

WHAT'S RIGHT IS RIGHT: THE SUPREME COURT GETS IT

Ken Norman
College of Law,
University of Saskatchewan,
Saskatoon, Saskatchewan, Canada

The Supreme Court's judgment in *Health Services* signals a crucial change in the discourse of labour rights in Canada. In this case the Court rejects, in principle, its previous stance that the rights to organize and to engage in collective bargaining are not fundamental constitutional rights at all. The reasoning in *Health Services* stands on a recognition of labour history as establishing that labour rights are fundamental and predate the Charter; of labour rights as reflecting the Charter values of human dignity, equality, liberty, respect for the autonomy of the person and enhancement of democracy and of Canada's commitments to collective bargaining rights in international conventions as providing a floor of labour rights for interpretation of freedom of association, s.2 (d), of the Charter. This paper argues that this third ground is by far the most important as it is the gateway to a new world of discourse about labour rights based on the understanding that ILO Freedom of Association Principles are basic Canadian human rights protected by the Charter. That said, the Supreme Court's cautionary comments in *Health Services* give cause for concern. There is much research and writing to be done if the Supreme Court's new project of filling freedom of association under the Charter with jurisprudence is to be kept from going sideways.

On June 8, 2007, the Supreme Court delivered its judgment in *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia* [*Health Services*]. The best insight into just how significant this is for Canadian labour involves a brief excursion to the dark side. In August, former BC Attorney General, Geoff Plant¹, ruminated in *The Lawyer's Weekly*² that *Health Services* is the prime example of how "predictability and stability, central pillars of the rule of law, are often lacking in Charter jurisprudence." In light of the Supreme Court's determination in *Health Services* to "constitutionalize" labour relations, Geoff Plant invited his reader to contemplate the following abyss:

On what basis is a government to make policy and draft legislation if not in reliance upon two decades of consistent decisions by the country's highest court?³

Well, I want to note that Geoff Plant is talking here about governments having enjoyed a free hand to do what they will to free collective bargaining.

And, I argue that his question - framed rhetorically - about the black hole facing Canadian governments can be met with a good answer; which is the voluminous jurisprudence of the ILO's Committee on Freedom of Association. Four years ago in an article entitled "ILO Freedom of Association Principles as Basic Canadian Human Rights: Promises to Keep"⁴ I sketched the outlines of the ILO Freedom of Association Principles and pointed out how very badly Canadian governments had fared when their repressive anti-union laws were before the Committee on Freedom of Association for review. I noted that:

Recently, the Committee on Freedom of Association censured the Campbell government of British Columbia with regard to six statutes curtailing the right to free collective bargaining and the right to strike in the health and education sectors. In the same report, the Committee also recommended that s.63.1 of the Ontario Labour Relations Act, which obliges employers to post notices setting out the process for terminating union bargaining rights certificates, be repealed on the ground that it violated freedom of association. As of these decisions, the results are that in forty of fifty-four such complaints, the Committee found that freedom of association principles had been violated.⁵

The Supreme Court's judgment invites more to be said about how to frame the freedom of association debates to come under s.2 (d) and s.1 of the Charter in light of what Roy Adams has called the "rich body of jurisprudence"⁶ that has been developed over the course of the past 55 years by the ILO Committee on Freedom of Association. My thesis is that far from abandoning "the rule of law", as Geoff Plant would have it, Health Services has subjected governments in Canada to the rule of law as they will now have to justify their anti-labour legislation in the language of human rights as developed by the ILO Committee on Freedom of Association.

Beginning in 1972, the Committee on Freedom of Association has published a digest of its decisions and principles. The 5th edition, 2006, runs to some 288 pages, and is available online.⁷ It should be required reading for anyone interested in the way forward for labour rights as human rights in Canada. In the introduction to this volume is found the following statement:

... the Committee has ... been guided by the constant values of freedom of association which, by allowing for the establishment of workers' and employers' organisations and vesting them with the means to promote and defend the interests of their members, constitute a source of social justice and one of the main safeguards of sustainable peace. At the same time, freedom of association is the *conditio sine qua non* of the tripartism that the Constitution of the ILO enshrines in its own structures and advocates for member States: without freedom of association, the concept of tripartism would be meaningless. This explains why, from the outset, the Constitution of the ILO has affirmed the principle of freedom of association and why, over the years, the International Labour Conference has adopted Conventions, Recommendations and

resolutions, which constitute the most important source of international law in this field and the principles of which, it should be recalled in this context, have been broadly assimilated into the legislation of many countries.⁸

