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"Labour is Not a Commodity"\(^1\): The Supreme Court of Canada and the Freedom of Association

Judy Fudge*

This article charts the shift in the Supreme Court of Canada's interpretation of the Charter of Rights and Freedoms' guarantee of freedom of association in the context of claims by trade unions for protection of their collective bargaining rights. It places this shift in Canadian Charter jurisprudence in the broader context of neo-liberal politics and globalization, and it considers the extent to which the Supreme Court, along with the International Labour Organization, can be understood as responding to the challenge to develop new norms of governance.

I. INTRODUCTION

In 1987, I surveyed how working people and unions in Canada had fared before the courts when they invoked the freedom of association guaranteed by the Canadian Charter of Rights and Freedoms\(^2\) in order to protect their rights to bargain collectively and to strike.\(^3\) The Supreme Court of Canada had just released three decisions in which the majority of the judges clearly held that the freedom of association

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* Law Foundation of Saskatchewan Chair, College of Law, University of Saskatchewan and Professor, Osgoode Hall Law School. This article is a revised version of my Law Foundation of Saskatchewan Lecture delivered at the College of Law, University of Saskatchewan on February 24, 2004. I would like to thank Jacob Watters for his very able research assistance and Beth Bilson and Ken Norman for their helpful conversations on this topic.

1 One important justification for permitting worker collective action derives from the recognition that labour is not merely a commodity or not a commodity at all, as the International Labour Organization (ILO) famously declared in 1944: ILO, 26th Sess., Declaration concerning the aims and purposes of the International Labour Organization, (1944), being Annex I(a) to the ILO Constitution [1944 Declaration of Philadelphia]. Reprinted in Ian Brownlie, ed., Basic Documents in International Law, 5th ed. (Oxford: Oxford University Press, 2002) at 53-54; see also ILO, Constitution, online: <http://www.ilo.org/public/english/about/ilolist.htm>.


did not protect these rights.\textsuperscript{4} I called the article “Labour, the New Constitution and Old Style Liberalism” because the majority decisions in the Labour Trilogy, as the three cases came to be known, exemplified the narrow individualism and negative conception of freedom embedded in the common law. Having just completed research on the development of labour legislation in Canada during the first half of the twentieth century, I was not surprised that a majority of the members of the Supreme Court of Canada characterized workers’ collective bargaining rights as modern and legislative and not fundamental.\textsuperscript{5} The history of the courts’ and common law’s treatment of collective action by workers is very clear. The courts protected the common law contract and property rights of individuals, typically employers, at the expense of workers who collectively organized, and legislation was needed to protect workers’ collective rights.\textsuperscript{6} Knowing this, I concluded my assessment of the Labour Trilogy with the grandiose claim that “while it is true that none of these decisions are logically compelled, once placed in the context of the historic role of the courts they were inevitable.”\textsuperscript{7}

For over a decade my claim about the historical inevitability of the highest courts’ rejection of collective labour rights seemed to be correct. There were a couple of decisions in 1999 in which the Supreme Court decided that consumer leafleting during a labour dispute was more like advertising than picketing and thus was deserving of constitutional protection,\textsuperscript{8} but until then, each time unions went to the Court for protection of their collective rights, they lost.\textsuperscript{9} In 2000


\textsuperscript{5} Judy Fudge, Voluntarism and Compulsion: The Canadian Federal Government’s Intervention in Collective Bargaining from 1900 to 1946 (D.Phil. Thesis, Oxford University, 1988) [unpublished].


\textsuperscript{7} Fudge, supra note 3 at 111.


I reviewed all of the Supreme Court of Canada decisions concerning workers' rights and the *Charter* and I concluded that:

After 18 years with the *Charter*, the early optimism has almost completely cooled, the most pessimistic predictions have been tempered and the flood of labour-related litigation has diminished to a trickle. With but minor, and very recent, exceptions, unions have not been able to establish collective labour rights under the *Charter*. The gap between the strong endorsement by the International Labour Organisation of workers' collective rights and their absence from the Canadian rights jurisprudence is glaring. But, neither have employers and individual employees been able to deploy *Charter* rights to unravel the key components of the statutory collective bargaining regime. The upshot is that, despite years of litigation and millions of dollars in legal fees, the central elements of the collective bargaining regime have been preserved....Self-styled pragmatists have applauded the courts' deference to the political compromises that legislatures and expert tribunals have fashioned in the contested arena of labour relations. However, in a context in which public sector workers' rights in particular and organised labour's strength in general have been systematically undermined, judicial deference has not been benign. Thus, while the instrumental impact of the *Charter* on workers' interests in employment and labour law has been slightly positive at best or neutral at worst, its ideological impact has been negative.10

In my view, the Supreme Court of Canada's emphasis on individualism and negative freedoms in the context of repeated attempts by unions to obtain constitutional protection for workers' rights reinforced the tendency in neo-liberal politics to treat unions as coercive monopolies rather than democratic organizations and to treat workers' rights as special interests rather than fundamental human rights.11 The Supreme Court of Canada's decisions meant that governments were entitled to run roughshod over workers' collective bargaining rights if they had the political will to do so. As governments across Canada

10 *Ibid.* at 176-77 [footnotes omitted].

11 For a discussion of the neo-liberal turn in Canadian politics, which was taken by Brian Mulroney's Conservative federal government in 1984 after Pierre Trudeau's Liberal government paved the way for monetarism by imposing wage controls on federal public sector workers, and the impact of this shift on labour legislation and labour policy, see Leo Panitch & Donald Swartz, *From Consent to Coercion: The Assault on Trade Union Freedoms*, 3rd ed. (Aurora, Ont.: Garamond Press, 2003).
took a neo-liberal turn, collective bargaining rights were rolled back. This occurred first in Alberta, then in Ontario, and finally in British Columbia and Quebec. Unlike freedom of expression, which the Supreme Court of Canada had so broadly defined that it includes everything from hate speech through pornography to tobacco advertising, freedom of association was given a very narrow meaning, and in the labour context included nothing more than the right to join a trade union.

Who could have predicted that in 2001 eight members of the Supreme Court of Canada would decide that there is a collective dimension to the freedom of association; that the freedom to join a trade union and participate in some of its activities are fundamental; and that governments are under a positive obligation to protect vulnerable workers from employer retaliation when they exercise their Charter-protected rights? In his majority judgment in Dunmore v. Ontario (Attorney General), Bastarache J. stated that “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.”

It is important not to exaggerate the “revolutionary potential” of Dunmore as it contains real limitations. Most significantly, although


16 For example, Roy J. Adams exaggerates the “revolutionary potential” of the decision by failing to discuss the limitations in the majority decision: Roy J. Adams, “The Revolutionary Potential of Dunmore” (2003) 10 C.L.E.L.J. 117. The majority took care both to limit the obligation on the government to provide statutory protection to the vulnerable and to distinguish between making representations to an employer from collective bargaining, see text accompanying note 61. In a recent
Bastarache J. said that freedom of association has a collective dimension, he also was very clear that it still does not include collective bargaining and the right to strike.\footnote{17} There are also very obvious ways in which courts can limit its scope to vulnerable workers.\footnote{18} However, \textit{Dunmore} does mark a change in the “discourse” of the Supreme Court of Canada’s interpretation of the \textit{Charter} in the context of labour rights.\footnote{19} Dissent has been elevated to \textit{dicta},\footnote{20} unions are no longer analogized to gun clubs, and collective bargaining and strikes are no longer compared to golf.\footnote{21} Despite its limitations, \textit{Dunmore} suggests that my claim in 1987 that the Supreme Court of Canada would continue to be hostile to collective labour rights and to impose positive obligations on governments to protect these rights was wrong. But only the cases that follow \textit{Dunmore} will tell by how much I was wrong.

