SUPREME COURT OF CANADA

CITATION: Health Services and Support – Facilities Subsector Bargaining Assn. *v*. British Columbia, 2007 SCC 27

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BETWEEN:

Health Services and Support – Facilities Subsector Bargaining Association, Health Services and Support – Community Subsector Bargaining Association, Nurses' Bargaining Association, Hospital Employees' Union, B.C. Government and Service Employees' Union, British Columbia Nurses' Union, Heather Caroline Birkett, Janine Brooker, Amaljeet Kaur Jhand, Leona Mary Fraser, Pamela Jean Sankey-Kilduff, Sally Lorraine Stevenson, Sharleen G. V. Decillia and Harjeet Dhami

Appellants

and

Her Majesty The Queen in Right of the Province of British Columbia

Respondent

- and -

Attorney General of Ontario, Attorney General of New Brunswick, Attorney General of Alberta, Confederation of National Trade Unions, Canadian Labour Congress, Michael J. Fraser on his own behalf and on behalf of United Food and Commercial Workers Union Canada, and British Columbia Teachers' Federation

Interveners

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish and Abella JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 168) McLachlin C.J. and LeBel J. (Bastarache, Binnie, Fish and Abella JJ. concurring)

REASONS DISSENTING IN PART: (paras. 169 to 252) Deschamps J.

health services and support *v.* b.c.

Health Services and Support – Facilities Subsector Bargaining Association, Health Services and Support — Community Subsector Bargaining Association, Nurses' Bargaining Association, Hospital Employees' Union, B.C. Government and Service Employees' Union, British Columbia Nurses' Union, Heather Caroline Birkett, Janine Brooker, Amaljeet Kaur Jhand, Leona Mary Fraser, Pamela Jean Sankey-Kilduff, Sally Lorraine Stevenson, Sharleen G. V. Decillia and Harjeet Dhami *Appellants*

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Indexed as: Health Services and Support — Facilities Subsector Bargaining Assn. *v.* British Columbia

Neutral citation: 2007 SCC 27.

File No.: 30554.

2006: February 8; 2007: June 8.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish and Abella JJ.

on appeal from the court of appeal for british columbia

Constitutional law — Charter of Rights — Freedom of association — Right to bargain collectively — Health and social services delivery improvement legislation adopted by provincial government in response to pressing health care crisis — Legislation affecting health care workers' terms of employment — Whether constitutional guarantee of freedom of association includes procedural right to collective bargaining — If so, whether legislation infringes right to bargain collectively — Whether infringement justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 2(d) — Health and Social Services Delivery Improvement Act, S.B.C. 2002, c. 2, Part 2.

Constitutional law — Charter of Rights — Equality rights — Health care workers — Health and social services delivery improvement legislation adopted by provincial government in response to pressing health care crisis — Legislation affecting health care workers' terms of employment — Whether effects of legislation on health care workers constitute discrimination under s. 15 of Canadian Charter of Rights and Freedoms — Health and Social Services Delivery Improvement Act, S.B.C. 2002, c. 2, Part 2.

The *Health and Social Services Delivery Improvement Act* was adopted as a response to challenges facing British Columbia's health care system. The Act was quickly passed and there was no meaningful consultation with unions before it became law. Part 2 of the Act introduced changes to transfers and multi-worksite assignment rights (ss. 4 and 5), contracting out (s. 6), the status of contracted out employees (s. 6), job security programs (ss. 7 and 8), and layoffs and bumping rights (s. 9). It gave health care employers greater flexibility to organize their relations with their employees as they see

fit, and in some cases, to do so in ways that would not have been permissible under existing collective agreements and without adhering to requirements of consultation and notice that would otherwise obtain. It invalidated important provisions of collective agreements then in force, and effectively precluded meaningful collective bargaining on a number of specific issues. Furthermore, s. 10 voided any part of a collective agreement, past or future, which was inconsistent with Part 2, and any collective agreement purporting to modify these restrictions. The appellants, who are unions and members of the unions representing the nurses, facilities, or community subsectors, challenged the constitutional validity of Part 2 of the Act as violative of the guarantees of freedom of association and equality protected by the *Canadian Charter of Rights and Freedoms*. Both the trial judge and the Court of Appeal found that Part 2 of the Act did not violate ss. 2(*d*) or 15 of the *Charter*.

Held (Deschamps J. dissenting in part): The appeal is allowed in part. Sections 6(2), 6(4), and 9 of the Act are unconstitutional. This declaration is suspended for a period of 12 months.

Per **McLachlin C.J.** and Bastarache, Binnie, **LeBel**, Fish and Abella JJ.: Freedom of association guaranteed by s. 2(*d*) of the *Charter* includes a procedural right to collective bargaining. The grounds advanced in the earlier decisions of this Court for the exclusion of collective bargaining from the s. 2(*d*)'s protection do not withstand principled scrutiny and should be rejected. The general purpose of the *Charter* guarantees and the broad language of s. 2(*d*) are consistent with a measure of protection for collective bargaining. Further, the right to collective bargaining is neither of recent origin nor merely a creature of statute. The history of collective bargaining in Canada reveals that long before the present statutory labour regimes were put in place, collective

bargaining was recognized as a fundamental aspect of Canadian society, emerging as the most significant collective activity through which freedom of association is expressed in the labour context. Association for purposes of collective bargaining has long been recognized as a fundamental Canadian right which predated the *Charter*. The protection enshrined in s. 2(*d*) of the *Charter* may properly be seen as the culmination of a historical movement towards the recognition of a procedural right to collective bargaining. Canada's adherence to international documents recognizing a right to collective bargaining also supports recognition of that right in s. 2(*d*). The *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified. Lastly, the protection of collective bargaining under s. 2(*d*) is consistent with and supportive of the values underlying the *Charter* and the purposes of the *Charter* as a whole. Recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the *Charter*. [22] [39-41] [66] [68] [70] [86]

The constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment. Section 2(*d*) of the *Charter* does not guarantee the particular objectives sought through this associational activity but rather the process through which those goals are pursued. It means that employees have the right to unite, to present demands to government employers collectively and to engage in discussions in an attempt to achieve workplace-related goals. Section 2(*d*) imposes corresponding duties on government employers to agree to meet and discuss with them. It also puts constraints on the exercise of legislative powers in respect of the right to collective bargaining. However, s. 2(*d*)

does not protect all aspects of the associational activity of collective bargaining. It protects only against "substantial interference" with associational activity. Intent to interfere with the associational right of collective bargaining is not essential to establish breach of s. 2(*d*). It is enough if the effect of the state law or action is to substantially interfere with the activity of collective bargaining. To constitute substantial interference with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer. [89-90] [92]

Determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries: (1) the importance of the matter affected to the process of collective bargaining, and more specifically, the capacity of the union members to come together and pursue collective goals in concert; and (2) the manner in which the measure impacts on the collective right to good faith negotiation and consultation. If the matters affected do not substantially impact on the process of collective bargaining, the measure does not violate s. 2(*d*) and the employer may be under no duty to discuss and consult. If, on the other hand, the changes substantially touch on collective bargaining, they will still not violate s. 2(*d*) if they preserve a process of consultation and good faith negotiation. Only where the matter is both important to the process of collective bargaining and has been imposed in violation of the duty of good faith negotiation will s. 2(*d*) be breached. [93-94] [109]

A basic element of the duty to bargain in good faith is the obligation to actually meet and to commit time to the process. The parties have a duty to engage in meaningful dialogue, to exchange and explain their positions and to make a reasonable effort to arrive at an acceptable contract. However, the duty to bargain in good faith does

not impose on the parties an obligation to conclude a collective agreement, nor does it include a duty to accept any particular contractual provisions. In considering whether the legislative provisions impinge on the collective right to good faith negotiations and consultation, regard must be had for the circumstances surrounding their adoption. Situations of exigency and urgency may affect the content and the modalities of the duty to bargain in good faith. Different situations may demand different processes and timelines. Moreover, failure to comply with the duty to consult and bargain in good faith should not be lightly found, and should be clearly supported on the record. [100-101] [103] [107]

In this case, ss. 4, 5, 6(2), 6(4) and 9 of the Act, in conjunction with s. 10, interfere with the process of collective bargaining, either by disregarding past processes of collective bargaining, by pre-emptively undermining future processes of collective bargaining, or both. Sections 4 and 5 are concerned with relatively minor modifications to in-place schemes for transferring and reassigning employees. Significant protections remained in place. While the Act took these issues off the collective bargaining table for the future, on balance, ss. 4 and 5 cannot be said to amount to a substantial interference with the union's ability to engage in collective bargaining so as to attract the protection under s. 2(*d*) of the *Charter*. However, the provisions dealing with contracting out (ss. 6(2) and 6(4)), layoffs (ss. 9(a), 9(b) and 9(c)) and bumping (s. 9(d)) infringe the right to bargain collectively protected by s. 2(*d*). These provisions deal with matters central to the freedom of association and amount to substantial interference with associational activities. Furthermore, these provisions did not preserve the processes of collective bargaining. Although the government was facing a situation of exigency, the measures it adopted constituted a virtual denial of the s. 2(*d*) right to a process of good faith bargaining and consultation. [128] [130-132] [134-135]

The section 2(*d*) infringement is not justified under s. 1 of the *Charter*. While the government established that the Act's main objective of improving the delivery of health care services and sub-objectives were pressing and substantial, and while it could logically and reasonably be concluded that there was a rational connection between the means adopted by the Act and the objectives, it was not shown that the Act minimally impaired the employees' s. 2(*d*) right of collective bargaining. The record discloses no consideration by the government of whether it could reach its goal by less intrusive measures. A range of options were on the table, but the government presented no evidence as to why this particular solution was chosen and why there was no meaningful consultation with the unions about the range of options open to it. This was an important and significant piece of labour legislation which had the potential to affect the rights of employees dramatically and unusually. Yet, it was adopted rapidly with full knowledge that the unions were strongly opposed to many of the provisions, and without consideration of alternative ways to achieve the government objective, and without explanation of the government's choices. [143-144] [147] [149] [156] [158] [160-161]

Part 2 of the Act does not violate s. 15 of the *Charter*. The distinctions made by the Act relate essentially to segregating different sectors of employment, in accordance with the long-standing practice in labour regulation of creating legislation specific to particular segments of the labour force, and do not amount to discrimination under s. 15. The differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, and not to the persons they are. Nor does the evidence disclose that the Act reflects the stereotypical application of group or personal characteristics. [165] [167]

Per **Deschamps J.** (dissenting in part): The majority's reasons concerning the scope of freedom of association under s. 2(*d*) of the *Charter* in the collective bargaining context are generally agreed with, as is their conclusion that no claim of discrimination contrary to s. 15 of the *Charter* has been established. However, the analysis relating to both the infringement of s. 2(*d*) and the justification of the infringement under s. 1 of the *Charter* is disagreed with. [170]

Given that this case does not involve a claim of underinclusive legislation, but an obligation that the state not interfere in a collective bargaining process, a "substantial interference" standard for determining whether a government measure amounts to an infringement of s. 2(*d*) should not be imposed. Furthermore, since there is no constitutional protection for the substantive outcome of a collective bargaining process, the matter affected is not the threshold issue when a claim is being evaluated under s. 2(*d*). Rather, the primary focus of the inquiry should be whether the legislative measures infringe the ability of workers to act in common in relation to workplace issues. In the present context, a more appropriate test for determining whether s. 2(*d*) has been infringed can be stated as follows: Laws or state actions that prevent or deny meaningful discussion and consultation about significant workplace issues between employees and their employer may interfere with the activity of collective bargaining, as may laws that unilaterally nullify negotiated terms on significant workplace issues in existing collective agreements. The first inquiry is into whether the process of negotiation between employers and employees or their representatives is interfered with in any way. If so, the court should then turn to the second inquiry and consider whether the issues involved are significant. Only interference with significant workplace issues is relevant to s. 2(*d*). [175] [177-178] [180-181]

In this case, the freedom of association of health care employees has been infringed in several instances, because ss. 4, 5, 6(2), 6(4) and 9 of the Act (in conjunction with s. 10) interfere with their right to a process of collective bargaining with the employer. Sections 4 and 5 nullify some existing terms of collective agreements, limit the scope of future negotiations and prevent workers from engaging in associational activities relating to the important matter of transfer and assignment of employees. Sections 6(2) and 6(4) nullify past collective bargaining relating to contracting out, thereby rendering the process nugatory, and preclude future collective bargaining on the issue. These provisions concern a significant issue of employment security, and negotiating such issues is one of the purposes of associational activities in the workplace. Lastly, s. 9 makes collective bargaining over specified aspects of layoff and bumping meaningless and invalidates parts of collective agreements dealing with these significant workplace issues. [186-188] [252]

In enacting Part 2 of the Act, the government's objectives were to respond to growing demands on services, to reduce structural barriers to patient care, and to improve planning and accountability, so as to achieve long term sustainability. In addition to these general objectives, the specific impugned provisions were designed to provide a more seamless and flexible health care delivery system and develop more cost-effective and efficient ways to deliver health services in order to improve patient care and reduce costs. The objectives of Part 2 of the Act and of the impugned provisions are important ones. The health care system is under serious strain and is facing a crisis of sustainability. There is little hope that it can survive in its current form. [198-200]

It is clear from the context of these objectives that while the nature of some of the working conditions that are likely to be affected tends to favour a less deferential

approach, substantial deference must be shown in determining whether the measures adopted in this case are justified under s. 1, in particular, in light of the crisis of sustainability in the health care sector and the vulnerability of patients. Here, the measures provided for in ss. 4, 5, 6(2), 6(4) and 9 of the Act are rationally connected to the pressing and substantial objectives being pursued and, with the exception of s. 6(4), meet the requirements of minimal impairment and proportionate effects. [193] [222-223]

With respect to minimal impairment, the record shows that the government adopted the impugned measures after considering and rejecting other options that it believed would not meet its objectives. Further, Part 2 of the Act was not aimed directly at the *Charter* rights of the affected employees. Rather, the goal was to respond to growing demands on services, to reduce structural barriers to patient care and to improve planning and accountability so as to achieve long- term sustainability. Section 4 was specifically designed to facilitate the reorganization of health care service delivery by enabling employers to transfer functions or services to another worksite or to another health sector employer within a region. As for s. 5, it relates to the temporary assignment of an employee to another worksite or another employer. Employees do not lose their employment as a result of ss. 4 and 5 and the regulations adopted pursuant to the Act mitigate the impact of these provisions on employees. Under s. 6(2), contracting out is not obligatory; rather, this provision prohibits collective agreement clauses preventing contracting out. Thus, although union density may be lower when work is contracted out, there is still substantial room for all employees providing non-clinical services to exercise their right to freedom of association and to engage in a process of collective bargaining, even when certain of those services are contracted out. In the context of the province's health care crisis, removing prohibitions on contracting out in collective agreements furthered the government's objective in ways that alternative responses could not.

Moreover, the alternative measures considered by the government were problematic in that many may have directly affected other *Charter* rights. As for s. 9, it impaired the collective bargaining process in respect of layoffs and bumping, but was limited by a time period. It was adopted as a transitional measure. It did not ban bumping or layoff provisions in collective agreements, but only imposed by legislative means attenuated terms for layoffs and bumping in place of those agreed to in the collective bargaining process. Not only was the impact of s. 9(d) on workers minimized by safeguards provided for in s. 5 of the regulations made under the Act, but there is also sufficient evidence that s. 9 enabled the government to meet its objectives of making the health care system more sustainable and improving service to patients in ways that other alternatives would not permit. As with s. 6(2), the history of labour relations in the province strongly suggests that the terms set out in s. 9 could not have been successfully negotiated by health care sector employers and unions. Sections 4, 5, 6(2) and 9 are carefully tailored so as to ensure that the government's objectives are attained while infringing s. 2(*d*) as little as possible. They are also a proportionate response to the crisis of sustainability in health care, striking an appropriate balance between the government's objectives and the freedom of association of employees. [229-230] [232] [234-236] [238] [240] [245] [248] [250-251]

Section 6(4) fails both the minimal impairment test and the proportionate effects test and is unconstitutional. The government has failed to establish by evidence, inference or common sense that the employers' ability to contract out would be restricted unreasonably by a requirement to consult with the relevant unions beforehand. While s. 6(4) does not, strictly speaking, prohibit consultations on contracting out, declaring that any clause in a collective agreement providing for consultation is void is an invitation to employers not to consult. Taking consultation, which is an important component of the collective bargaining process, off the table is also a disproportionate measure. The

marginal benefits of this provision are outweighed by the deleterious effects of denying consultation to affected unions. [242] [249] [252]

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Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize, 68 U.N.T.S. 17.

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International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 22(1), (2).

International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, Art. 8(1)(*c*).

APPEAL from a judgment of the British Columbia Court of Appeal (Esson, Low and Thackray JJ.A.) (2004), 30 B.C.L.R. (4th) 219, 243 D.L.R. (4th) 175, [2004] 11 W.W.R. 64, 201 B.C.A.C. 255, 120 C.R.R. (2d) 266, [2004] B.C.J. No. 1354 (QL), 2004 BCCA 377, upholding a judgment of Garson J. (2003), 19 B.C.L.R. (4th) 37, 110 C.R.R. (2d) 320, [2003] B.C.J. No. 2107 (QL), 2003 BCSC 1379. Appeal allowed in part, Deschamps J. dissenting in part.

Joseph J. Arvay, Q.C., and *Catherine J. Boies Parker*, for the appellants.

Peter A. Gall, Q.C., *Nitya Iyer* and *Neena Sharma*, for the respondent.

Robin K. Basu and *Shannon Chace-Hall*, for the intervener the Attorney General of Ontario.

Written submissions only by *Gaétan Migneault* for the intervener the Attorney General of New Brunswick.

Roderick S. Wiltshire, for the intervener the Attorney General of Alberta.

Mario Évangéliste, for the intervener the Confederation of National Trade Unions.

Steven M. Barrett and *Ethan Poskanzer*, for the intervener the Canadian Labour Congress.

Paul J. J. Cavalluzzo and *Fay C. Faraday*, for the intervener Michael J. Fraser on his own behalf and on behalf of United Food and Commercial Workers Union Canada.

The judgment of McLachlin C.J. and Bastarache, Binnie, LeBel, Fish and Abella JJ. was delivered by

THE CHIEF JUSTICE AND LEBEL J. –

I. Introduction

A. *Overview*

1 The appellants challenge the constitutional validity of Part 2 of the *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2 ("Act"), as violative of the *Canadian Charter of Rights and Freedoms* guarantees of freedom of association (s. 2(*d*)) and equality (s. 15).

2 We conclude that the s. 2(*d*) guarantee of freedom of association protects the capacity of members of labour unions to engage in collective bargaining on workplace

issues. While some of the impugned provisions of the Act comply with this guarantee, ss. 6(2), 6(4) and 9 breach it and have not been shown to be justified under s. 1 of the *Charter*. We further conclude that the Act does not violate the right to equal treatment under s. 15 of the *Charter*. In the result, the appeal is allowed in part.

B. *The Background*

3 This case requires the Court to balance the need for governments to deliver essential social services effectively with the need to recognize the *Charter* rights of employees affected by such legislation, who were working for health and social service employers. The respondent government characterizes the impugned legislation as a crucial element of its response to a pressing health care crisis, necessary and important to the well-being of British Columbians. The appellants, unions and individual workers representing some of the subsectors of the health care sector affected by the legislation, by contrast, see the Act as an affront to the fundamental rights of employees and union members under the *Charter*, which they understand as including a collective right to pursue fundamental workplace goals through collective bargaining in respect of terms of employment.

C. *The Act*

4 The Act was adopted as a response to challenges facing British Columbia's health care system. Demand for health care and the cost of providing needed health care services had been increasing significantly for years. For example, in the period from 1991 to 2001, the growth rate of health care costs in British Columbia was three times that of the provincial economy. As a result, the government of British Columbia found itself struggling to provide health care services to its citizens. The government characterized

the state of affairs in 2001 as a "crisis of sustainability" in the health care system (Respondent's Factum, at para. 3).

5 The goals of the Act were to reduce costs and to facilitate the efficient management of the workforce in the health care sector. Not wishing to decrease employees' wages, the government attempted to achieve these goals in more sustainable ways. According to the government, the Act was designed in particular to focus on permitting health care employers to reorganize the administration of the labour force and on making operational changes to enhance management's ability to restructure service delivery (see British Columbia, *Debates of the Legislative Assembly*, 2nd Sess., 37th Parl., vol. 2, No. 28, January 25, 2002, at p. 865).

6 The Act was quickly passed. It came into force three days after receiving a first reading as Bill 29 before the British Columbia legislature.

7 There was no meaningful consultation with unions before it became law. The government was aware that some of the areas affected by Bill 29 were of great concern to the unions and had expressed a willingness to consult. However, in the end, consultation was minimal. A few meetings were held between representatives of the unions and the government on general issues relating to health care. These did not deal specifically with Bill 29 and the changes that it proposed. Union representatives expressed their desire to be further consulted. The Minister of Health Services telephoned a union representative 20 minutes before Bill 29 was introduced in the legislative assembly to inform the union that the government would be introducing legislation dealing with employment security and other provisions of existing collective agreements. This was the only consultation with unions before the Act was passed (A.R., at p. 1076).

