

A MORAL RECONSTRUCTION OF FREEDOM OF ASSOCIATION IN CANADA

Andrea Talarico

Thesis submitted to the University of Ottawa
in partial Fulfillment of the requirements for the
Doctorate in Philosophy degree in Law

Faculty of Law
University of Ottawa

© **Andrea Talarico, Ottawa, Canada, 2023**

Per il mio nonno.
Ecco il libro.

Résumé

En 1987, la Cour suprême du Canada rejette les arguments à l'effet que la liberté d'association prévue à l'article 2(d) de la *Charte canadienne des droits et libertés* (ci-après, la *Charte*) protégeait un droit positif de négocier collectivement ses conditions de travail. Entre 1987 et 2007, la jurisprudence de la Cour suprême portant sur la liberté d'association fut marquée par certaines tensions. Notamment, la Cour rejette les arguments voulant que la liberté d'association était une liberté à dimension collective. De plus, la Cour adopta une approche dite négative à la liberté d'association, indiquant que l'article 2(d) de la *Charte* ne pouvait être utilisé pour créer des obligations pour l'État. Cette approche voulant que la liberté d'association conférait une protection négative (par opposition à des droits positifs) individuelle contre l'ingérence de l'État est typique d'une vision libérale des droits et libertés. Or, en 2007, dans l'arrêt *Health Services*, la Cour suprême s'appuya sur des valeurs sous-jacentes à la *Charte* (spécifiquement l'autonomie, la liberté, l'égalité, la démocratie et la dignité) pour étendre une protection constitutionnelle au droit de négocier collectivement. En 2015, cette protection constitutionnelle fut étendue au droit de grève.

L'utilisation de valeurs morales en adjudication constitutionnelle est répandue. Au Canada, les valeurs sous-jacentes à la *Charte* (les *Charter values*) sont utilisées à la fois pour interpréter les dispositions de la *Charte* et pour pondérer des droits concurrents, notamment dans l'exercice de proportionnalité effectué en vertu de l'article premier de la *Charte*. Utilisant une méthodologie de reconstruction morale, cette thèse examine l'utilisation des valeurs identifiées dans *Health Services* à travers le corpus jurisprudentiel de la Cour suprême. De ces valeurs, la thèse développe une reconstruction dite républicaine de la liberté d'association.

Alors que le libéralisme place l'accent sur la liberté de l'individu face à l'État, le républicanisme vise à assurer la non-domination, et ce, tant dans la sphère privée que publique. L'égalité, lorsque considérée dans une perspective républicaine, devient une égalité relationnelle. Le républicanisme est particulièrement pertinent pour le droit du travail qui repose sur une relation de subordination identifiée par les théoriciens républicains comme une relation de domination. Le dernier chapitre de la thèse explore des modèles alternatifs de protection de la liberté républicaine en milieu de travail.

Mots-clés : liberté d'association, négociation collective, droit de grève, libéralisme, républicanisme, reconstruction morale, valeurs sous-jacentes à la *Charte*

Abstract

In 1987, the Supreme Court of Canada rejected arguments that the freedom of association in section 2(d) of the *Canadian Charter of Rights and Freedoms* (hereafter, the *Charter*) protected a positive right to bargain collectively over working conditions. Between 1987 and 2007, the Supreme Court's jurisprudence on freedom of association was marked by certain tensions. In particular, the Court rejected arguments that freedom of association could have a collective dimension. In addition, the Court adopted a so-called negative approach to freedom of association, stating that section 2(d) of the *Charter* could not be used to create obligations for the state. The idea that freedom of association conferred negative (as opposed to positive) individual protection against state interference is typical of a liberal view of rights and freedoms. However, in 2007, in *Health Services*, the Supreme Court relied on underlying *Charter* values (specifically autonomy, liberty, equality, democracy and dignity) to extend constitutional protection to the right to collective bargaining. In 2015, this constitutional protection was extended to the right to strike.

The use of moral values in constitutional adjudication is widespread. In Canada, *Charter* values are used both to interpret *Charter* provisions and to weigh competing rights, notably in the proportionality exercise under section 1 of the *Charter*. Using moral reconstruction as a methodological approach, this thesis examines the use of the values identified in *Health Services* throughout the Supreme Court's body of case law. From these values, the thesis develops a so-called republican reconstruction of freedom of association.

While liberalism emphasises the freedom of the individual from the state, republicanism aims to ensure non-domination in both the private and public spheres. Equality, when considered from a republican perspective, becomes relational equality. Republicanism is particularly relevant to labour law, which is based on a relationship of subordination identified by republican theorists as a relationship of domination. The final chapter of the thesis explores alternative models for protecting republican freedom in the workplace.

Keywords: freedom of association, collective bargaining, right to strike, liberalism, republicanism, moral reconstruction, *Charter* values

Acknowledgments

Reader, please be patient; this is going to take a while.

I must first thank **Denis Nadeau** without whom I never would have embarked on the Ph.D. journey.

My most sincere thanks to **Ravi Malhotra** for his brutal honesty, his excellent comments and suggestions, his advice to “leave Raz to the philosophers”, as well as his support during a very difficult year. Ravi, may you continue to be as illuminating as your name would suggest.

To **Vanessa MacDonnell**, thank you for stepping in as co-supervisor on short notice. Your many suggestions made this possible.

To the GOAT, **Charles-Maxime Panaccio**, thank you for talking me out of giving up. I could not have asked for a better advisor.

To my twin, **Terry Skolnik**, thank you for being my fellow train- without-breaks in all our projects.

To the incomparable **Jennifer Quaid**, thank you for your support. Your friendship has been a highlight of this journey.

Danielle Lussier, your thanks are at the start of chapter 1 (see footnotes).

To all my students, but particularly to the students who stepped up as peer-mentors when Terry and I started the program, thank you. **Alexia, Hadi, Janice, Nadreyh, Nick et Robbie**, je serai toujours reconnaissante d’avoir eu la chance de vous côtoyer. La profession sera chanceuse de vous compter parmi ses membres.

To **mom and dad**, there are not enough pages to thank you for everything you have done to support me.

To the loves of my life, **Eloïse and Benedict**, all my thanks from the bottom of my heart. Eloïse, mon petit loup, merci de me rappeler ce qu’il y a de plus important et merci d’avoir été patiente avec maman lorsqu’elle devait finir sa « crèse ». To Benedict, my Bear, thank you for being my everything. I love you.

Finally, I have benefited from the financial support of **Ontario Graduate Scholarships** and from the **University of Ottawa**. I thank both institutions without whom none of this would have been possible.

Table of contents

Résumé.....	iii
Abstract.....	iv
Acknowledgments.....	v
Table of contents.....	vi
Introduction.....	1
Main argument.....	2
The Evolution of Trade Union Freedom in Canada.....	2
Methodology.....	15
Overview of the theoretical framework.....	17
Structure of the thesis.....	22
Part I– Beyond Liberalism: Republicanism, Egalitarianism, and the Evolution of Freedom of association in Canada.....	24
Chapter 1 – The Evolution of Freedom of Association in Canada: A Review of the Literature.....	27
1.1 – The Early Jurisprudence: Individual Rights and Collective Activities.....	31
1.2 – The Freedom <i>From</i> Association Cases: The Negative Dimension of Freedom of Association.....	40
1.3 – The <i>Dunmore</i> Departure: Exploring the Role of Equality Rights.....	46
1.4 – The Uncertain Recognition: Questioning the Role of the Court.....	51
1.5 – The Right to Strike.....	62
Chapter 2 – The Workplace as a Site of Republican Unfreedom: A Theoretical Framework.....	74
2.1 – Individual Freedom in the Workplace.....	79
2.2 – The Negative and Positive Dimensions of Freedom of Association.....	84
2.2.1 – Negative Rights and Positive Freedoms.....	85
2.2.2 – Freedom from Compelled Association.....	87
2.3 – Republican Freedom and Relational Equality.....	89
2.4 – The Strike as a Tool for Achieving Republican Freedom and Relational Equality	93
2.5 – Horizontal Domination and the Legitimacy of the Court’s Actions.....	95
Conclusion.....	101
Conclusion of Part I.....	103
PART II – A Reconstruction Founded on Charter Values.....	105
Chapter 3 – The Use of Charter Values by the Supreme Court of Canada.....	107

3.1 –The Use of Moral Arguments in Constitutional Adjudication	108
3.2 – The Uses of <i>Charter</i> Values by the Supreme Court of Canada.....	117
3.2.1 – As a Balancing Instrument.....	118
3.2.2 – As an Instrument of Interpretation	121
Conclusion	125
Chapter 4 – Autonomy, Equality, Democracy, and Dignity: Towards a Neo-Republican Reconstruction of Freedom of Association	127
4.1 – Freedom and Autonomy as Antipower.....	128
4.1.1 – Freedom, Liberty, Autonomy, and the Supreme Court of Canada	128
4.1.2 – The Court’s Republican Approach to Autonomy	135
4.2 – Freedom of choice.....	140
4.3 – Relational equality as Non-Domination.....	145
4.3.1 – From « formal » to « substantive”: The Evolution of the Court’s Equality Jurisprudence Under the <i>Charter</i>	145
4.3.2 – Equality as an underlying <i>Charter</i> value	152
4.4 – Industrial Democracy and Non-Domination	162
4.4.1 – Industrial Democracy	163
4.4.2 – Democracy as an Unwritten Principle and a Value.....	169
4.5 – Dignity and Non-Domination.....	178
4.5.1 – Dignity as a Common Thread.....	182
4.5.2 – Dignity in the Workplace.....	187
Conclusion	189
Chapter 5 – Future Work: Freedom of association beyond the <i>Charter</i>	191
5.1 – A Republican Reexamination of <i>Charter</i> Rights and Freedoms.....	191
5.2 – A Republican Reexamination of the Employment Relationship.....	197
5.3 – A Republican Reexamination of the Constitutional Protection of Freedom of Association	201
Conclusion	208
Conclusion of Part II	210
Conclusion.....	212
BIBLIOGRAPHY.....	219

Introduction

In 1987, the Supreme Court of Canada (the Court), adopting what can be described as a classically liberal approach to freedom of association, rejected union arguments and decided that freedom of association (protected under s. 2(d) of the *Canadian Charter of Rights and Freedoms*¹, hereinafter the *Charter*) did not protect a right to bargain collectively. According to the majority, the *Charter* protected an individual's right to join a union, free from the interference of the state. This protection did not extend to collective union activities. In short, the Court favoured a negative and individual approach to freedom, consistent with the liberal ideal of protection from government interference.

In 2007, the Court reversed its position. Of all the arguments the Court drew upon to justify this new broad interpretation, the most surprising was its reliance on moral values. In *Health Services*, the Court relied on the values of freedom, autonomy, equality, democracy, and dignity to expand the protection of freedom of association². When drawing on these values, both in *Health Services*, and more broadly, the Court imbued the values with distinctly republican overtones. Freedom, autonomy, and dignity became paths to exercise free choice. Equality as a value was relational equality, distinct from the equality protection found in the *Charter*. Democracy became a method to ensure both free choice and relational equality in the workplace. By reading an obligation to bargain in good faith into freedom of association, the Court imposed positive duties on private actors to counter worker domination.

¹ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, s. 2(d). [*Canadian Charter*]

² *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 (CanLII), [2007] 2 SCR 391 [Health Services].

Main argument

Examining the evolution of the Court's jurisprudence on freedom of association and collective labour rights, one can identify certain points of tension that go beyond whether section 2(d) of the *Charter* protects the acts performed by the association. Namely, there is controversy surrounding the nature of freedom, the role of the state, and the place of equality in protecting collective labour rights. That is because the *Charter* can be viewed as a classically liberal Bill of Rights whose focus is on non-interference by the state.

In contrast, the employment relationship is both private and inherently illiberal, or, to use the vocabulary that will be explored in this thesis, employment is a situation of horizontal domination and the workplace, a site of republican unfreedom. To reconcile such a private relationship with a liberal instrument focused on non-interference by the state, focus must be shifted from non-interference to non-domination. In short, it is useful to view the freedom of association through a republican lens instead of a liberal lens. That is what the Court did in using a moral argument (specifically, a reference to the values underlying the *Charter*, or to *Charter Values*) to expand the previous interpretation of freedom of association.

The Evolution of Trade Union Freedom in Canada

The movement towards constitutional protection of collective bargaining was lengthy. Historically, freedom of association derives from principles of religious freedom which gave way to a principle of free enterprise for commercial purpose. The movement from a general freedom of association to freedom of association for trade union purposes is considered a modern historical development³.

³Clarence Wilfred Jenks, *The International Protection of Trade Union Freedom* (London: Stevens & Sons, 1957) 14.

References to trade union rights can be found in international instruments adopted by the International Labour Organization (ILO), as well as in the *Universal Declaration of Human Rights*⁴ (the Universal Declaration), the *International Covenant on Economic Social and Cultural Rights* (ICESCR)⁵, and the *International Covenant on Civil and Political Rights* (ICCPR)⁶.

In 1919, freedom of association was explicitly included in the Preamble of the *Constitution of the International Labour Organisation*⁷. Since 1948, the right to join a trade union of one's choosing is included in the *Universal Declaration of Human Rights*⁸.

In Canada, a constitutionally protected right to bargain collectively was recognized in 2007⁹ and, in 2015, that protection was extended to the right to strike¹⁰. In 2007's *Health Services*, the majority of the Court stated that Canadian labour history reveals "the fundamental nature of collective bargaining" and that this history reflected that the framers of the *Canadian Charter of Rights and Freedoms* (hereinafter, the *Charter*) intended to include it under freedom of association¹¹. According to the Court in *Health Services*, we can identify three distinct phases in Canadian labour history: repression, toleration, and (legal) recognition¹² though confidence in this

⁴ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948), 71. [*Universal Declaration*]

⁵ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

⁶ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

⁷ International Labour Organization (ILO), *Constitution of the International Labour Organisation*, 1 April 1919, Preamble.

⁸ *Universal Declaration*, *supra* note 4, art. 23(4).

⁹ *Health Services*, *supra* note 2.

¹⁰ *Saskatchewan Federation of Labour c. Saskatchewan*, (2015) 1 R.C.S. 245; 2015 CSC 4 [Saskatchewan Federation of Labour].

¹¹ *Health Services*, *supra* note 2, at par. 40.

¹² *Health Services*, *supra* note 2, at par. 44

three-phase narrative is eroding¹³. To these three phases, a fourth can be added: constitutional protection since 2007.

Relatively little is known about early trade unions in Canada. Though there are no formal documents regarding the number of labour conflicts in 19th century Canada¹⁴, it has been said that strikes in Upper Canada in the early 19th century were infrequent¹⁵. A first strike involving criminal prosecution occurred in 1837 and arose out of a conflict between a master baker and his journeymen bakers in Kingston¹⁶, when striking workers were summoned before three magistrates and charged with acts of combination and intimidation. Ultimately, the accused were acquitted¹⁷.

This case, raises the question of what British legislation was in force in Upper Canada in 1837. There existed, in England, state-imposed restrictions on combinations of workers, which, having been adopted before 1792, might have been incorporated into the legislation of Upper Canada¹⁸. According to the majority of the Court in *Health Services*, it is however unclear whether the common law doctrine and the British *Combination Acts* were introduced into Canadian law¹⁹. The majority added that it was “unnecessary to resolve this debate”, simply stating that, until 1872, Canadian law was hostile towards trade unions²⁰. Although this may be true of the formal law, it appears that reality was more ambiguous.

¹³ Tucker, Eric, “The Faces of Coercion: The Legal Regulation of Labor Conflict in Ontario, 1880–1889” (1994) 12:2 *Law and history review* 277 at 277.

¹⁴ Palmer, Bryan D, “Labour Protest and Organization in Nineteenth-Century Canada, 1820-1890” (1987) 20:1 *Labour* 61 at 61.

¹⁵ Eric Tucker, “‘That Indefinite Area of Toleration’: Criminal Conspiracy and Trade Unions in Ontario, 1837-77” (1991) 27:27 *Labour (Halifax)* 15 at 19; also Palmer, *supra* note 14, 67.

¹⁶ Tucker, *supra* note 15, 19.

¹⁷ Tucker, *supra* note 15, 20.

¹⁸ Tucker, *supra* note 15, 21.

¹⁹ *Health Services*, *supra* note 2, par. 50.

²⁰ *Ibid.*

Though combinations were, at least before 1850, unlawful, there existed a “zone of social, political and possibly formal legal toleration, although this issue remained unresolved in the courts”²¹. Though the jury's refusal to convict the journeymen bakers might not reveal very much about the formal law, it might reflect such a zone of social toleration, though it is insufficient to assume the existence of a social consensus on the question²².

From the 1860s onward, British immigrants to what would become Canada “brought British unions with them”²³. In 1871, the city of Toronto had “at least two British unions, six or eight American internationals (one with union locals), and five purely local unions”²⁴.

A watershed moment in Canadian labour history occurred in 1872 with the Toronto Typographical Union's strike²⁵. As part of their 1872 bargaining, the Typographical Society demanded a 54-hour work-week and 10\$ of weekly pay²⁶. On March 13th 1872, the Typographical Society were made aware of the employer's refusal of their demands, and thus a strike motion was adopted²⁷. On April 15th, ten thousand people took to the street in front of Queen's Park in support of the Typographical Society and to demand a nine-hour work day²⁸. The next day, twenty-four union members were arrested²⁹. Various unions raised funds to pay for bail and four thousand people protested the arrests³⁰. Though the arrested protesters were never charged or prosecuted, it is impossible to determine why that was the case since records have since been destroyed³¹.

²¹ Tucker, *supra* note 15, 30.

²² Tucker, *supra* note 15, 25.

²³ Forsey, Eugène, “Insights into Labour History in Canada” (1965) 20:3 *Relations industrielles* 445 at 451.

²⁴ Forsey, *supra* note 23, p. 455.

²⁵ *Health Services*, *supra* note 2, par. 51.

²⁶ Lipton, Charles, *Histoire du syndicalisme au Canada et au Québec, 1827-1959*, Collection Aspects ; no 32, (Montréal: Éditions Parti pris, 1976) at 52.

²⁷ *Ibid.*

²⁸ Lipton, *supra* note 26, 53.

²⁹ Lipton, *supra* note 26, 54.

³⁰ Lipton, *supra* note 26, 55.

³¹ Claude D’Aoust & François Delorme, “The Origin of the Freedom of Association and of the Right to Strike in Canada. An Historical Perspective” (1981) 36:4 *Relations industrielles* 894 at 903-904.

Finally, amidst the popular and political turmoil caused by the strike, protests, and subsequent arrests, on April 18 1872, John A. MacDonald tabled an act to decriminalize worker combinations³².

Tucker refers to the period of 1872 to 1877 as a period of "Formal Legal Toleration"³³. According to Tucker, the claim that worker combinations were criminal conspiracies was not legally outrageous, "but rather became notorious because it asserted a position which was politically and socially untenable³⁴". After the typographer's strike, the legality of trade unions themselves became the focal point of debate and led to the hasty enactment of the *Trade Union Act* and the *Criminal Law Amendment Act*, both modelled on English statutes, effectively decriminalizing worker combinations³⁵. In the debates leading to the adoption of the *Trade Unions Act* of 1872 and the *Criminal Law Amendment Act*, MacDonald stated that trade union activity had matured to the point of being recognized as socially legitimate, a fact that was not reflected in law³⁶.

The *Trade Unions Act* was not, according to Baggaley, "a carefully thought-out attempt to correct a problem in the labour market", but rather a "hasty response to a politically-charged situation"³⁷. Though Ottawa's Typographical Union, the first in the city, sent a letter of gratitude to Sir John A. Macdonald for the *Trade Unions Act*³⁸, the *Trade Unions Act* "did nothing to legalize the means which trade unionists could use to pursue the now clearly-legal purpose of combining to raise wages. Indeed, the accompanying *Criminal Law Amendment Act* did precisely the opposite",

³² Lipton, *supra* note 26, 57.

³³ Tucker, *supra* note 15, 42.

³⁴ Tucker, *supra* note 15, 38.

³⁵ Tucker, *supra* note 15, 40.

³⁶ Mark Chartrand, "The first Canadian trade union legislation: an historical perspective" (1984) 16:2 *Ottawa law review* 267, 268.

³⁷ Carman Baggaley, "A century of labour regulation in Canada" (1981) Economic Council of Canada, Working Paper 19 at 11.

³⁸ Forsey, *supra* note 23, 456.

defining even more activities resulting from trade disputes as crimes.³⁹ Regardless of its formal legal effects, the 1872 legislation came to be understood as legislation to legalize trade unions⁴⁰.

The 1880s were known as "the Great Upheaval", with 759 active labour unions⁴¹. The decade was also marked by a sharp increase in strike activity and experimentation with boycotts in an effort to pressure employers into recognizing unions⁴². Despite this increase, there was relatively little state coercion during this decade and, indeed, until the early twentieth century⁴³. Examining union action in the 1880s and legal responses to these actions, Tucker concludes that "in none of the cases we examined was the outcome totally one-sided", noting a "complex relation of the law to industrial conflict"⁴⁴. This "low level of direct state coercion starkly contrasts with the American experience" for the same time period⁴⁵.

According to Tucker, "by 1880 criminal law sanctions for simple breaches of contract by employees had been repealed, trade unions were no longer criminal conspiracies per se, much trade union activity was still criminalized - although there had been some relaxation"⁴⁶.

In 1898, the Supreme Court of Canada affirmed the legality of trade unions⁴⁷. In this case, an action for damages against the Union Ouvrière des Tailleurs de Pierre, the Plaintiff claimed that the union had illegally combined and had conspired to injure him by forming an association of tradesmen practicing the same trade as himself, thereby preventing him from freely exercising his

³⁹ Tucker, *supra* note 15, 41.

⁴⁰ Tucker, *supra* note 15, 42.

⁴¹ Palmer, *supra* note 14, 79.

⁴² Tucker, *supra* note 13, 278.

⁴³ Tucker, *supra* note 13, 279.

⁴⁴ Tucker, *supra* note 13, 329.

⁴⁵ Tucker, *supra* note 13, 330.

⁴⁶ Tucker, *supra* note 13, 283-284.

⁴⁷ *Perrault v. Gauthier*, (1898) 28 SCR 241 [*Perreault v. Gauthier*]; where Girouard J. stated: "The Criminal Code of 1892 has re-affirmed the legality of trade unions", 249.

trade and obtaining employment as a stone-cutter⁴⁸. Taschereau J., in an opinion reminiscent of early freedom of association cases under the *Charter*, stated that union members were merely exercising together rights that they held individually⁴⁹.

Formal legal recognition of trade union activity began in the twentieth century. Though union activity was merely tolerated rather than formally recognized in law, the 1901 report of the Canadian Labour Congress states that there were 871 labour organizations in Canada (447 in Ontario, 148 in British Columbia, 144 in Québec, 55 in Nova Scotia, 36 in Manitoba, 25 in New Brunswick and 15 in what is now Alberta and Saskatchewan)⁵⁰. If criminal barriers against union activity were indeed lifted by the early 1900s, the courts continued to apply common law doctrines which effectively restrained union activity, allowing employers for example to refuse to hire employees who were part of a combination⁵¹.

The legal framework for labour legislation in Canada was established by Federal Cabinet Order PC 1003 in Canada, based generally on the United States' *Wagner Act* of 1935⁵². The *National Labour Relations Act* of 1935 (usually referred to as the *Wagner Act*) has been called "the most radical piece of legislation ever enacted by the United States Congress"⁵³. Most employers in the United States of America were opposed to the passage of the *Wagner Act*⁵⁴. Scholars have speculated that the Act's "radical potential" produced fear of a loss of control over production⁵⁵,

⁴⁸ *Perrault v. Gauthier*, *supra* note 47,, 242.

⁴⁹ Taschereau: "Je renverrais cet appel sans hésitation. Il m'est impossible de voir la moindre illégalité ans la conduite des intimés (...). Or, les intimés dans l'occasion en question, n'ont fait qu'user d'un droit qu'ils partagent avec leurs concitoyens de toutes classes. Et ce droit, ils pouvaient s'entendre pour l'exercer tous ensemble, tout comme chacun d'eux pouvait le faire seul", *Perrault v Gauthier*, *supra* note 47, 244.

⁵⁰ Forsey, *supra* note 23, 465; Forsey, from whose article these numbers are drawn, notes that these numbers, though taken directly from the 1901 report, don't add up.

⁵¹ *Health Services*, *supra* note 2, par. 53.

⁵² John R Calvert, "Collective Bargaining in the Public Sector in Canada" (1990) 12:2 *Employee Relations* 19 at 20.

⁵³ Karl E Klare, "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941" (1978) 62:3 *Minnesota law review* 265 at 265.

⁵⁴ Klare, *supra* note 53, 266.

⁵⁵ Klare, *supra* note 53, 287.

as well as fear that the Act would encourage and promote radicalism and class conflict⁵⁶. Generally respected corporate employers engaged vast resources in antiunion campaigns “involving such tactics as company unionism, propaganda, espionage, surveillance, weapons stockpiling, lockouts, pooling agreements for the supply of strikebreakers, and terrorism”⁵⁷.

Klare identified six goals of the *Wagner Act*. First, the act aimed to subdue strikes and other forms of industrial unrest by encouraging collective bargaining⁵⁸. Second, it “sought to enhance collective bargaining for its own sake because of its presumed ‘mediating’ or ‘therapeutic’ effects”⁵⁹. Third, it aimed to improve liberty to contract by redressing the balance of bargaining power⁶⁰. Fourth, it aimed to protect the “free choice of workers to associate amongst themselves and to select representatives of their own choosing”⁶¹. Fifth, it sought to promote economic recovery and to increase the purchasing power of workers, thus preventing future depressions⁶². Sixth, though this conclusion is controversial, the Act sought to establish a form of industrial democracy⁶³. The concept of industrial democracy will be examined at length in Chapter 4.

In Canada, a resolution was adopted at the 1937 convention of the Toronto Labour Congress requesting that provincial labour bodies obtain *Wagner Act* protections⁶⁴. Parallel to this, an outburst of strikes in 1937 resulted in legislative initiatives to extend collective bargaining and

⁵⁶ Klare, *supra* note 53, 288.

⁵⁷ Klare, *supra* note 53, 287.

⁵⁸ Klare, *supra* note 53, 281.

⁵⁹ Klare, *supra* note 53, 282.

⁶⁰ *Ibid.*

⁶¹ Klare, *supra* note 53, 283.

⁶² *Ibid.*

⁶³ Klare, *supra* note 53, 284.

⁶⁴ Judy Fudge & Eric Tucker, *Labour Before the Law: The Regulation of Workers’ Collective Action in Canada, 1900-1948*, Canadian Social History Series (Toronto: University of Toronto Press, 2004) at 196.

freedom of association. However, the legislative response varied from province to province as labour regulation was recognized as a matter of provincial jurisdiction⁶⁵.

In both 1937 and 1938, the Canadian Commonwealth Federation (CCF) introduced bills to amend the *Criminal Code*, making it a crime for an employer to interfere with a worker's right to join a trade union. In 1938, the bill was debated with then Minister of Labour, Norman Rogers, stating that the "right of workers to form or to join trade unions has the full support of this government". Though the bill was defeated in 1937 and 1938, in 1939 it was incorporated as part of slew of *Criminal Code* amendments, making it a crime to refuse to employ someone for the sole reason that the person was a member of a lawful trade union⁶⁶.

Though most provinces had passed legislation inspired by the *Wagner Act* by the late 1930s, it was the Order in Council P.C. 1003 (the *Wartime Labour Relations Regulations*), adopted by the Federal government, which firmly implemented the principles of the *Wagner Act* in Canada⁶⁷. The Court described P.C. 1003 as a "compromise adopted to promote peaceful labour relations"⁶⁸.

PC 1003 was a compromise which came about grudgingly. As workers' bargaining power increased during the early war years, employers and government turned to coercive measures. When these measures failed, they turned to legal reform⁶⁹. The right to strike became a central compromise. In Hofeldian terms, it can be said that workers benefited from a freedom to strike since 1872 (that is to say that strikes were tolerated despite the lack of legal right to strike)⁷⁰. However, the right to strike became a trade-off when Canadian workers gained the formal right to

⁶⁵ Fudge and Tucker, *supra* note 64, 193.

⁶⁶ Fudge and Tucker, *supra* note 64, 225-226.

⁶⁷ *Health Services*, *supra* note 2, par. 58.

⁶⁸ *Health Services*, *supra* note 2, par. 60.

⁶⁹ Judy Fudge & Harry Glasbeek, "The Legacy of PC 1003" (1994) 3 *Canadian Lab & Emp LJ* 357 at 365.

⁷⁰ Judy Fudge & Eric Tucker, "The Freedom to Strike in Canada: A Brief Legal History History, Meaning, and Constitutionalization of a Right to Strike" (2009) 15:2 *Canadian Lab & Emp LJ* 333 at 334.

bargain collectively. Indeed, the *Wagner Act* Model of industrial relations, adopted through provincial legislation inspired by P.C. 1003, entailed substantial restrictions on the freedom to strike⁷¹. Notably, though strikes became illegal for the lifespan of the collective bargaining agreement, unions gained the right to enforce the terms of the agreement through legally binding arbitration⁷².

For all that it was a compromise, PC 1003 did represent “a fundamental and positive change in Canadian labour relations policy. For the first time in Canada's history, the government compelled employers to recognize and to bargain with duly elected representative and or trade unions⁷³”.

The *Wagner Act*-style of labour relations legislation only applied to the private sector⁷⁴. The enactment of legislation permitting collective bargaining in the public sector came later, with the exception of Saskatchewan (with a social democratic provincial government for much of the post-war period). Québec's Quiet Revolution in the 1960s served as an impetus for change in other provinces as it gave public-sector workers the same collective bargaining rights as private-sector workers by the mid-1960s. The Federal Government followed in 1967. Other provinces followed in the mid-to-late 1970s⁷⁵.

In addition to the enactment of *Wagner Act*-style legislation, the post-war period saw the development of the Rand Formula. In 1945, thousands of workers at Ford Windsor went on strike. A key union demand was union security, specifically that all workers be union members and that the employer deduct union dues from paycheques. Justice Ivan Rand was appointed as sole

⁷¹ Fudge and Tucker, *supra* note 70, 348.

⁷² Fudge and Tucker, *supra* note 70, 350.

⁷³ Fudge and Glasbeek, *supra* note 69, 359.

⁷⁴ Fudge and Glasbeek, *supra* note 69, 357–400.

⁷⁵ Calvert, *supra* note 52, 21.

arbitrator to settle the dispute⁷⁶. The strike ended with a compromise, now dubbed the Rand Formula. Rand J. denied the union's request for mandatory union membership but imposed the deduction of union dues from the paycheques of all workers, whether union members or not⁷⁷. The Rand Formula has since become "a bedrock principle of collective bargaining in Canada", embedded into legislation in all Canadian jurisdictions⁷⁸. The constitutional validity of the Rand Formula will be discussed in Chapter 1.

In 2007's *Health Services*, the majority of the Supreme Court summarized the evolution of the legal recognition of collective bargaining in the pre-Charter era as follows:

In summary, workers in Canada began forming collectives to bargain over working conditions with their employers as early as the 18th century. However, the common law cast a shadow over the rights of workers to act collectively. When Parliament first began recognizing workers' rights, trade unions had no express statutory right to negotiate collectively with employers. Employers could simply ignore them. However, workers used the powerful economic weapon of strikes to gradually force employers to recognize unions and to bargain collectively with them. By adopting the Wagner Act model, governments across Canada recognized the fundamental need for workers to participate in the regulation of their work environment. This legislation confirmed what the labour movement had been fighting for over centuries and what it had access to in the *laissez-faire* era through the use of strikes — the right to collective bargaining with employers⁷⁹.

Since 1982, Freedom of association is explicitly recognized in the *Charter*, though whether collective bargaining could be protected under such a general freedom of association was a topic of debate. In the early 1980s, trade unions largely ignored the *Charter* and its potential

⁷⁶ Debra Parkes, "The Rand formula revisited: union security in the Charter era" (2010) 61 *University of New Brunswick law journal* 223 at 223.

⁷⁷ Parkes, *supra* note 76, 224.

⁷⁸ *Ibid.*

⁷⁹ *Health Services*, *supra* note 2 par. 63.

implications for collective bargaining⁸⁰, though by the end of the decade, the trade union movement sought constitutional recognition for collective labour rights⁸¹.

In 1987, the Court handed down a trilogy of cases analyzing the application of section 2(d) of the *Charter* in matters relating to union activities⁸². The majority of the Supreme Court (in what shall be referred to as the *Alberta Reference*) stated that section 2(d) of the *Charter* did not protect a right to strike⁸³. A strongly worded dissent was penned by justices Dickson and Wilson⁸⁴.

Around the time of the *Alberta Reference*, unions discovered that the *Charter* could be used to undercut the collective bargaining system, by invoking individual rights at the expense of collective union rights. This led some to fear that the union movement would bear the brunt of "an individualist-oriented document affirming rights which are expressed in a very general language⁸⁵". Professors Fudge⁸⁶ and Etherington⁸⁷ wrote about the apparent duality of using the Courts to protect and to attack collective bargaining. Writing for the majority in *Lavigne*, judge Wilson concluded that there was no freedom from association⁸⁸.

⁸⁰ Joseph M Weiler, "The Regulation of Strikes and Picketing under the Charter", in J.M. Weiler and R.B. Elliot, eds., *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986), 212.

⁸¹ It is unclear how this shift occurred. A study on the use of *Charter* by the trade union movement is currently in development.

⁸² *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 at par. 326-327 [*Reference Re Public Service Employee Relations Act*].

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ Paul JJ Cavalluzzo, "Freedom of Association - Its Effect upon Collective Bargaining and Trade Unions" (1988) 13 *Queen's Law Journal* 267 at 267-268.

⁸⁶ Judy Fudge, "Labour, the New Constitution and Old Style Liberalism" (1988) 13 *Queen's Law Journal* 61.

⁸⁷ Brian Etherington, "Freedom of association and compulsory union dues: towards a purposive conception of a freedom to not associate" (1987) 19:1 *Ottawa Law Review* 1.

⁸⁸ *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 SCR 211, CanLII 68 (SCC) [*Lavigne*].

More than a decade later, in *Dunmore*, farm workers and union organizers challenged the exclusion of farm workers from protection under the *Ontario Labour Code*. The Court recognized that it was the first time it had examined the total exclusion of a category of workers from a statutory regime⁸⁹. In *Dunmore*, the Court highlighted at least two ways in which the legislation impaired freedom of association to a degree greater than necessary to achieve its objectives: first, by denying the right of association to every sector of agriculture, and second, by denying every aspect of the right, especially whatever protection was necessary to form and maintain employee associations, to agricultural workers⁹⁰. *Dunmore* was nothing short of a departure. Barrett and Oliphant point out that the Court's position in *Dunmore* was closest to Dickson's 'universalist' approach in the *Alberta Reference*, that is to say a vision of freedom of association which included protection of strike action, drawing heavily on international labour standards⁹¹.

Six years after *Dunmore*, the Court handed down *Health Services*. In 2002, the government of British Columbia adopted legislation without meaningful consultation with unions⁹², rendering invalid sections of existing collective agreements⁹³. Unions contested the constitutional validity of the legislation and, in 2007, the Supreme Court of Canada reexamined section 2(d) of the *Charter* in order to determine whether it protected the right to bargain collectively. In this decision, the Supreme Court granted a limited constitutional protection to collective bargaining⁹⁴. Finally, in early 2015, the Supreme Court handed down three decisions⁹⁵ on freedom of association which,

⁸⁹ *Dunmore c. Ontario (Procureur général)*, (2001) 3 R.C.S. 1016; CSC 94 [*Dunmore*].

⁹⁰ *Dunmore*, *supra* note 89, 1073-1074.

⁹¹ Steven Barrett & Benjamin Oliphant, "The Trilogy strikes back: reconsidering constitutional protection for the freedom to strike" (2014) 45:2 *Ottawa Law Review* 201 at 223.

⁹² *Health Services*, *supra* note 2, par. 7.

⁹³ *Health Services*, *supra* note 2, par. 11.

⁹⁴ *Health Services*, *supra* note 2, par. 92.

⁹⁵ *Mounted Police Association of Ontario v. Canada (Attorney General)*, (2015) 1 S.C.R. 3, 2015 SCC 1 [Mounted Police Association of Ontario]; *Meredith c. Canada (Procureur général)*, (2015) 1 R.C.S. 125; 2015 CSC 2 [Meredith]; *Saskatchewan Federation of Labour*, *supra* note 10.

again, changed the legal landscape surrounding section 2(d) of the *Charter*, leading to a constitutionally recognized right to strike⁹⁶.

Though it is true that the adoption of the *Wagner Act* model of industrial relations marked the beginning of the right to bargain collectively in Canada and that such a right has received constitutional protection since 2007, given the rise in informal work and so-called gig work, scholars have questioned the continued relevance of the *Wagner Act* model as a means of ensuring the right to bargain collectively and the right to strike⁹⁷. In addition, automation and technological changes have weakened the protection of constitutionally protected collective bargaining rights, including the right to strike⁹⁸.

Methodology

This thesis aims to explain the evolution of the constitutional protection of collective bargaining and the right to strike in Canada by analyzing the values used by the Court to justify these constitutional protections and the expanded interpretation of freedom of association. It also aims at ensuring a coherent interpretation of both rights moving forward.

⁹⁶ *Saskatchewan Federation of Labour*, *supra* note 10, par. 3.

⁹⁷ See: Yasaman Maozami, "UBER in the U.S. and Canada: Is the Gig-Economy Exploiting or Exploring Labor and Employment Laws by Going beyond the Dichotomous Workers' Classification" (2017) 24:2 U Miami Int'l & Comp L Rev 609. See also: Sara Slinn, "Exploring Sectoral Solutions for Digital Workers: The Status of the Artist Act Approach" (2021) 65:1 St. Louis University Law Journal.

⁹⁸ Andrea Talarico, "Technological strikebreaking A Case Study of Quebec's Anti-Scab Legislation" (2021) 76 (3) Relations Industrielles 587.

The methodology used in this thesis is one of moral reconstruction. In *The Global Model of Constitutional Rights*, Möller proposes a theory of constitutional rights based on moral principles⁹⁹. He refers to his theory as a reconstructive theory. The idea of moral reconstruction is not new (one can find a similar example in Kitcher's natural pragmatism¹⁰⁰), Möller innovates however in applying this approach to law.

According to Möller, a reconstructive theory "aims at providing a theory which (...) is morally coherent" but which need not be *the* moral best theory where the moral best is evaluated independently of the practice. In other words, "Of the several morally coherent theories, the reconstructive theory will pick the one which fits the practice better than any other coherent theory"¹⁰¹. A moral reconstructive approach aims at finding the moral value in practice¹⁰², an idea to which we shall return in Part II. Furthermore, a morally reconstructive theory can explain or interpret practice, but it can also "assess specific aspects of the practice" to correct departures from the reconstructive theory¹⁰³.

This thesis will use the values identified by the Supreme court of Canada that are said to serve as a moral foundation for the *Charter* to build the reconstructive theory. These values were referred to as "*Charter Values*" in *Health Services*.

⁹⁹ Kai Möller, *The Global Model of Constitutional Rights* (Oxford: Oxford University Press, 2012) 1.

¹⁰⁰ Kitcher, Philip, *The Ethical Project* (Cambridge, Mass: Harvard University Press, 2011).

¹⁰¹ Möller, *supra* note 99, 20.

¹⁰² Möller, *supra* note 99, 21.

¹⁰³ *Ibid.*

Overview of the theoretical framework

This thesis is grounded in the idea of the workplace as a site of unfreedom, specifically of republican unfreedom. Thus, the theoretical framework of the thesis can be qualified as neo-republican. The concepts of workplace government and how the nature of said government limits freedom from domination will be further explored in Chapter 2.

Contemporary neo-republican thought (which, for the remainder of this dissertation, will simply be referred to as republicanism or republican theory) traces its origins in Roman thought. The *liber* (or free man) of Rome was “someone who lived in his own domain” and who, within that domain, “lived *sui juris*, as it was put in Roman law” or “under his own jurisdiction”¹⁰⁴. Thus, one can understand that, much like liberalism (to which we shall return shortly), republicanism places its focus on freedom. Machiavelli drew on Roman republicanism in his *Discourses*¹⁰⁵. The revival of humanist ideals in the seventeenth century led English theorists to return to Machiavelli’s view of freedom (the *vivere libero*)¹⁰⁶ inspiring, according to Pettit, “a search for republican devices whereby a state might impose on people without compromising their freedom”¹⁰⁷. Ultimately

¹⁰⁴ Pettit, Philip. *On The People’s Terms*, 3rd ed (Cambridge: Cambridge University Press, 2014) at 17.

This thesis builds upon Pettit’s writings on republicanism. Professor Pettit “is L.S. Rockefeller University Professor of Politics and Human Values at Princeton University, where he has taught political theory and philosophy (...).He works in moral and political theory and on background issues in the philosophy of mind and metaphysics.” (“Philip Pettit”, online: <http://www.princeton.edu/~ppetit/>). He “has been engaged in a sustained effort to revive republicanism as an approach to political philosophy” (“On The People’s Terms: A Republican Theory and Model of Democracy” (May 1, 2013), online: *New Books in Philosophy*, <https://newbooksinphilosophy.com/philip-pettit-on-the-peoples-terms-a-republican-theory-and-model-of-democracy/>.)

¹⁰⁵ Pettit, *supra* note 104, 148.

¹⁰⁶ Quentin Skinner, *Liberty before liberalism* (Cambridge : Cambridge University Press, 1998) at 5.

¹⁰⁷ Pettit, *supra* note 104, 148.

however, according to Skinner, “the ideological triumph of liberalism left the neo-roman theory largely discredited”¹⁰⁸.

Pettit defines domination as “subjection to an arbitrary power of interference on the part of another - a *dominus* or master - even another who chooses not actually to exercise that power”¹⁰⁹. “What, then, asks Skinner, divides the neo-roman from the liberal understanding of freedom?”¹¹⁰. To this question, he proposes the following:

What the neo-roman writers repudiate *avant la lettre* is the key assumption of classical liberalism to the effect that force or the coercive threat of it constitute the only forms of constraint that interfere with individual liberty. The neo-roman writers insist, by contrast, that to live in a condition of dependence is in itself a source and a form of constraint¹¹¹.

Republicanism can be viewed as building upon the liberal tradition¹¹². Liberalism has also been considered an epistemic priority for republicanism, in that the knowledge of republican freedom supposes possession of the knowledge of liberal freedom¹¹³. Larmore argues that Pettit uses liberal principles to defend his view of freedom¹¹⁴, placing him squarely within “the very liberal tradition he imagines he has transcended”¹¹⁵. Again, according to Larmore, Pettit’s contribution lies not in a radical departure from liberal ideals, but on building upon those ideas forcing us to rethink that from which we are free¹¹⁶.

¹⁰⁸ Skinner, *supra* note 106, preface.

¹⁰⁹ Philip Pettit, “Keeping Republican Freedom Simple: On a Difference with Quentin Skinner” (2002) 30:3 Political Theory 339 at 340.

¹¹⁰ Skinner, *supra* note 106, 84.

¹¹¹ *Ibid.*

¹¹² Charles Larmore, “Liberal and Republican Conceptions of Freedom” in Daniel Weinstock and Christian Nadeau, eds, *Republicanism: history, theory and practice* (London: Routledge, 2004), 96 at 108.

¹¹³ Boudewijn de Bruin, “Liberal and Republican Freedom” (2009) 17:4 *The journal of political philosophy* 418.

¹¹⁴ Larmore, *supra* note 112, 107.

¹¹⁵ Larmore, *supra* note 112, 108.

¹¹⁶ Larmore, *supra* note 112, 112.

Pettit himself recognizes affinities between his own republicanism and liberalism, though he states that liberalism's "indifference" to domination has made the approach "tolerant of relationships in the home, in the workplace, in the electorate, and elsewhere, that the republican must denounce as paradigms of domination and unfreedom¹¹⁷". In short, classic liberalism is tolerant of unfreedom in the private sphere. This thesis will focus on employment relationships, generally considered to be private.

The liberal/republican dichotomy is not, however, absolute. Pettit himself recognizes that many left-of-center liberals would reject this distinction and "would see their liberalism as having more in common with the republican position than the libertarian" and would reject Pettit's taxonomy of "populism, republicanism, and liberalism" in favour of "populism, republicanism/liberalism, and libertarianism"¹¹⁸.

In short, the core of republican theory is the equal freedom of citizens, "in particular their freedom as non-domination - the freedom that goes with not having to live under the potentially harmful power of another"¹¹⁹. In republican theory, subordination, an essential component of the employment contract, is viewed as a form of domination¹²⁰. Freedom as non-domination is, in neo-republican thought, an ideal for the state to promote¹²¹ and, for neo-republicans, law is required to prevent both actual and potential domination¹²². Consequently, a neo-republican approach to labour law would primarily be concerned with ensuring the freedom of workers from the arbitrary power of their employer.

¹¹⁷ Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997), at 9.

¹¹⁸ *Ibid.*

¹¹⁹ Pettit, *supra* note 104, 5.

¹²⁰ Daire McCormack-George & Philip Pettit. "Republicanism and Labour Law: A Defence" (2021) NY: Social Science Research Network at 20.

¹²¹ Pettit, *supra* note 104, 1.

¹²² McCormack-George & Pettit, *supra* note 120, 30.

By adopting a neo-republican approach as opposed to a liberal approach, the Court avoided one of the limits of the *Charter*, specifically, its limited application. Equality and freedom in private relations fall outside of the scope of the *Charter* when the *Charter* is viewed through a liberal lens, that is to say when we consider the *Charter* as an instrument to protect individuals against state interference. Within the private sphere, or so the classical liberal would say, the individual is free from state interference and does not require *Charter* protection.

And yet, individuals are increasingly unfree in the private sphere as private corporations and employers assume roles traditionally associated with the state, such as security, surveillance, and cartography.

Indeed, for Anderson, the ideals of classical liberalism function in the absence of the "private government" of the workplace; they are not adapted to the realities of the industrial revolution¹²³. Indeed, a free market presupposes freedom to contract. Liberal egalitarians have used the inequality of bargaining power as justification for government intervention in the field of employment and labour, as employment contract cannot be said to be freely negotiated in the face of this inequality¹²⁴. However, the liberal focus on the free employment contract is inadequate, as "little negotiation takes place in most labor contracts. The typical worker, upon being hired for a job, is not given a chance to negotiate. Nor is she handed a contract detailing the terms of the deal. She is handed a uniform, or a mop, or a key to her office, and told when to show up. The critical terms are not even what is said, but what is left unspecified"¹²⁵. The

¹²³ Elizabeth Anderson, "When the market Was "left"" , in Elizabeth Anderson, ed, *Private Government: How Employers Rule Our Lives (and Why We Don't Talk about It)* (Princeton: Princeton University Press, 2017) 1.

¹²⁴ Elizabeth Anderson "Equality and Freedom in the Workplace: Recovering Republican Insights" (2015) 31(2) *Social Philosophy and Policy* 48 at 49.

¹²⁵ Anderson, *supra* note 124, 50.

conceptual focus on the voluntariness of the labour contract hides what actually happens within the employment relationship. According to Anderson:

the fundamental normative issues concerning the relation of freedom to equality at work do not lie in arguments about the voluntariness of the labor contract. They lie in arguments about the legitimate form of government of productive enterprises. Since the state is needed to set that form, when it does so by reserving specific rights to workers in labor contract, this does not amount to 'interference' in free labor markets¹²⁶.

In short, once we recognize that the employment relationship constitutes a form of private government, we can turn to examining legitimate forms of government for a productive enterprise¹²⁷. Republicanism is of particular relevance when examining labour law¹²⁸, as there is no reason why a legitimate social order that guarantees freedom ought not to extend to private relations. A republican model would confer upon workers a certain number of rights enabling them to participate in decisions affecting them¹²⁹.

The justification of legislative intervention in the field of labour and employment has traditionally fallen into two camps. The first rationale for intervention focuses on the inequality of bargaining power' discussed above, while the second, more economic in nature, focused on the establishment of a well-functioning labour market¹³⁰. Cabrelli and Zahn point out that labour law finds itself in both a conceptual and a normative crisis, unable to respond to increased vertical inequality. For this reason, they propose a civil republican justification for labour law¹³¹. Indeed,

¹²⁶ *Ibid.*

¹²⁷ Anderson, *supra* note 124, 51.

¹²⁸ The view of the dominated worker is not universally espoused. For example, Hasan argues for a structural view of domination where structures dominate the individual. In the case of the worker, it is labor law and not the employer who dominates. (Rafeeq Hasan, "Republicanism and Structural Domination" (2021) 102:2 Pacific philosophical quarterly 292.)

¹²⁹ David Cabrelli & Rebecca Zahn, "Civic Republican Political Theory and Labour Law" in Hugh Collins, Gillian Lester & Virginia Mantouvalou, eds, (*Philosophical Foundations of Labour Law*. Oxford: Oxford University Press, 2018) at 109-111.

¹³⁰ Cabrelli and Zahn, *supra* note 129, 104.

¹³¹ Cabrelli and Zahn, *supra* note 129, 104 and 109.

non-domination can provide both a "descriptively contoured account of and normative programme for labour law"¹³².

Anderson also considers republicanism as a theory of freedom of particular relevance to the workplace¹³³. The government of the workplace is "private, arbitrary, and largely unaccountable to the workers"¹³⁴. Indeed, if the early socialists defined early capitalism as a system of wage slavery however little actual interference workers suffered, it was owing to the fact that workers lived under constant exposure to potential arbitrary domination¹³⁵.

Structure of the thesis

The thesis is composed of two parts. The first part of the thesis will present an overview of the evolution of freedom of association in Canada, with a particular focus on the limits of a liberal approach to *Charter* rights when applied to collective labour rights. The second chapter will address the five points of tension inherent to a liberal approach to collective bargaining and will begin developing a republican response to each point.

The use of unwritten constitutional principles and "*Charter* values" in particular will be examined in the second half of the thesis. This second part will examine each value identified in *Health Services* in turn to reconstruct a moral theory that may guide Canadian courts moving forward. Each of the four values will be examined within the context of freedom of association and within

¹³² Cabrelli and Zahn, *supra* note 129, 104 and 109-110.

¹³³ Anderson, *supra* note 124. It is worth noting that not all neorepublicans agree that, beyond the systemic domination of extremely commodified workers due to unequal access to the means of production, all workers are in situations of interpersonal domination at the hand of a specific employer; see Fausto Corvino, "Republican Freedom in the Labour Market" (2019) 66:158 *Theoria* (Pietermaritzburg) 103 at 109.

¹³⁴ Anderson, *supra* note 124, 59.

¹³⁵ Pettit, *supra* note 117, 141.

the broader body of the Court's jurisprudence. From this study, a picture of freedom from domination and of relational equality emerges.

Part I– Beyond Liberalism: Republicanism, Egalitarianism, and the Evolution of Freedom of association in Canada

The *Charter* has been viewed as, in its essence, a traditional liberal bill of rights, even though the interpretation of *Charter* rights has evolved beyond their classical liberal scope. Consequently, as a result of this commitment to liberalism, interpretation of freedom of association has usually centered around its negative and individual dimensions (with particular focus on non-interference by the State), leading to tension within the jurisprudence of the Court and within scholarship.

Highlighting the “negative nature of *Charter* rights combined with a selective view of state action”¹³⁶, Petter (writing in the early days of the *Charter*) described the *Charter* as “a 19th century liberal document set loose on a 20th century welfare state”¹³⁷. For Sheppard, not only is the *Charter* of “liberal inspiration” but it “has instilled in the public an awareness of their individual rights that cannot be reversed”¹³⁸. Examining section 24(2) of the *Charter*, Parfett describes the development of the exclusionary rule in Canada as particularly reflective of the *Charter*’s liberalism where liberalism is characterized as the non-interference of the State within the sphere of the accused’s privacy¹³⁹.

The negative dimension of *Charter* rights, consistent with a liberal approach, was confirmed by the Court early in its *Charter* jurisprudence in *Southam*, where Dickson J. wrote:

The Canadian Charter of Rights and Freedoms is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and

¹³⁶ Andrew Petter, “Immaculate Deception: The Charter’s Hidden Agenda” (1987) 45:6 *Advocate* (Vancouver Bar Association) 857 at 858.

¹³⁷ Petter, *supra* note 136, 857.

¹³⁸ Terry Sheppard, “Liberalism and the Charter: Freedom of Association and the Right to Strike” (1996) 5 *Dalhousie Journal of Legal Studies* 117 at 120.

¹³⁹ Julianne Parfett, “A Triumph of Liberalism: The Supreme Court of Canada and the Exclusion of Evidence” (2002) 40:2 *Alberta Law Review* 299.

freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself and authorization for governmental action¹⁴⁰.

Some authors question this categorical classification, stating that though some sections of the *Charter*, such as section 2, are consistent with classical liberalism, other sections (particularly sections 35, Aboriginal and treaty rights, and 15, Equality rights) have been interpreted according to “a vision that is radically different from classical liberalism”¹⁴¹.

In examining the early jurisprudence of the Court on freedom of association, one can see the influence of classical liberal ideology on the interpretation of the *Charter*. Early rejection of a right to bargain collectively and of a right to strike centered around individualism (rights and freedoms are held by individuals) and a negative approach to freedom of association (the State cannot interfere in the creation of associations but has no obligation to protect their actions). Though liberalism can refer to a variety of beliefs, central to liberal thought is the idea that political structures should be based on the individual “with each individual possessing a maximum amount of liberty”¹⁴², and where liberty is defined by freedom from interference from the state¹⁴³.

Furthermore, one notes a rejection of equality arguments to focus on individual freedom. Indeed, the freedom of association cases have fallen short as an opportunity to reconcile equality rights within traditional views of freedom, except when using the value of equality rather than section 15 of the *Charter*. This approach changed somewhat in 2001 with *Dunmore*¹⁴⁴ and more significantly still in 2007 with *Health Services*¹⁴⁵.

¹⁴⁰ *Hunter et al v Southam Inc*, [1984] 2 SCR 145 at 156. [*Southam*]

¹⁴¹ John Carpay, “A Level Playing Field for Classical Liberalism: the Abolition of the Court Challenges Program Empowers a Diversity of Perspectives on Freedom and Equality” (2007) 16:3 Constitutional Forum 117 at 120.

¹⁴² Sheppard, *supra* note 138, 118.

¹⁴³ Sheppard, *supra* note 138, 119.

¹⁴⁴ *Dunmore*, *supra* note 89.

¹⁴⁵ *Health Services*, *supra* note 2.

The first chapter of the thesis will focus on the evolution of freedom of association in Canada, particularly as it relates to collective bargaining rights. Five distinct stages in this evolution will be highlighted with each stage corresponding to a specific point of tension typical of a liberal approach to *Charter* rights and freedoms. The second chapter seeks to provide a response to each point of tension identified in Chapter 1 by adopting a republican, rather than a liberal approach to freedom of association. This approach will be examined through the five points of tension identified in the first chapter.

