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7 “The Trilogy is a Foreign Country, They Do Things Differently There”¹
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¹ With apologies to L.P. Hartley. This article will be edited by the Ottawa Law Review for publication in Ottawa Law Review Volume 45.

I Legal Souvenirs From The foreign Country of the Trilogy

Many people are familiar with the opening line of Hartley's novel *The Go-Between*: "The past is a foreign country, they do things differently there."² But it is still a shock to realize that one used to live in that foreign country – and that one has simply **forgotten** how differently they do things there. I had to face this truth when re-reading the Supreme Court of Canada's 1987 labour law "Trilogy"³. There it was in black and white in *PSAC v Canada*: in 1982 the Federal Government has taken the draconian step of extending collective agreements and imposing "Wage Restraint" by, and pay attention to this, fixing the wages of the PSAC members at 6% in the first year and 5% in the second. That is some restraint by today's standards! It does no good to point out that the inflation rate was around 11.5% per year in that foreign country. That is just another reminder of how foreign that country really is. This is the sort of thing we can expect when we are offered the opportunity to time travel, to visit that foreign land we once inhabited ourselves. We are likely to be startled as with travel to any foreign land. Sometimes we are startled by how odd the practices there really are – but sometimes we are startled by how well they do things there and ask why can we not do that at home? This conference on the 25th anniversary of the Trilogy opens that door to the past. In what follows I make the claim that some of the legal ways they do things differently there still have effects in the present, and not necessarily for the better. These legal "souvenirs" from that foreign country have current effects in two ways. First, we now have thrown away some of our legal souvenirs from that foreign country which we should, in fact, have retained. Second, we have retained some souvenirs from that foreign country which we would now be better off throwing away. Both of these possibilities are in play when we compare the homeland of our present constitutional labour law, with that foreign country of its past, which is the Trilogy.⁴

In Part II of what follows I identify the approach to the content of 2(d) articulated in the Trilogy by Justice MacIntyre as the most important souvenir from the foreign country of the

² Hamish Hamilton, 1953.

³ Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161 [Alberta Reference]; *Public Service Alliance of Canada v. Canada*, [1987] 1 S.C.R. 424, 38 D.L.R. (4th) 249 [PSAC]; *Retail, Wholesale and Department Store Union, Locals 544, 496, 635 and 955 v. Saskatchewan*, [1987] 1 S.C.R. 460, 38 D.L.R. (4th) 277.

⁴ For longer discussions of these two points see, Langille and Oliphant, "From the Frying Pan to the Fire: Fraser and the Shift from International Law to International "Thought" in Charter Cases", (2012), 16 *Canadian Labour and Employment Law Journal* 181-234. Langille, "Why the Right/Freedom Distinction Matters to Labour Lawyers – and All Canadians" (2011), 34 *Dalhousie Law Journal* 143-164. Langille, "What is a Strike?" in (Langille, ed.) *Is There a Constitutional right to Strike in Canada? Special Symposium Issue of the Canadian Labour and Employment Law Journal*, Vol. 15 (2009-2010) 355-372. Langille, "Why are Canadian Judges Drafting Labour Codes - and Constitutionalizing the Wagner Act Model?" (2009-2010), 15 *Canadian Labour and Employment Law Journal* 101-128. Langille, "The Freedom of Association Mess: How we got into it and how we can get out of it." (2009), 54 *McGill Law Journal* 177-215. Langille, "Can We Rely on the ILO?" (2007), 13 *Canadian Labour and Employment Law Journal* 363- 390.

I also had a chance to remind myself, in my journey to that foreign country of the Trilogy, of another amazing truth – that one Supreme Court Judge – Wilson - did accept the equality argument, albeit under the Bill of Rights, not the Charter. See PSAC supra n. 3 at para. 68.

1 Trilogy that we have thrown away, but which we ought to have held onto. This is because it is
2 an essential part of a legally coherent (and not just politically attractive) account of freedom of
3 association. I also identify as a souvenir we should have abandoned, but have instead retained,
4 our continued rejection of the constitutional guarantee of “equality” as a key tool in our legal
5 thinking about these cases. I then show, in Part III, that this pair of truths about our treatment
6 of basic ideas from the foreign land of the past explains a great deal about our current legal
7 confusion regarding 2(d), including the very unsatisfactory results and reasoning in Fraser
8 decision of the Supreme Court, as well as in important and subsequent appellate level
9 decisions. I then, in Part IV discuss another souvenir which has a curious life history. This is the
10 dissent of Chief Justice Dickson in the Trilogy and in particular his use of international law to
11 defend his approach to 2(d). This is a souvenir we did not buy at the time, but which seems to
12 have made it into our intellectual luggage, lingering there until recently discovered and put on
13 prominent display. The discovery and embracing of this particular souvenir is a matter of some
14 real jurisprudential, and as it turns out, real world regret

15
16 I Two souvenirs from the foreign land of the Trilogy: one abandoned and one retained.

17
18 The most basic of the practices of the foreign country of the Trilogy which we have now
19 rejected, but should have retained, is the following: we would be much better off now if we
20 were to accept Justice McIntyre’s conception of 2(d) as set out in the Trilogy (freedom of
21 association is the freedom to do with others what I am free to do myself)⁵ and apply it to the
22 facts correctly, as he famously did not.⁶ This is not the current Supreme Court’s view and this is,
23 in my view, a large source of the current problems we have with 2(d).⁷

⁵ Alberta Reference, supra n 3, SCR at 409: “It follows from this discussion that I interpret freedom of association in s. 2(d) of the Charter to mean that Charter protection will attach to the exercise in association of such rights as have Charter protection when exercised by the individual. Furthermore, freedom of association means the freedom to associate for the purposes of activities which are lawful when performed alone. But, since the fact of association will not by itself confer additional rights on individuals, the association does not acquire a constitutionally guaranteed freedom to do what is unlawful for the individual.”

