

# The Legal Structure of Freedom of Association

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*Though law is often assessed against a normative framework, structural soundness is also important. This article argues that inattention to law's structural requirements in recent freedom of association cases, specifically those recognizing derivative rights to strike and meaningful collective bargaining, has created confusion about the nature of the Charter's protection of freedom of association, as well as the legitimate role of the courts in applying it. In order to illustrate this, the authors provide a detailed account of the basic purpose of law, the building blocks that it uses and each building block's specific function. Together, these make up the law's structure. The authors then illustrate how this structure has set up freedom of association at the common law, statutory and constitutional levels. The leading freedom of association cases are then analyzed with this structure in mind, demonstrating that the Supreme Court's inattention to structure has led to the creation of complicated derivative rights where none were required.*

*The authors then explore the resulting legal and political implications, and provide their own solutions by considering novel ways in which courts may consider freedom of association that adhere to law's structural demands while still ensuring that recognized section 2(d) protections remain in place. In order to get back on the right track, the Court must pay attention to law's structural requirements and recognize that the judiciary may not create derivative rights frequently or broadly.*

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# Introduction

This essay is about the law of freedom of association of workers in Canada. Its aim is to clarify and help structure our thinking about this important and currently contested area of law. To achieve this goal, we examine not only the constitutional guarantee of freedom of association, but also the common law of freedom of association and the comprehensive statutory codes (now commonly referred to as laws based on the “Wagner Act Model”) instantiating that freedom for Canadian workers.<sup>1</sup>

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1. See *Plourde v Wal-Mart Canada Corp*, 2009 SCC 54 at para 56, [2009] 3 SCR 465. The term “instantiate” has been used by the Court in *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 at para 36, [2001] 3 SCR 1016 [*Dunmore*].

There are many ways to implement any particular set of political goals, one of which is through the law. There are other ways, but if we use the law, it comes with its own demands and has its own way of doing business. That is, labour law not only has a moral or political *narrative*, it also has a legal *grammar*. This grammar is not just lexical; it does not merely serve a technical or communicative purpose. It also reveals the substantive characteristics and internal demands of the law, as law.

Of course, all labour lawyers have a view about labour law's moral purposes and its normative "narrative"—where we *should* be going and why. Whatever narrative or theory of labour law justice we embrace, Canadian constitutional cases force us to confront not only that narrative of workplace justice, but also law's internal structure. If we fail to attend to the law's grammar, then the law becomes part of the problem rather than part of the solution, no matter what narrative one seeks to advance.

Over the life of the *Canadian Charter of Rights and Freedoms*,<sup>2</sup> there has been an evolution in the court's view of freedom of association in the workplace—from the Labour Trilogy<sup>3</sup> to *Delisle v Canada (Deputy Attorney General)*,<sup>4</sup> to the second labour trilogy of *Dunmore v Ontario (Attorney General)*,<sup>5</sup> *Health Services and Support—Facilities, Subsector Bargaining Assn v British Columbia (BC Health)*<sup>6</sup> and *Ontario (Attorney General) v Fraser*,<sup>7</sup> to the cases that have followed,<sup>8</sup> most recently in

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2. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

3. *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313, 78 AR 1 [*Alberta Reference* cited to SCR]; *Public Service Alliance of Canada v Canada*, [1987] 1 SCR 424, 48 DLR (4th) 249; *RWDSU v Saskatchewan*, [1987] 1 SCR 460, 38 DLR (4th) 277 [collectively "the Trilogy"].

4. [1999] 2 SCR 989, 176 DLR (4th) 513 [*Delisle* cited to SCR].

5. *Supra* note 1.

6. 2007 SCC 27, [2007] 2 SCR 391 [*BC Health*].

7. 2011 SCC 20, [2011] 2 SCR 3 [*Fraser* SCC].

8. See *Association of Justice Counsel v Canada (Attorney General)*, 2012 ONCA 530, 117 OR (3d) 532 [*Association of Justice Counsel*]; *Independent Electricity System Operator v Canadian Union of Skilled Workers*, 2012 ONCA 293, 110 OR (3d) 561; *Mounted Police Association of Ontario v Canada (Attorney General)*, 2012 ONCA 363, 111 OR (3d) 268 [*Mounted Police*].

*R v Saskatchewan Federation of Labour*.<sup>9</sup> We fear that over this period, inattention to the grammar of law has undermined a coherent approach to freedom of association. This inattention first appeared in *BC Health*, and subsequently continued through *Fraser*, where the Court conflated the notion of the state's failure to *respect* a freedom by directly impinging upon it with the failure to adequately *protect* a freedom from the freedom of another. It has ultimately led the courts to require that claimants demonstrate state interference with their freedom of association to the standard of "effective impossibility" to attract *Charter* protection. Requiring such a standard is anomalous within the fundamental freedoms and should be avoided.

This article begins by examining some basic ideas about law and legality—what it is to have a legal system. We review some very basic legal concepts that we consider essential to understanding our system—such as how the Constitution interacts with statutory and common law sets of freedoms, rights and duties—through the vertical, horizontal and diagonal application of the Constitution.

We then move to how those concepts have been deployed to structure the law of freedom of association—a survey that will reveal the legal structure of the options the Supreme Court has faced, and will continue to face, in freedom of association cases. Once all of this is in place, it is possible to see that, on terms we now understand and can deploy meaningfully, the construction of "derivative rights", via the constitutional technique of what we call the "diagonal" application of the *Charter* to private actors, is one which can and needs to be handled with care, but so far has not been. We conclude by asking when it is constitutionally required that the *Charter* demands a legislature pass a law altering the pre-existing common law distribution of rights and freedoms, and set out three possible answers to this difficult question.

Ultimately, the confusion demonstrated in some of these decisions has its costs, not the least of which is blurring the lines between the roles of our judiciary and legislatures, and placing the courts in a role to which they are unsuited. We hope that upon successfully retrieving the grammar

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9. 2013 SKCA 43, 361 DLR (4th) 132 [*Saskatchewan Federation of Labour* CA], rev'g 2012 SKQB 62, 390 Sask R 196 [*Saskatchewan Federation of Labour* QB] (which found that—following *BC Health*—section 2(d) of the *Charter* did include protection for the right to strike).

of the law, we will be in a better position to see what it is we are legally talking about in these cases, and to make clear-eyed decisions on that basis. This undertaking requires us to go back to the beginning and re-establish the legal structure of freedom of association from the ground up.

## I. The Idea of Legality (Generally)

To clearly see the structure of legal thought in freedom of association cases, some unpacking of very basic ideas about the grammar of law is required. The first and most basic idea is that law is omnipresent; the amount of law we have is, in a meaningful sense, constant. On this view, assertions that “labour law is over” or “labour law is dead” can be misleading.<sup>10</sup> As long as people engage in productive activities (i.e., work, labouring), some set of rules will govern that part of their lives (as with all other parts).

Our assertion is not that it is a poor policy decision to have *less* or *more* law; rather, it is impossible. For example, if we repeal labour standards legislation dealing with minimum wages and maximum work hours, that does not mean we have reduced the amount of law we have governing the workplace. It just means that we have replaced one set of legal relations with another. We simply move from a set of statutory rights and standards governing employment to a complex set of common law rules about contracts of employment. We also move from administrative enforcement to judicial enforcement in (more expensive to access) common law courts. We may end up with less real-life enforcement of a less generous (for workers, usually) set of rules, but there is no change in the quantity of law we have, just the quality.

If only the quality of law and never its quantity can be changed, then law cannot simply be a tool or an empty vessel at hand to attain other goals or extraneous goods (although it can be that as well).<sup>11</sup> Law has

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10. See e.g. Alan Hyde, “The Idea of the Idea of Labour Law: A Parable” in Guy Davidov & Brian Langille, eds, *The Idea of Labour Law* (Toronto: Oxford University Press, 2011) 88; Keith Ewing, “The Death of Labour Law?” (1988) 8:2 Oxford J Leg Stud 293.

11. See Arthur Ripstein, “Self-Certification and the Moral Aims of the Law” (2012) 25:1 Can JL & Jur 201; Martin Jay Stone, “Planning Positivism and Planning Natural Law” (2012) 25:1 Can JL & Jur 219.

its own resources, internal logic and morality because law is an answer to a very basic social problem: “who governs?” or “who decides?” Who is sovereign over this body, this labour power, this chair, this land, this water supply and so on.<sup>12</sup> Who can do what they wish without the leave or interference of others, and who can require others to act (or not act) in a certain way in a certain situation? These are questions fundamental to the very idea of law. As Arthur Ripstein points out, it is a “formal” problem, which can be stated as follows: “[N]ot everyone can tell everyone else what to do about everything.”<sup>13</sup> Law is best understood as providing a comprehensive solution to this problem.

This basic insight leads to other familiar “natural law” stories, most importantly Lon Fuller’s.<sup>14</sup> For positive law to be law—to do the job it is designed to do—certain elements of legality must be in place. Law comes with constraints, including: generality, publicity, non-retroactivity, feasibility, congruence, consistency, comprehensibility and constancy. Law cannot function properly as law if it does not conform to these internal constraints. This does not mean that we cannot have substantively bad (or even evil) law. It does, however, mean that in our pursuit of a just labour law regime, we may fail not only on some external normative metric, but also on law’s own terms, despite the most noble of intentions.

In this sense, law is not just a way of implementing other plans. It is itself “a plan to do something”.<sup>15</sup> All of the things that the law does, like determining who owns labour power, and whether and how it can be sold, are parts of this larger problem of “legality”. The question is simply: “What rights and what freedoms do we have?”<sup>16</sup> In law, there cannot be no answer. The only question is which answer is it, and whether that answer is not only normatively appealing, but both complete and structurally coherent. That is why quality, and not quantity, is always the problem.

From this, it follows that we forever need and have a legal answer to all of the questions associated with freedom of association. As we have seen, that answer must always be complete and coherent with the structure

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12. See Stone, *supra* note 11 at 266.

13. Ripstein, *supra* note 11 at 206.

14. Lon Fuller, *The Morality of Law*, revised ed (New Haven: Yale University Press, 1969).

15. See Stone, *supra* note 11 at 225.

16. If you wish to add more of the Hohfeldian list—rights, immunities, liabilities, powers, etc., see Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions: As Applied in Judicial Reasoning*, ed by Walter Wheeler Cook (New Haven: Yale University Press, 1964).

of legality. There is not and never has been no answer in Canada's legal system. The quantity of law is static and must be given law's project. So, to advance the cause of freedom of association through law is to alter the law, not create it for the first time. This means that a complete system of rights and freedoms establishing a certain version of freedom of association was in place in Canada long before there was an entrenched *Charter*. Indeed, there were answers to all of our freedom of association questions long before the Wagner Act Model came to Canada in the 1930s and 1940s. It may not have been one that was normatively appealing, but it was a complete and coherent system of primarily common law rules. After the establishment of the Wagner Act Model, an utterly new set of rules governing freedom of association in the workplace was introduced—one that some would argue is deficient, although in different ways. Nonetheless, these legal systems constituted complete, coherent and complex legal regimes that satisfied the requirements of legality. The idea that a partial account of freedom of association can be created out of whole constitutional cloth and injected into Canadian law without attending to the existing structure of rules and, even more troubling, to the legal logic of that structure regardless of its existing content, is problematic. If we remove a part of this architecture, we must consciously replace it with something else, and in a way that fits.

In short, there always has been in the Canadian legal system—and always will be—a legal way to describe the complete constellation of rights and freedoms which provide us with a full account of freedom of association. If we change our law through legislation or constitutional adjudication, there is an existing body of law upon which we will conduct constitutional surgery. It is important to pay close attention to the existing legal anatomy before wielding the knife.

## II. The Legal Grammar of Freedom of Association

### A. *The Building Blocks of Legality*

There are some well-understood basic concepts, or “building blocks”, that make legality possible.<sup>17</sup> About this there is little disagreement in general, and even less among those who have thought seriously about freedom of association.<sup>18</sup> But, as mere building blocks, they do not tell us how to deploy them—they are in themselves inert.<sup>19</sup> It falls to lawmakers to create a structure which stands up by deploying them in a way such that each is compatible with the others, with attention to the logic of their own structure. These basic ideas may be grouped into four categories:

#### (i) Freedoms

Freedoms are about what I am free to do or not do. They have nothing to do with others, strictly speaking. Freedom describes a legal state where an individual is at liberty to act or not act, placing no duties on others to act or not act.

#### (ii) Rights & Duties

Whereas a freedom tells each of us what we may do, rights by definition place duties on *others* to do or not do something. My right to not be assaulted places a duty on *you* to not assault me, and my right that you fulfill our contract places a duty on *you* to pay me. If there is no duty,

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17. See Brian Langille, “Why the Right-Freedom Distinction Matters to Labour Lawyers—And to All Canadians” (2011) 34:1 Dal LJ 143 [Langille, “Right-Freedom Distinction”]; 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 [Langille, “Freedom of Association Mess”].

