

Regulating Strikes in Essential (and Other) Services after the “New Trilogy”

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Labour relations statutes across Canada generally use one of three standing models for regulating essential service strikes — the “unfettered strike,” “designation” and “no-strike” models. An ad hoc variant of the unfettered strike and designation models — what the author calls the “instant back-to-work” model — has recently been used several times by the federal government to circumvent the designation model in the Canada Labour Code. After reviewing these models, the author moves to the question of what forms of strike regulation might be held to infringe freedom of association in section 2(d) of the Canadian Charter of Rights and Freedoms, and therefore to need justification under section 1 as a reasonable limit on that freedom. Pierre Verge, like Brian Langille, has argued that a constitutional right to strike should simply require governments to respect the common law freedom of employees to withdraw their services without incurring criminal or tort liability, in the absence of a section 1 justification for any infringement of that freedom. This approach, the author suggests, would require excessive recourse to section 1, and would be of value mainly to strategically placed employees because it would offer no protection against employer reprisals for strike action. In his view, a right to strike should instead be held to flow from the Charter-based right to collective bargaining adopted in B.C. Health and Fraser. This would leave legislatures with significant discretion to regulate industrial conflict, but would require that employees who are not allowed to strike must have access to a truly independent means of resolving collective bargaining disputes. To that end, the Supreme Court of Canada should reinstate the trial judgment in the Saskatchewan Federation of Labour case, which held (1) that the right to collective bargaining includes a limited right to strike; and (2) that this right was unjustifiably breached by a statute which gave the provincial government the unilateral right to designate those public sector employees who could not strike, and also denied those employees access to an alternative independent dispute resolution process.

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1. INTRODUCTION

For nearly half a century, the labour law and industrial relations community in Canada and abroad has benefitted beyond measure from Pierre Verge's many extraordinary qualities, including his warm collegiality, his legendary incisiveness and productivity, and his capacity for nurturing emerging scholars. His academic career and mine began at about the same time, and he has been a constant inspiration to me.

Professor Verge has made a major contribution over the years to our understanding of industrial conflict in both its legal and social dimensions. Structural changes to the workforce and declining unionization rates have left fewer and fewer private-sector workers with legal access to the strike weapon or the bargaining power to use it effectively. Because strikes now occur mainly in the public and parapublic sectors, and especially in strategically placed units within those sectors, they are (as Professor Verge has noted) having less impact on employers than they used to have, and more impact on the rest of us — so, in his words, they are “falling ever more out of favour with the public.”¹ Nevertheless, he sees the right to strike as still being fundamentally important not only to collective bargaining but also to “collective autonomy . . . and the democratic vitality of society as a whole.”²

More than a decade ago, in November 2001, two industrial relations scholars (Michel Grant and Allen Ponak) and I published quite a detailed study³ on the regulation of industrial conflict in essential service sectors.⁴ Our focus was on the actual operation of the three models used by Canadian legislatures to regulate strikes and lockouts — what we called the “unfettered strike” model, the “designation” or controlled strike model, and the “no-strike” model. We interviewed

1 Pierre Verge, “Inclusion du droit de grève dans la liberté générale et constitutionnelle d’association: justification et effets” (2009) 50 C de D 267 at 269-270. Translations in this essay from Professor Verge’s writings are mine.

2 *Ibid* at 270.

3 Bernard Adell, Michel Grant & Allen Ponak, *Strikes in Essential Services* (Kingston, Ont: Queen’s IRC Press, 2001) 200.

4 I will say little here about what is or is not an essential service. That question is discussed in our book, *ibid* at 9-13.

many people in union and management roles in hospital nursing, municipal services and urban transit in the five largest provinces, and we tried to assess how well each regulatory model had served to maintain essential services in the event of a strike or lockout and (on the other hand) to promote efficient collective bargaining, voluntary settlements, and employment terms acceptable to the parties and the public purse. Part 2 of this essay takes a somewhat updated look at the strengths and weaknesses of the three regulatory models we studied in our book, and at a mutation that I will call (not entirely facetiously) the “instant back to work” model.

When we did our study, the pros and cons of different approaches to regulating strikes, in essential services and in the rest of the economy, raised important public policy issues but did not raise live constitutional issues under the *Canadian Charter of Rights and Freedoms*.⁵ At the time, the constitutional background for labour relations policy was still set by three 1987 decisions of the Supreme Court of Canada⁶ — often called the labour trilogy, or the right-to-strike trilogy — which held that the guarantee of freedom of association in section 2(d) of the *Charter* protected neither the right to strike nor the right to collective bargaining. Then, in December 2001, just a few weeks after our book came out, the Supreme Court released its decision in the *Dunmore* case.⁷ In that decision, the Court changed direction markedly, holding that the right of employees to make collective representations to their employer was indeed protected by the *Charter*'s guarantee of freedom of association. Later, in *B.C. Health*⁸ in 2007 and *Fraser*⁹ in 2011 — the second and third of the cases which (along with *Dunmore*) make up what I will call the “new trilogy” — the Court went further, interpreting that guarantee to

5 Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11. Section 2(d) of the *Charter* says: “Everyone has the following fundamental freedoms: . . . freedom of association.”

6 *Reference Re Public Service Employees Relations Act (Alberta)*, [1987] 1 SCR 313 [*Alberta Reference*]; *RWDSU v Saskatchewan*, [1987] 1 SCR 460 [*Dairy Workers*]; *PSAC v Canada*, [1987] 1 SCR 424.

7 *Dunmore v Ontario (AG)*, 2001 SCC 94, [2001] 3 SCR 1016.

8 *Health Services and Support-Facilities Subsector Bargaining Ass'n v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*B.C. Health*].

9 *Ontario (AG) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3.

include a right to a process of collective bargaining and to protection against governmental restrictions which “substantially interfere”¹⁰ with this right. However, the Court has not yet been called upon to reconsider its 1987 holding that section 2(d) does not encompass a right to *strike*. Part 3 of this essay asks, in light of the “new trilogy,” what sorts of governmental regulation of strikes (in essential services and elsewhere) will be or should be held to breach section 2(d) and therefore be struck down unless the government can meet the onus of justifying them under section 1 of the *Charter*¹¹ pursuant to the multi-stage *Oakes* test.¹² Part 3(a) considers these questions in the light of the ongoing debate among Canadian labour law scholars, including Professor Verge, on the prospects for a constitutional right to strike and its relationship to the right to collective bargaining. Part 3(b) looks at the *Saskatchewan Federation of Labour* case¹³ — the first post-“new trilogy” case (and so far, I believe, the only one) which deals squarely with whether there is such a right. Part 3(c) offers some reflections on what might lie ahead with respect to a constitutional right to strike and other workplace rights under section 2(d). Part 4 tries to bring Parts 2 and 3 together in the form of a brief conclusion.

2. HOW WELL DOES EACH REGULATORY MODEL ACTUALLY WORK?

(a) The Unfettered Strike Model

This model subjects strikes and lockouts only to the more or less procedural prerequisites set out in general labour relations statutes

10 *Ibid* at para 2.

11 Section 1 says: “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.”

12 *R v Oakes*, [1986] 1 SCR 103.

13 *Saskatchewan v Saskatchewan Federation of Labour*, 2012 SKQB 62 (Ball J) (available on CanLII); rev’d *sub nom R v Saskatchewan Federation of Labour*, 2013 SKCA 43 (available on CanLII). Leave to appeal to the Supreme Court of Canada has been granted: 2013 CanLII 65412.

that cover most of the workforce.¹⁴ Saskatchewan used to be the heartland for the unfettered strike model, but moved sharply away from it in 2008 (more on that in Part 3(b) below). Today, that model is most heavily used in Nova Scotia, where a proposal to abandon it in health care was dropped in 2007.¹⁵ In most provinces it still applies throughout the private sector, but it is no longer used at all in British Columbia or in the federal jurisdiction.

The respondents in our 2001 study generally agreed that the threat of a strike or lockout helped to speed up bargaining and encourage settlement, but most of them (on both sides) acknowledged that the unfettered strike model generated the highest level of uncertainty about what services would be maintained, as well as the highest level of risk to health and safety. By and large, this model leaves it to unions to decide unilaterally what services to provide during work stoppages, and there was little agreement on how responsibly they had exercised that discretion. For example, we were told that striking nurses in Saskatchewan at one time responded very promptly to requests for additional services but later took a harder line.

In hospital nursing in general, our respondents mostly agreed that essentiality levels were high and getting even higher, because the number of nursing managers had dropped sharply, the proportion of acutely ill patients had gone up, and rapid technological change had made it harder for the remaining non-bargaining-unit staff to fill in effectively for strikers. Before we did our study, I tended to favour a rather minimalist approach to health care essentiality — e.g., in the hospital context, the idea that what services were really essential could be discerned by looking at an institution's disaster plan. However, nearly everyone we spoke to saw that approach as obsolete.

