THE LEGAL STRUCTURE OF FREEDOM OF ASSOCIATION

Brian Langille & Benjamin Oliphant

Faculty of Law
University of Toronto

THE LEGAL STRUCTURE OF FREEDOM OF ASSOCIATION

BRIAN LANGILLE & BENJAMIN OLIPHANT

FACULTY OF LAW

UNIVERSITY OF TORONTO

DRAFT – MAY 28, 2013.

TABLE OF CONTENTS

I. INTRODUCTION

This essay is about the law of freedom of association of workers in Canada. Its ambition is a simple one - to clarify and help structure our thinking about this important area of our law. In order to achieve this goal this essay takes as its domain not only the Constitutional guarantee of freedom of association, set out in s 2(d) of the Canadian *Charter of Rights and Freedoms*, 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.[1] That is, I here seek to lay out the entire legal structure of freedom of association, in its essential parts, and discuss how the various portions thereof can and do interact. This essay is written after the Supreme Court of Canada's decision in *Fraser*[2] and the motivation for undertaking this project is a concern that poor legal thinking, of the sort on display in *Fraser*, will undermine (and is now undermining) our efforts to get to the legal results Canadians deserve and require - including the agricultural workers whose rights and freedoms were at stake in *Fraser*.[3] It seeks to make clear what is wrong with the legal thinking in *Fraser*, how the errors in that case followed from, and compounded, the errors and omissions in legal thinking in the cases that came before, and what effect *Fraser* will have (and has had) on cases that have and will come after. But this exercise is undertaken in the spirit that it is not too late to straighten out our thinking about freedom of association, to see its legal structure, and to deploy it in way in a sensible manner to produce just results.

It may be appropriate to begin by reminding ourselves where we are now, in 2013, with respect to our fundamental freedom of association, as enshrined in the *Charter*. Here is what we "know" post-*Fraser* - because we have been told so by the Supreme Court of Canada - about section 2(d) and how that constitutional freedom fits with the other parts (common law and statutory) of our law of freedom of association.

1. *Labour Trilogy* (1987)[4] – We learned that labour relations are basically a 'no-go zone' for the *Charter*. According to LeDain J for the plurality, the *Charter* only protects, against the state, the freedom to join, belong to and engage in the "lawful activities" of an association. However, because the "activity of an association in pursuit of its objects is to be constitutionally protected or left to be regulated by

[1] One of us has been using the term 'instantiate' for some time to describe the intention and effect of the Wagner Act model on freedom to organize in the labour context. It has also been used by the Court, in *Dunmore v Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 SCR 1016 at para 36 [*Dunmore*]. See also Binnie J in *Plourde v Wal-Mart Canada Corp*, 2009 SCC 54, [2009] 3 SCR 465 at para 56 describing the Quebec statute: "(…) the entire Code is the embodiment and legislative vehicle to implement freedom of association in the Quebec workplace."

[2] *Ontario (Attorney General) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3 [*Fraser*]

[3] See generally the contributions in Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the* Fraser *Case* (Toronto: Irwin Law, 2012) [Faraday, Fudge & Tucker].

[4] *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 [*Alberta Reference*]; *PSAC v Canada*, [1987] 1 SCR 424 [*PSAC*]; *RWDSU v Saskatchewan*, [1987] 1 SCR 460 [*Dairy Workers*].

legislative policy", the addition of "lawful activities" does not add anything to the equation, from the perspective of constitutional adjudication. As such, activities of an association – such as collective bargaining and strike action – are not constitutionally protected – the entire arena is left up to legislative wisdom or lack thereof. This constitutes what has been called a "thin theory" of freedom of association.[5] Justice McIntyre found that 2(d) protected the freedom to do with others what individuals are free to do alone, but that strike action is not protected, because it is, in his view, *qualitatively* different from an individual withholding work while negotiating better terms of employment. Chief Justice Dickson dissented, agreeing with McIntyre J. that collective bargaining and strike action are qualitatively different from individual analogues. Contrary to McIntyre J., however, this led the Chief Justice to conclude that 2(d) must cast a broader net, in order to include those activities central to an organization's functioning for which there is no individual analogue (such as collective bargaining and strike action). The Chief Justice did not provide, however, any analytical process to determine what other activities should be protected, in what situations, and for what other organizations.[6]

2. *PIPSC* (1991)[7]- We learned that 2(d) protects the freedom to establish, belong to, and maintain a union as well as the freedom to do with others what one is free to do alone. We also learned it "does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association". Granting a statutory monopoly to one union to represent all workers, and failing to extend labour rights to any other unions as chosen by workers, does not violate the *Charter*.

3. The *Equality Cases* (1985 - present)[8] - In a series of important cases beginning in the late 1980s, the Court "read down" section 15 of the *Charter*, so that it is not an equality guarantee but "merely" applies to a subset of the ideas's concerns, i.e. to discrimination in which differential treatment is based on "enumerated or analogous grounds" (and then only if this treatment is also discriminatory in a normative sense). Thus we learned that because 'employment status' or 'work

[5] Brian Langille, "The Freedom of Association Mess: How We Got into It and How We Can Get out of It", 54 McGill LJ 177 at 205 [Langille, "Freedom of Association Mess"].

[6] See e.g. According to Professor Cameron, "Dickson C.J. gave little thought to the standard for breach, and he essentially concluded, without elaboration, that statutory provisions which restrict the right to strike *prima facie* violated s 2(d)." Jamie Cameron, "The Labour Trilogy's Last Rites: *B.C. Health* and a Constitutional Right to Strike" (2009) 15 CLELJ 297 at 307. See also Dianne Pothier, "Twenty Years of Labour Law and the Charter" (2002) 40 Osgoode Hall LJ 369 at 379 [Pothier] (Dickson CJ "never clearly articulated what it was about the objects of unions that would determine what kinds of objects of other associations would merit constitutional protection")

[7] *Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner)*, [1990] 2 SCR 367 [*PIPSC*].

[8] See e.g. *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143; *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, at para. 8; *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 93.

sector' are not analogous grounds[9] – in the sense of being immutable or constructively immutable – unequal and arbitrary distribution of statutory labour rights could not constitute a violation of section 15.

4. *Delisle* (1999)[10] – We learned that section 2(d) does not require the state to protect the exercise of fundamental freedoms (i.e. grant statutory rights against other private actors, such as employers) with respect to under-inclusive legislation, unlike section 15. The government has the power to instantiate the freedom for some workers, while not extending that protection to others. However, the government *as employer* cannot act so as to directly infringe the freedom (e.g. by committing unfair labour practices). But there is no duty to legislate, in the sense of extending equal labour rights to all employees. As such, the exclusion of RCMP officers from any statutory scheme of collective bargaining available to other state workers did not violate 2(d).

5. *Dunmore* (2001)[11] – We learned that, contrary to *Delisle*, sometimes there *is* a duty to legislate, to extend to certain groups labour rights and protections afforded to the majority of employees by legislation. Restricting protection of 2(d) to those activities performable by individuals, as held in the *Trilogy* and *PIPSC*, is no longer a sufficient guarantee of freedom of association. We learned that Dickson C.J. was right - 2(d) must extend to inherently and qualitatively different collective activities for which there is no individual analogue. Thus, the exclusion of farm workers from labour relations legislation offering protection to others against other private actors interfering with the exercise of their freedom, does infringe on their 2(d), as they – unlike the RCMP members in *Delisle* – were able to demonstrate that it was 'impossible to associate' without statutory rights protection against employer interference. As such, the government is under an affirmative constitutional obligation – under 2(d), instead of 15 – to legislate unfair labour practice protection, at least in those cases where associating would be a "substantial impossibility" without the protection.[12] (This provides the employees what, as we shall see, are correctly, but not at the time, labeled "derivative rights", placing a duty on employers (i.e. other private actors via the state) to not interfere with the freedom to associate.)

6. *B.C. Health* (2007)[13] – We learned that the reasons given in the *Trilogy* for excluding collective bargaining from protection of 2(d) and rendering labour relations a 'no-go zone' for the *Charter*, were mistaken. We also learned that because collective bargaining is an inherently collective activity of considerable

---

[9] *Baier v Alberta*, 2007 SCC 31, [2007] 2 SCR 673 at para 65 [*Baier*]; *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 at 162-166 [*B.C. Health*]; *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989 at para 44 [*Delisle*].
[10] *Delisle*, *ibid*.
[11] *Dunmore*, *supra*.
[12] This is the term used in *Fraser*, *supra* at para 34, in summarizing *Dunmore*. *Dunmore* itself, like *B.C. Health* and *Fraser*, can be read to impose a range of substantive standards from 'impossibility' to 'substantial interference' to 'discourage'. In any case, this is our best effort at representing the Court's decisions in summary fashion.
[13] *B.C. Health*, *supra*.

importance to trade unions, it must receive constitutional protection. There is not a constitutional *freedom* to collectively bargain (i.e. an obligation on the state to 'respect' the exercise of the freedom, a consideration not present in *B.C. Health* as such), but rather section 2(d) confers a *right* to collectively bargain, placing governments under an affirmative obligation to enact protective legislation placing a duty on employers to bargain in good faith. This right to collectively bargain, unlike the right to unfair labour practice protection in *Dunmore*, seems to be available[14] whether or not a claimant can show the freedom was otherwise impossible to exercise, although they must show that the government action or inaction constituted a substantial interference with an important associational activity.

7. *Fraser* (2011)[15] – We learned that the constitutional right to collectively bargain is (using the word for the first time in this line of cases) a "derivative" right necessary for the protection of the freedom of association – it will be required where, but for the protection, freedom of association is made to be "impossible" to exercise or otherwise meaningless. The government is under an affirmative obligation to ensure, at least, that there is a meaningful process of dialogue between employer and employees, which entails the ability of employees to make representations and the entitlement to have those representations considered in good faith by employers. But the rest of the Wagner Act model which specifies to and by whom this obligation is owed is not constitutionally required. We also learned that there is no meaningful difference between rights and freedoms, and the relevant inquiry for section 2(d) is whether by action or inaction the government has rendered the freedom (or right) meaningless. Concurring in the result, Rothstein J found that 2(d) does not confer *rights*, but rather the *freedom* to do with others what one can do alone, although he found that affirmative protections against unfair labour practices (i.e. rights) were required in order to permit associating. Justice Abella dissented, saying that *B.C. Health* did in fact confer a right to "meaningful collective bargaining", which requires the state to enact legislation which at a minimum included a statutory duty to bargain in good faith, majoritarian exclusivity, and a dispute resolution mechanism.

This set of results is both legally irrational and arbitrary. In this world agricultural workers have, in effect, constitutional unfair labour practice rights against their employers. RCMP members do as well. But not Walmart workers. And no one else it seems. But all workers have right to bargain with their employer. And that is not all we "know". We are informed that freedom of association, somehow, creates constitutional rights in the ether – that are held by unspecified collectives and against no identified duty bearer. At the same time we are told that governments can directly interfere with the freedom of association so long as they do not do so to a degree that completely obliterates the freedom, by making associating "impossible".

[14] No one has ever questioned, let alone answered, how the derivative rights in *Dunmore* were restricted (not available to other workers) but the derivative rights in *B.C. Health* were not. This will be discussed below.
[15] *Fraser, supra.*

All of this is, on the view presented here, wrong and the claim here is that setting out the legal structure of freedom of association will let us understand why. The basic idea is that this package of holdings is made possible because we have lost sight of some basic legal ideas, which we must strive to bring back into view. If we succeed in this, then we can clearly establish what it is we are talking about in these cases – legally talking about. This requires us to go back to the beginning and re-establish the legal structure of freedom of association which may be fairly said to have been not so much lost as abandoned in these cases.

So, this is an "essay in retrieval". It seeks to open a legal/conceptual "lost and found" department for freedom of association and then reallocate the items turning up there to their rightful place in our thinking. All in the name of protecting Canadian workers' freedom to associate.

Ultimately, the key question in all of these cases is this: how do we deal with a constitutional fundamental freedom available to "everyone" – such as freedom of association – when we have in place a complex and intricate statutory mechanism designed to instantiate that very freedom in a specific context (i.e. the workplace)? More particularly, how should we respond to arbitrary exclusions from such detailed instantiations of the fundamental freedom? These are our real questions.[16] The approach taken here is that they will be only be rendered answerable by sorting out the legal basics at stake and in play in our Supreme Court cases. If we do this we will see not only where these cases went wrong, but also where legally sound alternatives are to be found.

Some may take the view that legal reasoning does not matter, only the results and that we should take the results in cases such as *B.C. Health* and not worry about the reasons. Those who are tempted to think this way should read *Fraser* – it is exhibit A in the case against this way of thinking. It shows starkly what can happen when we lose sight of some basic ideas.

It should be noted that a very simple notion, lurking but quite visible in the background here, is that we have lost track of the relationship between our political theory, policy goals, and aspirations on the one hand, and law on the other. On the view taken here, one very important way of implementing any particular set of political goals – what we can refer to as any desired *narrative* for the deployment of labour in society – is through the law. There are other ways. But if we wish to use law, we must attend to the fact that law comes with its own demands and that the law has its own way of doing business. That is, labour law not only has a moral or political *narrative*, it has a legal *grammar*. In advancing our vision of a just society, it would be an awful if familiar mistake to ignore very basic and fundamental legal necessities. This basic grammar is not just lexical. It does not just serve a technical or communicative purpose – as important as that is. It also reveals substantive characteristics of the law, which will become clear as we move along.

[16] Or rather, they are made into difficult problems by the relegation of our equality provision to an anti-discrimination provision. More on that later.

One of us has written about labour law's moral purposes and its normative "narrative" – where we *should* be going and why.[17] That work relies upon the work of Amartya Sen and his ideas of real human freedom and capability, and argues that we need and have at hand a powerful justification of our labour law – much more powerful than that currently on offer in familiar labour law theory. In short, we have an even better account of why "freedom of association" for workers is so important. But – and this is the crucial point - these constitutional cases force us to confront law's internal structure when we use it, and not other means, to advance such a justified cause. If we ever hope to get where we want to go, to advance labour law's morality, then we must take not only the law's narrative but the law's grammar seriously.

In what follows, the starting point is quite a long way from our destination, which is a consideration of our current law of freedom of association. This essay begins with some basic ideas about law and legality – what it is to have a legal system. It then reviews some very basic legal concepts which are essential to clear legal thinking within a legal system. Then it moves to how those concepts have been deployed to structure our common, statutory, and constitutional law of freedom of association. Once this structure is made apparent, we can look to how it reveals the legal structure of the options the Supreme Court faced and will face in our line of cases set out above and those which will follow. Once all of this is in place we will see that, on terms we now understand and can deploy accurately, it turns out that the construction of derivative rights, via the constitutional technique of what has been called the "diagonal" application of the *Charter* to private actors, is one which needs to be handled with care, but has not been. But all is not lost. Our dedication to the very idea of legality also reveals and provides another way of accomplishing what we need to do, and in conformity with legality's critical demands. This is the still neglected constitutional idea of equality. But we will also see that it is possible to have a view of freedom of association which is coherent from a legal point of view, should we ever need to deploy it.

---

[17] Brian Langille, "Seeking Post-Seattle Clarity - And Inspiration" in Conaghan, Fischl & Klare, eds, *Labour Law in An Era of Globalization* (Toronto: Oxford University Press, 2002), 137-157; Brian Langille, "Labour Policy in Canada - New Platform, New Paradigm", (2002) 28 Canadian Public Policy 133; Brian Langille, "Re-reading the 1919 ILO Constitution in Light of Recent Evidence on Foreign Direct Investment and Workers' Rights", (2003) 42 Columbia Journal of Transnational Law 101-113; Brian Langille, "Core Labour Rights – The True Story" (2005), 16 European Journal of International Law 1; Brian Langille, "Globalization and The Just Society: Core Labour Rights, the FTAA, and Development", in Craig & Lynk, eds, *Globalization and the Future of Labour Law* (Cambridge: Cambridge University Press, 2006) 274-303; Langille, "Labour Law's Back Pages", in Davidov & Langille, eds, *The Boundaries and Frontiers of Labour Law*, (Portland: Hart Publishing, 2006) 13-36; Brian Langille, "The ILO Is Not a State, Its Members Are Not Firms" in G Politakis, ed, *Protecting Labour rights as Humans Rights: Present and Future Of International Supervision* (ILO: Geneva, 2007) 247-257; Brian Langille, "The Future of ILO Law, and the ILO", in The Future of International Law (Proceedings of the American Association of International Law 101st Annual Meeting) (2007) 394-396; Brian Langille, "What is International Labour Law For?", (2009) 3 Law and Ethics of Human Rights 47; Brian Langille, "Putting International Labour Law on the (Right) Map" in Blackett & Levesque, eds, *Social Regionalism in a Global Economy* (New York: Routledge, 2009); Brian Langille, "Imagining Post Geneva Consensus Labour Law for Post Washington Consensus", (2010) 31 Comparative Labour Law and Policy Journal 523; Brian Langille, "Labour Law's Theory of Justice" in Langille and Davidov (eds) The Idea of Labour Law (Toronto: Oxford University Press, 2011).

II. THE IDEA OF LEGALITY (GENERALLY)

We can perhaps make a start in the essay in retrieval begin by noting that if one engages with the much legal literature, one may be struck by the force with which some very fundamental, yet often unarticulated, assumptions are deployed. One such basic assumption is that lawyers have a great deal to learn from other disciplines. We take this to be true. But there is a often a flip side to this assumption – that other disciplines have nothing to learn from law. That is, it is striking how often the relationship of law to other disciplines is seen as a one-way street – the other discipline or literature is seen as "bearing upon" and informing the law. But the law has nothing to add or to say on its own terms. It does not "bear back". And this is not simply or even mainly a problem only for scholars of other disciplines – it is a too familiar position within the discipline of law itself. It may be simply that this reflects a basic disciplinary divide in which other disciplines, such as political theory or economics,[18] or what have you, may be sometimes abstract and not grounded in particular processes or institutional detail. But on the view taken here, lawyers, even international lawyers, always require a way of understanding how ideas of justice (or efficiency, or capability theory, or whatever) are actually delivered or instantiated in the world as we know and live in it. That is, our concerns about "workplace justice" or "social and economic" rights, have to mapped onto a structure of what is distinctly legal thinking about how these ideas can possibly be, and sometimes are, "made available" in the world via law. This is not to say that there is only one type of law, or that "formal" legal structures are the only relevant means at our disposal, particularly in the world of "transnational governance" of many of our concerns. But it is the case that insofar as we wish to use the formal legal system, and perhaps especially constitutional litigation, to achieve our goals, we must see our normative goals through the lens of legal thinking. We need to translate these ideas and map them onto a structure of legal thought.

To be able to see clearly the structure of legal thought in play in these freedom of association cases requires some unpacking of some very basic ideas about the basic grammar of law. Let us start with the observation that sometimes people say the oddest things – like "labour law is over".[19] Or 'labour law is dead'.[20] But labour law will never end or die because for as long as people engage in productive activities (work, labouring) some set of rules will govern that part of their lives (as with all other parts). This follows

[18] This recalls an amusing quote from Edward Rubin: "For the last few dark and stormy decades, ever since it irreversibly dismantled its formalist home, legal scholarship has been traipsing from door to door, looking for a methodological refuge. The doors at which it has knocked have included literature, philosophy, economics, political science, and sociology. Most of the residents have turned legal scholarship away with a meagre handout and an explanation that they had problems enough of their own. Economics, which suffers few such doubts, invited it in and tried to gobble it up." Edward L Rubin, *Law and the Methodology of Law*, 1997 Wis L Rev 521 at 521.

[19] See for an example. Alan Hyde, " The Idea of the Idea of Labour Law" in Davidov & Langille, *The Idea of Labour Law*, *supra* at 88.

[20] See Keith Ewing, "The Death of Labour Law?" (1988) 8 OJLS 293.

from the first rule about law that we learn in law school: there is never no law. Someone always wins. The amount of law we have is in a very important sense constant.

It is not that it is poor policy to argue that we should have 'less' or 'more' law – it is that is impossible. For example, if we repeal, say, labour standards legislation dealing with minimum wages, maximum hours, and so on, that does not mean we have reduced the amount of law (or government) we have. It just means that we have replaced one law with another. There is no decrease in the amount of regulation in existence – just a change in the rules (and processes for their implementation) that do the regulating. So, in our labour standards act repeal example, we simply move from a set of complex statutory rules governing employment to a complex set of common law rules about contracts of employment. We also move from administrative enforcement to (much more complex) enforcement in (more expensive to access) common law courts. Of course it is true that 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. There is always a comprehensive set of rules in place. The only issue is whether they are smart ones that are doing what we want to have done and in an effective way.

If we are right that there is always law, and that only its quality and never its quantity can be changed, this points to something which is rather fundamental. This something else, it is suggested,[21] can be seen in the following way. Law has its own resources, its own internal logic and morality, because law (not any particular law – but just law as such) is an answer to a very basic moral/political/social problem. It is how we can all live together in a way that confronts and solves solve the most basic political issue every society of people or state faces. Law is not simply a tool or an empty vessel which is at hand to attain other goals or extraneous goods (although it is often that as well). The basic problem of law is "who governs?", or "who gets to decide?" Who is sovereign over this body, this labour power, this chair, this land, this water supply, and on and on.[22] This is a basic problem because in any or state or community or society the question of who gets to tell whom what to do – and who can do what they wish without the leave or interference of others – is fundamental. In labour law, as in any other sphere of human interaction, the basic problem law seeks to solve is who has authority and dominion over what and whom. It is as Arthur Ripstein points out, a "formal" problem, which can be stated as follows "not everyone can tell everyone else what to do about everything."[23] Law is best understood as providing the solution to this problem.