This article explores the shift in the Supreme Court of Canada’s reasoning regarding freedom of association and collective labour rights and tries to determine why this shift has occurred. Instead of addressing the normative question of what the Supreme Court of

\footnote{17} \textit{Dunmore}, supra note 14 at para. 17.

\footnote{18} \textit{Ibid.} at paras. 41, 45.


\footnote{20} Hughes, \textit{supra} note 13 at 38, notes that “[t]he Supreme Court’s decision in \textit{Dunmore}...raises \textit{dicta} and dissents in its previous labour relations jurisprudence to the level of \textit{ratio}, both with respect to the meaning of freedom of association and the obligation of government to take positive action in aid of fundamental freedoms.”

\footnote{21} In the \textit{Alberta Reference}, \textit{supra} note 4 at 404, McIntyre J. stated that the “unacceptability” of according independent constitutional status to the aims, purposes, and activities of an association was clearly demonstrated by Peter A. Gall’s example of a gun club in Peter A. Gall, “Freedom of Association and Trade Unions: A Double-edged Constitutional Sword” in Joseph M. Weiler & Robin M. Elliot, eds., \textit{Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms} (Toronto: Carswell, 1986) at 247. McIntyre J. also analogized the right to strike to the right to golf, \textit{supra} note 4 at 408. For a criticism of this analogy, see H.W. Arthurs, “The Right to Golf: Reflections on the Future of Workers, Unions and the Rest of Us under the \textit{Charter}” (1988) 13 Queen’s L.J. 17.
Canada should do,\(^{22}\) I shall look at what the Court has done and speculate about why it may have shifted direction. The first section describes and critically evaluates the shift in the Supreme Court's jurisprudence about the freedom of association and trade unions and collective bargaining and discusses some of the implications of this shift. The second section briefly considers what this shift indicates about broader institutional and political changes in Canada and internationally. \textit{Dunmore} suggests that my initial assessment of the role of the courts and labour's collective rights did not appreciate the complex relationship between courts and governments on the one hand, and liberal principles and globalization on the other.

\section*{II. FROM INDIVIDUAL TO COLLECTIVE RIGHTS}

In the early 1980s when governments across Canada imposed wage controls on public sector workers, unions invoked the \textit{Charter}'s guarantee of freedom of association to challenge legislative restrictions on their rights to bargain collectively and to strike.\(^{23}\) Unions argued that the \textit{Charter}'s guarantee of freedom of association ought to be read purposively and, as such, should include not only the right to join an association to pursue common goals, but also to protect the objects of the association (in their case, collective bargaining) and the means by which those objects are pursued (in their case, striking). This argument was spectacularly unsuccessful before the Supreme Court.

In the \textit{Alberta Reference} several public sector unions challenged a bundle of Alberta statutes that placed restrictions on collective bargaining by provincial government employees, firefighters, police, and hospital workers by prohibiting strikes, restricting the scope of bargaining, and imposing compulsory arbitration.\(^{24}\) This case provided the reasons upon which the other two cases in the trilogy were based.\(^{25}\) The majority decision, which was written by Le Dain J., was very short (under two pages) and provided both a conceptual and

\begin{itemize}
  \item I think there are good reasons for the Supreme Court of Canada to provide constitutional protection to key elements of collective bargaining. I have expressed these opinions in affidavits provided for \textit{Dunmore} (sworn February 28, 1997 and September 23, 1997) and in support of litigation brought by the United Food and Commercial Workers Union challenging the constitutionality of the \textit{Agricultural Employees Protection Act, 2002}, S.O. 2002, c. 16 [\textit{AEP Act}], which was introduced by the Ontario government in response to \textit{Dunmore} (sworn February 25, 2004 and March 11, 2004).
  \item Panitch & Swartz, \textit{supra} note 11 at 32; Fudge, \textit{supra} note 3 at 61-62.
  \item \textit{Alberta Reference}, \textit{supra} note 4.
  \item \textit{PSAC}, \textit{supra} note 4, involved federal legislation extending the life of collective agreements by two years and thereby postponing the use of strikes and limiting wage increases to 6\% in the first year and 5\% in the second year. In \textit{RWDSU}, \textit{supra} note 4, the challenge involved back-to-work legislation to end a general lockout and partial strike in the dairy industry and imposed compulsory arbitration.
\end{itemize}
institutional analysis of why the freedom of association protected in the Charter does not include collective bargaining.\footnote{26} According to Le Dain J., whose reasons were endorsed by two other judges, the freedom of association only encompassed the freedom to join in association for a common purpose and association activities insofar as they represented the exercise of another fundamental or constitutionally protected right or freedom.\footnote{27} He rejected the argument that freedom of association be extended to activities essential to an association's existence or the underlying purposes of the association because of the "implications of extending a constitutional guarantee...to the right to engage in particular activity on the ground that the activity is essential to give an association meaningful existence."\footnote{28} It appears that Le Dain J. was concerned about providing constitutional protection to too great a range of associational activity. According to him,

[the rights for which constitutional protection are sought—the modern rights to bargain collectively and to strike, involving correlative duties or obligations resting on an employer—are not fundamental rights or freedoms. They are the creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as requiring a specialized expertise.\footnote{29}]

However, why a right is not considered to be fundamental because it is modern and legislative is not explained in the decision. This is an important omission, for, as Dianne Pothier has pointed out, it took the introduction of human rights legislation after World War II "for Canadian law to accept that non-discrimination rights could trump freedom of contract."\footnote{30}

Le Dain J. also ran the conceptual argument into the institutional argument by claiming that modern legislative rights such as collective bargaining require the balancing of competing interests and thus courts should defer to legislatures in such cases. However, all sorts of rights claims involve balancing competing interests and rights; equality rights, for example, may conflict with religious freedoms and courts have to balance these rights.\footnote{31} The majority begged the

\footnote{26 For this terminology, see Dianne Pothier, "Twenty Years of Labour Law and the Charter" (2002) 40 Osgoode Hall L.J. 369 at 374.}
\footnote{27 Alberta Reference, supra note 4. Beetz and La Forest JJ. concurred with Le Dain J.}
\footnote{28 Ibid. at 390-91.}
\footnote{29 Ibid. at 391.}
\footnote{30 Pothier, supra note 26 at 374 [footnote omitted].}
\footnote{31 Trinity Western University v. British Columbia College of Teachers, [2001] 1 S.C.R. 772, 199 D.L.R. (4th) 1, 2001 SCC 31, posed the question of how to handle the conflict between freedom of religion and equality claims in the context of human rights legislation.}
question of why courts should not interfere with the balance that the legislature has struck in collective bargaining but should interfere with the legislative balance struck in other contexts. The problem with Le Dain's J. analysis is that he fails to address what has been distinctive about the courts' approach to trade union rights and entitlements—that the individualism and pro-property bias of the common law has been disadvantageous to unions and for this reason, courts have been urged to defer to legislatures when it comes to workers' collective rights.32

