Court File No. **32968**

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal of Ontario)

BETWEEN:

THE ATTORNEY GENERAL OF ONTARIO

APPELLANT
(Respondent in the Court of Appeal)

-and-

MICHAEL J. FRASER
on his own behalf and on behalf of the
UNITED FOOD AND COMMERCIAL WORKERS UNION CANADA,
XIN YUAN LIU, JULIA MCGORMAN and BILLIE JO-CHURCH

RESPONDENTS
(Appellants in the Court of Appeal)

-and –

ONTARIO FEDERATION OF AGRICULTURE

INTERVENER
(Intervening Party in the Court of Appeal)

-and-

THE ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL OF ALBERTA, THE ATTORNEY GENERAL OF BRITISH COLUMBIA, THE ATTORNEY GENERAL OF NEW BRUNSWICK, THE ATTORNEY GENERAL OF NOVA SCOTIA, THE ATTORNEY GENERAL OF QUEBEC, FEDERALLY REGULATED EMPLOYERS TRANSPORTATION AND COMMUNICATIONS, CONSEIL DU PATRONAT DU QUÉBEC INC., MOUNTED POLICE MEMBERS' LEGAL FUND, CANADIAN EMPLOYERS COUNCIL, COALITION OF BC BUSINESSES AND BRITISH COLUMBIA AGRICULTURE COUNCIL, JUSTICIA FOR MIGRANT WORKERS AND INDUSTRIAL ACCIDENT VICTIMS GROUP OF ONTARIO, CANADIAN LABOUR CONGRESS, CANADIAN POLICE ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION

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PART 1: STATEMENT OF FACTS

A. Overview

1. The Ontario Court of Appeal has misapplied this Court's decision in *Health Services and Support - Facilities Subsector Bargaining Assn.* v. *British Columbia*, 2007 SCC 27 ("*Health Services*"). By mandating that specific elements must exist in legislation in order for that legislation to satisfy s. 2(d) of the *Charter*, the Court of Appeal has effectively constitutionalized a particular model of labour relations. This Court should use the opportunity presented by this case to clarify and confirm that the protection for collective bargaining in s. 2(d) of the *Charter* goes no further than providing a strict guarantee of process.

B. Facts

2. The Attorney General of British Columbia accepts and adopts the statement of facts contained at paragraphs 5 to 11 of the Appellant's Factum.

3. The Attorney General's submissions do not rely on the particular evidence presented in this case but he does accept the accuracy of the facts contained at paragraphs 12 to 77 of the Appellant's Factum.

4. In order to put the Attorney General's participation in this Appeal in context, the following facts are brought to the Court's attention. In response to this Court's decision in *Health Services*, the Provincial government of British Columbia engaged the unions which litigated that case in discussions that ultimately led to an agreement to address the repercussions of this Court's decision. The salient features of that agreement included a payment of approximately $85

million to those unions, the repeal of the legislative provisions declared unconstitutional [see: *Health Statutes Amendment Act*, 2008, S.B.C. 2008, c. 34, ss. 6 and 7] as well as similar provisions in other legislation [ss. 4(1), 4(3), 5(2) and 5(4) of the *Health Sector Partnerships Agreement Act*, S.B.C. 2003, c. 93, as repealed by *Health Statutes Amendment Act*, *supra*, s. 9] and the conclusion of agreements between the unions, their employers and government to allow for the contracting out of union work that resulted in layoffs.

PART II – POINTS IN ISSUE

5. The Attorney General supports the Appellant and adopts his factum in response to the following Constitutional questions:

1. Does the *Agricultural Employees Protection Act*, 2002, S.O. 2002, c. 16, infringe s. 2(d) of the Canadian Charter of Rights and Freedoms?
2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the Canadian Charter of Rights and Freedoms?
3. Does s. 3(b.1) of the *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sched. A, infringe s. 2(d) of the Canadian Charter of Rights and Freedoms?
4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the Canadian Charter of Rights and Freedoms?

6. The Attorney General takes no position on the constitutional questions relating to s. 15 of the *Charter*.

7. The Attorney General's submissions will focus on the content of freedom of association in support of his submission that the Ontario Court of Appeal misapplied the *Health Services* decision.