Chapter 1 – The Evolution of Freedom of Association in Canada: A Review of the Literature

*Shall we still be slaves and work for wages
It is outrageous
Has been for ages
Oh, this earth by right belongs to toilers
And to spoilers of liberty
The master class is small
But they have lots of 'gall'
When we united to gain our right
If they resist we'll use our might
There is no middle ground
This fight must be one round
To victory, for liberty
Our class is marching on*

(Excerpt from *Workingman Unite* by Joe Glazer¹⁴⁶)

The interpretation of freedom of association under the *Charter* is marked by various points of tension inherent to the liberal origins of the *Charter*. These points of tension are apparent from the point of drafting onwards.

Leading up to the first referendum on the sovereignty of Québec, Prime Minister Trudeau promised a “renewed federalism” if the “no” side won¹⁴⁷. In May 1980, Trudeau’s justice minister, Jean Chrétien, took off on a tour of the provinces to promote the “people’s package” of constitutional reform, namely patriation, an amending formula, and a Charter of rights and freedoms¹⁴⁸ (hereinafter, the *Charter*). Early writing on freedom of association in the *Charter* highlighted a tension between individual autonomy and collectivism, particularly as the *Charter*

¹⁴⁶ Joe Glazer, *Workingman Unite* in “I Will Win, Songs of the Wobblies” (Collector Records, 1927). The author of this thesis wishes to thank Dr. Danielle Lussier for inspiring her to consider the role of popular music (or, in this case, of the songs historically sung by the labour movement) as reflections of the values that are central to this thesis. Consequently, each of the first four chapters will begin with a song quote corresponding to the *Charter* values of freedom, equality, democracy, and dignity. The fifth chapter will begin with a song reflective of the egalitarian goals and optimism of early twentieth-century trade unionism. Some songs have been selected from the songbooks of the International Workers of the World (the IWW, more colloquially referred to as the Wobblies), while others are contemporary.

¹⁴⁷ Adam D. Dodek, *The Charter Debates* (Toronto: University of Toronto Press 2018) at 25.

¹⁴⁸ Dodek, *supra* note 147, 25-26.

could relate to trade unionism¹⁴⁹. The trade union movement primarily expressed indifference towards the *Charter* at the time of its enactment¹⁵⁰, though a document published by the Confédération des syndicats nationaux states the union's firm opposition to the *Charter* as it embodied "des droits individuels du XIXe siècle¹⁵¹", echoing the view of the *Charter* as a liberal instrument of little use to collective actors. It has been said that, by ignoring the process of *Charter*-building, the labour movement "missed the boat"¹⁵².

On October 23rd 1980 and November 3rd 1980, motions were passed in the House of Commons and the Senate, respectively, to refer a draft of the *Charter* to a special joint committee¹⁵³. The Special Joint Committee of the Senate and the House of Commons (hereinafter the Joint Committee) operated from November 1980 to February 1981¹⁵⁴. It is worth noting that no trade unions participated in the hearings of the Joint Committee¹⁵⁵. Indeed, the Canadian labour movement ignored the entire process of adopting the *Charter*¹⁵⁶. It has been said that the Canadian Labour Congress felt that unemployment rates were too high to justify using limited union resources advocating "arcane" issues such as *Charter* rights¹⁵⁷.

On January 22nd 1981, MP Svend Robinson proposed adding "including the freedom to organize and bargain collectively" to the proposed text of section 2(d) of the *Charter* (freedom of

¹⁴⁹ Peter Gall, "Freedom of Association and Trade Unions: A Double-Edged Constitutional Sword, in J.M. Weiler and R.B. Elliot, eds., *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986) 244 at 245.

¹⁵⁰ Cavalluzzo, *supra* note 85, 267.

¹⁵¹ "XIXth century individual rights" (translation by the author); *NON au rapatriement unilatéral de la constitution* (1981), Montreal, Archives of the Confédération des syndicats nationaux, at 5.

¹⁵² Thomas A. McIntosh, "Labouring Under the Charter: Trade Unions and the Recovery of the Canadian Labour Regime", (1989) 58 Research and Current Issues, Industrial Relations Centre, Queen's University, 45.

¹⁵³ Dodek, *supra* note 147, 29.

¹⁵⁴ Dodek, *supra* note 147, 3.

¹⁵⁵ Canada, Parliament, "Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada" (1981) 32nd Parl, 1st Sess, No 43 at 76.

¹⁵⁶ McIntosh, *supra* note 152, 2.

¹⁵⁷ Weiler, *supra* note 80, 213.

association)¹⁵⁸. Robinson argued that this made explicit the implicitly recognized principles contained in the international instruments signed by Canada. Robinson also stated that this would, in no way, protect a right to strike¹⁵⁹. The proposed amendment was defeated¹⁶⁰ and the debate surrounding the proposition was brief. According to MP Bryce Mackasey, the amendment was not necessary as there was nothing preventing workers from organizing¹⁶¹, adding:

Although this is meant to help the trade union movement, I do not think it does, because most trade unionists I know of cherish their right to form their own union on a voluntary basis and then seek the right under the laws of their province, and to use that association for a specific legal purpose, maybe to bargain with their employers¹⁶².

Consequently, no mention of a right to bargain collectively was included in the *Charter*.

Before the enactment of the *Charter*, the connection between a constitutionally protected freedom of association and trade union rights had already been examined by the Judicial Committee of the Privy Council. In 1965, Trinidad enacted the *Industrial Stabilisation Act* which imposed a system of compulsory arbitration in lieu of a right to strike. As freedom of association and assembly were protected under the Trinidadian constitution, the Privy Council examined whether those freedoms conferred any other substantive rights other than that of forming an association. Applying the freedoms restrictively, the Judicial Committee of the Privy Council found that removing the right to strike did not make freedom of association devoid of all content¹⁶³.

Stating outright his support for collective bargaining as a valuable institution¹⁶⁴ (before the Supreme Court of Canada handed down its first decisions on the issue), Weiler expressed

¹⁵⁸ Canada, *supra* note 155, 68.

¹⁵⁹ Canada, *supra* note 155, 69.

¹⁶⁰ Canada, *supra* note 155, 76.

¹⁶¹ Canada, *supra* note 155, 71.

¹⁶² Canada, *supra* note 155, 72.

¹⁶³ *Collymore v. Attorney-General*, [1970] A.C. 538. [*Collymore*]

¹⁶⁴ Weiler, *supra* note 80, 211.

opposition to the inclusion of collective bargaining in section 2(d) of the *Charter* for three reasons. First, that the freedoms listed in section 2 of the *Charter* are aimed at political and democratic rights and should not include the protection of economic interests. Second, that the *Charter* should not protect a specific model of industrial relations. Third, that judges should not have to make policy judgments regarding the nature and scope of collective bargaining systems in the context of an evaluation under section 1 of the *Charter*¹⁶⁵.

Reflective of Weiler's scepticism, the Court's freedom of association jurisprudence, particularly as it relates to collective labour relations, has been marked by four dialogues which can be viewed as tensions inherent in the liberal paradigm of *Charter* Rights. The first dialogue (or point of tension) is between those embracing a collectivist view of freedom of association and those embracing an individualist approach to *Charter* rights; this dialogue was particularly prevalent in early writing. The second dialogue is between negative and positive conceptions of *Charter* rights. This dialogue was particularly marked by attempts at arguing for freedom from association as a protected *Charter* right but is also reflected in recent decisions on the extent to which a *Charter* freedom can give rise to the collective bargaining process as a right. Around the turn of the millennium, focus shifted to the uneasy relationship between freedom and equality; this third dialogue was precipitated by the Court's approach in *Dunmore*. Finally, after the recognition of a constitutional right to bargain collectively in 2007, scholarship was marked by a dialogue between those calling for greater judicial restraint and those defending the intervention of the Court. The final period of the Court's jurisprudence centers around the uneasy recognition of a constitutionally protected right to strike derived from the right to bargain collectively.

¹⁶⁵ Weiler, *supra* note 80, 223.

This chapter will examine how the Supreme Court of Canada's interpretation of section 2(d) of the *Charter* evolved between 1987 to 2015. During this evolution, the Court moved from an interpretation centered on the individual, along with an attitude of deference towards the legislator and a narrow view of freedom, to a broad and positive view of freedom centered on the idea of collective activity.

1.1 – The Early Jurisprudence: Individual Rights and Collective Activities

In the first years, trade unions largely ignore the *Charter* and its potential implications for collective bargaining¹⁶⁶. In 1987, the Court handed down a trilogy of cases analyzing the application of section 2(d) of the *Charter* in matters relating to union activities.

Following the adoption of legislation in Alberta which prohibited strikes and lockouts in the public sector and which imposed mandatory mediation and arbitration in lieu, the Lieutenant Governor in Council of Alberta referred questions to the Court of Appeal for an advisory opinion. The question asked to the Court of Appeal was as follows: "Are various legislative provisions imposing mandatory mediation and arbitration, and prohibiting strikes and lockouts, contrary to the Constitution Act, 1982?"¹⁶⁷. The majority of the Court of Appeal answered in the negative¹⁶⁸. This decision was then appealed before the Supreme Court. The majority of the Court (in what shall be referred to as the *Alberta Reference*) stated that section 2(d) of the *Charter* did not protect a right to strike, with judges Le Dain and McIntyre delivering concurring opinions¹⁶⁹.

Le Dain J. stated that the issue in the case was whether a particular activity was meant to be constitutionally protected (rather than left to be regulated by the legislator). Le Dain J. added that

¹⁶⁶ Weiler, *supra* note 80, 212.

¹⁶⁷ *Reference Re Public Service Employee Relations Act*, *supra* note 82, 326-327.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Reference Re Public Service Employee Relations Act*, *supra* note 82.

the rights for which constitutional protection was sought (collective bargaining and the right to strike) were “modern rights” which involved correlative duties on third parties. Thus, they could not be considered fundamental rights, but merely legislative creations involving a balancing of interests. Calling for judicial restraint, Le Dain J. concluded: “The resulting necessity of applying s. 1 of the *Charter* to a review of particular legislation in this field demonstrates in my respectful opinion the extent to which the Court becomes involved in a review of legislative policy for which it is really not fitted”¹⁷⁰.

McIntyre J.’s approach was most consistent with writing of the period, which focused on the individual protection conferred by *Charter* rights. He argued that “while a liberal and not overly legalistic approach should be taken to constitutional interpretation, the *Charter* should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time”¹⁷¹. He began his judgment noting that freedom of association is, at its core, a freedom belonging to individuals rather than to groups¹⁷² and that if the group’s activity was not, in itself, an individual right enshrined in the *Charter*, then the group cannot collectively claim that right through association¹⁷³. For McIntyre J., freedom of association signifies the freedom to associate for the purposes of activities which are lawful when performed alone¹⁷⁴, adding: “When this definition of freedom of association is applied, it is clear that it does not guarantee the right to strike. Since the right to strike is not independently protected under the *Charter*, it can receive

¹⁷⁰ *Reference Re Public Service Employee Relations Act*, *supra* note 82, par. 144.

¹⁷¹ *Reference Re Public Service Employee Relations Act*, *supra* note 82, par. 151.

¹⁷² *Reference Re Public Service Employee Relations Act*, *supra* note 82, par. 155.

¹⁷³ *Reference Re Public Service Employee Relations Act*, *supra* note 82, par. 157.

¹⁷⁴ *Reference Re Public Service Employee Relations Act*, *supra* note 82, par. 176. The approach to 2(d) as developed by McIntyre J. in the Trilogy was eventually rejected by the Court, though commentators have argued that it is an aspect of the Trilogy that should be maintained. See: Brian Langille, “The Trilogy Is a Foreign Country, They Do Things Differently There” (2013) 45 *Ottawa Law Review* 285.

protection under freedom of association only if it is an activity which is permitted by law to an individual”¹⁷⁵.

McIntyre J. concluded by noting that the right to strike was explicitly mentioned in the constitutions of France and Italy, while the Japanese constitution guarantees the rights of trade unions. He argued that this omission, “taken with the fact that the overwhelming preoccupation of the Charter is with individual, political, and democratic rights” (as opposed to economics rights) speaks against a constitutional protection of the right to strike¹⁷⁶.

Judges Dickson and Wilson dissented, with reasons given by Chief Justice Dickson. For Dickson C.J.:

Freedom of association is the cornerstone of modern labour relations. Historically, workers have combined to overcome the inherent inequalities of bargaining power in the employment relationship and to protect themselves from unfair, unsafe, or exploitative working conditions¹⁷⁷.

The dissenting judges examined four sources to determine whether section 2(d) of the *Charter* protected the freedom of workers to “act in concert and to bargain collectively”, namely Canadian jurisprudence on the constitutional scope of the freedom of association; the jurisprudence of the Judicial Committee of the Privy Council, United States cases on freedom of association, as well as international jurisprudence¹⁷⁸. Examining the *Collymore* decision (discussed previously), Dickson C.J. wrote that its application to the *Charter* was limited owing to the “different nature of the constitutional documents. The Constitution of Trinidad and Tobago is more similar in character

¹⁷⁵ *Reference Re Public Service Employee Relations Act*, *supra* note 82, par. 176-177.

¹⁷⁶ *Reference Re Public Service Employee Relations Act*, *supra* note 82, par. 180.

¹⁷⁷ *Reference Re Public Service Employee Relations Act*, *supra* note 82, par. 23.

¹⁷⁸ *Reference Re Public Service Employee Relations Act*, *supra* note 82, par. 25.

and function to the *Canadian Bill of Rights* than to the *Charter*, accepting, as it does, a "frozen rights" approach¹⁷⁹."

Putting aside, rather dismissively, both *Collymore*¹⁸⁰ and the applicability of American caselaw¹⁸¹, Justice Dickson examined divergent opinions¹⁸² from provincial appellate courts regarding freedom of association¹⁸³. Finally, he turned to international law. Examining the United Nations Covenants, as well as the declarations of the International Labour Organisation (ILO) and the decisions of the ILO's Committee on Freedom of Association, he wrote that the most salient feature of the international instruments ratified by Canada was the relationship between freedom of association and collective labour activities¹⁸⁴.

Returning again to the individual and collective dimensions of freedom of association, Dickson C.J. wrote that what section 2(d) of the *Charter* "seeks to protect is not associational activities *qua* particular activities, but the freedom of individuals to interact with, support, and be supported by, their fellow humans in the varied activities in which they choose to engage"¹⁸⁵. He added that "Certainly, if a legislature permits an individual to enjoy an activity which it forecloses to a collectivity, it may properly be inferred that the legislature intended to prohibit the collective activity because of its collective or associational aspect"¹⁸⁶". Dickson C.J. then acknowledged that certain activities did not have an individual equivalent, such as the right to strike. According to Dickson

¹⁷⁹ Reference Re Public Service Employee Relations Act, *supra* note 82, par. 33.

¹⁸⁰ Reference Re Public Service Employee Relations Act, *supra* note 82, par. 34.

¹⁸¹ Reference Re Public Service Employee Relations Act, *supra* note 82, par. 48 to 56.

¹⁸² *Dolphin Delivery Ltd. v. Retail, Wholesale & Department Store Union, Local 580* (1984), CanLII 750 (BC CA), in which the Court of Appeal finds that freedom of association does not include the protection of the purposes of the association or of the means of achieving those purposes; and, *Re Retail, Wholesale & Department Store Union, Locals 544, 496, 635 and 955 and Government of Saskatchewan* (1985), CanLII 184 (SK CA), 19 D.L.R. (4th) 609 in which the Court of Appeal comes to the opposite conclusion.

¹⁸³ Reference Re Public Service Employee Relations Act, *supra* note 82, par. 36.

¹⁸⁴ Reference Re Public Service Employee Relations Act, *supra* note 82, par. 72.

¹⁸⁵ Reference Re Public Service Employee Relations Act, *supra* note 82, par. 88.

¹⁸⁶ Reference Re Public Service Employee Relations Act, *supra* note 82,, par. 89.

C.J., the remaining question was “whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits”, adding that the “legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature”¹⁸⁷. Consequently, the dissenting judges concluded that section 2(d) of the *Charter* protected the right to strike.

The Court reached the same conclusion in *PSAC v. Canada* as it did in the *Alberta Reference*. In *PSAC v. Canada*, the Court examined whether provisions of the *Public Sector Compensation Restraint Act* violated section 2(d) of the *Charter*¹⁸⁸. In *RWDSU v. Saskatchewan*, unions had served strike notices on the major dairies in Saskatchewan. Before rotating strikes could begin, the provincial government enacted the *Dairy Workers (Maintenance of Operations) Act*, thereby prohibiting strikes in the industry. Examining whether this act violated section 2(d) of the *Charter*, the Court reached the same conclusion as in the *Alberta Reference* with the exception that justice Dickson C.J., whilst granting a constitutional protection to the right to strike, justified the act under section 1 of the *Charter*¹⁸⁹.

For Carter, the most troubling aspect of the Court’s early jurisprudence was McIntyre J.’s analysis whereby the *Charter* is viewed as guaranteeing individual rights¹⁹⁰. His main fear being that the individualistic approach would lead to contestations such as the *Lavigne* decision, still before Ontario Courts at the time of writing, which might be a bigger threat to union security than the Court’s decision in the trilogy¹⁹¹. In the trilogy, the Court would have merely confirmed “that the

¹⁸⁷ *Ibid.*

¹⁸⁸ *PSAC v. Canada*, [1987] 1 SCR 424, 1987 CanLII 89 (SCC). [*PSAC*]

¹⁸⁹ *RWDSU v. Saskatchewan*, [1987] 1 SCR 460, 1987 CanLII 90 (SCC). [*RWDSU*]

¹⁹⁰ Donald D. Carter, “Canadian Labour Relations Under the Charter, Exploring the Implications” (1988) 43:2 *Relations Industrielles* 305 at 307.

¹⁹¹ Carter, *supra* note 190, 308.

regulations of our industrial relations system belongs in the political arena where it has always been¹⁹²”.

A few years after *Alberta Reference*, protection of union representation under section 2(d) of the *Charter* was brought before the Supreme Court of Canada in *Professional Institute of the Public Service of Canada v. Northwest Territories*. The Professional Institute of the Public Service of Canada (PIPS) represented nurses until, owing to legislative change, they became employees of the territorial government and ceased to be represented by PIPS¹⁹³. The question asked to the Court was whether the relevant section of the *Public Service Act* violated section 2(d) of the *Charter*? Again, the Court was divided¹⁹⁴. Writing for the majority of the Court, Sopinka J. restated the Court's position that restrictions on the activities carried out by a union do not affect the individual ability to join a union¹⁹⁵. Referencing the *Alberta Reference*, he added that it was “no longer open to an association (union or otherwise) to argue that the legislative frustration of its objects is a violation of s. 2(d) if the restriction is not aimed at and does not affect the establishment or existence of the association -- unless the association's activity is another Charter-protected right, or an activity that may lawfully be performed by an individual”¹⁹⁶.

Dickson C.J., who penned the dissenting opinion in the *Alberta Reference*, wrote a concurring opinion and concluded that, “short of overruling the reasons of the majority of this Court ... this appeal must be dismissed with costs to the respondents¹⁹⁷.” A dissenting opinion was delivered by Cory J.. After reiterating the Court's position that freedom of assembly is an individual right¹⁹⁸, he added

¹⁹² Carter, *supra* note 190, 307.

¹⁹³ *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 SCR 367, 1990 CanLII 72 (SCC). [PIPSC]

¹⁹⁴ *Ibid.*

¹⁹⁵ PIPSC, *supra* note 193, 404.

¹⁹⁶ PIPSC, *supra* note 193, 405.

¹⁹⁷ PIPSC, *supra* note 193, 374.

¹⁹⁸ PIPSC, *supra* note 193, 379.

that the right of the individual to choose the association of his or her choice is of fundamental importance¹⁹⁹. Before concluding that there was a violation of section 2(d) of the Charter²⁰⁰, he wrote:

Whenever people labour to earn their daily bread, the right to associate will be of tremendous significance. Wages and working conditions will always be of vital importance to an employee. It follows that for an employee the right to choose the group or association that will negotiate on his or her behalf with regard to those wages and working conditions is of fundamental importance. The association will play a very significant role in almost every aspect of the employee's life at work, acting as advisor, as spokesperson in negotiations, and as a shield against wrongful acts of the employer. If collective bargaining is to function properly, employees must have confidence in their representative. That confidence will be lost if the individual employee is unable to choose the association²⁰¹.

The Court's view of freedom of association based around the individual is made clear from these early decisions, which reflected narrow individualism and a negative conception of freedom²⁰².

Freedom of association was also examined by the Court in combination with other rights, namely mobility rights (section 6) and freedom of expression (section 2(b)). Freedom of association was brought before the Supreme Court in conjunction with the Charter's mobility rights in two decisions, beginning with *Black v. Law Society of Alberta*²⁰³.

In *Black*, the Law Society of Alberta enacted two rules: the first prohibiting partnership with non-residents, and the other prohibiting lawyers from exercising in partnership in more than one firm²⁰⁴. The Court examined whether these rules violated both mobility rights under the *Charter* and freedom of association. The majority of the Court, finding that the rules violated mobility rights, did not examine freedom of association. McIntyre J., dissenting in part, found that the rules did

¹⁹⁹ *PIPSC, supra* note 193, 381.

²⁰⁰ *PIPSC, supra* note 193, 384.

²⁰¹ *PIPSC, supra* note 193, 380.

²⁰² Judy Fudge, "Labour is Not a Commodity: The Supreme Court of Canada and the Freedom of Association" (2004) 67 Sask L Rev 425 at 426.

²⁰³ *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591. [*Black*]

²⁰⁴ *Black, supra* note 203, 599.

not infringe upon mobility rights but did limit freedom of association, though the issue was not examined any further²⁰⁵.

In *Canadian Egg Marketing Agency v. Richardson*, the Court examined whether legislation preventing eggs produced in the Northwest Territories from being marketed interprovincially violated sections 2(d) and 6 of the *Charter*. The majority of the Court found that the legislation did not violate section 2(d) of the *Charter*²⁰⁶. Citing the *Alberta Reference*, the Court repeated that it was the associational aspect of activities and not the activities themselves that were protected under freedom of association²⁰⁷, regardless of whether the activity is foundational to the association or whether the association is foundational to the activity²⁰⁸.

Freedom of association was examined in its relation to freedom of expression in the contexts of prostitution and electoral spending in *Skinner* and *Libman*, respectively. In *Skinner*, the Court examined whether section 195(1)(c) of the *Criminal Code* violated freedom of expression and freedom of association under the *Charter*. The Court found nothing to justify a violation under section 2(d) as the activity in question (solicitation of a prostitute) was expressive rather than associative²⁰⁹. In *Libman*, the president of the Equality Party contested the constitutional validity of provisions of the *Referendum Act* on the basis that it infringed freedom of expression and freedom of association in three ways: by limiting contributions by individuals, by requiring that expenses be incurred through a national committee, and by limiting groups or individuals wishing to participate without supporting either option to unregulated expenses²¹⁰. By being forced to join an official committee to incur regulated expenses under the Referendum Act, Libman argued that

²⁰⁵ *Black*, *supra* note 203.

²⁰⁶ *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 SCR 157, 1998 CanLII 17020 (SCC). [*Richardson*]

²⁰⁷ *Richardson*, *supra* note 206, par. 105.

²⁰⁸ *Richardson*, *supra* note 206, par. 113.

²⁰⁹ *R. v. Skinner*, [1990] 1 SCR 1235, 1990 CanLII 107 (SCC).

²¹⁰ *Libman c. Québec (Procureur général)*, (1997) 3 R.C.S. 569; 1997 CanLII 326 (CSC) at 14. [*Libman*]

his freedom of assembly was limited²¹¹. In *Libman*, the Court found that there was a violation of freedom of expression but did not analyze the issue of freedom of association²¹². The question of freedom of association as it relates to electoral spending was brought before the Supreme Court again in 2004 in *Harper v. Canada*. However, in their analysis, the Court did not examine whether spending limits infringed section 2(d) of the *Charter*, focusing instead on freedom of expression²¹³.

Following the Trilogy, it was clear, for Arthurs, that the *Charter* could not and would not be used to protect collective bargaining. The main tool of the labour movement being politics, not litigation²¹⁴. Humorously using the Supreme Court's golf analogy²¹⁵, he wrote: "so far as I am concerned, rather like golf, Charter litigation is not a game for serious people, especially those involved in labour relations. Serious people like a little suspense in their games, but the outcome of Charter litigation over labour relations issues is drearily predictable²¹⁶." He added that never in over two hundred years of analyzing labour law issues had Anglo-Canadian courts created a right to be asserted by or on behalf of workers, adding, that nor "have they since the enactment of the *Charter*. Nor, I conclude, is it likely that they ever will²¹⁷".

McIntosh gave a further three reasons to explain an incompatibility of *Charter* rights with the needs of organised labour. First, *Charter* rights are conceived as individual, which is incompatible with the notion of collective rights. Second, the organised labour regime was born through political contestation whereas the rights regime was the creation of an interplay between political and

²¹¹ *Libman*, *supra* note 210, 27.

²¹² *Libman*, *supra* note 210.

²¹³ *Harper v. Canada (Procureur général)*, (2004) 1 R.C.S. 827; 2004 CSC 33.

²¹⁴ Harry Arthurs, "The Right to Golf: Reflections on the Future of Workers, Unions and the Rest of Us under the Charter" (1988) 13 Queen's Law Journal 17.

²¹⁵ In illustrating the parallel liberty standard, a reference to golf was made: "golf is a lawful but not constitutionally protected activity. However, the Legislature could not constitutionally provide that golf could be played in pairs but in no greater number, for this would infringe the Charter guarantee of freedom of association", *Reference Re Public Service Employee Relations Act*, *supra* note 82, par. 175.

²¹⁶ Arthurs, *supra* note 214, 18.

²¹⁷ *Ibid.*

economic actors. Third and most importantly, arguments based on rights cannot be settled in the political arena; they must be settled by the judiciary. Thus organised labour becomes removed from the process of determining its own rights²¹⁸. For McIntosh, the use of the *Charter* by the labour movement would first require the recognition of collective rights under the *Charter*²¹⁹, though a textual analysis of the *Charter* (according to McIntosh) reveals little in terms of evidence as to the existence of collective rights²²⁰.

The question of the collective dimension of collective bargaining and its (in)compatibility with individual rights and freedoms protected under the *Charter* shall be examined in the following chapter, specifically as it relates to liberal views of the *Charter*.

1.2 – The Freedom *From* Association Cases: The Negative Dimension of Freedom of Association

A second dialogue in the Court's jurisprudence emerged shortly after the *Alberta Reference*. In this second dialogue, the divided Court examined two questions tied to the negative dimension of freedom of association. The first question was whether freedom of association could be used negatively to protect against compulsory union membership or the payment of union dues. The second question, which remains somewhat unresolved in 2022²²¹, is whether one can derive a positive right from a negative freedom. This second question, intimately tied to the liberal reading of *Charter* freedoms, primarily emerged after 2007's *Health Services* decision.

²¹⁸ McIntosh, *supra* note 152, 37.

²¹⁹ McIntosh, *supra* note 152, 45.

²²⁰ McIntosh, *supra* note 152, 47.

²²¹ This debate marked the Quebec Court of Appeal decision regarding the unionization rights of managers, *Association des cadres de la Société des casinos du Québec c. Société des casinos du Québec*, 2022 QCCA 180 (CanLII) at par. 118-138. In this decision, the Court of Appeal put aside the determination of whether a negative freedom would confer a positive right. As the issue remains unresolved, it would be unsurprising for the Supreme Court of Canada to reexamine this issue in the next few years.

Around the time of the *Alberta Reference*, unions discovered that the *Charter* could be used to cut the underpinning of the collective bargaining system, through an invocation of individual rights at the expense of collective union rights. This led some to fear that the union movement would bear the brunt of "an individualist-oriented document affirming rights which are expressed in a very general language²²²". Professor Judy Fudge wrote about the apparent duality of using the Courts to protect and to attack collective bargaining in a 1988 article, stating that there was "nothing contradictory in organized labour asking the courts to restrain themselves from dismantling the collective bargaining regime, while at the same time asking them to defend that regime from legislative destruction when they have the power to do so"²²³. Freedom from association was examined by the Court in *Lavigne*, *Advance Cutting & Coring Ltd.*, and *Bernard*.

Lavigne was a teacher at a community college. Though represented by a union (the Ontario Public Service Employees Union or OPSEU), he never became a member of the union²²⁴. The collective agreement stated that union dues were to be used for the purposes determined by the union; OPSEU made several payments to causes to which *Lavigne* objected²²⁵. Thus, the Court was seized with the following question: Did the compulsory payment of union dues (because they could be used to contribute to political causes) violate sections 2(b) and 2(d) of the *Charter*²²⁶? According to Etherington, a "slim majority in *Lavigne* stumbled towards the recognition of some

²²² Cavalluzzo, *supra* note 85, 267-268.

²²³ Fudge, *supra* note 86, 81.

²²⁴ *Lavigne*, *supra* note 88, 222.

²²⁵ *Lavigne*, *supra* note 88, 223.

²²⁶ *Lavigne*, *supra* note 88.

concept of freedom *from* association under subsection 2(d)²²⁷, disagreeing only as to the scope of the freedom²²⁸. Writing for the majority, Wilson J. concluded that there was no freedom *from* association, dismissing the argument that if section 2(d) of the *Charter* protected freedom of association, it should also protect the converse (thereby creating a right not to associate)²²⁹.

Again, placing the emphasis on the individual, La Forest J. delivered a concurring opinion to the effect that forced union dues did violate section 2(d) of the *Charter* but that this violation was justified under section 1²³⁰. On freedom of association, he wrote that forced association was likely to “stifle the individual's potential for self-fulfillment and realization as surely as voluntary association will develop it”, adding that “society cannot expect meaningful contribution from groups or organizations that are not truly representative of their memberships' convictions and free choice”.²³¹ Interestingly, La Forest J. grounded his decision in the concepts of autonomy, self-actualisation and democracy²³², concepts which would be used to justify an expansion of section 2(d) in 2007.

In *Advance Cutting & Coring*, the requirement for construction workers in Québec to be affiliated with a union in order to obtain the necessary competency certificates was contested under section 2(d) of the *Charter*²³³. Writing for the majority, justice LeBel appeared to move away from the individualist approach to *Charter* freedoms when he wrote that the Court had “defined the right of association primarily as an instrument of self-fulfillment and realization of the individual, but it has

²²⁷ Brian Etherington, “Lavigne v. Opseu: moving toward or away from a freedom to not associate?” (1991) 23:3 Ottawa Law Review 533 at 536.

²²⁸ Etherington, *supra* note 227, 541.

²²⁹ *Lavigne*, *supra* note 88, 258-259.

²³⁰ *Canadian Charter*, *supra* note 1, Section 1 specifies that the rights and freedoms set out in the *Charter* are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. The test to determine whether such limits are reasonable was developed by the Court in *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103.

²³¹ *Lavigne*, *supra* note 88, 318.

²³² *Lavigne*, *supra* note 88, 322.

²³³ *R. c. Advance Cutting & Coring Ltd.*, (2001) 3 R.C.S. 209; 2001 CSC 70. [*Advance Cutting & Coring Ltd.*]

never forgotten that the act of association brings together, for some common purpose, a group of human beings, giving birth to a new relationship between themselves”²³⁴.

Nonetheless, the Court returned to its position in the *Alberta Reference*, particularly the insistence that association is a right belonging first to the individual, fostering “one’s self-fulfillment by allowing one to develop one’s qualities as a social being”²³⁵. Again, the Court referenced two values which would come to be used, seven years later²³⁶, to widen the scope of s. 2(d) of the *Charter*, namely democratic values²³⁷ and self-actualisation²³⁸.

Turning towards an analysis of *Lavigne*, the Court stated that the issue in *Advance Cutting & Coring* was more difficult than the application of the Rand formula in *Lavigne*. According to the Court, if the obligation to join a union “triggers the negative component and becomes a breach of s. 2(d)” then “it might well mean that all forms of compulsory membership provided for or even authorized under statute would be open to challenge under the *Charter*”. The Court adds that the “proper analysis of *Lavigne* and of the nature of the constitutional guarantee does not allow for such a result²³⁹”.

The Court reiterated that, in *Lavigne*, it had found that some forms of compelled association in the workplace could be compatible with *Charter* values, adding that “a negative right not to associate would not justify a finding of an infringement of the guarantee whenever a form of compelled association arises²⁴⁰”, adding that, in this case, no witness had testified that joining a union had “associated him with activities he disapproved of, or with opinions he did not share²⁴¹”.

²³⁴ *Advance Cutting & Coring Ltd.*, *supra* note 233, 308.

²³⁵ *Advance Cutting & Coring Ltd.*, *supra* note 233, 310.

²³⁶ *Health Services*, *supra* note 2.

²³⁷ *Advance Cutting & Coring Ltd.*, *supra* note 233, 325.

²³⁸ *Advance Cutting & Coring Ltd.*, *supra* note 233, 326.

²³⁹ *Advance Cutting & Coring Ltd.*, *supra* note 233, 324-325.

²⁴⁰ *Advance Cutting & Coring Ltd.*, *supra* note 232, 329.

²⁴¹ *Advance Cutting & Coring Ltd.*, *supra* note 233, 330.

In the specific case of the construction industry, the closed-shop model appeared necessary to foster union democracy while the legislative scheme still left individuals free to choose amongst various unions.

For l'Heureux-Dubé J., freedom of association did not have a corresponding freedom from association. In her concurring opinion, she further questioned the validity of defining the scope of s. 2(d) as the *Charter* as a protection aimed at the individual: "In society, there is an element of synergy when individuals interact. The mere addition of individual goals will not suffice. Society is more than the sum of its parts. Put another way, a row of taxis do not a bus make²⁴²."

Four judges recognized a freedom from association based in part on article 20 of the *Declaration of the United Nations*, with a particular emphasis placed on the choice of union²⁴³. For Bastarache J., writing for the dissenting judges, there is a negative aspect to section 2(d) of the *Charter*²⁴⁴ which has clearly been violated, as the legislative regime is a form of "government coercion"²⁴⁵. This insistence on freedom from government coercion can be viewed as an almost literal application of the liberal doctrine. Finally, it is interesting to note that the dissent also refers to *Charter* values, stating that the case "shows how interrelated *Charter* rights and values can be²⁴⁶".

Lavigne was widely viewed as a victory for the labour movement even though neither *Lavigne* nor *Advance Cutting* extended any new rights to unions or workers²⁴⁷.

Several years after *Advance Cutting & Coring*, freedom from association was again brought before the Court. In *Bernard*, an employee who was represented by a union but not a union

²⁴² *Advance Cutting & Coring Ltd.*, *supra* note 233, 265.

²⁴³ *Advance Cutting & Coring Ltd.*, *supra* note 233, 232.

²⁴⁴ *Advance Cutting & Coring Ltd.*, *supra* note 233, 238.

²⁴⁵ *Advance Cutting & Coring Ltd.*, *supra* note 233, 250.

²⁴⁶ *Advance Cutting & Coring Ltd.*, *supra* note 233, 247.

²⁴⁷ Susanna Quail "Labour Rights and Labour Politics under the Charter" (2013) 45 *Ottawa Law Review* 343 at 351.

member filed a complaint with the privacy commissioner when her employer gave her personal address to the union²⁴⁸. The Court found no basis for the employee's argument that the disclosure violated her *Charter* rights, particularly under section 2(d), stating that the "Court's decision in (*Lavigne*) is determinative and its conclusion is supported by the more recent decision in (*Advance Cutting & Coring*)"²⁴⁹.

Etherington highlighted two "predominant and opposing" approaches used by lower courts in analyzing freedom *from* association, with the prevalent position being a narrow interpretation, focused on the freedom of individuals to enter into "consensual arrangements", protecting "neither the objects of the association nor the means of attaining those objects". The opposing opinion favoured a "broad purposive" interpretation of freedom of association "aimed at fulfilling the purpose of the guaranteed freedom".

Again, skipping ahead chronologically to the Court's recognition of a constitutionally protected right to bargain collectively in 2007's *Health Services*, one sees the other facet of the negative/positive dichotomy in approaching *Charter* rights and freedoms. For Langille, the Court's recognition of a duty to bargain in good faith as part of freedom of association has also raised questions:

If you do say that there is a "duty" on employers to bargain in good faith with workers, and that as a result that workers have a "right" that employers do so, then you have to face up to the boldness of this idea. The boldness of that idea is quite obvious and it is this: if you are going to say that the Constitution protects collective bargaining, including a duty to bargain in good faith on the employer, as the Court held in *BC Health*, then you have to have an answer to the question which inevitably follows: "Well, alright, if I as an employer have a duty to bargain, with whom must I bargain-- i.e. to whom do I owe this duty?" This is one way of asking "if the employer has a duty, who has the right?" This is a question which cannot, legally, be left unanswered²⁵⁰.

²⁴⁸ *Bernard c. Canada (Procureur général)*, (2014) 1 R.C.S. 227; 2014 CSC 13. [*Bernard*]

²⁴⁹ *Bernard*, *supra* note 248, 37.

²⁵⁰ Langille, *supra*, note 174, 290.

Again, the positive and negative dimensions of rights and freedoms as reflective of two conflicting views of *Charter* rights will be discussed in the following chapter.

1.3 – The *Dunmore* Departure: Exploring the Role of Equality Rights

At the turn of the 21st century, the Court’s jurisprudence on freedom of association revealed an uneasy tension between freedom and equality rights. Nowhere was this more apparent than in 2001’s *Dunmore* decision and in the decisions that immediately followed it.

In 1999, the Court examined whether the exclusion of members of the RCMP from the application of the *Public Service Staff Relations Act* and the *Canada Labour Code* violated section 2(d) of the *Charter*²⁵¹. Writing for the majority, Bastarache J. states that it is because of the nature of freedom that section 2(d) of the *Charter* imposes a negative obligation on the government²⁵². RCMP members are thus protected against interference in the establishment of an employee association, but there is no corresponding right to be included in any specific legislative regime²⁵³, save for “exceptional circumstances which are not at issue in the instant case”²⁵⁴. Justices Cory and Iacobucci penned a dissenting opinion, referring again to the “fundamental purpose” of freedom of association, namely assisting “in the attainment of individual goals and individual self-fulfilment”²⁵⁵.

Shortly after, in *Dunmore*, farm workers and union organizers challenged the exclusion of farm workers from protection under the *Ontario Labour Code*. The Court recognized that it was the first time it had examined the total exclusion of a category of workers from a statutory regime²⁵⁶. For

²⁵¹ *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989, 1999 CanLII 649 (SCC). [*Delisle*]

²⁵² *Delisle*, *supra* note 251, 1015.

²⁵³ *Delisle*, *supra* note 251, 1006.

²⁵⁴ *Delisle*, *supra* note 251, 1019.

²⁵⁵ *Delisle*, *supra* note 251, 1036.

²⁵⁶ *Dunmore*, *supra* note 89.

the Court, the issue was broader than unionization, with the appellants highlighting a number of union activities that went beyond collective bargaining. According to the Court, these activities related to “workers’ empowerment and participation in both the workplace and society at large” and included the promotion of workplace democracy²⁵⁷ and protection from abuse. The Court also highlighted the “social and political functions of trade unions”, including providing access to courts, political education, and constitutional challenges brought by unions on behalf of workers²⁵⁸. Thus, the Court concluded, “these functions make it clear that the appellants direct their attack not at legislation restricting collective bargaining per se, but at legislation restricting the 'wider ambit of union purposes and activities'”²⁵⁹.

To establish the scope of section 2(d) of the *Charter*, Bastarache J. cited the *Alberta Reference*, then quoted Sopinka J. in *Professional Institute of the Public Service of Canada*, to state that there were four elements to section 2(d) of the *Charter*. First, it protects 'the freedom to establish, belong to and maintain an association'. Second, it does not protect a specific activity simply because that activity is an essential purpose of the association. Third, it protects 'the exercise in association of the constitutional rights and freedoms of individuals'. Fourth, it protects 'the exercise in association of the lawful rights of individuals'²⁶⁰. Bastarache J. called for a purposive approach to freedom of association, moving away from a purely individualist approach²⁶¹. For Bastarache J., the four-part test doesn't cover all activities protected by section 2(d) of the *Charter*. This will be the case for activities which are not explicitly protected under any other constitutional freedom and which cannot be understood as the lawful activities of individuals, owing to their fundamentally collective nature²⁶². He added that the concept of “association” inherently

²⁵⁷ The concept of workplace democracy will be referenced again by the Court in 2007's *Health Services* decision.

²⁵⁸ *Dunmore*, *supra* note 89, 1036.

²⁵⁹ *Ibid.*

²⁶⁰ *Dunmore*, *supra* note 89, 1037-1038.

²⁶¹ *Dunmore*, *supra* note 89, 1043.

²⁶² *Dunmore*, *supra* note 89, 1039.

“recognizes the qualitative differences between individuals and collectivities. It recognizes that the press differs qualitatively from the journalist, the language community from the language speaker, the union from the worker”²⁶³. Citing the principle elaborated by the Court in *Beaulac*²⁶⁴, that “a language community cannot be nurtured if the law protects only the individual’s right to speak”, the Court states that the law must protect the union activities which, although central to freedom of association, are “inconceivable” on the individual level²⁶⁵. The Court added that not all such activities fall under the ambit of freedom of association, citing the long-standing exclusion of the right to strike and to bargain collectively²⁶⁶.

For Bastarache J., the main issue in *Dunmore* was not the differential treatment of farm workers, but the government “creating conditions which in effect substantially interfere with the exercise of a constitutional right²⁶⁷”. Bastarache J. added that although this did not create a positive obligation for protective legislation, it did mean that “legislation that is underinclusive may, in unique contexts, substantially impact the exercise of a constitutional freedom²⁶⁸”.

As the *Dunmore* claim had been brought under both sections 2(d) and section 15(1) of the *Charter*, the Court moved on to this dimension of its analysis. According to the Court, “while it is generally desirable to confine claims of underinclusion to s. 15(1), it will not be appropriate to do so where the underinclusion results in the effective denial of a fundamental freedom such as the right of association itself”²⁶⁹.

²⁶³ *Dunmore*, *supra* note 89, 1041-1042.

²⁶⁴ *R. v. Beaulac*, [1999] 1 S.C.R. 768 at par. 20.

²⁶⁵ *Dunmore*, *supra* note 89, 1041-1042.

²⁶⁶ *Ibid.*

²⁶⁷ *Dunmore*, *supra* note 89, 1045.

²⁶⁸ *Dunmore*, *supra* note 89, 1046.

²⁶⁹ *Dunmore*, *supra* note 89, 1051.

Most surprisingly perhaps, Bastarache J. added:

As stated earlier in these reasons, it is only the right to associate that is at issue here, not the right to collective bargaining. Nevertheless, to suggest that s. 2(d) of the Charter is respected where an association is reduced to claiming a right to unionize would, in my view, make a mockery of freedom of association²⁷⁰.

In the examination under s. 1 of the *Charter*, the Court examined the purpose of the exclusion, namely the protection of the family farm²⁷¹. The Court however, did not find that the exclusion of agricultural workers was justified under s. 1²⁷². The Court added that there were at least two ways in which the legislation impaired freedom of association to a degree greater than necessary to achieve its objectives: first, by denying the right of association to every sector of agriculture, and second, by denying every aspect of the right, especially whatever protection was necessary to form and maintain employee associations, to agricultural workers²⁷³.

Dunmore was nothing short of a departure. Barrett and Oliphant point out that the Court's position in *Dunmore* was closest to Dickson's 'universalist' approach in the *Alberta Reference*, that is to say a vision of 2(d) which included protection of strike action, drawing heavily on international labour standards²⁷⁴. Professor Judy Fudge wrote:

Who would 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 rights²⁷⁵?

Dunmore departed from previous cases in three ways. First, the Court was strict in its application of the Oakes test, "despite the fact that the LRA was directed towards the protection of a

²⁷⁰ *Dunmore*, *supra* note 89, 1061.

²⁷¹ *Dunmore*, *supra* note 89, 1066-1067.

²⁷² *Dunmore*, *supra* note 89, 1069.

²⁷³ *Dunmore*, *supra* note 89, 1073-1074.

²⁷⁴ Barrett & Oliphant, *supra* note 91, 223.

²⁷⁵ Fudge, *supra* note 202, 428.

vulnerable group" (i.e., family farmers)²⁷⁶. Traditionally, when applying the Oakes test, a more relaxed standard of scrutiny has been used when the challenged legislation served to protect a vulnerable group, as was ostensibly the case with the family farm in *Dunmore*²⁷⁷. Second, the Court turned away from its "traditionally cautious approach" in labour relations matters where it has stated that labour issues were best dealt with by the legislatures and not the courts. Third, the remedy was a departure from the Court's approach in *Delisle* where it found that the *Charter* did not impose a positive obligation of protection or inclusion, save for exceptional circumstances²⁷⁸. This positive obligation was an obligation to ensure relation equality through association, a turn which will be examined further in the following chapter.

Nonetheless, the decision remained ambiguous, in that there remained significant inherent limitations, namely the explicit exclusion of collective bargaining from the scope of section 2(d) of the *Charter* and the fact that the governments obligation to protect freedom of association appears dependent on a finding that the workers themselves were extremely vulnerable²⁷⁹.

Implied in *Dunmore* was the idea that the "unequal access to associational rights fettered agricultural worker's ability to participate in Canadian society", an idea traditionally associated with the Court's section 15 (equality) jurisprudence rather than its section 2(d) jurisprudence²⁸⁰. Authors have argued that *Dunmore* created an overlap between section 2(d) and 15(1) of the *Charter*²⁸¹ with Langille going so far as to call it a section 15 case stuffed into the 2(d)

²⁷⁶ Caroline Libman, "The Dunmore Departure: Section 1 and Vulnerable Groups" (2003) 13 Forum Constitutionnel 30 at 30.

²⁷⁷ Libman, *supra* note 276, 31.

²⁷⁸ Libman, *supra* note 276, 30.

²⁷⁹ Fudge, *supra* note 202, 438.

²⁸⁰ Alex Kerner, "In Pursuit of Equality: Rethinking the Constitutionalization of Labour Rights After Fraser" (2013) 18 Appeal 81 at 90.

²⁸¹ Nitiya Iyer, "Disadvantaged Unions: The Merging of ss. 2(d) and 15(1) of the Charter" (2005) 12 Can Lab & Emp LJ 1.

framework²⁸². In *Dunmore*, the union presented itself as an equality-seeker under both sections 2(d) and 15(1) of the *Charter*. The combination of both sections, as invoked by a union representing disadvantaged workers, created a “constitutional platform upon which to advance their collective economic aims”²⁸³.

If equality was central to the union’s success in *Dunmore*, equality arguments (that is to say arguments under section 15 of the *Charter*) have had mitigated success both before and after. The Court’s reluctance to engage with equality as a right while using equality as a value to expand other rights and freedoms will be explored in Chapter four, particularly as this reluctance relates to the freedom of association jurisprudence. For the time being, suffice to say that the emphasis placed on freedom to the detriment of various forms of equality is consistent with a liberal reading of *Charter* rights.

1.4 – The Uncertain Recognition: Questioning the Role of the Court

In 2007, Arthurs wrote that the *Charter* only affected labour law “at the margins, and in unexpected and often negative ways”²⁸⁴ and that labour and social rights are mainly determined by what he calls the “real constitution”, i.e. our economic realities²⁸⁵. Referencing British union struggles in the last half of the twentieth century, Arthurs wrote:

It seems, then, that "real constitutions" are what we make them. If so, labour and social rights under Canada's "real constitution" will not be magically conjured up by a process of constitutional exegesis. They will be hard won, by workers' struggles on the shop floor and picket line, by political and social campaigns, and by clear thinking and effective advocacy²⁸⁶.

²⁸² Brian Langille, “The Freedom of Association Mess: How We Got into It and How We Can Get out of It” (2009) 54:1 McGill LJ 177 at 208.

²⁸³ Iyer, *supra* note 281, 5.

²⁸⁴ Harry Arthurs, “Labour and the ‘Real’ Constitution” (2007) 48 C de D 43 at 61.

²⁸⁵ *Ibid.*

²⁸⁶ Arthurs, *supra* note 284, 64.

In short, Arthurs echoed earlier authors for whom, writing at the time the *Charter* was enacted, trade union battles were not to be won through litigation or constitutional modification.

Before *Health Services*, the Court had shown timidity in the development of a "meaningful concept of freedom of association under the *Charter*" and an opposition to interfering with legislative choices²⁸⁷. Shortly after the *Alberta Reference*, Cavalluzzo wrote that courts were an inappropriate forum for deciding upon the "delicate balance of interests" inherent in collective bargaining²⁸⁸. The early cases were merely a re-affirmation that trade union rights were statutory rather than constitutional rights and could thus serve as protection against "s.2(d) attacks brought by employers and dissident employees against labour laws which provide for exclusive representation and union security clauses"²⁸⁹.

In 2002, the government of British Columbia adopted the *Health and Social Services Delivery Improvement Act* without meaningful consultation with unions²⁹⁰, rendering invalid sections of existing collective agreements²⁹¹. Unions contested the constitutional validity of the act and, in 2007, the Court reexamined section 2(d) of the *Charter* in order to determine whether it protected the right to bargain collectively. In this decision, the Court granted a limited constitutional protection to collective bargaining:

We conclude that s. 2(d) of the Charter protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of "collective bargaining", as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute, or guarantee access to any particular

²⁸⁷ Brian Etherington, "The B.C. *Health Services and Support* decision - the constitutionalization of a right to bargain collectively in Canada: where did it come from and where will it lead?" (2009) 30:4 Comparative Labor Law & Policy Journal 715 at 715.

²⁸⁸ Cavalluzzo, *supra* note 85, 272.

²⁸⁹ *Ibid.*

²⁹⁰ *Health Services*, *supra* note 2, par. 7.

²⁹¹ *Health Services*, *supra* note 2, par. 11.

statutory regime. What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals²⁹².

Four reasons were given by the Court to justify this position. First, the reasons invoked in the past to justify excluding collective bargaining activities no longer stood after *Dunmore*²⁹³. The Court furthered their departure from narrow individualism by stating that the “narrow focus on individual activities has been overtaken by *Dunmore*, where this Court rejected the notion that freedom of association applies only to activities capable of performance by individuals²⁹⁴.” The Court reiterated its initial position (see *Richardson*) that it is the associational aspect of activities and not the activities themselves that are protected, but reaffirmed the idea, first expressed in *Dunmore* that “equal legislative treatment of individuals and groups does not mean that the “associational aspect” of an activity has not been interfered with. A prohibition on an individual may not raise associational concerns, while the same prohibition on the collective may do so²⁹⁵.”

Regarding the second argument, the Court went over the history of collective bargaining in Canada before concluding that, by 1982, at the time when the *Charter* was enacted, “collective bargaining had a long tradition in Canada and was recognized as part of freedom of association in the labour context²⁹⁶.” Though this position is supported by the debates of the Special joint committee (see previously), the Court did not cite them. Etherington was highly critical of the Court’s choice to use the history of labour relations in Canada as a justification for an expanded scope of freedom of association, as prior to the adoption of a *Wagner*-model of industrial relations in the late 1940s, “the best our unions could hope for was a laissez-faire attitude that would allow them to use strikes to force employers to bargain” adding that even that power was limited by frequent recourse to injunctions by employers. Consequently, it would be a “hollow claim” to

²⁹² *Health Services, supra* note 2, par. 19.

²⁹³ *Health Services, supra* note 2, par. 22.

²⁹⁴ *Health Services, supra* note 2, par. 28.

²⁹⁵ *Health Services, supra* note 2, par. 32.

²⁹⁶ *Health Services, supra* note 2, par. 64.

assert that Canadian society recognized collective bargaining as a fundamental right or freedom and that “it is clearly not accurate to assert that it recognized a legal right to engage in collective bargaining that included an obligation on the part of employers also to engage in bargaining when approached by unions”²⁹⁷.

The second and third arguments used by the Court (namely that protection of collective bargaining is consistent with labour history and with Canada’s international obligations) will be analysed at length in a following chapter.

Perhaps most interestingly, the Court justified its position on underlying *Charter* values, namely human dignity, equality, liberty, personal autonomy and democracy²⁹⁸. According to the Court, the “right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work²⁹⁹”. Regarding equality³⁰⁰, the Court wrote that one “of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees”³⁰¹. As for democracy, collective bargaining “permits workers to achieve a form of workplace democracy” and ensures “the rule of law in the workplace”, by allowing workers to have a say in the rules governing a major aspect of their lives³⁰².

Carter foresaw this change in 1988. According to Carter, an examination of the *Charter* reveals the existence of a particular set of values, namely freedom of thought, belief, and expression, as

²⁹⁷ Etherington, *supra* note 287, 727.

²⁹⁸ *Health Services*, *supra* note 2, par. 81.

²⁹⁹ *Health Services*, *supra* note 2, par. 82.

³⁰⁰ It is worth noting that the Court rejected the claims under section 15 of the *Charter*. Academic commentators have argued that continued rejection of the equality argument has been a mistake that the Court has dragged since the Trilogy. See: Langille, *supra*, note 174.

³⁰¹ *Health Services*, *supra* note 2, par. 84.

³⁰² *Health Services*, *supra* note 2, par. 85.

well as life, liberty, and security of the person. Carter asks whether these "loftier values" could signify the emergence of a new form of industrial democracy in Canada³⁰³.

Finally, the Court was explicit in the fact that section 2(d) granted a limited right, namely the right to a process and not to a specific outcome. The Court added that it protected a general process and not a specific model of industrial relations³⁰⁴. With *Health Services*, "it is not only the existence of collective bargaining rights but their scope which the courts have undertaken to monitor for constitutional compliance³⁰⁵". According to the majority, the protection of section 2(d) was limited to protection against "substantial interference with associational activity, in accordance with a test crafted in *Dunmore*", though the "intent to interfere with the associational right of collective bargaining is not essential to establish breach of s. 2(d) of the Charter" so long as the effect of the law substantially interferes with collective bargaining or "collective pursuit of common goals"³⁰⁶. Most significantly, the majority adds, from this newly recognized right, a corresponding duty on employers; freedom of association "requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation"³⁰⁷.

Regarding substantial interference, the Court wrote:

To constitute *substantial interference* with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer that we call collective bargaining. Laws or actions that can be characterized as "union breaking" clearly meet this requirement. But less dramatic interference with the collective process may also suffice. In *Dunmore*, denying the union access to the labour laws of Ontario designed to support and give a voice to unions was enough. Acts of bad

³⁰³ Carter, *supra* note 190, 311-312.

³⁰⁴ *Health Services*, *supra* note 2, par. 91.