14 Among those prerequisites (which vary somewhat from province to province) are the certification of a union with majority support in the particular bargaining unit, the exhaustion of a conciliation or mediation process, the elapsing of a "cooling off" period, and the expression of employee support for strike action through a compulsory ballot.

15 The proposal briefly surfaced again in April 2012, during Nova Scotia health care negotiations which ended in a bargained settlement. David Jackson, "Nova Scotia premier open to strike ban," *Halifax Chronicle-Herald*, 27 April 2012, online: <<http://thechronicleherald.ca/novascotia/90679-nova-scotia-premier-open-to-strike-ban>>.

The condition of psychiatric patients, for example, and patients needing major physiotherapy, could quickly deteriorate if their therapy was even briefly suspended. This sort of refrain from both sides led us to conclude that the unfettered strike model had pretty well had its day in health care.

(b) The Designation (or Controlled Strike) Model

This middle-ground model requires that before a strike or lock-out becomes legal, a list of services must be designated as essential and therefore as having to be maintained during a work stoppage. Typically, that list is to be drawn up by the parties, and if they cannot agree, by the labour relations board or some other adjudicative body. The designation model applies in most sectors in British Columbia and the federal jurisdiction, and in parts of the public and parapublic sectors in Ontario and several other provinces. In Quebec, it applies in the parapublic sector (which includes education and health care) and in a range of what in that province are called “public services” — services of a public nature provided not by the Crown but by other public and private bodies, including municipalities. In Saskatchewan, a variant of the designation model adopted in the broader public sector in 2008 gives employers an unusual degree of control over the designation process, and is the subject of the current *Charter* challenge discussed in Part 3(b) below.

Most but by no means all of the people we interviewed for our study thought that under the designation model, the rate of voluntary settlements had been fairly high, that settlement terms had generally been reasonable, and that essential services had usually been maintained more or less adequately during work stoppages. Most also agreed that adjudicators tended to be very wary of potential risks to health and safety and therefore to set high designation levels. At times, this led unions to suspect that the real policy agenda behind the designation model was to reduce their bargaining power rather than to protect essential services — a suspicion which has no doubt been aggravated by recent developments in the federal jurisdiction and in Saskatchewan referred to later in this essay. In any event, most of our union-side respondents tended to see the model as acceptable if it was structured and administered in a way that sought to limit its effect on their bargaining power.

A major perceived disadvantage of the designation model was how cumbersome and costly it had been to implement. When it replaced the no-strike model in the Ontario public service in 1993, well over a year of arduous and acrimonious labour board hearings were needed to set essential service levels in bargaining units across the province, but the process has worked somewhat more smoothly in later rounds. Similarly in B.C., the model's initially almost overwhelming cumbersomeness seems to have been reduced by the labour board's practice since the early 1990s of issuing "global orders" laying out templates for essential service designations for each sector, and insisting that those orders be followed in later negotiating rounds.¹⁶

(c) The No-Strike Model

This model is at the other end of the spectrum from the unfettered strike model. It flatly prohibits strikes in a particular sector, and replaces them with what is supposed to be a more principled way of settling terms and conditions of employment — usually interest arbitration.

The heartland for the no-strike model is Alberta, where it still prevails in the civil service and has been used in hospitals for about thirty years. At the time of our study, there had been no major nursing strikes in Alberta since 1988, but respondents on both sides agreed that the model was not working well in the hospitals. One reason was the bitter labour relations climate in which it was introduced. Another reason — no doubt linked to that history of bitterness — was the Alberta nurses' union's explicit and long-standing policy of defying the legislation,¹⁷

16 Communication to the author from Peter Cameron, chief spokesperson for the B.C. Community Social Service Employers' Association, 11 May 2012.

17 The union still adheres to that policy today: "United Nurses of Alberta members have repeatedly voted to maintain a standing policy to reject compulsory arbitration since the provincial government made strikes by nurses illegal in 1983. The policy is: UNA is opposed to any compulsory arbitration legislation. Regardless of any legislation, UNA members alone, and not the government or any other body, will decide when this Union will strike and when it will not." United Nurses of Alberta, "Negotiations Backgrounder," 8 March 2010, online: <<http://www.una.ab.ca/negotiations/archive/2010/background>>.

to the point where what had developed in practice looked more like an unfettered strike model.¹⁸

In sharp contrast, the hospital sector in Ontario is something of a poster child for the no-strike model. In 1965, after a long support staff strike at a small hospital, the Ontario government acted on the recommendation of a Royal Commission by passing the *Hospital Labour Disputes Arbitration Act*¹⁹ (HLDAA), which withdrew the right to strike from all hospital employees and replaced it with compulsory interest arbitration. Over the nearly five decades in which HLDAA has been in force, there has been only one substantial work stoppage (a one-week strike by support staff in 1981) and a brief refusal by nurses in 2001 to work overtime.

For a time in the 1980s, HLDAA's arbitration process was at risk of buckling under the massive number of unresolved bargaining demands put to arbitrators — an instance of what is often called the “chilling effect” of compulsory arbitration on collective bargaining. However, in the 1986 negotiations, at the insistence of an arbitration board chaired by my late colleague Gordon Simmons, the parties pared a list of about 160 demands down to a far more manageable number.²⁰ A decade later, the neo-liberal Harris government legislatively required interest arbitrators to take certain economic factors into account in their awards²¹ and also refused to appoint mainstream arbitrators, instead choosing retired superior court judges with little labour relations experience.²² However, in a key nurses' dispute, one

18 *Supra* note 3 at 145-162.

19 Now RSO 1990, c H.14.

20 On how hospitals, unions and arbitrators adapted to compulsory interest arbitration during HLDAA's first two decades, see Bernard Adell, Gordon Simmons, Megan Slobodin & Frank Syer, “The System of Labour Dispute Resolution in Ontario Hospitals and its Application at Kingston General Hospital” in T Hanami & R Blanpain, eds, *Industrial Conflict Resolution in Market Economies: A Study of Canada, Great Britain and Sweden* (Deventer: Kluwer, 1987) 45.

21 HLDAA, *supra* note 19, s 9(1.1).

22 This action by the Harris government was ultimately struck down by the Supreme Court of Canada as being inconsistent with the statutory authority of the Minister of Labour. HLDAA required the appointment of arbitrators who were “in the opinion of the Minister, qualified to act.” *Supra* note 19, s 6(5). The Supreme Court held this to mean that the Minister had to appoint “persons who were not only impartial and independent but possessed expertise and who were generally seen as acceptable to both labour and management in the labour relations community.” *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at para 206.

of those retired judges (Lloyd Houlden) took a very independent approach, adopting what was at the time quite an innovative blend of mediation and arbitration, inducing the parties to settle many outstanding issues and resolving the others in a generally well-received way.²³ This type of experience, and comments from our respondents on both sides, led us to conclude that “the no-strike model, at least as it has developed under the HLDAA, has shown itself to be quite resilient and surprisingly resistant to government attempts to influence arbitration outcomes,” and that it had “provided an important element of stability in a healthcare system which has been in a state of transition (perhaps even upheaval) for several years and will continue to be for some time to come.”²⁴

Not surprisingly, we found that as well as avoiding the need for long and arduous designation procedures or other devices for working out essential service levels, the no-strike model had led to the highest level of essential service provision, at least when the law was respected (which it almost always was, except by Alberta nurses). Its most obvious perceived disadvantage was (and is) the fact that it leaves no room at all for legal strikes or lockouts. This is a significant issue for anyone who shares Professor Verge’s view that the possibility of using the strike weapon is important to democratic rights, or

23 Tom Archibald, “Health Care Restructuring under Different Labour Law Approaches: The Ontario and Québec Experiences” (1998) 24:1 Queen’s LJ 61 at 92-95.

24 *Supra* note 3 at 143. On March 27, 2012, Ontario’s minority Liberal government proposed a set of legislative amendments designed to speed up the arbitration process under HLDAA and other statutes, and to make arbitrators give more detailed reasons: *Strong Action for Ontario Act (Budget Measures), 2012* (Bill 55 of 2012). The Ontario Nurses’ Association described these amendments as “unnecessary and unwelcome,” and maintained that HLDAA “is not a perfect system, but it has served the parties well since its enactment in 1964.” “Hands off HLDAA: No need to fix what is not broken,” 18 April 2012, online: <http://www.ona.org/documents/File/politicalaction/Handsoff_HLDAA_20120418.pdf>. The opposition parties refused to agree to the amendments, and they were dropped from the final version of the statute (SO 2012, c 8). See Paul E Broad, “Amended Ontario Budget Bill Passes,” 20 June 2012, online: <<http://www.hicks-morley.com/index.php?name=News&file=article&sid=1272>>. A few years ago, Judy Haiven and Larry Haiven (2007 and 2008) argued that the unfettered strike model in Nova Scotia health care had worked well, particularly in comparison to the no-strike model in Alberta hospitals. They gave very little attention, however, to the experience in the Ontario hospitals under HLDAA.

who believes that settlements imposed by (or reached under the threat of) third-party intervention are inherently less stable than settlements reached under the threat of a work stoppage — a belief that Hebdon and Mazerolle described as “conventional wisdom in industrial relations.”²⁵ There is also a fear on the employee side that the interest arbitration process may be inadequately insulated from government pressure. As mentioned above, experience in Ontario under HLDAA indicates that this fear is not always warranted, even under a government as determined to take control of the process as the Harris government was in the first few years after it came into power in 1995.