⁶ Ibid. at 410. McIntyre famously forgot that at the end of a contract neither side has to perform because no performance is due - until a new contract is agreed, if one is. So not going to work without a contract is not only “legal” it is basic to the very idea of contract itself. He also associated himself with another bit of legal thinking best, in my view, avoided in these circumstances- that there is no “analogy” between one person ceasing to work at the end of a contract (strike) and more than one person doing so. This is clearly wrong – the legal analysis is exactly the same. It is not that there **is** an **analogy** between one person, and more than one person, not agreeing to a new contract – it is that they are, legally, the same thing. See Beatty and Kennett, “Striking Back” 91988) 13 Queens LJ 214 and Oliphant “Exiting the Fraser Labyrinth: Resurrecting the Trilogy Standard under Section 2(d) and Saving the Freedom to Strike” forthcoming in (2013) U of T Fac Law Rev.

⁷ Health Services v BC [BC Health], [2007] 2 SCR 391.

1 The most important example of our holding onto a souvenir, when we should not have
2 picked it up in the first place, is our continued rejection of the idea of equality as the legally safe
3 vehicle for the protection of labour rights in Canada, now and for the foreseeable future.⁸

4 If anyone doubted these two points before the Supreme Court's decision in Fraser⁹ - I do
5 not see how they can after Fraser. Fraser is "Exhibit A" in the case in favour of both of these
6 two points. (Exhibits "B" and "C" might be the Ontario Court of Appeal decisions in RCMP¹⁰ and
7 Justice Counsel¹¹ – legal curiosities which should be unavailable in a legally coherent world.)

8 This, and much else, was pointed out after BC Health¹². But it took the wisdom, and perhaps
9 courage, of a great labour lawyer – Chief Justice of Ontario, Warren Winkler (in Fraser at the
10 OCA¹³) – to show how much of a problem BC Health had created for the Canadian labour law
11 community. In Dunmore¹⁴ the Court had created new, properly called in my view (but without
12 using the word), "derivative" unfair labour practice rights and duties protecting agricultural
13 workers.¹⁵ The Court did not use the word "derivative" right until much later, in Fraser, and
14 then it did so erroneously. One large problem is that the current Court alleges that you can
15 think about 2(d) without the distinction between rights and freedoms and, as a result, it has
16 shown little understanding of what derivative rights – a very important idea – might look like,
17 and what their creation might entail. In BC Health it continued this pattern of creating of new
18 derivative rights – by creating, even though not asked to, and even though not possibly raised
19 by the legal case involved, the "right/duty to bargain in good faith". Some people brought forth
20 the message that this may not have been a good idea and was not supported by the reasoning
21 on offer.¹⁶ Some other people then adopted the time honoured strategy of shooting at least
22 certain of those messengers.¹⁷

⁸ See Langille, "The Freedom of Association Mess" supra n 4.

⁹ Ontario (AG) v Fraser 2011 SCC 20, [2011] 2 SCR 3

¹⁰ [2012] ONCA 363

¹¹ [2012] O.J. No. 2420.

¹² See, for examples, Eric Tucker, "The Constitutional Right to Bargain Collectively: The Ironies of Labour History in the Supreme Court of Canada," *Labour/Le Travail*, 61 (Spring 2008), 151–180. Brian Etherington, "The B.C. Health Services and Support Decision - The Constitutionalization of a Right to Bargain Collectively in Canada: Where did it come from and where will it lead?" (2009), 30 *Comparative Labor Law and Policy Journal* 715. Jamie Cameron, "Due Process, Collective Bargaining, and s. 2(d) of the Charter: A Comment on B.C. Health Services" (2008) 13 *CLEJ* 323 and "The Labour Trilogy's Last Rites: B.C. Health and a Constitutional Right to Strike" in Langille (Ed) *Is There a Constitutional Right to Strike in Canada?* (2009-10) 15 *Can Lab and Employ LJ* 297; Langille, "The Freedom of Association Mess" and "Can We Rely?" supra n.4; Charney, "The Commerce Clause Comes to Canada" (2007-08) 23 *NJCL* 65. And so on.

¹³ *Fraser v Ontario (Attorney General)* (2009), 92 OR (3d) 481 (OCA)

¹⁴ [2001] SCR 209. This case is the first of two Supreme Court of Canada decisions (the second is *Fraser* in 2011) about the constitutionality, under 2(d) of the Charter, of the exclusion of agricultural workers from the Ontario Labour Relations Act. The Court held that the exclusion did violate 2(d).

¹⁵ On the idea of derivative rights see Langille "Why the Right/Freedom Distinction Matters..." supra n.4

¹⁶ See the sources supra n.12.

¹⁷ Bogg and Ewing, "A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada" 33 *Comp. Lab. L. & Pol'y J.* 379

1 But it took Winkler CJO to make the consequences of the BC Health ruling too plain to
2 ignore. This is because as a good legal thinker and good labour lawyer Winkler saw the
3 predicament in which BC Health had left him - and all of us.

