

Citation: Rogenbogen, Sonia & Christopher Pigott, “Constitutional Restrictions on the Capacity of Governments to Enact Reforms: Does Section 2(d) of the Charter Include a Right to Strike?” (2013) 17:2 CLELJ 449

Abstract: This paper considers the likelihood of whether freedom of association under section 2(d) of the *Charter* will be held to include a constitutional right to strike – a question which the Supreme Court of Canada will have an opportunity to answer when it hears the upcoming appeal in the *Saskatchewan Federation of Labour* case. The authors note that the prospects for the recognition of such a right have changed dramatically in the five years since the Supreme Court concluded in *B.C. Health* that the *Charter* provided protection for a limited process of collective bargaining. The main reason for this shift is the Court’s subsequent decision in the Fraser case, holding that collective bargaining is merely a “derivative right” of freedom of association and that an infringement of section 2(d) in the labour relations context will be found only where the impugned legislation or state action has the effect of making it “impossible” for employees to collectively pursue workplace goals. The authors go on to review how this “effective impossibility” test has been applied by appellate courts in Ontario, British Columbia and the federal jurisdiction in recent freedom of association claims. In their view, the restrictive approach now taken by the courts makes it highly unlikely that section 2(d) will be found to protect a right to strike. Even if strike activity is held to attract constitutional protection, they argue, such protection would apply only in very limited situations.