PART III – ARGUMENT

A. The Scope of Protection for a Process of Collective Bargaining Needs to be Clarified

8. Commentators have noted that this Court's decision in *Health Services* has created uncertainty about the scope of protection for a process of collective bargaining within s. 2(d) of the *Charter*. Other comments go further to state that the impact of this decision will be felt far beyond labour relations:

> The scope of the new Canadian contract clause remains unclear - the Supreme Court is, after all, making this up as it goes along. This decision, however, has the potential to result in a significant interference with government economic regulation, and to impose *laissez-faire* economic principles on the Canadian constitutional fabric. Significant negotiated terms in collective agreements - particularly collective agreements affecting working conditions in the broader public service (security, health care, education, social services, etc.) - have a direct impact on important issues of public policy which extend well beyond the parties to the collective agreement. These issues of public policy, the Supreme Court tells us, may no longer be decided by the democratically elected legislature in which all citizens participate. Such policy decisions are now the almost exclusive (subject to *Charter* s. 1) reserve of the collective bargaining negotiations taking place behind closed doors between the employer and the exclusive bargaining agent of the employees. Workplace democracy trumps parliamentary democracy.
>
> R. Charney, The Contracts Clause Comes to Canada: The British Columbia *Health Services* Case and the Sanctity of Collective Agreements, (2007) 23 N.J.C.L. 65
>
> See also: Brian Langille, *The Freedom of Association Mess: How We Got into It and How We Can Get out of It*, 54 McGIll L. J 177 [Appellant's Book of Authorities ("ABA"), Vol. V, Tab 53, pp. 1 to 38]

9. Charney's criticism relates most directly to the following passage in *Health Services* (para. 25):

> As developed more thoroughly in the next section of these reasons, the fundamental importance of collective bargaining to labour relations was the very reason for its incorporation into statute. The statutes they passed did not create the right to bargaining collectively. Rather, they afforded it protection. There is nothing in the statutory

entrenchment of collective bargaining that detracts from its fundamental nature.

ABA, Vol. II, Tab 21, p. 19

10. Peter Hogg also questions this conclusion; he goes on to point out that it may lie at the heart of internal inconsistencies in the decision.

> The majority in the Health Services Bargaining case claimed that the Court had been mistaken in the past to describe the right to collective bargaining as a modern right, created by statute. But, with respect, the Court was right the first time. A Collective agreement has to bind all members of a bargaining unit, whether or not they are members of the union and whether or not they agree with the terms of the agreement. Only a statute can accomplish that result.
>
> ...The majority also claimed that it was not constitutionalizing "a particular model of labour relations". But that is exactly what it was doing: North American labour relations regimes are based on the American Wagner Act of 1935. Other methods of ordering labour relations are used in other parts of the world, but presumably only compulsory collective bargaining (the Wager model) will now pass muster in Canada. The majority even claimed that the Court had been wrong in the past to exercise "judicial restraint in interfering with government regulation of labour relations". But, without any clear prescription in the Charter, there is much to be said for leaving the regulation of labour relations to elected legislative bodies (and the sanction of the ballot box).
>
> The majority in the *Health Services Bargaining* case repeatedly emphasized that what it was constitutionalizing was the "procedure" or "process" of collective bargaining, and they pointed out correctly that "it is entirely possible to protect the 'procedure' known as collective bargaining without mandating constitutional protection for the fruits of the bargaining process". But they immediately ignored this distinction, granting constitutional protection to the collective agreements precisely because they were the fruits of the bargaining process. The Act breached s. 2(d), not merely by limiting *future* collective bargaining, but also "by invalidating existing collective agreements and consequently undermining the *past* bargaining processes that formed the basis for these agreements".
>
> ...
>
> This ruling elevated collective agreements above statutes in the hierarchy of laws, and granted them virtually the same status as the provisions of the Charter itself.

