Due Process, Collective Bargaining and Section 2(d) of the Charter: A Comment on B.C. Health Services

Jamie Cameron
Osgoode Hall Law School of York University, jcameron@osgoode.yorku.ca

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/sclr

This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License.

Citation Information
https://digitalcommons.osgoode.yorku.ca/sclr/vol42/iss1/7

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.
Due Process, Collective Bargaining and Section 2(d) of the Charter: A Comment on B.C. Health Services*

Jamie Cameron**

I. THE DEMISE OF PRECEDENT

The year 2007 marked the 25th anniversary of the Canadian Charter of Rights and Freedoms,† as well as the 20th anniversary of the Supreme Court of Canada’s decisions in the Labour Trilogy.‡ The cases comprising the Trilogy — landmarks which held that section 2(d) does not protect collective bargaining or the right to strike — gave the Charter’s guarantee of associational freedom a confined and demoralizing interpretation. At the time, the Labour Trilogy was a profound disappointment to those who had hoped that the Charter would enlarge the rights of workers.§ Instead, the Court reacted to fears about section 2(d)’s implications for labour relations with a confused and apprehensive concept of entitlement. Despite failing to establish a definition of the right, the Labour Trilogy was determinative; until this

---

* This article was originally published in the Canadian Labour and Employment Law Journal (2006-2007) 13 C.L.E.L.J. 233 and is reprinted here by permission of Lancaster House Publishing (Toronto: <http://www.lancasterhouse.com>).

** Professor of Law, Osgoode Hall Law School, York University. I would like to thank Bernie Adell for commenting on and editing this article, and Michael Lynk for his comments on an earlier draft.

year, the guarantee had virtually no impact on labour relations, nor did it protect the entitlement in other settings.\(^4\)

By enshrining freedom of association as one of its fundamental freedoms, Canada followed the lead of international and European human rights instruments. In this, the Charter’s framework filled a gap in the much-hallowed *Bill of Rights*: Canada had the foresight to guarantee a right Americans do not explicitly enjoy.\(^5\) By making it the equal of the Charter’s other guarantees, the text of section 2(d) created an opportunity for the Supreme Court of Canada to develop a distinctive concept of associational freedom. Rather than seize the opportunity, the Court flinched. To be fair, timing may have been a factor: section 2(d) arrived at the Court for the first time in the wake of milestone decisions in *Hunter v. Southam Inc.*,\(^6\) *R. v. Big M Drug Mart Ltd.*,\(^7\) *Reference re Motor Vehicle Act (B.C.) S. 94(2)*,\(^8\) and *R. v. Oakes*.\(^9\) The rights-protective approach of those cases was out of the question for section 2(d), where a large and liberal interpretation of the guarantee could constitutionalize all human activity except the isolated acts of individuals. Especially in light of the formidable standard of justification newly in place under *R. v. Oakes*, such an approach was not an option.


\(^5\) Section 2 of the Charter provides: “Everyone has the following fundamental freedoms … (d) freedom of association.” Compare this to the First Amendment to the U.S. Constitution, which states, in its entirety: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”


The Court moved quickly to tether section 2(d)’s guarantee of associational freedom, in decisions that placed the spotlight on labour policy.

Against its stated commitment to a generous and purposive approach to other Charter guarantees, the Court gave section 2(d) a minimalist interpretation. In that regard McIntyre J.’s concurring opinion in the Alberta Reference — the Labour Trilogy’s leading decision — was indicative. There, he held that constitutionalizing collective efforts would privilege groups and organizations over individuals. That prospect offended an instinct that activities should not have special status just because they are initiated by groups. This kind of egalitarian logic led McIntyre J. to conclude that “[p]eople, by merely combining together, cannot create an entity which has greater constitutional rights and freedoms than they, as individuals, possess”. He found that section 2(d) protects the right of individuals to form an association, and the right of associations to engage in activities, qua associations, but only where the activities could lawfully be undertaken by individuals. Under that definition, section 2(d) did not include actions in the name of the association or in aid of the association’s objects.

Members of the Court also fretted openly in the Alberta Reference that section 2(d) had the potential to destroy labour policy. On behalf of three of the panel’s six members, Le Dain J. voiced strong resistance to the constitutionalization of such policy. In his view, “[t]he rights for which constitutional protection are sought … are not fundamental rights

10 Supra, note 2. This decision was weakened by fragmentation within the panel, which comprised only six of the Court’s members. A majority of four dismissed claims that the Charter protects collective bargaining and the right to strike, but failed to agree on a definition of associational freedom. Justice Le Dain wrote for a plurality of three judges and McIntyre J. wrote a separate concurring opinion; Dickson C.J.C. and Wilson J. both dissented, and each wrote separate reasons.

11 Id., at 398. In that case, the rights of the association would exceed those of the individual “merely because of the fact of association” (emphasis added). For that reason, McIntyre J. was firmly of the view that “[f]reedom of association cannot therefore vest independent rights in the group”: id., at 397 (emphasis added).

12 Id.

13 Under his definition, freedom of association included the right to form an association, id., at 407, and “will attach to the exercise in association of such rights as have Charter protection when exercised by the individual”, as well as to “the freedom to associate for the purposes of activities which are lawful when performed alone”: id., at 409 (emphasis added).

14 In PIPS, supra, note 4, Sopinka J. reworked McIntyre J.’s conception of associational freedom and placed it in a four-point framework: infra, note 57.

15 Alberta Reference, supra, note 2, at 391.
or freedoms … [but] are the creation of legislation”.\footnote{In his view, activities which were recognized as a matter of statutory permission or privilege could not be so easily, automatically or immutably transformed by the Charter.} Meanwhile, McIntyre J.’s objection to an associational conception of entitlement was also rooted in his opposition to judicial intervention in the “dynamic process” of labour relations. He bluntly refused to grant unions “an economic weapon” which would potentially be immune from legislative control.\footnote{Id., at 415.} These judges feared that a collective conception of association might have a domino effect and topple all manner of labour laws. An individualistic definition of entitlement which excluded union activities from the Charter eliminated that risk.\footnote{Id., at 398 (per McIntyre J., who stated that “[c]ollective bargaining is a group concern … but the group can exercise only the constitutional rights of its individual members”, and that “[i]f the right asserted is not found in the Charter for the individual, it cannot be implied for the group merely by the fact of association”).}

The Labour Trilogy determined the prospects of a guarantee which would have little or no vitality in its first 20 years. Without further analysis or reflection, freedom of association was reduced to an all-or-nothing proposition: once having refused to protect freedom of association in the context of collective bargaining, the Court decided not to protect the entitlement in others.\footnote{The dilemma was that “[i]f s. 2(d) protects only the right to come together and form an association, its importance is relatively modest. On the other hand, if it were held also to protect the essential activities of the group, it would have enormous impact, particularly in the realm of labour relations.” R. Sharpe, K. Swinton & K. Roach, The Charter of Rights and Freedoms, 2d ed. (Toronto: Irwin Law, 2002), at 151. Examples include Skinner, Black, Suresh and Harper, supra, note 4.} As the victories accumulated under other Charter provisions, section 2(d) became all but invisible. The Court’s definition of associational freedom was so underinclusive over the years that claims succeeded on two occasions only, in Libman v. Quebec (Attorney General)\footnote{Supra, note 4.} and Dunmore v. Ontario (Attorney General).\footnote{Supra, note 4.}

step of overruling itself.\textsuperscript{23} Despite effectively doing so on other occasions — as, for instance, in \textit{R. v. Mills}\textsuperscript{24} and \textit{United States of America v. Burns}\textsuperscript{25} — the Court has been hesitant to overrule its own precedents. Another factor is the McLachlin Court’s decision-making tempo, which adds to the intrigue of \textit{B.C. Health Services}. Many see this as a deeply conservative Court, one that is unusually shrewd and parsimonious in its use of institutional authority. Yet this same Court has an appetite, albeit one that is infrequently indulged, for risky and innovative Charter interpretations.\textsuperscript{26} Predictions about when the judges will be moved to act, on which issues, and in what circumstances, are a matter of sheer guesswork.

