The "Supreme Court of Canada's Labour Law Trilogy": Its Legacy and Implications on the Future

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"What can you do, thought Winston,
against the lunatic who is more intelligent than yourself,
who gives your arguments a fair hearing
and then simply persists in his lunacy?"
George Orwell, 1984

I. INTRODUCTION AND CAVEAT

This paper discusses the legacy of the Supreme Court of Canada's application of the *Charter*[1] to collective bargaining, beginning with a trilogy of cases heard together in 1987—the "Labour Trilogy,"[2]—up to the political and judicial developments in this area as of February 2013.

To begin, the perspective of this discussion must be clarified. This paper has been authored by a labour arbitrator and believer in collective bargaining. There is no attempt to remain unbiased about this author's belief in the importance of balanced and effective collective bargaining. Experience has demonstrated that principled collective bargaining can lead to healthy workplaces—for employers, investors and employees. The bargaining process has the potential to serve all parties' needs. Therefore, nothing in this paper should be interpreted as favouring labour unions or as being against an employer's right to manage. Readers should note the following is simply a discussion about the implications of judicial and political protections and/or interventions in this field.

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1 *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*].

2 *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313, 38 DLR (4th) 161; *PSAC v Canada*, [1987] 1 SCR 424, 38 DLR (4th) 249; *RWDSU v Saskatchewan*, [1987] 1 SCR 460, 38 DLR (4th) 277 [hereinafter referred to as the "Trilogy"].

II. ON THE EVE OF CHANGE: THE LABOUR TRILOGY

In 1987, it was not surprising that the Trilogy failed to give any constitutional protection to collective bargaining or related activities. The majority view at the Supreme Court of Canada (the "SCC") had historically been that the *Charter*'s guarantee of freedom of association did not extend to collective bargaining. This was consistent with the notion that courts would not interfere with legislation or government action that affected labour relations. Courts had been content to leave those issues to the legislature, and left arbitrators and labour boards to address the disputes and conflicts that followed.

This approach was also consistent with the long history of judicial misunderstanding of unions, unionized workplaces and labour relations. Up until this point, there had been little appreciation of the role the *Charter* could—or should—play in labour law or labour relations.[3]

However, the current scheme of labour arbitration was designed to recognize that courts were neither equipped, nor the appropriate forum, to address the unique practical or policy issues that surround labour relations. Courts are too slow, too technical, too remote and too costly. A specialized and efficient alternate forum had to be created to bring cost efficient, responsive and realistic resolutions to workplace disputes. This is why unionized workplaces are governed by legislation that places workplace disputes before labour boards and arbitrators, giving such decision-makers the ability to issue binding resolutions with considerable deference given if tested on appeal or review. Therefore, courts are now reluctant to interfere with the application, administration and interpretation of collective agreements and leave any employment-related matters outside of their own jurisdiction. This expansion of arbitral authority has been illustrated in *Weber v Ontario Hydro*[4] and *Parry Sound (District) Social Services Administration Board v Ontario Public Service Employees Union, Local 324*.[5]

The last 25 years have witnessed an evolution in *Charter* protection, judicial respect for labour relations matters and the appreciation of their importance in a democracy.

III. THE FIRST STEP: DUNMORE AND *BC HEALTH*

This evolution began with *Dunmore v Ontario (Attorney General)*[6] in 2001. Legislation passed by the Ontario government had stripped away collective bargaining rights

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3 See Paul JJ Cavalluzzo and Fay Faraday, "Industrial Democracy and the Common Sense Revolution: Freedom of Association in an Era of Neo-Conservatism" (Paper delivered at the University of Western Ontario Labour Law Lecture and Conference 2007, "The Charter, Human Rights and Labour Law: 25 Years Later", 26–27 October 2007), online: <www.cavalluzzo.com/resources/publications>.

4 [1995] 2 SCR 929, 125 DLR (4th) 583.

5 2003 SCC 42, [2003] 2 SCR 157.

6 2001 SCC 94, [2001] 3 SCR 1016.

for agricultural workers, which had been granted by a previous administration just one year earlier. The facts evoked sympathy and arose at a time when a better appreciation of *Charter* rights was evolving. The SCC was persuaded that the legislation had deprived agricultural workers of their fundamental right to freedom of association. The SCC also showed a willingness to review and, if necessary, strike down laws that affect the fundamental freedoms that the *Charter* was enacted to uphold.

