THE RIGHT TOOL FOR THE JOB?: FREEDOM OF ASSOCIATION UNDER PROVINCIAL HUMAN RIGHTS CODES

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"It is a vain thing to imagine a right without a remedy."[1]

1. Introduction

Over the last decade, the Supreme Court of Canada has provided an expanding framework of labour rights that are protected by the constitutional guarantee of freedom of association[2] under the *Canadian Charter of Rights and Freedoms*.[3] It has now been recognized that freedom of association in the labour context protects the rights to form, join, and maintain trade unions, including a right to choice of bargaining agent which is independent from one's employer; to collectively bargain, including a duty on employers to bargain in good faith; and to strike.

But despite the, unquestionably profound, changes in s. 2(d) jurisprudence, the reach of freedom of association under the *Charter* remains limited. This is because the *Charter* applies only to government action or government actors, not to private parties or the relationships between private parties.[4] Hence, while the *Charter* will apply directly to labour relations between a government and its employees,[5] that is because of the government's role as legislator, not as an employer *qua* employer. The *Charter* does not directly protect workers within the private sector.[6] In other

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[1] *Ashby v White* (1703), 92 ER 126 [*Ashby*].

[2] See in particular *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*BC Health Services*]; *Ontario (AG) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3 [*Fraser*]; *Mounted Police Assn of Ontario v Canada*, 2015 SCC 1, [2015] 1 SCR 3 [*MPAO*]; *Meredith v Canada*, 2015 SCC 2, [2015] 1 SCR [*Meredith*]; and *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245 [*SFL*].

[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[4] *Ibid* at s 32(1). See also *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573, 33 DLR (4th) 174 and *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 95, 126 DLR (4th) 129.

[5] *BC Health Services*, *supra* note 2 at para 88.

[6] Though the constitutional protections would seem to *indirectly* protect private sector workers by preventing governments from eliminating existing statutory protections of section 2(d) rights; or even, in some cases, by placing a positive obligation upon governments to provide statutory protections to those

words, the *Charter* does not itself require private sector employers to collectively bargain with their employees; it does not relieve workers or unions of liability in tort for strike activity;[7] it does not even render collective agreements enforceable as contracts at common law.[8] Such rights and obligations arise under labour relations legislation, not from the *Charter* directly.

That said, freedom of association is also protected under human rights legislation.[9] In some cases, application of the freedom is specifically limited to review of other legislation; the human right statute's purpose is to ensure that the rights and freedoms protected therein are respected within other legislation. [10] More germane to this article, however, is where a province or territory has included freedom of association within its human rights code. Such inclusion is admittedly uncommon – only Yukon, Saskatchewan, and Québec have done so to date.[11] However such inclusion, when coupled with the Supreme Court's purposive approach to freedom of association, arguably places the same obligations that are currently upon public employers – a duty to collectively bargain, a duty not to retaliate against employees who strike – directly upon private employers.[12] And this may be true even – or especially – for those workers who are not "unionized" [13]

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currently excluded from, for instance, trade union legislation: see *Dunmore v Ontario*, 2001 SCC 94, [2001] 3 SCR 1016 [*Dunmore*].

[7] While strikes are no longer *forbidden* under the common law (*Canadian Pacific Railway Co v Zambri*, [1962] SCR 609, 34 DLR (2d) 654, strikers could be and can still be liable for numerous torts. For a general and still relevant review, see IM Christie's seminal *The Liability of Strikers in the Law of Tort: A Comparative Study of the Law in England and Canada* (Kingston: Queen's University Press, 1967) and Harry Arthurs, "Tort Liability for Strikes in Canada; Some Problems in Judicial Workmanship" (1960) 38 Can Bar Rev 346. See also *RWDSU Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, [2002] 1 SCR 156 at para 73, 208 DLR (4th) 385 (continuing applicability of tort law in restraining picketing).

[8] *Young v CNR*, [1931] 1 DLR 645, [1931] AC 83 [*Young*], (collective agreements are not enforceable at common law). While unions have often been granted "personhood" under labour legislation (for example, s 6-3 of *The Saskatchewan Employment Act*, SS 2013, c S-15.1 (*SEA*), states that "for the purposes of this Act, every union is deemed to be a person"), such status is often limited to the scope of the statute in question. And while unions also have sufficient legal status to, for instance, be found liable for contempt, as in *United Nurses of Alberta v Alberta (AG)*, [1992] 1 SCR 901, 89 DLR (4th) 609, that does not mean that there will be the necessary privity of contract to convert individual contracts of employment to a legally binding collective agreement in the absence of a statutory declaration to that effect.

[9] The *Charter* is of course also a "human rights" statute, and in using the term "human rights legislation" I am not suggesting that the *Charter* is something other than what it is. For the purposes of this article, however, I will use the term "human rights legislation" or "human rights code" to distinguish "mere" statutes from the *constitutional* human rights protections found in the *Charter*.

[10] *The Alberta Bill of Rights*, RSA 2000, c A-14, and the *Canadian Bill of Rights*, SC 1960, c 44.

[11] *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1, s 6 [*SHRC*]; the Yukon *Human Rights Act*, RSY 2002, c 116, s 5 [*YHRA*]; *The Charter of Human Rights and Freedoms*, RSQ c C-12 at s 3 [*Québec Charter*].

[12] As I will explore further below, for the purposes of enforcement, the Yukon and Saskatchewan statutes, at least, do not distinguish between fundamental freedoms and anti-discrimination provisions.

[13] I recognize here that Professor Roy Adams, for one, takes issue with the Canadian tendency to equate "represented by a certified bargaining agent" to "unionized", as there are other ways to "unionize" outside of the *Wagner Act* model of labour relations: Roy Adams, "*Fraser v Ontario* and International Human

under the relevant labour relations legislation, and who therefore cannot take advantage of the statutory protections that currently exist for workers who are covered, or who are seeking to be covered, by that legislation.

This presents a conundrum. On the one hand, if freedom of association is guaranteed within a provincial statute, why cannot workers (or indeed anyone) exercise that freedom on the terms set out by the Supreme Court under the *Charter*? On the other hand, is it a given that the two freedoms of association are equivalent? And might enforcement of a provincial freedom of association undermine or destabilize the existing labour relations legislation that the Supreme Court has taken pains to reinforce in its section 2(d) jurisprudence?

What I explore in this article, therefore, is the potential of provincial human rights codes in promoting and protecting freedom of association and labour rights for non-unionized workers.[14] I am less concerned with the use of freedom of association to challenge legislative provisions; that can also be done using the *Charter*, and while it may be arguable that at least some elements of Canadian labour relations regimes are unconstitutional, [15] that is not my focus here, though that aspect of the inquiry will become more relevant when dealing with the right to strike.

It is hardly self-evident, however, that human rights commissions are a possible (or appropriate) venue to pursue associational rights. There are numerous issues that must be addressed in making this argument. The issues I will address therefore are, in order: first, whether human rights commissions can, or should, be used to enforce freedom of association; second, whether freedom of association under human rights codes is the equivalent to freedom of association under the *Charter*; and third, what freedom of association under human rights codes might look like in application. In terms of application, I will examine the less controversial applications – freedom of association as an aspirational principle, as a principle used in interpreting other legislation, and as a complementary remedy within labour arbitrations – and then the more controversial – specifically the duty to recognize

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Rights: A Comment" (2009) 14 CLELJ 378 at 387 and "A Pernicious Euphoria: 50 years of Wagnerism in Canada" (1995) 3 CLELJ 321. However, for convenience's sake, I will uphold the general practice and refer to workers who are represented by a certified bargaining agent as "unionized", for the most part, and those who are not as "non-unionized". There is some ambiguity here, as workers who are represented by an exclusive bargaining agent that is uncertified, but voluntarily recognized by the employer, would also usually be seen as "unionized"; where such distinctions become relevant I will be more precise in my nomenclature.

[14] As discussed later in the paper, where workers fall under the existing protections of labour relations legislation, the necessity and desirability of human rights commissions entertaining associational rights complaints are much reduced.

[15] For instance, I have previously argued that the statutory restrictions on sympathetic action, such as workers refusing to cross another union's picket line, are unconstitutional: Keir Vallance, "'Lest You Undermine Our Struggle: Sympathetic Action and the *Canadian Charter of Rights and Freedoms*" (2015) 53:1 Alta L Rev 139 [Vallance, "Lest You Undermine"].

employee associations (especially those without majority support within the workplace), the duty to bargain in good faith, and the right to strike.

I should add that nothing I say here should be taken to suggest that governments cannot or should not amend existing labour relations legislation to expand the range of protections or the range of workers who are covered. Of course, governments can do so; and perhaps should, given the limited success of the existing regime in promoting collective bargaining.[16] For that matter, governments in Saskatchewan, Yukon, and Québec could remove freedom of association from their human rights codes or restrict the application of fundamental freedoms to review of other legislation. However, in the absence of legislative will one way or the other, it may be that the courts (or as I will argue, human rights commissions) may provide an alternative avenue for labour rights.[17] And at a more basic level, my focus is, simply put, on the implications that arise from the *existing* legislative guarantees of freedom of association. We already have the right; what, then, is our remedy?[18]

A final introductory point: While the focus of this paper is labour law, the interaction between *Charter* rights and provincial human rights codes, and labour rights and human rights, may be of more general interest. In the vein of this issue of the University of New Brunswick Law Journal, the issues raised herein have constitutional and administrative law implications. The interaction between constitutional *Charter* freedoms and the equivalent quasi-constitutional freedoms within human rights legislation is not limited to freedom of association; though association is perhaps the most complicated in application, given the positive obligations inherent in the section 2(d) jurisprudence. The use of human rights commissions to enforce fundamental freedoms also raises significant administrative law implications, with an administrative tribunal potentially being asked to deal with issues outside of its institutional competence; and with two competing tribunals (human rights commissions and labour relations boards) potentially dealing with identical or similar issues.

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[16] In 2011, for example, just over 31 per cent of Canadian employees were covered by a collective agreement, but this number is misleading because while almost 75 per cent of public sector workers were covered, only 17.5% of private sector workers were: Canada, Statistics Canada, *Unionization 2011*, by Sharanjit Uppal, Catalogue no. 75-001-x (Ottawa: Statistics Canada, 2011), online: StatsCan <www.statcan.gc.ca/pub/75-001-x/2011004/article/11579-eng.pdf>. In the private sector this was a decline from 21.3% in 1997 and 19% in 2004: Roy Adams, *Labour Left Out*: *Canada's Failure to Protect and Promote Collective Bargaining as a Human Right* (Ottawa: Canadian Centre for Policy Alternatives, 2005) at 21 [Adams, *Labour Left Out*].

[17] In a similar vein, see Roy Adams, "Bringing Canada's *Wagner Act* Regime into Compliance with International Human Rights Law and the *Charter*" (2016) 19:2 CLELJ 365 [Adams, "Compliance"].

