infraction de terrorisme.

La procédure est enclenchée lorsqu'un agent de la paix, qui a obtenu le consentement préalable du procureur général, demande à un juge de rendre une ordonnance autorisant la recherche de renseignements : par. 83.28(2) et (3). Le juge peut rendre l'ordonnance sollicitée et, par le fait même, amorcer l'investigation s'il est convaincu a) qu'il existe des motifs raisonnables de croire qu'une infraction de terrorisme a été commise et que des renseignements relatifs à cette infraction ou au lieu où se trouve un suspect sont susceptibles d'être obtenus, ou b) qu'il existe des motifs raisonnables de croire qu'une infraction de terrorisme sera commise, qu'il existe des motifs raisonnables de croire que le témoin a des renseignements directs et pertinents relatifs à une infraction de terrorisme ou au lieu où se trouve un suspect, et que des efforts raisonnables ont déjà été déployés pour obtenir des renseignements auprès du témoin : par. 83.28(4). La portée de l'ordonnance déterminera en définitive les paramètres de l'investigation subséquente.

Aux termes du par. 83.28(5), le juge peut a) ordonner de procéder à l'interrogatoire, sous serment ou non, d'une personne visée par l'ordonnance (la « personne désignée »), b) ordonner à la personne désignée de se présenter pour l'interrogatoire et de demeurer présente jusqu'à ce qu'elle soit libérée par le juge qui préside, c) ordonner à la personne désignée d'apporter avec elle toute chose

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another judge as the judge to preside over the examination; and (e) include any other terms or conditions considered desirable, including those for the protection of the named person, third parties, and an ongoing investigation. Under s. 83.28(7), the terms of the order may be varied.

qu'elle a en sa possession ou à sa disposition afin de la remettre au juge qui préside, d) désigner un autre juge pour présider l'interrogatoire, e) inclure les modalités qu'il estime indiquées, notamment quant à la protection de la personne désignée ou de tiers, ou quant à la protection d'une investigation en cours. Le paragraphe 83.28(7) permet de modifier les conditions de l'ordonnance.

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The powers of the presiding judge and the Attorney General at the judicial investigative hearing itself also fall within the ambit of s. 83.28. Under s. 83.28(8), the named person must answer questions put to him or her by the Attorney General and produce tangibles he or she was ordered to bring to the examination. The named person may refuse to answer a question or produce any such thing that would violate any law relating to the non-disclosure of information or to privilege: s. 83.28(8). Section 83.28(9) empowers the presiding judge to rule on any objection or other issue relating to a refusal to answer a question or produce an item. Section 83.28(10) provides the named person with use and derivative use immunity with respect to self-incrimination which will be discussed below in the context of s. 7 of the *Charter*. The named person has a right to retain and instruct counsel at any stage of the proceedings: s. 83.28(11). The presiding judge may also order tangibles to be given into police custody if satisfied that any such item is relevant to the investigation of any terrorism offence: s. 83.28(12).

44 Relèvent également du champ d'application de l'art. 83.28 les pouvoirs du juge qui préside l'investigation judiciaire elle-même et ceux du procureur général qui y participe. Aux termes du par. 83.28(8), la personne désignée doit répondre aux questions que lui pose le procureur général et remettre les choses exigées par l'ordonnance. La personne désignée peut refuser de répondre à une question ou de remettre quelque chose dans la mesure où la réponse qu'elle donnerait ou la remise qu'elle ferait violerait le droit applicable en matière de divulgation ou de privilèges : par. 83.28(8). Le paragraphe 83.28(9) habilite le juge qui préside à statuer sur toute objection ou question concernant le refus de répondre à une question ou de lui remettre une chose. Le paragraphe 83.28(10) accorde à la personne désignée l'immunité contre l'utilisation de la preuve et l'immunité contre l'utilisation de la preuve dérivée relativement à la question de l'auto-incrimination qui sera analysée plus loin dans le contexte de l'art. 7 de la *Charte*. La personne désignée a le droit d'engager un avocat et de lui donner des instructions en tout état de cause : par. 83.28(11). S'il est convaincu qu'une chose sera utile à l'enquête relative à une infraction de terrorisme, le juge qui préside peut ordonner que cette chose soit confiée à la garde de la police : par. 83.28(12).

While the provision covers many facets of the initial order and the subsequent judicial investigative hearing, in important respects the specific meaning of s. 83.28 is unclear and ambiguous. In our opinion, s. 83.28 reasonably bears two differing interpretations: one narrow and restrictive in scope, the other broad and purposive. Two principal ambiguities are apparent on the face of the provision. The first concerns the role of counsel and the second relates to the threshold for relevance and admissibility. As we will now discuss, we endorse a broad and

45 Bien que la disposition vise maintes facettes de l'ordonnance initiale et de l'investigation judiciaire subséquente, le sens de l'art. 83.28 est, à certains égards importants, vague et ambigu. À notre avis, l'art. 83.28 peut raisonnement recevoir deux interprétations différentes : l'une, stricte et de portée restrictive, l'autre, large et téléologique. Deux ambiguïtés principales ressortent à la lecture de la disposition. La première concerne le rôle de l'avocat et la seconde, le critère préliminaire de pertinence et d'admissibilité. Comme nous allons maintenant

purposive interpretation of s. 83.28, which accords with the presumption of constitutional validity discussed above.

46 There is some ambiguity about the scope of the role of appellant's counsel in the judicial investigative hearing. Section 83.28(9) provides broadly that the presiding judge "shall rule on any objection or other issue relating to a refusal to answer a question or to produce a thing" (emphasis added). The preceding subsection, however, states that the named person may refuse to answer questions or produce tangibles based on the application of law related to non-disclosure of information or privilege: s. 83.28(8). Under a more narrow approach, it would appear that counsel for the witness is restricted to making objections only on these specified grounds. The proximity of subss. (8) and (9) lends support to this view, as does the omission of qualifying words to describe the scope of judicial rulings. In contrast, s. 83.28(12) expressly provides that upon the judge's satisfaction that "any thing produced during the course of the examination will likely be relevant to the investigation", he or she shall order it be given into police custody.

47 A purposive reading of the provision, however, suggests that "any objection" as stated in s. 83.28(9) provides for more fulsome participation by counsel. Section 83.28(12) attaches a relevancy requirement to demands for production which implies that objections under s. 83.28(9) may be based on relevancy and s. 83.28(9) is not restricted to the grounds in s. 83.28(8). The relevancy requirement in s. 83.28(12), when s. 83.28 is viewed in its entirety, would also attach to the questioning of the named person. This Court has taken a similarly purposive approach to proceedings held under commissions of inquiry. Such proceedings have been analogized to the judicial investigative hearing provision in s. 83.28. In *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, at para. 175, the Court stated that "the nature and the purpose of public inquiries require courts to give a generous interpretation to a commissioner's

le voir, nous sommes en faveur d'une interprétation large et téléologique de l'art. 83.28, qui soit conforme à la présomption de constitutionnalité analysée plus haut.

Le rôle que l'avocat de l'appelant est appelé à jouer au cours de l'investigation judiciaire est ambigu dans une certaine mesure. Le paragraphe 83.28(9) prévoit, de façon générale, que le juge qui préside « statue sur toute objection ou question concernant le refus de répondre à une question ou de lui remettre une chose » (nous soulignons). Le paragraphe précédent précise toutefois que la personne désignée peut refuser de répondre aux questions ou de remettre des choses en raison du droit applicable en matière de divulgation ou de privilèges : par. 83.28(8). Selon une interprétation plus stricte, il semblerait que l'avocat du témoin ne puisse formuler des objections que pour ces motifs précis. La proximité des par. (8) et (9) vient étayer ce point de vue, tout comme l'absence de qualificatifs précisant la portée des décisions du juge. Par contre, le par. 83.28(12) prévoit expressément que, s'il est convaincu qu'« une chose remise pendant l'interrogatoire est susceptible d'être utile à l'enquête », le juge peut ordonner que cette chose soit confiée à la garde de la police.

Cependant, selon une interprétation téléologique de la disposition, l'expression « toute objection » figurant au par. 83.28(9) laisse entrevoir une participation plus complète de l'avocat. Le paragraphe 83.28(12) prévoit que la chose que l'on demande de remettre doit être utile, ce qui signifie que les objections formulées en vertu du par. 83.28(9) peuvent être fondées sur l'utilité de la chose sollicitée et que le champ d'application du par. 83.28(9) n'est pas limité aux motifs prévus au par. 83.28(8). Compte tenu de l'ensemble de l'art. 83.28, l'exigence d'utilité contenue au par. 83.28(12) s'appliquerait également à l'interrogatoire de la personne désignée. La Cour a adopté une interprétation téléologique semblable à l'égard des travaux des commissions d'enquête. Une analogie a été établie entre ces travaux et l'investigation judiciaire prévue à l'art. 83.28. Dans l'arrêt *Phillips c. Nouvelle-Écosse (Commission d'enquête sur la tragédie de la mine Westray)*, [1995] 2 R.C.S. 97, par. 175, la Cour a affirmé

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powers to control their own proceedings" (emphasis added).

Such an interpretive approach is further supported by the wide ambit given to the ordering judge to set such terms and conditions as he or she considers desirable: s. 83.28(5)(*e*). The provision expressly provides that terms and conditions may be set for the protection of the named person's interests, the interests of third parties, and the interests of the investigation. Section 83.28(7) also provides for the ordering judge or any other judge of the same court to vary the terms and conditions set. The inclusion of such a broad power to amend the order empowers the ordering and/or hearing judge to respond flexibly to the specific circumstances of each application of the provision, and ensure that constitutional and common law rights and values are respected. Such a view of the provision would reasonably demarcate irrelevant or abusive questioning of the named person as falling far outside the parameters set by the legislature.

While the specific content of judicial independence will be discussed later in the reasons, the judicial aspect of the hearing is relevant to the interpretive approach taken at the outset. Section 83.28 operates under the aegis of a judge. We consider that the participation of judges in s. 83.28 brings with it all that our justice system imparts into the judicial function.

Another aspect of ambiguity concerns the procedural threshold where "information" is sought, as opposed to evidence: s. 83.28(2). It was put to us that this choice in wording was deliberate and reflects legislative intention that a lower threshold of relevance and admissibility applies in judicial investigative hearings than that usually applied in criminal proceedings. To this end, the *MLACMA*

qu'« étant donné la nature et l'objet des enquêtes publiques, les tribunaux sont tenus de donner une interprétation libérale aux pouvoirs conférés aux commissaires [. . .] pour la conduite de leurs travaux » (nous soulignons).

48 Cette interprétation est également étayée par la grande latitude dont le juge qui rend l'ordonnance dispose pour établir les modalités qu'il estime indiquées : al. 83.28(5)*e*). La disposition prévoit expressément qu'il peut établir des modalités quant à la protection des droits de la personne désignée et de ceux des tiers, et quant à la protection de l'investigation. Le paragraphe 83.28(7) permet en outre au juge qui a rendu l'ordonnance ou à un autre juge du même tribunal de modifier les conditions établies. Grâce à l'inclusion de ce pouvoir général de modifier l'ordonnance, le juge qui rend l'ordonnance ou qui préside l'investigation dispose, dans chaque cas, de la latitude nécessaire pour tenir compte du contexte particulier dans lequel s'applique la disposition et pour assurer le respect des droits et des valeurs reconnus par la Constitution et la common law. Cette interprétation de la disposition aurait raisonnablement pour effet d'écarter l'interrogatoire abusif ou inutile de la personne désignée pour le motif qu'il déborde les paramètres établis par le législateur.

49 Alors que le contenu exact du principe de l'indépendance judiciaire sera analysé plus loin dans les présents motifs, il reste que l'aspect judiciaire de l'investigation est pertinent en ce qui concerne la méthode d'interprétation adoptée au départ. L'application de l'art. 83.28 est supervisée par un juge. Nous considérons que la participation des juges à l'application de l'art. 83.28 s'accompagne de tout ce que notre système de justice rattache à la fonction judiciaire.

50 Un autre élément d'ambiguïté tient au critère procédural préliminaire qui s'applique lorsque l'on recherche des « renseignements » et non pas des éléments de preuve : par. 83.28(2). On nous a fait valoir que le choix de ce terme était délibéré et qu'il témoigne de l'intention du législateur d'appliquer aux investigations judiciaires un critère préliminaire de pertinence et d'admissibilité moins strict

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was cited for the proposition that s. 83.28 would make express provision for the operation of evidentiary rules if these were meant to apply. Section 22.2 of the *MLACMA* states expressly that those rules of evidence and procedure apply to the examination of a witness as dictated by the jurisdiction to which assistance is being provided. However, the need for clarity in the *MLACMA* is quite obvious given potential conflicts of laws.

51 In considering the threshold of relevance and admissibility in relation to information gathering under s. 83.28, we note that the *Canada Evidence Act*, R.S.C. 1985, c. C-5 ("*CEA*"), applies generally to "all criminal proceedings and to all civil proceedings and other matters whatever respecting which Parliament has jurisdiction" (s. 2). In the context of *Charter* interpretation, "proceedings" has been given large and liberal interpretation and taken to include both adjudicative and investigative processes: *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at p. 481. In *Thomson*, regulatory investigations were held to be within the ambit of "proceeding". Applying this reasoning to the case at bar, Part I of the *CEA* may reasonably be viewed as applying to judicial investigative hearings. Consequently, the named person is entitled to protections such as: spousal privilege (s. 4(3)), procedures concerning cross-examination of adverse witnesses (s. 9), and cross-examination in relation to prior statements (ss. 10 and 11).

52 The more important rules of evidence, however, are to be found in the common law and not in statutory instruments. Relevance is a common law rule that we conclude applies to judicial investigative hearings. The boundaries of relevance will be dictated in large measure by the supporting materials for the s. 83.28 order for the gathering of information, as well as by the investigatory nature of the proceeding. The latter may increase the scope of

que celui qui s'applique habituellement en matière criminelle. À cet égard, la *LEJMC* a été citée à l'appui de la proposition selon laquelle, si les règles de preuve devaient s'appliquer, l'art. 83.28 le prévoirait expressément. L'article 22.2 *LEJMC* précise que les règles de preuve et de procédure qui s'appliquent à l'interrogatoire d'un témoin sont celles du ressort qui reçoit l'aide. Toutefois, le besoin de clarifier la *LEJMC* est fort évident en raison des possibilités de conflit de lois.

En examinant le critère préliminaire de pertinence et d'admissibilité applicable à la recherche de renseignements fondée sur l'art. 83.28, nous remarquons que la *Loi sur la preuve au Canada*, L.R.C. 1985, ch. C-5 (« *LPC* »), s'applique généralement à « toutes les procédures pénales et civiles ainsi qu'à toutes les autres matières de compétence fédérale » (art. 2). Dans le contexte de l'interprétation de la *Charte*, le terme « procédures » a reçu une interprétation large et libérale et a été considéré comme visant à la fois les poursuites judiciaires et les enquêtes : *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425, p. 481. Dans l'arrêt *Thomson*, la Cour a jugé que les enquêtes réglementaires étaient visées par le mot « procédures ». Si on applique ce raisonnement à la présente affaire, on peut raisonnablement considérer que la partie I de la *LPC* s'applique aux investigations judiciaires. Par conséquent, la personne désignée a droit aux protections que lui offrent notamment le privilège relatif aux conjoints (par. 4(3)), les procédures concernant le contre-interrogatoire des témoins opposés (art. 9) et le contre-interrogatoire portant sur des déclarations antérieures (art. 10 et 11).

Toutefois, les plus importantes règles de preuve émanent de la common law et non de textes réglementaires. La pertinence est une règle de common law que nous jugeons applicable aux investigations judiciaires. Les limites de la pertinence sont dictées, dans une large mesure, par la documentation soumise à l'appui de la demande d'ordonnance autorisant la recherche de renseignements prévue à l'art. 83.28, ainsi que par la nature inquisitoire de l'acte

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the allowable questioning, but must be kept within reasonable bounds by the judicial nature of the investigative hearing and all of the procedural protections that the oversight of a judge implies.

Accordingly, the observance of the applicable common law rules of evidence is mandatory. More importantly, the judge is present at the judicial investigative hearing to ensure that the procedure is carried out in accordance with constitutional protections.

To conclude on these points, a narrow, restrictive view of s. 83.28 does not resolve ambiguities in favour of the presumption of constitutionality discussed earlier. However, when viewed purposively, the judicial investigative proceeding can be viewed as a criminal proceeding, albeit unique in its application. The common law evidentiary principles of relevance and fairness clearly apply to the provision, as do evidentiary requirements mandated by the *CEA*. Consequently we find no ground at the interpretive stage to conclude that the presumption of constitutionality has been rebutted.

D. *Discussion of Issues*

(1) Retrospectivity

The appellant submits that s. 83.28 ought not to apply retrospectively to incidents that occurred prior to its enactment. In support of this contention, the appellant argues that judicial investigative hearings are not strictly procedural as they essentially create new offences by operation of the triggering "terrorism offence" definition, and therefore are substantive in nature. Moreover, the appellant asserts that s. 83.28 affects fundamental rights, such as a right to silence under s. 7 of the *Charter*. With respect, we do not agree. We find that s. 83.28 effects only procedural change.

de procédure. Ce dernier peut repousser les limites de l'interrogatoire acceptable, qui doivent cependant demeurer raisonnables en raison de la nature judiciaire de l'investigation et de l'ensemble des protections procédurales qu'implique la supervision par un juge.

53 Par conséquent, l'observation des règles de preuve applicables en common law est obligatoire. Qui plus est, la présence du juge à l'investigation judiciaire vise à assurer un déroulement conforme aux garanties constitutionnelles.

54 Pour conclure sur ces points, une interprétation stricte et restrictive de l'art. 83.28 ne permet pas d'éliminer les ambiguïtés d'une manière favorable à la présomption de constitutionnalité analysée plus haut. Cependant, selon une interprétation téléologique, l'investigation judiciaire peut être considérée comme une instance criminelle, en dépit de son caractère unique. Les principes de pertinence et d'équité dont la common law requiert l'application en matière de preuve s'appliquent manifestement à la disposition, tout comme les exigences en matière de preuve prescrites par la *LPC*. Par conséquent, rien ne nous permet de conclure, à l'étape de l'interprétation, que la présomption de constitutionnalité a été réfutée.

D. *Analyse des questions en litige*

(1) Rétrospectivité

55 L'appelant soutient que l'art. 83.28 ne doit pas s'appliquer rétrospectivement à des faits survenus avant son adoption. Il fait valoir, à l'appui de cet argument, que les investigations judiciaires ne sont pas strictement procédurales, étant donné qu'elles créent essentiellement de nouvelles infractions en raison de la définition de l'« infraction de terrorisme » qui les déclenche et qu'elles sont donc de nature substantielle. L'appelant ajoute que l'art. 83.28 touche à des droits fondamentaux, tel le droit de garder le silence garanti par l'art. 7 de la *Charte*. En toute déférence, nous ne sommes pas d'accord. Nous concluons que l'art. 83.28 traduit seulement une évolution procédurale.

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56 As expressed in Sullivan, *supra*, at p. 582, procedural legislation concerns the conduct of actions. Accordingly, s. 83.28 is *prima facie* procedural, as it outlines the process by which judicial investigative hearings are to be carried out. Nevertheless, an assessment of whether a provision is procedural or not must be determined in the circumstances of each case. Furthermore, for a provision to be regarded as procedural, it must be exclusively so: *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256. We now consider whether s. 83.28 is procedural in substance and in effect.

57 Driedger and Sullivan generally describe procedural law as "law that governs the methods by which facts are proven and legal consequences are established in any type of proceedings": Sullivan, *supra*, at p. 583. Within this rubric, rules of evidence are usually considered to be procedural, and thus to presumptively apply immediately to pending actions upon coming into force: *Howard Smith Paper Mills Ltd. v. The Queen*, [1957] S.C.R. 403. However, where a rule of evidence either creates or impinges upon substantive or vested rights, its effects are not exclusively procedural and it will not have immediate effect: *Wildman v. The Queen*, [1984] 2 S.C.R. 311. Examples of such rules include solicitor-client privilege and legal presumptions arising out of particular facts.

58 As discussed above, s. 83.28 provides for a process in which various rules of evidence are detailed. The appellant's concerns with the nature of the provision arise largely with respect to the "terrorism offence" referenced in s. 83.28(4). The definition of "terrorism offence" is not before us in this appeal. However, it is necessary here to consider whether the application of that definition in relation to s. 83.28 creates a "substantive gloss" on the provision. In our view, the reference to "terrorism offence" does not alter the procedural nature of the provision.

Comme le dit Sullivan, *op. cit.*, p. 582, les lois en matière de procédure portent sur la façon d'intenter des actions. L'article 83.28 est donc, à première vue, de nature procédurale, car il expose la façon de procéder à une investigation judiciaire. Néanmoins, la question de savoir si une disposition est de nature procédurale doit être tranchée en fonction des circonstances de chaque affaire. De plus, pour qu'une disposition soit considérée comme étant de nature procédurale, elle doit toucher exclusivement la procédure : *Angus c. Sun Alliance Compagnie d'assurance*, [1988] 2 R.C.S. 256. Nous passons maintenant à la question de savoir si l'art. 83.28 est de nature procédurale sur le plan du fond et de ses effets.

Driedger et Sullivan qualifient généralement le droit procédural de [TRADUCTION] « droit régissant les moyens de prouver des faits et d'établir des conséquences juridiques dans tout genre d'instance » : Sullivan, *op. cit.*, p. 583. À ce chapitre, les règles de preuve sont habituellement considérées comme étant de nature procédurale et sont donc présumées s'appliquer aux actions en cours dès leur entrée en vigueur : *Howard Smith Paper Mills Ltd. c. The Queen*, [1957] R.C.S. 403. Toutefois, si une règle de preuve crée des droits substantiels ou acquis, ou empiète sur ces droits, elle n'a pas une incidence strictement procédurale et elle ne prend pas effet immédiatement : *Wildman c. La Reine*, [1984] 2 R.C.S. 311. Parmi ces règles, il y a le privilège avocat-client et les présomptions légales émanant de faits particuliers.

Comme nous l'avons vu, l'art. 83.28 établit une procédure dans laquelle diverses règles de preuve sont exposées en détail. Les préoccupations de l'appelant relatives à la nature de la disposition ont trait, dans une large mesure, à l'« infraction de terrorisme » mentionnée au par. 83.28(4). La définition de l'« infraction de terrorisme » n'est pas en cause dans le présent pourvoi. Cependant, il faut ici se demander si l'application de cette définition au regard de l'art. 83.28 donne une « connotation substantielle » à la disposition. À notre avis, la mention d'une « infraction de terrorisme » ne change rien à la nature procédurale de la disposition.

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The term "terrorism offence" is defined in s. 2 of the *Code* that creates new offences under para. (*a*), but also refers to pre-existing offences under paras. (*b*) and (*c*). Neither s. 83.28 nor the definition in s. 2 alters the substantive elements of these offences. Clearly, the offences listed under paras. (*b*) and (*c*) are not substantively new because they were present prior to the enactment of the anti-terrorism provisions. We agree with Holmes J.'s characterization of a "terrorism offence" as "a descriptive compendium of offences created elsewhere in the *Criminal Code*". The mere association of such offences with a "terrorist group" or "terrorist activity" does not constitute a substantive change in the law so as to transform the procedural nature of s. 83.28 into a substantive one.

59 L'expression « infraction de terrorisme » est définie à l'art. 2 du *Code* qui, à l'al. *a*), crée de nouvelles infractions, mais qui, aux al. *b*) et *c*), mentionne également des infractions déjà existantes. Ni l'art. 83.28 ni la définition de l'art. 2 ne modifient les éléments substantiels de ces infractions. De toute évidence, les infractions énumérées aux al. *b*) et *c*) ne sont pas nouvelles sur le plan du fond car elles existaient avant l'adoption des dispositions en matière d'antiterrorisme. Nous sommes d'accord avec la juge Holmes pour qualifier l'« infraction de terrorisme » de [TRADUCTION] « compendium descriptif d'infractions créées ailleurs dans le *Code criminel* ». Le simple fait d'associer ces infractions à un « groupe terroriste » ou à une « activité terroriste » ne constitue pas une modification substantielle de la loi qui fait passer de procédurale à substantielle la nature de l'art. 83.28.

Below, we discuss in detail the merits of the appellant's submission on a s. 7 *Charter* right to silence/right against self-incrimination, which we find not to have been violated by the judicial investigative hearing. As a related argument, the appellant further submits that, in relation to retrospectivity, the violation of the same right to silence precludes s. 83.28 from taking retrospective effect. This argument must fail. It suffices to state here that while the judicial investigative hearing may generate information pertaining to an offence (and indeed, this is the purpose of the hearing), the hearing itself remains procedural. In the manner of other procedural tools such as DNA and wiretap authorizations, s. 83.28 provides a mechanism for the gathering of information and evidence in the ongoing investigation of past, present, and future offences.

60 Nous procédons plus loin à une analyse détaillée du bien-fondé de l'argument de l'appelant relatif au droit de garder le silence et de ne pas s'incriminer garanti par l'art. 7 de la *Charte*, auquel, concluons-nous, l'investigation judiciaire n'a pas porté atteinte. À titre d'argument connexe, l'appelant ajoute qu'en ce qui concerne la rétrospectivité, l'atteinte portée à ce même droit de garder le silence empêche l'art. 83.28 de s'appliquer rétrospectivement. Cet argument ne saurait être retenu. Il suffit de dire ici que, bien qu'elle puisse permettre d'obtenir des renseignements relatifs à une infraction (ce qui, en fait, correspond à son objet), l'investigation judiciaire elle-même reste de nature procédurale. À l'instar d'autres outils procéduraux, telles les empreintes génétiques et les autorisations d'écoute électronique, l'art. 83.28 offre un moyen de recueillir des renseignements et des éléments de preuve dans le cadre d'une enquête portant sur des infractions passées, présentes et futures.

Having found that s. 83.28 is purely procedural in nature, we turn to consider whether the presumption of immediate effect has been rebutted.

61 Après avoir conclu que l'art. 83.28 est de nature purement procédurale, nous allons maintenant examiner si la présomption de prise d'effet immédiate a été réfutée.

At common law, procedural legislation presumptively applies immediately and generally to both pending and future acts. As Sullivan, *supra*,

62 En common law, les mesures législatives procédurales sont présumées s'appliquer immédiatement et généralement aux actes pour lesquels leur

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discusses at p. 582, the presumption of immediate application has been characterized in a number of ways: that there is no vested right in procedure; that the effect of a procedural change is deemed beneficial for all; that procedural provisions are an exception to the presumption against retrospectivity; and that procedural provisions are ordinarily intended to have immediate effect. The rule has long been formulated in the following terms:

> . . . where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act.

(*Wright v. Hale* (1860), 6 H. & N. 227, 158 E.R. 94, at p. 96; see also Sullivan, *supra*, at p. 582.)

63 This presumption will yield where the contrary intent of Parliament has been evinced: *R. v. Ali*, [1980] 1 S.C.R. 221, at p. 235.

64 On this point, the appellant submits that the legislative intent of Parliament precludes retrospective effect given the preventive focus of the anti-terrorism legislation. In support, the appellant notes that the Act is silent on the issue of temporal application in contrast with s. 487.052 of the *Code*, which expressly provides for retrospective application in the context of DNA identification.

65 The appellant's arguments on this point are not compelling. While the prevention of future acts of terrorism was undoubtedly a primary legislative purpose in the enactment of the provision, as discussed earlier, it does not follow that Parliament intended for procedural bifurcation respecting past acts of terrorism *vis-à-vis* anticipated or future acts. The provision itself provides for judicial investigative hearings to be held both before and after the commission of a terrorism offence under s. 83.28(4)(*a*) and (*b*). While the legislation is not express on the issue of temporal application, the purpose and effect of the inclusion of

auteur est en train de subir son procès et aux actes futurs. Comme l'indique Sullivan, *op. cit.*, p. 582, la présomption d'application immédiate a fait l'objet de nombreuses descriptions voulant notamment qu'il n'existe aucun droit acquis en matière de procédure, qu'une évolution procédurale soit réputée avantageuse pour tous, que les dispositions procédurales fassent exception à la présomption de non-rétrospectivité et que les dispositions procédurales doivent normalement prendre effet immédiatement. La règle a longtemps été formulée ainsi :

> [TRADUCTION] . . . lorsque le texte législatif ne touche qu'à la procédure, il s'applique, sauf indication contraire, à toutes les actions intentées avant ou après son adoption.

(*Wright c. Hale* (1860), 6 H. & N. 227, 158 E.R. 94, p. 96; voir aussi Sullivan, *op. cit.*, p. 582.)

Cette présomption cédera le pas à l'intention contraire exprimée par le législateur : *R. c. Ali*, [1980] 1 R.C.S. 221, p. 235.

À ce sujet, l'appelant soutient que l'intention du législateur empêche la mesure législative antiterroriste de s'appliquer rétrospectivement étant donné qu'elle est axée sur la prévention. À l'appui de cet argument, l'appelant souligne que la Loi est muette en ce qui concerne sa date de prise d'effet, contrairement à l'art. 487.052 du *Code* qui précise qu'il s'applique rétrospectivement en matière d'identification par les empreintes génétiques.

Les arguments de l'appelant sur ce point ne sont pas convaincants. Bien que, comme nous l'avons déjà vu, la prévention de futurs actes de terrorisme ait sans doute été l'un des objectifs législatifs principaux de l'adoption de la disposition en cause, cela ne signifie pas pour autant que le législateur a voulu créer une division procédurale entre les actes de terrorisme passés et les actes de terrorisme appréhendés ou futurs. La disposition elle-même prévoit qu'il est possible de procéder à une investigation judiciaire avant et après la commission d'une infraction de terrorisme visée par les al. 83.28(4)*a*) et *b*). Quoique la mesure législative ne soit pas

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s. 83.28(4)(*a*) indicate that Parliament intended that the provision may be applied retrospectively.

For the reasons above, s. 83.28 does not interfere with the substantive rights of the appellant, and is, accordingly, strictly procedural. The appellant has not rebutted the presumption of immediate application. As such, s. 83.28 has immediate effect, and applies retrospectively to the effects of past events.

(2) Section 7 of the *Charter*

(a) *General Approach to Section 7*

Statutory compulsion to testify engages liberty interests under s. 7 of the *Charter*: *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, at para. 28; see also *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, at para. 33; *Thomson*, *supra*, at p. 536. The encroachment upon liberty is complete at the moment of the compelled speech, regardless of its character: *S. (R.J.)*, at para. 43. Individuals named in an order under s. 83.28(5) may be required to attend at a hearing, be examined under oath, and be required to produce any thing in their possession. Moreover, under s. 83.29, such individuals may be imprisoned for evasion of service, or failure to attend or remain at the examination. Section 83.28 also attracts the ordinary laws of contempt of court in relation to a failure to answer questions, and potential liability for offences relating to perjury. Given these consequences, the judicial investigative hearing provision clearly engages s. 7 liberty interests.

This Court has very recently affirmed the approach to principles of fundamental justice encapsulated in s. 7 of the *Charter*: *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74; and *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4. In *Canadian Foundation*,

explicite en ce qui concerne sa date de prise d'effet, l'objet et l'effet de l'inclusion de l'al. 83.28(4)*a*) indiquent que le législateur a voulu que cette disposition puisse s'appliquer rétrospectivement.

66 Pour les motifs susmentionnés, l'art. 83.28 ne porte pas atteinte aux droits substantiels de l'appelant et est donc de nature strictement procédurale. L'appelant n'a pas réfuté la présomption d'application immédiate. Par conséquent, l'art. 83.28 prend effet immédiatement et s'applique rétrospectivement aux répercussions d'événements passés.