³⁰⁵ Beth Bilson, "Enter Stage Right: Players and Roles in a Post-B.C. Health Services World" (2009) 59 *University of New Brunswick Law Journal* 67 at 70.

³⁰⁶ *Health Services*, *supra* note 2, par. 90.

³⁰⁷ *Ibid.*

faith, or unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation may also significantly undermine the process of collective bargaining. The inquiry in every case is contextual and fact-specific. The question in every case is whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted³⁰⁸.

Health Services was met with some enthusiasm with Quail proclaiming that in the “context of the struggle between labour and capital, the courts seem to have shifted, ever so slightly, towards the side of labour³⁰⁹”. Commentators also expressed surprise:

The release of BC Health sent shockwaves through the legal community, not simply because the highest court had, in a rare move, overruled itself, but because of what it had now concluded. However, it is not surprising to learn that, in a democracy, there is a constitutional protection for human dignity and a prohibition against discrimination. Similarly, it should not have come as a shock to anyone in 2007 to be told that people have the right to come together to engage in meaningful discussions about their rights and responsibilities in a workplace. [...] [T]he Charter does not create rights; it protects them. Therefore, all that really happened in BC Health was that the Court clarified that the freedom of association included the right to engage in the process of collective bargaining. It was not a giant step forward to determine that the process of collective bargaining means bargaining in good faith³¹⁰.

Etherington argued in favour of the Court’s position in *Health Services*, denying excessive interventionism from the Court. He stated that the Court was “driven to take some action to constitutionalize a right to collective bargaining by the actions of conservative governments in enacting increasingly aggressive measures to strip or deny collective bargaining rights³¹¹”, adding that the rise of neoliberalism and conservative governments in the early twenty-first century eroded union trust in the legislatures and pushed them towards the courts³¹².

³⁰⁸ *Health Services*, *supra* note 2, par. 92.

³⁰⁹ Quail, *supra* note 247, 346.

³¹⁰ Paula Knopf, “The ‘Supreme Court of Canada’s Labour Law Trilogy’: Its Legacy and Implications on the Future” (2013) 45 *Ottawa Law Review* 265 at 269.

³¹¹ Etherington, *supra* note 287, 747.

³¹² Etherington, *supra* note 287, 748.

McEvoy examined the impact in the 18 months immediately following *Health Services*. The author found thirty-eight decisions referencing *Health Services*, but only four in which *Health Services* was given more than a passing reference³¹³. In short, the author found the immediate impact to be somewhat limited.

The Court's reasoning in *Health Services* lead Langille to call the state of freedom of association jurisprudence "a mess"³¹⁴, pointing out inconsistencies with section 15 of the *Charter*, a misunderstanding of Canadian labour law history, a misunderstanding of Canada's international obligations, an unhelpful insistence of the "collective" dimension of labour rights, and the obscuring of any distinction between freedoms and rights³¹⁵.

Perhaps the sharpest criticism of *Health Services* came from Rothstein J. in his dissenting opinion in *Fraser*. In *Fraser*, as a response to the Court's decision in *Dunmore*, the government of Ontario adopted the *Agricultural Employees Protection Act*³¹⁶. This Act was contested before the Ontario Courts and the Supreme Court of Canada was tasked with answering whether section 2(d) of the *Charter* required that the government of Ontario guaranteed a certain form of collective bargaining rights for agricultural workers³¹⁷.

In a strongly worded dissent³¹⁸, Rothstein J. expressed disagreement with the Court's finding in *Dunmore* that collective bargaining is constitutionally protected under s. 2(d) of the *Charter*³¹⁹. According to Rothstein J., *Health Services* "strayed significantly from earlier sound precedents

³¹³ John P. McEvoy, "B.C. Health Services: The Legacy After 18 Months" (2009) 59 U.N.B.L.J. 48.

³¹⁴ Langille, *supra* note 282, 178.

³¹⁵ Langille, *supra* note 282, 178-179.

³¹⁶ *Ontario (Procureur général) c. Fraser*, (2011) 2 R.C.S. 3; 2011 CSC 20 at par. 1. [*Fraser* (2011)]

³¹⁷ *Fraser* (2011), *supra* note 316.

³¹⁸ Another dissenting opinion was penned by Justice Abella who, while fully endorsing the majority's position regarding the scope of section 2(d) of the *Charter* and the interpretation of *Health services*, disagreed with the conclusion on the constitutionality of the contested legislation.

³¹⁹ *Fraser* (2011), *supra* note 316, par. 124.

with respect to the purpose of *Charter* protection for freedom of association", particularly as section 2(d) was a protection for individuals and was never meant to secure outcomes³²⁰. Again, according to Rothstein J., it was the "shift from protecting what is necessary to exercise the freedom to associate, to constitutionalizing the goals of an association - that is, negotiating a collective agreement - which results in *Health Services* being inconsistent with the ruling in *Dunmore*³²¹". Rothstein listed five reasons why the Court was wrong in *Health Services*. First, it assigned a collective dimension to an individual right. Second, it assigned a positive dimension to a negative right³²². Third, *Health Services* privileged certain forms of association over others. Fourth, *Health Services* raised contracts (collective bargaining agreements) over statutes. Finally, *Health Services* deviated from a long-standing principle of judicial deference³²³.

Rothstein's analysis on the freedom-rights distinction (or the negative vs positive freedom distinction) is particularly worthy of note and echoes the more Hohfeldian approach referenced by Langille. According to Rothstein J., though it is "possible to describe a freedom in terms of rights", this only serves "to blur the distinction between what is being protected in either case". Do freedoms protect "a sphere of autonomy, an area within which the individual will encounter no obstacles", rights exist "to provide an individual with a claim to some specific thing"³²⁴. According to Rothstein, collective bargaining could not be considered a derivative right³²⁵, as by "its very

³²⁰ *Fraser (2011)*, *supra* note 316, par. 144.

³²¹ *Fraser (2011)*, *supra* note 316, par. 156.

³²² The author notes here that the degree to which a *Charter* freedom, particularly freedom of association, can serve to protect specific positive rights has not been resolved by the Courts in 2022. This was highlighted by the Québec Court of Appeal in *Association des cadres de la Société des casinos du Québec c. Société des casinos du Québec*, *supra* note 221, further discussed in Chapter 5.

³²³ *Fraser (2011)*, *supra* note 316, par. 177.

³²⁴ *Fraser (2011)*, *supra* note 316, par. 191.

³²⁵ *Fraser (2011)*, *supra* note 316, par. 197.

nature, a derivative right must be necessary to the exercise of a freedom, not constitute a stand-alone right by itself³²⁶.

The majority judges in *Fraser* did not find that the AEPA violated section 2(d) of the Charter³²⁷, as section 2(d) guarantees neither a particular model of collective bargaining, nor a particular outcome³²⁸. Reiterating the Court's position in *Health Services*, justices McLachlin and LeBel wrote that "what s. 2(d) protects is the right to associate to achieve collective goals. Laws or government action that make it impossible to achieve collective goals have the effect of limiting freedom of association by making it pointless"³²⁹. Responding to justice Rothstein's critique of *Health Services*, the judges wrote:

Our colleague appears to interpret *Health Services* as establishing directly or indirectly a Wagner model of labour relations. The actual holding of *Health Services*, as discussed above, was more modest, *Health Services* affirms a derivative right to collective bargaining, understood in the sense of a process that allows employees to make representations and have them considered in good faith by employers, who in turn must engage in a process of meaningful discussion³³⁰.

For McLachlin J. and LeBel J., Rothstein's critique founded on the strictly individual dimension of 2(d) was unfounded as, citing Bastarache J. in *Dunmore*, "certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning³³¹." Furthermore, the judges repeated that the majority decision in *Health Services* framed s. 2(d) as an individual right, namely the rights of employees and union members³³², ending their analysis as follows:

³²⁶ *Fraser (2011)*, *supra* note 316, par. 195.

³²⁷ *Fraser (2011)*, *supra* note 316, par. 113.

³²⁸ *Fraser (2011)*, *supra* note 316, par. 91.

³²⁹ *Fraser (2011)*, *supra* note 316, par. 45-46.

³³⁰ *Fraser (2011)*, *supra* note 316, par. 54.

³³¹ *Fraser (2011)*, *supra* note 316, par. 63.

³³² *Fraser (2011)*, *supra* note 316, par. 64.

In summary, *Health Services* was consistent with the previous cases on the issue of individual and collective rights. It recognized, as did previous jurisprudence, that s. 2(d) is an individual right. But it also recognized, as did previous cases, that to meaningfully uphold this individual right, s. 2(d) may properly require legislative protection of group or collective activities³³³.

As for Rothstein J.'s distinction between positive and negative rights, the majority rejected this distinction outright: "This bright line between freedoms and rights seems to us impossible to maintain. Just as freedom of expression implies correlative rights, so may freedom of association. The freedom to do a thing, when guaranteed by the Constitution interpreted purposively, implies a right to do it³³⁴." The majority was clear that the purposive interpretation of a freedom may require positive government action³³⁵. As in previous cases, an equality claim was raised and ignored.

Up to this point, a significant portion of the case law had turned (even implicitly) on defining the 'meaningful' scope of section 2(d) of the *Charter*³³⁶, with the jurisprudence revealing differing conceptions of the purpose of freedom of association thereby making identifying the meaningful scope rather difficult³³⁷. The multiple judgments in *Fraser* reflect this difficulty³³⁸. Use of the *Wagner* model to circumscribe the meaningful scope has been criticized, seeing that the *Wagner* Act did not develop out of a desire to protect or promote freedom of association, but rather out of a desire to balance competing interests³³⁹.

³³³ *Fraser (2011)*, *supra* note 316, par. 65.

³³⁴ *Fraser (2011)*, *supra* note 316, par. 67.

³³⁵ *Fraser (2011)*, *supra* note 316, par. 70.

³³⁶ Richard Ellis, "Testing the Boundaries of Institutional Legitimacy: The Courts' Delicate Dance of Defining a 'Meaningful' Freedom of Collective Bargaining" (2014) 33 NJCL 95 at 98.

³³⁷ Ellis, *supra* note 336, 99.

³³⁸ Ellis, *supra* note 336, 101.

³³⁹ Ellis, *supra* note 336, 105.

Braley considered *Fraser* “unanticipated” in light of *Health Services*³⁴⁰, calling it “significant back-peddalling”³⁴¹. Braley denied that the *Wagner* model should be considered a particular statutory regime (as per the Court’s majority reasoning in *Fraser*)³⁴², referring to it as a “set of provisions deemed necessary to make collective bargaining meaningful”³⁴³. However, *Fraser* can also be viewed as a step away from the dominance of the *Wagner* model of labour relations, possibly opening up the possibility of other forms of “employer-employee negotiations, as long as those negotiations are ‘meaningful’ and are conducted by the parties in ‘good faith’”³⁴⁴.

Doorey had proposed that *Health Services* had already opened the door to a modification of the Wagnerian model, proposing a model of *graduated* trade unionism³⁴⁵. Owing to the decline of trade union representation in the private sector, only a small proportion of Canadian private-sector workers would benefit from the “new” constitutional protection. Thus, a graduated freedom of association model would allow workers not represented by a majority union to associate and make collective representations through vehicles other than *Wagner*-style trade unions, thus guaranteeing the minimum that has become constitutionally protected through *Health Services*³⁴⁶. Mandatory work councils³⁴⁷, he argues, would be a step towards this alternative³⁴⁸.

³⁴⁰ Alison Braley, “‘I Will Not Give You a Penny More Than You Deserve’: *Ontario v. Fraser* and the (Uncertain) Right to Collectively Bargain in Canada” (2012) 57:2 McGill LJ 351 at 353.

³⁴¹ Braley, *supra* note 340, 354.

³⁴² Braley, *supra* note 340, 362.

³⁴³ Braley, *supra* note 340, 364.

³⁴⁴ Richard Chaykowski, “Canadian Labour Policy in the Aftermath of *Fraser*” (2011) 16 Can Lab & Emp LJ 291 at 300.

³⁴⁵ David Doorey, “Graduated Freedom of Association: Worker Voice Beyond the Wagner Model” (2013) 38 Queen’s Law Journal 511.

³⁴⁶ Doorey, *supra* note 345, 514.

³⁴⁷ Work councils are bipartite or tripartite bodies, akin to boards of direction and will be further discussed in Chapter 5.

³⁴⁸ Doorey, *supra* note 345, 520.

1.5 – The Right to Strike

Up to this point, the Court appears to have been inconsistent in its application of a standard to define the scope of 2(d) of the *Charter*. In the *Alberta* reference, McIntyre J. developed the parallel liberty approach to section 2(d) which served to protect certain activities done in concert³⁴⁹. In *Dunmore*, Bastarache J. relied on Dickson C.J.'s dissent to find that exclusive reliance on the parallel liberty standard was unduly restrictive for uniquely collective activities³⁵⁰. *Health Services* constitutionalized a right to collective bargaining “unmoored from any generally applicable definition of freedom of association”, making it unclear to whom the duty to bargain in good faith was owed³⁵¹. *Fraser* has been said to have done “little to resolve confusion over the applicable standard”³⁵², creating an indefensible unpredictability regarding the meaning of section 2(d)³⁵³.

Langille argued that the Court was correct in *Health Services* to overturn the *Alberta Reference* but that its reasoning was incorrect. According to Langille, there was no reason to abandon the parallel liberty standard³⁵⁴; the court defined freedom of association correctly in the *Alberta Reference* though it was unable to apply it³⁵⁵:

The Court disregarded the plain fact that an individual is legally free, subject to statutory minimum terms, to bargain for the terms of an employment contract and to refuse to go to work until these terms have been agreed upon. These notions are very basic; when we add them to the idea that freedom of association means the freedom to do in combination what one is free to do alone, we arrive at the conclusion that there is a right to collective bargaining and a right to collectively refuse to work until the terms of the bargain are settled (that is, to strike)³⁵⁶.

³⁴⁹ Benjamin Oliphant, “Exiting the Freedom of Association Labyrinth: Resurrecting the Parallel Liberty Standard under 2(d) & Saving the Freedom to Strike” (2012) 70 U of T Fac L Rev 36 at 44.

³⁵⁰ Oliphant, *supra* note 349, 46.

³⁵¹ Oliphant, *supra* note 349, 49.

³⁵² Oliphant, *supra* note 349, 50.

³⁵³ Oliphant, *supra* note 349, 54-55.

³⁵⁴ The parallel liberty standard refers to the freedom to do with others what one is free to do alone.

³⁵⁵ Langille, *supra* note 282, 183.

³⁵⁶ *Ibid.*

An argument in favour of the parallel liberty standard is that it is a negative entitlement³⁵⁷ (protection from interference when performing collectively that which one is protected in doing individually). Arguing that section 2 of the *Charter* primarily protects negative freedoms (making an analogy with freedom of religion)³⁵⁸, Oliphant stated that the parallel liberty standard is consistent with the Courts' approach to other fundamental freedoms "insofar as it may at times allow legislative encroachment on individual freedoms under section 1 but rarely, if ever, require it under section 2 in pursuit of extrinsic goods (e.g., unionization, economic equality, particularly meaningful expression). Such is the nature of fundamental freedoms as they have traditionally been understood-they generally require non-interference by the state"³⁵⁹. A criticism of the parallel liberty standard is that it leaves union activities unprotected. Oliphant argued that it protects all collective activities that an individual is free to do alone, referencing McIntyre J's 'right to golf' analogy. Thus, in a labour context, it would protect the freedom of individuals, acting collectively, to refuse to work without a contract³⁶⁰.

In early 2015, the Court handed down three decisions on freedom of association which, again, changed the legal landscape surrounding section 2(d) of the *Charter*.

In *Mounted Police Association of Ontario*³⁶¹, the Court reversed the position previously expressed in *Delisle*. As previously stated, members of the RCMP have been prevented from unionizing and have been excluded from the scope of the *Public Service Labour Relations Act* since its

³⁵⁷ Oliphant, *supra* note 349, 67.

³⁵⁸ Oliphant, *supra* note 349, 68.

³⁵⁹ Oliphant, *supra* note 349, 72.

³⁶⁰ Oliphant, *supra* note 349, 62.

³⁶¹ *Mounted Police Association of Ontario*, *supra* note 95.

enactment in the 1960s³⁶². The Court, once again, examined whether this was a violation of section 2(d) of the *Charter*.

The majority began with a summary of its caselaw under section 2(d), beginning with the 1987 Trilogy and ending with *Fraser*³⁶³. According to the Court, the jurisprudence under s.2(d) established that freedom of association must be interpreted in a broad and generous fashion, consistent with the Court's approach to other basic rights connected with human activities and needs³⁶⁴. The Court adds that freedom of association "is not derivative of these other rights. It stands as an independent right with independent content, essential to the development and maintenance of the vibrant civil society upon which our democracy rests³⁶⁵". The Court identified the three approaches previously identified by Dickson C.J. in the *Alberta Reference*, namely the constitutive, derivative, and purposive approaches. The constitutive approach protects only the right to belong to or to form an association; the derivative approach additionally protects the right to associational activity that specifically relates to other constitutional freedoms; and the purposive approach which 'defines the content of s.2(d) by reference to the purpose of the guarantee of freedom of association'³⁶⁶. According to the majority, a purposive approach "recognizes that freedom of association is empowering, and that we value the guarantee enshrined in s.2(d) because it empowers groups whose members' individual voices may be all too easily drowned out³⁶⁷", and concluding as follows:

Section 2(d), we have seen, protects associational activity for the purpose of securing the individual against state-enforced isolation and empowering individuals to achieve collectively what they could not achieve individually. It follows that the associational rights

³⁶² *Mounted Police Association of Ontario*, *supra* note 95, par. 1-2.

³⁶³ *Mounted Police Association of Ontario*, *supra* note 95, par. 30-46.

³⁶⁴ *Mounted Police Association of Ontario*, *supra* note 95, par. 47-48.

³⁶⁵ *Mounted Police Association of Ontario*, *supra* note 95, par. 49.

³⁶⁶ *Mounted Police Association of Ontario*, *supra* note 95, par. 51-54.

³⁶⁷ *Mounted Police Association of Ontario*, *supra* note 95, par. 55.

protected by s.2(d) are not merely a bundle of individual rights, but collective rights that inhere in associations³⁶⁸.

The Court expressly rejected the idea that the *Charter* did not protect collective rights, citing the right to peaceful assembly, freedom of expression, the right to vote, and freedom of religion³⁶⁹. Though the majority repeat the central findings of *Health Services* and *Fraser*, including that 2(d) guarantees a process, rather than an outcome or a particular model of labour relations³⁷⁰, the Court widened the purpose of section 2(d), stating that it “functions to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power³⁷¹”. The Court disagreed with the argument of the Attorney General to the effect that the test created in *Fraser* was one of “effective impossibility”³⁷². *Fraser* and *Health Services* used ‘impossible’ and ‘effectively nullified’ “to describe the effect of legislative schemes (including legislative exclusions), not the legal test for infringement of s.2(d)³⁷³.” *Fraser* did not reduce collective bargaining to a derivative right, but stated that it was a ‘necessary precondition’ to a meaningful guarantee of freedom of association³⁷⁴.

The Court insisted on choice and independence from the employer as essential qualities of an association for the purpose of collective bargaining³⁷⁵. According to the Court, “the degree of choice required by the *Charter* for collective bargaining purposes is one that enables employees to have effective input into the selection of the collective goals to be advanced by their association³⁷⁶”. Regarding independence, collective bargaining requires a degree of

³⁶⁸ *Mounted Police Association of Ontario*, supra note 95, par. 62.

³⁶⁹ *Mounted Police Association of Ontario*, supra note 95, par. 64.

³⁷⁰ *Mounted Police Association of Ontario*, supra note 95, par. 67.

³⁷¹ *Mounted Police Association of Ontario*, supra note 95, par. 70.

³⁷² *Mounted Police Association of Ontario*, supra note 95, par. 73.

³⁷³ *Mounted Police Association of Ontario*, supra note 95, par. 75.

³⁷⁴ *Mounted Police Association of Ontario*, supra note 95, par. 79.

³⁷⁵ *Mounted Police Association of Ontario*, supra note 95, par. 85-90.

³⁷⁶ *Mounted Police Association of Ontario*, supra note 95, par. 83.

independence “that ensures that the activities of the association are aligned with the interests of its members³⁷⁷”. The Court also expressly recognized that the *Wagner* model was not the only model to effectively guarantee sufficient choice and independence to ensure compliance with section 2(d) of the *Charter*³⁷⁸.

In the case of the RCMP, the Court found that the association of employees did not present a sufficient degree of independence from management³⁷⁹, nor did it allow sufficient choice, unduly restricting members’ freedom to advocate for the right to be represented by an independent association³⁸⁰. Ultimately, the Court found that there was a violation of section 2(d) of the *Charter*.

The *Meredith* case was heard together with *Mounted Police* and questioned the constitutionality of the RCMP labour relations regime under section 2(d) of the *Charter*³⁸¹. Relying on their reasoning in *Mounted Police*, and asking whether state action “substantially impaired the employees’ collective pursuit of workplace goals³⁸²”, the Majority found that there was no violation:

Simply put, the Pay Council continued to afford RCMP members a process for consultation on compensation-related issues within the constitutionally inadequate labour relations framework that was then in place. The ERA and the government’s course of conduct cannot be said to have substantially impaired the collective pursuit of the workplace goals of RCMP members. This said, our conclusions, as they relate to the ERA’s impact on the Pay Council process, should not be taken to endorse the constitutional validity of that process or of similar schemes³⁸³.

In a concurring opinion, Rothstein J. agreed with the finding of the majority, but since the majority relied on its findings in *Mounted Police* (in which Rothstein J. dissented), he issued separate reasons. According to Rothstein J., the correct framework for analysis under section 2(d) was to

³⁷⁷ *Ibid.*

³⁷⁸ *Mounted Police Association of Ontario, supra* note 95, par. 95.

³⁷⁹ *Mounted Police Association of Ontario, supra* note 95, par. 113.

³⁸⁰ *Mounted Police Association of Ontario, supra* note 95, par. 117.

³⁸¹ *Meredith, supra* note 95.

³⁸² *Meredith, supra* note 95, par. 24.

³⁸³ *Meredith, supra* note 95, par. 30.

ask whether the legislation in question rendered meaningful collective bargaining effectively impossible³⁸⁴. He wrote:

I agree with the majority that there was no s.2(d) violation in this case. The ERA did not make meaningful collective bargaining effectively impossible. There was no consultation with RCMP members' representatives before the ERA received Royal Assent and s. 62 of the ERA explicitly allowed future negotiations on some issues of compensation³⁸⁵.

Completing the 2015 Trilogy, *Saskatchewan Federation of Labour* extended a constitutional protection to the right to strike. Once again, the Court was divided.

In 2007, the government of Saskatchewan adopted two statutes, the *Public Service Essential Services Act* (PSESA) and the *Trade Union Amendment Act*³⁸⁶. Prior to the enactment of these acts, public sector strikes were regulated on an *ad hoc* basis³⁸⁷, whereas the PSESA prohibited "essential service employees" from participating in any work stoppage³⁸⁸. The question brought before the court was whether the prohibition on certain employees from participating in strike action amounted to "a substantial interference with their right to a meaningful process of collective bargaining³⁸⁹". According to the majority opinion, penned by Abella J., the PSESA met the threshold of substantial interference as it prevented employees from "engaging in any work stoppage as part of the bargaining process³⁹⁰". In reaching this conclusion, the Court effectively widened the ambit of s. 2(d) to include a constitutional protection for a right to strike.

Beginning her opinion with a one-paragraph review of Trilogy, *Health Services*, *Fraser*, and *Mounted Police*, Abella J. concluded with: "Clearly the arc bends increasingly towards workplace

³⁸⁴ *Meredith*, *supra* note 95, par. 33.

³⁸⁵ *Meredith*, *supra* note 95, par. 49.

³⁸⁶ *Saskatchewan Federation of Labour*, *supra* note 10, par. 5.

³⁸⁷ *Saskatchewan Federation of Labour*, *supra* note 10, par. 6.

³⁸⁸ *Saskatchewan Federation of Labour*, *supra* note 10, par. 8.

³⁸⁹ *Saskatchewan Federation of Labour*, *supra* note 10, par. 2.

³⁹⁰ *Saskatchewan Federation of Labour*, *supra* note 10, par. 78.

justice³⁹¹". According to the majority of the Court: "The conclusion that the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations is supported by history, by jurisprudence, and by Canada's international obligations³⁹²."

After reviewing the history of the legalization of strike action in Canada, as referenced by the Court in *Health Services*³⁹³, Abella J. adds:

It is important to point out, however, that the right to strike is not a creature just of the Wagner model. Most labour relations models include it. And where history has shown the importance of strike action for the proper functioning of a given model of labour relations, as it does in Wagner-style schemes, it should come as no surprise that the suppression of legal strike action will be seen as substantially interfering with meaningful collective bargaining. That is because it has long been recognized that the ability to collectively withdraw services for the purpose of negotiating the terms and conditions of employment - in other words, to strike- is an essential component of the process through which workers pursue collective workplace goals³⁹⁴.

The examination of the Court's jurisprudence focused particularly on the *Charter* values identified in *Health Services*. Here, the majority wrote that the "right to strike is essential to realizing these values and objectives through a collective bargaining process because it permits workers to withdraw their labour in concert when collective bargaining reaches an impasse³⁹⁵", this promoting equality in the bargaining process³⁹⁶.

For the majority, the protection of the right to strike as part of a meaningful collective bargaining was also mandated by Canada's international obligations³⁹⁷. Here, Abella J. cited the following international instruments in support of this position: the *International Covenant on Economic, Social, and Cultural Rights*; the *Charter of the Organization of American States*; and *ILO*

³⁹¹ *Saskatchewan Federation of Labour*, *supra* note 10, par. 1.

³⁹² *Saskatchewan Federation of Labour*, *supra* note 10, par. 3.

³⁹³ *Saskatchewan Federation of Labour*, *supra* note 10, par. 34-35.

³⁹⁴ *Saskatchewan Federation of Labour*, *supra* note 10, par. 46.

³⁹⁵ *Saskatchewan Federation of Labour*, *supra* note 10, par. 54.

³⁹⁶ *Saskatchewan Federation of Labour*, *supra* note 10, par. 55.

³⁹⁷ *Saskatchewan Federation of Labour*, *supra* note 10, par. 62.

*Convention 87*³⁹⁸. The Court also reference the decisions of the Committee on Freedom of association³⁹⁹ and the *International Covenant on Civil and Political Rights*⁴⁰⁰.

Finally, regarding deference, the majority wrote that in “the context of constitutional adjudication, deference is a conclusion, not an analysis”, adding that “the whole purpose of Charter review is to assess a law for constitutional compliance. If the touchstone of Charter compliance is deference, what is the point of judicial scrutiny?”⁴⁰¹.

In short, the Court found the PSESA to be unconstitutional⁴⁰². The *Trade Union Amendment Act*, on the other hand, was not found to violate section 2(d) of the *Charter*⁴⁰³.

Justices Rothstein and Wagner penned the dissenting opinion, in which they disagreed that the Court was protecting strike action as part of collective bargaining. They, instead, found that the majority was creating a stand-alone constitutional right to strike which did not fall under the ambit of section 2(d) of the *Charter*⁴⁰⁴. The dissenting judges based their opinion on a reluctance to stray from the Court’s precedents, history, international law, and deference.

The dissenting judges considered the majority’s finding that the right to strike is an indispensable component of meaningful collective bargaining contrary to the definition of meaningful collective bargaining put forward in *Fraser and Health Services*⁴⁰⁵. According to the dissenting judges: “finding that there is a constitutional right to strike (or to an alternative statutory dispute resolution

³⁹⁸ *Saskatchewan Federation of Labour*, supra note 10, par. 65-67.

³⁹⁹ *Saskatchewan Federation of Labour*, supra note 10, par. 69.

⁴⁰⁰ *Saskatchewan Federation of Labour*, supra note 10, par. 70.

⁴⁰¹ *Saskatchewan Federation of Labour*, supra note 10, par. 76.

⁴⁰² *Saskatchewan Federation of Labour*, supra note 10, par. 97.

⁴⁰³ *Saskatchewan Federation of Labour*, supra note 10, par. 102.

⁴⁰⁴ *Saskatchewan Federation of Labour*, supra note 10, par. 108.

⁴⁰⁵ *Saskatchewan Federation of Labour*, supra note 10, par. 128.

process), is an express contradiction of this Court's ruling in *Fraser* that s. 2(d) of the *Charter* does not require a statutory dispute resolution process⁴⁰⁶."

Regarding history, the dissenting judges felt that the majority had conflated the common law right to withdraw labour with its modern equivalent, a right to strike that imposed obligations upon employers⁴⁰⁷. The dissenting judges also wrote that there was no clear international consensus regarding a right to strike⁴⁰⁸.

It is the issue of the Court's role in labour relations which appears most problematic to the dissenting judges⁴⁰⁹:

The statutory right to strike, along with other statutory protections for workers, reflects a complex balance struck by legislatures between the interests of employers, employees, and the public. Providing for a constitutional right to strike not only upsets this delicate balance, but also restricts legislatures by denying them the flexibility needed to ensure the balance of interests can be maintained⁴¹⁰.

Finally, Rothstein J. and Wagner J. wrote that the constitutional protection of a right to strike would introduce uncertainty in labour relations by making statutory limits on strike action presumptively unconstitutional⁴¹¹.

Conclusion

One concern raised about *Charter* litigation in the context of collective labour relations is that it moves the focus from workplaces to courtrooms, essentially de-radicalizing the labour movement⁴¹². However, Quail notes that there has been no systematic examination of the

⁴⁰⁶ *Saskatchewan Federation of Labour*, *supra* note 10, par. 147.

⁴⁰⁷ *Saskatchewan Federation of Labour*, *supra* note 10, par. 111.

⁴⁰⁸ *Saskatchewan Federation of Labour*, *supra* note 10, par. 156.

⁴⁰⁹ *Saskatchewan Federation of Labour*, *supra* note 10, par. 115.

⁴¹⁰ *Saskatchewan Federation of Labour*, *supra* note 10, par. 107.

⁴¹¹ *Saskatchewan Federation of Labour*, *supra* note 10, par. 123.

⁴¹² Quail, *supra* note 247, 359.

potential depoliticizing effect of *Charter* litigation⁴¹³. Leaving aside questions of union strategy, one can draw the following conclusions from this examination of thirty-five years of caselaw under section 2(d) of the *Charter*. The Court's interpretation of section 2(d) of the *Charter* has evolved from restrictive interpretation that included neither a right to bargain nor a right to strike, to a broad interpretation encompassing strike action as part of meaningful collective bargaining. The clearest summary of the caselaw up to the new Trilogy of 2015 can be found in *Mounted Police Association of Ontario*.

According to the Court:

The jurisprudence on freedom of association under s. 2(d) of the Charter (...) falls into two broad periods. The first period is marked by a restrictive approach to freedom of association. The second period gradually adopts a generous and purposive approach to the guarantee⁴¹⁴. (...)

To recap, and notwithstanding noteworthy dissents, the majority of this Court in this early period maintained a narrow view of freedom of association, which protected only the bare formation of the association and the collective exercise of individuals freedoms. This view prevailed for some time. Outside the labour relations context, the same approach was applied in *Canadian Egg Marketing Agency v. Richardson* (...). And in the labour relations context, this approach resulted in the majority of this Court holding that the exclusion of RCMP members from the PSSRA did not violate s. 2(d) in the 1999 case of *Delisle*⁴¹⁵. (...)

The Court then examined the 'negative' freedom cases⁴¹⁶ (*Lavigne, Advance Cutting & Coring, Bernard*), which "marked the beginning of a more generous, purposive approach to s. 2(d) – an approach that was resoundingly affirmed in *Dunmore*⁴¹⁷" and which "led to the express recognition of a s. 2(d) right to collective bargaining in *Health Services*⁴¹⁸". According to the Court, *Fraser*

⁴¹³ *Quail*, *supra* note 247, 360.

⁴¹⁴ *Mounted Police Association of Ontario*, *supra* note 95, 30.

⁴¹⁵ *Mounted Police Association of Ontario*, *supra* note 95, 41.

⁴¹⁶ *Mounted Police Association of Ontario*, *supra* note 95, 42.

⁴¹⁷ *Mounted Police Association of Ontario*, *supra* note 95, 43.

⁴¹⁸ *Mounted Police Association of Ontario*, *supra* note 95, 44.

“reaffirmed that s. 2(d) confers the right to a process of collective bargaining, understood as meaningful association in pursuit of workplace goals⁴¹⁹”.

Returning to the concept of *Charter* values, the Court summarised its 1987 to 2015 caselaw as follows:

... after an initial period of reluctance to embrace the full import of the freedom of association guarantee in the field of labour relations, the jurisprudence has evolved to affirm a generous approach to that guarantee. This approach is centered on the purpose of encouraging the individual's self-fulfillment and the collective realization of human goals, consistent with democratic values, as informed by 'the historical origins of the concepts enshrined' in s. 2(d)⁴²⁰.

In 2015, the majority in *Saskatchewan* added the right to strike to the constitutionally-protected ambit of freedom of assembly by stating that it was a core component of meaningful collective bargaining⁴²¹.

The Court's interpretation of section 2(d) evolved through two distinct phases. First a gradual move away from an individualistic conception of Charter rights, and second through a broad, positive, interpretation of liberty based on underlying charter values. These values do not, for the most part, appear in Canadian constitutional documents. This begs the question: What influenced these choices? Furthermore, during both phases, the Court oscillated as to its role with regards to labour relations, alternating between a call for interventionism and a call for deference.

In short, the Court's reasoning can be viewed as four dialogues, in keeping with the *Charter's* liberal heritage: the first between individual and collectivist views of rights, the second between positive and negative conceptions of freedom, the third between an emphasis on equality and an emphasis on liberty, and the fourth between the deferential and activist roles of the judiciary.

⁴¹⁹ *Mounted Police Association of Ontario*, *supra* note 95, 45.

⁴²⁰ *Mounted Police Association of Ontario*, *supra* note 95, 46.

⁴²¹ *Saskatchewan Federation of Labour*, *supra* note 10.

These four dialogues will be examined in the following chapter along with a fifth dimension, the constitutional protection of a right to strike.

Chapter 2 – The Workplace as a Site of Republican Unfreedom: A Theoretical Framework

*We're the women of the union in the forefront of the fight,
We fight for women's issues, we fight for women's rights,
We're prepared to fight for freedom, we're prepared to stand our ground,
Women make the union strong.*

*Through our sisters and our brothers, we can make our union strong,
For respect and equal value we have done without too long,
We no longer have to tolerate injustices and wrongs,
For the union makes us strong.*

*When racism in all of us is finally out and gone,
Then the union movement will be twice as powerful and strong,
For equality for everyone will move the cause along,
For the union makes us strong.*

(Solidarity Forever, additional verses

added by the Public Service Alliance of Canada⁴²²)

The theoretical framework used in this thesis is one of republican freedom and democratic equality. The moral reconstruction of freedom of association is grounded in Elizabeth Anderson's neo-republican approach to equality and freedom in the employment context.

In *Private Government*, Anderson invites a reconsideration of the workplace as a locus of private government. Though the apparent focus is on worker autonomy and workplace democracy, the essays in *Private Government* draw heavily on principles of dignity and equality⁴²³.

⁴²² *Solidarity Forever* in Public Service Alliance of Canada, "Education on the Picket Line" (Ottawa: Public Service Alliance of Canada, 2004).

⁴²³ Elizabeth S Anderson, *Private Government* (Princeton: Princeton University Press, 2017). This thesis draws heavily on Anderson's aforementioned *Private Government*, as well as on a 1999 article entitled "What is the point of Equality?". Both pieces examine issues of freedom and equality. *Private Government* analyses (un)freedom in the workplace, while "What is the Point of Equality?" considers equality as equal access to rights and freedoms. Both works can be seen as distinctly neo-republican, though Anderson herself uses the terms egalitarian. Professor Anderson "specializes in moral, social and political philosophy, feminist theory, social epistemology, and

According to Anderson, contemporary political philosophy treats government synonymously with the public sphere, usually represented by the State. “The supposed counterpart private sphere is the place where, it is imagined, government ends, and hence where individual liberty begins⁴²⁴.” This, however, does not reflect the current institutions of workplace governance. Thus, “we need to revive the concept of private government”⁴²⁵, a concept which, according to Anderson, predated the industrial revolution.

Anderson calls for a rejection of the “false narrowing” of government to the State, arguing that liberty can be significantly constrained in domains of private activity⁴²⁶. She defines private government as follows:

A government is private with respect to a subject if it can issue orders, backed by sanctions, to that subject in some domain of that subject's life, and that subject has no say in how that government operates and no standing to demand that their interests be taken into account, other than perhaps in narrowly defined circumstances, in the decisions that government makes. Private government is government that has arbitrary, unaccountable power over those it governs. This of course is a matter of degree. Its powers may be checked in certain ways by other governments, by social norms, and by other pressures⁴²⁷.

Anderson proposes the following scenario:

the philosophy of economics and the social sciences. She is particularly interested in exploring the interactions of social science with moral and political theory, how we learn to improve our value judgments, the epistemic functions of emotions and democratic deliberation, and issues of race, gender, and equality” (“Elizabeth Anderson”, online: *University of Michigan*, <https://lsa.umich.edu/philosophy/people/faculty/eandersn.html>).

⁴²⁴ Anderson, *supra* note 423, 41.

⁴²⁵ *Ibid.*

⁴²⁶ Anderson, *supra* note 423, 48.

⁴²⁷ Anderson, *supra* note 423, 45.

Imagine a government that assigns almost everyone a superior whom they must obey. Although superiors give most inferiors a routine to follow, there is no rule of law. Orders may be arbitrary and can change at any time, without prior notice or opportunity to appeal. Superiors are unaccountable to those they order around. They are neither elected nor removable by their inferiors. Inferiors have no right to complain in court about how they are being treated, except in a few narrowly defined cases. They also have no right to be consulted about the orders they are given⁴²⁸.

She then asks whether people subject to such a government would be free⁴²⁹.

The modern workplace is characterized by a centralized authority⁴³⁰ whose influence extends beyond working hours. Indeed, federal and provincial boards and arbitrators have examined comments made on social media (outside of working hours) when employees have been dismissed for insubordination⁴³¹. Additionally, employers can effectively control behaviour outside of working hours through drug and alcohol testing, subject to certain limits. Though mandatory, random and unannounced drug and alcohol testing of all employees has been generally perceived as a violation of workers' dignity and privacy, testing is permitted when there is reasonable cause (including a generalized problem of substance abuse in the workplace)⁴³².

Thus, the main characteristic of private government is that its subjects are unfree⁴³³ with work imposing a “far more minute, exacting and sweeping regulation of employees than democratic

⁴²⁸ Anderson, *supra* note 423, 38.

⁴²⁹ Anderson, *supra* note 423, 39.

⁴³⁰ Anderson, *supra* note 423, 51.

⁴³¹ Jared Teitel, “Fired Over Facebook: The Consequences of Discussing Work Online” (2012) *Western Journal of Legal Studies*.

⁴³² *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd*, [2013] 2 SCR 458 at par. 6.

⁴³³ Anderson, *supra* note 423, 41.

states do in any domain outside of prisons and the military”⁴³⁴. Outside of collective bargaining (to which we shall return extensively), employers’ authority is both sweeping and arbitrary⁴³⁵.

Of course, though employer control in the workplace is pervasive, the private government’s sanctioning powers are limited. “It cannot execute or imprison anyone for violating orders. It can demote people to lower ranks. The most common sanction is exile. Individuals are also free to emigrate, although if they do, there is usually no going back”⁴³⁶.

Anderson identifies four strategies for protecting the liberties and interests of governed peoples: exit, the rule of law, substantive constitutional rights, and voice⁴³⁷. Exit is the freedom to leave. In the case of private workplace government, it is the freedom to exit the contractual relationship and is, according to Anderson, “usually touted as a prime libertarian strategy for protecting individual rights”⁴³⁸. Anderson’s rule of law and constitutional rights protections reflect the existence of statutes limiting employer power and protecting worker rights (creating a workplace “Bill of Rights”), respectively⁴³⁹.

⁴³⁴ Anderson, *supra* note 423, 63.

⁴³⁵ Anderson, *supra* note 423, 54.

⁴³⁶ Anderson, *supra* note 423, 38.

⁴³⁷ Anderson, *supra* note 423, 65-66.

⁴³⁸ Anderson, *supra* note 423, 66.

⁴³⁹ Anderson, *supra* note 423, 67-68.

Not all limits developed for State authority can easily be transferred to the employment context⁴⁴⁰. Though economic or cost-based analysis of Anderson's arguments would suggest that one should not worry about the dictatorial nature of a company if the cost of exit remains low⁴⁴¹, Anderson points out the existence of contractual barriers to exit, namely the existence of noncompete clauses⁴⁴². Workers who are not represented by unions cannot negotiate limits on the employers' power⁴⁴³. Ultimately:

there is no adequate substitute for recognizing workers' voice in their government. ... Just because a workplace governance requires a hierarchy of offices does not mean that higher officeholders must be unaccountable to the governed, or that the governed should not play any role in managerial decision-making⁴⁴⁴.

This idea, referred to as workplace or industrial democracy, will be revisited in chapter 4.

The liberal focus on State intervention coupled with the view of the *Charter* as an inherently liberal instrument explain the four points of tension (or four dialogues) which appear in the Court's jurisprudence as it relates to constitutionalizing the protection of worker voice through collective bargaining. However, as the Court moved from a liberal approach to a neo-republican approach through the use of *Charter* values (see part II), the Court found a justification for its intervention through the protection of individual freedom from domination through collective action, including the right to strike.

⁴⁴⁰ Anderson, *supra* note 423, 67.

⁴⁴¹ Tyler Cowen, "Work Isn't So Bad After All" in Elizabeth Anderson, ed., *Private Government*, Princeton: Princeton University Press, 2017) 108 at 109.

⁴⁴² Anderson, *supra* note 423, 66. Such contract clauses would effectively limit the desire of an individual worker to exit the existing contractual relationship by limiting his or her ability to pursue employment elsewhere.

⁴⁴³ Anderson, *supra* note 423, 57.

⁴⁴⁴ Anderson, *supra* note 423, 69.

This chapter will set out a neo-republican response to the four dialogues presented earlier. A neo-republican justification for a constitutionally protected right to strike will also be presented. The justification for the Court's intervention (see 2.5) will act as a building block for the second half of the dissertation.

2.1 – Individual Freedom in the Workplace

In 1987, McIntyre J. stated in the *Alberta Reference* that while it must be recognized that freedom of association might advance group interests, "it is nonetheless a freedom belonging to the individual and not to the group formed through its exercise."⁴⁴⁵ In other words, and as described in the preceding chapter, the Court originally viewed freedom of association as the freedom to associate freely, but did not recognize the rights of the association formed. It is the individual framing of *Charter* rights that made McIntosh conclude in the early years of the *Charter* that it was an instrument incompatible with collective labour relations⁴⁴⁶.

Though the emphasis on individual rights is recognized as a cornerstone of liberalism (and of liberal instruments like the *Charter*), the *Charter* does appear to recognize the rights of collectivities. Furthermore, it is unclear whether the protection of collective bargaining is truly a collective right, rather than, for example, the right of an agent. This section will begin with a

⁴⁴⁵ *Reference Re Public Service Employee Relations Act (Alta.)*, *supra* note 82, par. 155.

⁴⁴⁶ McIntosh, *supra* note 152, 37.

distinction between differing views of collective rights and group rights. Finally, the right to bargain collectively will be examined through a neo-republican lens.

For Edwards, discourse about rights in liberal states is discourse about individual rights. “The rights-tradition in the west has its roots in individual rights”⁴⁴⁷. For some scholars, however, liberalism is not incompatible with the recognition of collective rights⁴⁴⁸. Edger defines collective rights simply as rights held by groups rather than individuals where “group” generally refers to a set of individuals “with strong racial, state, religious, or linguistic ties”⁴⁴⁹. In Canada, the expression “collective rights” was first used in the 1972 Gendron Commission (the Commission of Inquiry on the Position of the French Language and on Language Rights in Québec), though late public law scholar François Chevette concluded that the expression was too imprecise to be of legal use⁴⁵⁰. According to Cardinal, although the Supreme Court had not (by the time of writing in 2000) formally used the term “collective rights”, it had nonetheless recognized such rights in relations to minority language rights and the rights of First Nations⁴⁵¹.

In Canada, collective rights have been invoked in relation to groups associating under ethnic, linguistic or religious grounds, but not in relation to class or gender. Hartney speculates that the

⁴⁴⁷ John Edwards, “Collective Rights in the Liberal State” (1999) 17:3 *Netherlands Quarterly of Human Rights* 259 at 259.

⁴⁴⁸ Daniel Weinstock, “How Can Collective Rights and Liberalism Be Reconciled?” in Rainer Baubock and John Rundell, eds, *Blurred Boundaries* (Brookfield: Aldershot, 1998). For some, the distinction between group and individual human rights is more than a question of philosophical allegiance, with group rights being perceived as potential threats to individual rights, that is to say rights claimed over individuals; see: Peter Jones, “Human Rights, Group Rights, and Peoples’ Rights” (1999) 21:1 *Human Rights Quarterly* 80 at 81.

⁴⁴⁹ Rob Edger, “Collective Rights” (2009) 72 *Saskatchewan Law Review* 1 at 2.

⁴⁵⁰ Cardinal, Linda, “Collective Rights in Canada: A Critical and Bibliographical Study” (2000) 12 *National Journal of Constitutional Law* 165 at 167.

⁴⁵¹ Cardinal, *supra* note 450, 168.

focus on these groups is due to the fact that both the *Constitution Act* and the *Charter* contain provisions aimed at these groups⁴⁵². Indeed, scholars have claimed that sections 25 and 35 of the *Charter* are premised on the notion that groups can have rights⁴⁵³.

Not all authors agree on the definition of group or collective rights, with some emphasizing the collective agent and others emphasizing the collective interest protected by the group. Corlett traces a first distinction between collective moral rights and collective legal rights, the latter being “conferred by legal rules on some collective as a legal guarantee against the infringement of that collective's interest or choice”⁴⁵⁴. This section only examines collective rights in a legal perspective (though moral choices will, of course, be examined in the second part of the thesis). Green distinguishes rights of collective agents from rights to collective goods or collective interests⁴⁵⁵. Most legal systems recognize that entities other than individuals (corporations or political parties, for example) can have rights⁴⁵⁶. This, however, is not a protection of collective rights, as “collective

⁴⁵² Hartney, Michael, “Some Confusions Concerning Collective Rights” (1991) 4:2 Canadian Journal of Law and Jurisprudence 293 at 295. Indeed, sections 25 and 35 of the Charter establish protections for Aboriginal and treaty rights, indicating that there is a recognition that Indigenous people, as a group, hold rights. These sections read: (25) The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

and

(35) (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, aboriginal peoples of Canada includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) treaty rights includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

⁴⁵³ Edger, *supra* note 449, 1.

⁴⁵⁴ J Angelo Corlett, “The Problem of Collective Moral Rights” (1994) 7 Canadian Journal of Law and Jurisprudence 237 at 239.

⁴⁵⁵ Leslie Green, “Two Views of Collective Rights” (1991) 4:2 Canadian Journal of Law and Jurisprudence 315.

⁴⁵⁶ *Ibid.*

rights are distinguished not by the sort of agents they protect, but by the sort of interests they protect⁴⁵⁷."

Hartney questions much of the discourse surrounding the protection of collective rights as the "the energy of defenders of collective rights seems to be spent arguing for the moral importance of communities, and charging opponents of collective rights with denying any value to communities⁴⁵⁸" whereas few question the value that community plays in human flourishing⁴⁵⁹. A right (or, indeed, a freedom) may have a purpose directly related to a collectivity or to a community without it being a collective right. An individual may have the freedom to join a group and, having joined the group, may now possess rights as a member of the group. This freedom and this right, however, are held in an individual capacity⁴⁶⁰. This is the approach favoured by the Court in the *Alberta Reference*. This is most apparent when the majority describes the scope of freedom of association as " the freedom of individuals to interact with, support, and be supported by their fellow humans in the varied activities in which they choose to engage"⁴⁶¹.

Building on Raz's *Morality of Freedom*, Jones states that though individuals have rights as individuals, they may also hold rights as groups when "the joint interest of a sufficient number of individuals provides sufficient justification for imposing duties upon others" even if the interest of only one such person would provide insufficient justification for imposing such duties⁴⁶². According to Jovanovic (also echoing Raz), "the interest of a group in its flourishing is decisively, yet

⁴⁵⁷ Green, *supra* note 455, 320.

⁴⁵⁸ Hartney, *supra* note 452, 296.

⁴⁵⁹ *Ibid.*

⁴⁶⁰ Jones, *supra* note 448, 82.

⁴⁶¹ *Reference Re Public Service Employee Relations Act*, *supra* note 82, par. 88.

⁴⁶² Jones, *supra* note 448, 84.

indirectly, connected to the individual member's well-being"⁴⁶³. This view, which Jones refers to as "collective" is then contrasted with a view he calls "corporate", the difference being that "while the collective conception ascribes moral standing only to the individuals who jointly hold the group right, the corporate conception ascribes moral standing to the group as such". Thus, the holder of the right is the group, rather than the individual⁴⁶⁴.

Building on the ideas expressed in the general introduction as well as in the opening of this chapter, we now see the particularity of trade unionism. Supposing that individuals have a right to working conditions that are free from arbitrary domination, this would suppose a collective conception of rights (with freedom being held by each individual subject in the private government of the workplace). However, to achieve a state of non-domination, workers under the *Wagner Act* system of collective bargaining give up their individual right to negotiate to a collective (the union), echoing a corporate view of collective rights.

As explained previously, a reason cited for rejecting the reading in of collective bargaining within the *Charter* protection of freedom of association was McIntyre J.'s insistence that the *Charter* protected individual rather than collective rights. Ultimately, however, the Supreme Court recognized the rights of unions to bargain collectively and imposed a correlative duty on third parties to negotiate in good faith. For Langille, discussion of collective rights obscured a very important point, namely that the right to bargain collectively allows individuals to achieve what

⁴⁶³ Miodrag A Jovanović, *Collective rights: a legal theory* (Cambridge: Cambridge University Press, 2012) at 83.

⁴⁶⁴ Jones, *supra* note 448, 86.

would be inconceivable on the individual level⁴⁶⁵. The shift to collectivism also obscured the primary purpose of labour law, namely “to protect and advance the interests of workers”⁴⁶⁶. With that said, it remains unclear whether the union can be considered an individual holder of the rights of its members or whether this is an actual recognition of collective rights, as will be further discussed below.

The reconciliation of freedom of individual workers and the collective right to bargain is made possible by examining freedom as freedom from domination. Non-domination, according to Pettit, is not a goal that can be satisfactorily pursued by individuals⁴⁶⁷. When viewed through a republican lens, the individual-collective debate as it relates to collective bargaining becomes moot. Each individual has a right to live free from domination, but such a goal cannot be achieved by individuals. Non-domination in the private government of the workplace requires the establishment of reciprocal power. Such reciprocal power can only be exercised by the group when such a group has the right to compel management to negotiate.

Scholars have drawn a connection between McIntyre J.’s analysis emphasizing individual rights with the contestations to compelled unionization as seen in *Lavigne*⁴⁶⁸. Freedom from association, as it relates to freedom from domination, will be explored in the following section.

2.2 – The Negative and Positive Dimensions of Freedom of Association

A liberal examination of (or an examination of the limits of liberalism in relation to) the positive and negative dimensions of freedom of association can refer to two distinct issues. The first is the

⁴⁶⁵ Langille, *supra* note 282 , 187.

⁴⁶⁶ Langille, *supra* note 282, 188.

⁴⁶⁷ Pettit, *supra* note 117, 92.

⁴⁶⁸ Carter, *supra* note 190, 307.

distinction between negative freedoms and positive rights; the second is the question of freedom from mandatory association. Both shall be examined in this section.

2.2.1 – Negative Rights and Positive Freedoms

In *Health Services*, the Court read in to a “negative” freedom (freedom of association), a positive right (the right to bargain collectively) and a corresponding duty on third parties (the duty to bargain in good faith). This turn was criticized by Langille and Oliphant as a modification which ignored the “grammar of law”⁴⁶⁹.

Central to liberal thought is the idea that political structures should be based on the individual “possessing a maximum amount of liberty”⁴⁷⁰, where liberty is defined by freedom from interference from the state⁴⁷¹. Thus, a freedom in a public law instrument like the *Charter* would be, in a classically liberal approach, a freedom from state interference.

The correlative of freedom is not a right or a duty, but a “no-right” or an absence of a right⁴⁷² or, in liberal parlance, a sphere free from state interference. Thus, the correlative of my freedom to associate for trade union purposes would be neither my right to bargain nor your duty to bargain in good faith, but merely the absence of the state’s right to restrict my freedom to associate with

⁴⁶⁹ Brian Langille & Benjamin Oliphant, “The Legal Structure of Freedom of Association” (2014) 20 *Queen’s Law Journal* 249 at 252.

⁴⁷⁰ Sheppard, *supra* note 138, 118.

⁴⁷¹ Sheppard, *supra* note 138, 119.

⁴⁷² Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1919) at 36.

others. Furthermore, Langille and Oliphant ask, if we recognize a right to bargain, then who possesses this right⁴⁷³?

According to Pettit, a requirement of justice is the promotion, by the State, of freedom as non-domination for all its citizens⁴⁷⁴. To achieve non-domination, the state must, according to Pettit, “have the power of coercively imposing the order it establishes”⁴⁷⁵. Thus, shifting from a classically liberal perspective to a neo-republican perspective, the imposition of duties on third parties is a component of the state’s duty of ensuring justice for its citizens. A coercive power to force good faith bargaining by either side has been granted to labour boards⁴⁷⁶, both provincial and federal, in the *Wagnerian* model in force in Canada. That these *Wagner*-model rights and duties were elevated to the status of constitutional rights raised concerns about the power of the Court (as opposed to the legislature). This difficulty will be explored in section 2.4 of this chapter.

As for the possessor of the right to bargain, as explored previously, to avoid domination, workers will cede their individual rights to a collective agent, the union. Thus, the union and not the workers are in possession of the right to bargain and it is with respect to the union, and not individual workers, that employers have a corresponding duty to bargain in good faith.

⁴⁷³ Langille & Oliphant, *supra* note 469, 268.

⁴⁷⁴ Pettit, *supra* note 104, 130.

⁴⁷⁵ Pettit, *supra* note 104, 133.

⁴⁷⁶ See, e.g.: *Canada Labour Code*, RSC 1985, c L-2, at. 80 (3) (a); *Labour Relations Code*, RSBC 1996, c 244, art. 139 (h); *Labour Relations Act*, 1995, SO 1995, c 1, Sch A, art. 17; *Code du travail*, RLRQ c C-27, art. 53 and 111.33.