\textit{B.C. Health Services} is a case in point.\textsuperscript{27} Though section 2(d)’s prospects brightened after \textit{Dunmore v. Ontario}, the Court’s decision to overrule precedent, constitutionalize collective bargaining, and impose a Charter duty to bargain in good faith was radical, to say the least. In doing so, the joint majority opinion, written by McLachlin C.J.C. and LeBel J., skimmed lightly over a body of case law that had consistently been tentative and uneasy about section 2(d). The \textit{Labour Trilogy} baldly exposed the Court’s discomfort with a concept of entitlement that might indiscriminately constitutionalize activity of all descriptions, simply because it was collective in nature. As well, the Court has been constant


\textsuperscript{27} \textit{Supra}, note 22. The Court sat as a panel of seven in \textit{B.C. Health Services}. Justice Charron was not included in the panel, and Rothstein J.’s process of appointment had not been completed at the time of the hearing. Six judges signed the joint opinion of McLachlin C.J.C. and LeBel J., and Deschamps J. wrote separately, in partial dissent.
in its aversion to the constitutionalization of labour relations; while *Dunmore* unsettled that pattern, Bastarache J.’s reasons in that case carefully avoided dislodging precedent. From the time of the *Labour Trilogy*, those dynamics had conspired to hold section 2(d) at bay.

Against this backdrop, *B.C. Health Services* reads as a supremely confident decision. In a bold opinion, McLachlin C.J.C. and LeBel J. easily discounted the concerns that had held section 2(d) jurisprudentially in check for so long. Rather than concede the legitimacy of those concerns, the Court forged on, waving off the jurisprudence of the first 20 years on the strength of *Dunmore*. At the forefront of many questions which arise from *B.C. Health Services* is the decision’s impact on collective bargaining, specifically, and on labour relations, more generally. A key point for debate concerns the framework that this decision has established for public sector bargaining under the Charter. That issue invites close attention but should not obscure another, equally important, question, which is whether and in what ways the case may affect the Court’s conception of associational freedom. The decision to overrule precedent created a conceptual hiatus in the section 2(d) jurisprudence; what freedom of association means will no longer be found in the *Labour Trilogy* and *P.I.P.S.C. v. Northwest Territories (Commissioner)* but will take its lead, instead, from *B.C. Health Services*. Surely it is odd, in such circumstances, that the Court’s decision never ventured beyond the collective bargaining context, and expressed no interest in developing a theory of entitlement.

This article focuses less on the decision’s importance to labour law and more on its broader consequences for section 2(d). Specifically, it examines the Court’s discussion of associational freedom in the context of collective bargaining to see whether the decision offers a theory of entitlement for the guarantee. The inquiry follows a trajectory that analyzes the key elements of the Court’s methodology: first is the creation of due process rights for collective bargaining; second is a conception of section 2(d) as a source of positive rights; and third is the role of context in constitutional analysis. What emerges from the discussion are doubts about the soundness of the doctrines the Court relied on to constitutionalize collective bargaining. Those doubts lead to the conclusion that *B.C. Health Services* could have regressive consequences for section 2(d) and its promise of associational freedom.

The article closes with a section which develops that concern by pointing out a tension, or ambivalence, that has infused the section 2(d) case law from the beginning. The tension is between an interpretation of
section 2(d) which is content-dependent and focused on the question of labour entitlements, and one which is abstract and more inclusive in its view of associational freedom. *B.C. Health Services* expressed disapproval of the Court’s early jurisprudence and its abstract or “generic” definition of the guarantee, because it excluded union activities from the Charter, and repeatedly noted the superiority of a contextual approach. In at least one respect the point is well taken: the *Labour Trilogy* did err in adopting an individualistic conception of a collective right. Even so, that point does not render section 2(d)’s underlying values and principles irrelevant, and deciding cases by a process of serial contextualization is not the answer.

Though both approaches — the abstract and the contextual — have a presence in the jurisprudence, the Supreme Court’s section 2(d) decision-making in recent years has favoured labour claims. B.C. *Health Services* represents the culmination, thus far, of a trend that interprets the guarantee primarily, though not exclusively, from that perspective. The danger in this is that associational freedom may cease to have content and relevance outside the labour law setting.

It was honest and forthright for the Supreme Court to overrule precedents that it now regards as unprincipled. At the least, *B.C. Health Services* and its model for the partial constitutionalization of collective bargaining will have enormous consequences for labour relations in this country. Meanwhile, the decision to overrule section 2(d)’s founding precedents marooned the guarantee; for whatever reason, the Court chose not to comment more generally on associational freedom or to indicate how it should be interpreted. Accordingly, this article proposes that *B.C. Health Services* be read as the Court seemingly intended — on its own terms, as a decision that is specific to the status of collective bargaining under the Charter. In other words, *B.C. Health Services* has opened the door to labour claims under section 2(d), without shutting it on a reconsideration of section 2(d)’s theoretical underpinnings. Far

---

from foreclosing that possibility, the Court’s decision both contemplates and invites a re-conceptualization of the guarantee.

II. SECTION 2(d), DUE PROCESS AND COLLECTIVE BARGAINING

1. The Constitutionalization of Collective Bargaining

*B.C. Health Services* overruled the *Labour Trilogy* and *PIPSC*, which were the Court’s key decisions on section 2(d) prior to *Dunmore*.29 In doing so, the Court explained, in firm but diplomatic terms, 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”.30 The Chief Justice and LeBel J. wrote that *Dunmore* “opened the door to reconsideration of that view”,31 and this observation made it relatively painless for them to dispatch previous case law which had tenaciously excluded collective bargaining from the Charter. Thus emboldened by a single decision — *Dunmore* — the judges declared that “the holdings in the *Alberta Reference* and *PIPSC* excluding collective bargaining from the scope of s. 2(d) can no longer stand”.32

Throughout, the joint majority opinion focused singular attention on collective bargaining and its status under the Charter, overruling the Court’s precedents as a prelude to constructing a due process model of collective bargaining under section 2(d). That enterprise led to a conclusion that provincial legislation unilaterally altering the terms of employment for certain health care workers was invalid because it undercut “the right of employees to associate in a process of collective action to achieve workplace goals”.33 In defining this right, the joint opinion quickly isolated the process for pursuing workplace goals from the outcomes of that process and the question of whether those goals

---

29 *Supra*, note 4.
30 *B.C. Health Services*, supra, note 22, at para. 20.
31 *Id.*, at para. 22.
32 *Id.*, at para. 36.
33 *Id.*, at para. 19. In the result, the Court upheld ss. 4 and 5, but invalidated ss. 6(2), 6(4) and 9 of the *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2. Sections 4 and 5, which dealt with relatively minor modifications to schemes for transferring and reassigning employees, took these issues off the “collective bargaining table”, but were upheld by the Court. By contrast, the sections which dealt with contracting out (*i.e.*, s. 6(2) and (4)), layoffs (*i.e.*, s. 9(a), (b), and (c)), and bumping (*i.e.*, s. 9(d)) infringed s. 2(d) because they addressed matters that were central to freedom of association and could not be upheld under s. 1 of the Charter. The Court declared those provisions unconstitutional but suspended its declaration of unconstitutionality for 12 months.
were, in fact, achieved. The result was a model of due process which partly constitutionalized collective bargaining, but specifically excluded its substantive content from section 2(d).\(^{34}\) The first step in the Court’s methodology proposed a definition of the right which was procedural, rather than substantive, in nature. In that regard, it is striking that s. 2(d) had never before been limited to, or organized around, rights of due process. In addition to the decision’s implications for labour relations, the broader concern is that *B.C. Health Services* may have read the guarantee down from a substantive, to a procedural, entitlement.

The Court’s model of due process rights recognized that access to a collective bargaining process would not be effective unless “corresponding duties” were imposed on government employers. The second part of the joint opinion’s methodology introduced a combination of affirmative entitlement and positive obligation: *B.C. Health Services* held that employee associations have the right to engage in collective bargaining (except in certain circumstances) and that employers who are bound by the Charter have a positive obligation or duty to bargain with them in good faith. Here, as in *Dunmore*, the Court promoted a conception of section 2(d) as a source of affirmative entitlements for workers. The result was a standard of due process in collective bargaining which requires that the state “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.”\(^{35}\) Unlike *Dunmore*, which rested on the historical circumstances of agricultural workers, *B.C. Health Services* established a constitutional norm for collective bargaining across a broad spectrum. Despite the enormity of that step and its consequences for labour relations, the decision’s implications for section 2(d) as a whole and for the concept of associational freedom under the Charter are uncertain. In that regard, the difficulty is that the Court recognized positive duties without explaining what role such obligations should play in section 2(d)’s interpretation.

The third element of the methodology is “context”. As already noted, the degree to which it dominated the analysis in *B.C. Health Services* is telling. The Chief Justice and LeBel J. showcased the Court’s

---

\(^{34}\) The point was repeated several times: *id.*, at para. 89 (stating that s. 2(d) “does not guarantee the particular objectives sought through this associational activity”), and para. 91 (confirming that “as the right is to a process, it does not guarantee a certain substantive or economic outcome”).