In separate and concurring reasons, McIntyre J. limited freedom of association to the protection of all activities pursued in association with others that a person could lawfully pursue as an individual.33 According to him, "[i]f Charter protection is given to an association for its lawful acts and objects, then the Charter-protected rights of the association would exceed those of the individual merely by virtue of the fact of association."34 He invoked the examples of gun and golf clubs to demonstrate how unacceptable it would be to protect the objects and activities of an association.35 He went on to state that:

[m]odern labour relations legislation has so radically altered the legal relationship between employees and employers in unionized industries that no analogy may be drawn between the lawful actions of individual employees in ceasing to work and the lawful actions of union members in engaging in a strike....It is apparent, in my view, that interpreting freedom of association to mean that every individual is free to do with others that which he is lawfully entitled to do alone would not entail guaranteeing the right to strike.36

He also agreed with Le Dain J. that courts should defer to legislatures when it came to labour legislation since labour relations was a matter of politics and economics.37 However, McIntyre J. specifically stated in PSAC that "[m]y finding in this case does not, however, preclude the possibility that other aspects of collective bargaining may receive Charter protection under the guarantee of freedom of association."38

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33 Alberta Reference, supra note 4 at 407.
34 Ibid. at 404.
35 Ibid.
36 Ibid. at 411-12.
37 Ibid. at 414.
38 Supra note 4 at 453.
The problem with McLintyre J.'s analysis is the simple analogy that he draws, without discussion or elaboration, between gun and golf clubs on the one hand, and trade unions on the other. The crucial issue is not whether there is an individual analogue (such as an individual employee's quitting) to a strike, but whether it is accurate to equate qualitatively different kinds of association for the purpose of guaranteeing Charter rights. Instead of questioning whether it is appropriate to analogize different types of associations, Peter Hogg also focuses on the qualitative difference between collective and individual action. He praises Paul Weiler's invocation of price-fixing by businesses as a "good example" of the significance of the distinction between individual and collective action: "[W]hat is lawful for an individual seller is properly prohibited by our competition law when performed in concert with other sellers. It is surely an undue extension of freedom of association to expand its protection to every activity by an association that is permitted to an individual." However, business price-fixing cartels are quite different from trade unions. Historically, trade unions have played an important role in the struggle for democracy and the achievement of human rights. This claim is not true of businesses that combine to interfere with the market. It is because trade unions are regarded as a vehicle for protecting individuals who would otherwise be vulnerable to exploitation that they, and the practice of collective bargaining, are specifically excluded from competition legislation. It is the objects of the association and the history of how the law has treated the association that are important in determining the scope of Charter-protected rights and not whether there is an individual analogue for collective action.


42 Both the common law and anti-combinations legislation have historically forbidden entrepreneurs from combining to restrict competition, which is the guiding principle of commercial law and policy. However, this principle does not apply in the labour relations context because of the distinctive nature of labour—its humanity. This understanding of the distinctive nature of labour is incorporated into the current Canadian Competition Act that exempts "combinations or activities of workmen or employees for their own reasonable protection" as well as arrangements pertaining to collective bargaining over terms and conditions of employment: Competition Act, R.S.C. 1985, c. C-34, s. 4(1)(a).
In his dissent in the *Alberta Reference*, Dickson C.J. emphasized the distinctive nature of trade unions and labour rights and their collective dimension. Unlike the other judges, he referred to the International Labour Organization (ILO) and its jurisprudence on the freedom of association as a source for the meaning of the Canadian guarantee. According to him, "[f]reedom 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." He went on to state that "[i]f freedom of association only protects the joining together of persons for common purposes, but not the pursuit of the very activities for which the association was formed, then the freedom is indeed legalistic, ungenerous, indeed vapid." He concluded that collective bargaining and striking were essential if unions were to be able to attain their objects and thus were included under the freedom of association protected in the *Charter*. Although Dickson C.J. made it clear that not all associational activity attracts constitutional protection merely because it is engaged in by more than one person, "he never clearly articulated what it was about the objects of unions that would determine what kinds of objects of other associations would merit constitutional protection."

The issue of whether the *Charter*'s guarantee of freedom of association included the right to bargain collectively appeared to have been decisively resolved in 1990 by the Supreme Court in *Professional Institute of the Public Service of Canada (PIPSC) v. Northwest Territories (Commissioner)*. The PIPSC represented a group of federal nurses whose employment was transferred to the government of the Northwest Territories. The public service labour legislation in the Northwest Territories required a union to be incorporated in order to be certified as a bargaining representative for public service employees.

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43 *Alberta Reference*, supra note 4 at 353. Wilson J. agreed with Dickson C.J.'s characterization of the scope of the freedom of association in the Labour Trilogy, although she departed from him over the s. 1 analysis.


46 *Ibid.* at 371. In his s. 1 analysis in each of the cases in the Labour Trilogy, Dickson C.J. was very deferential to the governments in upholding the limitations on the union's freedom of association. Wilson J. adopted a less deferential stance in both *PSAC* and *RWDSU*.

47 Pothier, *supra* note 26 at 379 [footnote omitted].

48 [1990] 2 S.C.R. 367, 72 D.L.R. (4th) 1 [*PIPSC v. Northwest Territories* cited to S.C.R.]. The Court split four to three, with five judges writing reasons. Sopinka J. wrote substantive reasons dismissing the appeal while Dickson C.J., La Forest J. and L'Heureux-Dubé J. each wrote their own reasons, agreeing in the result with Sopinka J.
The Supreme Court of Canada and the Freedom of Association

The government refused to incorporate the PIPSC and thus, it could not bargain collectively on behalf of its transferred members. Four of the seven judges, including Dickson J. who wrote that he was bound by the majority decision in the Labour Trilogy, held that the freedom of association did not protect the right to bargain collectively. The majority of the judges concluded that the government was under no constitutional obligation to provide a statutory scheme for collective bargaining by recognition or certification. According to Sopinka J., "restrictions on the activity of collective bargaining do not normally affect the ability of individuals to form or join unions." He limited the constitutional guarantee of freedom of association to that of simply forming an association. In dissent, Cory J. complained that limiting the protection of freedom of association to the simple act of associating without protecting any of the objects of the association was like allowing people to form and join hockey teams without allowing them to play hockey.

The problem with Cory J.'s analogy is that the nurses over which PIPSC claimed representation rights did have a representative, the Northwest Territories Public Service Association (NWTPSA), which could collectively bargain on their behalf. What PIPSC wanted was to carve out a separate bargaining unit for the nurses it had formerly represented; it was not challenging the representativeness of the NWTPSA. Instead of arguing for a specific bargaining unit as a Charter-protected right (which would be a difficult argument to make), PIPSC argued that the denial of a certification procedure violated its constitutionally protected right. Although, as Pothier remarked, "PIPS[C] was not a very good case for determining the issue of whether there is a right to collective bargaining encompassed within freedom of association," it became the precedent for excluding collective bargaining from constitutional protection in subsequent cases.