[18] As stated by McLachlin J (as she then was) in *Watkins v Olafson*, [1989] 2 SCR 750 at 767, 61 DLR (4th) 577, paraphrasing *Ashby*, *supra* note 1*:* "Where there is a right, there must also be a remedy."

2. Non-Wagnerist Labour Rights for the Non-Unionized

Canadian labour relations legislation is based on the American "*Wagner Act*".[19] Union representation of workers under *Wagner Act*-style (or "Wagnerist") legislation is premised on two key principles: majoritarianism and exclusivity. If workers wish to collectively bargain with their employer, they must first become members of a bargaining unit certified by the relevant Labour Relations Board. Within the proposed bargaining unit, a majority of the workers must vote to be represented by the applicant union – majoritarianism – and then *only* the applicant union may represent those workers – exclusivity – unless and until the union is displaced by another union or the workers choose to decertify. If the union is successful, then it becomes the bargaining agent for all workers in the bargaining unit and the employer and union both have a statutory duty to bargain in good faith and make efforts to conclude a collective agreement. [20] If the applicant union is unsuccessful in becoming the bargaining agent for the bargaining unit, however – if it fails to obtain majority support within the unit – then the employer is under no legal obligation whatsoever to collectively bargain with either its employees, or any union.

Canadian labour relations legislation is also characterized by strict control of strike activity. Workers who are not represented by a certified bargaining agent cannot, generally speaking, strike. [21] Workers who undertake such action will be seen to have breached, or even repudiated, their contracts of employment.[22] And workers who *are* represented by a certified bargaining agent are governed by the so-called "peace obligation" which prohibits any strike during the term of a collective agreement.[23] Where workers historically used the strike to force an employer to recognize and bargain with their union, they now use the certification process and

[19] *National Labor Relations Act*, 29 USC §§ 151-169 (*Wagner Act*). I will also use the terms "Wagnerist" or "Wagnerism" when discussing labour relations statutes or principles based on the *Wagner Act*.

[20] See e.g. the *SEA*, *supra* note 8 at s 6-7 (duty to bargain in good faith) and 6-62(1)(d) and 6-63(1)(c) (unfair labour practice for employers or unions, respectively, to fail to bargain in good faith); *Canada Labour Code*, RSC 1985, c L-2, Part 1, Div IV.

[21] For example, s 6-63(1)(d) of the *SEA* sets out that it is an unfair labour practice for an employee to, *inter alia*, take part in a strike unless a "strike vote is taken, and a majority of employees who vote do vote in favour of a strike", while s 6-32 provides that "no employee shall strike before a vote has been taken by the employees in the bargaining unit affected and the majority of those employees who vote have voted for a strike". The prohibition here is both explicit (no employee shall strike) and implicit (by definition, unorganized workers do not have a "bargaining unit" as defined under the *SEA*). The interaction between such provisions and situations where an employer has voluntarily recognized an uncertified bargaining agent is not always clear. See also Roy Adams, *Industrial Relations Under Liberal Democracy* (Columbia: University of South Carolina Press, 1995) at 89; Peter Barnacle, Roderick Wood, Geoffrey England & Innis Christie, *Employment Law in Canada*, 4th ed (Markham: LexisNexis Canada, 2005) at 11-10

[22] See e.g. *Reference Re Public Service Employees Relations Act (Alta)*, [1987] 1 SCR 313, 38 DLR (4th) 161. [*Alberta Reference*] at paras 176-77, per McIntyre J.

[23] See e.g. *SEA*, s 6-30; *Canada Labour Code*, s 88.1. See also generally Geoffrey England, "Some Thoughts on the Peace Obligation" (1980) 12:52 Ottawa Law Rev 521.

the statutory "duty to bargain in good faith". Where strikes were once the means by which collective agreements were enforced,[24] disputes between employers and their unionized employees are now handled through statutorily-mandated labour arbitration.[25]

Outside of labour relations legislation, labour rights such as collective bargaining and the right to strike are fragile. Consider non-unionized workers undertaking strike action. This could include activity such as the "fast food strikes" or the "Fight for 15"[26] in the United States, where low-wage workers walked off the job *en masse* to militate for a higher minimum wage and more effective protection of union organizing. Or it could include less dramatic action such as Icelandic women collectively leaving work two hours early to protest the 30 per cent wage gap between women and men.[27] Such action would not be protected – indeed, would be illegal – under Canadian labour relations statutes. The workers would be liable for discipline or dismissal owing to their individual breaches of contract.

Consider also a situation where workers wish to collectively bargain with their employer, but they either cannot obtain the majority support necessary to certify a bargaining agent under the labour relations legislation in their jurisdiction, or they do not wish to avail themselves of the rights, protections, and obligations that labour relations legislation would provide. Their employer has no duty to negotiate with them; Wagnerism is, as Professor David Doorey has described it, an "all or nothing" affair.[28]

A helpful approach to labour rights, and one that I will adopt in my discussion, is Professor Doorey's characterization of labour rights as "thick" and "thin".[29] The "thinnest" right is what the Supreme Court has referred to as "constitutive" freedom of association – the right to form, belong, and maintain worker associations.[30] "Thicker" rights include the right to exercise a "right of

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[24] See *Young, supra* note 8.

[25] See *SEA*, s 6-45ff; *Labour Relations Code*, RSA 2000, c L-1, s 135.

[26] E.g. Adam Edelman, "Thousands of airport, fast food workers across U.S. plan strike", *New York Daily News* (21 November 2016), online: <www.nydailynews.com/news/national/thousands-airport-fast-food-workers-u-s-plan-strike-article-1.2882236>; Justin Worland, "Fast Food Workers Strike in 270 Cities to Demand $15 Minimum Wage" *Time* (November 10, 2016), online: <time.com/4106133/fast-food-workers-strike>; Alana Semuels, "Fast-food workers walk out in NY amid rising US labor unrest" *Los Angeles Times* (29 November 2012), online: <articles.latimes.com/2012/nov/29/business/la-fi-mo-fast-food-strike-20121129>. While the strikes have focused on raising the national minimum wage in the United States to fifteen dollars per hour, they have also included demands for labour rights and the right to organize without fear of retaliation.

[27] Uri Friedman, "Why Thousands of Women in Iceland Left Work Two Hours Early This Week" *The Atlantic* (27 October 2016), online: <www.theatlantic.com/international/archive/2016/10/iceland-women-gender-pay-gap/505460/>.

[28] David Doorey, "Graduated Freedom of Association: Worker Voice Beyond the Wagner Model" (2012), 38:2 Queen's LJ.

[29] *Ibid.*

association" without being "punished, terminated or interfered with" by one's employer; the right to make "collective representations" to an employer through an association; and an obligation on an employer to "receive collective employee representations, and to engage in 'meaningful dialogue' and consider representations 'in good faith'".[31] The "thickest" rights are those found under Wagnerist labour relations legislation – a right to strike (on the terms allowed under the legislation) without penalty; access to grievance arbitration, interest arbitration, and/or mediation to assist with collective bargaining; and a statutory duty to bargain in good faith.[32] Some of the rights that he categorized as "thickest" (the right to strike, to full collective bargaining, and to mediation and arbitration; as well as a duty to bargain in good faith)[33] have arguably now been constitutionalized in *SFL* (the right to strike)[34] and *BC Health Services* and *Fraser* (a constitutional duty to bargain in good faith).[35]

To further apply Professor Doorey's categorization, my focus in this article is on the "thinner" and "thicker" labour rights – but not the "thickest" (i.e. Wagnerist) rights.[36] I am not suggesting that human rights commissions be called upon to create and adjudicate a comprehensive labour code, nor that they insert themselves wholesale into matters properly before a labour relations board.[37]

In addressing labour rights outside of existing labour statutes, the *Charter* is of limited help. The Supreme Court has made it quite clear that Wagnerism is, in

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[30] *Ibid* at 533; *MPAO*, *supra* note 2 at para 52.

[31] *Ibid.*

[32] *Ibid.*

[33] *Ibid*.

[34] *SFL*, *supra* note 2 at paras 3, 24, 77.

[35] *BC Health Services*, *supra* note 2 at para 90; *Fraser*, *supra* note 2 at paras 40ff. See also Justice Rothstein's dissent in *MPAO*, *supra* note 2 at para 169.

[36] Note however that I do consider the right to strike later in the paper.

[37] Practically speaking, human rights legislation generally grants its Commission the discretion to refuse to accept a complaint where the subject matter of the complaint has been adequately dealt with elsewhere: see *YHRA*, s 20(1)(h) and (i): the commission shall investigate a complaint unless "… the complainant has not exhausted grievance or review procedures which are otherwise reasonably available or procedures provided for under another Act…"; or "the substance of the complaint has already been dealt with in another proceeding"; *SHRC*, *supra* note 11 at s 27(1)(d): the commission may dismiss a complaint if "the substance of the complaint has been appropriately dealt with pursuant to another Act or proceeding". Where a worker or a group of workers has availed, or attempted to avail, themselves of Wagner Act-style legislation, they gain access to the rights, protections, and obligations of that regime. Again, such rights and protections may not extend beyond that specific statute or regime. See e.g. *SEA*, *supra* note 10, s 6-62(1)(a) (an employer may not "interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Part" (emphasis added); similar restrictions appear under 6-62(1)(g) (discrimination in terms and conditions of employment), while the duty to bargain is limited to bargaining with a "bargaining unit" (6-62(1)(d)). The implication seems to be that labour rights outside of the *Act* are not so protected. Notably the *Canada Labour Code*'s protections (s 94) are not so limited, though strike activity is only protected insofar as it is permitted by the *Code* (s 94(3)(a)(vi)).

general, constitutional.[38] While exclusion of a group of workers *from* a Wagnerist statute, or at least from protections comparable to those within a Wagnerist statute, might be unconstitutional,[39] the Court has shown little appetite to overturn the Wagnerist model. But the *Charter* is not entirely without application. If an employer were to pursue an unfair labour practice against non-unionized employees who went on strike, an argument could be made that the prohibition on strikes is unconstitutional.[40] It is more likely, however, that an employer would simply either dismiss striking employees, or accept their repudiation of their contracts of employment, rather than pursue an ULP – though it is perhaps also arguable that the values underlying the *Charter*[41] would dictate that such strikes would not be considered breaches, or at least not repudiation, of contract by employees.[42]

I would argue, however, that freedom of association under human rights legislation might provide meaningful protection of labour rights. In particular, in relying upon a human rights code, a claimant is not dependent upon "*Charter* values"; the human rights protection will apply to private employers and to the common law directly. The procedural protections under human rights legislation may also provide greater access to labour rights for those workers not represented by an established union. And if nothing else, placing freedom of association within human rights legislation can serve as an aspirational statement about the value of labour rights.[43]

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[38] See *MPAO*, *supra* note 2 at paras 94–95 (*Wagner Act* model is one possible model); SFL, *supra* note 2 at para 101-102 (legislative amendments making it more difficult to unionize under Wagner Act model nonetheless constitutional).