This subsummation of individual workers within the union has raised issues of freedom with regards to compelled (or universal) unionization as explored in the first chapter. This second dimension of negative freedom will be explored below.

2.2.2 – Freedom from Compelled Association

If the correlative of privilege (or freedom) is not a right or a duty, but a “no-right” or an absence of right⁴⁷⁷, it would seem that compelled unionization or mandatory union dues would be a direct interference with the exercise of personal freedom. Yet, while constituting an interference, mandatory or compelled unionization promotes freedom from domination, thus maximizing (rather than inhibiting) freedom.

This issue was dealt with by the Court in *Lavigne* and in *Advance Cutting & Coring*, as examined extensively in chapter 1. In a concurring opinion in *Lavigne*, justice La Forest found that forced union dues did violate section 2(d) of the *Charter* but that this violation was justified under section 1⁴⁷⁸. According to the majority in *Advance Cutting & Coring*, if the obligation to join a union “triggers the negative component and becomes a breach of s. 2(d)” then “it might well mean that all forms of compulsory membership provided for or even authorized under statute would be open to challenge under the *Charter*”. The Court added that the “proper analysis of *Lavigne* and of the nature of the constitutional guarantee did not allow for such a result⁴⁷⁹”.

⁴⁷⁷ Hohfeld, *supra* note 471, 36.

⁴⁷⁸ *Lavigne*, *supra* note 88, 318.

⁴⁷⁹ *Advance Cutting & Coring Ltd.*, *supra* note 233, 324-325.

Noting that the concept of liberty (or freedom) could be used to argue both in favour of unionization (freedom of association) and against mandatory unionization (freedom from association)⁴⁸⁰, Reiff argued for mandatory (or universal) unionization in the American context justified on the basis of Republican freedom⁴⁸¹.

Starting from the premise that the firm is a threat to liberty⁴⁸², Reiff argues that universal unionization enhances republican liberty, as unions “dramatically increase the enactment and enforcement of the laws designed to protect workers from the arbitrary acts of their employers and somewhat decrease the chances of management behaving in an antisocial manner and engaging in acts of domination against the general public at large⁴⁸³”.

Reiff’s argument is based on the recognition of a certain number of pre-institutional rights on which other rights (including freedom of speech and even freedom of association) are premised⁴⁸⁴. Though this is not dissimilar to the Court’s reliance on values which underly *Charter* rights in *Health Services*⁴⁸⁵, Reiff goes a step further. The union, according to Reiff, is a basic institution. Indeed, if society is to be viewed as having three levels (a basic structure, its basic institutions, and the output of said institutions), unions should be considered a basic institution of society, that is to say an institution required for making the basic structure more just. To determine whether

⁴⁸⁰ Mark R Reiff, *In the name of liberty: the argument for universal unionization* (Cambridge: Cambridge University Press, 2020) at 2.

⁴⁸¹ Reiff, *supra* note 480.

⁴⁸² This position is not dissimilar to Anderson’s position in *Private Government* outlined earlier.

⁴⁸³ Reiff, *supra* note 480, 148.

⁴⁸⁴ Reiff, *supra* note 480, 83.

⁴⁸⁵ Talarico, Andrea, Book review of: *In the Name of Liberty: the argument for universal unionization* (M. Reiff) (2020) 75-3 *Relations Industrielles - Industrial Relations* 621.

the union would be a basic institution, Reiff focuses not on specific (post-institutional) rights, but on the rights and values from which other rights derive (in this case, freedom)⁴⁸⁶.

Thus, for Reiff, unionization is not only positive in a neo-republican view of society where freedom is an underlying value, unionization is a requirement to achieve freedom from domination. Thus, universal unionization should not only be viewed as not limiting republican freedom, it should be viewed as a requirement for republican freedom.

Though the Court never goes as far as Reiff, his neo-republican approach and his insistence on pre-institutional rights justify both the Court's approach to mandatory union dues in *Lavigne* and to sector-wide unionization in *Advance Cutting & Coring*. Furthermore, it is the recognition of pre-institutional rights (which the Court call *Charter* values) which will allow for the recognition of a right to bargain collectively in *Health Services*, as will be explored at length in the second part of this thesis.

2.3 – Republican Freedom and Relational Equality

Whereas liberalism can be said to overemphasize freedom to the detriment of equality, a republican approach to freedom of association allows us to view freedom and equality as two sides of the same coin.

⁴⁸⁶ Talarico, *supra* note 485.

Anderson's 1999 article entitled *What is the Point of Equality?* planted the seeds for *Private Government*⁴⁸⁷. This earlier article reoriented the debate around equality in American philosophy, effectively steering it away from a redistributive focus to a focus on relational equality⁴⁸⁸.

The focus on "the distribution of divisible, privately appropriated goods, such as income and resources" by theories of equality led to neglecting the "much broader agendas of actual egalitarian political movements"⁴⁸⁹, namely ending oppression. Anderson's approach is not focused on ensuring that one gets what one deserves, but on creating "a community in which people stand in relations of equality to others"⁴⁹⁰. Anderson points out that, historically inequality referred less to a question of distribution and more to relations "between superior and inferior persons"⁴⁹¹. These unequal social relations then generated inequalities in distribution of resources⁴⁹². Thus, democratic equality is "a relational theory of equality"⁴⁹³ which seeks to guarantee effective access to the social conditions of freedom⁴⁹⁴.

As with Berlin's two views of freedom⁴⁹⁵, democratic or relational equality has both negative and positive dimensions. Negatively, democratic equality seeks the abolition of oppression, "that is, forms of social relationship by which some people dominate, exploit, marginalize, demean, and

⁴⁸⁷ Niko Kolodny, "Help Wanted: Subordinates" in Elizabeth Anderson, ed, *Private Government* (Princeton: Princeton University Press, 2017) 99 at 99.

⁴⁸⁸ Kolodny, *supra* note 487, 100.

⁴⁸⁹ Elizabeth S Anderson, "What Is the Point of Equality?" (1999) 109:2 *Ethics* 287 at 288.

⁴⁹⁰ Anderson, *supra* note 489, 288-289.

⁴⁹¹ Anderson, *supra* note 489, 312.

⁴⁹² *Ibid.*

⁴⁹³ Anderson, *supra* note 489, 313.

⁴⁹⁴ Anderson, *supra* note 489, 289.

⁴⁹⁵ These two views of freedom will be analyzed in depth in chapter 4.

inflict violence upon others”⁴⁹⁶. In its positive dimension, what is sought is the creation of “social order in which persons stand in relations of equality”, one in which persons live “in a democratic community, as opposed to a hierarchical one”⁴⁹⁷.

Returning to the idea of distribution, the distribution of nature’s fortune (whether good or bad) is, according to Anderson, “neither just nor unjust”⁴⁹⁸. Democratic equality looks at what is societally done in response to this distribution of fortune⁴⁹⁹ to avoid relations of oppression and to ensure full and equal societal participation. For example, a wheelchair user may not, according to Anderson, have a right to walk, but he or she has a right to ramps and other means allowing for full participation.

Anderson’s view of democratic equality must be read in conjunction with republican views of freedom. As stated previously, for Pettit, where liberalism focuses on freedom from interference (or freedom as a state of non-interference)⁵⁰⁰, republicanism focuses on freedom from domination (or freedom as non-domination)⁵⁰¹. The dominating party may be an individual or a collective agent. The domination may target a group but it will then “constitute domination of individual people but in a collective identity or capacity or aspiration”⁵⁰². While interference can include a wide range of behaviors including physical coercion, coercion of the will, and manipulation⁵⁰³,

⁴⁹⁶ Anderson, *supra* note 489, 313.

⁴⁹⁷ *Ibid.*

⁴⁹⁸ Anderson, *supra* note 489, 331.

⁴⁹⁹ *Ibid.*

⁵⁰⁰ Pettit, *supra* note 117, 9.

⁵⁰¹ Pettit, *supra* note 117, 4.

⁵⁰² Pettit, *supra* note 117, 52.

⁵⁰³ Pettit, *supra* note 117, 53.

domination is characterized by the fact that the power-bearer has “the capacity to interfere arbitrarily, even if they are never going to do so”⁵⁰⁴. Thus, domination is distinct from interference and can occur without interference, because domination merely requires the capacity for arbitrary interference, not actual arbitrary interference⁵⁰⁵.

For Raz, individual freedom and autonomy in particular are cornerstones of liberal morality⁵⁰⁶, though his *Morality of Freedom* is intended to read as a “critique of individualism” and an “endeavor to argue for a liberal morality on non-individualistic grounds”⁵⁰⁷. Though freedom has a distinct value, this value is intertwined with others and cannot exist by itself⁵⁰⁸. Like Pettit, Raz doesn’t seek equality for equality’s sake, stating that political morality must contain principles “concerning the well-being of people and the degree of our responsibility towards others”⁵⁰⁹. Pettit does not think that justice requires that the state should impose substantive equality amongst citizens⁵¹⁰, but that “whatever benefits the state makes available as a matter of justice to its citizens, it is subject to the constraint of making them available in an expressively egalitarian way”⁵¹¹.

Thus, both in Pettit’s neo-republican analysis and in Anderson’s egalitarian analysis, equality and freedom must be analysed together, as freedom requires a certain level of equality to be free from

⁵⁰⁴ Pettit, *supra* note 117, 63.

⁵⁰⁵ Pettit, *supra* note 117, 23.

⁵⁰⁶ Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at 2.

⁵⁰⁷ Raz, *supra* note 506, 18.

⁵⁰⁸ Raz, *supra* note 506, 19.

⁵⁰⁹ Raz, *supra* note 506, 235.

⁵¹⁰ Pettit, *supra* note 104, 78.

⁵¹¹ *Ibid.* This view can be compared with Raz’s view. See Raz, *supra* note 506, 219.

arbitrary domination and equality requires equal freedom. The state, according to Pettit, "ought to promote the enjoyment of free or undominated choice amongst its citizens, under the expressively egalitarian constraint of treating those citizens as equals"⁵¹². The relationship between freedom and choice, as well as a more fulsome examination of equality (both as a right and as a value), will be explored in Chapter 4.

2.4 – The Strike as a Tool for Achieving Republican Freedom and Relational Equality

In 2015, the majority of the Court read a right to strike into freedom of association protected under the *Charter*⁵¹³. In a dissenting opinion, justices Rothstein and Wagner considered the majority's finding that the right to strike constituted an indispensable component of meaningful collective bargaining contrary to the definition of meaningful collective bargaining put forward in *Fraser and Health Services*⁵¹⁴. According to the dissenting judges: "finding that there is a constitutional right to strike (or to an alternative statutory dispute resolution process), is an express contradiction of this Court's ruling in *Fraser* that s. 2(d) of the *Charter* does not require a statutory dispute resolution process"⁵¹⁵."

This section will not examine the right to strike as part of a dispute resolution process. Rather, the right to strike will be viewed as a form of reciprocal power indispensable to achieving freedom in the workplace.

⁵¹² Pettit, *supra* note 104, 82.

⁵¹³ *Saskatchewan Federation of Labour*, *supra* note 10.

⁵¹⁴ *Saskatchewan Federation of Labour*, *supra* note 10, par. 128.

⁵¹⁵ *Saskatchewan Federation of Labour*, *supra* note 10, par. 147.

Pettit identifies two strategies for achieving non-domination: reciprocal power and constitutional provision⁵¹⁶ (or the introduction of a constitutional authority depriving one party of their power to interfere arbitrarily⁵¹⁷). The strategy of reciprocal power aims at equalizing the resources of dominator and dominated to enable the previously dominated person to defend themselves against interference though Pettit recognizes that this “ideal defensive form” is rarely available. Usually, the feasible alternative is to allow the parties to threaten interference with punishment⁵¹⁸.

Pettit uses the trade union movement as an example of reciprocal power, stating that the movement advanced the non-domination of workers in the industrial world by “giving them collective powers with which to confront the powers of employers⁵¹⁹”. Republican freedom also legitimized the use of strikes, as strikes “may represent the only hope of winning freedom as non-domination for those who are employed. It may be the only way of giving workers sufficient power to enable them to stand up, individually, to their employer”⁵²⁰.

In short, republican theory legitimizes strikes for their own value in countering domination in the private government of the workplace. Strikes are no longer derivative rights, but an exercise in reciprocal power. The state must then guarantee access to this mechanism of reciprocal power

⁵¹⁶ Pettit, *supra* note 117, 67.

⁵¹⁷ Pettit, *supra* note 117, 68.

⁵¹⁸ Pettit, *supra* note 117, 67.

⁵¹⁹ Pettit, *supra* note 117, 95.

⁵²⁰ Pettit, *supra* note 117, 142.

to ensure freedom. In Canada, this culminated with a constitutional protection of the right to strike in 2015.

2.5 – Horizontal Domination and the Legitimacy of the Court’s Actions

Shortly after the *Alberta Reference*, Cavalluzzo wrote that courts were an inappropriate forum for deciding upon the “delicate balance of interests” inherent in collective bargaining⁵²¹. The early cases were merely a re-affirmation that trade union rights were statutory rather than constitutional rights and could thus serve as protection against “s.2(d) attacks brought by employers and dissident employees against labour laws which provide for exclusive representation and union security clauses”⁵²².

The shift from focus from non-interference to non-domination⁵²³ shifts the role of the state.

According to Pettit:

Imagine that we have a choice between leaving employers with a lot of power over employees, or men with a lot of power over women, and using state interference to reduce such power. Maximizing overall non-interference is perfectly compatible with taking the first option. While we do not guard against interference by the stronger under that option, we may not think that is very likely to occur; and because we do not guard against interference by the stronger, we will count the absence of state interference as a great boon⁵²⁴.

⁵²¹ Cavalluzzo, *supra* note 85, 272.

⁵²² *Ibid.*

⁵²³ A critique leveled against this approach is that it ignored systemic forms of control endemic to modern society, including systemic racism and widespread prejudice. See: Michael J Thompson, “Reconstructing republican freedom: A critique of the neo-republican concept of freedom as non-domination” (2013) 39:3 *Philosophy & social criticism* 277.

In response to such critiques, Costa points out that there are causal relationships between prejudice and arbitrary interference, so that when one targets prejudice, once also reduces domination. See: M Victoria Costa, “Freedom as Non-Domination and Widespread Prejudice” (2019) 50:4 *Metaphilosophy* 441 at 444.

⁵²⁴ Pettit, *supra* note 117, 85.

As non-domination is not a goal that can be satisfactorily pursued by individuals⁵²⁵ (as discussed earlier), having the state seek to promote non-domination by non-dominating means becomes more promising⁵²⁶. Thus, republican views of the role of law and law-makers will differ considerably from libertarian (and some liberal) views. For a republican, a properly constituted law may represent a form of interference, but it is a non-dominating interferer that does not compromise liberty⁵²⁷. According to Pettit: “Good laws may relieve people from domination - may protect them against the resources or dominium of those who would otherwise have arbitrary power over them - without themselves introducing any new dominating force⁵²⁸”.

The issue raised here is not *state* action (where the State is usually associated with the legislature) but *court* action. In short, it is an issue of legitimacy raised by decisions made by the Court as opposed to through legislative channels. Some scholars question from where Courts, performing what is perceived as a constraint on majority rule, derive their legitimacy⁵²⁹, a problem labeled by Bickel as the “Counter-majoritarian Difficulty”⁵³⁰ and expressed by numerous scholars in the aftermath of *Health Services*.

⁵²⁵ Pettit, *supra* note 117, 92.

⁵²⁶ Pettit, *supra* note 117, 93.

⁵²⁷ Pettit, *supra* note 117, 35.

⁵²⁸ Pettit, *supra* note 117, 36.

⁵²⁹ Ian Shapiro, *Politics against Domination* (Cambridge, Mass: Harvard University Press, 2016) at 41.

⁵³⁰ Alexander M Bickel, *The least dangerous branch: the Supreme Court at the bar of politics*, 2nd ed. (New Haven: Yale University Press, 1986) at 16.

Qualifying the newly developed right to bargain collectively as a “derivative” right⁵³¹, Langille and Oliphant summarized this very issue with *Dunmore* and *Health Services* as follows:

Does the Charter demand the legislature pass a statute altering the background common law structure of rights and freedoms of private actors (the employers of the agricultural workers) in order to secure the constitutional freedom of the workers to associate? There are three possible answers in any given case: (1) the Charter forbids the redistribution of common law rights and freedoms via the statutory construction of derivative rights; (2) the Charter demands, or sometimes demands, the creation of such derivative rights; or (3) the Charter is agnostic, in that it neither forbids nor demands modification of the background law, but leaves it to legislative judgment (or the lack thereof). It is critical to note that all of our statutory labour and employment law depends on the first answer not being the right one. Before *Dunmore*, the answer in the labour relations sphere was largely the third answer. After *Dunmore*, it is often the second⁵³².

For Langille and Oliphant, the freedom of association cases brought to light how the *Charter* “blurred the lines” between judicial and legislative functions in Canada⁵³³. In his seminal analysis of the United States Supreme Court, Bickel wrote that “the root difficulty is that judicial review is a counter-majoritarian force in our system”⁵³⁴. Though the legislature cannot operate by consulting the population through repeated plebiscites, the entire legislative decision-making system is subject to a certain amount of public scrutiny and account⁵³⁵. Waldron is explicit when stating that “judicial review of legislation is inappropriate as a mode of final decision making in a free and democratic society”⁵³⁶. Indeed, for Waldron, it’s counter-majoritarian nature makes it democratically illegitimate: “By privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles

⁵³¹ *Dunmore*, *Health Services*, and *Fraser* are, according to Langille and Oliphant, derivative rights cases. The claim is not that the state should not interfere, but rather that the state has a constitutional duty to modify the existing set of legal entitlements forming the legal structure of freedom of association by enacting a further scheme of rights and duties to protect the exercise of freedom of association. Langille and Oliphant, *supra* note 469, 266.

⁵³² Langille & Oliphant, *supra* note 469, 265.

⁵³³ Langille & Oliphant, *supra* note 469, 298.

⁵³⁴ Bickel, *supra* note 530, 16.

⁵³⁵ Bickel, *supra* note 530, 17.

⁵³⁶ Jeremy Waldron, “The Core of the Case against Judicial Review” (2006) *The Yale Law Journal*, Vol. 115, No. 6, 1346 at 1348.

of representation and political equality in the final resolution of issues about rights⁵³⁷. Kavanagh challenges Waldron's claim that "giving people a say in the political decision-making of majoritarian institutions is more important than the outcomes of that decision-making process" and asserts that judicial review itself can be viewed as a valuable channel of political participation⁵³⁸. As will be discussed below, the judicial review of legislation by the courts can even be considered part of our democratic dialogue.

Scholars have written that an advantage of judicial action is that judges make decisions rooted in the "flesh and blood" of actual cases, rather than in abstraction⁵³⁹. Waldron, however, points out that by the time an issue reaches the Supreme Court, it often presents a level of abstraction similar to the issue presented before the legislature⁵⁴⁰.

For Raz, courts are political bodies but do not deal with the same matters as the legislature⁵⁴¹. Questions of competing civil and political rights inevitably combine issues of individual interest with issues of common interest, and should therefore be dealt with by the courts⁵⁴². Since these questions cannot be settled except by deciding questions of public interest, the Court is inevitably involved in politics. However, seeing how – according to Raz - these matters are best settled on the basis of the central tenets or principles of the political tradition, "it is fitting that they should be

⁵³⁷ Waldron, *supra* note 536, 1353.

⁵³⁸ Aileen Kavanagh, "Participation and Judicial Review: A Reply to Jeremy Waldron" (2003) 22 *Law and Philosophy* 451 at 453.

⁵³⁹ Bickel, *supra* note 530, 116.

⁵⁴⁰ Jeremy *supra* note 535, 1379-1380.

⁵⁴¹ Joseph Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994) at 58.

⁵⁴² Raz, *supra* note 541, 57.

removed from the ordinary democratic process and be assigned to a separate political process”⁵⁴³.

Within neo-republican thought, the counter-majoritarian difficulty also raises controversy. For Shapiro, judicial review is not problematic as such, though its merits “have been greatly oversold”⁵⁴⁴. Though an independent judiciary is sold as the “best bet” to protect minority rights from the dangers of majoritarianism, Shapiro finds that “most judges are conventional establishment figures” and that Supreme Court judges, when appointed, reflect the values of the government appointing them⁵⁴⁵. Shapiro adds that if they sway from those values, “It is more likely to be in the direction of public opinion as expressed through elected branches than away from it”⁵⁴⁶. In Canada, the Court has historically rejected two-thirds of the *Charter* claims it hears⁵⁴⁷. Finally, Shapiro adds that it is “exceedingly difficult to show that judicial review matters for the prevention of domination”, as, citing fascism and apartheid as examples, “authoritarian governments routinely flout courts when they are intent on domination”⁵⁴⁸.

There are two main responses to the counter-majoritarian difficulty as raised in the freedom of association cases. First, as presented above, freedom from domination requires state action. Second, the Court’s action was more limited than what critics would suggest, giving a wide margin

⁵⁴³ *Ibid.*

⁵⁴⁴ Shapiro, *supra* note 529, 71.

⁵⁴⁵ *Ibid.*

⁵⁴⁶ *Ibid.*

⁵⁴⁷ Kent Roach, *The Supreme Court on Trial - Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2016) at 9.

⁵⁴⁸ Shapiro, *supra* note 529, 72.

within which the legislature could act. Indeed, the Court never imposed a particular legislative model of collective bargaining rights⁵⁴⁹. In leaving the actual model of collective bargaining rights open to legislative intervention, the Court entered into a dialogue with the legislator. Indeed, for Roach, the freedom of association cases present an excellent example of how judicial review leads to dialogue between the Court and the legislature. In *Dunmore*, the Court struck down legislation but suspended the remedy for 18 months. A decade later, in *Fraser*, the Court upheld the government's new legislation⁵⁵⁰. The dialogic interaction between the Court and the legislature was described by the Court itself as follows:

As I view the matter, the Charter has given rise to a more dynamic interaction among the branches of governance. This interaction has been aptly described as a “dialogue” by some (...) In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches. As has been pointed out, most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives (...). By doing this, the legislature responds to the courts; hence the dialogue among the branches⁵⁵¹.

In Canada, the Court has frequently delayed its declaration on invalidity, thus suspending the remedy to give legislatures opportunity to adopt new legislation⁵⁵². In the case of freedom of association, legislatures have indeed crafted a range of replies to the Court's decisions, often justifying the limits they impose on certain facets of expanded freedom of association⁵⁵³.

⁵⁴⁹ This distinction was applied in a series of decisions in Québec in the decade following *Health Services* when various statutes were contested. See : *Association des cadres de la Société des casinos du Québec et Société des casinos du Québec inc.*, 2016 QCTAT 6870 (CanLII) at par. 220; *Centrale des syndicats du Québec c. Québec (Procureur général)*, 2013 QCCS 32 (CanLII) at par. 390; *Confédération des syndicats nationaux c. Québec (Procureur général)*, 2008 QCCS 5076 (CanLII) at par. 221. These cases will be further discussed in Chapter 5.

⁵⁵⁰ Roach *supra* note 546, 350.

⁵⁵¹ *Vriend v. Alberta*, 1998 CanLII 816 (SCC), [1998] 1 SCR 493 at par. 138. [*Vriend*]

⁵⁵² Roach, *supra* note 546, 226.

⁵⁵³ Roach, *supra* note 546, 350.

Finally, the review of legislative action by the courts was justified by Bickel by the particular role played by the courts (particularly, in the case of Bickel, by the United States Supreme Court). The function of the Court in constitutional matters, according to Bickel, "is to define values and proclaim principles"⁵⁵⁴. Government action invariably has two aspects: the immediate effects and the - perhaps unintended- "bearing on values we hold to have more general and permanent interest"⁵⁵⁵. If the legislature is better suited to satisfying the immediate needs of the many, the Court is better suited to supporting and maintaining "enduring general values"⁵⁵⁶. Roach sees this aspect of decision-making as one which contributes to democracy. The Court enhances democracy, not by avoiding constitutional judgment, but by defining broad enduring principles which are then refined by the legislation required in particular cases⁵⁵⁷.

In the Canadian context, this reliance on principles was most evident in *Health Services*, where the Court relied on principles that were said to underly the *Charter* to interpret a particular *Charter* freedom. These principles (namely liberty, freedom, autonomy, equality, democracy, and dignity) will be examined at length in the second half of the dissertation.

Conclusion

In 1986, the majority of the Court defined "government" in section 32 of the *Charter* as " the Parliament and Government of Canada and to the legislatures and governments of the Provinces in respect of all matters within their respective authorities"⁵⁵⁸. Though this is a commonly held

⁵⁵⁴ Bickel, *supra* note 530, 68.

⁵⁵⁵ Bickel, *supra* note 530, 24.

⁵⁵⁶ Bickel, *supra* note 530, 27.

⁵⁵⁷ Roach, *supra* note 546, 167.

⁵⁵⁸ *RWDSU v. Dolphin Delivery Ltd.*, 1986 CanLII 5 (SCC), [1986] 2 SCR 573 at par. 33. [*Dolphin Delivery*]

view of government, Anderson calls for a rejection of the “false narrowing” of government to the State, arguing that liberty can be significantly constrained in domains of private activity⁵⁵⁹. Indeed, though liberalism focuses on freedom from state intervention, Anderson highlights the state of unfreedom that one finds oneself subject to under the private government of the workplace. Private government, according to Anderson, “has arbitrary, unaccountable power over those it governs”⁵⁶⁰. If the promotion of freedom as non-domination for all citizens is a requirement for justice, then the state cannot limit itself to examining only its activities; it must also seek to limit arbitrary domination in the workplace.

Though such intervention can be carried out by the legislature, when the ball is placed in the court of the judiciary (not to say the Court’s court), the Court, as guardian of principles, may draw on pre-institutional rights to read into the right to join a union both a right to bargain and a right to strike. Though both rights may seem incompatible with a liberal approach focused on individual negative freedoms, the shift to a republican understanding of freedom of association allows for the protection of individual freedom from domination through collective action to fulfil expressly egalitarian objectives.

⁵⁵⁹ Anderson, *supra* note 423, 48.

⁵⁶⁰ Anderson, *supra* note 423, 45.

Conclusion of Part I

From 1982 onwards, discussions of the application of the *Charter* to collective bargaining raised certain points of tension. Early, issues related to the collective nature of labour rights were raised. To this, questions regarding the negative dimension of a *Charter* freedom and of the freedom not to associate were added in the early 1990s. The *Dunmore* departure raised issues of quality rights, specifically of how equality interacts with freedom in the field of labour law. Finally, the specific role to be played by the Court (particularly as it expanded freedom of association to protect the right to strike) was called into question.

The turn taken in *Health Services* went beyond the imperatives of international law or the guidelines of labour history (as will be more fully explored in Part II), deviating from trends in earlier jurisprudence under 2(d). Perhaps the strongest worded critique of *Health Services* was, as mentioned previously, Rothstein J.'s dissent in *Fraser*. In this dissent, the judge espoused an interpretation more consistent with classical liberalism and the Court's earlier jurisprudence, namely that the *Charter* protected individual rights⁵⁶¹ and that 2(d) granted a protection from obstacles to association (a freedom and not a right)⁵⁶². Finally, Rothstein disagreed with the Court's use of *Charter* values, arguing that the interpretation strayed too far from the words of the *Charter* itself⁵⁶³. To Rothstein J.'s dissent, the majority in *Fraser* wrote that "a value-oriented approach to the broadly worded guarantees of the *Charter*" had been "repeatedly endorsed by *Charter* jurisprudence"⁵⁶⁴. This jurisprudence will be thoroughly examined in the next part.

Indeed, the second part of this thesis will focus on the use of these *Charter* values, values which may not only serve to justify the expansion of freedom of association but also the very action of

⁵⁶¹ *Fraser 2011, supra* note 316, par. 178.

⁵⁶² *Fraser 2011, supra* note 316, par. 190-195.

⁵⁶³ *Fraser 2011, supra* note 316, par. 252-253.

⁵⁶⁴ *Fraser 2011, supra* note 316, par. 96.

the Court. Each value (liberty, personal autonomy, equality, democracy, and dignity) will be examined both in the context of freedom of association and in the Court's jurisprudence more generally. From these values, a coherent framework of freedom of association in Canada will be developed based on existing legal and political theory to address tensions within the interpretation of freedom of association in a liberal bill of rights, as well as philosophical tensions in examining the employment contract in a liberal society.

PART II – A Reconstruction Founded on Charter Values

As explored previously, the *Canadian Charter of Rights and Freedoms* is, at its core, a liberal instrument. Thus, exploration of a right to bargain collectively protected under the *Charter's* freedom of association reveals specific points of tension consistent with liberal approaches to rights and freedoms. In contrast, the employment contract is inherently illiberal. The strict and limited application of an instrument such as the *Charter* to an institution like employment is anachronistic.

Under republican theory, the role of the state is protective; law may present a form of interference, but it does not dominate⁵⁶⁵. On the contrary, law may relieve people from domination and protect against those that would otherwise yield arbitrary power⁵⁶⁶. This protective stance justifies interference and may seem at odds with classical liberalism. When the judiciary branch is involved, the protective role is exercised through interpretation. The Court will draw on moral concepts to widen the interpretation of *Charter* rights and freedoms.. In Canada, the Court refers to these moral concepts as *Charter* values. The Court also makes use of moral arguments in subtler ways, including through appeals to universal reason in its use of international law. Ultimately, the legislature will be responsible for adopting or amending legislation in a way consistent with its protective role of preventing domination. Thus, the Court and the legislature will play two distinct yet complimentary roles; the Court will provide a moral framework for the legislature to protect rights and freedoms.

In the case of freedom of association, by interpreting *Charter* rights and freedoms broadly, in a way consistent with the protective function of the state and in an attempt to reduce domination,

⁵⁶⁵ Pettit, *supra* note 117, 35.

⁵⁶⁶ Pettit, *supra* note 117, 36.

the Court creating constitutional (rather than merely statutory) obligations for private actors. To reduce workplace domination, the Court interpreted freedom of association through a moral lens but also with an objective of reducing domination and relational inequality. To achieve this aim, the Court needed to create mechanisms of antipower. Such mechanisms already existed in provincial legislation, as well as in the *Canada Labour Code*. Thus, the Court elevated statutory rights and duties, giving them a constitutional protection.

The approach taken by the Court since *Health Services* is closer to a republican approach to freedom than a classically liberal approach. By drawing on a series of moral values, the Court made a normative choice (to protect a right to bargain collectively) based on a republican argument for freedom from domination in the work place.

This part of the thesis offers a theoretical reconstruction of freedom of association in Canada founded on a republican approach to *Charter* rights. This moral reconstruction stems from the four values identified in *Health Services*, specifically freedom and autonomy, equality, democracy and dignity. Chapter 3 examines the general use of *Charter* values by the Court, as well as how the *Charter* values argument compares to other arguments raised in *Health Services*. The fourth of this thesis will examine each of the four values in turn. The fifth and final chapter of this thesis will examine an argument used by the Court in *Health Services*, namely international law. However, this argument will be reexamined in light of the previous chapters as a moral argument, specifically an appeal to universal reason.

Chapter 3 – The Use of Charter Values by the Supreme Court of Canada

There is power in a factory, power in the land
Power in the hand of the worker
But it all amounts to nothing
If together we don't stand
There is power in a Union
Now the lessons of the past
Were all learned with workers' blood
The mistakes of the bosses we must pay for
From the cities and the farmlands
To trenches full of mud
War's always been the bosses' way, sir
The Union forever defending our rights
Down with the blackleg, all workers unite
With our brothers and our sisters
From many far-off lands
There is power in a Union
Now I long for the morning that they realize
Brutality and unjust laws cannot defeat us
But who'll defend the workers who cannot organise
When the bosses send their lackeys out to cheat us?
Money speaks for money
The Devil for his own
Who comes to speak for the skin and the bone?
What a comfort to the widow
A light to the child
There is power in a Union.

(There is Power in a Union,

Billy Bragg⁵⁶⁷)

⁵⁶⁷ Bragg, Billy, "There is Power in a Union" (1986). A first version of this song was originally written by Joe Hill in 1913 and was included in the Wobblies' *Little Red Songbook*. Though there is only an indirect reference to industrial democracy, the author of the thesis could not have imagined not including this song in her dissertation. In 2019, Bragg published a pamphlet on freedom entitled *The Three Dimensions of Freedom*. The three-pronged approach to freedom (liberty, equality, and accountability) reflects both neo-republican and egalitarian approaches to freedom. With an analysis centered around freedom of speech, Bragg argues that protection against tyranny requires more than absolute freedom; freedom requires equal protection, and to avoid domination, we must be accountable for the truthfulness of our expression. (Billy Bragg, *The Three Dimensions of Freedom*, (London: Faber & Faber Ltd, 2019)) If Mr. Bragg ever reads this, my entire doctoral journey will have been worthwhile.

In *Health Services*, the Court relied on four main arguments to conclude that collective bargaining fell under the ambit of section 2(d) of the *Charter*. Briefly, these arguments can be summarized as follows. First, the caselaw of the Court evolved beyond the Court's original position in the 1987 *Alberta Reference*. Second, international law supported a constitutional protection of collective bargaining. Third, the same could be said of Canada's labour history. Finally, the Court relied on the *Charter's* underlying values to justify this expansion of section 2(d) of the *Charter*⁵⁶⁸.

In using values to read collective bargaining into the general freedom of association protected under the *Charter*, the Court applied moral arguments to constitutional adjudication. This chapter will first examine the use of moral arguments in constitutional adjudication (3.1), before examining specific uses of *Charter* values by the Court (3.2).

3.1 –The Use of Moral Arguments in Constitutional Adjudication

Constitutions contain moral language⁵⁶⁹. For example, the *Charter* speaks of “fundamental justice”⁵⁷⁰, of “just cause”⁵⁷¹, of cruelty⁵⁷², and of equality⁵⁷³. Such language is broad and evocative of moral and ethical considerations.

⁵⁶⁸ *Health Services*, *supra* note 2.

⁵⁶⁹Boško Tripković, *The metaethics of constitutional adjudication* (Oxford, United Kingdom: Oxford University Press, 2017) at 18.

⁵⁷⁰ *Canadian Charter*, *supra* note 1, art. 7.

⁵⁷¹ *Canadian Charter*, *supra* note 1, art. 11(e) .

⁵⁷² *Canadian Charter*, *supra* note 1, art. 12.

⁵⁷³ *Canadian Charter*, *supra* note 1, art. 15.

For Dworkin, we all engage in a moral reading of the constitution, in the sense that judges, lawyers and citizens interpret and apply the abstract clauses of constitutional documents “on the understanding that they invoke moral principles about political decency and justice”⁵⁷⁴. Though Dworkin is explicit in stating that there is nothing revolutionary in the moral reading of constitutional texts, he is quick to add that it would “indeed be revolutionary for a judge to openly recognize the moral reading, or to admit that that it is his or her strategy of constitutional interpretation, and even scholars and judges who come close to recognizing it shrink back, and try to find other, usually metaphorical, descriptions of their own practice”⁵⁷⁵. In Canada, this use of morality is not hidden as the Court has explicitly recognized their use of moral values in *Charter* cases since 1986. In *Dolphin Delivery*, the majority of the Court (writing on the inapplicability of the *Charter* to a private conflict), wrote that the “judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution”⁵⁷⁶. Two years later, the Court added that statutory interpretation must take *Charter* values into consideration (without citing any particular *Charter* right or freedom)⁵⁷⁷. Writing on the process of adjudicating in the *Charter* era, judges Rivet and Santorineos stated that to assert that law is composed of values is to also recognize the place of morality in adjudication⁵⁷⁸.

⁵⁷⁴ Ronald Dworkin, *Freedom’s Law, The Moral Reading of the American Constitution* (Cambridge, Massachusetts: Harvard University Press, 1996) at 2.

⁵⁷⁵ Dworkin, *supra* note 574, 3.

⁵⁷⁶ *Dolphin Delivery*, *supra* note 558, par. 39.

⁵⁷⁷ *Hills v. Canada (Attorney General)*, 1988 CanLII 67 (SCC), [1988] 1 SCR 513 at par. 93.

⁵⁷⁸ Michèle Rivet & Anne-Marie Santorineos, “Juger à l’ère des droits fondamentaux”(2012) 42-1-2 *Revue de Droit de l’Université de Sherbrooke* 363 at 380.

For some authors, moral philosophy is intimately tied to law. According to Dworkin, both judges and lawyers “are always philosophers, because jurisprudence is part of any lawyer’s account of what the law is”. In constitutional adjudication, philosophy is even “closer to the surface of the argument”⁵⁷⁹. Other authors evoke the proximity of moral values and unwritten constitutional principles, with Zhou writing of the “close relationship between principles and values is universally recognized in various ways, from the assertion that values are 'characteristically expressed' in legal principles to their indispensable interconnection to even their complete interchangeability”⁵⁸⁰.

The distinction between moral arguments and arguments based on unwritten constitutional principles can be ambiguous. For Triptovic, the moral function of the argument depends on “the degree to which such argument aims at a morally apposite answer⁵⁸¹”, adding that “ethical arguments are more often than not oriented towards innovative interpretation rather than towards conserving interpretation”⁵⁸² which makes them different from other constitutional arguments such as those founded on unwritten constitutional principles.

Despite repeated references to values in *Charter* cases, Bernatchez notes that the Court generally avoids ethical discussion in constitutional adjudication (Bernatchez describes these

⁵⁷⁹ Ronald Dworkin, *Law’s Empire* (Cambridge, Massachusetts: Belknap Press, 1986) at 380.

⁵⁸⁰ Han-Ru Zhou, “Legal Principles, Constitutional Principles, and Judicial Review” (2019) 67 *American Journal of Comparative Law* 899 at 902.

⁵⁸¹ Tripković, *supra* note 569, 18.

⁵⁸² *Ibid.*

decisions as minimalist)⁵⁸³. Using the Court's interpretation of equality founded on human dignity as an example, Bernatchez argues that the Court paradoxically recognizes the place of morality in legal reasoning while refraining from fully delving into moral issues⁵⁸⁴. As it is simpler to agree on constitutional practices than on principles, the Court (particularly when confronted with hard cases) will often reduce a question to its most concrete dimensions to reach what Bernatchez describes as incompletely theorized agreements⁵⁸⁵.

Nonetheless, the Court has repeatedly made reference to and use of moral arguments (framed as underlying values) since 1986. These moral concepts have evolved and, through the principle of *stare decisis*, acquired a legal force that is impossible to ignore. To gain acceptance, moral arguments have to obtain a legal form that is recognized by the legal system⁵⁸⁶. As judges are frequently criticized for "not applying the law", judges convert moral arguments into legal forms⁵⁸⁷. In the case of freedom of association, these legal forms are *Charter* values.

It would be incorrect, writes Triptovic, to "think of morality as something that exists apart from legal reasoning and that at times finds its way to judicial decisions while retaining its distinctive character, unaffected by the whole process. Instead, the morality used in constitutional cases is by and large constructed by constitutional reasoning"⁵⁸⁸.

⁵⁸³ Stéphane Bernatchez, "La Fonction Paradoxale de la Morale et de L'Éthique dans le Discours Judiciaire" (2006) 85 Canadian Bar Review 221.

⁵⁸⁴ Bernatchez, *supra* note 583, 224.

⁵⁸⁵ Bernatchez, *supra* note 583, 228.

⁵⁸⁶ Tripković, *supra* note 569, 20.

⁵⁸⁷ Tripković, *supra* note 569, 25.

⁵⁸⁸ Tripković, *supra* note 569, 22.

Triptovic identified three categories of moral arguments used by judges in constitutional adjudication: arguments from constitutional authority, arguments from common sentiment, and arguments based on universal reason⁵⁸⁹. Arguments based on universal reason, specifically how the Court used international law as a moral argument, will be examined in Chapter 5.

Arguments from common sentiment look at existing moral feelings to discover solutions to moral issues⁵⁹⁰. The argument of common sentiment does not exclude other (even other moral or ethical) arguments for constitutional interpretation⁵⁹¹. A Canadian example cited by Tripkovic is LaForest J.'s analysis of "principles of fundamental justice" in *Schmidt*⁵⁹². Examining the applicability of the *Charter* to matters of extradition, La Forest J. stated that situations "may well arise where the nature of the criminal procedures or penalties in a foreign country sufficiently shocks the conscience as to make a decision to surrender a fugitive for trial there one that breaches the principles of fundamental justice enshrined in s. 7"⁵⁹³. The "sufficiently shocks the conscience" test was, in the words of Triptovic "a litmus test consisting in an emotional reaction to extradition"⁵⁹⁴.

Arguments from constitutional identity locate "the source of value in a set of deep and self-identifying evaluative commitments that develop in a society in virtue of the fact that it has a constitution⁵⁹⁵." In short, they are ethical arguments that derive from the constitution itself. Arguments from constitutional identity derive their force from the fact that the constitutional document reflects certain moral commitments of the community, while remaining independent

⁵⁸⁹ Tripković, *supra* note 569.

⁵⁹⁰ Tripković, *supra* note 569, 59.

⁵⁹¹ Tripković, *supra* note 569, 63.

⁵⁹² Tripković, *supra* note 569, 72.

⁵⁹³ *Canada v. Schmidt*, 1987 CanLII 48 (SCC), [1987] 1 S.C.R. 500, 522.

⁵⁹⁴ Tripković, *supra* note 569, 73.

⁵⁹⁵ Tripković, *supra* note 569, 13.

from the substance of the constitutional document itself⁵⁹⁶. As such, *Charter* values, though moral arguments, can be considered arguments from constitutional identity.

The primary difficulty identified by scholars is identifying what is or is not a *Charter* value and why⁵⁹⁷. Furthermore, the use of *Charter* values as a way of making legislation compliant while simultaneously avoiding invalidation poses a problem for the concept of *Charter* dialogue⁵⁹⁸. Another critique, which echoes the critique of unwritten constitutional principles more generally, is that although some values might align with rights, others do not, leading to unpredictability⁵⁹⁹. Finally, it is unclear to what extent the values constitute judicially enforceable constitutional law⁶⁰⁰, despite the uncontroversial use of unwritten principles to “fill the gaps” of the written constitution since the *Secession reference*⁶⁰¹.

In addition to arguments from common sentiment and from constitutional identity, Triptovic identifies arguments to universal reason as a third category of moral argument in constitutional adjudication. Universal reason “relies on the idea that morality is universal, or at least more detached from particular communal, cultural, or individual experiences⁶⁰²” and often takes the form of reliance on foreign law in constitutional cases. Again, according to Triptovic, both “case law and academic commentary share the notion that the use of foreign law has to do with the idea of reasoned judgment in morally sensitive issues, and that this phenomenon depends on a more

⁵⁹⁶ Tripković, *supra* note 569, 31.

⁵⁹⁷ Lorne Sossin & Mark Friedman, “Charter Values and Administrative Justice” (2014) 67 Supreme Court Law Review 391 at 409.

⁵⁹⁸ Mark Harding & Rainer Knopff, “Charter values vs. Charter dialogue” (2013) 31:2 National Journal of Constitutional Law 161.

⁵⁹⁹ Christopher Brecht & Ewa Krajewska, “Doré: All That Glitters Is Not Gold” (2014) 67 Supreme Court Law Review 339 at 353.

⁶⁰⁰ Mark Harding & Rainer Knopff, “Constitutionalizing Everything: The Role of Charter Values” (2013) 18 Review of Constitutional Studies 141 at 143.

⁶⁰¹ Harding & Knopff, *supra* note 600, 154. See: *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 SCR 217.

⁶⁰² Tripković, *supra* note 569, 97.

cosmopolitan understanding of the nature of value⁶⁰³. Barak encourages the use of foreign law as an interpretive aid when the legal systems share common values⁶⁰⁴.

In the freedom of association cases, the Court drew on international law and “international thought” to expand the protection of freedom of association under the *Charter*. In *Health Services*, the majority of the Court stated that a right to bargain collectively was crystallized in the *Declaration on Fundamental Principles and Rights at Work*⁶⁰⁵. Drawing on the *Declaration* to impose legal obligations is questionable. The *Declaration on Fundamental Principles and Rights at Work* was adopted in 1998⁶⁰⁶ as a way for the ILO to recognize the challenges posed by globalisation⁶⁰⁷. It was adopted as discussions on the economic and social implications of the globalization of the world economy were taking place in other fora⁶⁰⁸. It has been argued that the Declaration cannot be used as a source of law, as the point of the Declaration was largely “promotional” and it sought to enact a new strategy, namely that of tying a select few core labour rights to development assistance rather than legal enforcement⁶⁰⁹. The Court also referred to three United Nations instruments in its decisions, namely the *Universal Declaration of Human Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the *International Covenant on Civil and Political Rights*⁶¹⁰.

⁶⁰³ Ibid.

⁶⁰⁴ Aharon Barak, *The Judge in a Democracy* (Princeton, New Jersey: Princeton University Press, 2006) at 198 and 201.

⁶⁰⁵ *Health Services*, *supra* note 2, par. 78.

⁶⁰⁶ Isabelle Duplessis, “La déclaration de l’OIT relative aux droits fondamentaux au travail : Une nouvelle forme de régulation efficace ?” (2004) 59:1 *Industrial Relations* 52 at 52.

⁶⁰⁷ Duplessis, *supra* note 606, 53.

⁶⁰⁸ Hillary Kellerson, “The ILO Declaration of 1998 on fundamental principles and rights: A challenge for the future” (1998) 137:2 *International Labour Review* 223 at 224.

⁶⁰⁹ Brian Langille & Benjamin Oliphant, “From the Frying Pan into the Fire: Fraser and the Shift from International Law to International ‘Thought’ in Charter Cases” (2011) 16 *Can Lab & Emp LJ* 181 at 198.

⁶¹⁰ *Health Services*, *supra* note 2, par. 71-74.

Referring to the lack of analysis of international obligations in both *Health Services* and *Fraser*, Banks writes: "The Supreme Court has yet to canvass international jurisprudence on the meaning of freedom of association in any depth"⁶¹¹. While it is true that the Court's analysis, particularly in *Health Services*, was brief, several authors have pointed out errors in the Court's use of ILO instruments.

Langille and Oliphant point out an error of reasoning in the majority's use of international law in *Health Services*. According to the authors, the majority used international legal documents as a form of legal argument, treating the texts as "Holy Scripture" without providing analysis of the obligations contained therein⁶¹². Though the majority points out the 'persuasive' (as opposed to binding) nature of international law, it does not cite a single ILO case in *Health Services*, nor does it explain what is binding in the cited instruments⁶¹³.

The international framework for collective bargaining has been described as follows:

The framework within which collective bargaining must take place if it is to be viable and effective is based on the principle of the independence and autonomy of the parties and the free and voluntary nature of the negotiations; it requires the minimum possible level of interference by the public authorities in bipartite negotiations and gives primacy to employers and their organizations and workers' organizations as the parties to the bargaining⁶¹⁴.

According to Banks, there is no support in international law for imposing a legal duty to bargain on employers⁶¹⁵ in part, because it cannot be said that ILO instruments favour a Wagner model of industrial relations. First, ILO instruments encourage bargaining at the sectoral level⁶¹⁶.

⁶¹¹ Kevin Banks, "The Role and Promise of International Law in Canada's New Labour Law Constitutionalism" (2011) 16 Can Lab & Emp LJ 233 at 252.

⁶¹² Langille & Oliphant, *supra* note 609, 183.

⁶¹³ Langille & Oliphant, *supra* note 609, 193.

⁶¹⁴ Jean-Michel Servais, "ILO standards on freedom of association and their implementation" (1984) 123 International Labour Review 765 at par. 34.

⁶¹⁵ Banks, *supra* note 611, 245.

⁶¹⁶ Servais, *supra* note 614, 36.

Second, both systems where a union represents only its members and a system where it represents all employees (majority unionism) respect *Convention 87*⁶¹⁷. Finally, the ILO conventions contain no formal obligation to negotiate for the purpose of reaching an agreement⁶¹⁸, let alone do they contain an obligation to bargain in good faith. Indeed, “good faith cannot be imposed by law, it 'could only be achieved as a result of the voluntary and persistent efforts of both parties'⁶¹⁹”. Though it may seem, from *Health Services*, that the obligation to bargain in good faith derives from Canada’s international obligations, the constitutional duty to bargain far exceeds that which is contained in international instruments. Nothing in the ILO conventions imposes an obligation to bargain in good faith⁶²⁰, an obligation that was read into section 2(d) in both *Health Services* and *Fraser* based -apparently- on international obligations⁶²¹.

Further insight into the weight to give international law in establishing the scope of section 2(d) of the *Charter* is provided in *Fraser*. Indeed, international law has recognized unionization rights for agricultural workers equivalent to those of industrial workers since 1921⁶²². Nowhere is this discussed in *Fraser*⁶²³. Thus, it would appear that international legal standards are used selectively by the Court. Langille and Oliphant also question the use of the phrase “international thought” in *Fraser*, stating that “thought” is a long way away from a norm or a rule, or even a consensus⁶²⁴. Thus, in *Fraser*, the Court appears to rely on unwritten principles outside of

⁶¹⁷ Servais, *supra* note 614, 38.

⁶¹⁸ Servais, *supra* note 614, 41.

⁶¹⁹ Servais, *supra* note 614, 43.

⁶²⁰ Pierre Verge & Dominic Roux, “L’affirmation des principes de la liberté syndicale, de la négociation collective et du droit de grève selon le droit international et le droit du travail canadien: deux solitudes?” in Pierre Verge, ed, *Droit International du Travail, Perspectives Canadiennes* (Cowansville: Thomson Reuters Canada, 2010) 437 at 450.

⁶²¹ Langille & Oliphant, *supra* note 609, 212.

⁶²² Harold Dunning, “The Origins of Convention No. 87 on freedom of association and the right to organize” (1998) 137:2 *International Labour Review* 149 at 160.

⁶²³ *Fraser 2011*, *supra* note 316.

⁶²⁴ Langille & Oliphant, *supra* note 609, 213.

international legal documents to justify its position, echoing the Court's use of *Charter* Values in *Health Services*.

The late special rapporteur John Ruggie, stated that the eight ILO conventions listed in the *Declaration on Fundamental Principles and Rights at Work* formed part of the "International Bill of Rights"⁶²⁵ which, for Finnis, formed the outline of the common good⁶²⁶. In this sense, the Court's references to a vague "international thought", speak to an idea of universally shared values which may guide the interpretation of Canadian constitutional law. This is compatible with the idea put forward by some academics that the legitimacy of national and regional human rights instruments rests on the existence of similar international instruments⁶²⁷.

3.2 – The Uses of *Charter* Values by the Supreme Court of Canada

Applying the Court's logic in the *Secession Reference*⁶²⁸ *mutatis mutandis*, it can be said that *Charter* values "inform and sustain" the *Charter*'s text and are vital to its understanding. In nearly forty cases, the Court has made reference to *Charter* values or to values underlying the *Charter*. These values have been used across many fields of law and have been used to interpret written *Charter* rights and freedoms, or to balance competing *Charter* rights and freedoms. *Charter*

⁶²⁵ United Nations, "Guiding principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" framework" (2011) at 19.

⁶²⁶ John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 214.

⁶²⁷ Krzysztof Orzeszyna, "Universalism of Human Rights: Notion of Global Consensus or Regional Idea" (2021) 3 *Review of European and Comparative Law* 165.

⁶²⁸ *Reference re Secession of Quebec*, *supra* note 600, par. 52-53: the Court has recognized that the Constitution is not limited to the constitutional texts and that certain broad principles, having legal authority, can be used to fill gaps in constitutional texts. Though these broad principles differ from *Charter* values, the author of the thesis wishes to draw the reader's attention to the recognition of normative principles outside of constitutional texts and the Court's reliance on such normative principles to compare and contrast with the Court's use of moral arguments (*Charter* values) as will be explored in section 3.2.

values, or more specifically, the need to interpret common law in conformity with *Charter* values, has even served as an argument for the creation of a common law tort of invasion of privacy⁶²⁹.

An overview of the Court's use of the terms "*Charter* values" reveals, across all fields of law, two primary categories of use: one as an interpretive instrument, the other as a balancing instrument.

3.2.1 – As a Balancing Instrument

Constitutional rights, according to Alexy can either be viewed narrowly or broadly. This second, broad and purposeful approach, he calls the principle construction⁶³⁰. In his *A Theory of Constitutional Rights*⁶³¹, Alexy invites the reader to distinguish between two categories of constitutional norms, namely rules and principles, adding that the concept of principles is necessary to account for conflicting constitutional rights⁶³². Distinguishing these category of norms can be made on the basis of their generality (with principles being of higher generality than rules)⁶³³, however their main distinction lies in the degree of satisfaction required by the norm. Whereas rules are either fulfilled or not, requiring one to do exactly what is stated in the rule, principles are "optimization requirements" requiring "that something be realized to the greatest extent possible given the legal and factual possibilities"⁶³⁴. Alexy's structural account of constitutional law (i.e. that rights are principles and that principles are optimization requirements) has been described as 'highly original' and 'compatible with the kind of strong substantive commitments that characterize normative theories of political liberalism'⁶³⁵. Kumm adds that

⁶²⁹ John Craig, "Invasion of Privacy and Charter Values: The Common-Law Tort Awakens" (1997) 42 McGill Law Journal 355 at 369-370.

⁶³⁰ Robert Alexy, "Constitutional Rights, Balancing, and Rationality" (2003) 16 Ratio Juris 131 at 131.

⁶³¹ Robert Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 1986).

⁶³² Alexy, *supra* note 631, 45.

⁶³³ *Ibid.*

⁶³⁴ Alexy, *supra* note 631, 47-48.

⁶³⁵ Mattias Kumm, "Constitutional rights as principles" (2004) 2:3 International Journal of Constitutional Law 574 at 576.

viewing rights as principles to guide and contain government act “reflects a conception of rights that is part of the revolutionary enlightenment tradition”⁶³⁶.

Conflicts between rules are resolved by reading an exception into a rule or by declaring a rule invalid⁶³⁷. When principles compete, courts decide which principle outweighs the other in those particular circumstances. Neither principle is declared invalid and neither has an exception read into it⁶³⁸. The courts will establish a “conditional relation of precedence between the principles” in light of the circumstances of a particular case⁶³⁹. The existence of principles therefore implies balancing or proportionality analysis⁶⁴⁰, and values are the evaluative criteria with which principles can be balanced⁶⁴¹. Consequently, it is unsurprising that a primary use of *Charter* values by the Court was the resolution of conflicts between competing principles, specifically through balancing or proportionality analysis.

Writing specifically on the right to pre-trial silence, justice Sopinka wrote, echoing the ideas expressed by Alexy, that *Charter* rights were not absolute “in the sense that they cannot be applied to their full extent regardless of their context”⁶⁴². Thus, according to Alexy’s classification, *Charter* rights are principles rather than constitutional rules. Justice Sopinka then added that

⁶³⁶ Mattias Kumm, “Who’s Afraid of the Total Constitution – Constitutional Rights as Principles and the Constitutionalization of Private Law” (2006) 7:4 German Law Journal 341 at 346.

