

**The Freedom of Association:**

**The emerging right to strike consensus in international  
and domestic labour law**

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## **The Freedom of Association:**

### **The emerging right to strike consensus in international and domestic labour law**

#### **Abstract:**

The paper discusses the emerging international consensus that collective bargaining and strike activity are important labour rights for workers which are protected even when not expressly referenced in constitutional instruments with reference to Canadian and international case law.

In January 2015, the Supreme Court of Canada released a landmark decision: *Saskatchewan Federation of Labour v Saskatchewan* 2015 SCC 4 [SFL], which recognized that Canadian workers have a constitutionally protected right to strike. In 1982, Canada adopted its *Charter of Rights and Freedoms* which guaranteed the freedom of association to Canadians, but without further explanation as to the extent of that freedom. The Canadian courts, relying on international and comparative law, 33 years later defined the scope of the freedom of association to include the rights of workers to organize, strike, and collectively bargain. In doing so, Canada joined an emerging international consensus that the right to strike is a fundamental right of workers and a critical component of the freedom of association and collective bargaining.

The development of Canadian, and other domestic labour law, draws increasingly on international law sources, including decisions of the International Labour Organization's Committee of Freedom of Association, the European Court of Human Rights, and interpretations of ILO Conventions 87 and 98. Canadian jurisprudence in particular has been recognized by jurists in other countries as a persuasive source of constitutional rights and has played part of the growing consensus on the right to strike.

## The Canadian Experience : the birth of *Charter* jurisprudence

For most workers, it is self evident that the ability to decide whether and how to work is their most fundamental right. While this right preserves personal autonomy in that it allows workers the limited right to quit, it is of limited use in changing terms and conditions of employment when exercised individually. As a collective right, used in concert with other workers, the ability to refuse to work in order to achieve more favourable terms of employment is powerful. The right to strike is a critical leveller in the balance of power in the workplace, as noted over 70 years ago:

Where the rights of labour are concerned, the rights of the employer are conditioned by the rights of the men to give or withhold their services. The right of workmen to strike is an essential element in the principle of collective bargaining.<sup>2</sup>

However, the right to strike did not receive constitutional protection in Canada until 2015. Since the *Charter of Rights and Freedoms*<sup>3</sup> was enacted in 1982, the Supreme Court of Canada [SCC] has struggled to define the scope of those rights and freedoms and apply them across all aspects of Canadian society within a complex balancing of employer, government, individual, and public policy interests, constantly evolving *Charter* jurisprudence, and Canada's international law commitments. One of the most challenging tasks for the SCC has been to define which, to what extent, and how labour rights are protected.

After establishing a restrictive framework for the freedom of association in 1987 in a group of labour cases referred to as the 1987 *Labour Trilogy* based on a constitutive conception of that freedom, the SCC's jurisprudence has taken a meandering and sometimes contradictory path towards a purposive understanding of association. However, the overall arc of the freedom of association in the 28 years since the 1987 *Labour Trilogy* has been to recognize and strengthen labour rights and finally recognize the right to strike.

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<sup>2</sup> *Crofter Harris Tweed Co. v Veitch*, [1942] 1 All ER 142 (HL)

<sup>3</sup> *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*]

This evolutionary process culminated in 2015, as the SCC released its decision in *SFL* which defined the three key components of the freedom of association in the labour context: 1) the right to organize and choose a bargaining agent; 2) the right to bargain and the extent of government restrictions on the scope of bargaining; and 3) the right to strike. With the *SFL* decision, the SCC finally reversed the 1987 *Labour Trilogy* and fully endorsed a purposive interpretation of the *Charter*.

Some SCC decisions in the first years of the *Charter* by lower courts recognized that workers enjoyed significant substantive rights, including the right to strike and the right to collectively bargain protected by the freedom of association.<sup>4</sup> However, when those initial cases made it to Canada's highest court by 1987, it was evident that the SCC at that time did not share the same expansive view of the freedom of association.