(2) L'article 7 de la *Charte*

a) *Interprétation générale de l'art. 7*

67 La contrainte légale à témoigner fait intervenir le droit à la liberté garanti par l'art. 7 de la *Charte* : *R. c. S. (R.J.)*, [1995] 1 R.C.S. 451, par. 28; voir aussi *British Columbia Securities Commission c. Branch*, [1995] 2 R.C.S. 3, par. 33; *Thomson*, précité, p. 536. L'atteinte à la liberté est complète au moment du discours forcé, quelle qu'en soit la nature : *S. (R.J.)*, par. 43. Aux termes du par. 83.28(5), les personnes visées par une ordonnance peuvent être tenues de se présenter à une investigation, interrogées sous serment et obligées de remettre toute chose qu'elles ont en leur possession. L'article 83.29 prévoit, en outre, que ces personnes pourront être incarcérées si elles se soustraient à la signification ou si elles ne se présentent pas ou ne demeurent pas présentes à l'interrogatoire. En plus de donner lieu à l'application des lois ordinaires en matière d'outrage au tribunal lorsqu'il y a défaut de répondre aux questions, l'art. 83.28 fait aussi en sorte que l'auteur d'une infraction liée au parjure risque de voir sa responsabilité engagée à cet égard. Vu ces conséquences, la disposition relative à l'investigation judiciaire fait clairement intervenir le droit à la liberté garanti par l'art. 7.

68 La Cour a tout récemment confirmé la façon d'interpréter les principes de justice fondamentale mentionnés à l'art. 7 de la *Charte* : *R. c. Malmo-Levine*, [2003] 3 R.C.S. 571, 2003 CSC 74, et *Canadian Foundation for Children, Youth and the Law c. Canada (Procureur général)*, [2004] 1 R.C.S. 76, 2004 CSC 4. Dans l'arrêt *Canadian Foundation*,

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at para. 8, the Chief Justice summarized the approach thus:

> Jurisprudence on s. 7 has established that a "principle of fundamental justice" must fulfill three criteria: *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74, at para. 113. First, it must be a legal principle. This serves two purposes. First, it "provides meaningful content for the s. 7 guarantee"; second, it avoids the "adjudication of policy matters": *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503. Second, there must be sufficient consensus that the alleged principle is "vital or fundamental to our societal notion of justice": *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 590. The principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens. Society views them as essential to the administration of justice. Third, the alleged principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results. Examples of principles of fundamental justice that meet all three requirements include the need for a guilty mind and for reasonably clear laws.

(b) *The Right to Silence/The Right Against Self-Incrimination*

69 The appellant contends that s. 83.28 is a violation of an individual's absolute right to silence and the right against self-incrimination. However, in this context, the right to silence is inextricably tied to the right against self-incrimination. Accordingly, we address the argument under the s. 7 right against self-incrimination. For the reasons that follow, we conclude that the appellant's s. 7 rights have not been infringed, whether through the protection against self-incrimination, or through a broader right to silence.

70 This Court has recognized that the right against self-incrimination is a principle of fundamental justice: *S. (R.J.)*, *supra*, at para. 95; *Branch*, *supra*; *R. v. Jarvis*, [2002] 3 S.C.R. 757, 2002 SCC 73. In *Jarvis*, at para. 67, the right against self-incrimination was described as "an elemental canon of the Canadian

par. 8, la Juge en chef résume ainsi ce mode d'interprétation :

> La jurisprudence relative à l'art. 7 a établi qu'un « principe de justice fondamentale » doit remplir trois conditions : *R. c. Malmo-Levine*, [2003] 3 R.C.S. 571, 2003 CSC 74, par. 113. Premièrement, il doit s'agir d'un principe juridique. Cette condition est utile à deux égards. D'une part, elle « donne de la substance au droit garanti par l'art. 7 »; d'autre part, elle évite « de trancher des questions de politique générale » : *Renvoi : Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486, p. 503. Deuxièmement, le principe allégué doit être le fruit d'un consensus suffisant quant à son « caractère primordial ou fondamental dans la notion de justice de notre société » : *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519, p. 590-591. Les principes de justice fondamentale sont les postulats communs qui sous-tendent notre système de justice. Ils trouvent leur sens dans la jurisprudence et les traditions qui, depuis longtemps, exposent en détail les normes fondamentales applicables au traitement des citoyens par l'État. La société les juge essentiels à l'administration de la justice. Troisièmement, le principe allégué doit pouvoir être identifié avec précision et être appliqué aux situations de manière à produire des résultats prévisibles. Parmi les principes de justice fondamentale qui remplissent les trois conditions, il y a notamment la nécessité d'une intention coupable et de règles de droit raisonnablement claires.

b) *Le droit de garder le silence et le droit de ne pas s'incriminer*

L'appelant prétend que l'art. 83.28 porte atteinte au droit absolu d'une personne de garder le silence et à son droit de ne pas s'incriminer. Cependant, dans le contexte de la présente affaire, le droit de garder le silence est inextricablement lié au droit de ne pas s'incriminer. Par conséquent, nous abordons l'argument sous l'angle du droit de ne pas s'incriminer que garantit l'art. 7. Pour les raisons qui suivent, nous concluons qu'il n'y a eu aucune atteinte aux droits que l'art. 7 garantit à l'appelant, que ce soit sous forme de protection contre l'auto-incrimination ou de droit général de garder le silence.

La Cour a reconnu que le droit de ne pas s'incriminer est un principe de justice fondamentale : *S. (R.J.)*, précité, par. 95; *Branch*, précité; *R. c. Jarvis*, [2002] 3 R.C.S. 757, 2002 CSC 73. Au paragraphe 67 de l'arrêt *Jarvis*, le droit de ne pas s'incriminer est décrit comme une « règle essentielle du

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criminal justice system". It has further been recognized in relation to the principle of individual sovereignty and as an assertion of human freedom: *S. (R.J.)*, *supra*, at para. 81; *R. v. Jones*, [1994] 2 S.C.R. 229, at pp. 248-49; and *R. v. White*, [1999] 2 S.C.R. 417, at para. 43. Having recognized the centrality of the principle in Canadian law, this Court's jurisprudence has further articulated general principles regarding the relationship of self-incrimination to criminal law more broadly. To this end, testimonial compulsion has been invariably linked with evidentiary immunity. Beginning in *S. (R.J.)*, *supra*, and continuing in *Branch*, *supra*, *Phillips*, *supra*, and *Jarvis*, *supra*, the more recent jurisprudence of our Court on self-incrimination developed such that three procedural safeguards emerged: use immunity, derivative use immunity, and constitutional exemption.

Use immunity serves to protect the individual from having the compelled incriminating testimony used directly against him or her in a subsequent proceeding. The derivative use protection insulates the individual from having the compelled incriminating testimony used to obtain other evidence, unless that evidence is discoverable through alternative means. The constitutional exemption provides a form of complete immunity from testifying where proceedings are undertaken or predominately used to obtain evidence for the prosecution of the witness. Together these necessary safeguards provide the parameters within which self-incriminating testimony may be obtained. It is against this backdrop that s. 83.28 must be assessed.

Section 83.28(10) provides both use and derivative use immunity to the individual named in an order for the gathering of information. Section 83.28(10)(*a*) provides that no answer given or thing produced shall be used or received against any criminal proceedings against that person, save prosecution for perjury or giving contradictory evidence. Derivative use immunity is provided for in s. 83.28(10)(*b*). Indeed, the protection in para. (*b*) goes beyond the requirements in the jurisprudence, and

système de justice criminlle au Canada ». Ce droit a en outre été associé au principe de la souveraineté de l'individu et défini comme une affirmation de la liberté humaine : *S. (R.J.)*, précité, par. 81; *R. c. Jones*, [1994] 2 R.C.S. 229, p. 248-249; *R. c. White*, [1999] 2 R.C.S. 417, par. 43. Après avoir reconnu le rôle crucial de ce principe en droit canadien, la Cour a, dans sa jurisprudence, formulé des principes généraux au sujet du lien qui existe entre l'auto-incrimination et le droit criminel en général. Ce faisant, elle a constamment relié la contrainte à témoigner à l'immunité relative à la preuve. À commencer par l'arrêt *S. (R.J.)*, précité, jusqu'aux arrêts *Branch*, *Phillips* et *Jarvis*, précités, la jurisprudence la plus récente de la Cour en matière d'auto-incrimination a évolué au point où trois garanties procédurales ont vu le jour : l'immunité contre l'utilisation de la preuve, l'immunité contre l'utilisation de la preuve dérivée et l'exemption constitutionnelle.

71 L'immunité contre l'utilisation de la preuve empêche que le témoignage incriminant qu'un individu a été contraint de livrer soit utilisé directement contre lui dans une instance ultérieure. L'immunité contre l'utilisation de la preuve dérivée empêche que le témoignage incriminant qu'un individu a été contraint de livrer serve à obtenir d'autres éléments de preuve, sauf si ces éléments de preuve peuvent être découverts par d'autres moyens. L'exemption constitutionnelle confère une forme de droit absolu de ne pas témoigner lorsque les procédures engagées visent ou servent essentiellement à recueillir des éléments de preuve qui permettront de poursuivre le témoin. Ensemble, ces garanties nécessaires établissent les paramètres à l'intérieur desquels un témoignage incriminant peut être obtenu. C'est dans ce contexte qu'il faut apprécier l'art. 83.28.

72 Le paragraphe 83.28(10) accorde à la personne visée par une ordonnance autorisant la recherche de renseignements l'immunité contre l'utilisation de la preuve ainsi que l'immunité contre l'utilisation de la preuve dérivée. L'alinéa 83.28(10)*a*) prévoit que la réponse donnée ou la chose remise par une personne ne peut être utilisée ou admise contre elle dans des poursuites criminelles, sauf dans le cas de poursuites pour parjure ou pour témoignage contradictoire. L'immunité contre l'utilisation de la preuve dérivée

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provides absolute derivative use immunity, such that evidence derived from the evidence provided at the judicial investigative hearing may not be presented in evidence against the witness in another prosecution even if the Crown is able to establish, on a balance of probabilities, that it would have inevitably discovered the same evidence through alternative means. The constitutional exemption is provided for in this case in light of the ordinary application of the principle asserted in *Jarvis*, *supra*, at para. 96, that testimonial compulsion is precluded where the predominant purpose of the proposed hearing is the determination of penal liability. There is no reason to believe that the predominant purpose of the judicial investigative hearing before us is to obtain information or evidence for the prosecution of the appellant.

73 It is clear from the above discussion that the procedural protections available to the appellant in relation to the judicial investigative hearing are equal to and, in the case of derivative use immunity, greater than the protections afforded to witnesses compelled to testify in other proceedings, such as criminal trials, preliminary inquiries or commission hearings. However, s. 83.28(10) provides for such safeguards only in the context of "any criminal proceedings". The legislation does not speak to safeguards in relation to other types of hearings, such as extradition or deportation hearings, or proceedings in foreign jurisdictions.

74 The international scope of terrorism activities and the inter-jurisdictional ambit of terrorism investigation raise grave concerns about potential uses of information gathered pursuant to s. 83.28(10): D. M. Paciocco, "Constitutional Casualties of September 11: Limiting the Legacy of the *Anti-Terrorism Act*" (2002), 16 *S.C.L.R.* (2d) 185, at p. 231. Compelled testimony obtained pursuant to s. 83.28 may potentially be used against individuals in extradition hearings, and subsequently passed on to foreign authorities for use in prosecution abroad: see J. Millard,

est prévue à l'al. 83.28(10)*b*). En fait, la protection accordée par l'al. *b*) déborde les exigences de la jurisprudence et confère une immunité absolue contre l'utilisation de la preuve dérivée, de sorte que la preuve émanant du témoignage livré à l'investigation judiciaire ne peut être produite contre le témoin dans d'autres poursuites, même si le ministère public est en mesure d'établir, selon la prépondérance des probabilités, qu'il aurait inévitablement découvert cette preuve par d'autres moyens. L'exemption constitutionnelle découle en l'espèce de l'application normale du principe énoncé au par. 96 de l'arrêt *Jarvis*, précité, selon lequel la contrainte à témoigner est interdite lorsque l'audience projetée a pour objet prédominant d'établir la responsabilité pénale. Rien ne permet de croire que l'investigation judiciaire dont il est question en l'espèce a pour objet prédominant d'obtenir des renseignements ou des éléments de preuve qui permettront de poursuivre l'appelant.

L'analyse qui précède montre clairement que les garanties procédurales dont l'appelant peut se prévaloir en ce qui concerne l'investigation judiciaire sont équivalentes et, dans le cas de l'immunité contre l'utilisation de la preuve dérivée, supérieures à celles dont jouissent les témoins contraints à témoigner dans d'autres procédures, comme les procès criminels, les enquêtes préliminaires ou les audiences de commissions. Toutefois, le par. 83.28(10) prévoit que ces garanties ne s'appliquent que dans le cadre de « poursuites criminelles ». La disposition législative ne parle pas de garanties applicables à d'autres types d'audiences, comme celles en matière d'extradition ou d'expulsion ou encore les procédures dans un ressort étranger.

La portée internationale des activités terroristes et des enquêtes sur le terrorisme suscite de graves inquiétudes au sujet des utilisations qui peuvent être faites des renseignements obtenus conformément au par. 83.28(10) : D. M. Paciocco, « Constitutional Casualties of September 11 : Limiting the Legacy of the *Anti-Terrorism Act* » (2002), 16 *S.C.L.R.* (2d) 185, p. 231. Le témoignage forcé obtenu conformément à l'art. 83.28 peut éventuellement être utilisé contre un individu lors d'une audience en matière d'extradition et, par la suite, transmis à des autorités

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"Investigative Hearings under the *Anti-Terrorism Act*" (2002), 60(1) *U.T. Fac. L. Rev.* 79, at p. 81. Such testimony may also be used against non-citizens in deportation hearings under s. 34 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, such that the Minister's "reasonable belief" that an individual has engaged in terrorism may be based on the testimony of that individual at a judicial investigative hearing.

étrangères pour qu'elles s'en servent dans des poursuites à l'étranger : voir J. Millard, « Investigative Hearings under the *Anti-Terrorism Act* » (2002), 60(1) *R.D.U.T.* 79, p. 81. Ce témoignage peut aussi être utilisé contre des non-citoyens lors d'audiences en matière d'expulsion tenues en vertu de l'art. 34 de la *Loi sur l'immigration et la protection des réfugiés*, L.C. 2001, ch. 27, de sorte que la « croyance raisonnable » du ministre qu'une personne se livre au terrorisme peut être fondée sur le témoignage que celle-ci a livré au cours d'une investigation judiciaire.

This Court has recently expressed the seriousness with which it views deportation or extradition to countries where torture and/or death are distinct possibilities: *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1. In such cases, guarantees of fundamental justice apply even where deprivations of life, liberty or security may be effected by actors other than the Canadian government, if a sufficient causal connection exists between the participation of the Canadian government and the ultimate deprivation effected: *Suresh*, at para. 54. This general principle was recognized in *Suresh* to apply equally to either deportation or extradition hearings.

75 La Cour a récemment dit prendre au sérieux l'expulsion ou l'extradition vers des pays où le risque de torture ou de peine de mort, ou les deux à la fois, est réel : *États-Unis c. Burns*, [2001] 1 R.C.S. 283, 2001 CSC 7; *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 3, 2002 CSC 1. Dans ces cas, les garanties relatives à la justice fondamentale s'appliquent même si les atteintes au droit à la vie, à la liberté et à la sécurité de la personne sont le fait d'acteurs autres que le gouvernement canadien, à condition qu'il existe un lien causal suffisant entre la participation de notre gouvernement et l'atteinte qui survient en bout de ligne : *Suresh*, par. 54. Dans l'arrêt *Suresh*, la Cour a reconnu que ce principe général s'applique également aux audiences en matière d'expulsion ou d'extradition.

In our view, a sufficient causal connection exists where information gathered under s. 83.28 is used to effect deprivations of liberty, such as torture or death, in circumstances where the government's participation was a necessary precondition, and the resulting deprivation an entirely foreseeable consequence of the participation. Accordingly, deportations or extraditions must accord with the principles of fundamental justice. Consequently, the parameters recognized in *Burns*, *supra*, at para. 124, and *Suresh*, *supra*, at para. 76, must be respected.

76 Nous estimons que, dans un cas où la participation du gouvernement était une condition préalable nécessaire et que l'atteinte résultante était une conséquence tout à fait prévisible de cette participation, il existe un lien causal suffisant dès que les renseignements recueillis sous le régime de l'art. 83.28 sont utilisés pour porter atteinte à la liberté, notamment par la torture ou la peine de mort. Les expulsions et les extraditions doivent donc respecter les principes de justice fondamentale. En conséquence, les paramètres reconnus dans les arrêts *Burns*, précité, par. 124, et *Suresh*, précité, par. 76, doivent être respectés.

This appeal is our first opportunity to discuss the parameters of a right against self-incrimination in the context of possible deportation or extradition

77 Le présent pourvoi nous donne l'occasion d'analyser, pour la première fois, les paramètres du droit de ne pas s'incriminer dans le contexte d'audiences

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hearings against, on the facts of this case, persons named under the s. 83.28 proceeding. Prior cases have focussed exclusively on the engagement of s. 7 in relation to government participation where the possibility of torture or death exists. The right against self-incrimination in the guise of testimonial compulsion has been recognized as non-absolute. Indeed, in the reasons above, we have affirmed the need for various procedural safeguards where testimonial compulsion is at issue. This Court has also expressly recognized the dire consequences which may flow from deportation and extradition, as such proceedings frequently have grave consequences for the liberty and security interests of individuals.

78 As in many other areas of law, a balance must be struck between the principle against self-incrimination and the state's interest in investigating offences. We believe such a balance is struck by extending the procedural safeguards of s. 83.28 to extradition and deportation hearings. As mentioned earlier, s. 83.28(5)(*e*) permits the inclusion of other terms and conditions, including those required for the protection of the witness. Moreover, under s. 83.28(7), the terms and conditions of the order may be varied to provide as much. This point was conceded by the Crown in oral argument.

79 In order to meet the s. 7 requirements, the procedural safeguards found in s. 83.28 must necessarily be extended to extradition and deportation proceedings. In *Branch*, *supra*, at para. 5, derivative use immunity was stated to apply both in subsequent proceedings where the witness is an accused subject to penal sanctions, and more generally to any proceeding which engages s. 7 of the *Charter*, such as extradition and deportation hearings. The protective effect of s. 83.28(10) would be significantly undercut if information gathered under s. 83.28 was used at the state's discretion in subsequent extradition or deportation proceedings. Therefore, where there is the potential for such use by the state, the hearing judge must make and, if necessary, vary the terms of

en matière d'expulsion ou d'extradition auxquelles sont exposées, selon les faits de la présente affaire, des personnes visées par l'acte de procédure délivré en vertu de l'art. 83.28. Les affaires antérieures portaient exclusivement sur l'application de l'art. 7 dans le cas où le gouvernement participe à des procédures où le risque de torture ou de peine de mort est un enjeu. La Cour a reconnu que le droit de ne pas s'incriminer en livrant un témoignage forcé n'est pas absolu. En fait, dans les motifs qui précèdent, nous avons confirmé que diverses garanties procédurales sont requises lorsqu'il est question de contrainte à témoigner. La Cour a aussi expressément reconnu que les procédures d'expulsion et d'extradition peuvent avoir des effets désastreux, étant donné les graves conséquences qu'elles ont souvent sur les droits à la liberté et à la sécurité de certaines personnes.

Comme dans bien d'autres domaines du droit, il est nécessaire d'établir un équilibre entre le principe interdisant l'auto-incrimination et l'intérêt qu'a l'État à enquêter sur des infractions. Nous croyons que l'application des garanties procédurales de l'art. 83.28 aux audiences en matière d'extradition et d'expulsion permet d'établir cet équilibre. Comme nous l'avons vu, l'al. 83.28(5)*e*) permet d'inclure d'autres modalités, y compris celles requises pour protéger le témoin. En outre, le par. 83.28(7) prévoit que les modalités de l'ordonnance peuvent être modifiées en ce sens. Le ministère public a concédé ce point durant sa plaidoirie.

Pour satisfaire aux exigences de l'art. 7, il faut nécessairement appliquer les garanties procédurales de l'art. 83.28 aux procédures d'extradition et d'expulsion. Dans l'arrêt *Branch*, précité, par. 5, la Cour a affirmé que l'immunité contre l'utilisation de la preuve dérivée peut être revendiquée, à la fois, dans des procédures subséquentes où le témoin est un accusé passible de sanctions pénales et, de façon plus générale, dans toutes procédures qui déclenchent l'application de l'art. 7 de la *Charte*, telles les audiences en matière d'extradition et d'expulsion. L'effet protecteur du par. 83.28(10) serait sérieusement compromis si l'État pouvait, à sa discrétion, utiliser dans des procédures d'extradition ou d'expulsion subséquentes les renseignements recueillis

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an order to properly provide use and derivative use immunity in extradition or deportation proceedings.

(3) The Independence of the Judiciary

Judicial independence is the "lifeblood of constitutionalism in democratic societies": *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at p. 70. The importance of judicial independence to the promotion and preservation of the rule of law cannot be overstated. In this respect, as the late Professor Lederman noted, judicial independence is one of the original principles of the English Constitution: W. R. Lederman, "The Independence of the Judiciary", in A. M. Linden, ed., *The Canadian Judiciary* (1976), 1, at p. 2. An independent judiciary is absolutely necessary to "ensure that the power of the state is exercised in accordance with the rule of law and the provisions of our Constitution. In this capacity, courts act as a shield against unwarranted deprivations by the state of the rights and freedoms of individuals": *Ell v. Alberta*, [2003] 1 S.C.R. 857, 2003 SCC 35, at para. 22, *per* Major J.

This principle exists in Canadian law in a number of forms. In the Constitution, it is explicitly referenced in ss. 96 to 100 of the *Constitution Act, 1867* and in s. 11(*d*) of the *Charter*. The application of these provisions, however, is limited. The former applies to judges of superior courts, and the latter to courts and tribunals charged with trying the guilt of persons charged with criminal offences: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 84; *Ell*, *supra*, at para. 18. Judicial independence has also been implicitly recognized as a residual right protected under s. 7, as it, along with the remaining protections in ss. 8 to 14, are specific examples of broader principles of fundamental justice: *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503. Moreover, the commitment to the "foundational principle" of judicial independence has also

en vertu de l'art. 83.28. Par conséquent, lorsqu'un tel risque existe, le juge qui préside l'investigation peut établir ou modifier, si nécessaire, les modalités de l'ordonnance de manière à accorder, comme il se doit, l'immunité contre l'utilisation de la preuve et l'immunité contre l'utilisation de la preuve dérivée dans les procédures d'extradition ou d'expulsion.

(3) L'indépendance du pouvoir judiciaire

80 L'indépendance judiciaire est « l'élément vital du caractère constitutionnel des sociétés démocratiques » : *Beauregard c. Canada*, [1986] 2 R.C.S. 56, p. 70. On ne saurait trop insister sur l'importance de l'indépendance judiciaire pour la promotion et le respect de la primauté du droit. À cet égard, comme le soulignait le défunt professeur Lederman, l'indépendance judiciaire est l'un des principes originaux de la Constitution anglaise : W. R. Lederman, « The Independence of the Judiciary », dans A. M. Linden, dir., *The Canadian Judiciary* (1976), 1, p. 2. L'indépendance judiciaire est absolument nécessaire pour « veille[r] [. . .] à ce que l'exercice du pouvoir étatique respecte la primauté du droit et les dispositions de notre Constitution. À ce titre, [les tribunaux] servent de bouclier contre les atteintes injustifiées de l'État aux droits et libertés des citoyens » : *Ell c. Alberta*, [2003] 1 R.C.S. 857, 2003 CSC 35, par. 22, le juge Major.

81 Ce principe revêt différentes formes en droit canadien. Sur le plan constitutionnel, il est mentionné expressément aux art. 96 à 100 de la *Loi constitutionnelle de 1867* et à l'al. 11*d*) de la *Charte*. L'application de ces dispositions est cependant limitée. Dans le premier cas, les articles en question s'appliquent aux juges des cours supérieures et, dans le deuxième cas, l'alinéa mentionné s'applique aux tribunaux qui se prononcent sur la culpabilité de personnes accusées d'une infraction criminelle : *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3, par. 84; *Ell*, précité, par. 18. L'indépendance judiciaire a, en outre, été implicitement reconnue comme étant un droit résiduel protégé par l'art. 7, étant donné que, à l'instar des autres garanties accordées par les art. 8 à 14, elle est un exemple concret de principe général de

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been referenced by way of the Preamble to the *Constitution Act, 1867*: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, at para. 109; see also *Ell*, at para. 19. Judicial independence further represents the cornerstone of the common law duty of procedural fairness, which attaches to all judicial, quasi-judicial and administrative proceedings, and is an unwritten principle of the Constitution.

82 The twin aspects of judicial independence and impartiality are relevant to this appeal. The first is the requirement that the judiciary function independently from the executive and legislative branches of government: *Beauregard*, *supra*, at pp. 72-73. The second is the recognition that judicial independence is necessary to uphold public confidence in the administration of justice: *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13. The relationship between judicial independence and impartiality was considered by the Court in *R. v. Lippé*, [1991] 2 S.C.R. 114, at p. 139:

> The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a "means" to this "end". If judges could be perceived as "impartial" without judicial "independence", the requirement of "independence" would be unnecessary. However, judicial independence is critical to the public's perception of impartiality. Independence is the cornerstone, a necessary prerequisite, for judicial impartiality.

83 In this respect, we must ultimately consider whether a reasonable and informed person would conclude that the court under s. 83.28 is independent: *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 689; *Ell*, *supra*, at para. 32.

84 One of the criticisms levied against s. 83.28 is that it co-opts the judiciary into performing executive, investigatory functions in place of its usual adjudicative role: see, e.g., Paciocco, *supra*, at p. 232. Essentially, the assertion is that judges acting under

justice fondamentale : *Renvoi : Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486, p. 503. De plus, la reconnaissance du « principe fondamental » qu'est l'indépendance judiciaire a également été évoquée dans le préambule de la *Loi constitutionnelle de 1867* : *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, par. 109; voir aussi *Ell*, par. 19. En plus de constituer un principe constitutionnel non écrit, l'indépendance judiciaire est la pierre d'assise de l'obligation d'équité procédurale reconnue par la common law, qui s'applique à toutes les procédures judiciaires, quasi judiciaires et administratives.

Les deux facettes de l'indépendance et de l'impartialité judiciaires sont pertinentes en l'espèce. La première facette est l'exigence que le pouvoir judiciaire soit indépendant des organes exécutif et législatif du gouvernement : *Beauregard*, précité, p. 72-73. La deuxième facette est la reconnaissance que l'indépendance judiciaire est nécessaire au maintien de la confiance du public dans l'administration de la justice : *Mackin c. Nouveau-Brunswick (Ministre des Finances)*, [2002] 1 R.C.S. 405, 2002 CSC 13. Dans l'arrêt *R. c. Lippé*, [1991] 2 R.C.S. 114, p. 139, la Cour a examiné le lien qui existe entre l'indépendance et l'impartialité des juges :

> La garantie d'indépendance judiciaire vise dans l'ensemble à assurer une perception raisonnable d'impartialité; l'indépendance judiciaire n'est qu'un « moyen » pour atteindre cette « fin ». Si les juges pouvaient être perçus comme « impartiaux » sans l'« indépendance » judiciaire, l'exigence d'« indépendance » serait inutile. Cependant, l'indépendance judiciaire est essentielle à la perception d'impartialité qu'a le public. L'indépendance est la pierre angulaire, une condition préalable nécessaire, de l'impartialité judiciaire.

À cet égard, il faut se demander, en définitive, si une personne raisonnable et renseignée conclurait que la cour dont il est question à l'art. 83.28 est indépendante : *Valente c. La Reine*, [1985] 2 R.C.S. 673, p. 689; *Ell*, précité, par. 32.

L'une des critiques formulées à l'encontre de l'art. 83.28 veut qu'il permette au pouvoir judiciaire d'exercer des fonctions exécutives d'enquête au lieu d'exercer sa fonction juridictionnelle habituelle : voir, par exemple, Paciocco, *loc. cit.*, p. 232. On

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s. 83.28 lack institutional independence or impartiality. The institutional dimension of judicial independence was recognized in *Ell*, *supra*, at para. 22, where Major J. described it as "the need to maintain the independence of a court or tribunal as a whole from the executive and legislative branches of government". We note that there has been no allegation that Holmes J. has conducted herself in a partial or biased manner.

affirme essentiellement que les juges qui agissent en vertu de l'art. 83.28 sont dépourvus d'indépendance ou d'impartialité institutionnelle. Dans l'arrêt *Ell*, précité, par. 22, le juge Major a reconnu l'aspect institutionnel de l'indépendance judiciaire qu'il décrit comme « la nécessité de maintenir l'indépendance d'un tribunal judiciaire ou administratif dans son ensemble vis-à-vis des organes exécutif et législatif du gouvernement ». Nous notons qu'il n'a pas été allégué que la juge Holmes avait fait montre de préjugé ou de parti pris.

The role of the judge was described by this Court in *Therrien (Re)*, [2001] 2 S.C.R. 3, 2001 SCC 35, at para. 108:

> The judicial function is absolutely unique. Our society assigns important powers and responsibilities to the members of its judiciary. Apart from the traditional role of an arbiter which settles disputes and adjudicates between the rights of the parties, judges are also responsible for preserving the balance of constitutional powers between the two levels of government in our federal state. Furthermore, following the enactment of the *Canadian Charter*, they have become one of the foremost defenders of individual freedoms and human rights and guardians of the values it embodies . . . . Accordingly, from the point of view of the individual who appears before them, judges are first and foremost the ones who state the law, grant the person rights or impose obligations on him or her.

85 Dans l'arrêt *Therrien (Re)*, [2001] 2 R.C.S. 3, 2001 CSC 35, par. 108, la Cour décrit ainsi le rôle du juge :

> La fonction judiciaire est tout à fait unique. Notre société confie d'importants pouvoirs et responsabilités aux membres de sa magistrature. Mis à part l'exercice de ce rôle traditionnel d'arbitre chargé de trancher les litiges et de départager les droits de chacune des parties, le juge est aussi responsable de protéger l'équilibre des compétences constitutionnelles entre les deux paliers de gouvernement, propres à notre État fédéral. En outre, depuis l'adoption de la *Charte canadienne*, il est devenu un défenseur de premier plan des libertés individuelles et des droits de la personne et le gardien des valeurs qui y sont enchâssées [. . .] En ce sens, aux yeux du justiciable qui se présente devant lui, le juge est d'abord celui qui dit la loi, qui lui reconnaît des droits ou lui impose des obligations.

We find that the substance of such a criticism is not made out in the context of the s. 83.28 judicial investigative hearing. Judges routinely play a role in criminal investigation by way of measures such as the authorization of wire taps (s. 184.2 of the *Code*), search warrants (s. 487 of the *Code*), and in applications for DNA warrants (s. 487.05 of the *Code*). The thrust of these proceedings is their investigatory purpose, and the common underlying thread is the role of the judge in ensuring that such information is gathered in a proper manner. The place of the judiciary in such investigative contexts is to act as a check against state excess.

86 Nous estimons que, pour l'essentiel, cette critique n'est pas fondée en ce qui concerne l'investigation judiciaire prévue à l'art. 83.28. Les juges jouent normalement un rôle dans les enquêtes criminelles, notamment en accordant des autorisations d'écoute électronique (art. 184.2 du *Code*), en décernant des mandats de perquisition (art. 487 du *Code*) et en statuant sur des demandes de mandat autorisant le prélèvement pour fins d'analyse génétique (art. 487.05 du *Code*). Ces procédures sont principalement axées sur la conduite d'une enquête, et leur dénominateur commun est le rôle du juge qui consiste à veiller à ce que les renseignements soient recueillis d'une manière régulière. Dans ce contexte d'enquête, le rôle du pouvoir judiciaire est de refréner les excès de l'État.

However, once legislation invokes the aid of the judiciary, we must remain vigilant to ensure that the

87 Toutefois, dès qu'une mesure législative requiert l'aide du pouvoir judiciaire, il faut veiller à ce que

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integrity of its role is not compromised or diluted. Earlier in these reasons we endorsed a broad and purposive approach to the interpretation of s. 83.28. This interpretation is consistent not only with the presumption of constitutional validity, but also with the traditional role of the judiciary. The function of the judge in a judicial investigative hearing is not to act as "an agent of the state", but rather, to protect the integrity of the investigation and, in particular, the interests of the named person *vis-à-vis* the state.

