Restoring the Bargain:

Contesting the Constitutionality of the Amendments to the Saskatchewan *Trade Union Act* (Bill 6)

By Dr. S. Muthu

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April 2010

"The strongest is never strong enough to be always the master, unless he transforms his strength into right and obedience into duty."

Jean Jacques Rousseau

About the Author

Dr. S. Muthu, Professor Emeritus, University of Regina, earned his PhD in Industrial Relations at the University of Wisconsin, Madison in 1968. He has more than thirty years of teaching experience in collective bargaining, comparative industrial relations, business ethics and administrative law. He is the author of many articles on labour law reform, human rights and trade unions. He can be reached at *s.muthuchidambaram@uregina.ca*

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Introduction

And it looks as though
They'll punish the monkey
and let the organ grinder go.

Mark Knopfler, 2007

Although labour law has consequential impacts on the vast majority of wage earners and their families, for the most part, it receives only passing attention in today's society. Governments hive off the labour portfolio and resource it poorly. Major newspapers no longer dedicate a journalist to the labour beat. And although law schools and business schools in universities pay some attention to labour law and trade unionism, they are both considered to be narrow specialties. Nonetheless, the briefest analysis of labour issues reveals that there is a direct relationship connecting the decline of labour union density, the gradual weakening of trade union legislation by the provincial legislatures and the failure of much of middle and working class families to attain a fair share of earnings and income.

Trends in union membership and density show that the unionization rate has been falling steadily since the mid-1980s. During the 1970s union membership rose to a high of 38 per cent of the Canadian workforce and then declined to a low of 29 per cent in 2007. Only 17 per cent of the private sector is currently unionized. (Lynk, p.132)

Since the 1980s six provincial legislatures have amended labour laws making union organizing and negotiating collective agreements more difficult. Most recently Saskatchewan's essential services legislation and revisions to the *Trade Union Act* have created obstacles in the way of unions' freedom of association. Mandatory election certification processes have replaced the card-count process which determines whether a union has the majority support of the employees in a workplace. As Lynk concludes, these amendments have diminished the vitality of our labour laws, and in the provinces that have required mandatory certification elections, the combined unionization rate was almost 14 per cent lower than the rate for the five provinces that still employ the card-check process. (Lynk, p. 132-136)

Paul Gingrich's study *Boom and Bust: The Growing Income Gap in Saskatchewan* finds that inequality of both earnings and after-tax incomes increased among Saskatchewan families with children in the thirty years from 1976 to 2006. For the half of Saskatchewan families with children that were the least well off, median earnings and after-tax income were lower in real terms in 2006 than they were in 1976. And their share of total earnings and after-tax income was lower in 2006 than in 1976. In contrast, the best off families increased both their real income and their share of total income. Through both bust and boom in Saskatchewan's economy, the income gap has widened and has accelerated during the recent economic expansion. Income inequality increased to an unprecedented level at the end of the thirty year period. Those at the lower end of the spectrum have made few or no gains in real income and the bottom half experienced a

decline in their share of after-tax income. It has been the best off ten per cent of families that have taken what those at the lower and middle ends have lost. (Gingrich, p. 42-43)

Studies of the effects of collective bargaining over decades reveal that union contracts raise the wages of the lowest paid, spread out the earnings of the middle and dampen those of the highest earners. (Lynk p.132) Thus as unions are weakened wages rates of the low and middle income have failed to keep pace and the phenomenon of the "growing gap" worsens.

S. Muthu's, *Restoring the Bargain: Contesting the Constitutionality of the Amendments to the Saskatchewan Trade Union Act, Bill 6*, is a meticulous examination of the evolution of labour law from its American origins in the Bill of Rights through the Wagner Act to the Canadian Charter of Rights and Freedoms. The study provides an important link in our understanding of how labour law and its interpretation by courts impacts union organizing and collective bargaining. The approach taken is broad-based; interdisciplinary, normative, descriptive and comparative. Applying a critical perspective Muthu takes the reader through a complex argument and logic track. Section I begins with an examination of the origins of labour relations framework and describes the differences between the U.S. Bill of Rights interpretation of freedom of association and the Canadian Charter. He shows how property rights have driven labour law development and interpretation even though property rights have been excluded from the Canadian Charter. This is followed in Section II with a comparison of Supreme Court decisions since 1987 with emphasis on the Court's 'turn' regarding its most recent interpretations of unions' freedom of association.

Section III critiques the amendments to the Saskatchewan Trade Union Act 2007 by viewing them through the lens of the workplace as a market of ideas, employers' property rights and the concept of corporate personhood. He demonstrates how property rights and corporate power have dominated the worker/union/employer/government narrative, which has resulted in long term weakening of laws that protect workers. At the same time he thoroughly evaluates recent Supreme Court decisions, with emphasis on the *Dunmore* decisions and *Health Services et al v.B.C.* to determine if recent guidance by the Supreme Court will uphold Bill 6.

His concluding deliberation regarding the constitutionality of Saskatchewan's labour law revisions is an outstanding contribution to industrial relations jurisprudence. The questions he raises about the constitutionality of the Saskatchewan government's amendments require careful consideration, particularly, if society wants to 'rebalance' middle and working class family earnings and income.

Regressive labour legislation should concern us all. Labour and employment rights express core constitutional and human rights as set out in the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights and the International Covenant of Economic, Social and Cultural Rights, all of which directly benefit citizens in democratic societies. Should Canadian legislatures continue to entrench employer rights over labour rights the democratic deficit is bound to grow. For too long the effect of Canadian labour law has been to "punish the monkey and let the organ grinder go."

April 10, 2010
Brian Banks
CCPA Saskatchewan
Board Member

Section I
Understanding Labour Law and Its Constitutional Background

Section 1 describes the framework, methodology and legal concepts used in the paper.

U.S. Bill of Rights[1] and the Canadian Charter:[2] Relevant Provisions

U.S. First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Fifth Amendment

No person shall … be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Fourteenth Amendment

(N)or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within *its jurisdiction the equal protection of the laws.*

Canadian Charter of Rights and Freedoms

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in free and democratic society.

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:
- *(a) freedom of conscience and religion;*
- *(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;*
- *(c) freedom of peaceful assembly; and*
- *(d) freedom of association*

Legal Rights

7. 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.

Express Declaration of Exception

33 (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

The analysis in this paper is done primarily from the perspective of the "mischief remedy"

[1] *The Constitution of the United States,* Amendments 1, 5. 14

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

principle, which was described in *Driedger on the Construction of Statutes*[3] as follows:

> "Historically, purposive analysis is associated with the so-called mischief rule or the rule in Heydon's Case. Although this rule did not originate in Heydon's Case, it was there it received its most famous and influential formulation:
>
> For the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered: —
>
> 1st. What was the common law before making the Act.
>
> 2nd. What was the mischief and defect for which the common law did not provide.
>
> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
>
> And
>
> 4th. The true reason of the remedy; and then the office of all Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.
>
> Judges are here advised to not only interpret legislation to promote its purpose but also to suppress measures designed to avoid the impact of the legislation and add to the scheme, if necessary, to ensure that the legislature's true intent is accomplished.

The Saskatchewan *Trade Union Act*[4] ("TUA") passed in 1944, is a classic example of socio-economic remedial legislation. The word "mischief" is used to signify evil or danger which a statute is intended to cure or avoid. A critical study of employer "unfair labour practices" under S. 11(1) of the TUA, from (a) to (p) serves as a refresher course on a century and a half history of trade unions' and workers' struggles against the master-servant regime perpetuated under the common law.

A critical study such as this examines fundamental power relationships and their asymmetries to uncover their impact on the policy context, legislation and court decisions. The questions below guide the examination. (See also Appendix A: Chart 1, Managerial Ideologies)[5]

Contextualization of Policy Changes Evaluation

1. What is the nature of the political power-holding party in the legislature in terms of its ideological preferences and in terms of its perception of groups either as antagonist, as protagonist, or as neutral?
2. Has there been a genuine legislative due process for all concerned for striking a balance between competing interests and values in an open forum or is it a case of a preconceived solution for a non-problem?
3. What is the nature of the mischief or harm and the inability or unwillingness to assess and evaluate it: the efficaciousness of the remedy?
4. How imminent is the vulnerability of the group needing protection?

[3] Ruth Sullivan, *Driedger on the Construction of Statutes, 3rd ed.* (Toronto: Butterworths, 1994) at pp. 36 and 37.
[4] 1944, 2nd sess., c. 69
[5] Charles Perrow, *Complex Organizations: A Critical Essay* (Glenview, Illinois: Scott, Foremans and Co., 1972) at p.73

5. What subjective fears and apprehension of harm are present?
6. What is the nature of the infringed or enhanced activity in terms of its social value?
7. Have *Charter* decisions regarding policy changes and new labour legislation been examined in a thorough way?

From the Common Law to the *Trade Union Act*: A Remedial Framework

The change from common law regime to a system of industrial relations was achieved through the passage of the TUA. This change was not just change in degree but in kind, resulting in the development of industrial jurisprudence. The TUA provides protection against the tyranny of both free-market *laissez-faire* economics and the authoritarianism of "employment-at-will" (i.e. an employment relationship in which either party may terminate the relationship without incurring liability) ("EAW") exercised by the employer. EAW declares that employers whose employees are not specifically covered by statute or contract "may dismiss their employees at will … for good cause, for no cause, *or even for causes morally wrong*, without being thereby guilty of legal wrong." [emphasis added][6] The TUA requires the application of the rule of law at workplaces.

Hitherto, the history of labor law has been, in large measure, the history of property rights. The TUA has transformed that history with a human touch.[7] The TUA is based upon the fundamental principle that employers' rights over property do not automatically grant them the right to dominate over people. People are autonomous, possessing will and power for self-determination. They are an end in themselves. Therefore, they should not be treated *merely* as a means to other peoples' ends.

Professor James A. Gross[8] has equated labor's right to freedom of association to human rights. Human rights are a species of moral rights which all persons possess equally simply because they are human, not because these rights are earned or acquired by special enactments or contractual agreements. Every human being is sacred, in a secular as well as spiritual sense; certain things ought not to be done to any human being and certain other things should be done for every human being, in order to achieve social justice for workers.

It is in this spirit that labour relations laws generally have certain common elements incorporated in them. What were hitherto legal under common law, have been made illegal under labour law. And also what were illegal under common law, the labour law legalized (see below under general framework). Among the factors of production, land, labor and capital (technology is treated as previously crystallized labour), labour alone is qualitatively different from the other factors. Even though the quintessence of labour is humanity itself, the market system has converted it into a commodity. Labour law, to some extent, attempts to rectify this commodification. As Professor Judy Fudge observed in a 2004 article[9]:

> "Labour is a 'fictitious commodity': neither is it produced as a commodity, nor is its production governed by an assessment

[6] Lawrence E. Blades, "Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power,"(1967) 67 Colum.L.Rev. 1404 at 1405.
[7] Cynthia L. Estlund, "Labor, Property, and Sovereignty After Lechmere" (1994) 46 Stan. L. Rev. 305
[8] James A. Gross, "A Human Rights Perspective on United States Labor Relations Law: A Violation of the Right of Freedom of Association" (1999) 3 Employee Rights and Employment Policy Journal 65
[9] Judy Fudge, "'Labour is Not a Commodity': The Supreme Court of Canada and the Freedom of Association," (2004) 67 Sask. L. Rev. 425

of its realization on the market. Labour is embodied in human beings who are born, cared for, and tended in a network of relations that operate outside of the direct discipline of the market. Also, unlike other commodities, human beings have the capacity to act individually and collectively to resist the compulsion of supply and demand."

The Basic Framework of Industrial Relations

The preamble of the TUA states: "An Act respecting *Trade Unions* and the *Rights of Employees to organize* in Trade Unions of *their own choosing* for the *Purpose of Bargaining Collectively*, with their Employers." [emphasis added] Freedom of choice is given to employees and a union as an institution has the right to organize workers. A union is certified on the basis of majoritarianism and exclusivity of representation of all employees, members as well as dues-paying non-members. Henceforth, the employer is required to deal with employees through the union. No more individual bargaining is allowed and employment-at-will comes to an end.

The TUA outlaws employer interference with, restraint, or coercion of employees in the exercise of their right to organize, to bargain collectively, and to engage in concerted acts such as strikes and picketing. It also prohibits employer-initiated and -dominated representation plans which are mere puppets to be manipulated by the employer. Discrimination in hiring or firing or in any condition of employment to encourage or discourage membership in a labour organization, as with the "yellow dog" contract (i.e. a contract in which the employee promises, as a condition of employment, to never join a union), is also prohibited.

The TUA has carved out all labour relations issues of the unionized sector from judicial control and has brought them under the jurisdiction of the Labour Relations Board (LRB). The LRB is a tripartite quasi-judicial administrative tribunal, consisting of a legally trained neutral chairperson along with representatives from unions and employers. The decision of the Board is binding on the disputants. The decisions are subject to judicial review on limited grounds, and the LRB has a standing in their reviews.

Any dispute over the rights of the parties under a current collective agreement is settled by a single arbitrator sitting alone or a tripartite arbitration board.

Exclusivity of representation, majoritarianism, quasi-judicial tripartism, the obligation to refrain from job action during the currency of a collective agreement, and third party assistance in interest disputes (negotiation of a collective agreement) are the basic framework of the industrial relations system, with some variations in the eleven different jurisdictions in Canada.

In the light of this context, a comparative analysis of the U.S. *Bill of Rights* and the *Canadian Charter of Rights and Freedoms* follows.

United States Bill of Rights and the Charter: A Comparison of the Definition of Rights

The United States Bill of Rights, which is among the oldest in the world, has served as a reference point in shaping the *Canadian Charter of Rights and Freedoms*. Yet the Charter is a completely Canadianized Bill of Rights.[10]

[10] McKercher, William R. (Ed.). *The U.S. Bill of Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Ontario Economic Council. 1982).

There is *no explicit general right of association* under the U.S. First Amendment. It is a *derivative* and *implicit* right.[11] The entitlement to write and to petition in groups implies a right to associate for the purpose of speaking and conducting other expressive activity. This is the source of most rights of association in the U.S. Any more general rights of association must come through the due process clauses of the Fifth and Fourteenth Amendments. But these clauses mention liberty without saying what it is, what its sources may be, who defines it, or how much it "weighs". All are important problems once a court starts "balancing" among rights.[12]

In Canada, the right to freedom of association has been guaranteed as an *independent and separate fundamental freedom* in section 2(d) of the *Charter*. This is a significant departure not only from the American Bill of Rights, but also from the *Canadian Bill of Rights*, S.C. 1960, c. 44 (a federal statute) which linked freedom of association with the right to freedom of assembly.

According to Paul Cavalluzzo, a Canadian labour lawyer, this granting of a separate right of freedom of association is consistent with international covenants and conventions (to which Canada is a signatory). This suggests that international law may be a useful source to give content to the right guaranteed by section 2(d) of the *Charter*.[13]

Unlike Canada, the U.S. approach towards international covenants and conventions is either to reject them on legal or pragmatic grounds or to accept some of them in principle, but conveniently ignore them in practice to safeguard its sovereignty over these matters.

Another important aspect of the Bill and the *Charter* is that the former states categorically these "self-evident", "inalienable" "natural" rights, while the latter begins with a statement of limits to the rights and freedoms under Section 1:

> "The language of the *Bill of Rights* is clear, simple, and unqualified in its assertion of the citizen's rights. The *Charter's* language is more complex, legalistic, and the rights therein are subject to a number of qualifications and clarifications. Each of the documents clearly reflects the historical era in which they were created. The components of liberty were much easier to define in the late eighteenth century than they are in an era sensitized to racism and sexism, committed to multiculturalism and bilingualism, and challenged by technological complexities unimagined by the likes of Jefferson."[14]

Is the *Charter* the supreme law of the land? Yes, but the supremacy of the legislatures is also recognized under Section 33(1) "not withstanding" clause. The inclusion of this clause in any Act of Parliament or of a provincial government would permit the jurisdiction to exempt itself from the application of Section 2 or any of Sections 7 to 15, for a limited period.

