IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***The Health Services and Support - Facilities Subsector Bargaining Association et al. v. Her Majesty The Queen et al.***
2003 BCSC 1379

Date: 20030911
Docket: L020810
Registry: Vancouver

Between:

The Health Services and Support – Facilities Subsector Bargaining Association, The Health Services and Support-Community Subsector Bargaining Association, The Nurses' Bargaining Association, The Hospital Employees' Union, The B.C. Government and Service Employees' Union, The British Columbia Nurses' Union, Heather Caroline Birkett, Janine Brooker, Amaljeet Kaur Jhand, Leona Mary Fraser, Paamela Jean Sankey-Kilduff, Sally Lorraine Stevenson, and Sharleen G.V. Decillia

Plaintiffs

And

Her Majesty The Queen In Right Of The Province of British Columbia

Defendant

Before: The Honourable Madam Justice Garson
(In Chambers)

Reasons for Judgment

Counsel for the plaintiffs:	J. J. Arvay, Q.C. and C. J. Parker
Counsel for the defendants:	P. A. Gall, Q.C., N. Sharma, and A. Zwack
Date and Place of Trial:	April 14-17, 22-24, 2003 Vancouver, B.C.

TABLE OF CONTENTS

I. **INTRODUCTION**

[1] On January 28, 2002, the government of British Columbia enacted the ***Health and Social Services Delivery Improvement Act***, S.B.C. 2002, c. 2 ("Bill 29"). On second reading of the legislation, the Minister responsible, the Honourable G. Bruce, said, among other things, "The reality is that our health system has been on a fast track to collapse. We've got to get the situation under control so we can meet the needs of the patients and the needs of the people of British Columbia". Broadly speaking, Bill 29, which applies to non-clinical services performed by health care workers, voids certain provisions of existing collective agreements with the result that:

- a health sector employer may contract with outside service providers to perform certain services previously provided by the plaintiffs;

- upon lay-off, the employer shall not give more than 60 days notice to employees;

- the previously agreed regime for the bumping by senior employees of junior employees upon lay-off is replaced with a more restrictive one;

- health care workers or services may be transferred or assigned between different sites; and

- health sector employers are no longer required to provide laid off employees with the benefits of the Employment Security and Labour Force Adjustment Agreement which gave such employees up to one year of retraining and assistance in finding alternative positions.

[2] I will describe the provisions of Bill 29 and the regulation enacted pursuant to it in further detail below.

[3] In this action the plaintiffs, who are certain health care sector unions, associations of bargaining agents, and employees affected by Bill 29, challenge the constitutionality of Bill 29. The plaintiffs' objections to Bill 29 are perhaps best captured by Anne Harvey, Chief Operating Officer of the British Columbia Nurses Union, when she says in her affidavit, "The provisions of Bill 29 emphasize that a union's ability to engage in a free collective bargaining process can be removed by the stroke of a government pen."

[4] The plaintiffs' argument rests upon three grounds:

- Bill 29 impedes the plaintiffs' freedom to join, establish and maintain an association, namely, a workplace union, which freedom is guaranteed by s. 2(d) of the ***Charter of Rights and Freedoms***.

- Bill 29 infringes the rights of the plaintiffs "to life, liberty, and security of the person" protected by s. 7 of the ***Charter***. The plaintiffs say that s. 7 embraces the principle that an employee will not be terminated from his or her employment without cause or notice except in accordance with the principles of fundamental justice. The consequence of Bill 29, they say, is to terminate employment of its members, not in accordance with the collective agreement, and without adherence to fundamental principles of justice.

- Bill 29 discriminates against the members of the plaintiff unions and the individual plaintiffs on the ground of sex, or on the analogous ground of women who work in female-

dominated sectors, doing work associated with women, contrary to s. 15 of the ***Charter.***

[5] In response, the Crown argues that the plaintiffs' opposition to Bill 29 is based on a policy dispute with the current government. The Crown says in its brief, "It is clear that the plaintiffs dislike the Act. They oppose its underlying policy and philosophy, both in terms of health care and in terms of labour relations." However, the Crown argues, this policy dispute does not engage the freedoms guaranteed by the ***Charter.***

[6] The remedy sought by the plaintiffs is a judgment of this court striking down Parts 1 and 2 of Bill 29 and the ***Health Sector Labour Adjustment Regulation***, B.C. Reg. 39/2002 ("the Regulation") passed pursuant to those parts. Part 3 of Bill 29 does not pertain to the plaintiffs.

[7] The plaintiffs' principal argument is that the impact of Bill 29 is so significant that it impedes their s. 2(d) freedom to associate. Mr. Arvay, counsel for the plaintiffs, describes this as his "what is the point?" argument, meaning that the plaintiffs would, if asked, articulate their feelings about Bill 29 by saying "what is the point of joining or maintaining a union membership?" "What would be the point?"

they would say, because the fundamental advantages of union membership have been removed by the legislature and their hard won achievements, such as pay equity included in their last collective agreement, have been frustrated by Bill 29. He says that the recent judgment of the Supreme Court of Canada in ***Dunmore v. Ontario (Attorney General)***, [2001] 3 S.C.R. 1016, 2001 SCC 94, in which the Court held that the provision of the ***Ontario Labour Relations Act***, R.S.O. 1980, c. 288 excluding agricultural workers from the labour relations regime was a breach of the plaintiffs' s. 2(d) Charter rights, is the first but significant step by the Supreme Court of Canada towards giving constitutional protection to certain fundamental entitlements of collective bargaining.

[8] The plaintiffs also challenge the constitutionality of Bill 29 under ss. 7 and 15 of the ***Charter***. I will examine these alternative arguments below.

II. **THE PLAINTIFFS**

[9] Before examining the impugned legislation I will describe briefly the plaintiffs and the collective agreements to which they are party.

[10] The Hospital Employees Union ("HEU") has been representing health care support workers (currently the "Facilities Subsector") since 1944. The HEU represents over 46,000 employees in acute care hospitals, long-term care facilities, and other community services and agencies, most of which are operationally funded by the Provincial Government. Ninety percent of HEU members are covered by the facilities subsector collective agreement. HEU members provide direct patient care, as well as support services such as laundry, housekeeping and food services.

[11] The British Columbia Government Employees Union ("BCGEU") represents many of the employees in the community subsector. The community subsector includes employees who work in the following areas: home support, alcohol and drug treatment, mental health, adult day care, regional and community administration, and services to people with disabilities. While BCGEU members also work in the Facilities and Paramedical sectors, they are concentrated in the Community Support Subsector.

[12] The British Columbia Nurses Union ("BCNU") is the successor to the Registered Nurses' Association of British Columbia ("RNABC"), which became the certified bargaining

agent for many hospital and community nurses in 1946. The BCNU was established in 1980 during a special convention of the RNABC for the purpose of representing nurses and advancing their interests respecting terms and conditions of employment. The BCNU now has 24,111 members, almost all of whom are registered nurses.

[13] The individual plaintiffs are members of the plaintiff unions who allege that they have been affected by Bill 29.

[14] Heather Birkett is a long term care aid at a privately owned facility. She helped organize the employees when the BCGEU was certified to represent the employees at her workplace in April, 2001. Bill 29 has no immediate impact on her employment.

[15] Janine Brooker is a renal dialysis technician. Bill 29 has no immediate impact on her employment.

[16] Amaljeet Kaur Jhand is a cook. As a consequence of Bill 29 her hours have been reduced from 7.2 to 5.5 hours per day.

[17] Leona Fraser is a community worker employed at a private agency. She is a member of the BCGEU and she remains employed.

[18] There is no evidence concerning the circumstances of the plaintiffs Sankey-Kilduff and Stevenson.

[19] Sharleen Decillia is a registered nurse and continues to be employed. She says she lost funding for two courses from the disbanding of the Health Labour Adjustment Agency ("HLAA").

[20] The Health Services and Support – Facilities Subsector Bargaining Association, the Health Services and Support-Community Subsector Bargaining Association, and The Nurses' Bargaining Association are associations of the plaintiff unions formed under the ***Health Authorities Act***, R.S.B.C. 1996, c. 180, and certified as the exclusive bargaining agents for all employees in the particular health subsector to which they apply.

[21] There are three collective agreements which govern the employment of the plaintiffs: the April 1, 2001 – March 31, 2004, Health Services & Support Facilities Subsector Collective Agreement (the "Facilities Subsector Agreement"), the April 1, 2001 – March 31, 2004 Nurses Collective Agreement (the "Nurses Agreement") and the April 1, 2001 - March 31, 2004, Health Services and Support – Community Subsector Collective Agreement (the "Community Subsector Agreement").

III. **LEGLISLATION – BILL 29**

[22] The changes to the governance, structure, and management of the health care sector brought about by this legislation may be divided into six categories as follows:

A. Contracting Out

B. Bumping

C. Lay-Offs

D. Changes to Employment Security and Labour Force Adjustment) ("ESLA") Agreements and the HLAA

E. Multi-Worksite Assignment Rights and Transfers

F. Exclusion of the ***Labour Relations Code*** R.S.B.C. Provisions Relating to True Employer Declarations, Successorship, and Common Employer Declarations.

A. **CONTRACTING OUT**

[23] Section 6 of Bill 29 is entitled "Contracting outside of the collective agreement for services." Section 6(2) says:

> A collective agreement between HEABC and a trade union representing employees in the health sector must not contain a provision that in any manner restricts, limits or regulates the right of a health sector employer to contract outside of the collective agreement for the provision of non-clinical services.

[24] Section 6 applies to the provision of non-clinical services as defined in s. 6(1). Essentially, s. 6 permits a health sector employer to contract out for all services except those provided by designated health care professionals to admitted patients in an acute care hospital. This means, for example, that the employer could contract out what has been referred to by the Crown as the "hotel services," meaning laundry, janitorial, cooking and also nursing services provided to outpatients such as surgical day-care, emergency wards, and long-term care facilities. Bill 29 and the Regulation are silent with respect to the labour relations status of outside contractors. In other words, the outside contractor could be unionized. Bill 29 does not restrict the ability of unions, including the plaintiff unions, to organize employees of outside contractors.

[25] Section 6(4) voids any provision in a collective agreement which requires a health sector employer to consult with a trade union before contracting out for the provision of services.

[26] Before the enactment of Bill 29, contracting out for services provided by the plaintiffs was prohibited by the terms of the existing collective agreements.

[27] Each of the three agreements contains similar language concerning contracting out. For example, the Facilities Subsector Agreement contains the following language at clause 17.12:

> The Employer agrees that they will not contract out bargaining unit work that will result in the lay-off of employees within the bargaining unit during the term of this agreement. The Employer will discuss with representatives of the local in a timely manner, functions they intend to contract out after the date of signing this collective agreement that could otherwise be performed by Union members with the facility, except where an emergency exists.
>
> There will be no expansion of contracting in or contracting out of work within the bargaining units of the unions as a result of the reduction in FTEs. [Full Time Equivalent Positions]

B. **BUMPING**

[28] Section 9 of Bill 29 concerns what is known as "bumping." Section 9 says:

> For the period ending December 31, 2005, a collective agreement must not contain a provision that
>
> …
>
> (d) provides an employee with bumping options other than the bumping options set out in the regulations.

[29] Section 5 of the Regulation concerns bumping. The effect of this provision, as described by the plaintiffs in

their brief, is that an employee with less than five years seniority may bump only the most junior employee whose hours of work are comparable and whose job the bumping employee is capable of performing. An employee with more than five years seniority can only bump those employees with less than five years. If there is no one with less than five years seniority whose job the laid off employee can perform, the long service employee will not be able to bump at all.

[30] The plaintiffs' three collective agreements in force at the time Bill 29 was enacted all contained bumping regimes that allowed a displaced employee to select another job in accordance with seniority. Bill 29 voids the bumping regimes contained in these collective agreements and substitutes a more restrictive regulatory bumping regime, which makes it less likely a displaced or laid off employee will be able to find a more junior employee to bump.

C. **LAY-OFFS**

[31] Section 9 of Bill 29 prohibits the inclusion in a collective agreement of any provision restricting the employer from laying off an employee, requiring an employer to meet conditions before laying off an employee, or requiring an

employer to provide more than 60 days notice of layoff to an employee.

[32] Prior to the passage of Bill 29, the collective agreements contained provisions related to notice periods for termination of employment.

[33] In the case of the Community Subsector Agreement, the notice period provision stipulated differing periods depending on length of service to a maximum period of eight weeks, the same as contained in Bill 29. In addition, there was a provision that permitted the laid off employee to retain employment security for period up to 12 months, during which time the HLAA would endeavour to find alternative employment for the employee. The employee was entitled to his or her wages and benefits during this employment security period.

[34] The Nurses Agreement also contained a maximum notice period of 60 days. Under the Nurses Agreement, a laid off nurse was entitled to a severance allowance, depending on length of service, of up to 20 weeks pay. The severance allowance is not affected by Bill 29 and is paid in addition to the 60 day notice provision is Bill 29. Also, under the Nurses Agreement, a laid off nurse is entitled to pay out of

banked sick leave on termination of employment. The payment of sick leave on termination is unaffected by Bill 29.

[35] The Facilities Subsector Agreement contains provisions for notice periods of up to six months in duration, depending on length of service, which is longer than is permitted under Bill 29. Under the Facilities Subsector Agreement, the employee is also entitled to up to 20 weeks severance allowance depending upon length of service. This is in addition to the 60-day notice period under Bill 29 and a pay-out of a percentage of banked sick leave.