[39] See *MPAO*, *supra* note 2; *Dunmore*, *supra* note 6.

[40] Though equally arguably justified under section 1. See Brian Etherington, "The Right to Strike Under the Charter after *Saskatchewan Federation of Labour*: Applying the New Standard to Existing Regulation of Strike Activity" (2016) 19 CLELJ 492.

[41] See e.g. *Hill*, *supra* note 4 at para 91.

[42] See again Vallance, "Lest you Undermine", *supra* note 15.

[43] That said, Professor Adams made a similar argument over ten years ago about the aspirational/educational value of including freedom of association in human rights legislation: Adams, *Labour Left Out*, *supra* note 16 at 39–40. The argument has merit, but I cannot help but note that Saskatchewan has had freedom of association in its human rights legislation since 1947 (*The Saskatchewan Bill of Rights Act, 1947*, SS 1947, c 35, s 5), with little or no observable impact on the state of the law in that province. Perhaps the newly-expanded scope of freedom of association that has now been recognized by the Supreme Court will revitalize this argument.

3. Human Rights Commissions and Fundamental Freedoms

i. Human Rights Commissions as an Appropriate Venue

It may at first blush seem absurd to suggest that workers pursue freedom of association complaints before human rights commissions and tribunals.[44] For reasons that follow, I suggest the concept is not as far-fetched as it may appear and, indeed, the Supreme Court's freedom of association jurisprudence may require us to consider the possibility. At the most basic level, freedom of association does, after all, appear within the human rights codes in question. That suggests on the face of it that it should be taken as seriously as other provisions within the statute. Further, the Supreme Court has again invited exploration of these issues in its administrative law jurisprudence. The traditional hostility of courts to the ability of human rights commissions and tribunals[45] to interpret their "home statutes" has faded, and a more deferential standard of review regarding decisions of administrative tribunals has become the norm.[46] Commensurate with that relaxed standard is, perhaps, a greater ability of commissions and tribunals to engage with and interpret previously unexplored territory within the wording of their statutes, particularly when it is serving to extend the reach of a right also protected under the *Charter*.[47]

I will note here also that as far as enforcement is concerned, the Yukon and Saskatchewan statutes do not distinguish between bill of rights portions and non-discrimination portions of the statute. There is therefore no statutory bar to proceeding with a human rights complaint, including investigation by the Commission or subsequent litigation, regarding violation or infringement of a

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[44] I will note at the outset that in Yukon, Saskatchewan, and Québec, it falls upon the human rights commission to accept, investigate, mediate, and carry forward human rights complaints. However, in Saskatchewan, it now falls upon the Saskatchewan Court of Queen's Bench, not a human rights tribunal, to adjudicate any complaints that proceed to a hearing: *SHRC*, *supra* note 11 at s 29.6. Yukon and Québec retain administrative tribunals – a board of adjudication and a human rights tribunal, respectively – as the adjudicative body: see *YHRA*, supra note 11 at s 22 and *Québec Charter*, *supra* note 11 at s 78-82.

[45] *Canada (CHRC) v Canada (AG)*, [2011] 3 SCR 471 [*Mowat*] at paras 19-20.

[46] E.g. *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 22, [2016] 2 SCR 293. See also *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 SCR 895; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]; *R v Conway*, 2010 SCC 22 at paras 81-84, [2010] 1 SCR 765 [*Conway*] (administrative tribunals' ability to apply the *Charter*). See also Paul Daly, "Canada's Bipolar Administrative Law: Time for Fusion" (2014) 40:1 Queen's LJ 213 at 218.

[47] Indeed, I would suggest that it would be an error if a human rights commission were to refuse to take on a freedom of association complaint based only on the fact that workers could pursue certification under another Act. After all, the Supreme Court has stated that the Wagner Act model has not been constitutionalized. To interpret freedom of association to mean simply compliance with a Wagner Act–style labour relations statute seems not merely to limit but outright ignore a right given by a quasi-constitutional statute.

person's freedom of association.[48] The *Québec Charter* differs in that its investigative functions seem limited to the statute's anti-discrimination provisions,[49] and human rights complaints must be within the "sphere of investigation of the commission."[50] The *Québec Charter* does, however, have a "catch-all" investigative provision which allows the Commission to investigate "any act of reprisal or attempted reprisals and into any other act or omission which, in the opinion of the commission, constitutes an offence under this Charter…"[51] Nonetheless, the Québec commission's mandate to accept and investigate human rights complaints regarding freedom of association is more ambiguous than under the Yukon and Saskatchewan statutes.

It should be noted, though, that the *Québec Charter* does provide the Commission with the ability to identify where *legislation* has violated the *Québec Charter*, though its power is only to recommend changes to the government.[52] Both the *YHRA* and the *SHRC* provide that each Act takes precedence over other legislation.[53] In the *SHRC*, statutory provisions that are inconsistent with the *Code* are "inoperative", while under the *YHRA* the *Act* "supersedes" other legislation. Neither statute expressly provides the power to strike down legislation. However, the *Charter* can be used for that purpose insofar as freedom of association is statutorily infringed.

The Supreme Court's constitutional and administrative law jurisprudence invite exploration. But furthermore, the purposes of the various statutes, regimes, and areas of law at play here – the *Charter*, human rights legislation, and labour law - are also eminently compatible. The purposes of both freedom of association and of human rights legislation are arguably furthered by enforcement of labour rights under human rights statutes. The Supreme Court has confirmed that freedom of association should be interpreted generously and purposively;[54] that it is "aimed at reducing social imbalances, not enhancing them;"[55] that it "prevents individuals from being overwhelmed by the powerful while at the same time providing collective strength."[56] While s. 2(d)'s purpose may be to protect individuals from "*state-enforced* isolation",[57] freedom of association under human rights legislation is not so

[48] *YHRA*, *supra* note 11, s 20 ("a contravention of this *Act*"); *SHRC*, *supra* note 11 at s 27 ("contravened a provision of this Act").

[49] *Québec Charter*, *supra* note 11 at s 71(1).

[50] *Ibid* at s 74.

[51] *Ibid* at s 71(9).

[52] *Ibid* at s 71(6)

[53] *SHRC*, *supra* note 11 at s 44; *YHRA*, *supra* note 11 at s 39.

[54] *MPAO*, *supra* note 2, para 5.

[55] *Ibid* at para 59

[56] *Ibid* at para 70.

[57] *Ibid* at 58, citing the *Alberta Reference* at 365 [emphasis added].

restricted. Using human rights codes to extend the reach of a now-recognized constitutional right seems compatible with, albeit not a direct application of, the Supreme Court's expansion of administrative tribunals' ability to apply *Charter* remedies.[58]

Similarly, human rights legislation has a special, quasi-constitutional[59] status and should be interpreted liberally and purposively.[60] And certainly a number of the types of complaints that could involve freedom of association, at least, are in essence discrimination cases (i.e. reprisal for union involvement or union or strike activity). There seems no reason why the Commission's expertise could not be turned to preventing discrimination on the basis of union activity; and indeed the existence of freedom of association within the *Code* suggests that workers have a right to freedom from anti-union discrimination – "right of non-reprisal", in Professor Doorey's words.[61]

When applying freedom of association to labour law, it is also important to consider the underlying purposes of labour law. Professor Doorey has framed the goal of labour law as the "facilitation of employee voice,"[62] while Professor Beth Bilson has suggested that worker participation and self-determination are rights in themselves, not merely means to an end.[63] The value of freedom of association in the workplace was recognized by the majority in *MPAO,* citing Dickson CJ in the *Alberta Reference* – that association was of most value to those who were "liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer."[64] In the *Alberta Reference*, Dickson CJ also noted that collective bargaining enhanced the "human dignity, liberty and autonomy of works 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…"[65]

Finally, the purpose and values underlying the *Charter* – "human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of

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[58] See, e.g., *Conway*, *supra* note 46.

[59] *ICBC v Heerspink*, [1982] 2 SCR 145, 137 DLR (3d) 219; *Ontario Human Rights Commission v Simpson– Sears*, [1985] 2 SCR 536, 52 OR (2d) 799.

[60] *Gould v Yukon Order of Pioneers*, [1996] 1 SCR 571 at para 5, 133 DLR (4th) 449 [*Gould*] ("a fair, large and liberal interpretation with a view to advancing its objects"); Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis Canada Inc, 2008) at 497.

[61] Doorey, *supra* note 28 at 528–529.

[62] *Ibid* at 520. See also *MPAO*, *supra* note 2 at paras 55, 87.

[63] Beth Bilson, "Future Tense: Some Thoughts About Labour Law Reform" (2005) 12 CLELJ 233 at 256, 259.

[64] *MPAO*, *supra* note 2 at para 57.

[65] *Alberta Reference*, *supra* note 22 at para 82.

democracy"[66] – are close to the stated purposes of human rights legislation. The *SHRC*, for example, provides that the *Code* is meant to "promote recognition of the inherent dignity and the equal inalienable rights of all members of the human family" and to "further public policy in Saskatchewan that every person is free and equal in dignity and rights and to discourage and eliminate discrimination".[67] To this I will add one more related point: access to justice. Unlike *Charter* litigation, human rights legislation places emphasis on conciliation and settlement prior to recourse to an adversarial hearing process.[68] There is a greater potential, perhaps for parties to mediate or otherwise resolve their dispute within the human rights framework - the process is arguably less adversarial than that within the Wagnerist model of labour relations. If the goal of labour rights is employee "voice", then resolution by the parties themselves would continue to be a priority within the human rights process (as it ostensibly is within labour relations legislation). Human rights commissions potentially have a greater emphasis on the good of society generally – the social good – rather than merely justice between the parties – workplace justice.[69] This, at least in theory, places greater emphasis on social relationships and harmony over individualistic conflict. It is when a dispute is "closed to conciliation and mediation" that "human rights law and procedures [enter] the realm of the semijudicial."[70] In situations where individuals are attempting to exercise their labour rights, possibly without the assistance of an established union and the accompanying resources and expertise, such access to justice concerns seem relevant.

At the same time, the carriage of a complaint by a human rights commission may by its very nature disempower or delegitimize employee voice. A human rights Commission may have a final say on whether a settlement negotiated between the parties is acceptable[71] and may refuse to proceed with a complaint if a complainant has refused an offer of settlement that the Commission views as fair.[72] Employee voice or employee interests may be subordinated to the Commission's view of what is fair, or what is in the broader interest. While the means of enforcement of "thinner" labour rights may be *available* under human rights legislation, there is by no means a guarantee that they will be exercised in a manner that respects or promotes the principle (per Professor Bilson) of "self-determination" which, at least ostensibly, underlies collective bargaining under labour relations legislation.