With this reference to legislation, it will be recalled that, a generation ago, the Supreme Court's Labour Trilogy judgments left Canadian governments with no incentive so to assimilate freedom of association principles into their labour laws.⁹ As I put it in my chapter on Freedom of Association in *Beaudoin & Mendes, Canadian Charter of Rights and Freedoms 4th ed., 2005*, "... the Court declared that there was no Charter right to collective voice, nor was there any right to strike in furtherance of a union's collective bargaining *raison d'être*."¹⁰ For the governing three members of the Court, *Le Dain J.* rejected the ILO jurisprudence as supplying guidance to the Court's task of interpreting s.2 (d) of the Charter and simply asserted that "...the modern rights to bargain collectively and to strike ... are not fundamental rights or freedoms. They are the creation of legislation, involving a balance of competing interests ..."¹¹

Twenty years later, the Supreme Court has finally recanted this doctrine in *Health Services*; thereby, no doubt to Geoff Plant's dismay, restricting the free hand given by the Labour Trilogy to governments unilaterally to do with unions and collective bargaining what they would. The statute before the Supreme Court in *Health Services* was the *Health and Social Services Delivery Improvement Act, 2002 [Bill 29]*. It had been rushed through the House; coming into force just three days after its first reading, without any serious consultation with the affected unions.¹² Seniority rights were undercut in a number of respects so as to leave the *Health Employers Association of British Columbia* with a green light to contract out in the name of improving delivery of health and social services. To the extent that this new regime contradicted rights under existing collective agreements, *Bill 29* gave itself the trump card.¹³

Justices *McLachlin* and *LeBel* lead the Court in reversing the Labour Trilogy and its successor case *PIPS*¹⁴ on the principled ground that "None of the reasons provided by the majorities in those cases survive scrutiny, and the rationale for excluding inherently collective activities from s. 2(d)'s protection has been overtaken by *Dunmore*."¹⁵ They look to labour history in ruling that association for the purpose of collective bargaining is a fundamental right predating the Charter.¹⁶ The Court also draws from "Charter values" to support its conclusion. Such values as human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy "are complemented and indeed, promoted, by the protection of collective bargaining in s.2(d) of the Charter".¹⁷

Most notably for the purposes of the argument that I want to advance in this paper, the Court looks to international law to support the conclusion that s. 2(d) of the Charter recognizes a right to collective bargaining.¹⁸ Following a

discussion of ILO Convention No. 87 and the ILO principles concerning collective bargaining the Court summarizes in two vital sentences:

In summary, international conventions to which Canada is a party recognize the right of the members of unions to engage in collective bargaining, as part of the protection for freedom of association. It is reasonable to infer that s. 2(d) of the Charter should be interpreted as recognizing at least the same level of protection.¹⁹ [Emphasis added]

I have emphasized “at least” because I will argue that they represent a beacon of light shining through the dim cautionary language of the Supreme Court in *Health Services* with regard to a number of vital “limits” questions. Now, with this idea firmly in place, let’s take a look at a few of the Court’s cautionary comments in *Health Services*. First, drawing from Bastarache J’s judgment in *Dunmore*²⁰ the Court asserts that the Charter does not protect all aspects of the associational activity of collective bargaining; it protects “only against substantial interference”.²¹ In its s. 1 analysis of whether the impugned B.C. statute could be “saved” as being demonstrably justifiable in a free and democratic society, the Court places much weight on the fact that the government of B.C. had presented no evidence as to why it had opted for the impugned measures and that there had been no meaningful consultation with the unions about the range of options open to it.²²

What then is entailed in working out what it would mean for Canada, including the Supreme Court of Canada, to take seriously ILO Freedom of Association principles as basic Canadian human rights.²³ First, one can read the Supreme Court’s discussion of just what the content of “substantial interference” with the associational activity of collective bargaining entails, as many lawyers will, and miss the fundamental point that these paragraphs do not reference the solid jurisprudential ground of ILO Freedom of Association Principles. Save, that is, for a brief reference to ILO principle “H”, the principle of good faith in collective bargaining.²⁴ It is clear that the Court isn’t paying attention here to its earlier foundational assertion that the Charter is to be read as providing “at least” the same level of protection of collective bargaining as do international conventions to which Canada is a party.

