

Judicial Development of Collective Labour Rights – Contextually

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The Supreme Court of Canada's decision in B.C. Health, holding that collective bargaining attracts Charter protection, emphasizes the importance of context in constitutional interpretation. The author agrees with the Court in looking to context as part of a purposive approach to interpretation of laws, and he argues that such an approach can be compared to the way in which labour laws have been developed in Israel — a country which, in his view, is a useful source of comparative law for Canada. In an effort to respond to changing realities in the labour market and labour relations (most notably the weakening of trade unions), Israeli judges have in recent years created a number of collective rights in the area of freedom of association, collective bargaining, and strikes. On the basis of the experience of Israeli courts in developing new workplace protections where they are needed, the author contends that the Supreme Court of Canada should now take the next step and extend Charter protection to the right to strike.

1. INTRODUCTION

The decision of the Supreme Court of Canada in *B.C. Health*,¹ which raised the right to collective bargaining to a constitutional level, relies heavily on a “contextual” analysis. Earlier precedents (most notably the 1987 “Labour Trilogy”²), which the Court explicitly overruled, are criticized for adopting a “decontextualized approach.”³ The Court goes on to insist on sensitivity to context, both

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1 *Health Services and Support-Facilities Subsector Bargaining Ass'n v. British Columbia*, [2007] 2 S.C.R. 391.

2 *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313; *P.S.A.C. v. Canada*, [1987] 1 S.C.R. 424; *R.W.D.S.U. v. Saskatchewan*, [1987] 1 S.C.R. 460. Also overruled was *P.I.P.S.C. v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367.

3 *Supra*, note 1, at para. 30.

at the stage of deciding whether the constitutional right has been infringed⁴ and at the stage of deciding whether the infringement can be justified.⁵

The idea of interpreting a constitutional right (specifically, the guarantee of freedom of association under s. 2(d) of the *Canadian Charter of Rights and Freedoms*) in the light of “context” is strongly criticized by Brian Langille,⁶ who fears it will result in judicial overreach. Langille raises two related concerns. First, he is concerned that courts will intervene in the details of labour law, noting that this has proven to be highly problematic in the past in Canada.⁷ However, his argument is itself highly contextual. It relies on the specific experience of Canadian labour law with ill-advised interventions by courts as a basis for advising against such interventions in the future. But there is nothing in principle to suggest that judges are less capable of developing the law in the area of labour than in other areas. Indeed, as I will show below, in other countries (and specifically in Israel, which is the example I will use) judges have proven to be more adept than legislatures at responding to labour market developments.

Second, and more fundamentally, Langille objects to the idea of turning a “freedom” (to organize, or to bargain together with others) into a “right” which imposes corresponding duties on others. He also objects to the idea of “collective,” as opposed to individual, rights. However, once again there is no principled or theoretical reason to limit constitutional protection (whether in the labour law context or

4 Namely, whether s. 2(d) of the *Canadian Charter of Rights and Freedoms*, which expressly protects freedom of association, has been violated.

5 Namely, whether the infringement is “demonstrably justified in a free and democratic society,” within the meaning of s. 1 of the *Charter*. This has been held to require, among other things, “minimal impairment” and proportionality.

6 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, at pp. 202-203.

7 Objection to constitutional intervention in labour law has been common among Canadian labour law scholars. For a prominent example, see P.C. Weiler, “The *Charter* at Work: Reflections on the Constitutionalizing of Labour and Employment Law” (1990), 40 *U.T.L.J.* 117. For a more optimistic view of the potential of *Charter* litigation to improve labour laws, see D.M. Beatty, *Putting the Charter to Work: Designing a Constitutional Labour Code* (McGill-Queen’s University Press, 1987).