Thus, law does not exist simply as a means to do other things – to achieve other extrinsic aims determined elsewhere – although it may spend a lot of time doing, or trying to do, that. Rather, law has its own internal moral compass to which it must attend – its own structure. Law is not just a way of implementing other plans. It is itself "a plan to do something".[24] All of the things which the law does - like determining who owns labour

[21] Following Arthur Ripstein, "Self-Certification and the Moral Aims of the Law" (2012), 25 Can J Law & Juris 210 [Ripstein] and Martin Jay Stone, "Planning Positivism and Planning Natural Law' (2012), 25 Can J Law & Juris 219.
[22] Stone, *supra* at 226.
[23] Ripstein, *supra* at 206.
[24] Stone, *supra* at 227.

power, whether and how it can be sold, (say, all of labour law) - are parts of this larger problem of "legality" as such. In law, for there to be law, there always must be an answer to the question "who governs?" This is really just the question –"what rights and what freedoms (and if you wish to add more of Hohfeldian list – rights, immunities, liabilities, powers etc.[25]) do we have?" In law there cannot be no answer – the only question is which answer is it. That is why quality not quantity is always the problem.

Obviously, filling out the details of this "plan" is an enormous task of great complexity, because all of the parts of our law must fit together all of the time in order to solve the problem law addresses. Coherence, generality and systematicity are fundamental in the solution to the profound moral problem of authority that law aims to address (if imperfectly). In connection with every and all interactions between any two persons (say, this employee and this employer), or between the state and citizen, the question of who governs, who decides, who is subordinate to whom, who is the master of this, must be answered, and all of the time. That is law's project.

This basic insight leads to other and familiar "natural law" stories – most importantly Fuller's.[26] For positive law to be law – to do the job it is designed to do - to be an answer to the fundamental political/moral dilemma which law confronts and must answer systematically, certain elements of legality must be in place. Law comes with certain constraints (generality, non-retroactivity, stability, understandability, constancy, etc). It cannot be law, cannot be the answer to our problem, if it does not conform to these internal constraints. This does not mean that we cannot have substantively bad – or even evil – law. But it does mean that law can not only fail in terms of some external metric, say a morality or a narrative we seek to implement, but simply on its own terms.

Law's project is the answering (in a systematic, relational, understandable way) who is subordinate to whom, and who is not, concerning any human interaction. That is to say that the whole structure of the law is one of mapping rights and freedoms. That structure does not by itself tell us what those rights and freedoms ought to be. But it tells us a lot about the nature and comprehensive structure of those rights and freedoms. In so doing it makes available the very possibility of the legal instantiation of any such account of who has authority over whom regarding what. If there is to be law – and the rule of law – this is the structure that is in play. Otherwise we do not have law, as such. Those who seek to advance normative goals (e.g. human freedom, utility, equality) though law, and perhaps especially constitutional law (and even international or global law) need to know this legal structure and system of thought.

From all this it flows that we always need and have a legal answer to all of the questions associated with freedom of association. There is, and never has been in Canada's legal system, no answer. As we have seen the quantity of law does not alter – it is static – and must be given law's mission. So, to advance the cause of freedom of association by law is to alter the law – not create it for the first time. This means, as we shall see, that a complete system of rights and freedoms establishing a certain version of freedom of

[25] WN Hohfeld, *Fundamental Legal Conceptions: As Applied in Judicial Reasoning* (New Haven: Yale University Press, 1964).
[26] Lon Fuller, *The Morality of Law*, Revised ed (New Haven: Yale University Press, 1969).

association was already in place in Canada – long before there was an entrenched *Charter of Rights and Freedoms* and the agricultural workers' litigation. 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 40s. It may not have been, and in the view of most labour lawyers was not, one that fit with a normatively salient account (of, say, human freedom). After the establishment of the Wagner Act model, we had a new instantiation of freedom of association, one that may also be imperfect, although in different ways. Both of these legal systems of thought constitute complex regimes that contain many moving parts, and work together in complex ways. The idea that an 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 distressing, to the legal logic of that structure regardless of its existing content – is a bad one.

In short, there always has been in the Canadian legal system, and always will be is, a way - 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 are going to change our law, whether through legislation or constitutional adjudication, this is what we are changing. This is the body, and structure, of law upon which we are conducting constitutional surgery.

III. THE LEGAL GRAMMAR OF FREEDOM OF ASSOCIATION

a) The Building Blocks of Legality

What follows has been laid out in some detail before, so we will only do so briefly here.[27] The idea is that the idea of legality requires and has available some basic concepts which make it possible. We may consider these concepts as law's basic building blocks. They come in different shapes. About this there is little disagreement in general, and certainly among those who think seriously about freedom of association.[28] As with all building blocks they do not tell us how to deploy them – they are in themselves inert. But, and this is a critical point - they only "go together", or create a structure which stands up, if they are deployed in the right way. They may be used for many purposes – to create very different structures – but only if they are deployed according to the logic of their own structure as well. Here they are:

1- Freedoms – Freedoms are about what I am free to do or not do. They have nothing to do with others. The presence of freedom describes a legal state where an individual is at

[27] Brian Langille, "Why the Right-Freedom Distinction Matters to Labour Lawyers – And to All Canadians" (2011) 34 Dal L J 143 [Langille, "Rights-Freedom Distinction"]; Langille, "Freedom of Association Mess", *supra*.

[28] Sheldon Leader, *Freedom of Association: A Study in Labor Law and Political Theory* (New Haven, Conn.: Yale University Press, 1992); Ferdinand von Prondzynski, *Freedom of Association and Industrial Relations: A Comparative Study* (New York: Mansell, 1987); Alan Bogg & Keith Ewing, "A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada" (2011-2012) 33 Comp Lab L & Pol'y J 379 at 392-397 [Bogg & Ewing]; Judy Fudge and Eric Tucker, "The Freedom to Strike in Canada: A Brief Legal History" (2009-2010) 15 CLELJ at 333 at 336-337 [Fudge & Tucker].

liberty to act or not to act, placing no duties on others to act or not to act. Freedoms are referable to the actor – *I* have the freedom to walk down the sidewalk, but that says nothing about what you can or cannot do, as such. Freedom is the legal state when the answer to the question of 'who governs' is 'everyone for themselves'. I may walk down the street or not, or join a union or not, that is up to me with respect to myself. Or you, with respect to yourself.

2. Rights & Duties – Whereas a freedom tells us what you or I may do, rights necessarily place duties on *others* to do or not do something, and by definition. My right that you fulfil my contract places a duty on *you* to pay me. If there is no duty, there can be no right.[29] I have a right that you not assault me – and you have that duty. These rights are possessed by a legally defined entity, and are held against a legally defined entity, with respect to legally defined conduct. They must be to conform to the basic demands of legality, so that we know, as we must, who governs?

3. Background distribution of rights/duties – But freedoms *are* protected to some extent at common law by a scheme of rights and duties - the normal rules of tort, property and contract rights which form a perimeter of protection for the exercise of freedom. Freedom of expression, for instance, is protected by tort law, in so far as others are - for example - prohibited from covering your mouth as you speak (that is the tort of assault). Freedom of association is protected, for instance, in so far as it is a tort for an employer to send in thugs to assault workers taking part in a union meeting. Importantly, however, this bare perimeter of rights operates to protect individuals whether or not they are exercising any specific, constitutionally recognized freedoms. 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 happen to protect my exercise of my freedom to some extent.

4. Rights versus Interests – There is a key distinction between my actions (exercises of my freedoms) which have an *effect upon your interests* (how things turn out for you), and my actions which *violate your rights*. Inherent in the structure of freedoms and rights is this very basic idea. This is the idea that much of what I do may have an effect upon you and your life, but not violate your legal rights. So in a two-person workplace, if one worker does not wish to associate and form a union, the other worker's freedom to associate at work is thwarted. But there is no legal event here other than two freedoms being exercised. Freedoms do not conflict in law, they contend in fact.[30] This is not a defect. That is what freedoms are for and why they are important.

---

[29] Put differently, 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" (1971) 4 Adel LR 377 at 380.

[30] In a previous paper, the following example was provided: "I am free to start a restaurant in Truro. So are you. My restaurant may have a big impact upon you, your interests, and your exercise of your freedoms. If I start a restaurant and it is very good it may drive your not very good restaurant out of business. This has large impact upon you but you have no legal claim against me. I have not violated your rights. My exercise of my freedom has had an impact upon your exercise of your freedom and upon your material interests. But here the freedoms simply contend – or contest – in fact. They do not contest in law." See Langille, "Rights-Freedom Distinction", *supra* at 150.

5. Derivative Rights – Beyond the basic perimeter of rights described above, the law, mainly though legislation,[31] may choose to protect a freedom (say, of association) by modifying the background, formally equal common law entitlements by creating specific labour rights. Where rights are specifically designed to further protect the exercise of a specific freedom in a specific context, we can properly call these derivative rights. These are not different in form from other rights, but they have a different and definite purpose. The right of individuals to not be discriminated against on the basis of union status is a (statutory and not common law) right possessed by individuals, conferring a duty on all employers to not act in a way so as to unlawfully discourage associating. Whereas employers previously had the freedom and power to discourage associating (i.e. by dismissing unionized employees with reasonable notice), this freedom and power is removed by placing a duty to *not* do that specific thing.

This is a right designed specifically to protect a freedom – it does not require the employee to do or not do anything, but if he or she chooses to associate, they will not be subject to repercussions for so doing (i.e. the employer is under a duty to not adversely treat an employee on that basis). As a derivative right, intended to outlaw specific conduct, it does not affect all the other aspects of the employer's freedom to dismiss for virtually any other reason. All of the other applications of the principle of freedom to and of contract remain in place, unless otherwise modified. These are properly called 'derivative rights', as they are rights put in place to protect or facilitate the exercise of a specific freedom in a specific context – here, the freedom of association in the workplace. It creates a more robust perimeter of rights, possessed by employees and unions, which protects freedom to associate from employer attack.

Keeping an eye on these building blocks does not tell us what things we should build. The concepts themselves do not determine the normatively preferable distribution of freedoms, rights and duties.[32] But they do let us understand what we are doing from a legal point of view when we seek to put in place a preferred distribution. More basic is the idea that they permit and provide the possibility of such a legal structure. Attention to this grammar can lay bare what it is we are legally doing, and considering doing, for example, in creating the Wagner act model or in laying constitutional rights and freedoms over our pre-*Charter* structure of labour law and freedom of association.

b) The Building Blocks Deployed at Common Law

Our legal grammar around freedom of association for workers begins with the common law. As we have noted, because Canada has long had a legal system it has long had a complete law of freedom of association. The common law has the distinct advantage of

[31] 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 (ONCA) [*Hersees of Woodstock*], and the Supreme Court's wonderful overruling in *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8, [2002] 1 SCR 156 [*Pepsi-Cola*].

[32] On this point, there is not (and never has been) any dispute with Bogg & Ewing, *supra* at 394.

being (*properly done*)[33] formally neutral and equal as between private parties. It does not matter who your mother or father is. Where you come from. When you arrived. Who you voted for. What you think. Whether you are rich or poor, noble or common, "master" or "servant". We all have the same rights and freedoms.[34] This is the great accomplishment of the securing of a system of formal and equal rights and freedoms for all.[35]

Having such a system has the result that it permits parties in an economic market place to freely contract with each other, including for services. At common law, there was a complete law of unfair labour practices. The workers were legally free to join a union. And, as noted earlier, the normal perimeter of tort rights protected union meetings from being broken up by employer thugs, for example. But the employer's co-equal freedom of contract meant the workers could be dismissed for supporting the union. In other words, workers had the freedom to associate (i.e. join a union), but the employer was likewise at liberty to terminate the contract of employment. The common law of unfair labour practices was clear – and many such practices were permitted.

At common law, there was also a complete law of collective bargaining. The 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' – each party was legally free to choose whom to bargained with, or not. If an employer would not bargain, employees were free to withhold their services until the bargain they sought was reached. There was also a complete common law of collective agreement administration. At common law collective agreements were not binding. There was also no duty to arbitrate disputes. Rather, contract enforcement was by striking.[36]

Finally, there was a complete law of strikes at common law. There was no right to strike, only a freedom to do so. As just noted, 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). If employees did strike – did 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 legally perilous venture, exactly because the employer was likewise free to dismiss and contract with other (non-unionized) workers.

Thus, at common law, neither workers nor employers were legally required to contract with each other, nor were they legally prohibited from doing so – both were left with freedom to do or not do so. The decision of employers to refuse to bargain with unions did not violate any legal *rights* possessed by workers, although it had a substantial effect

---

[33] We must leave to one side the efforts of 19th and 20th century judges to create economic torts to restrain collective action. See e.g. *Hersees of Woodstock*, *supra*.

[34] Even if some will be in a better position to utilize the common law rights and freedoms - a prince has greater property rights than a pauper, in the sense that the former has dominion over more property.

[35] This may be the idea behind Burns' insight and poem– "A man's a man for a'that". See Jeremy Waldron, "Dignity, Rank, and Rights", *The 2009 Tanner Lectures at UC Berkeley* (September 2009), online: SSRN < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1461220>.

[36] All of this is made clear in *Young v CNR*, [1931] AC 83, [1931] 1 DLR 645 (PC).

on their interests. Likewise, the refusal of workers to agree to proposed terms – i.e. their freedom to not agree to contract terms and thus not provide their services – may have a substantial impact on the interests of employers, but did not affect their rights. Of course, workers (and employers) had a protective perimeter 'rights', but no more or less than any other individual in any other sphere of human interaction – they could sue in contract where breached (to collect damages for wrongful dismissal), or if their legally protected rights were infringed (i.e. in tort if they were assaulted). But there was no special (i.e. derivative) rights protection for their freedom to associate. Their freedom to associate was just that – a freedom – and it could be effectively stifled by the concurrent 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 meaningful legal structure. We know who has authority over any specific interaction, and how they can be bound (i.e. create rights and correlative duties). Our independent ideal of legality was realised.

c) Statutory Redistribution of the Building Blocks

About the time of World War II, governments in North America decided that such a legal structure – a structure of purely formal freedom – was not a just one. It had its formal legal strengths but it also had its real world weaknesses. It was considered normatively unappealing for any range of reasons, but the chief motivation for the shift was the formal system's indifference to the distribution of resources and power. The core insight upon which modern labour law was based was that inequality of bargaining power between employees on the one hand and employers on the other often prevented the securing of just terms and conditions for workers in the world of common law freedom of contract just described. From the water of the formal system you cannot derive the wine of justice.[37] This led to the wholesale acceptance of the Wagner Act model, which substituted the parties' formal freedoms at common law with a complex statutory structure of legal rights and obligations. No longer were employers permitted the freedom to refuse to bargain with unions – they were under a specific duty to bargain. No longer could employers refuse to hire or permitted to discipline or fire individuals because they had joined a union, as unfair labour practice protection placed employers under a duty to not do so. No longer could employers hire permanent replacements for (legally) striking workers, because the workers had a right that they not do so.

---

[37] The Court has repeatedly noted that the employment relationship is characterized by the inequality of bargaining power between employee and employer. See e.g. *Slaight Communications Inc v Davidson,* [1989] 1 SCR 1038 at 1051-52, where Dickson CJ cited the following passage with approval: "[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination . . . The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. Most of what we call protective legislation -- legislation on the employment of women, children and young persons, on safety in mines, factories, and offices, on payment of wages in cash, on guarantee payments, on race or sex discrimination, on unfair dismissal, and indeed most labour legislation altogether -- must be seen in this context. It is an attempt to infuse law into a relation of command and subordination." See also *Machtinger v HOJ Industries Ltd.,* [1992] 1 SCR 986 at 1003; *Wallace v United Grain Growers Ltd,* [1997] 3 SCR 701 at paras 92-94.

Two points should be briefly noted. This was not all "gain" for the workers, as it involved a substantial trade-off for workers, with respect to the key lever available to them – they were no longer permitted to strike to gain recognition, to obtain better terms in the course of a contract, or to enforce their collective agreements – indeed, the freedom to strike was severely limited by labour relations legislation, and relegated to the times permitted by legislation.[38] It was replaced with statutory rights to facilitate associating placing duties on employers to not commit unfair labour practices), certification (replacing) recognition strikes, placing employers under a duty to bargain which did not exist at common law,, binding arbitration replacing "*Young v CNR* strikes" (to enforce the terms of collective agreements) and so on. Employees were given a limited 'right' to strike, at limited times (i.e. the conclusion of a collective agreement, after procedural formalities have been attended to), which placed a duty on employers to not dismiss or otherwise discriminate against lawfully striking workers.

Later, other statutory instruments were brought to bear, which further restricted the freedom of both employers and employees – human rights protection prohibiting discrimination against workers on the basis of prohibited grounds, for instance,[39] and employment standards legislation which created a baseline set of entitlement for all workers. These were not derivative rights aimed at protecting freedom of association as such – they were general rights granted to all, regardless of whether or not they were associating.

After this revolution in labour law, all workers had protection against discrimination, a minimum set of labour entitlements, and rights protection facilitating efforts to associate and unionize, only the last of which were aimed directly at protecting the freedom of association. Once those workers had successfully unionized, this came with another bundle of rights, placing employers under a duty to recognize certified unions, bargain in good faith, submit contract disputes to binding arbitration, and so on. The act of certification also had a bearing on individual employees, by depriving them of their freedom to bargain for contract on their own terms, whether or not they chose to belong to a union. The 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, individual or otherwise.

This massive legal reorganization changed what was largely unbridled, competing freedoms, into a complex set of what are properly known as derivative rights – rights possessed largely but, importantly, not solely by employees and their organizations (with correlative duties on employers) which, it was believed, were necessary to facilitate the exercise of associational freedom in the workplace. In other words, the formal legal freedom existing at common law was deemed to not provide sufficient protection for the real, substantive freedom to associate. Thus, along with the basic perimeter of rights,

---

[38] See generally Fudge & Tucker, *supra*; Brian Langille, "What is a Strike?", (2009-2010) 15 CLELJ 355 at 367-369 [Langille, "What is a Strike"].

[39] This meant not only that the employer was no longer free to discriminate on the basis of prohibited grounds (i.e. they were under a legal duty to not discriminate), but that unions also had a duty to not discriminate, for instance, by bargaining for discriminatory terms. See e.g. *Central Okanagan School District No. 23 v Renaud*, [1992] 2 SCR 970.

workers were given a new bundle of rights, enforceable against employers, which (in theory) permitted employees to associate without reprisal, and without having to contend with the freedom of employers to refuse to bargain, to refuse to abide by collective agreements, to dismiss striking workers, and much more

The second large point is that this reorganization had the effect of creating a unique sphere - or 'zone' - of law in the context of labour relations. It is difficult to underemphasize just how massive this transformation effected by comprehensive labour relations legislation really was, and had to be, in order to maintain legality. 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.*[40]

Chief Justice Laskin elaborated on this point in some detail in a case called *McGavin Toastmasters*,[41] which involved an illegal strike (i.e. it occurred during the term of a collective agreement). In that case, the employer shut down the plant, and refused to pay employees severance owed under the collective agreement, relying on the doctrine of 'fundamental breach' at common law. Chief Justice Laskin explained that the collective agreement entered into by the union and the employer was binding on both parties as well as all employees in the bargaining unit. The notion that the collective agreement was merely a 'bundle of individual contracts' betrayed a "complete misapprehension of the nature of the juridical relation involved in the collective agreement"; because of the change effected by labour relation 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".[42] He continued:

> The reality is, and has been for many years now, throughout Canada, that individual relationships as between employer and employee have meaning only at the hiring stage and even then there are qualifications which arise by reason of union security clauses in collective agreements. The common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement…
>
> (…)

---

[40] *Re Peterboro Lock Mfg Co* (1954), 4 LAC 1499 at 1502. See also *Syndicat catholique des employés de magasins de Québec Inc v Compagnie Paquet Ltée* [1959] SCR 206 at 212 ("The union is, by virtue of its incorporation under the *Professional Syndicates' Act* and its certification under the *Labour Relations Act*, the representative of all the employees in the unit for the purpose of negotiating the labour agreement. There is no room left for private negotiation between employer and employee. …The terms of employment are defined for all employees, and whether or not they are members of the union, they are identical for all… *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.*") [emphasis added].

[41] *McGavin Toastmaster Ltd v Ainscough*, [1976] 1 SCR 718 at 725 [*McGavin Toastmaster*].

[42] *McGavin Toastmaster*, *supra* at 724.

> In my view, therefore, questions such as repudiation and fundamental breach must be addressed to the collective agreement if they are to have any subject-matter at all. When so addressed, I find them inapplicable in the face of the legislation which, in British Columbia and elsewhere in Canada, governs labour-management relations, provides for certification of unions, for compulsory collective bargaining, for the negotiation, duration and renewal of collective agreements. (…) Neither [the operative Act] nor the companion Labour Relations Act could operate according to their terms if common law concepts like repudiation and fundamental breach could be invoked in relation to collective agreements which have not expired and where the duty to bargain collectively subsists.[43]

Justice Laskin explained what this wholesale reorientation in the law meant. It meant that while an employer may be able to discipline employees for an illegal strike in accordance with the law of arbitration,[44] 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. This is because the whole juridical structure has been changed - completely. No breach is possible because no common law contract exists. Thus, the strike action and subsequent plant closure did not relieve the employer of its obligation to pay severance under the collective agreement.