Second, given the government of B.C.’s high-handed unilateral behaviour in *Health Services* one is not left with much to go on as to how the Court will assess a government’s s. 1 justifications in the next anti-labour statute to come its way. The judgment to worry about here is *Newfoundland (Treasury Board) v. N.A.P.E. [NAPE]*.²⁵ In that case, you will recall that the government of Newfoundland reneged on a signed pay equity agreement. Before the female public servants received one penny of their pay equity deal, the government enacted the *Public Sector Restraint Act* postponing the pay increases for three years and canceling any arrears dating back for three years. Thereby, it relieved itself of about \$24 Million of pay equity obligations. By all accounts this was a

clear violation of s. 15, the equality clause, of the Charter. However, the government's justification for this measure - that it was dealing with a "fiscal crisis" - easily prevailed. In a few brief paragraphs the Supreme Court accepted this plea as a sufficient pressing and substantial and minimally impairing objective under s. 1 of the Charter.²⁶ And the government of Newfoundland walked!

So what will the Supreme Court say the next time a government advances the same sort of "fiscal crisis" justification under s. 1 in a Charter challenge to a piece of anti-labour legislation? Will NAPE become the order of the day? Without a body of Canadian research and writing in place about the case law development of the ILO Freedom of Association Principles, I fear that the answer to this question may just be yes. The ILO Committee on Freedom of Association has developed a framework of reasonableness in assessing governmental limitations on collective bargaining. I argue that this analysis is what the Court needs to look to in its s.1 discussion of whether a challenged anti-labour statute is demonstrably justifiable in a free and democratic society.

Third, the Court in *Health Services* lets its reader know right at the outset of its analysis that "the present case does not concern the right to strike, which was considered in earlier litigation on the scope of the guarantee of freedom of association."²⁷ And, little more is said about the matter.²⁸ Granted, there are some comments that support the right to strike being constitutionalized by the Court at some future point.²⁹ That said, it is apparent that the Court's "earlier" comments on the question were entirely behind the notion that there exists no Charter protected right to strike in Canada.³⁰ Wayne Benedict has recently argued:

Should the Supreme Court choose to continue its journey through the door opened in *Dunmore* and widened in *Health Services*, by interpreting the Charter as matching Canada's promises to implement the ILO freedom of association principles, then it is possible that in a future case the Supreme Court will overturn what remains of the Labour Trilogy and interpret the Charter s. 2(d) freedom of association as including a right to strike subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.³¹

The first test case has already been filed. A number of Alberta building trades unions launched a Charter challenge to the Alberta Labour Relations Code on September 20, 2007.³² The challenged provision³³ shuts down any strike by a building trade union when 75% of the building trades unions have settled on a contract. Though the party plaintiffs are a handful of construction trades unions, led by the Carpenters, who were recently caught by this clause, their test case has been given full financial support by the Alberta Building Trades Council of Unions.³⁴

Let me conclude by contending that, not only is it possible, it is a necessary implication of the principled stand taken by the Supreme Court in *Health Services* that, to borrow NUPGE's powerful tag line, "Labour rights are Human rights".³⁵ When the Court said that it would interpret the Charter as providing "at least" the same level of protection to the freedom of association of workers as do international standards to which Canada currently adheres, the Court must be taken to mean that ILO Freedom of Association standards are basic Canadian human rights protected by the Charter. With regard to the linkage between the right to organize and the right to strike, the ILO Digest couldn't be clearer: The right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87.³⁶

So, the right to strike is an intrinsic feature of freedom of association under s.2 (d) of the Charter. How the Supreme Court, in *Health Services*, could fail to notice this basic collective labour right is cause for concern. At very least, assuming good faith on the part of the Supreme Court justices in times to come, they have a great deal to learn about ILO Freedom of Association jurisprudence. As Eric Tucker has noted "Its very important that unions have a clear understanding of the scope, limitations and impact of this landmark ruling on current and future challenges involving labour rights in Canada."³⁷