Next, in 2007, the SCC was faced with a situation where the province of British Columbia, without consultation, passed legislation that nullified existing terms and conditions of employment that had protected employees against contracting out and provided for job security.[7] The legislation precluded employers and unions from bargaining with respect to those issues in the future. In that context, the SCC recognized that a unionized workplace holds a fundamentally important place in a democratic society. The SCC overturned the Trilogy, declaring that freedom of association, as guaranteed by subsection 2(d), protects "the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining."[8]

The release of *BC Health* sent shockwaves through the legal community, not simply because the highest court had, in a rare move, overruled itself, but because of *what* it had now concluded. However, it is not surprising to learn that, in a democracy, there is a constitutional protection for human dignity and a prohibition against discrimination. Similarly, it should not have come as a shock to anyone in 2007 to be told that people have the right to come together to engage in meaningful discussions about their rights and responsibilities in a workplace. This is what enlightened and successful enterprises have been actualizing for decades in the free world. One would like to think that the SCC was simply giving recognition to what should have been accepted as a basic understanding many years ago. After all, the *Charter* does not create rights; it protects them. Therefore, all that really happened in *BC Health* was that the Court clarified that the freedom of association included the right to engage in the process of collective bargaining. It was not a giant step forward to determine that the process of collective bargaining means bargaining in good faith.

IV. AFTER *BC HEALTH*

The question then arose: "What does 'the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining' mean?"[9]

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7 See *Health Services and Support — Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*BC Health*].

8 *Ibid* at para 87.

9 *Ibid*.

To labour relations practitioners, whether they are neutral, union-side or management-side, those rights are thought to be fairly basic. The fundamental tools of collective bargaining have been recognized to be:[10]

- The right to organize voluntarily into an appropriately defined group;
- The right to bargain in good faith;
- The right to a system where an employer can deal with one representative of a defined and cohesive group of employees; and
- The right to a fair dispute resolution system in a situation of impasse.

Indeed, the SCC recognized this as well. In *BC Health*, the SCC emphasized that, while the *Charter* only protects the "process of collective bargaining,"[11] that same process confers substance and fundamental protections to both employers and unions. Accordingly, the SCC referred to the basic concept of "good faith bargaining"[12] and declared "the duty to negotiate in good faith…lies at the heart of collective bargaining…."[13] As such, that duty to negotiate carries with it several elements, including:

- The "duty to engage in meaningful dialogue;"
- The right of workers to have their views heard in the context of a "meaningful process of consultation and discussion;"
- The importance of "meaningful discussion and consultation" to collective bargaining;
- "[T]he ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment" through a process by which those goals are pursued;
- Mutually respecting the commitments entered into, taking into account the results of negotiations in good faith; and
- Protection from substantial interference with the activity of collective bargaining that discourages the collective pursuit of common goals, either by the state or by an employer.[14]

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10 *Ibid* at paras 77–89.

11 *Ibid* at para 80.

12 *Ibid* at para 133.

13 *Ibid* at para 98.

14 *Ibid* at paras 89, 90, 92, 98, 101, 114. Examples could be union breaking laws, denying unions access to the labour laws designed to support and give a voice to unions, bad faith, or unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation. However, as the SCC noted, the inquiry will always be contextual and fact-specific.

BC Health also recognized that the *Charter* protects employees from any legislation or government action that "substantially interferes"[15] with collective bargaining. The test of substantial interference is "whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted."[16] This involves a two-part inquiry:[17]

1. Ask about the "importance of the matter affected to the process of collective bargaining and, more specifically, to the capacity of the union members to come together and pursue collective goals in concert."
2. Ask about "the manner in which the measure impacts on the collective right to good faith negotiation and consultation."

After *BC Health*, it might have seemed clear that subsection 2(d) should—and would—protect the right of workers to organize and to engage in meaningful collective bargaining, implying an obligation upon lawmakers to enact legislation that would protect and respect the rights and freedoms of vulnerable groups. Further, consistent with other *Charter* applications, *BC Health* reminded us that subsection 2(d) should be interpreted purposively: guaranteeing freedom of associational activity in the pursuit of individual and common goals.[18] This would be necessary to remain consistent with Canadian values and international treaty commitments. *BC Health* went so far as to say that if a government employer passed legislation and took action that rendered the meaningful pursuit of these goals impossible, effectively nullifying the right to associate, this would constitute a limit on the exercise of subsection 2(d), and would be unconstitutional.