generally) to individual freedoms. The rich literature supporting social and economic rights shows that there is no clear distinction between “negative” freedoms and “positive” rights, and that rights sometimes remain illusory if there is no positive obligation on the state to promote them.⁸ There are similarly strong arguments in favour of recognizing collective rights alongside individual ones.⁹ This is not to suggest that freedom of association *must* be understood as a collective or positive right — just that there is no analytical reason to impose the opposite understanding. At the end of the day, it is open to each society to decide whether to constitutionalize positive and collective rights. If courts are left with the task of deciding how to interpret a constitutional right, they should consider the *purpose* of the relevant provision. Judges in most countries (with the notable exception of the United States) do not place great importance on the original (historic) intent, but rather look to general purposes and justifications that could change over time. In other words, interpretation involves consideration of the *context*.¹⁰

When making decisions on the scope of freedom of association, it is appropriate to consider, among other things, the relevant history and culture, and whether there is constitutional protection for property rights on the one hand and equality on the other. As part of this

8 See, e.g., C. Scott & P. Macklem, “Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution” (1992), 141 U. Pa. L. Rev. 1; M. Tushnet, “Civil Rights and Social Rights: The Future of the Reconstruction Amendments” (1992), 25 Loy. L. Rev. 1207; D. Davis, P. Macklem & G. Mundlak, “Social Rights, Social Citizenship and Transformative Constitutionalism,” in J. Conaghan, M. Fischl & K. Klare, eds., *Labour Law in an Era of Globalization* (Oxford: Oxford University Press, 2002) 511.

9 For the view that a right to strike is derived from freedom of association, see, e.g., R. Ben-Israel, *The Case of Freedom to Strike: A Study Prepared for the International Labour Office* (Deventer: Kluwer, 1988), at pp. 25-29. This is also the view adopted by the ILO Freedom of Association Committee (see International Labour Office, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (Geneva: ILO, 5th (revised) ed., 2006), at p. 109). See also the discussion in T. Novitz, *International and European Protection of the Right to Strike* (Oxford: Oxford University Press, 2003), at pp. 65ff.

10 Indeed, in *B.C. Health* the Court equates the *purposive* approach with the *contextual* approach (*supra*, note 1, at para. 30).

“context,” judges are also likely to consider the extent to which certain protections are *needed*. My argument below is that Israeli judges have been developing the law in recent years — creating new labour rights — because they have thought that increased protection is needed. Admittedly, these newly created or improved rights are not *constitutional* rights. Judges are likely to be more hesitant — and rightly so — when changing their view on what the constitution requires. Yet it seems to me that context, which includes changing labour market realities, informs and (at least to some extent) *should* inform constitutional interpretation. Hence, the Israeli example can perhaps shed some light on the underlying reasons for the Supreme Court of Canada’s dramatic change of heart in *B.C. Health* — a change which is likely to pave the way to recognizing a constitutional right to strike as well.¹¹ The Israeli example could also provide a supporting justification for that move. If changing realities in the labour market mean that freedom of association becomes hollow and meaningless without a corresponding right to bargain collectively and strike, then the purpose of the constitutional protection can be frustrated. Under such circumstances, it makes perfect sense for the Court to interpret freedom of association in a way that will *promote* that freedom — including the deriving of new rights from it in order to ensure that the purpose of entrenching the freedom is achieved, even if those rights were not needed in the past.

2. THE SETTING: CAN ISRAEL BE A GOOD SOURCE OF COMPARATIVE LAW?

The aim of this short paper is to suggest that some lessons can be learned from the Israeli experience with the development of

11 See Langille, *supra*, note 6, at p. 207; 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 p. 746; J. Fudge, “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.

collective labour rights. But this requires a preliminary justification. Why should Canada look at the experience of a small and, to put it mildly, controversial state? There are three reasons why readers ought to put aside any objections they may have to actions of the Israeli government, and consider the jurisprudence developed by Israeli courts in the area of collective labour rights.