88 The parameters of the judicial role under s. 83.28 must be clearly delineated and understood. As discussed above, the judge is empowered to ensure that questioning is fair and relevant, as required by the *CEA* and the common law. The scope of the order under s. 83.28(5), any exercise of judicial discretion under s. 83.28(5)(*e*) and the terms and conditions set under s. 83.28(7) must take as a starting point the rights and interests of the named person. Where a judge, acting pursuant to s. 83.28, imposes terms and conditions or exercises his or her discretion in a manner which goes beyond the role of the judiciary as guardian of the Constitution, that judge will have acted unconstitutionally. This accords with Parliamentary intention. During the third reading of Bill C-36 in the House of Commons, the Parliamentary Secretary to the Minister of Justice characterized the direct judicial supervision of s. 83.28 as one of the "very significant limits and controls" that brought the legislation into compliance with the *Charter*: *House of Commons Debates*, vol. 137, 1st Sess., 37th Parl., November 28, 2001, at p. 7620.

89 We conclude that judicial independence is not compromised in this case. Under a broad and purposive interpretation, s. 83.28 requires the judge to act "judicially", in accordance with constitutional norms, and the historic role of the judiciary in criminal proceedings. Moreover, the provision confers upon the judge considerable flexibility and discretion to set and vary the terms and conditions of the initiating order and the subsequent hearing. In light of the mandatory exercise of such discretion with

l'intégrité du rôle de ce dernier ne soit ni compromise ni diminuée. Plus tôt dans les présents motifs, nous avons souscrit à une interprétation large et téléologique de l'art. 83.28. Cette interprétation est compatible non seulement avec la présomption de constitutionnalité, mais également avec le rôle traditionnel du pouvoir judiciaire. Dans une investigation judiciaire, le juge doit non pas agir en qualité de « représentant de l'État », mais plutôt préserver l'intégrité de l'investigation et, en particulier, les droits de la personne désignée face à l'État.

Les paramètres du rôle judiciaire prévu à l'art. 83.28 doivent être clairement définis et bien compris. Comme nous l'avons vu, le juge est habilité à veiller à ce que l'interrogatoire soit équitable et pertinent conformément à la *LPC* et à la common law. Les droits et les intérêts de la personne désignée doivent être pris en compte au départ lorsqu'il s'agit de déterminer la portée de l'ordonnance rendue en vertu du par. 83.28(5), d'exercer le pouvoir discrétionnaire conféré par l'al. 83.28(5)*e*) et d'établir des modalités en vertu du par. 83.28(7). Si, en établissant des modalités en vertu du par. 83.28 ou en exerçant le pouvoir discrétionnaire que lui confère cet article, le juge excède le rôle de gardien de la Constitution que joue le pouvoir judiciaire, il agit alors de manière inconstitutionnelle. Cela est conforme à l'intention du législateur. Lors de la troisième lecture du projet de loi C-36 à la Chambre des communes, le secrétaire parlementaire de la ministre de la Justice a affirmé que la supervision judiciaire directe prévue à l'art. 83.28 constitue l'une « des limites et des contrôles importants » qui rendent la mesure législative conforme à la *Charte* : *Débats de la Chambre des communes*, vol. 137, 1re sess., 37e lég., 28 novembre 2001, p. 7620.

Nous concluons que l'indépendance judiciaire n'est pas compromise en l'espèce. Selon une interprétation large et téléologique, l'art. 83.28 exige que le juge agisse « de façon judiciaire », conformément aux normes constitutionnelles et au rôle traditionnel que le pouvoir judiciaire joue en matière criminelle. En outre, la disposition confère au juge une grande latitude et un large pouvoir discrétionnaire en ce qui concerne l'établissement et la modification des modalités de l'ordonnance autorisant l'investigation

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respect to rules of evidence, and use and derivative use immunity being extended to extradition and deportation hearings, judges bring the full weight of their authority as impartial adjudicators to the hearing to provide the witness with all the constitutional guarantees of the *Charter*. A failure on the part of a hearing judge to exercise his or her discretion in this manner will constitute reviewable error.

et en ce qui concerne l'investigation subséquente. Du fait que l'exercice de ce pouvoir est obligatoire en ce qui a trait aux règles de preuve et que l'immunité contre l'utilisation de la preuve et l'immunité contre l'utilisation de la preuve dérivée peuvent être revendiquées dans le cadre des audiences en matière d'extradition et d'expulsion, les juges mettent à contribution, à ces audiences, toute l'autorité qu'ils possèdent en tant que décideurs impartiaux pour veiller à ce que le témoin bénéficie de toutes les garanties constitutionnelles de la *Charte*. L'omission du juge qui préside l'audience d'exercer de cette manière son pouvoir discrétionnaire constitue une erreur donnant lieu à révision.

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The ultimate question, however, is "whether a reasonable and informed person, viewing the relevant statutory provisions in their full historical context, would conclude that the court or tribunal is independent": *Ell*, *supra*, at para. 32; *Valente*, *supra*, at p. 689. Professor Paciocco states that, "[e]ven though the legislation does not purport to command judges to perform this function, but leaves them with the discretion as to whether to conduct such a hearing, the appearance of independence is compromised": Paciocco, *supra*, at p. 235.

90 Cependant, il faut se demander, en définitive, « si en examinant les dispositions législatives pertinentes dans leur contexte historique complet, une personne raisonnable et renseignée conclurait que le tribunal judiciaire ou administratif en question est indépendant » : *Ell*, précité, par. 32; *Valente*, précité, p. 689. Selon le professeur Paciocco, [TRADUCTION] « [m]ême si la mesure législative n'est pas censée obliger les juges à exercer cette fonction, et leur confie plutôt le pouvoir discrétionnaire de tenir une telle audience, l'apparence d'indépendance est compromise » : Paciocco, *loc. cit.*, p. 235.

The concern about the judicial investigative hearing stems largely from its being held *in camera*. However, in the media appeal, we discuss the fundamental principle of openness of the courts, a hallmark of the Canadian judicial system. In that appeal, we conclude that judicial investigative hearings are to be held presumptively in open court and that the onus is on the Crown to rebut that presumption under the test laid out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76. In our view, the presumptive openness of the judicial investigative hearing is another factor that militates in favour of our conclusion that judicial investigative hearings do not compromise the independence or impartiality of the judiciary.

91 La crainte que suscite l'investigation judiciaire est due, en grande partie, au fait qu'elle se déroule à huis clos. Toutefois, dans le pourvoi relatif aux médias, nous analysons le principe fondamental de la publicité des procédures judiciaires qui est une caractéristique du système de justice canadien. Dans ce pourvoi, nous concluons qu'il existe une présomption de publicité à l'égard des investigations judiciaires et qu'il incombe au ministère public de réfuter cette présomption conformément au critère établi dans les arrêts *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835, et *R. c. Mentuck*, [2001] 3 R.C.S. 442, 2001 CSC 76. À notre avis, la présomption de publicité applicable aux investigations judiciaires est un autre facteur qui milite en faveur de notre conclusion que les investigations judiciaires ne compromettent pas l'indépendance ou l'impartialité du pouvoir judiciaire.

92 Assuming that this file had not been sealed to the extent that it was at the outset of the proceedings, a reasonable and informed person would conclude, on the facts of this case, and in light of the institutional function of the judiciary, that judicial impartiality and independence have not been compromised or diluted. Where a hearing is held within the parameters discussed above, justice will not only be done, but will also manifestly be seen to be done.

(4) The Role of the Crown

93 It was argued that the independence of Crown counsel is compromised by the judicial investigative hearing process, becoming impermissibly intertwined with the "police task" of investigation. We reject this argument for two reasons.

94 First, this Court in *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, declined to set a bright line delineating the proper pre-charge role of the Crown. Policy considerations have a legitimate place in developing the Crown's practical role in a given jurisdiction or situation. The core content of Crown independence is the maintenance of "objectivity throughout the proceedings" but the contextual framework may vary: *Regan*, at para. 83 (emphasis deleted). Since the application of Crown objectivity "is inevitably highly contextual" (*Canadian Foundation*, *supra*, at para. 11), it fails to meet the criteria for recognition as a principle of fundamental justice under s. 7.

95 Second, one may assume that by bringing Crown counsel into the judicial investigative hearing process, the legislature intended that the Crown would conduct itself according to its proper role as an officer of the court and its duty of impartiality in the public interest. This is consistent with our interpretation of the intended role of judges in the proceeding. Crown counsel are appropriately trained to question witnesses within the context of judicial rulings on relevance, fairness, privilege, and procedure. The mere fact of their involvement in the

Dans l'hypothèse où le présent dossier n'aurait pas été scellé comme il l'a été au début de l'instance, une personne raisonnable et renseignée conclurait, compte tenu des faits de la présente affaire et de la fonction institutionnelle du pouvoir judiciaire, que l'impartialité et l'indépendance judiciaires n'ont été ni compromises ni diminuées. Si une audience respecte les paramètres analysés plus haut, justice sera non seulement rendue, mais encore clairement perçue comme ayant été rendue.

(4) Le rôle du ministère public

On a fait valoir que le processus d'investigation judiciaire compromet l'indépendance de l'avocat du ministère public, du fait qu'il devient, de manière inacceptable, étroitement lié au travail d'enquête de la police. Nous rejetons cet argument pour deux raisons.

Premièrement, dans l'arrêt *R. c. Regan*, [2002] 1 R.C.S. 297, 2002 CSC 12, la Cour a refusé de délimiter clairement le rôle que doit jouer le ministère public avant le dépôt des accusations. Les considérations de politique générale ont leur place lorsqu'il s'agit de définir le rôle concret du ministère public dans un ressort ou un cas donné. Le maintien de « l'objectivité du début à la fin des procédures » est au cœur de l'indépendance du ministère public, mais le cadre contextuel peut varier : *Regan*, par. 83 (soulignement supprimé). Étant donné que son application « ne peut que dépendre fortement du contexte » (*Canadian Foundation*, précité, par. 11), le principe de l'objectivité du ministère public ne remplit pas les conditions requises pour pouvoir être considéré comme un principe de justice fondamentale prévu à l'art. 7.

Deuxièmement, on peut présumer qu'en faisant participer les avocats du ministère public au processus d'investigation judiciaire, le législateur a voulu que le ministère public se conforme au rôle qu'il doit jouer en tant qu'officier de justice et à son obligation d'agir impartialement dans l'intérêt public. Cela est compatible avec notre interprétation du rôle que les juges sont censés jouer dans ces procédures. Les avocats du ministère public sont bien formés pour interroger les témoins dans le cas où un tribunal est appelé à trancher des questions de

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investigation need not compromise Crown counsel's objectivity, as the critical component is their own "necessary vigilance": *Regan*, *supra*, at para. 83. Moreover, the Crown exercises a "public duty . . . performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings", and accordingly is presumed to act in good faith: *Boucher v. The Queen*, [1955] S.C.R. 16, at p. 24. Where, however, the Crown can be shown to have acted vexatiously or in bad faith, recourse may be sought through the courts.

(5) Other Issues

(a) *Section 11(d) of the Charter*

Section 11(*d*) of the *Charter* does not apply because the appellant is not an accused. The issues raised under this section are subsumed in our s. 7 analysis.

(b) *Pre-Trial Discovery*

It is argued that the judicial investigative hearing in the circumstances of this case served the improper purpose of obtaining pre-trial discovery. Section 83.28(2) states that the purpose of an order for the gathering of information is to investigate a terrorism offence. It follows that the issuing judge must be satisfied that the purpose of the Crown in seeking the proposed hearing is in fact investigative, and not founded upon any oblique motive or otherwise improper purpose: see *Boucher*, *supra*; *Lemay v. The King*, [1952] 1 S.C.R. 232; *Proulx v. Quebec (Attorney General)*, [2001] 3 S.C.R. 9, 2001 SCC 66; *Regan*, *supra*. Application for the order is made *ex parte*, and the onus is on the Crown to demonstrate its investigative purpose. If a party subsequently challenges the Crown's purpose in seeking an investigative hearing, the onus will be on the Crown to demonstrate the propriety of its purpose.

pertinence, d'équité, de privilège et de procédure. Le simple fait que l'avocat du ministère public participe à l'investigation ne compromet pas nécessairement son objectivité, qui tient essentiellement à la « vigilance » dont il est lui-même tenu de faire preuve : *Regan*, précité, par. 83. De plus, le ministère public s'acquitte d'un [TRADUCTION] « devoir public [. . .] d'une façon efficace, avec un sens profond de la dignité, de la gravité et de la justice des procédures judiciaires », et est donc présumé agir de bonne foi : *Boucher c. The Queen*, [1955] R.C.S. 16, p. 24. Toutefois, un recours en justice sera possible si on peut démontrer que le ministère public a agi de manière vexatoire ou de mauvaise foi.

(5) Autres questions en litige

a) *Alinéa 11d) de la Charte*

96 L'alinéa 11*d*) de la *Charte* ne s'applique pas étant donné que l'appelant n'est pas inculpé. Les questions soulevées en vertu de cet alinéa sont subsumées dans notre analyse de l'art. 7.

b) *Interrogatoire préalable*

97 On fait valoir que, dans les circonstances de la présente affaire, l'investigation judiciaire avait pour objet illégitime de procéder à un interrogatoire préalable. Le paragraphe 83.28(2) prévoit que l'objet d'une ordonnance autorisant la recherche de renseignements est la conduite d'une enquête relative à une infraction de terrorisme. Il s'ensuit que le juge qui rend l'ordonnance doit être convaincu que la demande d'investigation présentée par le ministère public vise, en fait, la conduite d'une enquête et n'est pas fondée sur un motif inavoué ou quelque autre motif illégitime : voir *Boucher*, précité; *Lemay c. The King*, [1952] 1 R.C.S. 232; *Proulx c. Québec (Procureur général)*, [2001] 3 R.C.S. 9, 2001 CSC 66; *Regan*, précité. La demande d'ordonnance est présentée en l'absence de toute autre partie et il incombe au ministère public de démontrer que sa demande vise la conduite d'une enquête. Si, par la suite, une partie met en doute l'intention qu'a le ministère public en sollicitant la tenue d'une investigation, il incombera alors à ce dernier de démontrer la légitimité de son intention.

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98 In addition, in an *ex parte* application of this nature, there is a well-recognised "duty of utmost good faith [on the Crown] in the representations that it makes to the court. The evidence presented must be complete and thorough and no relevant information adverse to the interest of that party may be withheld . . . . Virtually all codes of professional conduct impose such an ethical obligation on lawyers": *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75, at para. 27.

99 Holmes J., reviewing the purpose that supported issuance of the order, asked whether the predominant purpose was investigative. It appears that she placed the onus on the Crown to demonstrate the propriety of its purposes, although this is not explicitly stated. She tested the asserted investigative purpose against the factual record before her, taking into account the allegations of the appellant. She concluded that the purpose of the hearing as sought by the Crown was predominantly investigative and therefore permissible. Although the hearing judge expressed her conclusion in terms of a predominant purpose for the investigative hearing, in looking at her findings we are satisfied that she was using that expression to mean improper purpose or with an oblique motive.

100 Accepting that questions of propriety underlying Crown conduct fall on the legal end of the mixed law and fact spectrum discussed in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, at para. 36, we conclude that Holmes J. made no reviewable error. She correctly found no improper purpose in the Crown's calling of the appellant under the s. 83.28 provisions. Our colleague, Binnie J., puts great emphasis, to paraphrase, on trial tactics employed by the Crown to obtain advance or mid-trial discovery of an uncooperative witness. With respect, such conclusions are somewhat speculative.

De plus, lorsqu'il présente une demande *ex parte* de cette nature, il est reconnu que le ministère public a « l'obligation de présenter ses arguments avec la bonne foi la plus absolue. [Il] doit offrir une preuve complète et détaillée, et n'omettre aucune donnée pertinente qui soit défavorable à son intérêt [. . .] Presque tous les codes de déontologie professionnelle applicables aux avocats leur font cette obligation » : *Ruby c. Canada (Solliciteur général)*, [2002] 4 R.C.S. 3, 2002 CSC 75, par. 27.

Dans son examen de l'objet justifiant de rendre l'ordonnance sollicitée, la juge Holmes s'est demandé si l'objet prédominant était la conduite d'une enquête. Bien qu'elle ne l'ait pas expressément affirmé, il semble qu'elle ait attribué au ministère public le fardeau d'établir la légitimité de ses intentions. Elle a évalué l'objet d'enquête invoqué au regard des faits qu'on lui avait présentés, tout en tenant compte des allégations de l'appelant. Elle a conclu que, puisque l'objet prédominant de l'investigation sollicitée par le ministère public était la conduite d'une enquête, il était donc acceptable. Bien que la juge présidant l'investigation ait parlé d'objet prédominant de l'investigation dans la conclusion qu'elle a tirée, nous sommes convaincus, d'après ses constatations, qu'elle a utilisé cette expression au sens d'objet illégitime ou de motif inavoué.

Reconnaissant que les questions de légitimité sous-jacentes à la conduite du ministère public se situent à l'extrémité juridique du spectre des questions mixtes de droit et de fait analysé dans l'arrêt *Housen c. Nikolaisen*, [2002] 2 R.C.S. 235, 2002 CSC 33, par. 36, nous concluons que la juge Holmes n'a commis aucune erreur donnant lieu à révision. Elle a décidé, à juste titre, qu'en assignant l'appelant en vertu des dispositions de l'art. 83.28 le ministère public n'avait aucune intention illégitime. Notre collègue le juge Binnie insiste beaucoup — pour utiliser une paraphrase — sur les stratégies de prétoire auxquelles le ministère public a eu recours pour obtenir la communication, anticipée ou au milieu du procès, de renseignements par un témoin peu coopératif. En toute déférence, ces conclusions sont quelque peu conjecturales.

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It is further argued that, regardless of the investigative purpose of the hearing, its effect was to provide the Crown with a pre-trial discovery advantage in the Air India trial not afforded to the defence. In our view, this issue arose here largely because the judicial investigative hearing was sought in the midst of the ongoing Air India trial and the proceedings in the British Columbia Supreme Court were conducted in total secrecy. In the unique circumstances of this case, the presumption of openness for the judicial investigative hearing and the participation of counsel for the accused from the outset would have overcome any concerns regarding the practical effect of the hearing on the Air India trial.

Given that the result is then to say that the order's secrecy might initially have granted some pre-trial advantage to the Crown, this may lead the Court to allow the appeal in part. However, the order's faults will be remedied by complying with the Court's ruling in the media appeal.

(c) *Participation of Counsel*

In light of our ruling and discussion in the media appeal that the hearing should have been held in open court and our comments above on the scope and operation of s. 83.28, there is no need to decide whether the participation of counsel for the accused, Mr. Bagri and Mr. Malik, in the judicial investigative hearing was an appropriate condition under s. 83.28(5)(*e*).

We reiterate our conclusion in the media appeal that it is difficult to anticipate all of the difficulties that such an order may pose. Accordingly, this issue should be left for another day, and should be debated within the legal profession so that court-imposed conditions can properly consider ethical standards and best practices for the involvement of counsel.

101 De plus, on soutient que, indépendamment de son objet d'enquête, l'investigation permettrait au ministère, et non à la défense, de disposer, au procès Air India, d'un avantage que procure l'interrogatoire préalable. À notre avis, cette question tient ici largement au fait que l'investigation judiciaire a été sollicitée au milieu du procès Air India et que les procédures devant la Cour suprême de la Colombie-Britannique se déroulaient dans le plus grand secret. Compte tenu des circonstances exceptionnelles de la présente affaire, la présomption de publicité de l'investigation judiciaire et la participation des avocats des accusés dès le départ auraient permis d'apaiser toute crainte relative à l'effet concret de l'investigation sur le procès Air India.

102 Étant donné qu'il se pourrait donc que le secret ayant entouré l'ordonnance ait, au départ, conféré au ministère public quelque avantage émanant d'une procédure préalable au procès, cela peut amener la Cour à accueillir le pourvoi en partie. Cependant, le respect de la décision de la Cour dans le pourvoi relatif aux médias permettra de remédier aux lacunes de l'ordonnance.

c) *Participation des avocats*

103 Compte tenu l'analyse qui nous a amenés à décider, dans le pourvoi relatif aux médias, que l'investigation aurait dû se dérouler en public, ainsi que des commentaires que nous avons formulés plus haut quant à la portée et à l'application de l'art. 83.28, il n'est pas nécessaire de déterminer si la participation des avocats des accusés, MM. Bagri et Malik, à l'investigation judiciaire était une modalité indiquée au sens de l'al. 83.28(5)*e*).

104 Nous réitérons la conclusion que nous avons tirée dans le pourvoi relatif aux médias selon laquelle il est difficile de prévoir toutes les difficultés qu'une telle ordonnance risque de présenter. Par conséquent, il y a lieu de reporter à une autre occasion la réponse à cette question et de laisser la profession juridique en débattre afin que les conditions prescrites par un tribunal puissent dûment tenir compte des normes déontologiques et des meilleures façons de procéder en ce qui concerne la participation des avocats.

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VI. Disposition

105 The appeal should be dismissed. The order of this Court sealing the file in this case is lifted to the extent of the information disclosed in the reasons. The parties are at liberty to apply to the Court for any appropriate order regarding the disposition of any part of the file in this case that remains under seal.

106 The constitutional questions are answered as follows:

1. Does s. 83.28 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

No.

2. If so, is the infringement a reasonable limit, prescribed by law, as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

It is not necessary to answer this question.

3. Does s. 83.28 of the *Criminal Code* infringe the principles of judicial independence and impartiality guaranteed by s. 11(*d*) of the *Charter*?

No.

4. If so, is the infringement a reasonable limit, prescribed by law, as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

It is not necessary to answer this question.

5. Does s. 83.28 of the *Criminal Code* infringe the principles of independence and impartiality established by the Preamble to the *Constitution Act, 1867*?

No.

The reasons of Bastarache and Deschamps JJ. were delivered by

107 BASTARACHE J. — I agree with the majority reasons subject to my comments on the openness of investigative hearings.

VI. Dispositif

Le pourvoi est rejeté. L'ordonnance de mise sous scellés du dossier, rendue par la Cour en l'espèce, est levée en ce qui concerne les renseignements divulgués dans les motifs. Il est loisible aux parties de demander à la Cour de rendre toute ordonnance appropriée au sujet de quelque partie du dossier qui est encore sous scellés en l'espèce.

Les questions constitutionnelles reçoivent les réponses suivantes :

1. L'article 83.28 du *Code criminel*, L.R.C. 1985, ch. C-46, viole-t-il l'art. 7 de la *Charte canadienne des droits et libertés*?

Non.

2. Dans l'affirmative, cette violation constitue-t-elle une limite raisonnable prescrite par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique, au sens de l'article premier de la *Charte*?

Il n'est pas nécessaire de répondre à cette question.

3. L'article 83.28 du *Code criminel* viole-t-il les principes d'indépendance et d'impartialité judiciaires garantis par l'al. 11*d*) de la *Charte*?

Non.

4. Dans l'affirmative, cette violation constitue-t-elle une limite raisonnable prescrite par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique, au sens de l'article premier de la *Charte*?

Il n'est pas nécessaire de répondre à cette question.

5. L'article 83.28 du *Code criminel* viole-t-il les principes d'indépendance et d'impartialité judiciaires établis dans le préambule de la *Loi constitutionnelle de 1867*?

Non.

Version française des motifs des juges Bastarache et Deschamps rendus par

LE JUGE BASTARACHE — Je souscris aux motifs des juges majoritaires sous réserve de mes commentaires sur la publicité des procédures d'une investigation.

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I. The Independence of the Judiciary

In my view, where a judicial investigative hearing is closed, the independence or impartiality of the judiciary will not be compromised as several other factors promote independence and impartiality. Further, the subsequent release of the information disclosed during these proceedings promote the accountability of the judiciary.

II. Pre-Trial Discovery

It is my view that Holmes J. made neither a palpable nor an overriding error in her assessment of the facts and her approach was correct in principle. In my view, the participation of counsel for the accused from the outset of the hearing was sufficient to overcome any concern regarding the practical effect of the hearing on the Air India Trial.

III. Participation of Counsel

The majority chose not to comment on the participation of counsel in light of the conclusion on openness in the companion appeal. Like the majority, I limit my comments to this case and will not set out the requisite conditions for such an order generally. In my view, there is no evidence that Holmes J. erred in concluding that counsel for the accused, Mr. Malik and Mr. Bagri, could participate in the hearing. Holmes J. exercised her discretion properly.

The following are the reasons delivered by

BINNIE J. (dissenting) — Many of the reasons urged by my colleagues Iacobucci and Arbour JJ. in support of the constitutional validity of the anti-terrorism investigatory power in s. 83.28 of the *Criminal Code*, R.S.C. 1985, c. C-46 (as amended by S.C. 2001, c. 41), demonstrate why this is not a proper case for its exercise. In my view, the s. 83.28 order in this case was sought by the Crown for an inappropriate purpose, it was granted on inappropriate terms, and its impropriety was not cured (although the terms were much improved) by the amendments made by the hearing judge. Accordingly, while I agree that s. 83.28 of the *Code*,

I. L'indépendance du pouvoir judiciaire

108 J'estime que, lorsqu'une investigation judiciaire est terminée, l'indépendance ou l'impartialité du pouvoir judiciaire n'est pas compromise étant donné que plusieurs autres facteurs en favorisent le maintien. En outre, la diffusion subséquente des renseignements divulgués pendant ces procédures favorise la responsabilité des juges.

II. L'interrogatoire préalable au procès

109 Selon moi, la juge Holmes n'a commis aucune erreur manifeste ou dominante dans son appréciation des faits, et l'approche qu'elle a adoptée était correcte en principe. J'estime que la participation des avocats des accusés à l'investigation dès le départ était suffisante pour apaiser toute crainte relative à l'effet concret de l'investigation sur le procès Air India.

III. La participation des avocats

110 Les juges majoritaires ont choisi de ne pas commenter la participation des avocats à cause de la conclusion sur la publicité des procédures tirée dans le pourvoi connexe. À l'instar de ceux-ci, je limite mes commentaires à la présente affaire et je n'énoncerai pas les conditions généralement applicables à une telle ordonnance. J'estime que rien ne prouve que la juge Holmes a commis une erreur en concluant que les avocats des accusés, MM. Bagri et Malik, pouvaient participer à l'investigation. La juge Holmes a exercé correctement son pouvoir discrétionnaire.

Version française des motifs rendus par

111 LE JUGE BINNIE (dissident) — Bon nombre des raisons que mes collègues, les juges Iacobucci et Arbour, exposent à l'appui de la constitutionnalité du pouvoir d'enquête en matière de lutte contre le terrorisme, conféré par l'art. 83.28 du *Code criminel*, L.R.C. 1985, ch. C-46 (modifié par L.C. 2001, ch. 41), démontrent pourquoi la présente affaire ne se prête pas à l'exercice de ce pouvoir. J'estime que l'objet de l'ordonnance fondée sur l'art. 83.28, que le ministère public a sollicitée en l'espèce, et les conditions auxquelles cette ordonnance a été accordée étaient inappropriés, et que les modifications apportées par la juge présidant l'investigation n'ont

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as interpreted by my colleagues, is constitutionally valid, in my opinion the Crown's resort to it in the circumstances of this case was an abuse of process. I would therefore allow the appeal.

112 The Air India trial commenced on April 28, 2003. It has therefore been open to the Crown for more than a year to call the appellant as a witness for the prosecution. As of the date of the hearing of this appeal, the Crown had not done so. While the s. 83.28 hearing judge was persuaded that the "predominant purpose" of the Crown in seeking a s. 83.28 order was the ongoing Air India *investigation* rather than the ongoing Air India *trial*, it is clear that the *timing* of the Crown's attempt to obtain the appellant's s. 83.28 evidence was driven by trial tactics. By that I mean the Crown's desire to obtain a mid-trial examination for discovery of the appellant before a different judge to determine in advance precisely what the appellant will say or not say in the witness box. This is an abuse of the extraordinary powers granted under the *Anti-terrorism Act*, S.C. 2001, c. 41. In my view the s. 83.28 hearing should have been stayed until after the appellant testified at the Air India trial or the Crown declared that the appellant would not be called as a prosecution witness.

I. The Fundamental Issue

113 My colleagues quote in para. 6 the much repeated dictum of Jackson J. of the United States Supreme Court that the *Bill of Rights* (or in our case the *Canadian Charter of Rights and Freedoms*) is not "a suicide pact": *Terminiello v. Chicago*, 337 U.S. 1 (1949), p. 37 (in dissent). In that case the U.S. Supreme Court upheld the free speech rights of a Chicago priest charged with causing a riot by his inflammatory speech to the Christian Veterans of

pas remédié au caractère illégitime de l'ordonnance (en dépit de l'amélioration considérable de ses modalités). En conséquence, tout en reconnaissant la constitutionnalité de l'art. 83.28 du *Code*, selon l'interprétation qu'en donnent mes collègues, j'estime que, dans les circonstances de la présente affaire, le recours du ministère public à cette disposition constitue un abus de procédure. J'accueillerais donc le pourvoi.

Le procès Air India a commencé le 28 avril 2003. Le ministère public était donc en mesure, depuis plus d'un an, d'assigner l'appelant comme témoin à charge. À la date de l'audition du présent pourvoi, il ne l'avait pas encore fait. Bien que la juge présidant l'investigation prévue par l'art. 83.28 ait été persuadée que l'ordonnance que le ministère public sollicitait en vertu de cet article avait pour « objet prédominant » de faire progresser l'*enquête* en cours sur la tragédie d'Air India plutôt que le *procès* Air India en cours, il est clair que le *moment choisi* par le ministère public pour tenter d'obtenir le témoignage de l'appelant en vertu de cette disposition était le fruit d'une stratégie de prétoire. J'entends par là que le ministère public voulait faire subir à l'appelant, au milieu du procès, un interrogatoire devant un autre juge afin de connaître exactement à l'avance ce que l'appelant dirait ou ne dirait pas à la barre des témoins. Il s'agit là d'un exercice abusif des pouvoirs extraordinaires conférés par la *Loi antiterroriste*, L.C. 2001, ch. 41. J'estime que l'investigation fondée sur l'art. 83.28 aurait dû être suspendue jusqu'à ce que l'appelant ait témoigné au procès Air India ou que le ministère public ait déclaré qu'il ne l'assignerait pas comme témoin à charge.

I. La question fondamentale

Mes collègues citent, au par. 6, la remarque incidente, souvent reprise, du juge Jackson de la Cour suprême des États-Unis, dissident dans l'arrêt *Terminiello c. Chicago*, 337 U.S. 1 (1949), p. 37, selon laquelle le *Bill of Rights* (ou, dans notre cas, la *Charte canadienne des droits et libertés*) n'est pas [TRADUCTION] « un pacte de suicide ». Dans cette affaire, la Cour suprême des États-Unis a confirmé le droit à la liberté d'expression d'un prêtre de

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America. More to the point for our purposes, I think, is the observation of Douglas J. for the majority in the same case, that upholding constitutional rights at times of national stress is "one of the chief distinctions" that sets a liberal democracy apart from the "totalitarian regimes" that were considered at that time a threat to national security (p. 4).

Chicago, accusé d'avoir causé une émeute en prononçant un discours enflammé devant les Christian Veterans of America. J'estime plus à propos, dans le cas qui nous occupe, l'observation formulée par le juge Douglas, au nom des juges majoritaires dans cette même affaire, selon laquelle le maintien des droits constitutionnels, en période de malaise national, est [TRADUCTION] « l'un des principaux traits » qui distingue une démocratie libérale des [TRADUCTION] « régimes totalitaires », qui étaient considérés à l'époque comme une menace pour la sécurité nationale (p. 4).

Every legal system has its not-so-proud moments when in times of national upheaval or wartime emergency, civil rights have been curtailed in ways which were afterwards regretted. One need look no further than to mention the wartime treatment of Canadians of Japanese descent, upheld in *Reference Re: Persons of Japanese Race*, [1946] S.C.R. 248, aff'd [1947] 1 D.L.R. 577 (P.C.).

114 Chaque système juridique a connu des moments moins glorieux lorsque les droits civils de ses justiciables ont été réduits — d'une manière jugée regrettable par la suite — afin de remédier à une situation de crise nationale ou à une situation d'urgence en temps de guerre. Il suffit de penser au traitement réservé en temps de guerre aux Canadiens d'origine japonaise, dont la validité a été confirmée dans *Reference Re : Persons of Japanese Race*, [1946] R.C.S. 248, conf. par [1947] 1 D.L.R. 577 (C.P.).