There is no equivalent of Section 33 in the American Bill of Rights. Section 1 and 33 of the *Charter* are known as a product of "classic Canadian compromise" as well as "Canadianization of the constitution."

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[11] Frank H. Easterbrook, "Implicit and Explicit Rights of Association," (1987) 10 Harv. J.L. *and* Pub. Pol'y 91; Paul J.J. Cavalluzzo, "Freedom of Association and the Right to Bargain Collectively" in J.M. Weiler and R.M. Elliot, eds, *Litigating the Values of a Nation: The* Canadian Charter of Riqhts and Freedoms (Toronto: Carswell, 1986) at 203-209; Steven Barrett, "*Dunmore v. Ontario (Attorney General):* Freedom of Association at the Crossroads" (2003) 10 Can. J. Lab. *and* Emp. L. 83; Donald Carter and Thomas McIntosh, "Collective Bargaining and the Charter: Assessing the Impact of American Judicial Doctrines" (1991) Relations Industrielles 722.

[12] Easterbrook, *supra* note 11

[13] Roy J. Adams, "The Revolutionary Potential of Dunmore" (2003) 10 C.L.E.LJ. 117

[14] Carter and McIntosh, *Supra* note 11, at p.732

Reasons for Exclusion of Property Rights from the Charter

Why were property rights excluded from the *Charter*? Section 1(a) of the 1960 *Canadian Bill of Rights* provides federal statutory recognition of "the right of the individual to … enjoyment of property", and the right "not to be deprived thereof except by due process of law." As indicated earlier, the right to property is also included under the Fifth and Fourteenth Amendments of the American *Bill of Rights*.[15]

However, the Canadian *Charter* does not provide Constitutional protection for individual property rights. During the Parliamentary debate on Bill 60, Progressive Conservative MPs proposed that a right to "the enjoyment of property" be included under Section 7 of the *Charter*. This amendment was rejected largely due to provincial governments' concerns (property and civil rights come under provincial jurisdiction).[16]

What does the word "property" mean? Does it include only the traditional types of property? Or does it include the "new property", which includes various forms of government benefits, such as welfare payments, old age benefits, unemployment compensation, public housing, etc., without making any distinction between rights and privileges. Does it also include "commercial property" as opposed to "personal property"?

The New Democratic Party (NDP) was concerned about such matters as: the effect of a constitutional guarantee on provincial legislation regulating non-resident ownership of land; ability to legislate on and control unique types of "property", such as data bank information and mortgage relief, preserving farmland and recreational land, and legislation regulating businesses. The NDP's refusal to agree to a guarantee of property rights unless consideration was given to incorporation of a number of other economic and social rights, appears to have convinced Justice Minister Chrétien to adhere to the original plan, and the Conservative amendment was defeated.[17]

In the 1989 decision of *Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927*, the Supreme Court of Canada referred to the intentional exclusion of property rights from the *Charter* as a basis for finding that economic rights of a "Corporate-Commercial" nature are not protected under Section 7.

In his influential dissent in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 ("*Alberta Reference*"), Chief Justice Dickson explicitly rejects the majority's use of American jurisprudence as overly restrictive and as denying any real content to freedom of association, stating, at para. 84:

> "The derivative approach would, in my view, largely make surplusage of S.2 (d). The associational or collective dimensions of S. 2(a) and (b) have already been recognized by this Court in *R. v. Big M Drug Mart Ltd.*,[[1985] 1 S.C.R. 295] without resort to S.2(d). The associational aspect of S.2(c) clearly finds adequate protection in the very expression of a freedom of peaceful assembly. What is to be learnt from the United States jurisprudence is not that freedom of association must be restricted to associational activities independent of constitutional rights, but rather that the express conferral of a freedom of association is unnecessary if all that is intended is to give effect to the collective enjoyment of other individual freedoms."

[15] David Johansen. *Property rights and the constitution* (Ottawa: Research Branch, Library of Parliament, 1991).
[16] "Property Rights" University of Alberta Centre for Constitutional Studies, online: *www.law.ualberta.ca <http://www.law.ualberta.ca/centres/ccs/keywords/?id=50>*
[17] *Ibid.,* Johansen, *supra* note 15

Section II
Case Interpretation of Labour Challenges Under the *Charter*

The Old Trilogy: Freedom of Association in a Suspended Animation

Readers with limited exposure to labour laws and industrial relations statutes need a brief note on the trilogy old and new. The "old trilogy" consists of the following 1987 decisions by the Supreme Court of Canada: *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *PSAC v. Canada*, [1987] 1 S.C.R. 424 and *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460.

The new trilogy includes the following decisions by the Supreme Court: *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, R. v. *Advance Cutting & Coring Ltd., [2001] 3 S.C.R. 209*, and *Dunmore v. Ontario (Attorney General), [2001] 3 S.C.R. 1016*.

All the cases in each trilogy have raised issues related to freedom of association and collective bargaining. All the decisions made under the old trilogy went against the interests of workers and unions as an institution. These decisions were based on narrow, abstract and decontextualized interpretation of s.2 of the *Charter*, relying on the American jurisprudence without recognizing the distinct differences between the U.S. *Bill of Rights* and the Canadian *Charter*.

The Supreme Court decisions under the new trilogy, gradually and with some caution, began to recognize the above defects. The new trilogy cases have started deviating from 1987 precedents without explicitly overruling them, and thus paving the way for the Supreme Court to explicitly overrule these twenty year old precedents in its 2007 decision in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391 ("*Health Services*").

To be more specific what is the industrial jurisprudence established under the old trilogy of 1987?

In the *Alberta Reference*, there was no agreement among the majority of judges (4 to 2 verdict) as to the nature and scope of freedom of association under S.2(d) in the labour context.[18] The points of majority agreement (from Justice McIntyre's majority opinion) are as follows:

1. Collective activities are not protected under s.2(d) simply because they are essential to the association in question, and
2. Labour law is complex policy on matters better left to legislators as opposed to judges.
3. From this latter point sprang the principle of judicial deference in *Charter* labour cases.
4. Section 2(d) protects the exercise of the lawful rights of individuals in association.

[18] Thomas M.J. Bateman et. al, *The Court and the Charter. Leading Cases* (Toronto: Emond Montgomery Press, 2008) at p. 135; John Craig *and* Henry Dinsdale. "A 'New Trilogy' or the Same Old. Story?" (2003), 10 C.L.E.L.J. 59. 15.

5. The freedom of association provision did not extend the right to strike to labour unions.

6. The pith of the verdict categorically denies any institutional status of its own to the union. The collectivity is only a fiction and it cannot be greater than the sum total of the constituent members.

As authors John Craig and Henry Dinsdale note in a 2003 article,[19]

> "Statutory recognition, certification, collective bargaining and strikes are not freedom of individuals, nor lawful rights of individuals. These are collective activities of unions. The fact that they may be essential or even fundamental to the existence of unions is insufficient to bring them within Section 2(d)".

From the point of a prospective jurisprudential evolution, the most significant analysis in the *Alberta Reference* is that of the Chief Justice Dickson's dissent joined by Justice Wilson.

The Supreme Court's verdict in *Dunmore, supra*, is a consolidation and synthesis of dicta and dissents in its previous labour relations jurisprudence.[20] This new ratiocination (reasoned train of thought) evaded the precedents established under the old trilogy of 1987, by giving a positive content to freedom of association and by imposing an affirmative obligation on governments to promote fundamental freedoms.

Since Chief Justice Dickson's dissent has become the foundation for the new trilogy, this dissent deserves some elaboration.[21] Dickson took serious objection to Justice McIntyre's assertion in the *Alberta Reference* that collective activities are not protected under s. 2(d) simply because they are essential to the association in question, for the following reasons (at p. 367):

> "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 equivalent to 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." [emphasis in original]

How do we determine those *qualitatively* different and institutionally unique and inherent associational activities which ought to be protected under s. 2(d) of the *Charter* in a labour relations context? The two foremost activities to unions as institutions are capacities to bargaining collectively and strike. The following are the factors, among others, suggested by Steven M. Barrett:[22]

1. The importance of collective bargaining and strikes to advancing equality and dignity in the workplace,

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[19] *Supra* note 18, at pp. 64 and 65

[20] Patricia Hughes. "*Dunmore v. Ontario (Attorney General):* Waiting for the Other Shoe," (2003) 10 Can. Lab. *and* Emp. L. J. 27, at p.38.

[21] For this analysis I am indebted to Steven Barrett's excellent 2003 article "*Dunmore v. Ontario (Attorney General):* Freedom of Association at the Crossroads", *supra* note 11.

[22] *Supra* note 11, at p. 93

2. The vital importance of collective bargaining throughout history to the capacity of workers to overcome their vulnerability as individuals to the strengths of employers,
3. The extent to which collective bargaining is an integral and primary function of associations of working people,
4. The extent to which the right to strike is an indispensable part of our collective bargaining system and our democracy,
5. A recognition that if workers were not permitted to collectively refuse to work, they could not bargain collectively, and
6. The protection at international law (including under treaties to which Canada is signatory) of the right to collectively bargain and to strike as elements of the freedom of association.

The above reasoning based on Chief Justice Dickson's and Justice Wilson's dissent in the *Alberta Reference* provides the strongest foundation upon which to erect an appropriate edifice for full freedom of association. Here is his description followed by his prescription (at paras, 79 and 81):

> "At one extreme is a purely 'constitutive' definition whereby freedom of association entails only a freedom to belong to or form an association. On this view, the constitutional guarantee does not extend beyond protecting the individual's *status* as a member of an association. It would not protect his or her associational *actions*. [Emphasis in original]
>
> […]
>
> If freedom of association only protects the joining together of persons for common purposes, but not the pursuit of the very activities for which the association was formed, *then the freedom is indeed legalistic, ungenerous, and indeed vapid*." [emphasis added]

Power is a peculiar phenomenon in human relations. It is invisible. Yet it engenders obedience of the powerless. Power need not be exerted publicly and visibly in conflict by the power holders. "In fact, of course, it is in precisely those power relationships where the power disparity is greatest that its active exercise is least necessary. Consciousness even of the implicit threat that remains unspoken bends our minds towards whatever pattern of behaviour is required to prevent the threat being made."[23] Freedom of association is the critical mechanism for the powerless to contest the actions of the more powerful institutions. Hence Dickson from his dissent in the *Alberta Reference* has contextualized the issues of power in labour relations as follows (at para. 87):

> "Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfill their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict."

[23] Alan Fox. *Beyond Contract: Work, Power and Trust Relations* (London: Faber and Faber, 1974) at p. 276.

Dunmore: A Cautious Turn to Labour Rights from Social to Fundamental Rights

Prior to 1994, agricultural workers in Ontario had been excluded from the province's labour relations regime. In 1994, the provincial NDP government enacted the *Agricultural Labour Relations Act*, 1994, S.O. 1994, c. 6 (ALRA), which extended trade union and collective bargaining rights to agricultural workers. In 1995, the new Conservative provincial government enacted the *Labour Relations and Employment Statute Law Amendment Act*, 1995, S.O. 1995, c. I (LRESLAA). This Amendment repealed the ALRA, excluded agricultural workers from the provincial labour relations regime or *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sched. A (LRA), and terminated any certification rights of trade unions and any collective agreements certified under the ALRA.

Tom Dunmore and other agricultural workers challenged the LRESLAA on *Charter* grounds (SS. 2(d) and 15(1)). Both the Ontario Superior Court and the Ontario Court of Appeal upheld the challenged legislation.

The Supreme Court considered the following issues and answered:

1. Whether the LRESLAA violated s. 2(d) of the *Charter*. – Yes
2. Whether the LRESLAA violated s. 15(1) of the *Charter*. – No, but …
3. If so, whether the violation(s) were justifiable under s. 1 of the *Charter*. – No

In the interpretation of s. 2 (d), Justice Bastarache, writing for the seven-judge majority in reasons concurred in by Justice L'Heureux-Dubé and dissented from by Justice Major, recognized the following:

1. The purpose of s. 2(d) is to allow the achievement of individual potential through interpersonal relationships and collective action,
2. The traditional formulation of the content of the section (i.e. lawful activities of individuals) fails to capture the full range of activities protected by s. 2(d),
3. The section should be extended to protect some inherently collective activities,
4. To make the freedom to organize meaningful, s. 2(d) may impose a positive obligation on the state to extend protective legislation to unprotected groups, and
5. When challenging under-inclusive legislation, the following must be considered:
   a. Claims of under-inclusion should be grounded in fundamental *Charter* freedoms.
   b. The claimant must demonstrate that exclusion from a statutory regime permitted a substantial interference with s. 2(d) activity.
      i. The context must be such that the state can be held accountable.
      ii. The actions of private actors do not immunize the state from Charter review.

In her paper entitled "The New Discourse of Labour Rights: From Social to Fundamental Rights"[24] Professor Judy Fudge locates *Dunmore* within her "Trichotomy of Obligations — To Respect, To Protect, and To Fulfill" under "To Fulfill". The following observation in the Abstract shows the approach to be taken in reframing the industrial relations system rationally in the context of globalization of production, capital mobility and neo-liberalism:[25]

> "The new normative language responds to the need to re-institutionalize the

[24] Judy Fudge. "The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the Health Services and Support Case in Canada and Beyond" (2008) 37 Indus. L.J. 27

[25] *Ibid.* at p.27

> employment relationships in the light of economic restructuring, the breakdown of the standard employment relationship, and the challenge to traditional forms of collective representation. It also involves a realignment of the relationship between social rights and the market, and a reconceptualization of the judicial nature of social rights."

Fudge argues that it is now the role of the state to ensure that labour's rights are protected and fulfilled according to the criteria as suggested in column three of the chart below 'To Fulfill".[26]

The Supreme Court of Canada in *Dunmore* recognized that (per Bastarache J. for the majority at para.16):

> "the collective is 'qualitatively' distinct from the individual: individuals associate not simply because there is strength in numbers, but because communities can embody objectives that individuals cannot. For example, 'a majority view' cannot be expressed by a lone individual, but a group of individuals can form a constituency and distil their views into a single platform. Indeed, this is the essential purpose of joining a political party, participating in a class action or certifying a trade union."

Regarding the content of workers' rights, Prof. Fudge uses the following definition of industrial citizenship by Colin Crouch.[27] Industrial citizenship is

> "… the acquisition by employees of rights within the employment relationship, rights which go beyond, and are secured by forces external to, the position which employees are able to win purely through labour market forces … These rights cover

A Taxonomy of Labour and Social Rights
Trichotomy of Obligation

• The state refrains from interfering in the liberty of an individual or a collectivity • Negative obligation • Freedom *from* • Extreme Libertarianism *and* individualism • Neo-classical economics: • Milton Friedman • Robert Nozick • Frederic Von Hayek • Assumption: That government is the best which governs the least.	• The state regulation of interaction between private individuals and actors. • Conflict in the exercise of rights *and* conflict resolution • Material scope of rights horizontally between individuals *and* vertically between the individual and the state • State protective functions regarding economic, social, cultural, civil and political rights	• Programmatic dimension of labor *and* social rights. • This obligation to fulfill combines an obligation to *facilitate and* an obligation to *provide*. • Positive freedom or freedom *to*. • Hindering the hindrances to *enhance* the choices • In contrast with civil and political rights, the state's only obligation is to *respect*. • Important labor rights are *collective* (freedom of association, collective bargaining, strikes) superseding the individual. • *Dunmore v. Ontario* [2001] 3S.C. R1016

[26] *Ibid.*
[27] *Ibid.* at p.23

such matters as: individual rights to a safe and healthy working environment; to protection from arbitrary management action; to certain entitlements to free time; guarantees of some protection of standard of living in the case of inability to work as a result of loss of employment, poor health or old age; collective rights to representation by autonomous organizations in relations between employees and employers.