D. **ESLA AND HLAA**

[36] The ESLA program provided health care workers with employment security through a labour adjustment program administered through the HLAA. The ESLA program benefited employees displaced for reasons other than just cause. Following the expiration of the lay off notice period provided in the applicable collective agreement, employees retained their employment security for a period of up to 12 months during which time the HLAA made every effort to find an alternative position. The employee was also, if appropriate, retrained and was paid wages and benefits during the ESLA period. ESLA was specifically included in the Nurses and

Facilities Subsector Agreements. The Community Subsector Agreement also contains a provision providing for employment security and access to HLAA programs.

[37] Section 7 of Bill 29 provides that the parties will no longer be required to carry out the terms of ESLA. Section 8 provides, in essence, that the HLAA will be wound up once existing obligations and financial commitments have been satisfied. As a result, healthcare workers who are laid off will no longer have 12 months continued employment security and access to ESLA or HLAA programs.

E. **MULTI-WORKSITE ASSIGNMENT RIGHTS AND TRANSFERS**

[38] Sections 4 and 5 of Bill 29 give health sector employers the right to reorganize the delivery of their services. Pursuant to these sections, employers have the right to transfer functions, services and employees to another health sector employer or within a worksite. The Regulation sets out employee transfer rights and obligations. For example employees must not be transferred outside of their geographic location without their consent. Employees who decline transfers in such circumstances are entitled to lay-off notice and the limited bumping rights available under the Act. Employees who decline transfers within their geographic

region, however, will be deemed to have resigned 30 days after the refusal. Before the passage of Bill 29, the nurses' union had begun discussions with the health sector employers regarding altering work locations. Those consultations had not resulted in any modification to the existing collective agreement, which did not permit the transfer of employees without accessing bumping options and ESLA.

F. EXCLUSION OF THE *LABOUR RELATIONS CODE* PROVISIONS RELATING TO TRUE EMPLOYER DECLARATIONS, SUCCESSORSHIP, AND COMMON EMPLOYER DECLARATIONS

[39] As an adjunct to the provisions of s. 6 of Bill 29, which permits the health sector employer to contract out services previously performed by its employees, ss. 6(3) – 6(6) concern the status of the new contractor as an employee.

1. True Employer Declarations

[40] First, s. 6(3) codifies the rule for determining the "true employer." The employee will not be considered an employee of the health sector employer unless the employee "is fully integrated with the operations and under the direct control of the health sector employer."

[41] The Crown argues that the true employer test in s. 6(3) merely codifies existing arbitral case law. The plaintiffs argue that Bill 29:

> move[s] the 'goal posts' in these disputes far into the employer's end zone. The test is no longer a relative one of weighing the workers' relationship with each of the two employers. Under Bill 29, the criteria for determining when a worker is a dependent contractor is much narrower, and the test is an absolute one.

The plaintiffs argue that the "fully integrated test" is much more likely to result in a finding that the true employer is the subcontractor than the "control" test previously applied by the Labour Relations Board or arbitrators.

2. **Successorship**

[42] Section 35 of the ***Labour Relations*** Code regulates successorship in unionized workplaces. Stated broadly, s. 35 provides that if a collective agreement is in force and a business is sold or otherwise disposed of, the new owner is bound by the provisions of the previous owner's collective agreement.

[43] Section 6(5) of Bill 29 provides that a person who contracts with a health sector employer for services is not

bound by an existing collective agreement. It also provides that s. 35 of the ***Labour Relations Code*** does not apply to such a contractor.

3. **Common Employer Declarations**

[44] Section 38 of the ***Labour Relations Code*** gives the Labour Relations Board the power to declare that several employers constitute a single, common employer if they are associated, related, or under common control or direction.

[45] Section 6(6) of Bill 29 provides that a health sector employer must not be treated under s. 38 of the ***Labour Relations Code*** as a common employer with any other health sector employer or contractor.

IV. LEGISLATIVE HISTORY OF THE STATUTES THAT HAVE IN RECENT YEARS GOVERNED THE EMPLOYMENT OF THE HEALTH SECTOR WORKERS AND THE HISTORY OF LEGISLATIVE INTERVENTION

[46] While the plaintiffs describe Bill 29 as "an unprecedented attack on the association rights of health care workers," the defendant characterizes it as simply another instance in a long history of legislative intervention in collective bargaining in the health care sector. A review of the history of legislative regulation of, and intervention in, health care sector labour relations in the Province provides

an important contextual framework to the plaintiffs' claim that Bill 29 infringes their rights to freedom of association guaranteed under s. 2(d) of the ***Charter***. In other words, the plaintiffs' claim that there is now no purpose in joining a union or maintaining their union membership in the face of Bill 29's interference in the collective bargaining process must be examined in the context of previous legislative intervention, much of which has not been favourable to the plaintiffs, but which has not hindered or prevented the plaintiffs from joining, establishing and maintaining a trade union.

[47] Prior to 1972, most public sector employees in the Province did not have collective bargaining rights. Following the election of the New Democratic Party government that year, the ***Public Service Labour Relations Act***, S.B.C. 1973, c. 144, was enacted, establishing broadly-based collective bargaining in the provincial public service for the first time. British Columbia was one of the last provinces in Canada to pass such legislation. Hospital employees, however, had been covered by collective bargaining legislation long before the enactment of the ***Public Service Labour Relations Act***. Restrictions on their collective bargaining rights date at least as far back as 1968, when their right to strike was legislatively

curtailed by the designation of health care as an "essential service." Section 18 of the ***Mediation Commission Act***, S.B.C. 1968, c. 26 (later renamed the ***Mediation Services Act***) permitted the government to determine that a dispute threatened the "public interest and welfare" and to require that it be either averted or discontinued, and then brought before a Mediation Commission for binding arbitration.

[48] In 1975, the authority to designate certain services as essential ("to prevent immediate and serious danger to health, life or safety") and to order the continuation of those services during labour disputes was statutorily granted to the Labour Relations Board as a result of amendments to the ***Labour Code of British Columbia*** by the ***Labour Code of British Columbia Amendment Act***, 1975, S.B.C. 1975, c. 331, s. 15. The Labour Relations Board first exercised this authority in 1976 with respect to a strike at Vancouver General Hospital. The strike ended when the Government legislatively imposed a collective agreement upon the parties through the ***Hospital Services Collective Agreement Act***, S.B.C. 1976, c. 21.

[49] In 1977, the ***Essential Services Disputes Act***, S.B.C. 1977, c. 83, s. 7, introduced criteria for arbitrators to consider when resolving collective bargaining disputes in the

public sector, including the health care sector. These criteria included: the public interest, terms and conditions of employment in similar occupations, balance between different classification levels within an occupation and between occupations within an employer, and the need for fair and reasonable terms and conditions of employment.

[50] As part of a broader program of government restraint in the early 1980s, the provincial government enacted the ***Compensation Stabilization Act***, S.B.C. 1982, c. 32, which imposed public sector wage controls. By rendering terms of collective agreements regarding salaries ineffectual until approved by a compensation stability commissioner, the Act had the effect of restricting the content of collective agreements in the provincial public sector.

[51] This interventionist trend continued with the 1987 amendments to the ***Industrial Relations Act***, which had replaced the ***Labour Code***. The amendments permitted the government to order a 40-day cooling off period in labour disputes involving services designated essential and to unilaterally suspend strikes and lockouts involving such services. It additionally provided for binding arbitration of public sector labour disputes, and included the criteria to be considered by the

arbitrator in settling the terms and conditions of collective agreements: terms and conditions of employment in similar occupations within the relevant community in the Province, maintenance of a fair relationship between occupations in the workplace, the skill, effort, responsibility and nature of the work performed, and the cost and impact of the parties' proposals. Section 137.96(2) provided that where the ability of the public sector employer to pay was in issue, it was the "paramount factor."

[52] The ***Industrial Relations Act*** was replaced by the ***Labour Relations Code***. The Labour Relations Board was empowered to recommend the designation of certain services, including health care services, as essential, and upon the Minister's direction, to establish levels of essential services to be provided during a labour dispute. The provisions for mandatory binding interest arbitration were removed.

[53] During the 1990s and early 2000s, health care collective bargaining was characterized by a high level of government involvement in the structure of bargaining, as well as in determining particular terms of collective agreements. In 1990, the government of the day appointed a Royal Commission on Health Care and Costs chaired by retired Court of Appeal

justice, Mr. Justice Seaton. In a report entitled "Closer to Home" released in November 1991, the Seaton Commission recommended a new emphasis on the "wellness model" of health care with a reallocation of resources from acute care programs to community based programs that provided care where people lived. To address some of the issues such a reallocation might occasion, the government in 1993 proposed a Tentative Framework Agreement (the "Health Accord") as an outline of its broad plan to deal with specific labour issues in health care. The Health Accord, made outside the collective bargaining process, provided for a comprehensive transition program to be administered and funded by the HLAA to deal with employees displaced by restructuring. The Health Accord was agreed to by the health care unions. It was initially rejected by the employers but eventually accepted in July 1993. It was not incorporated into the collective agreements of the parties. The Health Accord expired in March 1996. The parties were unable to agree to its renewal; they were also unable to reach agreements regarding the renewals of their collective agreements.

[54] In 1996, following expiry of the Health Accord and unsuccessful attempts to bargain new collective agreements, the government appointed Vincent Ready as an Industrial

Inquiry Commissioner ("IIC") to mediate and make recommendations for new collective agreements between the HEABC and the health care unions representing the five bargaining tables in health care. On April 26, 1996, the Government introduced ***The Education and Health Collective Bargaining Assistance Act***, S.B.C. 1996, c. 1, which allowed the Government to order the acceptance of the IIC's recommendations by order-in-council. In May 1996, Mr. Ready issued a report with recommendations relating to the bargaining dispute between the Health Employers Assoc. of B.C. ("HEABC") and the various unions. These recommendations, which included the ESLA, were ratified by the unions in May and June 1996 but were rejected by the HEABC on June 7, 1996. On June 8, 1996, the Government, through order-in-council and regulation legislatively imposed Mr. Ready's report and recommendations pursuant to ***The Education and Health Collective Bargaining Assistance Act***.

[55] The government has also exercised a significant role in shaping the structure of health care collective bargaining in the Province, particularly since the early 1990s. In 1992, HEABC was created to act as a bargaining agent for health sector employers. The ***Health Authorities Act***, S.B.C. 1993, c. 47, was enacted in 1993, regionalizing management

responsibilities from the Ministry of Health to regional health boards and councils. (However, by December 2001, the government had consolidated 102 governing health boards and community councils to five regional health authorities.)

[56] In 1994/1995, James Dorsey was appointed by the Government to review the collective bargaining structure in the health care sector. The Dorsey Health Sector Labour Relations Commission issued its report and recommendations in June 1995 and recommended, *inter alia*, the establishment of five industry-wide multi-employer bargaining units reflecting the five "subsectors" in health care: nurses, paramedicals, residents, health services and support – facilities (the "Facilities Subsector"), and health services and support – community (the "Community Subsector"). (The Plaintiff groups do not include either the resident or paramedical bargaining units.) Each bargaining unit is covered by its own Province-wide collective agreement negotiated between the Association of Unions in the bargaining unit and the HEABC as the accredited employers' association. Although there have been subsequent fine tunings, the overall structure of the bargaining units remains that proposed by the Dorsey Health Sector Labour Relations Commission.

[57] This recommended structure was implemented through the ***Health Sector Labour Relations Regulation***, B.C. Reg. 329/95. This legislation met with significant opposition by a number of the health care unions which had been effectively stripped of their pre-existing collective bargaining rights: unions not on a legislated list had to transfer their representational rights to one of the named unions. In August 1997, the ***Health Authorities Amendment Act, 1997***, S.B.C. 1997, c. 23 was enacted, repealing the ***Health Sector Labour Relations Regulation*** and reinstating cancelled certifications.

[58] In 1996 and again in 1998, the parties bargained a Community Collective Agreement and a Facilities Collective Agreement. These were the first health care agreements negotiated under the new regime established by the ***Health Authorities Act*** and the ***Health Sector Labour Relations Regulation***. During bargaining in 2001, the unions, particularly the HEU and the BCGEU, took the position that there should be parity of terms and conditions in the two subsectors and therefore pushed for joint bargaining of the two agreements.

[59] In April 2001, the ***Health Authorities Amendment Act, 2001***, S.B.C. 2001, c. 13 was enacted, amalgamating the

Facilities Subsector and Community Subsector bargaining units. That summer, nurses and paramedicals engaged in partial strike action. The Government responded by first legislatively imposing a "cooling off" period and then by legislatively ending the strikes and imposing collective agreements: ***Health Care Services Continuation Act***, S.B.C. 2001, c. 23, and ***Health Care Services Collective Agreements Act***, S.B.C. 2001, c. 26.

V. PLAINTIFFS' CHALLENGE UNDER SECTION 2(d) OF THE CHARTER - FREEDOM OF ASSOCIATION

A. POSITION OF THE PARTIES

1. Position of the Plaintiffs

[60] The plaintiffs submit that Bill 29 violates s. 2(d) of the ***Charter*** in three distinct ways, each of which they say is sufficient on its own to render Bill 29 unconstitutional:

1. Bill 29 voids collective agreements while respecting individual contracts. This, they say, is a complete answer to the single inquiry that a s. 2(d) analysis now commands as a result of the Supreme Court of Canada's recent decision in ***Dunmore***: has the state precluded activity because of its associational nature and thereby discouraged the common pursuit of common goals? The Plaintiffs submit that this aspect of Bill 29 also

offends s. 2(d) under the more restrictive formulation of s. 2(d) set out in the earlier ***Labour Trilogy***, *infra*. While individuals have the lawful right to individually negotiate, enforce and receive the benefit of their employment agreements, Bill 29 prevents them from being able to do so collectively, contrary to the Supreme Court's earlier jurisprudence.