The Court has rooted labour rights in section 2 of the *Charter*, notably ss. 2(b) and 2(d):

S.2 Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

The Court readily recognized that some labour rights are protected by the *Charter*, particularly those rooted in s. 2(b), the freedom of expression, but only cautiously and tentatively recognized core labour rights under s. 2(d): the right to organize but not collectively bargain. It took four years from the introduction of the *Charter* for the SCC to comment on the application of the *Charter* to workplaces, initially recognizing that expressive labour activity could be protected under s. 2(b) and then in decisions in the next year drawing the contours of the core of labour rights under s. 2(d).

In 1987 the SCC dealt with a series of cases invoking the freedom of association and labour rights under s. 2(d). The SCC simultaneously released decisions in three appeals dealing with collective

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<sup>4</sup> eg. *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home* (1983) ONSC, 4 DLR (4th) 231 and *Retail, Wholesale and Department Store Union, Local 544 v. Saskatchewan*, (1985) (SKCA), 9 DLR (4th) 609

bargaining and the right to strike: *Alberta Reference*<sup>5</sup>; *PSAC*<sup>6</sup>, and *Dairy Workers*<sup>7</sup>: [collectively the 1987 *Labour Trilogy*]. The 1987 *Labour Trilogy* would govern Canadian labour relations and associational rights for the next 28 years, despite a slow but uncertain erosion of the strength of that precedent from 2007 until 2015.

At the heart of the 1987 *Labour Trilogy* was whether the freedom of association protected the right to strike and collective bargaining. In reviewing the scope of the freedom of association, a majority of the SCC examined freedom of association from a broad, decontextualized perspective, not a labour specific perspective. The main reasons were delivered in the *Alberta Reference*, a case challenging legislation which provided for different forms of arbitration at the discretion of government to resolve impasses in collective bargaining and a prohibition on strikes for workers providing essential services. The SCC firmly rejected the idea that either strike activity or collective bargaining were protected by the freedom of association under the *Charter*.

In *Alberta Reference*, the status of trade unions was not challenged, but their core activities, the ability to collectively bargain and strike, were contested. The majority of the SCC articulated a bright line test for claims under the freedom of association: the formation of the association was protected but not the activities of the association.

However, in *Alberta Reference* Dickson, CJ offered a compelling and principled dissent which advocated the recognition and protection of collective bargaining and the right to strike. There are several important elements in the dissent which the SCC would pick up in later cases. Dickson canvassed a wide array of sources of law, including Canadian, Commonwealth, United States, and International law to come to the conclusion that the freedom of association under the *Charter* must protect the right to collectively bargain and the right to strike.

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<sup>5</sup> *Reference re Public Service Employee Relations Act*, [1987] 1 SCR 313 [*Alberta Reference*]

<sup>6</sup> *PSAC v Canada*, [1987] 1 SCR 424 [*PSAC*]

<sup>7</sup> *RWDSU v Saskatchewan*, [1987] 1 SCR 460 [*Dairy Workers*]

The most significant aspect of the Dickson Dissent was the purposive approach to *Charter* interpretation, in which he rejected the majority's narrow approach.

The essentially formal nature of a constitutive approach to freedom of association is equally apparent when one considers other types of associational activity in our society. ... If freedom of association only protects the joining together of persons for common purposes, but not the pursuit of the very activities for which the association was formed, then the freedom is indeed legalistic, ungenerous, indeed vapid.<sup>8</sup>

Dickson explored the purpose and meaning of strike activity and found it was qualitatively different than individual activity, such as quitting, because of its associational aspect. A collective refusal to work to improve working conditions is fundamentally different than an individual refusal to continue to work. There is both an action directed at an employer, and a coming together of individuals which unites a collective. At interest in the freedom of association is association for a purpose: the balancing of power between individuals and larger entities, such as the state or an employer. Dickson also recognized the dignity interest in workers having a meaningful say over their working conditions.