The fate of the common law after the Wagner Act model was famously described by Harry Arthurs: "the umbilical cord has been severed".[45] Pause here to understand the significance of all of this. Under the comprehensive Canadian schemes the entire common law has been wiped out. (Along with the courts as the primary institution to enforce law). The common law contract of employment is not there (there is no idea of "incorporation" of collective agreements into individual contracts in play in Canada.) The contract is between the union and the employer. The employees would be "third parties" at common law. But we are not at common law – and the statute simply declares that although the workers are not parties, they are bound. As simple, and as complex, as that. Canadian labour law statutes are very impressive pieces of legislation – and they had to be to maintain allegiance to our commitment to legality. Every question that can come up and must be answered (and was answered at common law) is also answered here.[46] This especially true when the statutes make their most important move – to remove freedom of contract – and impose a right and a duty to bargain.

Very simply put, the common law – characterized by a comprehensive scheme of largely contenting freedoms and background, formally equal rights and duties - had been replaced wholesale with another legal regime entirely, one with a complex and intricate system of rights and obligations aimed at the facilitation of associational activities in the

---

[43] *Ibid* at 725-727.

[44] However, even here the employer's power was limited by 'just cause" provisions in the agreement. *McGavin Toastmaster*, *supra* at 728 ("It was open to the company in this case to take disciplinary action against the plaintiffs for participating in an unlawful strike, and it is arguable (although this is not before this Court) that discharge would have been held to be for sufficient cause in the light of all the circumstances, if this issue had gone to arbitration")

[45] *Port Arthur Shipbuilding* (1966), 17 LAC 109 at 112.

[46] As supplemented when required by other basic ideas drawn from our general ideas of law and legality – see the decision of Chair Laskin in *Re Polymer Corporation Ltd.* (1958), 59 CLLC para. 18158.

workplace. This alerts us to the statement of the Court in *B.C. Health*, in which they state that labour relations is no longer to be a "no-go zone" for the Charter. While many labour scholars have focused on the words "no-go', it really turns out that the key word in the phrase is "zone".

As noted above, the principal motivation for this revolution was the dominant narrative of labour law which is that the inequality of bargaining power required a modification to the common law, so dependent on contesting freedoms. Without a comprehensive framework of rights and duties to supplant the largely contending freedoms approach of the common law, the power of capital had the upper hand, which it could leverage to the detriment of workers.[47]

These are the legal basics, the particular operation of which was left up to administrative tribunals (such as Human Rights Tribunals and Labour Relations Boards). It may not be perfect, and it is not the only possible zone we might construct, but it provides a legally cognizable structure. We continued to know what aspects of the legal relationship were left up to the freedom of employees and employers, and where that freedom had been constrained by a complex set of rights and duties. We know in any specific context who governs, who has authority over who with respect to what.[48]

d) The Relationship of Constitutional Law to the Building Blocks

(i) The right question

As with the introduction of comprehensive, zone-obliterating and zone-recreating, labour relations statutes, the enactment of the *Charter* overlaid upon this structure another dimension of legal complexity. But again, it is *legal* complexity – which uses the same legal building blocks as the rest of our law. The large question which was visited upon labour law with the creation of the *Charter* in 1982 was: what does this legal document say about the pre-existing legal structure of rights and freedoms constructed by our common law and our statutory law, that is, about our current and complete legal structure of freedom of association. This is the legal question posed in our cases such as *Fraser*. As we shall see there are three possible answers to this question.

(ii) How the question must be posed

But before turning to the three possible answers, we need to attend to another constitutional law issue – not *what* does the constitution say about the current distribution of rights and freedoms – but *how* does the constitution "apply" to the pre-existing

---

[47] As noted before, this narrative is in a sense outdated, in the sense that we have a much better one available to us. See e.g. Langille, "Core Labour Rights", *supra*, etc. However, this essay is on *how* we get there, not *where* we want to go, so an effort will be made keep focused on the former.

[48] To foreshadow the discussion to come, this can be contrasted with the state we are in following *B.C. Heatlh*, where constitutional rights were employed, but no clear way to identify who owed the duties and to whom. Winkler CJO saw this, and tried to fix the problem in *Fraser*, whereas the Supreme Court overturned him, evidently preferring the route of legal impossibility. We will return to this point below, in discussing constitutional freedoms, rights and obligations, and in determining when we know that derivative rights are *constitutionally* required in order to protect constitutional freedoms.

distribution of rights and freedoms which constitute and give legal structure to our law of freedom of association. Very quickly, as this is not our main quarry, and is familiar constitutional law for the most part, we can note the following. The common understanding is that the *Charter* creates, at a minimum, a scheme of rights and freedoms, which, unlike the existing structure of rights and freedoms, are referable and correlate to duties against the state, not private actors. That point is a large and important part of what an entrenched set of constitutional rights is for. While this is interesting and important, it is far too simple. This is because of the fact in a system of law that there is *always* law, and that ultimately, the content of that law is determined by state actors.

In other words, both legislative commission and omission are, in a sense, state action, so long as there is a background common law that governs the interaction between private parties. The failure to enact a more comprehensive perimeter of rights to protect freedom of association (say in the form of the Wagner Act model) leaves in place the common law distribution of freedoms, rights and duties, common law enforceable by judges in state courts. Because there is always law it is difficult to avoid the truth that there is always "state action', at least in the sense that the law is invoked in any legal dispute. This leads us to a truth which Mark Tushnet put well: "the state action issue is, on careful analysis, merely a question, sometimes difficult, of what the substantive requirements of a nation's constitution are."[49]

This does not, however, mean that the distinction between conventional state action and inaction is meaningless. Far from it. The distinction is in fact crucial because the building blocks of our legality demand that we attend to the distinction in order to determine what "state action" actually amounts to in any given dispute. That is, in order to understand the proper outcome in a constitutional case, we must know *what* sort of state action is being 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. Where there is no traditional state action (e.g. statutory prohibitions or limitations on conduct), we need to think through the demands being made on our prior distribution of our rights and freedoms. While the idea of 'state action' does not in itself answer any substantive question in this context[50] – it does not tell us what the constitution says about any legal relationship – it reminds us to be clear about what, in any case, the state action actually is. The idea that state action is always present in this sense is made explicit by the building blocks of our legality, and the idea that there is always law. But as always, it is a legal idea that has to be deployed carefully.

But this truth leads us to yet others. The possible constitutional questions in our freedom of association cases may come then in a number of forms, two of which are primal. First,

---

[49] 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*].

[50] We do not here address another form of the 'state action' question, which has also not been entirely well set out - i.e. whether a given body is directly bound by the *Charter*, by virtue of section 32(1). Compare e.g. *Eldridge v British Columbia (Attorney General),* [1997] 3 SCR 624 and *Douglas/Kwantlen Faculty Assn v Douglas College,* [1990] 3 SCR 570 on the one hand to *Stoffman v Vancouver General Hospital,* [1990] 3 SCR 483 and *McKinney v University of Guelph,* [1990] 3 SCR 229 on the other. But this is another issue.

we may have cases of the state itself attacking the freedom directly by, usually, passing a law placing legal duties on actors to do or not do something which they were otherwise free to do. These are the "classic" constitutional cases. They are easy cases of state action. *BC Health* is such a case. So too the *Trilogy*. These are case of so called "*vertical*" application of the Charter (state to citizen) in which the allegation is that the state itself has failed to "respect" the constitutional freedoms of citizens. The claim is - we had freedom of association under the current distribution of rights and freedoms, and you (the state) interfered with it - most typically by enacting legislation. The state changed the rules, the distribution of rights and freedoms, in an unconstitutional way, by prohibiting us from doing a thing we were or should be free to do. The claimants in such cases are asking the state to stop interfering with, that is to 'respect', the freedom.

Given the ubiquity of state action, even when the state is "doing nothing" new other than letting the current distribution of rights and freedoms stand and be enforced by organs of the state, there is the claim that has another familiar form – the failure of the state to change the current distribution of rights and freedoms of private actors violates our freedom. If we put this in terms of our building blocks the constitutional claim in this sort of case looks like this: the *Charter* demands that something be done about the current (common law or statutory) distribution of rights and freedoms of worker and employers. It requires another distribution in order to give us what we are constitutionally promised – freedom of association (properly understood). The current rules fail to adequately 'protect' our freedoms from the freedom of others.

At this point we need to draw attention to the way in which constitutions can and do deal with claims of this sort, once we depart from the conventional, vertical analysis.[51] When it is said that the constitution demands that the current allocation of the rights and freedoms of workers and employers be reallocated, this can be a demand that the *Charter* apply to the rights of "private actors" directly (i.e. to workers and employers). This result would permit employees to sue their employers for violating their constitutional freedom of association if the employer exercised its common law freedom to dismiss workers for unionizing. This result is what would be called the "*horizontal*" application of the Charter (citizen-citizen). That is not part of the law in Canada, for a number of reasons, most notably section 32(1), which limits the application to legislatures and governments. Instead, we have two different ways to go about achieving what is in essence the same result. First, we have what is often called "indirect horizontal" application. This occurs where one litigant invokes a common law right against another, and the other litigant argues that the distribution of rights and freedoms at common law fails to adequately protect the constitutional rights or freedoms of the latter. In such a case, the Courts are wont to consider modifying the common law rule, to bring it in line with '*Charter* values'.[52] As these are not in play in our cases, we will not discuss this in detail.

---

[51] See in particular the work of Stephen Gardbaum, who has taken some time to sort out these various doctrinal approaches necessitated by the recognition of the fallacy of equating 'state action' with 'legislative action'. Stephen Gardbaum, "The 'Horizontal Effect' of Constitutional Rights" (2003) 102 Michigan L Rev 388 [Gardbaum].

[52] For examples, see *Pepsi-Cola, supra*; *WIC Radio Ltd v Simpson*, 2008 SCC 40, [2008] 2 SCR 420; *Grant v Torstar Corp*, 2009 SCC 61 (CanLII), [2009] 3 SCR 640.

The second way, which is in play in the constitutional cases such as *Fraser*, is what we refer to as "diagonal" application of the *Charter*.[53] This arises because Supreme Court tells us that we still have a 'state action' doctrine, and that the *Charter* only applies vertically to state action – not horizontally to private action (of an employer committing anti-association acts, as in our example). So, the way we deal with these cases is to articulate the claim about the current distribution of worker and employer rights and freedoms as follows: the *Charter* demands that the *legislature* pass a *statute* which alters the current (in all of our cases, *common law*) distribution of the rights and freedoms constituting our law of freedom of association. While there is no necessary difference in substance between horizontal and diagonal or indirect horizontal application, there is a difference in legal form and remedy. The 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*.[54]

So, in the end, we come to the question, as we must pose it, which actually was asked, and answered, in cases like *Dunmore* and *Fraser*. It is this: 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?

(iii) The three *possible answers*

With the right legal question, properly posed, in view, we can see something basic in constitutional law – that there are three well-known responses to the question of how a constitutional Charter can interact with background, common law distributions of rights and freedoms. They are:

First, constitutions can and have been read to *prohibit* the state from modifying the background common law structure of rights and freedoms. This is what the famous U.S. case of *Lochner*[55] was about – the decision prohibited the state from interfering with the freedoms of employers and employees, as they existed at common law, to contract at will, and on terms agreed upon. *Lochner* involved the U.S. Supreme Court finding unconstitutional a state statute which had removed from bakery employers and employees alike the power to contract for more than a certain number of hours a week. *Lochner* had the effect of replacing a statute that modified the common law with the freedom to include such terms in a contract.

[53] See Langille, "Rights-Freedom Distinction", *supra* at 158.
[54] We make no critical point about these doctrines at this stage, but only point out that even where the substance of the claim is essentially the same - this actor is interfering with my freedom - the Court undertakes a different analysis depending on the form of the claim. As we will see below, attending to the difference is important from the perspective of legality, and in particular, to ensure that the decision made is consistent with the other things we know about our law.
[55] *Lochner v New York*, 198 US 45 (1905).

All of our modern labour law depends on *Lochner* not being the right constitutional disposition, and the framers of the *Charter* were at great pains to ensure that did not occur.[56]

Second, a constitution can be read to *require* the state to pass a law modifying the background common law distribution of rights and freedoms i.e. it can demand the conferral of new derivative rights deemed necessary to protect the freedom. This is what *Dunmore* and *B.C. Health* aimed to accomplish, the former with respect to the freedom of employers to dismiss, discipline or refuse to hire workers who had chosen to associate (unfair labour practices), the latter with respect to the freedom of employers to bargain or not bargain with who they choose (although this was not requested by the litigants as it was not raised in the case). After these cases, the employers in question no longer had these freedoms – they were replaced with duties.

Third, a constitution can be read as *agnostic*, neither requiring nor prohibiting the modification of the background common law rules. This was our law before *Dunmore*. This is, from the point of view of legality and not politics, the "no go zone" approach. The Wagner Act model's (comprehensive) redistribution of the common law's rights and freedoms may be a good idea, for political/economic/moral reasons, but it is neither constitutionally suspect nor constitutionally guaranteed and (perhaps for good reason) not normally subject to judicial scrutiny.

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 dispositions.

From the point of view of legality, it may seem at first blush all three of these are at least theoretically permissible in legal logic and grammar, although we may have strong things to say about their sustainability, their fit within our system of law and government, our collective history, the purpose of the constitutional provisions, and so on. Nevertheless, as our cases show, there are limitations on what we can expect judges in *Charter* litigation to achieve. These limitations are clarified by attending to the idea of legality and to the legal structure at play in different cases, in which different legal demands, about different freedoms and rights, of different actors, are made. These points that will be addressed in the following sections.

IV. WHAT WE CAN SEE WHEN WE READ THE CASES

We have outlined the common law (or background) scheme of freedoms and rights, the legislative scheme of freedoms and rights, and the various ways the *Charter* may interact

[56] See e.g. Sujit Choudhry, "The *Lochner* Era and Comparative Constitutionalism" (2006) 2 I.Con 1 at 16-27. It is thus with some good humoured amusement that we read that a Hayekian view of constitutional law had been ascribed to one of us, given that it would entail a repudiation of a career's work. See Bogg & Ewing, *supra* at

with and have an impact upon the current legal structure of freedom of association and its distributions of freedoms and rights. These, in a nutshell, are our basic building blocks (freedoms, rights and duties) and our basic structures for protecting freedom of association in the workplace (the common, statutory and constitutional law).[57] We have now clarified the real and concrete legal issue in cases like *Fraser*, and others. The questions we now face is how well have our courts understood the question, and how well have they answered it?

a) The Building Blocks Applied

If we grasp the grammar described above, we can see more clearly what we are being asked to accept in the constitutional cases outlined in the introduction. We can see both what is going on in our cases, and what the court says is going on.

1. Cases like *Dunmore*, *Delisle* and *Fraser* are properly considered derivative rights cases under section 2(d). They are "protect" cases. They are 'diagonal' application cases. The claim is not that the state has a duty of non-interference – to merely leave in place the background common law rights and freedoms – but rather a duty to modify that set of legal entitlements, that legal structure of freedom if association, by the enactment of a further scheme of rights and duties to protect the exercise of freedom of association.

2. We can also see that in these cases the rights and freedoms of other non-state actors are in play and the claim is that the *Charter* applies, as described above, diagonally to them. With diagonal application, the *Charter* does not apply directly to private actors, such as private sector employers. Rather, the *Charter* instructs the court to tell the legislature to pass a statute rearranging the generally applicable background rights and freedoms of those private actors.[58]

---

[57] The final domino here is international labour law, about which much has been said already. In brief, it has been assumed in some quarters that – just as the *Charter* can tell us what the statutory and common law regulation of the law of work must look like in order to make freedom of association meaningful - international labour law can act as a guiding beacon for domestic labour law. In our terms the legal line of reasoning is now as follows: *International law* tells the Court what the *Charter* tells the *legislature* about statutes it must pass altering the *common law's* distribution of rights and freedoms structuring freedom of association. For some, international law can quite nearly amount to a complete code, which can be injected, via this line of legal logic, into domestic law through the *Charter*. Leaving aside that international labour law cannot, and does not purport to, play such a comprehensive role in the domestic law of nations, there is another serious legal mistake in taking international agreements, treaties and interpretations thereof as indicia of the meaning of the three words in our *Charter* "freedom of association". This is because it does not comport with *other spheres* of our law, as we know them – most notably, it runs roughshod over our separation of powers and division of powers. In order for labour law or the *Charter* to fulfil its function as one star in our constitutional constellation, it must cohere with other parts of our law that we know to be true. As we have dealt with this at length before, it will not be further considered here. The point is that by importing the ILO Digest into our constitutional law *holus bolus* may meet one standard of legality – that there must always be an answer to 'who governs' - it defies another, requiring that the plan that is our legality must be internally consistent and coherent. See Brian Langille, "Can We Rely on the ILO?" (2010) 13 CLELJ 363; 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 CLELJ 181.

[58] On the different forms of constitutional rights application, see generally Tushnet, *Weak Courts*, at 196-198; Gardbaum, *supra*.

3. We see that all of these derivative rights cases entail courts determining that the formally equal legal freedom to associate, as it exists at the common law (with its perimeter of contract and tort rights), is or is not sufficient to fulfil the government's constitutional obligation under section 2(d) of the *Charter*. While the workers in *Dunmore* were legally free to associate, they were, as we have seen, 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, leaving them with the common law scheme of contesting freedoms. The workers in *Fraser* had this protective rights protection – as enacted by the Ontario legislature following *Dunmore* – but claimed they needed further legislative rights protection in order to meaningfully associate.[59]

4. We can see that we must acknowledge from the outset that interpreting the section 2 freedoms as including a substantive *right***,** against either the state or other private actors, to meaningful exercise of that freedom is not a small step. Very often, the exercise of one's freedoms will be effectively meaningless, in the sense that it does not achieve what the actors wish to achieve, or in the sense that it may be frustrated by the exercise of the freedoms of others. One may shout from a street corner for days on end and not change a single mind or move government policy one iota. We would be outraged if the state *prohibited* that person from disseminating their message – that is, interfered with the exercise of the freedom. But if there is a substantive *right* to meaningful expression, this may require the state to do much more. Must a government representative listen to the street corner preacher? Must it, the state, provide him with the means to more effectively disseminate his message? More radically, must it prevent others from speaking out against him, or require others to listen? We would say: of course not. However, if what we are interested in protecting through section 2 is the *substantive* exercise of freedom, if the government is under an affirmative obligation to ensure that the exercise of freedom is 'meaningful', then it is hard to see why exactly these questions are not to be taken seriously. So, sorting this out will require some careful thought.

In other words, going from interpreting section 2(d) as requiring governments to respect a sphere of conduct (i.e. to not interfere with a freedom) to a positive entitlement to protection and facilitation in order to make the freedom meaningful (e.g. to grant protective or facilitative 'rights' against other private actors), is no mean leap.[60] If we all have a constitutional right to effective or *meaningful* expression, association, religion, and so on, and the government is under a corresponding duty to ensure a level of meaningfulness or efficacy in the exercise of these freedoms, and given our commitment to legality, it is difficult to see how society could function, unless that 'meaningfulness' is very carefully defined.

At the same time, once we recognize that there is always law governing a specific interaction, it seems arbitrary to not address whether a given allocation of rights and duties – either by legislation or the common law – is sufficient to meet the standard

[59] These are easy cases if we bring the law of equality to bear, but hard cases under section 2(d). These points are discussed below.

[60] Again, this is where equality comes in – section 15 includes a specific direction to states and courts, and a right to citizens, to equal benefit of the law. This is our easy answer.

demanded by the constitution. This is what makes these cases difficult under section 2(d), a point to which we return below.

5. But our commitment to legal thinking makes other point clear as well. Cases such as the *Trilogy*, or *B.C. Health*, are the 'easy', '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 effect of interfering with individuals exercising their freedom. They are cases of the state failing to respect the freedom, and should trigger the pure vertical application of the *Charter*.[61] They have nothing directly to do with the rights and duties of other private actors. No claim is made about or against another private actor and their use of their legal freedoms and rights.

So when the Court in *Fraser* says that its "decision in *Health Services* follows directly from the principles enunciated in *Dunmore*",[62] bells should start to go off. In *B.C. 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) over certain terms – after the impugned legislation, they were prohibited from doing so. It was a straightforward *respect* case. Justice Deschamps made the point well in *Fraser*:

> In *Health Services*, the claimants asked this Court to declare that the government had interfered with their right to unite to achieve common goals. While they recognized that under most Canadian labour law statutes, employers had an obligation to bargain in good faith, the claimants were not seeking a declaration characterizing this obligation as a constitutional one. Neither the British Columbia Supreme Court nor the Court of Appeal dealt with a duty on employers to bargain in good faith, because this subject was quite simply not raised. Indeed, it was in its legislative capacity — not as an employer — that the government had interfered with the employee's rights. Therefore, the majority in *Health Services* did not need to comment on or make findings in respect of whether the government, as an employer, had a duty to negotiate in good faith. There was thus no need to *impose* a *Charter*-based *duty* to bargain on employers. *A fortiori*, there was no need to import, together with this duty, the *good faith* element that is one of the hallmarks of the Wagner model and that inevitably entails a number of statutory components. I cannot therefore agree with the majority in the case at bar that *Health Services* imposes constitutional duties "on governments as employers".[63]

---

[61] 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 is defended by us before, and discussed in Part VI below. See further Benjamin Oliphant, "Exiting the Freedom of Association Labyrinth: Resurrecting the Parallel Liberty Standard under Section 2(d) & Saving the Freedom to Strike" (2013) 71 UTFLR (forthcoming), online: SSRN < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2271191 > [Oliphant, "Labyrinth"]; Langille, "Freedom of Association Mess", *supra*.

[62] *Fraser*, *supra* at para 38.

[63] *Fraser*, *supra* at para 304. Of course, this analysis of what the Court should have said cannot take back what the Court actually said.