2. Bill 29 interferes with health care workers' ability to join, establish and maintain an association by interfering with the achievements of their unions and restricting their activities in fundamental ways. While the jurisprudence prior to ***Dunmore*** may have only recognized the formal right to join and maintain an association, ***Dunmore*** explicitly recognizes that certain activities may have to be protected in order to substantiate this right. For unions, this includes the ability to negotiate fundamental terms on behalf of its membership and to enforce the resulting agreements. The plaintiffs query:

> If the government can purport to act *qua*-employer at the bargaining table, then leave the room and unilaterally, absolutely and with impunity purport to act *qua*-sovereign merely because it was not able to achieve at the bargaining table what it wanted, then why would any public sector union or, more importantly,

member of that union, have any faith in the process or the point of unionization?

3. Bill 29 interferes with essential aspects of collective bargaining: the opportunity to develop a collective position and make majority representations to the employer, the capacity to enter collectively into an agreement on matters of fundamental importance to workers, and the ability to enforce the resulting collective agreement. The ability to engage in such activities lies at the heart of s. 2(d) and is therefore deserving of constitutional protection, regardless whether such rights may also be statutorily protected by labour relations schemes. Bill 29, by voiding collective agreements and prohibiting the renegotiation of certain fundamental terms, violates s. 2(d).

[61] While the plaintiffs submit that Bill 29 is inconsistent with s. 2(d) of the ***Charter*** under both the narrow formulation derived from the ***Labour Trilogy*** and the more inclusive one developed in ***Dunmore***, they rely primarily on the latter decision.

[62] They assert that as a result of ***Dunmore***, it is no longer sufficient that s. 2(d) protect only a formal right to join a

trade union: it must also protect those inherently collective activities of the union that make that right meaningful and that promote the purpose of s. 2(d). In determining what collective activities should attract ***Charter*** protection, the threshold is whether the activity falls "within the framework established by the labour trilogy or that otherwise furthers the purpose of s. 2(d)": ***Dunmore*** at ¶ 69. While conceding that not every aspect of a specific collective bargaining regime will receive constitutional protection, the plaintiffs submit that those aspects critical to realizing the purpose of s. 2(d) in the context of labour relations must be included within the ambit of its protection.

[63] The purpose of s. 2(d), say the plaintiffs, is to ensure that individuals are able to pursue their individual goals through collective action. In this regard, three primary contextual factors shape the case at bar and demonstrate how collective bargaining goes to the core of s. 2(d)'s purpose:

1. The employment relationship is primarily one of inequality of bargaining power;

2. The vulnerability of workers in this regard is especially significant because employment is a defining feature of an individual's sense of identity and self-worth; and

3. Collective negotiation of employment terms allows workers, by acting in concert, to achieve a form of workplace democracy and to ensure the rule of law in the

> workplace. These are important matters for protecting the dignity of these workers and is only available to them when acting collectively.

[64] The plaintiffs also rely on evolving international legal norms that regard freedom of association and aspects of the right to bargain collectively as fundamental human rights.

[65] The plaintiffs submit that while ***Dunmore*** did not explicitly overrule the ***Labour Trilogy***, the conclusions in those cases that collective bargaining does not fall within the protective ambit of s. 2(d) can, to some extent, be distinguished. They additionally assert that the earlier cases should no longer be relied upon to the extent they deny s. 2(d) protection to collective activities on the basis that they do not have an individual analogue.

[66] The plaintiffs say in their argument that:

> Three aspects of collective bargaining do qualify as such fundamental entitlements. First, there must be an opportunity to develop a collective position and make majority representations to the employer, in other words, to participate in collective negotiations. Second, there must be the capacity to collectively enter into an agreement on matters of fundamental importance to workers. Third, that agreement must be respected.

2. **Position of the Defendant**

[67] The defendant replies that the Supreme Court of Canada has conclusively determined that the s. 2(d) guarantee of freedom of association does not extend to the right to engage in collective bargaining, nor does it prohibit legislative alteration or imposition of the terms of collective agreements. Section 2(d), it says, protects the right to form, maintain, and participate in associations, including unions. It does not, however, protect the activities of those associations. Collective bargaining is a creation of the Legislature and, therefore, the determination of the scope of collective bargaining is similarly a legislative matter. As there is nothing in Bill 29 that interferes with the right to form, maintain or participate in a union, there is no merit to the plaintiffs' s. 2(d) claims.

[68] The defendant further submits that none of the plaintiffs' individual s. 2(d) claims establish an infringement of s. 2(d), as follows:

1. The legal regimes governing the establishment of terms and conditions of employment for unionized and non-union employees are fundamentally different. Unlike unionized employees covered by the ***Labour Relations Code***, for

example, non-union employees do not have the same statutory ability to withdraw their services in concert to compel their employers to accept their contractual terms with fear of termination or discipline. Non-union employees are themselves restricted from contracting with respect to various terms and conditions of employment by legislation such as the ***Employment Standards Act,*** R.S.B.C. 1996, c. 113. The defendant submits that the distinction drawn by Bill 29 is not related to the associational nature of the conduct, but rather, to the different consequences of the legal regime that governs collective bargaining as opposed to that governing the establishment of employment terms and conditions in the non-union sector. This distinction does not interfere with the formation or maintenance of associations, and Bill 29 is therefore constitutional.

2. In light of Supreme Court jurisprudence that s. 2(d) does not protect the right to engage in collective bargaining, the plaintiffs' submission that Bill 29 interferes with health care workers' ability to join, establish and maintain an association by interfering with the achievements of their unions and restricting their activities in fundamental ways is unsustainable. In

Public Service Alliance of Canada v. Canada, [1987] 1 S.C.R. 424 (***"PSAC")*** for example, the Supreme Court upheld federal legislation that precluded public service unions from bargaining about any terms and conditions of employment, including wages, for a period of two years. Moreover, since the Supreme Court concluded in ***Delisle v. Canada (Deputy Attorney General)***, [1999] 2 S.C.R. 989, that the government was free to prohibit collective bargaining for a particular group of workers entirely without infringing s. 2(d), then it must also be free to limit the scope of collective bargaining without infringing s. 2(d).

3. Bill 29 has neither the purpose nor effect of "deunionizing" the health care sector. Its purpose was to take particular operational matters out of collective bargaining so as to permit health care employers more operational flexibility in managing the health care system in an efficient and cost-effective manner. As to its effect, the defendant submits that Bill 29 does not infringe s. 2(d) simply because certain employees may have decided that they no longer wished to be represented by a union in collective bargaining; given that there is no constitutional right on the part of employees or

> unions to be legislatively afforded collective bargaining rights, s. 2(d) does not impose any obligation on government to promote or maintain unionization levels. Furthermore, nothing in Bill 29 derogates from the ability of health care workers to join unions or to pursue collective bargaining through such unions. Finally, says the defendant, the evidence before this Court refutes the plaintiffs' claim that Bill 29 facilitates deunionization of the health care sector.

[69] The defendant therefore submits that the plaintiffs' s. 2(d) claims should be dismissed.

B. ANALYSIS

1. Framework for Analysis

[70] Section 2(d) of the ***Charter*** guarantees freedom of association. It states, simply:

> Everyone has the following fundamental freedoms:
>
> …
>
> *(d)* freedom of association.

[71] The Supreme Court in ***Dunmore*** set out the approach to analyzing an alleged breach of s. 2(d):

1. Does the claim relate to activities that fall within the range of activities protected by s. 2(d) of the ***Charter***? In answering this question, regard is to be had to the framework established in the ***Labour Trilogy***, which enables a claimant to show that a collective activity is permitted for individuals in order to demonstrate that its regulation targets the association *per se*. Where this burden cannot be met, it nevertheless remains open to the claimant to demonstrate, by direct evidence or inference, that the legislature has targeted associational conduct because of its concerted or associational nature.

2. If the activity falls within the range of activities protected by s. 2(d), does the impugned legislation, either in purpose or effect, interfere with this activity?

a. Step 1 – Does Collective Bargaining Fall Within the Range of Activities Protected by s. 2(d)?

i. Pre-*Dunmore* Jurisprudence

[72] The Supreme Court of Canada first considered the scope of s. 2(d) in the labour relations context in a series of

cases referred to collectively as the ***Labour Trilogy***: ***Reference Re Public Service Employee Relations Act (Alberta)***, [1987] 1 S.C.R. 313 (the "***Alberta Reference***"); ***Public Service Alliance of Canada v. Canada***, *supra*; and ***Retail, Wholesale and Department Store Union v. Saskatchewan***, [1987] 1 S.C.R. 460. The ***Labour Trilogy***, in particular the ***Alberta Reference***, set the stage for all subsequent labour law decisions of the Supreme Court.

[73] The question in the ***Alberta Reference*** was whether s. 2(d) gave constitutional protection to the right of a trade union to strike as an incident to collective bargaining. The Supreme Court split three ways. McIntyre J., writing for a plurality, wrote the most widely cited decision in the judgment. Significantly, he characterized freedom of association as a freedom protecting individual interests, not the association formed through its exercise. At ¶ 153 he stated:

> The group or organization is simply a device adopted by individuals to achieve a fuller realization of individual rights and aspirations. People, by merely combining together, cannot create an entity which has greater constitutional rights and freedoms than they, as individuals, possess. Freedom of association cannot therefore vest independent rights in the group.

[74] After analyzing the diverse approaches to defining the parameters of s. 2(d), McIntyre J. concluded as follows at ¶ 174:

> 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.

[75] Simply put, freedom of association guarantees the collective exercise of constitutional rights and other acts that are lawful when exercised by individuals alone. As a consequence, however, McIntyre J. held that the right to strike and the right to bargain collectively did not come within the ambit of s. 2(d); both, by their nature, advanced collective socio-economic interests, as opposed to individual liberty interests. Since individuals could not participate in collective bargaining, s. 2(d) did not protect this right.

[76] McIntyre J. also described at some length the necessity for judicial deference to the legislature in matters relating to labour relations, given that labour law is

> …based upon a political and economic compromise between organized labour – a very powerful socioeconomic force – on the one hand, and the employers of labour – an equally powerful socio-economic force – on the other. (at ¶ 180, *per* McIntyre J.).

[77] Le Dain J., in brief reasons, agreed with McIntyre J. that s. 2(d) freedoms did not extend to the right to bargain collectively or to the right to strike. He rejected the view that s. 2(d) extended "to the right to engage in particular activity on the ground that the activity is essential to give an association meaningful existence" (at ¶ 140). Observing that the guarantee of freedom of association did not apply exclusively to unions but applied with equal force to a broad range of political, religious, social and economic organizations, he characterized the implications of extending constitutional status to the core activities of associations as "sweeping." Le Dain J. went on to write at ¶ 142:

> What is in issue here is not the importance of freedom of association in this sense, which is the one I ascribe to s. 2(d) of the ***Charter***, but whether particular activity of an association in pursuit of its objects is to be constitutionally protected or left to be regulated by legislative policy. The rights for which constitutional protection is sought – the modern rights to bargain collectively and to strike, involving correlative duties or obligations resting on an employer – are not fundamental rights or freedoms. They are the creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as

> requiring specialized expertise. It is surprising that in an area in which this Court has affirmed a principle of judicial restraint in the review of administrative action we should be considering the substitution of our judgment for that of the Legislature by constitutionalizing in general and abstract terms rights which the Legislature has found it necessary to define and qualify in various ways according to the particular field of labour relations involved. [emphasis added]

[78] In contrast, however, Dickson C.J., dissenting, rejected this restrictive approach. As his reasoning ultimately came to form part of the basis of the Supreme Court's reasoning in ***Dunmore***, it is worth reviewing.

[79] Accepting that the freedom of association embraced the liberty to do collectively that which one was permitted to do as an individual, Dickson C.J. would have nonetheless held that the freedom went considerably further:

> There will, however, be occasions when no analogy involving individuals can be found for associational activity, or when a comparison between groups and individuals fails to capture the essence of a possible violation of associational rights. This is precisely the situation in this case. There is no individual equivalent to a strike. The refusal to work by one individual does not parallel a collective refusal to work. The latter is qualitatively rather than quantitatively different. The overarching consideration remains whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits. The legislative purpose which will render legislation invalid is the

> attempt to preclude associational conduct because of its concerted or associational nature.

[80] In contrast to the majority, therefore, Dickson C.J. relied on the fact that the right to strike had no individual equivalent to conclude that it was a form of activity which had a unique associational aspect warranting protection.

[81] Describing freedom of association as "the cornerstone of modern labour relations," Dickson C.J. also addressed the notion that associational activity for the pursuit of economic ends should not be accorded constitutional protection. Focusing on the fundamental importance of employment to an individual's life in terms of identity, self-worth and emotional well-being, he noted the integral role of collective bargaining in ensuring equitable working conditions. He would have held that collective bargaining (and the corollary right to strike) protected important employee interests that could not be characterized as merely pecuniary in nature and was accordingly deserving of constitutional protection.

[82] While the ***Alberta Reference*** is the predominant case in the ***Labour Trilogy***, the Supreme Court's judgment in ***PSAC*** is of some import to the issues at bar. The appellants there sought a declaration that the ***Public Sector Compensation Restraint***

Act was inconsistent with the ***Charter***. Paragraph 6(1)(a) of the legislation, by continuing in force the terms and conditions of compensation plans for federal government employees, precluded collective bargaining on the compensatory components of collective agreements. Subsection (b) similarly precluded collective bargaining on all issues, including non-compensatory matters, subject to the operation of s. 7, which permitted the parties to a collective agreement to amend non-compensatory terms and conditions by agreement only.