Employers and governments sometimes complain that because arbitrators have strong incentives not to alienate either side, they will be too reluctant to order restraint measures in times when public finances are in poor shape. The evidence on this point is inconclusive. For example, Dachis and Hebdon found only a non-statistically-significant increase in wage levels when public-sector bargaining units moved to the compulsory arbitration route from some other dispute settlement model.²⁶ In a New York State study, Kochan, Lipsky *et al.* concluded that police and firefighter wages increased no more under compulsory arbitration than they did in states without arbitration.²⁷

With respect to the extent of the chilling effect of compulsory arbitration — i.e., the disincentive to settle — the evidence is again mixed. In a study of thousands of bargaining rounds in Ontario from 1984 to 1993, Hebdon and Mazerolle concluded that under an arbitration regime, negotiations “arrive at impasse 8.7 to 21.7 percent more often” than under a right to strike.²⁸ In contrast, Kochan, Lipsky *et al.*²⁹ found little evidence of a chilling effect, and concluded more broadly that “[a] retrospective appraisal of mandatory impasse

25 Robert Hebdon & Maurice Mazerolle, “Regulating Conflict in Public Sector Labour Relations: The Ontario Experience (1984-1993)” (2003) 58:4 RI 667 at 668.

26 Benjamin Dachis & Robert Hebdon, *The Laws of Unintended Consequences: The Effect of Labour Legislation on Wages and Strikes* (Toronto: CD Howe Institute, 2010).

27 Thomas Kochan, David B Lipsky, Mary Newhart & Alan Benson, “The Long Haul Effects of Interest Arbitration: The Case of New York State’s Taylor Law” (2010) 63:4 Indus & Lab Rel Rev 565.

28 *Supra* note 25 at 682.

29 *Supra* note 27 at 582.

arbitration for public sector negotiations finds limited support for the concerns voiced by its early critics.”³⁰

(d) A Fourth Model, of Sorts – The “Instant Back-to-Work” (IBTW) Model

Ad hoc back-to-work legislation has been used fairly often in Canada over the past several decades to end or forestall what would otherwise have been legal work stoppages, not only in sectors directly relevant to public health and safety but perhaps even more frequently in sectors where stoppages have been perceived as bringing high economic costs or a politically unpalatable degree of public inconvenience or resentment. In the federal jurisdiction, such legislation has been used about three dozen times since 1950, most often in the railways and grain handling.³¹ Provincially, about 100 ad hoc statutes were passed from the late 1950s to the early years of this century,³² and almost a third involved actual or threatened strikes by teachers or school support staff.³³ An extreme and repeated example, which led me to coin the term “instant back-to-work” (IBTW) legislation, was provided by the Toronto Transit Commission, where it became clear

30 It hardly seems surprising that the rate of actual resort to arbitration under the no-strike model is higher than the rate of actual resort to strikes or lockouts under other models; a work stoppage is usually riskier and more stressful than an arbitration proceeding, especially for the party in the weaker bargaining position. I am not at all sure that it is a defect of compulsory arbitration that the parties are more likely to use it than they would be to use the strike or lockout if allowed.

31 Ian Lee, “Striking Out: The New Normal in Canadian Labour Relations?” (2012) 6:1 *Journal of Parliamentary & Political Law* 205 at 213-223. Federal back-to-work statutes were introduced about six times in the 1950s and 1960s, 16 times in the 1970s and 1980s, nine times in the 1990s (and not at all between 1999 and 2007), only twice in the 2000s, and four times in the last three years alone.

32 Leo Panitch & Donald Swartz, *From Consent to Coercion: The Assault on Trade Union Freedoms*, 3d ed (Aurora, Ont: Garamond Press, 2003) at 247-251.

33 Panitch & Swartz, *ibid* at 247-251, indicate that ten provincial back-to-work statutes were introduced in the 1950s and 1960s, 46 in the 1970s and 1980s, and 29 from 1990 to 2002. Those authors also list (at 251-252) 26 provincial administrative orders suspending strikes or lockouts between 1966 and 2002, all but four of them during the 1970s and 1980s.

from the mid-1970s that a real or imminent work stoppage would invariably lead the Ontario legislature to pass a restraining statute.³⁴

In the federal and provincial jurisdictions as a whole, about three-quarters of the ad hoc statutes passed by the time of our study applied to units under the unfettered strike model. However, more surprisingly, the IBTW mutation has also emerged within the designation model in fairly recent years. In an early instance, Newfoundland in 1999 legislated an end to a legal hospital strike after a few days because of employer claims of danger to public health and safety in an already overstretched health care system. More troubling are several instances of what can only be described as the federal government's repeated circumvention of the designation model under the *Canada Labour Code* since 2011.³⁵ That Code has had a mandatory designation process since 1998. It requires the parties, during a legal strike or lockout, to continue services or production "to the extent necessary to prevent an immediate and serious danger to the safety or health of the public."³⁶ The Code gives the federal Minister of Labour the authority to ask the Canada Industrial Relations Board to deal with questions "with respect to the application of" this requirement to maintain truly essential services,³⁷ and postpones the right to strike or to lockout until the Board has answered those questions.³⁸ In an Air Canada flight attendants' dispute in September 2011 and an Air Canada pilots' dispute in March 2012, the Minister of Labour, Lisa Raitt, used that authority in a way which was clearly designed not to resolve essential service issues but simply to preclude what would

34 Finally, in March 2011, the provincial legislature brought the law into line with reality by moving the Toronto Transit Commission to the no-strike model, with the proviso that the statute would be reviewed after five years.

35 For a concise summary of the five instances of intervention by the federal government in 2011 and 2012 in actual or threatened work stoppages at Canada Post, Air Canada and CP Rail, see John Craig, Henry Dinsdale *et al*, "Federal Sector Update – 2012," online: <<http://www.heenanblaikie.com/en/Seminars-Conferences/All-Seminars-Conferences/2012/2012-Federal-Sector-Update.html>>.

36 *Canada Labour Code*, RSC 1985, c L-2, ss 87.4(1) and 89(1).

37 *Ibid*, s 87.4(5).

38 *Ibid*, s 89(1)(e).

otherwise have been legal work stoppages.³⁹ The main reasons the government gave for taking such action were its concerns about the risk of economic loss and public inconvenience and about the failure of what it described as extensive bargaining and mediation to lead to settlements.⁴⁰ Whatever the merits of those concerns, considerations of basic constitutional principle have (as Brian Langille has pointed out) repeatedly led the Supreme Court of Canada, in various contexts, to strike down as an affront to the rule of law the use of a statutory power for purposes other than those for which the power was conferred.⁴¹

In a Canada Post dispute in June 2011, Parliament passed a back-to-work statute⁴² within a few days after the beginning of a strike and a lockout. That statute sent the dispute to final offer selection arbitration by “a person that the Minister considers appropriate,”⁴³ and legislated a four-year term for the arbitrated collective agreement as well

39 In the Senate, the Minister of Labour was asked: “[I]f you believe that the public interest is seriously threatened, why, after so many attempts on your part to resolve the labour disputes at Air Canada, did you refuse to amend the law and designate Air Canada as an essential service [in other words, to legislate the no-strike model] so that these disputes would automatically be subject to binding arbitration?” The Minister replied that “these matters should be looked at on a case-by-case basis” — that if another carrier became large enough “to be able to absorb a work stoppage at Air Canada, then it is not going to be in the public interest to intervene.” *Debates of the Senate (Hansard)*, vol 148, No 61 (14 March 2012). Interestingly, the Minister mentioned Kingston, Ontario, where I live, as one of the communities “served solely by Air Canada.” I expect it would be hard to find anyone who considers Air Canada’s Kingston service to be anywhere near essential. A stronger case might of course have been made for the essentiality of the airline’s routes to more remote places, but there is little sign that the government was interested in making such a case.