8 In British Columbia, the collective bargaining structure in the health services is sectoral. Thus, the Act affects labour relations between "health sector employers" and their unionized employees. A "health sector employer", as defined under the Act, is a member of the Health Employers Association of British Columbia ("HEABC") established under s. 6 of the *Public Sector Employers Act*, R.S.B.C. 1996, c. 384, and whose employees are unionized (s. 3 of the Act). The HEABC is an employers' association accredited to act as the representative of its members in the bargaining process with health sector employees. Members of the HEABC are hospitals and other employers designated by regulation, including employers in the health sector receiving a substantial amount of funding from the Ministry of Health (A.R., at p. 212). Therefore, while the Act applies mainly to public sector employers, it also applies to some private sector employers.

9 The appellants in the present case are unions and members of the unions representing the nurses, facilities or community subsectors — groups affected by the legislation. Although they were affected by the legislation, other groups like residents and paramedical professionals did not join the litigation.

10 Only Part 2 of the Act is at issue in the current appeal (see Appendix). It introduced changes to transfers and multi-worksite assignment rights (ss. 4 and 5), contracting out (s. 6), the status of employees under contracting-out arrangements (s. 6), job security programs (ss. 7 and 8), and layoffs and bumping rights (s. 9).

11 Part 2 gave health care employers greater flexibility to organize their relations with their employees as they see fit, and in some cases, to do so in ways that would not have been permissible under existing collective agreements and without adhering to

requirements of consultation and notice that would otherwise obtain. It invalidated important provisions of collective agreements then in force, and effectively precluded meaningful collective bargaining on a number of specific issues. Section 10 invalidated any part of a collective agreement, past or future, which was inconsistent with Part 2, and any collective agreement purporting to modify these restrictions. In the words of the Act, s. 10: "Part [2] prevails over collective agreements". It is not open to the employees (or the employer) to contract out of Part 2 or to rely on a collective agreement inconsistent with Part 2.

12 The details of the legislation and its practical ramifications for employees and their unions will be considered in greater detail later in these reasons. It suffices to state at this point that while some of the changes were relatively innocuous administrative changes, others had profound effects on the employees and their ability to negotiate workplace matters of great concern to them.

II. Judicial History

13 Neither the trial court nor the British Columbia Court of Appeal was willing to recognize a right to collective bargaining under s. 2(*d*) of the *Charter*, although the Court of Appeal acknowledged that the Supreme Court of Canada had opened the door to the recognition of such a right. In the result, the Act was held to be constitutional under ss. 2(*d*) and 15.

14 The plaintiffs argued at trial that the impugned legislation violated several constitutional rights guaranteed under the *Charter*: freedom of association (under

s. 2(*d*)), life, liberty and security of the person (under s. 7), and equality (under s. 15). The s. 7 argument was not pursued on subsequent appeals.

A. *British Columbia Supreme Court* (2003), 19 B.C.L.R. (4th) 37, 2003 BCSC 1379

15 The trial judge, Garson J., dismissed the plaintiffs' freedom of association claim on the ground that collective bargaining was not an activity recognized by the Supreme Court of Canada as falling within the scope of s. 2(*d*) of the *Charter*. Indeed, she noted that the Supreme Court's jurisprudence consistently and explicitly stated that the ability to bargain collectively was not a *Charter*-protected activity. In her opinion, the plaintiffs had not proved that the law targeted associational conduct because of its concerted nature.

16 The trial judge also dismissed the plaintiffs' claim under the equality provisions in s. 15 of the *Charter*. The plaintiffs argued that the Act subjected them to differential treatment in a manner affecting their dignity and personhood, based on overlapping grounds of sex and being workers who work in "women's jobs" (para. 154). The trial judge, applying *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, held that there was no violation of s. 15. First, the Act did not distinguish between the plaintiffs and others in appropriate comparator groups on the basis of personal characteristics; the distinctions made were based on the claimants' sector of employment, not their personal characteristics. Second, any adverse effects of the impugned law on the claimants did not amount to differential treatment as required for a s. 15 violation; "the fact that this group is predominantly female does not constitutionally shield it from governmental action that may adversely affect them without evidence that it is being subject to differential treatment on the basis of s. 15 characteristics" (see para.

174). Third, the Act did not discriminate on the basis of an enumerated or analogous ground. In making this finding, the trial judge characterized the ground of discrimination primarily in terms of occupational status as health care workers, although she explicitly acknowledged that health care workers were more predominantly female than other groups of unionized workers in British Columbia and that their work continued to be considered "women's work" (see para. 181). Finally, in the opinion of the trial judge, any adverse treatment imposed by the Act did not affect the dignity of the claimants, as required for a violation of s. 15 (para. 189).

B. *British Columbia Court of Appeal* (2004), 30 B.C.L.R. (4th) 219, 2004 BCCA 377

17 The Court of Appeal (*per* Thackray J.A., Esson and Low JJ.A. concurring) concluded that there was no violation of s. 2(*d*) or s. 15 of the *Charter* and dismissed the appeal. After engaging in a detailed review of the Supreme Court's s. 2(*d*) jurisprudence, Thackray J.A. concluded that the current state of authority was insufficient to sustain the conclusion that a right of collective bargaining was protected under s. 2(*d*). He acknowledged that the decisions of the Supreme Court, especially in *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94, left room to recognize a right to collective bargaining in future cases. However, his view was that the appropriate forum for recognizing a right to collective bargaining under s. 2(*d*) of the *Charter* was the Supreme Court of Canada, not lower courts (see para. 106).

18 Having held that the impugned legislation did not violate s. 2(*d*) of the *Charter*, Thackray J.A. went on to consider whether the legislation was also valid under the equality rights provisions in s. 15. He found no error in the analysis of the trial judge. Like the trial judge, he inclined to the view that any disadvantages imposed on health care

workers under the Act related to their role as health care workers under a particular scheme of labour relations, and did not involve their personal characteristics, the enumerated or analogous grounds, or their dignity. Even though the appellants had legitimate complaints about the effects of the Act on their lives and work, these adverse effects were outside the scope of s. 15 of the *Charter*.

III. Analysis

A. *Section 2(d) of the Charter*

19 At issue in the present appeal is whether the guarantee of freedom of association in s. 2(*d*) of the *Charter* protects collective bargaining rights. We conclude that s. 2(*d*) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of "collective bargaining", as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime. What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals. If the government substantially interferes with that right, it violates s. 2(*d*) of the *Charter*: *Dunmore*. We note that the present case does not concern the right to strike, which was considered in earlier litigation on the scope of the guarantee of freedom of association.

20 Our conclusion that s. 2(*d*) of the *Charter* protects a process of collective bargaining rests on four propositions. First, a review of the s. 2(*d*) jurisprudence of this Court reveals that the reasons evoked in the past for holding that the guarantee of

freedom of association does not extend to collective bargaining can no longer stand. Second, an interpretation of s. 2(*d*) that precludes collective bargaining from its ambit is inconsistent with Canada's historic recognition of the importance of collective bargaining to freedom of association. Third, collective bargaining is an integral component of freedom of association in international law, which may inform the interpretation of *Charter* guarantees. Finally, interpreting s. 2(*d*) as including a right to collective bargaining is consistent with, and indeed, promotes, other *Charter* rights, freedoms and values.

21 In the sections that follow, we discuss each of these propositions. We then elaborate on the scope of the protection for collective bargaining found in s. 2(*d*) of the *Charter*. Ultimately, in applying our analysis to the facts of the case, we find provisions of the Act to be in violation of s. 2(*d*) and not justified by s. 1 of the *Charter*.

(1) Reasons for Excluding Collective Bargaining from Section 2(*d*) in the Past Require Reconsideration

22 In earlier decisions, the majority view in the Supreme Court of Canada was that the guarantee of freedom of association did not extend to collective bargaining. *Dunmore*, opened the door to reconsideration of that view. We conclude that the grounds advanced in the earlier decisions for the exclusion of collective bargaining from the *Charter*'s protection of freedom of association do not withstand principled scrutiny and should be rejected.

23 The first cases dealing squarely with the issue of whether collective bargaining is protected under s. 2(*d*) of the *Charter* were a group of three concurrently released

appeals known as the labour "trilogy": *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 ("*Alberta Reference*"), *PSAC v. Canada*, [1987] 1 S.C.R. 424, and *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460. The main reasons were delivered in the *Alberta Reference*, a case involving compulsory arbitration to resolve impasses in collective bargaining and a prohibition on strikes. Of the six justices participating in the case, three held that collective bargaining was not protected by s. 2(*d*); four held that strike activity was not protected. The next case to deal with the issue was *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 ("*PIPSC*"), in which the government of the Northwest Territories refused to enact legislation required in order for the PIPSC union to bargain collectively on behalf of nurses. A majority of four held that collective bargaining was not protected by s. 2(*d*).

24 In these cases, different members of the majorities put forth five main reasons in support of the contention that collective bargaining does not fall within s. 2(*d*)'s protection.

25 The first suggested reason was that the rights to strike and to bargain collectively are "modern rights" created by legislation, not "fundamental freedoms" (*Alberta Reference*, *per* Le Dain J., writing on behalf of himself, Beetz and La Forest JJ., at p. 391). The difficulty with this argument is that it fails to recognize the history of labour relations in Canada. As developed more thoroughly in the next section of these reasons, the fundamental importance of collective bargaining to labour relations was the very reason for its incorporation into statute. Legislatures throughout Canada have historically viewed collective bargaining rights as sufficiently important to immunize them from potential interference. The statutes they passed did not create the right to bargain

collectively. Rather, they afforded it protection. There is nothing in the statutory entrenchment of collective bargaining that detracts from its fundamental nature.

26 The second suggested reason was that recognition of a right to collective bargaining would go against the principle of judicial restraint in interfering with government regulation of labour relations (*Alberta Reference*, at p. 391). The regulation of labour relations, it is suggested, involves policy decisions best left to government. This argument again fails to recognize the fact that worker organizations historically had the right to bargain collectively outside statutory regimes and takes an overbroad view of judicial deference. It may well be appropriate for judges to defer to legislatures on policy matters expressed in particular laws. But to declare a judicial "no go" zone for an entire right on the ground that it may involve the courts in policy matters is to push deference too far. Policy itself should reflect *Charter* rights and values.

27 The third suggested reason for excluding collective bargaining from s. 2(*d*) of the *Charter* rested on the view that freedom of association protects only those activities performable by an individual (see *PIPSC, per* L'Heureux-Dubé and Sopinka JJ.). This view arises from a passage in which Sopinka J. set out the scope of s. 2(*d*) in four oft-quoted propositions (at pp. 402-3): (1) s. 2(*d*) protects the freedom to establish, belong to and maintain an association; (2) it does not protect an activity solely on the ground that the activity is foundational or essential to the association; (3) it protects the exercise in association of the constitutional rights and freedoms of individuals; and (4) it protects the exercise in association of the lawful rights of individuals. If this framework and the premise that s. 2(*d*) covers only activities performable by an individual is accepted, it follows that collective bargaining cannot attract the protection of s. 2(*d*) because collective bargaining cannot be performed by an individual.

28 This narrow focus on individual activities has been overtaken by *Dunmore*, where this Court rejected the notion that freedom of association applies only to activities capable of performance by individuals. Bastarache J. held that "[t]o limit s. 2(*d*) to activities that are performable by individuals would ... render futile these fundamental initiatives" (para. 16), since, as Dickson C.J. noted in his dissent in the *Alberta Reference*, some collective activities may, by their very nature, be incapable of being performed by an individual. Bastarache J. provided the example of expressing a majority viewpoint as being an inherently collective activity without an individual analogue (para. 16). He concluded that:

> As I see it, the very notion of "association" recognizes the qualitative differences between individuals and collectivities. It recognizes that the press differs qualitatively from the journalist, the language community from the language speaker, the union from the worker. In all cases, the community assumes a life of its own and develops needs and priorities that differ from those of its individual members. ... [B]ecause trade unions develop needs and priorities that are distinct from those of their members individually, they cannot function if the law protects exclusively what might be "the lawful activities of individuals". Rather, the law must recognize that certain union activities – making collective representations to an employer, adopting a majority political platform, federating with other unions – may be central to freedom of association even though they are inconceivable on the individual level. This is not to say that all such activities are protected by s. 2(*d*), nor that all collectivities are worthy of constitutional protection; indeed, this Court has repeatedly excluded the right to strike and collectively bargain from the protected ambit of s. 2(*d*).... It is to say, simply, that certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning. [Emphasis added; para. 17.]

29 The fourth reason advanced for excluding collective bargaining rights from s. 2(*d*) was the suggestion of L'Heureux-Dubé J. that s. 2(*d*) was not intended to protect the "objects" or goals of an association (see *PIPSC*, at pp. 391-93). This argument overlooks the fact that it will always be possible to characterize the pursuit of a particular activity in

concert with others as the "object" of that association. Recasting collective bargaining as an "object" begs the question of whether or not the activity is worthy of constitutional protection. L'Heureux-Dubé J.'s underlying concern — that the *Charter* not be used to protect the substantive outcomes of any and all associations — is a valid one. However, "collective bargaining" as a procedure has always been distinguishable from its final outcomes (e.g., the results of the bargaining process, which may be reflected in a collective agreement). Professor Bora Laskin (as he then was) aptly described collective bargaining over 60 years ago as follows:

> Collective bargaining is the procedure through which the views of the workers are made known, expressed through representatives chosen by them, not through representatives selected or nominated or approved by employers. More than that, it is a procedure through which terms and conditions of employment may be settled by negotiations between an employer and his employees on the basis of a comparative equality of bargaining strength.
>
> ("Collective Bargaining in Canada: In Peace and in War" (1941), 2:3 *Food for Thought*, at p. 8.)

In our view, it is entirely possible to protect the "procedure" known as collective bargaining without mandating constitutional protection for the fruits of that bargaining process. Thus, the characterization of collective bargaining as an association's "object" does not provide a principled reason to deny it constitutional protection.

30 An overarching concern is that the majority judgments in the *Alberta Reference* and *PIPSC* adopted a decontextualized approach to defining the scope of freedom of association, in contrast to the purposive approach taken to other *Charter* guarantees. The result was to forestall inquiry into the purpose of that *Charter* guarantee. The generic approach of the earlier decisions to s. 2(*d*) ignored differences between organizations. Whatever the organization — be it trade union or book club — its

freedoms were treated as identical. The unfortunate effect was to overlook the importance of collective bargaining — both historically and currently — to the exercise of freedom of association in labour relations.

31 We conclude that the reasons provided by the majorities in the *Alberta Reference* and *PIPSC* should not bar reconsideration of the question of whether s. 2(*d*) applies to collective bargaining. This is manifestly the case since this Court's decision in *Dunmore*, which struck down a statute that effectively prohibited farm workers from engaging in collective bargaining by denying them access to the Province's labour relations regime, as violating of s. 2(*d*) of the *Charter*. *Dunmore* clarified three developing aspects of the law: what constitutes interference with the "associational aspect" of an activity; the need for a contextual approach to freedom of association; and the recognition that s. 2(*d*) can impose positive obligations on government.

32 *Dunmore* accepted the conclusion of the majority in *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, that only the "associational aspect" of an activity and not the activity itself are protected under s. 2(*d*). It clarified, however, that equal legislative treatment of individuals and groups does not mean that the "associational aspect" of an activity has not been interfered with. A prohibition on an individual may not raise associational concerns, while the same prohibition on the collective may do so. *Dunmore* concluded:

> In sum, a purposive approach to s. 2(*d*) demands that we "distinguish between the associational aspect of the activity and the activity itself", a process mandated by this Court in the *Alberta Reference* [p.1043] (see *Egg Marketing, supra*, *per* Iacobucci and Bastarache JJ., at para. 111). Such an approach begins with the existing framework established in that case, which enables a claimant to show that a group activity is permitted for individuals in order to establish that its regulation targets the association *per se* (see *Alberta Reference, supra*, *per* Dickson C.J., at p. 367). Where this burden

> cannot be met, however, it may still be open to a claimant to show, by direct evidence or inference, that the legislature has targeted associational conduct because of its concerted or associational nature.
>
> (*Per* Bastarache J., at para. 18.)

33 Second, *Dunmore* correctly advocated a more contextual analysis than had hitherto prevailed. Showing that a legislature has targeted associational conduct because of its "concerted or associational nature" requires a more contextual assessment than found in the early s. 2(*d*) cases. This contextual approach was foreshadowed by the dissenting reasons of Bastarache J. in *R. v. Advance Cutting and Coring Ltd.*, [2001] 3 S.C.R. 209, 2001 SCC 70, expressing the view that to define the limits of s. 2(*d*), "the whole context of the right must be considered" (para. 9).

34 Finally, *Dunmore* recognized that, in certain circumstances, s. 2(*d*) may place positive obligations on governments to extend legislation to particular groups. Underinclusive legislation may, "in unique contexts, substantially impact the exercise of a constitutional freedom" (para. 22). This will occur where the claim of underinclusion is grounded in the fundamental *Charter* freedom and not merely in access to a statutory regime (para. 24); where a proper evidentiary foundation is provided to create a positive obligation under the *Charter* (para. 25); and where the state can truly be held accountable for any inability to exercise a fundamental freedom (para. 26). There must be evidence that the freedom would be next to impossible to exercise without positively recognizing a right to access a statutory regime.

35 Bastarache J. reconciled the holding in *Dunmore* of a positive obligation on government to permit farm workers to join together to bargain collectively in an effective manner with the conclusion in *Delisle v. Canada (Deputy Attorney General)*, [1999] 2

S.C.R. 989, that the federal government was not under a positive obligation to provide RCMP officers with access to collective bargaining by distinguishing the effects of the legislation in the two cases. Unlike the RCMP members in *Delisle*, farm workers faced barriers that made them *substantially incapable* of exercising their right to form associations outside the statutory framework (*per* Bastarache J., at paras. 39, 41 and 48). The principle affirmed was clear: Government measures that substantially interfere with the ability of individuals to associate with a view to promoting work-related interests violate the guarantee of freedom of association under s. 2(*d*) of the *Charter*.

36 In summary, a review of the jurisprudence leads to the conclusion that the holdings in the *Alberta Reference* and *PIPSC* excluding collective bargaining from the scope of s. 2(*d*) can no longer stand. None of the reasons provided by the majorities in those cases survive scrutiny, and the rationale for excluding inherently collective activities from s. 2(*d*)'s protection has been overtaken by *Dunmore*.

37 Our rejection of the arguments previously used to exclude collective bargaining from s. 2(*d*) leads us to a reassessment of that issue, discussed below.

(2) Collective Bargaining Falls Within the Scope of Section 2(*d*) of the *Charter*

38 The question is whether the s. 2(*d*) guarantee of freedom of association extends to the right of employees to join together in a union to negotiate with employers on workplace issues or terms of employment — a process described broadly as collective bargaining.

39 The general purpose of the *Charter* guarantees and the language of s. 2(*d*) are consistent with at least a measure of protection for collective bargaining. The language of s. 2(*d*) is cast in broad terms and devoid of limitations. However, this is not conclusive. To answer the question before us, we must consider the history of collective bargaining in Canada, collective bargaining in relation to freedom of association in the larger international context, and whether *Charter* values favour an interpretation of s. 2(*d*) that protects a process of collective bargaining: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344, *per* Dickson J. Evaluating the scope of s. 2(*d*) of the *Charter* through these tools leads to the conclusion that s. 2(*d*) does indeed protect workers' rights to a process of collective bargaining.

(a) *Canadian Labour History Reveals the Fundamental Nature of Collective Bargaining*

40 Association for purposes of collective bargaining has long been recognized as a fundamental Canadian right which predated the *Charter*. This suggests that the framers of the *Charter* intended to include it in the protection of freedom of association found in s. 2(*d*) of the *Charter*.

41 The respondent argues that the right to collective bargaining is of recent origin and is merely a creature of statute. This assertion may be true if collective bargaining is equated solely to the framework of rights of representation and collective bargaining now recognized under federal and provincial labour codes. However, the origin of a right to collective bargaining in the sense given to it in the present case (i.e., a procedural right to bargain collectively on conditions of employment), precedes the adoption of the present system of labour relations in the 1940s. The history of collective

bargaining in Canada reveals that long before the present statutory labour regimes were put in place, collective bargaining was recognized as a fundamental aspect of Canadian society. This is the context against which the scope of the s. 2(*d*) must be considered.

42 Canadian labour history can be summarized by borrowing words from the 1968 *Report of the Task Force on Labour Relations*. As society entered into the industrialized era, "workers began to join unions and to engage in collective bargaining with their employers. Although employers resisted this development with all the resources at their command, it eventually became apparent that unions and collective bargaining were natural concomitants of a mixed enterprise economy. The state then assumed the task of establishing a framework of rights and responsibilities within which management and organized labour were to conduct their relations" (Task Force on Labour Relations, *Canadian Industrial Relations: The Report of Task Force on Labour Relations* (1968) ("Woods Report"), at p. 13).

43 Canadian labour law traces its roots to various legal systems, most importantly to British and American law. Prior to the 1940s, British law had a significant influence on the development of our labour law. American law became an influential force when the United States passed the *Wagner Act* in 1935 (also called *National Labor Relations Act*). And a substantial part of Quebec's law governing labour relations and collective bargaining prior to 1944 was influenced by French law (see R. P. Gagnon, L. LeBel and P. Verge, *Droit du travail* (2nd ed. 1991), at pp. 26-27).

44 The development of labour relations law in Canada may be divided into three major eras: repression, toleration and recognition. We are aware that such categorization may not necessarily draw a perfectly accurate picture of the evolution of labour law in our

country (see, e.g., E. Tucker, "The Faces of Coercion: The Legal Regulation of Labor Conflict in Ontario, 1880-1889" (1994), 12 *Law & Hist. Rev.* 277). However, for present purpose, such categorization provides a sufficient historical framework in which to summarize the evolution of our law and to underline the flourishing of labour unions and collective bargaining as well as the historic openness of government and society to those organizations over the past century.