\(^{35}\) *Id.*, at para. 90.
attention to context at every opportunity, and compared their approach in *B.C. Health Services* to the “de-contextualization” for which they faulted the earlier jurisprudence.\(^{36}\) Despite providing a fresh perspective on collective bargaining, this approach treated context as the key to an analysis under section 2(d). In doing so, the joint majority opinion showed no awareness that an unabated contextual approach can be narrowing, subjective and easily manipulatable. For those reasons, the Court’s reliance on context invites caution.

Each of these methodological elements of *B.C. Health Services* supported the constitutionalization of collective bargaining, yet each may have regressive consequences for associational freedom under the Charter. The next sections of this paper identify those consequences but propose that they can be avoided by reading *B.C. Health Services* as a decision that addressed collective bargaining and otherwise left the interpretation of section 2(d) to another day.

2. **Due Process Rights under Section 2(d)**

The Court was poised for change in *B.C. Health Services*, and motivated to act by two key factors. First, the status quo, which entrenched “a judicial ‘no go’ zone for an entire right”, was no longer acceptable to the Court.\(^{37}\) The Chief Justice and LeBel J. concluded that the precedents which established this “no go” zone could not be sustained. As they explained, the principle of judicial restraint in the section 2(d) jurisprudence pushed deference “too far”.\(^ {38}\) Second, *Dunmore v. Ontario* enabled the Court to override precedent’s “narrow focus on individual activities” and to confirm that activities of an “inherently collective” nature are protected by section 2(d).\(^ {39}\) A few years earlier, *Dunmore* stood at the brink. Rather than overrule the *Labour Trilogy*, the Court at that time simply deflected its decision away from the weight of precedent. In *B.C. Health Services* the Court took the

---

\(^{36}\) *Id.*, at para. 30.

\(^{37}\) *Id.*, at para. 26.

\(^{38}\) *Id.* (stating that “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”).

\(^{39}\) *Id.*, at para. 28 (stating that *Dunmore* “rejected the notion that freedom of association applies only to activities capable of performance by individuals”, and adding — after referring to Dickson C.J.C.’s *Alberta Reference* dissent — that “some collective activities may, by their very nature, be incapable of being performed by an individual”).
definitive step of confronting the Trilogy jurisprudence, and did so in Dunmore’s name.

After rejecting restraint and highlighting Dunmore, the Court searched for a way to achieve the partial constitutionalization of collective bargaining, and came up with a model of due process under section 2(d). The joint opinion carefully stressed that collective bargaining as a procedure “has always been distinguishable from its final outcomes”, and that it was possible to protect the procedure itself “without mandating constitutional protection for the fruits of that bargaining process”\(^{40}\). The judges went on to define the entitlement as a right of access to a bargaining process that is free from “substantial interference” by government employers, who are under a Charter duty to meet and bargain in good faith.

To determine whether section 2(d) has been violated, the Chief Justice and LeBel J. proposed a standard which asks “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”.\(^{41}\) Despite this emphasis on access to a process, the “substantial interference” test poses substantive questions. For instance, the first step of the test considers the relative importance of the collective bargaining issue at stake.\(^{42}\) Then, the second step examines the state’s conduct, to determine whether the duty to bargain in good faith has been met.\(^{43}\) In developing this test, the joint opinion emphasized that its criteria are flexible, not rigid, in character. As the judges explained, “less central [workplace] matters may be changed more summarily, without violating s. 2(d)” and, likewise, “[i]mportant [workplace] changes effected through a process of good faith negotiation may not violate s. 2(d)”.\(^{44}\) Whether flexible or not, the test drifts beyond the purely procedural to incorporate questions of substance. The list of exceptions to what section 2(d) requires in public sector collective bargaining confirms that the Court’s due process model rests on

\(^{40}\) Id., at para. 29.

\(^{41}\) Id., at para. 92.

\(^{42}\) It is evident that the test contemplates a subjective assessment of substantive workplace issues; as it stated, “[t]he more important the matter, the more likely that there is substantial interference with the s. 2(d) right. Conversely, the less important the matter … the less likely that there is substantial interference with the s. 2(d) right to collective bargaining”: id., at para. 95.

\(^{43}\) Id., at para. 104.

\(^{44}\) Id., at para. 109.
substantive foundations; this list includes “essential services, vital state administration, clear deadlocks and national crisis”.45

The degree to which this model will cut a swath through collective bargaining practices in the public sector is unknown at present. Much will depend on the “substantial interference” test, which makes a right to bargain contingent on the substantive importance of the issues at stake, as well as on what it means to bargain in good faith in any given circumstance. It is also unclear what concrete exceptions the Court had in mind under section 2(d) and section 1.46 Even on a conservative interpretation, it seems clear that the McLachlin-LeBel model will have a major impact on collective bargaining in the public sector. Given that prospect, the Court’s procedural conception of associational freedom might not seem especially important. But a shift away from the assumption that section 2(d), like the other fundamental freedoms, guarantees substantive rights should not be overlooked; this could have transformative implications for the guarantee.

In order to confer “at least a measure of protection” on collective bargaining, the Court invoked the well-known distinction between substance and procedure.47 It is a familiar distinction in the Charter jurisprudence, having been invoked initially — and controversially — in the Motor Vehicle Reference.48 There, after dismissing the distinction between substance and procedure, the Court proposed an interpretation of section 7 which went against the intentions of the Charter’s drafters,49 by authorizing the Court to invalidate legislation that it found substantively unfair or unjust.50 Far from receding, the debate about the

45 Id., at para. 108 (specifically indicating that interference with collective bargaining, albeit on an exceptional and typically temporary basis, may be permitted in those situations). See R. Charney, “The Contract Clause Comes to Canada: The British Columbia Health Services Case and the Sanctity of Collective Agreements” (2008) 23 N.J.C.L. 65 [hereinafter “Charney”] (claiming, at 3, that the decision has the potential to result in “a significant interference with government economic regulation, and to impose laissez-faire economic principles on the Canadian constitutional fabric”).
46 B.C. Health Services, id., at para. 107 (discussing situations of exigency and urgency, which may affect the scope of the duty under s. 2(d)), and para. 108 (explaining the kinds of limitations that may be justified under s. 1).
47 Id., at para. 39.
48 Supra, note 8.
49 Id., at 498 (rejecting the “substance/procedural dichotomy” on the basis that it would narrow the issue to an “all-or-nothing proposition” and create difficulties by trying to distinguish between concepts with overlapping boundaries), and 508-509 (overriding the intention of the Charter’s drafters that the scope of s. 7 be limited to matters of procedure).
legitimacy of review — in general and as exemplified by the Court’s interpretation of section 7 — continues to this day.\textsuperscript{51}

The distinction between substance and procedure served a different function in \textit{B.C. Health Services}. There, it enabled the Court to create a halfway house between the \textit{Labour Trilogy}’s “no go” zone for collective bargaining and the substantive constitutionalization of labour relations. From the perspective of rights claimants, procedural entitlements may be less desirable than their substantive counterparts; in \textit{B.C. Health Services}, though, such entitlements marked an improvement on the status quo, which had all but shut labour claims out of section 2(d). It was inevitable, in the \textit{Motor Vehicle Reference}, that the Court’s rejection of the substance-procedure distinction would widen the scope of section 7. In \textit{B.C. Health Services}, similarly, the Court’s reliance on that distinction will at least enlarge the scope of section 2(d) as it applies to collective bargaining rights. Whether it will expand or contract the guarantee in other settings is less clear.

Prior to \textit{B.C. Health Services}, there was nothing in the text or history of section 2(d) to indicate that its content either included or should be limited to matters that are procedural in nature. Not only does the due process model run against the accepted interpretation of the guarantee, it raises the troubling concern that the Court may have read freedom of association “down” from a substantive entitlement to one that is procedural in content. Without doubt, that is exactly what \textit{B.C. Health Services} did: the Court expanded section 2(d) to include due process rights for collective bargaining but emphatically confirmed, at the same time, that substantive entitlements are absolutely and definitively excluded from the guarantee.\textsuperscript{52}

The Court’s procedural conception of entitlement rested on two assumptions. The first was that collective bargaining is a procedure,\textsuperscript{53} and the second was that collective bargaining had been a “fundamental

\textsuperscript{51} The Court’s interpretation of s. 7 has generated a significant literature. For criticisms of this jurisprudence, see J. Cameron, “The \textit{Motor Vehicle Reference} and the Relevance of American Doctrine in \textit{Charter} Adjudication” in R. Sharpe, ed., \textit{Charter Litigation} (Toronto: Butterworths, 1987); C. Flood, K. Roach & L. Sossin, eds., \textit{Access to Care: The Legal Debate over Private Health Insurance} (Toronto: University of Toronto Press, 2005); and J. Cameron, “From the \textit{MVR} to \textit{Choulli}: The Road Not Taken and the Future of Section 7” (2006) 34 S.C.L.R. (2d) 105.