Peter Hogg, *Constitutional Law of Canada*, 2007, 5th ed. Supplemented, (2008 Rel. 1): p. 44-8-9

11. These comments align with the Attorney General's concerns. A right to a process of collective bargaining, if interpreted without care, can too easily amount to constitutional protection for terms of collective agreements and can produce rigidity in the constitutional requirements of the design of collective bargaining procedures. Courts must be cautious not to conflate the process of collective bargaining with the bargains reached, transforming collective agreements into constitutional documents. Process and substance must be kept distinct. With respect, the Attorney General submits that portions of the *Health Services* reasons have created confusion about this vital distinction.

12. The Attorney General submits this Court should use the present appeal as an opportunity to provide clear guidance on the scope of freedom of association. In particular, this Court should confirm that the constitutional protection attached to collective bargaining is an entitlement to a process and *can never* amount to protection for a particular clause in an agreement, or to a right for any specific mechanism to reach an agreement. The following passages from *Health Services* buttress this conclusion:

(a) "Section 2(d) does not guarantee the particular objectives sought through this associational activity. However, it guarantees the process through which those goals are pursued". (para. 89) [ABA, Vol. II, Tab 21, p. 39]

(b) "The right to collective bargaining thus conceived is a limited right. First, as the right is to a process, it does not guarantee a certain substantive or economic outcome" (para. 91) [ABA, Vol. II, Tab 21, p. 39]

(c) "In our view it is entirely possible to protect the "procedure" known as collective bargaining without mandating constitutional protection for the fruits of that bargaining process" (para 29) [ABA, Vol. II, Tab 21, p. 21]

(d) "In our opinion, the concept of freedom of association under s. 2(d) of the *Charter* includes this notion of a procedural right to collective bargaining." (para. 66) [ABA, Vol. II, Tab 21, p. 31]

(e) "The protection enshrined in s. 2(d) of the *Charter* may properly be seen as the culmination of a historical movement towards the recognition of a

procedural right to collective bargaining". (para. 68) [ABA, Vol. II, Tab 21, p. 32]

13. Confusion arises from statements in *Health Services* that appear at odds with the conclusion that freedom of association is the right to a *process* of collective bargaining. The statements causing uncertainty include:

a) "But less dramatic interference with the collective process may also suffice. ... Acts of bad faith, or <u>unilateral nullification of negotiated terms</u>, without any process of meaningful discussion and consultation may also significantly undermine the process of collective bargaining" (para. 92)

(emphasis added)
[ABA, Vol. II, Tab 21, p. 40]

b) "While it is impossible to determine in advance exactly what sort of matters are important to the ability of unions members to pursue shared goals in concern, some general guidance may be apposite. Law or state actions that prevent or deny meaningful discussion and consultation about working conditions between employees and their employer may substantially interfere with the activity of collective bargaining as <u>may laws that unilaterally nullify significant negotiated terms in existing collective agreements</u>." (para. 96)

(emphasis added)
[ABA, Vol. II, Tab 21, p. 41]

14. It is important that this Court make clear that the preceding statements are not meant to extend the right protected in s. 2(d) beyond procedures for collective bargaining. The key is to confirm that the statements merely reflect the facts in *that* case where negotiated terms in the collective agreement were removed by legislation [by operation of s. 6(2)] and were combined with a proscription on the available *procedures* associated with those removed, substantive terms. Both parties were prohibited from including in any future agreement any limits on contracting out. [s. 6(2) and s. 10].

15. The Attorney General accepts that the removal of the negotiated terms of the collective agreement in *Health Services* was drastic. But from the point of view of the constitutional analysis, it was the combination of that removal of the substantive terms with the barriers on the procedures associated with them that caused the infringement:

> 120 The effect of s. 6(2) together with s. 10, is to invalidate these provisions in prior collective agreement. Further s. 6(4), in conjunction with s. 10, invalidates any provisions of a collective agreement that requires an employer to consult with a trade union prior to contracting outside the bargaining unit……
>
> 121 The combined effect of ss. 6(2), 6(4) and 10 is to forbid the incorporation into future collective agreements of provisions protecting employees from contracting out, or the inclusion of a provision requiring the employer to consult with the union. …The prohibition both repudiates past collective bargaining relating to the issue of contracting out and makes future collective bargaining over this issue meaningless.
>
> (emphasis added)
>
> 128 We conclude that ss. 4, 5, 6(2), 6(4) and 9, in conjunction with s. 10, interfere with the process of collective bargaining, either by disregarding past processes of collective bargaining, by pre-emptively undermining future processes of collective bargaining, or both. This requires us to determine whether these changes substantially interfere with the associational right of the employees to engage in collective bargaining on workplace matters and terms of employment.
>
> (emphasis added)
>
> ABA, Vol. II, Tab 21, pp. 47 and 49

