INTRODUCTION

In the British Columbia Health Services case\textsuperscript{1}, the Supreme Court of Canada surprised – and delighted - the labour law community by reversing twenty years of entrenched jurisprudence. Ever since the 1987 Labour Trilogy\textsuperscript{2} the Court had consistently excluded the institution of collective bargaining from the protective embrace of the Charter’s\textsuperscript{3} s. 2(d) guarantee of freedom of association\textsuperscript{4}. Health Services then, joins that constellation of recent public law decisions of the Court in which it quite dramatically has reversed what had been heretofore understood to be settled law.

These include its rejection of Cooper\textsuperscript{5} in Martin\textsuperscript{6}, thereby expanding the class of administrative tribunals possessed of Charter jurisdiction; its resiling from Kindler\textsuperscript{7} and Ng\textsuperscript{8} in Burns\textsuperscript{9}, thereby narrowing the discretion of the Minister of Justice to extradite to a death penalty state; its abandonment of Law\textsuperscript{10} in Kapp\textsuperscript{11}, thereby refashioning the legal test for determining discrimination in its equality jurisprudence; its double rejection in Dunsmuir\textsuperscript{12} first of Knight\textsuperscript{13}, thereby banishing public servants from entitlement to procedural fairness on dismissal\textsuperscript{14}, second, of Southam\textsuperscript{15} and its progeny, thereby reverting to a two-tiered from a three-tiered standard of

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\textsuperscript{3} Schedule B to the Canada Act 1982, (U.K.) 1982, c.11

\textsuperscript{4} Everyone has the following fundamental freedoms:


\textsuperscript{7} Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779.

\textsuperscript{8} Reference re Ng Extradition (Can.), [1991] 2 S.C.R. 858.

\textsuperscript{9} United States v. Burns, [2001] 1 S.C.R. 283

\textsuperscript{10} Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497.

\textsuperscript{11} R. v. Kapp, 2008 SCC 41

\textsuperscript{12} Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190

\textsuperscript{13} Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653.

\textsuperscript{14} Indeed, in the public employment context, it severely constricts the application of the momentous English decision in Ridge v. Baldwin, [1963] 2 All E.R. 66. Quite shocking.

\textsuperscript{15} Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748.
judicial review, but in the context abandoning that of patent unreasonableness as first conceived in the *NB Liquor Board* case\(^{16}\), the *fons et origo* of the modern jurisprudence.

Is there a jurisprudential force which draws these several cases into a single constellation and so explains a commonality of outcome? If so, will it assist us in predicting what else of the Supreme Court’s settled doctrine will succumb to its pull, and another reversal be added to that constellation? Or are we better off rejecting the idea of such a unified theory and concluding that each reversal is a singularity. Like astronomers who search for order in the firmament of the stars, we adepts of the law seek order in the firmament of the law.

Perhaps what we are witnessing is a maturing of our *Charter* jurisprudence as the Court gradually and ever more boldly departs from the dominant mode of deontological jurisprudential inquiry which characterized the common law and its narrow focus on the parties before the court; and more consciously espouses an openly instrumentalist or consequentialist mode of jurisprudential inquiry, one which looks beyond the immediate parties before the court to the broader sociological implications of the disputes it is called upon to determine.\(^{17}\)

Such a critical analysis of the broad sweep of the *Charter* jurisprudence is not without analogous precedent. “There are statutes and there are statutes” Lord Chancellor Sankey reminded us, and the interpretation of “an Imperial Act which creates a constitution for a new country” should be given “a large and liberal interpretation” he continued, chiding the Supreme Court of Canada for its timid interpretation of the *Constitution Act, 1867*\(^{18}\), in the celebrated *Persons* case.\(^{19}\) If that is so in the interpretation of our federal Charter, then how much the more so in the interpretation of our *Charter of Rights and Freedoms*.