In the 1999 case of Delisle v. Canada (Deputy Attorney General), the Supreme Court issued another narrow interpretation of freedom of association in the labour relations context. A member of the Royal Canadian Mounted Police (RCMP), who was the president of an informal employees' association representing RCMP officers in Quebec, challenged the exclusion of RCMP members from the collective bargaining legislation governing federal public service workers as a violation of the freedom of association protected in the Charter. He

49 In his brief reasons Dickson C.J. stated that the appeal must fail "because of the individual nature of the s. 2(d) right": ibid. at 373-74.
50 Ibid. at 404.
51 Ibid. at 382. Cory J.'s dissent was supported by Wilson and Gonthier JJ.
52 Pothier, supra note 26 at 384.
argued that the exclusion of RCMP members from the statutory protections regarding collective bargaining left them vulnerable to management actions designed to influence their right to form an association and carry out its lawful activities. Writing for the majority (four of the seven judges), Bastarache J. held that only the establishment of an independent employee association and the exercise in association of the lawful rights of its members are protected under the freedom of association in the Charter. He also stated that the protection of fundamental freedoms would not generally impose a positive obligation of protection or inclusion on the government.

Two years later Bastarache J. wrote the majority decision in Dunmore, which appears to have significantly expanded the scope of union-related activities protected by the Charter’s guarantee of freedom of association. Despite the fact that it is the freedom of association decision that has most markedly departed from precedent, Dunmore saw the highest degree of consensus among the judges in any freedom of association decision in the labour context to date. Six signed the majority decision, L’Heureux-Dubé J. concurred, and only Major J. dissented.

In Ontario, agricultural workers were excluded from the basic labour relations statute that protects union organizing activity and collective bargaining until 1994 when the first provincial New Democratic Party government enacted collective bargaining legislation specifically designed for agricultural workers. Ontario has the largest agriculture industry in Canada and employs the greatest number of agricultural workers. Almost half of these workers are employed on farms with sales over a million dollars a year. The United Food and Commercial Workers Union (UFCW) used this legislation to organize a couple of hundred workers at several mushroom and poultry operations. When the Conservative

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54 Ibid. at para. 28. Bastarache J. cited PIPSC v. Northwest Territories, supra note 48 at 405, 407-408 for the proposition that collective bargaining is not protected by the Charter's guarantee of freedom of association. Gonthier J., McLachlin C.J. and Major J. agreed with Bastarache J.

55 Delisle, supra note 53 at para. 33. In her concurring reasons L’Heureux-Dubé J. indicated that there might be a positive obligation to provide legislative protection against unfair labour practices or some form of official recognition under labour legislation because of the inherent vulnerability of employees to management: ibid.


57 See expert affidavits of Fudge, supra note 22. See also James White, A Profile of Ontario Farms and Farm Labour (Brampton, Ont.: James White & Associates, 1997).

58 Hughes, supra note 13 at 30, n. 13. During the operation of the Agricultural Labour Relations Act, 1994, the UFCW was certified to represent workers at a mushroom operation and had two certifications (one for another mushroom operation and another for a poultry operation) pending.
government of Mike Harris was elected in 1995, it immediately repealed the statute that allowed agricultural workers to organize and revoked the certifications that the food and commercial workers union had secured in order to represent them. The union brought a Charter challenge, arguing that by repealing the agricultural labour relations legislation and reinstating the exemption of agricultural workers from the labour relations statute, the government was violating agricultural workers' freedom of association. The union argued there was a violation because employers would be able to retaliate against agricultural workers who joined or participated in trade unions. Eight of the nine members of the Court ruled that the exclusion of agricultural workers from labour relations legislation substantially interfered with their fundamental freedom to associate. Although the majority considered protecting the family farm to be a valid legislative objective, the total exclusion of all agricultural workers, regardless of the type of farm they worked on, was not justifiable. The majority declared that the legislation that repealed the agricultural collective bargaining legislation was invalid, but suspended the effect of the declaration for eighteen months in order to give the government time to enact a new law.

Although Bastarache J. took care to align the reasons in Dunmore with the Supreme Court's earlier freedom of association decisions, the case marks a major change in direction. He held that freedom of association imposes a positive obligation on the government to protect the rights of vulnerable workers (such as agricultural workers) to join and participate in unions and to make collective representations to their employer. According to Bastarache J., the government's failure to include agricultural workers in a legislative scheme impaired their ability to exercise their fundamental freedom.

By contrast, Major J. held that the mere exclusion from the statutory labour relations regime did not in any way impair the agricultural workers' freedom to organize at common law. Bastarache J. also made it clear that the

59 Section 80(1) of the Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, repealed the Agricultural Labour Relations Act, 1994 and excluded agricultural workers from the Labour Relations Act, 1995, enacted as Schedule A to the Labour Relations and Employment Statute Law Amendment Act, 1995. Dunmore, supra note 14 at para. 62. Alberta is the only other jurisdiction in Canada that excludes all agricultural workers from the general labour relations legislation. Ibid. at paras. 21-23. It was on this basis that the Court distinguished Delisle, supra note 53. In Delisle, the RCMP officers had established employee associations in the absence of legislation.

60 Major J. essentially accepted the reasoning of Sharpe J. at trial: Dunmore v. Ontario (Attorney General) (1997), 155 D.L.R. (4th) 193, 37 O.R. (3d) 287 (Ont. Gen. Div.). According to this reasoning the state could not be held accountable for the inability of agricultural workers to exercise their freedom of association as agricultural workers historically experienced difficulty in organizing before the enactment of labour legislation. For these judges (Major J. and Sharpe J.), it was private employers
freedom of association protected in the Charter has a collective dimension, referring to both Dickson C.J.'s dissent in the Alberta Reference and the ILO's jurisprudence as support. The key question is whether the state has "precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals." According to Patricia Hughes, "[h]is approach means that objects of that association, as opposed to the act of associating, are to be viewed as a relevant consideration."45

Yet, despite all of the strong language about the collective nature of the freedom of association and the importance of work for individual dignity, there are some real limitations in Dunmore. Although Bastarache J. stated that freedom of association was not limited exclusively to individuals and included collective activities, he also reiterated that freedom of association does not include collective bargaining and the right to strike. Moreover, he was also careful to limit the extent of the positive obligation on governments. The requirement that governments enact legislation protecting workers' freedom of association seems to be dependent on a finding that the workers are extremely vulnerable and that most other workers have access to collective bargaining legislation.