[83] Dickson C.J., in dissent, would have held that by automatically extending the terms and conditions of collective agreements and by fixing wage increases for a two year period, the Act infringed the freedom of public sector employees to engage in collective bargaining. McIntyre J. referred to the Chief Justice's conclusion, and commented as follows at ¶ 54:

> The Chief Justice bases his reasons on the first issue – that of freedom of association under s. 2(d) of the ***Canadian Charter of Rights and Freedoms*** – upon the proposition that freedom of association in the context of labour relations includes freedom to engage in collective bargaining and the right to strike. For the reasons I expressed in the ***Reference re Public Service Employee Relations Act (Alta.)***, [1987] 1 S.C.R. 313 (judgment delivered concurrently), I am of the opinion that s. 2(d) of the ***Charter*** does not include a constitutional guarantee of a right to strike. My finding in that case does not, however, preclude the possibility that other aspects of collective bargaining may

> receive **Charter** protection under the guarantee of freedom of association. [emphasis added]

[84] Notwithstanding this suggestion that his reasons in the ***Alberta Reference,*** did not foreclose the possibility that some aspects of collective bargaining might warrant constitutional protection, McIntyre J. ultimately went on to hold that the impugned legislation did not interfere with collective bargaining so as to infringe the freedom of association. The Act did not restrict the role of the trade union as the exclusive agent of the employees. It required the employer to bargain and deal with the unionized employees through the union and it also permitted continued negotiations between the parties with respect to changes in the terms and conditions of employment which did not involve compensation. He found that the only effect of the Act was to deny the use of the "economic weapons" of strikes and lockouts for a two year period. Although this may have constituted a limit on the bargaining power of the trade union, it did not violate s. 2(d).

[85] Le Dain J., writing for three judges on the six judge panel, simply reiterated his conclusion in the ***Alberta Reference,*** *supra,* that "[the] constitutional guarantee of freedom of association in s. 2(d) of the ***Canadian Charter of***

Rights and Freedoms does not include, in the case of a trade union, a guarantee of the right to bargain collectively and the right to strike" (at ¶139).

[86] In 1990, the Supreme Court released ***Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)***, [1990] 2 S.C.R. 367 ("***PIPS***"), a decision addressing whether an employee association had the right to be formally recognized for the purposes of collective bargaining. Writing for a narrow 4-3 majority, Sopinka J. held that s. 2(d) did not confer a right to recognition/certification for the purposes of collective bargaining, in part because there was no individual analogue for such activity. He affirmed the individual nature of s. 2(d) and rejected the view that it protected the essential or foundational collective activities of an association. Sopinka J. distilled the Court's earlier judgment in the ***Alberta Reference*** at ¶ 73:

> Upon considering the various judgments in the ***Alberta Reference***, I have come to the view that four separate propositions concerning the coverage of the s. 2(d) guarantee of freedom of association emerge from the case: first, that s. 2(d) protects the freedom to establish, belong to and maintain an association; second, that s. 2(d) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association; third, that s. 2(d) protects the

> exercise in association of the constitutional rights and freedoms of individuals; and fourth, that s. 2(d) protects the exercise in association of the lawful rights of individuals.

[87] Drawing upon these propositions, Sopinka J. held that collective bargaining was a collective activity of unions, not the exercise of the rights or freedoms of individuals, and that, therefore, notwithstanding that it may be essential to the existence of unions, it did not come within the purview of s. 2(d). He stated at ¶ 78:

> The above propositions concerning s. 2(d) of the ***Charter*** lead to the conclusion, in my opinion, that collective bargaining is not an activity that is, without more, protected by the guarantee of freedom of association. Restrictions on the activity of collective bargaining do not normally affect the ability of individuals to form or join unions. Although collective bargaining may be the essential purpose of the formation of trade unions, the argument is no longer open that this alone is a sufficient condition to engage s. 2(d). Finally, bargaining for working conditions is not, of itself, a constitutional freedom of individuals, and it is not an individual legal right in circumstances in which a collective bargaining regime has been implemented: see McIntyre J. in the ***Alberta Reference***, at pp. 411-12. Apart from the reasons given in the ***Alberta Reference***, the conclusion that collective bargaining does not fall within s. 2(d) accords with the results in the s. 2(d) trilogy of cases. In those cases, this Court upheld not merely restrictions on the right to strike, but also the imposition of binding arbitration without negotiation, and the imposition of terms of employment without negotiation. It is difficult, therefore, to conceive of a principle that could bring other aspects of the collective bargaining

> relationship within the purview of s. 2(d), and yet not overrule the trilogy.

[88] More recently, the Supreme Court again considered the scope of s. 2(d) in the labour context in ***Delisle***. The majority rejected a challenge to the exclusion of R.C.M.P. officers from access to any legislative collective bargaining scheme. Writing for four of seven judges, Bastarache J. drew upon the Court's previous jurisprudence establishing a limited ambit for s. 2(d) and concluded that there was no violation of s. 2(d) when certain groups of employees were excluded from a specific union regime. He again called for deference to the legislature in defining the scope of s. 2(d) rights at ¶33:

> Freedom of association does not include the right to establish a particular type of association defined in a particular statute; this kind of recognition would unduly limit the ability of Parliament or a provincial legislature to regulate labour relations in the public service and would subject employers, without their consent, to greater obligations toward the association than toward their employees individually. I share the opinion expressed by McIntyre J. in ***Reference Re Public Service Employee Relations Act (Alberta)***, *supra*, at p. 415, when he states that labour relations is an area in which a deferential approach is required in order to leave Parliament enough flexibility to act.

ii. ***Dunmore***

[89] Starting with the ***Alberta Reference***, the Supreme Court has consistently ascribed a narrow ambit to s. 2(d), limiting it to those activities that an individual could lawfully do alone or that involved a constitutional right. It has also consistently affirmed that freedom of association protects the act of associating, not the group formed through its exercise. In ***Dunmore,*** however, the Court expanded the scope of s. 2(d) to encompass "…activities [that] may be collective in nature, in that they cannot be performed by individuals acting alone" (at ¶ 16). The decision is significant, therefore, in recognizing that collective activity, even in the absence of an individual equivalent, can, in some circumstances, warrant constitutional protection.

[90] In 1994, Ontario enacted the ***Agricultural Labour Relations Act***, S.O. 1995, c. 1, which extended trade union and collective bargaining rights to agricultural workers for the first time. One year later, the Act was repealed in its entirety, which had the effect of subjecting the agricultural workers to s. 3 of the Ontario ***Labour Relations Act***. Section 3 excluded agricultural workers from the labour relations regime set out in the Act. The appellant

agricultural workers argued that the repeal of the ***Agricultural Labour Relations Act*** infringed their rights under ss. 2(d) and 15 of the ***Charter*** by preventing them from establishing, joining and participating in the lawful activities of a trade union. Bastarache J., writing for the majority, held that the total exclusion of agricultural workers from the protection of the Ontario ***Labour Relations Act*** constituted a breach of s. 2(d) that was not saved by s. 1.

[91] Bastarache J. began his analysis by reviewing the four propositions distilled in ***PIPS***. He did not endorse these propositions, and observed that they were only affirmed by three of six judges in the ***Alberta Reference***, and two of seven judges in ***PIPS*** itself. Instead, he held that a better approach to defining the scope of s. 2(d) was one grounded in the purpose of the guarantee of freedom of association, which, citing from Wilson J. in ***Lavigne***, [1991] 2 S.C.R. 211, he characterized as "the collective action of individuals in pursuit of their common goals" (at ¶ 15) At ¶16 he wrote:

> …the purpose of s. 2(d) commands a single inquiry: has the state precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals? In my view, while the four-part test for freedom of association sheds light on this concept, it does not capture the

> full range of activities protected by s. 2(d). In particular, there will be occasions where a given activity does not fall within the third and fourth rules set forth by Sopinka J. in ***PIPSC***, *supra*, but where the state has nevertheless prohibited that activity solely because of its associational nature. These occasions will involve activities which (1) are not protected under any other constitutional freedom, and (2) cannot, for one reason or another, be understood as the lawful activities of individuals. As discussed by Dickson C.J. in the ***Alberta Reference***, *supra*, such activities may be collective in nature, in that they cannot be performed by individuals acting alone. The prohibition of such activities must surely, in some cases, be a violation of s. 2(d) (at p. 367).

[92] After citing Dickson C.J.'s comments in the ***Alberta Reference*** that not all collective activity has an individual analogue, Bastarache J. too endorsed the notion that a collective is qualitatively distinct from the individual. He then continued at ¶ 17:

> As I see it, the very notion of "association" recognizes the qualitative differences between individuals and collectivities. It recognizes that the press differs qualitatively from the journalist, the language community from the language speaker, the union from the worker. In all cases, the community assumes a life of its own and develops needs and priorities that differ from those of its individual members. Thus, for example, a language community cannot be nurtured if the law protects only the individual's right to speak (see ***R v. Beaulac***, [1999] 1 S.C.R. 768, at para.20). Similar reasoning applies, albeit in a limited fashion, to the freedom to organize: because trade unions develop needs and priorities that are distinct from those of their member individually, they cannot function if the law protects exclusively what might

> be "the lawful activities of individuals". Rather, the law must recognize that certain union activities – making collective representations to an employer, adopting a majority political platform, federating with other unions – may be central to freedom of association even though they are inconceivable on the individual level. This is not to say that all such activities are protected by s. 2(d), nor that all collectivities are worthy of constitutional protection; indeed, this Court has repeatedly excluded the right to strike and collectively bargain from the protected ambit of s. 2(d) (see ***Alberta Reference***, *supra*, per Le Dain J., at p. 390 (excluding the right to strike and collectively bargain), per McIntyre J., at pp. 409-410 (excluding the right to strike) ***PIPSC***, *supra*, per Dickson C.J., at pp. 373-74 (excluding the right to collectively bargain), per La Forest J., at p. 390 (concurring with Sopinka J.), per L'Heureux-Dubé J., at p. 392 (excluding both the right to strike and collectively bargain), per Sopinka J., at p. 404 (excluding both the right to strike and collectively bargain)). It is to say, simply, that certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning. [emphasis added]

[93] Bastarache J. concluded his analysis of the general scope of s. 2(d) by stating that a purposive approach to the section required that the associational aspects of an activity be distinguished from the activity itself; it is only where conduct is targeted because of its associational nature that s. 2(d) can be invoked.

[94] Much of the plaintiffs' claim is premised on this principle first articulated by Dickson C.J. in the ***Alberta Reference*** and endorsed in ***Dunmore*** that certain core activities

of an association must be protected under s. 2(d) in order to substantiate the right to form and maintain an association. They submit that notwithstanding Bastarache J.'s statement that the Court has repeatedly excluded the right to collectively bargain from the protected ambit of s. 2(d), the question of whether elements of collective bargaining warrant constitutional protection has not yet been decided. They seek to distinguish the judicial references cited by Bastarache J., primarily on the basis that they concerned the right to access a particular statutory collective bargaining regime, rather than the question of whether the ability to negotiate collectively is a fundamental freedom worthy of s. 2(d) protection. Moreover, say the plaintiffs, to the extent that collective bargaining was rejected in those cases on the basis that it had no individual analogue, this is no longer determinative in light of ***Dunmore***. I do not agree.

[95] It is evident from his judgment that Bastarache J. does not consider collective bargaining to be a collective activity that must be recognized if the freedom to form and maintain an association is to have meaning. Not only was he careful to emphasize that the Court was not resiling from its earlier position that collective bargaining is not protected by s. 2(d), but he also suggested the rather limited range of

collective union activities that "may" be central to the freedom of association: making collective representations to an employer, adopting a majority political platform, and federating with other unions. The remedy that Bastarache J. ultimately ordered is consistent with this narrow view of the scope of collective bargaining activities potentially covered by s. 2(d):

> Moreover, the freedom to establish, join and maintain an agricultural employee association lies at the core of s. 2(d) of the ***Charter***; the appellants' claim is ultimately grounded in this non-statutory freedom. For these reasons, I conclude that at a minimum the statutory freedom to organize in s. 5 of the LRA ought to be extended to agricultural workers, along with protections judged essential to its meaningful exercise, such as freedom to assemble, to participate in the lawful activities of the association and to make representations, and the right to be free from interference, coercion and discrimination in the exercise of these freedoms. [emphasis added]

[96] As outlined above, the plaintiffs submit that Bill 29 is contrary to s. 2(d) in three distinct ways: (1) it voids collective agreements while respecting individual contracts; (2) it interferes with health care workers' ability to join and maintain an association by interfering with its core activities, namely, the ability to negotiate fundamental terms on behalf of its membership and to enforce the resulting agreements; and (3) it interferes with essential aspects of

collective bargaining, the ability to engage in which lies at the heart of s. 2(d). To succeed on any of these claims, the plaintiffs must demonstrate that the broad ambit of collective bargaining activities is constitutionally protected by s. 2(d). The pre-***Dunmore*** authorities are clear that it is not, to the extent that the Supreme Court has held that government may preclude bargaining about key terms and conditions of employment (***PSAC***) or prohibit collective bargaining for a particular group of workers entirely (***Delisle***). While ***Dunmore*** opens the door to the possibility that some limited aspects of collective bargaining, such as the freedom to make representations to an employer, may warrant constitutional protection, it otherwise explicitly endorses the Court's conclusions in the earlier cases that the ability to bargain collectively is not protected by the ***Charter***.