Viewed from this perspective, *Health Services* becomes then a necessary - dare one say inevitable - corrective to the jurisprudential deformity which was the *Labour Trilogy*. In the first part of this paper, I explore *Health Services* from this perspective. I then frame out the place of the strike in our pre-*Charter* jurisprudence, and prognosticate on whether it too is swept under the protective umbrella of the *Charter* section 2(d) freedom of association, [I believe it can only be so]. Next, I explore the intriguing question whether in *Health Services* the Supreme Court has conferred constitutional status upon trade unions. Underlying the whole inquiry is a more far-reaching question: whether broad-sweeping case law such as *Health Services*, which consciously considers normative outcomes as its justificatory criterion, has the necessary staying power to ensure that stability, predictability and uniformity of result so central to the rule of law.

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\(^{17}\) I wish to acknowledge here the contribution of my colleague Aloke Chatterjee at the University of New Brunswick Faculty of Law, who has enhanced my understanding of these underlying jurisprudential currents.

\(^{18}\) 30 & 31 Victoria, c.1.

I Parsing the Text of the Judgement

Early on in the judgement, the Supreme Court stated baldly its rationale for disavowing the *Labour Trilogy*:

We conclude that the grounds advanced in the earlier decisions for the exclusion of collective bargaining from the Charter’s protection of freedom of association do not withstand principled scrutiny and should be rejected.  

A harsh criticism indeed of the capacity of the judicial cohort which had earlier addressed the issue to undergird with logic those earlier penned decisions.

For my purposes here, the decision needs require no painstaking analysis. Suffice to say, the Court has vindicated fully the view which Chief Justice Dickson so eloquently expressed in the *Labour Trilogy* that “the profoundly social nature of human endeavours” must inform our understanding of the Charter s.2(d) freedom of association, for “our freedom to act with others is a primary condition of community life, human progress and civilized society.” The philosophical underpinnings of Justice Dickson’s dissent are well captured in these words:

Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person’s dignity and self respect.

In sharp contrast, Justice McIntyre, in a concurring opinion which up until the BC *Health Services* case had come to represent the Court’s pinched analysis of Charter s.2(d) in the context of collective bargaining, had characterized trade unions as “overwhelmingly...concerned with the economic interests of their members”, and belittled the right to strike as “of relatively recent vintage”. All this is swept aside in BC *Health Services*, the Court opting to realign itself with the humane vision of the dignity of labour which had driven Chief justice Dickson’s dissent in the *Labour Trilogy*, rather than the utilitarian characterization by Justice McIntyre of work and therefore the worker as simply an economic construct.

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20 *Health Services*, supra n.1 at para. 22
21 *Reference re PSERA* supra n.2, at DLR p.197
22 Ibid at DLR p. 109
23 Ibid at DLR p. 231
The Court speaks of the right to collective bargaining as one which “enhances the human dignity, liberty and autonomy of workers”\(^\text{24}\), one which enhances fundamental informing values of the Charter, including equality and democracy.\(^\text{25}\) However, there are anomalies in the analysis. Principal among these is the Court’s insistence throughout the judgement that only the process of collective bargaining comes under the Charter rubric of freedom of association.\(^\text{26}\) In the face of the Court’s own labour law jurisprudence which has affirmed that the duty to bargain in good faith may require assent by an employer to “basic and standard terms” in a collective agreement\(^\text{27}\), this dichotomy between process and substance will prove difficult to sustain in a principled manner. The Court also insists on treating Justice Bastarache’s reasons for judgement in Dunmore\(^\text{28}\) as the jurisprudential source for its embrace of collective bargaining as a Charter protected activity, yet he himself had been insistent there to exclude it from the Charter’s reach.\(^\text{29}\)

II The Right to Strike\(^\text{30}\)

Early in its judgement the Court was swift to excise the right to strike from any consideration. It observed rather cryptically:

> We note that the present case does not concern the right to strike, which was considered in earlier litigation on the scope of the guarantee of freedom of association.\(^\text{31}\)