The challenge posed to our legal institutions by the current "war on terrorism" promises to be more enduring and difficult to manage than the more traditional wartime challenges to civil liberties previously experienced. The terrorist threat had no announced point of commencement and may have no end. The enemy is not conveniently dressed in uniforms or arranged in battlefield order. They operate among us in guerilla-style networks, where decisions can be made, adjusted, improvised and implemented in lower level cells. They are, it seems, everywhere and yet they are nowhere to be seen. There may be no dramatic final battle in which victors and losers are made manifest. We are told that there will be a long, slow process of attrition. Efforts to counteract terrorism are likely to become part of our everyday existence for perhaps generations to come. In these circumstances we can take limited comfort from the declared intention of the government that the *Anti-terrorist Act* is a temporary measure. While its continued existence will depend on Parliament's appreciation of developments in the "war on terrorism", such temporary measures may well slide into

115 Le problème que présente pour nos institutions juridiques l'actuelle « guerre contre le terrorisme » s'annonce plus durable et plus difficile à gérer que les attaques plus traditionnelles dont les libertés civiles ont jusqu'à maintenant été l'objet en temps de guerre. Rien n'annonçait la menace terroriste, qui pourrait continuer de planer indéfiniment. L'ennemi n'est pas aisément repérable du fait qu'il ne porte pas d'uniforme et qu'il n'est pas aligné en position de combat. Il évolue parmi nous sous forme de réseaux, pendants de la guérilla, au sein desquels les décisions peuvent être prises, adaptées, improvisées et exécutées par des cellules de niveau inférieur. L'ennemi semble être partout et, pourtant, on ne le voit nulle part. Il n'y aura peut-être jamais de grande bataille finale qui départagera les vainqueurs des vaincus. On nous prédit une longue et lente guerre d'usure. Les efforts déployés pour lutter contre le terrorisme feront probablement partie de notre vie de tous les jours pour des générations à venir. Dans ces circonstances, l'intention avouée du gouvernement de faire de la *Loi antiterroriste* une mesure temporaire n'est pas de nature à nous

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a state of *de facto* permanence. The role of s. 83.28 in our criminal law should be approached with that unhappy prospect firmly in mind.

116 The danger in the "war on terrorism" lies not only in the actual damage the terrorists can do to us but what we can do to our own legal and political institutions by way of shock, anger, anticipation, opportunism or overreaction.

117 This case, it seems to me, illustrates the problem.

II. The Air India Trial

118 My colleagues suggest (I think correctly) that generally speaking the role of the hearing judge under s. 83.28 is "to protect the integrity of the investigation and, in particular, the interests of the named person *vis-à-vis* the state" (para. 87). In this case, however, the difficult issue for the s. 83.28 hearing judge is not so much the fair treatment of the appellant as it is the need to ensure that the charges against the accused Ripudaman Singh Malik and Ajaib Singh Bagri in the Air India case are dealt with in accordance with our usual rules of a fair trial.

119 The hearing judge explicitly recognized in her publicly released synopsis of the s. 83.28 case that the "terrorism offence" under investigation at her inquiry is also the subject matter of the criminal charges against Malik and Bagri.

The terrorism offence relates to two explosions which occurred between June 22 and 23, 1985, and caused the deaths of two baggage handlers and injuries to four others in Narita, Japan, and the deaths of the 329 passengers and crew of Air India flight 182 off the west coast of Ireland.

rassurer complètement. Bien que son maintien dépende de l'idée que le gouvernement se fera des progrès de la « guerre contre le terrorisme », cette mesure temporaire risque bien de devenir permanente dans les faits. C'est en ayant fermement à l'esprit cette triste perspective qu'il faut aborder le rôle de l'art. 83.28 dans notre droit criminel.

Le risque que comporte la « guerre contre le terrorisme » n'est pas seulement le préjudice réel que les terroristes peuvent nous causer, mais encore ce que la consternation, la colère, l'anticipation, l'opportunisme ou la dramatisation peut nous amener à faire à nos propres institutions juridiques et politiques.

Il me semble que la présente affaire illustre bien le problème.

II. Le procès Air India

Mes collègues indiquent (à juste titre, selon moi) que, de manière générale, le rôle du juge présidant une investigation prévue par l'art. 83.28 est de « préserver l'intégrité de l'investigation et, en particulier, les droits de la personne désignée face à l'État » (par. 87). En l'espèce, cependant, le problème pour la juge qui préside l'investigation prévue par l'art. 83.28 n'est pas tant de s'assurer que l'appelant bénéficie d'un traitement équitable que de veiller à ce que les accusations portées contre les accusés Ripudaman Singh Malik et Ajaib Singh Bagri, dans l'affaire Air India, soient traitées d'une manière conforme à nos règles usuelles en matière de procès équitable.

Dans le résumé — qu'elle a fait publiquement — de l'affaire relative à l'art. 83.28, la juge présidant l'investigation a expressément reconnu que l'« infraction de terrorisme » examinée dans le cadre de son enquête est également visée par les accusations criminelles portées contre MM. Malik et Bagri.

[TRADUCTION] L'infraction de terrorisme a trait à deux explosions survenues entre les 22 et 23 juin 1985, qui ont causé la mort de deux bagagistes en plus de blesser quatre autres personnes à Narita, au Japon, ainsi que la mort des 329 passagers et membres d'équipage du vol 182 d'Air India au large de la côte ouest de l'Irlande.

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Mr. Malik and Mr. Bagri are currently on trial for conspiracy to murder and other offences relating to those events. Their trial began on April 28, 2003 and will resume on September 8, 2003.

([2003] B.C.J. No. 1749 (QL), 2003 BCSC 1172, at paras. 4-5)

She elsewhere noted that the s. 83.28 hearing was directed to "information about the Air India crimes and their perpetrators" (emphasis added). The perpetrators, on the Crown's theory, include Malik and Bagri.

The appellant is a witness scheduled to testify for the prosecution against Malik and Bagri. This person has "not cooperated with the police" nor, it seems, with the Crown. The hearing judge specifically noted that the appellant is "equally uncooperative with the defence". At the time of the hearing before Holmes J. the appellant had made no known disclosure to anyone of the evidence he or she might or might not give in the Air India trial.

A. *The Crown Sought Mid-Trial Discovery of an Uncooperative Witness*

The *Criminal Code* affords the Crown many advantages in a criminal proceeding but where, as here, the Crown chooses to proceed by direct indictment, a free-standing right to compel reluctant witnesses to answer questions under oath before they are called to give their evidence in open court is not amongst them.

In this case, the Crown decided not to hold a preliminary hearing before a judge in the ordinary way in the presence of the accused but to proceed to trial on a direct indictment signed by the Attorney General of British Columbia on March 8, 2001. The consequences of such a procedure are significant, as pointed out in *Skogman v. The Queen*, [1984] 2 S.C.R. 93, *per* Estey J., at p. 105:

Messieurs Malik et Bagri subissent actuellement leur procès pour complot en vue de commettre un meurtre et d'autres infractions liées à ces événements. Leur procès a commencé le 28 avril 2003 et reprendra le 8 septembre 2003.

([2003] B.C.J. No. 1749 (QL), 2003 BCSC 1172, par. 4-5)

120 Elle a noté ailleurs que l'investigation sollicitée en vertu de l'art. 83.28 visait l'obtention de [TRADUCTION] « renseignements relatifs aux crimes dont Air India a été victime et aux auteurs de ces crimes » (je souligne). Selon la thèse du ministère public, MM. Malik et Bagri comptent parmi ces auteurs.

121 L'appelant doit témoigner pour la poursuite au procès de MM. Malik et Bagri. Il n'a pas [TRADUCTION] « collaboré avec la police » ni, semble-t-il, avec le ministère public. La juge présidant l'investigation a souligné que l'appelant s'est [TRADUCTION] « également montré peu coopératif avec la défense ». Au moment de l'investigation présidée par la juge Holmes, l'appelant n'avait parlé à personne du témoignage qu'il pourrait livrer ou ne pas livrer au procès Air India.

A. *Le ministère public voulait obtenir l'interrogatoire, au milieu du procès, d'un témoin peu coopératif*

122 En vertu du *Code criminel*, le ministère public possède maints avantages dans des procédures criminelles, mais lorsqu'il choisit, comme il l'a fait en l'espèce, de procéder par mise en accusation directe, le droit distinct de contraindre les témoins réticents à répondre sous serment aux questions, avant de les assigner à témoigner dans un procès public, ne figure pas parmi ces avantages.

123 En l'espèce, au lieu de procéder à l'enquête préliminaire habituelle devant un juge et en présence de l'accusé, le ministère public a décidé de passer au procès en déposant, le 8 mars 2001, une mise en accusation directe signée par le procureur général de la Colombie-Britannique. Cette façon de procéder a des conséquences importantes, d'après ce que souligne le juge Estey dans l'arrêt *Skogman c. La Reine*, [1984] 2 R.C.S. 93, p. 105 :

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. . . the preliminary hearing has become a forum where the accused is afforded an opportunity to discover and to appreciate the case to be made against him at trial where the requisite evidence is found to be present.

124 The result of the direct indictment proceeding was that neither the Crown nor the defence had a preliminary look at how the witnesses would perform in a trial-like setting. This was the Crown's decision. The defence is given no choice in the matter.

125 A mid-trial examination of the appellant for discovery would recoup for the Crown some of the advantage it lost in opting for the direct indictment of Malik and Bagri. The defence, on the other hand, is given no comparable opportunity to obtain mid-trial (or pre-trial) discovery of some of the witnesses it may wish to depose: see *Re Regina and Arviv* (1985), 51 O.R. (2d) 551 (C.A.).

126 If it is fair to give the Crown a non-reciprocal right of pre-trial discovery of witnesses in *this* murder trial, why not generally? Why limit the Crown's right of discovery to those cases where s. 83.28 applies? However, no one argues that this is the normal way of conducting a murder trial. That being so, why single out Malik and Bagri for disadvantageous treatment? At what point, if at all, should principle yield to expediency in the "war on terror"? That is a key issue not only in this case but in all the cases to follow where the decision in this case to uphold as proper the Crown's use of s. 83.28 for discovery will be cited as a precedent.

127 On June 5, 2001, the Crown filed a new direct indictment under which Malik and Bagri are jointly charged with first degree murder in relation to Air India Flight 182, conspiracy to commit murder, attempted murder of the passengers and crew of Air India Flight 301, conspiring to cause bombs to be placed on various aircraft, and three counts of

. . . l'enquête préliminaire a évolué [. . .] de manière à fournir à l'accusé, lorsqu'on juge que les éléments de preuve nécessaires existent, la possibilité de découvrir et d'apprécier la nature de la preuve qui sera déposée contre lui à son procès.

En raison de cette mise en accusation directe, ni le ministère public ni la défense n'ont pu jeter un coup d'œil préliminaire sur la façon dont les témoins se comporteraient dans un contexte semblable à un procès. Cette décision relevait du ministère public. La défense n'a aucun choix en la matière.

L'interrogatoire de l'appelant, au milieu du procès, permettrait au ministère public de récupérer certains des avantages perdus en choisissant de procéder à la mise en accusation directe de MM. Malik et Bagri. Par contre, la défense n'a aucune possibilité comparable d'interroger, au milieu du procès (ou avant celui-ci), les témoins qu'elle peut vouloir assigner : voir *Re Regina and Arviv* (1985), 51 O.R. (2d) 551 (C.A.).

S'il est équitable d'accorder au ministère public un droit unilatéral de procéder à l'interrogatoire préalable de témoins dans *le présent* procès pour meurtre, pourquoi ne lui accorde-t-on pas ce droit de façon générale? Pourquoi limiter le droit d'interroger du ministère public aux seuls cas où l'art. 83.28 s'applique? Toujours est-il que personne ne prétend qu'il s'agit de la façon normale de tenir un procès pour meurtre. Alors pourquoi réserver ce traitement désavantageux à MM. Malik et Bagri? À quel moment, s'il y a lieu, les principes doivent-ils céder le pas à l'opportunisme de la « guerre contre le terrorisme »? Cette question est non seulement cruciale en l'espèce, mais encore elle le sera dans toutes les affaires subséquentes où sera citée, à titre de précédent, la décision, en l'espèce, de confirmer la légitimité du recours du ministère public à l'art. 83.28 pour procéder à un interrogatoire.

Le 5 juin 2001, le ministère public a déposé un nouvel acte de mise en accusation directe aux termes duquel MM. Malik et Bagri étaient conjointement accusés de meurtre au premier degré dans l'affaire du vol 182 d'Air India, de complot en vue de commettre un meurtre, de tentative de meurtre contre les passagers et l'équipage du vol 301 d'Air India, de

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placing a bomb on an aircraft. Malik and Bagri are also jointly charged with a second count of first degree murder in relation to the explosion at Narita Airport where deaths were caused during the transfer of luggage to Air India Flight 301. A third accused, Inderjit Singh Reyat, was charged in relation to the bomb on Air India Flight 182. It is difficult to conceive of a more serious set of criminal charges.

complot en vue de faire placer des bombes à bord de divers avions, en plus de faire l'objet de trois chefs leur reprochant d'avoir placé une bombe à bord d'un avion. Messieurs Malik et Bagri faisaient aussi conjointement l'objet d'un deuxième chef d'accusation de meurtre au premier degré relativement à l'explosion ayant causé la mort de certaines personnes à l'aéroport Narita, pendant un transfert de bagages sur le vol 301 d'Air India. Une troisième personne, Inderjit Singh Reyat, a été accusée relativement à l'explosion de la bombe placée à bord du vol 182 d'Air India. Il est difficile d'imaginer plus grave série d'accusations criminelles.

The enormity of the charges at issue in the Air India trial is what makes this case difficult. It is comparatively painless for a society to support the procedural rights of an accused when the stakes are small. It is when the stakes are high, as here, that our commitment is truly tested.

128 La présente affaire est complexe en raison de la gravité des accusations en cause dans le procès Air India. Il est relativement plus facile pour une société de défendre les droits procéduraux d'un accusé lorsque les enjeux sont négligeables. C'est lorsque les enjeux sont considérables, comme c'est le cas en l'espèce, que notre engagement envers ces droits est véritablement mis à l'épreuve.

On February 10, 2003, Reyat pleaded guilty to lesser charges and was sentenced to prison for five years in addition to the 10 years already served on an earlier conviction for manslaughter arising from the Narita Airport bombing plus the time he spent in custody awaiting extradition to Canada and the trials. At the time of his sentencing the Statement of Facts agreed to by the Crown and Reyat excluded Reyat as a suspect in the murder of the passengers on Air India Flight 182:

129 Le 10 février 2003, M. Reyat a plaidé coupable à des accusations moindres et a été condamné à cinq ans d'emprisonnement, en sus des 10 années déjà purgées à la suite d'une condamnation antérieure pour homicide involontaire coupable relativement à l'attentat à la bombe de l'aéroport Narita, plus le temps passé en détention avant l'extradition au Canada et les procès. Au moment de la détermination de sa peine, l'exposé des faits auquel avaient souscrit le ministère public et M. Reyat précisait que ce dernier n'était pas soupçonné du meurtre des passagers du vol 182 d'Air India :

> At no time did Mr. Reyat intend by his actions to cause death to any person or believe that such consequences were likely to occur. However, unbeknownst to Mr. Reyat the items that he acquired were used by another person or persons to help make an explosive device that, on or about June 23, 1985, destroyed Air India Flight 182, killing all 329 people on board.
>
> (British Columbia Criminal Justice Branch, Media Statement, "Inderjit Singh Reyat Pleads Guilty to Role in Air India Explosion", February 10, 2003)

> [TRADUCTION] Monsieur Reyat n'a jamais agi dans l'intention de causer la mort de quelqu'un et n'a jamais cru que de telles conséquences pourraient s'ensuivre. Toutefois, des articles achetés par M. Reyat ont été utilisés à son insu par une ou plusieurs autres personnes pour fabriquer un engin explosif qui, le 23 juin 1985 ou vers cette date, a détruit le vol 182 d'Air India, tuant les 329 personnes qui se trouvaient à bord.
>
> (British Columbia Criminal Justice Branch, Media Statement, « Inderjit Singh Reyat Pleads Guilty to Role in Air India Explosion », 10 février 2003)

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130 The trial of Malik and Bagri started April 28, 2003. They are, of course, presumed innocent unless and until the Crown establishes their guilt beyond a reasonable doubt.

B. *The Appellant Was Under No Legal Duty to Cooperate With the Police*

131 On March 21, 2003, the appellant was subpoenaed to give evidence at the trial of Malik and Bagri but, as stated, has cooperated neither with the police nor with the defence. Generally speaking, under our law, there is no legal obligation for an ordinary citizen to cooperate in a police investigation. As Martin J.A. put it in *R. v. Esposito* (1985), 24 C.C.C. (3d) 88 (Ont. C.A.), at p. 94:

> Although a police officer is entitled to question any person in order to obtain information with respect to a suspected offence, he, as a general rule, has no power to compel the person questioned to answer. Moreover, he has no power to detain a person for questioning, and if the person questioned declines to answer, the police officer must allow him to proceed on his way unless he arrests him on reasonable and probable grounds.

Section 83.28 gives the police new powers in that regard, but they are powers that should be exercised under judicial supervision with due attention to their extraordinary nature and with regard to the rights not only of persons subpoenaed to testify but of third parties whose interests are affected, including in this case Malik and Bagri.

C. *The Crown Proceeded Without Notice to the Defence*

132 A week after the Air India trial began, and without notice to counsel for Malik and Bagri, the Crown appeared before a judge other than the trial judge for an order under s. 83.28 of the *Criminal Code* to examine the appellant on some of the matters at issue in the Air India trial. While s. 83.28 permits an application to be made without notice, there is no requirement that it be done in that way, and in light of the links of this s. 83.28 proceeding to the Air India trial, I think it would have been proper here for the Crown to give notice to counsel for Malik

Le procès de MM. Malik et Bagri a commencé le 28 avril 2003. Il va sans dire qu'ils sont présumés innocents tant et aussi longtemps que le ministère public n'aura pas établi leur culpabilité hors de tout doute raisonnable.

B. *L'appelant n'était pas légalement tenu de collaborer avec la police*

Le 21 mars 2003, l'appelant a été assigné à témoigner au procès de MM. Malik et Bagri, mais, comme nous l'avons vu, il n'a collaboré ni avec la police ni avec la défense. De façon générale, selon l'état actuel de notre droit, le citoyen ordinaire n'est pas légalement tenu de collaborer à une enquête policière. Comme l'a affirmé le juge Martin dans l'arrêt *R. c. Esposito* (1985), 24 C.C.C. (3d) 88 (C.A. Ont.), p. 94 :

> [TRADUCTION] Bien qu'il ait le droit d'interroger des gens pour obtenir des renseignements relatifs à une infraction présumée, le policier n'a généralement pas le pouvoir de contraindre la personne interrogée à répondre. Il n'a pas non plus le pouvoir de détenir une personne pour l'interroger et, si la personne interrogée refuse de répondre, le policier doit la laisser poursuivre sa route, à moins de la mettre en état d'arrestation s'il a des motifs raisonnables et probables de le faire.

L'article 83.28 accorde, à cet égard, de nouveaux pouvoirs aux policiers, qui doivent les exercer sous la supervision d'un juge en tenant dûment compte de leur nature extraordinaire et des droits non seulement des personnes assignées à témoigner, mais aussi des tiers concernés, dont MM. Malik et Bagri en l'espèce.

C. *Le ministère public a agi sans aviser la défense*

Une semaine après l'ouverture du procès Air India et sans avoir préalablement avisé les avocats de MM. Malik et Bagri, le ministère public a comparu devant un autre juge que le juge du procès en vue d'obtenir une ordonnance fondée sur l'art. 83.28 du *Code criminel* l'autorisant à interroger l'appelant sur certains points en litige au procès Air India. Même si l'art. 83.28 permet de présenter une demande sans donner de préavis, rien n'oblige à procéder de cette façon et, compte tenu des liens qui existent entre la demande fondée

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and Bagri. At that point their role, if any, in the s. 83.28 hearing could have been the subject of argument. Instead, the Crown requested that the s. 83.28 hearing be held *in camera* and that the appellant be prohibited from disclosing, except to his or her own counsel, any information or evidence obtained at the s. 83.28 hearing. This prohibition was designed to keep both the accused Malik and Bagri and their counsel, amongst others, in a state of ignorance of even the *existence* of the s. 83.28 proceedings.

sur l'art. 83.28 et le procès Air India, j'estime qu'il aurait convenu, en l'espèce, que le ministère public avise les avocats de MM. Malik et Bagri. Il aurait alors été possible de débattre la question du rôle que ces avocats pourraient éventuellement jouer dans l'investigation fondée sur l'art. 83.28. Le ministère public a préféré demander que l'investigation fondée sur l'art. 83.28 se déroule à huis clos et qu'il soit interdit à l'appelant de divulguer, sauf à son avocat, les renseignements ou éléments de preuve obtenus dans le cadre de cette investigation. Cette interdiction visait à cacher, notamment aux accusés, MM. Malik et Bagri, ainsi qu'à leurs avocats, l'*existence* même des procédures fondées sur l'art. 83.28.

One purpose of the s. 83.28 hearing was to provide the Crown with a transcript of the appellant's compelled testimony under oath that would otherwise be unobtainable under our law.

133 L'un des objets de l'investigation fondée sur l'art. 83.28 était de fournir au ministère public une transcription du témoignage que l'appelant serait contraint de livrer sous serment et que notre droit ne permettrait pas d'obtenir autrement.

If the testimony of the appellant at the Air India trial proves to be consistent with the s. 83.28 transcript, or more favourable to the prosecution, its existence might never be disclosed to the trier of fact.

134 Si, en définitive, le témoignage de l'appelant au procès Air India correspond à la transcription obtenue de l'art. 83.28 ou est plus favorable à la poursuite, il se pourrait que son existence ne soit jamais divulguée au juge des faits.

If the appellant departs from the s. 83.28 transcript in a way unfavourable to the prosecution, the s. 83.28 transcript would be available for impeachment and perhaps to lay the basis for an application to have the appellant declared a hostile witness, with a view to allowing the Crown the further advantage of cross-examining its own witness: see s. 9 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. The existence of the transcript may open the door to its use not only as a prior inconsistent statement but for the truth of its contents: see *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764.

135 Si l'appelant agit au détriment de la poursuite en s'écartant de la transcription du témoignage qu'il a livré en vertu de l'art. 83.28, il sera alors loisible au ministère public d'utiliser cette transcription pour attaquer sa crédibilité et peut-être même pour étayer une demande visant à le faire déclarer témoin hostile, et d'avoir ainsi l'avantage supplémentaire de contre-interroger son propre témoin : voir l'art. 9 de la *Loi sur la preuve au Canada*, L.R.C. 1985, ch. C-5. Dans les cas où elle existe, la transcription risque non seulement de servir de déclaration antérieure incompatible, mais aussi d'être utilisée pour établir la véracité de son contenu : voir l'arrêt *R. c. U. (F.J.)*, [1995] 3 R.C.S. 764.

While the contents of the transcript would eventually be disclosed to defence counsel under the principles set out in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, the hearing judge specifically ordered

136 Certes, le contenu de la transcription finirait par être divulgué aux avocats de la défense conformément aux principes énoncés dans l'arrêt *R. c. Stinchcombe*, [1991] 3 R.C.S. 326, mais cela n'a pas

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that the transcript could not be shown to the persons best able to comment on its accuracy in relation to them, namely the accused Malik and Bagri.

empêché la juge présidant l'investigation d'interdire expressément de montrer la transcription aux personnes les plus aptes à en commenter l'exactitude en ce qui les concernait, à savoir les accusés MM. Malik et Bagri.

137 My colleagues give little weight to the Crown's resort to s. 83.28 as a form of "mid-trial" discovery and simply argue at para. 101 that

Mes collègues accordent peu d'importance au fait que le ministère public se soit servi de l'art. 83.28 pour obtenir une forme d'interrogatoire « au milieu du procès », et font simplement valoir, au par. 101, que

> the presumption of openness for the judicial investigative hearing and the participation of counsel for the accused from the outset would have overcome any concerns regarding the practical effect of the hearing on the Air India trial.

> la présomption de publicité de l'investigation judiciaire et la participation des avocats des accusés dès le départ auraient permis d'apaiser toute crainte relative à l'effet concret de l'investigation sur le procès Air India.

This analysis, with all due respect, sidesteps the significance of at least one of the purposes the Crown was seeking to achieve in the first place by resort to the s. 83.28 procedure, as will now be discussed.

En toute déférence, comme nous allons maintenant le constater, cette analyse ne tient pas compte de l'importance que revêt au moins l'un des objectifs que le ministère public cherchait à atteindre au départ en recourant à la procédure prévue à l'art. 83.28.

D. *Use of Section 83.28 to Obtain Mid-Trial Discovery of an Uncooperative Witness Was an Abuse of Process*

D. *Le recours à l'art. 83.28 pour obtenir l'interrogatoire, au milieu du procès, d'un témoin peu coopératif constituait un abus de procédure*

138 It is apparent that in this case an investigative procedure designed for the purpose of gathering information at the pre-charge stage was invoked behind the backs of the accused in part at least to obtain advance discovery of an uncooperative prosecution witness not only after charges were laid but during the Air India trial itself.

Il est évident, en l'espèce, qu'une procédure d'enquête conçue pour recueillir des renseignements avant le dépôt d'accusations a servi, à l'insu des accusés et du moins en partie, à obtenir la communication anticipée de renseignements par un témoin à charge peu coopératif, non seulement après le dépôt des accusations, mais encore pendant le procès Air India lui-même.

139 The Crown, as well as defence counsel, are only in the initial stages of grappling with the proper limits of s. 83.28. Nevertheless, its use in this case goes far beyond what was suggested in Parliament by the responsible Minister:

Le ministère public et les avocats de la défense ne font que commencer à s'attaquer au problème des limites auxquelles doit être assujetti l'art. 83.28. Néanmoins, le recours à cette disposition dans la présente affaire va bien au-delà de ce que le ministre responsable a indiqué en Chambre :

> Bill C-36 would also provide for investigative hearings under the criminal code. These hearings would permit the gathering of evidence in investigations of

> Le projet de loi C-36 prévoit également la tenue d'audiences d'enquête en vertu du Code criminel. Ces audiences permettraient de recueillir des preuves durant

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terrorism offences prior to the laying of charges. [Emphasis added.]

(*House of Commons Debates*, vol. 137, 1st Sess., 37th Parl., October 16, 2001, at p. 6166)

Section 83.28 does not cease to be available to investigators once charges have been laid, but there is nothing in s. 83.28 to suggest that Parliament intended to confer on the Crown a right of mid-trial discovery of uncooperative witnesses before a different judge where the Crown proceeds by direct indictment in the trial of criminal offences, even if those offences involve terrorist acts. Section 83.28 was not designed to serve as a sort of halfway house between a preliminary hearing and a direct indictment.

My colleagues write that "[t]he place of the judiciary in such investigative contexts is to act as a check against state excess" (para. 86), but the point, in my opinion, is that, on the particular facts of this case, the s. 83.28 order was itself "state excess". So far as Malik and Bagri are concerned, the presence of the judge presiding over the examination adds weight to its coercive potential and strengthens the hand of the prosecution. The Crown's trial tactic to use s. 83.28 to deal with an uncooperative witness in the ongoing Air India trial, on the facts of this particular case, was abusive of the proper role of the judiciary.

III. The Terms of the Initial Section 83.28 Order Were Inappropriate

The motions judge, Dohm A.C.J., who heard the motion *ex parte* and therefore did not have the advantage of hearing submissions from anyone other than the Crown, ordered the appellant examined on the following conditions:

(a) "The Investigative Hearing shall take place *in camera*";

des enquêtes sur des actes de terrorisme, avant que des accusations ne soient portées. [Je souligne.]

(*Débats de la Chambre des communes*, vol. 137, 1re sess., 37e lég., 16 octobre 2001, p. 6166)

Les enquêteurs peuvent toujours recourir à l'art. 83.28 après le dépôt des accusations, mais rien n'indique, dans cet article, que le législateur a voulu accorder au ministère public le droit d'obtenir, au milieu du procès et devant un autre juge, l'interrogatoire de témoins peu coopératifs, lorsqu'il procède par mise en accusation directe dans le contexte d'un procès portant sur des infractions criminelles, même celles comportant la perpétration d'actes terroristes. L'article 83.28 n'est pas conçu pour servir de moyen terme entre l'enquête préliminaire et la mise en accusation directe.

140 Mes collègues estiment que, « [d]ans ce contexte d'enquête, le rôle du pouvoir judiciaire est de refréner les excès de l'État » (par. 86), mais il reste, selon moi, qu'au vu des faits particuliers de la présente affaire l'ordonnance fondée sur l'art. 83.28 constituait elle-même un « excès de l'État ». En ce qui concerne MM. Malik et Bagri, la présence du juge qui préside l'interrogatoire contribue à augmenter le risque de coercition auquel ils sont exposés et à renforcer la position de la poursuite. Selon les faits de la présente affaire, la stratégie de prétoire du ministère public, ayant consisté à recourir à l'art. 83.28 pour s'occuper d'un témoin peu coopératif au procès Air India en cours, constitue un abus du rôle que doit jouer le pouvoir judiciaire.

III. Les modalités de l'ordonnance initiale fondée sur l'art. 83.28 étaient inappropriées

141 Le juge en chef adjoint Dohm, qui a entendu la demande *ex parte* et n'a donc pas eu l'avantage d'entendre d'autres arguments que ceux du ministère public, a ordonné que l'appelant soit interrogé aux conditions suivantes :

[TRADUCTION]

a) « l'investigation se déroulera à huis clos »;

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(b) "[The appellant] may be represented by counsel at the Investigative Hearing";

(c) "[The appellant] shall be examined on oath by the Attorney General's agent, and shall not be examined by any other person";

(d) "[The appellant] shall answer questions put . . . and shall produce to the presiding judge things that are ordered to be produced unless protected by any law relating to non-disclosure of information or to privilege";

(e) "[The appellant] shall not disclose, except to [his or her] counsel, any information or evidence obtained at the Investigative Hearing without the consent of the Attorney General or his agent";

(f) "Notice shall not be given to Ripudaman Singh Malik or Ajaib Singh Bagri."

(Emphasis added.)

The effect of the order was to confer a significant advantage on the prosecution. No provision was made in the order to advise the trial judge, Josephson J., of what was afoot. Yet, Josephson J. is the judge charged with ensuring that Malik and Bagri receive a fair trial. Not only would the Crown have had the exclusive right to put the questions, but Malik and Bagri, under the terms of the original order, would be deprived of the opportunity given to the Crown of hearing the appellant's testimony, and of appraising its likely strength, which is one of the usual benefits of discovery, i.e. whether the witness

is dull or quick-witted and whether he is accurate or otherwise in his testimony. Also, if he is given to exaggeration or over-emphasis; whether he is lacking in confidence; if his memory is good or bad and if he is honest. The examination is generally useful in determining the manner or line of cross-examination that will be most effective at the trial. [Emphasis added.]

(G. D. Cudmore, *Choate on Discovery* (2nd ed. (loose-leaf)), at pp. 1-11)

b) « [l'appelant] pourra être représenté par un avocat à l'investigation »;

c) « l'interrogatoire sous serment de [l'appelant] ne sera effectué que par le représentant du procureur général et par personne d'autre »;

d) « [l'appelant] devra répondre aux questions posées [. . .] et produire au juge qui présidera les choses exigées par l'ordonnance à moins qu'elles ne soient protégées par le droit applicable en matière de divulgation ou de privilèges »;

e) « [l'appelant] ne pourra divulguer qu'à son avocat tout renseignement ou élément de preuve obtenu lors de l'investigation, et ce, à condition d'avoir préalablement obtenu le consentement du procureur général ou de son représentant »;

f) « Aucun préavis ne sera donné à Ripudaman Singh Malik ou à Ajaib Singh Bagri. »

(Je souligne.)