40 The government also relied mainly on these arguments in its response to the complaint by the Canadian Union of Postal Workers and other union bodies to the ILO Committee on Freedom of Association about the *Restoring Mail Delivery for Canadians Act*, *infra* note 42. See International Labour Office, Governing Body, 317th Session, March 2013, “376th Report of the Committee on Freedom of Association,” Case No 2894, “Complaint against the Government of Canada,” at paras 289-318.

41 Brian Langille, “Why the Right-Freedom Distinction Matters to Labour Lawyers — and to All Canadians” (2011) 34:1 Dal LJ 143 at 145-146.

42 *Restoring Mail Delivery for Canadians Act*, SC 2011 c 17.

43 *Ibid*, s 8.

as the precise wage increase for each of the four years.⁴⁴ In May 2012, another federal back-to-work statute ended a strike at CP Rail after about five days⁴⁵ and sent the dispute to conventional interest arbitration, with the arbitrator once again to be chosen by the Minister rather than by the parties.⁴⁶ As in the Air Canada cases, the government justified these legislative interventions on the basis of concerns about economic loss and (in the Canada Post case) public inconvenience, and appears to have paid no heed to the standing designation process in the *Canada Labour Code*.

In public policy terms, there are no doubt times when a government can readily justify prohibiting or terminating a strike or lockout under the unfettered strike model, which provides no independent process for deciding what services are to be maintained during a work stoppage. A higher level of justification is surely called for, however, where the legislature has put a designation process in place, and a higher level yet where the government has not given that process a realistic chance to work. “A designation statute will become a dead letter,” we predicted in our study, “if strike action taken in compliance with it is more or less routinely met by back to work legislation.”⁴⁷

3. A CONSTITUTIONAL RIGHT TO STRIKE?

(a) The Debate on Prospects for a Constitutional Right to Strike

The Supreme Court of Canada has held in *B.C. Health*, and again in *Fraser*, that although the entrenchment of freedom of association in section 2(d) “does not guarantee a legislated dispute mechanism in the case of an impasse,”⁴⁸ it does include an employee right “to a general process of collective bargaining”⁴⁹ and to governmental respect for the results of that process. “Laws or government action that make it impossible to achieve collective goals,” the Court said

44 *Ibid*, ss 14 & 15.

45 *Restoring Rail Service Act*, SC 2012, c 8.

46 *Ibid* s 8(1).

47 Adell, Grant & Ponak, *supra* note 3 at 189.

48 *B.C. Health*, *supra* note 8 at para 103; *Fraser*, *supra* note 9 at para 41.

49 *B.C. Health*, *ibid* at para 91; *Fraser*, *ibid* at para 41.

in *Fraser*, “have the effect of limiting freedom of association, by making it pointless.”⁵⁰ However, the Court has not yet had occasion to reconsider its holding in the 1987 trilogy that section 2(d) does not guarantee a right to strike. When the occasion does arise, legal academics generally seem to agree, the Court will likely find some sort of constitutional protection for the right to strike. Nevertheless, there is little agreement on whether that right should be grounded in the right to collective bargaining established in *B.C. Health* and in *Fraser* or should be treated as a separate right grounded directly in freedom of association, without any necessary link to a right to collective bargaining or collective representation. I cannot canvass the debate on that question in detail in this essay, but I will look fairly briefly at what I think are very significant contributions by Pierre Verge and Brian Langille on one side and by Brian Etherington and Kevin Banks on the other, and I will offer some observations of my own in Part 3(c) below.

Professor Langille takes what might be called a common-law purist position, based on his view of freedom of association as meaning simply the right of a group of employees to do in concert what each of them has the right to do individually.⁵¹ From the late nineteenth century on, the common law has allowed an individual employee to withdraw his or her services without fear of incurring criminal or tortious liability, but without offering any shelter against employer reprisals for breach of the employment contract. A clear and simple way to decide what freedom of association means with respect to strikes is, in Professor Langille’s view, to hold that a group of employees are free to do in concert what each of them can do individually at common law (i.e., withdraw their services). Therefore, the constitutional entrenchment of that freedom must mean that any governmental restriction at all on concerted withdrawals of service involves (in Professor Langille’s words) “taking a bat to” the constitutional right, and must be justified under the *Oakes* test to escape being struck down by the courts.⁵² It would follow that the standing

50 *Fraser*, *supra* note 9 at para 46 [emphasis in original].

51 As Professor Langille acknowledges, his analysis in this respect parallels that of McIntyre J. in the lead case of the 1987 trilogy — the *Alberta Reference* case, *supra* note 6.

52 Langille, *supra* note 41 at 157-159.

restrictions on strikes now imposed by general labour relations legislation, even under the unfettered strike model (the certification requirement, compulsory strike votes and so on), would all contravene section 2(d) and have to be justified under section 1.⁵³

Professor Verge appears to share Professor Langille's view that any governmental action which takes away from workers the bare freedom to strike that has existed at common law since the late nineteenth century should be treated as a breach of freedom of association under section 2(d). Professor Verge emphasizes the idea that the right to strike serves democratic ends above and beyond collective bargaining and is integral to the concept of "collective autonomy" which he has developed and defended vigorously over the years, and which he sees as being synonymous with freedom of association.⁵⁴ He acknowledges that the standing restrictions on strike action now set out in Canadian labour relations statutes reflect "a sort of 'social compromise' " which seeks to balance employer and employee bargaining power. Nevertheless, he suggests, those restrictions should be held to contravene section 2(d) of the *Charter* and to need justification under section 1.⁵⁵ Even the statutory suspension of the right to strike during the lifetime of a collective agreement in return for mandatory grievance arbitration — one of the central tradeoffs of

53 Surprisingly (to me at least), this reasoning would seem to bring the constitutional default position for our strike law into some degree of convergence with the neo-marxist approach that I once described as the "unchained collective action" perspective on labour law. See B Adell, "Perspectives of Power and Perspectives of Principle in Canadian Labour Law Scholarship" in I McKenna, ed, *Labour Relations into the 1990's* (Don Mills, Ont: CCH Canadian, 1989) 27 at 34-36. From that perspective, the law (whether created by legislatures, courts or administrators) is inherently unable (in part because of the indeterminacy of legal rules) to regulate industrial conflict objectively, and should therefore leave workers free to use strike action without any type of legal restriction or support. Without putting too fine a point on it, this apparent convergence is somewhat paradoxical in light of Professor Langille's long-standing opposition to the sceptical view of law and language which underlies the neo-marxist perspective. See Brian Langille, "Revolution without Foundation" in *Labour Law under the Charter* (Kingston, Ont: Queen's Law Journal & Queen's School of Industrial Relations, 1988) 112.

54 Pierre Verge, "L'affirmation constitutionnelle de la liberté d'association: une nouvelle vie pour l'autonomie collective?" (2010) 51 C de D 353 at 366.

55 Verge, *supra* note 1 at 291-292.

Canadian Wagnerism — is in his view a breach of the freedom to negotiate collectively because it is based on a “periodic and iterative, or ‘static’” model of collective bargaining rather than on a “permanent or ‘dynamic’ ” model like that which prevailed in Britain until the early 1970s.⁵⁶ In the result, in Professor Verge’s opinion, and Professor Langille’s, the heavy lifting (indeed, virtually all of the lifting) on the question of whether a particular government restriction on strikes is unconstitutional under the *Charter* should be done not at the section 2(d) stage but at the section 1 stage: if a complainant can demonstrate any limitation whatsoever on the right to strike, the onus would shift to the government to justify that limitation under the *Oakes* test.⁵⁷

In contrast to what he describes as the simple right not to have the government undermine employees’ common law freedom to strike, Professor Langille sees claims by groups of employees to a constitutional right to collective bargaining as raising the far more complex issue of when the courts can legitimately compel legislatures to affirmatively (in his words) “go to bat for” those employees by creating the positive rights and remedies they often need in order to engage effectively in collective bargaining.⁵⁸ This, he claims, would be “a recipe for endless, incoherent, and needless litigation” on the precise configuration of those rights and remedies.⁵⁹ As an alternative — and this is a key aspect of Professor Langille’s overall view of

56 Verge, *supra* note 54 at 359, 372-373.

57 This view is also clearly expressed by Jamie Cameron, “The *Labour Trilogy*’s Last Rites: *B.C. Health* and a Constitutional Right to Strike” (2009-2010) 15:2 CLELJ 298. Professor Cameron argues (at 311-313) that the Supreme Court “should not dilute the scope of s. 2(d) to prevent restrictions on the right to strike from being tested under s. 1,” but “should turn its attention to s. 1 and develop a standard of review that is explicitly deferential in structure and application” — one that is “specific to labour issues.” Although Professor Verge characterizes the right to strike as being “a catalyst for democratic activity in a pluralist society” (*supra* note 1 at 275-276), he accepts (at 295) that restrictions on political strikes should be easier to justify than restrictions on economic strikes because Canada’s parliamentary democracy gives workers more of a voice on political matters than on economic matters.