But is that not the same line of litigation flowing from the Labour Trilogy which the Court considers unprincipled? Is the right to strike and bargain collectively so complex an hendiadys as to defy the Court’s ability to take a principled approach to the place of the strike in our constitutional order? To pose the question is to answer it. Rather, its hesitation to address the strike in this, its first articulation of collective bargaining as a constitutional value, must be understood as strategic. In a reversal of the Court’s jurisprudence of this magnitude, unanimity amongst the cohort of Judges seized guarantees its entrenchment; it is evident that were the strike to have been included in the Court’s consideration at this time, the cost would have been loss of that unanimity. A cost too great; rather, postpone to another day integration of the right to strike into our constitutional order.

\(^{24}\) Health Services, supra n.1 at para. 82.

\(^{25}\) Ibid at paras 84-6.

\(^{26}\) Ibid at paras 19, 91-92, 128-29, and passim.

\(^{27}\) Royal Oak Mines Inc. V. Canada (Labour Relations Board), [1996] SCJ No.14. And see Justice Binnie’s warning in Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services), [2001] SCJ No.41.


\(^{29}\) Ibid at para. 17.

\(^{30}\) In this section I draw on an earlier study: “Is the Collective Agreement a Contract”, unpublished paper delivered at the Viscount Bennett Seminar, University of New Brunswick, October 1984; and my decision as Vice-Chair, New Brunswick Industrial Relations Board in Re Moncton Northeast Construction Association (1986) 12 CLRBR (NS) 203; 86 CLLC, Case No. 16,005.

\(^{31}\) Health services, supra n.1 at para. 19.
That day is fast approaching. In Fraser\textsuperscript{32}, a decision on appeal from the Ontario Court of Appeal, the Court will address the requirement imposed upon the provincial legislature by that Court, to provide third-party compulsory binding arbitration for the resolution of interest disputes in its agricultural sector labour legislation. Implicit in such an imposed condition for constitutional integrity is recognition of the strike as an exercise of Charter section 2(d) freedom of association; or, as I have written elsewhere, the right to strike is entering Charter territory ‘by the backdoor.’\textsuperscript{33}

And this is not surprising. To speak of collective bargaining is to speak of the strike. The two are inextricably linked, and neither has anything at all to do with the individual contract of employment, a socio-economic and political reality recognized even by Justice McIntyre in his distorted analysis of the right to strike in the \textit{Labour Trilogy}.\textsuperscript{34} Both have everything to do with the solidarity of workers and their relationship to capital, and both are tolerated at common law, even as it denies contractual status to the collective agreement. This was recognized on the highest authority already by the end of the first quarter of the last century, long before statutory collective bargaining regimes had been enacted. So Lord Russell in \textit{Young v. CNR}:

\begin{quote}

By itself, it [the collective agreement] constitutes no contract between any individual employee and the company which employs him. If an employer refused to observe the rules, the effective sequel would be, not an action by any employee, not even an action by [the trade union] against the employer for specific performance or damages, but the calling of a strike until the grievance was remedied.\textsuperscript{35}

\end{quote}

That was on a \textit{per saltem} appeal from Manitoba.\textsuperscript{36} A decade later, in the \textit{Harris Tweed} case, Lord Wright could state:

\begin{quote}

The right of workmen to strike is an essential element in the principle of collective bargaining.\textsuperscript{37}

\end{quote}

And in Canada? Here is the view of our own Justice Rand in \textit{Newall v. Barker}, several years into a statutory collective bargaining regime in Canada:

\begin{quote}

It is now established beyond controversy that in the competition between workmen and employers and between groups of workmen, concerted abstention from work for the purpose of serving the interest of organized labour is justifiable conduct.”\textsuperscript{38}

\end{quote}


\textsuperscript{33} The Lawyer’s Weekly, 6 March 2009. at p.8. The section 1 analysis of compulsory binding interest arbitration as a reasonable limit on the right to strike as an exercise of Charter s.2(d) freedom of association was fully laid out by Chief Justice Dickson in \textit{Reference Re PSERA} supra n.2 at paras. 101ff.