6. We see that in spite of such efforts to recast *B.C. Health* in more palatable terms, *Fraser* confirmed what *B.C. Health* repeatedly said: that the Court had created a new, derivative constitutional right to collective bargaining, placing governments under an obligation to *protect* the exercise of freedom of association (in the context of collective bargaining) which, critically, required the placement of a duty to bargain on employers, public and private sector alike. The Court states at paragraph 90 of *B.C. Health*, 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".[64] This is, from the legal point of view, creating a constitutional entitlement to section 17 of our Ontario *Labour Relations Act*, where such an entitlement was not required in order to resolve the matter at hand.[65] Indeed, despite (perhaps, and in the opinion of many)[66] its backtracking in *Fraser* on the substance of the duty, the Court continued to draw analogies to such legislative rights in defining the content of the constitutional right.[67] Whatever the content of this good faith obligation in *Fraser*, the court confirmed that it was a 'derivative right' that was constitutionally required under the freedom of association guarantee, imposing as a legal requirement on legislatures the obligation to create some sort of duty to bargain on private parties.

7. We see that despite the fact that it was a run-of-the-mill *respect* case, the majority of the Court in *B.C. Health* provided, on its own motion, a *protect* remedy, in finding a constitutional right to collectively bargain placing concomitant duties on employers. Armed with a misunderstanding of Canadian labour law history[68] and international law,[69] the Court created a constitutionally required roadmap, out of whole cloth, for the direction of labour relations legislation in the country. We do not think that they intended

---

[64] *B.C. Health*, *supra* at para 90. See also *Fraser*, *supra* at para 51: "In our view, the majority decision in *Health Services* should be interpreted as holding what it repeatedly states: that workers have a constitutional right to make collective representations and to have their collective representations considered in good faith".

[65] *Labour Relations Act*, 1995, SO 1995, c 1, Sch A, s 17 ("The parties shall meet within 15 days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement").

[66] For a very good and pithy explication of the differences between the entitlement as defined in *B.C. Health* and *Fraser*, see Bogg & Ewing, *supra*, 379-381. See also Steven Barrett, "The Supreme Court of Canada's Decision in *Fraser*: Stepping Forward, Backward or Sideways?" (2012) 16 CLELJ 331 at 338-340 [Barrett, "Stepping"]; Peter W Hogg, *Constitutional Law of Canada*, 5th ed, looseleaf (Toronto: Carswell, 2012) at 44.3(c) [Hogg]; Eric Tucker, "Labour's Many Constitutions" (2012) Comp Lab L & Pol'y J 101 at 107 [Tucker]; 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" (2011-2012) 57 McGill L J 351 [Braley]; Judy Fudge, "Constitutional Rights, Collective Bargaining and the Supreme Court of Canada: Retreat and Reversal in the Fraser Case" (2012) 41 Ind'l L J 1; Steven Barrett & Ethan Poskanzer, "What Fraser Means for Labour Rights in Canada" at 232, in Fay Faraday, Judy Fudge & Eric Tucker, *Constitutional Labour Rights in Canada: Farm Workers and the* Fraser *Case* (Toronto: Irwin Law, 2012) [Barrett & Poskanzer].

[67] *Fraser*, *supra* at para 98.

[68] See generally 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.

[69] See Langille, "Freedom of Association Mess", *supra*, Langille & Oliphant, "Frying Pan", *supra*; Patrick Macklem, "The International Constitution", in Faraday, Fudge & Tucker, *supra* at 281. See also *Fraser*, *surpa* at paras 247-250, Rothstein J.

to do so,[70] but that is what they did. All of this could have been avoided if the Court had paid attention to the legal story we have been reminding ourselves of here.[71] The legal structure of the case was both clear and familiar, and the Court chose to ignore it. It is a case of an unnecessary step - of creating an extremely complicated derivative right where none was at issue nor requested. The full cost of this ignoring of legal thinking comes apparent when we come to *Fraser*.[72]

8. In *Fraser*, we see that many things are said which are, in light of all of the above, very problematic. Prime of place goes to the following remark;

> This bright line between freedoms and rights seems to us impossible to maintain. Just as freedom of expression implies correlative rights, so may freedom of association. The freedom to do a thing, when guaranteed by the Constitution interpreted purposively, implies a right to do it. The *Charter* cannot be subdivided into two kinds of guarantees — freedoms and rights. (…)[73]

---

[70] Our first hint that the Court may have not clearly seen what it was doing in *B.C. Health* 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." (*B.C. Health*, *supra* at para 90, emphasis added). Now, this is clearly what 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 others right) to bargain in good faith. What is unfathomable is how the exercise of an individual's freedom can boomerang to place those same employees under a constitutional obligation to bargain in good faith. Again, we do not think they meant to say this, but it was an inattention to legal logic that permitted it. As we know, a legal freedom is precisely the absence of duty to do or not do something. A freedom corresponds with the fact that no one else has a right that I do or not do that thing which I am free to do. Even if we interpret 2(d) to include affirmative claim-rights, requiring the government to act in a certain way, this also does not entail a duty on the individual who possesses the right – it entails an obligation on someone else. Interpreting a constitutional freedom so as to place the claimant under a constitutional duty is to make real mistake in legal reasoning, whatever the benefits of including derivative right protection under 2(d).

[71] This is not to say that if the Court had more closely attended to the legal grammar at play, realizing that *B.C. Health* was a respect case, the outcome was preordained. The Court still had to grapple with the extent to which legislatures may interfere with the process and outcomes of collective bargaining before it begins to interfere with the freedom of association. Legislatures frequently and in many ways interfere with collective bargaining, determining what matters may be bargained over, and within what bounds. The question is in doing so, has the government unduly restricted the freedom to act collectively. See generally Oliphant, "Exiting the Labyrinth", *supra* at 19-21.

[72] A result predicted by many – see Langille, "Freedom of Association Mess", *supra*.

[73] *Fraser*, *supra* at para 67. In a different era, where attention to legal grammar and reasoning was seen as important, Justice Galligan made the following comments in *Broadway Manor*,, in response to counsel's submission discussing the "rights" to organize, bargain and strike under freedom of association:

> I am troubled with his choice of words for reasons that may possibly appear to be semantic only, but which I think are fundamental. I do not think that a freedom is the same thing as a right, nor am I sure that a freedom can contain a right. It is true that over the years sometimes the words have been used virtually interchangeably. For example, the International Labour Organization in its Convention No. 87 suggests that freedom of association involves certain rights to organize. There are doubtless cases in which judges have used the words interchangeably. But I have been unable to find a case where in construing the constitution of a country a court has used those two important words interchangeably.

Now, this may be true in the sense that a constitutional freedom may be interpreted to require the conferral of rights, but it is strictly legal nonsense, as we have seen, if it is meant to suggest that the terms have no distinct meaning and legal import. And it was by failing to see that *B.C. 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). We now turn below to where that inattention to legal grammar has left us.

9. We can see that the "impossibility" test is a very misplaced ides if we fail to distinguish between respect and protect cases.[74]

10. We can also see, as the court did not, that only in cases such as *Dunmore*, *Delisle* and *Fraser* are we faced with the question above, properly posed, and with the three possible answers to it. The other cases – the conventional state action, vertical application, 'freedom' cases such as *B.C. Health* and the *Trilogy* may be difficult on the merits, but are straightforward in legal form and do not pose the question we have identified

11. Finally we can see what happened to the very idea of legality in our cases. It is to this issue that we now turn.

b) Legality and the Situation Just Before Fraser

As with all other legal instruments, interpretations of the *Charter* – whatever its substantive effect on the content of the law – must at the least abide by the requirements of our legal grammar that permit us to achieve a legal system, i.e. legality. We must know, in a way sufficiently certain to meet our requirement of legality, what the content of a freedom or right is. This leads to a range of questions. Does 2(d) protect merely coming together and associating, does it protect the lawful activities of the association, does it protect 'uniquely collective activities', and how do we determine whether actions fall into one group or another? Does it protect legal freedoms, or derivative rights, or both, and in what circumstances? Who possesses the freedoms and rights: individuals or collectives? If the former, do all individuals acting in concert, or only those individuals in certain associations (e.g. unions)? If the latter, do all collectives possess the rights, or only those with specific qualities? What are those qualities? Finally, who owes the duty? Is it only against the government? If so, is it against the government as law-maker (i.e.

> The Charter is very precise. By s. 1, it guarantees only those rights and freedoms set out in the Charter. It enumerates the guaranteed freedoms in s. 2, and specifically confers guaranteed rights in other sections. If the two words were intended to have the same or even substantially the same meaning, there would be neither point nor purpose in using both, nor in specifically separating them as has been done in the Charter. It is my opinion that while still in the early days of interpreting as important a document as the Constitution of our country, the courts should be cautious indeed before interpreting the document any way but in accordance with the ordinary meaning of the words chosen. And they should be cautious before using words which may have fundamentally different meanings interchangeably."

While Galligan J's definition of a constitutional freedom may not be exhaustive, this quotation alerts us to what it is we are talking about, and the crucial importance of attending to our shared legal grammar in discussing what it is that the *Charter* requires.

[74] See further below.

against the state as legislator and/or the courts as developers of the common law), against the state as enforcer (i.e. against the executive enforcing statutes, or courts enforcing laws), against the government as employer, or all three? To the extent that the constitution extends to private actors, does it bind them horizontally (i.e. direct application), indirectly (i.e. through the application of constitutional norms to the development of the common law), or diagonally (i.e. through an obligation on the state to modify the background rights by legislation, imposing duties on private parties), or some combination thereof?

It is easy to forget to that we have to know the answers to these questions, because so often they are self-evident. To use a simple example: the legislature passes a law making hate speech illegal.[75] In such a case, we know what type of entitlement we are talking about (a freedom), who possesses the freedom (citizen), who is prohibited from interfering with the freedom (the state), and the rough content of the freedom (any peaceful, communicative act). It is a vertical application case. Once we determine that the activity in question falls within the protected range of conduct, all we still need to know is whether the violation is justifiable under section 1. That can be difficult to determine, and the outcome of this case might leave other questions unanswered: it will not necessarily determine how an administrative agency should interpret a different hate speech provision,[76] or if a prohibition on spreading false (and hateful) news is justifiable.[77] Nevertheless, the basic scope of the inquiry is relatively well defined, and from the outset. However, where courts start creating vaguely worded constitutional rights out of fundamental freedoms, we are left with trying to answer *all* of these questions. This is where legality often goes missing, and must reassert itself.

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 *B.C. Health* – is by attending to the remedies actually given in our cases, in the broad sense, and what these entail. The idea of legality is evidently in play here – as it should be. Our legal structure of freedom of association must always meet the demands of the idea of law itself. What the court leaves in place after an act of constitutional surgery on the existing body of the system of rights and freedoms constituting our law of freedom of association must meet the demands of legality as well. It must leave all the questions answered, as they were before (albeit in an unconstitutional way). *Dunmore* answers all of the questions demanded by legality. *B.C. Health* and *Fraser* do not, as demonstrated below.

c) The Remedy in Dunmore – Preserving Legality

As noted above, *Dunmore* was – properly understood – a derivative rights case. The claimants had the legal freedom to associate, but alleged, credibly so, that exercising that legal freedom was perilous, as the employer was under no legal obligation to respect that decision to associate or not, and could fire or refuse to hire union supporters. As we have

[75] See e.g. *R v Keegstra*, [1990] 3 SCR 697.
[76] *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11.
[77] *R v Zundel*, [1992] 2 SCR 731.

noted, the reasoning process in *Dunmore* may not be impeccable (or even necessary), but in granting the remedy that it did, it did meet our standards for legality.

We should begin by Bastarache J's acknowledgement that the Court only has certain legal remedies available to it: the "Court is not in a position to enact such detailed legislation, nor to confer constitutional status on a particular statutory regime, I prefer to strike down the *LRESLAA* to the extent that it gives effect to the exclusion clause of the *LRA*." This is a very important remark. It attends to the proper role of courts in our constitutional framework,[78] a point returned to below.

In keeping with other under-inclusiveness cases – which prior to *Dunmore* were limited to the section 15 context[79] – Bastarache J. determined that the 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 remedy he outlined for the legislature to undertake to avoid the default remedy of striking down:

> In my view, these principles require at a minimum a regime that provides agricultural workers with the protection necessary for them to exercise their constitutional freedom to form and maintain associations. The record shows that the ability to establish, join and maintain an agricultural employee association is substantially impeded in the absence of such statutory protection and that this impediment is substantially attributable to the exclusion itself, rather than to private action exclusively. Moreover, the freedom to establish, join and maintain an agricultural employee association lies at the core of s. 2(*d*) of the *Charter*; the appellants' claim is ultimately grounded in this non-statutory freedom. For these reasons, 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.[80]

Canadian labour lawyers know exactly what Bastarache J. was granting as a constitutional remedy. The Court in *Dunmore*, then, effectively determined that farm workers were entitled under the constitution to s. 5 of the *LRA* (the statutory articulation of the basic freedom to associate) and the (derivative rights) unfair labour practice protection (analogous exactly to sections 70 and 72 of the Ontario *Labour Relations*

---

[78] In particular, section 52 of the *Constitution Act* which states that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". It does not state that any law that would better comport with the Court's views of fundamental rights and freedoms may be ordered by the Court. See the comment by Robert Charney, in response to the remedy ordered by Winkler CJO in *Fraser* at the Ontario Court of Appeal. Robert Charney, "Freedom of Majoritarian Exclusivity and Why Ms. Clitheroe Should Have Joined a Union: A Comment on Fraser and Clitheroe", (2010) 27 NJCL 45 at 50-52 ("Never before has a court ordered the government to enact legislation.")

[79] See e.g. *Vriend v Alberta*, [1998] 1 SCR 493; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624.

[80] *Dunmore, supra* at para 67.

Act)[81] afforded to other workers in the province, creating a more comprehensive scheme of rights to protect the freedom of association. It created a clear duty on the government to *protect* the exercise of the freedom from third parties; to enact clear rights, with clear duties on the employer, all involving a big change in the employers' prior common law freedoms, all in a legally sound manner. One way or another that was going to happen – though the legislative exclusion being struck down, or the legislature acting in accordance with the affirmative obligation. The key point is that no matter what you think of the result from the perspective of political theory or policy, this all adheres to the demands of legality. The minimum constitutional entitlement under section 2(d) that was owed to farm workers in the litigation was clearly defined – either the legislature would give equivalent unfair labour practice protections, or the exclusion of farm workers from the protections of the *LRA* were struck down.

d) The 'Remedy' in B.C. Health – Forsaking Legality

The 'derivative right/duty to bargain in good faith granted in *B.C. Health* was of a different legal order entirely.[82] We will begin where Court stated in *B.C. Health* (a phrase upon which the Court hung its hat in *Fraser*), that it was not constitutionalizing a system of labour relations: it simply provided a right "to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method".[83] This is all well and good to say, but simply saying it doesn't make it so. The legal problem is that, as a matter of law, the creation of some particular model of labour relations is exactly what is required by a constitutional remedy imposing a duty to bargain in good faith, in order to preserve some semblance of legality.[84] It may not be the same model that we have, but it must be a complete, coherent, that is to say, legal, model.[85]

Because our labour codes are, as we have seen,[86] self-contained systems which are designed to eliminate all of the prior common law of freedom of association along with its enforcement mechanisms (common law courts), our labour codes have to, and do, answer all of the many, many, many questions which can and must come up and were dealt with by the now eliminated common law which has, in the words of Bora Laskin, "ceased to exist". And our statutory codes, and the new institutions set up to administer them - labour boards and arbitrators – do answer them all. That is because a duty to bargain in good faith requires us to identify i) who possesses the right; ii) who bears the duty; and iii) with respect to what conduct. These questions require answers, because we

---

[81] Note his use of the labour law buzzword – "interference" – taken directly from s.70 of the OLRA.
[82] The formal remedy in *B.C. Health* was simply a suspended declaration of invalidity. However, in the broader sense, the court found that where a constitutional right to meaningful collective bargaining was not afforded by legislation, such legislation would be invalid.
[83] *BC Health*, *supra* at para 91; *Fraser*, *supra* at para 41.
[84] Creating unfair labour practice rights is a piece of cake in comparison – see *infra*.
[85] This fact is made very clear by the reality that government lawyers were able to draft a statute doing *exactly* what the Court's remedy demanded – a point made by many, including the (pre-*B.C. Health*) trial judgement in *Fraser*. See *Fraser v Ontario (Attorney General)*, 2006 CanLII 121 (ON SC) at para 21.
[86] See Part III(c), *supra*.

always must know the answer to the fundamental question of the law: who governs any specific interaction?[87]

i) Who possesses the right

The first question a "constitutional right to collectively bargaining"[88] raises is whether a union must be certified in order for this right to be given effect. Merely asking the question provides a clue that some basics of the idea of legality might have gone missing: how could it be possible that what the Supreme Court assures us is a constitutional entitlement that vests in the individual[89] could only available to those who have been certified according to labour relations legislation (or some other mechanism)? That is, would the constitution not require legislatures to impose a duty to bargain in good faith on employers with respect to 'minority unions', or indeed, any group of employees who choose to bargain collectively? Why or why not? 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 *B.C. Health*?

If our constitutional standard is ensuring meaningful exercise of an individual freedom through the provision of derivative rights, we cannot simply wish away this question on the basis that placing all employers under a duty to bargain in good faith with any two employees who seek to bargain together would be, for instance, impractical. Recall that these are fundamental freedoms, and it is a constitution we are expounding.[90] The Court must now decide who is to possess the derivative right to collectively bargain, and it must have a good reason for excluding those who – presumably – are in even greater need of protection, like those who are not supported by a well-established union. Our legislatures can provide greater rights to one group over another on the basis of practicality or convenience or administrative efficiency, but for a Court to distribute access to basic constitutional freedoms on that basis is something else entirely.

However, assume for the purpose of inquiry that certification of some sort is required in order to have access to this new right derived from a freedom.[91] Indeed, this seems to be an unstated presumption (and a faint, if illegitimate, echo of legality) behind the Court's stated need to constitutionalize "the exercise of certain collective activities", including

---

[87] See Part II, *supra*.
[88] *B.C. Health*, *supra* at para 89.
[89] *Fraser*, *supra* at paras 64, 65 (*B.C. Health* "recognized, as did previous jurisprudence, that s. 2(*d*) is an individual right").
[90] In the famous words of Justice John Marshall in *M'Culloch v. Maryland*, 17 US 316 at 407.
[91] This may be the implication of the majority's statement in *Fraser*, *supra* at para 66: "Rothstein J. also emphasizes that '[i]ndividuals who are not members of an association . . . have no constitutional right to oblige their employers to bargain' (paras. 179 and 187). In our view, this outcome is not anomalous. It follows logically from the fact that collective bargaining is a derivative right, a "necessary precondition" to the meaningful exercise of the constitutional guarantee of freedom of association: see *CLA*, at para. 30. Where there is no reliance on freedom of association, there is no derivative right to require employers to bargain."

"making *majority* representations to one's employer", an example cited in *Fraser*.[92] Thus, in order to answer the 'who' 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? How can a union lose its exclusive bargaining agent status? Must construction workers, due to the nature of the enterprise, have separate scheme to make their freedom meaningful? And so on.

Even before a union is certified as the exclusive bargaining representative, we must know who it represents, in order to conduct the above inquiries. We need to know 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 labour lawyers know can make the difference between effective and ineffective unionization, and presumably under a substantive freedom standard, meaningful or meaningless freedom.[93] 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?

Even once all of these questions and more are asked and answered, it should be noted that the employer (under our model), is necessarily *prohibited* from bargaining with individual employees, or 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 *Labour Relations Act*. 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? Why or why not? Recall again that while legislatures limiting freedoms of some in the interest of others may be necessary or justifiable,[94] it does not follow that a constitutional 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.[95]

---

[92] *Fraser*, *surpa* at para 29. See also *Dunmore*, *supra* at para 30.
[93] For an example of the serious effect that the definition of a bargaining unit can have on the real, practical ability to organize, see generally Elizabeth Lennon, "Organizing the Unorganized: Unionization in the Chartered Banks of Canada" (1980) 18 Osgoode Hall LJ 177.
[94] See e.g. *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 SCR 211 [*Lavigne*]; *R v Advance Cutting & Coring Ltd*, 2001 SCC 70, [2001] 3 SCR 209 [*Advance Cutting*].
[95] See generally the entries in Guy Davidov & Brian Langille, *Boundaries and Frontiers of Labour Law*, (Portland: Hard Publishing: 2006) at 271 to 336.

In fact, the "vertical disintegration" of firms is at the heart of much of labour law's difficulty.[96] There are definitions and provisions in the labour relations legislation, which deal with successor employers, related employers, employer associations, and so on.[97] Again, each of these provisions are hotly contested in labour boards across the country, on a daily basis, but there are rules in place to determine and Boards to decide 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

Finally, once we entertain a constitutional right to 'meaningful collective bargaining', we must know what conduct is required and what prohibited by the constitution. We will not get into the case law on the duty to bargain in good faith, but as with the other aspects of a right described above, it is voluminous.[98] If a legislature abides by its constitutional duty to enact section 17 protection, but permits employers to not 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? Why or why not? What topics must be included in the duty to bargain to make it sufficiently meaningful? The Court in *B.C. Health* appeared to limit this obligation to 'important' terms.[99] In effect, they set up 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 exactly not some state agency (like a court) to decide what to bargain about.[100] This is not to say that a constitutionalized duty to bargain cannot have different contours than the legislative duty, but is simply to highlight that it must ask itself these questions, and eventually proceed to answer them. This can only be done, presumably, with reference to the type of reasoning employed by our labour boards – that is, distinctly with an eye to policy making, as opposed to constitutional adjudication.

iv) Are other rights necessary to 'complete' the zone?