(i) Repression of Workers' Organizations

45 Workers' associations have a long history. In England, as early as the end of the Middle Ages, workers were getting together to improve their conditions of employment. They were addressing petitions to Parliament, asking for laws to secure better wages or other more favourable working conditions. Soon thereafter, strike activity began (M.-L. Beaulieu, *Les Conflits de Droit dans les Rapports Collectifs du Travail* (1955), at pp. 29-30).

46 In Canada, workers' organizations can be traced back to the end of the 18th century. "As early as 1794 employees of the North West Fur Trading Company went on strike for higher wages" (D. D. Carter et al., *Labour Law in Canada* (5th ed. 2002), at p. 48). However, it was not until the industrial revolution that workers' organizations took on more than a marginal role, and that a real labour movement was born (Carter et al., at p. 48; C. Lipton, *The Trade Union Movement of Canada, 1827-1959* (4th ed. 1978), at pp. 1-8; J. Rouillard, *Histoire du syndicalisme au Québec: Des origines à nos jours* (1989), at p. 11).

47 From the beginning, the law was used as a tool to limit workers' rights to unionize. In England, through the 18th and 19th centuries, labour organizations were considered illegal under the common law doctrine of criminal conspiracy (Lord Wedderburn, *The Worker and the Law* (3rd ed. 1986), at pp. 514-15); G. W. Adams, *Canadian Labour Law* (2nd ed. (loose-leaf)), § 1.30, at p. 1-2). Statutes soon added new limits. After the French Revolution, the British Parliament, convinced that labour organizations were the nesting ground of potential revolutions, adopted the *Combination Acts* of 1799 and 1800, making it unlawful for two or more workers to combine in an attempt to increase their wages, lessen their hours of work or persuade anyone to leave or refuse work. The Acts, which made it "a criminal offence to be a member of a trade union, to call a strike, or to contribute money for trade union purposes", had the effect of suppressing a large series of collective actions (J. G. Riddall, *The Law of Industrial Relations* (1981), at p. 24). Combinations of workers were already illegal at common law. The *Combination Acts* reinforced the common law by providing faster and more effective tools to enforce criminal penalties upon workers (W. R. Cornish and G. de N. Clark, *Law and Society in England 1750-1950* (1989), at p. 297).

48 In 1824, the English *Combination Acts* were repealed. The repeal was immediately followed by a series of strikes. The British Parliament responded with a new *Combination Act* less than a year later, which reintroduced strong criminal sanctions against workers. The new *Combination Act* of 1825 made it legal for workers to bargain collectively with their employers. However, it made strikes a criminal offence. S. Deakin and G. S. Morris summarize, as follows, the state of the law under the *Combination Act* of 1825:

> For the fifty years or so after 1825 the legal position was, in principle, that freedom of association was permitted, and that collective bargaining could be

> lawfully pursued; however, strike action remained tightly confined. In practice, there was no effective right to resist employers who refused to enter into collective bargaining since the main weapon open to trade unions, namely strike action, was regulated by the criminal law. The criminal law also imposed sanctions on individual workers who quit their employment in breach of contract, by virtue of the Master and Servant Act 1823 which was the successor to a number of eighteenth-century statutes which had a similar effect.
>
> (*Labour Law* (4th ed. 2005), at p. 7)

49 In the 1860s, two important events led the British Parliament to change course. First, a Royal Commission on Trade Unions was appointed in 1867. It recommended better legal recognition for trade unions. Second, a reform of suffrage law gave a large segment of the working class the right to vote, enabling them to exert more influence over Parliament (Adams, § 1.40, at p. 1-4; A. W. R. Carrothers, E. E. Palmer and W. B. Rayner, *Collective Bargaining Law in Canada* (2nd ed. 1986), at p. 16). In response to these events, in 1871 the British Parliament adopted the *Trade Union Act* and the *Criminal Law Amendment Act*, which were intended to immunize trade unions and their members from the criminal laws of conspiracy and restraint of trade. Nevertheless, British courts continued to view collective actions suspiciously, repressing strikes through the doctrine of criminal conspiracy and repressing other union activity through the application of economic torts. The British Parliament in turn responded on occasion by strengthening the legislative protection for trade unions in that country (Deakin and Morris, at pp. 8-10).

50 The question of whether the repressive common law doctrines and the *Combination Acts* of 1799 and 1800 were introduced into Canada is subject to controversy. Some scholars are of the opinion that the common law doctrines of conspiracy and restraint of trade were introduced into Canadian law (Adams, § 1.70, at p.

1-5; Beaulieu, at p. 73). Others, however, argue that the Canadian common law and the civil law of Quebec were more ambiguous and less oppressive to trade unions than the British common law (Gagnon, LeBel and Verge, at pp. 620-21; *Perrault v. Gauthier* (1898), 28 S.C.R. 241). It is unnecessary to resolve this debate. It suffices to recognize that, at least until 1872, Canadian laws "cast shadows on the legitimacy of trade unions ..." (B. D. Palmer, *Working-Class Experience: Rethinking the History of Canadian Labour, 1800-1991* (2nd ed. 1992), at p. 66; E. Tucker, "'That Indefinite Area of Toleration': Criminal Conspiracy and Trade Unions in Ontario, 1837-77" (1991), 27 *Labour* 15; see also Carrothers, Palmer and Rayner, at p. 18).

(ii) Tolerance of Workers' Organizations and Collective Bargaining

51 A major shift in Canadian labour law took place in the aftermath of the Toronto Typographical Unions' strike that occurred in 1872. The strike by the Toronto typographers, inspired by the call for a nine-hour work day, led to numerous arrests and charges against the strikers for common law criminal conspiracy. At that time, Canada had not yet adopted legislation immunizing trade union members from criminal charges for conspiracy or restraint of trade. The criminal charges against the Toronto strikers raised public concern and revealed that Canada was behind the times — at least compared to Britain — on the issue of union protection and recognition.

52 In consequence, Canada adopted its own legislation copied in part from the British *Trade Union Act* of 1871. The Canadian *Trade Unions Act* of 1872 "made it clear that no worker could be criminally prosecuted for conspiracy solely on the basis of attempting to influence the rate of wages, hours of labour, or other aspects of the work relation" (Palmer, at p. 111). Through this legislative action, the Canadian Parliament

recognized the value for the individual of collective actions in the context of labour relations. As Sir John A. Macdonald mentioned in the House of Commons, the purpose of the *Trade Unions Act* of 1872 was to immunize unions from existing laws considered to be "opposed to the spirit of the liberty of the individual" (*Parliamentary Debates*, 5th sess., 1st Parl., 7 May 1872, at p. 392, as cited by M. Chartrand, "The First Canadian Trade Union Legislation: An Historical Perspective" (1984), 16 *Ottawa L. Rev.* 267).

53 By the beginning of the 1900s, the main criminal barriers to unionism in Canada had been brought down. Criminal law no longer prohibited employees from combining for the purposes of ameliorating their working conditions (Carrothers, Palmer and Rayner, at p. 30). However, courts continued to apply common law doctrines to restrain union activities (Adams, p. 1-5, at para. 170; Carrothers, Palmer and Rayner, at p. 19). Moreover, nothing in the law required employers to recognize unions or to bargain collectively with them. Employers could simply ignore union demands and even refuse to hire union members. As J. Fudge and E. Tucker explain:

> While workers were also privileged to combine with other workers to advance their common interests, employers were free to contract only with those workers who were not part of a combination. In short, they could refuse to hire union members and could fire those who became union members after taking up employment.
>
> (*Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900-1948* (2001), at p. 2)

54 While employers could refuse to recognize and bargain with unions, workers had recourse to an economic weapon: the powerful tool of calling a strike to force an employer to recognize a union and bargain collectively with it. The law gave both parties the ability to use economic weapons to attain their ends. Before the adoption of the modern statutory model of labour relations, the majority of strikes were motivated by the

workers' desire to have an employer recognize a union and bargain collectively with it (D. Glenday and C. Schrenk, "Trade Union and the State: An Interpretative Essay on the Historical Development of Class and State Relations in Canada, 1889-1949" (1978), 2 *Alternate Routes* 114, at p. 128; M. Thompson, "Wagnerism in Canada: Compared to What?", in *Proceedings of the XXXIst Conference-Canadian Industrial Relations Association* (1995), 59, at p. 60; C. D. Baggaley, *A Century of Labour Regulation in Canada* (1981), Working Paper No. 19, prepared for the Economic Council of Canada, at p. 57). The unprecedented number of strikes, caused in large part by the refusal of employers to recognize unions and to bargain collectively, led to governments adopting the American *Wagner Act* model of legislation, discussed below.

(iii) Recognition of Collective Bargaining

55 The first few decades of the 20th century saw Parliament's promotion of voluntary collective bargaining. The federal Parliament enacted a series of statutes to promote collective bargaining by conferring on the labour minister the power to impose conciliation on the parties in an attempt to bring them to compromise (*The Conciliation Act, 1900*, S.C. 1900, c. 24; *The Railway Labour Disputes Act, 1903*, S.C. 1903, c. 55; *The Industrial Disputes Investigation Act, 1907*, S.C. 1907, c. 20). This model failed, mainly because employers had no real incentive to participate in the process. (See J. Webber, "Compelling Compromise: Canada chooses Conciliation over Arbitration 1900-1907" (1991), 28 *Labour* 15; Gagnon, LeBel and Verge, at p. 25; Carrothers, Palmer and Rayner, at p. 32; Adams, at p. 1-6.) Moreover, union members did not receive any protection against unfair labour practices undertaken by employers (Carrothers, Palmer and Rayner, at p. 37). In search of a better model, Canadian governments looked at what was happening in the United States.

56 In the United States, courts also relied heavily on the doctrine of conspiracy under criminal and civil law as well as antitrust law to limit union activities (Gagnon, LeBel and Verge, at pp. 19-20). In 1914, the American Congress immunized unions from the application of antitrust law and adopted a non-interventionist attitude in order to let workers and employers use their respective economic powers to manage their own labour relations. However, the Depression and resulting industrial tension of the 1930s rendered the old laissez-faire model inappropriate. The result was the *Wagner Act*, which explicitly recognized the right of employees to belong to a trade union of their choice, free of employer coercion or interference, and imposed a duty upon employers to bargain in good faith with their employees' unions (Adams, at p. 1-10).

57 K. E. Klare has identified the following main objects of the *Wagner Act*:

> 1. *Industrial Peace*: By encouraging collective bargaining, the Act aimed to subdue "strikes and other forms of industrial strife or unrest," because industrial warfare interfered with interstate commerce; that is, it was unhealthy in a business economy. Moreover, although this thought was not embodied in the text, industrial warfare clearly promoted other undesirable conditions, such as political turmoil, violence, and general uncertainty.
>
> 2. *Collective Bargaining*: The Act sought to enhance collective bargaining for its own sake because of its presumed "mediating" or "therapeutic" impact on industrial conflict.
>
> 3. *Bargaining Power*: The Act aimed to promote "actual liberty of contract" by redressing the unequal balance of bargaining power between employers and employees.
>
> 4. *Free Choice*: The Act was intended to protect the free choice of workers to associate amongst themselves and to select representatives of their own choosing for collective bargaining.
>
> 5. *Underconsumption*: The Act was designed to promote economic recovery and to prevent future depressions by increasing the earnings and purchasing power of workers.
>
> 6. *Industrial Democracy*: This is the most elusive aspect of the legislative purpose, although most commentators indicate that a concept of industrial

> democracy is embedded in the statutory scheme, or at the least was one of the articulated goals of the sponsors of the Act. Senator Wagner frequently sounded the industrial democracy theme in ringing notes, and scholars have subsequently seen in collective bargaining "the means of establishing industrial democracy, . . . the means of providing for the workers' lives in industry the sense of worth, of freedom, and of participation that democratic government promises them as citizens."
>
> ("Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941" (1978), 62 *Minn. L. Rev.* 265, at pp. 281-84)

58 By the end of the 1930s, most Canadian provinces had passed legislation incorporating the main objectives of the *Wagner Act* (Carrothers, Palmer and Rayner, at pp. 47-48). However, it is Order in Council P.C. 1003, a regulation adopted by the federal government to rule labour relations in time of war, that firmly implemented the principles of the *Wagner Act* in Canada and triggered further development of provincial labour laws (Carrothers, Palmer and Rayner, at p. 50; J. Fudge and H. Glasbeek, "The Legacy of PC 1003" (1995), 3 *C.L.E.L.J.* 357, at p. 358).

59 Fudge and Glasbeek emphasize the effects of P.C. 1003 on Canadian labour relations:

> For the first time in Canada's history, the government compelled employers to recognize and to bargain with duly elected representatives and/or trade unions. From the workers' perspective, this constituted a movement from having a right to state their interest in being represented by a union to having enforceable legal right to have their chosen representative treated as a union by their employer. There was no longer any need to use collective economic muscle — always seriously limited by the common law — to obtain the right to bargain collectively with employers. [p. 359]

60 P.C. 1003 was a compromise adopted to promote peaceful labour relations. On the one hand, it granted major protections to workers to organize without fear of unfair interference from the employers and guaranteed workers the right to bargain

collectively in good faith with their employers without having to rely on strikes and other economic weapons. On the other hand, it provided employers with a measure of stability in their relations with their organized workers, without the spectre of intensive state intervention in the economy (Fudge and Glasbeek, at p. 370). These elements of P.C. 1003 continue to guide our system of labour relations to this day (Adams, at pp. 2-98 *et seq.*).

61 In all the provinces except Saskatchewan, legislation inspired by the *Wagner Act* initially applied only to the private sector. Its extension to the public sector came later. Between 1965 and 1973 statutes were passed across the country extending labour protections to public sectors. (Fudge and Glasbeek, at p. 384; see also J. R. Calvert, "Collective Bargaining in the Public Sector in Canada: Teething Troubles or Genuine Crisis?" (1987), 2 *Brit. J. Can. Stud.* 1). However, the rights conferred to public sector employees were more restricted than in the private sector:

> Some employees are not allowed to bargain about certain subjects, some employees are given the alternative of striking or accepting a compulsory arbitrated award, some employees are not given the right to strike at all. Further, governments have retained the right to determine that, even if a public sector bargaining unit is given the right to strike, some of its members should be designated as being essential workers, that is, workers who must continue to deliver a governmental service during a lawful strike by their bargaining unit colleagues. Moreover, a government's assumed right and need to continue to look after the public's welfare makes it easy to pass legislation suspending or abrogating a trade union's previously granted strike rights. In the same vein, a government can always argue that, whatever collective bargaining rights its workers have, these can justifiably be curtailed to allow the government, not just to continue to deliver services, but also to pursue a major policy, such as the reduction of inflation or the balancing of the budget.
>
> (Fudge et Glasbeek, at p. 385).

62 Moreover, on many occasions (and with increasing frequency during the 1980s and 1990s), governments used legislation to impose unilaterally upon their own employees specific conditions of employment, in most cases related to wages (J. B. Rose, "Public Sector Bargaining: From Retrenchment to Consolidation" (2004), 59 *IR* 271, at p. 275).

63 In summary, workers in Canada began forming collectives to bargain over working conditions with their employers as early as the 18th century. However, the common law cast a shadow over the rights of workers to act collectively. When Parliament first began recognizing workers' rights, trade unions had no express statutory right to negotiate collectively with employers. Employers could simply ignore them. However, workers used the powerful economic weapon of strikes to gradually force employers to recognize unions and to bargain collectively with them. By adopting the *Wagner Act* model, governments across Canada recognized the fundamental need for workers to participate in the regulation of their work environment. This legislation confirmed what the labour movement had been fighting for over centuries and what it had access to in the laissez-faire era through the use of strikes — the right to collective bargaining with employers.

(iv) Collective bargaining in the *Charter* era

64 At the time the *Charter* was enacted in 1982, collective bargaining had a long tradition in Canada and was recognized as part of freedom of association in the labour context. The 1968 Woods Report explained the importance of collective bargaining for our society and the special relationship between collective bargaining and freedom of association:

> Freedom to associate and to act collectively are basic to the nature of Canadian society and are root freedoms of the existing collective bargaining system. Together they constitute freedom of trade union activity: to organize employees, to join with the employer in negotiating a collective agreement, and to invoke economic sanctions, including taking a case to the public in the event of an impasse. ...
>
> In order to encourage and ensure recognition of the social purpose of collective bargaining legislation as an instrument for the advancement of fundamental freedoms in our industrial society, we recommend that the legislation contain a preamble that would replace the neutral tone of the present statute with a positive commitment to the collective bargaining system. [p. 138]

65 The preamble of the *Canada Labour Code*, R.S.C. 1970, c. L-1, was later modified, in 1972 (S.C. 1972, c. 18), to express the benefits that collective bargaining brings to society:

> Whereas there is a long tradition in Canada of labour legislation and policy designed for the promotion of the common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes;
>
> And Whereas Canadian workers, trade unions and employers recognize and support freedom of association and free collective bargaining as the bases of effective industrial relations for the determination of good working conditions and sound labour-management relations;

66 Collective bargaining, despite early discouragement from the common law, has long been recognized in Canada. Indeed, historically, it emerges as the most significant collective activity through which freedom of association is expressed in the labour context. In our opinion, the concept of freedom of association under s. 2(*d*) of the *Charter* includes this notion of a procedural right to collective bargaining.

67 This established Canadian right to collective bargaining was recognized in the Parliamentary hearings that took place before the adoption of the *Charter*. The acting Minister of Justice, Mr. Robert Kaplan, explained why he did not find necessary a proposed amendment to have the freedom to organize and bargain collectively expressly included under s. 2(*d*). These rights, he stated, were already implicitly recognized in the words "freedom of association":

> Our position on the suggestion that there be specific reference to freedom to organize and bargain collectively is that that is already covered in the freedom of association that is provided already in the Declaration or in the Charter; and that by singling out association for bargaining one might tend to d[i]minish all the other forms of association which are contemplated — church associations; associations of fraternal organizations or community organizations.
>
> (Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, Issue No. 43, January 22, 1981, at pp. 69-70)

68 The protection enshrined in s. 2(*d*) of the *Charter* may properly be seen as the culmination of a historical movement towards the recognition of a procedural right to collective bargaining.

(b) *International Law Protects Collective Bargaining as Part of Freedom of Association*

69 Under Canada's federal system of government, the incorporation of international agreements into domestic law is properly the role of the federal Parliament or the provincial legislatures. However, Canada's international obligations can assist courts charged with interpreting the *Charter*'s guarantees (see *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, at para. 46).

Applying this interpretive tool here supports recognizing a process of collective bargaining as part of the *Charter*'s guarantee of freedom of association.

70 Canada's adherence to international documents recognizing a right to collective bargaining supports recognition of the right in s. 2(*d*) of the *Charter*. As Dickson C.J. observed in the *Alberta Reference*, at p. 349, the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.

71 The sources most important to the understanding of s. 2(*d*) of the *Charter* are the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3 ("*ICESCR*"), the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 ("*ICCPR*"), and the International Labour Organization's (ILO's) *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize*, 68 U.N.T.S. 17 ("*Convention No. 87*"). Canada has endorsed all three of these documents, acceding to both the *ICESCR* and the *ICCPR*, and ratifying *Convention No. 87* in 1972. This means that these documents reflect not only international consensus, but also principles that Canada has committed itself to uphold.

72 The *ICESCR*, the *ICCPR* and *Convention No. 87* extend protection to the functioning of trade unions in a manner suggesting that a right to collective bargaining is part of freedom of association. The interpretation of these conventions, in Canada and internationally, not only supports the proposition that there is a right to collective bargaining in international law, but also suggests that such a right should be recognized in the Canadian context under s. 2(*d*).

73 Article 8, para. (1)(*c*) of the *ICESCR* guarantees the "right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others." This Article allows the "free functioning" of trade unions to be regulated, but not legislatively abrogated (*per* Dickson C.J., *Alberta Reference*, at p. 351). Since collective bargaining is a primary function of a trade union, it follows that Article 8 protects a union's freedom to pursue this function freely.

74 Similarly, Article 22, para. 1 of the *ICCPR* states that "[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests." Paragraph 2 goes on to say that no restriction may be placed on the exercise of this right, other than those necessary in a free and democratic society for reasons of national security, public safety, public order, public health or the protection of the rights of others. This Article has been interpreted to suggest that it encompasses both the right to form a union and the right to collective bargaining: *Concluding Observations of the Human Rights Committee Canada*, U.N. Doc. CCPR/C/79/Add.105 (1999).

75 *Convention No. 87* has also been understood to protect collective bargaining as part of freedom of association. Part I of the Convention, entitled "Freedom of Association", sets out the rights of workers to freely form organizations which operate under constitutions and rules set by the workers and which have the ability to affiliate internationally. Dickson C.J., dissenting in the *Alberta Reference*, at p. 355, relied on *Convention No. 87* for the principle that the ability "to form and organize unions, even in

the public sector, must include freedom to pursue the essential activities of unions, such as collective bargaining and strikes, subject to reasonable limits".

76 *Convention No. 87* has been the subject of numerous interpretations by the ILO's Committee on Freedom of Association, Committee of Experts and Commissions of Inquiry. These interpretations have been described as the "cornerstone of the international law on trade union freedom and collective bargaining": M. Forde, "The European Convention on Human Rights and Labor Law" (1983), 31 *Am. J. Comp. L.* 301, at p. 302. While not binding, they shed light on the scope of s. 2(*d*) of the *Charter* as it was intended to apply to collective bargaining: *Dunmore*, at paras. 16 and 27, *per* Bastarache J., applying the jurisprudence of the ILO's Committee of Experts and Committee on Freedom of Association.