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[66] *Ibid* at para 81.

[67] *SHRC*, *supra* note 11 at s 3.

[68] Brian R Howe & David Johnson, *Restraining Equality: Human Rights Commissions in Canada* (Toronto: University of Toronto Press, 2000) at 11, 43; see *SHRC*, *supra* note 11 at s 28. See also *Scowby v Glindenning*, 148 DLR (3d) 55, 1983 CanLII 2065 (SKCA) (rev'd on other grounds [1986] 2 SCR 226) at paras 19, 22 (emphasis on amicable resolution).

[69] However, this also raises the uncomfortable question of to what extent labour rights should be subordinate to the "greater good," though Wagnerism already unquestionably does so in many ways (e.g. emphasizing industrial peace via the peace obligation).

[70] *Ibid* at 46.

[71] *SHRC*, *supra* note 11 at s 28(2.1).

[72] *Ibid* at s 29.5(2); *YHRA*, *supra* note 11 at s 20(1)(g).

ii. The Risks of "Labour Rights as Human Rights"

In following this line of reasoning, it is also important to note that pursuing freedom of association under human rights codes – of characterizing labour rights as human rights – is not free of risk or controversy. The arguments invoke the long-standing debate over labour rights as human rights; an ongoing debate among those sympathetic to unions since the advent of the *Charter* – one between, in Professor Brian Etherington's terms, *Charter* "romantics," "realists," and "pragmatists."[73] There are certainly those who have seen *Charter* rights (and the use of the language of human rights generally) as a welcome addition to the labour field[74] and caution that exclusion from constitutional discourse leaves labour vulnerable to government action,[75] or who at least view a human-rights based rhetoric as having potential.[76] But there are also ample and valid criticisms of viewing labour rights through the lens of human rights discourse. There has been and is significant hostility within the labour relations community to rights- or *Charter*-based analysis of labour law. Such hostility is perfectly understandable, whether it is based on distrust of the judiciary[77] after a "century of bruising encounters with judges determined to manipulate the

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[73] Brian Etherington, "An Assessment of Judicial Review of Labour Laws Under the Charter: Of Realists, Romantics and Pragmatists" (1992) 24 Ottawa L Rev 685.

[74] E.g. Roy Adams, "The Revolutionary Potential of *Dunmore*" (2003), 10 CLELJ 117 [Adams, "*Dunmore*"], Roy Adams, "From Statutory Right to Human Right: The Evolution and Current Status of Collective Bargaining" (2008) 12 Just Labour 48 [Adams, "From Statutory Right to Human Right"], and Adams, *Labour Left Out*, *supra* note 16; Ken Norman, "What's Right is Right: The Supreme Court Gets It" (2008) 12 Just Labour 16; Guy Davidov, "Judicial Development of Labour Rights – Contextually" (2010) 15(2) CLELJ 235; David Beatty, *Putting the Charter to Work: Designing a Constitutional Labour Code* (Kingston: McGill Queen's University Press, 1987); Canadian Foundation for Labour Rights website, online: <www.labourrights.ca>.

[75] E.g. David Beatty, "Labouring Outside the *Charter*" (1991) 29 Osgoode Hall LJ 839; Alan Hyde, "Exclusion is Forever: How Keeping Labour Rights Separate from Constitutional Rights Has Proven to Be a Bad Deal for American Trade Unions and Constitutional Law" (2010) 15(2) CLELJ 251.

[76] Judy Fudge, "Labour Rights as Human Rights: Turning Slogans into Legal Claims" (2014) 37 Dal LJ 601; Bradley Walchuk, "The Best of Both Worlds: A Pragmatic Approach to the Construction of Labour Rights as Human Rights" (2009) 14 Just Labour 75 [Fudge, "Labour Rights as Human Rights"]. Both Fudge and Walchuk have also expressed skepticism, or at least caution, about the value of rights discourse or rights litigation in the labour field: Judy Fudge, "Labour, Courts, and the Cunning of History" (2010) 16 Just Labour 1 and Judy Fudge, "The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the Health Services and Support case in Canada and Beyond" (2008) 37 Indus LJ 25; Bradley Walchuk, "Union Democracy and Labour Rights: A Cautionary Tale" (2011) 2:2 Global Labour J 106.

[77] E.g. Eric Tucker, "The Constitutional Right to Bargain Collectively: The Ironies of Labour History in the Supreme Court of Canada" (2008) 61 Labour/Le Travail 151; Judy Fudge; Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thomson Educational Publishing, Inc, 1994) at ch 5; Harry Arthurs, "'The Right to Golf': Reflections on the Future of Workers, Unions and the Rest of Us Under the Charter" (Labour Law Under the Charter, delivered at the School of Industrial Relations and Faculty of Law, Queen's University, 24-26 September 1987) [*Labour Law Under the Charter*].

common law and legislation to extinguish rights of workers";[78] scepticism over the efficacy or practicality of rights litigation as a means of protecting labour rights;[79] or concerns regarding rights-based rhetoric or legalism in labour relations or more generally.[80] While the Supreme Court has recognized, in what could almost be described as a throw-away line, that the *Charter* protects collective rights as well as individual rights,[81] that cannot be a full answer to the skeptics.

A more substantive response, at least within the scope of this paper, may be found in the nature of human rights commissions, which I canvassed earlier. Human rights complaints are relatively inexpensive to pursue, compared to constitutional litigation. And the ostensibly less adversarial nature of processes under human rights legislation may mean that labour rights under human rights legislation would *not* necessarily fall into a rights model that is individualistic, atomistic, or inherently corrosive to collective labour rights. But, on the other hand, the guiding (or, less charitably, paternalistic) hand of the Commission in its carriage of complaints may also serve to stifle class consciousness and radicalism, just as (in some skeptics' view) does the *Charter*.

I am not convinced that the skeptics are entirely wrong. Just as with rights discourse, applying human rights legislation to labour rights has its risks. While, in

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[78] Sandra Freedman, "Scepticism Under Scrutiny: Labour Law and Human Rights" in Tom Campbell et al, eds, *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2002) 197.

[79] E.g. Harry Arthurs, "The Constitutionalization of Employment Relations: Multiple Models, Pernicious Problems" (2010) 19 Soc & Leg Stud 43, and Harry Arthurs "Constitutionalizing the Right of Workers to Organize, Bargain and Strike: The Sight of One Shoulder Shrugging" (2010) 15(2) CLELJ 373 [Arthurs, "Constitutionalizing the Right of Workers"]; Bob Hepple, "The Right to Strike in an International Context" (2010) 15(2) CLELJ 133; Harry Arthurs & Brent Arnold, "Does the Charter Matter?" (2005) 11 Rev Const Stud 37; Bryan Palmer, "What's Law Got to Do With It?: Historical Considerations on Class Struggle, Boundaries of Constraint, and Capitalist Authority" (2003) 41 Osgoode Hall LJ 465; Paul JJ Cavalluzzo, "Freedom of Association – its Effect upon Collective Bargaining and Trade Unions" in *Labour Law Under the Charter*, *supra* note 77 at 267 [Freedom of Association]; Charles W Smith, "Labour, Courts and the Erosion of Workers' Rights in Canada" in Stephanie Ross & Larry Savage, eds, *Rethinking the Politics of Labour in Canada* (Winnipeg: Fernwood Publishing, 2012) 184. See also Larry Savage & Charles W Smith, *Unions in Court: Organized Labour and the Charter of Rights and Freedoms* (Vancouver: UBC Press, 2017). For an interesting view on the interaction between human rights and labour rights, specifically regarding the agendas and perspectives of organizations and activists within the labour movement and human rights movement, see Kevin Kolben, "Labor Rights as Human Rights?" (2009–2010) 50 Va J Int'l L 449.

[80] E.g. Palmer, *supra* note 79; Susannah Quail, "Labour Rights and Labour Politics under the *Charter* (2013-2014), 45 Ottawa L Rev 343 (specifically regarding the "de-radicalizing" effect of *Charter* litigation at p 359) Eric Tucker, "Labor's Many Constitutions (And Capital's Too)" (2012) 33 Comp Lab L & Pol'y J 355; Harry Arthurs, "Labour Law Without the State?" (1996) 46 UTLJ 1 at 40 (legalistic approaches as "corrosive" to collective bargaining) and Harry Arthurs, "The New Economy and the New Legality: Industrial Citizenship and the Future of Labour Arbitration" (1999) 7 CLELJ 45; Larry Savage, "Labour Rights as Human Rights? A Response to Roy Adams" (2008) 12 Just Labour 68. More generally, see Allan Hutchinson and Andrew Petter, "Private Rights/Public Wrongs: The Liberal Lie of the *Charter*" (1988) 38 UTLJ 278; Allan Hutchinson, *Dwelling on the Threshold: Critical Essays on Modern Legal Thought* (Toronto: Carswell, 1988) at 14 and 21 (the power of rights discourse and the risks of being co-opted thereby).

[81] *MPAO*, *supra* note 2 at paras 64–65.

the end, I keep returning to the old maxim in *Ashby* – the right already exists, and I am simply exploring the remedy – this is not a complete answer either (after all, s. 2(d) plainly exists and the *Charter* debate remains). At the same time, the potential of human rights legislation to over-run or corrode labour rights seems much less than the potential of the *Charter*, for instance, given the existence and prevalence of Wagnerist labour legislation. That is, regardless of how interesting the legal questions may be, a freedom of association guarantee within human rights legislation will likely to be seen as a "poor cousin" of more robust *Wagner Act* model protections. However, depending on the content of freedom of association, a human rights guarantee may even *strengthen* non-legalistic approaches. For instance, if freedom of association protects the right to strike, it may provide for greater use of the strike outside of labour relations legislation.[82] In the end, I would argue that "labour rights as human rights" in the context of human rights codes might be less problematic than within rights discourse generally, but like rights discourse remains one of many options and alternatives open to workers and to labour.

4. What is Freedom of Association?

Of course, much of the foregoing depends on exactly what freedom of association *means.* The definition of "freedom of association" provided by the Supreme Court now provides a relatively expansive web of rights and obligations. This new formulation has not been without criticism.[83] However, for the purposes of this article I intend to take the Supreme Court at its word, and apply freedom of association as the Supreme Court has framed it. But it does not automatically follow that freedom of association under human rights codes will include the same rights as freedom of association under the *Charter*. Freedom of association under provincial codes may provide the full range of rights and protections that we see under s. 2(d); or only some of them; or may provide different rights and protections entirely. While I will argue that freedom of association under s. 2(d) and under provincial human rights legislation are more or less synonymous, that conclusion is not a given and in some ways, treating freedom of association as a single unified concept creates greater challenges that must be addressed.

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[82] This is itself problematic as it may undermine the existing labour relations regime, including the peace obligation. This will be examined further below.