16. These comments confirm the constitutional infirmity did not arise because the prohibition on contracting out was removed by legislation; it arose because the legislation went further and prevented the union from being able to engage its employer in any discussions about contracting out both in terms of effects and for future collective agreements. The legislative removal of substantive terms was insufficient. Were it otherwise, this Court would have been saying that the unions in that case had a constitutional right to *not* have their jobs contracted out.

17. Instead, this Court's conclusion was that the legislation made it impossible for the unions to engage the employers in meaningful discussions about all aspects of contracting out, effectively *eliminating* the process of collective bargaining on a subject of fundamental importance to the union's ability to pursue the workplace goals of its members. The Attorney General submits that it is only when viewed in this light that this Court's comments (cited above at para. 13) about the potential invalidity of legislative removal of collective agreement can be consistent with the *ratio* of the majority decision.

18. The Attorney General emphasizes that he is not here contesting this Court's conclusion that s. 2(d) protects a process of collective bargaining. But the decision of the Ontario Court of Appeal illustrates how easily the constitutional right to a process can be interpreted too broadly if it is not carefully delineated. The result will be the interjection of judicial designs into labour relations schemes, as occurred here.

19. The Respondents deny that they are arguing for the constitutionalization of the *Ontario Labour Relations Act*, 1995 (Respondents' Factum, paragraph 65). At the same time they assert that the fundamental nature of collective bargaining must inform the scope of s. 2(d) while public policy goals attached to statutory collective bargaining schemes should not (see Respondents' Factum, paragraph 88). Yet the Respondents also want to rely on legislative history to inform the content of the right.

20. Such reasoning leads inevitably to the constitutionalization of specific models of labour relations, despite the Respondents' disavowal of that intent. To some extent, the problem arises from passages in *Health Services* where this Court struggles to describe the fundamental nature of collective bargaining as existing independent of legislation yet draws on decades of legislative

history (as discussed above at paras. 8 to 11). Bradley Miller identifies a possible source of the dilemma posed by the Court's approach in *Health Services:*

> The Court seldom overturns its own interpretations of the Charter. Even less frequently does it expressly acknowledge that in so doing it is overturning a Charter precedent.[88] One of those rare occasions is Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia[89] (2007), where the Court overruled a 20 year old precedent that held that the Charter's guarantee of freedom of association under s. 2(d) does not provide a right to collective bargaining.[90] In justifying the change of course, the majority of the Court relied heavily on history and originalist style argumentation:
>
>> [a]ssociation for purposes of collective bargaining has long been recognized as a fundamental Canadian right which predated the Charter. This suggests that the framers of the Charter intended to include it in the protection of freedom of association found in s. 2(d) of the Charter.[91]
>
> There is no "judicial frustration" here. Why, then, the 30 paragraphs of history? Why cite statements made by the acting Minister of Justice before the Special Committee in 1981?[92] The attraction to appeals to original intent in these circumstances, I suspect, is that it softens the apparent threat to the ideal of the rule of law that is posed by overturning a comparatively recent precedent. A court must be anxious that its departures from precedent not only be principled and restrained, but that they appear to be principled and restrained. They do not want to look as though they have simply changed their minds, and will prefer to ground the change in direction in something more fundamental than the now abandoned precedent.

Bradley W. Miller, "*Beguiled by Metaphors: the "Living Tree" and Originalist Constitutional Interpretation in Canada"*, (2009) 22 Can. J. L. & Jurisprudence 331-354 at para. 30

21. The Attorney General submits that clarification of the meaning and scope of the content of s. 2(d) in the manner discussed in these submissions best promotes a logical and reasonable boundary to freedom of association in labour relations.