77 A recent review by ILO staff summarized a number of principles concerning collective bargaining. Some of the most relevant principles in international law are summarized in the following terms (see B. Gernigon, A. Odero and H. Guido, "ILO principles concerning collective bargaining" (2000), 139 *Intern'l Lab. Rev.* 33, at pp. 51-52):

> A. The right to collective bargaining is a fundamental right endorsed by the members of the ILO in joining the Organization, which they have an obligation to respect, to promote and to realize, in good faith (ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up).
>
> ...
>
> D. The purpose of collective bargaining is the regulation of terms and conditions of employment, in a broad sense, and the relations between the parties.
>
> ...
>
> H. The principle of good faith in collective bargaining implies recognizing representative organizations, endeavouring to reach an agreement, engaging

> in genuine and constructive negotiations, avoiding unjustified delays in negotiation and mutually respecting the commitments entered into, taking into account the results of negotiations in good faith.
>
> I. In view of the fact that the voluntary nature of collective bargaining is a fundamental aspect of the principles of freedom of association, collective bargaining may not be imposed upon the parties and procedures to support bargaining must, in principle, take into account its voluntary nature; moreover, the level of bargaining must not be imposed unilaterally by law or by the authorities, and it must be possible for bargaining to take place at any level.
>
> J. It is acceptable for conciliation and mediation to be imposed by law in the framework of the process of collective bargaining, provided that reasonable time limits are established. However, the imposition of compulsory arbitration in cases where the parties do not reach agreement is generally contrary to the principle of voluntary collective bargaining and is only admissible: [cases of essential services, administration of the State, clear deadlock, and national crisis].
>
> K. Interventions by the legislative or administrative authorities which have the effect of annulling or modifying the content of freely concluded collective agreements, including wage clauses, are contrary to the principle of voluntary collective bargaining. These interventions include: the suspension or derogation of collective agreements by decree without the agreement of the parties; the interruption of agreements which have already been negotiated; the requirement that freely concluded collective agreements be renegotiated; the annulment of collective agreements; and the forced renegotiation of agreements which are currently in force. Other types of intervention, such as the compulsory extension of the validity of collective agreements by law are only admissible in cases of emergency and for short periods.
>
> L. Restrictions on the content of future collective agreements ... are admissible only in so far as such restrictions are preceded by consultations with the organizations of workers and employers and fulfil the following conditions: [restrictions are exceptional measures; of limited duration; include protection for workers' standards of living].
> (See also, M. Coutu, *Les libertés syndicales dans le secteur public* (1989), at pp. 26-29.)

78 The fact that a global consensus on the meaning of freedom of association did not crystallize in the *Declaration on Fundamental Principles and Rights at Work*, 6 IHRR 285 (1999), until 1998 does not detract from its usefulness in interpreting s. 2(*d*) of the *Charter*. For one thing, the Declaration was made on the basis of interpretations of international instruments, such as *Convention No. 87*, many of which were adopted by the

ILO prior to the advent of the *Charter* and were within the contemplation of the framers of the *Charter*. For another, the *Charter*, as a living document, grows with society and speaks to the current situations and needs of Canadians. Thus Canada's *current* international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the *Charter*.

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

(c) *Charter Values Support Protecting a Process of Collective Bargaining Under Section 2(d)*

80 Protection for a process of collective bargaining within s. 2(*d*) is consistent with the *Charter*'s underlying values. The *Charter*, including s. 2(*d*) itself, should be interpreted in a way that maintains its underlying values and its internal coherence. As Lamer J. stated in *Dubois v. The Queen*, [1985] 2 S.C.R. 350, at p. 365:

> Our constitutional *Charter* must be construed as a system where "Every component contributes to the meaning as a whole, and the whole gives meaning to its parts" (P. A. Côté writing about statutory interpretation in *The Interpretation of Legislation in Canada* (1984), at p. 236). The courts must interpret each section of the *Charter* in relation to the others (see, for example, *R. v. Carson* (1983), 20 M.V.R. 54 (Ont. C.A.); *R. v. Konechny*, [1984] 2 W.W.R. 481 (B.C.C.A.); *Reference re Education Act of Ontario and Minority Language Education Rights* (1984), 47 O.R. (2d) 1 (C.A.); *R. v. Antoine*, *supra*).
>
> (See also *Big M Drug Mart*, at p. 344; and *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, 2002 SCC 83, at para. 63.)

81 Human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy are among the values that underly the *Charter*: *R. v. Zundel*, [1992] 2 S.C.R. 731; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 100; *R. v. Oakes*, [1986] 1 S.C.R. 103. All of these values are complemented and indeed, promoted, by the protection of collective bargaining in s. 2(*d*) of the *Charter*.

82 The right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work (see *Alberta Reference*, at p. 368, and *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 93). As explained by P. C. Weiler in *Reconcilable Differences* (1980):

> Collective bargaining is not simply an instrument for pursuing external ends, whether these be mundane monetary gains or the erection of a private rule of law to protect dignity of the worker in the face of managerial authority. Rather, collective bargaining is intrinsically valuable as an experience in self-government. It is the mode in which employees participate in setting the terms and conditions of employment, rather than simply accepting what their employer chooses to give them .... [p. 33]

83 In *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, 2002 SCC 8, we underlined the importance of protecting workers' autonomy:

> Personal issues at stake in labour disputes often go beyond the obvious issues of work availability and wages. Working conditions, like the duration and location of work, parental leave, health benefits, severance and retirement schemes, may impact on the personal lives of workers even

> outside their working hours. Expression on these issues contributes to self-understanding, as well as to the ability to influence one's working and non-working life. [para. 34]

84 Collective bargaining also enhances the *Charter* value of equality. One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees: see *Wallace v. United Grain Growers Ltd.*, *per* Iacobucci J. In 1889, the Royal Commission on Capital and Labour appointed by the Macdonald government to make inquiries into the subject of labour and its relation to capital, stated that "Labour organizations are necessary to enable working men to deal on equal terms with their employers" (quoted in Glenday and Schrenk, at p. 121; see also G. Kealey, ed., *Canada investigates industrialism: The Royal Commission on the Relations of Labor and Capital, 1889 (abridged)* (1973)). Similarly, Dickson C.J. rightly emphasized this concern about equality in the *Alberta Reference*:

> Freedom of association is the cornerstone of modern labour relations. Historically, workers have combined to overcome the inherent inequalities of bargaining power in the employment relationship and to protect themselves from unfair, unsafe, or exploitative working conditions. As the United States Supreme Court stated in *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), at p. 33:
>
> > Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; ...
> >
> > The "necessities of the situation" go beyond, of course, the fairness of wages and remunerative concerns, and extend to matters such as health and safety in the work place, hours of work, sexual equality, and other aspects of work fundamental to the dignity and personal liberty of employees. [pp. 334-35]

85 Finally, a constitutional right to collective bargaining is supported by the *Charter* value of enhancing democracy. Collective bargaining permits workers to achieve a form of workplace democracy and to ensure the rule of law in the workplace. Workers gain a voice to influence the establishment of rules that control a major aspect of their lives (*Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, at pp. 260-61, *per* Wilson J.; *Alberta Reference*, at p. 369; *Dunmore*, at paras. 12 and 46; Weiler, at pp. 31-32). The 1968 Woods Report explained:

> One of the most cherished hopes of those who originally championed the concept of collective bargaining was that it would introduce into the work place some of the basic features of the political democracy that was becoming the hallmark of most of the western world. Traditionally referred to as industrial democracy, it can be described as the substitution of the rule of law for the rule of men in the work place. [p. 96]
>
> (See also Klare (quoted at para. 57 above).)

86 We conclude that the protection of collective bargaining under s. 2(*d*) of the *Charter* is consistent with and supportive of the values underlying the *Charter* and the purposes of the *Charter* as a whole. Recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the *Charter*.

(3) Section 2(*d*) of the *Charter* and the Right to Collective Bargaining

87 The preceding discussion leads to the conclusion that s. 2(*d*) should be understood as protecting the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining. The next question is what

this right entails for employees, for government employers subject to the *Charter* under s. 32, and for Parliament and provincial legislatures which adopt labour laws.

88 Before going further, it may be useful to clarify who the s. 2(*d*) protection of collective bargaining affects, and how. The *Charter* applies only to state action. One form of state action is the passage of legislation. In this case, the legislature of British Columbia has passed legislation applying to relations between health care sector employers and the unions accredited to those employers. That legislation must conform to s. 2(*d*) of the *Charter*, and is void under s. 52 of the *Constitution Act, 1982* if it does not (in the absence of justification under s. 1 of the *Charter*). A second form of state action is the situation where the government is an employer. While a private employer is not bound by s. 2(*d*), the government as employer must abide by the *Charter*, under s. 32, which provides: "This Charter applies ... (*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province." This case is concerned with an attack on government legislation; there is no allegation that the government of British Columbia, *qua* employer, violated s. 2(*d*) of the *Charter*.

89 The scope of the right to bargain collectively ought to be defined bearing in mind the pronouncements of *Dunmore*, which stressed that s. 2(*d*) does not apply solely to individual action carried out in common, but also to associational activities themselves. The scope of the right properly reflects the history of collective bargaining and the international covenants entered into by Canada. Based on the principles developed in *Dunmore* and in this historical and international perspective, the constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment. In brief, the protected activity might be

described as employees banding together to achieve particular work-related objectives. Section 2(*d*) does not guarantee the particular objectives sought through this associational activity. However, it guarantees the process through which those goals are pursued. It means that employees have the right to unite, to present demands to health sector employers collectively and to engage in discussions in an attempt to achieve workplace-related goals. Section 2(*d*) imposes corresponding duties on government employers to agree to meet and discuss with them. It also puts constraints on the exercise of legislative powers in respect of the right to collective bargaining, which we shall discuss below.

90 Section 2(*d*) of the *Charter* does not protect all aspects of the associational activity of collective bargaining. It protects only against "substantial interference" with associational activity, in accordance with a test crafted in *Dunmore* by Bastarache J., which asked whether "excluding agricultural workers from a statutory labour relations regime, without expressly or intentionally prohibiting association, [can] constitute a substantial interference with freedom of association" (para. 23). Or to put it another way, does the state action target or affect the associational activity, "thereby discouraging the collective pursuit of common goals"? (*Dunmore*, at para. 16) Nevertheless, intent to interfere with the associational right of collective bargaining is not essential to establish breach of s. 2(*d*) of the *Charter*. It is enough if the *effect* of the state law or action is to *substantially interfere* with the activity of collective bargaining, thereby discouraging the collective pursuit of common goals. It follows that the state must not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith. 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.

91 The right to collective bargaining thus conceived is a limited right. First, as the right is to a process, it does not guarantee a certain substantive or economic outcome. Moreover, the right is to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method. As P. A. Gall notes, it is impossible to predict with certainty that the present model of labour relations will necessarily prevail in 50 or even 20 years ("Freedom of Association and Trade Unions: A Double-Edged Constitutional Sword", in J.M. Weiler and R.M. Elliot, eds., *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedom*s (1986), 245, at p. 248). Finally, and most importantly, the interference, as *Dunmore* instructs, must be substantial — so substantial that it interferes not only with the attainment of the union members' objectives (which is not protected), but with the very process that enables them to pursue these objectives by engaging in meaningful negotiations with the employer.

92 To constitute *substantial interference* with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer that we call collective bargaining. Laws or actions that can be characterized as "union breaking" clearly meet this requirement. But less dramatic interference with the collective process may also suffice. In *Dunmore*, denying the union access to the labour laws of Ontario designed to support and give a voice to unions was enough. Acts of bad faith, or unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation may also significantly undermine the process of collective bargaining. The inquiry in every case is contextual and fact-specific.

The question in every case is whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted.

93 Generally speaking, determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries. The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.

94 Both inquiries are necessary. If the matters affected do not substantially impact on the process of collective bargaining, the measure does not violate s. 2(*d*) and, indeed, the employer may be under no duty to discuss and consult. There will be no need to consider process issues. If, on the other hand, the changes substantially touch on collective bargaining, they will still not violate s. 2(*d*) if they preserve a process of consultation and good faith negotiation.

95 Turning to the first inquiry, the essential question is whether the subject matter of a particular instance of collective bargaining is such that interfering with bargaining over that issue will affect the ability of unions to pursue common goals collectively. It may help to clarify why the importance of the subject matter of bargaining is relevant to the s. 2(*d*) inquiry. As we have stated, one requirement for finding a breach of s. 2(*d*) is that the state has "precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals" (*Dunmore*, at para. 16

(emphasis deleted)). Interference with collective bargaining over matters of lesser importance to the union and its capacity to pursue collective goals in concert may be of some significance to workers. However, interference with collective bargaining over these less important matters is more likely to fall short of discouraging the capacity of union members to come together and pursue common goals in concert. Therefore, if the subject matter is of lesser importance to the union, then it is less likely that the s. 2(*d*) right to bargain collectively is infringed. The importance of an issue to the union and its members is not itself determinative, but will bear on the "single inquiry" prescribed in *Dunmore* as it applies in the particular context of collective bargaining: does interference with collective bargaining over certain subject matter affect the ability of the union members to come together and pursue common goals? The more important the matter, the more likely that there is substantial interference with the s. 2(*d*) right. Conversely, the less important the matter to the capacity of union members to pursue collective goals, the less likely that there is substantial interference with the s. 2(*d*) right to collective bargaining.

96 While it is impossible to determine in advance exactly what sorts of matters are important to the ability of union members to pursue shared goals in concert, some general guidance may be apposite. Laws or state actions that prevent or deny meaningful discussion and consultation about working conditions between employees and their employer may substantially interfere with the activity of collective bargaining, as may laws that unilaterally nullify significant negotiated terms in existing collective agreements. By contrast, measures affecting less important matters such as the design of uniform, the lay out and organization of cafeterias, or the location or availability of parking lots, may be far less likely to constitute significant interference with the s. 2(*d*) right of freedom of association. This is because it is difficult to see how interfering with collective bargaining

over these matters undermines the capacity of union members to pursue shared goals in concert. Thus, an interference with collective bargaining over these issues is less likely to meet the requirements set out in *Dunmore* for a breach of s. 2(*d*).

97 Where it is established that the measure impacts on subject matter important to collective bargaining and the capacity of the union members to come together and pursue common goals, the need for the second inquiry arises: does the legislative measure or government conduct in issue respect the fundamental precept of collective bargaining — the duty to consult and negotiate in good faith? If it does, there will be no violation of s. 2(*d*), even if the content of the measures might be seen as being of substantial importance to collective bargaining concerns, since the process confirms the associational right of collective bargaining.

98 Consideration of the duty to negotiate in good faith which lies at the heart of collective bargaining may shed light on what constitutes improper interference with collective bargaining rights. It is worth referring again to principle H of the ILO principles concerning collective bargaining, which emphasizes the need for good faith in upholding the right to collective bargaining and in the course of collective bargaining. Principle H thus states:

> The principle of good faith in collective bargaining implies recognizing representative organizations, endeavouring to reach an agreement, engaging in genuine and constructive negotiations, avoiding unjustified delays in negotiation and mutually respecting the commitments entered into, taking into account the results of negotiations in good faith.

99 Consistent with this, the *Canada Labour Code* and legislation from all provinces impose on employers and unions the right and duty to bargain in good faith (see

generally Adams, at pp. 10-91 and 10-92). The duty to bargain in good faith under labour codes is essentially procedural and does not dictate the content of any particular agreement achieved through collective bargaining. The duty to bargain is aimed at bringing the parties together to meet and discuss, but as illustrated by Senator Walsh, chairman of the Senate committee hearing on the *Wagner Act*, the general rule is that: "The bill does not go beyond the office door." (Remarks of Senator Walsh, 79 Cong. Rec. 7659; see F. Morin, J.-Y. Brière and D. Roux, *Le droit de l'emploi au Québec* (3rd ed. 2006), at pp. 1026-27.)

100 A basic element of the duty to bargain in good faith is the obligation to actually meet and to commit time to the process (Carter et al., at p. 301). As explained by Adams:

> The failure to meet at all is, of course, a breach of the duty. A refusal to meet unless certain procedural preconditions are met is also a breach of the duty.
>
> ...
>
> A failure to make the commitment of time and preparation required to attempt to conclude an agreement is a failure to make reasonable efforts. [pp.10-101 and 10-106]

101 The parties have a duty to engage in meaningful dialogue and they must be willing to exchange and explain their positions. They must make a reasonable effort to arrive at an acceptable contract (Adams, at p. 10-107; Carrothers, Palmer and Rayner, at p. 453). As Cory J. said in *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369:

> In the context of the duty to bargain in good faith a commitment is required from each side to honestly strive to find a middle ground between their

> opposing interests. Both parties must approach the bargaining table with good intentions. [para. 41]

102 Nevertheless, the efforts that must be invested to attain an agreement are not boundless. "[T]he parties may reach a point in the bargaining process where further discussions are no longer fruitful. Once such a point is reached, a breaking off of negotiations or the adoption of a 'take it or leave it' position is not likely to be regarded as a failure to bargain in good faith" (Carter et al., at p. 302).

103 The duty to bargain in good faith does not impose on the parties an obligation to conclude a collective agreement, nor does it include a duty to accept any particular contractual provisions (Gagnon, LeBel and Verge, at pp. 499-500). Nor does the duty to bargain in good faith preclude hard bargaining. The parties are free to adopt a "tough position in the hope and expectation of being able to force the other side to agree to one's terms" (*Canadian Union of Public Employees v. Nova Scotia Labour Relations Board*, [1983] 2 S.C.R. 311, at p. 341).

104 In principle, the duty to bargain in good faith does not inquire into the nature of the proposals made in the course of collective bargaining; the content is left to the bargaining forces of the parties (Carter et al., at p. 300). However, when the examination of the content of the bargaining shows hostility from one party toward the collective bargaining process, this will constitute a breach of the duty to bargain in good faith. In some circumstances, even though a party is participating in the bargaining, that party's proposals and positions may be "inflexible and intransigent to the point of endangering the very existence of collective bargaining" (*Royal Oak Mines*, at para. 46). This inflexible approach is often referred to as "surface bargaining". This Court has explained the

distinction between hard bargaining, which is legal, and surface bargaining, which is a breach of the duty to bargain in good faith:

> It is often difficult to determine whether a breach of the duty to bargain in good faith has been committed. Parties to collective bargaining rarely proclaim that their aim is to avoid reaching a collective agreement. The jurisprudence recognizes a crucial distinction between "hard bargaining" and "surface bargaining" ... Hard bargaining is not a violation of the duty to bargain in good faith. It is the adoption of a tough position in the hope and expectation of being able to force the other side to agree to one's terms. Hard bargaining is not a violation of the duty because there is a genuine intention to continue collective bargaining and to reach agreement. On the other hand, one is said to engage in "surface bargaining" when one pretends to want to reach agreement, but in reality has no intention of signing a collective agreement and hopes to destroy the collective bargaining relationship. It is the improper objectives which make surface bargaining a violation of the Act. The dividing line between hard bargaining and surface bargaining can be a fine one.
>
> (*Canadian Union of Public Employees*, at p. 341; see also *Royal Oak Mines*, at para. 46)

105 Even though the employer participates in all steps of the bargaining process, if the nature of its proposals and positions is aimed at avoiding the conclusion of a collective agreement or at destroying the collective bargaining relationship, the duty to bargain in good faith will be breached: see *Royal Oak Mines Inc*. To the words of Senator Walsh, that collective bargaining does not go beyond the office door, we would add that, on occasion, courts are nevertheless allowed to look into what is going on in the room, to ensure that parties are bargaining in good faith.

106 In Canada, unlike in the United States, the duty to bargain in good faith applies regardless of the subject matter of collective bargaining. Under Canadian labour law, all conditions of employment attract an obligation to bargain in good faith unless the subject matter is otherwise contrary to the law and could not legally be included in a

collective agreement (Adams, at pp. 10-96 and 10-97; J.-P. Villaggi, "La convention collective et l'obligation de négocier de bonne foi: les leçons du droit du travail" (1996), 26 *R.D.U.S.* 355, at pp. 360-61). However, the refusal to discuss an issue merely on the periphery of the negotiations does not necessarily breach the duty to bargain in good faith (Carter et al., at p. 302).

107 In considering whether the legislative provisions impinge on the collective right to good faith negotiations and consultation, regard must be had for the circumstances surrounding their adoption. Situations of exigency and urgency may affect the content and the modalities of the duty to bargain in good faith. Different situations may demand different processes and timelines. Moreover, failure to comply with the duty to consult and bargain in good faith should not be lightly found, and should be clearly supported on the record. Nevertheless, there subsists a requirement that the provisions of the Act preserve the process of good faith consultation fundamental to collective bargaining. That is the bottom line.

108 Even where a s. 2(*d*) violation is established, that is not the end of the matter; limitations of s. 2(*d*) may be justified under s. 1 of the *Charter*, as reasonable limits demonstrably justified in a free and democratic society. This may permit interference with the collective bargaining process on an exceptional and typically temporary basis, in situations, for example, involving essential services, vital state administration, clear deadlocks and national crisis.

109 In summary, s. 2(*d*) may be breached by government legislation or conduct that substantially interferes with the collective bargaining process. Substantial interference must be determined contextually, on the facts of the case, having regard to

the importance of the matter affected to the collective activity, and to the manner in which the government measure is accomplished. Important changes effected through a process of good faith negotiation may not violate s. 2(*d*). Conversely, less central matters may be changed more summarily, without violating s. 2(*d*). Only where the matter is both important to the process of collective bargaining, and has been imposed in violation of the duty of good faith negotiation, will s. 2(*d*) be breached.