L'ordonnance conférait un avantage important à la poursuite. Elle ne contenait aucune disposition prévoyant que le juge du procès, le juge Josephson, serait informé de ce qu'on s'apprêtait à faire. Pourtant, c'est au juge Josephson qu'il incombe de veiller à ce que MM. Malik et Bagri subissent un procès équitable. Non seulement le ministère public aurait-il eu le droit exclusif de poser les questions, mais encore les modalités de l'ordonnance initiale privaient MM. Malik et Bagri de l'un des avantages habituels de l'interrogatoire, soit la possibilité, offerte au ministère public, d'entendre le témoignage de l'appelant et d'en apprécier la force probable, c'est-à-dire de savoir si le témoin

[TRADUCTION] a l'esprit lent ou vif et si son témoignage est exact ou non. De même, s'il est porté à exagérer ou à trop insister sur certains points, s'il manque d'assurance, s'il a une bonne ou une mauvaise mémoire et s'il est sincère. L'interrogatoire est généralement utile pour déterminer la façon de contre-interroger qui sera la plus efficace au procès. [Je souligne.]

(G. D. Cudmore, *Choate on Discovery* (2e éd. (feuilles mobiles)), p. 1-11)

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Despite the order of Dohm A.C.J. that Malik and Bagri were not to be notified of the s. 83.28 hearing, they found out about it. Malik, in particular, complained that the effect of the order, as issued, would have been that while they faced a judge-alone trial in the courthouse before Josephson J., elsewhere in the building

142 Bien que le juge en chef adjoint Dohm ait interdit de les aviser de l'investigation fondée sur l'art. 83.28, MM. Malik et Bagri en ont appris l'existence. Monsieur Malik, en particulier, s'est plaint que l'ordonnance rendue faisait en sorte que, pendant qu'au palais de justice M. Bagri et lui subissaient leur procès devant un juge seul, à savoir le juge Josephson, ailleurs dans le même édifice,

> the Crown was obtaining a secretive discovery of the evidence of a witness, with another judge of the same court presiding over that hearing. The result is disturbing; the court appears to be "taking sides" by actively and secretly assisting the Crown's case in an ongoing trial. This result undermines public confidence in the judiciary and it violates the judiciary's independence and impartiality.

> [TRADUCTION] le ministère public obtenait en secret la déposition d'un témoin dans le cadre d'une investigation présidée par un autre juge du même tribunal. Le résultat est troublant; le tribunal semble « se ranger dans un camp » en participant activement et secrètement à la constitution de la preuve du ministère public dans un procès en cours. Ce résultat mine la confiance du public dans les tribunaux et compromet l'indépendance et l'impartialité des juges.

The hearing judge, Holmes J., accepted in part the validity of this complaint. She wrote:

143 La juge Holmes qui présidait l'investigation a reconnu en partie le bien-fondé de cette plainte, en concluant ceci :

> I agree with [counsel for Malik] that if s. 83.28 were applied so as to provide to the Crown a form of pretrial preparation or discovery that is unavailable to the defence, then it would create an unfair advantage for the Crown that puts the accused person's fair trial rights seriously at risk. [Emphasis added.]

> [TRADUCTION] Je conviens avec [l'avocat de M. Malik] que si l'on applique l'art. 83.28 de manière à permettre en quelque sorte au ministère public, sans que la défense ne puisse elle-même le faire, de se préparer au procès ou d'obtenir une communication préalable de renseignements, le ministère public jouira alors d'un avantage injuste qui compromettra sérieusement les droits de l'accusé à un procès équitable. [Je souligne.]

This conclusion must be read in light of my colleagues' assertion at para. 87, with which I agree, that "once legislation invokes the aid of the judiciary, we must remain vigilant to ensure that the integrity of its role is not compromised or diluted". I would add that it is not the proper role of the s. 83.28 judge to become an extra player in an ongoing trial in another judge's courtroom, especially where the intervention is not disclosed to the trial judge. The connection between the Air India trial and the s. 83.28 hearing was plain and obvious and it was the responsibility of all concerned to ensure that the rights of the accused before Josephson J. were not abused in a concurrent and parallel s. 83.28 proceedings.

144 Il faut interpréter cette conclusion au regard de l'affirmation de mes collègues — à laquelle je souscris — voulant que « dès qu'une mesure législative requiert l'aide du pouvoir judiciaire, il fa[ille] veiller à ce que l'intégrité du rôle de ce dernier ne soit ni compromise ni diminuée » (par. 87). J'ajouterais que le juge qui agit en vertu de l'art. 83.28 ne doit pas devenir un joueur supplémentaire dans un procès en cours devant un autre juge, particulièrement si son intervention se fait à l'insu du juge du procès. Il y avait un lien clair et net entre le procès Air India et l'investigation fondée sur l'art. 83.28, et il incombait à tous les intéressés de s'assurer que les droits des accusés devant le juge Josephson ne soient pas bafoués dans des procédures concomitantes et parallèles fondées sur l'art. 83.28.

After the defence got its collective foot inside the s. 83.28 courtroom door and was able to make

145 Après que la défense se soit vu accorder la possibilité de présenter des observations dans la salle

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representations, Holmes J. allowed counsel for Malik and Bagri to participate in the s. 83.28 hearing on restricted terms:

(a) "If information is given in the hearing that does not relate to the trial, counsel for the accused Malik and Bagri are to leave the hearing."

(b) "The accused Malik and Bagri will not be present at the investigative hearing."

(c) "There will be no disclosure, including to them, of information or evidence obtained in the hearing except with the consent of the agent for the Attorney General or by order of the court."

(d) "The hearing will take place *in-camera*."

In short, the Crown was authorised to proceed with its discovery of the appellant before a judge other than the trial judge without the two accused being present to instruct their counsel, or to know what had transpired.

IV. The Defects in the Section 83.28 Order Were Not Cured by Amendments Made by the Hearing Judge

146 The issue is not just whether the hearing judge greatly improved the terms of the s. 83.28 order obtained *ex parte* by the Crown, which she did, but whether the s. 83.28 hearing of the appellant should proceed at all in the time frame sought by the Crown.

147 Holmes J. ordered the hearing to proceed because in her view the "predominant *purpose*" of the s. 83.28 hearing was not the ongoing trial but the ongoing investigation:

d'audience où se tenait l'investigation fondée sur l'art. 83.28, la juge Holmes a autorisé les avocats de MM. Malik et Bagri à participer aux procédures à certaines conditions :

[TRADUCTION]

a) « Si des renseignements sans rapport avec le procès sont divulgués au cours de l'investigation, les avocats des accusés MM. Malik et Bagri devront quitter la salle. »

b) « Les accusés MM. Malik et Bagri n'assisteront pas à l'investigation. »

c) « Aucune divulgation, même à ceux-ci, des renseignements ou éléments de preuve obtenus lors de l'investigation ne pourra avoir lieu sans le consentement du représentant du procureur général ou une ordonnance du tribunal. »

d) « L'investigation se déroulera à huis clos. »

Bref, le ministère public était autorisé à procéder à l'interrogatoire préalable de l'appelant devant un autre juge que le juge du procès, sans que les deux accusés ne soient présents pour donner des instructions à leur avocat, ou pour savoir ce qui s'était passé.

IV. Les modifications apportées par la juge présidant l'investigation n'ont pas remédié aux lacunes de l'ordonnance fondée sur l'art. 83.28

Il ne s'agit pas simplement de savoir si la juge présidant l'investigation a amélioré considérablement les modalités de l'ordonnance *ex parte* que le ministère public a obtenue en vertu de l'art. 83.28 — ce qu'elle a fait —, mais encore faut-il décider s'il y a lieu que l'investigation à laquelle l'ordonnance susmentionnée enjoint à l'appelant de se présenter se déroule selon l'échéancier sollicité par le ministère public.

La juge Holmes a ordonné la tenue de l'investigation prévue par l'art. 83.28 parce qu'elle estimait que celle-ci avait pour « *objet* prédominant » de faire progresser non pas le procès en cours, mais l'enquête en cours :

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I conclude that the factual record supports the Crown's position that the proposed hearing is predominantly for the purpose of furthering the Air India investigation as a whole, although it will undoubtedly have the incidental effect of providing the Crown with an opportunity for preparation or discovery in relation to the continuing trial.

My colleagues Iacobucci and Arbour JJ. do not agree with the hearing judge's "predominant purpose" test, but would still defer to the hearing judge's conclusion on the theory that she must have meant something other than what she said. They write (at para. 99):

Although the hearing judge expressed her conclusion in terms of a predominant purpose for the investigative hearing, in looking at her findings we are satisfied that she was using that expression to mean improper purpose or with an oblique motive.

My colleagues thereby substitute for the hearing judge's essentially fact based test (*predominant* purpose) an essentially law based test (*improper* purpose).

Even accepting that an "improper purpose" standard was applied by the hearing judge (although nowhere referred to), this begs the question of whether it is "proper" for a s. 83.28 hearing to proceed when there are twin purposes, one of which is for use as witness discovery in an ongoing criminal trial. The Crown argues that this Court should defer to the decision of the hearing judge on that point, citing *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33. In my view this reliance is misplaced once the test of "predominant purpose" is replaced by a test of "improper purpose". Far from being an issue of fact, the propriety of the relationship between investigations under s. 83.28 and an ongoing related criminal trial is a question of important precedential value. A determination on the issue by this Court requires an examination of how to reconcile the Crown's dual role in investigations under s. 83.28 on the one hand and as "minister of justice" in the criminal trial process on the other. This issue engages the "law making role" of this Court. I agree that the *propriety* of the resort to s. 83.28 is a better test than "predominant purpose", but I do not agree with the submission that we should defer to the

[TRADUCTION] Je conclus que les faits présentés étayent la thèse du ministère public selon laquelle l'investigation projetée a pour objet prédominant de faire progresser l'ensemble de l'enquête sur la tragédie d'Air India, même s'il ne fait aucun doute qu'elle aura pour effet accessoire de donner au ministère public la possibilité de se préparer ou d'obtenir des renseignements à l'égard du procès en cours.

Mes collègues, les juges Iacobucci et Arbour, ne souscrivent pas au critère de l'« objet prédominant » adopté par la juge présidant l'investigation, mais ils sont quand même d'avis de s'en remettre à sa conclusion en supposant qu'elle a voulu dire autre chose que ce qu'elle a dit. Ils écrivent ceci (par. 99) :

Bien que la juge présidant l'investigation ait parlé d'objet prédominant de l'investigation dans la conclusion qu'elle a tirée, nous sommes convaincus, d'après ses constatations, qu'elle a utilisé cette expression au sens d'objet illégitime ou de motif inavoué.

Mes collègues ont, de ce fait, remplacé le critère essentiellement factuel (objet *prédominant*) adopté par la juge présidant l'investigation par un critère essentiellement juridique (objet *illégitime*).

148 Même en admettant que la juge présidant l'investigation a appliqué une norme de l'« objet illégitime » (bien que ce ne soit mentionné nulle part), cela ne répond pas à la question de savoir s'il est « légitime » de procéder à une investigation fondée sur l'art. 83.28 qui vise deux objectifs, dont celui d'interroger un témoin dans le cadre d'un procès criminel en cours. Le ministère public renvoie à l'arrêt *Housen c. Nikolaisen*, [2002] 2 R.C.S. 235, 2002 CSC 33, pour prétendre que la Cour devrait s'en remettre à la décision rendue à cet égard par la juge présidant l'investigation. À mon avis, ce renvoi à l'arrêt *Housen* perd toute justification dès que le critère de l'« objet prédominant » est remplacé par le critère de l'« objet illégitime ». Loin de constituer une question de fait, la légitimité du lien établi entre une investigation fondée sur l'art. 83.28 et un procès criminel connexe en cours a une grande importance sur le plan jurisprudentiel. Pour trancher cette question, notre Cour doit examiner la façon de concilier le rôle que joue le ministère public dans une investigation fondée sur l'art. 83.28, d'une part, et celui de « ministre de la justice » qu'il joue dans un procès criminel, d'autre part. Cette question fait intervenir

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hearing judge's conclusion on this point (if indeed it can be said she reached any such conclusion, given that she thought she was applying a different test).

le « rôle de législateur » de notre Cour. Je conviens que le critère de la *légitimité* du recours à l'art. 83.28 est meilleur que celui de « l'objet prédominant », mais je ne souscris pas à l'argument selon lequel nous devrions nous en remettre à la conclusion tirée à cet égard par la juge présidant l'investigation (si on peut vraiment considérer qu'elle a tiré cette conclusion, étant donné qu'elle croyait appliquer un critère différent).

149 It is clear on the facts that one of the purposes of the s. 83.28 hearing in this case was to discover the evidence of the appellant in relation to the Air India trial. At this point it is convenient to recall the Crown's submissions to the hearing judge about the *admitted* linkages between the s. 83.28 hearing and the Air India trial. (In fairness to Dohm A.C.J., these matters did not emerge until after he had made the *ex parte* order.) Firstly, in addressing the impact of the delay associated with the constitutional challenge to s. 83.28, Crown counsel advised Holmes J. with respect to the Air India trial that

Les faits démontrent clairement qu'en l'espèce l'un des objets de l'investigation fondée sur l'art. 83.28 était d'obtenir la communication de la preuve que l'appelant produirait au procès Air India. Il convient ici de rappeler les observations que le ministère public a présentées à la juge présidant l'investigation au sujet des liens *reconnus* entre l'investigation fondée sur l'art. 83.28 et le procès Air India. (Pour être juste envers le juge en chef adjoint Dohm, mentionnons que ces questions se sont posées seulement après qu'il eut rendu l'ordonnance *ex parte*.) Premièrement, en abordant la question de l'incidence du délai lié à la contestation constitutionnelle de l'art. 83.28, l'avocat du ministère public a informé la juge Holmes qu'en ce qui concerne le procès Air India

> the Crown will not be calling [the appellant] as had been contemplated in the early part of September.

> [TRADUCTION] le ministère public n'assignera pas [l'appelant] au début du mois de septembre, comme il avait prévu le faire.

The explanation for this delay was that the Crown wanted the s. 83.28 transcript available when the appellant climbed into the witness box. To make this purpose clear, Crown counsel added:

Il a expliqué ce délai par la volonté du ministère public que la transcription obtenue en vertu de l'art. 83.28 soit disponible au moment où l'appelant se présenterait à la barre des témoins. Pour bien préciser cet objet, l'avocat du ministère public a ajouté :

> . . . obviously the Crown is anxious to have this [s. 83.28] investigative hearing take place before the conclusion of the Crown's case in *R. v. Malik and Bagri*. That is of critical significance to — or of great significance to the Crown's position and the Crown's decision whether or not it will call [the appellant] as a witness at the trial. [Emphasis added.]

> [TRADUCTION] . . . de toute évidence, le ministère public tient beaucoup à ce que cette investigation [fondée sur l'art. 83.28] ait lieu avant la conclusion de sa preuve dans l'affaire *R. c. Malik and Bagri*. Cela revêt une importance cruciale ou considérable pour la thèse du ministère public et en ce qui concerne sa décision d'assigner ou non [l'appelant] comme témoin au procès. [Je souligne.]

150 In other words, the s. 83.28 evidence was required for the purpose of determining an important component of the Crown's trial strategy in the Air India case, at least in relation to the use (or non-use) of the appellant as a Crown witness.

Autrement dit, le ministère public avait besoin de la preuve obtenue en vertu de l'art. 83.28 pour définir un aspect important de sa stratégie de prétoire dans l'affaire Air India, du moins en ce qui concernait l'opportunité d'assigner l'appelant comme témoin à charge.

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As recently as its factum filed with this Court, the Crown proposed a timetable under which the appellant would testify at the Air India trial on November 3, 2003 but not before the s. 83.28 hearing then scheduled by the Crown for October 26-27, 2003.

151 Tout récemment, lors du dépôt de son mémoire devant la Cour, le ministère public a proposé un échéancier prévoyant que l'appelant témoignerait au procès Air India le 3 novembre 2003, mais pas avant l'investigation fondée sur l'art. 83.28 qu'il avait alors fixée aux 26 et 27 octobre 2003.

In short, there is no doubt at all on the record that the Crown intended to use the s. 83.28 procedure at least in part for the purpose of a pre-trial (or mid-trial) discovery of the appellant. It is not necessary for present purposes to agree or disagree with the hearing judge's assessment of the predominant purpose. It is enough to note her recognition that *one* of the purposes was pre-trial (or mid-trial) discovery, and to ask whether *that* purpose was improper.

152 Bref, il n'y a absolument aucun doute, au vu du dossier, que le ministère public entendait utiliser, en partie du moins, la procédure prévue à l'art. 83.28 pour interroger l'appelant avant le procès (ou au milieu de celui-ci). Pour les besoins de la présente affaire, il n'est pas nécessaire d'être en accord ou en désaccord avec l'évaluation de l'objet prédominant par la juge qui a présidé l'investigation. Il suffit de noter qu'elle a reconnu que l'interrogatoire avant le procès (ou au milieu de celui-ci) était *l'un* des objets visés, et de se demander si *cet* objet était illégitime.

The hearing judge was alive to the problem. She expressed a caveat:

153 La juge présidant l'investigation était consciente du problème. Elle a formulé une réserve :

. . . if the conduct of the investigation, including through an investigative hearing ordered under s. 83.28, causes a breach of [Malik and Bagri's] *Charter* rights, they may apply to the [Air India] trial judge for a remedy.

[TRADUCTION] . . . si la conduite de l'enquête, notamment par la tenue de l'investigation ordonnée en vertu de l'art. 83.28, porte atteinte aux droits que leur garantit la *Charte*, [MM. Malik et Bagri] peuvent demander au juge du procès [Air India] de remédier à la situation.

The problem, of course, is that at the stage it reaches the trial judge, the Crown will already have had its "mid-trial" discovery. It will have used that discovery to decide whether or not to call the appellant. While the trial judge may restrict the use of the transcript at trial in some respects, the Crown would have obtained in advance the information that it truly wants, namely the compelled disclosure of what the appellant is likely to say. Such a preview is a significant advantage. An unpredictable witness who says unexpected things in the witness box might not just disappoint the Crown's desire to advance the prosecution, such a witness could also say things that might do serious damage to the Crown's case. That, presumably, is why the Crown was anxious to delay the appellant's appearance at the Air India trial until after the s. 83.28 hearing had tied the appellant to a particular version of events.

154 Il va sans dire que le problème est qu'au moment où il se présentera devant le juge du procès, le ministère public aura déjà procédé à son interrogatoire « au milieu du procès ». Il s'en sera servi pour décider d'assigner ou non l'appelant comme témoin. Bien que le juge du procès puisse, à certains égards, limiter l'utilisation de la transcription au procès, le ministère public aura obtenu d'avance les renseignements qu'il veut réellement, à savoir la divulgation forcée du témoignage que l'appelant est susceptible de livrer. Un tel aperçu est un avantage important. Un témoin imprévisible qui tient des propos inattendus à la barre des témoins risque non seulement de contrecarrer la volonté du ministère public de faire progresser sa cause, mais encore de nuire sérieusement à la preuve de ce dernier. C'est sans doute pour cette raison que le ministère public tenait à retarder la comparution de l'appelant au procès Air India jusqu'à ce que l'investigation fondée sur l'art. 83.28 ait permis de relier l'appelant à une version particulière des faits.

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155 I fully recognize the onerous and difficult responsibilities faced by Crown counsel in the Air India trial. Nevertheless, in the s. 83.28 procedure, as my colleagues emphasize, "the legislature intended that the Crown would conduct itself according to its proper role as an officer of the court and its duty of impartiality in the public interest" (para. 95). It is sometimes not an easy matter for the Crown to accommodate its duty to act impartially in the public interest and its role as advocate in an accusatorial adversarial criminal prosecution. Here, in my view, Crown counsel is not engaged in a detached investigative role, but seeks to bootstrap its case in the Air India trial by resort to s. 83.28 as a mid-trial discovery procedure. The issue is not one of high principle but trial tactics. Whether resort to such tactics is proper or improper is one of the questions of law to be settled by this Court.

Je reconnais parfaitement l'importance et la complexité des responsabilités qui incombent à l'avocat du ministère public dans le procès Air India. Cependant, comme le soulignent mes collègues, « le législateur a voulu [qu'en participant à l'investigation prévue par l'art. 83.28] le ministère public se conforme au rôle qu'il doit jouer en tant qu'officier de justice et à son obligation d'agir impartialement dans l'intérêt public » (par. 95). Il est parfois difficile au ministère public de concilier son devoir d'agir impartialement dans l'intérêt du public et son rôle de plaideur dans des poursuites criminelles de nature accusatoire et contradictoire. J'estime qu'en l'espèce l'avocat du ministère public joue non pas un rôle d'enquêteur désintéressé, mais cherche plutôt à étoffer sa preuve dans le procès Air India en recourant à l'art. 83.28 pour procéder à un interrogatoire au milieu du procès. Ce qui est en jeu est non pas un grand principe, mais plutôt une stratégie de prétoire. La légitimité du recours à de telles stratégies est une question de droit que notre Cour doit trancher.

156 If the Crown's dominant concern were truly to press ahead with an "ongoing investigation", it could have called the appellant to testify before Josephson J. at any time after the Air India trial started on April 28, 2003, by special arrangement or otherwise. This would have freed the s. 83.28 hearing from any constraints posed by the trial of Malik and Bagri.

Si le principal souci du ministère public avait vraiment été de faire progresser une « investigation en cours », il aurait pu, au moyen d'une entente spéciale ou autrement, assigner l'appelant à témoigner devant le juge Josephson en tout temps après l'ouverture du procès Air India, le 28 avril 2003. L'investigation fondée sur l'art. 83.28 aurait ainsi été dépourvue de toute contrainte émanant du procès de MM. Malik et Bagri.

157 In any event, I believe my colleagues' "improper purpose" test is too narrow. The Court's concern is not exhausted by whether there has been shown bad faith or "oblique motive" on the part of the Crown prosecutor. The Court must act on a broader basis to protect the public interest in a "fair and just trial process and the proper administration of justice": *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007. What is important is not only the Crown's *purpose* but, as much or more so in this case, the *effect* of the s. 83.28 order on the ongoing Air India trial. It is significant that a tactical split has developed between Bagri, who would now like his counsel to examine the appellant in the s. 83.28 hearing, and Malik, who opposes it. If the prejudicial effects of the s. 83.28

Quoi qu'il en soit, je crois que le critère de l'« objet illégitime » adopté par mes collègues est trop strict. La préoccupation de la Cour ne se limite pas à la question de savoir si l'on a démontré l'existence de mauvaise foi ou d'un « motif inavoué » chez l'avocat du ministère public. La Cour doit agir dans une perspective plus large afin de protéger l'intérêt du public dans un « régime de procès justes et équitables et [. . .] la bonne administration de la justice » : *R. c. Scott*, [1990] 3 R.C.S. 979, p. 1007. L'*incidence* de l'ordonnance fondée sur l'art. 83.28 sur le procès Air India en cours est en l'espèce aussi important, voire plus important, que l'*intention* du ministère public. Le fossé stratégique qui s'est creusé entre M. Bagri, qui aimerait que son avocat

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proceeding on the fair trial rights of Malik or Bagri or either of them can be eliminated by delaying the s. 83.28 hearing until after appellant testifies at the Air India trial, then, in my opinion, the s. 83.28 hearing should be delayed.

There might be exigent circumstances in another case where such a tilt in the playing field could be justified, perhaps in the face of an apprehended *future* terrorist act for example. That is not this case.

V. Should the Appellant Be Defeated by the Ruling in *Housen v. Nikolaisen*?

The Crown relies on *Housen v. Nikolaisen*, *supra*, for the proposition that this Court should defer to the decision of the hearing judge to allow the s. 83.28 hearing to proceed.

While the hearing judge found as a "fact" that the Air India investigation was the "predominant purpose", the link to the Air India trial was plain and obvious and acknowledged by the Crown. My colleagues rightly reject the "predominant purpose" test. The question at this point, therefore, is whether the Crown's purpose insofar as it related to the Air India trial was "improper". That is not an issue of fact. It is a matter of opinion.

In *Housen v. Nikolaisen*, Iacobucci and Major JJ. pointed out at para. 36 that

> [m]atters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness.

A finding of improper purpose, like a finding of negligence, is an issue of mixed fact and law. Further, a finding of impropriety lies at the "legal" end of the

interroge l'appelant dans le cadre de l'investigation fondée sur l'art. 83.28, et M. Malik, qui s'y oppose, est significatif. Si le report de l'investigation prévue par l'art. 83.28 à une date postérieure au témoignage de l'appelant au procès Air India peut permettre d'en éliminer l'incidence préjudiciable sur les droits de M. Malik ou de M. Bagri à un procès équitable, j'estime qu'elle doit être reportée.

158 Il se pourrait que, dans une autre affaire, l'urgence de la situation justifie de modifier les règles du jeu, par exemple, en cas de *menace* d'acte terroriste. Ce n'est pas le cas en l'espèce.

V. L'appelant doit-il échouer en raison de l'arrêt *Housen c. Nikolaisen*?

159 Le ministère public se fonde sur l'arrêt *Housen c. Nikolaisen*, précité, pour prétendre que notre Cour devrait s'en remettre à la décision de la juge présidant l'investigation d'autoriser l'investigation fondée sur l'art. 83.28.

160 Bien que la juge présidant l'investigation ait tiré la conclusion « de fait » que l'enquête sur la tragédie d'Air India constituait l'« objet prédominant », l'existence du lien avec le procès Air India est claire et nette et reconnue par le ministère public. Mes collègues ont rejeté, à bon droit, le critère de l'« objet prédominant ». Il s'agit donc maintenant de déterminer si l'intention du ministère public était « illégitime » en ce qui concernait le procès Air India. Ce n'est pas une question de fait. C'est une question d'opinion.

161 Dans l'arrêt *Housen c. Nikolaisen*, par. 36, les juges Iacobucci et Major ont souligné que

> [l]es questions mixtes de fait et de droit s'étalent le long d'un spectre. Lorsque, par exemple, la conclusion de négligence est entachée d'une erreur imputable à l'application d'une norme incorrecte, à l'omission de tenir compte d'un élément essentiel d'un critère juridique ou à une autre erreur de principe semblable, une telle erreur peut être qualifiée d'erreur de droit et elle est contrôlée suivant la norme de la décision correcte.

162 Comme pour la négligence, la conclusion qu'un objet ou une intention est illégitime est une question mixte de fait et de droit. En outre, la conclusion

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spectrum because it is the product of applying a legal standard to the facts established in evidence before the hearing judge. When we say something is improper we are implicitly, if not explicitly, doing so by reference to a standard of propriety. That is a legal issue.

163 It is also, in this case, an important issue of legal practice. This appeal does not come to us as a general constitutional reference brought by the government to determine the validity of s. 83.28, although that is an important element of what we have to deal with. The appellant brings the case here not to make new law but to obtain practical relief.

VI. The Result Was an Abuse of Process

164 The inherent power of a court to stay abusive proceedings has been discussed in a number of decisions including *R. v. Jewitt*, [1985] 2 S.C.R. 128; *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. O'Connor*, [1995] 4 S.C.R. 411; and *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391.

165 In those cases, the Court set the bar to obtain a stay very high because what was sought was an end to a prosecution. What is sought here is in the nature of a flexible common law remedy available to the courts to protect the integrity of their own processes. A temporary stay in this case would have required nothing more than a scheduling change.

166 There is nothing in the material to suggest that postponement of the s. 83.28 hearing until after the appellant had testified would have prejudiced any "ongoing investigation" into other aspects of the Air India disaster. That investigation has been "ongoing" for almost 20 years.

d'illégitimité se situe à l'extrémité « juridique » du spectre étant donné qu'elle résulte de l'application d'une norme juridique aux faits établis en preuve devant le juge présidant l'investigation. Lorsque nous affirmons que quelque chose est illégitime, nous le faisons implicitement, voire explicitement, en fonction d'une norme de légitimité. C'est là une question de droit.

Cela représente également, en l'espèce, une importante question de pratique du droit. Il n'est pas question ici d'un renvoi constitutionnel général dans lequel le gouvernement nous demande de nous prononcer sur la validité de l'art. 83.28, quoiqu'il s'agisse là d'un aspect important du problème que nous sommes appelés à régler. L'appelant a formé le présent pourvoi non pas pour créer du droit nouveau, mais pour obtenir un redressement concret.

VI. Un abus de procédure a résulté

Le pouvoir inhérent d'un tribunal d'ordonner l'arrêt de procédures abusives a été analysé dans un certain nombre de décisions, dont *R. c. Jewitt*, [1985] 2 R.C.S. 128; *R. c. Power*, [1994] 1 R.C.S. 601; *R. c. O'Connor*, [1995] 4 R.C.S. 411; et *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Tobiass*, [1997] 3 R.C.S. 391.

Dans ces décisions, la Cour a assujetti l'arrêt des procédures à un critère très exigeant étant donné que c'était la fin des poursuites qui était sollicitée. En l'espèce, ce qui est sollicité tient d'un redressement souple de common law que les tribunaux peuvent accorder pour préserver l'intégrité de leurs propres procédures. En l'occurrence, la suspension temporaire n'aurait nécessité rien de plus qu'une modification de l'échéancier.

Rien dans la documentation soumise n'indique que le report de l'investigation fondée sur l'art. 83.28 à une date postérieure au témoignage de l'appelant aurait nuit à une « investigation en cours » portant sur d'autres aspects de la tragédie d'Air India. Comme nous l'avons vu, cette investigation ou enquête durait depuis près de 20 ans.

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The Crown was not entitled to a mid-trial examination for discovery of an uncooperative witness according to the ordinary rules of criminal procedure and it should have been stopped. This brings us back to the point of my commencement. The courts should treat with healthy scepticism a government claim that the war against terrorism, important as it is, should trump the normal processes of the law. Situations may arise where that becomes necessary, but this is not one of those cases. At a minimum, alternatives to "trumping" should be explored. Here the interests of the Air India investigation could reasonably be accommodated to the exigencies of the Air India trial by a scheduling change. In these circumstances, in my respectful opinion, the hearing judge erred in giving the Crown the green light to proceed.

167 Selon les règles de procédure ordinaires en matière criminelle, le ministère public n'avait pas le droit de procéder, au milieu du procès, à l'interrogatoire d'un témoin peu coopératif, et il aurait dû être empêché de le faire. Cela nous ramène à mon point de départ. Les tribunaux devraient faire montre d'un scepticisme sain à l'égard d'une prétention du gouvernement que la guerre contre le terrorisme, si importante soit-elle, doit avoir préséance sur l'application régulière de la loi. Quoique cette préséance puisse se révéler parfois nécessaire, ce n'est pas le cas en l'espèce. Il y a lieu, à tout le moins, d'explorer d'autres avenues que cette « préséance ». Dans le cas qui nous occupe, une modification de l'échéancier aurait permis de concilier raisonnablement les intérêts de l'enquête sur la tragédie d'Air India avec les exigences du procès Air India. Dans ces circonstances, j'estime, en toute déférence, que la juge présidant l'investigation a commis une erreur en donnant le feu vert au ministère public.

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VII. Disposition

I would therefore allow the appeal, affirm the constitutional validity of s. 83.28 of the *Criminal Code* when correctly interpreted and properly applied, but I would have entered a stay against the s. 83.28 hearing in this proceeding until after the appellant had testified at the trial of Malik and Bagri, or the Crown otherwise had indicated that the appellant would not be called as a prosecution witness.

VII. Dispositif

168 Par conséquent, j'accueillerais le pourvoi, je confirmerais la constitutionnalité de l'art. 83.28 du *Code criminel*, interprété et appliqué correctement, mais j'aurais ordonné la suspension de l'investigation fondée sur l'art. 83.28 jusqu'à ce que l'appelant ait témoigné au procès de MM. Malik et Bagri, ou que le ministère public ait autrement indiqué qu'il ne l'assignera pas comme témoin à charge.

English version of the reasons of LeBel and Fish JJ. delivered by

LeBel J. (dissenting) — I agree with Binnie J. that the appeal should be allowed because of the abuse of process by the Crown and would reach the same conclusion as him on that issue. However, with respect for the contrary view, I cannot agree with my colleagues Iacobucci and Arbour JJ. on the issue of judicial independence. In my opinion, s. 83.28 of the *Criminal Code*, R.S.C. 1985, c. C-46 ("*Cr. C.*"), compromises judicial independence and should, for this reason, be declared unconstitutional. Due to the manner in which this provision structures relations between the judiciary, the investigative arm of the police and the Crown,

Les motifs des juges LeBel et Fish ont été rendus par

169 Le juge LeBel (dissident) — Je suis d'accord avec le juge Binnie pour reconnaître que le pourvoi devrait être accueilli en raison de l'abus de procédure commis par le ministère public, et pour conclure comme il le propose sur ce point. Toutefois, en toute déférence pour l'avis contraire, je ne puis partager l'opinion exprimée par mes collègues, les juges Iacobucci et Arbour, sur l'indépendance judiciaire. À mon avis, l'art. 83.28 du *Code criminel*, L.R.C. 1985, ch. C-46 (« *C. cr.* »), porte atteinte à l'indépendance judiciaire et devrait, pour cette raison, être déclaré inconstitutionnel. En raison de la manière dont elle aménage les rapports entre la

it will inevitably lead to the abuses and irregularities described so eloquently by my colleague Binnie J.