B. Clarifying the Scope of Protection for Collective Bargaining is Consistent with other Legal Principles

22. A clear demarcation between the process and the substantive elements of collective bargaining is critical to maintain the consistency of freedom of association jurisprudence with other important legal principles.

23. Specifically, the Attorney General takes issue with the Respondents' categorical statement that contextual factors should not be involved in the analysis of the scope of s. 2(d) but must be left entirely to s. 1 (Respondents' Factum, paragraph 72). This assertion is not consistent with this Court's recent statements as to the breadth of freedom of expression, which clearly involves internal limits:

> 28 However, s. 2(*b*) of the *Charter* is not without limits and governments will not be required to justify every restriction on expression under s. 1 (*Baier*, at para. 20). The method or location of expression may exclude it from protection: for example, violent expression or threats of violence fall outside the scope of the s. 2(*b*) guarantee, and individuals do not have a constitutional right to express themselves on *all* government property.
>
> *Greater Vancouver Transportation Authority* v. *Canadian Federation of Students – British Columbia Component*, 2009 SCC 31 at paras. 28-30.
>
> See also: *Baier* v. *Alberta*, [2007] 2 SCR 673, Paras. 34-42
>
> *Montreal (City)* v. *2952-1366 Quebec Inc*. [2005] 3 S.C.R. 141, 2005 SCC 62 at paras. 60-81

24. Just as importantly, the view that section 1 is the only place where limitations on a right can be considered [Respondents' Factum, paragraphs 72 and 167] or is merely a "last resort" justification for government action that does not reflect this Court's comments that section 1 itself protects values fundamental to Canadian society:

> In the words of s. 1 are brought together the fundamental values and aspirations of Canadian society. As this Court has said before, the premier article of the *Charter* has a dual function, operating both to activate *Charter* rights and freedoms and to permit such reasonable limits as a free and democratic society may have occasion to place upon them (*Oakes*, at pp. 133-34). What seems to me to be of significance in this dual function is the commonality that links the guarantee of rights and freedoms to their limitation. This commonality lies in the phrase "free and democratic society". As was stated by the majority in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1056:
>
>> The underlying values of a free and democratic society both guarantee the rights in the *Charter* and, in appropriate circumstances, justify limitations upon rights.
>>
>> [emphasis added]
>
> *R.* v. *Keegstra*, [1990] 3 S.C.R. 697, at para. 44

25. Thus, it is completely consistent with this Court's general approach to the fundamental freedoms protected by s. 2 of the *Charter* to grant constitutional protection only to the process of collective bargaining. Nor is it automatically wrong to analyze, at the initial stage, contextual factors relating to why the challenged law was passed or government action taken.

26. Other principles also support these clarifications to the content of s. 2(d). One is the respect for the constitutional separation between judicial and parliamentary powers. In the public sector, collective agreements are generally entered into between unions and government, an agent of government or some other public entity. But the responsibility for funding the agreement will almost always reside, ultimately, with the Legislature. Section 53 of the *Constitution Act, 1867* (along with s. 90 which makes that section applicable to the provinces) gives exclusive authority to the Legislative Assembly for both spending ("appropriating any part of the public revenue") and taxation ("imposing any tax or impost").

27. One consequence flowing from these provisions is that that legislatures, and certainly executive councils or government agents, cannot bind future parliaments or legislatures. More

specifically, no executive council can by contract or agreement preclude a legislature or Parliament from passing laws that are contrary to that contract or agreement.

> *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at pp. 559-560
>
> *Attorney General of British Columbia v. Esquimalt and Nanaimo Railway Co. et al*., [1950] 1 D.L.R. 305 (JCPC) at 312
>
> See also: P. W. Hogg and Patrick Monahan, "Liability of the Crown", 3rd ed. (Toronto: Carswell, 2000), at pp. 229.

28. Within freedom of association, the above principle is best respected by confirming that the protection to a process of collective bargaining means that legislative intrusions into substantive terms of collective agreements – even nullification of terms -- do not, on their own, infringe s. 2(d).