[97] Turning now to answer the questions required by the ***Dunmore*** analysis, the first question is: does the claim relate to activities that fall within the range of activities protected by s. 2(d) of the ***Charter***, having regard to the framework established in the ***Labour Trilogy***, which enables a claimant to show that a collective activity is permitted for

individuals in order to demonstrate that its regulation targets the association *per se*?

[98] I conclude in response to the first part of the first question posed in the ***Dunmore*** analysis that the regulation of the plaintiffs' collective agreements by Bill 29 does not fall within the range of activities protected by s. 2(d)as described in the ***Labour Trilogy***.

[99] The second branch of the first ***Dunmore*** question asks: Where this burden cannot be met, can the plaintiff nevertheless demonstrate by direct evidence or inference that the legislature has targeted associational conduct because of its concerted or associational nature?

[100] ***Dunmore*** recognizes that collective activity, even in the absence of an individual equivalent, can, in some circumstances, warrant constitutional protection. Do those circumstances exist here?

[101] Here, if the plaintiffs are to succeed they must prove that the enactment of Bill 29 limits or otherwise hinders their ability to join and maintain membership in their trade union, that is, that it targets associational conduct.

[102] The plaintiffs argue that health care workers who lose their jobs will be deprived of the benefits of their entire collective agreements. They say that employment security has been a priority of the plaintiff unions. Joseph Rose, for example, stated in his expert report that an emphasis on employment security is the norm in public sector collective bargaining. They have, they say, worked to protect the seniority of their workers and to provide recognition of long service through negotiation of notice provisions and bumping regimes, both of which have been substantially curtailed by Bill 29.

[103] Mr. Gerow, the former secretary and business manager for the HEU, and now a labour consultant, deposed in his affidavit that "seniority protection is one of the most common reasons people want to bring a union into their workplace." The plaintiffs are predominantly women, and on average are 45 years of age or older and have long years of service in the health sector. With respect to bumping, for example, the plaintiffs say that only 10.4% of nurses have less than five years seniority, thus it will be difficult for laid off nurses in particular to bump into another nurse's position if a nurse's position is terminated.

[104] The plaintiffs calculate that Bill 29 could result in the loss of more than 20,000 health sector jobs. The Crown says a maximum of 13,000 jobs may be lost owing to contracting out of non-clinical services and 13,000 jobs are anticipated to be eliminated through restructuring that would have occurred regardless of the enactment of Bill 29.

[105] Two of the plaintiffs' experts testified that contracting out is associated with a decline in wages and benefits, lower union density, fewer jobs, a diminution in employment conditions, a decline in workers' bargaining power and a shift of jobs from the union to the non-union sector.

[106] The plaintiff unions submit that they have worked long and hard for many years to achieve significant success in regard to pay equity. They say that the government's stated purpose in removing the protections against contracting out from the collective agreements is to reduce support workers' wages to that of the private service sector or actually transfer the jobs to that sector, a sector which has not been subjected to pay equity processes.

[107] The plaintiffs say that all of the unions have also sought to protect their members from arbitrary or disruptive transfers. Now, however, the employer is free to transfer the

work or the employee as prescribed by the Regulation under Bill 29. Workers are therefore concerned about how involuntary transfers will affect their personal lives.

[108] The plaintiffs say that Bill 29 eviscerates their collective agreement. They say that their legitimate achievements and aspirations have been denied. They say that many of them will lose their jobs and that the economic consequences to them will be severe.

[109] Mr. Gerow stated in his affidavit that in his opinion "Bill 29 emasculated the very role and purpose of a union and their right to carry out such role and purpose … a primary reason why employees join unions is … job security." He questions whether employees would feel that there is any point to joining a union if the government can summarily void a collective agreement.

[110] Mr. Haynes, a retired labour negotiator and organizer, gave expert evidence concerning the history of labour negotiations and collective agreements for nurses in long-term care facilities. He notes that long-term care nurses are nearly all women and that a high percentage have an "ethnic background." He says that in his opinion Bill 29 will have a serious and detrimental effect on the ability of workers to

organize and join unions largely because he believes long-term care facility employers would not hesitate to contract out nursing services if there is no bar to their doing so, thus reversing the achievements of the unions as to wages and benefits.

[111] Mr. Allnutt, the secretary and business manager of the HEU and chief bargaining spokesperson for the Facilities Association, deposes that HEU represents 46,000 employees and 90% of those employees are covered by the facilities subsector collective agreement. He says that Bill 29 "undoes what HEU members have struggled for and have achieved over several decades." He says that restrictions on contracting out are essential to protect the pay equity gains which HEU members have fought so hard to achieve but which private sector employees have not yet obtained. Mr. Allnutt says:

> … The planned contracted-out sectors typically have very low unionization rates, and hence low wages, few or no benefits and no job security. The workforces in those sectors, such as private-sector janitorial and laundry workers, are very difficult to unionize because they tend to be highly transient, they have limited education and literacy skills, they are often recent immigrants and are predominantly female. The contracted-out workers will have little means of advancing their collective interests or participating meaningfully in decisions affecting their working lives. Union density within the overall workforce employed in health care will

> decline, and the bargaining strength of the health sector unions will be further undermined.
>
> Even if the contracting firm is unionized, or becomes unionized, it will likely not be a member of HEABC. Only those workers whose employers are members of HEABC have access to the facilities subsector collective agreement. If HEU were to organize the firms who acquire these contracts, the process of obtaining a first collective agreement will take place outside the framework established by the Health Authorities Act. The gains which have been made on behalf of these workers, in terms of pay equity, standardization of pay and benefits, and so on, will have to won [sic] all over again, although their jobs may essentially be the same.
>
> Even those whose jobs are not contracted out will be affected. The impact of contracting out will be to reduce the size of the bargaining unit in the facilities subsector, which will significantly weaken the HEU and other health care unions. In addition, the union will be required to expend time and resources organizing workplaces all over again, developing new collective agreements and participating in a myriad of bargaining relationships just to reestablish the rights which have been previously won.

[112] This evidence does not establish that the impact of Bill 29 interferes with or prohibits membership in one of the plaintiff unions. The evidence does establish that the plaintiffs are disappointed about losing hard-fought for achievements, and that many may lose their jobs but the evidence does not go so far as to establish that the plaintiffs ***Charter***-guaranteed right to join a trade union is interfered with, only that some of the benefits of such

association have been circumscribed by Bill 29. Bill 29 must also be examined in the context of the legislative history of government intervention in the health care sector. Notwithstanding the continued intervention as described above the plaintiff unions have remained robust and politically powerful. I am not persuaded by the evidence before me that Bill 29 targets associational conduct i.e. joining, or maintaining membership in, a union.

[113] The Crown argues that s. 2(d) protects only the right to associate, that is, it says that despite the enactment of Bill 29, the plaintiffs are not limited or precluded from joining their unions. This is in contrast to ***Dunmore*** where the agricultural workers were held to require statutory protection to enable them to exercise their freedom to associate, to even form a union. The Crown says that the plaintiffs may bargain collectively with the HLRA outside the statutory regime of the ***Labour Relations Code***. The Crown says that the s. 2(d) constitutional protection is to associate, not to the statutory bargaining regime of the ***Labour Relations Code.*** This submission begs the question.

[114] The primary purpose of union membership is the benefit of collective bargaining. Although a union may perform other

functions, and may enter into accords or agreements outside the statutory bargaining regime (as the HEU did under the April, 2003, accord with the government to cap the number of contracted out positions) its *raison d'être* is to bargain collectively. However, this does not mean that collective bargaining necessarily deserves constitutional protection. (The April Accord was not ratified by the union membership)

[115] Bill 29 removes some of the content that historically has been the subject of bargains with the plaintiff unions. The plaintiffs say that the matters removed from the present collective agreements are so fundamental to collective bargaining that there is no longer any point to union membership. However, even accepting both that the benefits to the individual employee flowing from the union's collective bargaining are the prime and fundamental reason to join a trade union and that the reality of labour relations is that collective bargaining is exclusively under the statutory auspices of the ***Labour Relations Code,*** this does not entitle the plaintiffs to a particular collective agreement. As long as the impugned legislation does not effectively prevent employees from collectively approaching their employer, there is no violation of s. 2(d). Constitutionally enshrining certain aspects of collective agreements would hamstring

legislators from doing what is in the public interest. In my view, a legislature is constitutionally free to establish permissible and prohibited subjects of collective bargaining, even if the result is the elimination of certain subjects of bargaining that were previously permitted, provided that in doing so it does not target the associational activity itself. Here the evidence falls short of establishing that the associational activity was targeted.

[116] As noted by Professor Patricia Hughes in Waiting for the Other Shoe to Drop, 10 C.L.E.L.J. 27 at 34 – 35, the Supreme Court, even in ***Dunmore***, did not give the agricultural workers the full panoply of ***Labour Relations Code*** rights. The Court permitted the Ontario legislature 18 months to fashion a legislative response. The legislature was free to establish a separate statutory regime as long as it provided agricultural workers with the protection necessary for them to exercise their constitutional freedom to form and maintain associations including the freedom to assemble, to participate in the lawful activities of the association, and to make representations.

[117] There is no doubt that the plaintiffs are unhappy with Bill 29. It affects many of them personally and, in some

cases, profoundly. Nevertheless, the facts of this case, even accepting the plaintiffs' factual allegations described above, do not approach the facts of ***Dunmore*** where it was proven that those plaintiffs, because of the lack of statutory protection, could not even organize and join a trade union. In ***Dunmore*** there was overwhelming evidence that the employee farm workers could not organize outside the statutory scheme of the applicable provincial labour legislation. Here, the legislation, while placing significant constraints on the scope of permissible collective bargaining, does not preclude the union from making collective representations to an employer, from adopting a majority political platform, or from federating with other unions (***Dunmore***).

[118] As earlier noted, the remedy the plaintiffs seek is to strike down Bill 29. Effectively, this would re-instate and grant constitutional status to the collective agreements in force on the date Bill 29 was enacted. There are three key aspects of collective bargaining the plaintiffs argue deserve constitutional protection: the opportunity to develop a collective position and make majority representation to an employer, the capacity to collectively enter into an agreement on matters of fundamental importance to workers, and the ability to enforce that collective agreement. In my view,

Dunmore does not support the plaintiffs' position. Neither ***Dunmore*** nor any other authority has held that s. 2(d) requires an employer to respond in a certain way to, or negotiate in respect of, those representations. The ***Charter*** permits significant legislative limits on the freedom of contract with respect to employment.

[119] As illustrated above in the section on the history of legislative intervention, legislatures constantly attempt to strike the appropriate balance with respect to the scope of permissible collective bargaining in the public sector at any given time and in any given context. This balancing calls for a complex assessment of social, economic, political and policy factors, and this assessment must necessarily be flexible and fluid in order to respond to changes in any of these circumstances. The history of collective agreements in the health sector as described earlier in these reasons illustrates that legislative involvement in public sector collective bargaining is both common-place and, at least in the view of the legislators, essential. Granting constitutional protection in the broad scope claimed by the plaintiffs would seriously compromise the necessary powers of the government. As noted by Le Dain J. in the ***Alberta Reference***, a court should not substitute its own judgment for

that of the legislature concerning the restrictions of public sector collective bargaining.

[120] In ***R. v. Advance Cutting & Coring Ltd.***, [2001] 3 S.C.R. 209, the Supreme Court of Canada affirmed the Court's traditional view that such a delicate exercise in reconciling values and interests was best left to the legislature. At ¶ 257 LeBel J. said:

> Legislatures are entitled to a substantial, though not absolute, degree of latitude and deference, to settle social and economic policy issues (***RJR – MacDonald***, at ¶134, per McLachlin J.). Courts should be mindful to avoid second-guessing legislatures on controversial and complex political choices ***M. v. H.***, [1999] 2 S.C.R. 3 at ¶ 79, per Cory and Iacobucci JJ.). As discussed above, the jurisprudence acknowledges that legislative policy-making in the domain of labour relations is better left to the political process, as a general rule.

[121] The plaintiffs argue in reliance on ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817 at ¶ 70 that international human rights law has a critical influence on the interpretation of the scope of rights included in the ***Charter***. The plaintiffs rely on international law in support of their claim that Bill 29 violates the guarantee of freedom of association in s. 2(d) of the ***Charter*** and is therefore unconstitutional. I agree that international

law may provide a source of law applicable to the interpretation of the ***Charter***.

[122] A complaint about Bill 29 (as well as several other British Columbia bills affecting labour relations) was filed at the International Labour Organization ("I.L.O."). The experts of both the plaintiffs and the defendant differ in their interpretation of the decision. I find that the decision of the I.L.O. concerning Bill 29 and the complaint that it violates human rights does not support the plaintiffs' position. The I.L.O committee expressed the view that changes of the nature made in Bill 29 should be preceded by consultation with the appropriate organizations but the committee did not otherwise comment on the substance of Bill 29 and whether it violated international norms concerning freedom of association.

[123] I conclude that nothing in Bill 29 limits or otherwise interferes with the plaintiffs' ability to form or participate in the lawful activities of a trade union. Accordingly, in light of the Supreme Court's jurisprudence, the plaintiffs' s. 2(d) claim cannot succeed because it relates to an activity that does not fall within the range of activities protected by s. 2(d).

b. **Step 2 – If the Activity Falls Within the Range of Activities Protected by s. 2(d), Does the Impugned Legislation, Either in Purpose or Effect, Interfere with these Activities?**

[124] Having concluded that collective bargaining is not an activity that falls within the range of activities protected by s. 2(d) of the ***Charter***, it is not necessary for me to consider whether Bill 29, either in purpose or effect, interferes with such activity.