\textsuperscript{34} \textit{Reference Re PSERA}, supra n.2 at paras. 177ff.

\textsuperscript{35} [1931] 1 DLR 645 at p. 650 (PC).

\textsuperscript{36} Reported at [1930] 3 DLR 352 (Man CA).

\textsuperscript{37} \textit{Crofter Hand Woven Harris Tweed Co. v. Veitch}, [1942] 1 All ER 142 at pp.158-9 (HL).

\textsuperscript{38} [1950] SCR 385, at p. 397.
The strike itself had been fully developed during the period when collective bargaining fell outside the ken of the law and comprised its own order of mutual promise, one autonomous of the law and its institutions. The strike served three distinct, although inter-related remedial objectives within that dynamic regime.

First, the strike was used as an instrument of persuasion to induce recognition by the employer of the status of the trade union as the sole voice of its employees, their freely chosen representative, entitled as such to bargain on their behalf. Workers often found their solidarity frustrated by a stubborn refusal on the part of their employers to deal with the trade union chosen by them to be their sole representative. The strike could be a powerful disincentive to such employer recalcitrance.

Second, the strike was used as an instrument of negotiation once employer recognition of the trade union as sole representative of its workers had been attained and the process of collective bargaining to determine the terms and conditions of labour at the workplace had commenced. Where reason and hard bargaining had failed to birth a collective agreement, the full weight of worker bargaining power could be brought to bear and worker solidarity manifested to obtain a collective agreement setting out those terms and conditions of labour mutually agreed to be binding.

Third, the strike was used as an instrument of relief in the resolution of disputes arising under the terms of an extant collective agreement. Workers dissatisfied with the manner in which the employer was managing the workplace in the face of collective agreement restraints, would often down their tools and refuse to work until the employer had been brought to heel and the breach of the collective agreement curbed.

Under the statutory regimes common to all Canadian jurisdictions for over half a century now, the first and the third of these uses of the strike weapon have been rendered illegal. In the first instance, as an instrument of persuasion, the strike has been replaced by the process of certification whereby a trade union becomes statutorily recognized as the sole voice of an employer’s workers; in the latter instance, as an instrument of relief, the strike has been replaced by compulsory binding rights arbitration of all disputes arising between parties to a collective agreement. Only in the instance of its use as an instrument of negotiation does the strike remain lawful, and even then it is subject to stringent regulation as to the time and manner of recourse to its defensive thrust.

Little wonder then that the celebrated Woods Task Force Report on Canadian Industrial Relations [1968] considered the strike to be “an indispensible part of the Canadian industrial relations system” and “likely to remain so in our present socio-economic-political society.”

Driving that system is the theory that in a free market economy industrial democracy must

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39 This was the situation addressed by Lord Russell in Young v. CNR, supra n. 26.
40 Task Force Report at p.129.
underpin governance of the workplace, ie free collective bargaining “for which there is no substitute in a free society.”

And the requirements of an effective system of collective bargaining?

From the point of view of employees, such a system requires that they be free to engage in three kinds of activity: to form themselves into associations, to engage employers in bargaining with the associations, and to invoke meaningful economic sanctions in support of the bargaining.

Of the three, a reluctant Supreme Court gave to the first grudging recognition as a constitutional value in the Labour Trilogy; and buttressed this bare essential some 15 years later in Dunmore. The second which had been so forcefully rejected as a constitutional value in the Labour Trilogy, was resoundingly affirmed to enjoy constitutional status in the BC Health Services case. With anticipation workers and all Canadians of good will await affirmation by the Supreme Court of the strike as an essential element of collective bargaining, and as such, a manifestation of Charter section 2(d) freedom of association.

III Are Trade Unions Constitutional Actors?