(4) Application of the Law to the Facts at Bar

110 Having established that there is a right to bargain collectively under the protection of freedom of association in s. 2(*d*) of the *Charter*, and identified its scope, we must now apply it to the facts of this case. Ultimately, we conclude that ss. 6(2), 6(4) and 9 of the Act are unconstitutional because they infringe the right to collective bargaining protected under s. 2(*d*) and cannot be saved under s. 1. The remainder of Part 2 of the Act (consisting of ss. 3, 4, 5, 7, 8 and 10) does not violate the right to collective bargaining and withstands constitutional scrutiny under s. 2(*d*).

(a) *Does the Act Infringe the Right to Bargain Collectively Under Section 2(d) of the Charter?*

111 The question before us is whether particular provisions of the Act violate the procedural right to collective bargaining by significantly interfering with meaningful collective bargaining. In this context, examples of acts that may have such an impact are: failure to consult, refusal to bargain in good faith, taking important matters off the table and unilaterally nullifying negotiated terms.

112 On the analysis proposed above, two questions suggest themselves. First, does the measure interfere with collective bargaining, in purpose or effect? Secondly, if the measure interferes with collective bargaining, is the impact, evaluated in terms of the matters affected and the process by which the measure was implemented, significant enough to substantially interfere with the associational right of collective bargaining, so as to breach the s. 2(*d*) right of freedom of association?

(i) Does the Act Interfere with Collective Bargaining?

113 Sections 4 to 10 of the Act have the potential to interfere with collective bargaining in two ways: first, by invalidating existing collective agreements and consequently undermining the past bargaining processes that formed the basis for these agreements; and second, by prohibiting provisions dealing with specified matters in future collective agreements and thereby undermining future collective bargaining over those matters. Future restrictions on the content of collective agreements constitute an interference with collective bargaining because there can be no real dialogue over terms and conditions that can never be enacted as part of the collective agreement.

114 We pause to reiterate briefly that the right to bargain collectively protects not just the act of making representations, but also the right of employees to have their views heard in the context of a meaningful process of consultation and discussion. This rebuts arguments made by the respondent that the Act does not interfere with collective bargaining because it does not explicitly prohibit health care employees from making collective representations. While the language of the Act does not technically prohibit collective representations to an employer, the right to collective bargaining cannot be reduced to a mere right to make representations. The necessary implication of the Act is

that prohibited matters cannot be adopted into a valid collective agreement, with the result that the process of collective bargaining becomes meaningless with respect to them. This constitutes interference with collective bargaining.

115 A more detailed examination of Part 2 of the Act suggests that some of the provisions substantially interfere with the process of collective bargaining. They affect matters of substantial importance to employees, and they fail to safeguard the basic processes of collective bargaining. In proceeding through this analysis, it is critical to bear in mind the relationship between ss. 4 to 9 and s. 10 of the Act, which has the effect of voiding provisions of any collective agreement to the extent that these provisions are inconsistent with Part 2 of the Act.

1. *Sections 4 and 5*

116 Sections 4 and 5 deal with transfer and reassignment of employees. Their effect was summarized by Garson J. at trial:

> Sections 4 and 5 of [the Act] give health sector employers the right to reorganize the delivery of their services. Pursuant to these sections, employers have the right to transfer functions, services and employees to another health sector employer or within a worksite. The Regulation sets out employee transfer rights and obligations. For example employees must not be transferred outside of their geographic location without their consent. Employees who decline transfers in such circumstances are entitled to lay-off notice and the limited bumping rights available under the Act. Employees who decline transfers within their geographic region, however, will be deemed to have resigned 30 days after the refusal. [para. 38]

117 Sections 4 and 5 altered the provisions for transfer and reassignment, as they existed in some collective agreements prior to the Act. Specific rights in existing

collective agreements that employees lost when ss. 4 and 5 were enacted included: a requirement that the employer consider enumerated criteria in making hiring decisions, a guarantee that temporary assignments would not exceed four months, some protections for seniority, and the right to refuse a transfer if the employee has other employment options with the original employer under the collective agreement.

118 However, through the *Health Sector Labour Adjustment Regulation*, B.C. Reg. 39/2002, referred to in s. 4, protections similar in part to what the employees had under existing collective agreements were preserved. Notably, the regulation provided employees with a right to refuse being transferred outside of their geographic location without their consent, and a right to reasonable relocation expenses (see s. 2(1)(a) and (b)). These were substantially similar to entitlements that some employees previously had under their collective agreements. Thus although ss. 4 and 5 of the Act (together with s. 10) nullified some of the employee's entitlements under existing collective agreements, they appear to have preserved the substance of the central aspects of the provisions of existing collective agreements that dealt with those questions. We therefore conclude that ss. 4 and 5 may have had some impact on prior collective agreements, although the impact was not great.

119 Nevertheless, the effect of ss. 4 and 5, in conjunction with s. 10, is to render *future* collective bargaining over transfers and reassignments largely meaningless, since collective bargaining cannot alter the employer's right to make transfers and reassignments. Section 10 of the Act would render void any terms inconsistent with ss. 4 and 5. Because it is meaningless to bargain over an issue which cannot ever be included in a collective agreement, ss. 4 and 5, considered together with s. 10, interfere with future collective bargaining.

2. *Section 6*

120 Section 6(2) gives the employer increased power to contract out non-clinical services. Prior to the enactment of the Act, all collective agreements in the health care sector contained provisions restricting the right of management to contract out work. These provisions were inconsistent with s. 6(2) when that section was passed. The effect of s. 6(2), together with s. 10, is to invalidate these provisions in prior collective agreements. Further, s. 6(4), in conjunction with s. 10, invalidates any provision of a collective agreement that requires an employer to consult with a trade union prior to contracting outside the bargaining unit. For example, s. 17.12 of the Facilities Subsector Collective Agreement, which limits the ways in which the employer can contract out, is made void by ss. 6(4) and 10.

121 The combined effect of ss. 6(2), 6(4) and 10 is to forbid the incorporation into future collective agreements of provisions protecting employees from contracting out, or the inclusion of a provision requiring the employer to consult with the union. The prohibition on including certain provisions in a collective agreement related to contracting out is reflected in explicit language in s. 6(2), that "[a] collective agreement ... must not contain a provision" dealing with certain aspects of contracting out. The prohibition both repudiates past collective bargaining relating to the issue of contracting out and makes future collective bargaining over this issue meaningless. It follows that ss. 6(2) and 6(4) have the effect of interfering with collective bargaining.

122 Sections 6(3), 6(5) and 6(6) deal with a different but related issue, namely, the status of employees and the recognition of successorship rights where business is

contracted out by the original employer. Section 6(3) sets out a more onerous definition of the employer-employee relationship under the *Labour Relations Code*, R.S.B.C. 1996, c. 244, making it less likely that a health sector employer will still be considered the "true" employer owing duties to the union and its members if work is contracted out. Sections 6(5) and 6(6) prevent employees from retaining their collective bargaining rights with the subcontractor, as they would otherwise have done under ss. 35 and 38 of the *Labour Relations Code* if work was contracted out.

123 Although some might see ss. 6(3), 6(5) and 6(6) as harsh provisions aimed solely at employees of the health care sector, these sections simply modify the protections available under the *Labour Relations Code* and do not deal with entitlements of employees based on collective bargaining. Consequently, ss. 6(3), 6(5) and 6(6) do not interfere with collective bargaining and do not infringe the protection over collective bargaining offered by s. 2(*d*).

3. *Sections 7 and 8 — Job Security Programs*

124 Sections 7 and 8 deal with job security programs. Section 7 abolishes the Employment Security and Labour Force Adjustment Agreement ("ESLA"), a program giving employees of the health sector one year of training, assistance and financial support. This program was administered by the Healthcare Labour Adjustment Agency ("HLAA"), which is also abolished under the Act.

125 The ESLA did not arise out of collective bargaining but, rather, was imposed by the government on health sector employers pursuant to the recommendations of an inquiry committee. Since neither the ESLA nor the HLAA was the outcome of a

collective bargaining process, modifying them cannot constitute an interference with past bargaining processes. Further, since the ESLA and HLAA rely heavily on the authority of the government for their existence, and are outside of the power of health sector employees and employers, there is no potential for future collective bargaining over matters relating to either the ESLA and HLAA. Since there can be no future collective bargaining relating to the ESLA or the HLAA, there can be no interference with future collective bargaining over these matters either. It follows that neither s. 7 nor s. 8 has the purpose or effect of interfering with collective bargaining, past or future.

4. *Section 9 — Layoff and Bumping*

126 Section 9, which applies only to collective agreements up until December 31, 2005, deals with layoff and bumping. During the currency of this section, collective agreements could not contain provisions dealing with certain aspects of layoff and bumping. With respect to layoff, no collective agreement could restrict the right of health care employers to lay off employees (s. 9(a)), nor require them to meet conditions before giving layoff notice (s. 9(b)), nor provide notice beyond the 60 days guaranteed under the *Labour Relations Code* (s. 9(c)). With respect to bumping, no collective agreement could contain a provision providing an employee with bumping options other than those set out in regulations pursuant to the Act (s. 9(d)).

127 Section 9 made collective bargaining over specified aspects of layoff and bumping meaningless and also invalidated parts of collective agreements dealing with these issues, up to December 31, 2005. This constituted interference with both past and future collective bargaining, albeit an interference limited to the period between the enactment of the Act and December 31, 2005.

128 We conclude that ss. 4, 5, 6(2), 6(4) and 9, in conjunction with s. 10, interfere with the process of collective bargaining, either by disregarding past processes of collective bargaining, by pre-emptively undermining future processes of collective bargaining, or both. This requires us to determine whether these changes substantially interfere with the associational right of the employees to engage in collective bargaining on workplace matters and terms of employment.

(ii) Was the Interference Substantial, so as to Constitute a Breach of Freedom of Association?

129 To amount to a breach of the s. 2(*d*) freedom of association, the interference with collective bargaining must compromise the essential integrity of the process of collective bargaining protected by s. 2(*d*). Two inquiries are relevant here. First, substantial interference is more likely to be found in measures impacting matters central to the freedom of association of workers, and to the capacity of their associations (the unions) to achieve common goals by working in concert. This suggests an inquiry into the nature of the affected right. Second, the manner in which the right is curtailed may affect its impact on the process of collective bargaining and ultimately freedom of association. To this end, we must inquire into the process by which the changes were made and how they impact on the voluntary good faith underpinning of collective bargaining. Even where a matter is of central importance to the associational right, if the change has been made through a process of good faith consultation it is unlikely to have adversely affected the employees' right to collective bargaining. Both inquiries, as discussed earlier, are essential.

1. *The Importance of the Provisions*

130 The provisions dealing with contracting out (ss. 6(2) and 6(4)), layoffs (ss. 9(a), 9(b) and 9(c)) and bumping (s. 9(d)) deal with matters central to the freedom of association. Restrictions in collective agreements limiting the employer's discretion to lay off employees affect the employees' capacity to retain secure employment, one of the most essential protections provided to workers by their union. Similarly, limits in collective agreements on the management rights of employers to contract out allow workers to gain employment security. Finally, bumping rights are an integral part of the seniority system usually established under collective agreements, which is a protection of significant importance to the union. "Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process" (*Re United Electrical Workers, Local 512, and Tung-Sol of Canada Ltd.* (1964), 15 L.A.C. 161, at p. 162; see D. J. M. Brown and D. M. Beatty, *Canadian Labour Arbitration* (4th ed. (loose-leaf)), vol. 2, para. 6:0000, at p. 6-1). Viewing the Act's interference with these essential rights in the context of the case as a whole, we conclude that its interference with collective bargaining over matters pertaining to contracting out, layoff conditions and bumping constitutes substantial interference with the s. 2(*d*) right of freedom of association.

131 The same cannot be said of the transfers and reassignments covered under ss. 4 and 5 of the Act. These provisions, as discussed above, are concerned with relatively minor modifications to in-place schemes for transferring and reassigning employees. Significant protections remained in place. It is true that the Act took these issues off the collective bargaining table for the future. However, on balance ss. 4 and 5 cannot be said to amount to a substantial interference with the union's ability to engage in collective bargaining so as to attract the protection under s. 2(*d*) of the *Charter*.

2. *The Process of Interference with Collective Bargaining Rights*

132 Having concluded that the subject matter of ss. 6(2), 6(4) and 9 of the Act is of central importance to the unions and their ability to carry on collective bargaining, we must now consider whether those provisions preserve the processes of collective bargaining. Together, these two inquiries will permit us to assess whether the law at issue here constitutes significant interference with the collective aspect of freedom of association, which *Dunmore* recognized.

133 This inquiry refocuses our attention squarely and exclusively on how the provisions affect the process of good faith bargaining and consultation. In this case, we are satisfied that ss. 6(2), 6(4) and 9 interfere significantly with the ability of those bound by them to engage in the associational activity of collective bargaining.

134 It is true that the government was facing a situation of exigency. It was determined to come to grips with the spiralling cost of health care in British Columbia. This determination was fuelled by the laudable desire to provide quality health services to the people of British Columbia. Concerns such as these must be taken into account in assessing whether the measures adopted disregard the fundamental s. 2(*d*) obligation to preserve the processes of good faith negotiation and consultation with unions.

135 The difficulty, however, is that the measures adopted by the government constitute a virtual denial of the s. 2(*d*) right to a process of good faith bargaining and consultation. The absolute prohibition on contracting out in s. 6(2), as discussed, eliminates any possibility of consultation. Section 6(4) puts the nail in the coffin of

consultation by making void any provisions in a collective agreement imposing a requirement to consult before contracting out. Section 9, in like fashion, effectively precludes consultation with the union prior to laying off or bumping.

136 We conclude that ss. 6(2), 6(4) and 9 of the legislation constitute a significant interference with the right to bargain collectively and hence violate s. 2(*d*) of the *Charter*. The remaining issue is whether these infringements can be saved under s. 1 of the *Charter*, as limits that are reasonable and justifiable in a free and democratic society.

(b) *Are the Violations of Section 2(d) Justified Under Section 1?*

137 Section 1 provides:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

138 The analysis for assessing whether or not a law violating the *Charter* can be saved as a reasonable limit under s. 1 is set out in *Oakes*. A limit on *Charter* rights must be prescribed by law to be saved under s. 1. Once it is determined that the limit is prescribed by law, then there are four components to the *Oakes* test for establishing that the limit is reasonably justifiable in a free and democratic society (*Oakes*, at pp. 138-40). First, the objective of the law must be pressing and substantial. Second, there must be a rational connection between the pressing and substantial objective and the means chosen by the law to achieve the objective. Third, the impugned law must be minimally impairing. Finally, there must be proportionality between the objective and the measures adopted by the law, and more specifically, between the salutary and deleterious effects of

the law (*Oakes*, at p. 140; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 889).

139 The s. 1 analysis focuses on the particular context of the law at issue. Contextual factors to be considered include the nature of the harm addressed, the vulnerability of the group protected, ameliorative measures considered to address the harm, and the nature and importance of the infringed activity: *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, and *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, 2004 SCC 33. This said, the basic template of *Oakes* remains applicable, and each of the elements required by that test must be satisfied. The government bears the onus of establishing each of the elements of the *Oakes* test and hence of showing that a law is a reasonable limit on *Charter* rights on a balance of probabilities (see *Oakes*, at pp. 136-37).

140 In this case, the infringement of the appellants' right to bargain collectively is unquestionably prescribed by law, since the interference with collective bargaining is set out in legislation. The question is whether the remaining elements of the *Oakes* test are made out, such that the law is a reasonable limit on the appellants' right to collective bargaining under s. 2(*d*).

141 We find that the intrusions on collective bargaining represented by ss. 6(2), 6(4) and 9 are not minimally impairing, and therefore cannot be saved as a reasonable and justifiable limit in a free and democratic society. We turn now to the *Oakes* test to explain this conclusion.

(i) Does the Act Pursue a Pressing and Substantial Objective?

142 The first step of the *Oakes* test requires the government to establish that the limit on *Charter* rights was undertaken in pursuit of an objective "of sufficient importance to warrant overriding a constitutionally protected right or freedom" (*Big M Drug Mart*, at p. 352). At minimum, the objective must relate to concerns which are pressing and substantial in a free and democratic society.

143 The government set out its objectives for enacting the Act as follows:

> The objective of the *Act* is to improve the delivery of health care services by enabling health authorities to focus resources on the delivery of clinical services, by enhancing the ability of health employers and authorities to respond quickly and effectively to changing circumstances, and by enhancing the accountability of decision-makers in public health care.
>
> (Respondent's Factum, at para. 144)

144 These are pressing and substantial objectives. We agree with the respondent that the health care crisis in British Columbia is an important contextual factor in support of the conclusion that these objectives are pressing and substantial. (R.F., at para. 141). We also agree with the respondent that this Court's recent ruling in *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35, that governments are constitutionally obliged to provide public health care of a reasonable standard within a reasonable time, at least in some circumstances, reinforces the importance of the objectives, particularly of the main objective of delivering improved health care services (R.F., at para. 141).

145 The appellants argue that the objectives behind the legislation are not pressing and substantial on two bases. First, they contend that the objective is framed too broadly

and is not linked to the specific harm that the legislation is aimed at addressing. Second, they argue that the evidence suggests that the true objective behind the Act is to increase the rights of management, and to save costs, which constitute a suspect basis for finding a pressing and substantial objective. (See *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381, 2004 SCC 66, at para. 72, and *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, at para. 109).

146 We reject the argument that the government's objective is stated too broadly. The government states its objective in terms of one main objective (improving health care delivery), pursued by way of several sub-objectives (enabling health authorities to focus resources on clinical services, enhancing the ability of health employers and authorities to respond quickly to changing circumstances, and enhancing the accountability of decision-makers in public health care). Even if it is accepted that the main objective is somewhat broad, the more precise aims of the government are made clear in the sub-objectives. Therefore, the objective is not stated too broadly.

147 The appellants' contention that cutting costs and increasing the power of management are also objectives of the legislation has merit. The record indicates that at least part of the government's intention in enacting the Act was to cut costs and increase the rights of management. (A.F. (Reply), at paras. 8 and 14). To the extent that the objective of the law was to cut costs, that objective is suspect as a pressing and substantial objective under the authority in *N.A.P.E.* and *Martin*, indicating that "courts will continue to look with strong scepticism at attempts to justify infringements of *Charter* rights on the basis of budgetary constraints" (*N.A.P.E.*, at para. 72, see also *Martin*). Nor, on the facts of this case, is it clear that increasing management power is an objective that is "pressing

and substantial in a free and democratic society". However, this does not detract from the fact that the government has established other pressing and substantial objectives.

(ii) Is There a Rational Connection Between the Means Adopted by the Act and the Pressing and Substantial Objectives?

148 The second stage of the *Oakes* analysis requires the government to establish that there is a rational connection between the pressing and substantial objective and the means chosen by the government to achieve the objective. In other words, the government must establish, on the balance of probabilities, that the means adopted in the Act are rationally connected to achieving its pressing and substantial objectives. This element of the *Oakes* test has been described in this Court as "not particularly onerous" (see *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69, at para. 228, cited in *Trociuk v. British Columbia (Attorney General)*, [2003] 1 S.C.R. 835, 2003 SCC 34, at para. 34).

149 Broadly speaking, the means adopted by the Act include: modifying the scheme of bumping rights, winding up the HLAA and ESLA, and loosening restrictions on the employer's capacity to contract out non-clinical services, transfer and reassign employees, and lay off employees. Although the evidence does not conclusively establish that the means adopted by the Act achieve the government's objectives, it is at least logical and reasonable to conclude so. We therefore move to the determinative inquiry of minimal impairment.

(iii) Does the Act Minimally Impair the *Charter* Rights of the Appellants?

150 At the third stage of the *Oakes* test, the court is directed to inquire whether the impugned law minimally impairs the *Charter* right (*Oakes*, at p. 139, citing *Big M Drug Mart*, at p. 352). The government need not pursue the least drastic means of achieving its objective. Rather, a law will meet the requirements of the third stage of the *Oakes* test so long as the legislation "falls within a range of reasonable alternatives" which could be used to pursue the pressing and substantial objective (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160).

151 We conclude that the requirement of minimal impairment is not made out in this case. The government provides no evidence to support a conclusion that the impairment was minimal. It contents itself with an assertion of its legislative goal — "to enhance management flexibility and accountability in order to make the health care system sustainable over the long term", — adding that "the *Act* is a measured, reasonable, and effective response to this challenge, and ... satisfies the minimal impairment requirement" (R.F., at para. 147). In the absence of supportive evidence, we are unable to conclude that the requirement of minimal impairment is made out in this case.

152 The provisions at issue bear little evidence of a search for a minimally impairing solution to the problem the government sought to address.

153 Section 6(2) forbids any provision "that in any manner restricts, limits or regulates the right of a health sector employer to contract outside of the collective agreement". It gives the employers absolute power to contract out of collective agreements. There is no need or incentive to consult with the union or the employees before sending the work they normally perform to an outside contractor. To forbid any contracting out clause completely and unconditionally strikes us as not minimally

impairing. A more refined provision, for example, permitting contracting out after meaningful consultation with the union, might be envisaged.