[83] I do not intend to engage in a fulsome review or critique of the Supreme Court's section 2(d) jurisprudence; that has been done elsewhere. Among many others, see Brian Langille, "The Condescending Constitution (or, The Purpose of Freedom of Association is Freedom of Association)" (2016) 19 CLELJ 335 [Langille, "Condescending Constitution"]; Brian Langille, "The Freedom of Association Mess: How We Got into It and How We Can Get out of It" (2009) 54 McGill LJ 177 [Langille, "Freedom of Association Mess"]; Brian Etherington, "The Right to Strike Under the *Charter* after *Saskatchewan Federation of Labour:* Applying the New Standard to Existing Regulation of Strike Activity" (2016) 19 CLELJ 492; Keir Vallance, "Developments in Labour Law – Freedom of Association and Labour Law at the Supreme Court: The 2014-2015 Term" (2016) 72 SCLR 227; Arthurs, "Constitutionalizing the Right of Workers", *supra* note 79.

i. Freedom of Association under s. 2(d)

Freedom of association most obviously includes the right to form, join, and maintain associations - the "thinnest" labour rights. The Supreme Court recognized this even in the notorious *Alberta Reference*.[84] The Court has characterized this approach as the "constitutive" approach to freedom of association, and while it continues to be protected by section 2(d), the "derivative" approach (associational activity that "specifically relates to other constitutional freedoms") and the "purposive" approach (which looks at the overall purpose of the constitutional guarantee) are also protected under the *Charter*.[85] Indeed the Court has now fully endorsed the "generous and purposive" approach to freedom of association.[86]

The arguments put forward in this paper are not, of course, inherently tied to 'state-enforced isolation' or other criteria put forward by the Supreme Court that are clearly aimed at governmental action. But as referenced previously, the Court also noted that a purpose of freedom of association is to prevent individuals from being overwhelmed by the powerful (such as a government or employer) and that it is aimed at "reducing social imbalances". The reach of freedom of association in principle seems to extend beyond governmental action, even though the *Charter* itself may not.

Within the labour context specifically, the heart of the "new" freedom of association is the right to "meaningful collective bargaining."[87] It is from this right that other labour rights appear to emanate. In *BC Health Services*, it was defined "the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment. In brief, the protected activity might be described as employees banding together to achieve particular work-related objectives."[88] In *Fraser*, it was described as "meaningful association in pursuit of workplace goals."[89] In *MPAO*, the Court further defined "meaningful collective bargaining" to mean "a process that gives employees meaningful input into the selection of their collective goals, and a degree of independence from management sufficient to allow members to control the activities of the association, having regard to the industry and workplace in question."[90]

The right to "meaningful collective bargaining" contains numerous sub-rights. From *MPAO*, we know that it includes the right of workers to be represented

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[84] *Alberta Reference*, *supra* note 22 at para 143 *per* Le Dain J.

[85] *MPAO*, *supra* note 2 at paras 52-56.

[86] *Ibid* at para 46.

[87] *MPAO*, *supra* note 2 at para 5.

[88] *BC Health Services*, *supra* note 2 at para 89.

[89] *Fraser*, *supra* note 2 at para 42.

[90] *MPAO*, *supra* note 2 at para 99.

by a bargaining agent where workers have "a degree of choice and independence sufficient to enable them to determine their collective interests and meaningfully pursue them."[91] In the context of *MPAO,* "choice" and "independence" were analyzed in relation to a government-imposed labour relations scheme that did not, in the majority's view, adequately protect RCMP members' freedom of association.[92] This is obviously distinct from a private sector scenario; non-governmental employers do not have the luxury of using statutory muscle to impose a labour relations regime upon their employees. However, the basic principle that workers have a right to determine their collective interests and pursue them would be relevant in any workplace.

The right to meaningful collective bargaining also appears to include a duty on employers (and, one assumes, workers) to bargain in good faith. In *BC Health Services,* the Court held that s. 2(d)'s guarantee included a requirement that "both employer and employees…meet and…bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation."[93] The majority in *Fraser* endorsed this duty[94] – certainly to the basic level that "employers and trade unions should negotiate in good faith and endeavour to reach an agreement[95] – though the value of *Fraser* as a precedent is admittedly questionable at this point.[96] And, indeed, the Court's ruling in *Fraser* ultimately upheld a labour relations statute that arguably did *not* include an enforceable right to bargain, but rather an obligation merely to "listen in good faith."[97] *Meredith* further muddied the waters in refusing to require governments to consult with the workers affected (or their bargaining agents) prior to rolling back bargained-for wage increases.[98]

The characterization of the duty as a "duty to listen in good faith" rather than the Wagnerist "duty to bargain in good faith" was arguably strengthened by the

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[91] *Ibid* at para 81.

[92] *Ibid* at para 5.

[93] *BC Health Services*, *supra* note 2 at para 90. See also Justice Rothstein's dissent in *MPAO* at para 169.

[94] *Fraser*, *supra* note 2 at paras 40ff.

[95] *Ibid* at para 95

[96] Professor Etherington has suggested *MPAO* has relegated *Fraser* to "rulings that shall be ignored": Etherington, *supra* note 40 at 447.

[97] Quail, *supra* note 80 at 358.

[98] *Meredith*, *supra* note 2 at paras 25ff. The majority held that the government employer had not precluded consultation on other compensation issues and did not prevent future consultation on wages, and that the impact of the wage rollbacks were consistent with those in other government departments with which the government *had* consulted; therefore, the government had not infringed s. 2(d). This certainly suggests that even if there is a "duty to bargain" generally, a government need not bargain with *every* group of workers affected. This is in contrast with Justice Abella, who in her dissent argued that the lack of consultation with affected workers, in itself, would render the wage rollbacks unconstitutional (at paras 62ff).

Supreme Court's recent endorsement of Donald JA's dissent in *BCTF v BC*.[99] Justice Donald suggested that, at least for governments, the duty to bargain under s. 2(d) was explicitly *not* the Wagnerist duty to bargain in good faith[100] but rather a more general duty:

> Parties are required to meet and engage in meaningful dialogue where positions are explained and each party reads, listens to, and considers representations made by the other party. Parties' positions must not be inflexible and intransigent, and parties must honestly strive to find a middle ground. In order to determine whether the government is bargaining in good faith, it may sometimes be necessary to probe and consider the government's substantive negotiating position.[101]

Later in *BCTF*, Justice Donald chided the B.C. government for not "listening in good faith" and framed the duty to listen in good faith as the "absolute minimum that is required from the employer."[102]

This is arguably more general than the Wagnerist duty to bargain in good faith, where parties are explicitly legally obliged to attempt to finalize a *collective agreement* as defined by labour relations legislation.[103] Nonetheless, *Fraser's* exhortation for governments and their employees to "endeavour to reach an agreement", and *BCTF's* reference to finding "middle ground", suggest that while a collective agreement – in the sense of a legally binding agreement between the parties[104] – may not be the ultimate goal under the constitutional duty to bargain, there must at least be an attempt by both (or all) sides to resolve the parties' differences.

Regardless of the characterization, however, it seems clear that a government employer has a duty to at least consider proposals from its unionized

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[99] *British Columbia Teacher's Federation v BC*, 2016 SCC 49, [2016] 2 SCR 407, rev'g *British Columbia Teachers' Federation v British Columbia*, 2015 BCCA 184 [*BCTF* BCCA]. Notably the Court did not fully canvass the issue, stating only that the majority was allowing the appeal "substantially for the reasons of Justice Donald." It is therefore not certain that the Supreme Court has fully embraced Justice Donald's reasons nor that it will ultimately give a full-throated endorsement to the "duty to listen in good faith" should it have the opportunity.

[100] *BCTF* BCCA at paras 337–338.

[101] *Ibid* at para 348.

[102] *Ibid* at para 362.

[103] For example, *SEA*, *supra* note 8 at s 6-1(e), defines "collective bargaining" as, *inter alia*, "negotiating in good faith with a view to the conclusion of a collective agreement or its renewal or revision…" But see Rothstein J's dissent in *SFL*, *supra* note 2 at para 131, questioning whether a right to strike is necessary in light of a constitutional duty to bargain in good faith. It is not clear, however, by what means a union or workers would enforce the constitutional duty in the absence of statutory unfair labour practice protections.

[104] As I will explore below, a requirement to come to a collective agreement outside of a Wagnerist labour statute is complicated by the common law refusal to recognize collective agreements as binding: see *Young*, *supra* note 8.

employees – it cannot simply refuse to listen and legislate the result it wishes. The application of the duty to bargain (or to listen) on non-governmental employers is perhaps less clear.

Freedom of association also includes the right to strike. The strike is – to use the Supreme Court's wording – the "powerhouse of collective bargaining"[105], an "essential component of the process through which workers pursue collective workplace goals"[106] – "unique and fundamental" to effective collective bargaining.[107] But the right to strike's status within s. 2(d) also remains unclear. The language used in *SFL* appears to relegate the right to strike as protected only insofar as that right promotes "meaningful collective bargaining."[108] However Professor Etherington, for one, argues that the Supreme Court's language in *SFL* is more consistent with the right to strike as a "stand-alone right" than as a "derivative" right.[109] The characterization of the right to strike may have implications on whether protest strikes, for instance, are protected strike activity.

ii. Freedom of Association under Provincial Codes

Section 5 of the *YHRA* reads:

> Every individual and every group shall, in accordance with the law, enjoy the right to peaceable assembly with others and the right to form with others associations of any character.

The *SHRC* reads, at s. 6:

> Every person and every class of persons shall enjoy the right to peaceable assembly with others and to form with others associations of any character under the law.

And in the *Québec Charter*, at s. 3, the freedom is phrased thusly:

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[105] *SFL*, *supra* note 2 at para 55

[106] *Ibid* at para 46.

[107] *Ibid* at para 51.

[108] *SFL*, *supra* note 2 at paras 24–25:

> Along with their right to associate, speak through a bargaining representative of their choice, and bargain collectively with their employer through their representative, the right of employees to strike is vital to protecting the meaningful process of collective bargaining within s. 2(d)…Where strike action is limited in a way that substantially interferes with a meaningful process of collective bargaining, it must be replaced by one of the meaningful dispute resolution mechanisms commonly used in labour relations. [Emphasis added.]

See also Langille, "Condescending Constitution", *supra* note 83 at 351.

[109] Etherington, *supra* note 40 at 450.

> Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

Historically, courts and tribunals have tended to treat fundamental freedoms under provincial codes as synonymous with the comparable freedoms under the *Charter*.[110] For example, in *Syndicat Northcrest*[111] the Supreme Court applied the same analysis to freedom of religion under the *Québec Charter* as it did to freedom of religion under the *Charter*. Freedom of expression under the Saskatchewan *Code* has been interpreted as being much the same freedom as that in s. 2(b) of the *Charter*,[112] and freedom of association has been treated as a single concept regardless of whether it appears in provincial legislation or under the *Charter*.[113]

The *SHRC* guarantee, notably, does not reference "freedom of association," but rather the "*right...*to *form with others* associations..."[114] The wording might be more suggestive of the "constitutive" model of freedom of association. Nonetheless in *Dunmore v Ontario*, the right to "form and maintain associations" was held to be the interest at stake in s. 2(d), and the definition of s. 2(d) has of course expanded since 2001.[115] On the face of it, it would seem that s. 6 of the *SHRC* protects the same fundamental freedom as is found in s. 2(d) of the *Charter* and that similar interpretive principles would apply.[116]

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[110] The parallels between anti-discrimination provisions within provincial codes, on the one hand, and section 15 equality rights under the *Charter*, on the other, are not always so clearly and easily drawn. However, in that regard see e.g. *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 176 DLR (4th) 1 [*Meiorin*] at para 17ff; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)*, [2000] 1 SCR 665 at para 34ff, 185 DLR (4th) 385 (applying s 15 jurisprudence in interpreting anti-discrimination provisions under the *Québec Charter*). The difference is in application (the *Charter* does not apply to private entities) and in exhaustive (human rights codes) versus non-exhaustive (open-ended analogous grounds in s. 15) grounds of discrimination: McIntyre J (dissenting in the result) in *Law Society of British Columbia et al v Andrews et al* (1989), 56 DLR (4th) 1 at 18.

[111] *Syndicat Northcrest v Amselem*, 2004 SCC 47, [2004] 2 SCR 551. Many other cases effectively treat the various freedoms as synonymous; see for example *Proulx c Québec (PG)*, 2015 QCCS 1042 (expression and association).

[112] *Whatcott v the Queen and the University of Regina*, 2002 SKQB 399 at para 29, 201 CRR (2d).

[113] See e.g. *Gould*, *supra* note 60; *Syndicat des employées et employés professionnels et de bureau, section locale 573 (CTC-FTQ) c Commission de la construction du Québec*, 2014 QCCA 368 [*Syndicat des employées*]; *Johner's Homestyle Catering v RWDSU Loc 568* (2 November 2010), Regina, unreported, aff'd (in this regard) 2012 SKQB 539 [*Johner's*].

[114] This is no doubt due to its vintage; it predated the *Charter* by some 35 years, the *Québec Charter* by over 25, and even the *Universal Declaration of Human Rights*, (GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71) by a year.

[115] *Dunmore*, *supra* note 6 at para 17.

[116] Arbitrator Norman so found in *Johner's*, *supra* note 113. The fact that it is phrased as a "right" in the *Code* rather than a "freedom" would not appear to make any difference to the scope of the provision, as

However, while courts and tribunals have more or less treated "freedom of association" as a single concept, with much the same meaning under provincial legislation as it would have under the *Charter*, that is not an end to the inquiry. Courts and tribunals have not had to interpret the application of the purposive model of freedom of association in the labour context except when dealing with already-unionized employees.[117] All of the cases thus far have viewed freedom of association through the lens of the *Wagner Act* model.

As noted above, the Supreme Court in *MPAO* held the fundamental purpose of s. 2(d) to be "to protect the individual from 'state-enforced isolation in the pursuit of his or her ends'"; this clearly is targeted at governments. But s. 2(d) also "prevents individuals from being overwhelmed by the powerful while at the same time providing collective strength" – a more general statement that arguably has application beyond actions by the state. Furthermore, Justice Donald in *BCTF* noted the particular concerns that animate the government's constitutional duty to bargain. The relationship between a government and its employees is not the same as the relationship between a private employer and its employees for at least two reasons. First, government must represent the public, which includes the workers it employs.[118] And second, a government has the power to "unilaterally resolve impasse through legislation, or force workers to end a strike through constitutionally compliant back-to-work legislation."[119] In other words, the government has a broad public duty, but also holds a legislative trump card in its labour relations. A government must listen in good faith, perhaps, but once it has done so, it is arguably free to legislate as it sees fit.

We therefore see three employee rights, and three corresponding employer duties. First, workers[120] have the right to organize into independent employee associations, and the corresponding duty upon employers to recognize those associations. Outside of a Wagnerist model, this right and duty may have troubling implications, including a duty to recognize non-majoritarian employee associations. Second, workers have a right to collectively bargain; employers have a corresponding duty to bargain (or at least listen) in good faith. Third, workers have a right to strike; employers may have a corresponding duty not to discipline or dismiss workers who strike - a duty of non-retaliation.

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the Supreme Court has rejected a strict division between positive and negative rights: *Fraser*, *supra* note 2 at para 69.

[117] For example, both *Johner's*, *supra* note 113, and *Syndicat des employées*, *supra* note 113. *Syndicat des employées* involved employees who were already operating under a Wagnerist labour relations model.

[118] *BCTF* BCCA, *supra* note 99 at para 338.

[119] *Ibid* at para 339.

[120] An open question, to which I do not have a satisfactory answer, would be whether associational rights would *also* accrue to those workers who are excluded from Wagnerist legislation – for instance managerial employees, employees who operate in a confidential capacity, etc. – but there seems no principled reason why these rights would not apply.

Of course, the correspondence between governments and private employers is not exact. A private employer does not have the duty to represent the public at large; nor, obviously, does it have the power to impose a contract upon its workers. This may suggest that a provincial freedom of association guarantee is not necessarily the same as the constitutional guarantee, but there are counter-arguments in this regard.

First, human rights codes apply to both the private sector *and* the public sector.[121] It is possible that a provincial code would apply differently based on whether the act complained of was performed by a private employer or a public employer, but such a distinction does not appear within the legislation itself.

Second, while a private employer does not have the power to unilaterally resolve an impasse, employees remain vulnerable in many if not most employment situations.[122] An employer may, for instance, absent an attempt by employees to exercise collective rights under a Wagnerist statute,[123] certainly take action to dismiss (or explicitly or implicitly threaten to dismiss) employees who are attempting to collectively bargain, and may dismiss (or accept the repudiation of employment contracts by) employees who dare to strike. This dismissal may not be for just cause,[124] and the employer may therefore be required to provide notice of dismissal or pay in lieu, but the employees will still be dismissed and out of the workplace. While by no means does a private employer hold the *same* powers as a government, it may still hold considerable power over those workers whom they employ, and the animating principles of freedom of association would seem to be applicable.

Nonetheless, it is possible that freedom of association under human rights codes simply does not include the same web of rights and obligations that is included in the *Charter* as it applies within a Wagnerist regime (or exclusion from such a regime). Perhaps it is limited to the "thinnest" labour rights, as were recognized in the *Alberta Reference*, and does not include “thicker” rights such as a right to collective bargaining or a right to strike. Or perhaps the freedom is limited to the right to do collectively what one has the right to do individually, as Professor Langille has argued.[125] While, for reasons given, I do not believe freedom of

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[121] *SHRC, supra* note 11, s 43; *YHRA*, supra note 11, s 38.

[122] See e.g. *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038, 59 DLR (4th) 416.

[123] As discussed previously, ULP protections are often limited to the exercise of rights under a particular labour relations statute – so attempts to unionize or collectively bargain *outside* of that scheme would not necessarily have the same protections.

[124] Traditionally it likely would have been. In more recent times, where workplace discipline must be proportionate to the offence (*McKinley v BC Tel*, 2001 SCC 38, [2001] 2 SCR 161) and where the right to strike has been constitutionally affirmed, I would tentatively suggest that striking may be grounds for discipline but not dismissal.

[125] See Langille, “Condescending Constitution”, *supra* note 83 and Langille, “Freedom of Association Mess”, *supra* note 73.

association is necessarily so limited within human rights legislation, it is worth addressing these alternative conceptions of freedom of association.

The first alternative – the "constituitive" model of freedom of association – was roundly rejected by the Supreme Court in *MPAO*. The same model may be rejected regarding human rights codes for the same reasons. A general and purposive interpretation of the governing legislation arguably leads to the same conclusion regarding human rights codes as it does regarding the *Charter* (as was discussed earlier in this article). A right to meaningful collective bargaining is just as justified under human rights codes as under the *Charter*, and for similar reasons.

The difficulty with the second alternative is that if freedom of association is merely the right to do collectively what one could do individually, any "right to collective bargaining" becomes difficult to justify. At common law, collective agreements are not enforceable, and while strikes are not necessarily *illegal*, they are invariably justification for dismissal, and may give rise to liability in tort. As Professor Judy Fudge has noted,[126] emphasizing symmetry between an individual right and a collective analogue (for example, the right to strike) conceals the inherent legal inequality that continues to suffuse employment law. In the present context, unless certain duties are recognized upon employers – at the very least, the duty of non-retaliation – a human rights code freedom of association guarantee remains more or less mute within the labour context.

5. Application

Of course, even if freedom of association under human rights codes is more or less the same as freedom of association under the *Charter*, how is it to be applied? The Devil, as they say, is in the details.

In the sections that follow I examine three uncontroversial applications of freedom of association under human rights legislation – aspirational, interpretive, and complementary – and three applications that I would imagine are much more controversial – the duty upon an employer to, first, recognize non-Wagnerist employee associations; second, to bargain; and third, to refrain from retaliating against workers who strike.

i. Freedom of Association as Aspirational

In addition to their investigative role, human rights commissions have an educational and aspirational role,[127] to promote, and educate the public about, the rights protected

[126] See Fudge, "Labour Rights as Human Rights", *supra* note 76 at 613–615.

[127] *YHRA*, *supra* note 11, s 16 (though the *YHRA* in this regard seems more specifically targeted at anti–discrimination measures); *SHRC*, *supra* note 11 at s 25 – though, again, the emphasis for much of s 25

by human rights legislation. As noted previously, it was for this reason that Professor Adams argued that governments should add freedom of association under Canadian human rights legislation. Professor Adams viewed such a move as aspirational and educational – "proclaiming loudly that [labour rights] are rights equivalent to employment equity".[128] Professor Adams viewed this as part of a general strategy to bring about a "tripartite consensus" between government, employers, and unions (and the public at large) to create a culture friendlier to collective bargaining.[129]

Freedom of association has been present in human rights legislation for some time – in Saskatchewan, since 1947 – and it appears to have received little attention to date. But there is nothing in principle now preventing human rights commissions in Yukon, Saskatchewan, or Québec – or indeed elsewhere – from disseminating information on, and promoting, the new, purposive model of freedom of association.

ii. Freedom of Association as Interpretive

Freedom of association within human rights codes can also serve as an interpretive tool, particularly when there are competing rights or freedoms – such as the potential conflict between freedoms of expression and association, on the one hand, and non-discrimination provisions on the other. For example, in one notable decision under an earlier version of the *YHRA*, *Gould v Yukon Order of Pioneers*, both the Yukon Supreme Court[130] and the Yukon Court of Appeal[131] considered freedom of association under the Act as a right that had to be balanced against the right of the applicant to demand non-discriminatory treatment. However when the case reached the Supreme Court of Canada,[132] the majority was able to rule on the matter without considering freedom of association at all,[133] though La Forest J argued in his concurring reasons that forcing association – in that case, forcing the respondent organization to accept female members – would act to "paralyze" the freedoms of expression and association.[134] Similar "balancing" measures may take place under

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relates to anti-discrimination provisions rather than the Bill of Rights. Nonetheless, s 25(b) ("The commission shall…promote an understanding and acceptance of, and compliance with, this Act"), at least, seems to apply. See also *Québec Charter*, *supra* note 11.