VI. **SECTION 7 - THE RIGHT TO LIFE, LIBERTY AND THE SECURITY OF THE PERSON**

A. **POSITION OF THE PARTIES**

[125] The plaintiffs submit that the "right to life, liberty and security of the person" protected by s. 7 of the ***Charter*** encompasses an individual's interest in retaining his or her employment. While acknowledging that courts have rejected s. 7 claims that relate to purely economic interests, the plaintiffs stress that it is important not to mischaracterize as "economic" claims that go toward more fundamental interests. They submit that the Supreme Court of Canada has affirmed on numerous occasions the value of employment with respect to self-worth and emotional well-being, as well as the uniquely important interests at stake when an employment

relationship is terminated (***Alberta Reference***). The plaintiffs say that the fundamental importance of employment to individuals goes far beyond the economic importance of income, though this latter aspect is clearly critical to an individual's capacity to survive and provide for his or her family.

[126] In the alternative, the plaintiffs submit that Bill 29 engages the administration of justice, a principle clearly protected by s. 7 of the ***Charter***. Bill 29, in essence, seeks to prevent the plaintiffs' recourse to the legal framework established to govern the relationship between the affected individuals and the government as their employer, namely, the collective agreements. The government specifically elected to transfer collective bargaining labour relations away from the judicial legal system and into a statutory system of regulated collective bargaining governed by the Labour Relations Board. Having done so, the plaintiffs say, the government cannot insulate its actions from the reach of s. 7 by arguing that labour relations are no longer associated with the administration of justice.

[127] With respect to whether the deprivation of these rights was in accordance with the principles of fundamental justice,

the plaintiffs submit it was not. Firstly, they say that Bill 29 imposes notice periods considerably shorter than many would receive under common law. The plaintiffs cite the following examples.

[128] Under the Community Collective Agreement, a worker with 11.5 years of service would receive, upon layoff, eight weeks (56 days) notice and one year of employment security through ESLA. This same worker, if laid off now, is entitled to 60 days notice.

[129] The Facilities Collective Agreement provided that a worker with 11.5 years of service, upon lay off, would receive six months notice, approximately 5 ½ weeks severance and a year of employment security. That same worker is now entitled to only 60 days notice and the 5 ½ week severance. Under the Facilities Agreement, a worker with less than 10 years service received no severance entitlement. Accordingly, workers with nine years service would have been entitled to 6 months notice and 12 months employment security prior to Bill 29. Such workers will now receive no more than 60 days notice.

[130] The Nurses Collective Agreement provided that workers with 11.5 years of service would receive approximately 5 ½ week severance, 60 days notice and 12 months employment

security. These same employees will now receive 5 ½ weeks severance and 60 days notice. An employee with less than ten years service was not entitled to severance under the collective agreement and will now receive only 60 days notice.

[131] Secondly, the plaintiffs submit that Bill 29 fails to respect the rule of law in that the government enacted this legislation without providing directly affected parties the opportunity to be heard.

[132] Finally, they submit that by enacting Bill 29, the government is seeking to avoid its responsibility under duly executed collective agreements with its subjects.

[133] The Crown replies that the plaintiffs have established neither that Bill 29 deprives them of life, liberty or security of the person, nor that it does so in a manner contrary to the principles of fundamental justice. It submits that acceding to the plaintiffs' argument regarding s. 7 would extend that provision to prohibit any governmental action that had a significantly detrimental impact on an individual's ability to maintain a job. This would include not only lay-offs as a result of governmental action in the public sector, but also any governmental action that resulted in job losses in the private sector. Section 7 does not and should not

extend so far. Moreover, to the extent that Bill 29 can be said to affect the economic liberty and security of the individual plaintiffs, it does so no differently than other legislation that regulates employment in order to serve the public interest: for example, the ***Human Rights Code***, the ***Employment Standards Act*** and the ***Labour Relations Code***. The Crown also points to the jurisprudence which indicates that courts are to take a restrictive interpretation of s. 7 with respect to economic claims. In these cases, courts have held that restrictions on the employment, occupational and professional activities of individuals comprise economic regulation and as such, cannot engage the interests in liberty or security of the person within the meaning of s. 7.

[134] Furthermore, says the Crown, to the extent that s. 7 encompasses a right to employment as asserted by the plaintiffs, they must be able to demonstrate that their rights in this regard have been deprived by the state. Bill 29, however, does not deprive anyone of a job but merely confers a discretion on health sector employers that they previously did not have to contract out non-clinical work. The Crown submits that by no stretch can this amount to deprivation by the state of life, liberty or security of the person.

[135] In the alternative, the Crown submits that the individual plaintiffs cannot demonstrate that Bill 29 affects their s. 7 interests in a manner that is contrary to the principles of fundamental justice. Even if the principle that employees are entitled to retain their employment unless there is cause or reasonable notice for termination could be said to be one of fundamental justice, it submits that nothing in Bill 29 excludes the application of the ***Labour Relations Code*** provisions stipulating that dismissal or discipline be for "just and reasonable cause." As well, they say, Bill 29's limitation of the notice period is nothing more than a legislative determination of what constitutes reasonable notice. Finally, the Crown submits that there is no basis to the plaintiffs' assertion that principles of fundamental justice impose an obligation on government to consult with affected groups before enacting legislation. While such consultation may be useful, it is by no means legally required.

B. **ANALYSIS**

[136] Section 7 of the ***Charter*** reads:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived

> thereof except in accordance with the principles of fundamental justice.

[137] The Crown says that the plaintiff unions have no standing to allege a breach of s. 7 because the right protected by the provision is restricted to individuals. The Crown also says that none of the named plaintiffs have lost employment owing to Bill 29, with the possible exception of the plaintiff Jhand, and that they therefore have no standing either. In the circumstances of this case, it may be useful for me to fully consider the plaintiffs' s. 7 argument, and therefore for the purposes of argument I accept that they have standing.

[138] In order for s. 7 to be triggered, there must first be a finding that there has been a deprivation of the right to "life, liberty and security of the person," and secondly, that the deprivation is contrary to the principles of fundamental justice: ***Blencoe v. British Columbia (Human Rights Commission)***, [2000] 2 S.C.R. 307 at ¶ 47.

[139] In deciding whether s. 7 of the ***Charter*** applied to protect rights wholly unconnected to the administration of justice, a majority of the Supreme Court of Canada in ***Gosselin v. Quebec (Attorney General)***, 2002 SCC 84, noted at ¶ 80 that

in ***Irwin Toy Ltd. v. Quebec (Attorney General)***, [1989] 1 S.C.R. 927, at p. 1003 the Court had left open the question of whether s. 7 could operate to protect "economic rights fundamental to human…survival." The Court went on to state that even if s. 7 could be interpreted to encompass economic rights, it protected only the right not to be *deprived* thereof (at ¶ 81); nothing in the jurisprudence so far indicated that s. 7 placed a positive obligation on the state to ensure that each person enjoyed these protected rights. While this suggests that, at best, s. 7 can encompass only the right not to be deprived of employment, I am persuaded by the weight of judicial authority that s. 7 does not extend to protect the right to maintain employment.

[140] In ***Wilson v. British Columbia Medical Services Commission*** (1988), 53 D.L.R. (4th) 171, the British Columbia Court of Appeal held that geographical restrictions imposed by the government on the right to practice medicine in the Province constituted a violation of the right to liberty protected by s. 7. It held that although s. 7 did not extend to protect property or pure economic rights, it embraced individual freedom of movement, including the right to choose one's occupation and where to pursue it. This right was not merely a pure economic right since the denial of the right to

practice a chosen profession was a matter concerning dignity and self-worth.

[141] This issue of whether the right to practice in a given profession was a liberty interest protected by s. 7 was more recently addressed in ***Waldman v. British Columbia (Medical Services Commission)*** (1997), 150 D.L.R. (4th) 405 (B.C.S.C.), affirmed in the result at 177 D.L.R. (4th) 321, 1999 BCCA 508 (C.A.). The issue in ***Waldman,*** *supra* was the extent to which the Medical Services Commission could impose conditions of practice on newly qualified physicians. After citing earlier cases in which courts appeared to endorse the view that s. 7 protected the right to practice a profession, Levine J. (as she then was) reviewed subsequent authorities and concluded that s. 7 did not apply to protect such a right. Beginning at ¶ 280, she wrote:

> The respondents say that the Court of Appeal's view [in ***Wilson***] that section 7 guarantees the right to practice a profession has effectively been overruled. They rely on the comments of Lamer J. (as he then was) in ***Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*** (1990), 56 C.C.C. (3d) 65 (S.C.C.) (the "***Soliciting Reference***"), which have been followed in subsequent cases decided in the Federal Court of Appeal (***Canadian Association of Regulated Importers v. Canada***, [1992] 2 F.C. 130, 87 D.L.R. (4th) 730; the Court of Appeal of Prince Edward Island (***Walker v. Prince Edward Island***); and the Ontario Divisional Court (***Kopyto v. Law Society of Upper Canada*** (1993), 107 D.L.R. (4th) 259, citing

Biscotti v. Ontario (Securities Commission) (1991), 76 D.L.R. (4th) 762 (Ont. C.A.)). They also cite subsequent cases of the B.C. Court of Appeal (***Martinoff v. Dawson*** (1990), 57 C.C.C. (3d) 482; ***R. v. Baig*** (1992), 78 C.C.C. (3d) 260) and of this Court (***Bennett v. British Columbia (Securities Commission)*** (1991), 82 D.L.R. (4th) 129) in which, they argue, the courts cast doubt on the validity of the decision in ***Wilson***.

In the ***Soliciting Reference*** case, Lamer J. took the opportunity to express his view on the question of whether section 7 of the ***Charter*** guarantees the right to practice a profession. In so doing, he specifically referred to the ***Wilson*** case and at pp. 99-100 questioned the conclusions of the Court of Appeal:

> In my view, it is not clear that the statement by the Chief Justice [in ***Reference re Public Service Employee Relations Act*** (1987), 38 D.L.R. (4th) 161 at 198-9], quoted at length by the British Columbia Court of Appeal in ***Wilson***, is support for the view that s. 7 of the ***Charter*** protects a "right to pursue a livelihood or profession" as distinct from a "right to work" which is not protected….There is no doubt that the non-economic or non-pecuniary aspects of work cannot be denied and are indeed important to a person's sense of identity, self-worth and emotional well-being. But it seems to me that the distinction sought to be drawn by the court between a right to work and a right to pursue a profession is, with respect, not one that aids in an understanding of the scope of "liberty" under s. 7 of the ***Charter***.
>
> Further, it is my view that work is not the only activity which contributes to a person's self-worth or emotional well-being. If liberty or security of the person under s. 7 of the ***Charter*** were defined in terms of attributes such as dignity, self-worth and emotional well-being, it seems that liberty under s. 7 would be all inclusive. In such a state of affairs

> there would be serious reason to question the independent existence in the ***Charter*** of other rights and freedoms such as freedom of religion and conscience or freedom of expression.
>
> In short, then, I find myself in agreement with the following statement of McIntyre J. in ***Reference re Public Service Employee Relations Act***, *supra*, at p.231: "It is also to be observed that the ***Charter***, with the possible exception of s. 6(2)(b) (right to earn a livelihood in any province) and s. 6(4), does not concern itself with economic rights."

[142] Levine J. noted Lamer J's conclusion that s. 7 did not extend to the right to practice in a particular profession, and that while he agreed with the majority with respect to the outcome of the case, he was alone in expressing his views as to the application of s. 7 to the practice of a profession. She went on to discuss the various cases that endorsed Lamer J.'s cited comments and concluded at ¶ 293 that "the weight of authority, since ***Wilson***, is that section 7 does not protect the right of a person to practice a profession." Accordingly, she ultimately held that s. 7 had no application to the case before her. While the Court of Appeal decided the appeal on other grounds and did not address Levine J.'s s. 7 analysis, Hall J.A., writing for the Court, commented at ¶ 52 that he was "not presently disposed to differ from the conclusion the judge reached concerning the applicability of s. 7 of the ***Charter.***"

[143] The Court of Appeal recently cited Levine J.'s judgment in ***Waldman*** in ***British Columbia Teachers' Federation v. Vancouver School District No. 39***, 2003 BCCA 100, in concluding that the summary dismissal of a teacher for her refusal to undergo a psychiatric examination did not engage her rights under s. 7 of the ***Charter***. Writing for the majority, Hall J.A. stated at ¶ 209:

> There are any number of issues concerning the employment relationship that may lead to disagreement between the employer and the employee. In the non-union context, these issues are to be resolved under the contract rubric and in a union setting the grievance-arbitration process is available. In this area of private law, these remedies should suffice to resolve the issues that may arise for resolution. What is at issue in this case does not, in my opinion, rise to the level of any interest concerning the life, liberty or security of the person that would invoke the application of s. 7 of the ***Charter***. La Forest J. noted in ***R. v. Beare***, [1988] 2 S.C.R. 387 (the fingerprinting case), that while s. 7 must be given a generous interpretation, it was important not to overshoot the purpose of the right in question. To allow s. 7 to be invoked in the context of this case, in my view, would amount to overshooting the purposes this section was designed to protect.
>
> [emphasis added]

[144] Prof. Hogg, in his text Constitutional Law of Canada, 4th ed., loose leaf (Toronto: Carswell, 1997) at ¶44.7(b) explains the reasons for the exclusion of economic liberty

from s. 7. He too concludes that regulation of work is outside the scope of s. 7. He wrote:

> There are good reasons for caution in expanding the concept of liberty in s. 7. One reason is the unhappy experience of the United States during the ***Lochner*** era. Between 1905, when ***Lochner v. New York*** was decided, and 1937, when the case was overruled, the Supreme Court of the United States protected the liberties of the owners of factories and mines against the efforts of Congress and the state Legislatures to limit hours of work, to require the payment of minimum wages, to impose health and safety standards and to protect union activity. As Oliver Wendall Holmes pointed out in his brilliant dissenting opinions, the Court used the Constitution to enforce a laissez-faire economic theory that had been rejected by the elected legislators. The Court had taken sides in a political conflict that was suitable for resolution only by elected legislators. In 1937, after an exasperated President Roosevelt had proposed his court-packing plan, the Court changed its mind and reversed these decisions. Since then, the Court has been extremely reluctant to review social and economic regulation, despite its inevitable interferences with the property and contract rights that the Constitution of the United States expressly guarantees.
>
> All this happened in the United States, but the ***Lochner*** era cast its shadow over Canada as well. The framers of Canada's ***Charter of Rights*** deliberately omitted any reference to property in s. 7, and they also omitted any guarantee of the obligation of contracts. These departures from the American model, as well as the replacement of "due process" with "fundamental justice" (of which more will be said later), were intended to banish ***Lochner*** from Canada. The product is a s. 7 in which liberty must be interpreted as not including property, as not including freedom of contract, and, in short, as not including economic liberty.