The problem with assessing Dunmore is that it is fundamentally ambiguous. Does it signal a new collective approach to the freedom of association for working people or is it limited to extending protection for vulnerable workers such as agricultural workers? In their recent

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63 Dunmore, supra note 14 at para. 16.
64 Ibid. [emphasis omitted].
65 Hughes, supra note 13 at 43-44.
66 Dunmore, supra note 14 at para. 17: "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)."
67 Ibid. at paras. 43-48.
article on Canada, the ILO, and the freedom of association, Brian Burkett, John Craig, and Jodi Gallagher speculate that

in the post-*Dunmore* era, the jurisprudence on [freedom of association] may develop along two distinct paths. Down one path lies an expansion of *Dunmore* toward the broad guarantees embodied in the Freedom of Association Conventions. Along the second path lies a confirmation of the principles set out in the *Alberta Reference*, in which the *Dunmore* decision is viewed as a limited, principled expansion of individual rights rather than a sweeping recognition of collective, institutional union rights.\(^{68}\)

Only time will tell which path courts will take. The preliminary results have been both equivocal and limited. The British Columbia Supreme Court and the Alberta and Ontario Labour Relations Boards have adopted a restrictive interpretation of *Dunmore* in the context of challenges to hospital restructuring legislation and to legislative requirements that unions forfeit dues during illegal strikes.\(^{69}\) However, the labour boards in Saskatchewan and New Brunswick have interpreted the case as elevating protections against unfair labour practices to a constitutional status.\(^{70}\)

The crucial question is whether the Supreme Court of Canada can continue to separate freedom of association from collective bargaining. This separation is particularly difficult now that a majority of the Court has invoked the ILO jurisprudence as a source for the interpretation of Charter rights. Canada is bound by the ILO *Convention No. 98 on the Right to Organize and Collective Bargaining*,\(^{71}\) as much as it is by the *Convention No. 87 on Freedom of Association and Protection of the Right to Organize*,\(^{72}\) even though the Court has seen fit to mention only the

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68 Burkett, Craig & Gallagher, *supra* note 16 at 268.


latter in defining the scope of the Charter-protected freedom of association.\textsuperscript{73} This is because the freedom of association is a central element of the ILO’s Constitution. Both the Preamble and Part XIII of the \textit{Treaty of Versailles}\textsuperscript{74} recognize it. In 1944 the ILO adopted the \textit{1944 Declaration of Philadelphia}, which also affirmed the freedom of association for workers as one of the principles upon which the Organization was founded. This Declaration, which was incorporated into the ILO’s Constitution in 1946, also recognized the ILO’s obligation to further the implementation of programs which would achieve “the effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures.”\textsuperscript{75} Member states of the ILO are bound to respect the principles contained in the ILO’s Constitution. Freedom of association and the right to bargain collectively are considered fundamental principles and rights that member states are bound to respect and protect.\textsuperscript{76} Thus, it will be difficult for the Court to justify picking and choosing between Canada’s ILO obligations (for example, the right to form and join trade unions but not the right to bargain collectively) when interpreting the reach of Charter-protected labour rights.

Even now the exclusion of agricultural workers from the \textit{Labour Relations Act}\textsuperscript{77} is being challenged before the Ontario Labour Relations Board, and the union that has been organizing agricultural workers in Ontario launched a Charter challenge to the legislation that the Conservative government introduced in response to \textit{Dunmore}. The government took a minimalist approach to the Supreme Court’s decision, and the legislation prohibits employers from taking action against agricultural employees simply for joining or participating in an employees’ association and requires the employer to listen to the

\textsuperscript{73} Dunmore, supra note at 14 at para. 27. Canada has ratified \textit{Convention No. 87} (in 1972), but has not ratified \textit{Convention No. 98}. The federal government refuses to ratify conventions in situations where provincial legislation is in breach of the conventions: see Ken Norman, “ILO Freedom of Association Principles as Basic Canadian Human Rights: Promises to Keep” (2004) 67 Sask. L. Rev. 591 at 596.

\textsuperscript{74} The \textit{Treaty of Peace}, the Allied and Associated Powers and Germany, 28 June 1919 (signed at Versailles) [\textit{Treaty of Versailles}].

\textsuperscript{75} Supra note 1 at Annex III(e).


\textsuperscript{77} S.O. 1995, c. 1.
agricultural workers' representative. However, it does not impose a duty on the employer to bargain with the workers' representative or a requirement that the representative be selected by a majority of the affected employees. In effect, the legislation is worthless—it does not promote collective bargaining nor does it recognize trade unions.

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78 The AEP Act, supra note 22 imposes a number of limited restrictions and obligations on employers. It prohibits employers from interfering, coercing, or discriminating against agricultural employees simply because they have formed, joined, or participated in the lawful activities of an employees' association (s. 9, 10). In the event of an employee complaint, the burden is on the employer to establish that he or she did not discriminate against the employee because the employee was involved in, or a member of, an employees' association. The AEP Act also requires the employer to give an "employees' association a reasonable opportunity to make representations respecting the terms and conditions of employment of one or more of its members who are employed by that employer" and listen to oral representations or give a written acknowledgment that the employer has read the representations (s. 5). In determining whether "a reasonable opportunity to make representations" has been given, the following considerations are relevant:

1. The timing of the representation relative to planting and harvesting times.
2. The timing of the representations relative to concerns that may arise in running an agricultural operation, including, but not limited to, weather, animal health and safety and plant health.
3. The frequency and repetitiveness of the representations (s. 5).

The freedom of assembly protected under the legislation is also very narrow. The AEP Act provides a mechanism for "any person or entity" to apply to a tribunal to obtain access to the employers' property in situations where the agricultural employees reside on the employers' premises in order to persuade the employees to join an employees' association (s. 7(2)). The person or entity seeking access has the burden of satisfying the tribunal that an order giving access to the employer's property is necessary "to effectively communicate with employees" (s. 7(6)). The tribunal is also required to "ensure that the access does not unduly interfere with," among other things, "normal agricultural practices" and "privacy or property rights" (s. 7(7)). Essentially, the AEP Act provides very limited unfair labour practice protections for employees to join and participate in employees' associations and imposes a narrow duty on employers to provide access to employees who reside on employer property and endure representations made by employees' associations.

79 The AEP Act does nothing to support trade unions as employee representatives. In fact, it creates a framework that will likely undermine trade unions by permitting multiple representatives and not requiring majority support as a principle of representation. All the AEP Act does is stipulate that an employees' association be arms' length from the employer (s. 8). However, it does nothing to ensure either that the employees' association is independent of the employer's influence or freely chosen by the employees. Unlike the Labour Relations Act, supra note 77, the AEP Act does not require that employees' associations to be democratically selected or that they represent a majority of the employees. The AEP Act allows for the possibility that several employees' associations could represent the agricultural employees of one employer. The Ministry of Agriculture and Food's Fact Sheet on the AEP Act states that the Act "does not give any right of exclusive representation to employees' associations. Employees from the same workplace can choose to form or join different employees' associations": Ontario, Ministry of Agriculture and Food, Agricultural Employees Protection Act, 2002 (Factsheet) (June 2003) at
Several supervisory bodies of the ILO have repeatedly found that the exclusion of agricultural workers from legislation that promotes collective bargaining violates these workers' fundamental freedom to associate and right to bargain collectively. In 1996 a complaint by the Canadian Labour Congress that alleged that the legislation in Ontario that excluded agricultural workers from the Labour Relations Act without providing them with a mechanism to exercise their rights to organize and bargain collectively violated ILO standards and principles concerning freedom of association and collective bargaining was referred to the Committee on Freedom of Association. The Committee considered the complaint in 1997 and concluded that the absence of any statutory machinery for the promotion of collective bargaining and the lack of specific protective measures against anti-union discrimination and employer interference in trade union activities constitutes an impediment to one of the principle objectives of the guarantee of freedom of association, that is the forming of

\[\text{s.} \ 6, \text{online: <http://www.gov.on.ca/OMAFRA/english/busdev/facts/03-045.htm>.}\]

Under the AEP Act a union that represents 90% of the agricultural employees at a specific workplace would have the same right to represent the employees as an employee who represented two other co-workers or a group that represented 5% of the employees.