First, Israel has a unique combination of strong labour courts and a common law tradition that allows them to develop the law.¹² The labour courts have broad jurisdiction over labour, employment and welfare matters, on the model of Germany, Sweden and some other European countries. Judges in those courts have special expertise in labour law, and usually have a world view that supports the idea of labour law, with a healthy suspicion of market values and freedom of contract in the labour context. At the same time, the Israeli legal system is based on a common law tradition, which leaves judges relatively broad latitude to develop the law and create new rights. It is therefore quite common for the National Labour Court to rethink current workplace protections and develop new ones — more so than in other countries. While Israeli labour courts have the legitimacy to develop the law in the common law tradition, they do not feel bound by values often associated with common law systems, such as strong protection for freedom of contract and property rights. For better or worse, they constantly develop the law in a way they believe to be normatively justified.¹³

Second, Israel has a history of exceptionally high union density and strong collective bargaining, though there has been a significant drop in the last couple of decades. Although the decline of unionism is hardly unique to Israel, it is fair to say that we have experienced this phenomenon more sharply than other countries: union density

12 For a useful introduction to the Israeli system, see G. Mundlak, “The Israeli System of Labor Law: Sources and Form” (2009), 30 *Comp. Lab. L. & Pol’y J.* 159.

13 G. Davidov, “Unbound: Some Comments on Israel’s Judicially-Developed Labor Law” (2009), 30 *Comp. Lab. L. & Pol’y J.* 283.

fell from 80-85% in the early 1980s to 40-45% in 2000,¹⁴ and has probably continued to decline since then. This has prompted a response from the courts, perhaps more quickly and forcefully than in other countries.

Finally, there are some similarities in constitutional structure between Israel and Canada. The Israeli Knesset (the parliament) has enacted a number of Basic Laws over the years, which are understood by the Knesset and the Supreme Court to have constitutional stature. Most notably, the *Basic Law: Human Dignity and Freedom*, enacted in 1992, which entrenches a number of human rights and freedoms, was modelled to a large extent on the *Canadian Charter of Rights and Freedoms*. The limitation clause of this Basic Law is very similar to s. 1 of the *Charter*, and the Basic Law as a whole has already attracted numerous petitions, resulting in a large body of case law. Although the Basic Law does not include any explicit reference to freedom of association, the “right to human dignity” which is the cornerstone of that law has been interpreted very broadly by the Supreme Court, and is likely to include protection of freedom of association. In Israel, we therefore face questions similar to those currently being debated in Canada.

3. THE LAW ON STRIKES: BETWEEN A “BASIC RIGHT” AND A CONSTITUTIONAL RIGHT

Israeli courts have long considered the right to strike to be a “basic” or “fundamental” human right, and sometimes they have also described it as a “constitutional” right. In 1994, shortly after the enactment of the *Basic Law: Human Dignity and Freedom*, the Chief Justice of the Supreme Court at the time, Aharon Barak, wrote a comprehensive book on constitutional interpretation. After a wide-ranging analysis of the Basic Law, he dedicated a couple of paragraphs to freedom of association and the right to strike.¹⁵ Barak

14 Y. Cohen *et al.*, “Unpacking Union Density: Membership and Coverage in the Transformation of the Israeli IR System” (2003), 42 *Industrial Relations* 692.

15 A. Barak, *Interpretation in Law: Volume III – Constitutional Interpretation* (Jerusalem: Nevo, 1994), at pp. 430-431 [in Hebrew].

concluded that because freedom of association is closely linked to freedom of speech, it is derived from human dignity and therefore has ascended to a constitutional level. As for the right to strike, Barak noted that the question is more difficult, but added that he tends to agree with the view that the right to strike is also derived from human dignity, because it is needed to realize employees' freedom of association and give effect to their autonomy and free will.

In a 1995 judgment of the Supreme Court, Justice Dov Levin adopted Barak's view, with the other two justices on the bench leaving the issue open for future decision.¹⁶ In a 2000 judgment of the National Labour Court, the president of that court, Steve Adler, adopted the same view on behalf of the entire court.¹⁷ In a 2005 case, the National Labour Court added that "freedom of association in labour relations is comprised of the right to organize, the right to bargain collectively and the right to strike."¹⁸ Thus, it may appear that Israel now has a constitutional right to strike. Nonetheless, the cases just mentioned did not involve challenges to legislation, or even to a governmental decision; the statements I have referred to were made in the context of judgments protecting strikes from employer action or placing limits on strike action. The current constitutional jurisprudence of the Supreme Court is actually sceptical of the idea of deriving concrete rights from human dignity.¹⁹ So it is fair to assume — although it is yet to be decided explicitly — that the right to strike

16 *Attorney General v. Bezeq*, 49(2) P.D. 485 (1995).