29. Such a strict demarcation between process and content is not untested nor novel. The defining elements of administrative law – the principles of procedural fairness – have provided robust protection for fair process without transgressing the separation between process and content. This Court has put it thus:

> The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653, at p. 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: Knight, at pp. 682-83; Cardinal, supra, at p. 654; Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), [1990] 3 S.C.R. 1170, per Sopinka J.
>
> Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional,

> and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.
>
> *Baker v. Canada*, (*Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817, at paras. 21 and 22

30. The Attorney General submits the approach in *Baker* lends support to this Court leaving the content of the procedural protection for collective bargaining as open and flexible as possible. There should be no discomfort in this Court refusing to articulate or define <u>any</u> specific mechanism as being required to ensure that a collective bargaining process is constitutionally valid.

31. In the same way, the right to a process of collective bargaining must not be translated into the right to a *particular* process. The Attorney General submits it is important this Court refrain from being prescriptive about any necessary or minimal elements to a constitutionally valid process of collective bargaining. Like assessing procedural fairness, it will have to depend in any case on a careful examination of all the circumstances.

32. With respect, the case on appeal illustrates the very dangers identified and discussed in these submissions. The Court of Appeal has inappropriately extended protections for process to guarantees of particular mechanisms.

> 80. If legislation is to provide for meaningful collective bargaining, it must go further than simply stating the principle and must include provisions that ensure that the right can be realized. At a minimum, the following statutory protections are required to enable agricultural workers to exercise their right to bargaining collectively in a meaningful way: (1) a statutory duty to bargain in good faith; (2) a statutory recognition of the principles of exclusivity and majoritarianism; and (3) a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreement."
>
> Reasons of the Court of Appeal, 80, AR, Vol. 1, Tab 4, p. 51

33. The Court of Appeal has treated the inability to reach agreement on the facts of this case as if it were a demonstration of a *constitutional* imperative for the inclusion in legislation of specific, substantive characteristics for the process of collective bargaining. The elements identified (good faith bargaining, dispute resolution) are laudable features of an effective collective bargaining process but the court is mistaken to suggest there can only be one way of infusing those characteristics into the labour relations of a particular sector as it did in this case.

34. The Attorney General of Ontario addresses in his factum why the evidence in this case does not support the Court of Appeal's conclusions. The Attorney General of British Columbia submits the Court of Appeal's conclusions also represent a fundamental misunderstanding of this Court's decision in *Health Services*.

35. The Ontario Court basically treats a concluded collective agreement as the sole indicator that "meaningful collective bargaining" had occurred. This reasoning is deeply flawed. This Court in *Health Services* was clear in noting that constitutional protection for a process of collective bargaining does not mean that parties will always reach agreement (Para. 103):

> The duty to bargain in good faith does not impose on the parties an obligation to conclude a collective agreement, nor does it include a duty to accept any particular contractual provisions....
>
> ABA, Vol. II, Tab 21, pp. 42-43

36. The simple fact remains that there is no way to *guarantee* or ensure that parties in a negotiation will come to an agreement. Nor can there be a "one size fits all" set of features that must exist to best enable the parties to come to an agreement.

37. Even the duty to bargain in good faith -- a fundamental precept around which the procedural right to collectively bargain exists -- cannot be precisely defined or measured. This Court has given guidance by noting that a basic element of this duty is "the obligation to actually meet and to commit time to the process" (para. 100), "engage in meaningful dialogue..[be] willing to exchange and explain their positions …and make reasonable effort to arrive at an acceptable contract" (para. 101). The Attorney General submits no more specific statutory mechanics can be attached to this duty because it is, by nature, an extremely flexible concept.

ABA, Vol. II, Tab 21, p. 42

38. Because of this, the Attorney General submits it is dangerous for this Court to purport to define any specific mechanisms that must exist to meet the demands of s. 2(d). A useful analogy comes again from administrative law. Procedural fairness is the cornerstone of administrative law yet there is no one set of characteristics that every hearing must have to ensure fairness occurs. Instead, courts engage in a contextual analysis and examine each case on its own facts. Basic principles exist and those are sufficient to give courts and others guidance.

39. Lastly, the Attorney General submits that this Court must be careful to note the important difference between *Health Services* and the case at bar since the former involved the public sector. The Attorney General submits that this contextual factor – whether it is a public sector labour relations dispute or not – is a critical factor in any s. 2(d) analysis and must affect how the right is interpreted.