170 As noted by Iacobucci and Arbour JJ., the principle of judicial independence has a variety of sources. Judicial independence is guaranteed by s. 11(*d*) of the *Canadian Charter of Rights and Freedoms* and the Preamble to and ss. 96 to 100 of the *Constitution Act, 1867*, and it plays an essential role in the proper functioning of Canada's constitutional democracy (*Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13, at para. 34). This principle, which serves to maintain public confidence in the court system and the rule of law, was established to prevent interference by the executive and legislative branches in the exercise of judicial powers (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*Reference re Judges of the Provincial Court*"), at para. 10; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *Beauregard v. Canada*, [1986] 2 S.C.R. 56). The judiciary must remain completely independent of the other branches of government in the performance of its functions (*Mackin*, *supra*, at para. 35).

171 The courts have identified three fundamental characteristics of judicial independence: security of tenure, financial security, and administrative independence. Security of tenure means that a judge can be removed from office only for serious and very specific reasons following an independent review process that affords the judge the opportunity to be heard and to defend him- or herself. Financial security safeguards judges' salaries or other remuneration and pensions. Administrative independence, which is not to be confused with institutional independence, a point I will discuss below, gives courts necessary power over matters of administration bearing directly on the exercise of their functions (*Valente*, *supra*, at pp. 694-712).

magistrature, les services d'enquête policière et le ministère public, cette mesure législative ne peut que produire les abus et les irrégularités que décrit éloquemment l'opinion de mon collègue le juge Binnie.

Comme le rappellent les juges Iacobucci et Arbour, les sources du principe de l'indépendance judiciaire sont diverses. Protégé à la fois par l'al. 11*d*) de la *Charte canadienne des droits et libertés* ainsi que par le préambule et les art. 96 à 100 de la *Loi constitutionnelle de 1867*, le principe de l'indépendance judiciaire joue un rôle essentiel au bon fonctionnement de la démocratie constitutionnelle de notre pays (*Mackin c. Nouveau-Brunswick (Ministre des Finances)*, [2002] 1 R.C.S. 405, 2002 CSC 13, par. 34). Ce principe, qui vise à assurer le maintien de la confiance du public dans le système judiciaire et la primauté du droit, a pour objet d'éviter toute intervention des pouvoirs exécutif et législatif dans l'exercice des pouvoirs judiciaires (*Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3 (« *Renvoi relatif aux juges de la Cour provinciale* »), par. 10; *Valente c. La Reine*, [1985] 2 R.C.S. 673; *Beauregard c. Canada*, [1986] 2 R.C.S. 56). Dans l'exercice de ses fonctions, le pouvoir judiciaire doit donc demeurer complètement indépendant des autres pouvoirs de l'État (*Mackin*, précité, par. 35).

La jurisprudence identifie trois caractéristiques essentielles de l'indépendance, soit l'inamovibilité, la sécurité financière et l'indépendance administrative. L'inamovibilité ne permet la révocation que pour des motifs graves et bien déterminés, à la suite d'un examen indépendant et dans le respect d'une procédure qui permette au juge de se faire entendre et de se défendre. La sécurité financière protège la rémunération, le traitement et la pension des juges. Enfin, l'indépendance administrative, qui ne doit pas être confondue avec le critère de l'indépendance institutionnelle dont je discuterai ultérieurement, reconnaît aux tribunaux un pouvoir nécessaire sur les questions administratives qui ont un effet direct sur l'exercice de leurs fonctions (*Valente*, précité, p. 694-712).

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Judicial independence also has two dimensions, individual independence and institutional independence, which are distinct from its core characteristics (*Reference re Judges of the Provincial Court*, *supra*, at para. 119). On the one hand, individual independence attaches to the individual judge. Judges must be able to discharge their judicial functions without outside interference. Thus, this dimension of independence is concerned with the personal attributes of a judge, such as security of tenure. On the other hand, institutional independence attaches to courts as institutions. Courts must be independent, and appear to be independent, of the legislative and executive branches of government. The institutional dimension of judicial independence thus ensures the separation of powers (*Reference re Judges of the Provincial Court*, *supra*, at paras. 118-25; *Mackin*, *supra*, at para. 39; *Ell v. Alberta*, [2003] 1 S.C.R. 857, 2003 SCC 35, at paras. 21-23).

This Court has often stressed the need to safeguard the institutional dimension of judicial independence so that the courts can continue to fulfill their role as guardians of the Constitution (*Reference re Judges of the Provincial Court*, *supra*, at para. 123; *Mackin*, *supra*, at para. 39). If the courts are to retain the ability to provide individuals with effective protection against unwarranted deprivations of their rights and freedoms by the executive and legislative branches, they must necessarily be independent of those branches (*Ell*, *supra*, at para. 22).

In the case before us, it is important, indeed essential, that these two dimensions of judicial independence not be confused. Thus, although a judge may be independent in fact and act with the utmost impartiality, judicial independence will not exist if the court of which he or she is a member is not independent of the other branches of government on an institutional level. To determine whether judicial independence has been maintained in a specific case, both dimensions of judicial independence therefore have to be reviewed.

As noted by Iacobucci and Arbour JJ., the principle of judicial independence is essential to the

172 L'indépendance judiciaire comporte aussi deux dimensions, l'une individuelle, et l'autre institutionnelle, qui se distinguent de ses caractéristiques essentielles (*Renvoi relatif aux juges de la Cour provinciale*, précité, par. 119). D'un côté, l'indépendance individuelle s'attache au juge. Ce dernier doit effectivement être en mesure de s'acquitter de ses fonctions judiciaires sans ingérence extérieure. Cette dimension de l'indépendance vise donc les attributs personnels du juge, telle l'inamovibilité. De l'autre côté, l'indépendance institutionnelle s'attache aux tribunaux en tant qu'institutions. Les tribunaux doivent, en effet, être indépendants des pouvoirs législatif et exécutif de l'État et paraître tels. La dimension institutionnelle de l'indépendance judiciaire vise donc à assurer la séparation des pouvoirs étatiques (*Renvoi relatif aux juges de la Cour provinciale*, précité, par. 118-125; *Mackin*, précité, par. 39; *Ell c. Alberta*, [2003] 1 R.C.S. 857, 2003 CSC 35, par. 21-23).

173 Notre Cour a souvent souligné la nécessité de préserver la dimension institutionnelle de l'indépendance judiciaire afin que les tribunaux restent capables de remplir leur rôle de gardiens de la Constitution (*Renvoi relatif aux juges de la Cour provinciale*, précité, par. 123; *Mackin*, précité, par. 39). En effet, pour que les tribunaux puissent protéger efficacement les droits et libertés des justiciables contre les atteintes injustifiées des pouvoirs législatif et exécutif de l'État, ils doivent nécessairement être indépendants face à ces pouvoirs (*Ell*, précité, par. 22).

174 Il est important, voire primordial dans le cas qui nous occupe, de ne pas confondre ces deux facettes de l'indépendance judiciaire. Ainsi, bien qu'un juge puisse être indépendant de fait et se conduire avec la plus rigoureuse impartialité, l'indépendance judiciaire n'existera pas si le tribunal auquel il appartient ne demeure pas indépendant des autres organes du gouvernement sur le plan institutionnel. Afin de déterminer si l'indépendance judiciaire a été préservée dans un cas donné, un examen des deux dimensions de l'indépendance judiciaire s'avère donc nécessaire.

175 Comme l'ont souligné les juges Iacobucci et Arbour, le principe de l'indépendance judiciaire

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preservation of the fundamental normative order of a society founded on the principles of constitutionalism and the rule of law. Judicial independence effectively ensures the maintenance of public confidence in the administration of justice, which is itself an essential precondition for respect for and acceptance of the justice system and the rule of law. Thus, public confidence guarantees the effectiveness of our justice system, while at the same time putting the principle of the rule of law into practice (*Valente*, *supra*, at p. 689; *Therrien (Re)*, [2001] 2 S.C.R. 3, 2001 SCC 35, at para. 110; *Mackin*, *supra*, at paras. 34-38). The maintenance of public confidence in the administration of justice is therefore central to concerns relating to judicial independence.

176 To determine whether a measure compromises judicial independence, it must be asked whether the judicial institution, meaning, on the one hand, the individual judges and, on the other hand, collectively, the institution *per se*, is perceived by the public to be independent:

> Confidence in our system of justice requires a healthy perception of judicial independence to be maintained amongst the citizenry. Without the perception of independence, the judiciary is unable to "claim any legitimacy or command the respect and acceptance that are essential to it": see *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13, at para. 38, *per* Gonthier J. The principle requires the judiciary to be independent both in fact and perception. [Emphasis added.]

(*Ell*, *supra*, at para. 23; *Valente*, *supra*, at p. 689)

The appropriate test for this purpose is whether a reasonable person who is informed of the relevant statutory provisions would conclude, after viewing the matter realistically and practically, that the judiciary is independent (*Reference re Judges of the Provincial Court*, *supra*, at para. 113; *Mackin*, *supra*, at para. 38). It is important to note, however, that "reasonable person" does not for this purpose mean an experienced legal professional who understands the intricacies of legal issues based on subtle distinctions of which lay persons would generally

joue un rôle essentiel pour ce qui est de préserver l'ordre normatif fondamental d'une société fondée sur les principes du constitutionnalisme et de la primauté du droit. L'indépendance judiciaire assure effectivement le maintien de la confiance du public dans l'administration de la justice, qui est elle-même une condition indispensable du respect et de l'acceptation du système de justice et de la primauté du droit. Cette confiance du public permet ainsi d'assurer l'efficacité de notre système de justice et, du coup, la mise en œuvre du principe de la primauté du droit (*Valente*, précité, p. 689; *Therrien (Re)*, [2001] 2 R.C.S. 3, 2001 CSC 35, par. 110; *Mackin*, précité, par. 34-38). Le maintien de la confiance du public dans l'administration de la justice doit donc se situer au cœur des préoccupations relatives à l'indépendance judiciaire.

Afin de déterminer si une mesure porte atteinte à l'indépendance judiciaire, il faut se demander si l'institution judiciaire, tant au niveau des juges qu'à celui, collectif, de l'organisation elle-même, est perçue par le public comme étant indépendante :

> Pour que règne la confiance dans notre système de justice, il faut s'assurer que les citoyens aient toujours une saine perception d'indépendance judiciaire. Sans cette perception d'indépendance, le pouvoir judiciaire ne peut pas « prétendre à la légitimité, ni commander le respect et l'acceptation qui lui sont essentiels » : voir *Mackin c. Nouveau-Brunswick (Ministre des Finances)*, [2002] 1 R.C.S. 405, 2002 CSC 13, par. 38, le juge Gonthier. Le principe exige que le pouvoir judiciaire soit non seulement effectivement indépendant, mais encore perçu comme étant indépendant. [Je souligne.]

(*Ell*, précité, par. 23; *Valente*, précité, p. 689)

Dans cette recherche, il convient d'appliquer le critère de la personne raisonnable, informée des dispositions législatives pertinentes, qui, après avoir envisagé la question de manière réaliste et pratique, conclurait à l'indépendance du pouvoir judiciaire (*Renvoi relatif aux juges de la Cour provinciale*, précité, par. 113; *Mackin*, précité, par. 38). Il importe toutefois de préciser qu'à cet égard, la personne raisonnable n'est pas un juriste d'expérience qui comprend les subtilités juridiques basées sur de fines distinctions que les profanes ne décèlent

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be unaware. In short, the objective test of the reasonable person should serve to determine whether the public has a positive perception of judicial independence.

When analysed from this perspective, s. 83.28 *Cr. C.* compromises the institutional dimension of judicial independence. To conclude otherwise, it would be necessary to ignore the fundamental distinction between the two dimensions of judicial independence when applying the law to the facts of this case. Although they do discuss the institutional dimension of judicial independence, Iacobucci and Arbour JJ. seem to have inferred the existence of judicial independence from the individual independence of the judge acting pursuant to s. 83.28 without considering whether the institutional dimension was in fact protected. In my colleagues' view, if a judge conducting an investigation pursuant to this provision fails, in exercising his or her discretion, to uphold the rights and freedoms of the person being examined, then, and only then, could it be concluded, after the fact, that judicial independence had been compromised (para. 88).

Holmes J. concluded that s. 83.28 *Cr. C.* does not compromise judicial independence, because the judge conducting the investigation will not be the same as the one who presides at the trial, and because the two proceedings will very rarely take place in the same jurisdiction. This reasoning overlooks the institutional dimension of judicial independence and fails to consider the impact of the statutory provisions in question on that dimension and of the perception a reasonable, well-informed person would have with respect thereto. This analysis considers only the actions of individual judges and their personal impartiality in the conduct of the investigation process.

Without institutional independence or, in other words, without the appearance of a clear separation of powers between the judicial, executive and legislative branches, judicial independence cannot be said to exist. In my view, preserving the appearance

généralement pas. Bref, le critère objectif de la personne raisonnable doit servir à déterminer si le public a une saine perception d'indépendance judiciaire.

177 Analysé dans cette perspective, l'art. 83.28 *C. cr.* porte atteinte à l'indépendance judiciaire dans sa dimension institutionnelle. Une conclusion contraire repose sur l'omission d'établir cette distinction fondamentale entre les deux dimensions de l'indépendance judiciaire dans l'application du droit aux faits en cause. Bien qu'ils aient discuté de la dimension institutionnelle de l'indépendance judiciaire, les juges Iacobucci et Arbour semblent avoir inféré de l'indépendance individuelle du juge agissant en vertu de l'art. 83.28 une conclusion d'indépendance judiciaire, sans examiner si, dans les faits, la dimension institutionnelle de l'indépendance judiciaire était protégée. En effet, selon mes collègues, si un juge présidant une investigation en vertu de cette disposition utilisait sa discrétion d'une manière qui n'assure pas la protection des droits et libertés de la personne interrogée, alors, dans ce cas précis, il deviendrait ultérieurement possible de conclure à l'absence d'indépendance judiciaire (par. 88).

178 Par ailleurs, la juge Holmes a conclu que l'art. 83.28 *C. cr.* ne portait pas atteinte à l'indépendance judiciaire, pour le motif que le juge présidant l'investigation ne sera pas le même que celui présidant le procès et qu'il sera rarissime que ces deux procédures se déroulent dans le même ressort. Ce raisonnement a ainsi omis de prendre en compte la dimension institutionnelle de l'indépendance judiciaire et d'examiner les conséquences des mesures législatives en cause à l'égard de cette dernière et de la perception qu'en aurait la personne raisonnable et bien informée. Cette analyse ne prend en considération que le comportement individuel du juge et son impartialité personnelle dans la conduite de la procédure d'enquête.

179 Sans indépendance institutionnelle, ou, autrement dit, sans étanchéité apparente entre les pouvoirs judiciaire, exécutif et législatif, il ne peut effectivement y avoir d'indépendance judiciaire. À mon sens, la sauvegarde de l'apparence d'une

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of a separation of powers is a necessary condition for concluding that judicial independence exists.

180 Section 83.28 *Cr. C.* requires judges to preside over police investigations; as such investigations are the responsibility of the executive branch, this cannot but leave a reasonable person with the impression that judges have become allies of the executive branch. This perception that the judicial and executive branches are allied when conducting an investigation pursuant to this provision results, in my view, from the difficulty that a judge presiding over such a process will have protecting the rights and freedoms of the person being examined, the overly broad discretionary powers wielded by the judge, the legislative objectives behind the provision and the very nature of these proceedings, which may be held *in camera*.

181 Iacobucci and Arbour JJ. found that a judge exercises a judicial function when carrying out such an examination, since ss. 83.28(7) and 83.28(9) *Cr. C.* provide that he or she has the power to vary the terms and conditions of the order and to rule on objections relating to a refusal to answer a question. My colleagues thus conclude that the judge's role here is to protect the interests of the person being examined and thereby act as a shield against unwarranted deprivations thereof by the executive branch. I do not agree. Even if the impugned statutory provisions are interpreted as my colleagues propose, the judge will not have the necessary means to ensure that the rights and freedoms of the person being examined are protected.

182 First, I question how effective the judge's power to rule on objections to evidence in the course of these investigations will actually be. I am sceptical about the view that the rules of evidence set out in the *Canada Evidence Act*, R.S.C. 1985, c. C-5, such as ss. 8 to 12, 19 to 36 and 42, and the common law rules can govern the conduct of such an examination. These rules were created, first and foremost, to govern the building of a case to prove an accused's guilt. They are ill suited to the gathering of information relating to the commission of an offence or to fears that one may have been committed.

séparation des pouvoirs est nécessaire à une conclusion d'indépendance judiciaire.

L'article 83.28 *C. cr.*, en vertu duquel les juges sont de fait amenés à présider des enquêtes policières, qui relèvent de l'exercice du pouvoir exécutif, ne peut qu'entraîner chez la personne raisonnable une perception que les juges sont devenus alliés du pouvoir exécutif. Cette perception que les pouvoirs judiciaire et exécutif s'associent lors d'une enquête conduite en vertu de cette disposition résulte, à mon avis, de la difficulté qu'aura le juge qui la préside, à l'intérieur d'un pareil système, à protéger les droits et libertés des personnes interrogées, de sa trop grande discrétion, des objectifs législatifs ainsi que de la nature même des procédures qui pourront se tenir à huis clos.

Les juges Iacobucci et Arbour ont conclu que le juge exerce une fonction judiciaire lors de l'interrogatoire, car il a le pouvoir, en vertu des par. 83.28(7) et 83.28(9) *C. cr.*, de modifier les conditions de l'ordonnance et de statuer sur les objections concernant le refus de répondre à une question. Mes collègues concluent ainsi que le juge a pour tâche de protéger les intérêts de la personne interrogée et, qu'en ce sens, il remplit sa fonction de bouclier contre les atteintes injustifiées du pouvoir exécutif. Je ne partage pas ces vues. En effet, même en interprétant les dispositions législatives attaquées comme ils le proposent, il reste que le juge n'a pas les moyens nécessaires pour assurer la protection des droits et libertés de la personne interrogée.

D'abord, je m'interroge sur l'efficacité réelle du pouvoir du juge de trancher des objections à la preuve dans le contexte de ces investigations. Je demeure sceptique à l'égard de l'opinion que les règles de preuve fixées par la *Loi sur la preuve au Canada*, L.R.C. 1985, ch. C-5, tels les art. 8 à 12, 19 à 36 et 42, et par la common law puissent régir la tenue de l'interrogatoire. Ces règles sont d'abord créées pour régir la constitution d'une preuve de culpabilité d'un accusé. Elles s'adaptent mal à la cueillette d'information relative à la perpétration d'une infraction ou aux craintes qu'une infraction n'ait été commise.

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Next, even if I agreed with Iacobucci and Arbour JJ. as to the application of these rules of evidence, the rules would not create a framework allowing judges to effectively protect the rights and freedoms of the person being examined. Indeed, as my colleagues noted, the application of these rules of evidence is not mandatory. Moreover, some of the rules will not apply, as they are incompatible with the type of investigation provided for in s. 83.28. This is true of the rule against hearsay evidence. Finally, although the rules relating to the relevance of questions asked and to their probative value could be useful in theory, the judge will not be in a position to apply them. The judge presiding over the examination will undoubtedly not have access to the full record of the police investigation. It would therefore be easy for a Crown prosecutor to contend that a question is relevant or that its probative value outweighs its prejudicial effects. Without knowledge of the investigation's sources, framework and objectives, it will be virtually impossible for the judge to rule on such objections. Thus, the power to limit the scope of questions put to the person being examined could prove illusory. Even based on my colleagues' interpretation, the impugned provisions do not give the judge the means to effectively protect the rights and freedoms of the person being examined.

183 Par ailleurs, même si j'étais d'accord avec les juges Iacobucci et Arbour quant à l'application de ces règles de preuve, ces dernières ne créeraient pas un cadre permettant au juge de protéger efficacement les droits et libertés de la personne interrogée. En effet, comme l'ont précisé mes collègues, l'application de ces règles de preuve n'est pas obligatoire. De plus, certaines de ces règles ne s'appliqueront pas, car elles sont incompatibles avec le type d'enquête prévu par l'art. 83.28. Il en est ainsi de la règle interdisant le ouï-dire. Enfin, bien que les règles relatives à la pertinence des questions posées et à leur valeur probante puissent être utiles en théorie, le juge ne sera pas en mesure de les appliquer. En effet, le juge présidant l'interrogatoire n'aura sans doute pas accès au dossier complet de l'enquête policière. Le procureur de la Couronne pourra alors aisément prétendre qu'une question reste pertinente ou que sa valeur probante l'emporte sur ses effets préjudiciables. Dans l'ignorance des sources, du cadre et des objectifs de l'enquête, il sera quasi impossible pour le juge de statuer sur ces objections. Ainsi, le pouvoir de limiter l'étendue des questions posées à la personne interrogée risque de demeurer illusoire. Même en recourant à l'interprétation proposée par mes collègues, les dispositions attaquées ne laissent pas au juge les moyens de protéger efficacement les droits et libertés de la personne interrogée.

Moreover, if it were possible to conclude that the judge could effectively rule on certain objections, the fluidity and vagueness of the investigation procedure would still give too much discretion to the judge. Without a specific rule that can be applied uniformly to all cases, judges will have to rely on their own discretion, if not their own subjective preferences, when deciding which solution to apply to a given objection. To my mind, a judge's individual perception of his or her role will necessarily affect the nature and conduct of the examination. Thus, some judges will be more inclined to protect the fundamental rights of the person being examined, while others, who are more conservative, will adopt a contrary approach.

184 De plus, même s'il était possible de conclure que le juge pourrait réussir à trancher certaines objections, la fluidité et l'imprécision de la procédure d'enquête laissent une trop grande discrétion au juge. En effet, sans règle précise applicable uniformément à tous les cas, le juge devra arrêter à sa propre discrétion, voire au gré de sa propre subjectivité, les solutions qu'il désire appliquer à une objection donnée. À mon sens, la perception individuelle que le juge se fera de son rôle affectera nécessairement la nature et le déroulement de l'interrogatoire. Certains juges seront ainsi plus enclins à protéger les droits fondamentaux de la personne interrogée, alors que d'autres, plus conservateurs, adopteront une approche contraire.

As the judiciary is unable to defend the fundamental rights and freedoms of a person being

185 N'étant pas en mesure de défendre les droits et libertés fondamentaux de la personne interrogée en

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examined under s. 83.28 *Cr. C.* against interference from the executive branch, the judiciary's role is then, on its face, no different from that of the executive branch. In my view, a reasonable, well-informed person could conclude that the purpose of having a judge at such an investigation is to help the executive branch compel the witness to answer questions. The judiciary's symbolic and legal weight will assist the police in their investigations. The judiciary will then no longer be playing the role of an independent arbiter.

186 This perception is also justified by the legislative objectives of the *Anti-terrorism Act*, S.C. 2001, c. 41, and s. 83.28 *Cr. C.* As Iacobucci and Arbour JJ. have stated, Parliament's intent in enacting this legislation was to prevent and punish acts of terrorism. In enacting s. 83.28, Parliament gave increased powers to the executive branch to enable it to investigate such acts effectively. In light of these legislative objectives, a reasonable person might conclude that Parliament intended to use the judiciary to make the prevention and suppression of acts of terrorism more effective by sacrificing some of the judiciary's institutional independence. Professor Paciocco has given a clear description of how the judiciary's role in investigations conducted pursuant to s. 83.28 might be perceived by the public:

> The government is clearly counting on the oath of the witness and the threat of contempt of court to enforce this system, and it is using the power of the judicial office, not to obtain a legal ruling or to resolve a question of fact, but as a form of coercion to compel information in the advancement of the executive, investigative function.
>
> (D. M. Paciocco, "Constitutional Casualties of September 11: Limiting the Legacy of the *Anti-Terrorism Act*" (2002), 16 *S.C.L.R.* (2d) 185, at p. 233)

187 In light of the procedural framework established by s. 83.28 *Cr. C.*, it would be reasonable for the public to perceive the judicial and executive branches as allies. This public perception is heightened by the fact that the judge's duties under

vertu de l'art. 83.28 *C. cr.* contre les ingérences du pouvoir exécutif, le pouvoir judiciaire ne joue alors pas un rôle différent à première vue de celui exercé par l'exécutif. À mon avis, une personne raisonnable et bien informée pourrait conclure que la présence du juge lors d'une telle investigation vise à aider le pouvoir exécutif à contraindre le témoin à répondre aux questions. Le poids symbolique et juridique du pouvoir judiciaire vient assister l'enquête policière. Ce pouvoir ne joue alors plus son rôle d'arbitre indépendant.

Cette perception se justifie aussi par les objectifs législatifs de la *Loi antiterroriste*, L.C. 2001, ch. 41, et de l'art. 83.28 *C. cr.* En effet, comme l'ont précisé les juges Iacobucci et Arbour, en édictant cette loi, le législateur fédéral visait à prévenir et à punir les actes de terrorisme. Par l'adoption de l'art. 83.28, le législateur visait à donner plus de pouvoirs à l'exécutif afin qu'il puisse enquêter efficacement sur de tels actes. À la lumière de ces objectifs législatifs, la personne raisonnable pourrait alors conclure que le législateur prévoit utiliser le pouvoir judiciaire pour prévenir et réprimer plus efficacement les actes de terrorisme, en sacrifiant une part de son indépendance institutionnelle. Le professeur Paciocco a clairement décrit la manière dont le rôle du pouvoir judiciaire lors des investigations tenues en vertu de l'art. 83.28 pourrait alors être perçu par le public :

> [TRADUCTION] Il est clair que le gouvernement s'attend à ce que le serment du témoin et la menace d'outrage au tribunal permettront au système de fonctionner, et il se sert du pouvoir de la charge judiciaire non pas pour trancher un point de droit ou pour résoudre une question de fait, mais pour exercer une forme de contrainte destinée à obtenir des renseignements utiles à l'exercice de la fonction exécutive d'enquête.
>
> (D. M. Paciocco, « Constitutional Casualties of September 11 : Limiting the Legacy of the *Anti-Terrorism Act* » (2002), 16 *S.C.L.R.* (2d) 185, p. 233)

En raison du cadre procédural que met en place l'art. 83.28 *C. cr.*, le public pourra raisonnablement percevoir les pouvoirs judiciaire et exécutif comme des alliés. Cette perception du public s'accentue du fait que la fonction attribuée au juge par l'art. 83.28

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s. 83.28 are unlike any of the duties traditionally discharged by the judiciary.

The judge's powers under s. 83.28 *Cr. C.* differ from those wielded by judges under other *Criminal Code* provisions, such as ss. 184.2 (authorizations to intercept private communications), 487 (search warrants) and 487.05 (warrants relating to forensic DNA analysis). Those provisions require the judge to render an *ad hoc* decision authorizing the use of specific investigative techniques. The judge is involved in the conduct of the investigations only indirectly, via the authorization that is granted. In contrast, a judge acting under s. 83.28 is not limited to making an order authorizing the executive branch to conduct an examination and may even be required to preside over the examination. As I have already mentioned, s. 83.28 does not give judges the tools they need to effectively play their role as protector of the fundamental rights of the person being examined. Instead, the judge takes part in and facilitates the police investigation without having real power to act as a neutral arbiter.

In other cases, under provisions such as s. 231.4 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), and s. 11 of the *Competition Act*, R.S.C. 1985, c. C-34, a judge may have a role to play at a specific point in the investigation process, in that he or she may be asked to make an order, such as an order to attend. However, the judge does not preside over the investigation. Thus, the judge does not take part in the exercise of a power of the executive branch. A judge who presides over an examination under s. 83.28 *Cr. C.*, on the other hand, does take part in the exercise of a power of the executive branch and has no way to counterbalance the exercise thereof. In the pursuit of the undeniably important objective of suppressing and preventing terrorism, the distinction between the judicial and executive branches has been blurred.

The public's perception that the judicial and the executive branches do not act separately in an investigation under s. 83.28 *Cr. C.* will be

ne s'apparente à aucun autre rôle habituel du pouvoir judiciaire.

188 D'une part, les pouvoirs que détient le juge en vertu de l'art. 83.28 *C. cr.* diffèrent de ceux qu'il possède, par exemple, en vertu des art. 184.2 *C. cr.* (autorisations d'interception d'une communication privée), 487 *C. cr.* (mandats de perquisition) et 487.05 *C. cr.* (mandats relatifs aux analyses génétiques). En effet, en vertu de ces dispositions, le juge est appelé à rendre une décision ponctuelle pour autoriser l'utilisation de certaines techniques d'enquêtes particulières. Il ne s'associe pas à la conduite de cette enquête, sauf indirectement, par l'autorisation qu'il accorde. Au contraire, en vertu de l'art. 83.28, le juge ne se limite pas à rendre une ordonnance permettant à l'exécutif de procéder à un interrogatoire et peut même être amené à diriger l'interrogatoire. Or, comme je l'ai mentionné précédemment, l'art. 83.28 ne donne pas au juge les outils dont il a besoin pour exercer efficacement son rôle de protecteur des droits fondamentaux de la personne interrogée. Il participe à l'enquête policière, qu'il facilite, sans détenir un pouvoir réel d'agir à titre d'arbitre neutre.

189 Dans d'autres cas, en vertu, par exemple, de l'art. 231.4 de la *Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.), et de l'art. 11 de la *Loi sur la concurrence*, L.R.C. 1985, ch. C-34, le juge peut avoir un rôle ponctuel à jouer dans le processus d'enquête, en ce sens qu'il peut être appelé à rendre certaines ordonnances, telles que des ordonnances de comparution. Il ne préside toutefois pas ces enquêtes. Le juge ne participe donc pas à l'exercice du pouvoir exécutif. À l'inverse, en présidant l'interrogatoire tenu en vertu de l'art. 83.28 *C. cr.*, le juge assiste à l'exercice du pouvoir exécutif sans détenir les moyens nécessaires afin de lui faire contrepoids. Les pouvoirs judiciaire et exécutif tendent à la confusion dans la réalisation d'un objectif, certes important, de répression ou de prévention du terrorisme.

190 La perception du public selon laquelle les pouvoirs judiciaire et exécutif n'agissent pas de manière séparée lors d'une investigation tenue

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heightened when the investigation is held *in camera*. In such a case, a reasonable, well-informed person would be justified in questioning the role the judge is really playing in the investigation. The judge is therefore at risk of being perceived as a true ally of the executive branch in a secret investigation that is not subject to scrutiny.

191 In short, I do not believe it is possible to uphold the constitutional validity of the legislation in question by isolating individual cases in which judges will act unconstitutionally. When faced with the problems raised by s. 83.28 *Cr. C.*, it will not suffice to state that judicial independence will be compromised only in those specific cases, as such a conclusion would be based on an analysis restricted to the individual dimension of judicial independence. For the reasons I have stated above, I believe that s. 83.28 compromises the institutional dimension of judicial independence. In my view, the public will perceive the judicial and executive branches as allies rather than as separate branches of government. The implementation of s. 83.28, which is the source of this perception that there is no separation of powers, could therefore lead to a loss of public confidence in Canada's justice system. The tension and fears resulting from the rise in terrorist activity do not justify such an alliance. It is important that the criminal law be enforced firmly and that the necessary investigative and punitive measures be taken, but this must be done in accordance with the fundamental values of our political system. The preservation of our courts' institutional independence belongs to those fundamental values.

192 Therefore, it is my view that s. 83.28 *Cr. C.* compromises the judicial independence guaranteed by the Preamble to the *Constitution Act, 1867* and must be declared unconstitutional. For this reason, I would have allowed the appeal and found, as did Binnie J., that there was an abuse of process.

en vertu de l'art. 83.28 *C. cr.* s'accentuera encore lorsque les investigations seront tenues à huis clos. Dans ces cas, une personne raisonnable et bien informée sera justifiée de s'interroger sur le rôle que le juge joue réellement lors de l'interrogatoire. Le juge risque alors d'être perçu comme un véritable allié du pouvoir exécutif, dans une enquête secrète, dont le déroulement demeure incontrôlable.