17 *Horn & Leibovitch v. The Histadrut*, 35 P.D.A. 145 (2000). Referring to the right to strike as "constitutional" has since become commonplace in the National Labour Court's judgments. See, e.g., *Israel Electricity Co. v. The Histadrut*, October 10, 2007; *Hebrew University v. Hebrew University Senior Academic Staff Union*, January 14, 2008; *Koach La-Ovdim v. Jerusalem Cinematheque*, July 2, 2009.

18 *The Histadrut v. Ministry of Transportation and Metrodan*, March 3, 2005, at para. 10.

19 See, e.g., *The Movement for Quality Government in Israel v. The Knesset*, May 11, 2006 (discrimination violates human dignity only when it closely implicates the autonomy of the individual); *Ha-Mifkad Ha-leumi v. Attorney General*, August 20, 2008 (the Court is still undecided on whether freedom of speech is constitutionally protected as part of human dignity, although most judges appear to support the view that it is).

will not be considered a constitutional right, in the strong sense of a higher law to which all legislation must conform.²⁰

In the past few years there have been discussions in the Knesset about the adoption of a Basic Law on social and economic rights, or the adoption of a full constitution which would include such rights. All of the drafts discussed in this context include the right to strike as a relatively uncontroversial social right.²¹ Nonetheless, for various political reasons, constitutional reforms of this kind are not expected in the near future.

At the same time, there are no doubts about the status of the right to strike as a “basic right” — which courts sometimes also describe, perhaps mistakenly, as “constitutional” — just like freedom of speech, freedom of association, and freedom of occupation. Designating the right to strike as a “basic right” is not merely a figure of speech: according to rules developed by the Supreme Court long before the adoption of the *Basic Law: Human Dignity and Freedom*, basic rights (declared as such by the Court itself) enjoy three important protections. First, all legislation is interpreted on the

20 An attempt to challenge legislation that included wage cuts in the public sector, directly undercutting collective agreements, was dismissed without serious discussion (*Research Staff of the Defence Ministry Union v. Government of Israel*, judgment of December 31, 2003 (Supreme Court)). This was perhaps due to the fact that the legislation was based on an agreement between the government and the Histadrut, Israel’s major trade union, in the face of a difficult financial situation; therefore the judges may have considered the limitation to be demonstrably justified and proportional on its face. But the workers who initiated the petition were not represented by the Histadrut — the legislation undercut agreements signed by other unions as well. There was, accordingly, a valid argument that the right to collective bargaining (and with it, freedom of association) had been infringed, but the Court refused to consider this argument. Arguably, therefore, the Supreme Court has signalled that the right to collective bargaining is not constitutionally protected in Israel. Although this is hardly settled law — there has been no explicit decision on the matter, or any real discussion of it — the National Labour Court has already followed the ruling in a couple of other cases. See, e.g., *High School Teachers Union v. Union of Local Authorities in Israel*, September 30, 2009.

21 See, most notably, the *Basic Law: Social Rights Bill* (1994), s. 4; the Israeli Democratic Institute’s proposal for a constitution (2005), s. 31; and the draft constitution prepared by the Knesset’s Constitution, Law and Justice Committee, (2006), chap. 2, s. 20(c).

assumption that there was no intention to infringe basic rights. Second, government cannot infringe such rights without an explicit legislative authorization. And third, by-laws and regulations can be struck down if they infringe basic rights without explicit authorization.²²

Although these constraints are obviously weaker than the ability to strike down legislation, they have nonetheless proven to be highly significant. Often a court can use creative interpretation to reach the same result without the direct clash involved in invalidating a law. So it is fair to say that although Israel *does not*, strictly speaking, have a constitutional right to strike, the right to strike in Israel *does* have some constitutional stature. It could perhaps be described as a *weak* constitutional right.