This is not the end of our woes, however, with respect to a meaningful right to collectively bargain. Winkler CJO also noted, correctly, that with the Canadian model of

---

[96] See e.g. Hugh Collins, "The Productive Disintegration of Labour Law" (1997) 26 *Industrial Law Journal* 295. For how this issue plays out with respect to minimum labour standards, see e.g. *Lian v J Crew Group Inc* (2001) 54 OR (3d) 239 (Ont Sup Ct). Or consider this issue in light of the recent and tragic events in the garment industry in Bangladesh – "involving", among others, Canadian firms, for which, many believe, they have some responsibility.

[97] See e.g. the Ontario *Labour Relations Act*, 1995, SO 1995, c 1, Sch A at ss 1(4), ss 68-69.

[98] See Brian Langille & Patrick Macklem, "Beyond Belief: Labour Law's Duty to Bargain" (1988) 13 Queens LJ 62.

[99] *B.C. Health*, *supra* at paras 93-95.

[100] As explained by Chair Weiler in *Canadian Paperworkers Union v. Pulp and Paper Industrial Relations Bureau* (1977), 77 CLLC 675 at 690: "it is inconsistent with the objectives of the B.C. *Labour Code* to start this Board down that path of overseeing, even to this limited extent, substantive discussions of the parties at the bargaining table".

labour relations, there must be a system of rules to resolve genuine bargaining impasses, in order for a constitutional right to collectively bargaining to be meaningful. In the case of *SFL v Saskatchewan*,[101] Justice Ball also saw the need for a way to resolve bargaining impasses, as an integral component of the particular way Canada has instantiated freedom of association (the Wagner Act model). Justice Ball found, reasonably enough, that a meaningful right to collective bargaining – without our system of labour law – requires some defined mechanism to resolve impasses. He cites W.B. Rayner for 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".[102] On this reasoning, Justice Ball found that the Saskatchewan legislature 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 enables 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)".[103]

Indeed, Justice Ball did us a great service by showing us what it means to constitutionalize a right to collectively bargain within the Canadian system of labour law. Legality does not abhor a vacuum, it forbids it. Because we have a constitutional 'right to 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.

If there is a derivative-derivative constitutional 'right' to strike (as opposed to a freedom), as the recent Saskatchewan decision holds, then what is the constitutional law answer to the questions of the following sort (and these are just examples): What is a strike? Can an employer hire replacements workers during a strike? Are those – whether in another bargaining unit or unorganized – who refuse to cross someone else's picket line on strike? Who gets the jobs at the end of a strike – the strikers of those hired during the strike? Who gets to vote in a decertification application during a strike? Can an employer discipline a striker? What does 'essential services' mean anyway? And on, and on, and on, *ad infinitum*. All of this proceeds, more or less logically and necessarily, from declaring an end to the distinction between rights and freedoms, creating a right to the meaningful exercise of a freedom within a certain context, and getting on with reshaping labour law in the court's understanding of the constitution's image. It is not clear where this "series of ever expanding concentric circles" ends,[104] as each only serves to raise many more constitutional questions that require constitutional answers.

---

[101] *Saskatchewan v Saskatchewan Federation of Labour*, 2012 SKQB 62 [*SFL*, SKQB]. This case was recently overturned by the Saskatchewan Court of Appeal, not on the merits, but on the perhaps dubious assumption that *stare decisis* governed the case. *R v Saskatchewan Federation of Labour*, 2013 SKCA 43. See Steven Barrett & Benjamin Oliphant, "Constitutional Protection for the Right to Strike", (forthcoming).
[102] WB Rayner, *Canadian Collective Bargaining Law*, 2nd ed, (Markham, On: LexisNexis, 2007) at 541, cited in *SFL*, SKQB, *supra* at para 61.
[103] *SFL*, SKQB, *supra* at para 191.
[104] This apt description is borrowed from *All India Bank Employees Association v The National Industrial Tribunal* (1962) 49 AIR 171 at 180.

Of course, the Ontario *Labour Relations Act* proceeds, at great length, to answer all of these questions and many more. To use just one example noted above, in order for the employer to have a duty to bargain in good faith, the union must be certified. There are central features that let employers know that they are the relevant employer, when they must bargain in good faith, and with whom. Prior to certification, the common law freedom governs bargaining interactions: a group of workers are perfectly free to approach an employer, to make representations with respect to contractual terms, and an employer is perfectly free to bargain with them, if it so chooses. But without the duty to bargain, it has no legal obligation to do so, because the workers have no right to have them do so. In either situation, we know who governs. This is the demand of legality.

e) Fraser's Contribution: The Consequences of Digging in Heels in the face of the demands of the idea of legality

If there were an "inattention to legality" sweepstakes, *Fraser* would be a contender for first place. To make this clear, consider the position of our lower courts after *B.C. Health*'s (unnecessary) creation of the derivative right to good faith bargaining. They were, as we have just noted, in a very awkward legal predicament. Winkler C.J.O., one such judge, understood just how awkward things had become. As explained elsewhere:

> As a very experienced labour lawyer Chief Justice Winkler saw all of this clearly and knew that his/our options were rather starkly drawn. His options were: **(A)** in good common law fashion, gently have pointed out the mistakes in reasoning the Supreme Court had made in BC Health, showed how it was not necessary to decide the point in the case in any event because it did not arise, then showed what would follow if it were taken at face value (you would need to constitutionalize the other parts of the system including exclusivity, majoritarianisn, bargaining units, dispute settlement, and so on) and suggest that on the Supreme Court's own statements (to the effect that the Court is not constitutionalizing "a particular model of labour relations"[105]) it really did not mean, on pain of contradiction, to hold that there was a duty to bargain in good faith. A clearly available and honourable approach in my view – one that Courts of Appeal have adopted in many cases over the years when faced with a less than totally coherent decision from above. This approach has the disadvantage of explicitly exposing the Supreme Court's error, but also the advantage of correcting it. He might have even then pointed out the availability of the equality argument as the vehicle of getting both what the court wanted (a duty to bargain) without constitutionalizing the whole of a particular legislative scheme.
>
> **Or (B),** Chief Justice Winkler also had the option of saying that there was a clear holding in BC Health to the effect that an employer duty to bargain exists under 2(d) (which is clearly what the Court did say), noting that if there is such a duty one needs to have a way of answering the question "to whom is this duty owed?", then, drawing on his labour law expertize, showing that this means we also need to constitutionalize the ideas of bargaining units, exclusivity, majoritarianism, and so on. (ie, the rest of the statutory scheme.)

[105] *B.C. Health*, *supra* at para 91.

Winkler does **(B).** Again, an entirely plausible and principled bit of legal reasoning which has the advantage of not drawing explicit attention to the Supreme Courts error, but the disadvantages of extending it (by constitutionalizing almost all of the "Wagner Act model" and so on.)

What Winkler did **not** do was **(C).** He precisely did not maintain that you can have a duty to bargain in good faith, and simultaneously contradict himself by saying that we do not need to have a way of specifying to whom that duty is owed. This he did not do because it is not legally possible. The only two ways to avoid this legal impossibility are those set out above, **(A)** - hold that there is no duty, or **(B)** - hold that there is a duty and that therefore one needs to have a way of specifying to whom it is owed.

In Fraser Abella, in dissent, agrees with Winkler and opts for **(B)**. The other dissenters take different routes to **(A)**.

Whichever one of those two options you think is to be preferred, at least **(A)** and **(B)**, unlike **(C)**, have the distinct advantage of being legally possible.

Unfortunately, the Supreme Court majority in Fraser does **(C).** Or purports to.

In *Fraser*, the Court appears to have recognized the significant threat imposed by *B.C. Health*, after Winkler C.J.O. had begun to show what exactly a meaningful right to collectively bargain would entail. Instead of facing these legal truths, it dug in its heels. The majority in *Fraser* apparently accepts that having the courts answering all of these questions outlined in the above section, under direction of the three words "freedom of association", is undesirable. It therefore declared matter-of-factly that it was not constitutionalizing a system of collective bargaining or labour relations. But it did not realize that this is exactly what a constitutional right to collective bargaining, entailing correlative and affirmative duties on the state and employers, requires.

Rothstein J realized this, and believed *B.C. Health* should be overturned. Justice Deschamps realized that *B.C. Health* was really a respect case, and required no derivative right protection. Finally, Abella J. (like Justices Ball and Winkler) realized this, but believed that the Court meant what it said when it constitutionalized a right to collective bargaining, including a duty to bargain in good faith. These judges found, as a result, that the courts should start putting together the basics of a legal structure of a constitutional system of labour relations (statutory duty to bargain, majoritarian exclusivity, right to strike, and so on). Inevitably, it would be left up to future litigation to decide exactly what meat to put on those constitutional bones over decades, until we are left with some form of constitutionalized labour relations regime, from which democratically elected governments could not deviate. We think this is very wrongheaded, but at least it appears to realize what legality demands: an answer to the question 'who governs', in any specific interaction. The only decision in *Fraser* that did not even purport to attend to the strictures of legality was, unfortunately, the majority decision, which is the one we are left with.

So how does the majority in *Fraser* attempt to avoid the strictures of legality? First, as noted above, it tries to defer by reiterating that 2(d) does not require a specific legal regime, without recognizing that *some* specific legal regime is precisely what a duty to bargain in good faith requires, as demonstrated above. Second, it certainly appears to backtrack – no longer is there a constitutional right to collective bargaining entailing a duty to bargain in good faith (in section 17 terms), but rather a constitutional entitlement to good faith discussions, negotiations, dialogue, or what have you.[106] But, unfortunately for the Court, lessening the standard of the duty does not change the fact that one exists, and still leads to all of the above questions.

Finally, and most unfortunately, the Court attempts to treat all of the 2(d) cases discussed above as, of a similar legal kind. Only a real abandonment of law's basics can permit this. According to the Court, "(t)he decision in *Health Services* follows directly from the principles enunciated in *Dunmore*."[107] This is, as we have noted at length, just not the case. Recall that the test in *Dunmore* was – and arguably had to be[108] – something approaching the 'impossibility' of associating, in order to trigger a constitutional duty on the government to protect associating through the creation of derivative rights. By contrast, *B.C. Health* involved conventional state action interfering with the exercise of the freedom. It must be assessed on a much less onerous standard, otherwise direct government prohibitions or limitations on the freedom of association, however unnecessary or unjustifiable, with go unremedied. In conflating the two types of cases in *Fraser*,[109] we have a test of 'impossibility', 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.

If the standard of 'impossibility' becomes the default yardstick for conventional state interference with the freedom, along with the failure to provide derivative rights, we are in a heap of trouble. Indeed, this inattention to legal reasoning is already starting to show its teeth.[110] As explained elsewhere:

> (I)f the more rigorous formulation of the freedom (that it was 'impossible to associate' or that associating must be rendered 'meaningless' or 'pointless') is applied to strike cases (or other cases where direct government restrictions are placed on associational activity), it may serve to place an unduly onerous standard of breach on the claimant. Such a high bar has been soundly rejected with respect

[106] See Bogg & Ewing, *supra*, who spell out this potential backtracking in some detail.
[107] *Fraser*, *supra* at para 38.
[108] This point is further considered in Part V below.
[109] *Fraser*, *supra* at para 47 ("If 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.")
[110] The Court cannot say it was not warned. See Langille, "Rights-Freedom Distinction", *supra* at 59 ("The idea that there is a stringent test of impossibility to be deployed here is very odd if you think about it. It is inconsistent with our basic understanding of the *Charter*. If the government interferes with my freedom of speech—or religion—or any other freedom—the test is not, has not been, and should not be, "has the state made it impossible to exercise the freedom"? The test is, rather, whether the state has interfered with the freedom in a way that cannot pass s. 1 muster under some version of the Oakes test.")

to other fundamental freedoms, for the compelling reason that it would thereby immunize government action that directly and deliberately interferes with a fundamental freedom but does not do so to the point where it extinguishes the freedom entirely.

This is no idle concern. The restrictive reading of freedom of association appears to have already taken hold at the Ontario Court of Appeal, in three recent labour rights cases following *Fraser*. First, in *Independent Electricity System Operator*, a recent decision involving esoteric non-construction employer provisions, Winkler CJO relied heavily on the 'impossible to meaningfully associate' standard in articulating the applicable standard of breach. Similarly, in *Mounted Police* - the post-*B.C. Health* sequel to *Delisle* - the court allowed the Attorney General's appeal on the basis that "it is not impossible for the RCMP members to associate to achieve collective goals". Finally, the same approach was followed in a case challenging wage restraint legislation, where the Court called it the "effectively impossible" test for a violation of section 2(d). Moreover, it stated that

> 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.

I do not here intend to challenge the substantive outcomes in these cases, but merely to point out that the 'impossible to associate' standard may not be far from becoming the *exclusive* touchstone for establishing a violation of freedom of association. The concern is that the application of an 'effectively impossible' test with respect to government action directly impinging upon fundamental freedoms is wholly inconsistent with the Court's section 2 doctrine, and constitutes an unduly burdensome standard of breach.[111]

All of this has occurred largely as a result of inattention to basic legal reasoning, and the requirement of backing away from a legally indefensible position. Its further consequences are yet to be seen. And it only becomes increasingly indefensible with time: like all untruths any open adherence to it has to be justified by further untruths.

We can see now that the large error in *B.C. Health* and *Fraser* is just not in failing to appreciate the distinction between rights and freedoms – a most basic legal idea. The Court also seems unaware of the very idea that the question of "should we create a derivative right to protect the freedom?" is a completely separate question from "has the government interfered with the freedom?" If we attend to our basic building blocks this is all very clear.[112]

---

[111] Oliphant, "Labyrinth", *supra* at 18-19, citing *Association of Justice Counsel v Canada (Attorney General)*, 2012 ONCA 530 at para 32. On this point, see also Langille, "Rights-Freedom Distinction", *supra* at 59; Jamie Cameron, "Due Process, Collective Bargaining and s 2(d) of the *Charter*: A Comment on *B.C. Health Services*", (2009) 13 CLELJ 323 at 344-346.

[112] It might be noted that we have gone from a world in which it was plausibly argued that majoritarian exclusivity may violate the freedom of dissenting individuals (see David Beatty, "Constitutionalizing a

The Court in *B.C. Health* simply drives through the intersection between rights and freedoms without knowing it. And having passed through it, it hits the breaks in *Fraser*. Both legal driving acts are dangerous. Unlike in freedom, respect, conventional state action cases, where we already know the answers to the questions to these questions, where there is a derivative right, we have to ask to whom is it owed? Upon whom must the government place the duty? To what conduct is it directed? These questions are ignored completely by the majority in *Fraser*, but this is not possible in a world where there is always law – where there always a complete distribution of rights and freedoms. If the court states that the common law freedoms are not sufficient in the context of freedom of association as exercised in the workplace, it must give us an alternative. In other words, it can choose door (A) – no right to meaningful collective bargaining, or (B) – a comprehensive mechanism so that we can determine the content of the state obligation, with respect to the content of the right, the right-holder and the duty bearer. Winkler C.J.O. was right. Door C does not exist in law.

In other systems of labour law (in place in most other parts of the world) these question do not arise because they do not have to – because there is no right/duty to bargain. There is some complete and complex and coherent set of rights and freedoms in place in these other jurisdictions (comprising the vast majority of ILO member states), as there is in Canada. Just a different one that hangs together – i.e. conforms to the grammar of legality – is a different fashion than ours. As was also true with the old common law regime in Canada, which our legislation completely and comprehensively removed from our law for those covered by the legislation. The point is this – once you start to use the constitution to alter or enshrine central elements of the system such as the duty to bargain, you are committed to the long haul, to the package deal. It is, it will be recalled, a "zone". The alternatives are "no go" or "go all the way". That is because legality demands it. There will be an answer to all of the question which will come up once you start down the path. It is like getting on an escalator – the first step is the only one that counts. After that you are along for the ride, if you want to maintain some semblance of legality.

f) Can we avoid legality?

The question of whether and when to impose rights derivative of a freedom is a difficult one, but as the above demonstrates, not all derivative rights are the same. *Dunmore* created derivative rights, but did so according to a well-entrenched constitutional remedy

---

Labour Code: Creative Uses of Comparative Law", (1986-1987) 8 Comp Lab LJ 211) – a claim the Court has rejected, if barely, in cases like *Advance Cutting* and *Lavigne* – to a world in which it is can be said that the constitution requires the state to impose majoritarian exclusivity in order to make the freedom of those individuals who want to associate "meaningful" (this was essentially the conclusion of Justices Abella and Winkler, as outlined above). The former is a meaningful use of the legal term 'freedom', as we have been using it here – the idea is that each individual may decide whether to associate or not, and the state should not interfere with that freedom without a sound justification. This does not require the conclusion that the constitution forbids the limitation of the legal freedom in this way in the service of other objectives, but at least that is clearly the subject of dispute. The latter, involving a comprehensive scheme of rights and duties on employees and employers alike, in which the state is considered to be under a constitutional obligation to require association of dissenting individuals, constitutionally permissible as it may be, is not. It is a different legal animal, and should be treated as such.

(striking down provisions in legislation), and with defined contours answering all of our questions. *B.C. Health* and *Fraser* went much further. To see this more clearly, we should again remind ourselves that whatever the effect of the *Charter* on the distribution of rights and freedoms in a given jurisdiction. We must know at any given moment the answer to the question of 'who governs' any specific interaction. It appears that one answer to this claim appears to be: no, we don't. Consider this description by Bogg & Ewing, praising "the 'dynamic' aspect of rights-based duties".

> There is no reason to think that the fundamental right to collective bargaining is logically coupled with a duty to bargain in good faith. Contrary to this presentation of duties as fixed logical correlatives, duties have a more dynamic and evolutionary quality than this picture suggests. States have a vast range of techniques at their disposal to promote the realization of a right to collective bargaining.[113]

This is in one sense true and obvious – states do have a "wide range of options" at their disposal, including the Wagner Act model (and all the other models used by the vast majority of ILO members), in order to instantiate some form of freedom of association. But what is not true is that a legal system – and a court interpreting the constitution - does not have to be specific about the answer to every question about "who governs?" Put differently, it is of course 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 – but it must be logically coupled with *some* duty if it is to be a right.

A 'right to collective bargaining' placing the state under a 'duty to promote the realization of the freedom' does not seem to be a legal creature; it is a distinctly political one. A legal right placing a duty must be referrable to some range of conduct within which the right is operative. Otherwise, it is not a legal right-duty relationship, it is something else entirely, perhaps an aspiration of some sort. Whatever powers the *Charter* gives to the judiciary, the power to dictate a 'narrative' or 'aspirations' as a constitutional imperative is not one of them.[114] Perhaps Bogg and Ewing have in mind the idea of a "constitutional dialogue" between the court and the legislature.[115] This is an interesting idea – as far as it goes. But in a legal system the dialogue may be ongoing – but never the law. For the law the dialogue is always concluded now. The law must have

---

[113] Bogg & Ewing, *supra* at 399.

[114] Such a *Charter* of vague aspirations 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. The clearest example is the South African constitution. See e.g. Eric C Christiansen, "Adjudicating Non-Justiciable Rights: Socio- Economic Rights and the South African Constitutional Court" (2007) 38 Colum Hum Rgts L Rev 321; Cass R Sunstein, "Social and Economic Rights? Lessons from South Africa" (May 2001). U of Chicago, Public Law Working Paper No. 12 (May, 2001); Mark Tushnet, "Social Welfare Rights and the Forms of Judicial Review", (2003-2004) 82 Tex L Rev 1895. While such an exercise in quasi-adjudication is required in such cases, explicitly contained in the constitution, there seems to be no good reason to import the uncertainty here.

[115] See e.g. Peter Hogg, Allison A Bushell Thornton & Wade K Wright, "Charter Dialogue Revisited – Much Ado About Metaphors", (2007) 45 Osgoode Hall LJ 1.

an answer now to very case. And it does. Legal dialogue consists in exchanging complete accounts, not vague hints. That is why the remedy in *Dunmore* is written the way it was. And the problem, pointed out by Robert Charney, with Winkler CJO's remedy in *Fraser*, directing the legislature to enact a scheme of legislation.[116]

The case of *SFL v. Saskatchewan* provides a very useful illustration of where we are after *B.C. Health* and *Fraser*, and we can watch in real time how legality demands answers to the questions Bogg & Ewing believe need not arise. As noted above, Justice Ball at the Saskatchewan Court of Queens bench found that a right to strike was a necessary (and therefore now constitutionally entrenched) component of meaningful collective bargaining. But leaving aside the right or freedom to strike, which was its principal focus, the union also challenged changes to the Saskatchewan labour relation legislation, helpfully summarized by the Court of Appeal as follows:

> The *TUA Amendment Act* effected three major sets of changes to *The Trade Union Act* which are relevant here. First, it revised the manner in which a union becomes certified as a bargaining representative. Second, it modified the process for decertifying a union. Third, it amended the provisions which restrict communications by employers with their employees. Each of those points requires some further explanation.

Although each set of chances raises its own difficult questions, we will confine our discussion to the first issue (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, and directed that a vote be conducted where the support was between 25-50%, requiring cards to be signed within 6 months of the application for certification (if support was below 25%, there was no entitlement to a certification vote at all). The *TUAAA* eliminated the automatic certification where employee support was greater than 50%, increased the minimum level of support (from 25% to 45%) required in order for an entitlement to hold a certification vote, and decreased the period of time within which cards can be signed (from six to three months). Do these changes violate freedom of association by insufficiently securing the derivative right to meaningful collective bargaining? Perhaps Bogg & Ewing would say no, because a certain amount of leeway must be provided to legislatures to decide how to fulfil the constitutional right to collective bargaining:

> In constitutionalizing a fundamental right to collective bargaining, then, the government is still left with a wide range of choices as to how it will discharge its positive duties of fulfillment. In other words, the labor code will remain to be drafted by the elected political representatives.[117]

This is all well and good, but eventually, the legislative rubber must hit the constitutional road in a state governed by law. A constitutional right must mean something, and as we know, where there is a right there is a remedy. Sooner or later, the courts will necessarily

[116] Charney, *supra*.
[117] Bogg & Ewing, *supra* at 399.

be drawn into the questions outlined above: who possesses the right, who owes the duty, and with respect to what. *SFL* helps us see that.