This was a high point for collective bargaining. The decision in *BC Health* gave recognition to the fact that collective bargaining played an essential and valued role in Canadian society; it had the protection of international treaties and the *Charter* and promised protection from government interference that might jeopardize the meaningful exercise of those rights. At the same time, the SCC said, consistently and sensibly, that this right did not guarantee any specific outcome.[19]

However, four years later, the SCC's decision in *Ontario (Attorney General) v Fraser*[20] revisited the scope of *Charter*-protected collective bargaining rights and narrowed *Charter* protection for collective bargaining.

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15 *Ibid* at para 19.
16 *Ibid* at para 92.
17 *Ibid* at para 93.
18 *Ibid* at para 87.
19 *Ibid* at para 91.
20 2011 SCC 20, [2011] 2 SCR 3 [*Fraser*].

V. ADDING CONFUSION: THE DECISION IN *FRASER*

Fraser addressed the rights of agricultural workers—a group that had been ping-ponged through the Ontario legislature by successive New Democrat, Conservative and Liberal governments. The factual context of this case cannot be forgotten. The government had put in place a system for agricultural workers that had allowed them to bargain with their employers after the SCC had struck down the statute that had stripped them of any protection at all. The key provisions in Ontario's new *Agricultural Employees Protection Act*, 2002 ("*AEPA*")[21] established:

1. The right to form or join an employees' association.
2. The right to participate in the lawful activities of an employees' association.
3. The right to assemble.
4. The right to make representations to their employers, through an employees' association, respecting the terms and conditions of their employment.
5. The right to protection against interference, coercion and discrimination in the exercise of their rights.

While the *AEPA* allowed the workers to organize and created a tribunal to deal with issues, it offered none of the fundamental elements of a collective bargaining or labour relations system. Indeed, the facts of the case revealed that, although the workers had been able to organize and the employers had met with their representatives, meetings had been perfunctory, lasting only minutes and there was no evidence of any meaningful consideration being given to any proposals. In fact, all the elements that the SCC had listed in *BC Health* as being integral to bargaining in good faith would seem to have been flouted by the employers. As Chief Justice Winkler wrote for the Court of Appeal for Ontario:

> It is important to note what is missing from the *AEPA*. It does not impose an obligation on employers to bargain in good faith—or, indeed, to bargain at all—with an employees' association. The *AEPA* does not include mechanisms to resolve either bargaining impasses or disputes regarding the interpretation or administration of the collective agreement. Another notable omission from the legislation is that it does not preclude the formation of multiple employees' associations within a single workplace, purporting to simultaneously represent employees in that same workplace with similar job functions.[22]

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21 SO 2002, c 16, s 1(2) [*AEPA*].

22 *Fraser v Ontario (AG)*, 2008 ONCA 760 at para 28, 92 OR (3d) 481.

The Court of Appeal for Ontario concluded that the failure of the *AEPA* to provide protections for collective bargaining constituted a breach of subsection 2(d).[23]

However, on appeal, the SCC was called upon to determine the constitutionality of the *AEPA*. It concluded that the *Charter*'s subsection 2(d) protection had not been violated by the *AEPA* or its processes. Given the structure of the *AEPA* and the facts of the case, this may have seemed surprising. Most importantly, the SCC read into the legislation the duty to bargain in good faith, although that duty had been excluded from the legislation itself:

> …the right of an employees' association to make representations to the employer and have its views considered in good faith is a derivative right under s. 2(d) of the *Charter*, necessary to meaningful exercise of the right to free association.
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> The government must, on the words of its Minister, have intended the legislation to achieve whatever is required to ensure meaningful exercise of freedom of association. As discussed above, meaningful exercise of the right to free association in the workplace context requires good faith consideration of employee representations. As pointed out by the respondents, the Minister also stated that the *AEPA* was not intended to "extend collective bargaining to agricultural workers". However, this may be understood as an affirmation that the *AEPA* did not institute the dominant Wagner model of collective bargaining, or bring agricultural workers within the ambit of the *LRA*, not that the Minister intended to deprive farm workers of the protections of collective bargaining that s. 2(d) grants.
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> These considerations lead us to conclude that s. 5 of the *AEPA*, correctly interpreted, protects not only the right of employees to make submissions to employers on workplace matters, but also the right to have those submissions considered in good faith by the employer. It follows that s. 5 of the *AEPA* does not violate s. 2(d) of the *Charter*.[24]

Fraser sends mixed messages. It tells us that while employees have the right to organize voluntarily, to make collective representations and to have their proposals considered in good faith, some groups will have fewer protections for their bargaining than other workers who are either allowed or mandated to operate under Ontario's

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23 *Ibid* at para 11.