18. See e.g. Sheldon Leader, *Freedom of Association: A Study in Labor Law and Political Theory* (New Haven: Yale University Press, 1992); Ferdinand von Prondzynski, *Freedom of Association and Industrial Relations: A Comparative Study* (London, UK: Mansell, 1987); Alan Bogg & Keith Ewing, “A (Muted) Voice at Work?: Collective Bargaining in the Supreme Court of Canada” (2012) 33:3 Comp Lab L & Pol’y J 379 at 392–97; Judy Fudge & Eric Tucker, “The Freedom to Strike in Canada: A Brief Legal History” (2009–2010) 15:2 CLEJ 333 at 336–37.

19. See Bogg & Ewing, *supra* note 18 at 397. There is not—and never has been—any dispute on this point.



there can be no right.<sup>20</sup> Rights are possessed by, and are held against, a legally defined entity, with respect to legally defined conduct.

### (iii) Background Distribution of Rights/Duties

While freedoms are referable only to the actor himself, they are protected, indirectly, from the actions of others. At common law, freedoms are protected by a scheme of rights and duties—the normal rules of tort, property and contract rights that form a perimeter of protection for the exercise of freedom generally (e.g., the right to not be assaulted). It is critical to see that there are two legal concepts at work in these examples: my freedom, and the completely separate question of my rights against you, which may happen to protect the exercise of my freedom, at least to some extent.

### (iv) Derivative Rights

Derivative rights are specifically designed to protect the exercise of a specific freedom in a specific context. Beyond the basic perimeter of rights described above, the law, mainly through legislation,<sup>21</sup> may choose to protect a freedom (say, of association) by modifying the background, formally equal common law entitlements by creating specific labour rights. These are not different in form from other rights, but they have a definite, as opposed to a general, purpose. Labour legislation creates a more robust perimeter of rights, possessed by employees and unions, with the specific purpose of protecting the freedom to associate in the workplace setting. Derivative rights, intended to outlaw specific conduct, do not affect the other aspects of the employer's common law freedom to dismiss for virtually any other reason.

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20. In law, if I have a right, it is not a right to do or omit to do something, but rather a claim that someone else do or omit to do something. See John Finnis, "Some Professional Fallacies About Rights" (1972) 4:2 *Adel L Rev* 377 at 380.

21. Sometimes judges have created common law "derivative" rights in the labour relations sphere, often improperly, and typically to the benefit of employers. See e.g. *Hersees of Woodstock Ltd v Goldstein*, [1963] 2 OR 81, 38 DLR (2d) 449 (CA). See also the Supreme Court's reversal in *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8, [2002] 1 SCR 156 [*Pepsi-Cola*].

## *B. The Building Blocks Deployed at Common Law*

The legal grammar around freedom of association for workers begins with the common law, which once comprehensively structured relations between employers and employees.<sup>22</sup> Properly done, the common law has the distinct advantage of being formally neutral and equal as between private parties. We all have the same common law rights and freedoms.<sup>23</sup>

One result of this system is that it permits parties to freely contract with each other. Consequently, the common law's complete set of rules with respect to unfair labour practices was simply to permit them. For example, workers were legally free to join a union and possessed the normal perimeter of tort rights protecting union meetings from being broken up by employer thugs. However, the employer's co-equal freedom of contract meant the workers could be dismissed for supporting the union. In other words, workers had the legal freedom to associate (i.e., join a union), but the employer was likewise at liberty to terminate the contract of employment in response. Each employer was free to contract with employees of his or her choosing, or not, and each employee was free to join a union and face the risk inherent in that decision.

There was also a complete law of collective bargaining and collective agreement administration: Employees were free to demand that the employer deal with their union and the employer was free to refuse the invitation to do so. There was no "duty to bargain". Collective agreements were not binding and there was no duty to submit disputes to arbitration. There was, in effect, no legal right to have a collective agreement enforced, and therefore, no legal duty on an employer (or employees) to adhere to its terms.<sup>24</sup>

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22. It still does for those employees who are not in a unionized environment, as supplemented by employment standards acts, occupational health and safety codes, human rights acts and so on.

23. This is, of necessity, a simplified and idealized account. We must leave to one side the efforts of nineteenth and twentieth century judges to create economic torts to restrain collective action, for instance, which can fill (and has filled) a book. See IM Christie, *The Liability of Strikers in the Law of Tort: A Comparative Study of The Law in England and Canada* (Kingston, Ont: Queen's University, Industrial Relations Centre, 1967).

24. All of this was made clear in *Young v Canadian Northern Railway Co*, [1931] AC 83, [1931] 1 DLR 645 (PC).

Finally, there was a complete law of strikes at common law: There was no “right” to strike, only a freedom to do so. The basic theory of freedom of contract at common law left in place the freedom of employees to refuse to work in an effort to convince employers to bargain with them collectively (recognition strikes) or to achieve a contract, and to refuse to continue to work to ensure employers abide by any collective agreement (enforcement strikes). However, if employees did strike—that is, refuse to provide services until the employer agreed to terms acceptable to the employees—the employer was free to hire others. Striking was, therefore, an important tool to bend intransigent employers, but also a perilous venture because the employer was free to dismiss and contract with other (non-unionized) workers.<sup>25</sup>

Thus, at common law, neither workers nor employers were legally required to contract with each other, nor were they legally prohibited from doing so. They were both left with the freedom to do what they pleased. There was no special derivative rights protection for the employees’ freedom to associate. Their freedom to associate was just that—a bare freedom—and it could be effectively stifled by the freedom of employers to refuse to bargain or contract. We may find such a structure unappealing from a normative perspective, but it cannot be denied that it maintains a complete and coherent legal structure. We know who has authority over any specific interaction and how they can be bound. The idea of legality is realized.

### *C. Statutory Redistribution of the Building Blocks*

Modern labour law was based upon the core insight that inequality of bargaining power between employees and employers in the world of common law freedom of contract often prevented securing just terms and conditions for workers. The battle cry was “labour is not a commodity”<sup>26</sup> and the argument was that from the water of the system of formally equal

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25. See generally Brian Langille, “What Is a Strike?” (2009–2010) 15:2 CLEJ 355 [Langille, “Strike”].

26. See David M Beatty, “Labour Is Not a Commodity” in Barry J Reiter & John Swan, eds, *Studies in Contract Law* (Toronto: Butterworths & Co, 1980) 313, cited in *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 at 1054, 59 DLR (4th) 416.

rights and freedoms you cannot derive the wine of justice.<sup>27</sup>

This led to the wholesale acceptance of the Wagner Act Model, under which the juridical analysis of work relations underwent a tectonic shift.<sup>28</sup> The new model substituted the parties' formal freedoms at common law with a complex statutory structure of legal rights and obligations. No longer were employers at liberty to discipline, fire or refuse to hire individuals because they had joined a union—employers were placed under a specific duty not to do so. Nor were employers free to refuse to bargain with unions—they were under a specific legal duty to bargain. Collective agreements became legally binding and enforceable through arbitration. The act of certification deprived individual employees of their freedom to bargain or contract on their own terms, whether or not they chose to belong to a union. The certified union became the sole bargaining agent for all employees—union supporters and dissenters alike—and the employer was no longer free to bargain with any other agent or individual.

We cannot overemphasize just how massive the transformation really was, and had to be, in order to maintain fidelity to the idea of law. Canada's founding dean of labour law, Bora Laskin, described it as follows:

The change from individual to Collective Bargaining is a change in kind and not merely a difference in degree. The introduction of a Collective Bargaining regime involves the acceptance by the parties of assumptions which are entirely alien to an era of individual bargaining. *Hence, any attempt to measure rights and duties in employer-employee relations by reference to pre-collective bargaining standards is an attempt to re-enter a world which has ceased to exist.*<sup>29</sup>

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27. See e.g. *ibid* at 1051–52, citing Paul Davis & Mark Freedland, eds, *Kahn-Freund's Labour and the Law*, 3rd ed (London, UK: Stevens & Sons, 1983); *Machtinger v HOJ Industries Ltd*, [1992] 1 SCR 986 at 1003, 91 DLR (4th) 491; *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701 at paras 92–94, 152 DLR (4th) 1.

28. It should be noted that this was not all gain for workers. It involved a substantial trade-off with respect to the key tool available to them—the strike. Workers were no longer permitted to strike to gain recognition, to obtain better terms in the course of a contract, or to enforce their interpretation of collective agreements. In place of the relatively unrestricted freedom to strike, employees were given a very narrow and confined right to strike at a very limited time and for a limited purpose—to obtain a collective agreement. See generally Fudge & Tucker, *supra* note 18; Langille, “Strike”, *supra* note 25 at 367–69. The constitutionality of these types of restrictions was at issue in “the Trilogy”. See “the Trilogy”, *supra* note 3; *Saskatchewan Federation of Labour CA*, *supra* note 9.

29. See *Re Peterboro Lock Mfg Co Ltd* (1954), 4 LAC 1499 at 1502 (Industrial Relations Institute) [emphasis added]. See also *Syndicat Catholique des Employés de Magasins de Québec*

Chief Justice Laskin elaborated on this point in some detail in *McGavin Toastmasters Ltd v Ainscough*.<sup>30</sup> He wrote that the notion of a collective agreement as a mere bundle of individual (i.e., common law) contracts betrayed a “complete misapprehension of the nature of the juridical relation involved in the collective agreement”; because of the change effected by labour relations legislation, it is no longer “possible to speak of individual contracts of employment and to treat the collective agreement as a mere appendage of individual relationships”.<sup>31</sup> The scheme established by the common law is “no longer relevant” to employment relationships characterized by a certified union.<sup>32</sup>

Chief Justice Laskin proceeded to explain, with some care, what this wholesale reorientation in the law meant. Essentially, while an employer may be able to discipline employees for an illegal strike in accordance with the law of arbitration,<sup>33</sup> it could no longer, as it could at common law, treat the strike as a fundamental breach of contract, permitting the employer to consider the contract rescinded by the employees. One set of building blocks had been removed, and another very different set was put in its stead.

This change in structure alerts us to the Court’s statement in *BC Health*, instructing that labour relations should no longer be a “no-go zone” for the *Charter*.<sup>34</sup> While many have focused on the words “no-go”, the key word in the phrase is really “zone”. The legally important point is that every question that can come up was answered at common law and is also answered under the Wagner Act Model.<sup>35</sup> We know in any specific

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*Inc v La Compagnie Paquet Ltée*, [1959] SCR 206, 18 DLR (2d) 346 [cited to SCR]. The Court stated, “[t]here is no room left for private negotiation between employer and employee. . . . It was not within the power of the employee to insist on retaining his employment on his own terms, or on any terms other than those lawfully inserted in the collective agreement.” *Ibid* at 212–13 [emphasis added].

30. [1976] 1 SCR 718, 54 DLR (3d) 1 [*McGavin Toastmaster* cited to SCR].

31. *Ibid* at 724–25.

32. *Ibid* at 725–27. See also *Port Arthur Shipbuilding* (1966), [1967] 1 OR 272, 60 DLR (2d) 214 (HCJ) [cited to OR] (“the umbilical cord has been severed” at 276).

33. See *McGavin Toastmaster*, *supra* note 30 at 728.

34. *BC Health*, *supra* note 6 at para 26.

35. These answers are supplemented by other basic ideas drawn from our general ideas of law and legality. See *Polymer Corp Ltd v Oil, Chemical and Atomic Workers International Union, Local 16–14* (1958), 59 CLLC 1810 (OLRB).

context who governs, who has authority over whom and with respect to what. We have legality realized, again, as it was at common law.

### *D. Constitutional Law and the Building Blocks*

As with the introduction of comprehensive zone-obliterating and zone-recreating labour relations statutes, the enactment of the *Charter* overlaid upon the existing structure another dimension of legal complexity. The large question visited upon labour law with the creation of the *Charter* in 1982 was: What does this legal document say about the pre-existing rights and freedoms constructed by our common law and our statutory law—that is, what does it say about our current and complete legal structure of freedom of association?