All ratified conventions are dealt with by the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR). The CEACR was established in 1926 and it is composed of twenty independent experts who meet annually to review the reports sent by governments. It is the legal body responsible for examining the compliance of ILO member states with conventions. The CEACR comments on problems encountered by countries in the application of ratified conventions and submits its report to the annual International Labour Conference. In more difficult cases, the situation is referred to the tripartite Conference Committee on the Application of Standards in the annual session of the International Labour Conference. The chief task of the Conference Committee on the Application of Standards is to discuss with a representative of the government concerned the main problem the CEACR encountered in that government's application of standards. Even if a member state has not ratified a specific freedom of association convention, it is possible to invoke the constitutional complaint procedure against that state since freedom of association is recognized in the ILO Constitution. In 1951, the Governing Body created a special committee called the Committee on Freedom of Association (CFA) which is a tripartite body comprised of nine members of the Governing Body, and since 1978, it has been chaired by an independent. The CFA meets three times a year in order to examine complaints alleging violations of the Conventions on Freedom of Association. The CFA examines the substance of cases submitted to it and presents its conclusions to the Governing Body, which is the executive council of the ILO. The Governing Body has fifty-six members (twenty-eight government and fourteen each employer and worker representatives).
independent organizations capable of concluding collective agreements.\textsuperscript{81}

The Committee recommended that the Government of Canada take the necessary measures to ensure that agricultural workers have access to "machinery and procedures which facilitate collective bargaining"\textsuperscript{82} and "effective protection from anti-union discrimination and employer interference."\textsuperscript{83} It also drew the attention of the Committee of Experts on the Application of Recommendations and Conventions (CEACR) to the legislative aspects of the case.\textsuperscript{84}

\begin{itemize}
\item \textsuperscript{81} ILO, Committee on Freedom of Association, Report No. 308, G.B. 270/7, November 1997 at para. 187, online: <http://www.ilo.org/public/english/standards/relm/gb/docs/gb270/gb-7.htm> [CFA Report 308]. Bastarache J. referred to the Committee's decision; however, he only discussed freedom of association in terms of the right to join a trade union and ignored the aspect of the decision that dealt with collective bargaining: \textit{Dunmore}, supra note 14 at para. 41.
\item \textsuperscript{82} CFA Report 308, supra note 81 at 194.
\item \textsuperscript{83} Ibid.
\item \textsuperscript{84} In its report to the 1999 session of the International Labour Conference, the CEACR noted that agricultural workers were excluded from the Labour Relations Act in Ontario and the CFA's conclusions regarding the exclusion. The CEACR urged the government of Canada "to take the necessary measures to amend the aforementioned legislation in order to bring it into full conformity with the principles of freedom of association": Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), ILC, 87th Sess., 1999, online: <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/r-iiila.htm>. It also referred the exclusion of agricultural workers to the Conference Committee on the Application of Standards, where the Canadian government's representative was called on to account for the exclusion of agricultural workers from labour relations legislation in front of the Committee on the Application of Standards at the 1999 session of the International Labour Conference. The International Labour Conference, which meets annually in Geneva, is the legislative branch of the ILO, and it functions as an international parliament of labour. The Conference has a tripartite membership structure—each member State has two government delegates and one delegate representing employers and another representing workers—which is designed to enhance the legitimacy and viability of the rights and standards that it adopts. The Committee concluded its two hour session by stressing that the guarantees provided under \textit{Convention No. 87} "applied to all workers without distinction whatsoever, and that all workers should enjoy the right to establish and join organizations of their own choosing to further and defend their occupational interests": Report of the Committee on the Application of Standards, ILC, 87th Session, 1999, Canada. Again in 2001 the CEACR observed that Ontario continued to exclude agricultural workers from its labour relations legislation. While noting the Ontario government's information that agricultural workers were entitled to form associations and participate in voluntary negotiations, the CEACR urged the government to amend the legislation to bring it into full conformity with \textit{Convention No. 87}. It also asked the Canadian government to keep it informed of the Supreme Court of Canada's impending decision regarding the exclusion of agricultural workers: Report of the Committee of Experts on the Application of Conventions and Recommendations, supra.
\end{itemize}
In March 2003 the Committee on Freedom of Association again examined the exclusion of agricultural workers from labour relations legislation in Ontario and noted that since its initial consideration of the case in 1997, the Supreme Court of Canada had issued its decision regarding the Ontario exclusion and the Ontario government had enacted the *Agricultural Employees Protection Act* in response to the decision. However, the Committee went on to note “that this legislation does not give agricultural workers the right to establish or join trade unions and to bargain collectively.”85 This observation was echoed by the Committee of Experts on the Application of Conventions and Recommendations in its report to the 2003 session of the International Labour Conference.86

Thus, both of the ILO’s main supervisory bodies, the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions, have stated that the Ontario agricultural employees’ legislation falls short of Canada’s international obligations and is in breach of international norms because it fails to provide effective collective bargaining and recognition of trade unions. The question is whether this legislation meets Canadian constitutional standards: does the Canadian *Charter of Rights and Freedoms* protect collective bargaining? Given my incorrect prediction in 1987,87 I will not hazard any more predictions of what the Supreme Court will do. However, I will mention a few considerations that are relevant to any assessment of where the Supreme Court of Canada’s freedom of association jurisprudence may go.

The same year that the Court issued *Dunmore*, it also released *R. v. Advance Cutting & Coring Ltd.*,88 in which for the first time the Supreme Court of Canada considered whether collective bargaining legislation that required mandatory union membership violated the freedom of association protected in the *Charter*. A divided court narrowly (five to four) upheld the Quebec government’s construction industry collective bargaining legislation that required contractors to hire only construction workers who are members of one of five union groups listed in the statute.89 The legislation barely survived the s. 1

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87 Supra note 3.
89 A nine-member Court participated in the appeal. Four judges found no breach of the *Charter*. Le Bel J., with Gonthier and Arbour JJ., stated that freedom of association only protects individuals from forced ideological conformity and that compulsory union membership does not amount to forced ideological conformity. L’Heureux-Dubé J. stated that freedom of association does not include the freedom not to
analysis on the ground that the legislation stabilized what had been violent labour relations within the construction industry.\(^9\) Significantly, eight members of the Court interpreted the freedom of association as including the right not to associate and a slight majority considered that mandatory union membership violated that right. Bastarache J., who held that compulsory union membership itself amounted to forced ideological conformity, drew support, as he had done in *Dunmore*, from international human rights law.\(^{91}\)

The Supreme Court of Canada’s decisions interpreting the freedom of association in the labour relations context indicate that while the Court considers some forms of workers’ representation to be legitimate, it is not clear what these forms are. Nor is it clear the range of collective activities that are protected by the *Charter*. So far the Supreme Court of Canada has not yet embraced the central tenet of industrial pluralism—collective bargaining by democratically selected trade unions—as a fundamental right protected by the *Charter*. Nor has it fully embraced international human and labour rights jurisprudence as the basis for interpreting freedom of association in the labour context, although there are indications that it is an increasingly important legal source.\(^{92}\) However, as *Advance Cutting & Coring* indicates, international labour and human law rights can cut both for and against unions, although generally it tends to favour them. Moreover, according to Michael MacNeil, “*Advance Cutting & Coring* provides a stark reminder of the complexity of applying constitutional analysis in balancing competing visions of how a labour law regime should be constructed.”\(^{93}\)