24 *Fraser*, *supra* note 20 at paras 99, 106–07.

Labour Relations Act, 1995[25] under a Wagner model. That model was created by the "*Wagner Act*," formally cited as the *National Labor Relations Act*:[26]

> Employees shall have the right to self-organize, to form, join, or assist labour organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities….

The *Wagner Act* also provided that:[27]

- There could be only one bargaining representative for each unit of employees;
- Employers were compelled to bargain with the exclusive employee representative;
- Protections existed for collective bargaining practices; and
- The right to discuss wages is specifically recognized.

Further, on the facts of *Fraser*, the ostensible right to organize and bargain was rendered meaningless because of the employers' refusal to engage in any form of bargaining. Reading *Fraser* in the worst light, the SCC seemingly abandons the protections that it had just articulated. The SCC left it up to *AEPA*'s statutorily-established tribunal to oversee the process and declared that the application was premature until the tribunal had had a chance to exert its jurisdiction. Additionally, the majority of the SCC failed to fully address the concerns that had been raised about representation rights, dispute resolution mechanisms and/or multiple employee organizations. Further, the SCC made it clear that legislators will be given considerable latitude to establish a statutory labour regime, and that the protections given to collective bargaining under subsection 2(d) of the *Charter* do not require labour statutes to use a specific format of collective bargaining.

VI. THE CURRENT STATE OF AFFAIRS

So, where are we now with respect to the constitutional recognition of association rights in the collective bargaining process? The first thing to note is that the SCC has clearly signaled that what we had previously understood to be certain hallmarks of collective bargaining are no longer sacred. The Wagner model of collective bargaining does not have the protection of the *Charter*. In *Fraser*, the Court stated:

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25 SO 1995, c 1.
26 29 USC § 157 (1935).
27 *Ibid*, §§ 158–59.

> However, no particular type of bargaining is protected. In every case, the question is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals....What is protected is associational activity, not a particular process or result.[28]

Further, in *Fraser*, the SCC referenced its earlier decision in *BC Health*, noting that the decision did not support the idea that legislatures are required to enact laws which establish a uniform model to "impos[e] a statutory duty to bargain in good faith, [to] recogniz[e] the principles of exclusive majority representation and [to establish] a statutory mechanism for resolving impasses and disputes regarding... the administration of collective agreements."[29]

This view was actualized last year in *Mounted Police Association of Ontario v Canada*,[30] where certain members of the RCMP challenged legislation that excluded RCMP members from government legislation that enabled most employees to engage in collective bargaining. It also prescribed a committee to make recommendations regarding wages and working conditions. The legislated structure was not a Wagner-inspired model of collective bargaining. Applying *Fraser*, the Court of Appeal for Ontario ruled that, since the freedom of association under subsection 2(d) of the *Charter* does not guarantee a specific model of collective bargaining, the RCMP members did not have a constitutionally protected right to bargain with their employer through a union of their own choice, stating:

> In my view, the Supreme Court has established that the content of the constitutionally guaranteed right to "collective bargaining" is narrower than how that term is used in Wagner model regimes. "Collective bargaining" under s. 2(d) protects only the right to make collective representations and to have those collective representations considered in good faith...."collective bargaining" under s. 2(d) is a derivative right. A government employer is obligated to engage in "collective bargaining" under s. 2(d) only when the employees are able to claim the derivative right under s. 2(d). They are able to claim that derivative right upon showing that the exercise of the fundamental freedom of association is "effectively impossible". Only where the "core protection of s. 2(d)...to act in association with others to pursue common objectives and goals" (*Fraser*, at para. 25) cannot be meaningfully exercised does the derivative right arise. As s. 2(d) does not constitutionalize minority unions, the test of

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28 *Fraser*, *supra* note 20 at paras 46–47.

29 *Ibid* at para 47.

30 2012 ONCA 363, 111 OR (3d) 268, leave to appeal to SCC granted, 34948 (December 20, 2012) [*Mounted Police*].

> "effective impossibility" is applied to the workers at large and not to any particular combination of workers.[31]

Therefore, while "freedom of association" is now recognized to include protection for "collective bargaining," it does not generate the automatic right to a voluntarily formed association that commands the attention or duty to reach an agreement with an employer.