40. In the public sector, employer characteristics differ significantly from the private sector. A private employer generally has much greater latitude to run its business in a manner it sees as fit and almost always maintains the sole authority as whether it remains in business. Public

services are simply not the same. Governments do not have the option of shutting down operations. This fundamental difference has a profound effect on the labour relations dynamic of public sector collective bargaining.

41. For one thing, labour disputes in the public sector will certainly engage the broader public interest. Governments do not have the luxury to respond to a dispute *only* as the employer; its responsibility to the public interest and the operation of the public services cannot be ignored and may often be paramount to other concerns.

42. This dynamic places public sector labour relations issues squarely in the realm of public policy and politics. That reality will necessarily impact not only what agreements can be reached but <u>how</u> those agreements are reached and how both parties approach collective bargaining. This reality has been well understood and appreciated by the unions, which explains their legitimate (and extensive) participation in the political process.

43. Courts must exercise great caution because public sector labour disputes that go to litigation will always invite courts into the complicated policy debates surrounding the design, delivery and composition of public services. These realities support the Attorney General's submission that clear guidance is needed to confirm that s. 2(d) should not be used beyond ensuring workers have the right to a process of collective bargaining.

44. The Attorney General emphasizes that these concerns are not merely government reticence about the expansion of *Charter* rights; they reflect government's overarching duty to act in the broad public interest. Public services in areas such as health and education consume the greatest portion of government budgets. Planning and regulating in those areas is complicated and requires sophisticated and multi-layered policy analysis. The protection of workers' freedom to

associate with one another to promote union goals should not have the ancillary result of elevating the legitimate labour relations goals of those workers above other operational or policy goals.

CONCLUSION

45. Clear guidance from this Court as to the scope of protection for a process of collective bargaining is needed to guide all courts and governments as they interpret and apply the *Health Services* decision. For the reasons discussed above, this Court should confirm that freedom of association, applied to the collective bargaining process, must not be interpreted so broadly that it amounts to a constitutionalization of the terms in a collective agreement. Nor does the guarantee to a process of collective bargaining require that specific mechanisms must exist in <u>every</u> collective bargaining scheme.

PART IV – SUBMISSIONS AS TO COSTS

46. The Attorney General seeks no Order for costs and asks that no Order for costs be granted against him.

PART V – ORDERS SOUGHT

47. The Attorney General requests permission to present oral argument at the hearing of this case and supports the Orders sought by the Appellant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of November, 2009.

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NEENA SHARMA, Counsel for the Intervener
Attorney General of British Columbia

TABLE OF AUTHORITIES

CASES	PARAGRAPH NOS.:
Attorney General of British Columbia v. Esquimalt and Nanaimo Railway Co. et al., [1950] 1 D.L.R. 305 (JCPC)	27
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Greater Vancouver Transportation Authority v. *Canadian Federation of Students – British Columbia Component*, 2009 SCC 31	23
Health Services and Support - Facilities Subsector Bargaining Assn. v. *British Columbia*, 2007 SCC 27	1, 4, 7, 8, 9, 11, 12, 13, 20, 31, 36
Montreal (*City*) v. *2952-1366 Quebec Inc*. [2005] 3 S.C.R. 141, 2005 SCC 62	23
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ARTICLES and TEXTS

Bradley W. Miller, "*Beguiled by Metaphors: the "Living Tree" and Originalist Constitutional Interpretation in Canada"*, (2009) 22 Can. J. L. & Jurisprudence, 331-354	20
Brian Langille, *The Freedom of Association Mess: How We Got into It and How We Can Get out of It*, 54 McGill L. J 177	8
Peter Hogg, *Constitutional Law of Canada*, 2007, 5th ed. Supplemented, (2008 Rel. 1): p. 44-8-9	10
Peter W. Hogg and Patrick Monahan, "Liability of the Crown" 3rd ed. (Toronto: Carswell, 2000) at p. 229	27
R. Charney, The Contracts Clause Comes to Canada: The British Columbia *Health Services Case and the Sanctity of Collective Agreements*, (2007) 23 N.J.C.L. 65	8, 9

The Constitution Act, 1867

(THE BRITISH NORTH AMERICA ACT, 1867)

30 & 31 Victoria, c. 3.