4 Here it is. If you do say that there is a “duty” on employers to bargain in good faith with
5 workers, and that as a result that workers have a “right” that employers do so, then you have to
6 face up to the boldness of this idea. The boldness of that idea is quite obvious and it is this: if
7 you are going to say that the constitution protects collective bargaining, including a duty to
8 bargain in good faith on the employer, as the Court held in BC Health, then you have to have an
9 answer to the question which inevitably follows: “Well, alright, if I as an employer have a duty
10 to bargain, with whom must I bargain – ie, **to whom do I owe this duty?**” This is one way of
11 asking “if the employer has a duty, who has the right?” This is a question which cannot, legally,
12 be left unanswered.

13 And it is precisely that question (which only has to be answered in the very few labour law
14 systems which contain such a duty, such as Canada’s) which many or most of other provisions
15 in Canadian labour law legislation are designed to answer. These are the provisions on
16 bargaining units, certification, majoritarianism, exclusivity, the existence of a labour board to
17 run the show, and so on¹⁸. These two parts of the system – the duty to bargain **and**
18 majoritarianism/exclusivity and the rest of the scheme are conceptually joined. You cannot
19 separate them. They are required by the connection between right and duty. If there is a duty
20 then there is a right and we have to be able to specify who the right holders and duty bearers
21 are. Most other labour law systems do not create these problems for themselves because they
22 do not create the right/duty to bargain in the first place. (This is something which comes as a
23 surprise to many Canadian labour lawyers). But we in Canada do create it and as a result we
24 need to have also a labour law system which answers the obvious question it creates. And our
25 legislation does so, at great length.

26 This is where the Ontario Court of Appeal decision in Fraser¹⁹ enters our conversation. As a
27 very experienced labour lawyer Chief Justice Winkler saw all of this clearly and knew that
28 his/our options were rather starkly drawn. His options were: **(A)** in good common law fashion,
29 gently to point out the mistakes in reasoning the Supreme Court made in BC Health, show how
30 it was not necessary to decide the point in that case in any event because it did not arise, and
31 then show what would follow if the decision were taken at face value: that you would need to
32 constitutionalize the other parts of the system including exclusivity, majoritarianism, bargaining
33 units, dispute settlement, and so on. Finally, to suggest that on the Supreme Court’s own
34 statements to the effect that the Court is not constitutionalizing “a particular model of labour
35 relations”²⁰ it really did not mean, on pain of contradiction, to hold that there was a duty to

¹⁸ It seems that Australia now has something very similar to the Wagner Act Model’s duty to bargain. A feeling for the complexity of installing such a duty where one did not exist before can be gained by reading the recent and lengthy report on this innovation written by a number of prominent Australian labour law scholars – Forsyth et al, Fair Work Australia’s Influence in the Enterprise Bargaining Process (Centre for Employment and Labour Law, Melbourne Law School, 2012)

¹⁹ Supra n 12.

²⁰ BC Health supra n. 7 at para. 91.

1 bargain in good faith. A clearly available and honourable approach in my view and one which
2 Courts of Appeal have adopted in many cases over the years when faced with a less than totally
3 coherent decision from above. This approach has the disadvantage of explicitly exposing the
4 Supreme Court's error, but also the advantage of correcting it. He might have even then
5 pointed out the availability of the equality argument as the vehicle of getting what the court
6 wanted (a duty to bargain) without constitutionalizing the whole of a particular legislative
7 scheme.

8 **Or (B)**, Chief Justice Winkler also had the option of saying that there was a clear holding in
9 BC Health to the effect that an employer duty to bargain exists under 2(d) (which is clearly what
10 the Court did say), noting that if there is such a duty one needs to have a way of answering the
11 question "to whom is this duty owed?", then, drawing on his labour law expertise, showing that
12 this means we also need to constitutionalize the ideas of bargaining units, exclusivity,
13 majoritarianism, and so on. (ie, the rest of the statutory scheme.)

14 Winkler does **(B)**. Again, an entirely plausible and principled bit of legal reasoning²¹ which
15 has the advantage of not drawing explicit attention to the Supreme Court's error, but the
16 disadvantages of extending it (by constitutionalizing almost all of the "Wagner Act model" and
17 so on.²²)

18 What Winkler did **not** do was **(C)**. He precisely did not maintain that you can have a duty to
19 bargain in good faith, and simultaneously contradict himself by saying that we do not need to
20 have a way of specifying to whom that duty is owed. This he did not do because it is not legally
21 possible. The only two ways to avoid this legal impossibility are those set out above, **(A)** - hold
22 that there is no duty, or **(B)** - hold that there is a duty and that therefore one needs to have a
23 way of specifying to whom it is owed.