\textsuperscript{52} Supra, notes 34 and 40 and accompanying text.

Canadian right”\textsuperscript{54} and a “fundamental aspect of Canadian society” long before the Charter arrived.\textsuperscript{55} Putting the two together — a procedural conception of collective bargaining and a sympathetic rendering of its history — led to the conclusion that “[t]he 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”\textsuperscript{56}.

This approach offered strategic advantages. It allowed the Court to distance itself from the substantive aspects of collective bargaining and sidestep the pesky distinction — deeply entrenched in the section 2(d) doctrine — between an association and its activities. That distinction found a central place in the pre-Dunmore case law, which held that the right to form an association is protected but that the right to engage in activities in pursuit of an association’s objects is not — not, at least, unless the same activities would be lawful in the case of individuals.\textsuperscript{57} This distinction served the important purpose of inhibiting the constitutionalization of associational activity across the spectrum.\textsuperscript{58}

Collective bargaining was no exception. Negotiating the terms and conditions of employment is an activity which is aimed at advancing and promoting a union’s substantive objects. As such, it was squarely caught by the case law’s bright-line distinction between an individual’s right to form or join an association and the activities of the association as a collective enterprise. The challenge in \textit{B.C. Health Services} was to protect the associational activities of labour unions without conferring constitutional status on collective activities more generally. As well, any concession that the activities of an association are constitutionally protected would have required the Court to include \textit{Canadian Egg Marketing Agency v. Richardson}\textsuperscript{59} and \textit{Delisle v. Canada}\textsuperscript{60} in its purge of

\begin{flushleft}
\textsuperscript{54} Id., at para. 40.
\textsuperscript{55} Id., at para. 41.
\textsuperscript{56} Id., at para. 68.
\textsuperscript{57} Though the \textit{Labour Trilogy} introduced the distinction, its consequences were formalized in \textit{PIPSC}’s four-point framework. The four propositions are: first, that s. 2(d) protects the freedom to establish, belong to and maintain an association; second, that s. 2(d) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association; third, that s. 2(d) protects the exercise in association of the constitutional rights and freedoms of individuals; and fourth, that s. 2(d) protects the exercise in association of the lawful rights of individuals. \textit{PIPSC}, [1990] S.C.J. No. 75, [1990] 2 S.C.R. 367, at 402 (S.C.C.).
\textsuperscript{59} Id.
\textsuperscript{60} Supra, note 58.
\end{flushleft}
precedent. Both of those decisions relied on the distinction between an association and its activities to defeat claims under section 2(d).\textsuperscript{61}

Despite that distinction’s foundational role in the section 2(d) jurisprudence, \textit{B.C. Health Services} came close to abandoning the definitional boundary the Court had drawn between an association and its activities. Chief Justice McLachlin and LeBel J. observed that “it will always be possible to characterize the pursuit of a particular activity in concert with others as the ‘object’ of [an] association”, and therefore outside section 2(d)’s purview under the \textit{Labour Trilogy} jurisprudence.\textsuperscript{62} To avoid this problem, the judges responded with a distinction of their own, one that separated the associational element — re-characterized as procedural — from the activity itself, which seeks certain substantive results.\textsuperscript{63} Reformulating collective bargaining as a procedure rather than a substantive activity did little to solve the problem, however, because other forms of associational activity seem equally “procedural”. In other words, it is difficult to see why collective bargaining is procedural but other associational activities, once divorced from their substantive objects, are not.

The Court did not explain the difference between the process of collective bargaining and the processes engaged in by other associations, but neither did it overrule \textit{Canadian Egg Marketing Agency} or \textit{Delisle}. That could not be done without de-legitimizing virtually all of its pre-

\textsuperscript{61} In \textit{Canadian Egg Marketing Agency}, Iacobucci and Bastarache JJ. held that producers from the Northwest Territories, who complained about their exclusion from an egg marketing scheme, had confused an activity foundational to the association with an association foundational to an activity. The joint opinion stated that activity which is foundational to an association is excluded from s. 2(d), but that an association which is foundational to an activity is not. In other words, s. 2(d) includes an individual’s initial right to associate and then stops; the rights of associations do not exist and s. 2(d) does not protect any of an association’s activities, \textit{no matter how foundational}. \textit{Canadian Egg Marketing Agency} cited the PIPSC framework and confirmed that s. 2(d) does not extend to activities just because individuals form an association to carry on those activities. \textit{Canadian Egg Marketing Agency}, supra, note 58, at 227-28 and 232. Justice Bastarache’s subsequent majority opinion in \textit{Delisle} affirmed the endorsement of PIPSC in \textit{Canadian Egg Marketing Agency}, and applied conventional analysis to defeat the s. 2(d) claim yet again. In \textit{Delisle}, he found that freedom of association implies only that activities which employees can carry on as individuals cannot be prohibited when individuals organize themselves into associations; in the result, the RCMP “can very well set \textit{all} working conditions for its members without violating s. 2(d)”. \textit{Delisle}, supra, note 58, at paras. 11 and 36 (emphasis added).

\textsuperscript{62} \textit{B.C. Health Services}, supra, note 53, at para. 29 (stating, as well, that “[r]ecasting collective bargaining as an ‘object’ begs the question of whether or not the activity is worthy of constitutional protection”).

\textsuperscript{63} \textit{Id.}, at para. 32 (citing \textit{Dunmore} and \textit{Canadian Egg Marketing Agency} for the proposition that “only the ‘associational aspect’ of an activity and not the activity itself [is] protected under s. 2(d)”\textsuperscript{).
Dunmore jurisprudence and embarrassing Bastarache J., who wrote the majority opinion in both of those cases. Given that quandary, the substance-procedure distinction allowed the Court to obfuscate its decision to constitutionalize the activities of unions by highlighting the “procedural” history of collective bargaining in Canada. At least for the time being, this avoided an interpretation of section 2(d) that would constitutionalize the activities of all associations in all circumstances.

Perhaps B.C. Health Services will be read as a decision that confers due process rights on collective bargaining because of the particular role which that activity has played in labour relations over time. In other words, it may not follow from the creation of process rights in these circumstances that section 2(d)’s substantive entitlement will be read down in other settings. But it is also possible to read B.C. Health Services as a decision that potentially re-classifies all associational activities, and not just collective bargaining, as procedural in nature; on that view, the decision could dramatically widen the scope of entitlement. However, such a prospect is unlikely, so it remains a concern that the Court may now use B.C. Health Services to downgrade section 2(d) from a substantive to a procedural entitlement in other cases.

The Court’s interpretation of section 2(d) was grounded in its perception of what was required to protect collective bargaining under the Charter. Further evidence that the Court tailored section 2(d) to the requirements of collective bargaining can be found in its creation of an affirmative right to bargain and in its imposition on government employers of a duty to negotiate in good faith.

3. Affirmative Entitlements and Positive Obligations

Had the Labour Trilogy, PIPSC, and Delisle applied, the legislation at stake in B.C. Health Services would have been upheld. In each of those cases, the Court found that the right remained intact, though unions were excluded from a “statutory platform” for collective bargaining, because the freedom to associate existed “independently of any statutory regime”. Likewise, despite complaining that the statute violated section 2(d) by denying them access to the bargaining process, British Columbia’s health care workers also remained free to associate. In the meantime, and without committing the Court to a position on collective

\[64\] Delisle, supra, note 58, at paras. 31, 33.
bargaining, Dunmore had articulated an affirmative entitlement to meaningful association and had imposed a positive obligation on the government to advance its exercise. Though limited to the circumstances of agricultural workers who were historically unable to form effective associations, Dunmore provided the template for an alternative interpretation of section 2(d). The result was the decision in B.C. Health Services, which granted health care workers a positive right to bargain and imposed a duty on the government employer to bargain in good faith.