How have scholars and practitioners in labour law and industrial relations evaluated *Dunmore* in terms of its contribution to the evolution of industrial jurisprudence? Here is a short list of expressions, which are eminently self-explanatory, in the evaluation of *Dunmore*:

"Has Revolutionary Potential."[28]
"Waiting for the Other Shoe"[29]
"A 'New Trilogy' or the Same Old Story?"[30]
"Labour Not a Commodity";[31] and
"Freedom of Association at the Crossroads".[32]

Here are a number of unresolved issues in *Dunmore*, identified by Barrett:[33]

1. How are courts to identify uniquely or inherently associational activities, which are eligible for s.2(d) protection, and to distinguish them from collective activities with an individual analogue?
2. While associational activities are not protected simply because they are essential to an association's purposes, are all uniquely associational activities to be protected, or only some?
3. If only some, by what criteria will the courts determine which are entitled to protection, and which are not?
4. Indeed, ought the line to be drawn on the basis of whether an activity is uniquely associational, or on some other basis pertaining to the nature of the association and the activity, its value in preserving and enhancing the purposes of the freedom and of the Charter, and its importance to sustaining a free and democratic society?

On the last point, it is worthwhile to take into consideration the suggestion made by Beatty and Kennett[34] that a distinction should be made between collective bargaining and other forms of associational activity, since

> … collective bargaining, like speech or thought or assembly, is an activity which is integral to the deeper moral value of autonomy and personal self-government which underlies our whole theory and tradition of liberal democratic government.[35]

In my evaluation, the revolutionary element of *Dunmore* is anchored in its *disregard of some of the doctrines and principles established in the old trilogy*. Within 14 years, which is a very short time from the perspective of the judiciary, significant reinterpretations have occurred. How wide have the doors of s.2(d) been opened, compared to other freedoms under the same section? How long it will take for the Supreme Court to make a *clear break with the past*? Institutional culture and the conduct of the judiciary in general follow long established norms of behaviour.

[28] *Supra* note 13
[29] *Supra* note 20
[30] *Supra* note 18
[31] *Supra* note 9
[32] *Supra* note 111
[33] *Ibid.* at p. 115
[34] David Beatty *and* Steven Kennett, "Striking Back: Fighting Words, Social Protest and Political Participation in Free an Democratic Societies" (1988) 67 Can. Bar Rev. 573 at p. 601
[35] *Ibid.*, as cited in Barrett, *supra* note 11, at p. 106.

Judicial culture is based upon principles of precedents, reasoning by analogy, "rule" of law, all of which are based on values of certainty, predictability, uniformity, continuity, objectivity, equality and impartiality. It is procedure bound; hence it is not amenable for fast forwarding. At times, the "distinguishing" or "precise question" device may serve as a substitute to overruling precedents, but not permanently.

In the long run, precedent following has an inherent tendency to result in a kind of "caterpillar procession" in which the larvae have the instinct of moving in single file, touching one another head to tail, ultimately forming a circle, going round and round. Reliance on bad precedent is following the "established wrong".

For these reasons, I consider *Dunmore* a radical verdict. This case brings to a conclusion Chief Justice Dickson's and Justice Wilson's dissent in the *Alberta Reference* and as well as other dissents and *obiter dicta* later synthesizes them into a new ratiocination, in a rudimentary form.

Dunmore has introduced the following significant shift from the First Trilogy jurisprudence:

1. Recognition to associational activities of employees and unions
2. Some form of collective action can be exercised only by association
3. Equality component in s.(2) links it with s.15
4. Limits of judicial deference to legislatures
5. Positive state obligation and accountability for enabling and enhancing actions to develop industrial citizenship
6. Purposeful and contextualized determination of the scope of s.2(d).

In Professor MacNeil's evaluation,[36] Dunmore does not signify a wholesale reversal of earlier judicial precedents, although it does signal an increased willingness to hold the legislature to account for some policy choices in the labour relations field.

Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia, [2007] 2 S.C.R. 391: Charterization of Freedom of Association Begins

In 2002 the Liberal Party won the provincial election in British Columbia, winning 77 out of 79 seats and it formed the government and introduced Bill 29 — entitled *The Health and Social Services Delivery Impact Act* ("HSSDIA")[37] — to deal with a "crisis of sustainability".[38] The HSSDIA was hastily drafted and quickly passed without meaningful consultations. Union representatives were informed by the government just twenty minutes prior to introducing the Bill.

Part 2 of the HSSDIA introduced changes in the following collective agreement areas: transfers and multi-worksite assignment rights, contracting out, status of contracted out employees, job security programs and lay off and bumping rights. The Act granted greater flexibility to employers to organize their employee relations as they see fit, without any notice or consultation. One provision in the Act voided any part of a collective agreement, past or future, which was inconsistent with the purpose of the Act. The following is the impact of the HSSDIA, as described by Judy Fudge[39]:

[36] Michael MacNeil, "Unions and the Charter: The Supreme Court of Canada and Democratic Values" (2003) 10 C.L.E.L.J. 3 at p. 8

[37] S.B.C. 2002, c. 2.

[38] As described in the factum of the Respondent Her Majesty The Queen in Right of the Province of British Columbia, as cited at para.4 of the majority's reasons in *Health Services*

[39] *Supra* note 24 at p. 39

> … As a result of Bill 29, thousands of workers in the health services sector lost their jobs and accrued seniority and suffered substantial wage cuts, ranging from 15 to 40%. The unions representing these workers lost thousands of members, and they had to devote substantial resources to reorganizing them and negotiating collective agreements on their behalf. In addition, these unions spent a great deal of time and money before the labour board challenging health service sector employers who contracted out health care work.

Unions and members of the unions representing the nurses, facilities, or community subsectors, challenged the constitutional validity of Part 2 of the HSSDIA as violative of the guarantees of freedom of association and equality protected by the *Charter*. Having lost the case at trial and on appeal, the appellants approached the Supreme Court of Canada. The Supreme Court struck down parts of the HSSDIA as violative of freedom of association. The Supreme Court arrived at this decision by extensively analyzing the following antecedents:

1. The historical importance of collective bargaining in Canada.
2. Significance of collective bargaining to trade unions.
3. Intention of the *Charter's* drafters that freedom of association should include protection for collective bargaining.
4. Canada's adherence to international instruments, including ratified Conventions of the ILO's Convention 87 Concerning Freedom of Association and Protection of Right to Organize;[40] also Canada's endorsement of the International Covenant on Economic, Social, and Cultural Rights.[41]
5. In the pre-*Dunmore* decisions, the Court adopted a decontextualized approach to defining the scope of freedom of association in contrast to the purposive approach taken to other *Charter* guarantees. This generic approach ignores the differences between organizations and overlooks the importance of Collective bargaining in its institutional context.
6. The relationship between collective bargaining and the *Charter* values such as human dignity, equality, liberty, workplace democracy and the autonomy of workers, because they enable employees to assert an effective voice in the workplace.

The depth and breadth of the above analysis in the Supreme Court decision are par excellence in its thoroughness and will be of high jurisprudential value for future freedom of association cases.

On point (1) and (2) above, prior to the 1940s, Quebec's law governing labour relations and collective bargaining was substantially influenced by French law. In the rest of Canada, the labour law traces its roots prior to the 1940s to British law. American law became an influential force when the United States passed the "Wagner Act"[42] in 1935. The Wagner Act has become a model for Canada which explicitly recognized the right of employees to belong to a trade union of their choice, free of employer coercion or interference, and imposed a duty upon employers to bargain in good faith with their employees' unions.

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[40] *ILO Convention 87: Freedom of Association and Protection of the Right to Organise Convention, 1948,* online www.ilo.org <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C087>

[41] *International Covenant on Economic, Social and Cultural Rights,* Adopted by General Assembly resolution 2200 (XXI) of 16 December 1966; online *www.un-documents.net* < http://www.un-documents.net/icescr.htm>

[42] The *National Labor Relations Act* of 1935 (29 U.S.C.A. § 151 et seq.),

In *Health Services*, the majority adopted author K.E. Klare's description of the objectives of the Wagner Act *as follows* (at para 57):

1. *Industrial Peace:* By encouraging collective bargaining, the Act aimed to subdue "strikes and other forms of industrial strife or unrest," because industrial warfare interfered with interstate commerce; that is, it was unhealthy in a business economy. Moreover, although this thought was not embodied in the text, industrial warfare clearly promoted other undesirable conditions, such as political turmoil, violence, and general uncertainty.

2. *Collective Bargaining:* The Act sought to enhance collective bargaining for its own sake because of its presumed "mediating" or "therapeutic" impact on industrial conflict.

3. *Bargaining Power:* The Act aimed to promote "actual liberty of contract" by redressing the unequal balance of bargaining power between employers and employees.

4. *Free Choice:* The Act was intended to protect the free choice of workers to associate amongst themselves and to select representatives of their own choosing for collective bargaining.

5. *Underconsumption:* The Act was designed to promote economic recovery and to prevent future depressions by increasing the earnings and purchasing power of workers.

6. *Industrial Democracy:* This is the most elusive aspect of the legislative purpose, although most commentators indicate that a concept of industrial democracy is embedded in the statutory scheme, or at the least was one of the articulated goals of the sponsors of the Act. Senator Wagner frequently sounded the industrial democracy theme in ringing notes, and scholars have subsequently seen in collective bargaining "the means of establishing industrial democracy … the means of providing the workers' lives in industry the sense of worth, of freedom, and of participation that democratic government promises them as citizens."[43]

By adopting the Wagner Act model, governments across Canada recognized the fundamental need for workers to participate in the regulation of their work environment. According to the majority in *Health Services* (at para. 63), this legislation confirmed what the labour movement had been fighting over for centuries.

For failing to give contextualized content to "collective bargaining", the old trilogy is problematic. What is surprising in this regard is that the courts simply refused to take judicial notice of the intention of the drafters of the *Charter* for more than 20 years, in spite of the fact that the relevant parts have been brought to the attention of the courts by unions. Finally in *Health Services*, the majority discussed the Parliamentary hearings that took place before the adaptation of s.2(d) of the *Charter* (at para. 67):

> … The acting Minister of Justice, *Mr. Robert Kaplan explained why he did not find necessary a proposed amendment to have the freedom to organize and bargain collectively expressly included under s.2(d). These rights, he stated, were already implicitly recognized in the words "freedom of association":*
>
> Our position on the suggestion that there be specific reference to freedom to organize and bargain collectively is that is already covered in the freedom of association that is provided already in the Declaration or in

[43] Karl Klare, "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941" (1978), 62 Minn. L. Rev. 265 at pp.281-84

> the Charter, and that by singling out association for bargaining one might tend to d[i]minish all the other forms of association which are contemplated — church associations; associations of fraternal organizations or community organizations.
>
> Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidences*, Issue No. 43, January 22, 1981, at pp. 69-70) [emphasis added]

Also in *Health Services*, the Supreme Court relied on international labour law principles in determining the scope of freedom of association.[44] Canada as a mid-power, unlike the U.S. as a super-power, has a reputation as a leader in the area of international human rights.[45] Organized business in the U.S. has resisted the scrutiny of U.S. domestic labour relations law by the ILO's Freedom of Association Committee; it has also successfully prevented the ratification of ILO Conventions Number 87 and 98 by the U.S. Government. Former Secretary of Labour, Ray Marshall, condemned the dubious American approach to international covenants and conventions in the following observations:[46]

> We cannot assume, as we frequently appear to do, that we are above international law, that we will make our own rules — that we will join your organization, for example, but if it suits our purposes, we will ignore the rules.
>
> That is not the way a good world citizen operates, and we ought not to operate that way in international affairs. If we believe in the rules, we ought to see that they are fair and then we ought to observe them and see that they get enforced.
>
> One argument that somebody used against putting trade-linked labour standards in the Omnibus Trade Bill was that the United States might be prosecuted if we had those kinds of standards. And I said, "Good. If we're guilty, we ought to be prosecuted if we violate international rules."

Does this admonition by Ray Marshall equally apply to Canada?

Some Canadian scholars give an affirmative answer to this question.[47] Professor Savage says that Canadian governments have historically shown little openness toward the ILO's Committee on Freedom of Association, insisting instead that their violations of international labor standards were "temporary", and were only used in "emergency" situations. He has approvingly cited Panitch and Swartz's characterization of this type of government response as "permanent exceptionalism."[48] Complaints filed against Canadian federal and provincial governments represented over five percent of all complaints filed with the ILO between 1982 and 2005; violations of principles of freedom of association were found in approximately 63 percent of these complaints.[49] Under ILO Convention 87,[50] to which Canada is a signatory, the right to strike is an intrinsic corollary part of the right to organize.

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[44] At paras. 69 - 79

[45] Larry Savage."Workers' Rights as Human Rights: Organized Labour and the Rights Discourse in Canada" (2009) 34 Labour Studies Journal 8 at p. 12.

[46] As quoted in Gross, *supra* note 8, at p.81

[47] See Savage, *supra* note 45; Ken Norman, "ILO Freedom Of Association Principles as Basic Canadian Human Rights: Promises to Keep"(2004) 67 Sask. L.R. 591; and authorities discussed therein.

[48] Leo Panitch *and* Donald Swartz, *From Consent to Coercion: The Assault on Trade Union Freedoms, 3rd ed.* (Aurora, Ont.: Garamond Press, 2003) at p.49 , as cited in Savage, *supra* note 45 at p.12.

[49] Savage, *supra* note 45 at 12, citing Derek Fudge and John Brewin, *Collective Bargaining in Canada: Human Right or Canadian Illusion?* (Halifax: Fernwood Publishing, 2006)

[50] *ILO Convention 87: Freedom of Association and Protection of the Right to Organise Convention, 1948,* online www.ilo.org <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C087>

What is the Sum and Substance of the *Health Services* Verdict? What are Its Implications, Along with *Dunmore*, to Other Sectors, and Jurisdictions Within Canada?

The Supreme Court in *Health Services* declared that its case law hitherto regarding s.2(d) is unconstitutional. It also ruled certain sections of the HSSDIA unconstitutional. The Court suspended the rest of the HSSDIA for a period of 12 months during which the B.C. government had to deal with the repercussions of the ruling and to permit the government and unions to negotiate a settlement. (The remedies granted in *Dunmore* were similar.)

Here are the evaluations made by a few selected authors regarding the *Health Services* decision:

The key part of the majority judgment written by Chief Justice McLachlin and Mr. Justice Lebel with which four members of the court concurred (and from which one member of the court dissented) says (at para. 22):

> In earlier decisions, the majority view in the Supreme Court of Canada was that the guarantee of freedom of association did not extend to collective bargaining. *Dunmore, opened the door to reconsideration of that view. We conclude that the grounds advanced in the earlier decisions for the exclusion of collective bargaining from the Charter's protection of freedom of association do not withstand principled scrutiny and should be rejected.* [emphasis added]

In her extensive and meticulous critique of the *Health Services* decision, Professor Judy Fudge finds correctly "a disconnect between the breadth of the reasons offered by the Supreme Court of Canada for recognizing a constitutional right to bargain collectively and the actual test provided by the Court for determining when such a right has been violated.[51] The following is her evaluation of the B.C. case *in toto*:

> Yet despite its limitations, the Supreme Court of Canada's decision in the *Health Services and Support* case is an important symbolic and moral victory for health service sector workers, their unions and the Canadian labour movement in general, which has been on the defensive for the past 25 years. The failure of the Supreme Court to interpret the guarantee of freedom of association in the *Charter* to include collective bargaining had been taken as a signal by governments across the country that they could safely ignore labour rights. The British Columbia government's treatment of the non-clinical health care workers epitomized governments' cavalier attitude to public sector workers and their unions. As the Supreme Court of Canada emphasized, the government introduced Bill 29 without consulting the unions representing the thousands of workers who would be detrimentally affected by the legislation, and it used its majority to pass the legislation in three days. After this decision, at a minimum, governments will have to consider workers' rights and to consult with their unions before introducing draconian legislation. While the Court is clear that its decision protects only the process of collective bargaining, and neither a specific legislative model nor the substantive outcomes embodied in collective agreements, the emphasis on the government's duty to bargain in good faith fosters democratic deliberation, at the expense of an instinctive vilification of public sector workers.