In order to answer this question, we first need to ask how the Constitution applies to the pre-existing distribution of rights and freedoms, which constitute and give legal structure to our law of freedom of association. The common understanding is that the *Charter* creates, at a minimum, a scheme of rights and freedoms that are referable and correlate to duties against the state, not private actors—that is, there must be state action in order for the *Charter* to be invoked.<sup>36</sup> This framing is far too simple because, as we have noted, there is always law, and the content of that law is ultimately determined and enforced by state actors. A person whose freedom is unreasonably curtailed by the operation of law is no less coerced by the fact that it is a *common law* rule operating, as opposed to a legislative rule.<sup>37</sup> At least in a sense, state action is always present in these disputes.<sup>38</sup>

This does not, however, mean that the distinction between conventional (i.e., legislative) state action and legislative *inaction* is meaningless. We must attend to the distinction in order to determine what state action actually amounts to in any given dispute and to determine how to respond when asked to offer constitutional “rights” in order to facilitate the exercise of freedoms. In order to understand the proper outcome in a constitutional case, we must know what state action is being

36. See *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at 599, 33 DLR (4th) 174.

37. See *Pepsi-Cola*, *supra* note 21; *Grant v Torstar Corp*, 2009 SCC 61, [2009] 3 SCR 640.

38. See generally Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2008) at 162 [Tushnet, *Weak Courts*].

sought, relied upon, or impugned by a litigant, which will allow us to better determine what (if anything) the Constitution has to say about it, and what the appropriate remedy may be.<sup>39</sup>

The law's different legal forms require different responses in the context of constitutional review. Two of these forms are primal. First, we have cases of the state itself attacking a freedom directly by passing a law placing legal duties on actors to do or not do something that they were previously free to do or not, as they pleased. These are the conventional, "vertical" (state to citizen) constitutional freedom cases. We consider the facts of *BC Health* to be such a case, as were the cases addressed in the Trilogy, all of which involved the state passing legislation restricting the freedom of workers (to bargain and to strike, respectively). Properly understood, the allegation in these cases is that the state itself has failed to "respect" the constitutional freedoms of citizens; that the state acted to statutorily define the present distribution of rights and freedoms in such a way that prevents us from doing a thing we were or should be free to do. The claimant is saying, "I should decide whether or not to do that thing—I should decide what to bargain over, what terms are important to me, and in the absence of which terms I will refuse to work".

The second type of claim is more complex and stems from the ubiquity of legal rules in modern society. It posits that the failure of the state to actively alter the current distribution of rights and freedoms of other private actors may violate our own freedoms. For labour law, the constitutional claim in this sort of case is that the *Charter* demands that something be done about the common law distribution of rights and freedoms of workers and employers. While in such cases the legislature has not failed to "respect" our freedom by passing a law directly impinging upon it, the state has failed to adequately "protect" our freedoms from the co-equal freedom of others. This is the section 2(d) issue addressed in cases like *Fraser* and *Dunmore*.

At this point, we need to draw attention to the way in which constitutions deal with claims of this latter sort, once we depart from the

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39. Cass R Sunstein, "State Action Is Always Present" (2002) 3:2 Chicago J Intl L 465 ("[t]he constitutional question, in any system that has a state action requirement, is not whether there is state action, but whether the relevant state action is unconstitutional" at 466).

conventional vertical analysis.<sup>40</sup> While we do not have “direct horizontal” (i.e., placing duties on private citizens) application of the Constitution in Canada,<sup>41</sup> we have two different ways to go about achieving what may often lead to the same result. First, we have what is often called “indirect horizontal” application of the *Charter*. This occurs where one litigant invokes a common law right against another—for instance, by alleging that secondary picketing constitutes a tort and should be enjoined—and the other argues that the distribution of rights and freedoms at common law fails to adequately protect his constitutional rights or freedoms. In such a case, the claimant is saying “giving this person a right, placing me under a duty to not do this thing, unjustifiably restricts my freedom to do that thing”, and the courts may respond by modifying the common law rule.<sup>42</sup>

The second way, and the application which was at issue in *Dunmore* and *Fraser*, is what we refer to as “diagonal” application of the *Charter*.<sup>43</sup> In these cases, the claim about the current distribution of worker and employer rights and freedoms is that the *Charter* demands that the legislature pass a statute to alter the current (in all of the cases we discuss, common law) distribution of the rights and freedoms constituting our law of freedom of association. This has involved the courts telling governments that they *must* provide statutory (derivative) rights where there were previously only common law freedoms.

Any notion that the *Charter* has no application where the state has merely left in place the common law background rules is belied by both the indirect horizontal and diagonal application of the *Charter*. Simply put, limiting constitutional review to conventional state action cases ignores the fact that “any law that is inconsistent with the provisions

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40. See the work of Stephen Gardbaum, who has taken some time to sort out these various doctrinal approaches necessitated by the recognition of the error in equating “state action” with “legislative action”. Stephen Gardbaum, “The ‘Horizontal Effect’ of Constitutional Rights” (2003) 102:3 Mich L Rev 387.

41. Direct horizontal application of the Constitution is not part of the law in Canada for a number of reasons, most notably section 32(1), which seeks to limit the direct application of the *Charter* to legislatures and governments.

42. See e.g. *Pepsi-Cola*, *supra* note 21; *Grant v Torstar Corp*, *supra* note 37; *WIC Radio Ltd v Simpson*, 2008 SCC 40, [2008] 2 SCR 420.

43. See Langille, “Right-Freedom Distinction”, *supra* note 17 at 158, n 40.



of the Constitution is, to the extent of the inconsistency, of no force or effect",<sup>44</sup> which is not by its terms limited to laws passed by the legislature.

Thus, we come to the legal question actually addressed in *Dunmore* and *Fraser*: Does the *Charter* demand the legislature pass a statute altering the background common law structure of rights and freedoms of private actors (the employers of the agricultural workers) in order to secure the constitutional freedom of the workers to associate? There are three possible answers in any given case:<sup>45</sup> (1) the *Charter forbids* the redistribution of common law rights and freedoms via the statutory construction of derivative rights; (2) the *Charter demands*, or sometimes demands, the creation of such derivative rights; or (3) the *Charter is agnostic*, in that it neither forbids nor demands modification of the background law, but leaves it to legislative judgment (or the lack thereof). It is critical to note that all of our statutory labour and employment law depends on the first answer not being the right one.<sup>46</sup> Before *Dunmore*, the answer in the labour relations sphere was largely the third answer.<sup>47</sup> After *Dunmore*, it is often the second.

From the point of view of legality, each option outlined above is at least theoretically permissible in legal logic and grammar. This is not to say that we cannot challenge their political sustainability and normative desirability, their fit within our system of law and government, the purpose of the constitutional provisions, the role of the courts, and so on.<sup>48</sup> However, the point we are pursuing is that in addition to concerns about labour law's narrative, we also have to attend to law's grammar and see that the answer to our questions may depend critically on the questions asked. These are included among the demands that law puts upon judges who articulate new derivative rights in the name of advancing labour law's narrative, and what it means to enter the labour relations "zone".

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44. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 52.

45. Of course, these three dispositions are not mutually exclusive—courts may find that some redistributions of the background rules are constitutionally suspect, others demanded, and others merely permitted. But these are our basic and familiar options.

46. This was effectively the answer provided by the US Supreme Court during the *Lochner* era.

47. See the plurality decision in *Alberta Reference*, *supra* note 3 at 390–92.

48. See Part VI, below.

### III. What We See When We Read the Cases

#### A. *The Building Blocks Applied*

In a nutshell, these are our basic building blocks (freedoms, rights and duties), our basic structures for protecting freedom of association in the workplace (the common, statutory and constitutional law), and they can interact in various ways (vertical, horizontal and diagonal).<sup>49</sup> Once we grasp the grammar described above, we see more clearly what we are being asked to accept in the constitutional cases mentioned in the introduction. We see both what is going on in our cases and what the courts have said is going on, which we respectfully submit are not always the same thing.

First, we see that cases like *Dunmore* and *Fraser* are properly considered derivative rights cases under section 2(d). They are *protect* cases. They are diagonal application cases, and they are difficult. The claim is not that the government has a duty of non-interference—to merely leave in place the background common law rights and freedoms. Rather, the claim is that the state has a constitutional duty to modify the existing set of legal entitlements forming the legal structure of freedom of association by enacting a further scheme of rights and duties to protect the exercise of freedom of association.

We can also see that, in these cases, the rights and freedoms of other non-state actors are in play, the claim being that the *Charter* applies diagonally to them. These cases entail the courts determining that the formally equal common law freedoms are insufficient to fulfill the government's constitutional obligation under section 2(d) of the *Charter*. While the workers in *Dunmore* were legally free to associate, they were deprived of the comprehensive scheme of labour rights and entitlements (in particular, unfair labour practice rights altering the background common law) offered to the vast majority of other workers in the province. The workers in *Fraser* had this derivative rights protection against unfair labour practices—as enacted by the Ontario legislature following

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49. The final domino here is international labour law, about which much has been said already. See Brian Langille, "Can We Rely on the ILO?" (2006–2007) 13 CLEJ 273; 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 CLEJ 181.

*Dunmore*—but claimed they needed further legislated derivative rights protection to meaningfully associate (i.e., rights to collectively bargain).

We can also see that interpreting section 2 freedoms as including a substantive right, against either the state or other private actors, to the *meaningful* exercise of that freedom is something very different from prohibiting the government from interfering with a legal freedom.<sup>50</sup> Very often, the exercise of one's freedoms will be effectively meaningless, in that it does not achieve what the actors wish to achieve, or in that it may be frustrated by the exercise of the freedoms of others. One may shout from a street corner for days and not change a single mind or move government policy one iota, because others are free to ignore the message entirely. A straightforward vertical application of freedom of expression would prevent the state from *prohibiting* that person from disseminating their message. But if there is a substantive *right to meaningful* expression, then the state may be required to do much more. For example, must a government representative listen to the street corner preacher? Must the state provide him with the means to more effectively disseminate his message? More radically, must it prevent other private citizens from speaking out against him, or require others to listen? Most would say "of course not". However, if we want to protect the substantive or *meaningful* exercise of freedoms through section 2, and place the government under an obligation to ensure that the exercise of everyone's freedom is sufficiently *meaningful*, then it is hard to see why these questions are not to be taken seriously.

In short, there is a very real and large constitutional chasm between what the state cannot prohibit us from doing, and what it must *ensure we are able to do*. Respectfully, to say "[t]he freedom to do a thing, when guaranteed by the Constitution interpreted purposively, implies a right to do it",<sup>51</sup> involves a very significant confusion in terms, insofar as a right is considered to place a duty on the state to facilitate or affirmatively protect or promote the action in question. When the courts decide that individuals have a freedom to distribute false news or to possess certain forms of material considered to be child

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50. See generally Benjamin Oliphant, "Exiting the Freedom of Association Labyrinth: Resurrecting the Parallel Liberty Standard Under 2(d) & Saving the Freedom to Strike" (2012) 70:2 UT Fac L Rev 36 at 67–79.

51. *Fraser* SCC, *supra* note 7 at para 67.

pornography,<sup>52</sup> for instance, they cannot have meant that individuals have a *right* to do it, such that the state must in some way facilitate the conduct in question, or must pass legislation to prevent private actors from, for instance, terminating the actor's employment on the basis of such conduct in the workplace. Similarly, going from interpreting section 2(d) as requiring governments to respect a sphere of conduct to requiring a positive entitlement to make the freedom meaningful is no mean leap. This is essentially our "right to substantive freedom" problem, and sorting this out in a principled way requires some careful thought.

In contrast to *Dunmore* and *Fraser*, cases such as *BC Health* or those found in the Trilogy are the relatively familiar vertical application, *respect* cases, and it is important to recognize them when they appear. They are essentially freedom cases. The government passed laws having the purpose or effect of interfering with individuals exercising their freedom, triggering the vertical application of the *Charter*.<sup>53</sup> Although the Court did not see it this way, these cases do not necessarily have anything to do with the rights and duties of other private actors, and the use of their legal freedoms and rights. This is not to say that the answers to the questions posed by these cases are easy or obvious, but rather that the questions do not involve the same degree of legal complexity as our diagonal application cases.

So when the Court in *Fraser* says that its "decision in *Health Services* follows directly from the principles enunciated in *Dunmore*",<sup>54</sup> warning bells should start to go off. In *BC Health*, the claim was that by *negating* the terms of collective agreements and *prohibiting* bargaining on certain topics in the future, the government had "taken a bat to" the freedom. Prior to the impugned legislation, workers acting in concert (i.e., through their union) were free to bargain (or not bargain) together over

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52. See *R v Zundel*, [1992] 2 SCR 731, 95 DLR (4th) 202; *R v Sharpe*, 2001 SCC 2, [2001] 1 SCR 45. We are obviously drawing no equivalency whatsoever between the activity protected in *Dunmore* and *Fraser*, and the behaviour exhibited in these cases. We are only seeking to illustrate the difference between the freedom to do something and an affirmative right to do it, for the purposes of constitutional law.

53. We believe that the proper default definition for such cases is the "freedom to do in common what individuals are free to do alone". This indicia of a section 2(d) violation has been defended by us before. See Oliphant, *supra* note 50; Langille, "Freedom of Association Mess", *supra* note 17 at 183.

54. *Fraser* SCC, *supra* note 7 at para 38.

certain terms. After the impugned legislation, they were prohibited from doing so. It was in this sense a straightforward *respect* case.