58 Langille, *supra* note 41 at 157-162.

59 Brian Langille, “The Freedom of Association Mess: How We Got into It and How We Can Get out of It” (2009) 54:1 McGill LJ 177 at 212.

how the *Charter* should affect employee rights in the workplace — he has consistently argued, ever since the Supreme Court’s *Dunmore* decision came out, that the claim of Ontario agricultural employees to collective bargaining rights is really an equality rights claim rather than a freedom of association claim. The Court has long erred, in his view, in looking at section 15(1) of the *Charter*⁶⁰ (the equality rights clause) through the lens of what he calls a “thin theory of equality”⁶¹ — a theory which sees that section as merely prohibiting governmental discrimination on the basis of enumerated and analogous grounds. Instead, he argues, the Court should adopt a more open-ended commitment to equality which (in his words) would prohibit “cases of statutory exclusion”⁶² — apparently, if I understand his argument correctly, exclusion on any ground whatsoever. In this vein, Professor Langille maintains that in *Dunmore* (and more recently, in *Fraser*), the Court should have stayed away from section 2(d) of the *Charter* and relied instead on section 15(1) to require that agricultural employees, who had been legislatively excluded from the coverage of the Ontario *Labour Relations Act*, be given the same statutory collective bargaining rights enjoyed by most of the workforce under that Act — unless the government could make out a section 1 justification

60 Section 15(1) says: “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.”

61 The thrust of Professor Langille’s critique of the Supreme Court’s existing approach to section 15 is set out in this passage: “In a series of important cases in the 1980s and 1990s, the Court ‘read down’ section 15 of the *Charter* from a true equality provision to a much narrower nondiscrimination provision. Section 15, in the Court’s view, only applies to cases in which differential treatment is based on what we now refer to as ‘enumerated or analogous grounds’ (and then only if this treatment is also discriminatory). In 1989, in *Reference Re Workers’ Compensation Act, 1983 (Nfld)* [[1989] 1 SCR 922], we learned that employment status is not an analogous ground. (This is the ‘thin theory of equality.’)”: Langille, *supra* note 59 at 205. See also Brian Langille & Benjamin Oliphant, “From the Frying Pan into the Fire: *Fraser* and the Shift from International Law to International ‘Thought’ in *Charter* Cases” (2012) 16:2 CLELJ 181 at 219-220 (“After *Fraser* we see even more clearly the mess we are in as a result of this failure of our Court to stand behind our constitutional commitment to equality”).

62 Langille, *supra* note 59 at 211.

for not doing so.⁶³ This equality-based approach would, Professor Langille argues, be a more straightforward way of extending positive rights to Ontario agricultural workers. And it would better respect the separation of powers between the judiciary and the legislature, because it would look to how statute law had already framed those rights for other workers and would thereby avoid the need for unending constitutional litigation on their exact content.⁶⁴

The connection drawn by Professors Verge and Langille between the common law right or freedom to strike and the constitutional guarantee of freedom of association calls for some attention to what that guarantee would look like if it were based on the current common law right to strike. The common law (as revised by late nineteenth-century statutes) assures Canadian workers who are not covered by labour relations legislation that they will not be held criminally liable, or liable in tort, for refusing to work. It also protects them from being ordered back to work by the courts as a remedy for breaching their contracts of employment by refusing to work. However, it does nothing to shelter them from employer reprisals for that breach of contract, particularly from being dismissed and replaced.⁶⁵ As for workers who are covered by labour relations legislation and for whom a union has acquired statutory bargaining rights, the advent of a constitutional right to strike which did no more than entrench the common law by forbidding governments to require anyone to stay on the job would be of some value (perhaps considerable value) to those who are logistically or politically difficult to replace because they are in large bargaining units or in strategic positions — for example, airline pilots, hospital nurses and many government employees. It would, however, be of dubious value to the high proportion of the workforce whose services can more easily be replaced or done without, and whose jobs would therefore be in real and often immediate jeopardy if they took strike action under common law

63 *Ibid.*

64 Langille & Oliphant, *supra* note 61 at 219.

65 Judy Fudge & Eric Tucker, "The Freedom to Strike in Canada; A Brief Legal History" (2009-2010) 15:2 CLELJ 333 at 339-343; Brian Langille, "What Is a Strike?" (2009-2010) 15:2 CLELJ 355 at 368-369.

rules.⁶⁶ In other words, the constitutional right to strike, in the form envisaged by Professor Verge and Professor Langille, would seem to be of the most help to those employees who need it the least.⁶⁷

Among the voices on the other side of the debate are those of Brian Etherington and my colleague Kevin Banks. Like Professors Verge and Langille, Professors Etherington and Banks share the predominant academic view that in light of the Supreme Court of Canada's holding in *B.C. Health*, the Court *should* and likely *will* find that there is a constitutional right to strike. However, they see the right to strike in what might be called a more contextualized way⁶⁸ than does Professor Verge or Professor Langille — in other words, as an important way of helping to meet the need for a collective employee voice at work rather than as a way of entrenching a common law freedom that would probably be of little practical value to most of the workforce. Therefore, they see a constitutional right to strike as flowing directly from the right to collective bargaining, which itself flows from freedom of association. On this analysis, if a particular governmental limitation on the right to strike is designed in such a way that it does not substantially undermine the right to collective bargaining of the workers in question, it would not violate section 2(d) and would not require justification under section 1.

Professor Etherington has encapsulated this analysis, and what he sees as its likely consequences, in the following passage (written after *B.C. Health* and before *Fraser*):

In order to avoid continuous oversight of the plethora of restrictions on the right to strike that are found in all Canadian jurisdictions, I believe

66 Professor Verge explicitly recognizes this shortcoming, but says: “The simple exclusion of a category of employees from the scope of the law now regulating collective labour relations would not deny them the possibility, however little it may mean to them in practice, of asking the employer to bargain collectively with them for an agreement that would have only the force of a civil law contract” *Supra* note 54 at 369.

67 I do not claim that this is a devastating criticism of the Verge-Langille position. Experience shows that the right to bargain collectively also tends to be of the most value to employees who are already better off than most of the workforce.

68 Professor Langille castigates a contextual approach as a misguided way to interpret a constitution: “A constitution’s effort to construct a system of equal liberty or sovereignty involves the idea that its rules must be basic and universal. This understanding rightly places powerful constraints on ‘contextualization’: one cannot contextualize the basic grammar of the idea of a freedom.” *Supra* note 59 at 214.

it is likely that the Supreme Court's pragmatic inclinations will lead it to recognize a fairly limited right to strike — one that will require legislatures either to allow strikes or to provide a suitable substitute in the form of some other form of bargaining impasse resolution that gives access to a meaningful process of collective bargaining. Under this model, the right would be violated only where strike activity was totally prohibited or so severely restricted as to effectively deny access to meaningful collective bargaining. In the case of legislative attempts to substitute interest arbitration or some other form of third-party resolution, the right would be violated if the substitute process was not a fair and impartial one, with adequate incentives for the parties to negotiate in good faith in an attempt to reach a bargained settlement.

While recognition of this more limited right to strike would not avoid judicial oversight of legislative labour relations policy, it would keep such oversight to a minimum in several respects. First, it would avoid the need for detailed s. 1 scrutiny of any and all statutory restrictions on strikes, particularly those concerning the timing of strikes and the requirement of majority support through a strike vote. . . . Similarly, legislation substituting an adequate system of interest arbitration — one which ensured that meaningful collective bargaining was possible — would not breach s. 2(d) and would therefore not require s. 1 scrutiny. Standing legislation that imposes compulsory interest arbitration is common in the police, firefighting and hospital sectors throughout Canada [and] remarkably little dissatisfaction is expressed by most of the workers and unions that have been subject to it for a long time. In fact, in recent years in Ontario, it has usually been employers who have been averse to interest arbitration.⁶⁹

In a recent paper, Professor Banks has argued (along much the same lines as Professor Etherington) that the “substantial interference” test developed by the Supreme Court in *B.C. Health* should be applied to legislative restrictions on both the right to collective bargaining and the right to strike, with the result that a governmental restriction on strikes should not be held to breach section 2(d) unless it impairs those rights to a substantial degree. To do that, in Professor Banks' view, a restrictive measure would have to “undermine the capabilities that worker freedom of association protects in order to serve its purposes”⁷⁰ — more specifically, the capacity to “form self-governing organizations that can participate on equal terms in setting conditions

69 Brian Etherington, “Does Freedom of Association under the *Charter* Include the Right to Strike after *B.C. Health*? Prognosis, Problems and Concerns” (2009-2010) 15:2 CLELJ 315 at 324-325.