[128] Adams, *Labour Left Out*, *supra* note 16.

[129] Adams, "From Statutory Right to Human Right", *supra* note 74 at 63.

[130] *Gould v Yukon Order of Pioneers* (1991), 87 DLR (4th) 618, 1991 CanLII 8298 (YK SC).

[131] *Yukon (Human Rights Commission) v Yukon Order of Pioneers, Dawson Lodge #1* (1993), 100 DLR (4th) 596, 1993 CanLII 3415 (YK CA)

[132] *Gould*, *supra* note 60.

[133] *Ibid* at para 18.

[134] *Ibid* at para 74ff. McLachlin J (as she then was) strongly disagreed, noting that the very nature of anti-discrimination law that it "limit the freedom of those who are in a position to discriminate" (at para 145).

the common law – though of course *Charter* freedoms, and *Charter* values, may serve the same purpose.[135]

iii. Freedom of Association as a Complementary Remedy

Another option is to apply freedom of association as a remedial ground within other proceedings. For example, the majority of the arbitration board in *Johner's Homestyle Catering v RWDSU Local 568*[136] found that the grievor had been harassed and demoted due to her activity on the part of the union. In addition to ordering that the grievor be compensated for lost wages, the board also ordered $10,000 in damages under *The Saskatchewan Human Rights Code* on the basis that the grievor's right to freedom of association – as defined by (at the time) *BC Health Services* – had been violated. This particular application of freedom of association does not seem to be controversial; collective agreements have been widely held to incorporate human rights and other employment-related statutes as implied terms.[137] In labour arbitrations, then, it seems possible to use freedom of association as a basis for additional compensation for situations where an employee's freedom of association has been infringed: anti-union discrimination or animus, for instance, as in *Johner's*. The value and availability of such awards may be limited by the terms of the legislation.[138]

But such application of freedom of association benefits those who are already unionized – who already have access to Wagnerist rights under labour legislation. It is less easy to apply such a remedy in individual wrongful dismissal claims. Canadian courts have been reluctant to imply statutory rights, particularly human rights codes, into individual contracts of employment.[139] For the non-

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[135] See e.g. Wakeling JA's dissent in *Wall v Judicial Committee of the Highwood Congregation of Jehovah's Witnesses*, 2016 ABCA 255 at para 130ff (freedom of religion and freedom of association dictate that the courts should not intervene in religious organizations' membership decisions).

[136] *Gould*, *supra* note 60; *Johners*, *supra* note 113.

[137] See *Parry Sound (District) Social Services Administration Board v OPSEU, Local 324*, [2003] 2 SCR 157, 2003 SCC 42 [*Parry Sound*]; *Government of Alberta v Alberta Union of Provincial Employees*, 2013 CanLII 29734 (AB GAA). *Bisaillon v Concordia University*, 2006 SCC 19 at para 33, [2006] 1 SCR 666, summarized it thusly: "This Court has considered the subject-matter jurisdiction of grievance arbitrators on several occasions, and it has clearly adopted a liberal position according to which grievance arbitrators have a broad exclusive jurisdiction over issues relating to conditions of employment, provided that those conditions can be shown to have an express or implicit connection to the collective agreement..."

[138] *SHRC*, *supra* note 11 at s 31.4, limits compensation to a maximum of $20,000.00 and to situations where the party who has contravened the *Code* has acted "wilfully and recklessly" or where the injured party has "suffered with respect to feeling, dignity, or self-respect as a result of the contravention." *YHRA*, *supra* note 11, however, contains no such limitations, requiring simply that the *Act* be contravened (s 20), and placing no restriction on the quantum of damages (s 24).

[139] See e.g., *Seneca College v Bhadauria*, [1981] 2 SCR 181, 124 DLR (3d) 193 (refusal to recognize a tort of discrimination); *Honda Canada Inc v Keays*, 2008 SCC 39 at para 63, [2008] 2 SCR 362 (plaintiff

unionized, then, we must explore the possibility of direct application of freedom of association under human rights legislation.

iv. The Right to Organize / The Duty to Recognize

Many workers will attempt to achieve, or will achieve, certification under *Wagner Act* style legislation; they may take advantage of their "thickest" *Wagner Act* model rights. My argument herein does not involve them directly. I am, rather, examining workers who seek non-*Wagner Act* bargaining; who eschew, either by choice or necessity, the *Wagner Act* model.[140] This is likely through a form of minority, i.e. non-majoritarian, unionism, but it may also be for groups of workers who for whatever reason wish to collectively bargain but do not wish to assume the full panoply of *Wagner Act* rights.[141] This has not been an option commonly pursued by Canadian workers, and the suggestion that non-Wagner unionism be legitimized has not gained widespread traction in the labour movement or elsewhere, not least because minority unionism, at least, carries real risks to labour rights in Canada.[142] However having a non-majoritarian alternative in addition to the option of the Wagnerist model has been long-championed by Professor Roy Adams and is perhaps more in keeping with international labour standards than is the existing single model.[143]

The argument by Adams and other proponents of minority unionism is premised on statutory reform[144] – that governments should implement legislation that

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must pursue discrimination claim under human rights regime); *Macaraeg v E Care Contact Centers Ltd*, 2008 BCCA 182, 295 DLR (4th) 358 (overtime); *Schulz v Beacon Roofing Supply Canada Company*, 2016 BCSC 1475 (discrimination). Situations where the courts have been more open to pursuing statutory remedies in common law wrongful dismissal suits seem limited to where the statute lacks a comprehensive remedial scheme or where the statute does not clearly eliminate the common law remedy; see e.g. *McCracken v Canadian National Railway Company*, 2010 ONSC 4520, 3 CPC (7th) 81 (overtime under the *Canada Labour Code*). See also *Evangelista v Number 7 Sales Limited*, 2008 ONCA 599, 240 OAC 389, where the Ontario Court of Appeal – without explicitly addressing this issue – upheld a lower court's award for statutory vacation and public holiday pay within a wrongful dismissal claim.

[140] One example of a *statutory* regime that is not reliant on majoritarianism or "trade unionism" as such is the Ontario *Agricultural Employees Protection Act*: Doorey, *supra* note 28 at 537.

[141] One side-issue is that non-*Wagner Act* unions and associations would arguably not be bound by the "duty of fair representation" towards their members, premised as that duty is on majoritarian exclusivity: *Steele v Louisville & Nashville Railroad Co*, 323 US 192 (1944); *Canadian Merchant Service Guild v Gagnon et al*, [1984] 1 SCR 509, 9 DLR (4th) 641.

[142] For concerns about minority unionism, see e.g. Brad Walchuk, "The Pitfalls of Embracing Minority Unionism" (2016) 6:3 J Workplace Rights 1.

[143] See Adams, "*Dunmore*", *supra* note 74; Adams, "Compliance", *supra* note 17. Professor Adams does not suggest *replacing* the *Wagner Act* model but rather introducing non-majoritarian options *in addition to* the *Wagner Act* model.

[144] Professor Adams argued that "the Charter protects the right of farm workers to organize, to bargain collectively in any format with which both they and their employers are comfortable, and to strike without putting their jobs in jeopardy or being punished for doing so – and that the onus is on the Ontario

will allow and protect workers' right to organize into non-majoritarian unions. In keeping with the theme of this paper, however, I will examine the possibility of pursuing minority unionism through human rights codes.[145]

When considering risks, it is important to keep in mind that freedom of association under human rights codes has no *greater* ability to challenge Canadian *Wagner Act* model statutes than does the *Charter*. In other words, the Supreme Court appears satisfied for now that Wagnerism is constitutional. This means that for so long as there is a Wagnerist option open to workers, the risks of minority unionism through human rights legislation are fundamentally limited. Unless and until Canadian courts rule that the existing labour relations model is unconstitutional, workers will still be able to organize under the auspices of Wagnerist statutes. That means that they may take advantage of the "thickest" labour rights, including exclusivity (an employer must bargain with the certified bargaining agent, and *only* the certified bargaining agent) and unfair labour practice protections that work to prevent employers from undermining the collective bargaining process. Human rights-driven minority unionism does not directly interfere with those rights and protections; rather, it will almost inevitably operate on the periphery of the *Wagner Act* model.

It is possible that a greater emphasis on, or an enforceable right of, non-Wagnerist unionism would cause employers to promote such unions in bad faith, in order to dissuade workers from seeking majoritarian representation. But voluntary recognition under the *Wagner Act* model can be used in a similar manner.[146]

On the other hand, the very fact that human rights code-driven labour rights will operate outside of the *Wagner Act* model may demonstrate their value. The reach of *Wagner Act* unionism is short, and getting shorter, at least in the private sector. A duty upon employers to recognize employee associations even when those associations do not pursue certification may encourage recognition of labour rights among both employers and employees. It may legitimize labour rights; perhaps even serve as a "gateway" or half-measure which employees may pursue prior to then pursuing certification.

All of that said, the main goal of recognition is to pursue some form of collective bargaining, and so it is impossible to fully canvass the implications of a

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government to formulate a policy that will effectively protect and promote those rights." Adams, "*Dunmore*", *supra* note 74.

[145] In so doing I remain all too aware of the perils that minority unionism might bring, especially without being part of a broader effort in statutory reform. It is tempting to let sleeping freedoms lie. However, for reasons that follow I suggest the risks in the context suggested in this paper are limited.