Other expert assessment of the *Health Services* decision concluded as follows:

[51] *Supra* note 24 at p. 31

- Professor Michael Lynk: surprise; unexpected; path-breaking decision; a labour relations moment to savour.[52]
- Professor Savage: elite driven judicial strategy; liberal human rights discourse does little to address the inequalities in wealth and power;[53]
- Professor Judy Fudge: symbolic and moral victory for workers, unions and the labour movement;[54] and
- Canadian Employers Council: a landmark decision; Canadian labour law has become globalized.[55]

Savage asserts that no constitutional document, however progressive, can replace the need for sustained political struggle to protect and enhance workers' rights. He anticipates that the workers' rights as a human rights approach may end up undermining labour's capacity for class-based political mobilization in the future. He states: "Although a liberal rights-based strategy may yield positive results in the short term, over the long term, it may turn out to be the quickest path to irrelevancy for a labour movement that continues to tread water in an era of neoliberal globalization."[56]

(However, alternatively labour movements may undergo rejuvenation as the current global recession may bring about a receding of neoliberal economics as states reject WTO, IMF, and U.S. driven economic policies.)

Michael Lynk cautions *Charter* watchers to avoid the temptations of irrational exuberance. For all its constitutional vigour, he finds visible weaknesses in the Supreme Court's ruling: the "substantial interference" standard is quite demanding and the decision's focus on legislative process may well enable cunning governments to meet the consultation requirements without curbing their objective of rolling back statutory or bargained employment rights.[57]

Section II Recapitulation

Hitherto I have examined:

1. the contrasting aspects of the U.S. *Bill of Rights* and the Canadian *Charter of Rights and Freedoms*, to ascertain the limited applicability of American precedents in Charter related cases;
2. the imperative need for changes from common law to *The Saskatchewan Trade Union Act* as a remedial and preventive measure in labour law;
3. reasons for exclusion of property rights from the *Charter* on the basis of American experience with these rights; and
4. an analysis of shifts and revisions through *Dunmore* and *Health Services* in the evolution of constitutional jurisprudence, resulting in overruling precedents established in 1980s and 1990s and in enhancing the content of freedom of association and imposing certain positive obligations on governments to

[52] Michael Lynk, "Supreme Court Boldly Affirms Labour Rights" (2009) 56 CAUT Bulletin; online www.cautbulletin.ca <http://www.cautbulletin.ca/en_article.asp?articleid=324>
[53] *Supra* note 45
[54] *Supra* note 24
[55] Canadian Employers' Council, "Supreme Court issues Landmark Decision in *B.C. Health* Services (2007) *CEC Bulletin*, online *www.cec-cce.ca* <http://www.cec-cce.ca/news_documents/CEC%20Bulletin%20(June%202007)%20BC%20Health%20Services.pdf>
[56] *Supra* note 45 at p. 18
[57] *Supra* note 52 at p.4

facilitate, provide, and enhance labour's social rights as human rights.

In light of the above analyses, the rest of this paper is devoted to a critique of labour law changes in Saskatchewan, with special attention to changes in the *Trade Union Act*.

There is a need for a brief digression here. Some of the ideas made in this part of the paper were first expressed in a commentary published by the *Regina Leader Post*[58] and an earlier, unpublished paper,[59] entitled "Proposed Amendments to the Saskatchewan *Trade Union Act*: A Critique", which was written when Bill 6 was before the Saskatchewan legislature. This paper was included as a background document to the Bill 6 debate by the NDP.[60] The thesis of the above paper is this: The use of political analogy to justify union certification only by balloting, after an employer's intensive anti-union indoctrination of employees at the workplace, is conceptually and theoretically wrong and empirically unsound and unwarranted, given the inaccessibility of non-employee union organizers to the workplace, and the disparity in power and wealth between unions and employers.

[58] S.Muthu, "Commentary: Province's Goal is Deunionization" *Regina Leader-Post* (May 29, 2008) p. B-10; online <*www.leaderpost.com http://www.canada.com/reginaleaderpost/news/viewpoints/story.html?id=d1ff904c-3c23-4de2-b85b-654553d29afb*>

[59] S. Muthu, "Proposed Amendments to the Saskatchewan *Trade Union Act*: A Critique" (2008) unpublished.

[60] Province of Saskatchewan, Parliamentary Debates, Legislative Assembly, April 5, 2008 (S.Morin, Member for Walsh Acres) online <*www http://www.legassembly.sk.ca/hansard/26L1S/080313Hansard.pdf*> at p. 302

Section III
Saskatchewan *Trade Union Act*: 2007 Amendments in the Light of the Above Verdicts

Three broad legal developments in the U.S. have had, and still continue to have, a significant impact on the evolution of industrial jurisprudence in Canada. The first is the myth of the workplace as a "Marketplace of Ideas" (MOI) and its impact on workplace organizing rights of employees and of non-employee union organizers. The second doctrine is employer's property ownership prerogatives trumping workplace organizing rights. The third doctrine is the granting of almost a full personhood to commercial corporations in the U.S. by courts which enabled them to hijack the First Amendment and the Fourteenth Amendment rights to the detriment of natural persons. This has a spill over effect in Canada through U.S. corporations and consulting firms, specializing in "preventive industrial relations".[61]

Since all of the above doctrines are based on the classic concept of "market", a brief description of the classic concept of "market', and a brief description of the *market mystique* will be of use in evaluating these doctrines as well as to avoid the pitfalls of the proverbial blind men and the elephant parable.

Markets are competitive; perfectly competitive when left to operate without interference. Such a market is a "free market" because it is free from the intervention of the state. *Laissez-faire* politics and *laissez-faire* economics go together. People need to be shielded from the misguided activism of the state. In a competitive marketplace, people get what they deserve by their effort. There is no free rider.

Governance by the "invisible hand" of the market is qualitatively and quantitatively superior to governance by citizens or through their representatives, regulating the "visible hand" in the marketplace. What is the reality?

"Perfect" competition is an expression in superlative degree, not a positive or comparative concept. In that sense, "perfect market" is an *ideal* or *norm* (or shall we say a "model") against which the real market is evaluated to measure the degree of deviation of the reality from the superlative ideal.

A critical look at the system reveals a quantum leap in logic based on circularity of reasoning. It starts with an "*as if*". From there it moves to "as is" which finally leads to "as-it-ought" to be. A hypothetical competitive market transforms itself into an *affirmative or positive fact, from this "is"*, the *normative* "ought" is derived. This is how a market system ought to be. Marx, from without, and Keynes, from within, have criticized the market system from different perspectives and have recommended different remedies. Both Marx and Keynes have a *similar view on*

[61] John Kilgour, *Preventive Labor Relations*, (New York: Amacom, 1981); John Logan, "Consultants, lawyers, and the 'union free' movement in the USA since the 1970s," (2002) 33 Industrial Relations Journal 197.

one point[62]: left to itself, the market system has sufficient internal contradictions to engender its self-destruction. Keynes never accepted the dictum that "in the long-run", the market reaches its equilibrium because, in his view, we are all dead and gone in the long run. For Marx, that dictum is a pure and simple lie. It is deification of an abstraction and perpetuation of a falsehood.

An eminent jurist, Richard Posner[63] summed up the current world-wide descent into depression in these words: "In sum, rational maximization by businessmen and consumers, all pursuing their self-interest more or less intelligently within a framework of property and contract rights, can set the stage for an economic catastrophe." The verdict is that micro rationality collectively breeds macro irrationality quickening the crash of the whole system. *Laissez faire* is a systemic suicide pact.

The Myth of the Workplace as a Marketplace of Ideas

In light of the above prelude, let me examine the marketplace of ideas (MOI) and its application to industrial relations settings.

> "It is only too typical that the content of any medium blinds us to the character of the medium." (Aphorism: The medium is the message.)[64]
>
> "An industrial plant is not a debating society. Its object is production."[65]

Industrial relations scholars in the U.S. as well as in Canada, have extensively critiqued the doctrine of MOI and its misapplication, particularly at the workplace, in the context of union organizing, certification, and initial collective bargaining. Space does not permit an extensive discussion of these scholarly contributions. Only a brief summary of these critiques is provided here.

Marketplace of ideas doctrine (MOI) is an American product originating in the public political forum. But later on, it captured the attention of corporate human resource managers (HRM). It comes under the First Amendment, with a connotation of having a democratizing purpose. For corporate HRMs, it has become a camouflaged democratizing tool to keep business enterprises union-free. MOI is also in synch with an employer's freedom of speech in favour of the ideology of keeping the enterprise in a "union-free right-to-work" environment, for example Wal-Mart.[66]

MOI is born from the *laissez-faire* economics and it has all the birth marks, warts, assumptions, fallacies, and pitfalls of its parentage. Both are based on faulty assumptions and invalid premises, all of which result in drawing conclusions contrary to reality. The claimed classic conditions of the market seldom exist either in the marketplace of economics or in MOI. When the MOI is smuggled into the workplace, it opens Pandora's Box and creates a mischievous monstrosity in matters of labour relations.

The stated values behind MOI are admirable: seeking and discovering truth, ensuring self-fulfillment, knowledge based participatory decision making and balancing stability and change. Even a Martian who just landed in one of our industrial centers in this continent would not believe that employers are using MOI to seek truth, self-fulfillment, participatory

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[62] Paul Mattick, *Marx and Keynes: The Limits of the Mixed Economy* (Boston:, Extending Horizon Books, II, Beacon St., Boston, Mass,, 1969).
[63] Richard Posner, *A Failure of Capitalism: The Crisis Of '08 and The Descent Into Depression* (Cambridge:, Harvard University Press, Cambridge, Mass., 2009), at p.111 and 112.
[64] McLuhan, Marshall. *Understanding Media: The Extensions of Man (1st Ed.)* (New York: McGraw Hill, 1964) at p.24.
[65] *Ford Motor Co.* 3 L.A. 779, cited in Klare, *supra* at note 43
[66] Roy, J. Adams, "Organizing Wal-Mart: The Canadian Campaign," (2005) 6/7 Just Labour1.

decision making and enlighten workers to make an informed decision on unionization. MOI also assumes all consumers of ideas or commodities are sovereign, as well as totally rational, in making their decisions and actions. These assertions are found to be empirically incorrect.

All the above simplistic views of a laissez-faire market have fallen out of favor with economists, who realized long ago what critics of the MOI have argued. "The market is an imperfect and frequently malfunctioning machine and the costs of exchange add friction to its gears. This friction, which economists call "transaction cost", includes the time and expenditure needed to find, evaluate, and obtain good ideas or products.[67]

Any transplanting of practices from the public political arena to institutions in the private realm — whether it is *mandatory balloting for union certification or employer freedom of speech or applying the myth of MOI* — should be based on empirical evidence showing unmistakably that the recipient is eminently suitable to receive and cultivate these practices.

Institutions are material matters. According to Coase[68] (who has acknowledged the paternity of New Institutional Economics), institutions are humanly devised constraints that structure human interaction. They are made up of formal constraints (e.g., rules, laws, constitutions), informal constraints (e.g., norms of behaviour, conventions, self-imposed codes of conduct), and their enforcement characteristics.

Institutions can be placed on a continuum. At one end, there are speech, ideas, dialogue, debate and deliberation enhancing institutions (e.g., educational institutions, news media); and at the other end, there are institutions inhibiting or negating the functions identified above (e.g., what is known as total institutions, such as a monastery, military organizations, prisons).

There are other institutions which may fall in the mid-range between the two extremes of the continuum. For example, business corporations, and most of the non-unionized workplaces belong in this range. The workplace structure is hierarchical; top-down authority is driven by top-down monologue.

The workplace abhors cultures of dialogue, debate, discussion and participatory decision making. Efficiency requires quick decision making and smooth execution of the decision.

From a "structural-functional" perspective a business corporation closely resembles, at best, a self-perpetuating oligarchy of "professional managers", and at worst, a pure and simple autarchy. Business autarchies create climates where large scale impropriety and illegality are possible and since Enron executives were found guilty of fraud, we have seen a couple of dozen executives receiving prison sentences in the range of 5 to 25 years.[69]

In the light of these workplace institutional impediments against the workplace becoming a marketplace of competing ideas, let us examine the amendment to employer unfair labour practices in the opening of Section 11(1) (a) of the *Trade Union Act*. What are the purposes behind this amendment? Claims of "rebalancing" and "democratizing" the workplace power structure and distribution are highly speculative, hypothetical, and conjectural. Here is the amended version of Section 11 (1) (a) with the additions in italics and the omitted words within brackets:

[67] Joseph Blocher, "Institutions in the Marketplace of Ideas," (1998) 57 Duke Law Journal 821 at 826.
[68] As cited in Taylor, G. Michael., "Comment: 'I'll Defend To The Death Your Right To Say It … But Not To Me:' The Captive Audience Corollary To The First Amendment" (1983) 8, S. Ill. U. 211
[69] Benthany McLean *and* Peter Elkind*, The Smartest Guys In the Room: The Amazing Rise And Scandalous Fall of Enron* (New York:, Portfolio, New York, 2004); Barbara Ley Toffler and Jennifer Reingold. *Final Accounting: Ambition, Greed and Fall of Arthur Andersen* (New York: Currency Doubleday, 2003).

> 11(1) It shall be an unfair labour practice for an employer's agent or any other person acting on behalf of an employer:
>
> (a) [in any manner, including by communication] to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred in this Act, *but nothing in this Act precludes an employer from communicating facts or opinions to its employees*.

The omission of the phrase *in any manner* is as significant as the addition to (a). Previously, this inclusive phrase has served as a protective umbrella for employees when confronting an ideologically hard-boiled anti-union employer, such as Wal-Mart, who uses "world class" anti-union propaganda techniques which include holding inspirational anti-union pep rallies and indoctrination sessions.[70] Wal-Mart's voice is the loudest one around the globe submerging the voice of International Labour Organization and of the International Confederation of Trade Unions until they are inaudible.

Craig Becker[71] suggests that the preferred place of the mandatory representation election methods of determining employee choice, and the employer's right of free speech were *derived* from countervailing ideological authority of election process and from allowing "political liberties" to override legal efforts to redress economic disenfranchisement of employees.

Sixty eight years ago, in *NLRB v. Federbush Co.*,[72] Judge Learned Hand contextualized employer's freedom of speech subject to time, place, manner and content regulatory restrictions, given the power disparity and economic dependency of the employees. The following labour law jurisprudence, foresightedly prescribed in his verdict, is still valid; the constitutional validity of a statute which violates the spirit of this verdict, such as s. 11 (1)(a) of the *Trade Union Act*, is questionable:

> No doubt an employer is as free as anyone else in general to broadcast any argument he chooses against trade-unions; but it does not follow that he may do so to all audiences. The privilege of "free speech", like other privileges is not absolute; it has its seasons … Language may serve to enlighten a hearer, though it also betrays the speaker's feelings and desires; but the light it sheds will be in some degree clouded, if the hearer is in his power. Arguments by an employer directed to his employees have such an ambivalent character; they are legitimate enough as such, and *protanto* the privilege of "free speech" protects them: but, so far as they also disclose his wishes, as they generally do, they have a force independent of persuasion. … *Words are not pebbles in … juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part. What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart.*" [emphasis added]

Any public policy or governmental action which ignores Judge Learned Hand's contextualized approach has a heavy burden of proof to justify

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[70] Jim Warren, *Joining the Race to the Bottom: An Assessment of Bill 6, Amendments to the Trade Union Act, 2008* (Regina: Canadian Centre for Policy Alternatives, 2008) online www.policyalternatives.net *http://www.policyalternatives.ca/newsroom/news-releases/ccpa-study-demonstrates-bill-6%E2%80%99s-damaging-effects-saskatchewan%E2%80%99s-industrial-r*, at pp. 26 and 8

[71] Becker, Craig., "Democracy in the Workplace: Union Representation Elections and Federal Labour Law" (1993) 77 Minn. L. Review 495.

[72] 121 F.2d 954, 957 (2 Cir. 1941)

such a deviation. Why should employer freedom of speech get an overriding constitutional protection in the labour law context? The most insightful and extensive critique of the answer to this question is provided by Professor Alan Story.[73] Here are the purported justifications, followed by a constitutionally relevant evaluation:

1. The implicit fairness argument: the employer is allowed to speak because the union is allowed to speak.
2. The workplace as the marketplace of competing ideas — the right of the employee audience to listen.