In spite of efforts to recast *BC Health* in what might be more palatable terms, *Fraser* confirmed what *BC Health* repeatedly said: The Court created a new, derivative constitutional right to collective bargaining, placing governments under an affirmative obligation to protect the exercise of freedom of association. This obligation was to ensure that the duty to bargain was placed on employers in public and private sectors alike. The Court in *BC Health* states, in no uncertain terms, that the “employees’ right to collective bargaining imposes corresponding duties on the employer . . . to meet and to bargain in good faith”.<sup>55</sup> This is essentially a constitutional right to section 17 of the Ontario *Labour Relations Act* (*LRA*).<sup>56</sup> Indeed, despite (in the opinion of many) its backtracking on the substance of the duty in *Fraser*,<sup>57</sup> the Court continued to draw analogies to such legislative rights in defining the content of the constitutional entitlement.<sup>58</sup>

The various misunderstandings leading to the Court’s conclusion have been well documented<sup>59</sup> and will not be repeated here.<sup>60</sup> In effect,

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55. *BC Health*, *supra* note 6 at para 90. See also *Fraser* SCC, *supra* note 7 at para 51.

56. SO 1995, c 1, Schedule A, s 17.

57. For a very good and pithy explanation of the differences between the entitlement as defined in *BC Health* and *Fraser*, see Bogg & Ewing, *supra* note 18 at 379–81. See also Steven Barrett, “Supreme Court of Canada’s Decision in *Fraser*: Stepping Forward, Backward or Sideways?” (2012) 16:2 CLEJ 330 at 338–40; Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf 2009, 2011, 2012 supplements) ch 44 at 6–12; Eric Tucker, “Labor’s Many Constitutions (and Capital’s Too)” (2012) 33:2 Comp Lab L & Pol’y J 355 at 361; 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; Judy Fudge, “Constitutional Rights, Collective Bargaining and the Supreme Court of Canada: Retreat and Reversal in the *Fraser* Case” (2012) 41:1 Indus LJ 1; Steven Barrett & Ethan Poskanzer, “What *Fraser* Means for Labour Rights in Canada” in Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012) 190 at 232.

58. See *Fraser* SCC, *supra* note 7 at para 98.

59. See Langille, “Freedom of Association Mess”, *supra* note 17; Langille & Oliphant, *supra* note 49; Oliphant, *supra* note 50; Eric Tucker, “The Constitutional Right to Bargain Collectively: The Ironies of Labour History in the Supreme Court of Canada” (2008) 61 Labour/Le Travail 151. See also *Fraser* SCC, *supra* note 7 at paras 247–50, Rothstein J, concurring.

60. Our first hint that the Court may have not clearly seen what it was doing in *BC Health*

the Court created (perhaps unintentionally) a constitutionally required destination for the direction of labour relations legislation. This was an unnecessary step, creating an extremely complicated derivative right where none was at issue nor requested.<sup>61</sup> It is perhaps not surprising that it was the Court failing to see that *BC Health* was a respect/freedom case, and not a protect/derivative rights case, that led to many of the problems we now seek to address in the context of section 2(d).

Perhaps the best way to make progress in our pursuit of the ideas of legality and the legal structure of freedom of association—and the key difference between derivative right protection in *Dunmore* and *BC Health*—is to examine the degree of specificity with which the rights were described. What the Court leaves in place after constitutional surgery on the existing body of the system of rights and freedoms must meet the demands of legality. It must leave all the questions answered, as they were before (albeit in a way now considered unconstitutional). *Dunmore* answers all of the questions demanded by legality. *BC Health* and *Fraser* do not.

### *B. The Remedy in Dunmore: Preserving Legality*

*Dunmore* was a derivative rights case. The claimants had the legal freedom to associate, but alleged, quite credibly, that exercising the freedom was uniquely perilous for farmworkers.<sup>62</sup> The employer was under no legal obligation to respect their decision to associate or not,

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may be contained in the following statement: “Thus the employees’ right to collective bargaining imposes corresponding duties on the employer. It requires both employer *and* employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation.” *BC Health*, *supra* note 6 at para 90 [emphasis added]. Now, this is clearly what statutory duty to bargain provisions, like the *LRA*’s section 17, require—these statutory rights place both employers and employees under a duty (corresponding to each other’s right) to bargain in good faith. However, it is hard to fathom how the exercise of an individual’s freedom can boomerang to place those same individuals under a constitutional obligation to bargain in good faith. Interpreting a constitutional freedom so as to place the *claimant* under a constitutional duty is, respectfully, to make real mistake in legal reasoning, whatever the benefits of including derivative right protection under section 2(d).

61. See *Fraser* SCC, *supra* note 7 at para 304, Deschamps J, concurring.

62. See generally the contributions in Faraday, Fudge & Tucker, *supra* note 57.

and could fire or refuse to hire union supporters, effectively rendering impossible any efforts to unionize.

Before discussing the right and remedy provided, we should highlight Bastarache J's helpful acknowledgement that the Court only has certain legal remedies available to it. He noted that while the Court may strike down legislation considered incompatible with a *Charter* provision, the "Court is not in a position to enact such detailed legislation, nor to confer constitutional status on a particular statutory regime".<sup>63</sup> This is an important remark as it speaks to the proper and possible role of courts in our constitutional framework, a point returned to below.<sup>64</sup>

In keeping with other under-inclusiveness cases<sup>65</sup>—which, prior to *Dunmore*, were limited to the section 15 context—Bastarache J determined that the statutory exclusion was unconstitutional and struck it down, suspending the declaration of invalidity to provide the legislature with an opportunity to rectify the constitutional deficiency. From the perspective of legality, consider the specificity of the right and remedy he outlined for the legislature to undertake to avoid the default remedy of striking down:

I conclude that at minimum the statutory freedom to organize in s. 5 of the LRA ought to be extended to agricultural workers, along with protections judged essential to its meaningful exercise, such as freedom to assemble, to participate in the lawful activities of the association and to make representations, *and the right to be free from interference, coercion and discrimination in the exercise of these freedoms*.<sup>66</sup>

Justice Bastarache asserted that farm workers were entitled to the statutory articulation of the basic freedom to associate and the unfair

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63. See *Dunmore*, *supra* note 1 at para 66.

64. See *Constitution Act, 1982*, *supra* note 44, s 52. Notably, section 52 does not state that any law that would, in the Court's view, better facilitate the meaningful achievement of fundamental rights and freedoms may be ordered by the Court. See Robert E Charney, "Freedom of Majoritarian Exclusivity and Why Ms. Clitheroe Should Have Joined a Union: A Comment on *Fraser* and *Clitheroe*" (2009) 27 National J Constitutional L 45 ("[n]ever before has a court ordered the government to enact legislation" at 50–55). The fact that the claimants in *Dunmore* were simply seeking the rights enjoyed by the vast majority of Canadian workers may have made the outcome in *Dunmore* seem more natural than it would have seemed if rights against unfair labour practices were not so well entrenched in Canadian labour law.

65. See e.g. *Vriend v Alberta*, [1998] 1 SCR 493, 212 AR 237; *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624, 38 BCLR (3d) 1.

66. *Dunmore*, *supra* note 1 at para 67 [emphasis added].

labour practice protection afforded to other workers in the province under the Ontario *LRA*. The Court created a clear duty on the government to *protect* the exercise of the freedom from third parties, at least where workers would otherwise be “substantially incapable” of exercising that freedom in the workplace context (i.e., unionizing),<sup>67</sup> or where it would be effectively impossible.<sup>68</sup> The legislature was placed under a constitutional duty to enact clear rights for all employees, with clear duties owed by all employers, with respect to any conduct that constitutes interference with, or discrimination for, unionizing. One way or another it was going to happen, either through the statutory exclusion being struck down (which the courts can do), or through the legislature acting in accordance with the well-defined affirmative obligation (which the legislature can do).<sup>69</sup> The key point is that no matter what you think of the result from the perspective of political theory or labour policy, this all adheres, as an independent requirement, to the demands of legality.

### C. *The Right in BC Health: Losing Sight of Legality*

The derivative right and duty to bargain in good faith granted in *BC Health* was of a different legal order entirely. We will begin where the Court stated in *BC Health* (a phrase emphasized by the Court in *Fraser*), that it was not providing a right “to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method”.<sup>70</sup> The problem with this statement is that a constitutional right imposing a duty to bargain in good faith requires the creation of a particular model of labour relations. It may not be the exact same model that we have, but it must be a complete and coherent legal model.

Our labour codes are self-contained systems designed to eliminate all of the prior common law of freedom of association, along with its enforcement mechanisms (the common law courts). As such, these codes must answer the many questions which come up and which were

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67. *Ibid* at para 35.

68. *Ibid* at para 25.

69. This fact is made very clear by the reality that government lawyers were able to draft a statute doing more or less exactly what the Court’s remedy demanded. See *Fraser v Ontario (Attorney General)* (2006), 79 OR (3d) 219 at para 21, 263 DLR (4th) 219 (Sup Ct J); *Fraser SCC*, *supra* note 7 at para 14.

70. *BC Health*, *supra* note 6 at para 91; *Fraser SCC*, *supra* note 7 at para 41.



dealt with by the common law (which has, in the words of Laskin CJC, “ceased to exist”). Our statutory codes and the new institutions set up to administer them (labour boards and arbitrators) answer these questions. A duty to bargain in good faith requires us to identify who possesses the right and who bears the duty, and with respect to what conduct. In our view, these questions cannot be avoided.

### (i) Who Possesses the Right?

The “constitutional right to collective bargaining”<sup>71</sup> raises the obvious question of whether a union must be certified to give effect to this right. Merely asking the question suggests that some basics of the idea of legality might have gone missing: How is it possible that what the Court insists is a constitutional entitlement vesting in the individual,<sup>72</sup> ostensibly available to “everyone”, may only be available to members of a union that has been certified according to labour relations legislation? The majority in *BC Health* attempted to sidestep Rothstein J’s challenge that those “who are not members of an association . . . have no constitutional right to oblige their employers to bargain” by noting that “this outcome is not anomalous. It follows logically from the fact that collective bargaining is a derivative right . . . [w]here there is no reliance on freedom of association, there is no derivative right to require employers to bargain.”<sup>73</sup> However, any two individuals can seek to bargain together. Is the legislature under a constitutional obligation to require employers to bargain collectively with any two individuals? Would the Constitution not require legislatures to impose a duty on employers to bargain in good faith with respect to minority unions, or indeed, any group of employees who choose to bargain collectively? If not, why not?<sup>74</sup>

Nevertheless, we will assume for the purpose of this discussion that statutory certification is required to have access to this new constitutional

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71. See *BC Health*, *supra* note 6 at para 89.

72. See *Fraser SCC*, *supra* note 7 (stating that *BC Health* “recognized, as did previous jurisprudence, that s. 2(d) is an individual right” at para 65).

73. *Ibid* at para 66.

74. If what we are doing is protecting the exercise of an individual and fundamental freedom through derivative rights, are those who are not able to muster majority support not in even greater need of a right to collectively bargain, lest their freedoms be rendered meaningless, on the reasoning in *BC Health*? See Oliphant, *supra* note 50 at 76–79.

right derived from an individual freedom. In order to answer “who has the right” in a system of certification, there are complex procedures that must be sorted out. For instance, how many workers are required in order to certify? How must unions demonstrate the sufficiency of support? What is the relevant timeline in which to show that support? Does the union represent everyone in a bargaining unit, or simply union members? If the former, how can a union lose its exclusive bargaining agent status? Must construction workers, due to the nature of that enterprise, have a separate scheme to make their freedom sufficiently meaningful? As labour lawyers know, tinkering with the structure of certification can have a very real effect on the meaningfulness of the freedoms offered.

Assuming that a union must be certified as the exclusive bargaining representative in order to access this constitutional right, we must know who it represents (i.e., what the bargaining unit is). Here again, there are complex structures and mechanisms in place to determine who is included in the bargaining unit, which can make the difference between effective and ineffective unionization, and presumably under a substantive freedom standard, meaningful or meaningless freedom.<sup>75</sup> Is it to be everyone in a single workplace? Is it every employee of a given employer in a given region? Who is excluded (management, confidential employees, casual employees, etc.)? Can an employer be involved in creating the association? What does the Constitution say about these questions?

Even once all of these questions are answered, it should be noted that under our statutory model the employer is prohibited from bargaining with individual employees or other groups of employees. Thus, if a union is certified with 51% of the vote in a given bargaining unit, it becomes the exclusive bargaining agent for all employees. If the employer chooses to bargain separately with individuals, or with the other 49%, it is in violation of the Ontario *LRA*. Is this to be required by the guarantee of freedom of association in our Constitution? Are the freedoms of those who would rather not be union members, or not members of the majority union, relevant to the constitutional inquiry under the derivative right to collectively bargain? Why or why not? Needless to say, while legislatures

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75. For an example of the serious effect that the definition of a bargaining unit can have on the real, practical ability to organize, see Elizabeth J Shilton Lennon, “Organizing the Unorganized: Unionization in the Chartered Banks of Canada” (1980) 18:2 *Osgoode Hall LJ* 177.

limiting freedoms of some workers in the interest of the collectivity may be justifiable,<sup>76</sup> it does not follow that a court is required to impose the same limitations, set in constitutional stone, under the auspices of a fundamental freedom ostensibly available to all.