Significantly, Dickson also looked to international law norms, which he observed were relevant and persuasive, to find as a general principle from the International Labour Organization "that freedom to form and organize unions, even in the public sector, must include freedom to pursue the essential activities of unions, such as collective bargaining and strikes, subject to reasonable limits." The Dickson Dissent set out the following principles of international law relevant to *Charter* interpretation:

- there is a body of treaties, conventions and customary norms that comprise international human rights law and reflect the commitment of the nations of the world to ensure "freedom, dignity and social justice" for their citizens;
- the *Charter* conforms to the spirit of the international human rights movement and incorporates many of "policies and prescriptions of the various international documents pertaining to human rights;

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<sup>8</sup> *Alberta Reference*, per Dickson, para 81, [the Dickson Dissent]

- "various sources of international human rights law - declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms - must be... relevant and persuasive sources for interpretation of the *Charter's* provisions";
- given the similarity in "policies and provisions" of the *Charter* and international human rights Conventions, "considerable relevance" is attached to decisions of adjudicative bodies in supplying content to imprecise *Charter* rights such as freedom of association;
- Canada is party to a number of international human rights treaties that contain similar or identical provisions to those in the *Charter*;
- Canada has "obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the *Charter*"; and
- "the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified".

Although not adopted at the time, the reasons in the Dickson Dissent would serve to ground a principled interpretation of the *Charter* recognizing fundamental labour rights in 2007 and 2015. In the 1990s, the SCC confirmed the majority decision in the *Alberta Reference* that the freedom of association protects 1) the freedom to establish an association; 2) the exercise in association the constitutional rights of individuals; and 3) the exercise in association of lawful rights of individuals.

In 2001, the SCC considered s. 2(d) in the exclusion of agricultural workers in Ontario from the *Labour Relations Act*.<sup>9</sup> The SCC concluded that agricultural workers were unable to exercise their freedom to associate in the absence of a statutory mechanism which provided the ability to organize and requirements for employers to recognize the employee groups and bargain in good faith. In coming to this conclusion, the majority accepted that the government may need to act positively in rare cases for individual to actualize fundamental freedoms.

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<sup>9</sup> *Dunmore v. Ontario (Attorney General)*, [2001] 3 SCR 1016, 2001 SCC 94 [*Dunmore*]

Farm workers are a disadvantaged group and one can understand why the SCC was more willing to recognize infringement of the freedom of association in the case of these precarious workers. In *Dunmore*, given the substantial interference to the ability of farm workers to organize posed by their exclusion from a statutory labour relations regime, the Court found that exclusion unconstitutional. The Court relied on international law as the Dickson Dissent had, in particular ILO Convention No.87<sup>10</sup> for the principle that an differential treatment of certain classes of workers violates both the group's dignity interest an its basic freedom of association. The move to the adoption of international law and the reconciliation of the *Charter* with international thought really began in 2001

### **A decisive step forward: *Health Services***

Some twenty years after the 1987 *Labour Trilogy*, the SCC reviewed the rationale for finding that the freedom of association did not include collective bargaining in a decision that challenged severe interference by government.<sup>11</sup> *Health Services* dealt with a challenge to legislation introduced by a newly elected British Columbia government to address spending in the health care sector by removing protections against contracting out from collective agreements in order to allow health authorities and hospitals to have support services, mostly janitorial, laundry, and cleaning, performed by private contractors at a lower price, resulting in substantial job loss to union members.

The unions claimed a breach of the freedom of association in the government's nullification of negotiated collective agreement between the unions and public sectors employers. The SCC expanded upon *Dunmore* and revisited the 1987 *Labour Trilogy* and found that the reasoning of the majority which excluded collective bargaining from *Charter* protection could no longer stand. In

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<sup>10</sup> Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organize, 67 U.N.T.S. 17

<sup>11</sup> *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 SCR 391, 2007 SCC 27 [*Health Services*]

1987 the SCC had failed to adopt a contextual approach to the interpretation of s. 2(d) and therefore valued the associational aspect of collective bargaining as a merely a constitutive right.<sup>12</sup>

The SCC, in an exceptional move, reversed its earlier jurisprudence and extended the scope of the guarantee of freedom of association to include protection of the right to engage in collective bargaining on fundamental workplace issues and a concomitant obligation on employers to bargain in good faith.<sup>13</sup>

### **Convergence with international law**

The contextual approach utilized by the SCC in *Health Services* considered labour history, *Charter* jurisprudence, and importantly, international law which the SCC had turned to tentatively in *Dunmore*.