4. JUDICIAL DEVELOPMENT OF COLLECTIVE LABOUR RIGHTS

Although there has been little discussion of whether the right to strike is (or should be) a constitutional right in Israel, a lot can be learned from the judicial development of collective labour rights at the non-constitutional level. I will now briefly describe some major developments of the past 10 to 15 years in three contexts: freedom of association, the right to bargain collectively, and the right to strike. In all three, there have been dramatic developments, with the National Labour Court sometimes explicitly noting that change is needed in response to changing circumstances, most notably to counteract the weakening of unions.²³ While the Court has also referred to

22 See, e.g., *Bejerano v. Minister of Police*, 2 P.D. 80 (1949); *Kol Ha-am Ltd. v. Minister of Interior*, 7 P.D. 871 (1953); *Miterani v. Minister of Transportation*, 37 P.D. 337 (1983). And see, in the current context, *Ofek v. Minister of Interior*, 33(3) P.D. 480 (1979) (the Supreme Court invalidated rules issued by the Police Chief, without explicit legislative authorization, prohibiting unionization of police officers).

23 The president of the National Labour Court, Steve Adler, has been most explicit about this in an article: S. Adler, "The Freedom to Strike in the Eyes of the Court," in A. Barak & H. Berenzon, eds., *Berenzon Book: Volume II* (Jerusalem: Nevo, 2006) 475, at pp. 487-492 [in Hebrew]. However, there are hints of the same reasoning in the case law as well. See, e.g., *The Histadrut v. Tadiran Systems Ltd.*, December 13, 2005, at para. 8; *Israel Electricity Co. v. The Histadrut*, October 10, 2007, at para. 12.

international, comparative and constitutional sources, for the most part it appears that the adoption of new protections was driven by the view that there is increased need for such protections.²⁴

Until the 1980s, the Histadrut (Israel's major trade union) was extremely powerful, with a large majority of the workforce being unionized. Employers did not object to unionization, at least not in the sense of actively discouraging and fighting it. From the late 1980s, with the Histadrut gradually weakening and global competition creating new pressures, resistance to unionization started to appear. Such resistance became more overt and blatant over the years, although it is still at a lower level than in North America. As employers began to fight attempts by employees to organize, the National Labour Court responded by strengthening the protection of freedom of association, most notably by allowing specific performance of the contract of employment (reinstatement) where dismissals resulted from an attempt to curb unionization.²⁵ Reversing a long-held position that objected to "forcing" an employer to employ someone, the Court noted that this was necessary in order to protect the ability of workers to organize. Indeed, if we are faced with blatant dismissals of workers who are active in organizing, financial compensation is hardly sufficient as a remedy; employers might still have the incentive to pay and continue with such practices. Reinstatement, on the other hand, sends a clear message to employers, and to other workers in the same workplace, that the right to organize is truly protected.

Another protection developed by the Court to strengthen freedom of association is a prohibition against the targeting of unionized employees in downsizing or layoff situations as part of the employer's cost-cutting measures. As a result, where there has been an "economic" dismissal, and only part of the employer's workforce is covered by a collective agreement, the employer cannot choose to

24 For an in-depth analysis of recent changes in Israeli labour law, see G. Mundlak, *Fading Corporatism: Israel's Labor Law and Industrial Relations in Transition* (Ithaca: ILR Press, 2007). Mundlak explains the judicial development of the law as a response to the disintegration of the corporatist system of labour relations.

25 *Mif'aley Tachanot Ltd. v. Israel Yaniv*, 33 P.D.A. 389 (1996).

dismiss more of those who are covered and fewer of those who are not.²⁶

As for the right to bargain collectively, two major developments are noteworthy. First, the National Labour Court has increasingly broadened the range of issues considered to be open for collective bargaining, while limiting those that were previously deemed to be within the employers' unilateral prerogative.²⁷ In the past, the Histadrut often succeeded in using its power to influence such managerial decisions (e.g., on staffing levels in a certain department, or on outsourcing certain tasks). Now that the Histadrut is less powerful, it has asked the Court to declare that such matters are issues for collective bargaining, meaning that they can also justify a strike. The Court has agreed that outsourcing decisions affect workers' rights, or at least are likely to affect them in the future.²⁸ It has also agreed that staffing levels have an indirect impact on workers, and that at least this impact should be subject to negotiation.²⁹