> Another reason for caution in the definition of liberty is the placement of s. 7 with the ***Charter of Rights***. Section 7 leads off a group of sections (ss. 7 to 14 entitled "Legal Rights." These provisions are mainly addressed to the rights of individuals in the criminal justice system: search seizure, detention, arrest, trial, testimony and imprisonment are the concerns of ss. 8 to 14. It seems reasonable to conclude, as Lamer J. has done, the "the restrictions on liberty and security of the person that s. 7 is concerned with are those that occur as a result of an individual's interaction with the justice system, and its administration". This line of reasoning also excludes economic liberty from s. 7.
>
> The Supreme Court of Canada has held that s. 7 does not apply to corporations, because "liberty" does not include corporate activity. Nor does "liberty" include the right to do business, for example, by selling goods on a Sunday. Does "liberty" include the right of an individual to work? Despite some lower court decisions to the contrary, which emphasize the role of work as an instrument of self-fulfilment, the regulation of trades and professions should be regarded as restrictions on economic liberty that are outside the scope of s. 7.

[145] Returning to ***Gosselin,*** McLachlin C.J. at ¶ 80 left open the question of whether "… s. 7 could apply to protect rights or interests wholly unconnected to the administration of justice," (and in her dissent Arbour J. criticizes the resort to headings and groupings as an interpretive aid to s. 7). McLachlin C. J. said that it seems possible that a right fundamental to human survival (**Irwin Toy**, *supra*) could engage the protection of s. 7. Here the plaintiffs emphasize that

their jobs are very important to them. The plaintiffs summarize the actual impact of Bill 29 on them as follows:

- It deprives them of a specific kind of work that they have chosen or trained to do;

- It has deprived them of particular employers they have chosen to work for;

- It has deprived them of the right to work with colleagues and co-employees, sometimes of long standing;

- It has deprived them of working with patients with whom they have developed a nurturing and caring relationship;

- It will cause hardship for many employees, a fact acknowledged by the government;

- It has deprived them of the legitimate expectations of a job that would either be theirs for an indefinite period of time, absent just cause, or at least with the employment security offered by the collective agreement if the job was discontinued for proper reasons;

- It has deprived them of a myriad of fundamental life choices that may have been made because of the job, whether the buying of a house, having a child, getting married, deciding to place children in a particular school, or where to live.

[146] There is absolutely no doubt that employment provides both economic and non-economic benefits to individuals. Nevertheless, the fact that work or employment may be possessed of a psychological dimension, however significant, is insufficient in my view to elevate it to an entitlement deserving of constitutional status. While the plaintiffs' concerns described above are important, legitimate, and serious, I do not agree that they amount to "economic rights fundamental to … human survival" (***Gosselin***, *supra* at ¶80). As the Crown submits, the law has traditionally treated employment as an economic rather than psychological pursuit. For example, there is no protection from termination at common law (***Machtinger v. HOJ Industries Ltd.***, [1992] 1 S.C.R. 986) The common law has always recognized that employers are entitled to dismiss employees without cause, regardless of any attendant economic or emotional consequences, so long as they provide sufficient notice. Where sufficient notice is not provided, the terminated employee is entitled to monetary damages in lieu of notice. It is for the lack of notice that the employee is compensated, not for the loss of the job.

[147] Like the majority of the Court of Appeal in ***British Columbia Teachers' Federation***, I conclude that allowing s. 7 to be invoked in the context of the present case would amount

to overshooting the rights this section was designed to protect. The implications of concluding that s. 7 encompasses the entitlement to maintain employment as asserted by the plaintiffs are profound and demonstrate the extent to which such application of s.7 would overshoot its purpose. If s. 7 can be said to protect the right to maintain employment, then any state action that had a detrimental impact on an individual's ability to maintain a job would be open to challenge as violating the ***Charter***. As the Crown suggests, this could include, for example, any lay-offs that resulted from governmental action in the public sector, as well as any job losses in the private sector that similarly resulted from governmental action or policies. Such consequences would render governmental policy-making virtually impossible.

[148] I therefore conclude that s. 7 does not protect the right to maintain employment.

[149] Above, I described the notice provisions under the collective agreements. The most significant difference between the Bill 29 termination provision as compared to the collective agreements is the absence of recourse to the retraining and placement services of ESLA, which in, effect extended the notice periods by 12 months. It is noteworthy

that Maureen Topping, a member of the 1996, 1998, and 2001 BCGEU bargaining committees, says that in 1998 "the unions were finally able to achieve employment security for the first time in the community support sector. This was a major achievement for us." The Nurses and Facilities Subsector Agreements continue, notwithstanding Bill 29, to include severance entitlement of varying lengths. Even if s. 7 applied to protect the plaintiffs' employment, which I have concluded it does not, the factual record here is insufficient to support the plaintiffs' claim. Counsel have not drawn to my attention evidence from which it is possible to conclude that in a unionized environment the legislative imposition of a 60 day notice period is inadequate notice and therefore a breach of the rules of fundamental justice, assuming such rights could be engaged here. In particular, the evidence of Maureen Topping just mentioned proves that only recently have certain employees been entitled to lengthy notice periods. Such success on the part of the union does not mean that the entitlement to lengthy notice periods becomes constitutionally entrenched.

[150] Moreover, I can find no support in the jurisprudence for the plaintiffs' submissions that there is a right to prior

notice or consultation before the enactment of legislation such as Bill 29.

VII. **SECTION 15 OF THE CHARTER**

A. **POSITION OF THE PLAINTIFFS**

[151] The plaintiffs submit that Bill 29 infringes the equality protections contained in s. 15 of the ***Charter***. They say that pay equity studies have determined that women workers, particularly those in certain occupations, continue to suffer significant disadvantage. Health care work is the classic example of "women's work," which has historically been undervalued due to its association with women's traditional role in the home. The health and social services sectors are the most female dominated, with a higher than average proportion of workers over the age of 45, visible minorities and immigrants. The plaintiffs submit that Bill 29 denies these health care workers the benefit of fundamental provisions of their collective agreements and those provisions of the ***Labour Relations Code*** aimed at protecting collective bargaining rights.

[152] Citing the Supreme Court of Canada's decisions in ***Law v. Canada***, [1999] 1 S.C.R. 497 and ***Egan v. Canada***, [1995] 2

S.C.R. 513, the plaintiffs say that the courts have consistently stressed that every aspect of the s. 15 analysis must be informed by the purpose of the equality guarantee, "taking into account the large remedial component" of the provision. They say that while formal equality requires only that all people be treated alike, a guarantee of substantive equality requires that the courts focus their attention on how the impugned legislation or governmental action affects the actual circumstances of the group whose rights are in question. The plaintiffs submit that Supreme Court judgments indicate that s. 15 claims must be assessed on a contextual, flexible basis from the perspective of the claimant. Three important aspects of the contextual matrix that inform the present case are:

1. the disadvantage women suffer in employment, particularly in terms of wages, hours, benefits, and employment security;

2. the prejudice and stereotyping that is attached to "women's work"; and

3. the importance of unionization and collective bargaining in overcoming this disadvantage.

[153] Applying the three stage inquiry set out in ***Law***, the plaintiffs submit that firstly, Bill 29 only affects health care and social service workers, thereby drawing a formal distinction between these workers and all others. Occupational status, they submit, is a personal characteristic central to one's identity and sense of self. By targeting health care workers, the formal distinction in Bill 29 fails to take account of the plaintiffs' already disadvantaged position within Canadian society, resulting in substantively differential treatment between the plaintiffs and others on the basis of sex and of working in a female dominated occupational sector. The plaintiffs say in their submissions that the appropriate comparator group for the purpose of this analysis is "those public sector workers who do not work in the most female dominated sectors."

[154] Regarding the second step as enunciated in ***Law***, the plaintiffs say that they are subject to differential treatment based on the overlapping grounds of sex, an enumerated ground, and workers who work in "women's jobs," an analogous ground. Because health care workers are predominantly female, the effect of Bill 29 falls disproportionately on female workers.

[155] The plaintiffs characterize the third ***Law*** step as the heart of their claim and submit that Bill 29 imposes differential treatment on health care workers by denying them a benefit all other unionized workers enjoy, namely, the full benefit of the collective bargaining regime. This includes the right to negotiate terms such as seniority and job security, the ability to rely on their concluded collective agreements, and the protection of the ***Labour Relations Code*** and arbitral jurisprudence regarding successorship, common employer declarations, and true employer declarations. In addition, they submit, the substantive impact of Bill 29 is to deprive workers of the benefit of their collective agreements, including their pay equity gains. Because Bill 29 denies these benefits only to health care employees, it draws a distinction on the basis of a personal characteristic and perpetuates the view that these workers are not as deserving of respect and consideration as other unionized workers.

B. **ANALYSIS**

[156] Section 15(1) of the ***Charter*** provides,

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race,

> national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[157] The s. 15 analysis is governed by the Supreme Court of Canada's decision in ***Law*** *(*recently affirmed in ***Gosselin***, supra). The Court in ***Law*** held that the essence of the s. 15 analysis is whether a challenged distinction, viewed from the perspective of a reasonable person in the claimant's circumstances, violates that person's dignity and fails to respect him or her as a full and equal member of society. Three broad inquiries are necessary to make a determination of discrimination under s. 15.

> 1. Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantially differential treatment between the claimant and others on the basis of one or more personal characteristics?
>
> 2. Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?
>
> 3. Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?
>
> (***Law,*** at ¶88)

[158] The analysis of these matters must be undertaken in a purposive and contextual manner, that is, taking into account the large remedial component of s. 15(1) and the purpose of the provision in fighting discrimination: ***Law Society of British Columbia v. Andrews***,[1989] 1 S.C.R. 143 (***Andrews***) cited in ***Law***, *supra* at ¶ 23.

[159] The purpose of s. 15 was described in ***Law*** at ¶42 (citing McIntyre J. in ***Andrews***, *supra*):

> to promote "a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."

[160] A conflict between an impugned law and the purpose of s. 15(1) is essential in order to found a discrimination claim, and holds true with respect to each element of the discrimination claim (***Law*** at ¶ 41). Equality is ultimately a comparative concept and therefore identifying the appropriate comparator group is important when considering the contextual factors relevant to the discrimination analysis. The relevant comparison group for the purposes of a s. 15 analysis must be selected in light of the subject matter of the claim, the purpose and effects of the impugned law, and its context. The determination of the appropriate comparator and the evaluation

of the contextual factors that determine whether legislation has the effect of demeaning a claimant must be conducted from the perspective of the claimant (***Law*** at ¶ 59). Nevertheless, within the scope of the grounds pleaded, the court may determine that a certain comparator is not appropriate, select a different comparative group, or otherwise refine the claimant's description of the appropriate comparator (***Law*** at ¶ 58). With respect to context, important factors include, but are not limited to, pre-existing disadvantage, the relationship between the ground on which the claim is based and the claimant's characteristics or circumstances, the ameliorative purpose or effects of the impugned legislation upon a more disadvantaged group, and the nature and scope of the interest affected.

1. **The First Branch of the *Law* Test**

> **Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantially differential treatment between the claimant and others on the basis of one or more personal characteristics?**

[161] There is no dispute that the majority of workers affected by Bill 29 are female. 98% of nurses in British Columbia are women. 85% of HEU members are women. 90% of

BCGEU workers in the community subsector are women. Many health care workers are immigrants or members of visible minorities. 27% of HEU members self-identify as members of visible minorities in comparison to 18% of British Columbia as a whole.

[162] The plaintiffs' witness, Pat Armstrong, is a Professor of Sociology and Women's Studies. She has particular expertise in the study of women's work in the health and social services field. She says that:

> Despite the fact that women now constitute almost half of the labour force and form a critical component in the labour force, they are still significantly disadvantaged in comparison to men, and because of their gender, experience serious discrimination in their paid work. … Women's work is defined as less valuable and associated with being female…. The kind of systemic discrimination which segregates women into specific female-dominated jobs and pays them low wages is particularly evident in the health and social services sector.

[163] The Crown did not dispute this evidence and I accept it.

[164] The plaintiffs define their comparator group for the purposes of the first branch of the ***Law*** test as those public sector workers who do not work in the most female dominated sectors. I find it difficult to apply a comparator group that has the basis of the s. 15 claim infused into its description.