²¹ But, to repeat, not in my view a necessary one. My first argument about these cases has always been that the basic, and very expensive, flaw in the Court's reasoning is that the Court has based the revolutionary results in these cases on s 2(d) of the Charter. This is a mistake in reasoning because these cases are, in law, first and foremost, s. 15, ie equality cases. (See also Hogg, "Equality as a Charter Value in Constitutional Interpretation" (2003) 20 SCLR (2d) 113.) The costs of this mistaken reasoning are large and continue to mount. I worry these costs will undermine the revolutionary results we have achieved and with which I agree. The costs are easy to see. If the court had taken the simple path of s.15 then we would have all of the results we have had, and should have had, in a much less dangerous way. All that the court was required to say in these cases is that while we might not know exactly what "freedom of association" means in the constitutional abstract, we do know that the Canadian state has instantiated that fundamental freedom in a certain way for most Canadians – but not for these folks. That is, our problem is that we have an unequal distribution by the state of the protection of a fundamental freedom. That is something that free and democratic states just cannot do. And in these cases we can simply say: The state cannot respect and protect a fundamental freedom for some – and not for others. (Think of freedom of speech – or freedom of religion – as parallels). And if a state does purport to distribute respect and protection of a fundamental freedom unequally that puts a very heavy burden on the state to justify its making the freedom real for some people but not others. That is really what was at stake in these cases. This was really the argument, really the holding, and really the remedy in all of our leading cases in the 2(d) revolution – these folks want what everyone else has and that is what these decisions give them: protection of their fundamental freedoms according to what others have. The advantage of this approach is that you do not end up doing what Winkler did – constitutionalizing the whole statutory scheme.

²² Langille, "Why Are?" Supra n. 4.

1 In Fraser Abella, in dissent, agrees with Winkler and opts for **(B)**. The other dissenters take
2 different routes to **(A)**.

3 Whichever one of those two options you think is to be preferred, at least **(A)** and **(B)**, unlike
4 **(C)**, have the distinct advantage of being legally possible.

5 Unfortunately, the Supreme Court majority in Fraser does **(C)**. Or purports to.

6 This is, in my view, what makes that set of reasons so disappointing. It also explains why the
7 Court at once affirms what it said in BC Health regarding the existence and content of the duty,
8 and in the next breath transparently rewrites and “waters down” what was said there regarding
9 the content of the duty.²³ Further, it may (or may not) explain the clearly untenable holding
10 that the legislation in question satisfied the constitutionally required duty.²⁴ These are efforts
11 to avoid or cabin an obvious legal problem. But this is not possible – without creating other
12 legal errors. This is also, in my view, the best way to see many of the other legal problems
13 created in Fraser, including the effort to limit the legal damage through various and completely
14 new devices and tests such as the very bad, and completely new, idea that collective bargaining
15 is a “derivative right”²⁵, as well as the creation of a very dangerous threshold test of
16 “impossibility” in all 2(d) cases, that is for both “respect” (BC Health) and “protect” (Fraser)
17 cases.²⁶ These are efforts, as I see it, to limit the legally impossible position staked out. But this
18 cannot and will not be, and has not been, the result. The way to handle legal errors is to overtly
19 expose and remedy them. The result of failing to take this approach, and covertly attempting to
20 limit the impact, is more errors with the consequence of putting the content of 2(d), and all our
21 freedoms, at risk. As Karl Llewellyn said: “covert tools are never reliable tools”.²⁷

22 The fallout of the Fraser majority doing **(C)** is now all around us and it is not welcomed by
23 any labour lawyer. This compilation of errors in reasoning now, as predicted, threaten a
24 coherent content of the freedom. The Ontario Court of Appeal has now adopted the non-
25 Winkler strategy of keeping its head down and taking **(C)** as a given and as a plausible way of
26 thinking, along with all of the attendant and supplementary errors made in an effort to obscure
27 and contain its fatal flaw. For example, in its RCMP decision The Ontario Court of Appeal posed
28 the following question:

29 Yet many issues regarding the Charter’s guarantee of freedom of association in the
30 labour context remain. This appeal raises questions that were not directly contemplated
31 in the previous cases. One new question is whether “the right to collective bargaining”
32 under s. 2(d) guarantees workers the right to be represented in their relationship with
33 their employer by an association of their own choosing.²⁸

²³ For a breath by breath description see the helpful analysis in Bogg and Ewing, *supra* n. 11.

²⁴ On this Abella’s dissent says all that needs to said, and well.

²⁵ It is not a right. And it is not derivative. See Langille “Why the Right/Freedom Distinction Matters” *supra* n. 4

²⁶ Langille, “Why Are” *supra* n. 4.

²⁷ Karl Llewellyn, Book Review, (1939), 52 Harvard Law Review 700 at 703 (reviewing O. Prausnitz, *The Standardization of Commercial Contracts in English and Continental Law* (1937)).

²⁸ *Supra* n. 9 at para.2

1 It then answered it in the negative. This is not possible, in my view, under any plausible
2 theory of freedom of association. But it seems to be plausible in a legal world of “freedom of
3 association” in which **(C)** is taken as sensible.

4 So too in its recent Justice Counsel decision²⁹ the Court of Appeal agreed with the Supreme
5 Court of Canada that the test to be applied in all 2(d) cases - whether cases of state failure itself
6 to respect the freedom, or state failure to protect exercise of the freedom from the actions of
7 other non-state actors, the freedom (or in the Court of Appeal’s words whether “positive” or
8 “negative”, or ‘shield’ or “sword”) is one of “effective impossibility”. Sharpe JA put it this way:

9 This court considered Health Services and Fraser in Mounted Police Association of
10 Ontario v. Canada (Attorney General). That case, like Fraser and Dunmore, dealt with
11 what might be described as the “positive right” component of s. 2(d): the issue of the
12 adequacy of legislation to ensure effective bargaining rights. Juriansz J.A. conducted a
13 comprehensive review of the authorities and held that Fraser should be interpreted as
14 establishing that it is only where legislation, or the lack thereof, renders the pursuit of
15 collective goals “effectively impossible” that a claim that s. 2(d) obliges the government
16 to take positive action is made out. This case, like Health Services, involves what might
17 be described as the “negative right” component of s. 2(d): the issue of whether
18 impugned legislation impinges upon or interferes with the s. 2(d) rights of those who are
19 already part of a full collective bargaining scheme. In my view, the substantive content
20 of s. 2(d) must be the same whether raised as a sword to claim the positive right to an
21 effective legislative regime to protect freedom of association or used as a shield to
22 defend against legislation that impinges upon existing statutory protections. It follows
23 that the “effectively impossible” test applies to this case.³⁰