En somme, je ne crois pas qu'il soit possible d'isoler des cas d'espèce où certains juges agiront de manière inconstitutionnelle tout en préservant la validité constitutionnelle de l'ensemble de la législation. Devant les problèmes que pose l'art. 83.28 *C. cr.*, il ne suffit pas d'affirmer qu'il ne sera porté atteinte à l'indépendance judiciaire que dans ces cas, puisque cette conclusion dépend d'une analyse restreinte à l'examen de la dimension individuelle de l'indépendance judiciaire. Pour les motifs que je viens d'exposer, j'estime que l'art. 83.28 porte atteinte à la dimension institutionnelle de l'indépendance judiciaire. À mon avis, le public percevra les pouvoirs judiciaire et exécutif comme des alliés et non des pouvoirs séparés. La mise en œuvre de l'art. 83.28, qui entraîne cette perception de non-séparation des pouvoirs, risque dès lors d'entraîner la perte de la confiance du public dans le système de justice canadien. Les tensions et les craintes que suscite la montée du terrorisme ne justifient pas cette association. Il importe que le droit criminel soit appliqué fermement et que les mesures d'enquête et de répression nécessaires soient mises en œuvre, mais dans le respect des valeurs essentielles de notre régime politique. La préservation de l'indépendance institutionnelle des tribunaux demeure l'une de celles-ci.

Je suis par conséquent d'avis que l'art. 83.28 *C. cr.* porte atteinte à l'indépendance judiciaire protégée par le préambule de la *Loi constitutionnelle de 1867* et devrait être déclaré inconstitutionnel. J'aurais donc aussi accueilli le pourvoi pour ce motif, en plus de reconnaître qu'un abus de procédure a été commis, comme le conclut le juge Binnie.

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APPENDIX

Relevant Constitutional and Legislative Provisions

A. *Constitutional Provisions*

Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11. Any person charged with an offence has the right

. . .

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

B. *Legislative Provisions*

Criminal Code, R.S.C. 1985, c. C-46, as amended by S.C. 2001, c. 41

INTERPRETATION

2. In this Act

. . .

"terrorism offence" means

(*a*) an offence under any of sections 83.02 to 83.04 or 83.18 to 83.23,

(*b*) an indictable offence under this or any other Act of Parliament committed for the benefit of, at the direction of or in association with a terrorist group,

(*c*) an indictable offence under this or any other Act of Parliament where the act or omission constituting the offence also constitutes a terrorist activity, or

ANNEXE

Dispositions constitutionnelles et législatives pertinentes

A. *Dispositions constitutionnelles*

Charte canadienne des droits et libertés

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

11. Tout inculpé a le droit :

. . .

d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

B. *Dispositions législatives*

Code criminel, L.R.C. 1985, ch. C-46, modifié par L.C. 2001, ch. 41

DÉFINITIONS ET INTERPRÉTATION

2. Les définitions qui suivent s'appliquent à la présente loi.

. . .

« activité terroriste » S'entend au sens du paragraphe 83.01(1).

« groupe terroriste » S'entend au sens du paragraphe 83.01(1).

« infraction de terrorisme »

a) Infraction visée à l'un des articles 83.02 à 83.04 et 83.18 à 83.23;

b) acte criminel — visé par la présente loi ou par une autre loi fédérale — commis au profit ou sous

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(*d*) a conspiracy or an attempt to commit, or being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (*a*), (*b*) or (*c*);

"terrorist activity" has the same meaning as in subsection 83.01(1);

"terrorist group" has the same meaning as in subsection 83.01(1);

INVESTIGATIVE HEARING

83.28 (1) In this section and section 83.29, "judge" means a provincial court judge or a judge of a superior court of criminal jurisdiction.

(2) Subject to subsection (3), a peace officer may, for the purposes of an investigation of a terrorism offence, apply *ex parte* to a judge for an order for the gathering of information.

(3) A peace officer may make an application under subsection (2) only if the prior consent of the Attorney General was obtained.

(4) A judge to whom an application is made under subsection (2) may make an order for the gathering of information if the judge is satisfied that the consent of the Attorney General was obtained as required by subsection (3) and

(*a*) that there are reasonable grounds to believe that

(i) a terrorism offence has been committed, and

(ii) information concerning the offence, or information that may reveal the whereabouts of a person suspected by the peace officer of having committed the offence, is likely to be obtained as a result of the order; or

(*b*) that

(i) there are reasonable grounds to believe that a terrorism offence will be committed,

(ii) there are reasonable grounds to believe that a person has direct and material information that relates to a terrorism offence referred to in subparagraph (i), or that may reveal the whereabouts of an individual who the peace officer suspects

la direction d'un groupe terroriste, ou en association avec lui;

c) acte criminel visé par la présente loi ou par une autre loi fédérale et dont l'élément matériel — acte ou omission — constitue également une activité terroriste;

d) complot ou tentative en vue de commettre l'infraction visée à l'un des alinéas *a*) à *c*) ou, relativement à une telle infraction, complicité après le fait ou encouragement à la perpétration.

INVESTIGATION

83.28 (1) Au présent article et à l'article 83.29, « juge » s'entend d'un juge de la cour provinciale ou d'un juge d'une cour supérieure de juridiction criminelle.

(2) Sous réserve du paragraphe (3), l'agent de la paix peut, pour la conduite d'une enquête relative à une infraction de terrorisme, demander à un juge, en l'absence de toute autre partie, de rendre une ordonnance autorisant la recherche de renseignements.

(3) L'agent de la paix ne peut présenter la demande que s'il a obtenu le consentement préalable du procureur général.

(4) Saisi de la demande, le juge peut rendre l'ordonnance s'il est convaincu que le consentement du procureur général a été obtenu en conformité avec le paragraphe (3) et :

a) ou bien il existe des motifs raisonnables de croire, à la fois :

(i) qu'une infraction de terrorisme a été commise,

(ii) que des renseignements relatifs à l'infraction ou susceptibles de révéler le lieu où se trouve un individu que l'agent de la paix soupçonne de l'avoir commise sont susceptibles d'être obtenus en vertu de l'ordonnance;

b) ou bien sont réunis les éléments suivants :

(i) il existe des motifs raisonnables de croire qu'une infraction de terrorisme sera commise,

(ii) il existe des motifs raisonnables de croire qu'une personne a des renseignements directs et pertinents relatifs à une infraction de terrorisme visée au sous-alinéa (i) ou de nature à révéler le lieu où se trouve l'individu que l'agent de la paix

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may commit a terrorism offence referred to in that subparagraph, and

(iii) reasonable attempts have been made to obtain the information referred to in subparagraph (ii) from the person referred to in that subparagraph.

(5) An order made under subsection (4) may

(*a*) order the examination, on oath or not, of a person named in the order;

(*b*) order the person to attend at the place fixed by the judge, or by the judge designated under paragraph (*d*), as the case may be, for the examination and to remain in attendance until excused by the presiding judge;

(*c*) order the person to bring to the examination any thing in their possession or control, and produce it to the presiding judge;

(*d*) designate another judge as the judge before whom the examination is to take place; and

(*e*) include any other terms or conditions that the judge considers desirable, including terms or conditions for the protection of the interests of the person named in the order and of third parties or for the protection of any ongoing investigation.

(6) An order made under subsection (4) may be executed anywhere in Canada.

(7) The judge who made the order under subsection (4), or another judge of the same court, may vary its terms and conditions.

(8) A person named in an order made under subsection (4) shall answer questions put to the person by the Attorney General or the Attorney General's agent, and shall produce to the presiding judge things that the person was ordered to bring, but may refuse if answering a question or producing a thing would disclose information that is protected by any law relating to non-disclosure of information or to privilege.

(9) The presiding judge shall rule on any objection or other issue relating to a refusal to answer a question or to produce a thing.

(10) No person shall be excused from answering a question or producing a thing under subsection (8) on the ground that the answer or thing may tend to incriminate the person or subject the person to any proceeding or penalty, but

(*a*) no answer given or thing produced under subsection (8) shall be used or received against the person

soupçonne d'être susceptible de commettre une telle infraction de terrorisme,

(iii) des efforts raisonnables ont été déployés pour obtenir les renseignements visés au sous-alinéa (ii) de la personne qui y est visée.

(5) L'ordonnance peut contenir les dispositions suivantes :

a) l'ordre de procéder à l'interrogatoire, sous serment ou non, d'une personne désignée;

b) l'ordre à cette personne de se présenter au lieu que le juge ou le juge désigné au titre de l'alinéa *d*) fixe pour l'interrogatoire et de demeurer présente jusqu'à ce qu'elle soit libérée par le juge qui préside;

c) l'ordre à cette personne d'apporter avec elle toute chose qu'elle a en sa possession ou à sa disposition afin de la remettre au juge qui préside;

d) la désignation d'un autre juge pour présider l'interrogatoire;

e) les modalités que le juge estime indiquées, notamment quant à la protection des droits de la personne que l'ordonnance vise ou de ceux des tiers, ou quant à la protection de toute investigation en cours.

(6) L'ordonnance peut être exécutée en tout lieu au Canada.

(7) Le juge qui a rendu l'ordonnance ou un autre juge du même tribunal peut modifier les conditions de celle-ci.

(8) La personne visée par l'ordonnance répond aux questions qui lui sont posées par le procureur général ou son représentant, et remet au juge qui préside les choses exigées par l'ordonnance, mais peut refuser de le faire dans la mesure où la réponse aux questions ou la remise de choses révélerait des renseignements protégés par le droit applicable en matière de divulgation ou de privilèges.

(9) Le juge qui préside statue sur toute objection ou question concernant le refus de répondre à une question ou de lui remettre une chose.

(10) Nul n'est dispensé de répondre aux questions ou de produire une chose aux termes du paragraphe (8) pour la raison que la réponse ou la chose remise peut tendre à l'incriminer ou à l'exposer à quelque procédure ou pénalité, mais :

a) la réponse donnée ou la chose remise aux termes du paragraphe (8) ne peut être utilisée ou admise

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in any criminal proceedings against that person, other than a prosecution under section 132 or 136; and

(*b*) no evidence derived from the evidence obtained from the person shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 132 or 136.

(11) A person has the right to retain and instruct counsel at any stage of the proceedings.

(12) The presiding judge, if satisfied that any thing produced during the course of the examination will likely be relevant to the investigation of any terrorism offence, shall order that the thing be given into the custody of the peace officer or someone acting on the peace officer's behalf.

Appeal dismissed, BINNIE, LEBEL *and* FISH JJ. *dissenting.*

Solicitor for the appelant the "Named Person": Howard Rubin, North Vancouver.

Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the respondent the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitors for the respondent Ripudaman Singh Malik: Smart & Williams, Vancouver.

Solicitors for the respondent Ajaib Singh Bagri: Sack Goldblatt Mitchell, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Ministry of the Attorney General, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Torys, Toronto.

Solicitors for the intervener the Federation of Law Societies of Canada: Henein & Associates, Toronto.

Solicitor for the intervener the Canadian Bar Association: Gregory P. Delbigio, Vancouver.

contre lui dans le cadre de poursuites criminelles, sauf en ce qui concerne les poursuites prévues aux articles 132 ou 136;

b) aucune preuve provenant de la preuve obtenue de la personne ne peut être utilisée ou admise contre elle dans le cadre de poursuites criminelles, sauf en ce qui concerne les poursuites prévues aux articles 132 ou 136.

(11) Toute personne a le droit d'engager un avocat et de lui donner des instructions en tout état de cause.

(12) Si le juge qui préside est convaincu qu'une chose remise pendant l'interrogatoire est susceptible d'être utile à l'enquête relative à une infraction de terrorisme, il peut ordonner que cette chose soit confiée à la garde de l'agent de la paix ou à une personne qui agit pour son compte.

Pourvoi rejeté, les juges BINNIE, LEBEL *et* FISH *sont dissidents.*

Procureur de l'appelante la « personne désignée » : Howard Rubin, North Vancouver.

Procureur de l'intimé le procureur général du Canada : Procureur général du Canada, Ottawa.

Procureur de l'intimé le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Vancouver.

Procureurs de l'intimé Ripudaman Singh Malik : Smart & Williams, Vancouver.

Procureurs de l'intimé Ajaib Singh Bagri : Sack Goldblatt Mitchell, Toronto.

Procureur de l'intervenant le procureur général de l'Ontario : Ministère du procureur général, Toronto.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : Torys, Toronto.

Procureurs de l'intervenante la Fédération des ordres professionnels de juristes du Canada : Henein & Associates, Toronto.

Procureur de l'intervenante l'Association du Barreau canadien : Gregory P. Delbigio, Vancouver.

2004 SCC 42 (CanLII)

Solicitors for the interveners The Vancouver Sun, The National Post and Global Television Network Inc.: Farris, Vaughan, Wills & Murphy, Vancouver.

Procureurs des intervenants The Vancouver Sun, The National Post et Global Television Network Inc. : Farris, Vaughan, Wills & Murphy, Vancouver.

2004 SCC 42 (CanLII)

LABOUR RELATIONS CODE
[RSBC 1996] CHAPTER 244

Definitions

1(1) In this Code:

…

"employee" means a person employed by an employer, and includes a dependent contractor, but does not include a person who, in the board's opinion,

(a) performs the functions of a manager or superintendent, or

(b) is employed in a confidential capacity in matters relating to labour relations or personnel;

…

Duties under this Code

2 The board and other persons who exercise powers and perform duties under this Code must exercise the powers and perform the duties in a manner that

…

c) encourages the practice and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees,

…

Acquisition of bargaining rights

18(1) If a collective agreement is not in force and a trade union is not certified as bargaining agent for a unit appropriate for collective bargaining, a trade union claiming to have as members in good standing not less than 45% of the employees in that unit may at any time, subject to the regulations, apply to the board to be certified for the unit.

(2) If a collective agreement is not in force and a trade union is certified as bargaining agent for a unit appropriate for collective bargaining, a trade union claiming to have as members in good standing a majority of employees in a unit appropriate for collective bargaining may, subject to the regulations, apply to the board to be certified for the unit if either

(a) 6 months have elapsed since the date of certification of a trade union for the unit, or

(b) the board has consented to an application before the expiry of the 6 months.

(3) Unless the board consents, a trade union is not permitted to make an application under subsection (2) during a strike or lockout.

(4) Despite this section and section 19

(a) a trade union that is a party to a collective agreement, but is not certified for the employees covered by it, may apply to be certified at any time, and

(b) a council of trade unions comprised of trade unions that are parties to collective agreements may apply to be certified at any time in place of those trade unions.

…

Process relating to application

22(1) The board must, in respect of an application for certification under this Part,

(a) make or cause to be made the examination of records and other inquiries, including the holding of hearings it considers necessary to determine the merits of the application for certification, and

(b) specify the nature of the evidence the applicant must furnish in support of the application and the manner of application.

(2) In deciding whether a person is a member in good standing of a trade union, the board

(a) must decide the question on the basis of membership requirements prescribed in the regulations, and

(b) may decide the question without regard to the constitution and bylaws of the trade union.

Determination of appropriate unit

22.1 If a trade union applies for certification as the bargaining agent for a unit, the board

(a) must determine if the unit is appropriate for collective bargaining, and

(b) may, before certification, include additional employees in or exclude employees from the unit.

Certification

23 If the board is satisfied that

(a) on the date the board receives an application for certification under this Part at least 55% of the employees in the unit are members in good standing of the trade union, and

(b) the unit is appropriate for collective bargaining,

the board must certify the trade union as the bargaining agent for the employees in the unit.

…

Application of Administrative Tribunals Act

115.1 The following provisions of the Administrative Tribunals Act apply to the board:

…

(e) section 43 [discretion to refer questions of law to court];

…

Jurisdiction of board to decide certain questions

139 The board has exclusive jurisdiction to decide a question arising under this Code and on application by any person or on its own motion may decide for all purposes of this Code any question, including, without limitation, any question as to whether

(a) a person is an employer or employee,

(b) an organization or association is an employers' organization or a trade union,

(c) a collective agreement has been entered into,

(d) a person is or what persons are bound by a collective agreement,

(e) a person is or what persons are parties to a collective agreement,

(f) a collective agreement has been entered into on behalf of a person,

(g) a collective agreement is in full force and effect,

(h) a person is bargaining collectively or has bargained collectively in good faith,

(i) an employee or a group of employees is a unit appropriate for collective bargaining,

(j) an employee belongs to a craft or group exercising technical or professional skills,

(k) a person is a member in good standing of a trade union,

(l) a person is included in or excluded from an appropriate bargaining unit,

(m) an employer is included in or excluded from an accreditation,

(n) a person is a dependent contractor,

(o) an organization of trade unions is a council of trade unions,

(p) a service is essential for the purposes of Part 6,

(q) a person is described in section 68 (1),

(r) a trade union, council of trade unions or employers' organization is fulfilling a duty of fair representation,

(s) a site or place is a site or place of business, operations or employment of an employer,

(t) a person is an ally,

(u) a person is a professional,

(v) a person exercises technical or professional skills, and

(w) an activity constitutes a strike, lockout or picketing.

PUBLIC SERVICE ACT
[RSBC 1996] CHAPTER 385

Definitions

1 In this Act: …

"employee" means a person appointed under this Act other than a person appointed under section 15;

…

Appointments on merit

8(1) Subject to section 10, appointments to and from within the public service must

(a) be based on the principle of merit, and

(b) be the result of a process designed to appraise the knowledge, skills and abilities of eligible applicants.

(2) The matters to be considered in determining merit must, having regard to the nature of the duties to be performed, include the applicant's education, skills, knowledge, experience, past work performance and years of continuous service in the public service.

(3) Regulations, policies and procedures with respect to recruitment, selection and promotion must facilitate

(a) opportunities for external recruitment and internal advancement to develop a public service that is representative of the diversity of the people of British Columbia, and

(b) the long term career development and advancement of employees appointed under this Act.

(4) Subject to the regulations, the agency head may direct in respect of a vacancy or class of vacancies in the public service, that applicants be

(a) limited or given preference in a manner intended to achieve employment equity objectives,

(b) limited to employees to encourage career development and advancement,

(c) limited to employees of a stated occupational group, position level or organizational unit, or

(d) limited to a stated geographical area or locale.

PUBLIC SERVICE LABOUR RELATIONS ACT
[RSBC 1996] CHAPTER 388

Definitions

1 (1)In this Act:

…

"employee" means an employee as defined in the Public Service Act, or a person employed by or holding office at the pleasure of the government, but does not include any of the following:

(a) a deputy minister, associate deputy minister or assistant deputy minister;

(b) a practising lawyer or articled student as defined in section 1 (1) of the Legal Profession Act, who is engaged in the practice of law;

(c) a justice;

(d) a person authorized under an enactment to practise as a medical practitioner in British Columbia who is engaged in and working in the practice of that profession;

(e) a registrar, district registrar, deputy registrar or assistant deputy registrar of a registry of a court;

(f) a sheriff;

(f.1) a person employed as an industrial relations officer or employment standards officer of the Employment Standards Branch;

(f.2) a person appointed under the Public Service Act to exercise the powers of or perform the duties of

(i) the director under Parts 5 and 5.1 of the Residential Tenancy Act, or

(ii) the director under Parts 6 and 6.1 of the Manufactured Home Park Tenancy Act;

(f.3) a person appointed under the Public Service Act to perform the duties of a workers' adviser or employers' adviser under Division 6 of Part 8 of the Workers Compensation Act;

(f.4) a person appointed under section 54 of the Coroners Act or retained under section 55 of that Act to perform the duties of a coroner;

(f.5) a person appointed to serve as an investigator under section 38.06 (2) [IIO investigators] of the Police Act;

(g) [Repealed 1998-37-35.]

(h) a person employed as a personnel officer;

(i) [Repealed 1998-37-35.]

(j) a person employed for a period of less than 31 days;

(k) [Repealed 1998-37-35.]

(l) a person who is not appointed under the Public Service Act and is employed by or in the service of any of the following:

(i) a Crown corporation;

(ii) the Queen's Printer under the Queen's Printer Act, other than clerical or administrative employees;

(iii) the British Columbia Utilities Commission under the Utilities Commission Act;

(iv) the Insurance Corporation of British Columbia under the Insurance Corporation Act;

(m) a chief court administrator or regional court administrator;

(n) a person employed as a member of the staff of the Auditor General;

(o) a person principally engaged in carrying out duties that protocol requires the government to perform;

(p) a member of the staff of the Ombudsperson;

(q) a person employed in the Provincial Treasury Division, the Treasury Board Staff Division, the Office of the Chief Investment Officer, the Economics and Policy Division, the Financial Management Branch and the Internal Audit Branch of the Ministry of Finance;

(r) a person employed in the division;

(s) a person employed as a trade development officer;

(t) a person employed in the Office of Legislative Counsel;

(u) a person employed in the Legal Services Branch of the Ministry of Attorney General;

(v) a person employed in the office of Government Communications and Public Engagement;

(w) an internal auditor in a ministry;

(x) a person employed with the Cabinet Secretariat;

(y) a person employed to provide administrative or clerical support services to a judge of a court in British Columbia;

(z) and (aa) [Repealed 1998-37-35.]

(bb) [Repealed 2019-14-59.]

(cc) a person employed under section 9 of the Securities Act;

(dd) a person employed by the property assessment appeal board;

(ee) a member of the staff of the Chief Electoral Officer;

(ff) a member of the staff of the Representative for Children and Youth;

(gg) a person employed in the Teacher Regulation Branch of the Ministry of Education;

(hh) [Repealed 2022-15-88.]

…

Bargaining units

4 For the purpose of collective bargaining, every employee must be included in

(a) a nurses' bargaining unit, including all employees authorized under an enactment to practise as a registered nurse or registered psychiatric nurse, including those employees who are eligible to become so authorized,

(b) a licensed professional bargaining unit, including all employees in a professional classification in the public service classification structure who are members of an association that had, before July 1, 1998, statutory authority to license a person to practise that profession, other than those persons described in paragraph (a), or

(c) a public service bargaining unit including all employees other than those persons described in paragraph (a) or (b).

…

Other Acts

23 Unless otherwise provided in this Act, the Labour Relations Code applies, but, if this Act is contrary to, in conflict with or inconsistent with that or any other Act, this Act prevails.

CROWN COUNSEL ACT
[RSBC 1996] CHAPTER 87

British Columbia Crown Counsel Association Agreement

4.1(1) In this section:

"BCCCA" means the British Columbia Crown Counsel Association, a society under the Societies Act;

"Crown counsel" means an individual described in section 4 (1) who is an "employee" as defined in section 1 of the Public Service Act but does not include

(a) the Assistant Deputy Attorney General,

(b) the Director, Special Justice Programs,

(c) the Executive Director, Criminal Justice Branch,

(d) the Regional Crown counsel,

(e) the Deputy Regional Crown counsel,

(f) the Director, Criminal Appeals,

(g) the Director, Legal Services,

(h) the Communications Officer,

(i) the Director, Policy and Legislation,

(j) the Deputy Director, Commercial Crime,

(k) the Deputy Director, Criminal Appeals, and

(l) the persons in other positions specified by agreement of the employer and the BCCCA;

"employer" means the government represented by the BC Public Service Agency.

Implied power to administer oath in the taking of evidence.

31. Where by an Act of the Legislature, or by a rule of the Legislative Assembly, or by an order, regulation, or Commission made or issued by the Lieutenant-Governor in Council, under a law authorizing him to require the taking of evidence under oath, evidence under oath is authorized or required to be taken, or an oath is authorized or directed to be made, taken, or administered, the oath may be administered and a certificate of its having been made, taken, or administered may be given by anyone authorized by the Act, rule, order, regulation, or Commission to take the evidence, or by a Judge of any Court, a Notary Public, a Justice of the Peace, or a Commissioner for Taking Affidavits having authority or jurisdiction within the place where the oath is administered. R.S. 1948, c 1, s. 31.

Persona designata, rule as to.

32. Notwithstanding the provisions of section 2, where by any Act of the Legislature judicial or quasi-judicial powers are given to a Judge or an officer of any Court of Record, whether individually or as a member of a class, those powers shall be deemed for all purposes to be given to the Judge or the officer to be exercised by him in his capacity as Judge or officer of the Court, as if the Court itself had jurisdiction in respect thereof and not as a persona designata, unless the Act contains express provision to the contrary. R.S. 1948, c. 1, s. 32.

Publication of notices.

33. Where by any Act, or by any rule, regulation, or by-law made pursuant thereto, it is provided that notice shall or may be given, by the same being published or advertised in a newspaper published in a particular city, town, municipality, county, jurisdiction, or other place or district, such provision shall, unless the context otherwise requires, be taken and construed to mean that such notice shall or may be well and sufficiently given, if no newspaper is published at the time when the notice is to be given in the particular city, town, municipality, county, jurisdiction, or other place or district, as the case may be, by publishing or advertising the same in the newspaper that is published in the Province nearest to such city, town, municipality, county, jurisdiction, or other place or district, as the case may be; and, in every such Act, rule, regulation, or by-law, "newspaper" means a newspaper that has recognition as such by the Post Office Department and is accorded statutory privileges under section 23 of the *Post Office Act* of Canada, and that, in addition, is sold to the public and to regular subscribers upon a bona fide subscription list. R.S. 1948, c. 1, s. 33.

Effect of private Acts.

34. No Act of the nature of a private Act shall affect the rights of any person, or of any body politic, corporate, or collegiate (such only excepted as are therein mentioned or referred to). R.S. 1948, c. 1, s. 34.

Acts not to affect the Crown unless specially declared to do so.

35. No provision or enactment in any Act shall affect in any manner or way whatsoever the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby. R.S. 1948, c. 1, s. 35.

Reference aids not part of enactments.

10. Marginal notes, headings, and references after the end of a section or other division to former enactments form no part of the enactment, but shall be construed as being inserted for convenience of reference only.

Definitions and interpretation provisions.

11. Definitions or interpretation provisions in an enactment shall be construed as being applicable to the whole enactment including the section containing the definitions or interpretation provision.

Application of expressions in enactments to regulations.

12. Where an enactment confers power to enact regulations, expressions used in the regulations have the same respective meanings as in the enactment conferring the power.

Crown bound by enactments.

13. Unless an enactment otherwise specifically provides, every Act, and every enactment made thereunder, is binding on Her Majesty.

Proclamations.

14. (1) Where a Proclamation is issued pursuant to an order of the Lieutenant-Governor in Council, it is not necessary to mention in the Proclamation that it is issued pursuant to such an order.

(2) Where the Lieutenant-Governor in Council has authorized the issue of a Proclamation, the Proclamation may purport to have been issued on the day its issue was so authorized, and, subject to the *Regulations Act*, the day on which it so purports to have been issued shall be deemed to be the day on which the Proclamation takes effect.

(3) Where an Act is expressed to come into force on a day fixed by Proclamation, judicial notice shall be taken of the issue of the Proclamation and the day fixed thereby without being specially pleaded.

Corporate rights and powers.

15. Words in an enactment establishing a corporation shall be construed

(a) to vest in the corporation power
  (i) to sue in its corporate name;
  (ii) to contract and be contracted with by its corporate name;
  (iii) to have a common seal and to alter or change it at pleasure;
  (iv) to have perpetual succession;
  (v) to acquire and hold personal property or movables for the purposes for which the corporation is established and to alienate the same at pleasure; and
  (vi) to regulate its own procedure and business;

(b) to make the corporation liable to be sued in its corporate name;

(c) to vest in a majority of the members of the corporation the power to bind the others and the corporation by their acts;

(d) to exempt from personal liability for its debts, obligations, or acts such individual members of the corporation as do not contravene the provisions of the enactment establishing the corporation; and

INTERPRETATION ACT
[RSBC 1996] CHAPTER 238

Enactment remedial

8 Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

…

Government bound by enactments; exception

14(1) Unless it specifically provides otherwise, an enactment is binding on the government.

(2) Despite subsection (1), an enactment that would bind or affect the government in the use or development of land, or in the planning, construction, alteration, servicing, maintenance or use of improvements, as defined in the Assessment Act, does not bind or affect the government.

PUBLIC SERVICE BENEFIT PLAN ACT
[RSBC 1996] CHAPTER 386

Definitions for Part 2

9 In this Part and the regulations under it:

"contributor" means an employee who avails himself or herself of the coverage afforded by this Part and whose premium payments are in good standing;

"employee" means all of the following:

(a) a person in receipt of remuneration for services rendered to the government;

(b) a person who receives remuneration for services rendered to an employer within the meaning of the pension plan rules made under the Public Service Pension Plan, continued under the Public Sector Pension Plans Act, and who, with the consent of that employer, elects to have this Part apply to him or her;

(c) a person appointed to the Executive Council;

(d) members of the Legislative Assembly of British Columbia;

(e) a person who renders service, the remuneration for which is paid by a corporation, board, commission or authority that is an agent of the government, and to whom the Lieutenant Governor in Council declares this Part to apply;

"employer" means,

(a) in respect of an employee defined in paragraph (a), (c) or (d) of the definition of employee, the Minister of Finance,

(b) in respect of an employee defined in paragraph (b) of the definition of employee, the employer mentioned in that paragraph, and

(c) in respect of an employee defined in paragraph (e) of the definition of employee, the corporation, board, commission or authority that pays the remuneration.

INCOME TAX ACT
[RSBC 1996] CHAPTER 215

Enhanced tax credit for employers

124(1) In this section, "employee" means an employee, as defined in section 122 or 123, who

(a) is entitled to a deduction under section 118.3 (1) of the federal Act for the taxation year, or

(b) is registered as an Indian under the Indian Act (Canada).

(2) An eligible employer may claim a tax credit for a taxation year in respect of an employee in the amount of 50% of the total of the following:

(a) the amount the eligible employer may claim as a tax credit for the taxation year under section 122 [basic tax credit for employers] in respect of the employee;

(b) the amount the eligible employer may claim as a tax credit for the taxation year under section 123 [completion tax credit for employers] in respect of the employee.

ADMINISTRATIVE TRIBUNALS ACT
[SBC 2004] CHAPTER 45

Discretion to refer questions of law to court

43(1) The tribunal has jurisdiction to determine all questions of fact, law or discretion that arise in any matter before it, including constitutional questions.

(2) If a question of law, including a constitutional question, is raised by a party in a tribunal proceeding, on the request of a party or on its own initiative, at any stage of an application the tribunal may refer that question to the court in the form of a stated case.

(3) If a constitutional question is raised by a party in an application, on the request of the Attorney General, the tribunal must refer that question to the court in the form of a stated case.

(4) The stated case under subsection (2) or (3) must

(a) be prepared by the tribunal,

(b) be in writing,

(c) be filed with the court registry, and

(d) include a statement of the facts and relevant evidence.

(5) Subject to the direction of the court, the tribunal must

(a) to the extent that it is practicable in light of the stated case, proceed to hear and decide all questions except the questions raised in the stated case,

(b) suspend the application as it relates to the stated case and reserve its decision until the opinion of the court has been given, and

(c) decide the application in accordance with the opinion.

(6) A stated case must be brought on for hearing as soon as practicable.

(7) Subject to subsection (8), the court must hear and determine the stated case and give its decision as soon as practicable.

(8) The court may refer the stated case back to the tribunal for amendment or clarification, and the tribunal must promptly amend and return the stated case for the opinion of the court.

Chapter 1

Legal Personality of the Crown*

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§ 1:1 Generally

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§ 1:9 Executive and Legislative Power of the Crown

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§ 1:14 Prerogative Rights and the Civil Liability of the Crown
§ 1:15 Crown Immunity from Statute
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§ 1:28 Joint Venture and Other Relationships

VI. PRACTICE AND PLEADINGS

§ 1:29 Generally

These prerogatives were radically reduced by the 20th century enactment of Crown proceeding legislation, but some of them remain and will be discussed below.

