

**The *Fraser* Case:  
The Fog of Judicial Deference**

**SUMMARY OF COMMENTS**

**Workshop on the Implications  
of the *Fraser* Case  
The Centre for Law in the Contemporary Workplace  
Faculty of Law  
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## **INTRODUCTION**

Judicial deference is normally associated with judicial restraint. However, judicial deference led to judicial activism in both the majority judgment and the concurring judgment of Justice Rothstein.

## **JUSTICE ROTHSTEIN**

Justice Rothstein was prepared to overrule **B.C. Health Services** on his own motion. In doing so he failed to adequately review the trilogy judgments on judicial deference in labour matters. He also failed to defer to the legislative intent underlying s.2(d) of the *Charter*.

Finally, he applied judicial deference in defining scope of the fundamental freedom rather than at the s.1 stage. In this regard he relied upon the concerns expressed by Justice McIntyre in the **Alberta Reference** that the other approach will lead to judicial policy making in labour matters under s.1

## MAJORITY

In its judgment, the majority gave mixed messages on judicial deference in labour matters.

On the other hand they rejected the pre-**B.C. Health Services** judicial deference which led to a “judicial no go zone” in labour matters. They also agreed with Justice Bastarache in **Dunmore** that judicial deference should be applied in the s.1 analysis.

On the other hand, they do not find the AEPA unconstitutional even though they uphold **B.C. Health Services** by implying a duty to bargain in the legislation. This “deference” to the legislature disregarded the record and submissions, the wording of the legislation and the legislative intent clearly expressed by the government at the time the law was enacted. One can only speculate as to why the majority went to this length in upholding the legislation. Whatever the explanation, the result is that the majority did not defer to the legislative intent by implying a duty to bargain and effectively found the law constitutional retroactively.

## **CONCLUSION**

Judicial deference is usually associated with judicial restraint. However, it can also lead to conservative judicial activism where the court goes to unusual lengths to uphold government actions. The “leeway of judicial deference” in the application of the *Charter* should give us cause for concern as it does not provide a principled basis for judicial decision making.