24 Can this be correct? I think not and I take the view that this is a serious problem for all of
25 our freedoms.³¹ The idea that state attacks on freedoms are only constitutionally problematic
26 when they make the exercise of the freedom “effectively impossible” – as opposed to, say, a
27 test along the lines of “non-trivial interference” is not a good idea.³² But the short point here is
28 the following: In its two recent cases the Court of Appeal does not repeat Winkler’s “error”.
29 They keep their heads down and try to play ball with the game of **(C)**. The game of **(C)** is actually
30 quite complex – it has to be because, as noted above, like all untruths any open adherence to it
31 has to be justified by further untruths. Some of these untruths are quite dangerous – for
32 example the denial of the distinction between freedoms and rights, the distortion of the idea of
33 “derivative rights”, and the refusal to distinguish between “respect” cases where the claim is
34 that the state has taken a bat **to** the freedom and those “protect” cases where the claim is that
35 the state has failed to go to bat **for** the freedom.

36 But if we continue to reject the equality argument then the path to a clear understanding
37 of the legal structure of freedom of association must begin with revisiting our first error – that

²⁹ Supra n. 10

³⁰ Ibid at para 32.

³¹ Langille “Why the Right/Freedom Distinction Matters...” supra n.4.

³² Another way of making this point: what happened to the test in R v Oakes [1988] 1 SCR 35?

1 of rejecting a way of doing things from that foreign country which we ought to have retained.
2 This is McIntyre's "way of doing" freedom of association ("freedom of association means the
3 freedom to associate for the purposes of activities which are lawful when performed alone.") If
4 we could get back to that way of doing things then we would be in a position we cannot
5 currently attain – we could lay bare the legal structure of freedom of association. To do so
6 would require starting at the beginning with McIntyre's account of freedom of association and
7 then explicating the **common law** of freedom of association, (as expressed in the generally
8 applicable, formally equal, background legal rights and freedoms established by the law of
9 contract, tort and property), then moving on to the **statutory** redistribution³³ of those common
10 law rights and freedoms via the construction of a complex "zone"³⁴ of derivative rights and
11 duties, and then seeing, clearly and finally, what is really being asked of the **Charter** in our
12 constitutional cases. In these cases the Court is being asked the following question: **1.** Does the
13 Charter **forbid** the redistribution of the background common law rights and freedoms via the
14 statutory construction of derivative rights.³⁵ **2.** Or, does the Charter **demand**, or sometimes
15 demand the creation of such derivative rights?³⁶ **3.** Or, is the Charter **agnostic** in that it neither
16 forbids nor demands, but leaves it to legislative judgement?³⁷

17 Note: All of our modern labour law depends on **1** not being the right answer. For a long
18 time, until Dunmore, **3** was the answer. Now, if Dunmore is right (I think it is, but unnecessary
19 given the equality argument), and is the basis of everything we know about 2(d), as the Court
20 now holds in Fraser, then our answer is **2**. Sometimes the **Charter** demands that the **legislature**
21 pass a statute altering the background **common law** rules and creating new derivative rights.

22 Even though this is a coherent position there are many problems with, and questions to ask
23 about, the way it was deployed in Fraser. Some of the most interesting questions flow from the
24 dissent of Rothstein. He is quite correct – Fraser does not flow from Dunmore. Dunmore was a
25 derivative rights case. BC Health on the "right", ie freedom, to collective bargaining is not. (BC
26 Health on the duty to bargain is.) Rothstein says BC Health's new constitutional "right" to
27 collective bargaining includes a duty on the employer. That is correct as an interpretation of BC
28 Health. But he wishes to stick to the "freedom" to collectively bargain – without the derivative
29 right/duty to bargain. Because BC health goes beyond this, it should, in his view, be overruled.
30 The critical issue is: Why does he reject the idea of a derivative right/duty to bargain? He agrees
31 with Dunmore. Yet Dunmore is just the case where the Court did create a set of derivative
32 (unfair labour practice) rights for employees in order to protect their 2(d) freedom. How does
33 he avoid this problem?

³³ Indeed obliteration – see Laskin – "a world which has ceased to exist" Peterborough Lock Manufacturing Company (1954), 4 L.A.C. 1499 at p. 1502

³⁴ Which under the Trilogy was a "no go zone" – see BC Health supra n. 11 at para 26. The key word here is "zone", not "no go". This is Laskin's point.

³⁵ S This is the political position of Hayek as legally expressed in *Lochner* 198 U.S. 45 (1905). See the valuable discussion of Hayek and his challenge to labour law (Hayek is the "most articulate and influential theoretical critic of labour law and the welfare state") in Deakin and Wilkinson, *The Law of the Labour Market* (OUP 2005) at p.278 et seq).

³⁶ This is Dunmore.

³⁷ This was the position in the Trilogy.