70 Kevin Banks, “The Role and Promise of International Law in Canada's New Labour Law Constitutionalism” (2012) 16:2 CLELJ 233 at 282.

of employment through collective bargaining.”⁷¹ In agreement with Professor Etherington, Professor Banks envisages that “the substantial interference test would enable our courts to recognize as legitimate the legislative substitution of independent interest arbitration for the right to strike in a number of sectors that do not fit the ILO’s strict view of essentiality, or in cases of negotiating deadlocks affecting services of major importance to the public.”⁷²

I can only touch very briefly here on the important question that is a major focus of Professor Banks’ paper: i.e., when Canadian courts flesh out the constitutional right to collective bargaining and any eventual constitutional right to strike, what use (if any) should they make of International Labour Organization (ILO) standards and the decisions of the ILO committees that review the application of those standards by member states? Roy Adams takes the polar position that the provisions of the ILO Constitution, as well as ILO conventions (whether ratified by Canada or not), are legally and morally binding on the Canadian courts, which ought to treat what the ILO has said about the meaning of freedom of association in much the same way as lower courts are bound to treat the decisions of higher courts.⁷³ In sharp contrast, Professor Langille has mounted a forceful challenge⁷⁴ to the Supreme Court’s assertion in *B.C. Health*,⁷⁵ reiterated in *Fraser*,⁷⁶ that “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*.” In Professor Langille’s view, the ILO’s processes for creating and applying its standards are thoroughly political rather than legal in nature, and are ill-suited to “giving tangible and concrete meaning to domestic labour regimes, much less to fundamental constitutional provisions that affect spheres of life well beyond labour law.”⁷⁷

71 *Ibid* at 258.

72 *Ibid* at 282.

73 Roy Adams, “The Supreme Court, Collective Bargaining and International Law: A Reply to Brian Langille” (2009) 14:2 CLELJ 317.

74 This challenge has been spelled out in detail in Langille & Oliphant, *supra* note 61.

75 *Supra* note 8 at para 78.

76 *Supra* note 9 at para 92.

77 Langille & Oliphant, *supra* note 61 at 188.

Professor Banks takes an intermediate position on this matter.⁷⁸ He acknowledges that ILO jurisprudence sometimes fails to come to grips with the realities of the Canadian situation,⁷⁹ but he argues that if our courts were to approach that jurisprudence with considerable caution and an awareness of its shortcomings, it could be of real help to them in distinguishing between substantial and insubstantial governmental restrictions on freedom of association at the section 2(d) stage, and also in applying the *Oakes* test under section 1.⁸⁰

78 Banks, *supra* note 70.

79 “In Canada at least, imposing interest arbitration does not necessarily undermine the capacity of workers to pursue collective goals in concert, particularly in light of the fact that a standing statutory requirement for such arbitration has long been a feature of certain well-functioning Canadian public-sector collective bargaining regimes which enjoy the support of the relevant unions. Too readily characterizing the imposition of independent arbitration as a human rights violation risks trivializing the idea of freedom of association, and conflating the method of resolving collective bargaining disputes with the right to engage in collective bargaining itself.” *Ibid* at 280-281.

80 *Ibid* at 288-290. Pierre Verge and Dominic Roux have done a masterful job of recounting the ongoing dialogue of the deaf between the ILO and various Canadian federal and provincial governments on the matter of restrictions on the right to strike. Pierre Verge & 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 canadien: deux solitudes?” in Pierre Verge, ed, *Droit international du travail – perspectives canadiennes* (Cowansville, Qc: Éditions Yvon Blais, 2010) 441 at 460-467. A recent example of deafness on the ILO side is provided, in my view, by the attitude of its Committee on the Application of Conventions and Recommendations (CEACR) toward the provisions of the Manitoba *Labour Relations Act* which authorize the provincial labour board to impose arbitration at the request of either side if a strike or lockout has gone on for more than 60 days (CCSM c L10, ss 87.1 to 87.3). In its 2012 report, the CEACR reiterates the formulaic position, also taken in earlier reports, that those provisions “seriously limit the means available to trade unions to further and defend the interests of their members as well as their right to organize their activities and formulate their programmes.” International Labour Conference, 101st Session, 2012, *Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87)*, at 100.

(b) The Saskatchewan Federation of Labour Case⁸¹

In 2008, a newly elected neo-liberal government in Saskatchewan brought in a statute — the *Public Service Essential Services Act*⁸² (PSES Act) — which abruptly ended Saskatchewan’s long period as the heartland of the unfettered strike model in the public and para-public sector, replacing it with a variant of the designation model that applies very broadly to government employment, health care, municipalities and universities, and gives employers an unusual degree of control over the designation process. In a judgment released in February 2012, Justice Dennis Ball of the Saskatchewan trial court (who had at one time chaired the provincial labour relations board) upheld a union claim that the PSES Act violated employee freedom of association. He held that section 2(d) of the *Charter* encompassed a right to strike, that the PSES Act infringed that right, and that the government had not justified the infringement under the *Oakes* test.

Like most designation statutes across Canada, the PSES Act requires employers and unions to try to negotiate an agreement on the services to be provided in the event of a work stoppage. However, if they cannot agree, that Act gives the employer the uncommonly strong unilateral power to decide which employees will stay on the job, and to increase the number of designated employees at any time. It also gives the Saskatchewan Labour Relations Board the uncommonly weak authority to review only the number of designated employees in each classification, not the services that are to be provided or the particular employees who are to provide them. In Justice Ball’s words, although “the PSES Act ostensibly contemplates the negotiation of an essential services agreement between each public employer and the union representing its employees,” in reality it enables employers to unilaterally set the terms of those agreements.⁸³ Also, Ball J. held, the Act’s coverage is too broad: “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

81 *Supra* note 13.

82 SS 2008, c P-42.2.

83 *Supra* note 13 at para 116.

that their discontinuance would jeopardize the health and safety of the community.”⁸⁴

After noting that the Supreme Court of Canada had made it explicit in both *B.C. Health* and *Fraser* “that it was not dealing with the issue of the right to strike,”⁸⁵ Ball J. said he was “satisfied that the right to strike is a fundamental freedom protected by s. 2(d) of the *Charter* along with the interdependent rights to organize and to bargain collectively.”⁸⁶ He went on to describe the PSES Act’s infringement of the right to strike as being so clearly substantial that he did not have to decide whether section 2(d) would be breached by any interference whatsoever with the right to strike or only by a substantial interference.⁸⁷

Moving on to the section 1 analysis. Justice Ball referred with apparent approval⁸⁸ to Chief Justice Dickson’s view in the 1987 *Dairy Workers* case⁸⁹ that “strikes (and lockouts) may be limited where they would be ‘especially injurious’ to the economic interests of third parties.” He then quoted this passage from the Dickson judgment:

It would be strange, indeed, if our society were to give constitutional protection for the freedom of employees to advance economic, as well as non-economic, interests by striking, while insisting that the state remain idle and indifferent to the infliction on others of serious economic harm. To require the legislature to be blind to the economic harm which may ensue from work stoppages would be to freeze into the constitution a particular system of industrial relations. Although, as yet, it would appear that Canadian legislatures have not discovered an alternative mode of industrial dispute resolution which is as sensitive to the associational interests of employees as the traditional strike/lockout mechanism, it is not inconceivable that, some day, a system with fewer injurious incident effects will be developed. In the meantime, in my view, legislatures are justified in abrogating the right to strike and substituting

84 *Ibid* at para 96. On the pertinence of international labour law to the issues at hand, Ball J. said (at para 114): “Whether or not Canada’s international obligations directly bind the Government of Saskatchewan, they are nonetheless highly important in assessing whether provincial labour relations legislation is *Charter* compliant.”

85 *Ibid* at para 92.

86 *Ibid* at para 115.

87 *Ibid* at para 122.

88 *Ibid* at para 129.

89 *Supra* note 6.

a fair arbitration scheme, in circumstances when a strike or lock-out would be especially injurious to the economic interests of third parties

On the first branch of the *Oakes* test, Justice Ball found that the impugned provisions of the PSES Act had a pressing and substantial objective. He noted that during major Saskatchewan health care strikes in 1999 and 2001 under the unfettered strike model, “critical essential services were clearly withdrawn (although the Unions claim otherwise)”⁹⁰ However, on the crucial part of the second branch of the *Oakes* test — the minimal impairment inquiry — he held that several aspects of the PSES Act were significantly more restrictive of the right to strike than was necessary to the attainment of the Act’s objectives. Among those aspects were the Act’s application to certain units which clearly did not deliver essential services (for example, a technical college and a casino)⁹¹ and the fact that it let employers unilaterally decide what services would be provided during a work stoppage and by whom.⁹² No other essential services statute in Canada, Ball J. observed, “comes close to prohibiting the right to strike as broadly, and as significantly, as the PSES Act,” or “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.”⁹³ Significantly, he added the following, echoing Chief Justice Dickson:

In my view, the PSES Act would be substantially less impairing of the right to strike protected by s. 2(d) of the *Charter* if in every case it made provision for an effective, independent dispute resolution process to address the propriety of public employer designations of employees required to work during a work stoppage. In addition, the PSES Act would be substantially less impairing if it provided compensatory access to adequate, impartial and effective overall dispute resolution proceedings in those cases where employer designations effectively abrogate the right of employees to engage

90 *Supra* note 13 at para 139.