NOTES

1. Geoff Plant served as the Attorney General of British Columbia from 2001 to 2005.
2. *The Lawyers Weekly*, August 17, 2007, at 13.
3. *Ibid.*
4. (2004), 67 (2) Saskatchewan Law Review 592.
5. *Ibid.* at 605-606.
6. Roy J. Adams, "A Brief Introduction to International Labour Law and its Implications for Canadian Policy and Practice" *Workplace Gazette* 4:4 (Winter 2001) 81 at 83.
7. *Freedom of Association Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO Fifth (revised) edition, 2006*; www.org/ilolex/english/23e2006.pdf
8. *Ibid*, Introduction at 1-2. The fundamental Conventions on freedom of association and collective bargaining have received a very high number of ratifications: the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), has received 145 ratifications (as of 1 January 2006), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), has received 154 ratifications (as of the same date).]
9. *Reference re Public Service employee relations Act (Alta)*, [1987] 1 S.C.R. 313; *Retail, Wholesale & Department Store Union v. Saskatchewan*, [1987] 1 S.C.R. 460; *Public Service Alliance of Canada v. Canada* [1987] 1 S.C.R. 424. [*Labour Trilogy*]
10. Ken Norman, "Freedom of Association S. 2 (d)" chapter 7 in Beaudoin & Mendes, *Canadian Charter of Rights and Freedoms 4th ed*, 2005 (Toronto: LexisNexis, Butterworths) at 330.
11. *Supra*, *Reference Re Public Service Employee Relations Act (Alta)*, note x, at para. 144.
12. *Health Services*, *supra* note ii, at paras. 6 & 7.
13. *Ibid*, at para. 12.
14. *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)* [1990] 2 S.C.R. 367.
15. *Ibid*, at para. 36.
16. *Ibid*, at paras 40 - 64.
17. *Ibid*, at para 81 & continued discussion up to para 87.

-
18. *Ibid*, at paras. 70 – 78.
 19. *Ibid*, at para 79.
 20. *Dunmore v. Ontario (Attorney General)* [2001] 3 S.C.R. 1016.
 21. *Ibid*, at para 90 & following paragraphs spelling out the Court’s understanding of *Dunmore* and other Supreme Court decisions
 22. *Ibid*, at para 156.
 23. For a modest start on this project see, Ken Norman, *supra*, note v, “ILO Freedom of Association Principles as Basic Canadian Human Rights: Promises to Keep”.
 24. *Ibid*, at para 98.
 25. *NAPE* [2004] 3 S.C.R. 381.
 26. *Ibid*, at paras 61 – 72. At para 72, the Court states “the courts cannot close their eyes to the periodic occurrence of financial emergencies when measures must be taken to juggle priorities to see a government through the crisis.”
 27. *Ibid*, at para 19.
 28. *Ibid*, at para 28 the Court comments that it “has repeatedly excluded the right to strike and collectively bargain from the protected ambit of s.2 (d).”
 29. *Ibid*, at paras. 48, 63, 64, 75, 91, 92, & 96. I am grateful to Roy Adams for reading an earlier draft of this paper and offering a hopeful interpretation of these paragraphs. The Court refers to the Woods Task Force Report which includes invoking economic sanctions as part of the basic freedom to organize and to bargain collectively. Chief Justice Dickson’s dissenting comments as to the essential activities of unions in the *Labour Trilogy* are noted. Finally, there is a discussion that seems to lean in the direction of concluding that denial of the right to strike undermines the right to engage in collective bargaining.
 30. See, Wayne Benedict, “The Effect of *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia* on *The Labour Trilogy*, *PIPS v. Northwest Territories (Commissioner)* and its Potential Effect on the *Alberta Labour Relations Code*, (unpublished paper presented on August 30, 2007, to the Alberta Federation of Labour. The paper will be published by the AFL. It has been submitted for publication to the *Alberta Law Review*) at p. 42.
 31. *Ibid*, at p. 44.
 32. <http://www.albertabuildingtrades.com/challenge.html>
 33. *Alberta labour Relations Code*, s. 189.
 34. *Ibid*.
 35. National Union of Public and General Employees; www.nupge.ca
 36. *ILO Digest*, *supra*, note viii, at para. 523.
 37. http://www.nupge.ca/news_2007/n18se07a.htm ; September 18, 2007, presentation to the Executive Board of NUPGE.