Perhaps one can say with some confidence that the modifications to the system of certification in the *TUAAA* – to say nothing of the other changes made to that specific legislation, and to say nothing still of any number of other conceivable changes to legislation elected governments may make – is perfectly permissible, and denies no one their constitutional 'right' to collective bargaining derivative of freedom of association. But what if the changes were more drastic? What if, in order to be certified, a unit needed to demonstrate 75% support in one month? Or 90% support in a week? Unanimous support in a day? What if a system of certification, providing a union which can demonstrate sufficient support exclusive bargaining rights to represent both supporters and dissenters alike, was eliminated entirely? Are these permissible modifications – i.e. would such a scheme as exists in most places in Europe fulfil the governments obligation to protect freedom of association? Why or why not? And how do we know? Each of the other issues raised in that litigation, and a nearly infinite number of others, are equally difficult. The point is that while the Court may legally permit legislatures some margin of appreciation, it will eventually have to decide the outer limits of a meaningful right to collective bargaining.

Requiring answers to these questions is simply the requirement of legality – if we are to read 2(d) to confer rights, placing a duty on governments to enact legislation to protect the freedom against private actors, we must be clear on what type of protection they are required to enact, with respect to what and for whom. Once we institute a constitutional right to meaningful process of collective bargaining, entailing a duty on employers to bargain (or negotiate, or discuss, or consider)[118] in good faith, we must have an answer to all of these questions. Ontario Chief Justice Winkler saw this, and began to flesh out the details. He found that such a constitutional right must include answers to whom the duty is owed (through majoritarian exclusivity) and what the content of the duty was (a full statutory duty to bargain in good faith, presumably in line with the duty to bargain that exists in labour relations legislation across the country). As alluded to in the section above, however, each of these branches splinter off into an infinite number of other questions, all of which must ultimately be determined with reference to the constitution, the guidance it provides consisting entirely of the words 'freedom of association'.

Given the constraints of legality, we can see that rights and freedoms – be they constitutional or otherwise - are not dynamic, except in the sense that legal actors can change them, by, for example, replacing a freedom with a right and vice versa. This is what the Wagner model did – it replaced what were formerly freedoms (to bargain, to strike, etc.) with a scheme of rights and duties. It is also what *Lochner* did – it replaced statutory legal rights with background common law freedoms, under the guise of constitutional doctrine. But in a functioning legal system, 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, what duties it

[118] As noted above, while *Fraser* may have watered-down the *content* of the right and duty, this does not absolve the courts from answering all of the above questions.

places on them, with enough specificity so that a meaningful conversation can take place to determine whether the duty has been fulfilled.

There is another, related point here that deserves attention. That is the suggestion that a citizen may have a right to any of "a vast range of techniques at (a legislature's) disposal to promote the realization of a right to collective bargaining".[119] While this may be the best defence imaginable for a decision like *Fraser*, it is inadequate, as it acquiesces in a conflation between narrative and legal grammar. A narrative of labour law can tell us that collective bargaining is a good thing and that it should be promoted, but we need to employ a grammatically sound conception of the law in order to achieve it. This is what labour relations legislation does, across the country, in great detail. To ignore the need for this legality is the type of thinking that has gotten us where we are after *Fraser*: "knowing" that there is a 'right' to collectively bargain, but not knowing its content, the right-holder, or the duty-bearer. That is, knowing where the court says we want to go, without knowing how to get there.

Thus, when Bogg & Ewing say that "(d)uties evolve and change over time, and are sensitive to the texture of social, economic, institutional and cultural circumstances", all that this can mean is that the Courts and legislatures can change the content of such duties. As with Schrödinger's cat, we must eventually open the box to see what it contains. At best, this sense of 'dynamism' means that we have to answer and re answer these same constitutional questions on a pretty regular basis, again and again, not that we don't need to answer them.. A reluctance to consider the shape of our legal building blocks is problematic in all spheres, but particularly 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 precision. Legal scholars should attempt to hold them to this standard and help them meet it.

Often, it may be difficult to separate political preferences from constitutional interpretation, and to ignore grammatical mistakes if they lead to what are seen as positive policy developments. But the difficulty does not mean the task should not be undertaken, for all of the reasons stated above. There is, as we have seen, great risk here.

g) Conclusion

At this stage, we can see more clearly what distinguishes the derivative right conferred in *Dunmore* from the derivative right conferred (although not requested) in *B.C. Health*. The obvious answer is described in some detail above. In *Dunmore*, it was clear who possessed the right (farm workers), it was clear who owed the duty (given our idea of diagonality, the state), and it was clear what the duty was (to provide unfair labour practice protection – i.e. to modify the background rules to confer a right on agricultural workers and place a duty on private employers). As we have seen, this remedy is legally possible, because the unfair labour practice protection also provides clear rights (to all farm workers as individuals), and clear duties (on all agricultural employers), with respect to defined behavior (intimidation, coercion and discrimination against employees on the basis of unionization). It requires the government to provide discrete protection for

[119] Bogg & Ewing, *supra* at 399.

discrete activities. It does read the constitutional guarantee of "freedom of association" substantively, by declaring that the preservation of the 'freedom' requires – as a matter of constitutional law – the imposition of derivative rights and duties. However, it is simply the section 2(d) equivalent of section 15 cases like *Vriend* – it is a constitutional equality remedy, involving the striking down of an exclusion (or the reading in of an inclusion). It is legally akin adding another prohibited ground to discrimination statute. It doesn't require a complex 'zone' built up around it to answer the questions of what conduct is protected, who possesses the right and who owes the duty. By striking down the exclusion, the Court said that these questions have already been answered by the legislation in place, or something comparable.

B.C. Health is another kettle of fish entirely, as demonstrated above: once you have the right to meaningful collective bargaining, this right requires the legal creation of a judicial labour code, which among many other things demands the identity of the collective right-holder, if any semblance of legality is to be maintained. As noted above, Bogg and Ewing provide a defense of *B.C. Health*, or at least an offence against its detractors. They seem to believe that we can wish away all of the questions entailed by providing a right to collectively bargain with concomitant duties, by leaving it up to legislatures to fill in the details. This is not possible. Our commitment to the idea of law and legality tells us the line on each of these cases must be, and always is, drawn somewhere, eventually – deference to the legislature is all well and good, but can only go so far, because at the end of the day, the right must have *some* content which must be determined. This is not something which can be avoided. Law demands this.[120]

The view of the Court – along with Bogg and Ewing - may be that the Court can issue very vague instructions to the legislature – employees have a right to meaningful collective bargaining – and that there can be a hiatus in the law until the legislature responds. It may do so in one of a number of ways, at which point that response will be challenged and the Court will again decide whether this meets its vague direction, and so on. This would be elevating the Court to the status of a principal and authoritative advisor, a narrative-setter, who may at any point, undefined in advance, say 'good try, very close, but not quite what we had in mind'. This is not a process of constitutional adjudication. The courts duty, even in constitutional cases, is to decide cases. That is how legal structures– as opposed to political narratives - emerge, on a case-by-case basis.

[120] This point is demonstrated by the proliferation of litigation following *B.C. Health*, where a quick survey shows the following issues were impacted by the new right to meaningful collective bargaining: the determination of essential service positions for the purposes of strike action, exclusions from collective bargaining (from casual employees to marine captains and engineers horticultural employees), the state 'contacting employees directly' instead of through their union, general compensation restraint guidelines, a decrease in scheduled pay that did not arise from a process of collective bargaining, various methods of bargaining unit restructuring, public service delivery standards, certification application standards and procedures, sector specific bargaining frameworks, carving out bargaining units for anti-corruption officials, the Transportation Security Clearance application process, and so on. See generally Oliphant, "Labyrinth", *supra* at 19-21. This flood of litigation was simply legality reasserting itself, to fill the legal void created by *B.C. Health*. At a certain point, on each of these questions, constitutional answers must be provided. This is the requirement of legality, and attention to grammar helps us identify this.

Finally, in the world of legality there not only the issue, canvassed above, of whether the legislative response was adequate to meet the courts conception of 'sufficient promotion of the right' – there is also always the issue – what if the legislature does not respond at all? The reason *Dunmore* did not create such a hiatus in the law is because the real remedy is to strike down the exclusion – while giving the government time to do what is required and plainly specified as constitutionally valid as an alternative. What that meant was that, until the constitutional invalidity order went into effect, the common law would continue operate to govern the agricultural workers relationship. If the legislature passed legislation – which it did – then that would govern the interactions. But if it did not within the time frame dictated by the Court, the exclusion would be struck down, and the *Labour Relations Act* would govern the employment relationship, providing the claimants in *Dunmore* the derivative rights sought. There must be an answer in place. And there was.

The possibility and consequences of the legislature not responding is not hypothetical. This is exactly what happened to agricultural workers after *B.C. Health* – the Court said that all Canadians have a constitutional "right" to collective bargaining, but the Ontario government left in place a scheme which on any plausible theory of legal interpretation protected no such right for agricultural workers. There was simply no legislative response to the Court's decision in *B.C. Health*. Hence the *Fraser* litigation, which was an exercise in pure legality. The question posed in *Fraser* was: does the Legislation passed after *Dunmore* conform to new demands of *B.C. Health* to alter the background common law rules, or doesn't it? And though we might (we certainly do) agree with Abella J that is does not – the majority says it does. This is a legal judgement, and it was one required by the combination of *B.C. Health* and the lack of a legislative side to the dialogue.

But, to make the point even clearer – even if the legislature had responded post *B.C. Health* with the measure it had put in post-*Dunmore*, the same legal issue would have come up – and been litigated – does this legislation meet the new legal demands or not? By some process, we must answer all of the above questions, because legality demands it.

It is for this reason that *Delisle* is a bit of a sleeping giant here – waiting to make a rather large point. It will be recalled that in *Delisle* the employer was the government and that even though there was no legislative duty to act to protect the employees, the employees were said to be covered by the constitution "directly", in the sense that they had unfair labour law protection rights against their government as an employer. That is, the exclusion of RCMP officers from the generally applicable labour relations legislation was not unconstitutional as such, however if the government as employer acted in a way that interfered with freedom of association, this state action would be unconstitutional. This has, if you think about it, rather interesting implications. Here there is no possible dialogue – no one to pass the generality to for particularlization. The Court did not, as in *Dunmore*, determine that the legislative exclusion was unconstitutional, but rather stated that the government *as employer* could not act to interfere with the freedom. In this sort of case there is only the court to decide what action of the state as employer is a violation of freedom and what is not. It is the only game in town. There is no dialogue – just the court creating a law of unfair labour practices and the rest of a judicial labour code (including now a duty to bargain in good faith), and enforcing them.

V. STARTING AFRESH – A POSITIVE WAY OF THINKING ABOUT FREEDOM OF ASSOCIATION

a) Bringing Equality to Bear

We have covered some legal ground – but almost all of it in order to come to terms of what the Supreme Court has told us about freedom of association, and all in order to show what is so problematic with what we have been told. We have also spent some time explaining what we see as also problematic in what defenders of the Court's product, such as 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. It may, if interpreted as such, confer rights, a la *Dunmore*. If this can be done – if we abandon the idea that all 2(d) protects is the legal freedom - it can be read to confer many other legal entitlements. We must also agree, as stated before they wrote,[121] that while our commitment to legal grammar can tell us what is going on, that commitment cannot tell us what *should* go on (although it can go some way in that direction). 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. And here, as we have seen, our main allies are our ideas of institutional competence and legitimacy, tied to our ideas of law and legality, rather than our pure and abstract legal theory. This is to say that, as law, any viable constitutional doctrine must comport with the other things we know about the law.

We have seen as a result of all of this that *Dunmore* is, in contrast to *BC Health*, a result which does not violate what we know about law because – its alteration of the common law distribution is amenable to judicial efforts. It is discrete – in fact the overturning of one application of the old common law ruling in *Christie v York*[122] on freedom of contract. It gives a concrete right to an existing right holder (the employee) against an existing duty bearer (the employer). We have discussed this above. Just as we have discussed the very large ways in which *B.C. Health* is different. When you give a right to collective bargaining you really are legally stuck with defining the collective, defining free collective bargaining, and defining the other party to the collective bargaining process (the employer). It is these questions and many others to which many, many complex and interlocking provisions of our comprehensive labour codes are directed. Everyone seems to agree that judges cannot write such labour codes. Yet this is what their own holding in *B.C. Health, understood as a legal act*, condemns them to. And it is this truth that they attempt, unsuccessfully, to avoid in *Fraser*. And as we have been at pains to point out – we got into this mess by not thinking like lawyers, but rather like authors of dynamic narratives.

---

[121] See Langille, "Freedom of Association Mess", *supra* at 199 ("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"")

[122] *Christie v York Corporation*, [1939] SCR 50.

As a result of the position they defend, we don't know what Bogg & Ewing's conception of 2(d) it. They appear to believe it can be read to protect or guarantee, along with freedoms, any number of claim rights, positive and negative, liberties, powers, immunities, possessed by either individuals or collectives, possibly both, with respect to any range of undefined associational activities, imposing duties on any number of parties, both state and private parties.[123] This is not so much a theory of how a guarantee like section 2(d) should be interpreted, as the scrupulous absence of a theory. As we have seen, we do not think this is the way the legal world can or does work.

But we can agree with them that, as the evidence from the varied legal practices of all of the members of the ILO make clear, that the way freedom of association is legally expressed in various legal systems around the world reflects very different and deeply embedded understandings of how to put the fundamental legal building blocks together into a coherent legal structure. There are many different possible structures – all coherent and conforming (at least most of the time) to the requirements of legality. A very few have a duty to bargain; most do not. There are innumerable other differences all of which make comparative labour law both interesting and difficult.

We have also noted that there is a way to constitutionally achieve, in a way which respects the requirements of legality, and much else we hold dear including ideas about the role of democracy, what Bogg and Ewing seem to desire – a "contextualized", fluid, evolving, dynamic, constitutionally guaranteed set of labour rights. We can have this, even in the difficult cases like Canada, in a way that does not require the Court to hash out an entire labour code. This is because we have another fundamental constitutional value in play – the idea of equality.[124] As explained elsewhere:

> [T]he basic, and very expensive, flaw in the Court's reasoning is that the Court has based the revolutionary results in these cases on s 2(d) of the Charter. This is a mistake in reasoning because these cases are, in law, first and foremost, s. 15, ie equality cases. (...) If the court had taken the simple path of s.15 then we would have all of the results we have had, and should have had, in a much less dangerous way. All that the court was required to say in these cases is that while we might not know exactly what "freedom of association" means in the constitutional abstract, we do know that the Canadian state has instantiated that fundamental freedom in a certain way for most Canadians – but not for these folks. That is, our problem is that we have an unequal distribution by the state of the protection of a fundamental freedom. That is something that free and democratic states just cannot do. And in these cases we can simply say: The state cannot respect and protect a fundamental freedom for some – and not for others. (Think of freedom of speech – or freedom of religion – as parallels). And if a state does purport to distribute respect and protection of a fundamental freedom unequally that puts a very heavy burden on the state to justify its making the freedom real for some people but not others. That is really what was at stake in these cases. This was really the argument, really the holding, and really the

[123] See Bogg & Ewing, *supra* at 396-408.
[124] See also Peter Hogg, "Equality as a Charter Value in Constitutional Interpretation" (2003) 20 SCLR (2(d) 113.

> remedy in all of our leading cases in the 2(d) revolution – these folks want what everyone else has and that is what these decisions give them: protection of their fundamental freedoms according to what others have. The advantage of this approach is that you do not end up doing what Winkler did – constitutionalizing the whole statutory scheme.[125]

So, to go back to the basic assertion we make at the outset of this paper, the real and fundamental question on our cases is the following one: what is the relationship between our detailed statutory frameworks protecting and legally instantiating the exercise of constitutional freedoms and the constitutional guarantee itself? The very basic thought necessary to answer this question legally and adequately is - when you have an intricate, coherent, comprehensive, and interwoven statutory instantiation which "occupies the legal field" (the zone) of freedom of association for workers (ie our local "contextualized" version of freedom of association for workers) in place – as we do - then the first problem is *not* "what does freedom of association mean in a contextualized way for Canada?" That is because we have the answer to that question at hand. The answer to that question is - for now - subject to a rather broad consensus. Rather, the question in *Fraser* is – why are these workers excluded from that regime available to other workers? That is, the primary constitutional problem here is not "what does freedom of association mean in the workplace?" – but, rather, why is the known answer to that question not applied equally to all? This is the obvious legal way out of the mess we are in.

It will be noted that, in bringing equality to bear, no issues of details of legislative drafting arise because they are all solved. As a real bonus, legality prevails or rather does not surface as a problem. Where the question is one of under-inclusiveness – arbitrarily depriving individuals of the protection of their constitutional interests - it should, and typically is, solved through a constitutional right to equality. Notice the phrasing in the *Charter*: "*everyone* has the *right* to the *equal protection* and *equal benefit* of the law without discrimination". A more concise encapsulation of what the farmworkers were requesting, in both *Dunmore* and *Fraser*, is difficult to imagine. This is far more than the mere constitutional duty to 'promote' collective bargaining, whatever that might turn out to entail. Agricultural workers are entitled to the full, substantive, complete scheme of rights and duties instantiating freedom of association in the Canadian labour context. And, once again, all in full conformity with our dedication to legality and our conception of the legitimate and possible judicial role. This is the easy way. It is the right way.

Nevertheless, we must take it as an unfortunate fact that, for now,[126] the equality argument is not available to us.[127] And even if it were, we still have to go back and fix

---

[125] See Brian Langille, "The Trilogy is a Different Country", Ottawa L Rev, forthcoming.

[126] But there are straws in the wind – see the reasons of Justice Deschamps in *Fraser*, *supra* at paras 318-319 ("*Dunmore* was concerned with economic inequality. It was based on the notion that the *Charter* does not ordinarily oblige the government to take action to facilitate the exercise of a fundamental freedom. Recognition was given to the dichotomy between positive and negative rights. To get around the general rule, a somewhat convoluted framework was established for cases in which the vulnerability of a group justified resorting to government support. I agree with B. Langille, "The Freedom of Association Mess: How We Got into It and How We Can Get out of It" (2009), 54 *McGill L.J.* 177, that this detour appears to have been an artifice designed to sidestep the limits placed on the recognition of analogous grounds for the

section 2(d). That will be the objective of the rest of this Part. Not by reacting to what the Court has done – but by thinking, in conformity with the very idea of legality, the basic legal building blocks necessary and available to us, and our other legal concerns about competence and legitimacy. In short we seek to map out a viable future for 2(d) – should the occasion come where we really do need it (something that has not yet occurred in our leading cases.)

b) Beyond Equality: Protecting Freedom

Here is the way we would think about 2(d), from the ground up and in a legally coherent manner. First of all, most can agree that 2(d) means that workers must at the least have the *freedom* of association. The substance of this entitlement is the legal freedom[128] as explained above – what I am free to do and saying nothing in particular about any duties in others in that regard. Thus, government interference with this freedom – that is, taking a bat to the exercise of the freedom – constitutes a violation of section 2(d). This would, on anyone's definition, mean that the government cannot *prohibit* or otherwise limit joining an association.

---

purposes of s. 15."). See also the decision of Ball J, *SFL*, SKQB, *supra* at para 55, where he remarks on the cogency of such arguments.

[127] Of course, treating cases like *Dunmore* and *Fraser* as equality cases would require a sea-change in our section 15 doctrine. We appreciate the concern that a general equality guarantee - unconstrained by the notion of 'prohibited and analogous' grounds - would be a doctrine of unfathomable scope. That is because the principal objective of legislation is to, in a sense, 'discriminate' against people, and treat them differently, based on some factor or set of factors. The *Charter* and the Courts have identified certain criteria for inclusion and exclusion that are constitutionally suspect - i.e. the prohibited and analogous grounds - which have led to section 15 as being treated, exclusively, as an anti-discrimination guarantee. This is a very big part of the equality picture. However, we think there is another part of the equality picture, in particular that the state should not be able to arbitrarily deprive certain individuals of their fundamental and constitutionally protected interests, whether or not they do so on grounds normally considered 'suspect', and whether or not they do so in ways that most typically evince some kind of prejudice or stereotyping (e.g. the prohibited and analogous grounds). We think that doctrines in the United States and Europe - both of which tie their equality guarantee to fundamental constitutional interests in different ways - may provide fruitful examples to draw on in this regard. This is a long "proof", but it is one we hope to examine in a future paper.

[128] 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. Thus, 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. The citizen would possess the immunity, and the government would be under a disability preventing it from changing the legal relation, such that what is left in place is the individuals' freedom with respect to his or her choice to express, associate, pray, etc. From the perspective of *vires*, it might be said that, as a result of the immunity, the government does not have the power to interfere with the ambit of the freedom. See e.g. Sheldon Leader, *Freedom of Association: A Study in Labor Law and Political Theory* (New Haven: Yale University Press, 1992) at 12-16. For a discussion of Hohfeldian analysis as applied to constitutional law, which comes to the same conclusion with respect to constitutional immunities, see Allen T Rourke, "Refuge From a Jurisprudence of Doubt: Hohfeldian Analysis of Constitutional Law" (2009) 61 S Car L Rev 141. 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).