In order to avoid open conflict with Delisle, the decision in Dunmore set a high threshold for the positive obligation it imposed. The workers in Dunmore won because the hardship they had suffered in trying to exercise their associational freedom distinguished their circumstances from those of the RCMP. In discussing Dunmore, the joint opinion in B.C. Health Services noted that to establish a breach of section 2(d) “there must be evidence that the freedom would be next to impossible to exercise without positively recognizing a right of access to a statutory regime”. Only a few pages later, the Court set aside the “next to impossible” threshold and relied, instead, on the language of “substantial interference”. In B.C. Health Services the resulting standard has two parts: on the entitlement side, the relative importance of the bargaining issue determines whether there is an affirmative right to bargain; and on the obligation side, the question is whether the employer has met its duty to bargain in good faith. As the Chief Justice and LeBel J. explained, the interference must “seriously undercut or undermine” the collective

---

65 [2001] S.C.J. No. 87, [2001] 3 S.C.R. 1016, at para. 67 (S.C.C.) (stating that the province was constitutionally obligated to create “at a minimum a regime that provides agricultural workers with the protection necessary for them to exercise their constitutional freedom to form and maintain associations”).

66 Id., at para. 41 (comparing their relative circumstances and stating that “[i]t is no wonder … that agricultural workers have failed to associate in any meaningful way in Ontario, while RCMP officers have successfully created independent employee associations in several provinces across Canada”).

67 B.C. Health Services, supra, note 53, at para. 34 (emphasis added).

68 In Dunmore, Bastarache J. had stated that those who claim positive obligations in cases under s. 2 must prove that the fundamental freedom was rendered “impossible to exercise” and went on, in the same paragraph, to add that claimants must demonstrate that “exclusion from a statutory regime permits a substantial interference with the exercise of protected s. 2(d) activity” (emphasis in original): Dunmore, supra, note 65, at para. 25. In other words, substantial interference is proved when it has become “next to impossible” to exercise the right.

69 Here, as well, the Court acknowledged the subjectivity of this exercise, noting that “[d]ifferent situations may demand different processes and timelines”: B.C. Health Services, supra, note 53, at para. 107.
bargaining process, and can include “union breaking” as well as “[a]cts of bad faith, or unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation … “.70

In this way, the joint opinion proposed a standard which rests on subjective assessments of substantive matters, and which may for that reason be difficult to apply in an even-handed manner. Beyond the context of collective bargaining, it is worth reflecting on the role of affirmative entitlements and positive obligations in Charter analysis. It will seem to many that this double-barrelled entitlement marks a progressive step in the evolution of rights-protective Charter doctrines. Despite that impression, it remains the case that affirmative entitlements and positive obligations are the exception rather than the rule under the Charter.

Over the years, there has been much debate about the imposition of positive duties on government under the Charter, especially (though not exclusively) where there are fiscal implications or where a remedy threatens judicial interference in matters of democratic governance.71 In light of that debate, it is striking that the Court’s opinion in B.C. Health Services created significant entitlements without discussing the institutional burdens that are inherent in its model of due process rights. In this, the decision is quite unlike Dunmore, which concerned a single category of workers whose situation was rooted in circumstances that could not be easily generalized or analogized to other settings. Dunmore imposed institutional burdens which were significant, but discrete.72 By contrast, B.C. Health Services set up a framework which is designed to apply to collective bargaining across the public sector. Though the costs of this due process model cannot be quantified, it is clear that the Court’s collective bargaining scheme will impose substantial burdens on public sector employers.73

70 Id., at para. 92.
72 In choosing a remedy, the Court stated that “at minimum the statutory freedom to organize … ought to be extended to agricultural workers, along with the protections judged essential to its meaningful exercise”, and that the remedy granted neither required nor forbade the inclusion of agricultural workers in a full collective bargaining regime: Dunmore, supra, note 65, at paras. 67 and 68.
73 See Charney, supra, note 45.
B.C. Health Services recognized certain exceptions to the scope of collective bargaining rights under section 2(d), but found that they did not apply to the case at hand. For instance, the government had argued, in attempting to justify the legislation, that the statute was “a crucial element of its response to a pressing health care crisis, [which was] necessary and important to the well-being of British Columbians”.74 Earlier, the Court had allowed a province to roll back pay equity entitlements, in Newfoundland (Treasury Board) v. N.A.P.E., where the costs of enforcing Charter rights were quantified and were found, in consequence, to impose an undue burden on the government.75 Yet in B.C. Health Services, the province’s claim that the health care system was in fiscal crisis found no purchase.76 In rejecting that claim, the Court inferred that British Columbia’s legislation to amend the terms of employment for health care workers was motivated by suspect, cost-cutting objectives.77

There is another problem with a conception of section 2(d) as a source of positive rights. As Baier v. Alberta shows, this approach to entitlement permits a regressive interpretation of fundamental Charter freedoms.78 In that case, in a decision released a couple of weeks after B.C. Health Services, the Supreme Court considered the constitutionality, under section 2(b), of legislation which effectively banned school board employees from running for office as school district trustees.79 Though Rothstein J.’s majority opinion characterized the prohibition as a “blanket restriction”, it did not treat the statutory provision as an interference with expressive freedom which singled out one class of candidates for disqualification from office.80 Rather than follow the consistent pattern of the section 2(b) jurisprudence, which sets a low standard for breach and resolves the question of limits under

74 B.C. Health Services, supra, note 53, at para. 3.
75 Supra, note 71.
76 Id., at para. 147.
78 Baier v. Alberta, supra, note 78, at para. 7.
section 1, Rothstein J. redefined the issue. He found that school board employees who were barred from office by the legislation were pressing an affirmative entitlement, in the form of access to a “statutory platform”\(^8\). After classifying the claim as a positive right and noting that section 2(b) is reserved for negative entitlements, Rothstein J. applied the *Dunmore* criteria.\(^9\) There was no interference with expressive freedom, he said, because employees who were disqualified from school board positions remained free to engage in expressive activities.\(^10\)

It is worth noting that the jurisprudence had once given the same answer to workers who complained that excluding their unions from statutory collective bargaining schemes violated section 2(d). Prior to *B.C. Health Services*, in cases like *PIPSC* and *Delisle*, the Court responded that the workers’ right to associate was unaffected because it existed independently of the statute, and that nothing in the legislation prevented individuals from forming or establishing associations on their own initiative. While *B.C. Health Services* overruled that line of thinking, it quickly reappeared in a slightly different context in *Baier*.

Although further discussion must be deferred to another day, *Baier* confirms — for purposes of this article — that *Dunmore*’s “next to impossible” threshold has gained a foothold in at least some other settings.\(^11\) More specifically, *Baier* shows how section 2(d)’s restrictive criteria have negatively influenced the interpretation of section 2(b). That may be why Fish J.’s dissent in *Baier* claimed that it would be “most ironic for the Court’s generous interpretation of freedom of association under s. 2(d) in *Dunmore* to now be invoked here for the purpose of narrowing the Court’s traditionally broad interpretation of the historically and conceptually distinct freedom of expression guaranteed by s. 2(b)”.\(^12\) Thus, *Baier* serves as a warning to beware of positive rights: a narrowly drawn positive right, like that found in *Dunmore*, can look promising, only to be applied to restrict the scope of entitlement and uphold limits on the Charter’s fundamental freedoms, without the

\(^8\) *Id.*, at para. 36. The concept of a “statutory platform” references a distinction between claims that are legitimately rooted in the Charter’s fundamental freedoms, and those which otherwise seek access to a statutory platform.

\(^9\) *Id.*, at para. 20 (stating that “s. 2 generally imposes a negative obligation on government rather than a positive obligation of protection or assistance”).

\(^10\) *Id.*, at para. 48 (stating that, “absent inclusion in this statutory scheme”, employees have not shown that they are “unable to express themselves on education issues”).

\(^11\) *Id.*, at para. 30 and ff. (identifying and applying the criteria to the facts).

\(^12\) *Id.*, at para. 100 (emphasis in original).
necessity of a section 1 analysis. The concern is that what happened to section 2(b) in *Baier* can also happen to section 2(d).[^66]

In infusing the guarantee with procedural content and following *Dunmore*’s lead on positive rights, *B.C. Health Services* gave section 2(d) a novel interpretation. Yet instead of grounding the framework of collective bargaining in a conception of what associational freedom means, the Court launched into a context-dependent discussion of labour relations and collective bargaining. By focusing so closely on context, the Court lost contact with the guarantee’s contours and produced criteria which are overly customized to a single setting.