⁶³⁷ Alexy, *supra* note 631, 49.

⁶³⁸ Alexy, *supra* note 631, 50.

⁶³⁹ Alexy, *supra* note 631, 52.

⁶⁴⁰ Alexy, *supra* note 631, 66.

⁶⁴¹ Alexy, *supra* note 631, 87-88.

⁶⁴² *R. v. Crawford*, 1995 CanLII 138 (SCC), [1995] 1 SCR 858 at par. 34.

conflicting rights must be reconciled in a way that respects the underlying *Charter* values⁶⁴³, again echoing the idea of values are evaluative instruments in a balancing or proportionality analysis.

Though *Charter* Values had been used, particularly as a balancing tool, since the 1990s, the idea of *Charter* values as a tool for juridical decision-making has played a more prominent role since the Supreme Court's *Doré* decision⁶⁴⁴.

In *Doré*, the Court was faced with determining "how to protect *Charter* guarantees and the values they reflect in the context of adjudicated administrative decisions"⁶⁴⁵. The Court did this by "distilling" the "essence" of the *Oakes* test⁶⁴⁶. The Court calls for decision makers to always consider fundamental values and to treat the *Charter* as a reflection of those values⁶⁴⁷. The administrative decision-maker must balance statutory objectives with *Charter* values⁶⁴⁸. In *Loyola*, the Supreme Court applied the *Doré* framework to balancing the values of a secular state with the values underlying freedom of religion⁶⁴⁹. According to the majority, the minister's decision in *Loyola* didn't take into account the values underlying religious freedom, leading to a disproportionate result⁶⁵⁰.

⁶⁴³ *R. v. Crawford*, *supra* note 642, par. 35.

⁶⁴⁴ Angela Cameron & Paul Daly, "Furthering Substantive Equality Through Administrative Law: Charter Values in Education" (2013) 63:2 Supreme Court Law Review 169 at 171.

⁶⁴⁵ *Doré v. Barreau du Québec*, 2012 SCC 12 (CanLII), [2012] 1 SCR 395 at par. 3. [*Doré*]

⁶⁴⁶ *Doré*, *supra* note 645, par. 5.

⁶⁴⁷ *Doré*, *supra* note 645, par. 35.

⁶⁴⁸ *Doré*, *supra* note 645.

⁶⁴⁹ *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 (CanLII), [2015] 1 SCR 613 at par. 43. [*Loyola*]

⁶⁵⁰ *Loyola*, *supra* note 649, par. 68

Of course, the use of *Charter* values as a balancing tool has not been without controversy. Macklin highlights that the *Doré* framework centered on proportionality is not how proportionality under section 1 of the *Charter* operates. According to Macklin:

A proportionality analysis in the context of rights adjudication is not neutral as between rights and freedoms protected by the *Charter* and other interests, entitlements or "values". To denominate an interest as a right is to recognize its normative primacy. As such, a *Charter* right intrinsically "weighs" more (by virtue of being a right) than something called an interest, value or entitlement⁶⁵¹.

It is worth noting here that the use of *Charter* values in both *Doré* and *Loyola* is slightly different from the use of *Charter* values in other cases where values were used for evaluating proportionality. In both these cases, *Charter* values were both an evaluative criterion for weighing competing principles and possible principles themselves in that the administrative decision-makers were asked to apply the values rather than the rights (principles) they underlie. This broad view of *Charter* values is closer to the view taken in *Health Services*, as will be discussed below.

3.2.2 – As an Instrument of Interpretation

Charter values have been used as an interpretive tool since the early 1990s. However, their interpretive use has frequently overlapped with their balancing use described earlier.

⁶⁵¹ Audrey Macklin, "Charter Right or Charter-Lite? Administrative Discretion and the Charter" (2014) 67 Supreme Court Law Review 561 at 572-573.

Though the question raised in *Young* was primarily one of interpretation⁶⁵², the inherent limits of rights was raised from the outset with the majority stating that child custody is not a “right with independent value”. Rather a child has a right to a parent who will look after his best interest⁶⁵³. Thus, from the outset, the Court involuntarily reminds the reader that so-called rights (even in the common law) are often principles. According to the majority, the best-interest test is value-neutral and respects *Charter* values, even though the order of the trial judge is not subject to *Charter* scrutiny⁶⁵⁴. Justice Sopinka, however, holds that the courts must interpret the phrase “best interest of the child” in light of *Charter* values⁶⁵⁵.

In *Hill*, the appellants did not challenge the constitutionality of the provisions of the *Libel and Slander Act*, but asked the court to interpret “government action” broadly, in a way that the appellants argued was consistent with *Charter* values⁶⁵⁶. For the Court, the *Charter* is a “restatement of the fundamental values which guide and shape our democratic society” and, consequently, “it is appropriate for the courts to make such incremental revisions to the common law” as may be necessary to make it compliant with *Charter* values⁶⁵⁷. From this idea, the Court developed the presumption that the law must be interpreted consistently with *Charter* values, but reiterated that this presumption can only apply when there is genuine ambiguity⁶⁵⁸.

⁶⁵² Specifically the interpretation of “best interest of the child” in a custody case.

⁶⁵³ *Young v. Young*, [1993] 4 SCR 3, 1993 CanLII 34 (SCC) at 6.

⁶⁵⁴ *Young v. Young*, *supra* note 653, 9.

⁶⁵⁵ *Young v. Young*, *supra* note 653, 15.

⁶⁵⁶ *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 SCR 1130 at par. 65.

⁶⁵⁷ *Hill v. Church of Scientology of Toronto*, *supra* note 656, par. 92.

⁶⁵⁸ *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 SCR 559, 2002 SCC 42 (CanLII).

In *Health Services*, the Court based its expansion of section 2(d) of the *Charter* on the existence of values underlying the *Charter*, an argument which, according to Tucker, "will make trade unionists blush. It is effusive in its praise of the benefits of collective bargaining"⁶⁵⁹. The majority wrote that "Human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy are among the values that underly the *Charter*". It then added: "All of these values are complemented and indeed, promoted, by the protection of collective bargaining in s. 2(d) of the *Charter*⁶⁶⁰", effectively reading a new right and new obligations into freedom of association.

The use of values in freedom of association cases predates *Health Services*. Following the first series of cases in which the Court found that section 2(d) of the *Charter* protected neither a right to bargain collectively nor a right to strike⁶⁶¹, the next wave of cases brought before the Court examined freedom from compelled association.

Indeed, freedom from association was examined by the Court in *Lavigne*, *Advance Cutting & Coring Ltd.*, and *Bernard*. In *Advance Cutting & Coring*, the requirement for construction workers in Québec to be affiliated with a union in order to obtain the necessary competency certificates was contested under section 2(d) of the *Charter*⁶⁶², referencing two values which would come to be used, seven years later⁶⁶³, to widen the scope of s. 2(d) of the *Charter*, namely democratic values⁶⁶⁴ and self-actualisation⁶⁶⁵. The Court reiterated that, in *Lavigne*, it had found that some forms of compelled association in the workplace could be compatible with *Charter* values, stating

⁶⁵⁹ Eric Tucker, "The Constitutional Right to Bargain Collectively: The Ironies of Labour History in the Supreme Court of Canada" (2008) 61:61 *Labour* 151 at 156.

⁶⁶⁰ *Health Services*, *supra* note 2, par. 81.

⁶⁶¹ *Reference Re Public Service Employee Relations Act*, *supra* note 82.

⁶⁶² *Advance Cutting & Coring Ltd.*, *supra* note 233, 70.

⁶⁶³ See *Health Services*, *supra* note 2.

⁶⁶⁴ *Advance Cutting & Coring Ltd.*, *supra* note 233, 325. The author notes here that self-actualisation is implied in the description of freedom and autonomy in *Health Services* and is not explicitly mentioned.

⁶⁶⁵ *Advance Cutting & Coring Ltd.*, *supra* note 233, 326.

that “a negative right not to associate would not justify a finding of an infringement of the guarantee whenever a form of compelled association arises⁶⁶⁶”, and adding that, in this case, no witness had testified that joining a union had “associated him with activities he disapproved of, or with opinions he did not share⁶⁶⁷”. In the specific case of the construction industry, the closed-shop model appeared necessary to foster union democracy while the legislative scheme still left individuals free to choose amongst various unions., before concluding that the question at stake was best left to the legislature⁶⁶⁸.

In *Advance Cutting & Coring*, *Charter* values were primarily used as a balancing tool. As mentioned previously, in *Health Services*, *Charter* values would be used to expand the previous position of the Court regarding the scope of protection of section 2(d) of the *Charter*, namely human dignity, equality, liberty, personal autonomy and democracy⁶⁶⁹. According to the Court, the “right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work⁶⁷⁰”. Regarding equality⁶⁷¹, the Court wrote that one “of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees”⁶⁷². As for democracy, collective bargaining “permits workers to achieve a form of workplace democracy”

⁶⁶⁶ *Advance Cutting & Coring Ltd.*, *supra* note 233, 329.

⁶⁶⁷ *Advance Cutting & Coring Ltd.*, *supra* note 233, 330.

⁶⁶⁸ *Advance Cutting & Coring Ltd.*, *supra* note 233, 339.

⁶⁶⁹ *Health Services*, *supra* note 2, par. 81.

⁶⁷⁰ *Health Services*, *supra* note 2, par. 82.

⁶⁷¹ It is worth noting that the Court rejected the claims under section 15 of the *Charter*. Academic commentators have argued that continued rejection of the equality argument has been a mistake that the Court has dragged since the Trilogy. See: Langille, *supra* note 300.

⁶⁷² *Health Services*, *supra* note 2, par. 84.

and ensures “the rule of law in the workplace”, by allowing workers to have a say in the rules governing a major aspect of their lives⁶⁷³.

Donald Carter foresaw this change in 1988. According to Carter, an examination of the *Charter* reveals the existence of a particular set of values, namely freedom of thought, belief, and expression, as well as life, liberty, and security of the person. Carter asks whether these "loftier values" could signify the emergence of a new form of industrial democracy in Canada⁶⁷⁴.

Conclusion

The use of unwritten constitutional principles to interpret the constitution and “fill in the gaps” has been recognized since the 1980s and is relatively uncontroversial⁶⁷⁵. Though moral readings of the constitution may be almost ubiquitous, not all constitutional cases require such interpretation. Most cases, according to Dworkin, “even most constitutional cases, are not hard cases. The ordinary craft of a judge dictates an answer and leaves no room for the play of personal moral conviction”⁶⁷⁶. Furthermore, not all constitutional provisions require moral readings⁶⁷⁷. The *Charter* contains many provisions which do not contain the abstract and moral language giving rise to ethical considerations in interpretation⁶⁷⁸.

Charter values have been used both to interpret the *Charter* and as part of proportionality analysis. However, in *Health Services*, the use of *Charter* values went beyond either simple interpretation

⁶⁷³ *Health Services*, supra note 2, par. 85.

⁶⁷⁴ Carter, supra note 190, 311-312.

⁶⁷⁵ It is worth noting that, in 2021, the majority of the Court found that the unwritten principle of democracy could not be used to limit legislative action (*Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 (CanLII)), thereby limiting the scope of application of unwritten constitutional principles (UCPs). Though UCPs differ from moral arguments such as Charter values, it will be worth examining how the *Toronto* decision will influence constitutional adjudication based on values in the coming years.

⁶⁷⁶ Dworkin, supra note 574, 11.

⁶⁷⁷ Dworkin, supra note 574, 8.

⁶⁷⁸ See, for example : “The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative”, *Canadian Charter*, supra note 1, s. 18(1).

or proportionality analysis. This “interpretation” of a *Charter* provision created a positive duty for third parties (a duty to bargain in good faith) and, according to some authors, constitutionally protected a specific model of industrial relations, though it would be more accurate to state that the Court extended constitutional protection to rights already recognized through statute.

As fear of a lack of normative coherence across decision-making bodies is an oft-cited critique of the use of moral arguments in constitutional adjudication, the next chapter will explore the values cited in *Health Services* across their myriad of uses in the Court’s jurisprudence to extract commonalities and coherence. From these uses, a theoretical framework founded on the four moral values will be constructed.

Chapter 4 – Autonomy, Equality, Democracy, and Dignity: Towards a Neo-Republican Reconstruction of Freedom of Association

*As we go marching, marching,
in the beauty of the day,
A million darkened kitchens,
a thousand mill lofts gray,
Are touched with all the radiance
that a sudden sun discloses,
For the people hear us singing:
Bread and Roses! Bread and Roses!*

*As we go marching, marching,
we battle too for men,
For they are women's children,
and we mother them again.
Our lives shall not be sweated
From birth until life closes
Hearts starve as well as bodies
Bread and roses, bread and roses!*

(Bread and Roses⁶⁷⁹)

According to the Court, “dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy are among the values that underly the *Charter*”⁶⁸⁰. These values support an expanded view of freedom of association which grants constitutional protection to the right to bargain collectively. The Court, in *Health Services*, even went so far as to suggest that government policy should reflect these *Charter* values⁶⁸¹. Of course, as discussed in the previous chapter, values are often perceived as vague and this vagueness can be said to be detrimental to constitutional adjudication, particularly as it is not always clear whether (or to what extent) a

⁶⁷⁹ Judy Collins, *Bread and Roses* (1976, Elektra Records). *Bread and Roses* is a song traditionally associated with the women’s labour movement, most famously recorded by Judy Collins in 1976 on the album *Bread and Roses* (Elektra Records). The lyrics and title are derived from a poem by James Oppenheim and are taken from the slogan of a 1912 textile strike in Lawrence, Massachusetts. The bread referred to fair wages and roses referred to dignity in the workplace. See: https://en.wikipedia.org/wiki/Bread_and_Roses

⁶⁸⁰ *Health Services*, *supra* note 2, par. 81.

⁶⁸¹ *Health Services*, *supra* note 2, par. 26.

moral argument may be treated as binding. In this chapter, each value identified in *Health Services* shall be examined in turn. General principles will be examined in the Court's use of each value and, from these principles, a neo-republican reconstruction of freedom of association will be developed.

4.1 – Freedom and Autonomy as Antipower

In *Health Services*, the Court identified liberty and autonomy as values underlying the *Charter* which were enhanced through collective bargaining. The majority added:

The right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work⁶⁸².

4.1.1 – Freedom, Liberty, Autonomy, and the Supreme Court of Canada

The discussion of liberty and freedom under the *Charter* will take the opposition of negative and positive freedom, made famous by Berlin, as a starting point⁶⁸³. In 1958, Isaiah Berlin presented the idea of two forms of liberty. Berlin defined negative liberty as follows: ""What is the area within which the subject - a person or group of persons - is or should be left to do or be what he wants to do or be, without interference by other persons?⁶⁸⁴". Referencing Mill, Berlin stated that one was free to the degree to which no human interferes with one's activity and that some portion of human existence must remain independent from control⁶⁸⁵. Negative freedom assumes that the

⁶⁸² *Health Services*, *supra* note 2, par. 82.

⁶⁸³ Negative and positive freedom should be distinguished from the outset from the concept of negative and positive legal obligations discussed previously.

⁶⁸⁴ Isaiah Berlin, *Two concepts of liberty* (Oxford: Clarendon Press, 1958) at 7.

⁶⁸⁵ *Ibid.*

individual is naturally free⁶⁸⁶ and will seek to specify the situations in which there are restrictions to this state of natural freedom⁶⁸⁷. Consequently, a negative view of freedom will inevitably focus on a "private sphere" within which each individual will be free. Outside of the private sphere, the state will then have a "monopoly of coercive power" to prevent individuals from encroaching upon each other's freedom⁶⁸⁸.

Positive freedom, according to Berlin, "derives from the wish on the part of the individual to be his own master"⁶⁸⁹. Silier (critical of Berlin's perceived vagueness with regards to positive freedom⁶⁹⁰) defines positive freedom as the power for rational self-determination⁶⁹¹. The Court's analysis of self-determination and self-actualisation (as values) will be analyzed in a latter part of the thesis. For Silier, Berlin overemphasized the rationality required to achieve a state of positive freedom while neglecting the power required to achieve self-determination. This, according to Silier, "helps Berlin in depriving positive freedom of its concrete content"⁶⁹².

As previously stated, the negative view of freedom supposes the existence of a private sphere within which one would be free⁶⁹³. Anderson, of course, argues that liberty can be significantly constrained in domains of private activity⁶⁹⁴, referring to the concept of private government with arbitrary power⁶⁹⁵. For liberal defenders of the negative view of freedom, limiting state power to

⁶⁸⁶ Yildiz Silier, *Freedom: Negative and Positive Conceptions* (London: Routledge, 2017) at 39.

⁶⁸⁷ Silier, *supra* note 686, 9.

⁶⁸⁸ *Ibid.*

⁶⁸⁹ Berlin, *supra* note 684, 16.

⁶⁹⁰ Silier, *supra* note 686, 1.

⁶⁹¹ Silier, *supra* note 686, 79.

⁶⁹² Silier, *supra* note 686, 131.

⁶⁹³ Silier, *supra* note 686, 9 and 14.

⁶⁹⁴ Anderson, *supra* note 422, 48.

⁶⁹⁵ Anderson, *supra* note 422, 45.

protect individual freedom becomes paramount⁶⁹⁶, whereas Anderson and republican philosophers would look beyond the state's interference.

As the *Charter* is a liberal instrument, it is unsurprising that the overwhelming emphasis of the Court's interpretation of freedom and liberty has centered on a negative individual freedom. This section will explore the interpretation of liberty and freedom by the Court.

Though freedom and liberty are used interchangeably by Berlin⁶⁹⁷ and others, they appear distinctly in the *Charter*. Whereas section 2 of the *Charter* protects fundamental freedoms, section 7 protects a right to life, liberty, and security of the person⁶⁹⁸. In this section, "liberty" and "freedom", as interpreted by the Courts, will be examined separately. Parallels will then be drawn with various approaches to freedom, liberty, and autonomy.

The fundamental freedoms listed in section 2 of the *Charter* are freedom of conscience and religion (2(a)), freedom of thought, belief, opinion and expression, including freedom of the press (2(b)), freedom of peaceful assembly (2(c)), and freedom of association (2(d))⁶⁹⁹. While this section does not claim to presenting an extensive analysis of the Court's jurisprudence with regards to the four fundamental freedoms, it will provide an overview of the Court's approach to freedom under section 2 of the *Charter*.

In an early case on freedom of conscience and religion, the Court defined freedom as an "absence of coercion or constraint", adding that if "a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of

⁶⁹⁶ Silier, *supra* note 686, 9.

⁶⁹⁷ Berlin, *supra* note 684, 6.

⁶⁹⁸ Section 6 protects mobility rights in the English version of the *Charter*, but freedom of movement in the French version. This chapter will not analyze section 6.

⁶⁹⁹ *Canadian Charter*, *supra* note 1, s 2.

his own volition and he cannot be said to be truly free”⁷⁰⁰. Coercion, again according to the majority in *Big M Drug Mart*, includes both “direct commands to act or refrain from acting on pain of sanction” and “indirect forms of control which determine or limit alternative courses of conduct available to others”⁷⁰¹. In a similar case on freedom of conscience and religion (focusing on store openings on Sundays) handed down one year after *Big M Drug Mart*, the Court added that “indirect coercion by the state is comprehended within the evils from which s. 2(a) may afford protection”⁷⁰². Though this initial approach appears broad in its encapsulation of indirect coercion, it remains centered on the absence of interference from the state. This negative (or liberal) position was reiterated thirty years later in *Loyola High School*, where the Court found that freedom of conscience and religion signifies, at a minimum, the absence of government coercion upon individuals to affirm a religious belief or manifest a religious practice⁷⁰³. It is also reflected in the *Same-Sex Marriage Reference* where the majority wrote that “state compulsion on religious officials to perform same-sex marriages contrary to their religious beliefs would violate the guarantee of freedom of religion under s. 2(a) of the *Charter*”⁷⁰⁴.

Analyzing positive duties to promote freedom of expression, the Court rejected a claim that section 2(b) included a right to receive government funding to promote participation in constitutional discussions. According to the majority in *Native women’s Association of Canada*, where one group received less funding than its counterparts, “the provision of funding and the

⁷⁰⁰ *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 336.

⁷⁰¹ *R. v. Big M Drug Mart Ltd*, supra note 700, 336-337.

⁷⁰² *R. v. Edwards Books and Art Ltd*, [1986] 2 SCR 713 at 758.

⁷⁰³ *Loyola*, supra note 649, 649.

⁷⁰⁴ *Reference re Same-Sex Marriage*, [2004] 3 SCR 698 at 722.

invitation to participate in constitutional discussions facilitated and enhanced the expression of Aboriginal groups. It did not stifle expression”⁷⁰⁵. Again, the approach remained negative.

Though section 7 of the *Charter* protects life, liberty, and security of the person, the Court has recognized that these are three distinct elements⁷⁰⁶. Furthermore, according to La Forest J. in *Children’s Aid Society*, though “the English version of the *Charter* employs two different words, 'freedom' and 'liberty', both emanate from the same concept. In French, the term 'liberté' is used in s. 2 as well as in s.7⁷⁰⁷.” As was the case with section 2, the interpretation of liberty in section 7 has primarily focused on its negative dimensions, though it appears to receive a more expansive interpretation with occasional references to autonomy and choice.

The “generous” interpretation of “liberty” in section 7 first appeared in 1986, though the majority remained unclear about the actual limits of the concept⁷⁰⁸. In a dissenting opinion, Wilson J. advocated for a broad interpretation which expanded well beyond the mere absence of physical harm or restraint⁷⁰⁹, towards the positive dimensions of liberty discussed previously.

I believe that the framers of the Constitution in guaranteeing 'liberty' as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make

⁷⁰⁵ *Native Women’s Assn of Canada v Canada*, [1994] 3 SCR 627 at 654.

⁷⁰⁶ *Singh v. Minister of Employment and Immigration*, [1985] 1 SCR 177 at 204.

⁷⁰⁷ *B (R) v Children’s Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at 368.

⁷⁰⁸ *R v Jones*, [1986] 2 SCR 284 at 301.

⁷⁰⁹ *R v. Jones*, *supra* note 708, 317.

his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric - to be, in to-day's parlance, 'his own person' and accountable as such⁷¹⁰.

This positive approach was rejected in subsequent decisions with justice Lamer (in a concurring opinion), stating that he was "not prepared to recognize that, by including the expression "right to liberty" in s. 7, the framers of the *Charter* intended to protect "liberty" in its broadest sense or in all its dimensions⁷¹¹". Indeed, according to Lamer J.:

extending the scope of the word 'liberty' in s. 7 to include any type of freedom other than that which is connected with the physical dimension of the word 'liberty' would not only be contrary to the structure of the Charter and of the provision itself, but would also be contrary to the scheme, the context, and the manifest purpose of s. 7⁷¹².

While justice Lamer's position was firmly ensconced in the negative view of liberty, the majority opinion, penned by La Forest J., appeared open to a more positive conception:

On the one hand, liberty does not mean unconstrained freedom. (...) On the other hand, liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance⁷¹³.

The connection between choice and liberty has been made again in 1997 (where the right to choose where to establish a home was said to fall within the scope of "liberty"⁷¹⁴), as well as in 2000 (where the Court stated that "liberty is engaged where state compulsions or prohibitions affect important and fundamental life choices"⁷¹⁵). Nonetheless, the focus has remained on

⁷¹⁰ *R v Jones*, *supra* note 708, 318.

⁷¹¹ *B (R) v Children's Aid Society of Metropolitan Toronto*, *supra* note 707, 336.

⁷¹² *B (R) v Children's Aid Society of Metropolitan Toronto*, *supra* note 707, 348.

⁷¹³ *B (R) v Children's Aid Society of Metropolitan Toronto*, *supra* note 707, 368.

⁷¹⁴ *Godbout c Longueuil (Ville)*, [1997] 3 RCS 844.

⁷¹⁵ *Blencoe c. Colombie-Britannique (Human Rights Commission)*, [2000] 2 RCS 307 at 340.

interference by the state in the life choices of individuals. Freedom of choice will be further analyzed in the two following sections.

Through his defense of negative freedom, Berlin is said to have placed himself firmly in the liberal tradition⁷¹⁶. Unsurprisingly perhaps, the Court's jurisprudence – including when it espoused a “generous” interpretation of liberty – has been consistent with the *Charter's* nature as a liberal instrument. The Court has primarily favoured an interpretation consistent with negative liberty where liberty focuses on freedom from intervention from State action.

As described previously, there are limits to the liberal approach to freedom (or to the negative approach to freedom), particularly when one seeks a justification for expanding collective labour rights. Indeed, the liberal approach to freedom tends to overlook the private sphere⁷¹⁷, where considerable unfreedom can and does occur.

Liberty, freedom, autonomy, and even self-fulfillment (grouped here with freedom and autonomy in reference to Berlin's positive interpretation of positive freedom explained above) have been referenced as underlying *Charter* values in a handful of cases. In this section, these uses shall be examined in order to identify commonalities pointing to a coherent interpretation of freedom and autonomy as values.

As mentioned previously, self-fulfillment and self-actualization are, according to Berlin's vision of positive liberty, a component of freedom. As such, when the Court identifies self-fulfillment and self-actualization as *Charter* Values, both concepts merit examination as a facet of freedom and autonomy.

⁷¹⁶ Finn Bowring, “Negative and Positive Freedom: Lessons from, and to, sociology” (2015) 49:1 *Sociology* 156 at 157.

⁷¹⁷ Cabrelli & Zahn, *supra* note 129, 114.

In *Sharpe*, self-fulfillment was considered a value underlying free expression⁷¹⁸, and free expression was considered “a right fundamental to the liberty of each Canadian”⁷¹⁹. In this case, involving interpretation of the *Criminal Code* as it relates to the prohibition of child pornography and the protection of children, the Court was tasked with examining material that may pose “little or no risk of harm to children”, namely “self-created, privately held expressive materials” such as “journal, diaries, writings, drawings, and other works of the imagination, created by oneself exclusively for oneself⁷²⁰”. Such materials are said to engage “the values of self-fulfillment and self-actualization” with the Court adding that “for young people grappling with issues of sexual identity and self-awareness, private expression of a sexual nature may be crucial to personal growth and sexual maturation”⁷²¹.

Thus, according to the Court, self-fulfillment, self-actualization and self-awareness are values intimately connected to freedom of expression and freedom of association under the *Charter*. In *Lavigne* (analyzed in Chapter 1), La Forest J.’s dissenting opinion drew a clear parallel between freedom of association and “the freedom to choose the path to self-actualization”⁷²². The relationship between freedom and the capacity to exercise choice will be explored in section 4.2.

4.1.2 – The Court’s Republican Approach to Autonomy

The contrary of the *liber* (or free person) in Roman usage was the *servus* (the slave). Up until the 19th century’s embrace of liberalism, the free person was one who was not subject to the arbitrary power of another⁷²³. Though the antonym of liberty in contemporary thought has

⁷¹⁸ *R. v. Sharpe*, [2002] 1 SCR 45 at par. 23.

⁷¹⁹ *R. v. Sharpe*, *supra* note 718, par. 29.

⁷²⁰ *R. v. Sharpe*, *supra* note 718, par. 75.

⁷²¹ *R. v. Sharpe*, *supra* note 718, par. 107.

⁷²² *Lavigne*, *supra* note 88, 322.

⁷²³ Philip Pettit, “Freedom as antipower” (1996) 106:3 *Ethics* 576 at 576.

become interference (and specifically state interference)⁷²⁴, the use of freedom in *Health Services* reflects this republican approach as opposed to the dominant liberal approach. The underlying value of liberty and autonomy in *Health Services* is reflected in two aspects: the opportunity for workers “to influence the establishment of workplace rules” and the capacity to “gain some control over a major aspect of their lives”⁷²⁵.

The recognition by the Court in *Health Services* that collective bargaining allows workers to “gain some control over a major aspect of their lives”⁷²⁶ speaks to both the level of societal importance attached to employment, as well as to the importance of control in counteracting domination. In *Wallace*, the Court recognized simultaneously the power imbalance inherent in the employment relationship and the level of importance attached to employment⁷²⁷. Indeed, the loss of employment has long been recognized as having deleterious effects on one’s sense of self, effects which frequently disappear upon reemployment⁷²⁸. Work, according to Silier, can even become a vector for positive freedom and self-actualization through three aspects. First, it “involves an activity of overcoming obstacles through the development of new capacities”. Second, it can enhance feelings of self-mastery and self-esteem. Finally, as a cooperative activity, it can become a source of satisfaction, particularly if one feels they are contributing through their work to the satisfaction of the needs of others⁷²⁹. Unfortunately, owing in part to its inherent power imbalance, work can become a site of arbitrary domination. How then can collective bargaining contribute to regaining control to counteract this domination?

⁷²⁴ *Ibid.*

⁷²⁵ *Health Services*, *supra* note 2, par. 82.

⁷²⁶ *Ibid.*

⁷²⁷ *Wallace v. United Grain Growers Ltd*, [1997] 3 SCR 701 at par. 92-93.

⁷²⁸ Richard M Cohn, “The Effect of Employment Status Change on Self-Attitudes” (1978) 41:2 Social Psychology 81.

⁷²⁹ Silier, *supra* note 686, 161.

For Pettit, there is little doubt that in the absence of appropriate controls (“say, those that a vigilant union might guarantee”), an employer will always subjugate power over workers⁷³⁰. Indeed, workers that aren’t represented by unions, according to Anderson, cannot negotiate limits on the employers’ power⁷³¹. Thus, the power of the employer remains mostly unchecked and arbitrary subject only to a few statutory limits (such as restrictions on hours of work).

Since the nineteenth century, legal focus has been placed on the entry and exit conditions of the employment contract (to which we shall return shortly), while what went on in the workplace was “blackboxed”⁷³². Yet the central struggle of nineteenth century workers in the West was not wages, but freedom, taking the form of limits on working hours. According to Anderson: “If the Industrial Revolution meant [that workers] could not be their own bosses at work, at least they could try to limit the length of working day”⁷³³. However, academic discourse since has lost sight of the central issue so apparent to the nineteenth century workers: “the pervasiveness of private government at work”⁷³⁴.

Since the mid-seventeenth century, “egalitarian social movements have insisted that if government is necessary, it must be made a public thing to all the governed – accountable to them, responsive to their interests, and open to participation”⁷³⁵. Thus, workers must have a voice in workplace governance in order to counteract domination⁷³⁶, a concept to which we shall return in section 4.4.

⁷³⁰ Pettit, *supra* note 117, 61.

⁷³¹ Anderson, *supra* note 422, 57.

⁷³² Anderson, *supra* note 422, 58.

⁷³³ Anderson, *supra* note 422, 59.

⁷³⁴ Anderson, *supra* note 422, 62.

⁷³⁵ Anderson, *supra* note 422, 71.

⁷³⁶ Anderson, *supra* note 422, 69.

Pettit recognizes two strategies for limiting domination: reciprocal power and constitutional provision⁷³⁷. Pettit defines reciprocal power as a way of making the parties resources more equal so that the previously dominated party may be able to defend themselves⁷³⁸. Pettit uses the trade union movement as an example of reciprocal power:

The trade union movement almost certainly advanced the non-domination of workers in the industrial world of the nineteenth century. And that movement increased workers' non-domination precisely by giving them collective powers with which to confront the powers of employers⁷³⁹.

The other option identified by Pettit is the introduction of a constitutional authority which will deprive the dominating party of their power to arbitrarily interfere⁷⁴⁰. In the context of collective bargaining, this may take the form of a labour board forcing both parties to bargain in good faith or a labour arbitrator imposing (or threatening to impose) a contract in the absence of good faith bargaining.

The Court's approach in *Health Services* speaks to freedom as antipower. A difference in resources is always at the heart of domination. For example, an employer almost systematically has greater financial and legal resources than their employees. Therefore, to reduce domination, one must look at compensating for such imbalances⁷⁴¹. Such compensation is justified by viewing freedom as antipower. Antipower, according to Pettit, "is what comes into being as the power of some over others... is actively reduced and eliminated"⁷⁴². Antipower through regulation has been used for centuries, including regulation against the employment of children or, more recently, against unfair dismissal⁷⁴³. When freedom is construed an antipower rather than as non-

⁷³⁷ Pettit, *supra* note 117, 67.

⁷³⁸ *Ibid.*

⁷³⁹ Pettit, *supra* note 117, 95.

⁷⁴⁰ Pettit, *supra* note 117, 68.

⁷⁴¹ Pettit, *supra* note 696, 589.

⁷⁴² Pettit, *supra* note 696, 588.

⁷⁴³ Pettit, *supra* note 696, 591. Another method identified by Pettit for achieving antipower is through the development of welfare state initiatives.

interference, then legislative intervention is not an abrogation of liberty⁷⁴⁴. The fact that antipower is not a form of domination, does not signify that it is not a form of power. Pettit, however, compares antipower with antimatter: “it represents something repellent to subjugating power, as antimatter represents something repellent to ordinary matter”⁷⁴⁵.

Finally, it is necessary to address contracts and, specifically, how collective bargaining differs from mere freedom to contract as a method for counteracting workplace domination. According to Pettit, “opponents of domination must deplore... the rise of the doctrine of free contract⁷⁴⁶”:

The development of the doctrine saw freedom of contract invoked in defence of some fairly appalling contractual arrangements, as people ignored the consequences for domination - as they ignored the asymmetries of power established under the contract - and argued that a contract that was not actively coerced was free⁷⁴⁷.

Non-arbitrariness requires, according to Pettit, not consent but “the permanent possibility of effectively contesting” this power, as is afforded through mandatory collective bargaining⁷⁴⁸. In this context, intervention by the legislature or the Court to ensure good faith bargaining in the employment context becomes necessary to prevent arbitrary domination. According to Cabrelli and Zahn:

The import of the concept of 'justice as non-domination' viewed specifically through the lens of labour law lies primarily in its impact on the substantive fairness of the bargain concluded between management and an employee. To the extent that substantive interferences prescribed by law ruptures the freedom of contract doctrine, civic republicans ought to be relaxed about this, so long as the domination to which the employee is diminished and the employer's vertical position vis-à-vis the state is not so radically altered as to give rise to a relationship of domination⁷⁴⁹.

⁷⁴⁴ Pettit, *supra* note 696, 597.

⁷⁴⁵ Pettit, *supra* note 696, 589.

⁷⁴⁶ Pettit, *supra* note 117, 62.

⁷⁴⁷ *Ibid.*

⁷⁴⁸ Pettit, *supra* note 117, 63.

⁷⁴⁹ Cabrelli & Zahn, *supra* note 129, 116.

Non-domination (and, indeed, antipower) also supports the Court's position in 2015's *Saskatchewan Federation of Labor* regarding the constitutional protection of a right to strike:

... the ideal of freedom as non-domination would also have enabled socialists to defend the use of the strike weapon - the only instrument to which workers were able to have recourse. The ideal of freedom as non-interference as always been invoked, usually in the context of free contracts of employment, to make a case against collective industrial action by workers. Such action is a form of interference, of course, since it involves coercion of active obstruction. (...) Thus the ideal of non-interference naturally makes collective industrial action look illegitimate. (...) The resort to collective action, in such a situation may represent the only hope of winning freedom as non-domination for those who are employed. It may be the only way of giving the workers sufficient power to enable them to be able to stand up, individually, to their employer⁷⁵⁰.

4.2 – Freedom of choice

A significant dimension of the Court's jurisprudence surrounding freedom as a *Charter* value is choice, specifically free choice.

In *Hutterian Brethren of Wilson Colony*, the Court was tasked with examining whether Alberta's requirement to have pictures on drivers' licenses violated the Hutterian Brethren's freedom of religion⁷⁵¹. Though this case is one of freedom from interference (though the effect of the interference is, according to the majority, incidental)⁷⁵², it is the Court's definition of liberty as a value which merits attention. According to the majority, the "effects of a limit on freedom of religion requires us to consider the impact in terms of *Charter* values, such as liberty, human dignity, equality, autonomy, and the enhancement of democracy"⁷⁵³. The majority then qualified the listed values, stating that the "most fundamental" was liberty, specifically "the right of choice on matters

⁷⁵⁰ Pettit, *supra* note 117, 142.

⁷⁵¹ *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567.

⁷⁵² *Alberta v. Hutterian Brethren of Wilson Colony*, *supra* note 751, 93-94.

⁷⁵³ *Alberta v. Hutterian Brethren of Wilson Colony*, *supra* note 751, 88.

of religion”⁷⁵⁴. Thus, the Court simultaneously recognized the importance of liberty as a value and equated liberty with free choice.

In *Mabior*, the Court used *Charter* values as an interpretive tool, regarding the obligation to disclose seropositivity (HIV status) to a sexual partner⁷⁵⁵. Indeed, according to the Court, “values of equality, autonomy, liberty, privacy and human dignity are particularly relevant to the interpretation of fraud vitiating consent to sexual relations”⁷⁵⁶. Analysing a test previously developed in *Cuerrier*, the majority states that focus on “significant bodily harm” reflect the “*Charter* values of autonomy, liberty and equality”⁷⁵⁷ and supports “an approach to fraud vitiating consent that respects the interest of a person to choose whether to consent to sex with a particular person or not”⁷⁵⁸.

In short, though the use of liberty and autonomy vary depending on the other *Charter* values used in conjunction by the Court, there is a nonetheless a common theme to the Court’s approach, namely choice. Freedom of choice has been analyzed by the Court across many fields of law relating namely to State-induced criminal confessions⁷⁵⁹, protection against self-incrimination and the right to silence⁷⁶⁰, compensation for fisheries⁷⁶¹, and marital status⁷⁶².

Much as free choice is central to the Court’s approach to freedom, so is it central to republican approaches to freedom (demonstrating once again how the Court has deviated from classical liberalism in its use of morality to interpret *Charter* rights). Pettit distinguished between the

⁷⁵⁴ *Ibid.*

⁷⁵⁵ *R. v. Mabior*, [2012] 2 SCR 584.

⁷⁵⁶ *R. v. Mabior*, *supra* note 755, par. 45.

⁷⁵⁷ *R. v. Mabior*, *supra* note 755, par. 58.

⁷⁵⁸ *R. v. Mabior*, *supra* note 755, par. 89.

⁷⁵⁹ *R. v. Hart*, 2014 SCC 52 (CanLII), [2014] 2 SCR 544 at par. 171.

⁷⁶⁰ *R. v. Singh*, 2007 SCC 48 (CanLII), [2007] 3 SCR 405.

⁷⁶¹ *Manitoba Fisheries Ltd. v. The Queen*, 1978 CanLII 22 (SCC), [1979] 1 SCR 101.

⁷⁶² *Miron v. Trudel*, 1995 CanLII 97 (SCC), [1995] 2 SCR 418.

invasion of free choice and the hindrances that vitiate free choice⁷⁶³. Free choice must go beyond preference as a forced choice remains forced even if the action chosen is one the chooser preferred⁷⁶⁴; "if you depend on the goodwill of a given individual or set of individuals for being able to take the relevant option, then you do not have the ability in the sense required for freedom"⁷⁶⁵. Thus, the worker who has no say in his conditions of employment, is unfree no matter how much he may enjoy his working conditions. The imposition of one's will on another constitutes an inherently inimical assault on their freedom of choice - an invasion of their choice, according to Pettit⁷⁶⁶. Vitiators, according to Pettit's classification, deprive one of the resources required for freedom of choice, without imposing the will of another in their choice⁷⁶⁷. Vitiating implies "to be denied a precondition for enjoying freedom of choice, to lack required resources", while invasion "is to be denied the very condition by which freedom is identified: to be thwarted in making the choice according to your will"⁷⁶⁸. Invasion of choice implies domination⁷⁶⁹, though Pettit warns against downplaying vitiating⁷⁷⁰.

The restriction of freedom of choice can occur without actual interference through either invigilation or intimidation⁷⁷¹. Both tactics are especially visible in the workplace. To invigilate is to stand guard over someone, ready to interfere, thereby affecting the person's choice⁷⁷². Workplace surveillance, in addition to being an invasion of privacy in many cases, is an example of invigilation, affecting worker choice even in the absence of interference. Intimidation can have the

⁷⁶³ Pettit, *supra* note 104, 35-36.

⁷⁶⁴ Pettit, *supra* note 104, 30.

⁷⁶⁵ Pettit, *supra* note 104, 37.

⁷⁶⁶ Pettit, *supra* note 104, 38.

⁷⁶⁷ Pettit, *supra* note 104, 39.

⁷⁶⁸ Pettit, *supra* note 104, 43.

⁷⁶⁹ Pettit, *supra* note 104, 58.

⁷⁷⁰ Pettit, *supra* note 104, 44.

⁷⁷¹ Pettit, *supra* note 104, 60.

⁷⁷² Pettit, *supra* note 104, 61.

same effect, even without invigilation⁷⁷³, as an employee adapts his choices out of fear even if he is not aware of being watched. The establishment of workplace rules through collective bargaining is closely related to the concept of choice discussed previously and goes a long way towards decreasing arbitrary domination in the workplace.

As stated previously, the arbitrary interference of the workplace extends beyond working hours; federal and provincial boards and arbitrators have examined comments made on social media (outside of working hours) when employees have been dismissed for insubordination⁷⁷⁴. Additionally, employers can effectively control behaviour outside of working hours through drug and alcohol testing, subject to certain limits. This has led the Court to recognize that issues negotiated between employers and employees (via their union) can have repercussions outside of working hours, as conditions “like the duration and location of work, parental leave, health benefits, severance and retirement schemes, may impact on the personal lives of workers even outside their working hours”⁷⁷⁵.

To counteract the arbitrary domination of the workplace, a worker must have choices. As discussed previously, the Court has used freedom as a *Charter* value to reflect the importance of choice. Indeed, choice is an inherent component of freedom in most views of freedom (negative, positive or republican).

In an analysis of Rawlsian philosophy, Silier states that the essential feature of a free human is being “an autonomous chooser of ends”⁷⁷⁶. Summarizing Benn and Weinstein’s criteria for being a “free chooser”, Silier identifies three conditions for free choice. First, a degree of rationality is

⁷⁷³ *Ibid.*

⁷⁷⁴ Teitel, *supra* note 430.

⁷⁷⁵ *RWDSU*, [2002] 1 SCR 156, par. 34.

⁷⁷⁶ Silier, *supra* note 686, 120.

required so that one may understand the alternatives presented. Second, the choice must not be predetermined by another. Third, the “free chooser” must have the capacity to criticize and reject the proposal⁷⁷⁷.

The act of bargaining involves the critique and exchange of proposals. Bargaining is central to collective labour relations⁷⁷⁸. In creating an obligation to bargain in good faith, the Court (and the various provincial and federal legislatures before it) acted in a way consistent with ensuring the free choice of the parties involved. For example, putting forward rigid proposals while knowing the other party would not accept them⁷⁷⁹, much like refusing to discuss a basic or standard term that is generally accepted in the industry⁷⁸⁰, will generally be considered a breach of the duty to bargain in good faith. In acting in bad faith, the party is effectively depriving the other party of the opportunity to criticize and reject a proposal, as well as to present alternatives. If one refuses to even discuss standard terms, the party which refuses to bargain keeps the other party in a position where he or she is effectively dominated.

Finally, the Court recognized, early in its Charter jurisprudence on freedom of association, the existence of a connection between freedom and equality when it stated that a “free society is one which aims at equality with respect to the enjoyment of fundamental freedoms”, reaching this conclusion without relying upon section 15 of the Charter⁷⁸¹. I discuss the fundamental connection between freedom and equality below.

⁷⁷⁷ Silier, *supra* note 686, 62.

⁷⁷⁸ Indeed, the Court has pointed out that all provincial and federal labour relations codes contain sections relating to the duty to bargain in good faith, see: *Royal Oak Mines Inc v. Canada (Labour Relations Board)*, [1996] 1 SCR 369 at 396. [*Royal Oak Mines*]

⁷⁷⁹ *Royal Oak Mines*, *supra* note 778, 397.

⁷⁸⁰ *Royal Oak Mines*, *supra* note 778, 398.

⁷⁸¹ *R v Big M Drug Mart Ltd*, *supra* note 700, 336.

4.3 – Relational equality as Non-Domination

In *Health Services*, the majority found that collective bargaining “enhances the *Charter* value of equality. One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees”⁷⁸². Interestingly, the majority rejected claims that the contested legislation violated workers’ equality rights:

we conclude that the distinctions made by the Act relate essentially to segregating different sectors of employment, in accordance with the long-standing practice in labour regulation of creating legislation specific to particular segments of the labour force, and do not amount to discrimination under s. 15 of the *Charter*. The differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, and not to the persons they are⁷⁸³.

Thus, the value of equality which is said to underly the *Charter* is distinct from the protected right to equality under section 15(1) of the *Charter* and must be analysed as such. The approach taken to equality in *Health Services* was relational, differing from previous approaches to equality as either a formal or substantive (but comparative) right. Thus, throughout its freedom of association jurisprudence, the Court had to rely on equality as a value promoted through freedom of association (and underlying other *Charter* rights and freedoms) rather than on section 15(1) of the *Charter*.

4.3.1 – From « formal » to « substantive”: The Evolution of the Court’s Equality Jurisprudence Under the *Charter*

Section 15(1) of the *Charter* states:

⁷⁸² *Health Services*, *supra* note 2, par. 84.

⁷⁸³ *Health Services*, *supra* note 2, par. 165.

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

Prior to the adoption of the *Charter*, similar equality provisions existed under provincial legislative instruments, while the *Canadian Bill of Rights* (adopted in 1960) protected the “right of the individual to equality under the law”⁷⁸⁴. McLachlin C.J. (as she then was) wrote the following on the shift from equality as protected under the *Bill of Rights* to equality as protected under the *Charter*:

The *Canadian Charter* guarantees equality not just in one way, but in four - we are declared to be equal before the law, equal under the law, entitled to equal benefit of the law and to the equal protection of the law. Its framers were determined to pre-empt the restrictive interpretations that courts had placed on the guarantee of 'equality before the law' used in the *Charter's* predecessor document, the *Bill of Rights*. They gave the courts clear, unequivocal instructions: This is a guarantee of equality. Take it seriously. Don't cut it down. Interpret it in a meaningful and expansive way⁷⁸⁵.

Early discussions surrounding the adoption of the *Charter's* equality provision, focused on the inherent limits of the equality protection under the *Canadian Bill of Rights*, particularly following the Court's 1978 decision in *Bliss*. In *Bliss*, the Court was tasked with deciding whether sections of the *Employment Insurance Act* deprived a woman of her right to “equality before the law” owing to their application “during the specified period of pregnancy and childbirth”. According to the Court, the provisions were “concerned with conditions from which men are excluded. Any inequality between the sexes in this area is not created by legislation but by nature”⁷⁸⁶. Thus, the Court applied a test of formal equality (commonly phrased as “treating like as like”), concluding

⁷⁸⁴ *Canadian Bill of Rights*, S.C. 1960, c. 44, art. 1(b).

⁷⁸⁵ Beverley McLachlin, “Equality: The Most Difficult Right” (2001) 14:2 SCLR 17 at 17.

⁷⁸⁶ *Bliss v. Attorney General of Canada*, [1978] 1 SCR 183 at 190.

that the provisions “did not have the effect of depriving the appellant of her right to 'equality before the law’”⁷⁸⁷. According to Porter, writing about the adoption of the *Charter*:

Equality seekers of 20 years ago argued that transcending the impoverished vision of equality that had defined the jurisprudence under the *Canadian Bill of Rights* in cases such as *Bliss* would require more than non-discriminatory provision of benefits such as unemployment insurance. It would require a change in the paradigm of equality in order to understand the term 'equal benefit of the law' in its broader social dimension⁷⁸⁸...

The first *Charter* equality case to be heard by the Court was *Andrews*. In *Andrews*, a British Citizen was prevented from becoming a member of the Law Society of British Columbia on the basis of his citizenship status. The Court was tasked with determining whether this constituted a violation of section 15(1) of the *Charter*⁷⁸⁹. Wilson J., writing for the majority, included non-citizens as an analogous group subject to s. 15(1) protection⁷⁹⁰ and concluded that "a rule which bars an entire class of persons from certain forms of employment solely on the grounds that they are not Canadian citizens violates the equality rights of that class⁷⁹¹". In a partial dissent, McIntyre J. defined the purpose of s. 15(1) as follows:

It is clear that the purpose of s. 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component⁷⁹².

This purpose, and in particular its remedial component, would become central to following decisions.

⁷⁸⁷ *Bliss v. Attorney General of Canada*, *supra* note 786, 192.

⁷⁸⁸ Bruce Porter, "Expectations of Equality" (2006) 33 Sup Ct L Rev 23 at 27.

⁷⁸⁹ *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143. [*Andrews*]

⁷⁹⁰ *Andrews*, *supra* note 789, 152.

⁷⁹¹ *Andrews*, *supra* note 789, 151.

⁷⁹² *Andrews*, *supra* note 789, 171.

Despite the broadening of the concept of equality reflected in the majority decision in *Andrews*, McIntyre J.'s more nuanced approach (centered on both the listed grounds in section 15, as well as on analogous grounds), the evolution of equality was gradual, culminating with the complex test developed by the Court in *Law*. In *Law*, the constitutionality of sections of the Canada Pension Plan regarding the entitlement to a survivor's pension were contested because of distinctions drawn on the basis of age⁷⁹³. Writing for the majority, Iacobucci J. stated that section 15(1) of the *Charter* "guarantees to every individual the right to equal treatment by the state without discrimination. It is perhaps the *Charter's* most conceptually difficult provision"⁷⁹⁴. He then proposes three inquiries to be made by a court analysing a claim under s. 15(1):

First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is a differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage? The second and third inquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1)⁷⁹⁵.

Regarding the third enquiry, Iacobucci adds that though no single phrase can fully describe the purpose of the *Charter's* equality provision, focus should be "placed upon the goal of assuring human dignity by remedying of discriminatory treatment"⁷⁹⁶. The Court also adds that in determining compatibility with the fundamental purpose of s. 15(1), one must engage in a comparative analysis to evaluate the context of the claim and the claimant⁷⁹⁷.

⁷⁹³ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497. [*Law*]

⁷⁹⁴ *Law*, *supra* note 793, 507.

⁷⁹⁵ *Law*, *supra* note 793, 524.

⁷⁹⁶ *Law*, *supra* note 793, 530.

⁷⁹⁷ *Law*, *supra* note 793, 531.

For the first fifteen years of its *Charter* equality jurisprudence, the Court had, according to some scholars, “developed an approach to section 15 that has consistently purported to recognize the principle of substantive equality, but it has rarely applied section 15 so as to give effect to that principle”⁷⁹⁸, despite seemingly more progressive decisions such as reading in sexual orientation as a prohibited ground for discrimination⁷⁹⁹ or the recognition that a provincial government’s failure to provide sign language interpretation services constitutes adverse effect discrimination⁸⁰⁰.

For McLachlin, substantive (as opposed to formal) equality “is founded on the principle that all human beings are of equal worth and possessed of the same innate human dignity, which the law must uphold and protect, not just in form, but in substance”⁸⁰¹, a description to which she adds the following caveat: “absolute substantive equality is impossible. It is beyond the resources of society and the law to place everyone in exactly the same position of relative advantage and disadvantage, even if we wished to⁸⁰².” Again, according to McLachlin, substantive equality introduces a difficulty that formal equality did not present. Specifically, as substantive equality comprises both the right to be treated alike and the right to be treated distinctly when not doing so would result in discrimination⁸⁰³, it introduces a level of uncertainty and value judgements that doesn’t apply to formal equality⁸⁰⁴. With that said, the reliance on comparators and the choice of comparators that derived from *Law*, made substantive equality claims through section 15.1

⁷⁹⁸ Jennifer Koshan & Jonnette Watson Hamilton, “Meaningless mantra: substantive equality after Withler” (2011) 16:1 Review of Constitutional Studies 31 at 32.

⁷⁹⁹ *Vriend*, *supra* note 551.

⁸⁰⁰ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624. [*Eldridge*]

⁸⁰¹ McLachlin, *supra* note 785, 20.

⁸⁰² *Ibid.*

⁸⁰³ McLachlin, *supra* note 785, 22.

⁸⁰⁴ McLachlin, *supra* note 785, 21.

difficult, leading scholars to bemoan the import of *Charter* equality jurisprudence into the interpretation of provincial human rights codes⁸⁰⁵.

This overview of the Court's jurisprudence surrounding s. 15(1) of the *Charter* would be incomplete without discussing the 2020 *Fraser* decision⁸⁰⁶ though it is imperative to note that this decision was handed down after the main freedom of association cases discussed in Chapter 1. In *Fraser* (2020), the Court was asked to evaluate whether the pension impact of the RCMP's job-sharing program constituted adverse effects discrimination for the women who took part in the program. The majority of the Court found that this constituted a case of adverse effects discrimination, their first such finding in twenty-two years⁸⁰⁷, as well as the first successful such claim based on sex⁸⁰⁸. Reiterating the Court's commitment to substantive equality⁸⁰⁹, Abella J., writing for the majority, defined adverse effects (or adverse impact) discrimination as discrimination which occurs "when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground", adding that instead "of explicitly singling out those who are in the protected groups for differential treatment, the law indirectly places them at a disadvantage⁸¹⁰."

Though *Fraser* (2020) has been celebrated for its "brush-clearing"⁸¹¹ and for its use of multiple comparators to establish discrimination⁸¹², its limits have also been highlighted. For Moon, if the

⁸⁰⁵ A Wayne Mackay, "The marriage of human rights codes and section 15 of the Charter in pursuit of equality: a case for greater separation in both theory and practice" (2013) 64 *University of New Brunswick Law Journal* 54 at 55.

⁸⁰⁶ *Fraser v. Canada (Attorney General)*, 2020 SCC 28 (CanLII). [*Fraser 2020*]. Note: *Fraser*, was not a unanimous decision; justices Côté, Brown and Rowe dissented.

⁸⁰⁷ Jonnette Watson Hamilton, "Cautious Optimism: *Fraser v Canada (Attorney General)*" (2021) 30:2 *Constitutional Forum / Forum constitutionnel* 1 at 1.

⁸⁰⁸ Hamilton, *supra* note 807, 2.

⁸⁰⁹ *Fraser 2020*, *supra* note 806, par. 40, 42, and 48.

⁸¹⁰ *Fraser 2020*, *supra* note 806, par. 30.

⁸¹¹ Hamilton, *supra* note 807, 3.

⁸¹² Hamilton, *supra* note 807, 7.

central concern of section 15(1) is redressing systemic inequality, then the main issues with section 15(1) remain unaddressed. Specifically, as only a state action can breach the *Charter's* equality provision, both private acts and state inaction remain difficult to address⁸¹³.

An interesting innovation in *Fraser* (2020) is the discussion of choice, specifically the recognition that choices can be shaped by systemic inequality⁸¹⁴. This is reminiscent of the discussion of free choice in the previous chapter. Indeed, constrained choices are neither free nor are they reflective of equality.