The second development concerns a duty to bargain imposed on employers. Once again, such a duty was not needed when employers were unlikely to reject an advance from the almighty Histadrut. But increasingly, the Histadrut as well as other, smaller unions have been requesting the National Labour Court's help in bringing employers to the negotiating table. Changes on this front have been gradual. First, the Court introduced a "duty to consult" the union when an employer makes changes that have a significant impact on its employees.³⁰ The Court then turned this process of obligatory consultation into a duty to bargain, despite the silence of Israeli legislation on the subject. However, the duty arose only if there was a representative union and the parties had an ongoing relationship, which would include their having previously entered into a collective agreement.³¹ Finally, the National Labour Court has very recently introduced a duty on employers to bargain with a new representative union, where the

26 *Delek v. The Histadrut*, 33 P.D.A. 337 (1999).

27 I discuss some of these cases in Davidov, *supra*, note 13.

28 *Tel-Aviv-Yaffo Employees Union v. Tel-Aviv-Yaffo Municipality*, judgment of December 4, 1997.

29 *The Histadrut v. State of Israel*, 35 P.D.A. 103 (2000).

30 *Tirkovot Brom Ltd. v. The Histadrut*, 23 P.D.A. 456 (1991).

31 *Menashe Mo'adim v. Defense Ministry*, 33 P.D.A. 441 (1999).

parties did *not* have a previous relationship; in other words, an employer can no longer refuse to negotiate even for a first agreement.³² Interestingly, this newly created right was adopted soon afterwards by the Knesset and added to the *Collective Agreements Act*.³³ But the Court itself initiated the right, notwithstanding the absence of a direct statutory basis for it, maintaining that the duty to bargain follows from the idea of a representative union set out in the legislation, and is necessary to give effect to this idea. The Court further reasoned that the duty to bargain can be derived from the duty to act in good faith, which is included in Israeli contract law.

Lastly, just as we have seen an increase in resistance to workers' unionization and in the refusal to recognize unions and negotiate with them, we are now seeing more attempts to break strikes by economic and political force. The National Labour Court has reacted quite strongly to such attempts, instituting new protections for the right to strike. Thus, for example, there are prohibitions against the dismissal of striking employees,³⁴ the use of replacement workers,³⁵ and state interference with a strike through assistance to the employer.³⁶ Furthermore, the scope of "political" (and therefore illegitimate) strikes has in recent years been significantly narrowed.³⁷ Thus, for example, "quasi-political" strikes — strikes aimed at the state, but on issues that have a direct impact on the striking workers — are now allowed to continue for long periods of time.³⁸ All these developments are considered by the Court to be necessary in the light of changing labour market realities.

The changes in collective labour rights described above are based on the idea that the right to bargain collectively and the right to

32 *Koach La-Ovdim v. Jerusalem Cinematheque*, *supra*, note 17.

33 *Collective Agreements Act of 1957*, as amended, s. 33h1.

34 *Horn & Leibovitch v. The Histadrut*, *supra*, note 17.

35 *The Histadrut v. Tadiran Systems Ltd.*, *supra*, note 23.

36 *The Histadrut v. Ministry of Transportation and Metrodan*, *supra*, note 18 (the Court prohibited the Minister of Transportation from temporarily licensing a bus company to operate in a city where workers of the existing bus operator were on strike). See also *Port Authority v. The Histadrut*, December 9, 2003 (the Court prohibited the Port Authority from opening an alternative dock in order to frustrate a strike).