### 4. In Praise of Context

Context is valued and abstraction is not. The Court followed that pattern of thought in *B.C. Health Services* by dismissing its earlier section 2(d) decisions as unprincipled. According to the joint opinion, the *Labour Trilogy* jurisprudence erred in conceptualizing associational freedom as an abstract entitlement. In particular, the joint opinion declared that the decontextualized approach of earlier decisions compared poorly with the “purposive approach taken to other Charter guarantees”.[^87] In other words, an abstract definition of the right is not purposive. Such a “generic” approach, as the joint opinion termed it, had regretfully caused the Court in early cases to overlook the context of collective bargaining and its importance to the exercise of associational freedom in labour relations.[^88] In this, *B.C. Health Services* provided a critique of precedent which set up *Dunmore* as a revelation in methodology. Chief Justice McLachlin and LeBel J. announced that *Dunmore* had “correctly advocated a more contextual analysis” and conducted “a more contextual assessment than found in the early s. 2(d) cases”.[^89] The judges also praised Bastarache J.’s dissenting opinion in

[^66]: Note that in *Delisle*, which was not overruled, the Court stated that s. 2 of the Charter “generally requires only that the state not interfere”, that “except perhaps in exceptional circumstances, freedom of expression requires only that Parliament not interfere”, and that “the same is true for freedom of association”: supra, note 58, at paras. 25 and 27.


[^88]: Id.

[^89]: Id., at para. 33 (emphasis added).
**Advance Cutting & Coring** for anticipating the contextual approach and its emergence under section 2(d).

A focus on context in *B.C. Health Services* served the Court’s purpose of finding a way to constitutionalize collective bargaining. Without commenting on what the Court said about collective bargaining in Canada, this article questions a methodology which undertakes a quixotic search for the pedigree of entitlements, and looks to the broader implications of an approach that is heavily weighted toward a judicial appreciation of “context”. In that regard, the section 2(b) jurisprudence demonstrates that a contextual approach has merits, as well as serious drawbacks.

In doctrinal terms, this approach dates from Wilson J.’s sole concurring judgment in *Edmonton Journal v. Alberta (Attorney General)*. There, she complained that the Court’s interpretation of section 2(b) privileged an abstract conception of expressive freedom. She called for a contextualization of the entitlement which would engage the balancing of interests that must occur before justifiable limits can be found. After *Edmonton Journal*, the concept quickly evolved into a methodology for upholding limits under section 1 on “low value” expressive activities. This version of the contextual approach reached its apex in the late 1990s, with the Court’s decision in *R. v. Lucas*.

Though the doctrinal cast of this approach has been modified, context has retained its vitality in the section 2(b) jurisprudence. It has been deployed in recent cases to save limits on political expression, even

---

90 *Id.* Throughout, the joint opinion treaded carefully around the Bastarache J. jurisprudence under s. 2(d). The Chief Justice and LeBel J. heaped praise on Bastarache J.’s majority opinion in *Dunmore* and, in doing so, managed to spare him the embarrassment of overruling his majority opinion in *Delisle*.


93 *Id.* There, the Court applied a “low-value analysis” to discount the expression at stake and to uphold the Criminal Code’s (R.S.C. 1985, c. C-46) defamatory libel provisions.

when the evidence failed to demonstrate that expressive activities were harmful.95 From a certain perspective, using context to uphold limits on high-value expression is more regressive than using it to withhold protection from objectionable or low-value expression. In any case, the jurisprudence reveals that a contextual approach has been consistently applied to restrict the scope of section 2(b), not to expand it.96

In light of that experience, two concerns arise from the Court’s reliance on context in B.C. Health Services. The first is that under this approach, the question of breach under section 2(d) is entirely contingent on shifting perceptions of context. For instance, whether collective bargaining is protected by the Charter turned on the Court’s reading of history, which could have supported any number of interpretations. In principle, the use of history to validate the constitutional status of an entitlement sets a dangerous precedent. Not only is the interpretation of history a notoriously subjective project, it is one that ordinarily will not generate progressive insights into the scope of entitlement.97 A key difficulty in consulting history to determine the constitutional status of a particular activity is that materials can be selectively sourced and cited to advance or set back a claim; consequently, it is unreliable as a methodology. That history emerged in B.C. Health Services as the mainstay of the analysis does not augur well for other entitlements, which will be contingent on the Court’s rendering of histories as well as on contested perceptions of events.

Second, an approach that is exclusively contextual compromises the fundamentals of constitutional interpretation. Essentially, B.C. Health Services dismissed the earlier section 2(d) jurisprudence because it rested on a theory of entitlement which was abstract and flawed for that reason. This interpretation reveals a misapprehension of the cases, which demonstrate that the Court’s interpretation of associational freedom should draw its strength from section 2(d)’s underlying values. The interpretation which emerged in the Labour Trilogy line of cases can be challenged, and was challenged in B.C. Health Services, for its

95 See Harper (acknowledging that harm had not been established, but nonetheless upholding third-party spending limits), and Bryan (upholding limits on the publication of election results, again in the absence of evidence of harm): id.

96 But see Thomson Newspapers, supra, note 94.

97 As Lamer J. explained in the Motor Vehicle Reference, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 509 (S.C.C.), “[i]f the newly planted ‘living tree’ which is the Charter is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials … do not stunt its growth”.

[145x658]COMMENT ON B.C. HEALTH SERVICES

[234x658]153
misguided reliance on an *individualistic* approach to inherently *collective* activity. While the concept of entitlement in those cases was flawed, the Court’s methodology was not. Unless section 2(d) is to be restricted in scope to what is purely contextual, the guarantee must have an abstract definition which is rooted in associational freedom’s underlying values. Ironically, *B.C. Health Services* is the converse of what Wilson J. complained of in *Edmonton Journal*: in place of a definition that privileged abstract values at the expense of their contextual setting, *B.C. Health Services* chose an alternative that privileged context at the expense of an abstract or conceptual foundation for the guarantee.

When *B.C. Health Services* overruled precedent, section 2(d)’s conceptual foundation all but collapsed. Yet in taking this dramatic step, the Court did little to create a new foundation for the guarantee.\(^98\) Instead, the decision was so dependent on the context of collective bargaining that the guarantee’s abstract content and underlying values were effectively excluded from the analysis. The Court endorsed the proposition that section 2(d) protects collective activities, but limited its observations and reflections on associational freedom to the labour law context.

### 5. Regressive Consequences

This part of the article considers what the constitutionalization of collective bargaining implies for section 2(d). As shown above, the Court combined existing doctrines and concepts to create a new model of rights under this guarantee. While this methodology promoted one category of collective activity — labour negotiations — it did not advance a purposive interpretation of associational freedom. For example, characterizing collective bargaining as a *process* allowed the Court to dodge the distinction between an association and its activities. In the face of a consistent line of authority that made it awkward to protect associational activity, re-describing labour negotiations as a process or procedure appeared to present a solution. Thus, the Court in *B.C. Health Services* customized its interpretation of section 2(d) to meet the requirements of collective bargaining. The risk is that a solution that

---

\(^98\) Compare Dunmore, [2001] S.C.J. No. 87, [2001] 3 S.C.R. 1016, at paras. 16 and 17 (S.C.C.), which discussed the status of collective activity under s. 2(d), but did so without explicitly disapproving of or overruling authorities that advanced an individualistic conception of the right.
is expressly context-dependent in design might be unthinkingly applied to section 2(d) claims in other, dissimilar settings.

To suggest, for instance, that the decision redefined all associational activity as a process, which can be distinguished from its substantive objects and outcomes, would obliterate the doctrinal distinction between an association and its activity. Reading *B.C. Health Services* in this way would radically enlarge the scope of section 2(d). However, in the absence of indication that the Court views associational activity as inherently procedural, it is more likely that section 2(d)’s due process rights for collective bargaining will narrow the scope of the guarantee. Not only could the content of associational freedom be transformed from substantive to procedural, the new due process rights would be available only where the additional criteria set out in *B.C. Health Services* are met. As indicated, the context and substantial interference elements of the analysis set a high threshold for breach, which might not be easily satisfied in other settings.

Paradoxically, the Court’s enforcement of positive rights and duties might also have adverse consequences for associational freedom. As noted above, positive rights and obligations are usually seen as exceptional in nature — especially, in the Court’s view, under section 2 — and are available only in prescribed circumstances. Despite recognizing an entitlement, *Dunmore* and *B.C. Health Services* established criteria which may be applied restrictively, thereby limiting the scope of section 2(d) and other fundamental Charter freedoms to the rare or exceptional case when positive rights can be found and duties imposed. Already, *Baier v. Alberta* has demonstrated how *Dunmore* can be twisted to re-frame a negative entitlement in positive terms and eliminate a claim from the Charter. As shown above, the Court in *Baier* applied *Dunmore*’s narrow criteria for positive rights to countermand an established line of authority and rationalize a regressive interpretation of section 2(b). A concept of positive rights which worked for agricultural workers in *Dunmore* and collective bargaining in *B.C. Health Services* has a dark side, and a documented potential to deny rights which would have been recognized under a traditional conception of negative entitlement.