154 Section 6(4) makes void a provision in a collective agreement to consult before contracting out. The bite of s. 6(4) is arguably small; given the employer's absolute power to contract out under s. 6(2), there would appear to be no reason for an employer to agree to such a clause in any event. However, insofar as it hammers home the policy of no consultation under any circumstances, it can scarcely be described as suggesting a search for a solution that preserves collective bargaining rights as much as possible, given the legislature's goal.

155 Section 9 evinces a similar disregard for the duty to consult the union, in this case before making changes to the collective agreement's layoff and bumping rules. It is true that s. 9 was temporally limited, being in force only to December 31, 2005. However, this is scant comfort to employees who may have been laid off or bumped before this date, without the benefit of a union to represent them on the issue.

156 An examination of the record as to alternatives considered by the government reinforces the conclusion that the impairment in this case did not fall within the range of reasonable alternatives available to the government in achieving its pressing and substantial objective of improving health care delivery. The record discloses no consideration by the government of whether it could reach its goal by less intrusive measures, and virtually no consultation with unions on the matter.

157 Legislators are not bound to consult with affected parties before passing legislation. On the other hand, it may be useful to consider, in the course of the s. 1

justification analysis, whether the government considered other options or engaged consultation with the affected parties, in choosing to adopt its preferred approach. The Court has looked at pre-legislative considerations in the past in the context of minimal impairment. This is simply evidence going to whether other options, in a range of possible options, were explored.

158 In this case, the only evidence presented by the government, including the sealed evidence, confirmed that a range of options were on the table. One was chosen. The government presented no evidence as to why this particular solution was chosen and why there was no consultation with the unions about the range of options open to it.

159 The evidence establishes that there was no meaningful consultation prior to passing the Act on the part of either the government or the HEABC (as employer). The HEABC neither attempted to renegotiate provisions of the collective agreements in force prior to the adoption of Bill 29, nor considered any other way to address the concerns noted by the government relating to labour costs and the lack of flexibility in administrating the health care sector. The government also failed to engage in meaningful bargaining or consultation prior to the adoption of Bill 29 or to provide the unions with any other means of exerting meaningful influence over the outcome of the process (for example, a satisfactory system of labour conciliation or arbitration). Union representatives had repeatedly expressed a desire to consult with government regarding specific aspects of the Act, and had conveyed to the government that the matters to be dealt with under the Act were of particular significance to them. Indeed, the government had indicated willingness to consult on prior occasions. Yet, in this case, consultation never took place. The only evidence of consultation is a brief telephone conversation between a member of the government and a union representative within the half hour

before the Act (then Bill 29) went to the legislature floor and limited to informing the union of the actions that the government intended to take.

160 This was an important and significant piece of labour legislation. It had the potential to affect the rights of employees dramatically and unusually. Yet it was adopted with full knowledge that the unions were strongly opposed to many of the provisions, and without consideration of alternative ways to achieve the government objective, and without explanation of the government's choices.

161 We conclude that the government has not shown that the Act minimally impaired the employees' s. 2(*d*) right of collective bargaining. It is unnecessary to consider the proportionality between the pressing and substantial government objectives and the means adopted by the law to achieve these objectives. We find that the offending provisions of the Act (ss. 6(2), 6(4) and 9) cannot be justified as reasonable limits under s. 1 of the *Charter* and are therefore unconstitutional.

B. *Does the Act Violate Section 15 Equality Rights?*

162 Having established that ss. 6(2), 6(4) and 9 are unconstitutional on the basis that they infringe the right to bargain collectively in s. 2(*d*), we must consider whether the remainder of Part 2 of the Act violates the guarantee of equality under s. 15 of the *Charter*.

163 Section 15(1) of the *Charter* provides:

> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

164 At issue is whether the Act violates s. 15 of the *Charter*, and more specifically, that the Act discriminates against health care workers based on a number of interrelated enumerated and analogous grounds including: sex, employment in the health care sector, and status as non-clinical workers.

165 The courts below found no discrimination contrary to s. 15 of the *Charter*. We would not disturb these findings. Like the courts below, we conclude that the distinctions made by the Act relate essentially to segregating different sectors of employment, in accordance with the long-standing practice in labour regulation of creating legislation specific to particular segments of the labour force, and do not amount to discrimination under s. 15 of the *Charter*. The differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, and not to the persons they are. Nor does the evidence disclose that the Act reflects the stereotypical application of group or personal characteristics. Without minimizing the importance of the distinctions made by the Act to the lives and work of affected health care employees, the differential treatment based on personal characteristics required to get a discrimination analysis off the ground is absent here.

166 Accordingly, we see no reason to depart from the view of the trial judge that these effects on health care workers, however painful, do not, on the evidence adduced in this case, constitute discrimination under s. 15 of the *Charter*.

167 In summary, we find that the impugned Act does not violate s. 15 of the *Charter*. Therefore, there is no need to consider potential reasonable justification under s. 1.

IV. Conclusions and Disposition

168 For the above reasons, we allow the appeal in part, with costs. We conclude that ss. 6(2), 6(4) and 9 of the Act are unconstitutional. However, we suspend this declaration for a period of 12 months to allow the government to address the repercussions of this decision. We would answer the constitutional questions as follows:

1. Does Part 2 of the *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2, in whole or in part, infringe s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?

Yes, in part. Sections 6(2), 6(4) and 9 infringe s. 2(*d*).

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

No.

3. Does Part 2 of the *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2, in whole or in part, infringe s. 15 of the *Canadian Charter of Rights and Freedoms*?

No.

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

It is not necessary to answer this question.

The following are the reasons delivered by

169 DESCHAMPS J. — The future of our health care system is a matter of serious concern across the country. Sharply escalating health care costs combined with an aging population have spurred governments to attempt to find new ways to ensure that health care services will be available to those who need them. When, in doing so, a government makes a policy decision that infringes a *Charter* right, it is required to justify its choice as a reasonable limit on the protected right.

170 I am in general agreement with the Chief Justice and LeBel J. concerning the scope of freedom of association under s. 2(*d*) of the *Canadian Charter of Rights and Freedoms* in the collective bargaining context. I also agree that no claim of discrimination contrary to s. 15 of the *Charter* has been established. However, I part company with my colleagues over their analysis relating to both the infringement of s. 2(*d*) and the justification of the infringement under s. 1 of the *Charter*.

171 The interpretation that the Court is now giving to s. 2(*d*) of the *Charter* is a major step forward in the recognition of collective activities. However, the importance of this advance should not overshadow the justification analysis under s. 1 of the *Charter*. Throughout the litigation, the government of British Columbia has maintained that in the event that Part 2 of the *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2 ("Act"), is found to have infringed the *Charter*, the infringement will be

justified under s. 1. I find that ss. 4, 5, 6(2), 6(4) and 9 of the Act infringe s. 2(*d*) of the *Charter*, but in my view only s. 6(4) of the Act is not demonstrably justified in a free and democratic society.

I. Relevant Constitutional and Statutory Provisions

172 It will be helpful to recall the constitutional and statutory provisions that are at issue:

Canadian Charter of Rights and Freedoms

> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> **2.** Everyone has the following fundamental freedoms:
>
> . . .
>
> (*d*) freedom of association.

Health and Social Services Delivery Improvement Act, S.B.C. 2002, c. 2

> **Right to reorganize service delivery**
>
> **4** (1) A health sector employer has the right to reorganize the delivery of its services by transferring functions or services within a worksite or to another worksite within the region or to another health sector employer, including, but not limited to, partnerships or joint ventures with other health sector employers or subsidiaries.
>
> (2) A health sector employer has the right to transfer
>
> (a) functions or services that are to be performed or provided by another health sector employer under subsection (1) to that other health sector employer, and

(b) functions or services that are to be performed or provided at another worksite in the region to that other worksite.

(3) If a function or service is transferred to another health sector employer or within or to a worksite under this section, an employee who performs that function or service may be transferred to that employer or within or to that worksite in accordance with the regulations.

Multi-worksite assignment rights

5 A health sector employer

(a) has a right to assign an employee within or to any worksite of that employer or to a worksite operated by another health sector employer for a period not exceeding that set out in the regulations and under conditions specified in the regulations, and

(b) must post any position pursuant to the collective agreement if the employer requires the successful candidate for that position to work on a regular ongoing basis at more than one worksite of that employer as a condition of employment in that position.

Contracting outside of the collective agreement for services

6 (1) In this section:

"acute care hospital" means a hospital or part of a hospital designated by regulation;

"designated health services professional" means

(a) a nurse licensed under the *Nurses (Registered) Act*,

(b) a person who is a member of a health profession designated under the *Health Professions Act* on the date on which this section comes into force, or

(c) a person in an occupation or job classification designated by regulation;

"non-clinical services" means services other than medical, diagnostic or therapeutic services provided by a designated health services professional to a person who is currently admitted to a bed in an inpatient unit in an acute care hospital, and includes any other services designated by regulation.

(2) A collective agreement between HEABC and a trade union representing employees in the health sector must not contain a provision that in any manner restricts, limits or regulates the right of a health sector employer to contract outside of the collective agreement for the provision of non-clinical services.

(3) The labour relations board or an arbitrator appointed under the Code or under a collective agreement must not declare a person who

(a) provides services under a contract between a health sector employer and an employer that is not a health sector employer, and

(b) is an employee of the employer that is not a health sector employer

to be an employee of the health sector employer unless the employee is fully integrated with the operations and under the direct control of the health sector employer.

(4) A provision in a collective agreement requiring an employer to consult with a trade union prior to contracting outside of the collective agreement for the provision of non-clinical services is void.

(5) A collective agreement does not bind, and section 35 of the Code does not apply to, a person who contracts with a health sector employer.

(6) A health sector employer must not be treated under section 38 of the Code as one employer with any other health sector employer or a contractor.

Employment Security and Labour Force Adjustment Agreement

7 (1) A party to ESLA is not required to carry out a term of ESLA on or after the coming into force of this section.

(2) A party to a collective agreement is not required to carry out any part of a provision that is based on or derived from ESLA in the collective agreement.

(3) ESLA does not apply for the purposes of the interpretation or application of the collective agreement.

Healthcare Labour Adjustment Society

8 (1) In this section, "**HLAA**" means The Healthcare Labour Adjustment Society of British Columbia incorporated under the *Society Act*.

(2) The minister may appoint an administrator for HLAA.

(3) The administrator appointed under subsection (2) replaces the directors of HLAA and may exercise all the rights and duties of directors under the *Society Act*.

(4) The administrator must ensure that HLAA's programs and activities operate only to the extent necessary to honour obligations to employees of health sector employers who were laid off under ESLA and to honour existing financial commitments made to health sector or other employers for reimbursement under one of HLAA's programs.

(5) The minister may direct the administrator to offer programs and activities beyond those in subsection (4).

(6) The administrator is responsible for winding up HLAA in accordance with the *Society Act*.

(7) The administrator may wind up HLAA when its obligations under subsections (4) and (5) are complete.

(8) The administrator must complete his or her duties under this section within one year from the date on which he or she is appointed.

(9) Any money remaining in HLAA at the time it is wound up must be paid into the Health Special Account referred to in the *Health Special Account Act.*

Layoff and bumping

9 For the period ending December 31, 2005, a collective agreement must not contain a provision that

(a) restricts or limits a health sector employer from laying off an employee,

(b) subject to paragraph (c), requires a health sector employer to meet conditions before giving layoff notice,

(c) requires a health sector employer to provide more than 60 days' notice of layoff to an employee directly or indirectly affected and to the trade union representing the employee, or

(d) provides an employee with bumping options other than the bumping options set out in the regulations.

Part prevails over collective agreements

10 (1) A collective agreement that conflicts or is inconsistent with this Part is void to the extent of the conflict or inconsistency.

(2) A provision of a collective agreement that

(a) requires a health sector employer to negotiate with a trade union to replace provisions of the agreement that are void as a result of subsection (1), or

(b) authorizes or requires the labour relations board, an arbitrator or any person to replace, amend or modify provisions of the agreement that are void as a result of subsection (1),

is void to the extent that the provision relates to a matter prohibited under this Part.

II. Analysis

173 I will begin by discussing s. 2(*d*) of the *Charter* in the context of legislation that interferes with collective bargaining where the government is not acting as a party to a collective bargaining process but is, as in this case, performing its legislative function. I will then examine the alleged infringement of s. 2(*d*) in the case at bar. Next, turning to s. 1 of the *Charter*, I will review the contextual approach, after which I will assess the impugned legislative measures.

A. *Freedom of Association and Collective Bargaining Under the Charter*

174 I am in agreement with the following key propositions stated by the majority concerning the scope of s. 2(*d*) of the *Charter*:

1) The constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their

capacity to act in common to reach shared goals related to workplace issues and terms of employment;

2) The right is to a process of collective bargaining — it does not guarantee a certain substantive or economic outcome or access to any particular statutory regime; and

3) The right places constraints on the exercise of legislative powers in respect of the collective bargaining process.

175 However, I have concerns with the majority's test for determining whether a government measure amounts to an infringement of s. 2(*d*). According to my colleagues, the test involves two inquiries, the first into the importance of the matter for the union and the employees, and the second into the impact of the measure on the collective right to good faith negotiation and consultation. They summarize it as follows (para. 93):

> Generally speaking, determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries. The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.

176 The majority focus on "substantial" interference with a collective bargaining process and purport to do so on the basis of this Court's decision in *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94 (majority reasons at paras. 19, 35 and 90). However, the "substantial interference" standard cannot be adopted in this case simply because it was mentioned in *Dunmore*. It is necessary to look closely at the principles applied in that case. The concept of "substantial interference" was introduced by Bastarache J. in *Dunmore* because that case dealt with whether the government had a positive obligation to extend to a claimant the benefits of a particular statutory regime from which he or she was excluded. Requiring "substantial interference" was presented

as one of the considerations circumscribing "the possibility of challenging underinclusion under s. 2 of the *Charter*" (para. 24). The term referred to the heavier burden on a claimant attempting to make a case of underinclusion that had been established by the Court in *Haig v. Canada*, [1993] 2 S.C.R. 995, *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, and *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989. The use of the "substantial interference" criterion is explained in para. 25 of *Dunmore*. The following excerpt captures its essence:

> In my view, the evidentiary burden in these cases is to demonstrate that exclusion from a statutory regime permits a substantial interference with the exercise of protected s. 2(*d*) activity. [Emphasis omitted; para. 25]

177 Since the present appeal does not involve a claim of underinclusive legislation, but an obligation that the state not interfere in a collective bargaining process, I cannot agree with imposing a "substantial interference" standard.

178 Moreover, the first inquiry of the majority's test ("the importance of the matter affected to the process of collective bargaining" (para. 93)) is focused on the substance of the workplace issue rather than on interference with the collective bargaining process, which is what the constitutionally guaranteed right protects against. Since there is no constitutional protection for the substantive outcome of a collective bargaining process, I consider that the matter affected is not the threshold issue when a claim is being evaluated under s. 2(*d*) of the *Charter*. Rather, the primary focus of the inquiry should be whether the legislative measures infringe the ability of workers to act in common in relation to workplace issues. However, I recognize that the significance of the matter may be relevant. In some cases, it may be helpful to consider whether the matter affected is of

so little significance that the right to a collective bargaining process is not infringed and, accordingly, the purpose of freedom of association is not engaged. Nevertheless, I remain unconvinced that the importance of the workplace issue should "play a key role" in the infringement analysis.

179 With respect to the second inquiry ("the manner in which the measure impacts on the collective right to good faith negotiation and consultation" (para. 93)), I am concerned with the way this test is restated and applied in the majority's reasons. For example, rather than focussing on the impact on the right, the majority refer to "the manner in which the government measure is accomplished" (para. 109), "the process by which the measure was implemented" (para. 112) and "the process by which the changes were made" (para. 129). With respect, these formulations imply a duty to consult that is inconsistent with the proposition that "[l]egislators are not bound to consult with affected parties before passing legislation" (para. 157), one with which I fully agree. Another concern is that the majority consider the "circumstances" surrounding the adoption of the legislative provisions, such as the spiralling health care costs faced by the government, at the stage of determining whether s. 2 (*d*) is infringed. In my view, those considerations are entirely relevant to the s. 1 justification analysis, but are irrelevant where the issue is whether freedom of association is infringed.

180 Given these concerns, I find it more appropriate to rely on a somewhat different test than the one suggested by the majority, although the test I propose is built on the same foundation as theirs (see majority's reasons, para. 96). I am adjusting their test to take into consideration the fact that what is in issue is a positive infringement, not underinclusiveness, and that what is under scrutiny is legislation, not government action. My test can be stated as follows:

> Laws or state actions that prevent or deny meaningful discussion and consultation about significant workplace issues between employees and their employer may interfere with the activity of collective bargaining, as may laws that unilaterally nullify negotiated terms on significant workplace issues in existing collective agreements.

181 This test still involves two inquiries. The first is into whether the process of negotiation between employers and employees or their representatives is interfered with in any way, and the second into whether the interference concerns a significant issue in the labour relations context. An approach under which interference with the process is considered first has the merit of focussing attention on the constitutionally protected right itself, rather than having the court indirectly protect the substance of clauses in collective agreements. Only if the court determines that there has been interference with a process of negotiation should it turn to the second inquiry and consider whether the issues involved are significant, in order to ensure that the scope of s. 2(*d*) is not interpreted so as to exceed its purpose. In this way, not all workplace issues, but only significant ones, are relevant to s. 2(*d*). I agree with the majority that the "protection does not cover all aspects of 'collective bargaining', as that term is understood in the statutory labour relations regimes that are in place across the country" (para. 19). There may be matters covered by collective agreements that do not warrant constitutional protection — it is not every workplace issue that triggers s. 2(*d*) protection, but only those of significance.

182 Thus, legislation that alters terms of a collective agreement bearing on significant workplace issues, or that precludes negotiations on significant workplace issues that would normally be negotiable, will interfere with the collective bargaining

process. Such legislative measures nullify negotiations that have already taken place or prevent future negotiations on the topics they cover.

183 Even though I disagree with significant aspects of the majority's test for determining whether an infringement has occurred, I agree, for the reasons set out below, that certain provisions of the Act infringe s. 2(*d*) of the *Charter*.

B. *Infringement of Section 2(d) of the Charter*

184 This case concerns a claim that legislation enacted by the government of British Columbia interferes with the collective bargaining process, both because it unilaterally nullifies significant terms in existing collective agreements and because it precludes future collective bargaining on certain issues. The relevant collective bargaining process in this case involves, on the one hand, the Health Employers Association of British Columbia ("HEABC"), whose members are both public and private sector employers, and, on the other hand, health care unions. I will deal first with the provisions that do not infringe s. 2(*d*) of the *Charter*, before turning to those that do.

185 Sections 3 and 6(1) of the Act, which are definition provisions, and s. 10, which is an interpretative clause that operates only in conjunction with other provisions, do not need to be reviewed independently. Moreover, I agree with the majority that ss. 6(3), 6(5) and 6(6) of the Act do not infringe s. 2(*d*) of the *Charter*. They do not interfere with the collective bargaining process, but merely modify entitlements under a statutory scheme, which is within the legislature's authority. Similarly, for the reasons given by the majority, I agree that ss. 7 and 8 of the Act, which deal with statutory job security

programs, do not infringe s. 2(*d*) of the *Charter*. They do not relate to a collective bargaining process, past or future.

186 Sections 4 and 5 of the Act deal with the transfer and assignment of employees. Certain existing collective agreement provisions establish when an employee may refuse a transfer and how assignments are to take place. Similarly, existing collective agreements contain provisions relating to contracting out, which is dealt with in ss. 6(2) and 6(4) of the Act, and to layoffs and bumping, which are dealt with in s. 9 of the Act.

187 Therefore, ss. 4 and 5 of the Act (in conjunction with s. 10) nullify some existing terms of collective agreements and limit the scope of future negotiations; they prevent workers from engaging in associational activities on transfers and assignments. The majority appear to consider such provisions as importing "relatively innocuous administrative changes" (para. 12). However, I have some difficulty with discounting the importance of these working conditions by regarding them as insignificant. I prefer to consider the impact of the *Health Sector Labour Adjustment Regulation*, B.C. Reg. 39/2002 ("Regulation") at the justification stage. Accordingly, I find that these provisions infringe s. 2(*d*) of the *Charter*.

188 I agree with the majority that ss. 6(2) and 6(4) of the Act (in conjunction with s. 10) explicitly "repudiat[e] past collective bargaining relating to the issue of contracting out and mak[e] future collective bargaining over this issue meaningless" (para. 121). These provisions nullify past collective bargaining relating to contracting out, thereby rendering the process nugatory, and preclude future collective bargaining on the issue. They concern a significant issue of employment security, and negotiating such issues is one of the purposes of associational activities in the workplace. I also agree with the

majority that s. 9 of the Act (in conjunction with s. 10) interferes with collective bargaining in that it makes "collective bargaining over specified aspects of layoff and bumping meaningless and also invalidate[s] parts of collective agreements dealing with these issues" (para. 127). Section 9 deals with significant workplace issues related to the purpose of s. 2(*d*): layoff provisions give union members a degree of support at times when their livelihoods may be in jeopardy; bumping rights implicate seniority rights, and seniority is a cornerstone of employees' rights in most collective agreements. Therefore, I find that ss. 6(2), 6(4) and 9 also infringe s. 2(*d*) of the *Charter*.

189 Having stated my view regarding the infringement of s. 2(*d*) of the *Charter* in this case, I will now discuss the applicable legal framework for the s. 1 analysis.