Alan Story rejects both of these justifications because they are based on a false equivalence. The right of both parties is incorrectly viewed as equivalent, while in fact, they are enormously unequal in wealth, power, and political clout. Employer freedom of speech inherently flows from market forces and from protection of property and contract rights which are pillars of the market economy and ideology. These concrete variables abhor, and systemically deny, equivalence to labour. Hitherto and still the state steadfastly stands behind the system. Employers alone are *guaranteed access to speak*, only employees are *permitted to listen quietly and obediently*; a marketplace mirage of equivalence!

Labour and employee speech, though involving market and property issues, arises from the constitutional freedom of association, from human rights traditions, and from the conventions of international law. Labour is not a commodity and labour activity is not a commercial activity and it is qualitatively different from other factors and resources of production.

Humans are an end in themselves, as such, not to be treated as *mere* means. One of the purposes of trade union movement is decommodification of labour and to humanize workplace structure and practices. Which voices are heard and which voices are silenced in the debate over unionization? Story identifies five problems with the workplace as a marketplace of conflicting ideas:[74]

First, there is some incongruity between the employees' right to listen to the employers and the employer's right to enlighten employees and to constitutionalize these rights as equivalent rights. Whose interest is dominant here? Is the right to listen the flipside of right not to listen? Isn't this right a non-waivable right of every employee? To make this right an appendix to employer free speech is to violate the autonomy of the employee and the free-standing freedom of association of employees.

Second, this right to listen means, in most cases, a right to listen to an employer attack and undermine an idea and a course of conduct, the unionization of the workplace, that is arguably in the interest of many employees and conversely, not in the interest of the employer. Thus, while employees may theoretically get some valuable information from employer speech, *the underlying interests at stake cut clearly in the employer's favor*.

Third, the right of the employee to listen, at least in the case of a captive employee audience, is not a right but rather a strictly-enforced demand made of an employee.

Fourth, the employee may have the right to listen during an election campaign, but, incongruously for constitutional purposes, not the right to speak. Certain types of speech, such as disloyal speech, may result in termination.

Finally, the employee's democratic right to listen has been established within a relationship and context not noted for its democratic sensibilities.

[73] Allan Story. "Employer Speech, Union, Representation Elections, and the First Amendment" (1995). 16 Berk. J. Empl't. & Lab. L. 356 at pp. 403-4
[74] *Ibid.*

Story's overall thesis is that the Labour Relations Board and the courts either overlook and/or permit employers' coercive statements which have a chilling effect on employee rights of self-organization. This problem, in his analysis, stems from at least three theoretical and practical failings of the adjudicative system, caused by faulty presumptions:[75]

1. Conceptualizing the employer-employee relationship as a voluntary, non-coercive relationship, employer speech is detached from the forms of *power and coercion* which … are *embedded in the employment relationship*. Much coercive speech is overlooked if it is not appreciated that "economic coercion necessitates the employment relationship and furnishes the most basic and pervasive sort of worker control."

2. The adjudication of *coercive speech cases is framed by a positivist and empiricist approach to speech*. Thus, the inquiry is limited to statements that are empirically demonstrable as coercive — "*join that union and you'll be fired*." Coercive speech arising from the *"invisible" structure* of coercion between the employer and employee, as well as from the coercion of the wider society in its relation to the workplace, is all but ignored.

3. Even if it is not accepted that the employment relationship is inherently coercive, the employee speech doctrine is deficient in its understanding of the nature of speech and how it influences behaviour. Despite judicial commentary to the contrary, the Board's inquiry as to *the meaning of* employer speech *often occurs outside its context*. Such an inquiry often fails, as well, to *appreciate how propaganda works* and how seemingly non-coercive symbols can be just as effective mobilizers of action (or inaction) as direct commands and orders. [emphasis added, citations omitted]

Presumptions and assumptions behind employer speech are accepted as axioms needing no proof and remain largely unexamined. This lack of inquiry is caused by, according to Judge Jerome Frank,[76] the hypnotic power of words, such as freedom of speech and freedom of contract, "converting words into thought-paralyzing entities" and "'thingify' the words".

The three philosophical formations of adjudicatory determination of whether an employer speech or conduct is coercive are: the employment relationship is not inherently coercive; coercion is either absent or present (no-in-between or hidden unity of opposites); and the only coercion to be considered is intentional employer coercion. Professor Kathleen M. Sullivan, in her exhaustive and intellectually stimulating analyses of "Unconstitutional Conditions", finds all three foundations, individually and collectively, as well as descriptively and normatively, to be unrealistic abstractions which are in need of reexamination within the total context of institutional setting of the socio-economic system:[77]

> The … hidden assumption is that human autonomy depends on freedom from captivity to another person's will. The core of coercion, accordingly, is intentionality by human agents. This view recognizes neither social or structural coercion, nor the possibility that coercion might be the unconscious byproduct of human action primarily directed at other ends, nor the possibility that one might "coerce' by exploiting limitations on the freedom of others not of one's own making. On this view, the background circumstances that may make us unfree do not 'coerce' us.

[75] *Ibid.* at pp. 405-6
[76] As quoted in Story, *supra* note 70, at pp. 361-362
[77] Kathleen M. Sullivan, "Unconstitutional Conditions," (1989) 102 Harvard Law Rev. 1413 at p. 1449

Jim Warren[78] sums up the union organizers' views on s.11(1)(a) as follows: Labour activists view anti-union employer communications activities as the "mother" of all unfair labour practices since they open the door for employers to engage in many of the other 21 unfair labour practices spelled out in the Act. They argue the ban on communication serves a gatekeeper function. It is something of a catchall that prevents employers from engaging in a wide range of union-busting activities. Union observers claim most of the successful prosecutions for unfair labour practices under the Act (estimated as high as 95 percent) and related to this section.

Across Canada since the 1980s, despite the decline in union membership, whenever right-leaning political parties have captured power in the election, they have opted for a number of similar measures related to trade union operation:

1. first priority is to "democratize workplace" and re-establish "power equalization between the union and the employer"; a pressing need for "fine tuning";

2. to achieve the above objectives, increase employers' power, including their freedom of speech against unionization and decrease union powers by making certification more difficult and limiting the application of economic sanctions;

3. pack the Labour Relations Board with hand-picked pro-employer oriented persons and publicly lecture them on new rules of statutory interpretation and admonish them to act accordingly; and

4. last, but not least in magnitude and importance, is to make sure that the preferred clientele of the political party in power fully understand and appreciate changes to the policies 1, 2 and 3, and make frequent public declaration that the jurisdiction is fully *open for business*.

For example, Grant Devine in Saskatchewan (Bill 104,1983); Mike Harris in Ontario (Bill 7, 1993); Gordon Campbell in BC (Bill 29) and currently Premier Brad Wall in Saskatchewan (Bill 5; Bill 6, 2008; Bill 80, 2009), all use the same script to justify amending labour legislation.[79]

The most amazing objective among all of them is making employers and unions *equal*, which is based on an unexamined presumption that the latter have more power than the former and *therefore*, fairness requires re-balancing of power! How do they justify and perform this re-balancing act? To use the words of Anatole France from *Le Lis Rouge*,[80] this is how they can conjure it up: "The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread."

There is a way of genuinely balancing power between the parties. For example, mandatory certification vote and employer freedom of speech opposing unionization may be balanced by granting off-duty workers and non-employee union organizers access to the workplace at employer-specified times and conditions and full freedom to communicate pro-union message to workers. Another way of balancing is to strengthen the deterrent degree of the make-whole remedy for employers' unfair labour practices and by allowing the Labour Relations Board

[78] *Supra* note 70, at p. 25

[79] Muthu, *supra* note 59; Muthu, S., *Legislative Background To And An Examination of The Saskatchewan Trade Union Amendment Act: Bill 104* (1984) unpublished; Harish, C. Jain, and S. Muthu, *Ontario Labour Law Reform: A History and Evaluation of Bill 40* (Kingston: IRC Press, 1995); Harish C. Jain and S. Muthu, "Ontario Labour Law Reforms: A Comparative Study of Bill 40 and Bill 7" (1996) 4 C.L.E.L.J. 311; Bernard Fishbein, "Witmer says Changes Require Secret Ballot for Strikes" *The Globe and Mail* (October 3, 1995) B5.

[80] (France: Calmann-Levy Publishers, 1894)

to certify a union as a remedy for an employer's unfair labour practice when it does not have majority support, for then it could be argued that the union probably would have achieved majority support had not the unfair labour practice depressed the level to below 45 percent. The *Trade Union Act*, however, does not include this remedy.[81]

The rhetoric of power-balancing and of democratizing is used by right of the centre political parties as a selling technique in political marketing. Their ideal model is the U.S. Southern States' union-free right-to-work enterprises. They avoid open advocacy of this model, leaving it to other institutions, such as Wal-Mart[82] and the conservative think-tanks such as the Fraser Institute to actively advocate their model of workplace democracy without "union monopoly".

Professor England suggests that the Saskatchewan Party's supporters seem to endorse the conventional view of economists that collective bargaining is unjustifiably costly. According to England: "As well, the Party seems to have been influenced by a Fraser Institute study which reported that Saskatchewan ranked third from the bottom (2-3 in a ten-point scale) among all the Canadian jurisdictions on a North American Index of Labour Relations Laws … overall measure of the level of balance and promotion of labour market flexibility … the top score 9.2 by the twenty-two right-to-work states in the U.S."[83]

I have already identified the mission of labour law changes by Grant Devine, Mike Harris and at present by Premier Brad Wall based on their fascination for Right-To-Work-Law as the golden key to the "open for business" destination. When Grant Devine introduced Bill 104, the NDP opposition party asserted that the *philosophy behind that Bill was a way station on the road to a right-to-work law and to make Saskatchewan Georgia North.*[84]

The State of Georgia, in its brochure, boasts of its public policy, and takes pride in its achievement, and invites investments, with guarantees of full sovereign authority to the investors, and of powerless public employees and docile and obedient labour force. Here is a quote from the Georgia brochure:

> … The pro-business attitude of state government has given us the most streamlined environment permitting procedure in the Southwest as well as right-to-work legislation, free port tax incentives, a fair and taxable equitable tax structure which allows industry to pay only its fair share. *Georgia leads the nation in the percentage of labour-management elections won by management. Georgia prohibits public employee collective bargaining, strikes by public employees.*[85]

When union organizing begins, usually the workplace is governed by employment at will (EAW) which declares that in the absence of a contract for a specific duration, an employee may be fired "for good cause, for no cause or even for cause morally wrong."[86] The EAW grants iron fists to employers who keep them under velvet gloves.

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[81] Geoffrey England, "Evaluating the Merits of the 2008 Reforms to Collective Bargaining Law in Saskatchewan" (2008) 71 Sask.L.R. 307 at 316; see also Ron Lebi and Elizabeth Mitchell, "The Decline in Trade Union Certification in Ontario: The Case for Restoring Remedial Certification" (2003) 10 Can. Lab. & Emp. L.J. 473 and Kate E. Andrias, "A Robust Public Debate: Realizing Free Speech in Workplace Representation Elections (2003) 112 Yale L.J. 2415.

[82] See, for example, *Wal-Mart Canada Corp. v. Saskatchewan (Labour Relations Board),* 2004 SKQB 324 and *Wal-Mart Canada Corp. v. United Food and Commercial Workers, Local 1400*, 2004 SKCA 154

[83] *Supra* note 81, at p. 311

[84] *Supra* note 79 at pp. 16-17.

[85] Province of Saskatchewan, Parliamentary Debates, Legislative Assembly, June 15,1983 (N.Shillington, Member for Regina Centre) online <http://www.legassembly.sk.ca/Hansard/20L2S/83-06-03Hansard.pdf> at p. 302

[86] *Supra* note 6

In her extensive review of literature for her study of eight Canadian jurisdictions regarding employer resistance to union certification, Professor Karen Bentham has identified the following measures generally used by anti-union employers in Canada and the U.S.:[87]

1. dismissing union organizers and supporters, (insubordination)
2. being charged with unfair labour practices;
3. communicating anti-union sentiments directly to employees by means of letters, and/or one-on-one or captive audience meetings (during working hours practically they are in captivity for 1788 hours per annum in the Canadian workplace);
4. restricting union access to the workplace or supporters' ability to engage in workplace solicitations;
5. monitoring employees;
6. hiring consultants to assist in employer campaigns;
7. training managers to take action against organizing campaign;
8. threatening to close the plant or spreading rumors that this will happen;
9. promising increased pay or benefits if the union is defeated;
10. using administrative means, such as filing objections or postponements to delay the certification vote; or
11. using some combination of tactics.

The popular conception of Canadian private sector employers as less willing to oppose unionization than their U.S. counterparts may be mistaken for the reasons given above. Further, neither the accelerated certification procedures nor the strict enforcement of the law have been found to prevent employers' anti-union activities in Canada. Bentham comes to the conclusion that public policy amendments mandating certification votes in some Canadian jurisdictions have decreased the differences between Canada and U.S. certification results. When this change is added to enhancement of employer freedom of speech to oppose unionization and persuade employees accordingly, the Canadian employers' have a double-barrel gun to most successfully shoot down union success in an organizing drive. Bentham's study found employer resistance to be the norm, with 80 percent of employers overtly and actively opposing union certification application. This finding is confirmed by other studies.[88]

There are different techniques of conducting captive audience speech in the workplace. One is the assembly of all employees during working hours; the second form is in small group meetings; the third and most effective manner is using supervisors (who have very close relationship with every employee under their supervision) in one-on-one basis to indoctrinate workers with anti-union views. Few audiences are more captive than average workers.[89] All employer speech to employees during working hours, at the workplace, is virtually a speech to a captive audience; this is particularly so during union organizing time.

[87] Karen J. Bentham, "Employer Resistance to Union Certification: A Study of Eight Canadian Jurisdictions," (2002) 57 Industrial Relations 159 at pp. 161-162

[88] *Supra* note 87; Slinn, Sara. "The Effect of Compulsory Certification Votes on Certification Applications in Ontario: An Empirical Analysis." (2003) 10 C.L.E.L.J. 367; Lebi, *supra* note 81; David Doorey, "The Medium and the 'Anti-Union' Message: Captive Audience Meetings and Forced Listening in Canada" (2008) 29 Comparative Labor Law & Policy Journal 101

[89] *Supra* note 71 at p.600

Section 3 of the *Trade Union Act* explicitly mandates that the "employees have the right to organize in and to form, join, or assist trade unions [.]" This is a right to self-organizing. Therefore, section 11 proscribes the employer or his agent or any other person acting on behalf of the employer "to interfere with, restraint, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act."

There is a concrete asymmetry between worlds of polity (in public forum) and workplace in terms of process, functions, statutory and regulatory frameworks, and the results and hence it is a futile legal mischief to graft representative democracy onto employment relations.[90] The mythology of political analogy and fictional equality between employers and employees presumed under Bill 6, is contrary to the reality of economic domination under the well established corporate modus operandi and its anti-union animus in securing these legal changes.

Corporations use resources amassed in the economic marketplace in various manners to obtain an unfair advantage in the political marketplace.[91] It is not the power of their ideas but the power of their treasuries which the trade union movement is unable to match. Here, the fundamental question is to which side is Bill 6 tilting, with what valid justification?

Any attempt by the legislature, or Labour Relations Board, or Courts to transform employer campaigns from unfair labour practice into a protected speech and thereby assign the employer a status virtually tantamount to that of a candidate in a union election is a clear violation of the purpose of the *Trade Union Act*. This is particularly so after the Supreme Court verdicts of *Dunmore* and *Health Services*.

These verdicts grant employee and union rights precedence over employer rights for three reasons: First, workers rights are treated as human rights; secondly, the Supreme Court, in *Health Services*, for the first time recognized acting Minister of Justice, Mr. Robert Kaplan's statement during the Parliamentary hearing, that the freedom to organize and bargain collectively is included in S.2(d);[92] thirdly, the Court has given explicit recognition to international labour law principles in determining the overriding significance, content, and scope of freedom of association.