Finally, a contextual approach allowed the Court in *B.C. Health Services* to establish the pedigree of collective bargaining. A warning is likewise in order on that feature of the decision’s methodology. That “context” is inherently malleable has largely been its strength but, thus far, this approach has been more rights-constraining than rights-
enhancing. At least under section 2(b) — and under section 15 as well — context has been invoked to deny, rather than to validate, entitlement. In B.C. Health Services, the Court’s survey of collective bargaining history led to an expansion of rights under section 2(d); as has been observed, however, history is more frequently invoked to narrow than to enlarge the scope of entitlement. For all the praise it attracted in B.C. Health Services, the contextual approach has done as much, or more, to limit Charter rights and freedoms than it has to protect them.

Singling out one aspect of associational activity for constitutionalization, purely on the basis of its context, does not advance section 2(d)’s purposes, nor does it ground decision-making in principles of constitutional interpretation. B.C. Health Services relied on a concept of entitlement that was so heavily and exclusively contextualized to collective bargaining that the decision lost contact with the underlying values which have anchored section 2(d) since the Labour Trilogy. As a matter of constitutional interpretation, the risk is that by over-contextualizing the guarantee to labour relations issues, the Court may deny section 2(d) a generous and purposive interpretation which would allow it to take its place among the Charter’s other rights and freedoms.

To summarize, the Court’s due process model of collective bargaining may have regressive consequences for section 2(d) and other fundamental freedoms. It should be emphasized that B.C. Health Services spoke explicitly to the circumstances of collective bargaining, and did not address the “generic” meaning of the guarantee or suggest how it ought to be interpreted. Significantly, there is no indication that the Court intended its decision in B.C. Health Services to have negative consequences for associational freedom, and none should therefore be assumed. In developing its due process model for collective bargaining, the Court said nothing that would compromise section 2(d)’s prospects in other settings. To the contrary, B.C. Health Services took a vital step in renewing the promise this guarantee held out so many years ago, before the Labour Trilogy was decided. From that perspective, the better view is that B.C. Health Services should be read as a decision which is limited to collective bargaining, and which has otherwise left the challenge of redefining associational freedom to another day.

99 In the case of s. 2(b), see supra, notes 92-94; in the case of s. 15, see Law v. Canada (Minister of Employment and Immigration), [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.) (adopting a four-part contextual approach to interpretation of the guarantee, which has made it extremely difficult for claimants to establish a breach of equality rights).
The following comments reflect briefly on that larger project. Within the limits of this article, the discussion can do no more than frame some of the issues which call for fresh consideration.

III. A THEORY OF ENTITLEMENT

In *B.C. Health Services*, the Court opened up section 2(d) for the first time, essentially, since the *Labour Trilogy*, but did so without committing itself to a theory of entitlement. For that reason the Court should not be quick to extend concepts which were designed to address labour questions — and which may work in that setting — to other issues of associational freedom. Nor should it be assumed that section 2(d) is “reserved” for labour claims. Rather, *B.C. Health Services* should be read as a signal that the Court may now be ready to allow freedom of association to come into its own as one of the Charter’s fundamental freedoms. It is encouraging that *B.C. Health Services* has provided a fresh opportunity to rethink the “value added” of a textual guarantee that is dedicated to the protection of associational freedom. In doing so, it is useful to reflect on the first 20 years of section 2(d) jurisprudence, and to consider the lessons of that history.

From the outset, co-existing conceptions of associational freedom could be found in the jurisprudence. Under one view, section 2(d) had special, or nearly exclusive, significance for the rights of workers. There were skeptics, too, but many saw the Charter as a potentially transformative force for labour relations. In part because much of the jurisprudence addressed claims that pressed for the protection of union activities under the Charter, labour issues have been dominant in the literature on section 2(d). Generally, this literature is critical of the

---

Labour Trilogy’s refusal to constitutionalize collective bargaining and the right to strike; despite offering an inconclusive set of opinions, these decisions led to negative outcomes for organized labour in PIPSC and Delisle, and otherwise stifled the development of a vibrant jurisprudence.¹⁰¹

Yet the results were not as one-sided as some suppose: labour unions won significant victories in key decisions which tested the principle of non-association. In Lavigne and again in Advance Cutting & Coring, the Court departed from an individualist conception of the right, to protect union interests from those who sought to be free from compelled association with unions and their causes.¹⁰² Though the Labour Trilogy and its progeny relied on an individualistic definition of the right to exclude collective bargaining and the right to strike from the Charter, these two decisions applied a collective conception of association — either in interpreting section 2(d) or in applying Oakes — to defeat challenges to mandatory dues check-off for non-workplace activities, and to compulsory union membership as a condition of employment.¹⁰³ More recently, the McLachlin Court has steadily advanced the interests

---

¹⁰¹ See supra, notes 2 and 4.


¹⁰³ In Lavigne, for example, La Forest J. upheld the use by unions of mandatory dues for non-collective bargaining purposes under s. 1, because allowing employees to opt out could seriously undermine unionism’s financial base and membership, as well as “undermine the spirit of solidarity which is so important to the emotional and symbolic underpinnings of unionism”. Id., at 336-37. Subsequently, the Court’s decision in Advance Cutting & Coring upheld compulsory union membership as a condition of employment in Quebec’s construction industry. Four members of the Court found that such a condition did not violate s. 2(d). For instance, LeBel J. held that inner limits and restrictions should be read into any concept of non-association to ensure that individuals are not denied the benefits of collective activities. To avoid treating the guarantee as “an inferior right, barely tolerated and narrowly circumscribed”, LeBel J. endorsed mandatory membership as a way of advancing the union’s self-actualization through its “group voice” and “common strength”. Id., at para. 208.
of unions under the Charter in cases which include *Dunmore, Pepsi-Cola*\(^{104}\) and now *B.C. Health Services*.

From the beginning, members of the Court offered a second perspective on section 2(d), which undertook to identify section 2(d)’s underlying values and to define the scope of the right in abstract terms. In doing so, these judges applied the same approach to associational freedom that was followed in interpreting other guarantees, such as those in sections 2(a) and (b), 7 and 15.\(^{105}\) Accordingly, while Le Dain J.’s *Alberta Reference* reasons provided a definition of sorts and dismissed the claim in four curt paragraphs, McIntyre J. and Dickson C.J.C. wrote at length about the nature of associational freedom. An abstract or conceptual approach led McIntyre J. to conclude that rights of association under section 2(d) must be defined in the same way as individual rights. His reliance on the same-treatment principle avoided a double standard which would have allowed groups and organizations to claim special rights and privileges under the Charter.

By comparison, Dickson C.J.C.’s dissent in the *Alberta Reference* showed how an abstract definition of associational freedom could promote a generous and purposive interpretation of the right. He disputed McIntyre J.’s analysis, and proposed a definition that reflected the distinctive features and needs of associational activity. Chief Justice Dickson remonstrated that conceiving of section 2(d) as an individual right stripped it of content and meaning. He also resisted an interpretation that read the guarantee down, by treating inherently collective activity as a mere derivative of individual action — an interpretation which, in his view, made “surplusage” of section 2(d).\(^{106}\) Chief Justice Dickson contended, quite forcefully, that a failure to extend “effective protection to the interests to which the constitutional guarantee is directed” would render the freedom “legalistic, ungenerous,

---


\(^{106}\) *Alberta Reference*, [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313, at 364 (S.C.C.). He added that “the express conferral of a freedom of association is unnecessary if all that is intended is to give effect to the collective enjoyment of other individual freedoms.”
indeed vapid”.107 Similarly, he dismissed the distinction between the form of an association and the objects or substance of its activities, and emphasized that associational behaviour may have no analogy in the actions of an individual acting alone.108 Unsuccessfully, he urged other members of the Court to recognize that freedom of association is a distinctive entitlement which requires a distinctive interpretation.

_B.C. Health Services_ rejected the abstract and generic approach which had crystallized in _PIPSC_’s four-point framework.109 Yet it was the content of the _PIPSC_ definition of associational freedom, not an abstract concept of the right, that was problematic. Chief Justice Dickson’s reasons in the _Alberta Reference_ illustrate the value of an abstract approach, and confirm that an interpretation that defines a guarantee’s underlying purposes need not preclude attention to context. Accordingly, after defining the entitlement, Dickson C.J.C. analyzed the circumstances of the case, and concluded that collective bargaining and the right to strike were protected by section 2(d). His analysis shows that _B.C. Health Services_ was mistaken in assuming or implying that the Court must choose between the abstract and the contextual. An abstract approach which cannot take account of diverse contexts will present problems, but an approach that is purely contextual is not free from difficulty either.