[146] E.g. an employer may voluntarily recognize a union perceived to be employer-friendly so as to dissuade employees from seeking representation by another, perhaps more assertive, certified bargaining agent.

duty to recognize an employee association without also considering the extent of the employer's duty to bargain.

v. The Right to Collectively Bargain / The Duty to Bargain in Good Faith

It is possible to have collective agreements that exist independently of a Labour Relations Board order. Voluntary recognition, where an employer voluntarily agrees to accept a labour organization as the bargaining agent for a group of employees, is already recognized under labour statutes.[147] In such situations, the employer and union are generally held to much the same standards as where a group of workers are represented by a certified bargaining agent. Generally, proof of majority support of a collective agreement, at least, is required in order to sustain a voluntarily recognized bargaining unit in the face of a certification application.[148] In other words, voluntary recognition mimes *Wagner Act* majoritarianism.[149] Non-majoritarian collective agreements seem to remain legally unenforceable.[150]

Earlier, in the discussion regarding *BCTF*, I (and Donald JA, indeed) suggested that an employer's duty to bargain (or "listen") in good faith falls short of a duty to conclude a collective agreement. I will not repeat that analysis, but I will add that outside of a Wagnerist statute, an employer's duty perhaps *cannot* include a duty to conclude a collective agreement. I would suggest that recognition of freedom of association under human rights codes does not necessarily make non-Wagnerist collective agreements enforceable. Unlike under a Wagnerist statute,[151] "collective bargaining" under a human rights code would not necessarily displace the individual contract of employment. Rather, any “collective bargaining” that would occur would in effect be an employer *considering in good faith* workplace policies of general application, or identical or nearly identical terms and conditions of employment among a group of employees' contracts of employment.[152]

Again, this is not an unreservedly good thing for employees. The Supreme Court has made it clear that an employer is not required to negotiate with all groups

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[147] E.g. *Labour Relations Code*, RSA 2000, c L-1, ss 42–44; BC *Labour Relations Code*, RSBC 1996, c 244, s 34.

[148] See e.g. *SGEU v SIAST*, [1989] SLRBD No 37 at 14–15.

[149] See e.g. *Ontario Workers' Union v Service Employees International Union, Local 1*, 2012 CanLII 71553 (ON LRB) at para 18.

[150] See e.g. *Ontario Secondary School Teachers Federation v Greater Essex District School Board*, 2015 CanLII 38721 (ON LA) (MacDowell) at para 100; *Northstar Lumber v United Steelworkers of America, Local No 1-424*, 2009 BCCA 173 at para 105, 308 DLR (4th) 22.

[151] *McGavin Toastmaster Ltd v Ainscough*, [1976] 1 SCR 718, 54 DLR (3d) 1.

[152] It is also possible that freedom of association, as set out by the Supreme Court, would require that the common law revisit *Young*, *supra* note 8, and effectively bestow “personhood” by judicial fiat upon trade unions, but I do not believe that to be a necessary precondition to some form of meaningful employee voice via some form of collective or quasi-collective bargaining.

of employees who seek to collectively bargain[153] but it also does not *prevent* an employer from doing so. It does not in itself prevent an employer from, for instance, playing two employee associations against one another, or paying higher wages to those employees who choose not to engage in this form of quasi-collective bargaining. But the Supreme Court's jurisprudence *does* suggest that an employer cannot simply dismiss employee collective representations out of hand. Where an employer does so, or engages in anti-associational discrimination in the manner described, it may be a matter for a human rights complaint. Similarly, if an employer chooses to exercise its common law right to dismiss employees who attempt to engage in collective bargaining, that too would potentially fall within the scope of a human rights complaint.

In the result, a human rights commission would be empowered to bring an employer into mediation to attempt to resolve the complaint. That in itself may be sufficient to encourage good faith consideration of employee representations, and may further serve the aspirational goals of human rights legislation. If that were to fail, however, the remedies available would be much more limited than those available under labour relations legislation. A human rights tribunal (or in Saskatchewan, the Court of Queen's Bench) would be empowered to order the reinstatement of dismissed employees,[154] or to order compensation,[155] but it would not seem to have the authority to force the parties to bargain in good faith, for instance, or to table or accept particular bargaining proposals. This remedial shortfall in itself will limit the scope of an employer's duty to bargain – but given the nature of the duty as set out by the Supreme Court, where it is a duty to consider but not to agree, perhaps that is as it should and must be.

vi. The Right to Strike / The Duty of Non-Retaliation

I touched on the right of reinstatement above in the context of collective bargaining, but it has more significance when considering the right to strike. At the most basic level, a human rights complaint relating to freedom of association would allow for a right of workers not to suffer retaliation for attempting to exercise labour rights.[156]

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[153] *MPAO*, *supra* note 2 at para 83ff.

[154] *YHRA*, *supra* note 11, s 21; *SHRC*, *supra* note 11, s 31.3. While workers in the federal jurisdiction, it has now been confirmed, have the right of reinstatement in unjust dismissal complaints under the *Canada Labour Code* (*Wilson v Atomic Energy Commission*, 2016 SCC 29, [2016] 1 SCR 770), workers in most provincial jurisdictions do not. For workers who are fired for attempting to unionize under the existing labour relations regime, there are Unfair Labour Practices to protect their rights. But for workers who attempt to seek voluntary recognition of a bargaining agent, perhaps, or who seek to bargain as a group without seeking certification, or who undertake strike action, the right of reinstatement -not normally available at common law - may be of some significance.

[155] *YHRA*, *supra* note 11; *SHRC*, *supra* note 11, s 31.4; *Québec Charter*, *supra* note 11.

That relatively straightforward principle presents challenges in the context of the right to strike.

Those workers who strike outside of the protections of labour relations legislation have, at common law, breached or repudiated their contracts of employment and also face the possibility of torts brought against them – inducement of breach of contract if they encourage other workers to join the strike; interference with economic relations by unlawful means (i.e. threat of breach of contract or tortious behaviour); or the torts of trespass and nuisance that are already used as a basis for injunctions when picketing is undertaken. And if the strikers are successful in achieving their goals, having achieved their ends through threat of illegal action, i.e. either a strike or another economic tort, they may be liable in intimidation.[157]

The strike, however, is – to use the Supreme Court's wording – the "powerhouse of collective bargaining",[158] an "essential component of the process through which workers pursue collective workplace goals"[159] – "unique and fundamental" to effective collective bargaining.[160] Professor Doorey noted that "thin" rights may be of limited benefit without the right to strike.[161] A human rights code that includes freedom of association may provide an answer. Unlike the more nebulous *Charter* values,[162] freedom of association within human rights codes may allow workers to directly challenge the common law, limiting the power of employers to discipline or discharge workers who strike or otherwise seek to exercise labour rights; as well as to challenge tort liability that may accrue.[163]

That said, protecting a right to strike outside of the *Wagner Act* model is problematic. It would potentially herald a return to "recognition strikes", where workers would use the strike, and not a certification process, to force an employer to collectively bargain. It could give rise to walkouts being used, as they were prior to the *Wagner Act*, to resolve workplace disputes, rather than resorting to arbitration. It would weaken, perhaps to absurdity, the restriction on strikes under labour legislation. These are significant challenges. If freedom of association includes the

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[156] See also *YHRA*, *supra* note 11, ss 29–30; *SHRC*, *supra* note 11, ss 35, 45.

[157] See e.g. Christie, *supra* note 7; Arthurs, "Constitutionalizing the Right of Workers", *supra* note 79 at 382.

[158] *SFL*, *supra* note 2 at para 55

[159] *Ibid* at para 46.

[160] *Ibid* at para 51.

[161] Doorey, *supra* note 28 at 539.

[162] See *Hill*, *supra* note 4 at para 83ff. However, to date *Charter* values do not seem to have been used to challenge common law hostility to strikes or collective agreements.

[163] I will note here again that, *per* Professor Fudge, the right to strike is a labour right that does not have an easy or appropriate individual corollary. An individual employee can certainly leave their job. However, it is only when it is done collectively that tort liability becomes likely, and the "strike" is at its heart distinct from an individual resignation. See Fudge, "Labour Rights as Human Rights", *supra* note 76.

right to strike, as the Supreme Court says it does, what does that mean under human rights legislation?

For those workers operating within the *Wagner Act* model, it is almost certain that the restriction on strikes under labour relations legislation will pass constitutional muster. At least, appellate courts have previously upheld the restriction on mid-term strikes[164] and Professor Etherington has suggested that recognition of the right to strike in *SFL* will not require a re-imagining of the existing model of labour relations.[165] But that is premised on the *Wagner Act* model. One argument might be that strike restrictions within existing legislation is justifiable because workers accept a restriction on their strike activity as part of a "bundle" of Wagnerist rights and obligations. Workers operating outside of labour relations legislation do not gain the benefits of the legislation and, therefore, restricting their right to strike under statute may be less justifiable (under either the *Charter* or human rights legislation).

It may also be that the Supreme Court's ambiguity on the status of the right to strike limits the ambit of the right. If, as Abella J's reasons suggest, the right to strike is necessarily tied to collective bargaining, then that may serve as an internal limit on the right to strike under human rights legislation. Strike activity or time off work that is not connected to the "meaningful association in pursuit of workplace goals" would not be protected under freedom of association. That, too, gives rise to definitional problems, of course. Surely using the strike to convince an employer to collectively bargain is in pursuit of workplace goals!

It seems to me that the ultimate question will be whether human rights legislation or the *Charter* will require that the "peace obligation" be declared unconstitutional. Paradoxically, the right to strike under human rights legislation may require that, insofar as a strike is pursuing collective workplace goals, an employer is not entitled to retaliate (whether through discipline, or treating a contract as repudiated) against workers who strike. But it might not displace statutory restrictions that would render the strike outright illegal. In that case, and if the Supreme Court's s. 2(d) jurisprudence does lead us to this conclusion (and I am suggesting it does, though I am not entirely convinced of that conclusion myself), an employer whose non-unionized workers undertake strike action may be required to seek relief from a labour relations board. And if that is the case - if the strike remains restricted under the *Wagner Act* model, and hence workers' ability to access the

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[164] *Grain Workers' Union, Local 333 et al v British Columbia Maritime Employers Association et al*, 2009 FCA 201, [2010] 3 FCR 225 [*Grain Workers*], leave to appeal denied 2009 CanLII 71475 (SCC) (refusals to cross picket lines); *British Columbia Teachers' Federation v British Columbia Public School Employers' Association*, 2009 BCCA 39, 306 DLR (4th) 144 [*BCTF* (2009)], leave to appeal denied 2009 CanLII 44624 (SCC) (mid-term protest strikes). See also Dickson CJ's reasons in the "Dairy Workers" case, *RWDSU v Saskatchewan*, [1987] 1 SCR 460 at para 29ff, 38 DLR (4th) 277; which suggest that strike prohibitions will be relatively easy to justify under s 1 of the *Charter*.

[165] See also Etherington, *supra* note 40.

rights to organize and to collectively bargain is rendered more or less moot - then perhaps the Supreme Court has, despite its protestations, constitutionalized the *Wagner Act* after all.

6. Conclusion

The Supreme Court's constitutional, administrative law, and human rights jurisprudence raises numerous questions regarding the application of constitutional labour rights to workers outside of the public sector. In most jurisdictions, the question regarding the private sector – except insofar as statutory prohibitions or provisions are involved – can be safely ignored. But in jurisdictions where freedom of association appears within human rights legislation, and therefore is applicable to and enforceable in the private sector, I suggest that such questions need closer examination. The Supreme Court has provided a model of freedom of association that invokes profound and important principles, and also creates a significant, if rudimentary, set of constitutional labour rights and obligations. The implications may be equally profound and important; or they may be much more limited. To determine which, it is important to determine where the Supreme Court's jurisprudence logically leads.