What is required now in the light of *Dunmore* and *Health Services* are the following: totality of context and conduct orientation; purposeful and mischief-remedy oriented interpretation "to suppress subtle inventions and evasions for continuance of the mischief … and to add force and life to the cure and remedy, according to the true intent of the makers of the Act";[93] giving full attention to not only the content of the message but also to the medium; and taking a synchronized approach to all intermingling of principles of jurisprudence for hindering the hindrances to enhance the choices for the powerless.[94]

Taking into consideration of all the preceding arguments and analyses under the subtitle, "The Myth of the Workplace as a Marketplace of Ideas", I reach the following conclusion: Depriving employers of party status in union organizing, denying them the rights of candidates in union elections, dispossessing them of freedom of speech during organizing and before union certification would not violate any rights under S.2 of the *Charter*. Even if it does, it is saved under S.1 limitations (discussed *infra*).

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[90] *Ibid.* at p. 499; Muthu, *supra* note 59
[91] *Supra* note 71 at p.600
[92] Per the majority at para. 67
[93] *Supra* note 3
[94] *Supra* note 26.

Employer Rights and Workplace Organizing

Justice Involves Things and the Persons

> The good in the sphere of politics is justice; and justice consists in what tends to promote the common interest. General opinion makes it consist in some sort of equality. … In other words, it holds that justice involves two factors — things, and the persons to whom things are assigned — and it considers that persons who are equal should have assigned to them equal things. But here there arises a question which must not be overlooked. Equals and unequals — yes; but equals and unequals in what? This is a question which raises difficulties, and involves us in philosophical speculation on politics.[95]

Since the time of Aristotle, the concept of private property in law, economics and philosophy has changed to reflect the changes in the form and structure of property, ownership, possession, occupancy, use, and management.[96] There has always been a lag between the concrete changes in the form and structure of property ownership and the legal recognition, alteration, and accommodation of these changes in resolving the conflicts of laws. In law, retrogression and restoration also comes along after progression. The conflict between labour relations statutes and the newly evolved "common law of the shop"[97] on one hand and the classic principles of the traditional common law on the other hand is still continuing. The question raised by Aristotle some 2,500 years ago is still in currency, which is not to be overlooked.

The substance of my thesis hitherto is the following: employers have successfully co-opted freedom of speech and freedom of expression to achieve the following purposes:

1. to protect the status quo; to enhance values related to private property and managerial prerogatives
2. to diminish the statutory and constitutional right to freedom of association,
3. to undermine unions rights to collective bargaining
4. to apply appropriate economic sanctions, when collective bargaining fails.

Also it is highly pertinent here to bear in mind the previous discussion on the various reasons for the exclusion of property rights from the *Charter*. The American constitutional history alerted the Canadian constitutional makers to exclude property rights from the *Charter*.[98]

The U.S. due process clause was interpreted by the Supreme Court, from the 1890s to the 1930s, not only to protect procedural fairness but also *substantive fairness*. The court used this substantive due process doctrine to declare all social welfare legislation as unconstitutional: regulating minimum wages and maximum hours in employment; requiring Workmen's Compensation; regulating various business activities and fixing prices. Private property and freedom of contract, being the two pillars of laissez-faire capitalism, took precedence over the democratic social welfare and employment regulations. Professor Patrick Monahan puts the matter succinctly in these words:[99]

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[95] Aristotle, *The Politics* (Oxford: Oxford World Classics, 1995), Book III, chap.12, 1282b; see also Seth K. Kreimer, "Allocation Sanctions: The Problem of Negative Rights in a Positive State" (1984) 132 U. Pa. L. Rev. 1293

[96] Jain and Muthu, *supra* note 79 at p. 63

[97] *Supra* note 43 at p. 458

[98] Alexander Alvaro. "Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms" (1991) 24 Canadian Journal of Political Science 309; Johansen, *supra* note 15; Patrick Monahan. *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada (*Toronto: Carswell, 1987); Estlund, *supra* note 7

[99] *Supra* note 98 at p. 104

> [D]emocratic values are expressly or implicitly referred to through the Charter. There are a variety of provisions in the Charter directed either towards protecting democratic debate and argument, or towards remedying systemic defects in the process…. Throughout the document, there is a recognition of the *importance of communitarian values*. A variety of provisions is directed towards *ensuring that individuals living in communities are provided with the opportunities and means to define and develop their identities*. [emphasis added]

The purpose of Section 1 in the *Charter* explicitly serves the above purpose. Professor Peter Russell has emphasized this purpose, arguing that in liberal democracies "fundamental rights and freedoms are not zero-sum entities which citizens either possess in entirety or not at all".[100]

Once again, this is a Canadian synthesis, an attempt to bring unity to what seems to be opposites. The communitarian values revolve around the movement from the sphere of "freedom *from*" to the sphere of "freedom *to*". How do we build a bridge between the negative freedom and positive freedom and between an ideal libertarianism and the concrete requirements of communitarianism for practical every-day life?[101]

Democratic theory holds that everyone is an autonomous human being endowed with free will. The purpose of free will is to make a choice among the available alternatives, a meaningful choice to a given person's situation. Here are the pertinent questions for such a "situated person":

Given my situation, are all options available, and open to me? If some choices are completely closed for me, the question is why? Is it because of my inherent inability and limitations? Or is it due to institutional barriers deliberately erected against me, as well as against a similarly situated class of people, based on irrelevant and invidious criteria? If the former were to be the reason, can and should the state provide me, and the similarly situated class of persons, an opportunity to upgrade our *capabilities to enhance our choices?*[102]

If the latter were to be the reason, is there a positive obligation and responsibility on the part of the state to demolish these barriers — irrespective of the nature of those institutions: secular or religious; private, quasi-private; public, quasi-public; governmental or quasi-governmental, national or multi-national — through public policies? Or, are there already established policies which some governments and their enforcement agencies, purposely under staffed, fail to enforce, or enforce in an ineffective manner, strengthening and justifying certain status quo oriented institutions on ideological grounds?[103]

All these questions and issues about negative and positive liberty come under the parameters of Section 1 of the Charter analyses. Liberty is a positive power or capacity of doing or enjoying something worth doing or enjoying. This liberty is based on civic morality of mutuality

[100] Peter H. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms" (1983) 61 Canadian Bar Review 30

[101] *Supra* note 26; *Dunmore* at para. 57; Lane W. Lancaster, *Masters of Political Thought, Vol III: Hegel to Dewey* (Boston: Houghton Mifflin Co., 1968)

[102] Amartya Sen, *Commodities and Capabilities* (Delhi: Oxford University Press, 1999); Amartya Sen. *Development as Freedom* (New York: Anchor, 1999)

[103] Amartya Sen. *On Ethics & Economics* (Cambridge: Blackwell , 1987); Adam Smith, and D. D. Raphael and A. L. MacFie (eds). *The Theory of Moral Sentiments* (Oxford: Clarendon Press, 1976); Klare, *supra* at note 43; Derek Bok, "The Regulation of Campaign Tactics in Representation Elections Under the *National Labor Relations Act*" (1964) 78 Harv.L.Rev. 38; Paul C. Weiler, "Promises to Keep: Securing Workers' Rights to Self- Organization Under the NLRA," (1983) 96 Harv. L.R. 1769; Paul C. Weiler "Striking a New Balance: Freedom of Contract and Prospects for Union Representation" (1984) 98 Harv. L. Rev. 251; Kreimer, *supra* note 95.

and reciprocity in an egalitarian environment. To achieve these objectives, the state, in addition to being a mere night-watchman, should act as a *guarantor, sustainer, promoter, and reconciler of rights*. Such a positive role of the state is necessary to achieve industrial citizenship and justice for the workers.[104] If the state becomes a "partner" with the business sector to the exclusion of other stakeholders, such a partnership is in violation of S.1 requirements.

How does workplace organizing take place in the U.S. and Canada? What are the dominant values and assumptions in industrial jurisprudence which grant an almost unlimited sovereign authority to employers? Given the American corporate role in the Canadian economy, let us begin with developments in labour law in the U.S. and its spill-over effect on the Canadian industrial relations system, as we have done earlier regarding constitutional law developments between these countries (supra pp. 6-11).

A highly respected scholar in American industrial jurisprudence and sociology, Professor James B. Atleson, in his book *Values and Assumptions in American Labor Law*,[105] has propounded a theory of adjudication.[106] His basic thesis is that the adjudicative decisions — by courts, Labour Relations Board, Boards of Arbitration etc. — reproduce a consistent and coherent set of *managerial values and assumptions*, synthesized by managers of *late nineteenth century* capitalist production, though *with earlier antecedents* (emphasis mine). Atleson identifies the following five constitutive assumptions comprising his descriptive theory of labor adjudication:[107]

1. First, continuity of production must be maintained, tempered only when statutory language *clearly* protects employee interference (emphasis original).
2. Second, employees, unless controlled, will act irresponsibly.
3. Third, employees, in an assumption deriving not from nineteenth-century industrial capitalism but from a far earlier tradition, "owe a measure of respect and deference to their employers". Loyalty to the "common enterprise" circumscribes employee collective action while placing no legally cognizable (means capable of being periodically heard) limits on managerial freedom or authority.
4. Fourth, *the workplace is conceptualized as "property" of the employer and thus under his control, which serves as the express ground of limiting various statutory employee rights*. [emphasis mine]
5. Finally, employees cannot be full partners in the enterprise because such an arrangement would interfere with *inherent and exclusive managerial rights of employers*. [emphasis mine]

As under common law, the reference to subjects as "peripheral" or "indirect" interest to employees masks the use of hidden judicial values. The technique of balancing of interests between parties may have an appearance of evenhandedness and fairness but masks the fact that the approach taken itself represents a value choice. The choice of approaches may reflect such assumptions, whether by intention or by effect.

Alan Hyde[108] states that not one line in any federal statute indicates congressional approval of any of Atleson's five assumptions. Atleson's thesis is that the five pre-Wagner Act assumptions are nevertheless treated by federal courts and the National Labor Relations Board *as law, with the power to limit or override express statutory rights of*

[104] Selznick, P. *Law, Society and Industrial Justice* (New York: Russell Sage Foundation, 1969)
[105] James Atleson, *Values and assumptions in American labor law* (Amherst : University of Massachusetts Press, 1983)
[106] Alan Hyde, "The Future of Labor Law: An Essay Review" (1985) 9 Contemporary Crises 183
[107] *Supra* note 105 at pp.7-9
[108] *Supra* note 106 at p. 185

employees, including union organizing rights. How do ahistorical assumptions become law, which limits or overrides statutory rights of employees? Here is Atleson in his inimitable diction:[109]

> The notion that a set of inherent managerial prerogatives exists suggest a timeless historical imperative. The language in NLRB and judicial opinions not to mention arbitration opinions where the characteristic is most easily observable, often appeals to a "Genesis" view of labor-management relations: "In the beginning "there was management and some employees. Management directed the enterprise until limited by law and collective bargaining agreements. Management *still* possesses all power that has not been expressly or perhaps implicitly restricted by agreements. *The power of an employer, then, is analogized to a state, having all powers not expressly restricted in the state's constitution.* Moreover, management would prefer that these restrictions be narrowly interpreted and limited to the express terms of the written agreement. [emphasis in original]

Who can quarrel with "Genesis"? All the above are based on what Klare appropriately entitles as "Labour Law as Ideology: Toward a New Historiography of Collective Bargaining Law":[110]

> … The legislative analogy, with an accent on "industrial self-government" rather than "industrial democracy," contains the premise that the workplace is not a forum for workers to express themselves and to realize their creative potential and capacity for self-governance, either in work or in collective labor struggle. Rather the workplace is above all a place that must be *governed*. In short, the core theoretical function of the legislative analogy is to justify the necessity of hierarchical government of modern industrial operations through a command structure embodied in a system of rules. [emphasis in original, citations omitted]

Does the Canadian industrial jurisprudence differ from that of the U.S. as we found in the preceding pages on Employers' Rights and Workplace Organizing? Professor Patrick Macklem's extensive analyses and evaluation of case law in Canada[111] has found that the five assumptions of the theory of labour adjudication in the U.S. established by Atleson virtually dominate Canadian jurisprudence, too.

Employers prohibit workplace organizing on two grounds, namely "property right" and "managerial rights". These two rights have an air of naturalness and necessity while employees' right to organize is treated to be an unnatural and unjustifiable infringement of the employer's proprietary and managerial rights. Employers' private property rights are the norm, employees' statutory rights are the exception. The organizing rights of employees end at the plant gate. Non-employee union organizers enter onto an employer's private property only in the rarest of cases. This minimal intrusion on private property rights implies that labour boards are, in effect, guided by a presumption against legislative encroachment on private property.

As we found in American jurisprudence, the ghosts of common law barriers and impediments have haunted the workplace, and penetrated labour relations boards, courts and arbitrators, in spite of legislative changes. Balancing rhetoric, in this context, gives an appearance of even-handedness and fairness that serves to conceal inarticulate ideological premises adopted in the reasoning process. Macklem is in tune with Klare on the concept of "labor law as an ideology".

[109] Supra note 105 at p. 122
[110] Supra note 43 at p. 460
[111] Patrick Macklem. " Property, Status, and Workplace Organizing" (1990) 40 U.T.L.J. 74

> That the law fails to justify the invocation of property rights in this area indicates that it continues partially to embody and partially to operate under an absolutist conception of property, which in turn can be situated within a certain political vision of the individual, the market, and the state. As stated, this vision imagines individuals as free and equal, the market as the primary coordinator of the production and distribution of goods, services, and wealth, and the state as a facilitative mechanism to ensure those ends. *Bound up with this world-view is the idea that collective activity is illegitimate. The illegitimacy of collective action* — an idea that is often imagined to have been discarded with the emergence of collective bargaining regimes — ultimately grounds the failure to justify the rule that an employer is able to evict non-employees from his or her premises. The rule's presence is a remnant of the nineteenth-century conception of property; its invocation, absent further justification, is coherent only in the context of a world-view that imagines property protection as absolute. *The failure to justify its presence in the face of the relativization of property demonstrates that the law continues to reflect and reinforce the idea that collective activity is per se illegitimate*.[112] [emphasis added]

In Canada, Bora Laskin, an academic scholar and an eminent arbitrator (before becoming the Chief Justice of the Supreme Court of Canada), argued against the doctrine of employers' "reserved rights", which are also known as "prior right" and "residual right". In Laskin's opinion, the common law suffered all of the disabilities of an ancient regime and hence it failed to recognize workers' interests and to adjust for them fairly.[113] He objected to the use of this doctrine as a method of interpretation. If a collective agreement did not expressly deal with a particular matter, such as subcontracting, is management entitled to take unilateral action with respect to that matter? Many arbitrators answered that question affirmatively; on the basis of the "rights" which it enjoyed at common law prior to the legislative approval and adaptation of free collective bargaining.

This method of collective agreement interpretation is, in Laskin's opinion, a backdoor strategy to breathe life into "common law" which has been nullified by industrial relations statutes. This strategy perpetuates the employers' mischiefs against the statutory rights of workers. It is worthwhile to quote at length his rejection of "reserved rights" doctrine. In the opinion of Beatty and Langille, the following most famous of passages from Laskin's writings, almost every aspect of his basic theory of law is forcefully put to work and passionately defended:[114]

> In this Board's view, it is a very superficial generalization to contend that a Collective Agreement must be read as limiting an employer's pre-collective bargaining prerogatives only to the extent expressly stipulated. Such a generalization ignores completely the climate of employer-employee relations under a Collective Agreement. *The change from individual to Collective Bargaining is a change in kind and not merely a difference in degree. The introduction of a Collective Bargaining regime involves the acceptance by the parties of assumptions which are entirely alien to an era of individual bargaining.* Hence any attempt to measure rights and duties in employer-employee relations by reference to pre-collective bargaining *standards is an attempt to re-enter a world which has ceased to exist. Just as the period of individual bargaining had its own 'common law' worked out empirically over*

[112] *Ibid*. at p. 99
[113] David Beatty, and Brian Langille. "Bora Laskin and Labour Law: From Vision to Legacy" (1985) 35 U.T.L.J. 672
[114] Ibid. at 700

> *many years, so does a Collective Bargaining regime have common law to be invoked to give consistency and meaning to the Collective Agreement on which it is based.* It would seem to be fundamental in a Collective Bargaining regime that, save as otherwise specifically provided, an employer cannot unilaterally shift from an incentive to an hourly rate on a particular job for which an incentive rate has been fixed. Otherwise there is little sense in a Collective Agreement which provides for incentive rates as does the Agreement involved in this case. If it depends on an employer's whim whether he will continue to pay incentive on a job for which incentive pay has been fixed what is the point in prescribing conditions for the taking of time studies and for the modification of time-studied rates in certain circumstance? [emphasis added]

The adjudicative bodies' exclusive focus on safeguarding employer speech from state incursion leaves society vulnerable to private censorship. There is a clear failure to examine the issue in any depth or discuss workers' speech rights during a unionization attempts. Estlund[115] argues that the workplace is an institution where citizens relate with their fellow citizens; form and exchange opinions about how the workplace is regulated; and gain experience with self-governance.