Our conclusion that s. 2(d) of the *Charter* protects a process of collective bargaining rests on four propositions. First, a review of the s. 2(d) jurisprudence of this Court reveals that the reasons evoked in the past for holding that the guarantee of freedom of association does not extend to collective bargaining can no longer stand. Second, an interpretation of s. 2(d) that precludes collective bargaining from its ambit is inconsistent with Canada's historic recognition of the importance of collective bargaining to freedom of association. Third, collective bargaining is an integral component of freedom of association in international law, which may inform the interpretation of *Charter* guarantees. Finally, interpreting s. 2(d) as including a right to collective bargaining is consistent with, and indeed, promotes, other *Charter* rights, freedoms and values.<sup>14</sup>

This approach was an endorsement of the Dickson Dissent, particularly in the resort to international law. The sources most important to the SCC's understanding of the freedom of association were the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 [ICESCR],

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<sup>12</sup> The majority in *Alberta Reference* had failed to undertake a contextual analysis of freedom of association because that would have the effect of rooting s. 2(d) in labour rights, but by 2007, s. 2 had become the labour section of the *Charter* through jurisprudence.

<sup>13</sup> *Health Services*, para 19

<sup>14</sup> *Health Services*, para 20

the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 [ICCPR] , and ILO Convention No. 87. As the SCC explained:

Under Canada's federal system of government, the incorporation of international agreements into domestic law is properly the role of the federal Parliament or the provincial legislatures. However, Canada's international obligations can assist courts charged with interpreting the *Charter's* guarantees (see *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, at para. 46). Applying this interpretive tool here supports recognizing a process of collective bargaining as part of the *Charter's* guarantee of freedom of association.<sup>15</sup>

The SCC stated clearly its commitment to international law obligations.

... international conventions to which Canada is a party recognize the right of the members of unions to engage in collective bargaining, as part of the protection for freedom of association. It is reasonable to infer that s. 2(d) of the *Charter* should be interpreted as recognizing at least the same level of protection.<sup>16</sup>

International law plays a significant role in interpreting the meaning of freedom of association in constitutional law in multiple state jurisdictions. International law is in fact an underlying source in the development of a common understanding of the meaning of freedom of association in domestic constitutional law around the world. In *Health Services*, the SCC was both adopting and contributing to this recognition.

The use of international law in the SCC's interpretation of the *Charter* also reflects the linkage between those international obligations and the provisions of the *Charter*.

It is a matter of historical record that the drafters of the *Charter* looked to Canada's international treaty obligations, especially the ICCPR, for inspiration and guidance. The results may be seen on the face of the *Charter* itself; many of its provisions correspond closely to provisions of the UDHR, ICCPR and ECtHR.<sup>17</sup>

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<sup>15</sup> *Health Services*, para 69

<sup>16</sup> *Health Services*, para 79

<sup>17</sup> Van Ert, Gib. Using International Law in Canadian Courts, 2nd ed. (Toronto: Irwin Law Inc., 2008)

The development of a common understanding of freedom of association based on international law arises in the comparison of the jurisprudence of the SCC and the European Court of Human Rights, [ECHR]. Thus, without referring to one another, but considering similar international human rights law, convergence in caselaw has developed between the SCC and ECHR in respect to collective bargaining rights as an element of freedom of association under their respective governing instruments.

The European Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention] applies to the 47 countries in the Council of Europe comprising over 820 million people. The European Convention came into effect on September 3, 1953 and provides protection for a number of fundamental rights and freedoms, including freedom of association (Article 11). The state parties undertake to secure those rights and freedoms within their jurisdiction and ECHR was established to adjudicate convention obligations. The parties to a case before the ECHR must abide by the judgments of the SCC and take all necessary measures to comply. In that sense, the European Convention acts as a constitutional document that overrides contrary domestic state legislation.