Since the Supreme Court of Canada develops its jurisprudence on a case by case basis, it has a great deal of discretion and flexibility in responding to the facts of particular cases, broader shifts in public and elite opinion, and international law. However, there are constraints on how the Court can exercise its discretion. Some of the constraints are immediate: the Court cannot completely control the cases that associate. Five judges found a violation of the *Charter*, although one of them (Iacobucci J.) held that the legislation was saved under s. 1. Bastarache J., together with McLachlin C.J., Major and Binnie JJs., held that compulsory trade union membership is a form of forced ideological conformity that violates the *Charter*. Iacobucci J. rejected the narrow test of forced ideological conformity and held that the freedom of association was violated by forced union membership.

\(^{90}\) *Advance Cutting & Coring*, supra note 88 at para. 117.


\(^{92}\) Norman, supra note 73.

come before it, and some cases (such as the vulnerable agricultural workers in *Dunmore* who were denied basic statutory protection of their collective rights) are more compelling than others (such as the nurses in *PIPSC v. the Northwest Territories* who had a bargaining representative—albeit one they did not choose—which could bargain collectively on their behalf). Other constraints are longer term and have more to do with the Court's institutional legitimacy. In the next section I shall identify what I ignored when I offered my 1987 prediction—how the role that courts play within liberal democracies might be influenced by broader changes in the political economy.

III. THE NEW CONSTITUTIONALISM AND LABOUR RIGHTS AS HUMAN RIGHTS

Resolving the commodity status of labour is an essential dilemma of every liberal democracy. In the private realm of the market, workers are bearers of a commodity—labour—whose price is determined by supply and demand in the market for labour. As a private matter, the employment relationship and wage bargain are of no concern to anyone other than the individual buyer and seller. However, labour is a "fictitious" commodity: neither is it produced as a commodity, nor is its production governed by an assessment of its realization on the market. Labour is embodied in human beings who are born, cared for, and tended in a network of relations that operate outside of the direct discipline of the market. Also, unlike other commodities, human beings have the capacity to act individually and collectively to resist the compulsion of supply and demand.

One of the principal responses of workers to their subordination to employers in the labour market has been mutuality. Workers have joined together not just to advance their economic interests, but to build and enrich their lives and the lives of their families and communities through horizontal networks and organizations that provide social support and cultural expression. One important expression and manifestation of mutuality is the trade union and workers' collective action.

Collective worker action in liberal democracies is irretrievably enmeshed with law and the state. When workers engage directly with their employers to advance their interests, they do so within a political and legal order. The democratic state offers an opportunity for workers to express their humanity and demand that they not be treated simply as commodities. Grounding its authority to govern in the idea of

94 The next paragraphs are based on Fudge & Tucker, *supra* note 6 at c. 1.
consent and avowing its commitment to liberty, equality and the rule of law, the liberal state is impelled, however grudgingly, to respond to the demands of its propertyless subjects. Workers sought to use the political logic of the liberal state to inhibit their commodification in the capitalist economy by pressing their democratic demands as citizens for inhibitions in the private realm of market relations. However, in doing so they also had to confront and contest the boundary between the realm of commodities where individualism, contract and property rule, and the realm of citizenship where associational democracy governs.\footnote{See generally Samuel Bowles & Herbert Gintis, \textit{Democracy and Capitalism: Property, Community, and the Contradictions of Modern Social Thought} (New York: Basic Books, 1986); Ellen Meiksins Wood, \textit{Democracy against Capitalism: Renewing Historical Materialism} (Cambridge, U.K.: Cambridge University Press, 1995).}

The turn to the liberal state, however, is not without its dangers for workers. The slow emergence of the liberal state signalled not only the dominance of political democracy, but the hegemony of private property as the means of organizing economic activity.\footnote{See generally Bob Fine, \textit{Democracy and the Rule of Law: Liberal Ideals and Marxist Critique} (London: Pluto Press, 1984).} The liberal state is the guarantor of individual property rights and provides owners with a system of law in which their claims are both vindicated and enforced. In Anglo-American legal systems the common law and the ordinary courts have emphasized individualism, contract, and property. Market power can translate into political and legal influence not only through instrumental ties, but through deep structural linkages and the pervasive ideological expression of the view that the interests of capital are coincident with those of the polity as a whole. The liberal state must mediate the political demands of workers and employers, but it can never completely resolve the contradiction between democracy and private property.\footnote{See generally Bob Jessop, \textit{The Capitalist State: Marxist Theories and Methods} (Oxford: Martin Robertson, 1982); David Montgomery, \textit{Citizen Worker: The Experience of Workers in the United States with Democracy and the Free Market during the Nineteenth Century} (Cambridge, U.K.: Cambridge University Press, 1993).}

A recurring impetus and challenge for the liberal state is to institutionalize and contain the conflict within the labour market. In 1919, when the ILO was established after the devastation and destruction of the Great War, it became generally accepted that one of the important roles of government is to mediate competition in the labour market and the conflict that results by respecting certain labour rights as fundamental.\footnote{Canada was a signatory of the \textit{Treaty of Versailles}.} Towards the end of World War II the constitutional objectives of the ILO were reviewed in light of the atrocity of "[c]oncentration camps, in which not only genocide but
also forced labour was rife....In this context, workers' rights came to be viewed as human rights; they stemmed from a recognition of human dignity."100 After World War II, the principle that labour is not a commodity, which was part of the 1944 Declaration of Philadelphia, became part of the ILO's constitution and countries like Canada recognized freedom of association and collective bargaining as fundamental rights.101

During this period, governments across Canada enacted collective bargaining legislation for workers first in the private sector and then in the public sector. This legislation institutionalized the central features of industrial pluralism and citizenship—the right of workers to be represented by independent and democratic trade unions, and mechanisms to assist in establishing collective bargaining. Steeped as they were in the doctrines and individualism of the common law, courts were initially suspicious of this legislation. From the 1940s to the end of the 1970s, the legislature and not the courts, ensured that labour was not treated simply or solely as a commodity.102

This political and institutional entente began to unravel in the 1980s. Legislatures began to roll back the institutions of industrial pluralism first in the name of fiscal responsibility and then in the name of ideological purity. When the Supreme Court of Canada released the Labour Trilogy in 1987, Canada was on the cusp of embracing neo-liberalism. The US–Canada Free Trade deal was a fait accompli and the North American deal was in the offing. Public sector workers were targeted for restraint throughout the 1990s, and faced with unsympathetic legislatures and courts, unions turned to the ILO to lodge complaints over violations of freedom of association.103 Since the 1980s, Canada has had the dubious achievement of having the highest number of successful complaints brought against it for violating workers' right to freedom of association and collective bargaining of any of the one hundred and seventy-five member states of the ILO, and there is no sign that the tide is turning.104 In fact, a spate of recent complaints against the British Columbia government's draconian repeal of collective bargaining and union representation rights in the hospital sector have been successful.105 However, governments across Canada continue simply to ignore their

100 Novitz, supra note 76 at 99.
101 Ibid. at c. 5.
102 Fudge & Tucker, supra note 6 at c. 10 and 11.
103 Panitch & Swartz, supra note 11; Judy Fudge & Eric Tucker, "Pluralism or Fragmentation?: The Twentieth-Century Employment Law Regime in Canada" (2000) 46 Labour/Le Travail 251; Burkett, Craig & Gallagher, supra note 16.
104 Panitch & Swartz, supra note 11 at 208; Burkett, Craig & Gallagher, supra note 16 at 251-52.
105 Norman, supra note 73 at 605.
ILO obligations. The legislative assault against trade unions in the public sector and the incremental erosion of collective bargaining rights in the private sector both coincided with, and was conducive to, a reinvigoration of market forces. The forces of globalization accelerated the restructuring of the economy, unionization rates began a slow decline, earnings inequality increased, and working conditions deteriorated.