§ 1:15 Crown Immunity from Statute

The most important remaining Crown prerogative (at least domestically) is presumptive Crown immunity from restrictive legislation,[1] and the closely aligned immunity from penal sanction.[2] While Parliament or the legislature clearly have the *capacity* to bind the Crown by their statutes, at common law the Crown is *presumed* not to be restrictively bound by legislation, unless expressly or by necessary implication, or unless the Crown has waived the immunity.[3] Although early law may have held that the immunity was limited to the exercise of (other) Crown prerogatives,[4] the current scope of immunity applies to any restrictive application of the statute. This common

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1973, c. P-18, s. 14(2); *Proceedings against the Crown Act*, R.S.N.S. 1989, c. 360, s. 16(2); *Crown Proceedings Act*, R.S.P.E.I. 1988, c. C-32, s. 13(2); *Proceedings Against the Crown Act*, R.S.N.L. 1990, c. P-26, s. 15(1). An injunction may be obtained against the Crown in a constitutional case. See *Lameman v. Alberta*, 2013 ABCA 148, 583 W.A.C. 44 (Alta. C.A.), at para. 40, and cases cited there.

[Section 1:15]

[1]There is a subtle dispute as to whether the immunity from statute is part of the Crown prerogative or a rule of statutory construction: see the speeches in *Madras Electric Supply Corp. v. Boarland (Inspector of Taxes)*, [1955] A.C. 667 (H.L.), for various views of this question, all apparently in *obiter*. C.H. McNairn, Governmental and Intergovernmental Immunity in Canada and Australia (Toronto: University of Toronto Press, 1977), at pp. 3–4, argues that these two characterizations are consistent. We prefer to treat statutory immunity as an aspect of the Crown prerogative, because unlike any other "rule of construction", it can be waived as a matter of the executive act of the Crown. However, *Boarland* does make clear that the immunity need not be specifically asserted by the Crown.

[2]See § 1:17 "Crown Immunity from Penal Sanction".

[3]*Bombay (Province) v. Bombay (City)*, [1947] A.C. 58 (P.C.) ("*Bombay*"). The formulation in the text above has been adopted by the Federal Court of Appeal in *Toney v. Royal Canadian Mounted Police*, 2013 CarswellNat 3339, 2013 FCA 217 (F.C.A.), at para. 11. See C.H. McNairn, *Governmental and Intergovernmental Immunity in Australia and Canada* (Toronto: University of Toronto Press, 1977), for an exhaustive discussion of this subject, and of the related constitutional immunity of the Crown in right of Canada to provincial statutes. See also P. Hogg and P. Monahan, *Liability of the Crown*, 3d ed. (Toronto, ON: Carswell, 2000), c. 11, and ed. P. Lordon, *Crown Law* (Toronto and Vancouver: Butterworths, 1991), c. 4.

[4]H. Street, "The Effect of Statutes upon the Rights and Liabilities of the Crown" (1948), 7 U.T.L.J. 357. In *R. v. Eldorado Nuclear Ltd.*, [1983] 2

law rule has been embodied in the federal[5] and provincial[6] Interpretation Acts, except for those of British Columbia[7] and Prince Edward Island,[8] which have abolished presumptive Crown immunity from statute.

The principles governing rebuttal of the presumption against binding the Crown in a statute are very similar under the Interpretation Acts, as they were under the common law as set out in *Bombay*,[9] and no attempt at a distinction will be made here.

Express binding can come in two forms: either the phrase "The Crown is bound" (or equivalent words) or a clear intention to bind the Crown manifest from the terms of the statute in context.[10] There is not much case law on what counts as "express" binding. The Federal Court of Appeal has held that the phrase "between subject and subject *as well as otherwise*" does not expressly give the Federal Court jurisdiction over the provincial Crown.[11]

A law will only be considered to bind the Crown by necessary

S.C.R. 551 at p. 557, 4 D.L.R. (4th) 193, 1 O.A.C. 243, 7 Admin. L.R. 195, 8 C.C.C. (3d) 449, 77 C.P.R. (2d) 1, 50 N.R. 120, Dickson J. comments that Street makes a "persuasive case", but that the current common law immunity is much broader.

[5]*Interpretation Act*, R.S.C. 1985, c. I-21, s. 16.

[6]*Interpretation Act*, R.S.A. 2000, c. I-8, s. 14; *Interpretation Act, 1995*, S.S. 1995, c. I-11.2, s. 14; *Interpretation Act*, C.C.S.M., c. I80, s. 49; *Legislation Act*, S.O. 2006, c. 21, Sch. F, s. 71; *Loi d' Interpretation*, R.S.Q., c. I-16, s. 42; *Interpretation Act*, R.S.N.B. 1973, c. I-13, s. 32; *Interpretation Act*, R.S.N.S. 1989, c. 235, s. 14; *Interpretation Act*, R.S.N.L. 1990, c. I-19, s. 12.

[7]*Interpretation Act*, R.S.B.C. 1996, c. 238, s. 14.

[8]*Interpretation Act*, R.S.P.E.I. 1988, c. I-8, s. 14.

[9]*Alberta Government Telephones v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 2 S.C.R. 225, 61 D.L.R. (4th) 193, [1989] 5 W.W.R. 385, 68 Alta. L.R. (2d) 1, 26 C.P.R. (3d) 289, 98 N.R. 161 *sub nom.* CNCP Telecommunications v. Alberta Government Telephones and CRTC, 16 A.C.W.S. (3d) 421, *sub nom.* Alta. Govt. Tel. v. C.R.T.C., at paras. 129–130 ("*A.G.T.*").

[10]*R. v. Ouellette*, [1980] 1 S.C.R. 568, at p. 575, 111 D.L.R. (3d) 216, 52 C.C.C. (2d) 336, 14 C.R. (3d) 74, 32 N.R. 361 (*Criminal Code* provisions on costs impliedly bind Crown); *Alberta Government Telephones v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 2 S.C.R. 225, 61 D.L.R. (4th) 193, [1989] 5 W.W.R. 385, 68 Alta. L.R. (2d) 1, 26 C.P.R. (3d) 289, 98 N.R. 161 *sub nom.* CNCP Telecommunications v. Alberta Government Telephones and CRTC, 16 A.C.W.S. (3d) 421, *sub nom.* Alta. Govt. Tel. v. C.R.T.C., at para. 130.

[11]*Toney v. Royal Canadian Mounted Police*, 2013 CarswellNat 3339, 2013 FCA 217 (F.C.A.).

implication if it is apparent that the statute's purpose would be "wholly frustrated" unless the Crown is bound.[12] Not including the Crown within the scope of persons bound by the statute must result in an "absurdity", not just an undesirable result.[13] The Crown will not be bound as a result of the application of a rule of construction like *expressio unius est exclusio alterius.*[14] At the same time, the Supreme Court of Canada has warned that context must not be too narrowly construed, and must include the circumstances which led to the enactment of the statute and the mischief to which it was directed.[15] The provinces have been held to be bound to the Federal *Navigable Waters Protection Act*, notwithstanding the lack of any express

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[12]*Bombay (Province) v. Bombay (Municipal Corp. of City of)*, [1947] A.C. 58 (P.C.), at p. 63. Adopted in *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551, at p. 557, 4 D.L.R. (4th) 193, 1 O.A.C. 243, 7 Admin. L.R. 195, 8 C.C.C. (3d) 449, 77 C.P.R. (2d) 1, 50 N.R. 120.

[13]*Alberta Government Telephones v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 2 S.C.R. 225, 61 D.L.R. (4th) 193, [1989] 5 W.W.R. 385, 68 Alta. L.R. (2d) 1, 26 C.P.R. (3d) 289, 98 N.R. 161 *sub nom.* CNCP Telecommunications v. Alberta Government Telephones and CRTC, 16 A.C.W.S. (3d) 421, *sub nom.* Alta. Govt. Tel. v. C.R.T.C., at p. 281. See *Wanhella v. Agricultural Credit Corp. of Saskatchewan* (1988), 68 Sask. R. 146, 10 A.C.W.S. (3d) 220 (Q.B.) (legislated exemptions from foreclosure not binding against the Crown); *Investors Group Trust Co. v. Eckhoff* (2006), 283 Sask. R. 94, [2006] 5 C.T.C. 123, 151 A.C.W.S. (3d) 604, 2006 SKQB 368 (Q.B.), revd on other grounds, 2008 SKCA 18.

[14]*IBEW v. Alberta Government Telephones*, [1989] 2 S.C.R. 318, at p. 329, [1989] 5 W.W.R. 455, 68 Alta. L.R. (2d) 71, 98 N.R. 264 *sub nom.* Alberta Government Telephones and Alberta (Attorney General) v. Canada Labour Relations Board and International Brotherhood of Electrical Workers, Local 348, 16 A.C.W.S. (3d) 369. Although see *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1, [1992] 2 W.W.R. 193, 84 Alta. L.R. (2d) 129, 3 Admin. L.R. (2d) 1, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 31 A.C.W.S. (3d) 250, 48 F.T.R. 160*n*, at para. 76 ("*Oldman River*") ("By expressly excepting from the operation of the Act works authorized by Parliament since Confederation and by pre-Confederation provincial legislatures, at a time these bodies had power to interfere with navigation, the statute by necessary implication must be taken to provide that post-Confederation works undertaken by the provinces are subject to the Act").

[15]*IBEW v. Alberta Government Telephones*, [1989] 2 S.C.R. 318, at p. 329, [1989] 5 W.W.R. 455, 68 Alta. L.R. (2d) 71, 98 N.R. 264 *sub nom.* Alberta Government Telephones and Alberta (Attorney General) v. Canada Labour Relations Board and International Brotherhood of Electrical Workers, Local 348, 16 A.C.W.S. (3d) 369. Although see *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1, [1992] 2 W.W.R. 193, 84 Alta. L.R. (2d) 129, 3 Admin. L.R. (2d) 1, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 31 A.C.W.S. (3d) 250, 48 F.T.R. 160*n*, at para. 66.

provision including them, on the basis that to do otherwise would "effectively emasculate" the legislative purpose.[16]

The Crown may waive its immunity to statute by conduct. The principal manner in which this waiver comes about is that the Crown takes a benefit of a particular statute in such a way that the courts will not permit it to refuse a corresponding burden.[17] In *Sparling*, the Supreme Court of Canada endorsed the formulation of this exception in the first edition of Professor Hogg's book, as well as the formulation in Professor McNairn's work:

> The restrictions [on a statutory right] are regarded as restrictions on the right itself, and if the Crown could disregard them it would receive a larger right than the statute actually conferred. In other words all of the statutory provisions affecting a right to which the Crown claims title are interpreted as if they were advantageous to the Crown . . . [T]here is no room for the rule requiring express words or necessary implication.[18]
>
> By taking advantage of legislation the crown will be treated as having assumed the attendant burdens, though the legislation has not been made to bind the crown expressly or by necessary implication. The force of the rule of immunity is avoided by the particular conduct of the crown and the integrity of the relevant statutory provisions, beneficial and prejudicial.[19]

In *Sparling*, the Caisse, as agent of the Crown in right of

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[16]*IBEW v. Alberta Government Telephones*, [1989] 2 S.C.R. 318, at p. 329, [1989] 5 W.W.R. 455, 68 Alta. L.R. (2d) 71, 98 N.R. 264 *sub nom.* Alberta Government Telephones and Alberta (Attorney General) v. Canada Labour Relations Board and International Brotherhood of Electrical Workers, Local 348, 16 A.C.W.S. (3d) 369. Although see *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1, [1992] 2 W.W.R. 193, 84 Alta. L.R. (2d) 129, 3 Admin. L.R. (2d) 1, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 31 A.C.W.S. (3d) 250, 48 F.T.R. 160*n*, at para. 81.

[17]*Sparling v. Québec (Caisse de Dépôt et Placement)*, [1988] 2 S.C.R. 1015, 55 D.L.R. (4th) 63, 20 Q.A.C. 174, 41 B.L.R. 1 *sub nom.* Sparling v. Québec (Caisse de Dépôt & Placement du Qué.), 89 N.R. 120, *sub nom.* Sparling v. Quebec, 13 A.C.W.S. (3d) 13, at para. 13 ("*Sparling*").

[18]P.W. Hogg, *Liability of the Crown in Australia, New Zealand and the United Kingdom* (Sydney: Law Book Co., 1971), at p. 183. Ellipses and editorial additions are those of the Supreme Court of Canada in *Sparling v. Québec (Caisse de Dépôt et Placement)*, [1988] 2 S.C.R. 1015, 55 D.L.R. (4th) 63, 20 Q.A.C. 174, 41 B.L.R. 1 *sub nom.* Sparling v. Québec (Caisse de Dépôt & Placement du Qué.), 89 N.R. 120, *sub nom.* Sparling v. Quebec, 13 A.C.W.S. (3d) 13, at para. 18.

[19]C.H. McNairn, *Governmental and Intergovernmental Immunity in Australia and Canada* (Toronto: University of Toronto Press, 1977), at p. 10, as cited in *Sparling v. Québec (Caisse de Dépôt et Placement)*, [1988] 2 S.C.R. 1015, 55 D.L.R. (4th) 63, 20 Q.A.C. 174, 41 B.L.R. 1 *sub nom.* Sparling v. Québec (Caisse de Dépôt & Placement du Qué.), 89 N.R. 120, *sub nom.*

Québec, argued that it had prerogative immunity from the insider trading provisions of the federal *Canada Business Corporations Act*, S.C. 1974-75-76, c. 33. In rejecting this argument, the Supreme Court of Canada reasoned that a share is a bundle of rights and liabilities defined by statutory corporate law.[20] As a result, a Crown agent buying a share must take all of these obligations.

The court in *Sparling* rejected the proposition that its approach amounted to swallowing up the rule of Crown immunity in the exception.[21] In *A.G.T.*, it stated that not every benefit taken from a statute would lead to waiver.[22] The key is the degree of linkage (or "nexus") between the statutory right the Crown takes advantage of, and the attendant burden. The burden need not be in the same statute as the benefit,[23] but the use of the statute cannot be purely "passive" or "defensive".[24]

In practice, the distinction between burdens with a close nexus to benefits and those without such a nexus is a difficult one to make. A comprehensive code governing a type of contract may mean that all of its provisions are binding on the Crown

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Sparling v. Quebec, 13 A.C.W.S. (3d) 13, at para. 18.

[20]*Sparling v. Québec (Caisse de Dépôt et Placement)*, [1988] 2 S.C.R. 1015, 55 D.L.R. (4th) 63, 20 Q.A.C. 174, 41 B.L.R. 1 *sub nom.* Sparling v. Québec (Caisse de Dépôt & Placement du Qué.), 89 N.R. 120, *sub nom.* Sparling v. Quebec, 13 A.C.W.S. (3d) 13, at paras. 23–25.

[21]*Sparling v. Québec (Caisse de Dépôt et Placement)*, [1988] 2 S.C.R. 1015, 55 D.L.R. (4th) 63, 20 Q.A.C. 174, 41 B.L.R. 1 *sub nom.* Sparling v. Québec (Caisse de Dépôt & Placement du Qué.), 89 N.R. 120, *sub nom.* Sparling v. Quebec, 13 A.C.W.S. (3d) 13, at para. 28.

[22]*Alberta Government Telephones v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 2 S.C.R. 225, 61 D.L.R. (4th) 193, [1989] 5 W.W.R. 385, 68 Alta. L.R. (2d) 1, 26 C.P.R. (3d) 289, 98 N.R. 161 *sub nom.* CNCP Telecommunications v. Alberta Government Telephones and CRTC, 16 A.C.W.S. (3d) 421, *sub nom.* Alta. Govt. Tel. v. C.R.T.C., at para. 142 ("*A.G.T.*") ("At common law, the Crown can gain advantages from a statute without necessarily waiving its immunity therefrom").

[23]C.H. McNairn, *Governmental and Intergovernmental Immunity in Australia and Canada* (Toronto: University of Toronto Press, 1977), at p. 11, as cited in *Sparling v. Québec (Caisse de Dépôt et Placement)*, [1988] 2 S.C.R. 1015, 55 D.L.R. (4th) 63, 20 Q.A.C. 174, 41 B.L.R. 1 *sub nom.* Sparling v. Québec (Caisse de Dépôt & Placement du Qué.), 89 N.R. 120, *sub nom.* Sparling v. Quebec, 13 A.C.W.S. (3d) 13, at para. 21.

[24]C.H. McNairn, *Governmental and Intergovernmental Immunity in Australia and Canada* (Toronto: University of Toronto Press, 1977), at pp. 11–12, as cited in *Sparling v. Québec (Caisse de Dépôt et Placement)*, [1988] 2 S.C.R. 1015, 55 D.L.R. (4th) 63, 20 Q.A.C. 174, 41 B.L.R. 1 *sub nom.* Sparling v. Québec (Caisse de Dépôt & Placement du Qué.), 89 N.R. 120, *sub nom.* Sparling v. Quebec, 13 A.C.W.S. (3d) 13, at para. 28.

when it enters into such contracts.[25] Participating in a discovery process has been found to be sufficient to waive any remaining immunities from court rules.[26] On the other hand, the Ontario Court of Appeal has held that there is no sufficient connection between the benefits of a building permit under a provincial Building Code and the permit fees.[27] The Supreme Court of Canada denied any close connection between merely entering a federally regulated industry and liability to federal labour relations statutes,[28] or between inter-connecting a telephone network by inter-provincial agreement with fellow members of a federally regulated inter-provincial association and allowing a non-member to connect to its network.[29] Registering an interest in land with a land title office is not enough to bind the Crown to other provisions of such a statute,[30] nor is simply registering a security interest enough to waive Crown priorities.[31]

The Crown is only exempted from restrictive legislation. The Crown is entitled to the benefit and protection of statutes, without the need for express language,[32] although if the statute on its own terms expressly or implicitly excludes the Crown

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[25]*Bank of Montreal v. Quebec (Attorney General)*, [1979] 1 S.C.R. 565, 96 D.L.R. (3d) 586, 25 N.R. 330 *sub nom.* Prov. of Quebec v. Bank of Montreal (Crown bound by notice provisions of Civil Code in relation to forged cheques).

[26]*Nova Scotia (Attorney General) v. Royal & Sun Alliance Insurance Co. of Canada* (2005), 233 N.S.R. (2d) 280, 23 C.C.L.I. (4th) 229, 11 C.P.C. (6th) 272, 139 A.C.W.S. (3d) 841, 2005 NSSC 126 (S.C.).

[27]*Collège d'Arts Appliqués et de Technologie La Cité Collégiale v. Ottawa (City)* (1998), 157 D.L.R. (4th) 73, 37 O.R. (3d) 737, 107 O.A.C. 144, 5 Admin. L.R. (3d) 166, 5 Admin. L.R. (3d) 166, 45 M.P.L.R. (2d) 187, 77 A.C.W.S. (3d) 646 (C.A.).

[28]*IBEW v. Alberta Government Telephones*, [1989] 2 S.C.R. 318, [1989] 5 W.W.R. 455, 68 Alta. L.R. (2d) 71, 98 N.R. 264 *sub nom.* Alberta Government Telephones and Alberta (Attorney General) v. Canada Labour Relations Board and International Brotherhood of Electrical Workers, Local 348, 16 A.C.W.S. (3d) 369.

[29]*Alberta Government Telephones v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 2 S.C.R. 225, 61 D.L.R. (4th) 193, [1989] 5 W.W.R. 385, 68 Alta. L.R. (2d) 1, 26 C.P.R. (3d) 289, 98 N.R. 161 *sub nom.* CNCP Telecommunications v. Alberta Government Telephones and CRTC, 16 A.C.W.S. (3d) 421, *sub nom.* Alta. Govt. Tel. v. C.R.T.C.

[30]*Canada (Director of Soldier Settlement) v. Alberta (North Alberta Land Registration District)*, [1984] A.J. No. 756 (Q.B.).

[31]*Workers' Compensation Board v. New Brunswick and Federal Business Development Bank* (1985), 21 D.L.R. (4th) 379, 64 N.B.R. (2d) 58 (C.A.).

[32]*Alberta Government Telephones v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 2 S.C.R. 225, 61 D.L.R. (4th)

from its scope, the Crown cannot take advantage of it.[33] One interesting issue is whether legislation governing presumptive contractual terms can be said to be restrictive, if the Crown could, but does not, seek to change them at the time of contract formation. These provisions could be said to restrictive at the time of contractual breach if they work against the interests of the Crown, but on a broader view, they would not be restrictive at all if the Crown could have contracted out of them. In *Gauthier*, the Supreme Court of Canada held that the Crown could revoke an arbitration agreement (as parties were entitled to do at common law), notwithstanding provincial legislation to the contrary. However, in *Dominion Building Corp.*, the Privy Council held that the immunity applied only to the accrued rights of the Crown, and so applied a provincial statute making time not of the essence (unless the parties agreed to make it so). Although the differences between *Gauthier* and *Dominion Building Corp.* have never been definitively resolved, subsequent cases have followed *Dominion Building Corp.* in holding the Crown to the background statutory rules governing its contracts, where it did not try to alter these by agreement.[34] Although these cases have typically been analyzed in terms of "waiver", such statutes might also be thought not to be restrictive.

The principle of Crown immunity from statute has been widely criticized.[35] There may be good policy reasons for government immunities in particular circumstances. However, it is easy for a government convinced that the Crown needs to be exempted from the provisions of legislation to write such an exemption into the legislation. The main difference with a blan-

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193, [1989] 5 W.W.R. 385, 68 Alta. L.R. (2d) 1, 26 C.P.R. (3d) 289, 98 N.R. 161 *sub nom.* CNCP Telecommunications v. Alberta Government Telephones and CRTC, 16 A.C.W.S. (3d) 421, *sub nom.* Alta. Govt. Tel. v. C.R.T.C., at para. 135.

[33]*Hamilton v. The King* (1917), 54 S.C.R. 331, 35 D.L.R. 226; *Nisbet Shipping Co. v. The Queen*, [1955] 4 D.L.R. 1 (P.C.).

[34]*Bank of Montreal v. Quebec (Attorney General)*, [1979] 1 S.C.R. 565, 96 D.L.R. (3d) 586, 25 N.R. 330 *sub nom.* Prov. of Quebec v. Bank of Montreal.

[35]*R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551, at p. 558, 4 D.L.R. (4th) 193, 1 O.A.C. 243, 7 Admin. L.R. 195, 8 C.C.C. (3d) 449, 77 C.P.R. (2d) 1, 50 N.R. 120 ("Why that presumption [of Crown immunity from statute] should be made is not clear. It seems to conflict with basic notions of equality before the law. The more active government becomes in activities that had once been considered the preserve of private persons, the less easy it is to understand why the Crown need be, or ought to be, in a position different from the subject"); P.W. Hogg and P.J Monahan, *Liability of the Crown*, 3d ed. (Toronto: Butterworths, 2000), at pp. 326–9.

ket presumptive immunity is that the Crown need not think about whether an immunity is justified in a particular case, and it need not make matters explicit to the opposition, the media and the voters — neither of which seem like good reasons to keep a blanket immunity. However, the courts have been clear that any reform must come from the legislatures and not from them.[36] So far, only British Columbia and Prince Edward Island have chosen to reform Crown immunity.

§ 1:16 Crown Immunity from Statute—Federal Crown Immunity from Provincial Statute

The common law immunity of the Crown from legislation applies to the Crown in right of all jurisdictions, federal and provincial, including the Crown in right of jurisdictions other than the one enacting the statute.[1] So, at common law, the Crown in right of Alberta is immune from federal statutes, and the Crown in right of Quebec is immune from Ontario statutes. As Professor McNairn put it, in words subsequently endorsed by the Supreme Court of Canada:

> In a federal system it makes some sense to put the onus on a legislature to specially include the other level of government within its enactments if they are to so extend in a restrictive way. This preserves a degree of freedom to the various political units within the federation that is consistent with their mutual independence.[2]

Professor McNairn has referred to the immunity of the

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[36]*Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, 71 D.L.R. (4th) 193, [1990] 5 W.W.R. 97, 67 Man. R. (2d) 81, [1990] 3 C.N.L.R. 46, 110 N.R. 241, 21 A.C.W.S. (3d) 1244, at para. 64.

[Section 1:16]

[1]*Alberta Government Telephones v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 2 S.C.R. 225, 61 D.L.R. (4th) 193, [1989] 5 W.W.R. 385, 68 Alta. L.R. (2d) 1, 26 C.P.R. (3d) 289, 98 N.R. 161 *sub nom.* CNCP Telecommunications v. Alberta Government Telephones and CRTC, 16 A.C.W.S. (3d) 421, *sub nom.* Alta. Govt. Tel. v. C.R.T.C., at para. 113 ("*A.G.T.*") (Crown immunity under Federal *Interpretation Act* applies to Agent of Crown in right of Alberta); *Athabasca Chipewyan First Nation v. Canada (Minister of Indian Affairs and Northern Development)* (2001), 199 D.L.R. (4th) 452, [2001] 8 W.W.R. 419, 281 A.R. 38, 93 Alta. L.R. (3d) 1, 30 Admin. L.R. (3d) 87, [2001] 3 C.N.L.R. 8, 7 C.P.C. (5th) 1, 248 W.A.C. 38, 105 A.C.W.S. (3d) 77, 2001 ABCA 112 (Alta. C.A.), at para. 27 (Crown immunity in Alberta applies to Government of British Columbia).

[2]C. McNairn in "Comment" (1978), 56 Can. Bar Rev. 145, at p. 150, cited in *Alberta Government Telephones v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 2 S.C.R. 225, 61 D.L.R. (4th) 193, [1989] 5 W.W.R. 385, 68 Alta. L.R. (2d) 1, 26 C.P.R. (3d) 289,

[1] The rule

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CHAPTER 7 Plausible Meaning

§ 7.02 The Plausible Meaning Rule

[1] The rule

Under the modern principle, a court's primary duty is to harmonize the ordinary meaning of the text with the other indicators of legislative intent gleaned from reading the text in its entire context. However, reliance on these other indicators is subject to the following constraint: the interpretation ultimately adopted must be one that the words of the text can reasonably bear. This is the plausible meaning rule.

In *Re: Sound v. Motion Picture Theatre Associations of Canada*, LeBel J. wrote: "Although statutes may be interpreted purposively, the interpretation must nevertheless be consistent with the words chosen by Parliament."[1]

In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, Charron J. wrote: "... The Court cannot disregard the actual words chosen by Parliament and rewrite the legislation to accord with its own view of how the legislative purpose could be better promoted."[2]

In *Saulnier v. Royal Bank of Canada*, Binnie J. wrote: "... We cannot wish away the statutory language however much practical sense is reflected in the result reached by the courts below."[3]

These are all expressions of the plausible meaning rule.

Footnote(s)

1 *[2012] S.C.J. No. 38*, *2012 SCC 38* at para. 33 (S.C.C.).

2 *[2011] S.C.J. No. 25*, *2011 SCC 25* at para. 40 (S.C.C.).

3 *[2008] S.C.J. No. 60*, *2008 SCC 58* at para. 15 (S.C.C.). See also *Ruby v. Canada (Solicitor General)*, *[2002] S.C.J. No. 73*, *[2002] 4 S.C.R. 3* at para. 58 (S.C.C.); *Ivanhoe Inc. v. United Food and Commercial Workers, Local 500*, *[2001] S.C.J. No. 47*, *[2001] 2 S.C.R. 565* at para. 153 (S.C.C.); *Berardinelli v. Ontario Housing Corp.*, *[1978] S.C.J. No. 86*, *[1979] 1 S.C.R. 275* at 284 (S.C.C.); *Hess v. Thomas Estate*, *[2019] S.J. No. 99*, *2019 SKCA 26* at paras. 50-51 (Sask. C.A.); *Holt v. Saskatchewan Government Insurance*, *[2018] S.J. No. 23*, *2018 SKCA 7* at paras. 70-71 (Sask. C.A.); *Postma v. Horizon Helicopters Ltd.*, *[2016] Y.J. No. 103*, *2016 YKCA 12* at 32*ff* (Y.T.C.A.).

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[3] Purposive analysis vs. a purposive approach

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CHAPTER 9 Purposive Analysis

§ 9.01 Introduction

[3] Purposive analysis vs. a purposive approach

Purposive analysis as described in this chapter differs from what is sometimes called a purposive approach to interpretation. Under the modern principle, an interpreter must always carry out an analysis to determine the relevant purpose or mix of purposes, but the results of this analysis are not necessarily controlling. Purpose is not inherently more important than other contextual factors, and purpose cannot ordinarily be relied on to justify adopting an implausible interpretation.

Under a purposive approach, by contrast, the purpose or mix of purposes identified by the interpreter is the primary concern and other indicators of legislative intent, including the words of the text, are subordinate. The purposive approach is thus a reincarnation of equitable construction.[1] This is well described by Justice Shamgar in the following passage quoted by L'Heureux-Dubé J. in *R. v. St. Pierre*:

> [L]anguage does not govern the purpose, rather it serves it. The law is an instrument for realizing legal policy, and therefore interpretation needs to aim toward emancipating the wording from its semantic bonds, were these to distance it from the legislative purpose which the words are intended to realize.[2]

There are examples in Canadian case law in which courts arguably have adopted a purposive approach. In *Canada (Attorney-General) v. Xuan*,[3] for example, the Federal Court of Appeal held that an exception applicable to persons "confined in any jail, penitentiary or other similar institution" applied to a person who was prohibited by Chinese officials from leaving a city in China and returning to Canada. In *R. v. Monney*,[4] the Supreme Court of Canada held that believing a person has swallowed condoms containing heroin amounts to a belief that the person has drugs "secreted on or about his person" and detaining him in a "drug loo facility" amounts to "searching" him. In justifying these outcomes, neither court suggested that the semantic bonds of the text should give way to ensure that the legislature's purpose is achieved. Both purported to interpret the language of the text as written. Thus in *Xuan* the Court objected to the opposing argument because "it focuses exclusively on the words 'institution' at the expense of the word 'confined'."[5] In *Monney*, the Court objected to the lower court's focus on the words "on or about" and emphasized the word "secreted".[6] In these cases the courts do not interpret the language in light of purpose so much as ensure the purpose is achieved, regardless of the limiting language used by the legislature.

Generally speaking, Canadian courts decline to adopt a purposive approach. In *University of British Columbia v. Berg*, for example, after noting the importance of interpreting human rights legislation in a purposive way, Lamer C.J. wrote:

> This ... does not give a board or court license to ignore the words of the Act in order to prevent discrimination wherever it is found. While this may be a laudable goal, the legislature has stated, through the limiting words in s. 3, that some relationships will not be subject to scrutiny under human rights legislation. It is the duty of boards and courts to give s. 3 a liberal and purposive construction, without reading the limiting words out of the Act or otherwise circumventing the intention of the legislature.[7]

Footnote(s)

1 For an explanation of equitable construction, see § 2.02[1].

[3] Purposive analysis vs. a purposive approach

2 Per Justice Shamgar, President of the Supreme Court of Israel, quoted by L'Heureux-Dubé J. in *R. v. St. Pierre*, *[1995] S.C.J. No. 23*, *[1995] 1 S.C.R. 791* at 839 (S.C.C.).

3 *[1994] F.C.J. No. 76*, *111 D.L.R. (4th) 551* (F.C.A.).

4 *[1999] S.C.J. No. 18*, *[1999] 1 S.C.R. 652* (S.C.C.).

5 *Canada (Attorney-General) v. Xuan*, *[1994] F.C.J. No. 76*, *111 D.L.R. (4th) 551* at 557 (F.C.A.).

6 *R. v. Monney*, *[1999] S.C.J. No. 18*, *[1999] 1 S.C.R. 652* at paras. 26*ff* (S.C.C.).

7 *[1993] S.C.J. No. 55*, *[1993] 2 S.C.R. 353* at 371 (S.C.C.). See also *Bastien Estate v. Canada*, *[2011] S.C.J. No. 38*, *2011 SCC 38* at para. 25 (S.C.C.); *Barrie Public Utilities v. Canadian Cable Television Association*, *[2003] S.C.J. No. 27*, *2003 SCC 28* at para. 42 (S.C.C.).

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[6] Governing principle

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[6] Governing principle

Although the courts do not expressly say so, their practice appears to be guided by the following principle: the more compelling the absurdity to be avoided, the greater the departure from ordinary meaning that is tolerated; conversely, the clearer the language of the text, the greater the absurdity required to justify departure from its apparent meaning. If the language is relatively precise and clear, it receives considerable weight.[1] If the absurdity is relatively obvious and intolerable, most courts will strain language to avoid it and some courts will go further and significantly alter the legislative text.

Footnote(s)

1 See, for example, *Hess v. Thomas Estate*, *[2019] S.J. No. 99*, *2019 SKCA 26* at paras. 54-55 (Sask. C.A.).

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