Finally, the extent to which the right to equality can impose a positive obligation on the state was addressed by the Court in 1997 in *Eldridge*. In this unanimous decision, the Court was required to analyse whether a provincial government's failure to provide funding for sign language interpreters for Deaf persons receiving medical services violated s. 15(1) of the *Charter*⁸¹⁵. The Court found that adverse effects discrimination stemmed from the failure to ensure that deaf persons benefited equally from a service offered to the entire population⁸¹⁶. On the idea that sign language interpretation was a benefit rather than an obligation, La Forest J. wrote that "this position bespeaks a thin and impoverished vision of s. 15(1)", adding that the Court had "repeatedly held that since the state does provide a benefit, it is obliged to do so in a non-discriminatory manner (...) In many circumstances, this will require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons⁸¹⁷".

⁸¹³ Richard Moon, "Comment on *Fraser v Canada (AG): The More Things Change*" (2021) 30:2 Constitutional Forum / Forum constitutionnel 85 at 90.

⁸¹⁴ *Fraser 2020*, *supra* note 806, par. 90.

⁸¹⁵ *Eldridge*, *supra* note 800.

⁸¹⁶ *Eldridge*, *supra* note 800, 675.

⁸¹⁷ *Eldridge*, *supra* note 800, 678.

Given, on the one hand, the recognition by the Court that equality rights can include a positive duty on the part of the state and, on the other hand, the negative view of freedom (described in the previous chapter) espoused by the Court, it is unsurprising that several freedom cases (including freedom of association cases) have included equality arguments. The freedom of association cases, however, have been unsuccessful in their attempts at using section 15(1) of the *Charter* to achieve the constitutional protection of collective bargaining, though the Court has used equality as a value to expand the scope of freedom of association. The following two sections will focus on equality as a *Charter* value and its use in *Dunmore*, *Health Services*, and *Fraser* (2011) in particular.

4.3.2 – Equality as an underlying *Charter* value

Equality has been recognized as an underlying *Charter* value in nearly a dozen cases. As a *Charter* value, equality has been used both to interpret statutes and other *Charter* rights and freedoms, as well as part of proportionality analysis under section 1 (the *Oakes* test) and under the *Doré* framework. The use of values in this way (equality in particular) has been deemed as “far from controversial” and an accepted method of constitutional interpretation⁸¹⁸. The use of equality as a *Charter* value is overwhelmingly rhetorical, with emphasis placed on the relation between equality and the promotion of other values (including dignity, democracy, and pluralism). In this section, the use of equality as a value will be examined in relation to the forms of equality identified previously.

The primary use of equality as a *Charter* value by the Court has been in balancing or proportionality analysis, including in three distinct cases involving disclosure of privileged

⁸¹⁸ *Law Society of British Columbia v. Trinity Western University*, [2018] 2 SCR 293, 2018 SCC 32 (CanLII) at 329.

information⁸¹⁹. In *Ryan*, the appellant had sought psychiatric treatment following abuse at the hands of Dr. Ryan. The question brought before the Court was whether the appellant could be forced to disclose the psychiatrist's notes in the context of her civil suit against Dr. Ryan. According to the Court, "ensuring that the common law of privilege develops in accordance with 'Charter values' requires that the existing rules be scrutinized to ensure that they reflect the values the Charter enshrines⁸²⁰". Though two *Charter* values were used by the Court, namely privacy and equality, the use of equality is particularly interesting as the Court appears to revert to a test founded on differential treatment between victims of sexual assault and victims of other crimes⁸²¹.

The use of equality for balancing or proportionality analysis was also used in three education cases⁸²². In *Ross*, a Jewish parent filed a complaint with the New Brunswick Human Rights Commission alleging discrimination from the school board after a teacher made repeated public anti-Semitic remarks in his off-duty time⁸²³. In a unanimous decision, the Court found that the teacher's views served to "deny Jews respect for dignity and equality said to be among the fundamental guiding values" of proportionality analysis under s.1 of the *Charter*⁸²⁴. In *Chamberlain*, the Surrey School Board (in Surrey, British Columbia) passed a resolution refusing to authorize three books for classroom use on the ground that the books depicted same-sex parented families⁸²⁵. Though the majority opinion focused on secularism and its impact in the decision-making of the school board⁸²⁶, the dissenting opinion penned by Gonthier J. presented a tepid approach to *Charter* values: "Given, however, that there is generally a shared commitment

⁸¹⁹ *R. v. O'Connor*, [1995] 4 SCR 411, 1995 CanLII 51 (SCC); *A. (L.L.) v. B. (A.)*, [1995] 4 SCR 536, 1995 CanLII 52 (SCC); *M. (A.) v. Ryan*, [1997] 1 SCR 157, 1997 CanLII 403 (SCC).

⁸²⁰ *M. (A.) v. Ryan*, *supra* note 819, par. 23.

⁸²¹ *M. (A.) v. Ryan*, *supra* note 819, par. 30.

⁸²² *Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 825, 1996 CanLII 237 (SCC); *Chamberlain v. Surrey School District No. 36*, [2002] 4 SCR 710, 2002 SCC 86 (CanLII) [*Chamberlain*]; *Loyola*, *supra* note 649.

⁸²³ *Ross v. New Brunswick School District No. 15*, *supra* note 822.

⁸²⁴ *Ross v. New Brunswick School District No. 15*, *supra* note 822, par. 94.

⁸²⁵ *Chamberlain*, *supra* note 822.

⁸²⁶ *Chamberlain*, *supra* note 822, par. 19

to *Charter* values and to actual non-discrimination in the school-context more broadly, this case truly shows itself to be a question of balancing or accommodation, a question of choosing "ways and means" within policy implementation⁸²⁷. Arguing for deference towards the opinion of parents, Gonthier wrote:

It was submitted before this Court in the case at bar that the best interests of children includes education about "tolerance". I, obviously, agree... But to suggest that "tolerance" requires the mandatory approval of the Three Books, which is what the appellants seek as a remedy, begs the question as to what the books portray and the capability of children to receive the messages in the books in a manner which is consistent with the parental determination of what is in their best interests. This is a question regarding which reasonable parents disagree...⁸²⁸

Finally, in *Loyola*, a private high school in Montreal, sought an exemption from Québec's Ministry of Education to be able to teach its own version of the provincially-developed Program on Ethics and Religious Culture (ERC). Because Loyola's proposed ERC program was to be taught exclusively from a Catholic perspective, it was not considered, by the Ministry, equivalent to the provincial program. The Court, in two separate but concurring opinions, found that the Ministry's decision unduly restricted freedom of religion⁸²⁹. Both the majority opinion penned by Abella J. and the concurring opinion penned by McLachlin CJ and Moldaver J focus on community and collectivism, with Abella drawing a parallel between equality and pluralism⁸³⁰, and McLachlin and Moldaver focusing on the collective aspect of freedom of religion (what the Court refers to as communities of faith)⁸³¹.

⁸²⁷ *Chamberlain*, *supra* note 822, par. 79.

⁸²⁸ *Chamberlain*, *supra* note 822, par. 133.

⁸²⁹ *Loyola*, *supra* note 649.

⁸³⁰ "These shared values — equality, human rights and democracy — are values the state always has a legitimate interest in promoting and protecting. They enhance the conditions for integration and points of civic solidarity by helping connect us despite our differences... This is what makes pluralism work. ", *Loyola High School v. Quebec (Attorney General)*, *supra* note 649 at par. 47.

⁸³¹ *Loyola*, *supra* note 649, par. 93-94.

Mabior (where the Court interpreted the concept of “fraud” vitiating consent to sexual relations in the criminal context) was discussed previously. In addition to using autonomy and liberty as values, the Court also relied on the value of equality, stating that “we now see sexual assault not only as a crime associated with emotional and physical harm to the victim, but as the wrongful exploitation of another human being”⁸³². This view of equality as freedom from exploitation, which we can associate with a relational view of equality, was not the first such use in the Court’s jurisprudence.

In a dissent in *Zundel*, a relatively early *Charter* freedom case, two judges on the Court identified the connection between the underlying value of equality and liberty (or freedom), seen as the ability to fully participate in society⁸³³. In this case, an individual was accused of violating s. 181 of the *Criminal Code* (the willful publication of a statement known to be false or likely to cause injury or mischief to a public interest) by publishing a pamphlet denying the genocide of 6 million Jewish people during the Holocaust. The question brought before the Court was whether s. 181 of the *Criminal Code* violated section 2(b) and 7 of the *Charter*⁸³⁴, both discussed in the previous chapter. Though the majority of the Court took issue with the broad wording of s. 181 of the *Criminal Code*, the dissenting judges proposed an interpretation of “public interest” in the provision reflective of selected *Charter* values. According to Cory J. and Iacobucci J.:

the *Charter* provides us with indications as to which values go to the very core of our political structure. A democratic society capable of giving effect to the *Charter’s* guarantees is one which strives toward creating a community committed to equality, liberty and human dignity. The public interest is, therefore, in preserving and promoting these goals⁸³⁵

⁸³² *R. v. Mabior*, *supra* note 755, par. 45.

⁸³³ *R. v. Zundel*, [1992] 2 SCR 731, 1992 CanLII 75 (SCC), see particularly p. 814.

⁸³⁴ *R. v. Zundel*, *supra* note 833.

⁸³⁵ *R. v. Zundel*, *supra* note 833, 806.

For the dissenting judges, false statements “aimed at perpetuating the unequal participation of groups already disadvantaged along s. 15 enumerated or analogous grounds do not foster full participation in society but prevent it”⁸³⁶. Equality, or rather the elimination of disadvantage tied to a protected ground, is seen as relational and necessary for free participation in society. It is this relational view of equality as a value that shaped the majority decision in *Health Services* and to which we shall return in the following section.

4.3.3 –Relational (or Democratic) Equality in the Court’s Freedom of Association Cases

In an article penned shortly after *Health Services*, Langille declared that the Court’s jurisprudence regarding the constitutional protection of freedom of association for workers was “a mess”⁸³⁷. Highlighting several issues with the Court’s reasoning, Langille proposed a way around these issues, specifically a question: “Is there a rational reason why certain people are excluded from the statutory regime that instantiates a fundamental freedom open to others?”⁸³⁸. In short, Langille’s approach was to center the constitutional protection of collective bargaining on equality rather than freedom:

The important question is whether we can have real (thick, not thin) constitutional rights for labour without judicial overreach and without misunderstanding our past, our international obligations, and the nature of freedoms. The answer is yes, and the primary vehicle for this answer is the idea of equality⁸³⁹.

The Court has, in using the value of equality in proportionality analysis, recognized the link between equality and freedom, using equality to ensure freedom from exploitation. It is this same relational approach to equality that was adopted by the Court in the freedom of association cases. This section will first focus on the idea of relational equality (or equality as

⁸³⁶ *R. v. Zundel*, *supra* note 833, 814.

⁸³⁷ Langille, *supra* note 282, 178.

⁸³⁸ Langille, *supra* note 282, 204.

⁸³⁹ Langille, *supra* note 282, 206.

freedom from arbitrary domination) before examining how collective bargaining enhances relational equality in the workplace. Finally, the state's positive obligations will be examined.

In an article penned while she was still Chief Justice, McLachlin wrote the following while urging jurists to focus on the goal of s. 15(1) of the *Charter*: "Where the goal is equal distribution of benefits, the rules seem less clear than where the goal is amelioration of the downtrodden class's situation"⁸⁴⁰. Authors have pointed out that cases involving considerable equality gains are often not section 15(1) cases but are argued using other *Charter* rights or freedoms; such was the case with *Dunmore*⁸⁴¹. Indeed, a consequence of the Court's comparative approach to equality is that a right other than equality must be invoked when all are treated equally badly⁸⁴².

Liberalism has not, traditionally, been concerned with the promotion of substantive equality but with the promotion of liberty⁸⁴³. When examined however, through a republican lens, liberty shifts from the idea of non-interference to non-domination, taking on a significantly egalitarian character⁸⁴⁴. Maximising structural equality (as opposed to material equality) is a goal of republican theory⁸⁴⁵. According to Anderson, the focus on "the distribution of divisible, privately appropriated goods, such as income and resources" has led to neglecting the "much broader agendas of actual egalitarian political movements"⁸⁴⁶, namely ending oppression. Anderson's approach is not focused on ensuring that one gets what one deserves, but on creating "a

⁸⁴⁰ McLachlin, *supra* note 758, 25.

⁸⁴¹ See : Bruce Porter, "Expectations of Equality", in Sheila McIntyre and Sandra Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham: LexisNexis Canada, 2006) 37; and Dianne Pothier, "Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What's the Fairest of Them All", in Sheila McIntyre and Sandra Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham: LexisNexis Canada, 2006) 136.

⁸⁴² Pothier, *supra* note 841, 136.

⁸⁴³ Lorenne Clark, "Liberalism and the Living-Tree: Women, Equality, and the Charter" (1990) 28:2 *Alberta Law Review* 384 at 389.

⁸⁴⁴ Pettit, *supra* note 117, 111.

⁸⁴⁵ Pettit, *supra* note 117, 119.

⁸⁴⁶ Anderson, *supra* note 488, 288.

community in which people stand in relations of equality to others⁸⁴⁷. Thus, her approach seeks to guarantee effective access to the social conditions of freedom⁸⁴⁸ and, ultimately, the abolition of oppression, “that is, forms of social relationship by which some people dominate, exploit, marginalize, demean, and inflict violence upon others”⁸⁴⁹.

Historically, inequality referred to relations “between superior and inferior persons”⁸⁵⁰. Such unequal social relations were then used to justify inequality in distribution of both freedom and resources⁸⁵¹. Advocating for a return to such a relational approach to equality, Anderson refers to her approach as “democratic equality”⁸⁵², the purpose of which is to “end oppression, which by definition is socially imposed”⁸⁵³. Pettit echoes the idea of relational equality when stating that “free persons can walk tall, and look others in the eye. They do not depend on anyone’s grace or favour for being able to choose their mode of life”⁸⁵⁴. Indeed, a free person’s interactions are marked by a position of relatively equal strength⁸⁵⁵.

If the fundamental aim of the state, in classic liberal theory, is to secure the liberty of its members⁸⁵⁶, egalitarians (as Anderson dubs them) advocate for a more expansive understanding of freedom⁸⁵⁷. Egalitarians seek to abolish oppression⁸⁵⁸, in keeping with the “expressive demands of equal respect”⁸⁵⁹. Such expressive egalitarianism requires that the state “promote

⁸⁴⁷ Anderson, *supra* note 488, 288-289.

⁸⁴⁸ Anderson, *supra* note 488, 289.

⁸⁴⁹ Anderson, *supra* note 488, 313.

⁸⁵⁰ Anderson, *supra* note 488, 312.

⁸⁵¹ *Ibid.*

⁸⁵² Anderson, *supra* note 488, 313.

⁸⁵³ Anderson, *supra* note 488, 288.

⁸⁵⁴ Pettit, *supra* note 104, 82.

⁸⁵⁵ *Ibid.*

⁸⁵⁶ Anderson, *supra* note 488, 314.

⁸⁵⁷ Anderson, *supra* note 488, 315.

⁸⁵⁸ Anderson, *supra* note 488, 313.

⁸⁵⁹ Anderson, *supra* note 488, 289.

people's enjoyment of undominated choice"⁸⁶⁰, including in the workplace as previously discussed.

Anderson's (fundamentally republican) approach to equality does not guarantee outcomes, but effective access to processes⁸⁶¹ and to the capabilities allowing them to avoid oppression in social relationships⁸⁶². As such, it is reflective of the approach taken by the Court to collective bargaining. In *Royal Oak Mines*, the Court does not state that the duty to bargain in good faith imposes specific outcomes in the negotiation process, but emphasizes instead that "a commitment is required from each side to honestly strive to find a middle ground between their opposing interests"⁸⁶³.

In contrast to this vision of relational equality (or equality as freedom from oppression), Anderson views the workplace as a site of inherent inequality and unfreedom. While Collins defines the employment relationship as "both illiberal and inegalitarian"⁸⁶⁴, Bagenstos argues that the normative justification for employment law is social equality (i.e., eliminating hierarchies of social status)⁸⁶⁵, adding that "given the disproportionate power that owners and supervisors often have over their workers, the workplace continually threatens to create and entrench status hierarchies" particularly through their power to terminate the employment contract⁸⁶⁶. The Court had recognized the inherent inequality of workers *vis à vis* management in *Delisle*⁸⁶⁷.

⁸⁶⁰ Pettit, *supra* note 104, 89.

⁸⁶¹ Anderson, *supra* note 488, 318.

⁸⁶² Anderson, *supra* note 488, 316.

⁸⁶³ *Royal Oak Mines*, *supra* note 778, par. 41.

⁸⁶⁴ *Ibid.*

⁸⁶⁵ Samuel R Bagenstos, "Employment Law and Social Equality" (2013) 112:2 Mich L Rev 225.

⁸⁶⁶ Bagenstos, *supra* note 865, 244.

⁸⁶⁷ *Delisle v. Canada (Deputy Attorney General)*, *supra* note 251, par. 67.

In *Dunmore*, the occupational status of agricultural workers was found to be an analogous ground for discrimination under the Court's section 15(1) analysis⁸⁶⁸, though having found that there was a violation of the agricultural workers' freedom of association, the Court does not answer whether the contested legislation violated the workers equality rights⁸⁶⁹. Arguing, like Langille, that unions should rely on equality provisions as alternatives to section 2(d) analysis, Kerner states that it is "impossible to divorce the section 2(d) analysis Justice Bastarache relied on from the underlying equality concerns the agricultural workers had put forward to the Court⁸⁷⁰" and that the *Charter's* "equality provision had seeped into the Court's approach to freedom of association"⁸⁷¹.

In *Health Services*, the majority rejected claims that the contested legislation violated workers' equality rights, stating that the "differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, and not to the persons they are"⁸⁷².

In 2011's *Fraser*, the majority found that the claimants' equality claim was "premature". Referring to *Andrews*, the majority stated that "a formal legislative distinction does not establish discrimination under [s. 15](#). What s. 15 contemplates is substantive discrimination that impacts on individuals stereotypically or in ways that reinforce existing prejudice and disadvantage". The majority then added that though there exists a distinct statutory regime for agricultural workers (adopted in response to the Court's decision in *Dunmore*), it had "not been established that the

⁸⁶⁸ *Dunmore*, *supra* note 88, par. 170.

⁸⁶⁹ *Dunmore*, *supra* note 88, par. 207.

⁸⁷⁰ Kerner, *supra* note 280, 90.

⁸⁷¹ *Ibid.*

⁸⁷² *Health Services*, *supra* note 2, par. 165

regime utilizes unfair stereotypes or perpetuates existing prejudice and disadvantage”⁸⁷³. Contrasting the Court’s approach to the evidence regarding the vulnerability of farm workers in *Fraser* (2011) and in *Dunmore*, Faraday highlighted how the Court failed to take into account the effects of the legislative regime on farm workers’ vulnerability:

While in *Dunmore* the Supreme Court engaged with the evidence in a way that identified law as a dynamic agent that shaped farm workers’ relative position in society, the courts in *Fraser* made only very brief, glancing reference to the evidence and treated farm workers’ ‘vulnerability’ as a static condition that exists outside of law⁸⁷⁴.

This, in turn, led the Court to become trapped in a “mechanical” application of the legal test, failing in its commitment to substantive equality⁸⁷⁵. Indeed, though Pothier considered *Dunmore* to be a victory for equality rights achieved through other *Charter* rights, she pointed out that the Court’s approach to equality is often contrary to true substantive equality⁸⁷⁶.

Equality as a *Charter* value was, of course, an argument used by the majority in *Health Services* to support a constitutionally protected right to bargain collectively:

Collective bargaining also enhances the *Charter* value of equality. One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees⁸⁷⁷...

According to Hogg:

While the Supreme Court of Canada with its right hand has been building the elaborate structure of interpretation of section 15 (and section 1), with its left hand it has been finding ways of applying an equality “value” that is liberated from the restrictions on section 15⁸⁷⁸.

⁸⁷³ *Fraser 2011, supra* note 316, par. 116.

⁸⁷⁴ Fay Faraday, “Envisioning Equality: Analogous Grounds and Farm Workers’ Experience of Discrimination” in Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012) 109 at 126.

⁸⁷⁵ Faraday, *supra* note 874, 129.

⁸⁷⁶ Pothier, *supra* note 841.

⁸⁷⁷ *Health Services, supra* note 2, par. 84.

⁸⁷⁸ Peter Hogg, “Equality as a Charter Value in Constitutional Interpretation” (2003) 20:2 SCLR 113 at 115.

Hogg added the distinction that “Every *Charter* right is probably also a *Charter* value, but the latter is stated at a higher level of generality”⁸⁷⁹. Equality as a value is “imported” by the Court into other *Charter* rights in a way to remedy equality claims without dealing with listed and analogous grounds⁸⁸⁰. Hogg uses freedom of association as an example of a *Charter* right containing an inherent equality component⁸⁸¹. In *Health Services*, this view of equality was inherently relational and consistent with equality-as-freedom-from-exploitation seen in other cases where the Court relied on equality as a value. The “historical inequality between employers and employees⁸⁸²” described in *Health Services* is equivalent to the inherent inequality of the employment relationship described in *Delisle*⁸⁸³, to the “disproportionate power” described by Bagenstos⁸⁸⁴, and is reminiscent of Anderson’s definition of oppression, “that is, forms of social relationship by which some people dominate, exploit, marginalize, demean, and inflict violence upon others”⁸⁸⁵. Thus, the Court, in its approach to equality appears to have embraced a view of relational equality as freedom from domination and exploitation consistent with both Anderson’s view of equality and Pettit’s view of freedom.

4.4 – Industrial Democracy and Non-Domination

According to the majority in *Health Services*, “a constitutional right to collective bargaining is supported by the *Charter* value of enhancing democracy”⁸⁸⁶. The vision of democracy embraced

⁸⁷⁹ Hogg, *supra* note 878, 116.

⁸⁸⁰ Hogg, *supra* note 878, 117.

⁸⁸¹ Hogg, *supra* note 878, 115.

⁸⁸² *Health Services*, *supra* note 2, par. 84.

⁸⁸³ *Delisle v. Canada (Deputy Attorney General)*, *supra* note 251, par. 67.

⁸⁸⁴ Bagenstos, *supra* note 865, 244.

⁸⁸⁵ Anderson, *supra* note 488, 313.

⁸⁸⁶ *Health Services*, *supra* note 2, par. 85.

by the majority in *Health Services* is specifically industrial democracy, as evidenced by the majority's reference to the Woods Report and to Klare's explanation of the *Wagner Act*.

In the 1968 Woods report, industrial democracy was defined as "the introduction into the work place of some of the basic features of political democracy" and "the substitution of the rule of law for the rule of men in the workplace"⁸⁸⁷. According to the majority in *Health Services*, through collective bargaining workers "gain a voice to influence the establishment of rules that control a major aspect of their lives"⁸⁸⁸.

Approximately thirty decisions use democracy to establish constitutional obligations, to interpret a *Charter* right, to define the scope of a *Charter* right, or to balance competing interests in *Charter* litigation. Throughout these decisions, the focus on effective participation – particularly in the freedom of association cases – speak to an expressively egalitarian approach to democracy.

4.4.1 – Industrial Democracy

Dion defines industrial democracy as a doctrine founded on equality, responsibility, and freedom giving economic agents (i.e. the workers) the power to express themselves regarding decisions that affect them⁸⁸⁹. Thus, for Dion, industrial democracy draws on the twin values of freedom and equality examined in previous chapters. Dahl wrote that the idea of democratic participation stems from a logic of equality⁸⁹⁰. For Poole, Lansbury and Wailes, industrial democracy is "the exercise of power by workers or their representatives over decisions within their places of employment,

⁸⁸⁷ Task Force on Labour Relations, *Canadian Industrial Relations: The Report* (1968) Canada, Privy Council at p 96; see also *Health Services*, supra note 2, par. 85.

⁸⁸⁹ Gérard Dion, *Dictionnaire Canadien des Relations du Travail* (Québec : Les Presses de l'Université Laval, 1986) at 152.

⁸⁹⁰ Robert A Dahl, *On democracy* (New Haven: Yale University Press, 1998) at 10.

coupled with a modification of the locus and distribution of authority within the workplace"⁸⁹¹. How this modification of the locus and distribution of authority relate to the egalitarian views of Anderson and Pettit will be explored shortly. Poole *et al* add that the forms of worker participation associated with industrial democracy vary significantly and can include union-based forms of participation, codetermination, works councils, and even producer cooperatives⁸⁹².

Worker participation has a long history in the industrial world. Early calls for industrial democracy in the United States at the start of the twentieth century were aimed at giving workers "more voice", a share of control, and ultimately the recognition of workers' "individual worth and dignity"⁸⁹³. Wartime saw the development of joint labour-management committees in the United States to resolve workplace issues⁸⁹⁴. The more expansive idea of codetermination, however, was imported from Scandinavian countries to North America in the 1970s⁸⁹⁵. In a 1976 encyclical, Pope John XXIII wrote that the "nature of man demands that in the productive activities he should contribute to the organization of these activities and find satisfaction in his work"⁸⁹⁶

Though the AFL-CIO adopted the official position that codetermination was a European approach and that unions did not wish to be involved in management, it reversed this position in the

⁸⁹¹ Michael Poole, Russell Lansbury & Nick Wailes, "A Comparative Analysis of Developments in Industrial Democracy" (2001) 40:3 *Industrial Relations: A Journal of Economy and Society* 490 at 491.

⁸⁹² Poole, Lansbury & Wailes, *supra* note 891, 492.

⁸⁹³ Clyde W Summers, "From industrial democracy to union democracy" (2000) 21:1 *Journal of Labor Research* 3 at 5. See also: Otto Kahn-Freund, "Industrial Democracy" (1977) 2 *Indus LJ* 65.

⁸⁹⁴ Steven Deutsch, "A Researcher's Guide to Worker Participation, Labor and Economic and Industrial Democracy" (2005) 26:4 *Economic and Industrial Democracy* 645 at 646.

⁸⁹⁵ Deutsch, *supra* note 894, 649.

⁸⁹⁶ Pope John XXIII, *Mater et Magistra* (Paris: Éditions du Seuil, 1976) at 68.

1990s⁸⁹⁷. Today, codetermination remains foreign to North American labour law, though the Wagner style model of industrial relations did establish a form of industrial democracy⁸⁹⁸, by forcing the employer to negotiate the terms of the employment contract with elected worker representatives (i.e. the union).

Summers (here writing about the United States) echoes Anderson's words on the pervasiveness of private government in his writing on industrial democracy:

The theme that our system of political democracy should be matched by a system of industrial democracy has been an irrepensible one in our history. This theme is not our alone, for in every political democracy there is recognition that decisions of the work place may be more important to the worker than decisions in the legislative halls. Democratic principles demand that workers have a voice in the decisions that control their working lives; human dignity requires that workers not be subject to oppressive conditions or arbitrary actions⁸⁹⁹.

Workers are, however, subject to arbitrary actions in that they cannot normally negotiate limits on employer power⁹⁰⁰. Under private government, workers are kept out of government decision making⁹⁰¹; they exist in a state of republican unfreedom. Anderson argues that, to make workers free, "there is no adequate substitute for recognizing workers' voice in their government", adding that though the firm may require a hierarchy to function, there is no reason why 'higher officeholders must be unaccountable to the governed'⁹⁰². Furthermore, democratic participation advances relational equality as "engagement on equal, formal terms sends a message that each participant is worthy of concern and respect"⁹⁰³.

⁸⁹⁷ Deutsch, *supra* note 894, 653.

⁸⁹⁸ Klare, *supra* note 53, 284.

⁸⁹⁹ Clyde W Summers, "Industrial Democracy: America's Unfulfilled Promise" (1979) 1 Clev St L Rev 29 at 29.

⁹⁰⁰ Anderson, *supra* note 422, 57.

⁹⁰¹ Anderson, *supra* note 422, 45.

⁹⁰² Anderson, *supra* note 422, 69.

⁹⁰³ Michael Pal, "The Unwritten Principle of Democracy" (2019) 65:2 McGill Law Journal 269 at 290.

Thus, much as Pettit views democracy as “essential to the republic” only because “it is necessary for promoting the enjoyment of freedom as non-domination”⁹⁰⁴, industrial democracy is important in this reconstruction – regardless of the form that industrial democracy may take – because it allows for the non-domination of workers. Indeed, the emergence of trade unionism has been associated with countervailing “iniquitous” managerial authority⁹⁰⁵.

At the end of the 19th century, the Webbs (to whom we shall return shortly) identified collective bargaining as a way to avoid domination between workers through what would now be referred to as a “race to the bottom” approach to wages:

By the Method of Collective Bargaining the foreman is prevented from taking advantage of the competition of both these classes of men to beat down the earnings of the other workmen. The starving man gets his job at the same piecework rate as the workman who could afford to stand out for his usual earnings⁹⁰⁶.

In addition to contributing to the democratization of the private government of the workplace, unions may themselves reflect democratic structures and contribute to advanced democratic participation at the societal level. Indeed, if a union did not meet the essential criteria of representative government, it would merely become another form of domination.

Dion defines union democracy (as opposed to industrial democracy, defined previously) as a form of internal organization which protects individual members’ rights within union structures, giving

⁹⁰⁴ Pettit, *supra* note 117, 8.

⁹⁰⁵ Newton, Keith, “The theory and practice of industrial democracy: a Canadian perspective.” (1977) Discussion paper no 94, Ottawa: Economic Council of Canada at 16.

⁹⁰⁶ Sidney Webb, *Industrial democracy*, Reprints of economics classics (New York: AMKelley, 1965) at 174.

them a say in union policies and decision-making, and allowing union members to choose their union representatives⁹⁰⁷. Summers, in analysing what makes a union democratic stated that:

the most essential element is the ability of union members to have an effective voice in determining unions policies and electing union officers. This requires, as a minimum, access to information about union affairs and finances; freedom to express views concerning union policies and conduct of union officers without fear of reprisal; ability to communicate those views within the union and freedom to organize with others to promote those views; and the guarantee of free elections⁹⁰⁸.

In short, a democratic union will show the same basic features identified by the Court as part of democracy: free votes, voting equality, free speech, and access to information.

The Webbs' *Industrial Democracy* (published in 1897) first established the link between trade unionism and democracy⁹⁰⁹. In the introduction to this leading study, they wrote: "In the Anglo-Saxon world of to-day we find that Trade Unions are democracies: that is to say, their internal constitutions are all based on the principle of 'government of the people by the people for the people'⁹¹⁰." In their multi-year study, they found that trade unions expressed similar concerns to governments: "In both cases the problem is how to combine administrative efficiency with popular control. Both alike ultimately depend on a continuance of general assent. In a voluntary association, such as the Trade Union, this general assent is, as we have seen, the foremost requirement"⁹¹¹.

⁹⁰⁷ Dion, *supra* note 862, 152.

⁹⁰⁸ Summers, *supra* note 893, 9.

⁹⁰⁹ Peter Ackers, "Collective Bargaining as Industrial Democracy: Hugh Clegg and the Political Foundations of British Industrial Relations Pluralism" (2007) 45:1 *British Journal of Industrial Relations* 77.

⁹¹⁰ Webb, *supra* note 906.

⁹¹¹ Webb, *supra* note 906, 60.

In *Berry*, the Court examined the legal nature of relations between members of a trade union when analysing whether a member of a union could be liable to another union member for breach of contract based on the terms of the union constitution⁹¹². In this decision, the Court rejected the legal fiction that the union constitution created a contractual web between union members⁹¹³. According to the Court, when a person joins a union, a contract is formed between the member and the union as a legal entity⁹¹⁴. The relationship, however, is unique. On internal union democracy and internal relations between members, the following quote is long but revealing:

On a policy level, if courts were to allow disagreements between union members to result in claims against their personal assets absent the existence of an identifiable wrongdoer in breach of some duty, like the required elements of a tort action, this would have a chilling effect on union democracy. The importance of the democratic rights of union members, including the right to dissent, was pointed out in *Tippett v. International Typographical Union, Local 226* (1975), 1975 CanLII 1024 (BC SC), 63 D.L.R. (3d) 522 (B.C.S.C.), at p. 546:

All members of trade unions have the unqualified right to speak out against the manner in which union affairs are conducted. There is a right of dissent. There is a right to seek decertification, subject to the condition that no member of a union shall conspire with his employer to injure his union. I point out, moreover, that dual unionism is a fact of life in this Province. No person can be expelled or penalized by a trade union for insisting on his rights.

Exposing the personal assets of dissenting union members to liability would be antithetical to this "unqualified right" of union members to speak out against the agenda of their bargaining agent. The result would be to discourage member participation in union affairs and to erode union democracy⁹¹⁵.

Dahl's ideal democracy (see next section) "provides opportunities for: (1) effective participation; (2) equality in voting; (3) gaining enlightened understanding; (4) exercising final control over the agenda; (5) inclusion of adults"⁹¹⁶, all of which are present in the examples provided by the Webbs

⁹¹² *Berry v Pulley*, [2002] 2 SCR 493.

⁹¹³ *Berry v Pulley*, *supra* note 912, par. 54.

⁹¹⁴ *Berry v Pulley*, *supra* note 912, par. 48.

⁹¹⁵ *Berry v Pulley*, *supra* note 912, par. 60.

⁹¹⁶ Dahl, *supra* note 890, 38.

and in the Court's description cited above. Thus, the internal structure of the trade union is democratic, avoiding another form of worker domination.

Finally, there is considerable literature indicating that workplace participation, particularly through their trade union, socializes workers into developing more democratic expectations, which in turn, are reflected in the political sphere⁹¹⁷. Thus, industrial democracy can positively impact democracy at a societal level. According to Pateman:

The theory of participatory democracy is built around the central assertion that individuals and their institutions cannot be considered in isolation from one another. The existence of representative institutions at national level is not sufficient for democracy; for maximum participation by all the people at that level socialisation, or 'social training', for democracy must take place in other spheres in order that the necessary individual attitudes and psychological qualities can be developed. This development takes place through the process of participation itself. The major function of participation in the theory of participatory democracy is therefore an educative one...⁹¹⁸

This view is reminiscent of the Court's position in *RWDSU*⁹¹⁹, discussed previously, when the Court recognized the specificity of labour speech as fundamental to both labour relations and to society.

4.4.2 – Democracy as an Unwritten Principle and a Value

Unlike freedom, liberty, and equality (explored in the two previous chapters) which are simultaneously explicitly recognized in the *Charter* and values underlying the *Charter*, democracy

⁹¹⁷ John Godard, "Is Good Work Good for Democracy? Work, Change at Work and Political Participation in Canada and England" (2007) 45:4 *British Journal of Industrial Relations* 760 at 761.

⁹¹⁸ Carole Pateman, *Participation and democratic theory* (Cambridge: Cambridge University Press, 1970) at 42.

⁹¹⁹ *RWDSU*, *supra* note 748.

is not explicitly referenced in the *Charter* though both the title preceding articles three through five and article one mention democratic rights and democratic society respectively. Democracy, as an unwritten constitutional principle, has been derived from the preamble of the *Constitution Act, 1867*⁹²⁰ which states that Canada is to have a constitution “similar in principle to that of the United Kingdom”. As an unwritten principle, it has been used in two ways: first to interpret other constitutional provisions (including the Charter), second – and more controversially – it has been given its own normative force⁹²¹.

Despite its history, democracy remains ill-defined. According to Dahl: "Democracy has been discussed off and on for about twenty-five hundred years, enough time to provide a tidy set of ideas about democracy on which everyone, or nearly everyone, could agree. For better or worse, that is not the case⁹²²." Democracy, according to Pal, is an "essentially contested concept"⁹²³ which remains “underspecified in the Canadian Constitution⁹²⁴” and which has been largely ignored as a legal principle by scholars in Canada⁹²⁵. Indeed, while the Constitution Act, 1867 “does not expressly determine democracy's contours in any great detail, largely because of the assumption that Canada would follow the British model of an unwritten constitution⁹²⁶”, the Constitution Act, 1982 primarily set limits on the traditional freedoms of the legislatures⁹²⁷. Though the written constitutional documents treat democracy laconically, the Court has nonetheless described the principle of democracy “as a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated”,

⁹²⁰ Peter C Oliver, “‘A Constitution Similar in Principle to That of the United Kingdom’: The Preamble, Constitutional Principles, and a Sustainable Jurisprudence” (2019) 65:1 McGill Law Journal 207.

⁹²¹ Pal, *supra* note 903, 284.

⁹²² Dahl, *supra* note 890.

⁹²³ Pal, *supra* note 903, 271.

⁹²⁴ Pal, *supra* note 903, 273.

⁹²⁵ Pal, *supra* note 903, 272.

⁹²⁶ Pal, *supra* note 903, 274.

⁹²⁷ Pal, *supra* note 903, 275.

adding that it “is perhaps for this reason that the principle was not explicitly identified in the text of the *Constitution Act, 1867* itself. To have done so might have appeared redundant, even silly, to the framers”⁹²⁸.

Pal argues for a “thin” understanding of democracy in Canadian constitutional law, specifically focused on meaningful participation⁹²⁹, as opposed to “thick” understandings of democracy. Such thin versions “emphasize the procedural element of democracy and the institutions that reflect fundamental values, particularly the political equality of adult citizens” and view “competitive elections as a necessary, though admittedly not sufficient, condition for democracy⁹³⁰”. So-called thick accounts of democracy vary “but unite in seeking something more than formal mechanisms for participation, equality enshrined in formal liberal rights and institutions, and competitive elections⁹³¹”. They include such approaches as direct democracy⁹³² and deliberative approaches focused on consensus decision-making⁹³³. It is worth noting that contemporary democratic theory gives direct participation a limited role⁹³⁴.

Recognizing that democracy “refers both to an ideal and to an actuality”⁹³⁵, Dahl proposes five criteria to recognize a democracy. Dahl’s ideal democracy “provides opportunities for: (1) effective participation; (2) equality in voting; (3) gaining enlightened understanding; (4) exercising final control over the agenda; (5) inclusion of adults”⁹³⁶. Interestingly, these five criteria (which shall be

⁹²⁸ *Reference re Secession of Quebec*, *supra* note 600, par. 62.

⁹²⁹ Pal, *supra* note 903, 274.

⁹³⁰ Pal, *supra* note 903, 286.

⁹³¹ *Ibid.*

⁹³² Pal, *supra* note 903, 287.

⁹³³ Pal, *supra* note 903, 288.

⁹³⁴ Pateman, *supra* note 918, 1.

⁹³⁵ Dahl, *supra* note 890, 26.

⁹³⁶ Dahl, *supra* note 890, 38. Pateman critiques such attempts at description, stating that contemporary theories of democracy do not “merely describe the operation of certain political systems, but impl[y] that this is the kind of system that we should value and includes a set of standards or criteria by which a political system may be judged ‘democratic’. It is not difficult to see that, for the theorists under consideration, these standards are those that are inherent in the existing Anglo-American democratic system...”, see Pateman, *supra* note 918, 15.

further described below) though representative of a “thin” vision of democracy, are nonetheless seemingly more present in associations like trade unions than in a Westminster parliamentary system.

Effective participation, according to Dahl’s criteria signifies that "all the members must have equal and effective opportunities for making their views known to the other members as to what the policy should be" before any policy is adopted by an association⁹³⁷. Voting equality signifies that “every member must have an equal and effective opportunity to vote, and all votes must be counted as equal”⁹³⁸. Democracy also requires enlightened understanding where all members of the association, within reasonable limits as to time “have equal and effective opportunities for learning about the relevant alternative policies and their likely consequences”⁹³⁹. Control of the agenda signifies that members of the association have the opportunity to decide what matters are to be placed on the association’s agenda⁹⁴⁰. Finally, the inclusion of adults signifies that all adult permanent residents have the full rights implied in the four criteria listed previously⁹⁴¹.

Here, Dahl differs from the majority of the Court in the *Saskatchewan Electoral Boundaries Reference* where McLachlin J. (as she then was), writing for the majority stated:

It is my conclusion that the purpose of the right to vote enshrined in s. 3 of the Charter is not equality of voting power per se, but the right to 'effective representation'. Our is a representative democracy. Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative⁹⁴².

⁹³⁷ Dahl, *supra* note 890, 37.

⁹³⁸ *Ibid.*

⁹³⁹ *Ibid.*

⁹⁴⁰ Dahl, *supra* note 890, 38.

⁹⁴¹ *Ibid.*

⁹⁴² *Reference re Prov Electoral Boundaries (Sask)*, [1991] 2 SCR 158 at par. 183.

Participation, specifically through the electoral process, has been considered to be at the heart of democracy in Canada⁹⁴³. Dahl himself, however, points out the relative recency of true universal suffrage, stating that "if we accept universal adult suffrage as a requirement of democracy, there would be some persons in practically every democratic country who would be older than their democratic system of government"⁹⁴⁴. In 2002, however, the Court did recognize the importance of universal suffrage when it decided that restricting an inmate's right to vote was more likely to undermine democracy than to enhance it⁹⁴⁵.

Democracy as an unwritten constitutional principle received the most attention from the Court in the 1998 *Secession Reference*⁹⁴⁶. In a unanimous decision, the Court examined democracy to answer the question of whether the National Assembly, legislature or government of Québec could affect the unilateral secession of Québec from Canada. In this decision, the Court recognized democracy as a "fundamental value" with both an institutional and individual aspect⁹⁴⁷. Though it had been argued to support the "supremacy of the sovereign will of a people, this case potentially to be expressed by Quebecers in support of unilateral secession"⁹⁴⁸, the Court examined its meaning beyond such an expression. According to the Court:

Democracy is commonly understood as being a political system of majority rule. It is essential to be clear what this means. The evolution of our democratic tradition can be traced back to the Magna Carta (1215) and before, through the long struggle for Parliamentary supremacy which culminated in the English Bill of Rights of 1689, the emergence of representative political institutions in the colonial era, the development of responsible government in the 19th century, and eventually, the achievement of

⁹⁴³ *Figueroa v Canada (Attorney General)*, [2003] 1 SCR 912. See also: *Frank v. Canada (Attorney General)*, [2019] 1 SCR 3.

⁹⁴⁴ Dahl, *supra* note 890, 3.

⁹⁴⁵ *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 SCR 519.

⁹⁴⁶ *Reference re Secession of Quebec*, *supra* note 600.

⁹⁴⁷ *Reference re Secession of Quebec*, *supra* note 600, par. 61.

⁹⁴⁸ *Ibid.*

Confederation itself in 1867... Since Confederation, efforts to extend the franchise to those unjustly excluded from participation in our political system — such as women, minorities, and aboriginal peoples — have continued, with some success, to the present day⁹⁴⁹.

After stating this commitment to the institutions of democracy and to universal suffrage, the Court seems to turn from a thin to a thick view when it adds that democracy “is not simply concerned with the process of government” but “is fundamentally connected to substantive goals, most importantly the promotion of self-government”, adding that democracy “accommodates cultural and group identities”⁹⁵⁰.

In keeping with Dahl’s recognition that information forms an essential pillar of democracy and is essential to exercise free choice, the Court has used the unwritten principle of democracy in several cases focusing on access to information. In *Carson*, the majority found that free and open access to government is a component of democracy⁹⁵¹. In *Vancouver Sun*, the same was said of the open court principle⁹⁵². Additionally, the Court has referred to both freedom of expression⁹⁵³ and freedom of the press⁹⁵⁴ as cornerstones of democracy. In *Vice Media*, a case dealing with the protection of journalistic sources, the majority stated: “A strong, independent and responsible press ensures that the public’s opinions about its democratic choices are based on accurate and reliable information. This is not a democratic luxury — there can be no democracy without it”⁹⁵⁵. Similarly, access to information was deemed essential to democracy as it ensures that citizens have information to make their choices⁹⁵⁶. Finally, as with the preceding *Charter* freedoms which

⁹⁴⁹ *Reference re Secession of Quebec*, *supra* note 600, par. 63.

⁹⁵⁰ *Reference re Secession of Quebec*, *supra* note 600, par. 64.

⁹⁵¹ *R v. Carson*, [2018] 1 SCR 269.

⁹⁵² *Vancouver Sun (Re)*, [2004] 2 SCR 332.

⁹⁵³ *Bent v. Platnick*, 2020 SCC 23; *Bou Malhab v Diffusion Métromédia CMR inc.*, [2011] 1 SCR 214; *R v. Keegstra*, [1990] 3 SCR 697; *R v. Sharpe*, *supra* note 718.

⁹⁵⁴ *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 SCR 1326; *Canadian Broadcasting Corp v. Lessard*, [1991] 3 SCR 421; *Thomson Newspapers Co v. Canada (Attorney General)*, [1998] 1 SCR 877; *Lac d’Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, [2001] 2 SCR 743.

⁹⁵⁵ *R v. Vice Media Canada Inc.*, [2018] 3 SCR 374 at par. 110.

⁹⁵⁶ *Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403.

were said to underly the unwritten principle of democracy, the majority in *Bergevin* found that freedom of religion was a cornerstone of democracy⁹⁵⁷.

In short, even through a thin articulation, the unwritten principle of democracy encompasses minimally the right to meaningful participation, including the access to the information required to make decisions.

In addition to the cases listed above where the Court cited specific *Charter* rights and freedoms as elements supporting or enhancing democracy, the Court has also referenced democracy as a value to balance *Charter* rights and freedoms.

In *Aubry*, a young woman filed a suit for damages against a magazine for publishing a picture of her (seated on the front steps of a building) without her consent. This case, according to the Court, rested on a conflict between two rights: a right to privacy and freedom of expression⁹⁵⁸. In an approach that can be considered fundamentally liberal, the Court recognized the interrelated nature of rights, as well as the relationship between freedom and democracy: "When the values at issue in a case must be balanced, it is important to bear in mind that our law is characterized by recognition of interrelated rights whose purpose is to strengthen the democratic ideal. Individual freedom is at the heart of that ideal⁹⁵⁹."

In *Sharpe* (discussed in previous chapters), the Court reiterated the fundamental connection between freedom of expression, the free circulation of ideas (including unpopular ideas), and democracy:

Among the most fundamental rights possessed by Canadians is freedom of expression. It makes possible our liberty, our creativity and our democracy. It does this by protecting not

⁹⁵⁷ *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 SCR 525.

⁹⁵⁸ *Aubry v. Éditions Vice-Versa inc.*, [1998] 1 SCR 591 at par. 55.

⁹⁵⁹ *Aubry v. Éditions Vice-Versa inc.*, *supra* note 931, par. 64.

only "good" and popular expression, but also unpopular or even offensive expression. The right to freedom of expression rests on the conviction that the best route to truth, individual flourishing and peaceful coexistence in a heterogeneous society in which people hold divergent and conflicting beliefs lies in the free flow of ideas and images. If we do not like an idea or an image, we are free to argue against it or simply turn away. But absent some constitutionally adequate justification, we cannot forbid a person from expressing it⁹⁶⁰.

Again, the Court reiterated the connection between democracy and individual freedom.

Finally, in *Loyola High School* (also discussed previously), the Court stated that the value of democracy included the capacity of citizens to engage in meaningful and thoughtful deliberation⁹⁶¹, thus emphasizing both the capacity to make choices and the information required to choose freely.

In *RWDSU*⁹⁶², the Court drew a connection between democracy and freedom of expression, a common theme in cases dealing with democracy as a value. This case involved the legality of secondary picketing, that is to say union members picketing at locations other than the employer's premises. Adopting a "*Charter*-mandated methodology" of permitting secondary picketing "except where it involves tortious or criminal action"⁹⁶³, the Court adds: "labour speech engages the core values of freedom of expression, and is fundamental not only to the identity and self-worth of individual workers and the strength of their collective effort, but also to the functioning of a democratic society"⁹⁶⁴.

Thus, democracy as a *Charter* value underlies freedom of expression most notably. Information, according to the Court, is necessary for free and informed choice which in turn is a cornerstone

⁹⁶⁰ *R v Sharpe*, *supra* note 718, 70.

⁹⁶¹ *Loyola*, *supra* note 649.

⁹⁶² *RWDSU*, *supra* note 748.

⁹⁶³ *RWDSU*, *supra* note 748, 186.

⁹⁶⁴ *RWDSU*, *supra* note 748, 187.

of democracy. Though this is still considered a “thin” view of democracy, it is a view consistent with both liberal and republican approaches to freedom.

In conclusion, though democracy is not a *Charter* right, it can be said to permeate the *Charter*. First, it is explicitly included in justification and proportionality analysis through the wording of section 1 (“subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”⁹⁶⁵). Furthermore, sections 3 to 5 of the *Charter* are referred to as “Democratic Rights”. Finally, various rights and freedoms have been said to either include democracy or to be included in democracy.

Though the drafters of the *Constitution Act, 1867* and the *Constitution Act, 1982* made little reference to democracy, it has received considerable attention from both the Court and scholars as an unwritten constitutional principle. The Court and scholars have generally favoured a thin reading of democracy, that is to say an interpretation focused in procedural guarantees. The primary guarantees have included the right to vote, voting equality, access to information (including freedom of speech and freedom of the press), and freedom of choice.

In contrast, the private government of the workplace is inherently authoritarian. Its subjects (i.e. the workers) do not benefit from freedom of speech or have a say in workplace governance. In short, the workplace is fundamentally undemocratic. Through union representation and mandatory collective bargaining, however, workers gain a say in their conditions of employment. They suffer less from relational inequality and are not subject to arbitrary domination.

⁹⁶⁵ *Canadian Charter, supra* note 1, s. 1.

An egalitarian reconstruction of freedom of association thus requires meaningful participation of workers through democratic elections of union representatives and a mandatory system of bargaining to ensure that worker voices are heard.

In developing a model of relational equality, Anderson speaks of democratic equality. Pettit states that republicanism is only interested in democracy as a method against arbitrary domination. Hence, democracy, equality, and freedom are connected, as recognized by the Court in *Oakes*:

A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified⁹⁶⁶.

There remains one last value to be examined, one that has been recognized as inherent to both democracy (including in the above-cited paragraph) and equality, namely dignity. The use of dignity will be examined in the fifth and final section of this chapter.

4.5 – Dignity and Non-Domination

In a reflection on the unique role played by dignity in the German Basic Law⁹⁶⁷, Mahlmann offers the following reflection on the history and universality of the concept:

⁹⁶⁶ *R. v. Oakes*, *supra* note 230, 136.

⁹⁶⁷ Matthias Mahlmann, "The Basic Law at 60 - Human Dignity and the Culture of Republicanism" (2010) 11:1 German Law Journal 9. See also: Henk Botha, "Human Dignity in a Comparative Perspective" (2009) 20:2 Stellenbosch law review 171 at 172: "The scope and sophistication of the dignity jurisprudence of German courts -

The idea of human dignity is not only present in philosophical thought; its sources are, to the contrary, quite manifold and in no way limited to conceptual thinking. Antique sculpture, for example, is a rich resource of magnificent and shifting attempts to capture a certain vision of human existence and worth. Or consider literature. The concept of human dignity is, for example, not mentioned in the *Odyssey*. But is the longing for a return, the struggle to reach Ithaca, the confrontation with the dead and shadowy afterlife, the survival of the changing winds and the revengeful acts of the Gods not relevant for the existential situation of human beings that is a foundation for respect?⁹⁶⁸

Though the concept of human dignity can be said to have a history spanning three millennia⁹⁶⁹, the constitutional dimension of dignity (either as a value or as a right) is a much more recent development⁹⁷⁰. Barak begins his historical overview of dignity with the Stoics, for whom rationality set humans apart⁹⁷¹. For the Stoics, all people are part of an ethical community of rational beings, though within this community, only the wise (having the capability for philosophical understanding can be said to be free). Other creatures are intended to provide for the needs of man⁹⁷². Cicero developed the concept of “*dignitas*” to speak of the status of an individual within the community⁹⁷³. Such a concept was far removed from modern egalitarian approaches to dignity.

Judaism and Christianity derived their notion of dignity from the idea of man’s creation in the image of God (*imago dei*)⁹⁷⁴. According to Aquinas in the *Summa Theologia*, “God is rational and determines his goals for himself. Man was created in the image of God, and he too is rational and determines his own goals subject to the goals of God as a rational creation. Man

in particular the Federal Constitutional Court - and the depth of the academic comment by German constitutional law scholars on the concept and uses of dignity are unparalleled in any other country”.

⁹⁶⁸ Mahlmann, *supra* note 940, 14.

⁹⁶⁹ Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge: Cambridge University Press, 2015) at xvii.

⁹⁷⁰ Barak, *supra* note 969, 3.

⁹⁷¹ Barak, *supra* note 969, 17.

⁹⁷² *Ibid.*

⁹⁷³ Barak, *supra* note 969, 17.

⁹⁷⁴ Barak, *supra* note 969, 19-21.

has freedom of will. This is his dignitas.⁹⁷⁵ The philosophers of the Renaissance focused on man's creation in God's image as the source of man's rationality and free will (and, thus, his dignity). During the Enlightenment (mid seventeenth to mid eighteenth century), the focus shifted from man's creation in God's image to man's part in society⁹⁷⁶. The rationality of man became the source of man's dignity, equality and freedom for both Locke (1632-1704) and Pufendorf (1632-1694)⁹⁷⁷. Most famous, perhaps, is Kant's view of human dignity as a rejection of the idea that a person can be but a means for fulfilling the will of another. For Kant, no person is master over his fellow man⁹⁷⁸.

Through the ages, human dignity was not part of the legal discourse⁹⁷⁹. Dignity gained prominence in international instruments after World War II⁹⁸⁰ with its inclusion in both the Preamble of the *Charter of the United Nations*⁹⁸¹ and the *Universal Declaration of Human Rights*⁹⁸².

As a precept of constitutional adjudication, dignity "took hold" after the adoption of the *Universal Declaration of Human Rights*, even though the drafters disagreed on the meaning of dignity in the Declaration⁹⁸³. Dignity was included in the preamble to palliate for the lack of consensus for what should form the theoretical basis of human rights. Delegates disagreed about the foundation

⁹⁷⁵ Barak, *supra* note 969, 22.

⁹⁷⁶ Barak, *supra* note 969, 25.

⁹⁷⁷ Barak, *supra* note 969, 26.

⁹⁷⁸ Barak, *supra* note 969, 27-28.

⁹⁷⁹ Barak, *supra* note 969, 49.

⁹⁸⁰ Barak, *supra* note 969, 34.

⁹⁸¹ "WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small...", United Nations Charter, 1945, <https://www.un.org/en/about-us/un-charter/preamble> (consulted on December 11, 2021), preamble.

⁹⁸² "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world", United Nations, *Universal Declaration*, *supra* note 4, Preamble.

⁹⁸³ Neomi Rao, "Three Concepts of Dignity in Constitutional Law" (2011) 86:1 Notre Dame Law Review 183 at 185.