The ECHR only has jurisdiction to determine violations of the European Convention, although it can consider other international instruments to inform its decisions. Article 11 of the European Convention provides:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

The jurisprudence of the ECHR with respect to the interpretation of freedom of association pursuant to Article 11 of the European Convention has followed a similar path to that taken by the Supreme Court of Canada in the interpretation of freedom of association under s. 2(d) of the *Charter*. That is, in their initial case law, both courts took the position wherein collective bargaining and the right to strike were excluded from the scope of protection for freedom of association under their respective instruments. Both subsequently first distinguished and then expressly overturned the caselaw in accepting collective bargaining as an essential component of freedom of association.

This circumstance arose from two pairs of cases decided contemporaneously by the respective courts, the SCC and ECHR. The first set is *Dunmore, supra*, and *Wilson and Palmer*<sup>18</sup> where both courts worked around, but did not reject their earlier caselaw, to find some measure of collective representation was protected by their respective constituent provisions. In the second set of cases, *Health Services, supra*, and *Demir and Baykara*<sup>19</sup> both courts expressly overturned their earlier law coming to the conclusion that collective bargaining was protected within freedom of association.<sup>20</sup>

This convergence did not arise simply because of similar language in the constituent instruments per s.2(d) of the *Charter* and Article 11 of the European Convention, or the similar language justifying infringement under s. 1 and Article 11(2) respectively. Rather, it arose as result of similar analysis of the concept of freedom of association based on common sources of international law: for example, *Health Services* and *Demir and Baykara*, these sources included the ICCPR], the ICESCR and ILO Convention 87.<sup>21</sup> However, even by the close of the first decade of the century, there was no definitive recognition on the right to strike in Canada, only increasing movement and convergence.

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<sup>18</sup> *Wilson and Palmer v United Kingdom*, [2002] ECHR 552 [*Wilson and Palmer*]

<sup>19</sup> *Demir v. Turkey*, No. 34503/97, ECHR 2008-V [*Demir and Baykara*]

<sup>20</sup> Barnacle, Peter "Dunmore meets Wilson and Palmer: Interpretation of Freedom of Association in Canada and Europe" (2004), 11 C.L.E.L.J. 143:173 at 157-160

<sup>21</sup> Barnacle, Peter "Convergence Revisited: Canadian and European Judicial Approaches to Freedom of Association and their Implications for a Constitutional Right to Strike" (2012) 16 CLELJ, 419 at 437

### ***Post Health Services***

Following the landmark decision in *Health Services*, a number of legal challenges were launched or pursued across Canada based on the finding that collective bargaining was protected associational activity. The lower courts had a difficult time consistently applying and interpreting *Health Services* to a variety of labour relations issues and there would be several years of uncertainty in the law, primarily illustrated through two 2015 cases dealing the right to organize, independence of bargaining agents, and the right to strike.

Utilizing international law in establishing recognition of the right to strike as an essential element of freedom of association protected under s. 2(d) of the *Charter* reflected the continued convergence in the interpretation of freedom of association between Canada and other countries. That is, in considering international law, the ECHR determined that the right to strike is a protected element of freedom of association under the European Convention.

After *Wilson and Palmer*, the focus in Europe moved from recognition of the right to strike as an essential component to freedom of association to the justification analysis per the reasonable limits provision of European Convention Article 11(2). Thus, while the infringement of the right to strike was not justified under in the context of a blanket ban in *Enerji Yap-Sol Sen v. Turkey*<sup>22</sup>. Further, in a subsequent series of cases, the ECHR found reprimands and criminal sanctions for exercising the right to strike were not justified in *Karaçay v. Turkey*, *Özcan v. Turkey* and *Kaya and Seyhan v. Turkey*.<sup>23</sup> This case law, including more recent cases discussed below, was critical in the SCC's determination in *SFL*.