## (ii) Who Bears the Duty?

The questions implied by a constitutional duty to bargain in good faith do not neatly stop there. We must also know who bears the duty—or rather, following the logic of diagonal application, with respect to whom is the state under a constitutional obligation to place a duty to bargain in good faith? This is not as simple as saying “the employer”. The question of “who is the employer” is an extremely difficult one for modern labour law.<sup>77</sup> In fact, the “vertical disintegration” of firms is at the heart of much of labour law’s difficulty.<sup>78</sup> There are definitions and provisions in the labour relations legislation that deal with successor employers, related employers, employer associations and so on.<sup>79</sup> Again, each of these provisions is hotly contested in labour boards across the country on a daily basis, but there are statutory rules and jurisprudence in place to determine who owes the duty. What does the Constitution demand here? If it does not demand such procedures, how do we know whether the state has fulfilled its constitutional obligation?

## (iii) With Respect to What Conduct

Once we entertain a constitutional right to meaningful collective bargaining, we must know what conduct is required and prohibited by the constitution.<sup>80</sup> If a legislature abides by its constitutional duty to enact something like section 17 protection, but permits employers to not

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76. See e.g. *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211, 81 DLR (4th) 545; *R v Advance Cutting & Coring Ltd*, 2001 SCC 70, [2001] 3 SCR 209.

77. See generally the entries in Guy Davidov & Brian Langille, eds, *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Portland: Hart Publishing, 2006) at 271–336.

78. See e.g. Hugh Collins, “The Productive Disintegration of Labour Law” (1997) 26:4 Indus LJ 295. For how this issue plays out with respect to minimum labour standards, see *Lian v J Crew Group Inc* (2001), 54 OR (3d) 239, 104 ACWS (3d) 1062 (Sup Ct J).

79. See e.g. *Labour Relations Act*, *supra* note 56, ss 1(4), 68–69.

80. We will not get into the law on the duty to bargain in good faith, but as with the

disclose certain financial data, has it fulfilled its constitutional obligation? How much disclosure is required in order to make the freedom meaningful? If the legislation permits an employer to take a hard line at the bargaining table or to refuse to accede to certain important union demands, does this constitute a violation of the workers' section 2(d) freedom? What topics must be included in the duty to bargain to make it sufficiently meaningful?

The Court in *BC Health* appeared to limit this obligation to "important" terms.<sup>81</sup> In doing so, they resurrected the very mandatory-permissive dichotomy that has long been rejected with respect to the duty to bargain as inconsistent with the very idea of "free collective bargaining" (i.e., it is for the parties and not some state agency, like a court, to decide what to bargain about).<sup>82</sup>

This is not to say that a constitutionalized duty to bargain cannot have different contours than the legislative duty, but it is simply to highlight that a court must ask itself these questions and proceed to answer them—ostensibly according to the dictates of the constitution. These questions will be asked in the courts whether they are inclined to answer them or not. Presumably, such answers can only be given with reference to the type of reasoning employed by our labour boards—that is, distinctly with an eye to labour policy-making in line with statutory guidance, as opposed to constitutional adjudication.

#### (iv) Are Other Rights Necessary to "Complete" the Zone?

This is not, however, the end of our woes with respect to a meaningful right to collectively bargain. Chief Justice Winkler in Ontario also noted, correctly, that with the Canadian model of labour relations, there must be a system of rules to resolve genuine bargaining impasses in order for a constitutional right to collective bargaining to be meaningful.<sup>83</sup>

In the case of *R v Saskatchewan Federation of Labour*, Ball J also saw the need for a way to resolve bargaining impasses as an integral component

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other aspects of a right described above, it is voluminous. See Brian A Langille & Patrick Macklem, "Beyond Belief: Labour Law's Duty to Bargain" (1988) 13:1 *Queens LJ* 62.

81. *BC Health*, *supra* note 6 at paras 93–95.

82. As explained by Chair Weiler in *Canadian Paperworkers Union v Pulp and Paper Industrial Relations Bureau* (1977), 8 CLLC 675 at 690 (BCLRB).

83. See *Fraser v Ontario*, 2008 ONCA 760 at para 82, 92 OR (3d) 481.

of the particular way Canada has instantiated freedom of association (the Wagner Act Model), agreeing with the proposition that “[t]he ultimate truth of free collective bargaining is that it can only operate effectively, in market terms, if it is backed up by the threat of economic sanction.”<sup>84</sup> On this reasoning, Ball J found that Saskatchewan legislation permitting employers to unilaterally determine which employees were essential—and thus prohibited from striking—violated the derivative right of collective bargaining because the legislation “effectively [enabled] some public employers to eliminate the capacity of their employees to strike in any meaningful way (and, as a necessary corollary, to engage in meaningful collective bargaining)”.<sup>85</sup>

Justice Ball did us a great service by showing us what it means to constitutionalize a right to collectively bargain within the Canadian labour law system. Legality does not abhor a vacuum; it forbids it. Because we have a constitutional right to a meaningful process of collective bargaining, we must presumably have all other aspects of a system that make such a right meaningful. On this reasoning, we now have a derivative right to strike that is derivative of a right to collective bargaining, which is itself derivative of a freedom to associate.<sup>86</sup>

If there is a “derivative-derivative” constitutional right to strike (as opposed to a freedom), as the Saskatchewan Court of Queen’s Bench held, then courts will have to start answering a range of difficult questions as to what derivative rights are required to make this derivative right meaningful,<sup>87</sup> all with reference to a constitutional “right to collectively

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84. *Saskatchewan Federation of Labour* QB, *supra* note 9 at para 61, citing WB Rayner, *Canadian Collective Bargaining Law*, 2nd ed (Markham: LexisNexis, 2007) at 541.

85. *Saskatchewan Federation of Labour* QB, *supra* note 9 at para 191.

86. This somewhat convoluted train of legal logic could have been avoided by simply asking whether the state action prohibiting striking violated the freedom to associate, to which the answer is in our view clearly “yes”, and the question turns to whether such an abridgment is justifiable under section 1. See generally Oliphant, *supra* note 50.

87. Is there a right to return to work? Does it exist in perpetuity or dissolve after a certain period of time? Is there a right to occupy premises? Would a substitute interest arbitration scheme suffice to fulfill the “right to strike”? Can an employer discipline a striker? Who gets to vote if there is a decertification process during a strike? Which of these arrangements would suffice to fulfill the constitutional obligation, and which would violate it? And, again, if all we have to go on is “freedom of association”, on what principled legal basis could we tell the difference between a constitutionally sound and constitutionally insufficient derivative right to strike?

bargain". Of course, the Ontario *LRA* comprehensively answers these questions. However, a subsequent legislature could seek to answer the questions differently, and the courts will have to decide how far it can go before the right to collectively bargain ceases being sufficiently meaningful.

*D. Fraser's Contribution: Attempted Avoidance of the Demands of the Idea of Legality*

Now we can finally turn to the inattention to legality's demands illustrated in cases like *Fraser*. To make this clear, consider the position of our lower courts after *BC Health's* (in our view unnecessary) creation of the derivative right to good faith bargaining. They were in a very awkward legal predicament. Chief Justice Winkler had two legally possible options.<sup>88</sup> First, he could have gently pointed out the consequences of the Court's creation of a derivative right to meaningful collective bargaining and determined that the Court could not have meant to do what it did, and read *BC Health* as narrowly as possible. Alternatively, he could have followed the rather clear holding in *BC Health*, and begun to construct the elaborate legal apparatus necessary to make it legally so. He chose the latter. Notably, he did not choose what is legally impossible: to recognize the existence of a right, without specifying who possesses the right, against whom and with respect to what.

At the Supreme Court, Rothstein and Deschamps JJ, concurring in result, took different routes to arrive at the first option, while Abella J's dissent, like Winkler CJO, took the second route. Whichever route you prefer, the reasons provided by all of those outside of the majority were at least legally possible. Respectfully, we think the majority opted for the legally impossible outcome.

To their credit, the majority apparently accepted the undesirability of having courts answer all of the questions outlined in the above section under direction of the three words "freedom of association".<sup>89</sup> The majority declared that they were not constitutionalizing a uniform system of collective bargaining or labour relations. However, they failed

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88. See Brian Langille, "The *Trilogy* is a Foreign Country, They Do Things Differently There" (2014) 45 *Ottawa L Rev* [forthcoming] [Langille, "The *Trilogy*"].

89. See *Fraser* SCC, *supra* note 7 at paras 41, 47, 77.

to accept that this is exactly what a constitutional right to collective bargaining requires—correlative and affirmative duties on the state and employers. Instead of facing this legal reality, the majority dug in its heels.

More disturbingly, in conflating freedoms cases and derivative rights cases in *Fraser*,<sup>90</sup> we may be left with a standard requiring that it be “effectively impossible to exercise the freedom”, which presumably applies whether the state is attacking the exercise of a constitutional freedom or has simply left in place a scheme of contending freedoms.<sup>91</sup> If the standard of impossibility becomes the default yardstick for conventional state interference with the freedom, as well as the failure to provide derivative rights, we are in a heap of constitutional trouble.<sup>92</sup> This confusion is already starting to show its teeth.<sup>93</sup> Surely the Court did not intend to apply an “impossible to exercise” standard for vertical application, associational freedom cases, but that is what we are left with, and we think this response will only become increasingly indefensible with time.<sup>94</sup>

#### *E. Can We Avoid the Demands of Legality?*

The question of if and when to impose rights derivative of a freedom is a difficult one, but as demonstrated above, not all such rights are the same. *Dunmore* created derivative rights, with clearly defined and familiar contours, answering all of our questions. *BC Health* and *Fraser* went much further. To see this more clearly, we should again remind ourselves

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90. *Ibid* (“[i]f it is shown that it is impossible to meaningfully exercise the right to associate due to substantial interference by a law (or absence of laws: see *Dunmore*) or by government action, a limit on the exercise of the s. 2(d) right is established, and the onus shifts to the state to justify the limit under s. 1 of the *Charter*” at para 47).

91. See *Association of Justice Counsel*, *supra* note 8 (Sharpe JA wrote “the substantive content of s. 2(d) must be the same whether raised as a sword to claim the positive right to an effective legislative regime to protect freedom of association or used as a shield to defend against legislation that impinges upon existing statutory protections” at para 32).

92. See Oliphant, *supra* note 50 at 56–57. See also Langille, “Right-Freedom Distinction”, *supra* note 17 at 159; Jamie Cameron, “Due Process, Collective Bargaining and s 2(d) of the *Charter*: A Comment on *B.C. Health Services*” (2006) 13 CLEJ 233 at 254–56.

93. The Court cannot say it was not warned. See Langille, “Right-Freedom Distinction”, *supra* note 17 at 159.

94. See Fuller, *supra* note 14 (“infringements of legal morality tend to become cumulative” at 92).

that whatever the effect of the *Charter* on the distribution of rights and freedoms in a given jurisdiction, we must know now the answer to the question of who governs any specific interaction. It appears that one answer to this claim is that we do not.

Professors Alan Bogg and Keith Ewing have praised the “dynamic and evolutionary quality” of constitutional rights and duties, noting that legislatures “have a vast range of techniques at their disposal to promote the realization of a right to collective bargaining”.<sup>95</sup> This is in one sense true and obvious—states do have a wide range of options at their disposal in order to instantiate some form of freedom of association. These include the common law model, the Wagner Act Model, and all of the other models used by the vast majority of International Labour Organization members. However, what is not true is that a legal system—and a court interpreting a constitution—does not have to be legally specific about the answer to every question regarding “who governs?” As such, while it is certainly true that a fundamental right to collectively bargain need not be logically coupled with a duty to bargain in good faith, depending on how you define the scope and content of the right, it must be logically coupled with some duty owed by some duty bearer if it is to be a legally cognizable “right”. Moreover, that duty and the identity of its bearer must be specified to a degree which permit us to say that we have a legal system grounded in the rule of law.

Whatever powers the *Charter* gives to the judiciary, the power to dictate an overall narrative as a constitutional imperative and then draft a comprehensive labour code to implement it is, in our view, not one of them.<sup>96</sup> Perhaps Professors Bogg and Ewing are referring to the idea of

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95. Bogg & Ewing, *supra* note 18 at 399.