Further, it seems clear that the results of collective bargaining are not protected. It had always been assumed that once a collective agreement was achieved, the terms and conditions of employment were protected for the term of the contract. Interference with those terms used to be unthinkable. However, the premise of non-interference with collective agreements may no longer be safe. As the SCC noted in *Fraser*:

> Our colleague argues that *Health Services* gives constitutional status to contracts, privileging them over statutes. The argument is based on the view that *Health Services* holds that breach of collective agreements violates s. 2(d). In fact, as discussed above, this was not the finding in *Health Services*. The majority in *Health Services* held that the unilateral nullification of significant contractual terms, by the government that had entered into them or that had overseen their conclusion, coupled with effective denial of future collective bargaining, undermines the s. 2(d) right to associate, *not that labour contracts could never be interfered with by legislation*. . . .The *Charter* may protect collective bargaining and not the fruits of that process.[32]

However, courts have been, so far, reluctant to allow interference with collective contracts. In *Canada (Royal Canadian Mounted Police) v Canada (Attorney General)*,[33] the Treasury Board attempted to roll back previously agreed upon wage increases for the RCMP, undermining the accepted (and legislated) process of the existing and established pay council set up to determine appropriate wages. This was challenged on the basis of the *BC Health* analysis in the Federal Court of Canada, where it was found that:

> Although the actual provisions of the *ERA*[34] are not closely similar to the legislation considered in *BC Health Services*, the impact of the legislation [on the employees] is largely the same. In the first place, it confirms the Treasury Board's decision to unwind a previous

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31 *Ibid* at paras 119–20.
32 *Supra* note 20 at paras 76, 84 [emphasis added].
33 2011 FC 735, 392 FTR 35 [*RCMP*].
34 *Expenditure Restraint Act*, SC 2009, c 2, s 393.

> agreement and second, it restricts the manner of dealing with a particular issue in future agreements.[35]

Therefore, where a fiscally eager and/or responsible government employer may want to roll back contracts, courts will still be reluctant to allow this. However, a more patient and legally savvy legislative body may recognize the best option is to await the expiry of contracts and then seek to undo previously agreed-upon terms. Nothing in law has ever guaranteed the continuance of contractual terms in successive collective agreements.

Ontario's *Putting Students First Act, 2012*[36] is an example of a government dictating reductions in long entrenched terms and conditions of employment. Passed in September 2012, it is an example of a government taking over from the school boards that had the statutory responsibility to reach the collective agreement. Although the province is the funding source, this displacement of the authority of a school board as an "employer" or party to the collective agreement raises several important questions. As a practical matter, it resulted in great discontent within bargaining units and school boards, caused an enormous political backlash and spurred a number of job actions, including the withdrawal of extracurricular activities by the teachers. Constitutional challenges were also filed. However, this settled down with the repeal of the bill on January 23, 2013 and the resumption of collective bargaining leading to negotiated settlements. Interestingly, bargaining occurred between the federations and the province, and not at a local level, demonstrating that the source of funding has become the critical issue in bargaining, rather than the actual employer.

Another formerly sacred element of the collective bargaining regime that is less secure is the concept of a neutral dispute resolution system for disputes. *Fraser* does not seem to have recognized the importance of the availability of a neutral dispute resolution mechanism. Justice Abella raised this deficiency in her dissent:

> The *AEPA* does not protect, and was never intended to protect, collective bargaining rights....For a start, there is no point to having a right only in theory. Unless it is realizable, it is meaningless. There must therefore be an enforcement mechanism not only to resolve bargaining disputes, but to ensure compliance if and when a bargain is made.[37]

The importance of an independent and neutral dispute resolution mechanism, even in the absence of a right to strike, is something that the SCC in recent years has seemingly forgotten despite lending strong support to that protection

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35 *RCMP*, *supra* note 33 at para 83.
36 SO 2012, c 11, as repealed by *Putting Students First Act*, SO 2012, c 11, s 20.
37 *Supra* note 20 at paras 322, 339.

in a non-*Charter* case where the Ontario Legislature attempted to interfere with the appointment of retired judges with no labour experience under the *Hospital Labour Disputes Arbitration Act*.[38] In what has been referred to ever since as the "Retired Judges case,"[39] the SCC recognized the critical importance of arbitrators' independence, impartiality, labour relations expertise and recognized acceptability in the labour relations community to both management and labour:

> Labour arbitration as a dispute-resolution mechanism has traditionally and functionally rested on a consensual basis, with the arbitrator chosen by the parties or being acceptable to both parties. The intervener, National Academy of Arbitrators (Canadian Region), contended that "[a]rbitration which is, or is seen to be, political rather than rigorously quasi-judicial is no longer arbitration". Moreover, the intervener contends:
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> > If arbitrators are, or are perceived to be, a surrogate of either party or of government, or appointed to serve the interests of either party or of government, the system loses the trust and confidence of the parties, elements essential to industrial relations peace and stability....A lack of confidence in arbitration would invite labour unrest and the disruption of services, the very problem impartial interest arbitration was designed to prevent.
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> As the Ontario legislature has considered the *HLDAA* over the years, it has demonstrated an awareness of the fact that workers who feel unfairly treated can manifest their grievances with slowdowns or other job actions, including illegal walkouts. Ministers emphasized that the purpose of the *HLDAA* was to protect patients, not to tilt the balance between employers and employees one way or the other.... The anchors that were seen to justify the parties' confidence in *HLDAA* arbitrations were impartiality, independence, expertise and general acceptability in the labour relations community. An individual who combines relevant expertise with independence and impartiality can reasonably be expected to be experienced in the field, thus known to and broadly acceptable to both unions and management.[40]

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38 RSO 1990, c H.14.

39 *Canadian Union of Public Employees v Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539.

40 *Ibid* at paras 109–10.

It should follow that those qualities would be critical to collective bargaining and its protection under the *Charter*. However, unless a sector is guaranteed access to a dispute resolution system with this level of independence and expertise, it remains without *Charter* protection.

Having reached a stage where some aspects of collective bargaining rights are now protected by the *Charter*, are we truly in a different situation than we had when the Trilogy was in place? Recent government actions and policies in several spheres raise concern about the health and meaning of the "right to collective bargaining" in light of current economic and political influences.

VII. WHAT IS THIS "RIGHT TO COLLECTIVE BARGAINING"?

When the Association of Justice Counsel tried to negotiate a wage increase with the Government of Canada, they ultimately came to an impasse when they rejected the Government's final offer. After, the Association had to deal with legislation that limited an arbitrator's ability to award contractual terms over the amounts in the government/employer's last rejected offer. When this legislation was challenged on the basis that it rendered meaningless the process of collective bargaining, the Court of Appeal for Ontario ruled:

> *Fraser* makes clear that s. 2(d) has limits: it does not guarantee any dispute resolution process after the parties have reached an impasse and it does not guarantee any particular outcome. In my view, the validity of the *ERA* must be assessed on the basis of whether, at the time it was enacted, the parties had had the opportunity for a meaningful process of collective bargaining. If they had, s. 2(d) is satisfied. The faint hope of further negotiations in the shadow of a dispute resolution mechanism not protected by s. 2(d) cannot expand or extend the reach of s. 2(d) beyond its core guarantee.[41]

Does this mean that when the government is the employer, it can engage in the "process of collective bargaining" until the point of impasse and then enact legislation that imposes the terms that it has deemed are appropriate? This would significantly limit any real scope of collective bargaining. If that is the case, where is the incentive to bargain—for either side? Why would a government employer bother to bargain if it can get the terms that it wants and/or needs simply through legislation? Why would unions succumb to rollbacks voluntarily, when they know that rollbacks will be imposed upon them? Assuming the best, this still evokes the image of the benevolent despot who says, "be reasonable—do it my way." It may be that the resulting contract has terms that provide "reasonable" or fair wages

41 *Association of Justice Counsel v Canada (AG)*, 2012 ONCA 530 at para 41, 353 DLR (4th) 62, leave to appeal to SCC refused, 35027 (February 14, 2013).

and working conditions in light of the economic situation. However, this cannot be called collective bargaining. Nor can the resulting contract be referred to as a "collective agreement" because it is neither a set of working conditions that has been arrived at through collective collaboration, nor an agreement by both parties.