The use of international law to inform constitutional interpretation of freedom of association under constitutional law is not unique to Canada or Europe. Judge Dhayanithie Pillay of the Labour Court

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<sup>22</sup> *Affaire enerji yapi-yol sen c. Turquie* [CEDH], Requete No. 68959/01, 21 Avril 2009

<sup>23</sup> Barnacle, "Convergence Revisited", supra, at 441 and 442-3.

of South Africa, states that the use of international law is accepted in South Africa in interpreting the rights set out in section 23 of the Bill of Rights, part of the Constitution Act of South Africa:

The primary objects of the LRA [Labour Relations Act] include giving effect to and regulating the fundamental labour rights conferred by the labour rights clause of the Constitution, and giving effect to obligations incurred by South Africa as a member state of the ILO...The interpretation of the LRA must give effect to its primary objects and be in compliance with the Constitution and the public international law obligations of the Republic.<sup>24</sup>

The role of international law arising from a review of the freedom of association and the specific right to strike from in ILO cases is either to strengthen a decision based on domestic law" or " as a guide in interpreting domestic law. The strengthen or guide approach reflects the development of a common international understanding, or levelling effect in the use of relevant international law principles.

The High Court of Botswana relied upon ILO Convention 87, 98 and an ILO Committee of Experts opinion as a guide in interpreting freedom of association under Article 13 of the Botswana Constitution. Significantly, it relied upon the reasoning of the SCC in *Health Services*. The Court held that while it was not clear that freedom of association included the right to strike in Article 13, it was incumbent to interpret the constitution consistent with international law. As such the right to strike was recognized and the list of essential services in the offending legislation was held excessive and void as contrary to the constitutional protection for the right to strike and not "reasonably justifiable in a democratic society"(Article 13(2)).<sup>25</sup>

Just as other nations were recognizing the right to strike as a component of the freedom of association the ECHR in 2014 released a decision reviewing strike balloting and notice procedures and the right of trade unions to engage in secondary strikes under the European Convention. In

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<sup>24</sup> Dhayanithie Pillay, *The Constitutionalism of Fair labour Practices in South Africa*, New York Law School, *Public Policy and Legal Theory*, Research Paper Series 04/05 #13 (2006) at page 2,

<sup>25</sup> *Botswana Public Employees' Union and others. Minister of Labour and Home Affairs and others*, MAHLB-000674-11, 9 August 2012.

*RMT*<sup>26</sup> the ECHR found that the strike notice requirements do not violate the Convention and that while restrictions on secondary striking in the United Kingdom conflict with freedoms recognized at international law, this interference is justified due to the policy objectives of the Government and the nature of the interest at stake.

While the actions were regulated by domestic law, RMT sought to have those provisions of the *TULRA* which restricted strike action reviewed by the ECHR. The state parties to the European Convention, including the U.K., undertake to secure those rights and freedoms within their jurisdiction, and the ECHR adjudicates the state parties' Convention obligations. The parties to a case before the ECHR must abide by the judgments of the Court and take all necessary measures to comply, including remedying complainants and amending legislation. In that sense the Convention acts as a constitutional document that may override contrary domestic state legislation.

The ES Charter does recognize the right of workers to strike and the European Committee of Social Rights [ECSR] found that the balloting requirements of the United Kingdom in other cases are "excessive" and that the restrictions on secondary action make the ability of workers to take collective action "excessively circumscribed." Likewise, the EU Charter protects the right of workers "to take collective action to defend their interests, including strike action". These three sources informed the ECHR's interpretation of the Convention as sources of comparative law, in addition to domestic laws of other European nations.

In doing so, the ECHR found that the ability of a union to take strike action in support of its members at another employer was trade union activity, consistent with Convention 87, the EU Charter, and the ES Charter. The interference with the secondary strike activity in *RMT* breached Article 11(1) of the Convention and the ECHR then turned to consider justification for interference. In finding a right to collective bargaining and then the right to strike in Article 11 in *Demir and Baykara* and then later in *RMT*; the ECHR noted its reliance on Convention 87 and other United Nations instruments such as the ICCPR, the ICESCR, and the Declaration of Fundamental Principles

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<sup>26</sup> *The Rail, Maritime, and Transport Workers v. U.K.* 1045/10 - Chamber Judgment [2014] ECHR 366 (08 April 2014) [RMT]

and Rights at Work (1998). The ECHR turned to these sources of international law in expanding the meaning of the freedom of association to include the right to strike.<sup>27</sup>

Importantly, the ECHR did not expand the meaning of freedom of association in isolation, the development reflected decisions by the ILO Committee of Freedom of Association and Committee of Experts. Similarly, there has been a general trend in international law, in the ECHR and in Canadian law, of convergence in recognising the freedom of association includes protection of collective bargaining, and the right to strike which culminated in the *SFL* decision.