(citing religion, natural rights, liberal individualism, and communitarian ideals). The utility of dignity was to allow those participating in the debate to include their own theory of human rights. "Dignity meant something good, yet was plastic enough to satisfy a wide range of delegates"⁹⁸⁴. In short, dignity was (and remains) an essentially contested concept.

Ironically, given its roots in disagreement, the emphasis on dignity in the *Universal Declaration* made the concept an "internationally recognized legal term of value, even if the precise meaning of dignity remained unspecified"⁹⁸⁵.

The first national constitutions to include explicit references to dignity in the early twentieth century were Mexico, Weimar Germany, Finland, Portugal, Ireland, and Cuba⁹⁸⁶. While some constitutions recognize an explicit right to dignity, many more constitutions recognize dignity as a constitutional value⁹⁸⁷. The formal written Canadian constitution (both the *Canada Act, 1867* and the *Canada Act, 1982*) contains no such reference. However, dignity has been widely used as a constitutional value, particularly within the Court's equality jurisprudence. In *Health Services*, the *Charter* value of dignity appears to be treated as synonymous with freedom and autonomy⁹⁸⁸. This section will begin by presenting the idea that the value of dignity is the *Charter's* unifying value (4.5.1) before exploring the idea of dignity in the workplace (4.5.2).

⁹⁸⁴ Rao, *supra* note 983, 194.

⁹⁸⁵ Rao, *supra* note 983, 195.

⁹⁸⁶ Rao, *supra* note 983, 193.

⁹⁸⁷ Barak, *supra* note 969, 51.

⁹⁸⁸ " The right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work", see: *Health Services*, *supra* note 2, par. 82.

4.5.1 – Dignity as a Common Thread

Despite its absence from within the language of the *Charter*, Bateman describes dignity as a “foundational justificatory rhetorical device”⁹⁸⁹, often described as a justification for rights⁹⁹⁰ or as “rights grounding”⁹⁹¹. Yet despite its broad use and justificatory appeal, there is little doubt that dignity is a contested concept⁹⁹² with authors going so far as to state “that a dignity-based jurisprudence is the antithesis of principled decision-making, because it allows judges to resort to (subjective) values”⁹⁹³. For Barak, dignity is the value that unites all rights into one whole and “ensures the normative unity of human rights”⁹⁹⁴. The Court has even gone so far as to state that “the protection of all of the rights guaranteed by the *Charter* has as its lodestar the promotion of human dignity”⁹⁹⁵. However, despite its centrality as a value in the *Charter*, “it is not the supreme value, and not even the most important value. It is one of the fundamental and important values upon which the *Canadian Charter* is based”⁹⁹⁶.

Rao identifies three forms of dignity in constitutional adjudication. The first and most universal, she refers to as intrinsic dignity. “Such dignity exists merely by virtue of a person's humanity and does not depend on intelligence, morality, or social status”⁹⁹⁷. Tied to this concept of dignity is a presumption of equality (each person is born with equal dignity by virtue of being human⁹⁹⁸), as well as the liberal notion of negative freedom where the individual should be left “free to exercise his autonomy in whatever fashion he should choose consistent with the rights and freedoms of

⁹⁸⁹ Thomas M J Bateman, “Human dignity’s false start in the Supreme Court of Canada: equality rights and the Canadian Charter of Rights and Freedoms” (2012) 16:4 *The International Journal of Human Rights* 577 at 582.

⁹⁹⁰ Bateman, *supra* note 989, 577.

⁹⁹¹ Bateman, *supra* note 989, 582.

⁹⁹² Botha, *supra* note 967, 171.

⁹⁹³ *Ibid.*

⁹⁹⁴ Barak, *supra* note 969, 104.

⁹⁹⁵ *R v Kapp*, [2008] 2 SCR 483 at par. 21.

⁹⁹⁶ Barak, *supra* note 969, 213.

⁹⁹⁷ Rao, *supra* note 983, 187.

⁹⁹⁸ *Ibid.*

others"⁹⁹⁹. The second view of dignity (which Rao defines as a “substantive” form) requires living a certain way and embodies a specific view of what constitutes the good life¹⁰⁰⁰. This view can give rise to policies which Rao defines as “paternalistic, such as the French constitutional ban on the burqa, based on the supposed protection of the dignity of Muslim women¹⁰⁰¹. Finally, Rao identifies dignity as a form of recognition. “This dignity is rooted in a conception of the self as constituted by the broader community - a person's identity and worth depend on his relationship to society. Accordingly, respect for a person's dignity requires recognizing and validating individuals in their particularity. This recognition requires individuals to demonstrate respect and concern for each other”¹⁰⁰². This third view of dignity requires not only freedom from interference; it appeals to ideals of self-realization¹⁰⁰³ and requires respect from the social and political community¹⁰⁰⁴.

While the Court’s jurisprudence has mostly focused on intrinsic dignity, it is the third form of dignity (dignity as recognition) which is closest to the increasingly broad republican view of rights favoured by the Court.

For the Court, the concept of dignity is intrinsically tied to humanity. A corporation was imposed the minimum fine for carrying work as a contractor without a valid license. The corporation then challenged the constitutionality of a minimum fine, as it violated the *Charter* protection against cruel and unusual punishment. The question brought before the Court was whether a corporation

⁹⁹⁹ *Ibid.*

¹⁰⁰⁰ *Ibid.*

¹⁰⁰¹ Rao, *supra* note 983, 188. See also: Stéphanie Hennette-Vauchez, “A Human Dignitas? The Contemporary Principle of Human Dignity as a Mere Reappraisal of an Ancient Legal Concept” (2008) European University Institute Working Papers at 5. For Hennette-Vauchez, this form of human dignity is closer to the pre-modern *dignitas* than to the concept as developed in international instruments after World War II.

¹⁰⁰² *Ibid.*

¹⁰⁰³ Rao, *supra* note 983, 243.

¹⁰⁰⁴ Rao, *supra* note 983, 245.

could benefit from this protection. In three separate judgments, every judge on the Court concluded that a corporation could not have dignity and, therefore, did not benefit from said protection¹⁰⁰⁵.

In *Syndicat national des employés de l'hôpital St-Ferdinand*, the Court interpreted the right to dignity in provincial human rights legislation, stating that such an interpretation was consistent with the interpretation of dignity under the *Charter*¹⁰⁰⁶. Drawing on a dictionary definition (and inadvertently perhaps on Kant), the Court distinguished internal and external facets of human dignity:

In the *Petit Robert 1*, at p. 541, the expression "*dignité*" is defined as follows: [TRANSLATION] "1 Respect merited by someone. *Dignity of man compared with other beings*. See Grandeur, noblesse. *Principle of the dignity of the human person*: which holds that a human being must be treated as an end in himself or herself. '*All of the dignity of man lies in thought*' (PASC.). '*The only dignity of man: the tenacious revolt against his condition*' (CAMUS). 2 Self-respect. See Amour-propre, fierté, honneur. *To have dignity*. *To lack dignity*. '*His haughty dignity that . . . kept him honest and solitary*' (LOTI)". It is in these two senses, which could be characterized as internal and external, that we must understand "dignity" within the meaning of the [Charter](#), which itself makes no distinction¹⁰⁰⁷.

Such a definition corresponds roughly to Rao's intrinsic and substantive concepts of dignity. Indeed, speaking of the Supreme Court of the United States, Rao points out that "the Court uses 'dignity' to refer to a variety of different concepts, concepts that cannot easily coexist"¹⁰⁰⁸. Indeed, the open texture of the concept has given rise in Canada to occasionally contradictory uses. For example, in *Godoy*, dignity was used to justify both privacy (the interest of a person seeking to deny police entry into their home) and integrity of the person (the concern that a person's life may

¹⁰⁰⁵ *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32 (CanLII).

¹⁰⁰⁶ *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 SCR 211 at par. 102. [*St-Ferdinand*]

¹⁰⁰⁷ *St-Ferdinand*, *supra* note 1006, par. 101.

¹⁰⁰⁸ Neomi Rao, "The Trouble with Dignity and Rights of Recognition" (2013) 99 Virginia Law Review 29 at 30.

be in danger)¹⁰⁰⁹. In *Rodriguez*, dignity was used to justify a right to life as well as a right to quality of life¹⁰¹⁰.

Nonetheless, recognition of dignity is woven through the recognition of other *Charter* rights and freedoms. According to Barak:

At the foundations of the constitutional value of human dignity stands the autonomy of individual will... This aspect of the humanity of the person considerably overlaps with the aspect regarding the person as a free being, because this autonomy means that the individual controls his destiny and his life story¹⁰¹¹.

In its early *Charter* jurisprudence, the Court emphasized not only this connection between dignity and liberty, but also the classically liberal ideal of freedom from government interference:

Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance¹⁰¹².

In *Morgentaler*, dignity was associated with a positive view of freedom (“the ability to pursue one’s own conception of a full and rewarding life”)¹⁰¹³, as well as with freedom of choice¹⁰¹⁴. After *Morgentaler*, the connection between dignity and bodily autonomy was reiterated in *Manitoba (Director of Child and Family Services)*¹⁰¹⁵, in *Cuthbertson*¹⁰¹⁶, and in *Carter* where the Court was

¹⁰⁰⁹ *R v. Godoy*, [1999] 1 SCR 311 at par. 19.

¹⁰¹⁰ *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 SCR 519.

¹⁰¹¹ Barak, *supra* note 969, 129.

¹⁰¹² *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30 at p. 166.

¹⁰¹³ *R. v. Morgentaler*, *supra* note 1012, p. 164.

¹⁰¹⁴ *R. v. Morgentaler*, *supra* note 1012, p. 166.

¹⁰¹⁵ *AC v. Manitoba (Director of Child and Family Services)*, [2009] 2 SCR 181.

¹⁰¹⁶ *Cuthbertson v. Rasouli*, [2013] 3 SCR 341.

required to examine whether the right to life protected a right to quality of life and to death with dignity¹⁰¹⁷.

It is perhaps in the realm of equality jurisprudence that dignity, as a constitutional value, has seen the most use. In *Vriend* (where a teacher's employment was terminated because of his sexual orientation) the majority of the Court wrote that equality provided the foundations of a "just society which permits every individual to live in dignity and in harmony"¹⁰¹⁸. The very purpose of section 15(1) of the *Charter* has been said to be the prevention of violations of human dignity through the imposition of disadvantage based on prejudice¹⁰¹⁹. Often, however, the use of dignity by the Court served to restrict the application of the *Charter*. For example, in *Egan*, the restriction of the term "spouse" to a member of the opposite sex was not deemed contrary to section 15(1) of the *Charter* as it was not deemed offensive to inherent human dignity¹⁰²⁰. The use of reasonable force by parents and guardians to correct children was also not found to offend the dignity of children¹⁰²¹.

Dignity has also been said to underly a right to privacy¹⁰²², the protection of one's reputation¹⁰²³, the right to meaningful participation in one's child's life¹⁰²⁴, and even the right to vote¹⁰²⁵.

In short, dignity is the common thread uniting both *Charter* rights and *Charter* values. When dignity is invoked, it is usually invoked to ask what type of respect a person may demand from others and from the state¹⁰²⁶. Thus, dignity is more than the mere absence of interference from the state.

¹⁰¹⁷ *Carter v. Canada (Attorney General)*, 2015 SCC 5 (CanLII), [2015] 1 SCR 331.

¹⁰¹⁸ *Vriend*, *supra* note 551, par. 68.

¹⁰¹⁹ *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 SCR 203; see also *Lovelace v. Ontario*, [2000] 1 SCR 950.

¹⁰²⁰ *Egan v. Canada*, [1995] 2 SCR 513 at 544.

¹⁰²¹ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 (CanLII), [2004] 1 SCR 76.

¹⁰²² *R v. Golden*, [2001] 3 SCR 679. See also: *R v. Dymont*, [1988] 2 SCR 417.

¹⁰²³ *Hill v. Church of Scientology of Toronto*, *supra* note 629.

¹⁰²⁴ *Trociuk v. British Columbia (Attorney General)*, [2003] 1 SCR 835 at par. 14-16.

¹⁰²⁵ *Sauvé v. Canada (Chief Electoral Officer)*, *supra* note 945.

¹⁰²⁶ *Rao*, *supra* note 983, 186.

Indeed, dignity, when used to underly a right of recognition, requires an absence of domination and the recognition of the individual's status within society both from the state ("Government") and in private relations ("Private Government").

4.5.2 – Dignity in the Workplace

Dignity is not only central to the other *Charter* rights, but it is central to labour law generally¹⁰²⁷. To cater to workers' human interests is, in many ways, to cater to their human dignity¹⁰²⁸. Dignity is the value that allows us to bridge the gap between worker interests and rights¹⁰²⁹, much in the way the Court used the value of dignity to bridge the gap between a *Charter* freedom and collective worker rights. When a worker is subjected to arbitrary measures of discipline, discharge, promotion or allocation of tasks, or when a worker is not allowed to participate in the processes that determine the rules that govern his workplace activities (in short, when a worker is dominated), there is said to be an offense to his or her dignity¹⁰³⁰.

Gilabert distinguishes between status dignity (the dignity derived from the status of being human) and condition dignity. For Gilabert:

Workers toiling in a sweatshop-getting minimal pay, working very long hours, being routinely humiliated by managers, and threatened with loss of job if they try to organize to defend their interests- enjoy little condition-dignity. But they retain status-dignity, a nonconventional deontic standing which ought to be recognized even if it is not in fact recognized, and on account of which condition-dignity must

¹⁰²⁷ Pablo Gilabert, "Dignity at Work" in Hugh Collins, Gillian Lester & Virginia Mantouvalou, eds, *Philosophical Foundations of Labour Law* (Oxford: Oxford University Press, 2018), 68.

¹⁰²⁸ Gilabert, *supra* note 1027, 69.

¹⁰²⁹ Gilabert, *supra* note 1027, 73.

¹⁰³⁰ Charles Fried, "Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects" (1984) 51:4 *The University of Chicago Law Review* 1012 at 1022.

be aimed at. The kinds of respect and concern owed to people in accordance to their dignity is specified through dignitarian norms¹⁰³¹.

After World War II, the ILO reaffirmed its purpose and objectives in the *Declaration of Philadelphia* (now annexed to the ILO Constitution). In this *Declaration*, it is explicitly recognized that “all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity”¹⁰³².

In a case dealing with restrictions on secondary picketing and leafletting, the Court recognized the importance of free expression as a vehicle of protecting well-being and dignity in the workplace:

Admittedly, an individual’s employment provides economic benefits, but it also fulfils significant social and psychological needs. For workers, a form of expression which deals with their working conditions and treatment by their employer is a statement about their working environment. Thus it relates to their well-being and dignity in the workplace¹⁰³³.

Gilbert proposes to articulate the idea of human dignity through the ideal of solidaristic empowerment, that is to say that “we should support people in their pursuit of a decent and flourishing life by fulfilling both negative duties not to destroy or block their valuable human capacities and positive duties to protect and facilitate their development and exercise”¹⁰³⁴. Promoting dignity in the workplace requires more than negative duties (avoiding harm) but also positive duties (to protect and aid)¹⁰³⁵. The Court could not limit itself to a negative view of freedom of association when furthering worker dignity required positive duties.

¹⁰³¹ Pablo Gilbert, “Exploitation, Solidarity, and Dignity” (2019) 50:4 *Journal of social philosophy* 465 at 474.

¹⁰³² International Labour Conference, *The Declaration of Philadelphia* (1944) Philadelphia, Art. 2 (a).

¹⁰³³ *U.F.C.W., Local 1518, v. KMart Canada Ltd.*, 1999 CanLII 650 (SCC), [1999] 2 SCR 1083 at par. 29.

¹⁰³⁴ Gilbert, *supra* note 1027, 74.

¹⁰³⁵ *Ibid.*

Gilabert also recognizes the connection between unionization and workplace dignity, a connection that appears to be rooted in autonomy and freedom of choice:

Part of what gives rise to people's status-dignity is their capacity for self-direction. Other things equal, people should be able to be protagonists rather than mere recipients of the social processes supporting their rights. Thanks to their political rights, workers can help make their decent work conditions more secure. With their increased power, workers are less dependent on the goodwill of governments and employers, and become more active shapers of their condition-dignity¹⁰³⁶.

Workplace dignity serves to counteract exploitation¹⁰³⁷ which, in the private government of the workplace, requires collective action. Thus, though mandatory unionization may limit some liberty, this limitation will be justified as it furthers overall dignity¹⁰³⁸. In short, freedom to bargain collectively contributes to the dignity of workers by allowing them to exercise autonomy through workplace democracy. The antipower exercised through collective bargaining counteracts the arbitrary power of the employer in the private government of the workplace, contributing to employee freedom in a purely republican sense.

Conclusion

The *Charter* values of freedom, liberty, autonomy, equality, democracy, and dignity were used by the Court in *Health Services* to expand freedom of association from a negative freedom to a positive right to collective bargaining. These values had been used extensively by the Court before *Health Services* and their repeated use, over the Court's corpus of jurisprudence, points to a use that frequently went beyond a classically liberal approach to the Charter. Indeed, the emphasis on freedom of choice, on participation, and on relational equality in particular indicate

¹⁰³⁶ Pablo Gilabert, "Labor human rights and human dignity" (2016) 42:2 Philosophy & social criticism 171 at 181.

¹⁰³⁷ Gilabert, *supra* note 1056, 466.

¹⁰³⁸ Gilabert, *supra* note 1027, 72-73.

a turn towards republicanism. A republican approach to freedom of association, in turn, justifies the recognition of a constitutional right to bargain collectively.

Chapter 5 – Future Work: Freedom of association beyond the *Charter*

*Join the union, fellow workers
Men and women, side by side;
We will crush the greedy shirkers
Like a sweeping; surging tide;
For united we are standing,
But divided we will fall;
Let this be our understanding
All for one and one for all.*

(*Workers of the World, Awaken!*, Joe Hill¹⁰³⁹)

Despite the fact that a right to collective bargaining has been recognized in provincial labour legislation since the 1940s, in order to constitutionally protect that right, the Court fundamentally shifted its approach to the *Charter*. From a classically liberal approach centered on the non-interference of the state, the Court developed an approach focused on non-domination through active participation and positive protections. This shift is undoubtedly positive, particularly given the growing role played by non-state actors in situations of domination. However, it raises questions with regards to the future interpretation of *Charter* rights and freedoms. It also forces a reexamination of the employment relationship. Finally, it is necessary to examine whether a constitutionally protected right to bargain collectively and to strike are sufficient to ensure non-domination when both are tied to a *Wagner* model of labour relations.

5.1 – A Republican Reexamination of *Charter* Rights and Freedoms

Using moral reconstruction as a methodology, the moral arguments (“*Charter* Values”) used by the Court have been analysed to reach a conclusion that the jurisprudence of the Court shows a shift towards republicanism. In other words, Pettit’s neo-republican approach or Anderson’s

¹⁰³⁹ Joe Hill, “Workers of the World, Awaken!” in *The Little Red Songbook* (London: Industrial Workers of the World, 1916).

egalitarian approach best explain the interpretation of freedom of association in both *Health Services* and *Saskatchewan Federation of Labour*. Beyond freedom of association, however, this republican turn is pervasive and is reflected in both the development of positive obligations through *Charter* rights and in the *Charter's* impact in the private sphere as illustrated in the last chapter.

Kong states that there are two primary methods to counteract domination. The first is to ensure that "citizens can participate on equal terms with one another in public deliberation"¹⁰⁴⁰, echoing the *Charter* value of democracy. The second "is to create processes that deter or preclude the state from engaging in action that imposes arbitrary constraints on citizens"¹⁰⁴¹, echoing the positive dimension of *Charter* rights discussed in Chapter 2. The republican turn in *Charter* adjudication has also been noted in proportionality under section 1, as certain limitation on existing rights and freedoms (thus certain State interference) can be justified for the public interest¹⁰⁴².

Given this departure from the traditional liberal approach to *Charter* rights and the use of moral (rather than strictly legal) arguments, how can this change be reconciled with the Court's institutional legitimacy?

A first issue of legitimacy raised by Fraser relates to the republican illegitimacy of the *Charter* itself, as it was never submitted to the Canadian people for ratification¹⁰⁴³. Furthermore, *Charter*

¹⁰⁴⁰ Hoi Kong, "Towards a Civic Republican Theory of Canadian Constitutional Law" (2011) 15:2 Rev Const Stud 249 at 251.

¹⁰⁴¹ *Ibid.*

¹⁰⁴² Eoin Daly, "Freedom as Non-Domination in the Jurisprudence of Constitutional Rights" (2015) 2 Canadian Journal of Law & Jurisprudence 289 at 303.

¹⁰⁴³ Andrew Fraser, "Beyond the Charter Debate: Republicanism, Rights and Civic Virtue in the Civil Constitution of Canadian Society" (1993) 1:1 Rev Const Stud 27 at 31.

adjudication, according to Fraser, transfers power from the hands of Parliament to the hands of an unelected judiciary¹⁰⁴⁴. Fraser adds that the “*Charter* means whatever the judges say it means.

Because the judiciary is unrepresentative of and unaccountable to the community at large, the voices of the weak, the powerless and the different will not be heard in the process of endowing the vague language of the *Charter* with juridical significance¹⁰⁴⁵”. As stated in Chapter 2, Langille and Oliphant claimed that the freedom of association cases brought to light how the *Charter* “blurred the lines” between judicial and legislative functions in Canada¹⁰⁴⁶. Bickel, viewing judicial review as a positive counter-majoritarian force¹⁰⁴⁷, did not see this as illegitimate. Indeed, as discussed in Chapter 2, review of legislation based on the *Charter* could be considered part of our democratic dialogue.

Two further facets of the Court’s legitimacy must be examined. First, the Court’s deviation from liberalism as a guiding principle, and second the Court’s use of moral arguments. As the Court’s use of moral arguments has been examined at length in Chapter three, this section will focus on the shift to republicanism.

As the role of government changes, notably through the Courts, questions of legitimacy arise. McAuslan and McEldowney, writing on legitimacy, use the example of private property protections in the United Kingdom as an illustration of the changing role of government institutions, stating that the “protection of private property, once largely left to the police and civil and criminal actions

¹⁰⁴⁴ Fraser, *supra* note 1043, 32.

¹⁰⁴⁵ Fraser, *supra* note 1043, 46.

¹⁰⁴⁶ Langille & Oliphant, *supra* note 469, 298.

¹⁰⁴⁷ Bickel, *supra* note 530, 16.

in the courts, has now been transformed out of recognition by the plethora of programs, agencies and laws designed to protect the citizen in his or her every contact with property¹⁰⁴⁸. However, the ever-evolving nature of constitutional documents has been recognized at least since the Judicial Committee of the Privy Council dubbed the *British North America Act* a “living tree”, subject to growth and change. Consequently, the role of courts in interpreting the constitutional documents is not novel and their expansive interpretation cannot be deemed to be unlawful. Legitimacy, however, is not merely a question of lawfulness. Again, according to McAuslan and McEldowney, a court’s actions will be deemed legitimate if “they accord with what are generally perceived to be or what have long been held up to be, the fundamental principles of the constitution according to which government is or ought to be conducted¹⁰⁴⁹”.

Drawing on the writings of Max Weber, Coutu identifies three archetypes of constitutional decision-making: formal jurisprudence, instrumental jurisprudence, and axiological jurisprudence¹⁰⁵⁰. Formal constitutional interpretation rests on a formal positivist approach to adjudication, characterized in part by moral neutrality¹⁰⁵¹. An instrumental approach may take a more sociolegal turn founded on the competing interests of individuals, the State and societal groups¹⁰⁵². Finally, axiological interpretation is also referred to as value jurisprudence¹⁰⁵³ and seeks to establish a hierarchy of values that guide interpretation. Axiological jurisprudence explicitly rejects moral neutrality¹⁰⁵⁴. Axiological interpretation (of the type seen in *Health*

¹⁰⁴⁸ Patrick McAuslan & John F. McEldowney, *Law Legitimacy and the Constitution* (London: Sweet & Maxwell, 1985) at 3.

¹⁰⁴⁹ McAuslan & McEldowney, *supra* note 1048, 11.

¹⁰⁵⁰ Michel Coutu, “Légitimité et Constitution: les trois types purs de la jurisprudence constitutionnelle”, 2007, *Droit et société* 233 at 239.

¹⁰⁵¹ Coutu, *supra* note 1050, 240.

¹⁰⁵² Coutu, *supra* note 1050, 243.

¹⁰⁵³ Coutu, *supra* note 1050, 245.

¹⁰⁵⁴ Coutu, *supra* note 1050, 246.

Services), though not frequently studied, is not foreign to Canadian constitutional jurisprudence. It can be argued that as we draw on values which underly constitutional documents to interpret them, we give legitimacy to axiological interpretation through a continued recognition of supra-constitutional values which guide the Court's decision-making. Thus, the Court's deviation from a long-recognized approach (liberalism) to a republican approach to interpreting the *Charter* draws its legitimacy on the *Charter* values themselves.

Inevitably, a deviation from the classically liberal approach to a fundamental freedom such as freedom of association will lead to further research into the scope and limits of other *Charter* rights. Further research can be conducted into the positive obligations of the State. A research project that will be developed from this idea is an examination of post-liberal approaches to *Charter* rights, including republican approaches and approaches more closely aligned with Raz's liberal perfectionism.

As described in the first chapter, the Court incrementally shifted its approach to freedom of association over a period of twenty years. An entrenched constitution promotes stability but also confines change to small, incremental changes¹⁰⁵⁵. This incrementalism contributes to institutional legitimacy of the Court as it cannot be perceived as challenging the stability of the constitution. Thus, evolution towards republican interpretations of other rights would likely be equally incremental.

Beyond freedom of association, a republican reading of the *Charter* translates particularly well to other rights and freedoms. Indeed, the Court appears to have already shifted its analysis of several rights from a liberal approach to a republican one. As stated previously, Anderson's view

¹⁰⁵⁵ Michael D. Gilbert, "Entrenchment, Incrementalism, and Constitutional Collapse", 2017, 103:4 Virginia Law Review 631.

of equality does not guarantee outcomes, but effective access to processes¹⁰⁵⁶ and to the capabilities allowing individuals to avoid oppression in social relationships¹⁰⁵⁷. As such, it approaches strongly resembles the neo-republican approach to equality where equality is intimately related to freedom from domination. Thus, a republican reading of equality is relational and can include positive obligation when such obligations are necessary to prevent or remedy a situation of domination. The Court's reading of equality has incrementally shifted to include positive obligations of the state to address inequality¹⁰⁵⁸, as well as a recognition of affirmative action programs as part of a vision of substantive equality¹⁰⁵⁹.

With regards to substantive equality, the Court has moved away from a use of comparator groups which aligned its analysis with a formal approach to equality, emphasising instead the impact of the impugned legislation on the individual¹⁰⁶⁰. More recently, the Court has examined how neutral choices may reflect situations of inequality¹⁰⁶¹. In short, it seems (at first glance) that the Court's view of equality as a right has progressively begun catching up to its use of equality as a value and is evolving in a manner consistent with a republican reading of equality.

Looking at the other fundamental freedoms, a republican reading (though unused) may inform interpretation and justify limitations. For example, freedom of assembly (section 2(c) of the *Charter*) has not been examined by the Court. As such, its content and limits remain ill-defined. When the "Freedom Convoy" occupied Ottawa for almost a month in February 2022, protesters justified their actions under the banner of freedom of peaceful assembly and freedom of speech.

¹⁰⁵⁶ Anderson, *supra* note 488, 318.

¹⁰⁵⁷ Anderson, *supra* note 488, 316.

¹⁰⁵⁸ *Eldridge*, *supra* note 800.

¹⁰⁵⁹ *R. v. Kapp*, *supra* note 995. See also the Court's analysis of the ameliorative effect of programs in *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37 (CanLII), [2011] 2 SCR 670.

¹⁰⁶⁰ *Withler v. Canada (Attorney General)*, 2011 SCC 12 (CanLII), [2011] 1 SCR 396.

¹⁰⁶¹ *Fraser 2020*, *supra* note 806.

Ultimately, a state of emergency was declared by the provincial government¹⁰⁶² and the federal government invoked the *Emergency Measures Act* to put an end to the occupation. Though it was ultimately decided that the Federal Government had met the minimal threshold to invoke the *Emergency Measures Act*¹⁰⁶³, the issue raised the question of whether all assembly merited protection. If I were to begin to sketch a republican answer, emphasis would have to be placed on whether the assembly (peaceful though it may be) might increase domination. The same could be said of freedom of speech. Speech which increases arbitrary domination towards an identifiable group would not meet the republican definition of freedom. Such contours and limits merit examination in further research.

Having established that the republican turn may translate to the interpretation of other *Charter* rights and freedoms, I will now examine how republicanism can inform our reading of the employment relationship and how that reading can translate into policy.

5.2 – A Republican Reexamination of the Employment Relationship

As stated throughout this dissertation, the employment relationship is a site of unfreedom, as employees are generally subject to the arbitrary will of an employer, an arbitrary control which may extend beyond working hours. Historically, however, employment was viewed as a way of achieving autonomy and self-determination. This ended with the industrial revolution when labor became dominated by capital. Nineteenth century socialists, particularly Marx, drew on the republican ideal of freedom from domination, though Marxism is rarely viewed through the lens of freedom. Today, worker domination (and, conversely, the desire for autonomy) are intimately

¹⁰⁶² "Truck Convoy: Ford declares provincewide state of Emergency, City pursuing injunction" (February 11, 2022) *Ottawa Citizen*, on line: <https://ottawacitizen.com/news/local-news/truck-convoy-protest-enters-day-15-premier-to-speak-ahead-of-expected-weekend-surge-in-protesters-police>.

¹⁰⁶³ "Federal Government met the threshold to invoke Emergencies Act: Rouleau" (February 17, 2023) *CBC News*, online: <https://www.cbc.ca/news/politics/poec-report-released-friday-1.6750919>.

related to both disengagement (and “quiet quitting”) and resignation. Thus, employment and labour law may need to return to their republican origins and shift their focus to reexamining the employment relationship to respond to current needs.

In seventeenth-century Britain, forms of “government” were everywhere, ranging from the domination of the Anglican Church to the master-servant relationships¹⁰⁶⁴. By contrast, the new class of labourers and itinerant merchants were “masterless men”, free to ply their trade on an open market¹⁰⁶⁵. Thus, the idea of a free market became a cause espoused by egalitarian social movements of the time¹⁰⁶⁶, including the Levellers for whom “support for free trade formed an essential part of the larger program of liberating individuals from interlocking hierarchies of domination and subordination”¹⁰⁶⁷. As the 18th century marked a transition from feudalism to market society¹⁰⁶⁸, the market was seen as a perfectly competitive forum, where material inequality would be limited to individual differences in effort and skill. Consequently, no laborer would be subject to another’s domination¹⁰⁶⁹.

The industrial revolution, bringing with it large-scale production, “shattered the egalitarian ideal of universal self-government in the realm of production”¹⁰⁷⁰. Consequently, the late eighteenth century was marked by a shift in republican thought, as wage slavery came to be viewed as a central cause of poverty¹⁰⁷¹, paving the way for the development of nineteenth century labor rights as well as socialist thought. Generally, there is little writing about how much of early socialism

¹⁰⁶⁴ Anderson, *supra* note 123, 8.

¹⁰⁶⁵ Anderson, *supra* note 123, 10-11.

¹⁰⁶⁶ Anderson, *supra* note 123, 1.

¹⁰⁶⁷ Anderson, *supra* note 123, 8.

¹⁰⁶⁸ Anderson, *supra* note 123, 18.

¹⁰⁶⁹ Anderson, *supra* note 123, 21.

¹⁰⁷⁰ Anderson, *supra* note 123, 33.

¹⁰⁷¹ Gregory Claeys, “The Origins of the Rights of Labor: Republicanism, Commerce, and the Construction of Modern Social Theory in Britain, 1796-1805” (1994) 66:2 *The Journal of Modern History* 249 at 255.

was shaped by civic republican discourse¹⁰⁷², yet Marx's diagnoses of the evils of capitalism point to forms of domination. For Clare Roberts, Marx radicalizes the republican tradition "for which freedom as non-domination is the highest virtue of institutions"¹⁰⁷³.

Despite the egalitarian origins of what we consider to be employment, modern employment law has traditionally focused on the entry and exit conditions of the employment contract, while providing varying degrees of regulation of working conditions. Other than recognizing subordination as a fundamental characteristic of the employment contract, the labour relationship has been left largely unexamined outside of organizational psychology. Yet, as a large number of persons left the labour market in 2021 and 2022 (in a phenomenon dubbed the "Great Resignation"), a desire for flexibility or control over the daily performance of work was cited as a major preoccupation for workers.

In July 2022, nearly a quarter of Canadian workers were new to their position¹⁰⁷⁴. The two most cited reasons for changing jobs were an increase in compensation and a desire for greater flexibility¹⁰⁷⁵. In addition to those having changed position in 2022, almost half of Canadian workers were considering a change of employment in 2022 with a desire for flexibility and work-life balance cited as primary reasons for the change¹⁰⁷⁶. This desire for flexibility and balance could reflect a search for freedom and control in a context where freedom has been limited, posit some authors:

¹⁰⁷² William Clare Roberts, *Marx's Inferno: The Political Theory of Capital* (Princeton, New Jersey: Princeton University Press, 2017) at 3.

¹⁰⁷³ Clare Roberts, *supra* note 1072, 19.

¹⁰⁷⁴ Noella Ovid, "Almost a quarter of Canadians changed jobs amid the Great Resignation" (July 29 2022) *Financial Post*, online: <https://financialpost.com/executive/executive-summary/posthaste-almost-a-quarter-of-canadians-changed-jobs-amid-the-great-resignation>.

¹⁰⁷⁵ *Ibid.*

¹⁰⁷⁶ Danielle LaBossiere Parr, "The Great Resignation: A wake up call for corporate Canada" (April 29, 2022) *Perspectives*, online: <https://navltd.com/insights/the-great-resignation-a-wake-up-call-for-corporate-canada/>.

For months, so many of our choices were taken away from us: we couldn't go to malls, couldn't watch a movie in the theater, couldn't plan weddings and family reunions. It was extremely disorienting, realizing that freedoms we once took for granted had evaporated overnight. Even for people who made these sacrifices willingly, the loss of freedom and control felt threatening. That loss of control in our personal lives was compounded by a loss of control at work too. (...) Some managers' inability to see people at their desks in an office tightened their grip over team members. It's no wonder, then, that losing even more control over their lives made so many workers want to re-exert their autonomy in the only way they could: by quitting¹⁰⁷⁷.

Much like the eighteenth century market was viewed as emancipation from earlier forms of domination, with “masterless men” turning away from domination, the great resignation can be perceived as a form of avoiding domination. With the Great Resignation, another manifestation of employee dissatisfaction emerged in 2022, specifically “Quiet Quitting”.

The term “Quiet Quitting” emerged in 2022 and has been defined as “where you’re not outright quitting your job but you’re quitting the idea of going above and beyond”. In short, it is the idea of disengaging with employment in order to do the bare minimum required to maintain employment¹⁰⁷⁸. Though the term is novel, employee engagement (or disengagement) has been an object of study for decades. Autonomy has been positively linked with employee engagement¹⁰⁷⁹, while degree of choice is directly related to worker empowerment¹⁰⁸⁰. Indeed,

¹⁰⁷⁷ Ted Bauer & Jay Dixit, "The State of Discontent: What's really behind the Great Resignation" (July 7, 2021), online: <https://neuroleadership.com/your-brain-at-work/the-state-of-discontent>.

¹⁰⁷⁸ Cal Newport, The Year in Quiet Quitting (December 29, 2022) *The New Yorker*, online: <https://www.newyorker.com/culture/2022-in-review/the-year-in-quiet-quitting>.

¹⁰⁷⁹ Diane R. Edmonson & Lucy M. Matthews. “How Engaged Are Your Employees?: Enhancing Engagement through Autonomy and Skill Discretion in Today’s Changing Environment” (2022) *Journal of Marketing Theory and Practice* 1.

¹⁰⁸⁰ Robert C Liden and Thomas W. Tewksbury, “Empowerment and Work Teams”, in Gerald R. Ferris, Sherman D. Rosen, and Darold T. Barnum, eds, *Handbook of Human Resource Management* (Cambridge, Mass: Blackwell Publishers, 1995), 386 at 389.

since the 1960s, studies have demonstrated that employee participation in decision-making has had a significant positive impact on job satisfaction¹⁰⁸¹.

Despite ample study on these topics, resignation and disengagement increased in 2022. If employee dissatisfaction, tied to a desire for increased freedom and participation in the workplace, is not addressed through existing protections, what more can be done? A republican approach to institutional design should not only offer mechanisms to counteract domination, it should seek to pre-empt domination by facilitating participation in decision-making¹⁰⁸². Consequently, in the following section, examples of labour rights and models beyond the *Wagner* model will be examined.

5.3 – A Republican Reexamination of the Constitutional Protection of Freedom of Association

Given the foregoing, one can ask whether a constitutional protection of freedom of association as it already exists under most provincial legislation (that is to say the freedom to join a union coupled with the duty to bargain in good faith) is sufficient to ensure freedom from domination in the workplace? Could the Court (or indeed, other courts) further read into freedom of association (beyond the 2015 protection of a right to strike) so as to protect collective bargaining outside of the *Wagner Act* model? A republican reexamination of labour law would arguably favour three possible modifications to the existing model, specifically an expansion of collective bargaining rights, possible individual affiliation, and steps towards co-determination.

¹⁰⁸¹ Delmar L. Landen, Irving Bluestone & Edward E. Lawler III, “High Involvement Organizations and Industrial Democracy” in Gerald R. Ferris, Sherman D. Rosen, and Darold T. Barnum, eds, *Handbook of Human Resource Management* (Cambridge, Mass: Blackwell Publishers, 1995), 370 at 372.

¹⁰⁸² Kong, *supra* note 1040, 264.

Most Canadian provinces specifically exclude managers from collective bargaining¹⁰⁸³. *Health Services* has been used in Quebec to expand the right to join a union to first-level managers. In doing so, the labour board focused on inequality of bargaining power¹⁰⁸⁴. In 2009, the Association des cadres de la Société des Casinos du Québec (an association of first level managers at provincial casinos in Quebec) requested to be certified as a union¹⁰⁸⁵. According to the Labour Board, the first level managers, though tasked with representing employers on the Casino “shop floor”, didn’t participate in the Casinos strategic decision-making¹⁰⁸⁶. The employers, on the other hand, were powerful businesses entities, thus generating an imbalance of bargaining power¹⁰⁸⁷. Analysing the history of the *Wagner Act* and the *Labour Code*, in addition to questions of relational equality, the Labour Board concluded that the exclusion of managers from the provisions of the Labour Code was a violation of the managers’ freedom of association.

As this case was first judicially reviewed¹⁰⁸⁸, then brought before the Quebec Court of Appeal¹⁰⁸⁹, the extent of the State’s positive obligation to remedy the inequality of bargaining power was never fully addressed. Furthermore, though analysis focused on inequality in bargaining power and, to a lesser extent, unfreedom, the plaintiff associations did not extend their claims beyond a recognition of rights that already existed for other categories of worker. The restriction on association for managers under Québec’s *Labour Code* was recognized by both the Labour Board

¹⁰⁸³ See, e.g. : *Labour Code*, CQLR c C-27, art. 1(l) (1); *Labour Relations Code*, RSBC 1996, c 244, art. 1; *Labour Relations Code*, RSA 2000, c L-1, art. 1 (l); *The Labour Relations Act*, CCSM c L10, art. 1; *Labour Relations Act*, RSNL 1990, c L-1, art. 1 (m).

¹⁰⁸⁴ *Association des cadres de la Société des Casinos du Québec c. La Société des casinos du Québec inc.*, 2015 QCCRT 102 (CanLII).

¹⁰⁸⁵ *Association des cadres de la Société des casinos du Québec et Société des casinos du Québec inc.*, supra note 549, par. 2.

¹⁰⁸⁶ *Association des cadres de la Société des casinos du Québec et Société des casinos du Québec inc.*, supra note 549, par. 315.

¹⁰⁸⁷ *Association des cadres de la Société des casinos du Québec et Société des casinos du Québec inc.*, supra note 549, par. 316-320.

¹⁰⁸⁸ *Société des casinos du Québec inc. c. Tribunal administratif du travail*, 2018 QCCS 4781 (CanLII).

¹⁰⁸⁹ *Association des cadres de la Société des casinos du Québec c. Société des casinos du Québec*, supra note 221.

and the Court of Appeal as a situation which generated relational inequality. This case, currently before the Supreme Court¹⁰⁹⁰, shows how existing labour relations models (including the models which deny unionization rights to first-level managers) can be insufficient to ensure freedom from domination.

Furthermore, other groups associate to negotiate their working conditions but remain unrecognized under provincial labour codes. For example, in Quebec doctors have joined together to form associations, yet without access to *Labour Code* protections, the provincial government can impose working conditions through legislation, bypassing any negotiation with the aforementioned associations¹⁰⁹¹.

Beyond extending current protections to groups that do not benefit from such protections, can freedom from domination be further protected, first in union structures themselves and, second, outside of the *Wagner* model of unionisation?

As freedom from domination implies freedom of choice, to what extent must freedom of choice be reflected in union structures and in union representation to avoid union membership becoming a form of domination? As mentioned previously, the Webbs' study uncovered how trade unions acted democratically, "that is to say, their internal constitutions are all based on the principle of 'government of the people by the people for the people'¹⁰⁹²." Limitations on freedom as a result of the *Wagner Act* were examined in 1937 by the United States Supreme Court (USSC) though the forms of freedom invoked were freedom of interstate commerce, freedom of contract, and

¹⁰⁹⁰ *Société des casinos du Québec inc., et al. c. Association des cadres de la Société des casinos du Québec, et al.*, 2022 CanLII 88686 (CSC).

¹⁰⁹¹ See, e.g., in the context of tele-health: Fanny Lévesque, "Le Syndicat des Omnis Menace de Poursuivre Québec" (April 14, 2022) *La Presse*, online : <https://www.lapresse.ca/actualites/sante/2022-04-14/acces-a-la-premiere-ligne/le-syndicat-des-omnis-menace-de-poursuivre-quebec.php>.

¹⁰⁹² Webb, *supra* note 906.

freedom of choice¹⁰⁹³. The USSC asserted that the Wagner Act was constitutional, while also discussing how collective bargaining could promote rather than hinder freedom. Writing for the majority, Charles Evan Hughes C.J. stated:

*Congress could seek to make appropriate collective action of employees an instrument of peace rather than of strife. We said that such collective action would be a mockery if representation were made futile by interference with freedom of choice. Hence the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both.*¹⁰⁹⁴

Thus, freedom of choice in union representatives has been recognized since 1937 as a fundamental component of freedom. It could be argued that it is a condition for avoiding a situation of domination within the union itself.

It could also be argued that freedom of choice would be maximized by allowing a multiplicity of bargaining agents based on worker choice within the same workplace. Currently, in Canada, under the *Wagner Act* model, employees in a bargaining unit are represented by a single majority union. However, such legislative measures which prevent union fragmentation appear to violate freedom of choice protected under the ILO's *Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87) (*Convention 87*). Indeed, in the 1970s, the main problem reported by the Committee of Experts relating to *Convention 87* was one of trade union monopoly, a violation of article 2¹⁰⁹⁵. Observations relating to trade union monopoly increased in the 1980s, mostly concerning countries of Eastern Europe¹⁰⁹⁶. It would then appear that decisions like

¹⁰⁹³ *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 57 S. Ct. 615; 81 L. Ed. 893.

¹⁰⁹⁴ *Ibid.*

¹⁰⁹⁵ Geraldo von Potobsky, "Freedom of association: The impact of Convention No. 87 and ILO action" (1998) 137:2 International Labour Review 195 at 204.

¹⁰⁹⁶ Potobsky, *supra* note 1095, 205.

Advance Cutting and Coring run counter to the basic principles declared by the ILO¹⁰⁹⁷. Though majority unionism is touted as an effective form of representation, it does not necessarily reflect the needs of all union members, leading to possible cases of domination. Inevitably, this issue will need to be reexamined in the context of a constitutionally protected right to bargain, particularly given the importance placed upon minority rights (as opposed to majority rule) by the Court in the *Secession Reference*¹⁰⁹⁸.

Furthermore, beyond collective bargaining, other models of industrial relations may act as even greater mechanisms of anti-power.

As stated earlier, independent work was originally emancipatory, allowing day-laborers to earn a living free from the domination of a master. However, the industrial revolution returned the worker to state of domination which early socialists referred to as wage slavery. Just as republican ideals were central to early socialist thought (specifically through Marx's *Capital*), the ideal of freedom from domination guided Belloc in *The Servile State* to advocate for redistribution of land and capital. For Belloc, workers who did not own the means of production existed in a state of servitude. Rejecting the ideal of central ownership of the means of production, Belloc advocated that means of production be divided amongst the workers, an idea he refers to as distributism¹⁰⁹⁹. Echoes of distributism may be found in the cooperative movement where workers own the firm which employs them. On a larger scale, the idea of workers guiding the firm is best exemplified through co-determination, though co-determination differs from cooperativism in that workers will not co-own the codetermined firm.

¹⁰⁹⁷ Langille & Oliphant, *supra* note 469, 196.

¹⁰⁹⁸ Writing on the necessity to balance majority rule with other unwritten constitutional principles, the Court wrote that "the protection of minority rights is itself an independent principle underlying our constitutional order. The principle is clearly reflected in the Charter's provisions for the protection of minority rights", *Reference re Secession of Quebec*, *supra* note 600, par. 80.

¹⁰⁹⁹ Hilaire Belloc, *The Servile State* (London: Constable, 1950)..

Co-determination refers to a practice where workers are represented on the board of directors of a company¹¹⁰⁰, thus having a voice in the strategic decisions of the company or institution for which they work. Scholars identify two republican responses to the issues of workplace domination. The first focuses on ensuring an employee's capacity to exit the workplace, including through the existence of universal basic income policies. The second approach focuses instead on workplaces practices "and the institutionalization of worker voice and democratic control within firms"¹¹⁰¹. Full participation in the workplace, particularly in strategic decision-making, is limited in Canada¹¹⁰², though co-determination may aid in pre-empting domination. . An example cited by authors is that of EDF, a French utility service, which reserves six seats amongst the eighteen voting seats on their board of directors for employee representatives, thus ensuring that employee voices are heard in strategic decision-making¹¹⁰³. By contrast, neither Hydro-Québec¹¹⁰⁴, Hydro Ontario¹¹⁰⁵, British -Columbia Hydro and Power¹¹⁰⁶, nor any other provincial electricity utility company ensure employee representative at the director level.

Recognizing that most of the American labour force spends their working time under an authoritarian "private government", Mazumder and Yan suggest that American workers express preference for democratically structured firms (with workers on corporate boards or through

¹¹⁰⁰ Ewan McGaughey, "The Codetermination Bargains: The History of German Corporate and Labour Law" (2016) 23(1) Columbia Journal of European Law 135.

¹¹⁰¹ Keith Breen, "Non-Domination, Workplace Republicanism, and the Justification of Worker Voice and Control" (2017) 33:3 International Journal of Comparative Labour Law and Industrial Relations, 419.

¹¹⁰² Julie Bourgault & Michel Coutu, "Le système québécois de participation des travailleurs: vers une refondation sur de nouvelles assises constitutionnelles?" (2018) 3 Revue de droit comparé du travail et de la sécurité sociale 92.

¹¹⁰³ Bourgault & Coutu, *supra* note 1079.

¹¹⁰⁴ *Hydro-Québec Act*, CQLR c H-5.

¹¹⁰⁵ *Electricity Act*, 1998, SO 1998, c 15, Sch A.

¹¹⁰⁶ *Hydro and Power Authority Act*, RSBC 1996, c 212.

employee ownership programs)¹¹⁰⁷ while also stating that such firms are often more productive than less democratically structured firms¹¹⁰⁸.

The first statutes to impose codetermination were the *Oxford University Act, 1854*, the *Port of London Act, 1908* (both in the United Kingdom) and the German *Supervisory Board Act, 1922*¹¹⁰⁹.

In Canada, despite the fact that worker representatives are generally excluded from a company's decision-making processes, provincial legislation already presents certain openings to increased co-determination, such as statutory obligations to create joint occupational health and safety committees¹¹¹⁰ or to jointly evaluate pay disparities¹¹¹¹.

Under the *Wagner* model of industrial relations, all that is not covered in a collective bargaining agreement falls under the employer's residual powers or discretion. This generally limits employee participation in a company decision-making and may give rise to domination, including in a unionised environment.

Since the mere possibility of arbitrary domination is sufficient, according to Republican thinkers, to conclude that there exists a state of unfreedom, workers' control rights are perceived as binding

¹¹⁰⁷ Soumyajit Mazumder & Alan N. Yan, "What Do Americans Want from (private) Government? Experimental Evidence Demonstrates That Americans Want Workplace Democracy" (2020) SocArXiv 3.

¹¹⁰⁸ Mazumder & Yan, *supra* note 1107, p. 2. Despite the advantages, one should be careful not to idealise the codetermination model as a form of industrial democracy. See: "If one believes in more worker involvement in decision-making at all levels of society codetermination in the narrow sense of that term has a major role to play in an overall system of industrial democracy. Even within such a comprehensive process of industrial democracy, however, the average worker may not feel that involved", John Crispo, "Codetermination: Its Relevance for Canada", in Wolfgang Dorow, ed., *The Business Corporation in the Democratic Society*, (Berlin: De Gruyter, 2019), 271 at 274.

¹¹⁰⁹ *Ibid.*

¹¹¹⁰ See, e.g.: *Act respecting occupational health and safety*, CQLR c S-2.1 ("68. A health and safety committee may be established in any establishment employing more than twenty workers and belonging to a category identified for that purpose by regulation", and " 71. At least one-half of the members of a committee shall represent the workers and be designated in accordance with section 72"); *Occupational Health and Safety Act*, RSO 1990, c O.1, on joint health and safety committees ("9(7) At least half the members of a committee shall be workers employed at the workplace who do not exercise managerial functions").

¹¹¹¹ See: *Pay Equity Act*, CQLR c E-12.001 ("16. An employer shall enable employees to take part in the establishment of a pay equity plan by setting up a pay equity committee on which they are represented").

managerial discretion which can no longer be exercised arbitrarily¹¹¹². Workers "have a basic right to protection against arbitrary interference at work" which "requires a regime that both constrains the discretion of managerial decision-making and provides institutional guarantees for workers to be able to contest managerial directives"¹¹¹³.

For some authors, co-determination alone is insufficient to bring about a state of republican freedom without co-ownership¹¹¹⁴. Other authors, on the other hand, distinguish workplace republicanism from co-determination, stating that is sufficient conditions protecting employee exit and allowing employee voice are present, co-determination is not necessary¹¹¹⁵. Consequently, co-determination may present a necessary and useful limit on the arbitrary power of employers, including in unionized environments. As such, it is a policy initiative that merits further exploration.

The republican turn in addressing relational inequality and domination in the workplace may eventually force a reexamination of how worker voice can be maximized in the company's decision-making processes, thus increasing instances of co-determination (such as legislatively created joint committees in the event of technological changes affecting production or mass layoffs) and possibly pre-empting situations of domination. Worker voice through alternative models of representation will be a foundation for future research.

Conclusion

This dissertation raises three primary issues which can guide further research. First, as the Court shifted its approach to *Charter* rights, further examination of post-liberal approaches to *Charter*

¹¹¹² Inigo Gonzalez-Ricoy, "Ownership and control rights in democratic firms – a republican approach" (2020) 78:3 Review of Social Economy 411 at 418.

¹¹¹³ Nien-hê Hsieh, "Rawlsian Justice and Workplace Republicanism" (2005) 31:1 Social Theory and Practice 116.

¹¹¹⁴ Gonzalez-Ricoy, *supra* note 1112, though Gonzalez-Ricoy also recognizes that co-determination presents an advantage over cooperativism, in that workers do not bear the same financial risk if they do not co-own the firm (Gonzalez-Ricoy, *supra* note 1112, 426).

¹¹¹⁵ Hsieh, *supra* note 1113, 115.

rights becomes necessary. In the employment context, recognizing the workplace as a form of private authoritarian government and constitutionally protected collective bargaining as a mechanism of antipower, we can now examine how to further enhance worker protection beyond the Wagner model. This can take the form of research into expansion of collective bargaining rights or research into non-majority unionism where a plurality of unions may be present in the same workplace. Legal research on non-majority unionism would need to be supplemented by empirical research to study whether such fractioning would enhance worker voice and worker choice, two fundamental components to non-domination. Finally, worker voice beyond the *Wagner* model can be examined through codetermination, particularly as legislation does recognize certain forms of egalitarian decision making when workers are concerned, including outside of collective bargaining.

Conclusion of Part II

The revival of humanist ideals in the seventeenth century led English theorists to return to Machiavelli's view of freedom (the *vivere libero*)¹¹¹⁶ inspiring, according to Pettit, "a search for republican devises whereby a state might impose on people without compromising their freedom"¹¹¹⁷

The use of *Charter* values allowed the Court to move away from classical liberalism towards a republican approach to freedom of association. This republican approach was reflected in the Court's broader jurisprudence where *Charter* values were invoked. Based on the Court's praxis, what does a moral reconstruction of *Charter* rights founded on neo-republican principles look like? Broadly speaking, a republican reconstruction of *Charter* rights will emphasize choice, participation, and relational equality, in addition to allowing for the development of mechanisms of antipower. This has become evident in how the Court's freedom of association jurisprudence has been used, particularly by labour boards and tribunals. If *Saskatchewan Federation of Labour* can be viewed as the Court's ultimate protection of antipower in the employment context, recent decisions out of Quebec for, example, have emphasized freedom of choice¹¹¹⁸, as well as relational equality¹¹¹⁹.

¹¹¹⁶ Skinner, *supra* note 106, 5.

¹¹¹⁷ Pettit, *supra* note 104, 148.

¹¹¹⁸ *Les avocats et notaires de l'État québécois c. Procureure générale du Québec*, 2019 QCCS 3897 (CanLII), par. 203 and 258. (Arguing that 2(d) did not protect a specific model of collective bargaining, the attorney general of Quebec highlighted the respect of freedom of choice to support his argument that many labour relations regimes could respect freedom of association. Ultimately, Quebec's Superior Court found that the contested legislation violated the *Charter*.) See also: *Association des cadres de la Société des casinos du Québec c. Société des casinos du Québec*, *supra* note 221, par. 106.

¹¹¹⁹ *Association des cadres de la Société des casinos du Québec c. Société des casinos du Québec*, *supra* note 221, par. 182 : The exclusion of managers from the scope of the labour code results in an unjustified imbalance of power between the employer and low-level management.