However, accepting for the purposes of this analysis that this is an appropriate comparator group, I do not see how Bill 29 draws a distinction between the plaintiffs and this comparator group *on the basis of personal characteristics*.

[165] There are three ways in which it might be said that Bill 29 draws a distinction or results in differential treatment within the meaning of s. 15.

[166] First, Bill 29 draws a formal distinction between employees who provide non-clinical services and those who provide clinical services, in that the work performed by the first group may be contracted out by health authorities, whereas work performed by the latter group cannot be contracted out if the relevant collective agreement prohibits it. Assuming that an employer's ability to contract work out is a disadvantage from the perspective of the potentially affected employee, the claimant group with respect to this legislative distinction is health support workers, including nurses, who perform non-clinical services. The relevant comparator group is nurses and paramedicals, who perform clinical services. I do not see how Bill 29 draws a distinction between the plaintiff and this comparator group on the basis of their personal characteristics.

[167] Second, Bill 29 eliminates the employment security provisions (ESLA and the HLAA) for all to whom it applies, regardless of whether these employees perform clinical or non-clinical services, and regardless of what union represents them. Unlike the first effect, this effect is not the product of a formal distinction, and so the question is whether this effect results in "substantively differential treatment between the claimant and others."

[168] According to Ms. McInnes, the director of compensation services for the Health Employers Association, "Services that may be contracted out under Bill 29 include Security, Accounting, Information Technology, Medical Technology, Transportation, Janitorial or Maintenance, and Medical, Diagnostic and Therapeutic Services not delivered to an in-patient in an acute care hospital. Job classes within these service areas are not all female-dominated. For example, Grounds keepers, Painters, Building Security Officers, and Maintenance Workers are all male-dominated job classes that may be affected by contracting out." The distinction between the plaintiffs and other public sector unionized employees turns on specific attributes of a person's employment and in this context, despite the fact that the majority of the plaintiffs are women, is not a "personal characteristic."

[169] Since ESLA (including the HLAA) was a benefit unique to the claimant group and did not apply to anyone else, the only way in which this aspect of Bill 29 can be said to result in differential treatment is by comparing the claimants with themselves. That is, the claimants are only "worse off" compared to their situation before the enactment of the legislation. This is not differential treatment within the meaning of s. 15. Section 15 requires that the comparator group be a group other than the claimant. To the extent that the plaintiffs' claim is really that Bill 29 adversely affects benefits they enjoyed before it was enacted, they have no s. 15 claim. As the Ontario Superior Court stated in ***Shulman v. College of Audiologists and Speech Language Pathologists of Ontario,*** (2001), 155 O.A.C. 171, 90 C.R.R. (2d) 82 (Ont. Sup. Ct.) at ¶ 27.

> It is not appropriate to compare the Appellants before and after the impugned changes; if that approach were taken, every change or restriction would result in substantively differential treatment, and the effect would be to entrench earlier levels of service.

[170] The Crown submits that this effect of Bill 29 (termination of ESLA) cannot constitute differential treatment for the purposes of s. 15 and I agree. Effectively, the

plaintiffs are seeking to constitutionally entrench an earlier level of employment benefits. Therefore, any s. 15 claim based on the removal of ESLA and the HLAA must fail at the first stage of the s. 15 analysis.

[171] Third, Bill 29 changes the terms of certain other employment rights (it limits bumping, and reduces restrictions on the transfer of employees and services within or among work sites) for all employees to whom it applies, and it prohibits collective bargaining with respect to these terms.

[172] The restrictions in Bill 29 apply to public health sector employees. They do not apply to public sector employees outside the health sector or to unionized private sector employees who can bargain with respect to these areas, and can benefit from the results of their bargain. Non-unionized employees are not an appropriate comparator group since they are subject to an entirely different employment rights regime. Thus, in respect of this legislative distinction, the relevant comparator group is unionized public sector employees outside the health sector.

[173] In oral submission the plaintiffs said that in this case one's choice of work is a personal characteristic. I do not agree. Bill 29 alters the collective bargaining regime for

workers in the health care sector. It does not alter the collective bargaining regime applicable to most other public sector employees (except those in the social services sector who are also affected by Bill 29). The distinction that is being drawn here is simply between different sectors within the broader public sector; it is not based upon the personal characteristics of the employees within these sectors. Notwithstanding the comments of L'Heureux-Dubé J. in ***Dunmore,*** and ***Deslisle*** to the effect that occupational status can, in certain circumstances, constitute an analogous ground for the purposes of s. 15, I do not consider the status of the plaintiffs as health care workers to be a personal characteristic. This is particularly so given the broad and disparate occupational classifications that health care workers encompass and because one's personal choice is not an "immutable characteristic."

[174] The government has made a policy decision with respect to the health care system that has adversely affected the employment interests of a group whose composition is linked to s. 15 characteristics. However, the fact that this group is predominantly female does not constitutionally shield it from governmental action that may adversely affect them without evidence that it is being subject to differential treatment on

the basis of s. 15 characteristics. I do not find this to be the case. I conclude that the plaintiffs have failed to satisfy either aspect of this first stage of the s. 15 analysis.

[175] In the event I am in error in so concluding, I will go on to consider the remaining two branches of the ***Law*** test.

2. The Second Branch of the *Law* Test

Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

[176] In ***Corbiere v. Canada (Minister of Indian and Northern Affairs)***, [1999] 2 S.C.R. 203 at ¶13, the Supreme Court of Canada described how to identify analogous grounds for the purpose of s. 15:

> What then are the criteria by which we identify a ground of distinction as analogous? The obvious answer is that we look for grounds of distinction that are analogous or like the grounds enumerated in s. 15 -- race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second stage of the Law analysis is to reveal grounds based on

> characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion. Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.

[177] At the risk of putting the plaintiffs' argument regarding the second part of the ***Law*** test too simplistically, I understand it to be thus: health-care work is seen as women's work; women in the workforce are generally a disadvantaged group; sex is an enumerated ground; and therefore the occupational classification of 'health-care workers' should be considered an analogous ground.

[178] As already noted, the contention that occupational status may be recognized as an analogous ground in certain circumstances arises from dicta of the Supreme Court of Canada in ***Dunmore*** and ***Delisle***. ***Dunmore*** concerned the complete exclusion of agricultural workers from a general collective bargaining regime. ***Delisle*** concerned a similar exclusion with

respect to R.C.M.P. officers. In ***Delisle***, the majority of the Court rejected the argument that occupational status is an analogous ground. In ***Dunmore***, the majority chose not to address the s. 15 issue. In both cases, L'Heureux-Dubé J., writing alone, suggested that, *in certain circumstances*, occupational status can be an analogous ground. In ***Delisle*** she would have held that it was not; in ***Dunmore*** she would have held that it was.

[179] The Crown submits that the majority of the Supreme Court of Canada has not recognized that occupational status is an analogous ground, and the plaintiffs' s. 15 claim must fail in this respect. Alternatively, if occupational status can be an analogous ground in some circumstances, is this such a case? Put simply, are unionized public sector health care workers (or unionized health care workers who perform non-clinical services) more like agricultural workers or police officers?

[180] L'Heureux-Dubé J. in ***Dunmore*** at ¶ 168, described agricultural workers as "among the most economically exploited and politically neutralized individuals in our society" and noted that they face "serious obstacles to effective participation in the political process." This is hardly true of unionized health care workers in British Columbia,

particularly in light of their history of participation in the political process and their wage rates as compared to unionized and non-union workers elsewhere in Canada. A further difficulty in the plaintiffs' argument is the disparate nature of the group. Although it is true the plaintiffs are predominantly women workers in the health care sector, the similarity ends there. Some of the plaintiffs are, for example, highly trained specialized nurses. Undoubtedly nurses have, in this era of fiscal restraint, encountered enormous difficulty in providing the quality of care they would want to give. However, even accepting Prof. Armstrong's evidence that the work they do is undervalued and seen as women's work, they cannot be described in the same way as the agricultural workers in ***Dunmore.*** I do not think that for the purposes of a s. 15 analysis the occupational group "health care workers" or "unionized health care workers" can be seen as sharing the same immutable characteristics.

[181] The fact that health sector work is "female predominant," and that much of it is considered to be "women's work," does not mean that every law that adversely affects such work or the terms and conditions of those employed to perform it is discriminatory. The true effect of the law is not upon "women" or on "those who perform women's work" it is

upon those who perform health care work in British Columbia's unionized public sector. The unique circumstances surrounding that work is the distinguishing factor: correspondence with sex or 'women's work' is not the basis of the legislation.

[182] As noted above in the discussion concerning the first part of the ***Law*** test, Bill 29 has three general effects. The provisions of Bill 29 which discontinue ESLA cannot form the basis of a discrimination claim which satisfies the second part of the ***Law*** test because the comparator group does not benefit from ESLA. Similarly, the contracting out provisions cannot satisfy the second part of the ***Law*** test because the comparison is to a group possessing the same employment classification but who work in acute care services and who possess the same personal characteristics. Only the third effect of Bill 29 could potentially satisfy the second ***Law*** test, that is, the changes to terms of certain employment rights (bumping, transfers, etc.) and as already discussed, I have concluded that an employment classification of unionized health-care workers is not an analogous ground upon which the legislative distinction is based.

3. **The Third Branch of the *Law* Test**

Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

[183] The plaintiffs say that the impact of Bill 29 affects their dignity and feelings of self-worth. Evidence of Sharleen DeCillia, Janine Brooker, Doreen McConnell serves to illustrate the point they make.

[184] Sharleen DeCillia says in her affidavit:

> I do not believe this government would have passed Bill 29 against the steelworkers or the longshoremen. I think that as a voter and as a taxpayer I should have the same value accorded to my work as is accorded to men's work. The message that I hear from the government is that I am not as valuable as a man. From my perspective, even the doctors are better organized than we are as nurses. I see that the doctors are a predominantly a male group and they get what they want when they deal with government. I feel violated that my fairly won rights were taken away by Bill 29. I see that the public is misinformed about nurses and I am angry that this government has the audacity to act as it does.

[185] Janine Brooker says in her affidavit:

> In the past, the kind of work that healthcare workers did was not properly valued or respected. Our collective agreement was negotiated, in part, in order to ensure that what is often considered "women's work" is properly valued. The progress we have made in this regard is being taken away from us by Bill 29.
>
> I believe that if the health care sector was predominantly male we would not be treated like this. I feel like the government believes that health care workers need to be put in their place.
>
> Bill 29 makes me feel less valuable. It makes me feel that women's work is less valuable. I think that this is because the work that women do in the health care sector is considered to be the same thing as staying home and looking after your family. Because of this, it is not valued.

[186] Doreen McConnell says in her affidavit:

> Through Bill 29 the government has negated provisions of our signed contract. I believe that they thought that we would tolerate this blatant attack on our rights because we are predominantly a profession of women. Bill 29 has made me question so many things: my value as a person, my work as a nurse, and the stability of my future. It has caused my to greatly mistrust the government. I feel ignored and disrespected, and I am constantly wondering what else the government might do.

[187] The third part of the s. 15 ***Law*** test revolves around the question of when comparatively adverse treatment is so significant that it infringes the claimant's human dignity. It is clear from the cases that not all adverse treatment will satisfy this requirement.

[188] For example, in ***Gosselin,*** *a* regulation reducing welfare benefits for individuals under the age of 30 who were not participating in training or work experience employment programs was held not to impair their dignity. See also: ***Nova Scotia (Attorney General) v. Walsh,*** 2002 SCC 83 (exclusion of unmarried opposite sex cohabitants from matrimonial property statute does not impair their dignity); ***Granovsky v. Canada (minister of employment and immigration),*** [2000] 1 S.C.R. 703, 2000 SCC 28 (failure to extend "drop-out" exceptions to CPP contribution requirements to applicants with a temporary disability does not impair their dignity); ***Lovelace v. Ontario,*** [2000] 1 S.C.R. 950, 2000 SCC 37 (exclusion of non-band aboriginal communities from negotiations regarding the development of a reserve-based casino and from casino proceeds does not impair their dignity); ***Siemens v. Manitoba (Attorney General),*** 2003 SCC 3 (conferral of power to municipalities to hold binding plebiscites on the prohibition of video lottery terminals does not impair the dignity of the residents of

Winkler, Ontario); ***Delisle,*** (exclusion of members of the RCMP from federal collective bargaining protection does not impair their dignity); ***Sollbach v. Canada*** (1999), 252 N.R. 137, 71 C.R.R. (2d) 109 (F.C.A.) (limitation on total benefits under the ***Unemployment Insurance Act*** to 30 weeks does not impair the dignity of pregnant women); and ***Shulman v. College of Audiologists and Speech Language Pathologists of Ontario*** (2001), 155 O.A.C. 171 (Sup. Ct. Jus.) (elimination of public insurance funding for hearing aid evaluations and re-evaluations does not impair the dignity of persons with a hearing disability).

[189] While the plaintiffs are clearly aggrieved by the legislation for various justifiable reasons, the impact upon them is not of the quality or characteristic that impacts their dignity in the sense that engages s. 15.

[190] I conclude that all three questions posed in the ***Law*** analysis must be answered in the negative.

V111. DISPOSITION

[191] The plaintiffs have challenged the constitutionality of Parts 1 and 2 of Bill 29 on three constitutional grounds, s. 2(d), s. 7 and s.15 of the ***Charter***. I have concluded the

impugned law does not infringe the ***Charter*** on any of the three grounds argued by the plaintiffs, accordingly the plaintiffs' claim is dismissed.

N. Garson, J.