But on our view there is a second, slightly more difficult question as to how we know what, exactly, the state is taking a bat to. In the *Trilogy*, Chief Justice Dickson found, with respect to the freedom to strike (as a species of freedom of association), that the impugned legislation in that case 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."[129] But how to do we know that?

Again, on our view, the crispest and 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 C.J., and endorsed by McIntyre J:

> if 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[130]

This is, we think, just right – it is simply the best available associational equivalent to the analysis deployed with respect to other fundamental freedoms.[131] However, both the Chief Justice and Justice McIntyre, in different ways, failed to take the concept to its logical fruition, bedevilled by the irrelevant distinction between qualitatively and quantitatively different activities.[132] Typically, almost by definition, collective activity is both qualitatively and quantitatively different than individual action. That is the point of protecting associational activity – to permit an increase in quantity to lead to a qualitatively different result. Professor Pothier has put this point well, in applying the idea to strike action:

> In large measure, it is precisely because collective action is qualitatively different from individual activity that people choose to engage in collective action; it is often the collective exercise which turns ineffective action into effective action… the real difference between an individual quit and a collective strike as a bargaining tactic is that someone engaged

---

[129] *Alberta Reference*, *supra* at para 98.
[130] *Ibid*, at paras 89 and 175, respectively.
[131] No one would say that by limiting a certain content of speech, for example, the government is not hindering expression, but is rather just hindering one *outcome* or *activity* of expression. It is well understood that the outcome very much is the expression. Likewise, the participation in activities not foreclosed to individuals is simply the outcome of association.
[132] Dickson CJ thought 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 covered if not performable in the same way as individual activities. Both of these self-imposed limitations on the parallel liberty approach are unnecessary. See Pothier, *supra* and Oliphant, "Labyrinth", *supra*.

> in the latter has a much greater chance of succeeding, and a much lesser chance of ending up jobless. Is this difference not precisely the point of protecting freedom of association, namely to enable people to be more effective by acting together?[133]

So, every individual in Canada has the freedom of association, which (on the theory presented here) means that such individuals are immune from government action that limits that freedom by placing restrictions on collective action not placed on individual action. What amounts to a limitation on the freedom may not always be easy to sort out on the margins, but it is the 2(d) equivalent of what the Court has been sorting out with respect to sections 2(a) and 2(b) from the get-go. 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 individuals conducting the same activity alone, it has violated 2(d), and must justify that violation under section 1.

So too, in our view it would be a bad misreading of the *Charter*, and of the very idea of freedom of association, to have one 'freedom test' for unions and another freedom test for book clubs and a third for criminal gangs.[134] The government cannot – in a non-trivial manner – 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 2(d), and the government would have to justify those restrictions. By contrast, individuals are not free to partake in criminal activity or violence – so prohibiting that activity for groups raises no constitutional issue. So, when it comes to the freedom itself, contextualization is exactly wrong.[135]

On this, our, view, as we have explained here and elsewhere – we see that there is a freedom to strike and a freedom to bargain collectively. This is because these are things I am free to do as an individual (negotiate terms of a possible deal with a potential employer, and not go to work if we do not make a deal). This is all so terribly straight forward, in our view, but critical to basic freedom of association for Canadians.

All of this is the easy part.

c) Beyond freedom to derivative rights.

Now the hard part - how to identify and deal with the 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 lays bare our options. We cannot have derivative constitutional rights in the ether – if the creation of a derivative right creates constitutional questions, these must have constitutional

[133] Pothier, *supra* at 378.
[134] This 'neutrality' point is addressed more completely below.
[135] As explained in more detail below, we think that Rothstein J is exactly right on this point. See *Fraser*, *supra* at paras 203-215.

answers. But if we open the door to derivative rights, how do we know when the 'substantive freedom' has been fulfilled? How far must the state go to ensure in protecting and facilitating freedom of association? To what extent are the freedoms of others, generally available to all in exactly formally equal way, to be sacrificed or traded off in the name of freedom of workers?

As we have seen, employing a threshold 'state action' requirement in the these cases will not answer our questions, unless we are to consider the common law to not be law, or the state enforcement mechanism engaged in common law disputes (courts, police, and so on) to not be state action, and therefore completely beyond the influence of the constitution. If there is always law of some sort at play, any notion that one aspect of the law (statutory) is in some sense subject to constitutional influence but another (common law) is not, is a distinctly arbitrary line to draw. Section 52 states that "*any* law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect", and this must include the common law.[136]

However, in our view and as also noted above, 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 *B.C. Health*), indirectly infringing a freedom through the common law (as in *Pepsi-Cola*), or failing to provide a protective right (as in *Dunmore* and *Fraser*)? In particular, we must know what the individual is claiming: a right or a freedom, and if a right, a right against whom? As we have seen, these are different legal questions and a lot will depend on which one we are asking in any given case. As stated elsewhere:

> Although the Court has at times shied away from strictly categorizing guarantees as 'rights' or 'freedoms', there can be no doubt that the questions "can the state prevent me from building a church?" or "can the government criminalize my political message?" are categorically different than "must the government purchase a parcel of land for my church?" or "must the legislature force private broadcasters to disseminate my message?" The former questions ask 'what freedom do I have?', while the latter ask 'what rights do I have?' While both state action and state inaction can operate to effectively 'preclude' the meaningful exercise of one's freedom, depending on the circumstances, the two are and must be treated differently as a matter of constitutional law. Simply stating that the line between 'rights' and 'freedoms' can occasionally be a hazy one cannot obliterate the line entirely.[137]

---

[136] As recognized in *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at para 25 ("To adopt a construction of s. 52(1) which would exclude from *Charter* application the whole body of the common law which in great part governs the rights and obligations of the individuals in society, would be wholly unrealistic and contrary to the clear language employed in s. 52(1) of the Act.")

[137] Oliphant, "Labyrinth", *supra*. We would add that there is also a difference between the creation of "positive" rights as against the state (e.g. that the state must invest in a system of labour tribunals or fund impecunious associations) and "positive" rights against other citizens (i.e. derivative rights as outlined in labour relations legislation, possessed by employees as against employers). The only cases we have seen in Canada in the context of 2(d) and the provision of labour rights are the latter sort. We mention this only because in many discussions the use of the word "positive" rights can be positively ambiguous.

But when we come to the real issue in *Fraser* – the creation of derivative rights against other private actors (via "diagonal" application of the *Charter* as described above) – what is the right way to think about this sort of demand that the usual background rules be altered? That the pre-existing equal freedom to contract be altered? That the freedom of one must be altered to protect the freedom of another? Recall that the question we are asking is not 'is this a good idea as a matter of policy?' but 'is this constitutionally required?'[138]

As we noted above, constitutionalizing 'substantive freedom', in so far as it provides affirmative rights exercisable against the state for failing to adequately modify the common law and effectively creating the constitutional obligation to create rights as against other private parties, or for failing to redistribute resources necessary for the 'meaningful' exercise of a freedom, is a vexed matter. Instead of the artificial 'state action' problem, we can call this the 'substantive freedom' problem, for the sake of clarity for the discussion that follows. So, that is the hard question. What is the answer?

There are 3 familiar and possible answers to the question 'when are derivative rights, imposing a duty on the state to modify the background common law entitlements, constitutionally required to protect or facilitate substantive freedom?'

i) The 'Never' Answer

One theoretically viable answer is to say "never". Such an answer could be based on the difficulty of closing the 'substantive freedom' door, and drawing principled distinctions between a constitutional requirement imposed on the state to create derivative rights in some cases and not others. This answer would seek to preserve the distinction between 'freedom' and 'derivative rights facilitative of the freedom'. It sees the argument that all conduct, private or otherwise, effectively constitutes "state action" as being "unattractively totalitarian in its implications".[139] Adopting this approach would not mean, however, 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 private actions of individuals are not. More precisely, on this theory, the question is always whether the law governing a specific interaction has unduly hampered the freedom. If two 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,

[138] We think that realising this difficulty, the Court has typically been quite stingy in granting 'rights' derivative of freedoms – either affirmative obligations on the state directly, or by requiring rights be put in place as against third parties, through the state as an intermediary. While other Charter provisions have been read to grant 'rights' not infrequently – 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 rights and preserving freedom, noting that while a right to equal treatment 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". Hence the common refrain in the context of 2(b) that the "that "freedom of expression contained in s. 2(b) prohibits gags, but does not compel the distribution of megaphones".

[139] Frank Goodman, "Professor Brest on *State Action* and Liberal Theory" (1981-1982) 130 U Pa L Rev 1331 at 1345.

where the common law distributes *rights* that place duties on individuals, we can meaningfully ask: "does the common law allocation of *rights* to third parties infringe on the constitutional mandated sphere of freedom?" That is, does the common law unduly restrict the freedom of actors by placing them under an unconstitutional duty to act or not act?[140]

Although decided under 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 at common law. 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 (as it had been interpreted) gave to employers the right to enjoin secondary picketing, placing striking employees under a duty to not picket suppliers and customers of its employer's product. The operation of the common law distribution of rights impacted the worker's freedom, by enjoining such conduct. This common law allocation of rights was found to hamper freedom of expression, and it was corrected accordingly, 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. Thus, following from our premise that there is always law, we can ask whether a common law rule operates so as to restrict the freedom of parties, by asking whether the allocation of rights and duties violates the constitutional freedom. If it does, it would be up to the court to remedy the common law. However, beyond that, this theory would leave 'derivative rights' out of the fundamental freedoms equation, and leave diagonal application cases like *Dunmore* and *Fraser*, or claims to affirmative state assistance or facilitation, to the equality provision. This is one viable answer. But it is not the answer in *Dunmore*.

ii) The 'Very Rarely' Standard

Another viable answer to the 'substantive freedom' problem is to say: 'sometimes derivative rights are necessary under section 2, but very rarely'. This would place discrete constitutional obligations on the state to *protect* the exercise of freedom against third parties, by placing those parties under a duty to not interfere with associational activities. That is, the *Charter* is being applied diagonally, in effect against private parties, but through constitutional duties owed by the state to individuals. It applies to a discrete sphere of conduct – for instance, associating in the workplace. But 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. To set a bar of 'substantially interfere' or 'discourage' – as *Dunmore* purports to do at parts - would mean that every individual whose exercise of freedom was rendered unsuccessful by the freedom of third parties – anytime their interests were affected - could bring a constitutional claim for the requirement of state action to protect the freedom. Consider again our street corner preacher, or our restaurant owner, and what it might mean to decide whether his freedom is sufficiently meaningful, and what remedies the courts have at their disposal.

Given this substantial freedom problem, a positive obligation arises requiring the state to *protect* the freedom, only where it would otherwise be more or less impossible to

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

exercise the freedom.[141] Although *Dunmore* can be read to suggest a "positive obligation" would be present where ever the absence of 'state action' a substantial interference standard, it distinguished previous cases like *Delisle* on the basis that "unable to prove that the fundamental freedom at issue, as opposed to merely their requested statutory entitlement, was *impossible to exercise*".[142] This would appear to be especially necessary where the claim is that the state has a constitutional obligation to deviate from the common law rights and freedoms of third parties, given that "human rights claims are often if not typically are in play on both sides of a common-law case".[143] Were the bar not set at something approaching 'impossibility', the individual placed under a constitutional duty to act or not act in a specific way can often fairly ask: 'but what about *my* freedom?'

Despite the demise of a bright line standard between state action and inaction, owed to the fact that the background rules of the common law are invoked in any such case, there are a number of theories when the state might be under such an obligation to 'protect' individuals from the common law rights and freedoms of others. None of them are perfectly satisfactory, but all pointing in the same general direction.[144] One that may be particularly useful in the context of freedom of association would be to determine where a private entity has become, for all intents and purposes, able to stifle a freedom to such an extent that it mirrors the operation of a statutory prohibition. The best example of this might be the old chestnut of state action theory, *Marsh v Alabama*,[145] in which a company owned town was prohibited from exercising its background property rights to exclude religious leafletters from town sidewalks. Because the private entity effectively monopolized the property in the town, it had the same coercive power of the state, which could be wielded so as to extinguish the freedom more or less entirely. The 'very rarely' answer would be animated by the notion that while only a state can change the laws and directly take away your freedom, sometimes individuals can have the same effect as a state.

So, on the 'very rarely' approach, we might say that where a private party can exercise their 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, by creating derivative rights or otherwise modifying the common law scheme of rights

---

[141] See also *Baier*, *supra* at para 20 ("s. 2 generally imposes a negative obligation on government rather than a positive obligation of protection or assistance")

[142] *Dunmore*, *supra* at para 25 (emphasis added).

[143] See Frank Michelman, "The Bill of Rights, The Common Law, and The Freedom-Friendly State" (2003) 58 Miami L Rev 401 at 431.

[144] See generally Tushnet, *Weak Courts*, *supra*; Michelman, *ibid*; and Gardbaum, *supra*. 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 seemed to be relied on by Bastarache J in *Dunmore* in finding that the absence of protection constituted state action, by finding that "(w)hat the legislature has done by reviving the LRA is not simply allow private circumstances to subsist; it has reinforced those circumstances by excluding agricultural workers from the only available channel for associational activity… The most palpable effect of the LRESLAA and the LRA is, in my view, to place a chilling effect on non-statutory union activity" (*Dunmore*, *supra* at pars 44-45).

[145] *Marsh v Alabama*, 326 U.S. 501 (1946).

and duties. This standard is not without its difficulties, and there are others equally imperfect.[146] But something like a standard of 'impossibility' prior to imposing duties on third parties – under this theory - is critical to maintaining some semblance of a functioning democracy, and preventing all individuals whose exercise of freedom is meaningless or ineffectual simply in virtue of the exercise of freedoms by others[147] from raising constitutional claim for protection and facilitation. We might disagree with the way the test has been applied in the past. But it recognizes that something different – something legally different – is going on in protect cases, that we need not attend to in our typical vertical state action cases.

iii) Beyond Dunmore: Constitutionalizing Labour Codes

It might be argued that **t**he answer to 'when is the state under a constitutional obligation to impose derivative rights to protect a freedom' may be: 'frequently', or 'whenever a freedom is not sufficiently meaningful otherwise'.[148] This is the answer provided in *B.C. Health*, if its invitation is taken up as it was by Justices Winkler and Ball. Our commitment to legality, as described in Part IV above, tells us what this fruition entails, and that this is no small undertaking. It tells us that there has to be answers – constitutional answers - to the questions of who holds the right, who bears the duty, and with respect to what conduct. Our commitment to legality – in the sense of there always having to be an answer - does not tell us whether the courts *should* undertake the task of effectively writing a judicial labour code – however minimal – into section 2(d). However, other aspects of our legality do.

Put differently, our hard question is: if it is legally possible to impose a derivative right to unfair labour practice protection, 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, with the infinite number of questions this inevitably entails? Why can we not say that a constitutional obligation arises every time a freedom is not sufficiently 'substantive', or the product of that freedom not sufficiently 'meaningful'? To this question there are a number of responses. Among them: that we must distinguish what judges interpreting a constitution can and should do, and what a government can and should do. This requires us to look at other things we know about our law.

First, we know that there are only certain remedies available to a constitutional court, where it finds that the background distribution of rights and freedoms does not meet what it considers to be the constitutional benchmark. Section 52 states that:

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

So we know that a remedy under section 52 can only be referable to a law, not an absence of a law. Pointing in the same direction is the fact that if a legislature is ever to justify an

[146] See Tushnet, *Weak Courts*, *supra* at 177-181.
[147] Which is, from the perspective of substantive outcomes, most of us, most of the time.
[148] This seems to be the approach Bogg & Ewing prefer, although it may not be.

infringement of broadly worded freedoms, such reasonable deviations must be "prescribed by law" for section 1 to have any operation. If the true absence of a law were to lead to a constitutional violation, there would be no room for the type of reasonable justifications that are central to our constitutional framework. This reminds us that, in order to ground a constitutional violation, we should be looking for what law is being employed and impugned in any given case.

Second, we know that the *Charter* applies only "to the Parliament and government of Canada in respect of all matters within the authority of Parliament … (and) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province".[149] Whatever this requirement means, it must impose some restraint on the courts with respect to imposing constitutional duties on private parties, however cleverly conceived. While section 24(1) confers a rather broad discretion on judges to award the remedies deemed "appropriate and just in the circumstances", we think the words of Justice L'Heureux-Dube deserve attention:

> It is important to recognize that the Charter has now put into judges' hands a scalpel instead of an axe -- a tool that may fashion, more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system.

The Court has consistently recognized the limitations of its role in crafting constitutional remedies, the Court has noted that courts should, as much as possible, avoid the "risk of making inappropriate intrusions into the legislative sphere".[150] As Chief Justice Dickson noted in the seminal case of *Hunter v Southam*:

> While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.[151]

Finally, the Court can itself modify the common law. This is what happened in *Pepsi-Cola*. However, the Court has – some would say wisely – 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".[152] With respect to the development of the common law, Chief Justice McLachlin put the point well in *Watkins v Olafson*:

---

[149] At the risk of being too clever by half, we might note that the *Charter's* caution in section 31 that "(n)othing in this Charter extends the legislative powers of any body or authority" would presumably include the legislative authority of the Courts.
[150] *Schachter v Canada*, [1992] 2 SCR 679; *Vriend v Alberta*, [1998] 1 SCR 493; *R v Sharpe*, 2001 SCC 2 (CanLII), [2001] 1 S.C.R. 45, 2001 SCC 2; *R v Ferguson*, 2008 SCC 6, [2008] 1 SCR 96 at para 50.
[151] *Hunter et al v Southam Inc*, [1984] 2 SCR 145 at 169.
[152] *R v Salituro*, [1991] 3 SCR 654 at 666.

> There are sound reasons supporting this judicial reluctance to dramatically recast established rules of law. The court may not be in the best position to assess the deficiencies of the existing law, much less problems which may be associated with the changes it might make. The court has before it a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases. Moreover, the court may not be in a position to appreciate fully the economic and policy issues underlying the choice it is asked to make. Major changes to the law often involve devising subsidiary rules and procedures relevant to their implementation, a task which is better accomplished through consultation between courts and practitioners than by judicial decree. Finally, and perhaps most importantly, there is the long-established principle that in a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform.[153]

In short, the Court is not empowered to, designed for, or competent to write labour relations legislation under the auspices of a constitutional guarantee like "freedom of association". It cannot simply provide a 'substantive freedom' standard, and go about ordering legislatures to enact legislation deemed necessary to bring this standard to legal fruition, because it has limited remedial authority to do so. Striking out exclusions from fully functioning legislation, as in *Dunmore*, is one thing. Ensconcing a right, the remedy for which would entail writing an entire judicial labour code, is quite another.

There is, in the words of Peter Birks, a democratic bargain to be attended to:

> The terms of that bargain are, on the part of the demos, that some of its power shall be ceded to unrepresentative experts whose expertise consists in the interpretation of the law, and on the part of those experts that they will not usurp the functions of the representative legislature. The difficulty of drawing the line is certainly great, but not so great as to render the bargain void for uncertainty. And just as well, for if, as some think, the bargain is and always will be at best an illusion and at worst a sham, our law and legal institutions are destined to change for the worse.[154]

We think that, whatever the terms of this bargain are, the creation of a judicial labour code would quite clearly exceed the judicial side of this bargain. This seems to be implicitly accepted by the Court in *Fraser*, in its reluctance to require the government "to enact laws that set up a uniform model of labour relations" under the auspices of 2(d).[155] Bogg & Ewing appear to accept this as well, in arguing that the instantiation of the constitutional right can be left to the legislature. We do not think this is a viable alternative, as discussed above.

Each of these constitutional doctrines and provisions point to something we all know to be true about our law: that there is a real, albeit sometimes difficult to identify with

---

[153] *Watkins v Olafson*, 1989 CanLII 36 (SCC), [1989] 2 SCR 750 at 760-761.
[154] Birks, "Equity", *supra* at 97.
[155] *Fraser*, *supra* at para 48.

precision, difference between the courts' role and the legislatures' role in a constitutional democracy, and it is critically important to attend or at the very least alight to "the proper balance between judicial and legislative action".[156]

As a society, we have lots of labour law. We have a plan, imperfect and contentious as it may be. Because *Lochner* type thinking has no purchase here – presumably because we as a society are interested in *real* as opposed to purely formal freedom[157] - we can as a society create statutory derivative rights (many of which redound to the benefit of employees, but others – such as restrictions on strike action – do not). And we have the theory from which these statutory mechanisms are derived - the standard narrative, based on the inequality of bargaining power (we think there is a better narrative that we should be attending to, but that is the topic for other papers).

But that is not the question we are concerned with here: it is not *may* the state reallocate the background entitlements. In Canada, our answer to that is yes, and it is the stuff that elections are won and lost over. It 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. But where the question is *must* the government do so as a constitutional obligation, that is another matter entirely. It is not simply a matter of engaging in democratic politics, or debating the best way to make freedom of association meaningful as a matter of political philosophy. This is a basic elision in the reasoning of much of the scholarship following *B.C. Health*: it presupposes that because a given theory or narrative of labour law is in their mind more preferable to another, this narrative must be found latent in the constitution. We think this is a serious error, but one that is easily made once we forget what it is we are doing. This is one big reason why the answer of 'frequently' cannot be the right answer to the derivative rights question: because it would undermine other things we know to be true about our law, most notably the division of responsibilities between the courts and legislatures.

iv) When to contextualize?

There is a difficult matter of contextualization that should be addressed, if in passing. Recall that our *Charter* states that "*everyone* has … freedom of association". It does so without drawing distinctions between associations, elevating some to pre-eminent status, and relegating others to the constitutional wilderness. This fundamental equivalency, granting to *everyone* freedom of association, must be reckoned with, and cannot be ignored because we might prefer the *Charter* said something differently.