[Consolidated with amendments]

An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith.

(29th March, 1867.)

WHEREAS the Provinces of Canada, Nova Scotia and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:

And whereas on the Establishment of the Union by the Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America: (1)

Money Votes; Royal Assent.

53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

LÉGISLATION FINANCIÈRE; SANCTION ROYALE

Bills pour lever des crédits et des impôts

53. Tout bill ayant pour but l'appropriation d'une portion quelconque du revenu public, ou la création de taxes ou d'impôts, devra originer dans la Chambre des Communes.

. . .

6. THE FOUR PROVINCES

90. The following Provisions of this Act respecting the Parliament of Canada, namely,-- the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved,-- shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada.

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6. LES QUATRE PROVINCES

Application aux législatures des dispositions relatives aux crédits, etc.

90. Les dispositions suivantes de la présente loi, concernant le parlement du Canada, savoir: les dispositions relatives aux bills d'appropriation et d'impôts, à la recommandation de votes de deniers, à la sanction des bills, au désaveu des lois, et à la signification du bon plaisir quant aux bills réservés, — s'étendront et s'appliqueront aux législatures des différentes provinces, tout comme si elles étaient ici décrétées et rendues expressément applicables aux provinces respectives et à leurs législatures, en substituant toutefois le lieutenant-gouverneur de la province au gouverneur-général, le gouverneur-général à la Reine et au secrétaire d'État, un an à deux ans, et la province au Canada.

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IMPORTANT INFORMATION

This Act is Current to November 4, 2009

Health Sector Partnerships Agreement Act

[SBC 2003] CHAPTER 93

Assented to December 2, 2003

Contracting outside of designated private sector partner's collective agreement

4 (1) [Repealed 2008-34-9.]

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

(a) provides non-clinical services at or for a designated health care facility under a contract between a designated private sector partner and another person, and

(b) is an employee of the other person

to be an employee of the designated private sector partner, or of a health sector partner, unless the designated private sector partner or the health sector partner intended the employee to be fully integrated with the operations of the designated private sector partner or the health sector partner, as the case may be, and intended the employee to be working under its direct supervision and control.

(3) [Repealed 2008-34-9.]

. . .

Contracting outside of contractor's collective agreement

5 (1) In this section, **"contractor"** means a person who contracts with a designated private sector partner for the provision of non-clinical services at or for a designated health care facility, and includes any other person who contracts with that contractor for the provision of those non-clinical services.

(2) [Repealed 2008-34-9.]

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

(a) provides non-clinical services at or for a designated health care facility under a contract between a contractor and another person, and

(b) is an employee of the other person

to be an employee of the contractor, of a designated private sector partner or of a health sector partner, unless the contractor, the designated private sector partner or the health sector partner intended the employee to be fully integrated with the operations of the contractor, the designated private sector partner or the health sector partner, as the case may be, and intended the employee to be working under its direct supervision and control.

(4) [Repealed 2008-34-9.]

2008 Legislative Session: 4th Session, 38th Parliament
THIRD READING

The following electronic version is for informational purposes only.
The printed version remains the official version.

Certified correct as passed Third Reading on the 29th day of May, 2008
Ian D. Izard, Q.C., Law Clerk

HONOURABLE GEORGE ABBOTT
MINISTER OF HEALTH

BILL 26 – 2008
HEALTH STATUTES AMENDMENT ACT, 2008

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

Health and Social Services Delivery Improvement Act

***5 Section 3 of the Health and Social Services Delivery Improvement Act, S.B.C. 2002, c. 2, is amended by repealing the definition of* "bumping".**

6 Section 6 (2) and (4) is repealed.

7 Sections 9 and 19 (2) (c) are repealed.

8 Section 5 of the Health Sector Labour Adjustment Regulation, B.C. Reg. 39/2002, is repealed.

. . .

Health Sector Partnerships Agreement Act

9 Sections 4 (1) and (3) and 5 (2) and (4) of the Health Sector Partnerships Agreement Act, S.B.C. 2003, c. 93, are repealed.