96. Such a course may be required by practical imperatives where a Constitution grants a broad range of social and economic rights that can only plausibly be ensured in a partial and imperfect form, and which exist on the border of justiciability. See e.g. Eric C Christiansen, “Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court” (2007) 38:2 Colum Hum Rgts L Rev 321; Cass R Sunstein, “Social and Economic Rights?: Lessons from South Africa” (2001) University of Chicago, Public Law Working Paper No 12; Mark Tushnet, “Social Welfare Rights and the Forms of Judicial Review” (2004) 82:7 Tex L Rev 1895. In such cases, a court is effectively issuing an “order to plan”. See Mark Tushnet, “A Goldilocks Account of Judicial Review” (2002) 37:1 USFL Rev 63 at 83. While such an exercise in quasi-adjudication may be required where more aspirational constitutional provisions are involved, we remain of the view that it is



a “constitutional dialogue” between the court and the legislature.<sup>97</sup> This is an interesting idea, but it only goes so far. In a legal system, while the dialogue may be ongoing, the law itself may not. Legal dialogue must consist in the exchange of complete accounts of what the law is with respect to the parties at any given moment. This must be true, for there is never a guarantee that there will be a legislative reply to a court’s ruling, and if there is no reply, some legal answer must already be in place.<sup>98</sup>

*R v Saskatchewan Federation of Labour* provides a useful illustration of where we are after *BC Health* and *Fraser*, and allows us to see how legality demands answers to the questions that we are asked to believe need not arise in the courts. In *Saskatchewan Federation of Labour*, the freedom to strike was the principal focus of the union; however, they also challenged other aspects of the *Trade Union Amendment Act (TUAA)*,<sup>99</sup> in particular, those revising the way in which a union became certified and decertified.

Although each set of changes raises its own difficult questions, we will confine our discussion to the issue of certification for the purposes of illustration. The previous legislation required certification where more than 50% of employees in a given bargaining unit had signed membership cards,<sup>100</sup> and directed that a vote be conducted where the support was between 25% and 50%.<sup>101</sup> Cards were required to be signed within six months of the application for certification (if support was below 25%, there was no entitlement to a certification vote at all).<sup>102</sup>

The amendments to the *TUAA* meaningfully raised the minimum level of support for certification. They eliminated the automatic certification where employee support was greater than 50%, increased the minimum level of support required to hold a certification vote (from 25% to 45%), and decreased the period of time within which cards could be signed

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unnecessary to import the uncertainty here with respect to our fundamental freedoms, at this stage in our constitutional development.

97. See e.g. Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, “Charter Dialogue Revisited: Or ‘Much Ado About Metaphors’” (2007) 45:1 Osgoode Hall LJ 1.

98. For example, the lack of response to *BC Health* by the Ontario government, giving rise to the litigation in *Fraser*.

99. *The Trade Union Amendment Act, 2008*, SS 2008, c 26 [*TUAA*], amending RSS 1978, c T-17 [*TUA*], as repealed by *The Saskatchewan Employment Act*, SS 2013, c S-15.1.

100. *Saskatchewan Federation of Labour QB*, *supra* note 9 at para 225.

101. See *TUA*, *supra* note 99, s 6(2).

102. *Ibid.*

(from six to three months). Do these changes violate freedom of association by insufficiently securing the derivative right to meaningful collective bargaining? Some might say no, because a “government is still left with a wide range of choices as to how it will discharge its positive duties of fulfillment”, such that “the labour code will remain to be drafted by the elected political representatives”.<sup>103</sup>

So, let us assume that, according to some unknown standard of “meaningfulness”, the modifications to the system of certification in the *TUAA* are constitutionally permissible, and deny no one their constitutional right to meaningful collective bargaining. However, what if the changes were more drastic? What if, in order to be certified and access their constitutional right to meaningful collective bargaining, a unit needed to demonstrate 75% support in one month? Or 90% support in a week? Unanimous support in a day? What if the system of certification that provides a union with exclusive bargaining rights to represent supporters and dissenters alike was eliminated entirely? Are these permissible modifications? Would such a scheme as exists in most places in Europe fulfill the government’s obligation to protect freedom of association? Why or why not? And how do we know?

Each of the other issues raised in *Saskatchewan Federation of Labour*, and a nearly infinite number of others, are equally difficult. The point is that while the Court may permit legislatures some margin of appreciation, it will eventually have to decide the outer limits of a meaningful right to collective bargaining. In other words, it might, over decades, draft a very permissive or minimal constitutional labour code, but it will still have to draft one.

Given the constraints of legality, we can see that rights and freedoms are not dynamic, except in the sense that legal actors such as legislators or constitutional courts can change them, for example, by replacing a freedom with a right and vice versa. This is what the Wagner Act Model did: It replaced what were formerly freedoms (to bargain, to strike, etc.) with an intricate scheme of rights and duties. It is also what cases like *Lochner v New York* did.<sup>104</sup> In that case, which has become something

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103. Bogg & Ewing, *supra* note 18 at 399.

104. 198 US 45 (1905).

of a cautionary tale the world over,<sup>105</sup> the US Supreme Court replaced statutory legal rights with background common law freedoms, under the guise of constitutional doctrine. However, one cannot have a right to promote the realization of a freedom that exists in the ether. It must be legally clear who possesses the right, in respect of what conduct, who owes the duty, and what duties it places on them. There must be enough specificity so that a meaningful conversation can take place to determine whether the duties have been fulfilled.

Thus, when it is argued that “[d]uties evolve and change over time, and are sensitive to the texture of social, economic, institutional and cultural circumstances”,<sup>106</sup> all this can mean is that the courts and legislatures can change the content of such duties. At best, this sense of dynamism means that we have to answer these constitutional questions on a pretty regular basis, again and again, in a piecemeal and haphazard fashion. It does not mean that we do not have to answer them at all. A reluctance to keep our basic legal concepts in mind is problematic in all spheres of law, but it is particularly problematic in the constitutional adjudicative sphere where judges are defining what it is that a democratic government can and cannot do. They should do so carefully and with their eyes on the ideas central to legality.

## IV. Starting Afresh: A Positive Way of Thinking About Freedom of Association

Almost all of the legal ground we have covered has been in order to come to terms with what the Supreme Court has told us about freedom of association, and why we consider it problematic. We have also spent some time explaining what we see as equally troubling in what defenders of the Court’s product, such as Professors Bogg and Ewing, have had to say. It is quite right to point out that constitutional “freedoms” may conceivably be read to involve a number of jural relations. Courts may interpret a constitutional freedom to confer derivative rights, as in *Dunmore*, along with much else. Although reasonable people may disagree on whether it is necessary or wise, given the implications that a “rights necessary for a

105. See generally Sujit Choudhry, “The *Lochner* Era and Comparative Constitutionalism” (2004) 2:1 Intl J Constitutional L 1.

106. Bogg & Ewing, *supra* note 18 at 398.

meaningful freedom” standard may have on our constitutional law, we can all agree that it is legally possible so long as the Court undertakes the task. We also agree that while our commitment to legal grammar can tell us what is going on, it cannot tell us what should go on, (although it can help us).<sup>107</sup> Legality can only take us so far, and once we have confirmed its necessary presence and the (sometimes stark) options it reveals, we must make some normative decisions about the proper scope of the freedom as a matter of constitutional law. Here, our main allies are our ideas of institutional competence and legitimacy, tied to our ideas of law and legality.

While everyone seems to agree that judges cannot or should not write entire labour codes under the auspices of a constitutional freedom of association, this is what the Court’s own holding in *BC Health* condemns them to do. Of course, there is a way to constitutionally achieve what many of the Court’s defenders seem to desire—a contextualized, fluid, evolving, dynamic, constitutionally guaranteed set of labour rights<sup>108</sup>—in a way which respects the requirements of legality, and much else we hold dear, including ideas about the role of democracy. We can have this in a way that does not require the Court to hash out an entire labour code because we have another fundamental constitutional value in play—the idea of equality.<sup>109</sup> This is effectively the idea employed in *Dunmore*, which allowed the Court to adhere to the strictures of legality: it said that agricultural workers get what most other workers get with respect to unfair labour practices.<sup>110</sup> As discussed elsewhere,<sup>111</sup> we believe cases like *Dunmore* and *Fraser* can be best viewed as section 15 cases, insofar as they depend on the logic of equality: group A has certain statutory rights and group B wants them. Our courts might not know what “meaningful” or “substantive” freedom of association entails in the constitutional abstract, but they know how the state has instantiated that idea for most Canadians and that it has not extended the same protection to others. We essentially

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107. See Langille, “Freedom of Association Mess”, *supra* note 17 (“Hohfeld cannot solve our political and moral controversies; he can merely make sure that we are talking clearly and about the same things when we speak of ‘rights’” at 53).

108. See Bogg & Ewing, *supra* note 18 at 398–400.

109. See generally Peter Hogg, “Equality as a *Charter* Value in Constitutional Interpretation” (2003) 20 SCLR (2d) 113.

110. *Dunmore*, *supra* note 1.

111. See Langille, “The *Trilogy*”, *supra* note 88.

have an unequal distribution of state protection for a fundamental freedom—a notion we find very problematic, and one we think should place a constitutional burden on the state to justify not extending that protection to all.

Of course, this option has been rendered unavailable by the Supreme Court's interpretation of section 15, limiting equality protection to the enumerated and analogous grounds.<sup>112</sup> The feasibility and desirability of the option we prefer involves a long proof beyond the scope of this article, but the rough contours of this approach are starting to be put in place.<sup>113</sup> If we deployed this very familiar constitutional idea—as the Court effectively did in *Dunmore*—we would not face the need to answer all of the questions raised above according to some mercurial standard of “substantively meaningful freedom”, and the need to draft a judicial labour code does not arise. The Court would merely need to identify those aspects of the statutory regime directed at instantiating the freedom of association, and extend it equally to all workers in the province, in the absence of a section 1 justification. Leaving that solution aside for the moment, we still need to map out a viable future for section 2(d).

### *A. Beyond Equality: Protecting Freedom*

Here is the way we believe we should think about section 2(d) from the ground up and in a legally coherent manner. First of all, most can agree that section 2(d) means that workers must at least have the freedom<sup>114</sup> of association. The substance of this entitlement is the legal freedom explained above: It involves what I am free to do and says nothing in particular about any duties of others in that regard. This would mean

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112. See Langille, “Freedom of Association Mess”, *supra* note 17 at 205.

113. See Robin Elliot & Michael Elliot, “The Addition of an Interest-Based Route into Section 15 of the *Charter*: Why It's Necessary and How It Can Be Justified” (2014) 64 SCLR (2d) 462. There have been other straws in the wind. See *Fraser SCC*, *supra* note 7 at paras 318–19, Deschamps J, concurring. See also *Saskatchewan Federation of Labour QB*, *supra* note 9 at para 55.

114. We agree with Bogg & Ewing that, as a matter of strict Hohfeldian logic, a legal freedom does not place a duty on others, so much as signify the absence of anyone else's right that the holder of the freedom do or not do that thing. In the context of *constitutional* freedoms, it may be, strictly speaking, more apt to consider the jural relation to be an Hohfeldian *immunity* against government, which leaves in place the underlying freedom or liberty. From the perspective of *vires*, it might be said that, as a result of the immunity,

that the government cannot prohibit or unduly interfere with the joining or belonging to an association<sup>115</sup> without a constitutionally permissible excuse. Even the plurality in the Trilogy went this far.<sup>116</sup>

Our notion of the freedom does not stop there, however. In the Trilogy, Dickson CJC found, with respect to the freedom to strike (as a species of freedom of association), that the impugned legislation prohibited “a collective refusal to work at the conclusion of a collective agreement” and, therefore, there “can be no doubt that the legislation is aimed at foreclosing a particular collective activity *because* of its associational nature”.<sup>117</sup> We agree, but how do we know that?

In our view, the most elegant legal way to determine if the state is foreclosing a particular collective activity because of its associational nature is to ask: “Are individuals prohibited from so acting?” Both the Chief Justice and McIntyre J accepted this formulation of the parallel liberty approach. In the words of Dickson CJC, and endorsed by McIntyre J:

[I]f a legislature permits an individual to enjoy an activity which it forecloses to a collectivity, it may properly be inferred that the legislature intended to prohibit the collective activity because of its collective or associational aspect. Conversely, one may infer from a legislative proscription which applies equally to individuals and groups that the purpose of the legislation was a *bona fide* prohibition of a particular activity because of detrimental qualities inhering in the activity (e.g., criminal conduct), and not merely because of the fact that the activity might sometimes be done in association.<sup>118</sup>

This is simply the best available associational equivalent to the analysis applied to other fundamental freedoms. However, Dickson CJC and McIntyre J both, in different ways, failed to take the concept to its logical fruition, bedevilled by the irrelevant distinction between qualitatively

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the government does not have the power to interfere with the ambit of the freedom. See e.g. Leader, *supra* note 18 at 12–16. Nevertheless, the point remains that the legal status being protected is the “freedom”, in the sense that an individual is left with the choice to do or not do something (i.e., the absence of a legal duty to associate or not associate).