VIII. THE ZEAL TOWARDS GOVERNMENT INTERVENTION: BACK-TO-WORK LEGISLATION

Further, it is difficult to conclude that collective bargaining remains alive in the public sector despite the *Charter* protection articulated in *BC Health*. Indeed, we have had many examples of "back-to-work" legislation halting legal strikes within hours or days as a result of public and political pressures. Thus, what is the point of a sanction such as a strike or a lock-out, when the legislature will immediately intervene to halt the sanction? What is the risk of imposing (or resisting) a sanction if it is known that the sanction will have no effect? Have we come to a time where collective bargaining is a well-choreographed performance where the parties simply await government intervention? The following chart illustrates just a few examples of the most recent interventionist zeal:

Employer	**Jurisdiction**	**Strike Date/Date Enacted**	**Legislative Response Time**	**Brief Description**	**Legislation Enacted**
Air Canada	Federal	**Strike:** n/a **Royal Assent:** March 15, 2012	Pre-emptive before strike—implemented during collective bargaining	The federal government passed back-to-work legislation to prevent a work stoppage at Air Canada during the March break vacation season. The legislation prevented the airline from locking out employees, and stopped employees (pilots and baggage handlers) from striking. The Act banned a strike or lock-out until new collective agreements were signed, and brought in a federally appointed arbitrator to choose a final offer. The legislation also barred court action from questioning the appointment of the arbitrator or the arbitrator's decision.	*Protecting Air Service Act*, SC 2012, c 2.
Air Canada	Federal	**Strike:** June **Royal Assent:** n/a	2 days	Close to 4000 striking sales and service agents returned to work after reaching an agreement with Air Canada. The deal was announced shortly after the government tabled back-to-work legislation. The rationale given for the legislation was that the strike threatened Canada's economic recovery and the country's reputation as a reliable trading partner.	Bill C-5, *Continuing Air Service for Passengers Act*, 1st Sess, 41st Parl, 2011 (first reading 16 June 2011).

Canadian Pacific Rail (CPR)	Federal	**Strike:** May 23, 2012 **Royal Assent:** May 31, 2012	8 days	On May 23, 2012, after months of negotiations, CPR employees walked off the job when no agreement was reached by the union's deadline. Around noon on May 23, the Federal Minister of Labour gave notice that she would be tabling back-to-work legislation if the two sides were unable to reach an agreement.	*Restoring Rail Service Act*, SC 2012, c 8.
Air Canada	Federal	**Strike:** June **Royal Assent:** n/a	2 days	Close to 4000 striking sales and service agents returned to work after reaching an agreement with Air Canada. The deal was announced shortly after the government tabled back-to-work legislation. The rationale given for the legislation was that the strike threatened Canada's economic recovery and the country's reputation as a reliable trading partner.	Bill C-5, *Continuing Air Service for Passengers Act*, 1st Sess, 41st Parl, 2011 (first reading 16 June 2011).
Toronto Transit Commission (TTC)	Ontario	**Strike:** April 26, 2008 **Royal Assent:** April 27, 2008	1 day	A legal strike action by the TTC unionized employees began on April 26, 2008. All transit service was suspended leaving thousands of people stranded across the city. Although the strike was legal, the union did not provide 48-hours' notice of the service withdrawal as they had previously promised they would do. Instead, the Amalgamated Transit Union only provided 90-minutes' notice before the service withdrawal.	*Toronto Public Transit Service Resumption Act, 2008*, SO 2008, c 4.
Canada Post	Federal	**Strike/ Lock-out:** June 2, 2011 **Royal Assent:** June 26, 2011	24 days-rotating	Back-to-work legislation was introduced to force 50 000 postal workers to resume mail delivery. The legislation came after striking postal workers were locked out by Canada Post following two weeks of rotating strikes.	*Restoring Mail Delivery for Canadians Act*, SC 2011, c 17.
York University	Ontario	**Strike:** November 6, 2008 **Royal Assent:** January 29, 2009	85 days	A strike by CUPE Local 3903, the union representing contract professors, teaching assistants, and graduate assistants at York University. The strike began on November 6, 2008 and concluded on January 29, 2009 when the provincial parliament legislated the union back-to-work. This was the longest faculty strike in Canadian university history.	*York University Labour Disputes Resolution Act, 2009*, SO 2009, c 1.

Ontario School Boards	Ontario	**Royal Assent:** September 11, 2012 **Repealed:** January 23, 2013	Rotating one day strikes	The legislation imposed a broad compensation freeze on all employees and imposed a July 5, 2012 memorandum of understanding that was negotiated between the Ministry of Education and the Ontario English Catholic Teachers Association. It set out requirements for terms that must be included in employment contracts (for non-bargaining unit employees) and collective agreements (for bargaining unit employees) during the "restraint" period. The period applies for a minimum of two years, but does not exceed three years. The restraint period commenced for teachers (and for most other employees) on September 1, 2012.	*Putting Students First Act, 2012*, SO 2012, c 11.