C. *Contextual Approach Required in the Section 1 Analysis*

190 Over the past decade, my colleague Bastarache J. has been at the forefront of articulating the basis for and operation of the contextual approach to s. 1 in a trilogy of judgments of this Court that have garnered majority support. This jurisprudence is a major contribution towards a full and proper understanding of the s. 1 analysis. Several considerations are important to highlight in reviewing this case law.

191 First, in *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at paras. 87-88, Bastarache J. described the importance of considering contextual factors:

> The analysis under s. 1 of the *Charter* must be undertaken with a close attention to context. This is inevitable as the test devised in *R. v. Oakes*, [1986] 1 S.C.R. 103, requires a court to establish the objective of the impugned provision, which can only be accomplished by canvassing the nature of the social problem which it addresses. Similarly, the proportionality

> of the means used to fulfil the pressing and substantial objective can only be evaluated through a close attention to detail and factual setting. In essence, context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a *Charter* right.
>
> Characterizing the context of the impugned provision is also important in order to determine the type of proof which a court can demand of the legislator to justify its measures under s. 1. . . .

192 Second, Bastarache J. recently summarized the relevant contextual factors discussed in *Thomson Newspapers*, *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, 2004 SCC 33, and *R. v. Bryan*, 2007 SCC 12, as follows: "(i) the nature of the harm and the inability to measure it, (ii) the vulnerability of the group protected, (iii) subjective fears and apprehension of harm, and (iv) the nature of the infringed activity": *Bryan*, at para. 10. He had noted in *Thomson Newspapers* (at para. 90) that these factors "do not represent categories of standard of proof which the government must satisfy, but are rather factors which go to the question of whether there has been a demonstrable justification". It is not surprising that the factors considered in this trilogy of cases were so similar, since all the cases in the trilogy concerned alleged infringements of freedom of expression in the law relating to federal elections. I am of the view that, in cases on topics other than freedom of expression, a contextual approach necessarily implies that the factors may be adjusted to take into consideration differences between claims of justification under s. 1 of the *Charter*.

193 Third, in this Court's recent decision in *Bryan*, Bastarache J., again writing for the majority, explained that "only once the objectives of the impugned provision are

stated can we turn to an examination of the context of those objectives to determine the nature and sufficiency of the evidence required under s. 1" (para. 11).

194 Fourth, in *Harper*, Bastarache J. explicitly noted that there is a link between the contextual factors and the degree of deference owed to the government in evaluating s. 1 of the *Charter*:

> On balance, the contextual factors favour a deferential approach to Parliament in determining whether the third party advertising expense limits are demonstrably justified in a free and democratic society. Given the difficulties in measuring this harm, a reasoned apprehension that the absence of third party election advertising limits will lead to electoral unfairness is sufficient. [para. 88]

195 Therefore, the trilogy underlines several features of the contextual approach. First, context infuses every aspect of the proportionality stage of the framework developed in *R. v. Oakes*, [1986] 1 S.C.R. 103, thereby avoiding tunnel vision in the analysis. Second, as the context varies with the nature of the claims, the factors need to be adapted accordingly. Third, the objective has to be identified before turning to the context; only then will it be possible to determine the nature of the evidence that is required and whether the evidence that has been adduced is sufficient. Finally, the contextual factors have a specific effect on the overall degree of deference that will be afforded to the government in determining whether the measures it has adopted are demonstrably justified in a free and democratic society.

196 While the majority agree that a contextual approach to s. 1 is appropriate, they do not apply it in their justification analysis. In my view, the majority do not give context the importance it deserves. Instead, my colleagues adopt an axiological approach that does not lend itself to the justification analysis: see, e.g., S. Bernatchez, "La procéduralisation contextuelle et systémique du contrôle de constitutionnalité à la lumière de l'affaire *Sauvé*" (2006), 20 *N.J.C.L.* 73, at pp. 87-90. This is apparent from their sweeping statements concerning possible justification claims, such as the following (at para. 108):

> Even where a s. 2(*d*) violation is established, that is not the end of the matter; limitations of s. 2(*d*) may be justified under s. 1 of the *Charter*, as reasonable limits demonstrably justified in a free and democratic society. This may permit interference with the collective bargaining process on an exceptional and typically temporary basis, in situations, for example, involving essential services, vital state administration, clear deadlocks and national crisis. [Emphasis added.]

With respect, it is my view that these statements prejudge the s. 1 analysis by limiting justification to exceptional and temporary measures. This is inconsistent with the Court's s. 1 jurisprudence. It is the first time that a standard of exceptional and temporary circumstances has been applied to justification.

D. *Contextual Analysis*

197 In the trilogy of *Thomson Newspapers*, *Harper* and *Bryan*, this Court refined the criteria of the contextual approach under s. 1 of the *Charter*, emphasizing the notion

that "courts ought to take a natural attitude of deference toward Parliament when dealing with election laws" (*Bryan*, at para. 9). It is now incumbent on us in the instant case to identify the relevant criteria and to adapt them to a context in which health care legislation is at issue. As was mentioned in *Bryan*, we must begin by identifying the objectives of the impugned provisions before turning to the specific contextual factors.

(1) Objectives of the Impugned Provisions

198 In its factum, the government states the objectives it was pursuing as follows: "to respond to growing demands on services, to reduce structural barriers to patient care, and to improve planning and accountability, so as to achieve long term sustainability" (para. 4). Two restructuring priorities flowed from these objectives: "adopting new health service models to maintain the level and quality of publicly delivered health services within the new financial mandate, and improving value for money" (para. 5).

199 In addition to these general objectives, the record provides further insights into the objectives of the specific impugned provisions. All of them were designed to "[p]rovide a more seamless and flexible health care delivery system" and "[d]evelop more cost-effective and efficient ways of delivering health services in order to improve patient care and reduce costs" (Respondent's Record, at pp. 52, 55, 59 and 84). Facilitating the reorganization of health care service delivery was a specific goal of ss. 4 (transfers) and 9 (layoff and bumping) (R.R., at pp. 52 and 84). One objective of s. 5 of the Act (multi-worksite assignment rights) was "improved use of human resources . . . [in order] to deal with fluctuations in workload" (R.R., at p. 55). Finally, the contracting-out provisions in s. 6 of the Act were intended to "[a]llow fair competition on hospital contracts and provide better value to taxpayers" (R.R., at p. 59).

200 I agree with the majority that the objectives of Part 2 of the Act are important ones and would add that the objectives of the impugned provisions are also important. The health care system is under serious strain and is, as will be discussed below, facing a crisis of sustainability. There is little hope that it can survive in its current form. Patients depend on the availability of health care services of a reasonable standard within a reasonable time: *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35, at para. 112. Having discussed the objectives of Part 2 of the Act and the specific impugned provisions, I will now consider the relevant contextual factors in detail.

(2) Contextual Factors

201 Several contextual factors have been advanced for the s. 1 analysis. I will apply the guiding principles that were adopted in the elections trilogy, making adjustments to adapt them to the health care context.

(a) *Nature of the Harm*

202 In *Harper*, the nature of the harm that the impugned legislation was intended to address was electoral unfairness (para. 79). In the instant case, the nature of the harm that Part 2 of the Act is designed to address is a crisis of sustainability in health care. There is substantial evidence in the record that the delivery of services in British Columbia's health care system was unsustainable at the time the Act was introduced and that the Act was part of the government's approach in attempting to address the situation.

203 A growing and aging population, costly emerging high-end technology and drugs, and complexity in disease patterns have caused an explosion in the demand for health services in British Columbia and elsewhere in Canada. In British Columbia, health care costs have been rising three times faster than the rate of economic growth in the province. In a submission to the International Labour Office, the government referred to "unsustainable pressures on the budget that needed to be addressed", given that "health and education expenditures by the province represented 64.4 per cent of the total expenditure in 2001-02": International Labour Office, Committee on Freedom of Association, Report No. 330, Cases Nos. 2166, 2173, 2180 and 2196, "Complaints against the Government of Canada concerning the Province of British Columbia", *I.L.O. Official Bulletin*, vol. LXXXVI, 2003, Series B, No. 1, at para. 267. As a result, the government submitted that:

> The health care system in British Columbia is facing a crisis of sustainability, as the costs of health care will continue to rise, and a crisis of service, as the demands on the system exceed its capacity to provide service.
>
> (R.R., at p. 1040)

204 By far the largest share of health care costs are those relating to labour: "[a]pproximately 80% of healthcare costs are labour costs – the majority being unionized labour costs" (Appellants' Supplementary Record, at p. 7). In breaking these costs down further, the government presented evidence that health support workers in British Columbia receive higher wages than in other jurisdictions:

> Support workers are particularly highly paid in comparison with their counterparts in other provinces, with starting and maximum wages on average 34% and 28% higher than the national average.
>
> (R.R., at p. 1044; see also R.R., at pp. 199 and 207)

205 Based on this evidence, I consider the crisis of sustainability in the province's health care system, which this Act and the impugned provisions were designed to address, to be a contextual factor that is of the utmost importance to the s. 1 analysis in the case at bar.

(b) *Vulnerability of the Protected Group*

206 In *Harper*, the impugned legislation was designed to protect "the Canadian electorate by ensuring that it is possible to hear from all groups and thus promote a more informed vote" (para. 80), as well as candidates and political parties to ensure that they "have an equal opportunity to present their positions to the electorate" (para. 81). In the instant case, the primary group that Part 2 of the Act is designed to protect is composed of persons in need of health care. The government submits that the Act "advances the interests of health care users, who are a vulnerable group" (Respondent's Factum, at para. 143).

207 In the years before the Act came into force, labour relations in British Columbia's health sector were volatile and, at times, acrimonious. The interests and demands of health care unions were pursued not just at the bargaining table, but also by means of political advertising and lobbying (R.R., at p. 1033). As late as the summer of 2001, nurses and paramedics were engaged in partial strike action. Legislation was enacted by the government, first to impose a "cooling off" period, and then to end the strikes and impose collective agreements (R.R., at p. 1039). The government submits that "[c]ontrolling public health care labour costs through collective bargaining is difficult, if not impossible. The public depends on access to health care, and cannot go elsewhere

during a labour dispute for these services, as they typically can when a labour dispute involves a private sector business" (R.F., at para. 35).

208 In *Chaoulli*, the majority of this Court were critical of years of failure by the Quebec government to act to improve that province's deteriorating public health care system; patients may face serious, and even grave, consequences where the health care system fails to provide services of a reasonable standard within a reasonable time (paras. 97, 105 and 112). Accordingly, this Court cannot ignore patients' needs in considering the constitutionality of health care reforms that are designed to make the system more viable and efficient.

209 In my view, the vulnerability of health care users and their constitutionally protected rights are relevant contextual factors to be considered in determining whether the impugned legislative provisions are demonstrably justified under s. 1.

(c) *Apprehension of Harm and Ameliorative Measures Considered*

210 In *Harper*, the Court considered the Canadian electorate's subjective fears and apprehension of harm with respect to electoral unfairness as part of the contextual approach (paras. 82-83). This factor thus served to link the nature of the harm to the vulnerability of the group. In the instant case, two factors that led to the adoption of the Act were concerns over the need to respond to the province's health care crisis and the government's evaluation of other alternatives.

211 Governments across the country have been attempting to develop measures to reform the health care system that will address concerns about its sustainability. On

introducing the Act, the Minister responsible for it, the Honourable Graham Bruce, stated: "The reality is that our health system has been on a fast track to collapse. We've got to get the situation under control so we can meet the needs of patients and the needs of the people of British Columbia" (British Columbia. *Debates of the Legislative Assembly*, 2nd Sess., 37th Parl., vol. 2, No. 29, January 26, 2002, at p. 909). In fact, as outlined below in the discussion on minimal impairment, the government considered numerous measures to address this harm.

212 As this Court recognized in *Chaoulli*, at para. 94, "courts must show deference . . . [where there is] an ongoing situation in which the government makes strategic choices with future consequences that a court is not in a position to evaluate". In the case at bar, the various alternatives considered by the government to address concerns about the viability of the province's health care system constitute a contextual factor that is relevant to the s. 1 analysis.

(d) *Nature of the Affected Activity*

213 In *Harper*, the affected activity was expression under s. 2(*b*) of the *Charter*. The Court considered the nature of that activity in the electoral context in order to determine the degree of constitutional protection that ought to be afforded it. The instant case concerns the freedom of association of union members under s. 2(*d*) of the *Charter* in the health care context. Since the activity of collective bargaining involves both employees (through their union representatives) and their employer (in this case, the HEABC), the interests of each of them are relevant contextual factors. Additionally, since the claim in this case is against the government of British Columbia, its position must be

taken into account to ensure that the entire context in which the Act was adopted is considered.

(i) The Employees' Perspective

214 Although s. 2(*d*) of the *Charter* protects only the collective bargaining process, the substance of the negotiated provisions is what matters to employees. For them, collective bargaining is a means to an end. Employees bargain, through their union representatives, on matters that are of varying degrees of importance to them.

215 Sections 4 and 5 of the Act affect a worker's ability to keep the same job description and position in the same institution. Section 6(2) of the Act could affect the ability of workers to maintain their present employment and "to gain employment security". Section 6(4) takes this a step further by signalling to the union that even consultation on contracting out would be a waste of time. With respect to s. 9 of the Act, it affects the seniority regime that is valued by unions and their members, as well as an employee's ability to retain secure employment. There is no question that some of the issues concerned here, such as restrictions on contracting out and mobility, are high priorities for most unions and workers. However, this is not necessarily the case for all the impugned provisions. For example, the revised rules for transfer and assignment set out in ss. 4 and 5 might be considered less important, given that employees retain their employment.

(ii) The HEABC's Perspective

216 The HEABC is not a party to this appeal, but its perspective – as disclosed in the record – both as an employer and as an administrator of the health care system, is nevertheless a relevant contextual factor. In August 2001, the HEABC, in a briefing document prepared for the government, identified numerous provisions in the main health sector collective agreements that, in its view, had to be changed "to enable health employers to seek greater efficiencies in operating B.C.'s health care system" (HEABC, *Briefing Document – Collective Agreement Efficiencies* (2001), at p. 1).

217 In that document, written just five months before the Act was introduced, the HEABC outlined changes that it desired to 33 aspects of existing collective agreements. Most of the provisions that found their way into Part 2 of the Act appear among these recommendations, such as: eliminating restrictions on contracting out, removing barriers to cross-site mobility and transfers, eliminating the Healthcare Labour Adjustment Agency, making bumping less disruptive and changing layoff requirements.

218 However, the HEABC also called for numerous other changes to health sector collective agreements that went well beyond those that were ultimately adopted in Part 2 of the Act, such as: removing pay equity adjustments, adjusting vacation levels and reducing vacation entitlements, ensuring enhanced accountability for union leaves, reducing the amount of paid and unpaid time off for union-related business, requiring the unions to reimburse the employer for one half of the expense of paying union representatives to represent the union at committee meetings, amending various job classifications, allowing banked overtime only at the employer's discretion, and taking unspecified measures to "reduce" the number of employees on sick leave, workers' compensation and long-term disability.

219 I find that it is a relevant contextual factor both that the government, in adopting the impugned provisions of the Act, was reacting to the HEABC's recommendations on how to improve the health care system and that it elected *not* to pursue many of the avenues proposed by the HEABC that might have affected *Charter* rights directly and substantially (such as removing pay equity adjustments, and measures that would affect the union's ability to effectively represent employees).

(iii) The Government's Perspective

220 The government submits that the Act is part of a broader program to restructure health care in the province and that its "general philosophy about the proper boundaries of publicly provided health services as between clinical services and non-clinical services" is a relevant contextual factor in the s. 1 analysis (R.F., at para. 142). It is worth noting that the HEABC, as the employer, remains constant, whereas governments come and go as they are elected and defeated. New governments are sometimes elected on the basis of promises to reform social programs, and the need to reform the health care system is one of the most serious challenges that has ever been faced. Legislation is one of the principal tools available to governments to set policy and restructure programs. However, the terms and the duration of collective agreements that are in force when a new government takes office may operate as a severe constraint on efforts to reform programs that depend on unionized labour, such as the public health care system.

221 The political background to the introduction of the Act at issue in the case at bar is thus a relevant contextual factor. This is particularly so given that the reform of the province's health care system was part of a shift in the government's philosophy towards

health care delivery after a decisive election on May 16, 2001. Some eight months later, in introducing the Act, the Minister of Skills Development and Labour characterized it as "a fundamental restructuring of the size and scope of government that reflects our New Era commitments, the core services review, and taxpayers' priorities" (R.R., at p. 337). The Act was therefore part of a much larger shift in the government's approach to the role of government services at a time of a crisis of sustainability, and of labour tensions, in the health care sector.

3. Summary on Contextual Factors

222 While the nature of some of the working conditions that are likely to be affected tends to favour a less deferential approach, substantial deference must be shown in determining whether the measures adopted in this case are justified under s. 1 in light of the crisis of sustainability in the health care sector, the vulnerability of patients, whose rights are constitutional in nature, the recommendations of the HEABC as an employer and as an administrator of the health care system, and the highly political context of health care reform in B.C.

E. *Section 1 Justification Analysis*

223 The majority set out the applicable framework from *Oakes* for determining whether s. 1 of the *Charter* has been satisfied. I substantially agree with them that the impugned provisions in the case at bar are prescribed by law, that they were enacted in pursuit of a pressing and substantial objective, and that the measures taken are rationally connected with the objective being pursued. However, for the reasons that follow, I find that ss. 4, 5, 6(2) and 9 of the Act satisfy the *Oakes* test and are saved by s. 1 of the

Charter. While I agree that s. 6(4) of the Act fails the minimal impairment test and thus is not justified under s. 1 of the *Charter*, I arrive at this conclusion for different reasons than those given by the majority.

(1) Minimal Impairment Test

224 Under this Court's approach to the minimal impairment test, the government bears the burden of justifying the infringement of a *Charter* right, but deference is owed to its choice of means to attain its legitimate objectives. In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160, McLachlin J. (as she then was) stated: "If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement". Expanding on this in *Harper* at paras. 110-11, Bastarache J. held that "the impugned measures need not be the least impairing option. The contextual factors speak to the degree of deference to be accorded to the particular means chosen by Parliament to implement a legislative purpose".

225 Measures adopted by a government may be part of a broader legislative, administrative and operational response. They may further objectives in ways that would not otherwise be possible. As Dickson C.J. held in *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 784-85:

> It may be that a number of courses of action are available in the furtherance of a pressing and substantial objective, each imposing a varying degree of restriction upon a right or freedom. In such circumstances, the government may legitimately employ a more restrictive measure, either alone or as part of

> a larger programme of action, if that measure is not redundant, furthering the objective in ways that alternative responses could not, and is in all other respects proportionate to a valid s. 1 aim.

226 This jurisprudence demonstrates that minimal impairment is a spectrum of constitutionally justifiable activity whose outer limits are defined by the courts on the basis of relevant contextual factors.

(2) Proportionate Effects Test

227 The purpose of the final stage of the *Oakes* analysis is to evaluate the proportionality between the government's objective and the measures it has adopted. This stage requires an assessment of the benefits and the harmful effects of the measures. In *R. v. Edwards Books and Art*, [1986] 2 S.C.R. 713, at p. 768, Dickson C.J. held with respect to the limiting measures that "their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights". See also *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 889. In other words, the court must ask "whether the Charter infringement is too high a price to pay for the benefit of the law": P. W. Hogg, *Constitutional Law of Canada* (2002 ed.), at p. 801.

228 Having set out the relevant contextual factors and the minimal impairment and proportionate effects tests, I can now apply them to the impugned provisions in the case at bar.

(3) Application to the Impugned Provisions

229 The government chose, in performing its legislative function, to enact the *Health and Social Services Delivery Improvement Act*, Part 2 of which was designed to improve the delivery of health care in the province and to ensure the sustainability of this vitally important social program. Sections 4 and 5 affect agreements resulting from past collective bargaining and make future collective bargaining on transfer and multi-worksite assignments meaningless. Section 6(2) provides that prohibitions on contracting out in health sector collective agreements are void, and prevents future collective bargaining on this subject. Under s. 6(4), provisions in such agreements that require an employer to consult with the affected union before contracting out are void. Section 9 modifies layoff and bumping provisions in such agreements. Each of these provisions of the Act has been found above to infringe s. 2(*d*) of the *Charter*. Bearing in mind the deference owed to the government in the instant case under the contextual approach, these impugned provisions may now be assessed to determine whether they satisfy the minimal impairment and proportionate effects tests. If they do, they will be justified under s. 1 of the *Charter*.

(a) *Minimal Impairment Analysis*

230 The record shows that the government considered a range of alternatives in seeking to address the crisis of sustainability in the province's health care system. Several options that required government intervention were considered, and their advantages and disadvantages were identified. These options included the following (see R.R., at pp. 13, 14, 16 and 17):

(a) imposing an across-the-board wage reduction for all unionized health care employees (see also Appellants' Record, at p. 1870);

(b) removing pay equity adjustments for "Facilities" employees;

(c) increasing the work week from 36 to 37.5 hours per week without a pay increase (see also R.R., at pp. 28-30);

(d) changing the employer's share of health and welfare premiums from 100% to 50%;

(e) changing the governance structures of regional health authorities;

(f) imposing differentiated compensatory and job security terms for new hires;

(g) removing the requirement in collective agreements to provide 12 months of employment security following the end of a contractual layoff notice period; and

(h) voiding collective agreement language that prohibits contracting out, while maintaining the unions' ability to advocate against contracting out on the basis of a business rationale.