37 For a brief review of these judgments, see Davidov, *supra*, note 13.

38 *Israel Electricity Co. v. The Histadrut*, *supra*, note 17; *Union of Local Authorities in Israel v. High School Teachers Union*, December 4, 2007.

strike are derived from freedom of association, and that protecting these rights is necessary in order to give effect to workers' right to organize. Often this is implicit in the case law, but sometimes the point is made explicitly as well.³⁹

5. CONCLUSION

It is widely accepted that laws should be interpreted purposively. This applies to constitutions as well. As part of a purposive interpretation of the *Canadian Charter of Rights and Freedoms*, it is pertinent for courts to consider the *context*. There is no one meaning of the term "freedom of association," and a court cannot, and should not, define the scope of this right by looking at dictionaries or other "objective" sources. The purpose of constitutionally entrenching freedom of association can change from one society to another, and from time to time.

As part of that interpretive process, courts should consider labour market realities and what protections they require. I have used the Israeli example to show how courts outside Canada are developing the law continuously in response to changes in the labour market and in labour relations. The Supreme Court of Canada was in my view right, in *B.C. Health*, to review its previous judgments and determine that in order to truly protect freedom of association, there must be constitutional protection for the right to bargain collectively. It would also be right to take the next step and extend constitutional protection to the right to strike. The right to organize does not have much meaning in the labour context if workers are prohibited from bargaining collectively through their union, and there is little point in allowing them to bargain collectively if they are not allowed to strike. This was probably true in the 1980s, although the Supreme Court rejected the idea at that time.⁴⁰ It is certainly true today, when unions are weaker, governments are more often hostile, outsourcing and subcontracting are widespread, global competition is fierce, and

39 See, e.g., *Horn & Leibovitch v. The Histadrut*, *supra*, note 17.

40 For early critiques of the Labour Trilogy, see, e.g., G. England, "Some Thoughts on Constitutionalizing the Right to Strike" (1988), 12 *Queen's L.J.* 168; D. Beatty & S. Kennett, "Striking Back: Fighting Words, Social Protest and Political Participation in Free and Democratic Societies" (1988), 12 *Queen's L.J.* 214.

workers are frequently employed by small, less well-established enterprises that are not as likely to provide decent conditions and are more difficult to organize.⁴¹

It may be ironic that unions are winning the day at the Supreme Court of Canada only after becoming weaker (and therefore less feared).⁴² There are surely many explanations for this irony that are unflattering to the Court. But there is also a benign reason that should not be ignored: as unions become weaker, they *need* constitutional protection more, and a purposive/contextual interpretation of *Charter* rights must take into account the fact that new rights are needed in order to protect the same basic freedoms.

Giving constitutional status to the right to bargain collectively and the right to strike does not necessarily mean placing corresponding duties on employers. At the very least, it means that the legislature must allow collective bargaining by workers (i.e., exclude such bargaining from competition laws), and must provide basic protection for strikes (i.e., prevent employers from dismissing employees because they participate in strikes). There are probably other elements that should also be seen as necessary to give effect to the constitutional rights to bargain collectively and to strike, although we should certainly not go so far as to make a specific detailed model into the only constitutionally acceptable option.⁴³ In this paper, I have not purported to consider the *scope* of those rights. My aim has been different, and more modest: to argue that in interpreting the scope of s. 2(d) of the *Charter*, the Supreme Court of Canada was right to

41 For a succinct review of these changes and the resulting need to update employment laws, see *Fairness at Work: Federal Labour Standards for the 21st Century* (the Arthurs Report), available at http://www.hrsdc.gc.ca/eng/labour/employment_standards/fls/pdf/final_report.pdf.

42 E. Tucker, "The Constitutional Right to Bargain Collectively: The Ironies of Labour History in The Supreme Court of Canada" (2008), 61 *Labour/Le Travail* 151.

43 I agree with Brian Langille that the judgment of the Ontario Court of Appeal in *Fraser v. Ontario* (2008), 92 O.R. (3d) 481 appears to go too far in that direction. See B. Langille, "Why Are Canadian Judges Drafting Labour Codes – And Constitutionalizing The Wagner Model?" (2009-2010), 15 C.L.E.L.J. 101. I do not, however, believe that the judgment in *B.C. Health* necessarily leads to the constitutionalization of the Wagner model.

consider context, and specifically to consider what protections are needed in the light of changing labour market realities. Hopefully, the comparative insights I have offered from Israel have helped to make this point.