Estlund advances a theory in which the core domain of public discourse is surrounded by satellite domains of discourse within intermediate institutions such as the workplace.

What happens at the workplace has a long arm reaching into homes as well as society at large.[116] Just as the state has an affirmative obligation to protect the street corner speaker, the democratic state in the context of a union election has an affirmative obligation to prevent citizens — in this case, workers — from being silenced by private entities. The workplace is central to citizenship, identity, and community.

If state, legislature, administrative bodies and courts turn a blind eye to the silencing of workers' speech and to placing insurmountable barriers to exclude pro-union messages, these institutions become, willy-nilly, collaborators in aiding and abetting violations of freedom of speech and assembly in the workplace. If the state fails to intervene against such repression of workers' and unions' speech, then the rights enshrined in the Charter cease to be an instrument of democracy.

Under the *Canadian Charter of Rights and Freedoms*, even natural persons' enjoyment of these rights and freedoms are subject to Section 1 restrictions. Given that constitutional premise, any further claim by *persona ficta*, such as business corporations or governments, must be subjected to *Dunmore* and *Health Services* jurisprudence. The presumption should be against any expansion of such claim in order to prevent any hijacking of these rights by corporations, as has been occurring in the U.S. since 1886.

The following section is devoted to a comparative critique of corporate personhood and workplace organizing.

Corporate Personhood and Workplace Organizing

> The corporation's invocation of the first ten amendments symbolizes the transformation of our constitutional system from one of individual freedoms to one of organizational prerogatives. Regarded as America's most cherished palladium of personal liberties, the *Bill of Rights* was appended to the Constitution at the behest of Jefferson and inherited,

[115] Cynthia L. Estlund, "Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment" (1997) 75 Texas L.R. 687

[116] Andrias, *supra* note 81, at pp. 2461-2463

ideologically from political philosophers concerned with individual liberties: Locke, Rousseau, and Montesquieu. The use of these amendments by corporations raised extraordinary historical and political questions.[117]

Corporations acquired legal personhood at a time when all women, all Native Americans, and even most African American men were still denied the right to vote. And this was not an era of good feelings between the average person and corporations. It was the time of the robber barons, and the Supreme Court was filled with former railroad lawyers. It was the time of the Knights of Labor and the Populist movement. 1886 was the year of the Haymarket Massacre, the Great Southwestern Strike, and the next year the Pullman Strike. The people were struggling for real democracy and the wealthy ruling class did whatever it took to keep them down.[118]

American Corporate law ignores workers. They don't figure into the structure of the corporation or its legal duties. But there is no one group of people more identified with a corporation and more responsible for its day-to-day conduct than corporate workers.[119]

People can complain about the corporate culture at Enron, but that doesn't represent employee culture, the thousands of wonderful people who worked there.[120]

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence.[121]

The contentious part of the Fourteenth Amendment of 1868, as the formation of corporate personhood, is "… No state shall make or enforce any law which shall abridge the privileges or immunities of *citizens*; nor shall any state deprive *any person* of life, liberty, or property, without *due process of law*; nor deny to *any person* within its jurisdiction the *equal protection of the laws*." [my emphasis]

The birth of corporate personhood in the U.S. is a messy, crooked, least reasoned, and most unjurisprudential phenomenon.

In Europe, its origin is different in historical circumstance. There the church, being one of the oldest institutions, pre-political in one sense, acquired enormous property; at times church and the state overlapped. Instead of making abbots or heads of churches as owners, the state granted titles to religious institutions as corporate bodies. Later on the concept turned into "natural entity" and "person theory". Yet there is nothing "natural" or "personal" about it.

The English law took a different route. The breath of life doctrine is the formation for all institutional rights, privileges, and immunities; whether it is the East India Company or any other entity, given

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[117] Carl Mayer, "Personalizing the Impersonal: Corporations and the Bill of Rights" (1990) 41 Hastings LJ 577 at 578

[118] Molly Morgan and Jan Edwards "Abolish Corporate Personhood" (2002) 59 Guild Prac. 209

[119] Mitchell, Lawrence E. *Corporate Irresponsibility: America's Newest Export* (New Haven & London: Yale University Press, 2001); as quoted in Dalia Tsuk, "Corporations without Labor: The Politics of Progressive Corporate Law " (2003)151 U. Pa. L. Rev. 1861

[120] Kurt Eichenwald "Audacious Climb to Success Ended in a Dizzying Plunge" *New York Times* (January 13, 2002) at A1, quoting former Enron employee Lara Leibman; as quoted in Dalia Tsuk, "Corporations without Labor: The Politics of Progressive Corporate Law " (2003)151 U. Pa. L. Rev. 1861

[121] *Trustees of Dartmouth College v. Woodward,* 17 US 518. 4 L.Ed. 629 (1819). 4 Id.. 17 US per Chief Justice John Marshall at 636.

the supremacy of Parliament, it is the state which breathes life into these entities. The presumption of English jurisprudence is that the state may be a late comer, but the creatures of the state cannot assert constitutional rights against their creator who breathed life into them.[122]

I have already discussed briefly the reasons for the exclusion of property rights from the *Charter*. The following critique deals with the "corporate person's" ownership of enormous property and its impact on socio-economic reform, public policy, natural persons' loss of control over public domain and corporate persons' encroachment on natural persons' rights and freedoms.

Let me begin with a description of the most anomalous, complex, and inherently contradictory historical circumstances under which corporations were granted personhood. Corporations jumped the human queue waiting to acquire personhood and citizenship. As indicated at the beginning of this section, "corporations acquired legal personhood at a time when *all women, all Native Americans*, and even *most African American men* were still denied the right to vote.[123]

The word "Corporation" does not appear anywhere in the constitution, not because it was unknown to constitution makers but because they knew for-profit corporations like the Hudson Bay Company and the British East India Company were tools of imperial powers established to exploit the "New World". That accounts for the absence of the word corporation in the constitution.

The U.S. Constitution mentions only two entities, "We the People and the Government". In 1787 "We the People" had to be an adult male with white skin and a certain amount of property, including human property (slaves); white women were not citizens; the "one drop of blood doctrine" was strictly enforced; that is a single drop of non-white blood in a person, makes that person non-white. For census purposes, a black person was counted as three-fifth of a person. (I am not sure whether a black woman falls under one-third count, or zero.) Natives were not counted. A corporation is not he or she but merely an it, but that "it" had constitutional recognition far ahead of ninety percent of human beings. In 1787 "We the People" constituted only ten percent of the population. That is an ironic part of American His-Story.[124]

The *Santa Clara*[125] case itself was not about corporate personhood; it was about taxation. There was no ruling specifically on the question of corporation personhood. Prior to this case, the case law was against granting personhood to corporations. But *Santa Clara* subsequently was cited as precedent for holding that a corporation was a "natural person". How and why did it happen?

Prior to the delivery of its decision, the following statement is attributed to Chief Justice Waite: "*The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution*, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, *applies to these corporations. We are all of the opinion that it does*." [emphasis added][126]

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[122] Patricia H. Werhane. *Persons, Rights, and. Corporations* (Englewood Cliffs: Prentice-Hall Inc., 1985); Lawrence C. Becker, *Property Rights, Philosophic Foundations* (London: Routledge and Kegan Paul, 1980); Morgan and Edwards, *supra* note 119; Steven Gereneser, "The Corporate Person and Democratic Politics" (2005) 58 Political Research Quarterly 625; Mayer, *supra* at 118; Hammerstrom, Doug. "The Hijacking of the Fourteenth Amendment" (2002) online www.reclaimdemocracy.org <http://www.reclaimdemocracy.org/personhood/fourteenth_amendment_hammerstrom.pdf>; William Patton and Randall Bartlett. "Corporate 'Persons' and Freedom of Speech: The Political Impact of Legal Mythology" (1981) Wis. L. Rev. 494

[123] *Supra* note 118

[124] *Supra* note 118

[125] *Santa Clara County v. Southern Pacific Railroad Company*, 118 U.S. 394 (1886)

[126] As quoted in Morgan and Edwards, *supra* note 118

Doug Hammerstrom, an attorney at law, in his brief but insightful paper, entitled "The Hijacking of the Fourteenth Amendment",[127] says that the above statement is suspect because the issue was argued. But the case was decided on other grounds and the court directly declined to decide the Constitutional question. Is the statement "we are all of the opinion that it does" off the record *abiter dictum*? It does appear to be so but yet becomes an established precedent for corporate personhood.

On the one hand, while willy-nilly, the judiciary grants "unprecedented precedent" of corporate personhood, on the other hand, the Executive Branch of the U.S.A., Lincoln's successor, Andrew Johnson vetoed the *Civil Rights Act* of 1866, on the grounds, that "it was not proper to make our entire colored population … citizens of the United States.[128]

The following is evidence for how corporate personhood submerges social welfare public policies and downgrades or negates a natural person's basic freedoms.[129]

From the 1905 *Lochner*[130] decision until the middle of the 1930s, the court invalidated approximately two hundred economic regulations. Many of the challenges were brought by corporate plaintiffs. Most decisions centered on labor legislation, the regulation of prices, and restrictions on entry into businesses.[131]

When the court applied the Fourteenth Amendment during the first 50 years after *Santa Clara* less than one-half of one percent invoked it in protection of Black Americans (slavery was abolished in the U.S. in 1865), and more than fifty percent asked that its benefit be extended to corporations. For the period 1889 to 1918, attacks on state statutes that were made, 422 cases involving state police power and regulation of corporations; only 14 cases involved the general rights and liberties of natural persons.[132]

While the business press heralded the Supreme Court's rulings in favour of business corporations based on substantive due process, it simply ignored natural persons in whose interest the *Bill of Rights* came into existence to begin with.

The origin and evolution of the corporation and its personhood is a classic example of idolatry and human alienation and subordination. It is a human being who thinks, conceptualizes, designs, and crafts an idol. Therefore, the idol is an embodiment of that thinking resulting in the production of the idol. Gradually the idol appears to acquire superhuman power over its human creator. From thereon the creator becomes a mere creature, and the creature becomes an omnipotent creator. Subject becomes object and object becomes subject. Means becomes end and end becomes means. There is a displacement of goals. At that point a split occurs between human essence and human existence.

This is what has happened between corporation and its personhood on the one hand (means), and the human beings (the end) on the other hand. What Kant[133] thought cannot happen, in fact, has happened with the advent of corporate personhood: A person cannot be a property and at the same time be a thing which can be owned, for it is impossible to be a person and a thing at the same time, the proprietor and the property. Property has become a person; person has become a commodity or a thing.

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[127] *Supra* note 123
[128] *Supra* note 123 at p. 1
[129] *Supra* note 118 at p. 589
[130] *Lochner v. New York*, 198 U.S. 45 (1905)
[131] Tsuk, *supra* 119
[132] Mayer, *supra* note 118
[133] Kant, Immanuel (translated by H.J. Paton). *Groundwork of the Metaphysic of Morals* (New York: Harper Torchbooks, 1958)

But in the case of a corporation, the state is the creator of corporate idolatry. The state is also the sustainer, propagator, and worshipper of this system of idolatry. Finally, this creator becomes a creature in the hands of the corporate oligarchical shrine.

In Steven Gereneser's opinion,[134] the court may recognize a corporation, association, union or individual, all formally as persons, but in doing so, it breaks one of the oldest injunctions of justice by treating unequals as equals, and in that sense, it undermines the deliberative ideals it seems to affirm.

The discourse ethics lie behind the democratic deliberation, where Seyla Benhabib recognized that a theory of democracy, as opposed to a general moral theory, would have to be concerned *with questions of institutional specifications and practical feasibility*.[135] If there is an agreement on norms, procedures, consequences of deliberation for the participants, then such a deliberation should be *governed by norms of equality and symmetry; all have the same chances to initiate speech acts, to question, to interrogate, and to open debate*.[136]

In a labour relations context, none of these norms is applicable; the workplace is well known for inequality and asymmetry; employers abhor deliberation; top-down monologue is their specialized communication method. Given these institutional specifications, practical feasibility is a categorical impossibility.

Below are the reasons Patton and Bartlett's Critique on Artificial Entity Theory is concerned with political equality, power and the character of deliberation:[137]

1. Capital in unprecedented amounts is brought within the effective control of a single managerial entity, and the scope of a "firm" explodes beyond all of the boundaries, limiting an entrepreneurial organization or a small business. A corporation in large measure is a product of governmental action — both legislative and judicial.
2. This creation of large economic organizations in the form of corporations inevitably results in a redistribution of real political power. This redistribution is ultimately traceable to the state.
3. This inequality has been ensured and enhanced by the political system through freedom of contract, professional-managerial control of property without ownership, and through the added myth of corporate personhood.
4. "The right to speak can apply to corporations only if the myth of their 'personness' is accepted as a reality. But corporations as such do not speak or think or have ideas. Natural persons alone engage in these activities"

Professor Daniel Greenwood, in his excellent and most comprehensive study (1998), entitled "Essential Speech: Why Corporate Speech Is Not Free",[138] raised the following fundamental socio-economic and political issues as a matter of legitimacy:

> In a democracy, the citizens are the only legitimate source of law. It follows inexorably that *corporations, not being citizens, cannot be legitimate political actors*. Like the

[134] *Supra* note 122 at p.630
[135] Seyla Benhabib, "Toward a Deliberative Model of Democratic Legitimacy" in Seyla Benhabib (ed) Democracy and Differences (Princton: Princeton University Press, 1996), at p. 70
[136] *Ibid*. at p. 71
[137] *Supra* note 122 at pp. 496-498
[138] Daniel Greenwood, "Essential Speech: Why Corporate Speech is Not Free." (1998) 83 Iowa Law Review 1

> government itself, corporations are mere tools of citizenry, political objects rather than political subjects, to be given just as much respect as the citizens deem useful and no more. To grant a tool a right against the citizens who use it is a *form of political idolatry* that ought to be abhorrent to any democratic regime. *Rights are for people, not for their instruments* [citations omitted; emphasis added][139]

Does freedom of speech include freedom from a speech, irrespective of corporate personhood? Michael Taylor gives an affirmative answer in his comment, under an intellectually provocative title, "'I'll Defend To The Death Your Right To Say It… But Not To Me' — The Captive Audience Corollary To The First Amendment."[140]

He argues that the autonomy of thought of listeners is restricted by the act of forced listening. There is no right to press even 'good' ideas upon an unwilling captive. To require tuning out or ignoring a given communication may itself be an invasion of autonomy. It may be impossible for tuning out in a workplace situation. Compulsion by command of employers is an economic compulsion. "A listener has a right to not be exposed to an unwanted message in circumstances in which the message may not be avoided without the imposition of an *undue burden upon the listener* [emphasis added]"[141] *which may include loss of one's employment*. Freedom from speech is a corollary of freedom of speech:

> "*A listener has a right to avoid any message that he does not wish to hear. He may not be forced to listen to a message when he has no reasonable means of escaping it. The government has an interest in protecting the rights of the listener not to receive an unwanted message.* The government, in protecting that right, may not shield the captive from initial unwanted communications except in those circumstances where the speaker has an opportunity to present the message to the same listener in circumstances affording the listener an escape from the message if he so desires."[142] [emphasis added]

On the basis of the preceding analyses on corporate personhood, I reach the following conclusion. Any policy or adjudicatory decision should be rigorously subject to the principles of totality of context and any conduct within that totality. For our purpose here, contextualization includes time, place, historical background, nature of the speaker, type of ideas (e.g. packaged ideas by a management communication expert), power relationship between the speaker and the audience, character and the environment of the forum itself (such as town hall meetings; a workplace captive audience where employees are paid to listen). "A word is not crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content, according to the circumstances and time in which it is used."[143] Contents, forum, form etc. are inseparable; these variables contaminate one another.