Canada's embrace of neo-liberalism at the national level is part of the larger process of globalization and the worldwide shift in economic and political power. A key component of the process of globalization has been what Stephen Gill calls the "new constitutionalism," which comprises the international economic agreements and institutions such as the North American Free Trade Agreement and the World Trade Organization. These agreements and institutions put in place quasi-legal processes whereby nation states cede their authority to interfere with the market. According to Gill, "[i]n effect, new constitutionalism confers privileged rights of citizenship and representation to corporate capital, whilst constraining the democratization process that has involved struggles for representation for hundreds of years."

One of the most salient features of globalization and new constitutionalism during the 1990s was a profound and unprecedented increase in social inequality and an intensification of the exploitation of people on a worldwide scale. Neo-liberal policies internationally and domestically have subjected the majority of populations to market forces. The proliferation of supranational agreements and neo-liberal policies has led to pressure to recognize labour rights. The gulf between social justice, on the one hand, and international trade agreements and international economic institutions, on the other, has increasingly become a cause for concern as it is perceived to be a source of social and political instability. However, the attempt to link a social clause to trade agreements has met with huge opposition.

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106 Panitch & Swartz, supra note 11 at 208; Norman, supra note 73 at 605-606.
108 This discussion is based on Fudge, supra note 13 at 114ff; Stephen Gill, Power and Resistance in the New World Order (Houndsmill, U.K.: Palgrave Macmillan, 2003) at 131-35.
110 Gill, supra note 108 at 131-35.
111 Ibid. at 132.
112 Ibid. at 60.
from the governments of developing countries who regard the tying of trade to labour standards as a form of protectionism by developed countries.113

In this context the ILO has become "a social mediator in the process of globalization."114 At the United Nations' World Summit for Social Development in Copenhagen in 1995 and the World Trade Organization Conference in Singapore in December 1996, world leaders reaffirmed the important role of the ILO with regard to basic workers rights.115 In 1998 the International Labour Conference issued the Declaration on Fundamental Principles and Rights at Work.116 Although the 1998 Declaration does not have constitutional status, it indicates how the ILO's constitution is to be interpreted. Members states have an obligation to respect, promote, and realize these rights in good faith. Moreover, like the 1944 Declaration of Philadelphia, the Declaration on Fundamental Principles and Rights at Work recognizes that social justice and economic progress are inextricably linked.117 The Declaration identifies four categories of fundamental rights at work: freedom of association and the effective recognition of the right to effective collective bargaining; elimination of forced and compulsory labour; effective prohibition of child labour; and elimination of discrimination in employment and occupation. However, at the same time as the ILO has limited what it counts as core labour standards, it has also elevated them to the status of human or fundamental rights. This characterization emphasizes the universal nature of the standards selected as core rights and liberates them from analysis solely in economic terms.118 These rights are grounded in respect for human dignity and can no longer be trumped by economic efficiency. The rights in the Declaration "go to the essence of human dignity at work, touching upon bedrock values of freedom and equality."119

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114 Novitz, supra note 76 at 104.
115 Langille, supra note 113 at 240-41; Lee, supra note 113; Novitz, supra note 76 at 102-106.
117 Novitz, supra note 76 at 104.
118 Langille, supra note 113 at 241; Lee, supra note 113 at 181; Novitz, supra note 76 at 105.
Canada played a crucial role in the development and adoption of the Declaration. Canadian Ambassador Mark Moher, who was a government delegate from Canada at the 1998 International Labour Conference, was the Chairperson and Reporter of the Committee on the Declaration on Fundamental Principles and Rights at Work. Canada's Minister of Labour, the Honourable Lawrence McAulay, attended the 1998 International Labour Conference and made an address to the Plenary indicating Canada's support for the Declaration. Moreover, according to the Honourable Claudette Bradshaw, the federal Minister of Labour, "Canada attaches great importance to the Declaration on Fundamental Principles and Rights at Work...the Declaration is the key instrument for the promotion of the fundamental principles of freedom of association and collective bargaining."\(^{120}\) However, the problem is that there is no effective means to ensure that member states protect these fundamental rights.\(^{121}\) Canada continues to fail to live up to its obligation to respect the fundamental rights of freedom of association and collective bargaining.\(^{122}\)

It is important to place the recent shift in the Supreme Court's Charter and labour jurisprudence in the broader context of neo-liberalism and the growing resistance to it. Neo-liberalism has wrenched the economy from the social, and old mechanisms of redistribution have broken down. However, the detachment of the market from society, which is neo-liberalism's goal, is hard to sustain since inequality and insecurity tend to undermine civility and authority.\(^{123}\)

The anti-globalization protests since 1999 in Seattle have revealed the crisis of legitimacy at the international level where there has been an attempt to rearrange the institutions of global governance and enhance the role and authority of the specialized United Nations agencies such as the ILO. Thus, at the same time as collective labour rights have lost political legitimacy with Canadian governments, increasingly collective labour rights have been conceptualized internationally as fundamental human rights. The extent to which


\(^{121}\) Langille, supra note 113 at 253-54.

\(^{122}\) Norman, supra note 73 at 604-607.

the Supreme Court of Canada is prepared to recognize that labour is not a commodity in this context is an open question.

IV. CONCLUSION
Historically, a fundamental tension in liberal societies has been balancing property and contract, or the market, on the one hand, with democracy and equality on the other. Nowhere is this tension more evident than in the labour market. One of the major achievements of the period after World War II was the institutionalization of a set of rights and standards that guaranteed that labour was not simply treated as a commodity. If the Supreme Court of Canada does not recognize collective bargaining as a fundamental right, we may be witnessing a major transformation in liberalism in which liberty no longer has to be leavened with equality and liberalism no longer includes citizenship at work.

However, even if the Supreme Court is prepared to recognize collective bargaining as a fundamental right protected by the Charter, the shift in the site of legitimation for labour rights from the legislature to the courts does not bode well for unions or for working people. Courts have the power neither to foster new institutions nor to influence economic conditions. It is crucial in the face of neo-liberalism, with its faith in the market as the sole means of allocation and distribution, to continue to insist that labour is not a commodity, but it is a sad commentary on democratic politics that the courts may be one of the few places where this claim still has some legitimacy.