At the time of the _Labour Trilogy_, the Court feared section 2(d)’s consequences for labour relations, but also felt that “generic” collective activity could not be constitutionalized. Although a labour context was dominant in the key landmarks, it is difficult to tell whether those decisions gave associational freedom an individualist interpretation to prevent the constitutionalization of union activities, or whether the exclusion of labour activities was a by-product of the Court’s determination not to constitutionalize all associational activity. Both dynamics were present and, either way, the guarantee was trapped in an individualist definition.

The “no go” zone for associational freedom, as it was called in _B.C. Health Services_, not only ensured the failure of most labour claims, but compromised section 2(d)’s opportunities on other questions as well. If McIntyre J.’s musings about the constitutional right to golf in a

---

107 _Id._, at 363.
108 Thus he noted, in the context of a right to strike, that “[t]he refusal to work by one individual does not parallel a collective refusal to work” because “[t]he latter is qualitatively rather than quantitatively different.” _Id._, at 367 (emphasis in original).
109 See _supra_, note 57.
foursome did not prove the point that virtually all human activity is social or associational. Wilson J.’s dissent in *R. v. Skinner*, which would have protected solicitation by prostitutes under section 2(d), showed the potential consequences of an uninhibited conception of entitlement. As a result, the only non-labour claim that has succeeded under section 2(d) was in *Libman v. Quebec*, where freedom of association rode section 2(b)’s coat-tails. Attempts to establish a claim in other settings, some of which were meritorious, consistently foundered. Though more in theory than in practice, labour and non-labour entitlements co-existed in the first 20 years of section 2(d) jurisprudence. Labour claims may have dominated, but still the Court entertained non-

---

110 *Alberta Reference*, supra, note 106, at 408 (rejecting a definition of s. 2(d) which would deny the legislature the authority to allow golf to be played in pairs but not in greater numbers).

te to exclude the solicitation of an act of prostitution from the scope of the guarantee simply because of “the purpose for which the parties seek to associate”; on that point, the *Alberta Reference* was clear that “[o]nly the coming together is protected.” *Id.*, at 1249. Citing *Irwin Toy*, Wilson J. insisted that the logic that applies to s. 2(b) “also holds good for s. 2(d) of the Charter”. *Id.*, at 1251. Meanwhile, Dickson C.J.C. rejected Wilson J.’s view, which seemed to suggest that every restriction on expression would violate s. 2(d), because expressive activity is communicative and for that reason inherently associational. The Chief Justice saw that such an unbridled conception of entitlement could constitutionalize any and all activity that is social in nature.

112 [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569 (S.C.C.). In *Libman* a unanimous panel held that the province’s rules for third-party spending in referendum campaigns violated s. 2(b) and 2(d) of the Charter. Briefly, the legislation established national “yes” and “no” committees, and granted those committees the authority to incur “regulated expenditures”. Campaign spending outside the umbrella committees was permitted, but only to a maximum of $600. Otherwise, the legislation allowed those who preferred not to associate with either of the committees to “affiliate” instead. This option gave groups and individuals the opportunity to participate while maintaining some semblance of independence.

Though the Court invalidated the scheme under s. 2(b), it found that Quebec’s referendum rules also violated s. 2(d), because provisions that infringed the expressive freedom of individuals also offended the rights of groups and organizations. As such, the spending limit fell squarely within the principle that the Charter protects associational freedom when a group or organization is prevented from exercising another fundamental freedom. While it invalidated the spending limit under both guarantees, the Court’s analysis drew entirely from the jurisprudence on freedom of expression.

labour claims. More recently, the Court’s decisions have favoured union interests. In that regard, the non-association cases were the first to signal a turn in the section 2(d) jurisprudence. Labour considerations emerged more emphatically than they had previously in Lavigne v. O.P.S.E.U. and Advance Cutting & Coring, where the Court made explicit its solicitude for union security. And, as noted, a trend in favour of labour has become more pronounced in the McLachlin Court’s decisions. While Dunmore boosted labour’s prospects under the Charter, the decision has not had a favourable impact on positive rights under other guarantees. Meanwhile, though Pepsi-Cola was not a section 2(d) case, it was a breakthrough for labour which, like Dunmore, required the Court to give some of its own precedents an inventive interpretation. Most notable, thus far, is B.C. Health Services, which dedicated its discussion of section 2(d) entirely to the constitutionalization of collective bargaining.

Today, section 2(d) is at a juncture which makes it imperative to ask whether non-labour claims have any remaining traction. In raising that question for the future, three observations can be made. First of all, section 2(d) guarantees a fundamental Charter freedom, and does so in inclusive terms which draw no distinction between labour and non-labour claims. A short digression, comparative in perspective, may be appropriate. Despite not being protected in the text of the constitution, freedom of association is regarded in the United States as one of the cornerstones of that country’s constitutional tradition. Accordingly, it is worth noting that the distinctions relied on in Charter jurisprudence to narrow the guarantee are not found in American doctrine. For instance, it does not particularly matter to the U.S. Supreme Court whether freedom of association is individual or collective in nature; neither does that Court draw a distinction between an association and its activities. Moreover, although labour issues play a role in the American jurisprudence, it is not a major or dominant role. To the contrary, protecting organizations from being targeted by the state, recognizing forms of intimate association and providing a check on compelled


116 See Cameron, supra, note 92 (commenting on the Court’s Charter values analysis).
association have been the U.S. Supreme Court’s primary concerns. The point is that, while labour entitlements are one of the cornerstones of the guarantee in section 2(d), they neither define nor exhaust the scope of associational freedom.

Second, it is unfortunate that the Supreme Court’s jurisprudence has set up a contest between abstract and contextual approaches to the interpretation of rights. For instance, the Court made it clear in *B.C. Health Services* that it was choosing between the two, and that “contextualizing” is superior to abstract thinking. Although this contest dates back to *Edmonton Journal*, the assumption that the Court must make a choice between the abstract and the contextual has never been convincing. It is not clear why a contextual approach must be promoted at the expense of abstract principles. Nor does it make sense to view abstract principles as innately flawed and a contextual approach as irrefutably valid. In addition, it is difficult to see how an entitlement can be defined solely in contextual terms, without reference to the underlying values and rationales which give it meaning outside and beyond the competing interests at stake in particular circumstances. For these reasons, any reconsideration of section 2(d) must examine the relationship between the abstract and the contextual, and define the roles each should play in constitutional interpretation.

A third point is that *B.C. Health Services* failed to address or resolve the status of individual and collective entitlements under section 2(d). The early jurisprudence made the critical mistake of adopting an individualist conception of the entitlement and thereby excluding collective activity from the Charter. Now that *Dunmore* and *B.C. Health Services* have declared that section 2(d) protects at least some collective action, the Court may once again be tempted to engage in either-or thinking. The question is whether the recognition that section 2(d) includes collective activity necessarily means that there is no freedom of association for individuals under this guarantee. Here, too, it is essential, in rethinking how associational freedom should be defined, to ask

---

whether and to what extent freedom of association is both an individual and a collective entitlement.

Much energy will be devoted to discussion of *B.C. Health Services* and its implications for labour relations. By constitutionalizing the activity and creating due process rights, *B.C. Health Services* marks a new era for collective bargaining in Canada. The decision also has the potential to lead to an invigorated and purposive interpretation of the Charter guarantee of associational freedom. For such an interpretation to emerge, care must be taken not to assume that the Court’s approach in *B.C. Health Services* — which was specific to the circumstances of collective bargaining — established a new methodology for section 2(d). In rethinking the meaning of associational freedom, it is important to return to the guarantee’s roots, which are found primarily in Dickson C.J.C.’s *Alberta Reference* dissent and in Bastarache J.’s discussion of its abstract values and purposes in *Dunmore v. Ontario*. That conception of entitlement, and not a case-by-case contextualization of the guarantee, holds the key to section 2(d)’s aspirations.

Twenty years after the *Labour Trilogy*, the Supreme Court of Canada decided to give section 2(d) of the Charter a second chance. Whatever the future holds for collective bargaining, *B.C. Health Services* is an exciting decision because it has, at last, created an opportunity for freedom of association to flourish. Developing a theory of entitlement for section 2(d) — one which can guide the evolution of the guarantee — is now a priority.