Bogg and Ewing have objected to the notion that a constitutional freedom - ostensibly guaranteed to "everyone" - should be interpreted by the Courts, as much as possible, in a content-neutral fashion.[158] There appears to be some confusion here, and we think that they have conflated two very different sets of questions. One is whether the *state* or the

[156] *Cloutier v Langlois*, [1990] 1 SCR 158 at 184.
[157] The great benefits of the common law approach to freedom of association – formal, equal freedoms and rights available to everyone – was also its Achilles heel as a normatively appealing theory of freedom of association in the workplace.
[158] Bogg & Ewing, *supra* at 408-412.

government can or should be constitutionally prohibited from treating different associations differently – for instance, by creating derivative rights for unions and not bookclubs - and the other is whether courts, in interpreting a neutrally-worded fundamental freedom, should give constitutional preference to those associations that they deem to have greater social utility. Our concern here - like Rothstein J's[159] - is with the latter issue, while Bogg and Ewing's critique appears focussed wholly on the former, with which we have no quarrel.[160]

But there is a second question to be asked, and distinction to be made, in the constitutional arena.

As we noted above, for the purposes of section 2(d), the standard laid down – that "everyone" has the freedom of association, presumably in "all of the varied activities in which they choose to engage" - seems to dictate that the subjective preference for unions over bookclubs should not enter into the Court's equation.[161] In other words, and unless otherwise indicated, any viable section 2(d) doctrine must be sufficiently general to encompass a range of associations and applied equally. We believe that it is incumbent on Courts to derive a set of rules that do not directly define constitutional rights and freedoms available to everyone, in such a way that they can only be available to some, or to some in greater measure than others, on the basis of the perceived social utility of such organizations. The Court has been remarkably and admirably consistent in such a disposition towards the other fundamental freedoms, and deals with any 'central range of application' in the context of section 1,[162] in determining whether infringements are justified.

On our view, it is on the separate legal question of derivative rights where contextualization is important, in the sense that it is demanded by a high standard going well beyond a non-trivial interference, which should not be the standard in our typical, conventional state action, vertical application case.[163] But, in an important sense, even

---

[159] Rothstein J is very clear that he is concerned with the Court's interpretation, not legislative action. "The protection of fundamental freedoms *should not involve the Court* in adjudicating the relative values of the way in which individuals exercise those freedoms". *Fraser*, *surpa* at para 209 (emphasis added).

[160] See further Oliphant, "Labyrinth", *supra*.

[161] While the concept of 'neutrality' in constitutional adjudication has its uses and misuses, Cass Sunstein helpfully reconstructs the various ways in which 'neutrality' is perfectly uncontroversial as a matter of constitutional law. See Cass Sunstein, "Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion and Surrogacy" (1992) 92 Columbia L Rev 1 at 50-52.

[162] Thus, in deciding whether a limitation on freedom of expression is justifiable in a "free and democratic society", the Courts have necessarily looked at the social importance of the activity being limited – is it at the 'core' of the freedom, or the periphery - in line with the *Charter*. See e.g. *R v Keegstra*, [1990] 3 S.C.R. 697 at 765; *R v Sharpe*, 2001 SCC 2, [2001] 1 SCR 45 at para 181*; Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at para 121 ("(N)ot all expression will be treated equally in determining an appropriate balancing of competing values under a s. 1 analysis. That is because different types of expression will be relatively closer to or further from the core values behind the freedom, depending on the nature of the expression. This will, in turn, affect its value relative to other *Charter* rights, the exercise or protection of which may infringe freedom of expression.") However, this is a different question than whether 'everyone' has been afforded a particular freedom.

[163] The idea of impartially among various associations – from books clubs to unions – with respect to the constitutional freedom of association, is vital. But we believe that this concern for neutrality, and non-contextualization for that matter, is better focussed on the question of the freedom – rather than the separate

this standard remains sufficiently general and neutral to not exclude associations *prima facie*. That is, if bookclub members could show that the failure of the legislature to grant derivative rights made their act of association impossible, because their associations were under attack by private actors, it too would merit a constitutional remedy. Books sometimes do get burnt, but that is fortunately not a problem in Canada at the moment.

d) Conclusion

As a starting point for section 2(d), we believe this should entail protecting a sphere of freedom for everyone to do together what they can do alone, absent a section 1 justification. This would not engage the courts in picking and choosing which associations should be protected based on perceived social utility, but rather would require legislatures to justify treating collective acts differently from those same acts individually. On the more difficult derivative rights question, we think there are at least two legally viable answers. The first would be to say that the Court should never create derivative rights diagonally under the auspices of fundamental freedoms against private parties, should instead stay focused on protecting the sphere of freedom, and should leave questions of 'derivative rights' to common law modification (i.e. where the common law *rights* of private actors are brought to bear so as to unconstitutionally hamper the freedom) and section 15. The second viable option would be to maintain the content-neutral freedom standard, but require the creation of derivative rights in just those situations where the exercise of freedom is likely to be under a meaningful attack from third parties, so as to effectively extinguish the freedom in its entirety. That is, not just where association may not prove sufficiently meaningful, but where a private party has such power so as to make it effectively impossible in a given context. It is in this latter case that contextualization would be important, in the sense that the Court's should be reluctant to create derivative rights outside of a specific context where private power approaches the type of sovereignty or monopoly power over the freedom of others.

But, as we have explained at length above, after contextualization – and the imposition of a test along the lines of *Dunmore* – we are left with the considerations of legality and legitimacy set out above. The idea of legality drives us to see what the construction of

---

question of whether derivative rights are required to make it realizable. This is *Dunmore's* insight – in fact it is our labour law's insight. It is the insight behind our non-discrimination law in general. It is the basis for the non-discrimination aspect of s.15. At the base of this insight is the following question – "how do we know what the "grounds of discrimination are?" How do we know what goes on the list of prohibited (and analogous) grounds?" We know, by looking around and as a fact, that certain of us, or groups of us, have been and will be "attacked", or discriminated against, in our efforts to exercise our freedoms, by other private actors in a way which most others will not. And in such a powerful way that the effect is as if the state had limited our freedom. Workers are likely to be attacked for the exercise of their freedom, whie book club members are not. A positive way of making this point: we select these grounds for discrimination – out of the ocean of other, still permitted grounds of discrimination, on the basis that for these among us, we know as a matter of experience, their exercise of their freedom faces such harsh and persistent headwinds that they will not be free without restrictions being placed on the freedoms of others. Here we pierce the veil of private preference and personal freedom not in the name of some extrinsic end, but of freedom itself. This is where the 'impossibility' standard becomes important – the question is whether this claimant, in exercising this activity, has had his or her fundamental freedom extinguished by a private actor's freedom.

B.C. Health derivative rights really requires our courts to do. This is why the free-floating, 'meaningful exercise of association' standard, requiring the Courts to go about constitutionalizing substantive freedom in the abstract, is problematic. It has two readily observable problems – one of judicial competence (covered up in our cases by cutting and pasting the Wagner Act model) and the other of institutional legitimacy.

There is another thing that we know about how our law must operate – which Bogg and Ewing are attentive to and seek to advance – and this is its dynamism, in the sense that the law should, it must, change with changing circumstances. This puts another spin on the question of whether creating constitutional rights derivative of a freedom are constitutionally viable. Again, we agree with Bogg & Ewing that this is not a question that can be completely answered by attention to Hohfeld and legal grammar – although this grammar is crucially important in shedding light on what we are being asked to do, as demonstrated above. *Dunmore* was a perfectly grammatical outcome, at least in its end result. *Dunmore* passes the legality test.[164] *B.C. Health* and *Fraser* do not, because those cases leave a massive chasm between the constitutional 'right' to meaningful collectively bargaining and what is required of the state, as demonstrated above, while at the same time insisting that courts need not answer the above questions. While our narratives may shift, the "law must make up its mind".[165]

Moreover, we cannot viably *make* cases like *B.C. Health* and *Fraser* pass the legality test by simply requiring the constitution to answer all of the various questions outlined in Part III above. This seemed to be the path that Winkler C.J.O. and Abella J. started down, and in their defence, it seemed to be the path required by *B.C. Health*. But we do not think this is a credible exercise, simply because judges do not play a zone offence or defence, as such. That is not their role - as the Court has been at pains to point out elsewhere, by limiting incursions in to the sphere of legislative competence. As Lionel Smith has pointed out, in another context, there are

> (…) constraints under which the courts operate. Their function is to adjudicate disputes. This is why the changes they bring about in the law are secondary phenomena. Law reform by courts cannot be a primary activity. It must be an incident of constrained adjudication.[166]

Legality is part of the story that tells us what our options are. It tells us that you cannot have a derivative right to meaningful collective bargaining without constitutional answers to the myriad questions outlined above (who owes what duty to whom?). Legality also tells us that if the Court were to undertake an exercise in constitutional labour relations legislation, it would run headlong into another thing we know about our law: that constitutional courts are empowered to determine what laws are inconsistent with the constitution. What they are not empowered to do is set labour law narratives by writing

[164] This was undoubtedly made easier by the *de facto* cut and paste equality remedy available and used, although under the auspices of 2(d).
[165] Peter Birks, "Equity in Modern Law: An Exercise in Taxonomy" (1996) 26 West Aust L Rev 3 *supra* at 5.
[166] Lionel Smith, "Legal Epistemology in the restatement (Third) of Restitution and Unjust Enrichment" (2012) 92 Boston U L Rev 899 at 901.

complex codes to instantiate a freedom in a particular context. They cannot replace labour law with constitutional law, wholesale, without a viable remedial mechanism. A zone should never be written in constitutional stone.

This once again brings us back to the dynamism Bogg & Ewing see as a defining feature of a constitutional guarantee. We have argued above that this is not a helpful conception of rights and freedoms if we are in the business of legality. What is *dynamic*, however, are narratives of labour law. These must or should change as the world changes. We all have our own labour law narratives that we think best accords with where we should be going. We shall try to convince each other, and hopefully move forward as a result. But if we turn to the constitution to have those disputes over policy and political theory resolved, we will have lost the dynamism that is critical to a changing society, in which ideas ebb and flow, and narratives (of labour law and much else) rise, set and are eclipsed. This is what differentiates *Dunmore* derivative rights from *B.C Health* derivative rights. *Dunmore* does not disrupt this dynamism, because it is essentially an equality remedy masquerading as an associational one. *B.C. Health* and *Fraser* do disrupt this dynamism - for all the reasons outlined above, most notably that it would necessarily require the erection of a judicial labour code, with judges deciding all manner of difficult issues armed only with the words "freedom of association".

As we have tried to show, and much better, way to preserve this dynamism is to employ the notion of equality. We should be aware that our section 15 equality remedy disappears along with the zone-creating legislation. If a jurisdiction did away with the Wagner Act model, and put in place (or did not put in place) some alternative scheme to make unionization a viable proposition, perhaps even a more viable proposition, the section 15 issue disappears (or rather, shifts to the new instantiation). But where such derivative rights are constitutionally *required* by a constitutional freedom, they don't cease to be required depending on legislative choice, or a collective shift in narrative. They are simply required by the constitution, and may serve to stifle the creation of a zone that many labour lawyers would consider more normatively preferable.

The easiest way to look at this, and to avoid this problem entirely, is to say: we as a society have decided to comprehensively instantiate a freedom – through the *Labour Relations Act*, for instance – we cannot simply exclude a group of people without very good reasons. If society changes and we decide to instantiate the freedom in a different way, so be it – and we shouldn't have a constitutionalized judicial labour code standing in our way. But so long as this is how we have decided to do so, the real, substantial freedom afforded to most should be afforded to all, unless the state can meet its burden under section 1. This is the cleanest way to look at the problem in both *Dunmore* and *Fraser*, and the fastest way to get agricultural workers the full protection (i.e. full labour rights and not the sort of ambiguous rights Bogg and Ewing are prepared to contemplate) to facilitate the exercise of their freedom that all others take for granted.

None of which is to say that labour relations should be a no-go zone, or that derivative rights are in themselves constitutionally illegitimate. It is to say that if they are created, the courts should do so carefully, in line with the judicial role and the other things we know about the law, and according to constitutional remedies available to them. We

realized we have not answered the derivative rights problem here, but we hope we have gone someway towards pointing out the viable options.

VI. CONCLUSION

Our baseline, constitutional test for freedom of association – the parallel liberty approach protecting the freedom to do with others what we are free to do alone – has quite radical implications. It would certainly preserve a freedom to collectively bargain, a freedom to withdraw services (i.e. to strike), and a freedom to do much else in the workplace context. On this conception of freedom, there is no need to 'contextualize' – we are perfectly comfortable applying the test across all manner of associational activity, subject as always to section 1. The test fits with our ideas of law and legality, and affords "everyone" the freedom of association, and the equal protection and benefit of the law, as the Charter requires.

Moreover, where a government has set up a comprehensive scheme to protect or instantiate the freedom in a given context – such as the labour relations context – we think that substantive freedom should be afforded to all, subject again to a section 1 justification. That is the elegance of the equality argument.

This is to say that we have easily available legal answers to the constitutional questions revealed by cases like *Dunmore* and *Fraser*. The workers in these derivative rights cases wanted to be treated the same as all other workers in the province – they wanted to have the real protection for association from the operation of the freedom of employers to refuse to contract, to dismiss workers who chose to associate, and so on. They wanted the same derivative rights others have. This is, as some of us have been at pains to point out for some time, at its base, an equality claim, in which an equality remedy was sought, and an equality remedy was provided, but all under the guise of a fundamental freedom. If equality was applied, this paper may not have needed writing. That was the easy answer.

However, due to the currently in vogue restrictive interpretation of section 15 – limited to discrimination on the basis of prohibited and analogous grounds – such a claim could not proceed as an equality claim. As such, the Court "was able to assimilate the claim in *Dunmore* to earlier ones essentially by finding a requirement of equal treatment implicit" in the freedom of association.[167] Thus, a freedom of association violation was found, effectively on the basis that the workers *substantive* freedom was not adequately protected by the legislature. The state was under an affirmative duty to *protect* the freedom, where the exercise of the freedom was rendered meaningless by the formally equal freedom of third parties.

The important point identified above is the idea of *Dunmore*-type derivative rights is different from how we treat simple vertical application, conventional state action, freedom cases. It is by necessity a high bar, and will only be met in rare cases. This is

[167] Tushnet, *Weak Courts*, *supra* at 211.

because a legal freedom – and we take the *Charter* to be a legal document – by its "very nature (…) generally imposes a negative obligation on the government and not a positive obligation of protection or assistance".[168] So, where this is to be deviated from, it must be under only "exceptional circumstances", lest we see no end to the 'substantive freedom' problem. Some test will have to be provided, to separate one unsuccessful, meaningless or insubstantial exercise of a freedom from another. We are not sure a sustainable one has been yet provided, which is why the use of an equality provision would best accord with what exactly is being asked for and provided in cases like *Dunmore*.

However, if derivative rights under fundamental freedoms are required, it is critical that the remedy maintains our commitment to legality. Whatever its wisdom, the *Dunmore* remedy did that. In a sense, *Dunmore* passes the legality test by providing an equality remedy in a freedom case. If that is what is required to maintain legality, so be it.

Much of the above paper has been directed at showing how *B.C. Health* goes far beyond *Dunmore*, and sacrifices legality in the process. We do not think that the 'shoot first, and let the legislature sort it out' is a viable scheme for constitutional rights and freedoms. There are many viable methods of instantiating the freedom of association across the world, and there are many models of collective bargaining available. We have one in Canada, widely available and used, and we believe farm workers should have access to it. The problem with *B.C. Health* and *Fraser* is that it legally requires the type of detailed instantiation the Court believes it does not require, and that almost everyone seems to agree does violence to the division of powers between the courts and the legislatures.

So, if we were to follow this simple route – section 2(d) protects freedoms, and section 15 requires that if those freedoms are instantiated in a given way in a given context, it should be so for all - then we would have a baseline of legality against which we could measure the costs and benefits of our legislative schemes in terms of our constitutional rights and freedoms. For the most part, we would think that the constitution permits frameworks such as those described in great detail in labour relations statutes, but there may be problems around the edges. So, we might see that prohibiting employees from engaging in a day long political protest – even if declared a strike – is extremely problematic for a society committed to freedom of expression and association. We might see that preventing workers from withdrawing their services at the end of a contract – through back to work orders – is also problematic, not because it does not fit with a 'constitutional right to meaningful collective bargaining', but simply because those employees are prohibited from doing together what each could do alone. Their freedom is being restricted because they are acting in common. It might turn out that such restrictions are justified, but they should be shown to be so, the way all other non-trivial deprivations of fundamental freedoms are shown to be so, or struck down.

But erecting a meaningful system of collective bargaining is a package deal involving a massive and complex redistribution of the background rules. This is what judges like Winkler CJO and Ball J discovered. It involves 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 of the type we are used to. It involves costs and benefits

[168] *Delisle*, *supra* at para 26.

in terms of the prior common law set of rights and freedoms. It is not possible, not legally possible, to say that this complex system is required by our constitution according to the three words 'freedom of association'. However, we believe it is required as a matter of equality – we must provide it to all once we provide it to some.

We think this is the best way to bring the complex legal reality of Canadian collective bargaining to the agricultural workers in *Fraser*, in a way that conforms to legality and fits with everything else we know to be true about our constitutional democracy. And it is a much more meaningful set of freedoms, rights and duties than a vague notion of a 'right' to promote collective bargaining, whatever that could mean.

Most discussions legality - of this account of the systematicity and the inner morality of law, as some version of natural law theory, arises in the context of "wicked legal systems".[169] Fortunately, this is not the problem that we are dealing with here. These are not cases at the limit - of brute conflict of an evil external morality (Apartheid for example) seeking to advance its cause through law and coming up against the inner morality of law. Rather these freedom of association cases, in a sense, pose the opposite scenario – they are cases of where the statutes in place advance a decent and progressive morality – one which the litigants seek access, though law, specifically via constitutional law. So it is easy to miss the fact that the issue of legality remains – if you wish to advance the cause of capability and real human freedom though law, or some other narrative – then the law as always has had and will have a way of going about that.

When the morality which is being advanced is the morality of human freedom, then we are operating at the heart in the law's home turf. Here the external morality and the internal logic of the law are flying in very close formation. For, as we have seen, the very project of the law is the issue of authority and thus the distribution of freedom and human autonomy. Its project is the answering (in a systematic, relational, understandable way) who is subordinate to whom concerning any human interaction. That is to say that the whole structure of the law is one of mapping legal rights and freedoms. That structure does not by itself tell us what those rights and freedoms ought to be in any given case. Rather it makes available the very possibility of 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 which is in play. Otherwise we do not have law.

This is our legality.

The view that we need not attend to the grammar, and can focus solely on the narrative – the end we are seeking without careful attention to the means - has a large impact on a lot of modern legal thinking – and not just lay or non-lawyer academic thinking about law. The common and "modern" and "post-modern", view,[170] which is being partially resisted here, results in the idea that, for example, the task of the Supreme Court is simply to figure out, according to some view of what constitutes good public policy, what we wish

[169] For a great account of this issue, see David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (Toronto: OUP, 2010).
[170] The difference between modern and post-modern approaches seems to be whether this task is meaningful or possible, but not whether is necessary.

to achieve. The Court should figure out what kind and amount of substantive 'freedom of association' is necessary in our society, and should then go about distributing entitlements to it.

This type of thinking presumes that it is the task of those who run the legal system is to be experts in knowing where we want to go. But on the view taken here, this view masks a very real problem. As one author has commented, this 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 cars to such a mechanic?" [171] As engineers and mechanics know things so must, and do, 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. But it is a serious mistake to forget that the one is the handmaiden of the other, and to know which one lawyers and judges are particularly good at. As Peter Birks has argued:

> The legitimacy of expert law-making in a sophisticated democracy depends on the truth of the assertion that the interpreters are and must be both masters and servants of a complex system of reasoning. Why are they not elected? The answer must be that they are doing something different from the legislator and something that cannot be done by just anybody on the Clapham bus. They are restrained in their creativity by the system of reasoning which they serve, and they are qualified for the work which they do, not as chosen representatives but by hard-won mastery of the specialized rationality.[172]

This is all to say that the ways in which laws can be bad is not exhausted by ways identified by criteria external to law. Laws – and interpretations of laws - can be bad simply from a legal point of view, and no less bad for the fact that they seem to entrench some external conception that we find normatively pleasing. There is a structure our laws have to take, and we as lawyers cannot simply say that the end justifies the means.

Lawyers and judges, of course, have opinions about how things should go, and how society should operate. But their margin of professional advantage, principal task, and real contribution to society is knowing how to get there, legally. To ignore this is to give up the legal game.

Well ordered societies have worked out a systematic (and that means coherent) answer to the fundamental question of who governs – of who has authority over what and whom. These societies define in advance and with a legally sufficient degree of certainty, the extent of our rights and freedoms. They have law. Losing track of this idea of legality, and of the basic legal concepts by which it is operationalized, is a perilous prospect. It is a recipe for the sort of confusion we now live with in Canada concerning our law of freedom of association. This essay in retrieval has sought to remind us of this idea of legality and of these basic legal concepts which have gone missing in our law. In a big way, this essay does not answer our hard questions, but we think it helps us identify what

[171] See Allan Beever, "The Law's Function and the Judicial Function" (2003), NZ Univ L Rev 299 at 319.
[172] Birks, "Equity", *supra* at 98.

those questions are. We hope that by making the case for clarity, we can find our way to a better, legally possible and robust freedom of association for Canadian workers.