1 He says it is because McIntyre's view grants to the group what the individual does not
2 have. That is true. So did Dunmore. But beside the point. McIntyre's test is for what freedoms
3 we have. The test for derivative rights is a completely separate legal issue (which did not arise
4 in BC Health) and is for determining what specific rights against (and correlative duties upon)
5 private actors (ie employers) are required to protect the freedom because without them
6 exercise of the freedom would be "impossible" (or some such test). It is critical to see that
7 these are two separate legal questions. This is what Dunmore sees and Dunmore itself is wrong
8 if we lose sight of this. But Rothstein agrees with Dunmore.

9 So, how to explain? The judgement is very complex and Rothstein clearly believes that
10 there is a distinction between the two cases. To unpack this point and to see what may be
11 problematic with it would require a lot of time and space. But in my view the large point to
12 make is that the judgement at several places fails to attend to the legal logic of what a McIntyre
13 like theory freedom actually requires, and does not require. But we need to leave all of these
14 points aside here and stick to the basic idea which is this. Once you are "onside" with Dunmore
15 – as I believe the Court is and must be, albeit unnecessarily given the s.15 argument, then you
16 are stuck with what Dunmore got right. Sometimes the constitution does apply "diagonally" to
17 private actors – ie sometimes derivative rights are required. Sometimes the pre-existing
18 freedoms of others, like employers, are to be curtailed. So in Dunmore the employer freedom
19 to fire (or not hire) workers who are union supporters is taken away and replaced with a new
20 derivative right in favour of the workers not to be so treated. And a corresponding duty on their
21 employers. In Fraser the question is exactly parallel. Should the employer's pre-existing
22 freedom to not bargain with workers who wish to bargain collectively be taken away and
23 replaced with a derivative right/duty in favour of employees? There is no avoiding this
24 question. And it was answered in the positive in BC Health (although not even raised). But it
25 was squarely raised in Fraser. Rothstein believes there is a freedom to bargain collectively.
26 Once you believe that you can/have to ask about derivative rights required to make it real – as
27 in Dunmore. Rothstein may be right that under a Charter one should be very stingy with these
28 sorts of things. But once you have Dunmore – and agree with it – you are stuck with deciding
29 the issue.

30 Much of the confusion here hinges on the inclusion of the right/duty to bargain in BC
31 Health, and bundling it with the freedom, without noticing it – or so it seems to me. That is the
32 great obscuring legal manoeuvre in our law of 2(d). This is why it is important to keep our eye
33 on the right/freedom distinction and the related idea of "derivative rights". The right/duty to
34 bargain is a derivative right/duty. It needs to be and can be argued for – as were the derivative
35 "unfair labour practice" rights in Dunmore. But it is a much more complicated derivative right
36 to construct. Much, much more. This is what was pointed out after BC Health and made clear
37 by Winkler. And this is the best argument for the equality argument. That is, once more with
38 feeling, we should reject the souvenir which is the refusal to invoke the ideal of equality in
39 these cases. If we did so we could see that the easy and better path to the derivative right is via
40 the argument that we have created these derivative rights to protect the fundamental
41 freedoms of other Ontario workers, and can provide no good reason for leaving these workers

1 out. So give them the statute's duty, just not written in the constitutional stone of 2(d) but
2 rather written in the much more compelling logic of equality.

3 4 Part IV – A Final Souvenir - A Final Domino

5 I turns out that momentum of this paper carries us even further in our thinking and to
6 another legal level – the Global level.

7 . This is so for the following reason. We have seen that the legal issue posed by cases such
8 as *Dunmore* and *Fraser* is, in legal terms, the following:

9 “When does the **Charter** instruct the Court to tell the **legislature** that it must pass a
10 **statute** to alter the otherwise applicable background set of **common law** rights and
11 freedoms?”

12 The final and global move adds another domino to this line of legal thinking, and it can be
13 put as follows:

14 “When does **international law** instruct the Court to interpret the **Charter** to tell the
15 **legislature** to pass a **statute** to alter the otherwise applicable background set of
16 **common law** rights and freedoms?”

17 And the answer the Court gives to the question now – in *BC Health* and *Fraser* - has its
18 origins in the Trilogy, in Chief Justice Dickson's dissent in the *Alberta Reference*. In fact, this is
19 all that remains of the Trilogy. It is our final souvenir. This is undoubtedly an interesting idea –
20 but it is also very dangerous one. This is something about which I have had some things to say
21 in print and I will not repeat them at length here.³⁸

22 The very basic idea the Court is now advocating is found in the following set of remarks:

- 23 1. “I believe the *Charter* should generally be presumed to provide protection at least as
24 great as that afforded by the similar provisions in the international human rights
25 documents which Canada has ratified” (Chief Justice Dickson in *Alberta Reference*³⁹)
- 26 2. “In short, though I do not believe that the judiciary is bound by the norms of
27 international law in interpreting the *Charter*, these norms provide a relevant and
28 persuasive source for interpretation of the provisions of the *Charter* especially when
29 they arise out of Canada's international obligations under human rights conventions”
30 (Chief Justice Dickson in *Alberta Reference*⁴⁰)

³⁸ Langille, “The Freedom of Association Mess...”, Langille, “Can We Rely?...”; Langille and Oliphant “From the Frying Pan to the Fire” all supra n.4.

³⁹ *Alberta Reference*, supra note 24 at para 59

⁴⁰ *Ibid* at para 60.

3. "Canada's Charter of rights should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified." (*B.C. Health*⁴¹)
4. "Charter rights *must* be interpreted in light of Canadian values and Canada's international and human rights commitments" (*Fraser*⁴²)
5. Interpretation of the Charter must take into account "the current state of international thought on human rights" (*B.C. Health*, endorsed in *Fraser*⁴³).