Generally, the emphasis on non-domination instead of state interference means that *Charter* rights will find some form of application in private relationships. The general conclusion of this thesis will examine the decline of state power and the increase in domination from private entities performing state roles. In a republican model, if the *Charter* is to retain its significance, then both legislatures and courts will have to examine how constraints on some negative liberties (such as mandatory union membership) can generate increased protection of republican freedoms. Consequently, negative freedoms can no longer be considered sufficient; the three branches of government will have positive obligations to preserve dignity, autonomy, republican freedom and relational equality by implementing measures to counteract domination. For the legislative and executive branches, this may take the form of welfare state initiatives. For the judiciary, this may resemble broadened interpretation of *Charter* rights which impact non-state behavior, as was the case for freedom of association.

Conclusion

Prior to the enactment of the *Charter*, the Canadian trade union movement largely ignored the process of *Charter* drafting. The first cases relating to trade union rights and freedom under the *Charter* were brought before the Court in 1987.

From 1987 to 2007, the Court's jurisprudence on freedom of association and trade union rights illustrates points of tension consistent with the Court's general approach to the *Charter* as a classically liberal instrument. As discussed previously, the Court initially focused on the individual nature of *Charter* rights to deny a constitutional right to bargain collectively. The Court also insisted on the negative dimension of *Charter* freedoms, on the primacy of freedom over equality, and on the limited role of the judiciary. These points of tension – identified as dialogues in the first chapter- were resolved through the use of general principles (called *Charter* values by the Court) specifically in *Health Services*. Indeed, in *Health Services*, the Court justifies the reading in of a right to bargain collectively as part of a general freedom of association under the *Charter* on the basis that specific values justify such an interpretation, namely freedom, liberty, autonomy, democracy, equality, and dignity. When these values are examined both within the freedom of association jurisprudence and against the Court's corpus of jurisprudence, the image that emerges from these values is not a classically liberal image of freedom from state intervention, but a neo-republican image of freedom from domination, including domination within the private government of the workplace.

The points of tension identified in the first chapter can be resolved through such a shift to a neo-republican analysis. Viewed through this lens, freedom of association no longer protects a freedom to form associations away from state interference, but a right to unite to form mechanisms of anti-power to prevent domination. As such mechanisms of anti-power are best exercised

through collective action, it is the action of the collective that must be protected. In the workplace, such mechanisms of anti-power are collective bargaining and the right to strike. As domination in the workplace is exerted by private actors and since the state is responsible for ensuring freedom from domination, state interference is necessary to protect from domination by private actors. So the Court may expand a constitutional right to require the legislature to ensure that freedom from domination in the private workplace is ensured.

The second half of the thesis focused on the use of moral values by the Court. The Court has primarily used moral arguments to interpret or to balance constitutional rights. As stated above, in the case of freedom of association, moral arguments became an interpretation tool to expand constitutional protection to existing statutory rights. When the values applied by the Court in the freedom of association jurisprudence were evaluated against the entire corpus of the Court's use of the same values in *Charter* litigation, the results showed that the Court used such moral arguments to shift interpretation from a strictly liberal interpretation (as exemplified in *Southam*) to a republican interpretation. Thus, *Charter* rights are no longer limited to protection from state interference.

The gradually decreasing power of the state coupled with the emergence of global corporate actors and forms of transnational regulation support the shift from a liberal understanding of rights and freedoms to a republican view. Indeed, it can be argued that, in the twenty first century, to focus on the state as the primary source of unfreedom is anachronistic.

It is worth reiterating, that even domestically, private actors are capable of domination, often to a similar or greater extent than the state. The limited application of the *Charter* to situations of direct state interference thus seems to contradict the express purpose of the *Charter*, or indeed its moral purpose as reflected through the *Charter's* underlying values.

Section 32 of the *Charter* states that it applies “to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories”, as well as “to the legislature and government of each province in respect of all matters within the authority of the legislature of each province”¹¹²⁰.

In *Dolphin Delivery*, the Court examined whether secondary picketing by trade union members was protected expression under s. 2(b) of the *Charter*¹¹²¹. After a lengthy examination of freedom of expression, the majority turned to the question of whether the Charter applies to private litigation¹¹²². *Dolphin Delivery* came at a time where academic debate surrounding the scope of the *Charter* had reached a deadlock¹¹²³. Indeed, according to McIntyre J. (writing for the majority of the Court):

This is a subject of controversy in legal circles and the question has not been dealt with in this Court. One view of the matter rests on the proposition that the Charter, like most written constitutions, was set up to regulate the relationship between the individual and the Government. It was intended to restrain government action and to protect the individual. It was not intended in the absence of some governmental action to be applied in private litigation¹¹²⁴.

Given the controversy surrounding the scope of the *Charter* at the time, it was, according to scholars, “both surprising and disappointing to see how little analytical attention the court devoted to this crucial point”¹¹²⁵. Despite the wording on s. 32, some scholars advocated for an expansive application of the *Charter*. In 1983, Dale Gibson called for an application of the *Charter* to both public and private spheres of activity¹¹²⁶.

¹¹²⁰ *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 32.

¹¹²¹ *Dolphin Delivery*, *supra* note 558.

¹¹²² *Dolphin Delivery*, *supra* note 558, 593.

¹¹²³ Ghislain Otis, “The Charter, Private Action and the Supreme Court” (1987) 19:1 *Ottawa Law Review* 71 at 71.

¹¹²⁴ *Dolphin Delivery*, *supra* note 558, 593.

¹¹²⁵ Otis, *supra* note 1123, 72.

¹¹²⁶ Dale R Gibson, “Distinguishing the Governors from the Governed: The Meaning of ‘Government’ under Section 32(1) of the Charter” (1983) 13 *Manitoba Law Journal* 505 at 505.

In *Dolphin Delivery*, the majority cited John Stuart Mill on freedom of expression¹¹²⁷, reiterating commitment to the long liberal tradition that had previously been expressed in *Southam*¹¹²⁸ where the Court is said to have affirmed “that the purpose of a constitution is to regulate the relationship of the individual to government”¹¹²⁹. In contemporary political philosophy, the public sphere is opposed to the private sphere where individual liberty is said to prevail¹¹³⁰. This liberal approach was echoed by Otis who, in 1987, expressed fear that the expansion of *Charter* rights to the private sphere would lead to restrictions of freedom in “areas of private life which have until now been exempted from law’s constraint”¹¹³¹. Gibson, however, viewed this restriction to the public sphere through a distinctly neo-republican lens:

If... the *Charter* should not intrude so far into the private sector, the result would be to give one particular democratic right, (freedom from responsibility to others), priority over a large number of equally important rights. One of the best features of the *Charter* is that it provides a mechanism for weighing the respective claims of the often-conflicting rights and freedoms our society values¹¹³².

If the characterization of a labour conflict as “private” seemed straightforward in *Dolphin Delivery*, the qualification of universities was more controversial. In *McKinney*, the fact that a non-governmental entity (in this case, a university) was created by statute did not make its actions subject to the *Charter*, even if the university in question was performing a public service and even if its decisions were subject to judicial review¹¹³³. Examining lower court cases, McKay-Panos concluded that cases in which the Charter was deemed to apply to universities “tend to cast the

¹¹²⁷ *Dolphin Delivery*, *supra* note 558, 583.

¹¹²⁸ “Such a requirement puts the onus on the state to demonstrate the superiority of its interest to that of the individual. As such it accords with the apparent intention of the Charter to prefer, where feasible, the right of the individual to be free from state interference to the interests of the state in advancing its purposes through such interference”, *Southam*, *supra* note 140, 160.

¹¹²⁹ Anne McLellan & Bruce P Elman, “To Whom Does the Charter Apply - Some Recent Cases on Section 32” (1986) 24:2 Alberta Law Review 361 at 365.

¹¹³⁰ Anderson, *supra* note 422, 41.

¹¹³¹ Otis, *supra* note 1123, 82-83.

¹¹³² Gibson, *supra* note 1126, 515.

¹¹³³ *Mckinney v. University of Guelph*, [1990] 3 SCR 229.

nature of the universities' activities in a broad, holistic educational light. These decisions are supported in this outcome by characterizing universities as implementing government policies or programs, such as education"¹¹³⁴. In *Harrison* (handed down the same year as *McKinney*), Wilson J. (dissenting) found that the *Charter* applied to the University of British Columbia. She proposed three criteria to determine if an entity is subject to the *Charter*, namely: (1) whether the legislative, executive or administrative branch of government exercises control over the entity; (2) whether the entity performs a government function or exercises a state responsibility; and (3) whether the entity acts pursuant to a statutory authority granted to further an objective that the government, acting in the public interest, seeks to promote¹¹³⁵. Given the increased number of private entities carrying out functions that are traditionally associated with state responsibility (which will be discussed further), there is little doubt that Wilson J.'s test would have led to an expanded application of the *Charter*.

Much like for universities, contentious cases regarding the application of the *Charter* frequently involve privately owned spaces or entities which serve the public, such as airports, shopping malls, and some nursing homes¹¹³⁶. Additionally, when transportation services in British Columbia refused to post student political advertisements on their buses on the basis that their advertising policies permitted commercial but not political advertisement vehicles, the student federations alleged that the policies violated their right to freedom of expression. According to the majority of the Court, both BC Transit and Translink were "government" within the meaning of the *Charter*,

¹¹³⁴ Linda McKay-Panos, "Universities and Freedom of Expression: When Should the Charter Apply?" (2016) 5:1 Canadian Journal of Human Rights 59 at 91.

¹¹³⁵ *Harrison v. University of British Columbia*, [1990] 3 SCR 451, 465.

¹¹³⁶ McKay-Panos, *supra* note 1134, 61.

since neither could operate autonomously from government bodies. Consequently, the *Charter* applied to both organizations¹¹³⁷.

In short, the scope of application of the *Charter* is less clear than it may appear, probably owing to the fact that the distinction between public and private is less clear than may appear. In 1983, Gibson stated that “traditional functions of government carried out by private entrepreneurs — could create equally perplexing problems”¹¹³⁸ citing examples such as police services provided by private security companies under contract with city governments and private schools¹¹³⁹.

Anderson called for the rejection of the “false narrowing of the scope of government to the state”¹¹⁴⁰, in her essay on the private government of the workplace. Indeed, private government is ubiquitous:

Much of what we could call governing is done by groups that are not part of the institutions established by federal and state constitutions. If governing involves making rules, interpreting them, applying them to specific cases, and sanctioning violations, some of all of this is done by such different clusters of people as the Mafia, the National Collegiate Athletic Association, the American Arbitration Association, those who run large shopping centers, neighborhood associations, and even the regulars at Smokey’s tavern¹¹⁴¹.

Large corporation can assume governmental functions when they wish to avoid accountability¹¹⁴². Some corporations may, for example, have their own private police forces¹¹⁴³. In 2020, Amazon famously sought to recruit intelligence analysts to covertly investigate unionization efforts¹¹⁴⁴.

¹¹³⁷ *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, [2009] 2 SCR 295.

¹¹³⁸ Gibson, *supra* note 1126, 520.

¹¹³⁹ *Ibid.*

¹¹⁴⁰ Anderson, *supra* note 422, 48.

¹¹⁴¹ Stewart Macaulay, *Private Government* (New York: Springer International Publishing, 2020) at 153.

¹¹⁴² Macaulay, *supra* note 1141, 158.

¹¹⁴³ *Ibid.*

¹¹⁴⁴ Palmer, Annie, “Amazon deletes job listings for analysts to track 'Labor organizing threats' following public outcry” (2020) *CNBC*, Online: <https://www.cnbc.com/2020/09/01/amazon-seeks-intelligence-analyst-to-track-labor-organizing-threats.html>

These private entities will frequently borrow structures and symbols from public government such as uniforms, badges and hearings¹¹⁴⁵.

Given the prevalence of private government, there is a need to recognize that liberty can be constrained significantly in private activities that fall outside of the scope of the *Charter*. Ensuring protection from state interference is no longer sufficient to protect freedom as freedom can be greatly limited by private actors. The state must protect citizens from instances of domination arising from such actors and has indeed done so through litigation in the areas of employment and privacy. If *Charter* rights (and indeed *Charter* values) are to retain their significance, then legislatures and courts must examine how limited constraints on some negative liberties (such as mandatory union membership) can generate increased protection of republican freedoms¹¹⁴⁶.

¹¹⁴⁵ Macaulay, *supra* note 1141, 155.

¹¹⁴⁶ Anderson, *supra* note 422, 48.

BIBLIOGRAPHY

PRIMARY SOURCES

Canadian legislation

Act respecting occupational health and safety, CQLR c S-2.1.

Canada Labour Code, RSC 1985, c L-2.

Canadian Bill of Rights, S.C. 1960, c. 44.

Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982.

Code du travail, RLRQ c C-27.

Electricity Act, 1998, SO 1998, c 15, Sch A.

Hydro and Power Authority Act, RSBC 1996, c 212.

Hydro-Québec Act, CQLR c H-5.

Labour Relations Act, CCSM c L10.

Labour Relations Act, 1995, SO 1995, c 1, Sch A.

Labour Relations Act, RSNL 1990, c L-1.

Labour Relations Code, RSA 2000, c L-1.

Labour Relations Code, RSBC 1996, c 244.

Occupational Health and Safety Act, RSO 1990, c O.1.

Pay Equity Act, CQLR c E-12.001.

Canadian cases

A.(L.L.) v. B. (A.), [1995] 4 SCR 536, 1995 CanLII 52 (SCC).

AC v. Manitoba (Director of Child and Family Services), [2009] 2 SCR 181.

Alberta (Aboriginal Affairs and Northern Development) v. Cunningham, 2011 SCC 37 (CanLII), [2011] 2 SCR 670.

Alberta v. Hutterian Brethren of Wilson Colony, [2009] 2 SCR 567.

Andrews v. Law Society of British Columbia, [1989] 1 SCR 143.

Association des cadres de la Société des Casinos du Québec c. La Société des casinos du Québec inc., 2015 QCCRT 102 (CanLII).

Association des cadres de la Société des casinos du Québec et Société des casinos du Québec inc., 2016 QCTAT 6870 (CanLII).

Association des cadres de la Société des casinos du Québec c. Société des casinos du Québec, 2022 QCCA 180 (CanLII).

Aubry v. Éditions Vice-Versa inc., [1998] 1 SCR 591.

B (R) v Children's Aid Society of Metropolitan Toronto, [1995] 1 SCR 315.

Bell ExpressVu Limited Partnership v. Rex, [2002] 2 SCR 559, 2002 SCC 42 (CanLII).

Bent v. Platnick, 2020 SCC 23.

Bernard c. Canada (Procureur général), (2014) 1 R.C.S. 227; 2014 CSC 13.

Berry v. Pulley, [2002] 2 SCR 493.

Black v. Law Society of Alberta, [1989] 1 S.C.R. 591.

Blencoe c. Colombie-Britannique (Human Rights Commission), [2000] 2 RCS 307.

Bliss v. Attorney General of Canada, [1978] 1 SCR 183.

Bou Malhab v. Diffusion Métromédia CMR inc., [2011] 1 SCR 214.

Canada v. Schmidt, 1987 CanLII 48 (SCC), [1987] 1 S.C.R. 500, 522.

Canadian Broadcasting Corp v. Lessard, [1991] 3 SCR 421.

Canadian Egg Marketing Agency v. Richardson, [1998] 3 SCR 157, 1998 CanLII 17020 (SCC).

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 2004 SCC 4 (CanLII), [2004] 1 SCR 76.

Carter v. Canada (Attorney General), 2015 SCC 5 (CanLII), [2015] 1 SCR 331.

Centrale des syndicats du Québec c. Québec (Procureur général), 2013 QCCS 32 (CanLII).

Chamberlain v. Surrey School District No. 36, [2002] 4 SCR 710, 2002 SCC 86 (CanLII).

Commission scolaire régionale de Chambly v. Bergevin, [1994] 2 SCR 525.

Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd., [2013] 2 SCR 458.

Confédération des syndicats nationaux c. Québec (Procureur général), 2008 QCCS 5076 (CanLII).

Corbiere v. Canada (Minister of Indian and Northern Affairs), 1999 CanLII 687 (SCC), [1999] 2 SCR 203.

Cuthbertson v. Rasouli, [2013] 3 SCR 341.

Dagg v. Canada (Minister of Finance), [1997] 2 SCR 403.

Delisle v. Canada (Deputy Attorney General), [1999] 2 SCR 989, 1999 CanLII 649 (SCC).

Dolphin Delivery Ltd. v. Retail, Wholesale & Department Store Union, Local 580 (1984), CanLII 750 (BC CA).

Doré v. Barreau du Québec, 2012 SCC 12 (CanLII), [2012] 1 SCR 395.

Dunmore c. Ontario (Procureur général), (2001) 3 R.C.S. 1016; CSC 94.

Edmonton Journal v. Alberta (Attorney General), [1989] 2 SCR 1326.

Egan v. Canada, [1995] 2 SCR 513.

Eldridge v. British Columbia (Attorney General), [1997] 3 SCR 624.

Figueroa v. Canada (Attorney General), [2003] 1 SCR 912.

Frank v. Canada (Attorney General), [2019] 1 SCR 3.

Fraser v. Canada (Attorney General), 2020 SCC 28 (CanLII).

Godbout c Longueuil (Ville), [1997] 3 RCS 844.

Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component, [2009] 2 SCR 295.

Harper c. Canada (Procureur général), (2004) 1 R.C.S. 827; 2004 CSC 33.

Harrison v. University of British Columbia, [1990] 3 SCR 451.

Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27 (CanLII), [2007] 2 SCR 391.

Hill v. Church of Scientology of Toronto, 1995 CanLII 59 (SCC), [1995] 2 SCR 1130.

Hills v. Canada (Attorney General), 1988 CanLII 67 (SCC), [1988] 1 SCR 513.

Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc, [2001] 2 SCR 743.

Lavigne v. Ontario Public Service Employees Union, [1991] 2 SCR 211, CanLII 68 (SCC).

Law v. Canada (Minister of Employment and Immigration), [1999] 1 SCR 497.

Law Society of British Columbia v. Trinity Western University, [2018] 2 SCR 293, 2018 SCC 32 (CanLII).

Les avocats et notaires de l'État québécois c. Procureure générale du Québec, 2019 QCCS 3897 (CanLII).

Libman c. Québec (Procureur général), (1997) 3 R.C.S. 569; 1997 CanLII 326 (CSC).

Loyola High School v. Quebec (Attorney General), 2015 SCC 12 (CanLII), [2015] 1 SCR 613.

Lovelace v. Ontario, [2000] 1 SCR 950.

M. (A.) v. Ryan, [1997] 1 SCR 157, 1997 CanLII 403 (SCC).

Manitoba Fisheries Ltd. v. The Queen, 1978 CanLII 22 (SCC), [1979] 1 SCR 101.

Mckinney v. University of Guelph, [1990] 3 SCR 229.

Meredith c. Canada (Procureur général), (2015) 1 R.C.S. 125; 2015 CSC 2.

Miron v. Trudel, 1995 CanLII 97 (SCC), [1995] 2 SCR 418.

Mounted Police Association of Ontario v. Canada (Attorney General), (2015) 1 S.C.R. 3, 2015 SCC 1.

Native Women's Assn of Canada v Canada, [1994] 3 SCR 627.

Ontario (Procureur général) c. Fraser, (2011) 2 R.C.S. 3; 2011 CSC 20.

Perrault v. Gauthier, (1898) 28 SCR 241.

Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner), [1990] 2 SCR 367, 1990 CanLII 72 (SCC).

PSAC v. Canada, [1987] 1 SCR 424, 1987 CanLII 89 (SCC).

Quebec (Attorney General) v. 9147-0732 Québec inc., 2020 SCC 32 (CanLII).

Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand, [1996] 3 SCR 211.

R. c. Advance Cutting & Coring Ltd., (2001) 3 R.C.S. 209; 2001 CSC 70.

R. v. Beaulac, [1999] 1 S.C.R. 768.

R. v. Big M Drug Mart Ltd, [1985] 1 SCR 295.

R v. Carson, [2018] 1 SCR 269.

R. v. Crawford, 1995 CanLII 138 (SCC), [1995] 1 SCR 858.

R v. Dymment, [1988] 2 SCR 417.

R. v. Edwards Books and Art Ltd, [1986] 2 SCR 713.

R v. Godoy, [1999] 1 SCR 311.

R v. Golden, [2001] 3 SCR 679.

R. v. Hart, 2014 SCC 52 (CanLII), [2014] 2 SCR 544.

R. v. Jones, [1986] 2 SCR 284.

R v. Kapp, [2008] 2 SCR 483.

R v. Keegstra, [1990] 3 SCR 697.

R. v. Mabior, [2012] 2 SCR 584.

R. v. Morgentaler, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30.

R. v. Oakes, 1986 CanLII 46 (SCC), [1986] 1 SCR 103.

R. v. O'Connor, [1995] 4 SCR 411, 1995 CanLII 51 (SCC).

R. v. Sharpe, [2002] 1 SCR 45.

R. v. Singh, 2007 SCC 48 (CanLII), [2007] 3 SCR 405.

R. v. Skinner, [1990] 1 SCR 1235, 1990 CanLII 107 (SCC).

R v. Vice Media Canada Inc, [2018] 3 SCR 374.

R. v. Zundel, [1992] 2 SCR 731, 1992 CanLII 75 (SCC).

Re Retail, Wholesale & Department Store Union, Locals 544, 496, 635 and 955 and Government of Saskatchewan (1985), CanLII 184 (SK CA), 19 D.L.R. (4th) 609.

Reference re Prov Electoral Boundaries (Sask), [1991] 2 SCR 158.

Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 SCR 313.

Reference re Same-Sex Marriage, [2004] 3 SCR 698.

Reference re Secession of Quebec, 1998 CanLII 793 (SCC), [1998] 2 SCR 217.

Rodriguez v. British Columbia (Attorney General), [1993] 3 SCR 519.

Ross v. New Brunswick School District No. 15, [1996] 1 SCR 825, 1996 CanLII 237 (SCC).

Royal Oak Mines Inc v. Canada (Labour Relations Board), [1996] 1 SCR 369.

RWDSU v. Saskatchewan, [1987] 1 SCR 460, 1987 CanLII 90 (SCC).

RWDSU v. Dolphin Delivery Ltd., 1986 CanLII 5 (SCC), [1986] 2 SCR 573.

Saskatchewan Federation of Labour c. Saskatchewan, (2015) 1 R.C.S. 245; 2015 CSC 4.

Sauvé v. Canada (Chief Electoral Officer), [2002] 3 SCR 519.

Singh v. Minister of Employment and Immigration, [1985] 1 SCR 177.

Société des casinos du Québec inc. c. Tribunal administratif du travail, 2018 QCCS 4781 (CanLII).

Société des casinos du Québec inc., et al. c. Association des cadres de la Société des casinos du Québec, et al., 2022 CanLII 88686 (CSC).

Thomson Newspapers Co v. Canada (Attorney General), [1998] 1 SCR 877.

Toronto (City) v. Ontario (Attorney General), 2021 SCC 34 (CanLII)).

Trociuk v. British Columbia (Attorney General), [2003] 1 SCR 835.

U.F.C.W., Local 1518, v. KMart Canada Ltd., 1999 CanLII 650 (SCC), [1999] 2 SCR 1083.

Vriend v. Alberta, 1998 CanLII 816 (SCC), [1998] 1 SCR 493.

Vancouver Sun (Re), [2004] 2 SCR 332.

Wallace v. United Grain Growers Ltd, [1997] 3 SCR 701.

Withler v. Canada (Attorney General), 2011 SCC 12 (CanLII), [2011] 1 SCR 396.

Young v. Young, [1993] 4 SCR 3, 1993 CanLII 34 (SCC).

SECONDARY SOURCES

Books

Alexy, Robert, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 1986).

Anderson, Elizabeth S, *Private Government* (Princeton: Princeton University Press, 2017).

Barak, Aharon, *The Judge in a Democracy* (Princeton, New Jersey: Princeton University Press, 2006).

Barak, Aharon, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge: Cambridge University Press, 2015).

Belloc, Hilaire. *The Servile State* (London: Constable, 1950).

Berlin, Isaiah, *Two concepts of liberty* (Oxford: Clarendon Press, 1958).

Bickel, Alexander M, *The least dangerous branch: the Supreme Court at the bar of politics*, 2nd ed. (New Haven: Yale University Press, 1986).

Bragg, Billy, *The Three Dimensions of Freedom*, (London: Faber & Faber Ltd, 2019).

Clare Roberts, William, *Marx's Inferno: The Political Theory of Capital* (Princeton, New Jersey: Princeton University Press, 2017).

Dahl, Robert A, *On democracy* (New Haven: Yale University Press, 1998).

Dion, Gérard, *Dictionnaire Canadien des Relations du Travail* (Québec : Les Presses de l'Université Laval, 1986).

Dodek, Adam D., *The Charter Debates* (Toronto: University of Toronto Press, 2018).

Dworkin, Ronald, *Law's Empire* (Cambridge, Mass.: Belknap Press, 1986).

Dworkin, Ronald, *Freedom's Law, The Moral Reading of the American Constitution* (Cambridge, Massachusetts: Harvard University Press, 1996).

Finnis, John, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).

Fudge, Judy & Eric Tucker, *Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900-1948*, Canadian Social History Series (Toronto: University of Toronto Press, 2004).

Hohfeld, Wesley Newcomb, *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1919).

John XXIII, *Mater et Magistra* (Paris: Éditions du Seuil, 1976).

Jovanović, Miodrag A, *Collective rights: a legal theory* (Cambridge: Cambridge University Press, 2012).

Kitcher, Philip, *The Ethical Project* (Cambridge, Mass: Harvard University Press, 2011).

Lipton, Charles, *Histoire du syndicalisme au Canada et au Québec, 1827-1959*, Collection Aspects ; no 32, (Montréal: Éditions Parti pris, 1976).

Macaulay, Stewart, *Private Government* (New York: Springer International Publishing, 2020).

McAuslan, Patrick & John F. McEldowney, *Law Legitimacy and the Constitution* (London: Sweet & Maxwell, 1985).

Möller, Kai, *The Global Model of Constitutional Rights* (Oxford: Oxford University Press, 2012).

Pateman, Carole, *Participation and democratic theory* (Cambridge: Cambridge University Press, 1970).

Pettit, Philip, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997).

Pettit, Philip. *On The People's Terms*, 3rd ed (Cambridge: Cambridge University Press, 2014).

Raz, Joseph, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994).

Raz, Joseph, *The Morality of Freedom* (Oxford: Clarendon Press, 1986).

Reiff, Mark R, *In the name of liberty: the argument for universal unionization* (Cambridge: Cambridge University Press, 2020).

Roach, Kent, *The Supreme Court on Trial - Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2016).

Shapiro, Ian, *Politics against Domination* (Cambridge, Mass: Harvard University Press, 2016).

Silier, Yildiz, *Freedom: Negative and Positive Conceptions* (London: Routledge, 2017).

Skinner, Quentin, *Liberty before liberalism* (Cambridge: Cambridge University Press, 1998).

Tripković, Boško, *The metaethics of constitutional adjudication* (Oxford, United Kingdom: Oxford University Press, 2017).

Webb, Sidney, *Industrial democracy*, Reprints of economics classics (New York: AMKelley, 1965).

Wilfred Jenks, Clarence. "The International Protection of Trade Union Freedom" (London: Stevens & Sons, 1957).

Book chapters

Anderson, Elizabeth, "When the market Was "left"", in Elizabeth Anderson, ed, *Private Government: How Employers Rule Our Lives (and Why We Don't Talk about It)* (Princeton: Princeton University Press, 2017) 1.

Cabrelli, David & Zahn, Rebecca, "Civic Republican Political Theory and Labour Law" in Hugh Collins, Gillian Lester & Virginia Mantouvalou, eds, *Philosophical Foundations of Labour Law* (Oxford: Oxford University Press, 2018).

Cowen, Tyler, "Work Isn't So Bad After All" in Elizabeth Anderson, ed., *Private Government*, Princeton: Princeton University Press, 2017) 108.

Crispo, John, "Codetermination: Its Relevance for Canada", in Wolfgang Dorow, ed., *The Business Corporation in the Democratic Society*, (Berlin: De Gruyter, 2019), 271 at 274.

Faraday, Fay, "Envisioning Equality: Analogous Grounds and Farm Workers' Experience of Discrimination" in Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012) 109.

Gall, Peter, "Freedom of Association and Trade Unions: A Double-Edged Constitutional Sword, in J.M. Weiler and R.B. Elliot, eds., *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986) 244.

Gilabert, Pablo, "Dignity at Work" in Hugh Collins, Gillian Lester & Virginia Mantouvalou, eds, *Philosophical Foundations of Labour Law* (Oxford: Oxford University Press, 2018), 68.

Hogg, Peter, "Equality as a Charter Value in Constitutional Interpretation" (2003) 20:2 SCLR 113.

Kolodny, Niko, "Help Wanted: Subordinates" in Elizabeth Anderson, ed, *Private Government* (Princeton: Princeton University Press, 2017) 99.

Larmore, Charles, "Liberal and Republican Conceptions of Freedom" in Daniel Weinstein and Christian Nadeau, eds, *Republicanism: history, theory and practice* (London: Routledge, 2004), 96.

Landen, Delmar L., Irving Bluestone & Edward E. Lawler III, "High Involvement Organizations and Industrial Democracy" in Gerald R. Ferris, Sherman D. Rosen, and Darold T. Barnum, eds, *Handbook of Human Resource Management* (Cambridge, Mass: Blackwell Publishers, 1995), 370.

Liden, Robert C. & Thomas W. Tewksbury, "Empowerment and Work Teams", in Gerald R. Ferris, Sherman D. Rosen, and Darold T. Barnum, eds, *Handbook of Human Resource Management* (Cambridge, Mass: Blackwell Publishers, 1995), 386.

Porter, Bruce, "Expectations of Equality" in Sheila McIntyre and Sandra Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham: LexisNexis Canada, 2006) 37.

Pothier, Dianne, "Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What's the Fairest of Them All", in Sheila McIntyre and Sandra Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham: LexisNexis Canada, 2006) 136.

Verge, Pierre & Dominic Roux, "L'affirmation des principes de la liberté syndicale, de la négociation collective et du droit de grève selon le droit international et le droit du travail canadien: deux solitudes?" in Pierre Verge, ed, *Droit International du Travail, Perspectives Canadiennes* (Cowansville: Thomson Reuters Canada, 2010) 437.

Weiler, Joseph M, "The Regulation of Strikes and Picketing under the Charter", in J.M. Weiler and R.B. Elliot, eds., *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986), 212.

Weinstock, Daniel, "How Can Collective Rights and Liberalism Be Reconciled?" in Rainer Baubock and John Rundell, eds, *Blurred Boundaries* (Brookfield: Aldershot, 1998).

Articles

Ackers, Peter, "Collective Bargaining as Industrial Democracy: Hugh Clegg and the Political Foundations of British Industrial Relations Pluralism" (2007) 45:1 *British Journal of Industrial Relations* 77.

Alexy, Robert, "Constitutional Rights, Balancing, and Rationality" (2003) 16 *Ratio Juris* 131.

Anderson, Elizabeth, "Equality and Freedom in the Workplace: Recovering Republican Insights" (2015) 31(2) *Social Philosophy and Policy* 48.

Anderson, Elizabeth S, "What Is the Point of Equality?" (1999) 109:2 *Ethics* 287.

Arthurs, Harry, "Labour and the 'Real' Constitution" (2007) 48 *C de D* 43.

Arthurs, Harry, "The Right to Golf: Reflections on the Future of Workers, Unions and the Rest of Us under the Charter" (1988) 13 *Queen's Law Journal* 17.

Bagenstos, Samuel R, "Employment Law and Social Equality" (2013) 112:2 *Mich L Rev* 225.

Banks, Kevin, "The Role and Promise of International Law in Canada's New Labour Law Constitutionalism" (2011) 16 *Can Lab & Emp LJ* 233.

Barrett, Steven & Benjamin Oliphant, "The Trilogy strikes back: reconsidering constitutional protection for the freedom to strike" (2014) 45:2 *Ottawa Law Review* 201.

Bateman, Thomas M J, "Human dignity's false start in the Supreme Court of Canada: equality rights and the Canadian Charter of Rights and Freedoms" (2012) 16:4 *The International Journal of Human Rights* 577.

Bernatchez, Stéphane, "La Fonction Paradoxale de la Morale et de L'Éthique dans le Discours Judiciaire" (2006) 85 *Canadian Bar Review* 221.

Bilson, Beth. "Enter Stage Right: Players and Roles in a Post-B.C. Health Services World" (2009) 59 *University of New Brunswick Law Journal* 67.

Botha, Henk, "Human Dignity in a Comparative Perspective" (2009) 20:2 *Stellenbosch law review* 171.

Bourgault, Julie & Michel Coutu, "Le système québécois de participation des travailleurs: vers une refondation sur de nouvelles assises constitutionnelles?" (2018) 3 *Revue de droit comparé du travail et de la sécurité sociale* 92.

Bowring, Finn, "Negative and Positive Freedom: Lessons from, and to, sociology" (2015) 49:1 *Sociology* 156.

Braley, Alison, "'I Will Not Give You a Penny More Than You Deserve': *Ontario v. Fraser* and the (Uncertain) Right to Collectively Bargain in Canada" (2012) 57:2 *McGill LJ* 351.

Bredt, Christopher & Ewa Krajewska, "Doré: All That Glitters Is Not Gold" (2014) 67 *Supreme Court Law Review* 339.

Breen, Keith, "Non-Domination, Workplace Republicanism, and the Justification of Worker Voice and Control" (2017) 33:3 *International Journal of Comparative Labour Law and Industrial Relations*, 419.

Bruin, Boudewijn de, "Liberal and Republican Freedom" (2009) 17:4 *The journal of political philosophy* 418.

Calvert, John R, "Collective Bargaining in the Public Sector in Canada" (1990) 12:2 *Employee Relations* 19.

Cameron, Angela & Paul Daly, "Furthering Substantive Equality Through Administrative Law: Charter Values in Education" (2013) 63:2 *Supreme Court Law Review* 169.

Cardinal, Linda, "Collective Rights in Canada: A Critical and Bibliographical Study" (2000) 12 *National Journal of Constitutional Law* 165.

Carpay, John, "A Level Playing Field for Classical Liberalism: the Abolition of the Court Challenges Program Empowers a Diversity of Perspectives on Freedom and Equality" (2007) 16:3 *Constitutional Forum* 117.

Carter, Donald D, "Canadian Labour Relations Under the Charter, Exploring the Implications" (1988) 43:2 *Relations Industrielles* 305.

Cavalluzzo, Paul JJ. "Freedom of Association - Its Effect upon Collective Bargaining and Trade Unions" (1988) 13 *Queen's Law Journal* 267.

Chartrand, Mark, "The first Canadian trade union legislation: an historical perspective" (1984) 16:2 *Ottawa law review* 267.

Chaykowski, Richard, "Canadian Labour Policy in the Aftermath of *Fraser*" (2011) 16 *Can Lab & Emp LJ* 291.

Claeys, Gregory, "The Origins of the Rights of Labor: Republicanism, Commerce, and the Construction of Modern Social Theory in Britain, 1796-1805" (1994) 66:2 *The Journal of Modern History* 249.

Clark, Lorenne, "Liberalism and the Living-Tree: Women, Equality, and the Charter" (1990) 28:2 *Alberta Law Review* 384.

Cohn, Richard M, "The Effect of Employment Status Change on Self-Attitudes" (1978) 41:2 *Social Psychology* 81.

Corlett, J Angelo, "The Problem of Collective Moral Rights" (1994) 7 *Canadian Journal of Law and Jurisprudence* 237.

Corvino, Fausto "Republican Freedom in the Labour Market" (2019) 66:158 *Theoria* (Pietermaritzburg) 103.

Costa, M Victoria, "Freedom as Non-Domination and Widespread Prejudice" (2019) 50:4 *Metaphilosophy* 441.

Coutu, Michel, "Légitimité et Constitution: les trois types purs de la jurisprudence constitutionnelle", 2007, *Droit et société* 233.

Craig, John, "Invasion of Privacy and Charter Values: The Common-Law Tort Awakens" (1997) 42 *McGill Law Journal* 355.

Daly, Eoin, "Freedom as Non-Domination in the Jurisprudence of Constitutional Rights" (2015) 2 *Canadian Journal of Law & Jurisprudence* 289.

D'Aoust, Claude & François Delorme, "The Origin of the Freedom of Association and of the Right to Strike in Canada. An Historical Perspective" (1981) 36:4 *Relations industrielles* 894.

Deutsch, Steven, "A Researcher's Guide to Worker Participation, Labor and Economic and Industrial Democracy" (2005) 26:4 *Economic and Industrial Democracy* 645.

Doorey, David, "Graduated Freedom of Association: Worker Voice Beyond the Wagner Model" (2013) 38 *Queen's Law Journal* 511.

Dunning, Harold, "The Origins of Convention No. 87 on freedom of association and the right to organize" (1998) 137:2 *International Labour Review* 149.

Duplessis, Isabelle, "La déclaration de l'OIT relative aux droits fondamentaux au travail : Une nouvelle forme de régulation efficace ?" (2004) 59:1 *Industrial Relations* 52.

Edger, Rob, "Collective Rights" (2009) 72 *Saskatchewan Law Review* 1.

Edmondson, Diane R. & Lucy M. Matthews. "How Engaged Are Your Employees?: Enhancing Engagement through Autonomy and Skill Discretion in Today's Changing Environment" (2022) *Journal of Marketing Theory and Practice* 1.

Edwards, John, "Collective Rights in the Liberal State" (1999) 17:3 *Netherlands Quarterly of Human Rights* 25.

Ellis, Richard, "Testing the Boundaries of Institutional Legitimacy: The Courts' Delicate Dance of Defining a 'Meaningful' Freedom of Collective Bargaining" (2014) 33 *NJCL* 95.

Etherington, Brian. "Freedom of association and compulsory union dues: towards a purposive conception of a freedom to not associate" (1987) 19:1 *Ottawa Law Review* 1.

Etherington, Brian, "Lavigne v. Opseu: moving toward or away from a freedom to not associate?" (1991) 23:3 *Ottawa Law Review* 533.

Etherington, Brian. "The B.C. *Health Services and Support* decision - the constitutionalization of a right to bargain collectively in Canada: where did it come from and where will it lead?" (2009) 30:4 *Comparative Labor Law & Policy Journal* 715.

Forsey, Eugène, "Insights into Labour History in Canada" (1965) 20:3 *Relations industrielles* 445.

Fraser, Andrew, "Beyond the Charter Debate: Republicanism, Rights and Civic Virtue in the Civil Constitution of Canadian Society" (1993) 1:1 *Rev Const Stud* 27.

Fudge, Judy, "Labour is Not a Commodity: The Supreme Court of Canada and the Freedom of Association" (2004) 67 *Sask L Rev* 425.

Fudge, Judy, "Labour, the New Constitution and Old Style Liberalism" (1988) 13 *Queen's Law Journal* 61.

Fudge, Judy & Harry Glasbeek, "The Legacy of PC 1003" (1994) 3 *Canadian Lab & Emp LJ* 357.

Fudge, Judy & Eric Tucker, "The Freedom to Strike in Canada: A Brief Legal History History, Meaning, and Constitutionalization of a Right to Strike" (2009) 15:2 *Canadian Lab & Emp LJ* 333.

Fried, Charles, "Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects" (1984) 51:4 *The University of Chicago Law Review* 1012.

Dale R Gibson, "Distinguishing the Governors from the Governed: The Meaning of 'Government' under Section 32(1) of the Charter" (1983) 13 *Manitoba Law Journal* 505.

Gilbert, Pablo, "Exploitation, Solidarity, and Dignity" (2019) 50:4 *Journal of social philosophy* 465.

Gilabert, Pablo, "Labor human rights and human dignity" (2016) 42:2 *Philosophy & social criticism* 171.

Gilbert, Michael D., "Entrenchment, Incrementalism, and Constitutional Collapse", 2017, 103:4 *Virginia Law Review* 631.

Godard, John, "Is Good Work Good for Democracy? Work, Change at Work and Political Participation in Canada and England" (2007) 45:4 *British Journal of Industrial Relations* 760.

Gonzalez-Ricoy, Inigo, "Ownership and control rights in democratic firms – a republican approach" (2020) 78:3 *Review of Social Economy* 411.

Green, Leslie, "Two Views of Collective Rights" (1991) 4:2 *Canadian Journal of Law and Jurisprudence* 315.

Hamilton, Jonnette Watson, "Cautious Optimism: Fraser v Canada (Attorney General)" (2021) 30:2 *Constitutional Forum / Forum constitutionnel* 1

Harding, Mark & Rainer Knopff, "Charter values vs. Charter dialogue" (2013) 31:2 *National Journal of Constitutional Law* 161.

Harding, Mark & Rainer Knopff, "Constitutionalizing Everything: The Role of Charter Values" (2013) 18 *Review of Constitutional Studies* 141.

Hartney, Michael, "Some Confusions Concerning Collective Rights" (1991) 4:2 *Canadian Journal of Law and Jurisprudence* 293.

Hasan, Rafeeq, "Republicanism and Structural Domination" (2021) 102:2 *Pacific philosophical quarterly* 292.

Hsieh, Nien-hê. "Rawlsian Justice and Workplace Republicanism" (2005) 31:1 *Social Theory and Practice* 116.

Iyer, Nitiya, "Disadvantaged Unions: The Merging of ss. 2(d) and 15(1) of the Charter" (2005) 12 *Can Lab & Emp LJ* 1.

Jones, Peter, "Human Rights, Group Rights, and Peoples' Rights" (1999) 21:1 *Human Rights Quarterly* 80.

Kahn-Freund, Otto, "Industrial Democracy" (1977) 2 *Indus LJ* 65.

Kavanagh, Aileen, "Participation and Judicial Review: A Reply to Jeremy Waldron" (2003) 22 *Law and Philosophy* 451.

Kellerson, Hillary, "The ILO Declaration of 1998 on fundamental principles and rights: A challenge for the future" (1998) 137:2 *International Labour Review* 223.

Kerner, Alex, "In Pursuit of Equality: Rethinking the Constitutionalization of Labour Rights After Fraser" (2013) 18 *Appeal* 81.

Klare, Karl E, "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941" (1978) 62:3 *Minnesota law review* 265.

Knopf, Paula, "The 'Supreme Court of Canada's Labour Law Trilogy': Its Legacy and Implications on the Future" (2013) 45 *Ottawa Law Review* 265.

Kong, Hoi, "Towards a Civic Republican Theory of Canadian Constitutional Law" (2011) 15:2 *Rev Const Stud* 249.

Koshan, Jennifer & Jonnette Watson Hamilton, "Meaningless mantra: substantive equality after Withler" (2011) 16:1 *Review of Constitutional Studies* 31.

Kumm, Mattias, "Constitutional rights as principles" (2004) 2:3 *International Journal of Constitutional Law* 574.

Kumm, Mattias, "Who's Afraid of the Total Constitution – Constitutional Rights as Principles and the Constitutionalization of Private Law" (2006) 7:4 *German Law Journal* 341.

Langille, Brian, "The Freedom of Association Mess: How We Got into It and How We Can Get out of It" (2009) 54:1 *McGill LJ* 177.

Langille, Brian, "'The Trilogy Is a Foreign Country, They Do Things Differently There'" (2013) 45 *Ottawa Law Review* 285.

Langille, Brian & Benjamin Oliphant, "The Legal Structure of Freedom of Association" (2014) 20 *Queen's Law Journal* 249.

Langille, Brian & Benjamin Oliphant, "From the Frying Pan into the Fire: Fraser and the Shift from International Law to International 'Thought' in Charter Cases" (2011) 16 *Can Lab & Emp LJ* 181.

Libman, Caroline, "The Dunmore Departure: Section 1 and Vulnerable Groups" (2003) 13 *Forum Constitutionnel* 30.

Macklin, Audrey, "Charter Right or Charter-Lite? Administrative Discretion and the Charter" (2014) 67 *Supreme Court Law Review* 561.

Mackay, A Wayne, "The marriage of human rights codes and section 15 of the Charter in pursuit of equality: a case for greater separation in both theory and practice" (2013) 64 *University of New Brunswick Law Journal* 54.

Mahlmann, Matthias, "The Basic Law at 60 - Human Dignity and the Culture of Republicanism" (2010) 11:1 *German Law Journal* 9.

Maozami, Yasaman. "UBER in the U.S. and Canada: Is the Gig-Economy Exploiting or Exploring Labor and Employment Laws by Going beyond the Dichotomous Workers' Classification" (2017) 24:2 *U Miami Int'l & Comp L Rev* 609.

Mazumder, Soumyajit & Alan N. Yan, "What Do Americans Want from (private) Government? Experimental Evidence Demonstrates That Americans Want Workplace Democracy" (2020) *SocArXiv* 3.

McKay-Panos, Linda, "Universities and Freedom of Expression: When Should the Charter Apply?" (2016) 5:1 *Canadian Journal of Human Rights* 59.

McCormack-George, Daire & Philip Pettit. "Republicanism and Labour Law: A Defence" (2021) NY: Social Science Research Network.

McEvoy, John P, "B.C. Health Services: The Legacy After 18 Months" (2009) 59 *U.N.B.L.J.* 48.

McIntosh, Thomas A., "Labouring Under the Charter: Trade Unions and the Recovery of the Canadian Labour Regime", (1989) 58 *Research and Current Issues, Industrial Relations Centre, Queen's University* 45.

McGaughey, Ewan, "The Codetermination Bargains: The History of German Corporate and Labour Law" (2016) 23(1) *Columbia Journal of European Law* 135.

McLachlin, Beverley, "Equality: The Most Difficult Right" (2001) 14:2 *SCLR* 17.

McLellan, Anne & Bruce P Elman, "To Whom Does the Charter Apply - Some Recent Cases on Section 32" (1986) 24:2 *Alberta Law Review* 361.

Moon, Richard, "Comment on Fraser v Canada (AG): The More Things Change" (2021) 30:2 *Constitutional Forum / Forum constitutionnel* 85.

Oliphant, Benjamin, "Exiting the Freedom of Association Labyrinth: Resurrecting the Parallel Liberty Standard under 2(d) & Saving the Freedom to Strike" (2012) 70 *U of T Fac L Rev* 36.

Oliver, Peter C, "'A Constitution Similar in Principle to That of the United Kingdom': The Preamble, Constitutional Principles, and a Sustainable Jurisprudence" (2019) 65:1 *McGill Law Journal* 207.

Orzeszyna, Krzysztof, "Universalism of Human Rights: Notion of Global Consensus or Regional Idea" (2021) 3 Review of European and Comparative Law 165.

Otis, Ghislain, "The Charter, Private Action and the Supreme Court" (1987) 19:1 Ottawa Law Review 71.

Pal, Michael, "The Unwritten Principle of Democracy" (2019) 65:2 McGill Law Journal 269.

Palmer, Bryan D, "Labour Protest and Organization in Nineteenth-Century Canada, 1820-1890" (1987) 20:1 Labour 61.

Parfett, Julianne, "A Triumph of Liberalism: The Supreme Court of Canada and the Exclusion of Evidence" (2002) 40:2 Alberta Law Review 299.

Parkes, Debra, "The Rand formula revisited: union security in the Charter era" (2010) 61 University of New Brunswick law journal 223.

Petter, Andrew, "Immaculate Deception: The Charter's Hidden Agenda" (1987) 45:6 Advocate (Vancouver Bar Association) 857.

Pettit, Philip, "Keeping Republican Freedom Simple: On a Difference with Quentin Skinner" (2002) 30:3 Political Theory 339.

Pettit, Philip, "Freedom as antipower" (1996) 106:3 Ethics 576.

Poole, Michael, Russell Lansbury & Nick Wailes, "A Comparative Analysis of Developments in Industrial Democracy" (2001) 40:3 Industrial Relations: A Journal of Economy and Society 490.

Porter, Bruce, "[Expectations of Equality](#)" (2006) 33 Sup Ct L Rev 23.

Potobsky, Geraldo von, "Freedom of association: The impact of Convention No. 87 and ILO action" (1998) 137:2 International Labour Review 195.

Quail, Susanna. "Labour Rights and Labour Politics under the Charter" (2013) 45 Ottawa Law Review 343.

Rao, Neomi, "The Trouble with Dignity and Rights of Recognition" (2013) 99 Virginia Law Review 29.

Rao, Neomi, "Three Concepts of Dignity in Constitutional Law" (2011) 86:1 Notre Dame Law Review 183.

Rivet, Michèle & Anne-Marie Santorineos, "Juger à l'ère des droits fondamentaux" (2012) 42-1-2 Revue de Droit de l'Université de Sherbrooke 363.

Servais, Jean-Michel, "ILO standards on freedom of association and their implementation" (1984) 123 *International Labour Review* 765.

Sheppard, Terry, "Liberalism and the Charter: Freedom of Association and the Right to Strike" (1996) 5 *Dalhousie Journal of Legal Studies* 117.

Slinn, Sara, "Exploring Sectoral Solutions for Digital Workers: The Status of the Artist Act Approach" (2021) 65:1 *St. Louis University Law Journal*.

Sossin, Lorne & Mark Friedman, "Charter Values and Administrative Justice" (2014) 67 *Supreme Court Law Review* 391.

Summers, Clyde W, "From industrial democracy to union democracy" (2000) 21:1 *Journal of Labor Research* 3.

Summers, Clyde W, "Industrial Democracy: America's Unfulfilled Promise" (1979) 1 *Clev St L Rev* 29.

Talarico, Andrea, "Technological strikebreaking A Case Study of Quebec's Anti-Scab Legislation" (2021) 76 (3) *Relations Industrielles* 587.

Teittel, Jared, "Fired Over Facebook: The Consequences of Discussing Work Online" (2012) *Western Journal of Legal Studies*.

Thompson, Michael J, "Reconstructing republican freedom: A critique of the neo-republican concept of freedom as non-domination" (2013) 39:3 *Philosophy & social criticism* 277.

Tucker, Eric, "The Faces of Coercion: The Legal Regulation of Labor Conflict in Ontario, 1880–1889" (1994) 12:2 *Law and history review* 277.

Tucker, Eric, "'That Indefinite Area of Toleration': Criminal Conspiracy and Trade Unions in Ontario, 1837-77" (1991) 27:27 *Labour* 15.

Tucker, Eric, "The Constitutional Right to Bargain Collectively: The Ironies of Labour History in the Supreme Court of Canada" (2008) 61:61 *Labour* 151.

Waldron, Jeremy, "The Core of the Case against Judicial Review" (2006) *The Yale Law Journal*, Vol. 115, No. 6, 1346.

Zhou, Han-Ru, "Legal Principles, Constitutional Principles, and Judicial Review" (2019) 67 *American Journal of Comparative Law* 899.

OTHER SOURCES

Foreign cases

Collymore v. Attorney-General, [1970] A.C. 538.

National Labor Relations Board v. Jones & Laughlin Steel Corporation, 57 S. Ct. 615; 81 L. Ed. 893.

International instruments

International Labour Conference, *The Declaration of Philadelphia* (1944) Philadelphia.

International Labour Organization (ILO), *Constitution of the International Labour Organisation*, 1 April 1919.

UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

United Nations, "Guiding principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" framework" (2011).

Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948).

Other materials

"Elizabeth Anderson", online: *University of Michigan*, <https://lsa.umich.edu/philosophy/people/faculty/eandersn.html>.

"Federal Government met the threshold to invoke Emergencies Act: Rouleau" (February 17, 2023) *CBC News*, online: <https://www.cbc.ca/news/politics/poec-report-released-friday-1.6750919>.

NON au rapatriement unilatéral de la constitution (1981), Montreal, Archives of the Confédération des syndicats nationaux.

"On The People's Terms: A Republican Theory and Model of Democracy" (May 1, 2013), online: *New Books in Philosophy*, <https://newbooksinphilosophy.com/philip-pettit-on-the-peoples-terms-a-republican-theory-and-model-of-democracy/>.

"Philip Pettit", online: <http://www.princeton.edu/~ppetit/>.

"Truck Convoy: Ford declares provincewide state of Emergency, City pursuing injunction" (February 11, 2022) *Ottawa Citizen*, on line:

<https://ottawacitizen.com/news/local-news/truck-convoy-protest-enters-day-15-premier-to-speak-ahead-of-expected-weekend-surge-in-protesters-police>.

Bauer, Ted & Jay Dixit, "The State of Discontent: What's really behind the Great Resignation" (July 7, 2021), online: <https://neuroleadership.com/your-brain-at-work/the-state-of-discontent>.

Bragg, Billy, "There is Power in a Union" (1986).

Canada, Parliament, "Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada" (1981) 32nd Parl, 1st Sess, No 43.

Carman Baggaley, "A century of labour regulation in Canada" (1981) Economic Council of Canada, Working Paper 19.

Collins, Judy, *Bread and Roses* (1976, Elektra Records).

Glazer, Joe, *Workingman Unite* in "I Will Win, Songs of the Wobblies" (Collector Records, 1927).

Hennette-Vauchez, Stéphanie, "A Human Dignitas? The Contemporary Principle of Human Dignity as a Mere Reappraisal of an Ancient Legal Concept" (2008) European University Institute Working Papers.

Hill, Joe, "Workers of the World, Awaken!" in *The Little Red Songbook* (London: Industrial Workers of the World, 1916).

LaBossiere Parr, Danielle, "The Great Resignation: A wake up call for corporate Canada" (April 29, 2022) *Perspectives*, online: <https://navltd.com/insights/the-great-resignation-a-wake-up-call-for-corporate-canada/>.

Lévesque, Fanny, "Le Syndicat des Omnis Menace de Poursuivre Québec" (April 14, 2022) *La Presse*, online : <https://www.lapresse.ca/actualites/sante/2022-04-14/acces-a-la-premiere-ligne/le-syndicat-des-omnis-menace-de-poursuivre-quebec.php>

McCormack-George, Daire & Philip Pettit. "Republicanism and Labour Law: A Defence" (2021) NY: Social Science Research Network, 20.

Newport, Cal, The Year in Quiet Quitting (December 29, 2022) *The New Yorker*, online: <https://www.newyorker.com/culture/2022-in-review/the-year-in-quiet-quitting>.

Ovid, Noella "Almost a quarter of Canadians changed jobs amid the Great Resignation" (July 29 2022) *Financial Post*, online: <https://financialpost.com/executive/executive-summary/posthaste-almost-a-quarter-of-canadians-changed-jobs-amid-the-great-resignation>.

Palmer, Annie, "Amazon deletes job listings for analysts to track 'Labor organizing threats' following public outcry" (2020) *CNBC*, Online:
<https://www.cnn.com/2020/09/01/amazon-seeks-intelligence-analyst-to-track-labor-organizing-threats.html>.

Public Service Alliance of Canada, "Education on the Picket Line" (Ottawa: Public Service Alliance of Canada, 2004).

Talarico, Andrea, Book review of: *In the Name of Liberty: the argument for universal unionization* (M. Reiff) (2020) 75-3 *Relations Industrielles - Industrial Relations* 621.

Task Force on Labour Relations, *Canadian Industrial Relations: The Report* (1968) Canada, Privy Council.