Almost at the very outset of its judgement, in the several paragraphs in which it summarizes the Act under attack, the Court makes the following observation:

There was no meaningful consultation with unions before it became law. The government was aware that some of the areas affected by Bill 29 were of great concern to the unions and had expressed a willingness to consult. However, in the end, consultation was minimal. A few meetings were held between representatives of the unions and the government on general issues relating to health care. These did not deal specifically with Bill 29 and the changes that it proposed. Union representatives expressed their desire to be further consulted. The Minister of Health Services telephoned a union representative 20 minutes before Bill 29 was introduced in the legislative assembly to inform the union that the government would be introducing legislation dealing with employment security and other provisions of existing collective agreements. This was the only consultation with unions before the Act was passed (A.R., at p. 1076).

Was there a duty to consult, and if so where was it rooted – in Labour Law or in Constitutional Law?

The concept of consultation as a facet of the Employer’s duty to bargain in good faith, even if not explicitly so framed, is not altogether alien to Canadian labour law. Indeed the duty to bargain has come a fair distance from its original anodyne conceptualization as an empty procedural vessel, epitomized in the land of its origin by Senator Wagner’s folksy quip to a somewhat dubious Congress:

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41 Ibid at p.138.
42 Ibid at pp.3-4.
43 Dunmore v. Ontario (Attorney General), 2001 SCC 94.
44 Health Services, supra n.1 at para. 7.
When employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of the Employer and say, “Here they are, the legal representatives of your employees.” What happens behind those doors is not enquired into, and the bill does not inquire into it.\(^45\)

In a now classic exposition of the duty to bargain in good faith, Archibald Cox discerned four purposes propelling its enactment: first, to reduce industrial conflict and the incidence of strike action; second, to enhance the Employer’s legal duty to recognize the Union as representative of its employees; third, to implement the ‘basic philosophy’ of the Act to further collective over against individual bargaining and so elevate Labour to the status of an equal partner with the Employer in determining conditions and terms of work at the workplace; fourth, to enhance the institution of collective bargaining as ‘a rational process of persuasion’.\(^46\) As Cox noted, of these purposes only the first two were formally enacted into law, and although he was dubious whether the last two could be assimilated into the culture of a free market economy, later developments in American labour law went far to buttress the statutory duty.\(^47\)

Despite some false starts\(^48\), Canadian labour boards too have infused the duty to bargain in good faith with robustness, and even substantive content. Although they may not yet have gone so far as to formally espouse the principle of ‘equal partnership’\(^49\), they have firmly entrenched the concept of ‘a rational process of persuasion’ as the footing upon which the collective bargaining superstructure rests.\(^50\) Most tellingly, they have imposed upon the Employer a positive obligation arising during the negotiation process, to disclose to the Union any corporate decision or near-decision taken in the boardroom which would affect the structure of the bargaining unit and alter the bargaining rights of the Union.\(^51\) A duty to consult by another name? Perhaps.

In *Health Services*, the Court endorses this labour law doctrine without question, speaking as it does of “[t]he fundamental precept of collective bargaining – the duty to consult and negotiate in good faith”\(^52\)...“which lies at the heart of collective bargaining.”\(^53\) This is a duty which lies upon

\(^{45}\) (1935) 79 Congressional Record 7660, referenced in Bernard Adell, “The Duty to Bargain in Good Faith”, (Kingston: Queen’s University Industrial Relations Centre, Reprint Series No.48, 1980) and referred to in part in *Health Services* supra n.1 at para. 99.


\(^{47}\) “Negotiation nourished by full and informal discussion stands a better chance of bringing forth the fruit of a collective bargaining agreement than negotiation based on ignorance and deception” USSC xx, cited by BCLRB Chair, Paul Weller in *Re Noranda Metal Industries Ltd.*, [1975] 1 Can. LRBR 145 at 162.