The question is "what are we to make of such remarks?" They seem intuitively attractive. But are they articulating a good idea? Upon reflection, it is, and on some obviously available, and now accepted, interpretations of them, not at all clear that they are.

The path which these remarks open up, and suggest we follow, is one which converts, for example, (soft) international (ILO) labour law into (hard) domestic law is via the chain of reasoning set out above - ie international law – charter – statute - common law. This is a path which crosses a number of legal minefields. In other work I have outlined some of the legal dangers involved. These include some very real problems for the rules of Canadian federalism and for our constitutional rules regarding the ratification of treaties. Briefly, because the power to ratify treaties is, under Canadian law, a federal **executive** power, it is quite important that Canada have a "dualist" and not a "monist" rule regarding the impact of the ratification of treaties upon domestic law.⁴⁴ Otherwise we miss some rather important democratic steps in law making.⁴⁵ So too, we need to be careful given our rules about our division of powers in our federation. Labour law is primarily a provincial matter. Because the power to ratify is **federal**, in order to respect the division of powers it is equally the case that we need a "dualist" rule. Otherwise we run right over our division of powers regarding labour law.⁴⁶

Those legal difficulties created by a fascination with this particular souvenir are rather plain to see. But there are other hidden and secondary effects which have been theoretically in play for a while, but which now have become very visible.

The basic idea is that the distinction between international and domestic law is important – for international law. We have as much ILO law as we do because it is "binding" "only" internationally, and "binding" there almost always in a soft law way. That is, if it were hard/domestically enforceable law we would not have it, or as much of it. So the harder we make the law the less we will have it being produced in Geneva. Whether you view this as a problem depends on whether you think ILO law needs to be hard. (My own view is that ILO law

⁴¹ B.C. Health, supra n. 11 at para 70.

⁴² Fraser, supra n. 13 at para 92 (emphasis in original).

⁴³ Ibid.

⁴⁴ That is, it is important that we have the basic legal rule that our international obligations do not enter domestic law directly, but only enter if there is a further domestic act (passing a statute) incorporating the content of those obligations into domestic law.

⁴⁵ Federal **executive** ratifies a Convention newly minted in Geneva, courts inject into domestic law, and the **legislature** never appears on the radar.

⁴⁶ **Federal** executive ratifies Convention newly minted in Geneva, courts inject into domestic law, and the **provinces** never show up on the radar.

1 is primarily soft, that this is a good thing, and that most thinking to the contrary is in the thrall
2 of some bad ideas about what international law is for.⁴⁷⁾

3 But these theoretical conjectures have recently been given way to some real life events.
4 Last year (2012) the Employers Group at the ILO went, in effect, on “strike” at the annual
5 International Labour Conference. For the first time in history (the ILO was founded in 1919, the
6 supervisory mechanisms created in the 1920s) they brought the ILO “supervisory machinery” to
7 a halt by refusing to send any cases to the Conference Committee on the Application of
8 Conventions.⁴⁸ This effectively stopped the “normal supervisory process” at the final stage. The
9 reason for the employers’ strike was their long standing dissatisfaction with the Committee of
10 Experts view that ILO Convention 87 on Freedom of Association contains a right to strike, in
11 spite of the fact that it does not on its face. (And the interpretation is a bold one on any metric.
12 I urge you to take a look at C87 yourself.)⁴⁹ Note – this is just the ‘jurisprudence’ which Chief

⁴⁷ See, Langille, "Seeking Post-Seattle Clarity - And Inspiration" in Conaghan, Fischl, Klare (eds) *Labour Law in An Era of Globalization* (Oxford University Press, 2002) 137-157; Langille, "Labour Policy in Canada - New Platform, New Paradigm" (2002), 28 *Canadian Public Policy* 133-142; Langille, "Re-reading the 1919 ILO Constitution in Light of Recent Evidence on Foreign Direct Investment and Workers' Rights" (2003), 42 *Columbia Journal of Transnational Law* 101-113; Langille, "Core Labour Rights – The True Story" (2005), 16 *European Journal of International Law* 1-29; Langille, "Globalization and The Just Society: Core Labour Rights, the FTAA, and Development", in Craig and Lynk (eds.) *Globalization and the Future of Labour Law* (Cambridge University Press, 2006) 274-303; Langille, "Labour Law's Back Pages", in Davidov and Langille (eds) *The Boundaries and Frontiers of Labour Law*, (Hart Publishing, 2006) 13-36; Langille, "The ILO Is Not a State, Its Members Are Not Firms" in G. Politakis (ed.) *Protecting Labour rights as Humans Rights: Present and Future Of International Supervision* (ILO, Geneva, 2007) 247-257; Langille, "The Future of ILO Law, and the ILO", in *The Future of International Law* (Proceedings of the American Association of International Law 101st Annual Meeting) (2007) 394-396; Langille, "What is International Labour Law For?" (2009), 3 *Law and Ethics of Human Rights* 47-82; Langille, "Putting International Labour Law on the (Right) Map" in Blackett and Levesque (eds.) *Social Regionalism in a Global Economy* (Routledge, 2009.); Langille, "Imagining Post Geneva Consensus Labour Law for Post Washington Consensus" (2010), 31 *Comparative Labour Law and Policy Journal* 523. Langille, "Labour Law's Theory of Justice" in Langille and Davidov (eds) *The Idea of Labour Law* (OUP, 2011).