115. This point is importantly overlooked in the RCMP case at the Ontario Court of Appeal. See *Mounted Police*, *supra* note 8.

116. See *Alberta Reference*, *supra* note 3 at 391.

117. *Ibid* at 371 [emphasis added].

118. *Ibid* at 367, 408–09, respectively.

and quantitatively different activities.<sup>119</sup> Typically, collective activity is both qualitatively and quantitatively different from individual action. That is the point of protecting associational activity: to permit an increase in quantity to lead to a qualitatively different result.<sup>120</sup>

On this view, every individual in Canada has the freedom of association, in a way that is not dependent on statutory certification or anything else. They are immune from government action that limits the freedom by placing restrictions on collective action that are not placed on individual action. A limit on the freedom may not always be easy to sort out on the margins, but it is the section 2(d) equivalent of what the Court has been sorting out with respect to the other fundamental freedoms from the start. If the government prohibits, limits, hampers, or in any other non-trivial way restricts an activity done in concert, but does not impose those restrictions on individuals conducting the same activity alone, it has violated section 2(d) and must justify that violation under section 1. There is no “effectively impossible to exercise the freedom” standard on the radar.

So too, it would be a misapplication of the *Charter*, and of freedom of association, to have one “freedom test” for unions, another for book clubs and a third for criminal gangs. The government cannot interfere with the activity of the group if the activity itself is not interfered with when conducted alone. This is how we know that restrictions on group reading or collective bargaining violate section 2(d), but restrictions on gang warfare do not. In the former cases, individuals are free to read and bargain—any restrictions on the individuals doing so in concert would violate section 2(d), and the government would have to justify those restrictions. By contrast, individuals are not free to partake in criminal activity or violence, and therefore prohibiting those activities for groups raises no constitutional issue. So, when it comes to the freedom itself,

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119. Chief Justice Dickson thought that the parallel liberty approach was insufficient in that it could not cover qualitatively different activities, while McIntyre J thought that qualitatively different activities were not protected if not performable in the same way as individual activities. Both of these self-imposed limitations on the parallel liberty approach are unnecessary. See Dianne Pothier, “Twenty Years of Labour Law and the *Charter*” (2002) 40:3 Osgoode Hall LJ 369 at 377; Oliphant, *supra* note 50 at 63–67.

120. See Pothier, *supra* note 119 at 378; Oliphant, *supra* note 50 at 65–66; Steven Barrett & Benjamin Oliphant, “The *Trilogy* Strikes Back: Reconsidering Constitutional Protection for the Freedom to Strike” Ottawa L Rev [forthcoming].

“contextualization” is not necessary; “freedom of association” is granted to “everyone”, not just union members.<sup>121</sup>

As we have explained here and elsewhere, this view of section 2(d) entails a freedom to unionize, a freedom to bargain collectively and a freedom to strike, because these are things I am free to do as an individual (join groups, negotiate terms of a possible deal with a potential employer, and not go to work if we do not make a deal). This is a straightforward but critical insight into the basic freedom of association for Canadians.

### *B. Beyond Freedom: Derivative Rights*

Now the hard part: how to identify and deal with a distribution of the background rights and freedoms which we cannot countenance because they do not afford even the minimum level of protection for freedom of association. The discussion above illustrates our options. While employing a threshold state action requirement in these cases will not answer our questions, we must know precisely what form the state action takes in order to properly frame the response of the Constitution. Is the state directly infringing a freedom by passing legislation (as in the *Trilogy* and *BC Health*), indirectly infringing a freedom through the common law (as in *Pepsi-Cola*) or failing to provide a protective right to facilitate the freedom (as in *Dunmore* and *Fraser*)? In particular, we must know whether the individual is claiming a right or a freedom, and if a right, a right against whom and with respect to what.

When we come to the real issue in *Fraser*—the creation of derivative rights against other private actors via “diagonal” application of the *Charter*—what is the right way to think about the demand that the usual background rules be altered? Recall that the question we are asking is not “is this a good idea as a matter of policy?” but “is this constitutionally required?”<sup>122</sup> When does the *Charter* demand that the legislature pass a law altering the pre-existing common law distribution of rights and freedoms? This is the hard question, and there are three possible answers.

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121. As explained in more detail below, we think that Rothstein J is exactly right on this point. See *Fraser* SCC, *supra* note 7 at paras 203–15, concurring.

122. While other *Charter* provisions have been read to grant affirmative rights—typically where the words clearly entail such an entitlement (e.g., “right to equal benefit of the law”)—freedoms rarely have. In *Delisle*, the Court recognized the difference between granting



(i) The “Never” Answer

One theoretically viable answer is to say that the *Charter* should never demand that the legislature pass a law altering the pre-existing distribution of rights and freedoms. Such an answer could be justified by the difficulties that arise once the substantive freedom door is opened—most notably, drawing meaningful distinctions between imposing a constitutional requirement to create derivative rights in some cases and not in others. This answer would preserve the distinction between the freedom and derivative rights facilitative of the freedom, with only the former being protected. It accepts the argument that all conduct, private or otherwise, effectively constitutes “state action” as being “unattractively totalitarian in its implications”,<sup>123</sup> and effectively corrodes any principled distinction between the legislative and judicial functions.

Adopting this approach would not necessarily mean that constitutional freedoms are at the mercy of other private actors through the common law distribution of rights and freedoms. It simply dictates that while the law is subject to constitutional refinement, the actions of individuals are not. More precisely, on the most defensible reading of this theory, the question is always whether the law governing a specific interaction has unduly hampered the freedom. If two parallel freedoms are in place—say, with the freedom to bargain prior to entering into a contract—there would be no work for the Constitution to do, at least not under the rubric of “freedom of association”. However, where the common law distributes rights that place duties on individuals, we can meaningfully ask: “Does the common law allocation of rights to some infringe on the constitutional mandated sphere of freedom?” That is, does the common law unduly

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rights and preserving freedom, noting that while an affirmative right is “contemplated in the wording itself of s. 15 . . . the same cannot be said of the individual freedoms set out in s. 2, which generally requires only that the state not interfere”. *Supra* note 4 at para 25. Hence the common theme in the context of section 2(b) “that the freedom of expression contained in s. 2(b) prohibits gags, but does not compel the distribution of megaphones”. *Ibid* at para 27.

123. See Frank I Goodman, “Professor Brest on State Action and Liberal Theory, and a Postscript to Professor Stone” (1982) 130:6 U Pa L Rev 1331 at 1345.

restrict the freedom of actors by placing them under an unconstitutional duty to act or not act?<sup>124</sup>

Although decided under section 2(b), the Supreme Court's decision in *Pepsi-Cola* is a good example of how the courts could deal with the substantive freedom issue without resorting to affirmative derivative rights.<sup>125</sup> It involves the indirect horizontal application of the Constitution and the remedy is fully within the province of the courts as the authors of the common law.

In brief, the common law gave to employers the right to enjoin secondary picketing, placing striking employees under a duty to not picket suppliers and customers of their employer's product. This common law distribution of rights constrained the worker's freedom by enjoining such expressive conduct. The Court thus found that the common law allocation of rights hampered freedom of expression. This was corrected by removing the right to restrain secondary picketing, while leaving in place most other common law rights—property rights, rights to physical integrity and so on. The Court effectively modified the common law to protect the freedom: The workers could now picket where they were otherwise legally permitted to be, but were not required to do so, and no one was required to respond.

However, beyond modifying common law rules, this theory would leave derivative rights out of the fundamental freedoms equation. It would leave diagonal application cases like *Dunmore* and *Fraser*, or claims to affirmative state assistance, to the sphere of politics or perhaps other constitutional provisions more amenable to rights protection (e.g., equality).

## (ii) The "Sometimes, but Carefully and Specifically" Answer

Another potentially viable answer to the substantive freedom problem is to say that sometimes derivative rights are necessary under section 2,

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124. See e.g. Murray Hunt, "The 'Horizontal Effect' of the *Human Rights Act*" [1998] Public Law 423.

125. This method of proceeding with respect to the common law is not precluded by the other options discussed in this article, below. However, if the Court did not have the capacity to declare constitutional rights derivative of freedoms, and thereby place the state under a constitutional duty to legislate in a specific area, its only recourse would be to modify the common law directly.

but only if done with careful thought and legal specificity. This would place discrete obligations on the state to *protect* the exercise of freedom against private third parties by forcing the state to place those private parties under a duty not to interfere with associational activities. It would allow the *Charter* to be applied diagonally against private parties through constitutional duties owed by the state to individuals. It applies to a discrete sphere of conduct—for instance, associating in the workplace.

However, we have seen why the claimant must leap a high bar in order to be constitutionally entitled to this protection. This is our substantive freedom problem. If the bar was set at “substantially interfere” or “discourage” by the *absence* of protective legislation, every individual whose exercise of freedom was rendered unsuccessful by the freedom of third parties could bring a constitutional claim for state action to protect their freedom. Consider again our street corner preacher, what it might mean to decide whether his freedom is sufficiently meaningful, and what remedies the courts have at their disposal.

Given this problem, any positive obligation requiring the state to protect the freedom should arise only where it would otherwise be impossible to exercise the freedom.<sup>126</sup> This is because a legal freedom by its “very nature . . . *generally* imposes a negative obligation on the government and not a positive obligation of protection or assistance”.<sup>127</sup> Although *Dunmore* can be read to suggest that a positive obligation arises where the absence of state action constitutes a substantial interference with the freedom, it distinguished previous cases like *Delisle* on the basis that the claimants in those cases were “unable to prove that the fundamental freedom at issue, as opposed to merely their requested statutory entitlement, was *impossible to exercise*”.<sup>128</sup> The logic behind this high threshold is that in many of the situations where a party claims that the state has a constitutional obligation to alter the existing common law rights and freedoms of third parties, “human-rights claims often if not typically are in play on both sides”.<sup>129</sup> Were the bar not set high, the

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126. See also *Baier v Alberta*, 2007 SCC 31, [2007] 2 SCR 673 (“s. 2 generally imposes a negative obligation on government rather than a positive obligation of protection or assistance” at para 20).

127. *Delisle*, *supra* note 4 at para 26 [emphasis added].

128. *Dunmore*, *supra* note 1 at para 25 [emphasis added].

129. See Frank I Michelman, “The Bill of Rights, the Common Law, and the Freedom-Friendly State” (2003) 58:1 *Miami L Rev* 401 at 431.

individual placed under a constitutional duty to act or not act in a specific way to promote another's freedom would be right to ask: "But what about *my* freedom?"<sup>130</sup>

There are a number of theories outlining when the state might be under such an obligation to act. None of them are perfect, but all point in the same general direction.<sup>131</sup> One approach that may be particularly useful in the context of freedom of association would be to open the door to required state action where a private entity is able to stifle a freedom to such an extent that it mirrors the operation of a state prohibition. The best example of this is probably *Marsh v Alabama*, in which a court did not permit a company-owned town to exercise its background property rights to exclude religious leafletters from town sidewalks.<sup>132</sup> Since the private entity effectively monopolized the property in the town, it had exercised something like the same coercive power of the state, which could be wielded to extinguish freedoms more or less entirely in a specific context. As such, the "carefully and specifically" answer would be animated by the notion that while only a state can change the laws, and de jure take away a freedom, sometimes a private actor (e.g., your employer) can have the same de facto effect as a state prohibition.

With this approach, we might say that where a private party can exercise its background freedoms or rights so as to deprive others of a constitutional freedom more or less entirely, a constitutional obligation arises on the state to protect the exercise of that constitutional freedom,

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130. This is not to say that there is necessarily a constitutional claim on the other side of the equation, particularly in the labour relations sphere, but rather to point out that placing upon the government a duty to create a private right where one did not previously exist entails the placing of duties on a private party. We may not be particularly concerned about this in the case of employers—particularly large, institutional, corporate employers. But as we are establishing constitutional principles of a potentially wide breadth, the fact that a "meaningful freedom" standard could operate to undermine the freedom of other private actors is, in our view, a relevant consideration.

131. See generally Tushnet, *Weak Courts*, *supra* note 38 at 177–81; Michelman, *supra* note 129; Gardbaum, *supra* note 40. Other options canvassed include imposing a constitutional obligation where there is a sufficient "nexus" between the state and the private action so as to bring the latter within the sphere of state conduct. Something close to this notion seemed to be relied on in *Dunmore*, *supra* note 1 (finding that the absence of protection constituted state action, by finding that the deliberate legislative exclusion placed "a chilling effect on non-statutory union activity" at paras 44–45).