\(^{50}\) “The duty reinforces the obligation of an employer to recognize the bargaining agent, and beyond this somewhat primitive though important purpose, it can be said that the duty is intended to foster rational, informed discussion thereby minimizing the potential for ‘unnecessary’ industrial conflict... *Re DeVilbiss (Canada) Ltd.*, (1976), 76 CLLC, No. 1609 per Vice-Chair Adams at p. 405.


\(^{52}\) *Health Services* supra, n.1 at para.97.

\(^{53}\) Ibid., at para 98. And see also para. 107 “the collective right to good faith negotiations and consultation”.

all employers, *ergo* upon the Government *qua* Employer. Although in formulation novel, this is pure Labour Law. Yet, the Court had made the point earlier that the case before it was one against the Government *qua* Legislator, not Employer.\(^{54}\) So, how did the language of ‘consultation’, a term not native to labour law, come into the Court’s labour law analysis and what is its source? It can only be from its constitutional jurisprudence.

We began our discussion of this issue by referencing the Court’s evident disapprobation early on in its judgement of the Government’s failure to consult the aggrieved trade unions in any meaningful sense prior to the introduction of legislation which severely impinged on their collective bargaining rights. The Court returns to this failing at the conclusion of its judgement. It acknowledges that the principle of parliamentary sovereignty admits of no such stricture upon the Legislature’s law making authority\(^ {55}\), but hastens to add that it is upon Government that such an obligation lies in the pre-legislative ramping up process leading to legislative enactment.

It does so by reframing the obligation as a factor going to the minimal impairment inquiry under the *Oakes*\(^ {56}\) test. Government is criticised for presenting no evidence whatsoever “why there was no consultation with the unions about the range of options open to it”\(^ {57}\) There was “no meaningful bargaining or consultation” prior to passage of the legislation despite the desire “repeatedly expressed” by trade union representatives to consult the Government, yet “consultation never took place.”\(^ {58}\) This failing on the part of Government in orchestrating the speedy passage\(^ {59}\) of “an important and significant piece of labour legislation” with “the potential to affect the rights of employees dramatically and unusually”\(^ {60}\) was central to the Court’s ultimate conclusion. The Government had failed the minimal impairment test, leading inexorably to the conclusion that the offending provisions of the Act could not meet the justificatory demands of *Charter* section 1\(^ {61}\). This is pure Constitutional Law. And its origins?

One has to turn to another historically disenfranchised and vulnerable minority - and Government’s relationship to it - to discover the seedbed of a duty to consult: the Aboriginal Peoples of Canada. In a trilogy of judgements handed down in 2004\(^ {62}\), the Supreme Court confirmed as a principle of constitutional law that a duty lay upon the Crown to consult Aboriginal Peoples whenever the Crown or its licensee purports to take up or otherwise interfere with the use and enjoyment of lands subject to existing aboriginal and treaty rights\(^ {63}\). This duty is rooted in the Crown’s assertion of exclusive jurisdiction over Aboriginal peoples and their lands under the *Constitution Act, 1867*\(^ {64}\) a jurisdiction which engages the ‘honour of the Crown’

\(^{54}\) Ibid at para. 88

\(^{55}\) Ibid at para. 157.


\(^{57}\) *Health Services*, supra n.1 at para 158.

\(^{58}\) Ibid at para. 159.

\(^{59}\) The Act came into force three days after receiving first reading in the Legislature. Ibid at para. 6.

\(^{60}\) Ibid at para. 160.

\(^{61}\) Ibid at para. 161


\(^{63}\) Such rights are constitutionally entrenched at s.35(1) of the *Charter*.

\(^{64}\) S. 91.27 Indians, and Lands reserved for the Indians.
in all its dealings with the Aboriginal peoples. The duty requires of the Crown “meaningful good faith consultation” and a willingness to be accommodative following such consultation before taking action contrary to aboriginal treaty or other existing rights. Here we see the language of ‘consultation’ which has crept into Health Services both as a restraint upon Government as Legislator in the constitutional sense, and as a restraint upon Government as Employer in the labour law sense.