### **The Canadian Experience 2015: the maturity of Charter jurisprudence**

In *Mounted Police*<sup>28</sup>, RCMP officers commenced a challenge in 2006 over their continuing exclusion from statutory labour relations. *Mounted Police* deals with the right of workers to organize and right of officers in the Royal Canadian Mounted Police service to select their own, independent bargaining agent for dealing with their employer. *Mounted Police* reviews both the exclusion of police from bargaining and the mandatory imposition of an employer dominated organization for dealing with employers [the SRRP]. The claim was candidly acknowledged by the Court to require it “to review the nature and interpretation of the right guaranteed by s. 2(d) of the *Charter*, and to clarify the scope of the constitutional protection of collective bargaining recognized in *Health Services*.”<sup>29</sup>

The SCC expressly adopted the Dickson Dissent and the purposive approach to freedom of association. Although arising out of a workplace dynamic, the Court was careful to state the purpose of the freedom of association in broader terms: to rectify social imbalance.

This then is a fundamental purpose of s. 2(d) — to protect the individual from “state-enforced isolation in the pursuit of his or her ends”: *Alberta Reference*, at p.

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<sup>27</sup> Ewing, K. D. and Hendy, John, *The Dramatic Implications of Demir and Baykara* (March 2010). *Industrial Law Journal*, Vol. 39, Issue 1, pp. 2-51, 2010.

<sup>28</sup> *Mounted Police Association of Ontario v. Canada*, 2005 SCC 1 [*Mounted Police*]

<sup>29</sup> *Mounted Police*, para 1

365. The guarantee functions to protect individuals against more powerful entities. By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society.<sup>30</sup>

This purposive focus, beyond the pursuit of individual goals in concert, recognizes that associational rights are different than an aggregation of individual rights.

Section 2(d), we have seen, protects associational activity for the purpose of securing the individual against state-enforced isolation and empowering individuals to achieve collectively what they could not achieve individually. It follows that the associational rights protected by s. 2(d) are not merely a bundle of individual rights, but collective rights that inhere in associations<sup>31</sup>

The SCC found the SRRP prevented RCMP officers from meaningfully pursuing workplace goals due to the lack of independence from management. This decision set the stage for a decision which would finally recognise the right to strike shortly thereafter and reconcile Canadian with international law.

### ***Saskatchewan Federation of Labour***

*SFL* was a challenge brought by the Saskatchewan labour movement, headed by the Saskatchewan Federation of Labour, which squarely raised the issue of the right to strike before the SCC for the first time since the 1987 *Labour Trilogy*. The SCC, having declined the chance to comment on the right to strike previously, granted leave to appeal, faced with conflicting trial and appellate judgements applying *Fraser* and *Health Services*.

In 2007, the newly elected Saskatchewan government enacted the *Public Service Essential Services Act [PSESA]*. Public sector unions challenged the *PSESA* because of its impact on the ability of unions to strike and thus engage in meaningful collective bargaining. The *PSESA* provides the ability for employers to designate the services and positions that they deem essential and which must be

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<sup>30</sup> *Mounted Police*, para 58, endorsing Dickson

<sup>31</sup> *Mounted Police*, para 62

maintained during a labour dispute in the absence of an agreement with the union and severely limits the ability of the Labour Relations Board to review those numbers.

