The SCC Reimagines Freedom of Association in 2015

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The SCC Reimagines Freedom of Association in 2015[1]

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I. Introduction

1. The Supreme Court of Canada's recent jurisprudence on freedom of association was ground-breaking for labour lawyers and constitutional lawyers. It vindicates Chief Justice Dickson and precludes governments from lightly deciding to exclude certain workers from labour legislation or to prohibit them from collectively withdrawing their labour. The cases also have a broad range of implication.

2. After reviewing the evolution of the Court's approach to freedom of association (though excluding the Court's discussion of the corollary freedom *not* to associate), this paper reviews the Supreme Court of Canada's 2015 cases on freedom of association, also known as the 2015 Labour Trilogy, and discusses their implications: *Mounted Police* (*Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 ("*Mounted Police*") addressing the right to join a union; *Meredith v. Canada (Attorney General)*, 2015 SCC 2 ("*Meredith*") addressing legislation overriding predetermined wage increases; and *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 ("*SFL*") addressing the right to strike.

3. Then the paper discusses how the 2015 Labour Trilogy reinvigorated the values underlying the *Charter* and apply to strikes not directly relative to collective bargaining.

II. The Evaluation of the Scope of Freedom of Association – The Right to Associate

4. The Supreme Court of Canada first interpreted the right to freedom of association in *Reference re: Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 ("*Alberta Reference*"). In that case, by way of a reference to the Alberta Court of Appeal, the Lieutenant-Governor in Council of Alberta asked the Courts whether provision of certain statutes prohibiting some workers from striking, and replacing strikes with compulsory interest arbitration, violated the *Charter*. A majority of the Supreme Court of Canada held there was no *Charter* violation and narrowly viewed the scope of the *Charter*-protected freedom as only encompassing an individual's right to,

- form an association;

[1] Thoughts for this paper were first developed for the Osgood Hall Law School, Constitutional Cases Conference, April 10, 2015.

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- join an association;
- maintain an association;
- participate in an association's lawful activities; and
- do collectively what a person could do individually (the collective exercise of individual freedoms).

5. Significantly, the Court held that the *Charter* did not protect the actions of the collective with respect to things it could only achieve collectively in the labour context: collectively bargain and strike. That is, no constitutional rights attached to the collective as a whole and the association could only exercise the lawful and constitution rights of its individual members. As a result, the decision precipitated a large body of literature on the Court's hostility to collective bargaining, the broken promise of the *Charter* for labour, and why labour would be wise to avoid the courts.

6. Dissenting in the *Alberta Reference*, Chief Justice Dickson gave s. 2(d) a robust interpretation and found that it protects the activities of the collective group, including, in the labour context, collective bargaining and the collective withdrawal of labour, striking.

7. Freedom of association in a labour context was back before the Supreme Court in 1999. In *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 SCR 989, the Supreme Court considered whether provisions in federal labour legislation denying RCMP officers access to that labour regime violated the right to freedom of association protected by s. 2(d) of the *Charter*. In finding that there was no constitutional violation, the Court held that s. 2(d) does not protect a right to form a particular type of association defined by statute or a right to access to a particular legislative framework within which to exercise freedom of association. Thus, the federal government was under no obligation to include the RCMP in federal labour legislation. This did not preclude them from organizing employee associations outside of the statutory scheme to collectively exercise their lawful rights.

8. Subsequently, in *Dunmore v Ontario (Attorney General)*, 2001 SCC 94, the Court started to chip away at the majority view in *Alberta Reference*, decided fourteen years earlier. In *Dunmore*, the Court considered whether the exclusion of agricultural workers from Ontario's *Labour Relations Code* violated the right to freedom of association guaranteed in s. 2(d) of the *Charter*. The majority held that, while the *Charter* does not ordinarily oblige the state to take affirmative action to safeguard or facilitate the exercise of fundamental freedoms, there are circumstances in which there is such an obligation. Moreover, the Court held that the effective exercise of the right to freedom of association "may require not only the exercise in association of the constitutional rights and freedoms (such as

The Supreme Court's New Labour Trilogy - Momentous Decisions and a Modest Critique

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THE SUPREME COURT'S NEW LABOUR TRILOGY

Momentous Decisions and a Modest Critique

INTRODUCTION

Earlier this year the Supreme Court of Canada pronounced judgment in three cases where the constitutional protection of freedom of association in s. 2(d) of the *Canadian Charter of Rights and Freedoms* was invoked to challenge different labour legislation. Judgments in *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 ("*MPAO*") and *Meredith v. Canada (Attorney General)*, 2015 SCC 2 ("*Meredith*") were pronounced together on January 16, 2015. The decision in *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 ("*SFL*") came out two weeks later, on January 30th. The decisions, in particular the *SFL* decision, portend "striking" changes for labour relations law in Canada.