It should also be noted that following the one day TTC strike, the Ontario Legislature passed the *Toronto Transit Commission Labour Disputes Resolutions Act, 2011*.[42] This removed the right to strike or lock out from the transit system for the City of Toronto. The right to impose sanctions remains in place in the transit sectors for other large urban centres, such as Ottawa, that have also been significantly affected by labour disputes.

IX. WHO IS AT THE BARGAINING TABLE? WHOSE CONTRACT IS IT?

Recent government actions have had the effect of placing government personnel directly at the bargaining table, and managing negotiations in the place of what were supposed to be independent agencies. The federal budget, announced in May 2013, contained the following veiled threat: The "Economic Action Plan 2013 confirms the Government's intention to work with bargaining agents to further align overall compensation with other public and private sector employers."[43] As members of the media commented:

> The federal government is taking a harder line on collective bargaining, giving itself sweeping new powers to steer independent Crown corporations on their negotiations with employees over wages and benefits. The main targets are the CBC, Canada Post and Via Rail. The little-noticed measures were detailed for the first time in a budget bill introduced this week, and early reaction from labour

42 SO 2011, c 2.

43 Ministry of Finance, Media Release, "Jobs Growth and Long-Term Prosperity: Economic Action Plan 2013: The Budget in Brief" (21 March 2013) online: <http://www.budget.gc.ca/2013/home-accueil-eng.html>.

> groups is running from bewilderment to outrage, particularly from workers at the CBC.[44]

Practically, this means that even though an independent agency is the employer and party to a collective agreement, the source of the funding (the government) is now inserting itself at the public sector bargaining table in order to ensure fiscal responsibility. Serious questions are raised about the independence of such agencies when their collective agreements are being negotiated with direct intervention. This has implications on both the bargaining units and management. Who is really the employer in those situations?

In a similar vein, the Ontario government became the effective bargaining authority in the negotiations with the teacher federations after the repeal of the *Putting Students First Act* mentioned above. Although Ontario teachers are employed by local school boards, which hold collective agreements with the bargaining units, the fundamental terms of employment were determined in talks at a provincial level between the Ontario government and teacher federations. While this may have been a pragmatic, efficient and effective way to resolve the problems that arose in the aftermath of the *Putting Students First Act*, this process again blurs the concept of the "employer" role in traditional collective bargaining.

X. CONCLUDING REMARKS

Here are some of the questions that remain to be answered:

- Is there a right to bargain collectively if legislators are able to mandate a system without a neutral mechanism to resolve impasses?
- Is it really a "collective agreement" if its terms are dictated?
- Where are the protections of a collective agreement if there is no independent way to have differences regarding interpretation, administration or application resolved?
- How can employees and employers function effectively if there is no impediment to the formation of multiple employees' associations within a single workplace?
- How can the employees or employers deal with a situation of several entities purporting to simultaneously represent employees in that same workplace with similar job functions?
- Most importantly, who is the real employer? If a government takes over at the bargaining table and insists upon or imposes terms of a contract, but is not a party to that contract, what does this mean?

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44 Bill Curry & John Ibbitson, "Tories target CBC in public pay crackdown," *The Globe and Mail* (1 May 2013), A1.

While there may now be *Charter* recognition of the right to collectively bargain and be responded to in good faith, does this still mean that the SCC has recognized that subsection 2(d) protections include all of the fundamental elements of what the labour relations community has considered essential to a balanced and effective method of ensuring workplace democracy?

A basic premise of meaningful collective bargaining requires that there be a balance between the parties to the process. There has always been a tension between the demands of unions and the goals of management. History has taught us that both entities can function well only if there is balance.

Enlightened policy makers have crafted legislation that balances social and economic values, rights and responsibilities, individual and group needs and wants and public and private interests. But past experience has also taught us that political and socio-economic interests can influence the flavour of labour legislation. Few aspects of legal drafting or re-drafting have attracted as much attention as labour law. It seems that every newly elected governing party is anxious to put its own signature on labour law. Simply track the path of the agricultural workers in Ontario through the various parties who governed in the last two decades. Or, more generally, track the amendments to labour law following or preceding elections. Only when lawmakers allow for a balance between labour and management will they be able to adapt to emerging economic and social imperatives and to thrive in an increasingly global and competitive world.

The *Charter* is in place to protect fundamental rights that include the right to association, which is now clearly recognized as encompassing good faith collective bargaining. It is up to the courts to ensure that this fundamental right remains protected, subject only to reasonable limits. The economic challenges of this decade will be a true testing ground for the examination of the implications of this *Charter* protection.