⁴⁸ For those not experts on internal ILO machinery, don't worry about the institutional details. If you wish, see Langille "Can We Rely..?" supra n. 4

⁴⁹ I think that freedom of association, properly understood in legal terms, does include a freedom to strike. I also believe that there is an obvious (but, again, unnecessary given the idea of equality) argument to support the creation of a set of derivative rights protecting that freedom from non-state (ie employer) interference. But I don't think you can, under any legally principled approach to interpretation, interpret C87 as containing a right to strike. This involves reading the text – something Dickson, and the current Court, have never done it seems. If one does read the text ones see that it is a very limited instrument – one which seems explicitly, and ironically for Canadians, aimed at the very “thin” theory of freedom of association established in the Trilogy itself (to create, join, and administer unions). It is a convention about a fundamental freedom - but it is not a fundamental convention. It does not commit ratifying states to the broad and fundamental freedom but rather to some very specific and limited obligations regarding that freedom. But, as I say, this involves reading the Convention and seeing what is, and is not, there. I invite you to do so. This is of course what makes the CFA so interesting – it really is dealing with the “principles” of freedom of association and not the Conventions. The issue of the legal status of its views is complex. But the best account is that it is not elaborating jurisprudence, and that it is not giving legal content to the Conventions. The worth if its views lie in their substance – not in any legal authority. However, given its composition and role, it is not a surprise that those views are not readily reducible to coherent principle on many core issues for Canadians (such as “majoritarianism” and “exclusivity” for example). On this last point see Langille “Why Are...?” supra n.4

1 Justice Dickson relied upon in the Trilogy. But what really brought this longstanding matter to a
2 head, it seems, was the employers' view that it **now actually mattered** what the Experts were
3 thinking and saying. That is, the "law" as pronounced by the Experts, is no longer as soft as it
4 once was. The employers' view is that the Experts do not have "jurisdiction" to interpret
5 Conventions (and conclude that there is a right to strike in 87 for example). That did not matter
6 much in the past – but now it does. One of the ways it counts now is just via our chain of legal
7 dominos (international law-Charter-legislature-common law) – and the remarks, also set out
8 above, uttered by the Supreme Court of Canada. The real focus of concern in Geneva in 2012
9 was a parallel move by the European Court of Human Rights to follow ILO "law", ie the opinions
10 of the experts.⁵⁰ As Francis Maupain explains:

11 The right to strike, and its extent and limits, had suddenly transformed from a set of
12 more or less soft law principles into an enforceable right backed up by hard law (or at
13 least, too hard for the employers' taste, and enough to make a number of governments
14 uncomfortable). The general principles concerning the right to strike formulated by the
15 Committee on Freedom of Association had served as a stepping stone to the Committee
16 of Experts, who used these principles to "inform" the obligations undertaken by
17 Members that had ratified the relevant conventions (even though the conventions do
18 not expressly mention the right to strike). This "jurisprudence" – notwithstanding its
19 uncertain status even in ILO internal law – served in turn as a stepping stone for the
20 regional tribunals — and the ECHR in particular — to rule that the right to strike an
21 element of the rights covered by the European Convention on Human Rights and that
22 any violation could and must therefore be sanctioned by national authorities.⁵¹

23 This is exactly the path followed by Dickson in the Trilogy. Now the current Supreme Court
24 of Canada is following suit and doing what the ECHR has done. Our Court, like the ECHR, is now
25 a part of a "feed-back" loop to Geneva. And that feedback is being heard. This is, from a legal
26 point of view, not a bad thing for the ILO which has a long way to go to clarify its legal
27 processes, to create a clear, constitutionally legitimate and useful role of the CFA and the
28 Committee of Experts, and to come clean about the status of its legal act which is at best much
29 misunderstood and often misrepresented. As Maupain, a real authority, puts it above, this ILO
30 "jurisprudence" (quotation marks in original) has an "uncertain status even in ILO internal law".
31 That is, in my view, both authoritative and an understatement.

32 As I have said, in my view there is, on a proper understanding of the legal structure of
33 freedom of association, a constitutional right (ie a freedom) to strike in Canada. And I believe
34 that obvious (but unnecessary) arguments, which succeeded in Dunmore, are available to the
35 effect that this freedom is to be not only respected by the state but also protected, via
36 derivative rights, against private actor (employer) interference.. But this right to strike, and its
37 protection, does not flow from Canada's ILO obligations under C87. To think otherwise is to

⁵⁰ Demir and Baykara v Turkey [2008] ECHR 1345. See the discussion by Ewing and Hendy. "The Dramatic Implications of Demir and Baykara" (2010) 39 Ind LJ 1 at 8. See also Maupain "The ILO Regular Supervisory System: A Model in Crisis" forthcoming in The International Organizations Law Review n.44 and text.

⁵¹ Ibid.

1 misunderstand the content, nature and role of those obligations and their associated
2 supervisory processes And to say that those international obligations, and the interpretations of
3 the supervisory bodies, do instruct domestic courts on the detailed content of these vital
4 dimensions of Canadian law is not only legally confused but as we have just seen, now a way of
5 undermining those very international obligations, and bringing to a halt the potentially very
6 useful processes for their supervision.

7 All to say that we need to think hard before we decide which souvenirs of our journey to
8 the foreign country of the Trilogy we should keep or rediscover, and which ones we should
9 now see as unwise to have acquired in the first place.