The Court of Queen's Bench accepted that giving this imbalance of power to employers without the ability of unions to effectively challenge essential services had the affect of enabling employers to restrict the leverage and power of unions during bargaining. The trial judge found that the *PSESA* violated s. 2(d), overruling the 1987 *Labour Trilogy*:

I am satisfied that the right to strike is a fundamental freedom protected by s. 2(d) of the *Charter* along with the interdependent rights to organize and to bargain collectively. That conclusion is grounded in Canada's labour history, recent Supreme Court of Canada jurisprudence and labour relations realities. It is also supported by international instruments which Canada has undertaken to uphold. Governments may enact laws that restrict or prohibit essential service workers from striking, but those prohibitions must be justified under s. 1 of the *Charter*.<sup>32</sup>

Prophetically, the SCC in an appeal of the trial judge decision, did take that step in *SFL* and overturned the 1987 *Labour Trilogy* in a 5-2 majority decision. The SCC largely endorsed the trial judge's reasons, looking at a purposive and contextual approach, labour history, and international law and provided a simplified test for infringement, based on *Mounted Police*.

The SCC found that the right to strike was a necessary component of collective bargaining, not a free standing right, and followed the reasoning in the Dickson Dissent:

The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right. It seems to me to be the time to give this conclusion constitutional benediction.<sup>33</sup>

The SCC then provided a simplified, relative to *Health Services*, test for looking at infringement of the freedom of association.

The test, then, is whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with collective bargaining.<sup>34</sup>

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<sup>32</sup> *Saskatchewan Federation of Labour v. Saskatchewan*, 2012 SKQB 62, para 115

<sup>33</sup> *SFL*, para 3

<sup>34</sup> *SFL*, para 78

Like Dickson in *Alberta Reference*, Abella in *SFL* drew heavily on international norms, although going far beyond the ILO, labour history, and the development of the *Charter*, including the dignity interest and self-fulfilment of individuals having a say in their employment conditions. With the 2015 *Labour Trilogy*, the views and values espoused in the Dickson Dissent have been fully recognized. Canadian jurisprudence evolved to recognize the right to strike in 2015 with *SFL* but a critical component was the consistency with international law.

*SFL* recognizes that the *Charter* itself reflects the implementation of international law ratified by Canada and accepts the growing consensus in international law.

Additionally, there is an emerging international consensus that, if it is to be meaningful, collective bargaining requires a right to strike. The European Court of Human Rights now shares this view. After concluding in *Demir v. Turkey* [GC], No. 34503/97, ECHR 2008-V, that freedom of association under Article 11 of the European Convention on Human Rights, 213 U.N.T.S. 221, protects a right to collective bargaining, it went on in *Enerji Yapi-Yol Sen v. Turquie*, No. 68959/01, April 21, 2009 (HUDOC), to conclude that a right to strike is part of what ensures the effective exercise of a right to collective bargaining:<sup>35</sup>

Relying on the international law developments, and on labour history and labour relations realities and domestic *Charter* values, the SCC concluded that the right to strike was protected under the *Charter*.

This historical, international, and jurisprudential landscape suggests compellingly to me that s. 2 (d) has arrived at the destination sought by Dickson C.J. in the *Alberta Reference*, namely, the conclusion that a meaningful process of collective bargaining requires the ability of employees to participate in the collective withdrawal of services for the purpose of pursuing the terms and conditions of their employment through a collective agreement. Where good faith negotiations break down, the ability to engage in the collective withdrawal of services is a necessary component of the process through which workers can continue to participate meaningfully in the pursuit of their collective workplace goals. In this case, the suppression of the right to strike amounts to a substantial interference with the right to a meaningful process of collective bargaining.<sup>36</sup>

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<sup>35</sup> *SFL*, para 71

<sup>36</sup> *SFL*, para 75

## **Conclusion**

The *SFL* case mirrors the development of labour rights in international law and the struggle to recognize a constitutional right to strike. Indeed, Canadian cases shows remarkable parallels in the development of the law, echoed by the ECHR in *RMT* in establishing the protection of strike activity in the similarly worded freedom of association in the European Convention. Cumulatively, the cases demonstrate an emerging consensus that the rights to strike and collectively bargain are protected at international law and draw on each for support.