This interrelationship of the two bodies of jurisprudence can be confusing, but need not be so when properly grasped. As a general principle, “[t]here subsists a requirement that the provisions of the Act preserve the process of good faith consultation fundamental to collective bargaining. That is the bottom line.” This is a directive to Government as Legislator, and it will be brought up short whether the legislation under scrutiny and found to be lacking governs labour relations in the private sector, where employers are not themselves directly subject to Charter restraint in their collective bargaining relationships; or as here where it governs the public sector, where Government itself acts as Employer.

In the latter instance though, the two bodies of jurisprudence are conflated, for whenever the Government as Employer fails “to consult and negotiate in good faith” in the labour law sense, then pace the Court, in its capacity as a state actor it can only be said simultaneously to have engaged in conduct violative of Charter s.2(d)freedom of association which now conclusively embraces the institution of collective bargaining.

However, in whichever capacity the Government is acting, thrust upon it by the Court is the duty to consult Trade Unions as the chosen representatives of workers whenever the process of bargaining collectively in good faith with the objective of entering into a collective agreement “[h]as been, or is likely to be, significantly and adversely affected”, in a manner “[s]o substantial that it interferes not only with the attainment of the union members’ objectives (which is not protected), but with the very process that enables them to pursue these objectives by engaging in meaningful negotiations with the employer.”

The political science physiology of the duty to consult is not identical to that in the case of the Aboriginal peoples which, as we have noted, is rooted in the honour of the Crown. In the collective bargaining context it rests upon the Executive Branch of our tripartite constitutional structure. But given the political reality of the party system which dominates our polity, thereby entrenching a system of government best described as executive parliamentarianism, imposition of such a duty upon the Executive has the practical effect of hobbling the Legislative Branch in the exercise of its sovereign right to legislate.

65 See in particular, Haida Nation at paras. 17-19; 27, 39, 53.
66 Health Services supra n.1 at para. 107
67 Health Services supra, n.1 at para.97.
68 Ibid, at para.88
69 Ibid at para 92
70 Ibid at para 91.
71 Indeed, this is the rationale given by Justice Charron for rejecting the concept of a duty to consult lying upon government. Ibid at para 179.
There is an alternative way of viewing the phenomenon. One could read the judgement as a restraint upon the undoubted discretion of the Executive to shape governmental policy. Read in that light, one could draw upon that developing body of jurisprudence in which the Court has resurrected the theory of robust curial restraint of executive abuse of discretion, famously articulated by Justice Rand in *Roncarelli v. Duplessis.* Justice Binnie has been the catalyst here, and in two ingeniously crafted judgements has breathed new life into this iconic, but hitherto neglected pillar of our public law jurisprudence. His first foray was in the *Mount Sinai Hospital* case where, in re-affirming that the administrative law doctrine of legitimate expectations is limited to procedural relief, he noted parenthetically that the English jurisprudence, which allows for substantive relief, comprises “[t]he greatest intrusion by the courts into public administration” and represents

“[a] level of judicial intervention in government policy that our courts, to date, have considered inappropriate in the absence of a successful challenge under the Canadian Charter of Rights and freedoms.”

The passage clearly hints at bridging the divide between procedural and substantive relief in the administrative law legitimate expectation jurisprudence by recasting the challenge to governmental action in *Charter* language where legitimate expectations may well attract substantive relief. There was no Charter issue in *Mount Sinai*. Yet, Justice Binnie was able to see to it that the underlying facts were “recycled in the abuse of discretion analysis” and so grant substantive relief to the legitimate expectations of the aggrieved hospital center. Only Chief Justice McLachlin endorsed his analysis and creative disposition, the other five judges on the panel arriving at the same result in a more pedestrian manner.