132. 326 US 501 (1946).

by creating derivative rights or otherwise modifying the common law. This standard is not without its difficulties,<sup>133</sup> and there are others that are equally imperfect.<sup>134</sup> Nevertheless, a high threshold is critical to distinguish cases worthy of such exceptional protection<sup>135</sup> from others where an individual's exercise of freedom is rendered ineffectual simply by the exercise of freedoms by others.<sup>136</sup>

We might disagree with the way the test has been applied in the past. However, at least it recognizes that something legally different is going on in the diagonal application/protect cases that we need not attend to in our typical vertical state action cases. As we have been at pains to point out, any test along the lines of "effective impossibility" is a heretical notion where what we are talking about is the state directly, and deliberately, infringing upon constitutional freedoms.

### (iii) The "Frequently and Broadly" Answer

At this stage, it might be argued that if it is legally possible to impose a derivative right to protection from unfair labour practices, why is it not also possible to create a constitutional right to collective bargaining, imposing an obligation on the state to enact some duty on employers? In other words, it might be argued that the answer to our hard question—when

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133. A court might ask, for instance, whether the workers in *Dunmore* were deprived entirely of their freedom of association, given that they could still associate without fear of reprisal so long as they did not do so in an attempt to form a union (one suspects the employer would have been agnostic had they wanted to set up a beer league hockey team or a chess club). Similarly, in *Marsh*, it cannot be said that the company obliterated freedom of expression entirely, but rather just one particularly important instance of it (i.e., protesting on public sidewalks). Once we start down this path, we must determine what activities are sufficiently important to require constitutional protection, and attempt to draw those distinctions in a principled and ascertainable way, without resorting to the logic of "I like this activity, and therefore it must be protected by the constitution".

134. See Tushnet, *Weak Courts*, *supra* note 38 at 177–81.

135. Before proclaiming in *Fraser* that the "decision in *Health Services* follows directly from the principles enunciated in *Dunmore*", the Court clearly (and rightly, in our opinion), saw *Dunmore* as an exceptional circumstance requiring an exceptional remedy. See *Baier v Alberta*, *supra* note 126 at paras 25–28; *Fraser SCC*, *supra* note 7 at para 38. See also Oliphant, *supra* note 50 at 80–83.

136. Which is, from the perspective of substantive outcomes, most of us, most of the time. Very few people are able to consistently exercise their freedom in such a way so as to achieve whatever substantive outcome they hope to achieve.

should the Court create rights derivative of freedoms?—is “frequently”, or “whenever a freedom is deemed by the courts to be not sufficiently meaningful otherwise”.<sup>137</sup> It seems to us that this is the answer provided by the majority in *BC Health*. However, if it is, then the invitation must be taken up, as it was by Winkler CJO and Ball J, to answer the critical questions that it inevitably entails. Our commitment to legality tells us that it is no small undertaking. There must be constitutional answers to the questions of who holds the right, who bears the duty, and with respect to what conduct.

While our commitment to legality does not tell us whether the courts should undertake the task of effectively writing a judicial labour code into section 2(d), other aspects of our legal system do. We must make at least some effort to distinguish the role of judges interpreting the Constitution from the role of democratic branches of government. This takes us out of the realm of jural relations and into the realm of political and constitutional theory. It requires us to look at other things we know about our law and, in particular, the limits upon judges drafting complex labour codes covering freedom of association.

We begin by noting that the Court has consistently recognized the limits of its role in crafting constitutional remedies. For instance, it has noted that courts should avoid the “risk of making inappropriate intrusions into the legislative sphere”.<sup>138</sup> As Lamer CJC observed in the seminal case of *Schachter v Canada*, “how the statute ought to be extended in order to comply with the Constitution cannot [always] be answered with a sufficient degree of precision on the basis of constitutional analysis”.<sup>139</sup> He continued:

In *Hunter*, the Court decided that the scheme for authorizing searches under the relevant legislation did not withstand *Charter* scrutiny. In such a circumstance, it would theoretically be possible to characterize the “extent of the inconsistency” as the absence of certain safeguards. Thus, in the abstract, the absence of appropriate safeguards could have been declared of no force or effect, which would have led to the establishment of the appropriate safeguards. However, this approach would have been inappropriate because

137. This seems to be the approach Bogg and Ewing prefer, although it may not be. Bogg & Ewing, *supra* note 18.

138. *R v Ferguson*, 2008 SCC 6 at para 50, [2008] 1 SCR 96. See also *Schachter v Canada*, [1992] 2 SCR 679, 93 DLR (4th) 1; *Vriend v Alberta*, *supra* note 65; *R v Sharpe*, *supra* note 52; *Delisle*, *supra* note 4 at para 23.

139. *Schachter*, *supra* note 138 at 706.

this would have required establishing a new scheme, the details of which would have been up to the Court to determine.<sup>140</sup>

It is critical to note that, in both *Hunter* and *Schachter*, it would have been constitutionally permissible for the legislature to respond by doing nothing. The legislature could have decided simply not to authorize the search of any premises under the *Combines Investigation Act* or not to provide any maternity benefits, respectively. This would have rectified the constitutional deficiencies identified by the Court. The absence of legislation, however, is not an option where the Court decides that substantive derivative rights are affirmatively *required* by the Constitution. In defining a protective constitutional right to collectively bargain or a right against unfair labour practices, the Court is doing something quite different than it is doing in deciding whether to search constitutionally or not at all, or whether to extend parental benefits to everyone or no one at all. The same limits with respect to judicial competence apply *a fortiori*.

As noted above, there is another “remedy” available to the Court where the legislature has failed to protect the exercise of a constitutional freedom by leaving in place the background distribution: the Court can simply modify the common law itself. This is what happened in *Pepsi-Cola*. Granted, the Court has closely structured and limited its capacity to modify the common law. It has recognized that while it has the power to develop the common law in line with *Charter* values, “complex changes to the law with uncertain ramifications should be left to the legislature”.<sup>141</sup>

The Court’s recognition of its limited remedial capacity points to the idea that there is a real (albeit sometimes difficult to identify) difference between the role of courts and the role of legislatures in a constitutional democracy, and it is critical to attend to “the proper balance between judicial and legislative action”.<sup>142</sup> Courts cannot simply provide a right to substantive freedom and go about ordering legislatures to enact legislation deemed necessary to bring this standard to legal fruition. It has limited remedial authority to do so. Striking out exclusions from fully functioning but under-inclusive legislation, as in *Dunmore*, is one

140. *Ibid* [emphasis in original].

141. *R v Salituro*, [1991] 3 SCR 654 at 666, 50 OAC 125. See also *Watkins v Olafson*, [1989] 2 SCR 750 at 760–61, 39 BCLR (2d) 294.

142. *R v Salituro*, *supra* note 141 at 675.

thing, but ensconcing a broadly conceived derivative right, which would ultimately entail writing an entire judicial labour code, is quite another.

We believe that there are serious issues of institutional competence and legitimacy that require attention, even in the age of the *Charter*. Whatever the exact limits of judicial competence or precise terms of the democratic bargain are, the creation of a judicial labour code under the auspices of freedom of association would clearly entail the judiciary assuming a greater share of the power than was or could properly be ceded to it. This seems to be implicitly accepted by the Court in *Fraser* with its reluctance to require the government “to enact laws that set up a uniform model of labour relations” under section 2(d).<sup>143</sup> Professors Bogg and Ewing also appear to accept this premise, arguing that the detailed instantiation of the constitutional right can be left to the legislature.<sup>144</sup> However, for all the reasons discussed above, we do not think a constitutional right to meaningful collective bargaining can coexist with the notion that the courts will be able to avoid mapping in detail the contours of this right.<sup>145</sup>

As a society, we have a lot of labour law. We have a complete legal plan, imperfect and contentious as it may be from a normative perspective. *Lochner*-type thinking has no purchase here because we, as a society, are interested in *real*, as opposed to purely formal, legal freedom. We can create statutory derivative rights as a society (many are to the benefit of employees, but others, such as restrictions on strike action, are not). However, the question with which we are concerned here is not *may* the state reallocate the background entitlements. In Canada, our answer is typically “yes”, and it is the stuff that elections are won and lost over. This is what different political actors who endorse different labour law narratives argue over, and in one way or another work towards to see enacted into legislation.

The question we are concerned with is *must* the government reallocate the background entitlements as a constitutional obligation. It is not simply an issue of engaging in democratic politics or debating the best way to make freedom of association meaningful as a matter of political philosophy or

143. *Fraser* SCC, *supra* note 7 at para 47.

144. Bogg & Ewing, *supra* note 18 at 400.

145. This point has been obscured, perhaps because of the actual technique our courts have used to undertake this task. While insisting they are doing nothing of the sort, they are simply “cutting and pasting” from the Wagner Act Model. This is what Winkler CJO did so brilliantly, and it is also what happened in both *Dunmore* and *BC Health*.



public policy. It is also not simply a matter of getting the narrative right. It is a matter of law. This is a basic omission in the reasoning of much of the scholarship following *BC Health*: It presupposes that because a given theory or narrative of labour law is considered preferable to another, it must be found latent in the Constitution and that judges armed with three words—“freedom of association”—are competent to do all that is required to bring that narrative to fruition. This is, in our view, a serious error, but one that is easily made once we forget what it is we are doing.

Thus, the answer of “frequently” cannot be the right one to the derivative rights question. It would undermine other things we know to be true about our law—most notably the separation of powers between the courts and legislatures. We think that the Court agrees with this point, but we fear it has not yet recognized that a derivative right to meaningful collective bargaining condemns us to ignore it.

## Conclusion

Erecting a meaningful system of collective bargaining involves a massive and complex redistribution of an entire zone of background rules. It comprises a very unique set of trade-offs, often in a perilous balance, and must be completely designed in order for the plan to create meaningful collective bargaining. Our commitment to legality shows us that a constitutional right to meaningful collective bargaining really does require the type of detailed instantiation that the Court seems to think it does not. It involves costs and benefits in terms of the prior common law set of rights and freedoms of both employers and employees. It is not, in our view, plausible to say that this complex system is required by our Constitution according to the three words “freedom of association”.<sup>146</sup>

Law must be able to answer, in a systematic, rational and understandable way, who is subordinate to whom in any human interaction. Its whole structure is one of mapping legal rights and freedoms. But that structure does not in itself tell us what those rights and freedoms ought to be in any given case. Rather, it simply makes possible the legal instantiation of any such account of who should have authority over whom regarding what. If there is to be law—and the rule of law—this is the structure that is in play.

146. However, as we have pointed out, we believe it is required as a matter of equality—we must provide it to all once we provide it to some.

The view that we need not attend to the grammar, and can focus solely on the narrative, has had a large impact on modern legal thinking. The common “modern” and “post-modern” view, which is at least partially resisted here, results in the idea that the task of the Supreme Court is primarily to figure out, according to some view of good public policy, what we wish to achieve as a society. On that view, the Court should seek to develop answers to what kind and what amount of substantive freedom of association is preferable, and then require the legislature to go about distributing that meaningful freedom, entirely undefined in advance.

This type of thinking presumes that the real task of the judiciary is to be experts in knowing where we want to go and what kind of system of labour law we should have. We argue that this perspective masks a very real problem. As one author has commented, an exclusive focus on external accounts of the good has caused modern lawyers and academics to “become like mechanics who have forgotten how cars work but who have become experts in various theories as to the social value and costs of driving. But who would take their car to such a mechanic?”<sup>147</sup> As engineers and mechanics know things, so must lawyers. The law has a deep grammar informed by its task. We think that some legal folk have lost the legal, but not the normative, script.

Undoubtedly, the *Charter* has further blurred the lines between judicial and legislative functions in Canada. This has required the Court to inject itself into complex policy discussions and deep moral quandaries. However, it has not erased the lines of the division of legal labour entirely, as the Court itself has frequently observed. The Court’s task remains to ensure that *Charter* rights and freedoms are realized through the law, which requires unique attention to the principles of legality and legal grammar.

The list of ways in which laws can be bad is not exhausted using criteria external to law. Laws, and their interpretation, can be bad simply from a legal point of view. They are made no less bad where they seem to entrench some external conception that we find normatively pleasing. The problem with cases like *BC Health* and *Fraser* is not that the outcomes are bad in the substantive conclusions reached or the normative assumptions that underlie them. It is just that they are, in our respectful view, bad

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147. See Allan Beever, “The Law’s Function and the Judicial Function” (2003) 20:3 NZ Univ L Rev 299 at 319.

laws, on law's own terms. Lawyers and judges, of course, have opinions about how things should go, and how society should operate. However, their margin of professional advantage, and real contribution to society, is knowing how to get there, legally.<sup>148</sup> Our law of freedom of association, as with all law, has a grammar and a structure. We need to keep an eye on this truth. Failure to do so not only generates the confusions we have identified; it gives up on the idea of legality.

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148. This brings to mind Oliver Wendell Holmes' famous quote: "[I]f my fellow citizens want to go to Hell I will help them. It's my job." Mark DeWolfe Howe, ed, *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J Laski* (Cambridge, Mass: Harvard University Press, 1953) at 249.