91 *Ibid* at para 184.

92 In Ball J.’s words, “[d]ecisions based on the genuine needs of the community were not always made when the unions held the unilateral power to impose essential service protocols on public employers, and they will not always be made when the situation is reversed.” *Ibid* at para 190.

93 *Ibid* at para 205.

in meaningful strike action Every work place is different, and every work place must be dealt with according to its own set of circumstances.⁹⁴

On April 26, 2013, in a judgment written by Justice Robert G. Richards,⁹⁵ a unanimous five-judge panel of the Saskatchewan Court of Appeal reversed Justice Ball's holding that a right to strike is protected by section 2(d) of the *Charter*. The main thrust of Justice Richards' judgment is that Justice Ball had wrongly engaged in "what might be called 'anticipatory overruling'" of the Supreme Court of Canada's 1987 labour trilogy. The "standard approach" to *stare decisis*, in Justice Richards' words, "is that a lower court will not side step a precedent on the strength of a prediction that the court which established the precedent will reverse itself."⁹⁶ In any event, he said, before a lower court could take such action, there would have to be "a great deal of certainty that the higher court could be expected to reverse itself."⁹⁷ "If the right to strike is characterized as a dimension of collective bargaining — and this is how the trial judge proceeded," Justice Richards went on, "it is not at all clear that the Supreme Court's recent decisions lead to a conclusion that strike action is protected by s. 2(d)."⁹⁸ Rather, in his words,⁹⁹ the Court in *Fraser* "appears to say that a mechanism for *resolving* bargaining impasses (regardless of what institutional form it might take) is not part of what s. 2(d) requires in the context of collective bargaining."¹⁰⁰ So, he concluded, any step to reverse what the Supreme Court said about the right to strike in the 1987 trilogy "should be taken by that Court itself."¹⁰¹

Although he noted that it was "unnecessary to do so," Justice Richards added that the argument for a constitutional right to strike would be no clearer under existing Supreme Court jurisprudence if that right were "conceptualized in what might be called

94 *Ibid* at para 218.

95 2013 SKCA 43 (CanLII). Justice Richards has since been appointed Chief Justice of Saskatchewan.

96 *Ibid* at para 49.

97 *Ibid* at para 51.

98 *Ibid* at para 54.

99 *Ibid* at para 59 (after quoting from para 47 of the Supreme Court's majority judgment in *Fraser*, *supra* note 9).

100 *Supra* note 95 at para 60 [emphasis in original].

101 *Ibid*.

‘free-standing’ terms” rather than as an aspect of the right to collective bargaining.¹⁰² The complainant unions, he observed, were not arguing for “some pure or ‘state of nature’ entitlement to withdraw labour,” but for “the *contemporary* right to strike, a right significantly bound up with, integrated into, and defined by a specific statutory regime.”¹⁰³ Therefore, elaborating on his objection to anticipatory overruling, Justice Richards said:

A statutorily-grounded view of the right to strike immediately collides with the fact that the Supreme Court has said s. 2(d) does not contemplate any particular sort of labour relations regime. But, at the same time and cutting in the other direction, it is important to note that, at para. 25 of *Health Services*, the Court rejected the idea that collective bargaining is a “modern right” created by legislation rather than a fundamental freedom. These cross currents create at least some measure of uncertainty about how the Court might approach the right to strike even if strike action is seen as a free-standing concept and not merely as an aspect of collective bargaining.¹⁰⁴

Justice Richards’ judgment, and other appellate-level decisions handed down since *Fraser*, have led to the concern, as expressed by Michael Lynk after the B.C. Court of Appeal’s recent judgment in *Federal Government Dockyard Trades and Labour Council v. Canada (Attorney General)*,¹⁰⁵ that *Fraser* “has very much narrowed the arguments unions can make in the courts on a section 2(d) challenge . . . given that the Supreme Court used the term ‘substantial interference’ regarding legislation and collective bargaining in *Health Services*, and then [in *Fraser*] applied an impossibility test for unions to demonstrate their associational rights were being denied.”¹⁰⁶ *Dockyard Trades* dealt with a union’s section 2(d) challenge to limits imposed by the federal *Expenditure Restraint Act*¹⁰⁷ on an arbitrated wage increase for a unit of federal government employees. In dismissing the challenge, Justice Mary Saunders, speaking for the B.C. Court

102 *Ibid* at para 61.

103 *Ibid* [emphasis in original].

104 *Ibid* at para 64. At para 25, Justice Richards briefly summarized Justice Ball’s section 1 analysis, but did not comment on it.

105 2013 BCCA 371 (available on CanLII) [*Dockyard Trades*].

106 Christopher Guly, “Court rules against union in wage restraint case,” 33:21 *Lawyers’ Weekly* (4 October 2013), quoting Professor Lynk.

107 SC 2009, c 2.

of Appeal, held that the Act's nullification of what she called "a single, time-limited wage increase" did not "rise . . . to such significance that its loss amounts to a breach of the constitution of Canada."¹⁰⁸ This seems to say that whether a government's imposition of particular collective agreement terms constitutes a violation of section 2(d) is to be decided on pretty well the same criterion as that used in *B.C. Health* — i.e., did it have a major rather than a minor impact on the exercise of the right to collective bargaining?

In this essay I cannot go into the question of whether (as Professor Lynk's comment set out in the preceding paragraph implies) an impact on the right to collective bargaining that would likely have been considered major after *B.C. Health* might be considered only minor after *Fraser*. As noted in Part 3(a) above, the majority judgment in *Fraser* said that "[l]aws or government action that make it impossible to achieve collective goals *have the effect* of limiting freedom of association, by making it pointless."¹⁰⁹ I do, however, think it is important to remember that the *Fraser* majority judgment repeatedly and quite vigorously defended the majority judgment in *B.C. Health* against a concerted attack by two members of the *Fraser* Court. "It is difficult to imagine a meaningful collective process in pursuit of workplace aims," the *Fraser* majority said,¹¹⁰ "that does not involve the employer at least considering, in good faith, employee representations." In my view, it is also hard to imagine that a collective process would be really meaningful if an employer could count on ultimately imposing its position on major workplace issues, with its employees having no right at all to resort to a strike or to any independent means of resolving those issues.

In any event, in *Dockyard Trades* Justice Saunders rejected the government's argument that because a wage increase was imposed by arbitration rather than being agreed to by the parties, rolling it back could have no effect on employee freedom of association: "I . . . respectfully suggest," Justice Saunders wrote,¹¹¹ "that the subtleties of modern negotiation, practiced by experienced parties, does not

108 *Supra*, note 105 at para 53.

109 *Fraser*, *supra* note 9 at para 46 [emphasis in original].

110 *Ibid* at para 43.

111 *Supra* note 105 at para 35.

admit [*sic*] the distinction between a collective agreement achieved by arbitration and one achieved solely by collective inter-party bargaining” This is a clear holding to the effect that whether or not section 2(d) has anything to say about a government decision to put a particular bargaining unit on the arbitration route or the strike route, it gives both routes the same degree of protection from government interference.

(c) What Will (or Should) Happen Next?

For a moment, let us imagine that we could go back a dozen years, to a point in December 2001 just before the Supreme Court of Canada released *Dunmore* (and just after our book came out), and rewrite the story of the application of the *Charter* to labour relations law from that point on. If the new script were based on the plot sketched out in Professor Langille’s writings, it might read roughly as follows:

- (i) The Supreme Court would have applied the equality rights clause of the *Charter* (section 15) to Ontario agricultural workers, and no doubt by now to other categories of excluded workers across the country, giving them access to the Wagner model as enjoyed by most of the workforce in their particular jurisdiction — for whatever that model might be worth to them in practice. This would have required the Court to depart sharply from the view that section 15 extends only to discrimination on the basis of enumerated and analogous grounds, and would instead have read that section as making a vastly more open-ended commitment to equality rights. Any government-imposed distinction would be a breach of section 15 and would have to be justified under section 1, in accordance with the *Oakes* test.
- (ii) As far as workplace rights were concerned, section 2(d) of the *Charter* would entrench only a right to strike which clones the common law freedom to strike and therefore protects nothing more than an employee’s freedom to withdraw his or her services without being ordered back to work by government action (again, unless the government can justify such action under section 1). Legislators would be entirely free to decide whether or not to give strikers any forms of legal protection not given by the common law — for example, protection against employer

reprisals for breach of contract, or a right to return to the job after a strike. But (once again, absent a section 1 justification), section 15 would preclude giving any such protection to some parts of the workforce but not others.