In the *Ontario Judges as Arbitrators* case Justice Binnie was able to attract the support of five members of the Court in an even more daring application of abuse of discretion doctrine. He determined that, in declining “[t]o select arbitrators from candidates who were qualified not only by their impartiality, but by their expertise and general acceptance in the labour relations community”, the Minister had failed “[t]o exercise his power of appointment in a manner consistent with the purpose and objects of the statute...”, outside of “[t]he perspective within which a statute is intended to operate”, namely “that of a legislative measure that seeks to achieve industrial peace.” Is it that much of a leap from failure to exercise a ministerial discretion in accord with a legislative mandate so as to attract

72 [1959] SCR 121.
73 Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services), [2001] 2 SCR 281, hereinafter *Mount Sinai;* CUPE v. Ontario (Minister of Labour), [2003] 1 SCR 539, hereinafter *Ontario Judges as Arbitrators* case.
74 *Mount Sinai*, supra n.50 at paras 22-38.
75 Ibid at paras. 26-27.
76 Ibid ar para. 52.
77 These were Justices Gonthier, Iacobucci, Arbour, LeBel and Deschamps. Chief Justice McLachlin and Justices Major and Bastarache dissented. Of the Court, the Chief Justice and Justices Gonthier, Iacobucci, Major and Bastarache had also sat with Justice Binnie on *Mount Sinai*, as had Justice L'Heureux-Dubé, who had since retired.
78 Supra n.50 at para.49 .
79 *Roncarelli v. Duplessis*, supra n.49 at p.140.
80 Supra n. 50 at para.94.
substantive relief, to failure to exercise the power of governance within the bounds of the Charter so as to attract substantive relief? I think not. In each case abuse of discretion analysis drives the outcome.

Are trade unions constitutional actors, then? Without a doubt. That status may not be entrenched explicitly in the Constitution itself as is the case of the Aboriginal peoples, but it is a necessary concomitant of the Court’s determination to welcome the institution of collective bargaining into the Charter tent. There were hints already in its earlier jurisprudence that the Court would accord to trade unions a ‘most favoured nation’ status under the Charter. In Dunmore Justice Bastarache had adverted to “[t]he dynamic and evolving role of the trade union in Canadian society,” observing that in Delisle, Justice L’Heureux Dubé had noted that “the right to freedom of association must take into account the nature and importance of labour associations as institutions that work for the betterment of working conditions and the protection of the dignity and collective interests of workers in a fundamental aspect of their lives: employment.”

From these earlier appreciations of the centrality of trade unions to freedom of association, it was but a small step to vest them with a consultative constitutional role where the institution of collective bargaining, now Charter protected, is at risk. Yet, a caveat. Grant of such status presumes maturity in its exercise. Trade Unions must show themselves up to the standard expected in the exercise of their consultative function, lest by over-reaching they lose the trust which the Court has placed in them, and with it, any meaningful consultative role in shaping the institution of collective bargaining as a constitutional artifact.

CONCLUSION

Does broad-sweeping case law, such as Health Services, which consciously considers normative outcomes as its justificatory criterion have the necessary staying power to ensure the stability, predictability and uniformity of result so central to the rule of law? I think so and look forward with anticipation to the Court’s continuing exegetical encounter with the Charter s.2(d) freedom of association as it considers the raft of cases enlivened by Health Services which already are starting to come before it.

I commenced my paper with a simple observation: that the BC Health Services case joins ‘that constellation of recent public law decisions of the Court in which it quite dramatically has reversed what had been heretofore understood to be settled law.” I conclude by observing that,

81 Constitution Act, 1982, Part II, Rights of the Aboriginal Peoples of Canada. In contrast to the Constitution Act 1867, s.91.24, where they are passive constitutional subjects.
83 Dunmore supra n. 55 at para. 37, citing Delisle v. Canada (Deputy Attorney General), [1999] 2 SCR 989 at para. 6, emphasis in the original.
84 Supra p.1, para .1.
happily, it is a constellation that burns bright in the galaxy of the *Canadian Charter of Rights and Freedoms*. 