231 The government also submitted that the Act was linked to the findings of several federal and provincial health care commissions and – with respect for the majority's view to the contrary – did in fact explain how the measures it had adopted would help it achieve its objectives:

> As a result of these studies, various options for reform were identified. One set of options focussed on reducing existing restrictions on management's ability to change service delivery. These included: eliminating restrictions on contracting out of services; eliminating the 'enhanced consultation', long notice periods and the employment security process required by ELSA; reducing lengthy bumping chains; and reducing restrictions on transfer of services and employees from one site to another. The other set of options focussed on directly reducing compensation for health sector workers. These included wage rollbacks, wage freezes, return to a 37.5 hour work week, reduction in holidays, elimination of pay equity increases, reduction or

> elimination of sick bank payouts. While the latter set of options would save money in the short term, the government concluded that these options could not advance the goal of creating a different framework for conduction business [sic] or contribute to long-term sustainability. The former set of options furthered both of these objectives. [Emphasis added; (R.R., at pp. 1045-46).]

232 While some of the options put forward by the HEABC and considered by the government were ultimately adopted in Part 2 of the Act, many were examined and rejected. It is notable that the rejected options included alternatives that could have affected other *Charter* rights directly and substantially, such as removing pay equity adjustments, which could have infringed the equality rights provided for in s. 15 of the *Charter*. In addition, many of the other rejected alternatives — such as imposing an across-the-board wage reduction, increasing the work week without a pay increase, changing the employer's share of health and welfare premiums, and imposing different compensation and security terms for new hires — would have interfered with the collective bargaining process and may also have infringed s. 2(*d*) of the *Charter*. Others — such as those affecting union leave and the payment of union representatives — could have affected the union's ability to represent employees effectively. The record shows that many of these rejected alternatives were not pursued at the time because the government believed that they would not meet its objective of improving the delivery of health care services. In particular, the government found that many of the options, while offering short-term cost savings, would not facilitate the longer-term structural reforms that were necessary to ensure the sustainability of service delivery for patients.

233 The government chose to enact legislation as part of its "multi-faceted policy initiative" (R.F., at para. 21). In applying the minimal impairment test, it is important to consider whether the impugned legislation or state action directly targets the *Charter* rights of an identifiable individual or group of individuals, or whether its effect infringes a *Charter* right of a more amorphous class of persons. Generally speaking, the former situation suggests that the adopted measure is more drastic than in the latter situation. For example, in *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6, the majority found that an absolute prohibition by a school board against a student's wearing a kirpan infringed the student's freedom of religion under s. 2(*a*) of the *Charter* and that the infringement was not saved by s. 1. In that case, the individual student was singled out by the administrative decision maker who refused to allow him "to wear his kirpan to school [even if] he complied with certain conditions to ensure that it was sealed in his clothing" (para. 3). Further, "there was no evidence of any violent incidents involving kirpans in Quebec schools" (para. 8).

234 In the instant case, it cannot be said that the legislation intentionally targeted the s. 2(*d*) rights of health sector union members or that it was aimed at an identifiable group. This finding flows largely from the fact that in its jurisprudence, this Court had not previously held that employees have a right to a process of collective bargaining. For the reasons given by the majority, the foundations of that case law have been displaced, and it is now appropriate for us to recognize such a right. Nor can it be said that the government disregarded rights that employees were then recognized to have or to have targeted such rights. Rather, the goal was "to respond to growing demands on services, to reduce structural barriers to patient care, and to improve planning and accountability, so as to achieve long term sustainability" (R.F., at para. 4).

235 I thus accept that other alternatives would not have enabled the government to achieve its objectives and that Part 2 of the Act was not aimed directly at the *Charter* rights of the affected employees. I will now consider the specific impugned provisions.

(i) Sections 4 and 5 of the Act (Transfer and Assignments)

236 Section 4 of the Act was specifically designed to facilitate the reorganization of health care service delivery by enabling employers to transfer functions or services to another worksite or to another health sector employer within a region. As for s. 5, it relates to the *temporary* assignment of an employee to another worksite or another employer. Employees do not lose their employment as a result of these provisions. Furthermore, as the majority noted, the Regulation adopted pursuant to the Act mitigates the impact of ss. 4 and 5 on employees (para. 118). These provisions are important to a timely restructuring of the health care system. For example, without s. 4, a transfer of functions or services to another worksite would likely result in disruption and delays if affected employees were to exercise bumping, layoff and recall rights (R.R., at p. 52). Nonetheless, s. 5(b) specifically requires that the collective agreement's provisions on posting a position be complied with where the assignment is to be on an ongoing basis. These provisions are thus carefully tailored so as to ensure that the government's objective is attained while infringing s. 2(*d*) as little as possible.

(ii) Sections 6(2) and 6(4) of the Act (Contracting Out)

237 Sections 6(2) and 6(4) were adopted to enable health sector employers to contract out certain non-clinical services in order to "[d]evelop more cost-effective and efficient ways of delivering non-clinical health services in order to improve patient care

and reduce costs" (R.R., at p. 59). Section 6(2) has the effect of repudiating collective agreement provisions that in "any manner restric[t], limi[t] or regulat[e] the right of a health sector employer to contract outside of the collective agreement for the provision of non-clinical services", and prevents such provisions from being agreed to in the future. Section 6(4) voids provisions in collective agreements that require employers to consult with unions before contracting out non-clinical services.

238 The chambers judge, Garson J., found that s. 6(2) of the Act "does not restrict the ability of unions, including the plaintiff unions, to organize employees of outside contractors" ((2003), 19 B.C.L.R. (4th) 37, 2003 BCSC 1379, at para. 24). Moreover, it is notable that contracting out is not obligatory. Rather, what s. 6(2) does is prohibit collective agreement clauses preventing contracting out. Thus, although union density may be lower when work is contracted out, there is still substantial room for *all* employees providing non-clinical services to exercise their right to freedom of association and to engage in a process of collective bargaining, even when certain of those services are contracted out.

239 An impact assessment of the Act by the Ministry of Health dated January 24, 2002 explained that the contracting-out provisions "[w]ill allow employers to control costs while focusing on care delivery" (A. Supp. R., at p. 17). The government added that:

> Eliminating contracting-out restrictions on non-clinical services, in particular, was seen as necessary to inject an 'air of reality' into compensation for these services, and to empower health authorities to appropriately allocate scarce

> resources as between support services and clinical services involving direct patient care and health programs. (R.R., at p. 1046)

In negotiating, the parties can avoid contracting out by agreeing to working conditions that are more consistent with those that apply when work is contracted out. The provision thus brings some competition into the bargaining process. Without s. 6(2) of the Act, the government would be effectively prohibited from making a policy decision to restructure non-clinical health services in the province, because existing collective agreements would block such a decision, without any further discussion.

240 The history of labour relations in the province, discussed above, strongly suggests that the terms set out in s. 6(2) could not have been successfully negotiated by the HEABC and the health sector unions. Moreover, in the context of the province's health care crisis, removing prohibitions on contracting out in collective agreements furthered the government's objective in ways that alternative responses could not. Furthermore, the alternative measures considered by the government were problematic in that many may have directly affected other *Charter* rights. For these reasons, in my view, s. 6(2) of the Act satisfies the minimal impairment test.

241 The same cannot be said about s. 6(4) of the Act. The only evidence in the record that may be relevant to the minimal impairment analysis in respect of s. 6(4) comes from the HEABC, which made representations to the government with respect to "enhanced consultation" between the HEABC, as the employer, and the relevant unions:

> The supposed purpose of the language was to allow the unions' input prior to the finalization of employer decisions affecting union members. The reality has proven to be constant union attempts to move from an 'input' model to a 'co-management' model and the use of the language to block or delay management initiatives. Many Employers have indicated that Labour

> Adjustment Committees and the Enhanced Consultation models are significant barriers to any innovative changes Employers want to make to the health system.
>
> (HEABC, *Briefing Document – Collective Agreement Efficiencies*, at p. 4.)

In that document, the HEABC was in my view expressing to the government its frustration with the "enhanced consultation" model that has been adopted in the past for other management initiatives. However, there is no constitutional entitlement to such consultation prior to contracting out. A far more direct, or time-limited, consultation between the HEABC and the affected unions might be possible. It is notable that during oral argument before this Court, even counsel for the government submitted that it would be desirable to hold consultations before contracting out.

242 Accordingly, I consider that the government has failed to establish by evidence, inference or common sense that the employers' ability to contract out would be restricted unreasonably by a requirement to consult with the relevant unions beforehand. While s. 6(4) does not, strictly speaking, prohibit consultations on contracting out, declaring that any clause in a collective agreement providing for consultation is void is an invitation to employers not to consult. Consultation is never harmful unless truly exigent circumstances do not allow time for it, or it is rendered moot because recent consultations have made further discussions unnecessary.

(iii) Section 9 of the Act (Layoff and Bumping)

243 Section 9 of the Act is designed "to allow for the timely reorganization and restructuring of health care services" (R.R., at p. 84) by modifying, for the period ending December 31, 2005, provisions of collective agreements relating to layoffs and bumping.

244 There is evidence in the record that bumping and layoff restrictions can significantly delay the restructuring of health care service delivery. In its impact assessment of the Act dated January 24, 2002, the Ministry of Health stated the following about the bumping and layoff provisions:

> Employers need the ability to lay people off quickly and efficiently. Current bumping provisions create endless chains. Numerous employees are affected and considerable time transpires before anyone is actually laid-off. New bumping provisions in the Regulations still allow for bumping but reduces its affect and inherent delays. [A. Supp. R., at p. 17]

The record contains several examples of the disruption that bumping can cause in the workplace. In one particularly clear example, the elimination of a data entry clerk position in July 1996 resulted in a chain of eight people in total bumping each other, and the last person in the chain was not placed in a position until four years later, in July 2000 (R.R., at p. 86; see also R.R., at p. 118). The HEABC advised the government that "[d]isplacement and bumping is disruptive to staff directly affected by the displacement, and those involved in the bumping chain. This disruption impacts on the quality of program delivery and occupies unnecessary administrative time. The bumping process needs to be expedited" (*Briefing Document – Collective Agreement Efficiencies,* at p. 6).

245 One feature of s. 9 that is relevant to the minimal impairment analysis is that it is a sunset provision. The Act came into force on January 28, 2002, and s. 9 ceased to operate on December 31, 2005. Section 9 impaired the collective bargaining process in respect of layoffs and bumping, but was limited by a time period approximating the mandate of the government, which had been elected some eight months previously. This

suggests that it was closely tied to the health care reform being implemented, and that it was adopted as a transitional measure. The majority state that "this is scant comfort to employees who may have been laid off or bumped before this date, without the benefit of a union to represent them on the issue" (para. 155). With respect, there is nothing in the Act that prevents the union from representing an employee who is laid off as a result of the operation of s. 9. Furthermore, s. 9 did not ban bumping or layoff provisions in collective agreements, which are not, *per se*, constitutionally protected. Rather, it imposed by legislative means attenuated terms for layoffs and bumping in place of those agreed to in the collective bargaining process. As with ss. 4 and 5 of the Act, the impact of s. 9(d) on workers was minimized by safeguards provided for in s. 5 of the Regulation made under the Act. There is sufficient evidence that s. 9 of the Act enabled the government to meet its objectives of making the health care system more sustainable and improving service to patients in ways that other alternatives would not permit. As with s. 6(2), the history of labour relations in the province strongly suggests that the terms set out in s. 9 could not have been successfully negotiated by the HEABC and the health sector unions. Therefore, in my view, it satisfies the minimal impairment test as a transitional clause that represents government policy and is carefully circumscribed.

(b) *Proportionate Effects Analysis*

246 Sections 4, 5, 6(2) and 9 of the Act have been fashioned to facilitate the restructuring of the province's health care system in order to improve service delivery and sustainability. Are the effects of the measures proportionate? In its submission to the International Labour Office, the government emphasized the link between the Act and the health care challenges it was facing:

> Any restrictions on collective bargaining or on the right to strike were exceptional measures, enacted in view of the difficult economic and fiscal situation, in the context of protracted and difficult labour disputes, which could have serious consequences in the health and education sectors.
>
> ("Complaints against the Government of Canada concerning the Province of British Columbia", at para. 269)

It is now necessary to consider whether the benefits of the impugned measures outweigh their negative consequences in terms of the infringement of s. 2(*d*) of the *Charter*.

(i) Sections 4 and 5 of the Act (Transfer and Assignments)

247 In my view, ss. 4 and 5 of the Act do not have a serious impact on employees and, what is more, the measures provided for in s. 5 are only temporary. As noted earlier, the intrusiveness of the revised transfer and assignment process under ss. 4 and 5 is limited, given that employees retain their employment. Conversely, the benefit of these provisions is to open the door to improvements to the health care system by providing flexibility for the restructuring process. Thus, I am satisfied that they are a proportionate response to the crisis of sustainability in health care.

(ii) Sections 6(2) and 6(4) of the Act (Contracting Out)

248 Section 6(2) of the Act does not prevent employees providing contracted-out non-clinical services from exercising their right to freedom of association in a collective bargaining process. Moreover, the intention in enacting it was to facilitate the long-term reform of health care delivery, as opposed to simply seeking short-term cost savings or imposing a heavier burden on taxpayers (who are also potential health care users). Although s. 6(2) does interfere with collective bargaining on contracting out, it strikes an

appropriate balance between the government's objectives and the freedom of association of employees. Therefore, the infringement resulting from s. 6(2) of the Act is justified under s. 1 of the *Charter*.

249 While I have already found that s. 6(4) fails the minimal impairment test, I would add that taking consultation, which is an important component of the collective bargaining process, off the table is also a disproportionate measure. The benefit of s. 6(4), that of reducing the pressure on employers to consult with unions before contracting out, is nominal. The marginal benefits of this provision are outweighed by the deleterious effects of denying consultation to affected unions. Accordingly, s. 6(4) fails to satisfy s. 1 of the *Charter* and is unconstitutional.

(iii) Section 9 of the Act (Layoff and Bumping)

250 Finally, s. 9 is consistent with the government's objectives relating to systemic reform, which I have found to be entitled to deference, and the cost of its enactment is limited interference with the collective bargaining process. The negative effects of the infringement are minimal because it is time-limited, and while bumping and layoff protections are attenuated, they are not abolished. The procedural infringement is thus outweighed by the evidence that layoff and bumping provisions in collective agreements would place serious obstacles in the way of the timely restructuring of the health care system. Timely restructuring simply could not take place unless such barriers were removed. Accordingly, s. 9 of the Act is a proportionate response, and the infringement is justified under s. 1 of the *Charter*.

III. Conclusion

251 In addressing the crisis of sustainability in health care, governments face a difficult public policy challenge with no end in sight in the immediate future. As alternatives are considered, competing rights and interests arise. Government must be accorded deference to enable them to navigate these difficult waters. At the same time, this Court must ensure that the path they take is respectful of the constitutional rights of those who are affected by it, and that any infringement of those rights is demonstrably justified.

252 In the case at bar, the freedom of association of health care employees has been infringed in several instances, because provisions of the legislation enacted by the government interfere with their right to a process of collective bargaining with the employer. It is the collective bargaining process that is constitutionally protected, not the content of the actual provisions of the collective agreements. In my view, the government has established that four of the five infringements, namely those resulting from ss. 4, 5, 6(2) and 9 of the Act, are constitutionally justified. However, I find that s. 6(4) of the Act fails the minimal impairment and proportionate effects tests and thus is not saved under s. 1 of the *Charter*.

Appendix

HEALTH AND SOCIAL SERVICES DELIVERY IMPROVEMENT ACT

S.B.C. 2002, CHAPTER 2

PART 2- HEALTH SECTOR

Definitions

3 In this Part:

"**bumping**" means the exercise of a right of one employee to displace another employee who is on the same seniority list under a collective agreement;

"**collective agreement**" means a collective agreement between HEABC and a trade union or an association of trade unions in an appropriate bargaining unit;

"**ESLA**" means the Employment Security and Labour Force Adjustment Agreement, issued as part of the recommendations of the Industrial Inquiry Commissioner on May 8, 1996 and included in whole or in part in one or more collective agreements between HEABC and trade unions representing employees in appropriate bargaining units, and includes any collective agreement provisions arising from ESLA, including Part 4 and Schedule 1 of the Recommendations of the Industrial Inquiry Commissioner;

"**HEABC**" means the Health Employers Association of British Columbia established under section 6 of the *Public Sector Employers Act*;

"**health sector**" means all members of HEABC whose employees are unionized and includes their unionized employees;

"**health sector employer**" means an employer in the health sector;

"**worksite**" means a facility, agency, centre, program, organization or location at or from which an employee is assigned to work.

Right to reorganize service delivery

4 (1) A health sector employer has the right to reorganize the delivery of its services by transferring functions or services within a worksite or to another worksite within the region or to another health sector employer, including, but not limited to, partnerships or joint ventures with other health sector employers or subsidiaries.

(2) A health sector employer has the right to transfer

(a) functions or services that are to be performed or provided by another health sector employer under subsection (1) to that other health sector employer, and

(b) functions or services that are to be performed or provided at another worksite in the region to that other worksite.

(3) If a function or service is transferred to another health sector employer or within or to a worksite under this section, an employee who performs that function or service may be transferred to that employer or within or to that worksite in accordance with the regulations.

Multi-worksite assignment rights

5 A health sector employer

(a) has a right to assign an employee within or to any worksite of that employer or to a worksite operated by another health sector employer for a period not exceeding that set out in the regulations and under conditions specified in the regulations, and

(b) must post any position pursuant to the collective agreement if the employer requires the successful candidate for that position to work on a regular ongoing basis at more than one worksite of that employer as a condition of employment in that position.

Contracting outside of the collective agreement for services

6 (1) In this section:

"**acute care hospital**" means a hospital or part of a hospital designated by regulation;

"**designated health services professional**" means

(a) a nurse licensed under the *Nurses (Registered) Act*,

(b) a person who is a member of a health profession designated under the *Health Professions Act* on the date on which this section comes into force,or

(c) a person in an occupation or job classification designated by regulation;

"**non-clinical services**" means services other than medical, diagnostic or therapeutic services provided by a designated health services professional to a person who is currently admitted to a bed in an inpatient unit in an acute care hospital, and includes any other services designated by regulation.

(2) A collective agreement between HEABC and a trade union representing employees in the health sector must not contain a provision that in any manner restricts, limits or regulates the right of a health sector employer to contract outside of the collective agreement for the provision of non-clinical services.

(3) The labour relations board or an arbitrator appointed under the Code or under a collective agreement must not declare a person who

(a) provides services under a contract between a health sector employer and an employer that is not a health sector employer, and

(b) is an employee of the employer that is not a health sector employer

to be an employee of the health sector employer unless the employee is fully integrated with the operations and under the direct control of the health sector employer.

(4) A provision in a collective agreement requiring an employer to consult with a trade union prior to contracting outside of the collective agreement for the provision of non-clinical services is void.

(5) A collective agreement does not bind, and section 35 of the Code does not apply to, a person who contracts with a health sector employer.

(6) A health sector employer must not be treated under section 38 of the Code as one employer with any other health sector employer or a contractor.

Employment Security and Labour Force Adjustment Agreement

7 (1) A party to ESLA is not required to carry out a term of ESLA on or after the coming into force of this section.

(2) A party to a collective agreement is not required to carry out any part of a provision that is based on or derived from ESLA in the collective agreement.

(3) ESLA does not apply for the purposes of the interpretation or application of the collective agreement.

Healthcare Labour Adjustment Society

8 (1) In this section, "**HLAA**" means The Healthcare Labour Adjustment Society of British Columbia incorporated under the *Society Act*.

(2) The minister may appoint an administrator for HLAA.

(3) The administrator appointed under subsection (2) replaces the directors of HLAA and may exercise all the rights and duties of directors under the *Society Act*.

(4) The administrator must ensure that HLAA's programs and activities operate only to the extent necessary to honour obligations to employees of health sector employers who were laid off under ESLA and to honour existing financial commitments made to health sector or other employers for reimbursement under one of HLAA's programs.

(5) The minister may direct the administrator to offer programs and

activities beyond those in subsection (4).

(6) The administrator is responsible for winding up HLAA in accordance with the *Society Act.*

(7) The administrator may wind up HLAA when its obligations under subsections (4) and (5) are complete.

(8) The administrator must complete his or her duties under this section within one year from the date on which he or she is appointed.

(9) Any money remaining in HLAA at the time it is wound up must be paid into the Health Special Account referred to in the *Health Special Account Act.*

Layoff and bumping

9 For the period ending December 31, 2005, a collective agreement must not contain a provision that

(a) restricts or limits a health sector employer from laying off an employee,
(b) subject to paragraph (c), requires a health sector employer to meet conditions before giving layoff notice,
(c) requires a health sector employer to provide more than 60 days' notice of layoff to an employee directly or indirectly affected and to the trade union representing the employee, or
(d) provides an employee with bumping options other than the bumping options set out in the regulations.

Part prevails over collective agreements

10 (1) A collective agreement that conflicts or is inconsistent with this Part is void to the extent of the conflict or inconsistency.

(2) A provision of a collective agreement that

(a) requires a health sector employer to negotiate with a trade union to replace provisions of the agreement that are void as a result of subsection (1), or
(b) authorizes or requires the labour relations board, an arbitrator or any person to replace, amend or modify provisions of the agreement that are void as a result of subsection (1),

is void to the extent that the provision relates to a matter prohibited under this Part.

John Baigent and *David Yorke*, for the intervener the British Columbia Teachers' Federation.

The judgment of McLachlin C.J. and Bastarache, Binnie, LeBel, Fish and Abella JJ. was delivered by

Appeal allowed in part with costs, DESCHAMPS J. *dissenting in part.*

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