This trio of cases recalls another occasion, 28 years ago, when the Supreme Court examined freedom of association in a labour relations context in three companion rulings: *Reference Re Public Service Employee Relations Act (Alberta)* [1987] 1 S.C.R. 313; *Public Service Alliance of Canada v. Canada* [1987] 1 S.C.R. 424; and *Retail, Wholesale and Department Store Union v. Saskatchewan* [1987] 1 S.C.R. 460. This old labour trilogy has now been supplanted by a new labour trilogy. Whatever might be said about the logic of the progression of the Court's thinking on this topic, it displays, at least, a certain symmetry.

In this paper, with a nod to the expositive force of organizing thoughts in triads, I offer three criticisms of the Supreme Court's recent work re-shaping what the constitutional protection of freedom of association means in the field of labour relations law: (1) it ignores the reasonably clear intent of the drafters of the *Charter*; (2) it has been inconsistent and unpredictable, producing destabilizing effects; and, (3) it usurps to the judiciary a role in regulating labour relations that is better left to legislators.

THE OLD LABOUR TRILOGY – A BRIEF HISTORY

First, some context may be helpful for those less familiar with the Supreme Court's body of work in this area.

In 1987, five years after the *Charter* became part of our constitutional law, the Supreme Court of Canada pronounced its judgments in the original labour trilogy. One of the decisions arose from a constitutional reference that the Alberta Government initiated to determine the validity of public

sector labour legislation that prohibited strikes and lockouts and established compulsory arbitration as the means to conclude collective agreements when public employers and unions could not arrive at negotiated contract settlements. The other two cases involved actions by unions seeking declarations to invalidate a federal wage restraint law of the day (similar to the legislation upheld in *Meredith*) and legislation that had temporarily prohibited a strike and corresponding lockout from starting in the dairy industry in Saskatchewan. The Supreme Court used these cases as an early occasion for it to address the scope of freedom of association in s. 2(d) of the *Charter* generally, and more specifically its application to government regulation of collective labour relations.

Labour relations cases have enjoyed a near-monopoly of attention in freedom of association jurisprudence in this country ever since.

In the original trilogy a six-two majority of the Court (with then Chief Justice Dickson in dissent on the principal issue, but not in the result in all of the cases) held that freedom of association did not encompass constitutional protection of a right to collective bargaining or a right to strike.

This view of freedom of association in the original labour trilogy remained more or less intact for 20 years. Then in 2007 the Supreme Court of Canada issued its decision in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 ("*Health Services*"). It overruled the conclusion in the 1987 *Alberta Reference* and companion cases, at least to the extent of recognizing a constitutional right, flowing from s. 2(d) of the *Charter*, for associations of individuals in the labour relations sphere of activity to have access to a meaningful process of collective bargaining to pursue their workplace aspirations. The Court stopped short of recognizing constitutionally enshrined status for any particular process or model of collective bargaining, or for any particular bargaining dispute resolution mechanism. In *Health Services* the Court declined to say whether or not a freedom to strike was included within its new conception of freedom of association.

The next significant step in the evolution of the Court's jurisprudence was in 2011, when it ruled in the case of *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 ("*Fraser*"). The Justices examined the constitutionality of the Ontario government's legislative response to an earlier Supreme Court ruling (*Dunmore v. Ontario (Attorney General)*, 2001 SCC 94), which had found the complete exclusion of agricultural workers from a statutory labour relations regimen wanting, because it denied them opportunity to associate to pursue workplace goals. The legislative answer to the deficiency identified in *Dunmore*, which the Supreme Court endorsed in *Fraser*, was the palest imitation of a conventional labour relations statute: it did not allow for unions to be certified as bargaining agents;