- (iii) The Supreme Court would never have given voice to the instinct that the process and product of collective bargaining (or at least some means of collective employee representation vis-à-vis employers) is important enough in our economy and our society to warrant constitutional protection. This instinct was expressed (however awkwardly) by every member of the Court in *B.C. Health* and was reiterated, in quite a different context, by a clear majority in *Fraser*. Under the new script, as long as strikers were not ordered back to work by government (yet again, unless such an order could be justified under the *Oakes* test), there would be no constitutional obstacle to a governmental refusal to countenance any other form of employee representation rights. Any such refusal would, however, have to extend equally across the whole workforce, to avoid running afoul of the new reading of section 15 and therefore needing justification under the *Oakes* test.

However intriguing this new script might be, I expect that when we came out of our daydream we would see real problems with it, at various levels. First and most obvious would be the great practical difficulty of rolling back *Dunmore*, *B.C. Health* and *Fraser* — and even more to the point, much of the Court’s equality rights jurisprudence — to anything like the extent that the new script would require.

Even if that obstacle were overcome, the new script would read both section 2(d) and section 15 of the *Charter* in a way that required constant recourse to section 1 and the *Oakes* test, with its multifaceted scrutiny of (among other things) whether the governmental action in question impairs the affected rights as minimally as possible. It is true that over the years the Supreme Court has slightly relaxed some aspects of the *Oakes* test,¹¹² and that if the Court did opt for an

112 See, for example, *Canada (AG) v JTI-Macdonald Corp*, 2007 SCC 30, [2007] 2 SCR 610 (available on CanLII), and *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 (available on CanLII).

interpretation of sections 2(d) and 15 which downloaded as much to section 1 as the new script does, it could perhaps be persuaded to take up Jamie Cameron's proposal for an approach to section 1 that was both "specific to labour issues" and "explicitly deferential in structure and application."¹¹³ Nevertheless, it seems to me that the new script would likely lead to even more of what Professor Langille has called "endless, incoherent, and needless litigation"¹¹⁴ than would the Court's efforts in the "new trilogy" to recognize and protect a right to a collective employee voice in the workplace under section 2(d).

Nor is it at all clear that the new script would do any better than the current "new trilogy"-based narrative in furthering Canadian labour law's longstanding aspiration to advance the interests of vulnerable workers without letting more strategically placed groups do undue harm to employers and the public. Entrenching just the bare common law freedom to strike would offer no assurance of any legal protection against employer reprisals for exercising that freedom, so it would help mainly those employees who were in jobs where it was already economically or politically difficult for employers to take such reprisals. It is true that, as critics of *Fraser* have pointed out, the outcome in that case shows that the Supreme Court's current approach has by no means opened a direct, detour-free route to a stronger voice for vulnerable workers.¹¹⁵ However, the majority judgment did at least make the point repeatedly (nine or ten times in a dozen short paragraphs)¹¹⁶ that the employer obligation under the Ontario *Agricultural Employees Protection Act* (AEPA) to listen to and acknowledge collective employee representations will have to be interpreted to require the employer to "consider [such] representations in good faith" and without "a closed mind."¹¹⁷ It is not hard, of course, to see why the complainants in *Fraser* went straight to court with their constitutional complaint about the AEPA rather than going first to the tribunal charged with administering that statute

113 *Supra* note 57.

114 *Supra* note 59 at 212.

115 See, for example, Alison Braley, " 'I will not give you a penny more than you deserve': *Ontario v. Fraser* and the (uncertain) right to collectively bargain in Canada" (2011) 57:2 McGill LJ 351.

116 *Fraser*, *supra* note 9 at paras 101-112.

117 *Ibid* at paras 102 & 103.

(the Agriculture, Food and Rural Affairs Appeal Tribunal, which few labour lawyers would expect to be very receptive to the complainants' concerns). Nevertheless, from a broader legal process perspective it did make some sense for the Supreme Court to agree with the court of first instance that the "Tribunal should be given a fair opportunity to demonstrate its ability to appropriately handle the function given to it by the *AEPA*."¹¹⁸ The majority judgment went on to add, in unmistakably directive and forward-looking terms: "The Tribunal may be expected to interpret its powers, in accordance with its mandate, purposively, in an effective and meaningful way."¹¹⁹

An indication of the protective potential of this aspect of the *Fraser* case can be seen in the judgment of Justice Thomas M. Davis of the Quebec Superior Court in *L'Écuyer v. Côté*.¹²⁰ The Quebec *Labour Code* excludes employees on farms with less than three "continuously . . . employed" workers from being in a certified bargaining unit (although they are covered by other parts of the Code, including the unfair labour practice provisions). In the *L'Écuyer* case, the Quebec Commission des relations du travail held that, given the absence of any other process for protecting the freedom of association of employees on such farms, their statutory exclusion from certification was intended to (and did) breach their rights under section 2(d).¹²¹ In upholding the Commission's decision on judicial review, Justice Davis found that although there was "no evidence that [the union] had actually attempted to negotiate with [the owners of the farm in question] on behalf of the workers, the conclusion that the employer had no intention of negotiating was one which could be drawn from the evidence on a balance of probabilities,"¹²² particularly in light of the fact that neither the employer nor the farm employers' association to which it belonged had "been proactive in seeking out common ground on working conditions with the employees or the Union."¹²³ Justice Davis concluded, applying what he called "the principles confirmed by the Supreme Court of Canada in *Fraser*,"

118 *Ibid* at para 111.

119 *Ibid* at para 112.

120 2013 QCCS 973 (available on CanLII).

121 *Ibid* at para 95.

122 *Ibid* at para 96.

123 *Ibid* at para 97.

that the impugned statutory exclusion “is discriminatory as being a significant hindrance on [the affected employees’] ability to exercise their fundamental right of freedom of association.”¹²⁴ In contrast, he added, the Ontario statute at issue in *Fraser* — the AEPA — required an employer to “receive and consider the collective demands of its employees and implies an obligation of good faith on the part of the employer”¹²⁵

4. CONCLUSION

As mentioned above, Pierre Verge has noted that the strike weapon contributes to “the democratic vitality of society as a whole.”¹²⁶ But does it do that as a backstop to collective bargaining in giving employees an effective voice in the workplace, or as a sort of free-standing means of furthering a much more open-ended range of claims? There is, I think, a strong argument that the main purpose of the right to strike is, as Brian Etherington puts it in the passage quoted in Part 3 above, to ensure “access to meaningful collective bargaining,” or at least to some meaningful form of workplace representation.¹²⁷ That argument is supported by the fact that, as Professor Verge has acknowledged,¹²⁸ the Canadian system of government gives workers quite effective forms of *political* voice but no other vehicles that are as effective as collective bargaining for advancing their *workplace* rights and interests.

If the right to strike does flow from the right to collective bargaining, then (to bring Parts 2 and 3 of this essay together) a no-strike model or a designation model which imposed statutory limits on the strike weapon while providing for a reasonably effective and truly

124 *Ibid* at para 98.

125 *Ibid* at para 101. Justice Davis went on to agree with the Commission that the impugned provision was not justified under section 1. He issued a declaration of invalidity, but suspended it for a year to allow the legislature to act. “[W]hatever option is chosen [by the legislature],” he said (at para 123), “it must reflect the reality that freedom of association for farm workers gives them the right to organize with a view to collectively presenting their demands to their employer who must receive them in good faith.”

126 *Supra* note 1 at 270.

127 *Supra* note 69 at 324.

128 *Supra* note 1 at 295.

independent alternative means of resolving collective bargaining disputes could appropriately be held to meet the demands of freedom of association under section 2(d), without any need to invoke section 1. If for any reason a government balked at the idea of a truly independent interest arbitration process, it would be free to put the parties onto the strike-lockout route or to try to make out a section 1 justification for some other type of dispute resolution process. However, for the reasons set out in Justice Ball's judgment in the *Saskatchewan Federation of Labour* case, it would be very hard indeed to justify the one-sided initiatives reflected in the Saskatchewan PSES Act and in the federal government's actions in at least some of the recent "instant back to work" cases referred to in Part 2(d) above. In a more or less well-functioning democracy like ours, I am inclined to think that outcome would represent a good balance between legislative discretion and judicial oversight, despite Professor Verge's cogent advocacy of a somewhat different approach which would put governments under even tighter constraints.¹²⁹

129 *Supra* note 1 at 291-292.