Authoritarianism oozes out of every nook and cranny of the workplace. This authoritarian ambience co-exists with the powerlessness of the employees. This workplace forum stands testimony to the triumph of superior power rather than triumph of reason, facts, truth, and enlightenment. The ghost of corporate personhood haunts that place. Industrial pluralism is a misnomer from the perspective of most employers; they are presumptively monists.

My evaluations and conclusions throughout this paper fall under the *Critical Model*, with some

[139] *Ibid.*, at p.1
[140] *Supra* note 68
[141] *Ibid.*, at p. 220
[142] *Ibid.,* at p. 225
[143] Stanley Ingber, "The Marketplace of Ideas: A Legitimizing Myth" (1984) 1 Duke L.J. 1.

overlapping with the *Pluralist Model*. See Appendix, Chart II, which is a chronological extension of Chart I, describing how managerial ideologies impact industrial relations.

The reason for my limited overlapping of the Critical with the Pluralist Model is not because of any deficiency in its theoretical sophistication, but because of the development of a very powerful ideology of managerialism which hijacked pluralism itself and co-opted and submerged it beyond recognition. Also, there are varieties of pluralism in a spectrum from conservatism to radicalism.[144]

For these reasons, I am in full agreement with the following thesis established by Alan Fox, in his classic work, *Beyond Contract: Work, Power and Trust Relations*:[145]

> *Despite the continued rejection by many employers and managers of pluralist notions and values*, it is not difficult to argue that the *propagation of such an ideology represents, in the context of modern business, a high point in sophisticated 'managerialism', in the sense that it serves managerial interests and goals whether pluralists themselves identify with those interests and goals or not*. Admittedly it urges the full acceptance by managers of rival focuses of authority, leadership, and claims to subordinate loyalty. It recommends the limited sharing of some rule-making and decision-taking. It deprives managers of all theoretical justification for asserting total prerogative. *Yet the outcome of these concessions is visualized, not as the weakening of managerial rule as we now understand it, but as its strengthening and consolidation*. … Certainly *support for pluralism can spring from other values* as well, such as those underlying the notion of self-determination by self-defining interest groups. Nevertheless the pluralist position remains open to the interpretation of being *no more, or no less, than sophisticated managerialism*, … *contained within a regulative framework*. [emphasis added]

[144] David Nichols. *Three Varieties of Pluralism*. (London: The Macmillan Press, 1974); Robert Paul Wolff, Barrington Moore, Jr., and Herbert Marcuse. *A Critique of Pure Tolerance* (Boston: Beacon. Press, 1969)
[145] *Supra* note 23 at pp.280-1

Section IV
Conclusion:
Are Bill 6 Section 11(1)(a) Amendments Constitutional?

"It is important to remember what a corporation is to understand the implications of corporate personhood for democracy. A corporation is not a real thing; it's a legal fiction, an abstraction. You can't see or hear or touch or smell a corporation — it's just an idea that people agree to and put into writing. Because legal personhood has been conferred upon an abstraction that can be redefined at will under the law, corporations have become superhumans in our world. A corporation can live forever. It can change its identity in a day. It can cut off parts of itself — even its head — and actually function better than before. It can also cut off parts of itself and from those parts grow new selves. It can own others of its own kind and it can merge with others of its own kind. It doesn't need fresh air to breathe or clean water to drink or safe food to eat. It doesn't fear illness or death. It can have simultaneous residence in many different nations. It's not male, female, or even transgendered. Without giving birth it can create children and even parents. If it's found guilty of a crime, it cannot go to prison."[146]

"But however widespread the acceptance of the master institutions of the society, there remains from the power-holders' point of view, *a never-ending need* for what might be called "*fine tuning*." … only the margins of power are needed to cope with marginal adjustments. This, then, is what accounts for the *illusion of power balance. Labour often has to marshal all its resources* to fight on these marginal adjustments; capital can, as it were, *fight with one hand behind its back and still achieve* in most situations a verdict that it finds tolerable." [emphasis added][147]

"That Norris [ed: Saskatchewan Minister of Labour] and company choose to conduct themselves in this manner suggests a certain *deliberateness in his actions* — a desire to send out a message to the unions as to who the new boss in Saskatchewan … Despite all its pre-election rhetoric about being a true "Saskatchewan" party that wouldn't be beholden to the business lobby, *it's apparent the government is not only pushing the pendulum in labour relations to the right, but also anchoring it there* … Virtually every option the government has taken on the labour front of late has been punitive — *a deliberate attempt to ensure that the pendulum remains on business's side*."[148]

"Our faith calls us to measure this economy, not only by what it produces but also by

[146] *Supra* note 119 ar 213

[147] *Supra* note 146 at pp.278-9

[148] Murray Mandryk, "Rough handling of labour issues." *The Regina Leader Post* (March 11, 2008) B6; online *www.canada.com* <http://www.canada.com/reginaleaderpost/news/viewpoints/story.html?id=72d87830-169a-48ce-9bc5-86047fba38e7>

> how it touches human life and whether it protects or undermines the dignity of the human person.… Economic decisions have human consequences and moral content; they help or hurt people, strengthen or weaken family life, advance or diminish the quality of justice in our land.
>
> […]
>
> The way power is distributed in a free market economy frequently gives employers greater bargaining power than the employees in the negotiation of labour contracts… The church fully supports the right of workers to form unions or other associations to secure their rights to fair wages and working conditions… No one may deny the right to organize without attacking human dignity itself." [citations omitted][149]

The above lengthy prelude of quotes is to inform the readers the constitutive elements of the general frame of reference used in this section. Further, my concluding evaluation of the labour law policy changes are based on the specific criteria I have identified at the beginning of this paper, under the subtitle "Contextualization of Policy Changes Evaluation".

Bill 5, *The Saskatchewan Public Service Essential Services Act*, S.S. 2008, c. P-42.2 suffers from over breadth in scope and the amendment added by Bill 6, *The Saskatchewan Trade Union Amendment Act*, 2007, S.S. 2008, c.26 to s. 11(1)(a) of the TUA suffers from vagueness by using the blanket expression, "nothing in this Act precludes" to employer freedom of speech.[150] Both of these Acts increase the powers of employers and concurrently decrease and/or eliminate hitherto existing rights of employees. Abstraction, decontextualization and arguments through analogies resulting in absurdity are the dubious hallmarks of these labour law changes.

Conclusive labels, such as "democratizing workplace", "balancing", "rebalancing powers", Bill 5 "stand behind essential services", "a healthier balance", Bill 6 "Consistent with the democratic ethos of Saskatchewan", do not enlighten anybody.[151] Simply glorifying labeling is not a valid substitute for the three basic requirements of sound public policy formulation, namely, the analytical dimension, the normative dimension and the pragmatic dimension.[152]

The analytical dimension of policy examines parts and from there to the whole; from the particular to the general. Policy reform should articulate explicit objectives and follow a clear model of the employment relationship, such that the policy reform is logically consistent with these objectives and the model. The government did not do much in this area. No background empirical study was done in terms of problem identification and definition and identification of various alternative policy choices.

The normative dimensions of policy deal with objectives of the policy reform in terms of desirability, necessity, urgency and practicality. Among others, norms of efficiency, equity and voice are

[149] National Conference of Catholic Bishops in the U.S. "Economic Justice For All: A Pastoral Letter" (1986) online *www.osjspm.org* <http://www.osjspm.org/economic_justice_for_all.aspx>
[150] *Supra* note 81
[151] See i.e. Mandryk, *supra* note 149; Murray Mandryk, "Sask. Party: mixed messages on ideology." *The Regina Leader Post* (June 20, 2009) B6; Murray Mandryk, "Rough handling of labour issues." *The Regina Leader Post* (March 11, 2008) B6; Murray Mandryk, "Rigid walls of partisanship divide this old House." *The Regina Leader Post* (June 19, 2009) B6; Murray Mandryk, "Firmly in the driving seat." *The Regina Leader Post* (May 16, 2008) B10; Murray Mandryk, "Premier needs to drop angry act." *The Regina Leader Post* (May 10, 2008) B6; Murray Mandryk, "New law catches unions off balance." *The Regina Leader Post* (February 27, 2009) B6; Murray Mandryk, "Making hard work of labour changes." *The Regina Leader Post* (March 18, 2008) B6; Murray Mandryk, "Cronyism can come with a price." *The Regina Leader Post* (March 8, 2008) B6
[152] *Supra* note 135; John W. Budd, "Fairness at Work, and Maybe Efficiency But Not Voice: An Evaluation of The Arthurs' Commission Report" (2008) 29 *Comparative Labour Law & Policy Journal* 475

important. Equity involves fairness, justice and security. The voice dimension of norm refers to ensuring participatory democratic discourse of all interested parties in an open forum where there is full play of discussion, debate, dialogue, and meaningful input into the policy decisions, individually and collectively. Here norms of equity and voice qualify the efficiency norm. The Saskatchewan Government has done an extremely poor job of justifying amendments to Bills 5 and 6 on the grounds of necessity, equity and voice.

This Government has been found to be highly allergic to matters of procedure. It flatly denied unions' suggestion for an open forum of legislative committee to receive and discuss labour law changes. The deliberative model of democratic procedure and its legitimacy has been under valued in labour law changes.[153]

Given the failure of the government in the analytical and normative dimensions of policy making, there is no need for me to discuss the third dimension which is only a derivative of the first two.

Mandryk in his commentary, "Firmly in driving seat"[154] has observed that two major pieces of labour legislation were not subject to an internal party-caucus legislative review process and were communicated extremely badly. He also identified another flaw:

> "At issue is a government that surely has personality flaws — flaws that very well might be the extension of key personalities of those running this government. Individually and collectively, this is a government quickly becoming *known for its impatience with process and details*. It's also been *stubbornly uncompromising, overly political, cliché-ishly insular in its thought process and occasionally disrespectfully arrogant*." [emphasis added]

Also it is worth noting here, an observation in which appeared in the *Leader Post* (In Brief May 2, 2009, C-9):155

> This government has been willing to change its mind on what could be called administrative details. *But when the Saskatchewan Party's core philosophy is involved, it digs in its heels — note its complete deafness to claims that its labour law changes are unnecessary and excessive*." [emphasis added]

The following findings which pervade throughout this paper and are worth repeating in the conclusion: Procedural inadequacy of democratic discourse; substantive deficiencies based on faulty premises; ideological unrelentingness and tunnel vision preventing the emergence of a consensus equilibrium based on fairness and equity; a priori decisions begging for justifications; absolute faith in invisible hands resulting in total blindness to the mischief of visible hands in the marketplace; and swearing by Adam Smith's *Wealth of Nations*[156] but totally ignoring his *Theory of Moral Sentiments*.[157]

Now, I move on to the constitutional aspect of the Saskatchewan labour law changes. The basic question here is: how does judicial deference to legislative functions operate? On what grounds does the judiciary deny deference to the legislature?

In *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989 Justices Iacobucci and Cory observed that "labour relations law is typically an area in which courts have shown the legislature a degree of deference, owing to the complexity

[153] *Supra* notes 149 and 152; Trevor Newell, "CUPE Wants hearings." *The Regina Leader Post* (March 7, 2008) D2
[154] *Supra* note 152
[155] Leader Post Staff. "Listening to what voters are saying." *The Regina Leader Post* (May 2, 2009) C9
[156] Smith, Adam, and Campbell, R. H., Skinner, Andrew S. and Todd, W.B. (eds). *An inquiry into the nature and causes of the wealth of nations* (New York: Clarendon Press, Oxford University Press, 1976)
[157] *Supra* note 104

and delicacy of the balance sought to be struck by legislation among the interests of labour, management, and the public" (at para. 126). They have also cautioned that this deference was not an invitation to abandon constitutional analysis. The extent to which deference is appropriate is to be determined in context, taking into account the following four factors (para. 127):

1. The role of the legislature in striking a balance between the interests of competing groups, as distinct from the situation where the legislature is the "singular antagonist" of the individual whose *Charter* freedoms have been infringed;
2. The vulnerability of the group that the legislature seeks to protect, and that group's subjective fears and apprehensions of harm;
3. The inability to measure scientifically a particular harm in question or the efficaciousness of a remedy; and
4. The low social value of the activity suppressed by the legislation.

The new Trilogy (*Delisle*, *Advance Cutting*, and *Dunmore*) started the declining trend in deference to the constitutional interpretation of other branches of government. Fundamental freedoms (s.2), legal rights (ss.7 to 14), and equality rights (s.15), have become the bone of contention.

Saskatchewan labour law changes did not meet the above four evaluating constitutional test criteria. The government conduct did not appear to be striking a balance between the interests of competing groups. The changes were initiated from the employer side.

Unions' and employees' freedoms have been infringed and employers' freedom enhanced; in that sense the legislature conduct was singularly antagonist toward the former.

Employers were in no way a vulnerable group deserving the legislature's protection. There was no evidence of any fear and apprehensions of harm on the part of employers. In the absence of a valid empirical finding of imminent harm, determining the efficaciousness of any remedy is a wild-goose chase. Such a quest is analogous to an a priori conjecture looking for a problem.

The fourth factor, "Social value of the activity suppressed", has a flip side to it. When some activity is discouraged for the purpose of encouraging or enhancing some other activity, the matter requires a comparative analysis of encouragement and discouragement to determine the magnitude of the social value. In this labour law context, there is a clear conflict of interests and rights among employers, employees and unions, and the public at large, bearing in mind that labour also is part of the public. Whose interests and rights are promoted at whose cost? And on what evidence and justifications: socio-economic, ethical, legal or ideological? What is the social value of suppressing unions' ability to organize workers? Wouldn't there be an overall increase in social value if the law were amended to encourage unionization?

There is one aspect worth repeating again. The highest number of employer unfair labour practices in the shortest period of time occurs during union organizing drives. Employers conduct at this time includes the strategy of firing a couple of supervisors as a warning shot to employees. Employees' fears and apprehensions of harm, including being fired, are at their peak given this environment of hostility. Employees are also at their highest level of vulnerability. Time is on the employer's side and dead against employees and organizers. Bills 5 and 6 changes, willy-nilly, provide the employer with a double-barrel gun — freedom of speech enhancement at critical organizing moments and mandatory requirement of certification elections — with a lot of ammunition, resulting in practically an open hunting season on unions. (Tilted labour

laws and a slanted Labour Relations Board open Saskatchewan up for deunionization.)[158]

My critique, taken together, leads me to conclude that Bill 6 amendments to S.11(1)(a) are in violation of sections 2(b), 2(c), 2(d) of the *Charter*. Also, I contend that these changes are not saved by the constitutional test under Section 1.[159]

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it *subject only* to such *reasonable limits prescribed by law* as can be *demonstrably justified in a free and democratic society*.

The following is an account of the requirements to obtain constitutional validity, that is,

1. Limits must be *reasonable*
2. Limits must be *prescribed by law*
3. As can be *demonstrably justified*
4. In a *free and democratic society*.

1. "*Reasonable limits*": This phrase imports an objective validity. The judges, on the basis of the powers conferred upon them in s.24(1), will determine whether a limit as found in legislation is reasonable or not. The question involved is *whether there is a rational basis for the limit imposed*. Criterion 1 is qualified by criterion 4. The concept of reasonableness is to be understood as being "reasonable" in a "free and democratic society".

A caution is necessary here. Rationality and reasonableness are not coterminous. The former is a high level abstraction. Reasonableness is concretized and contextualized rationality as an intersubjectivist notion. In an industrial relations context, subordination of rationality to "the reasonable" is necessary. Further, reasonableness is fundamental to the need to follow the criteria of an overlapping consensus in a pluralistic system. Ideas of *good* are correlated to rationality but ideas of *right* are correlated to reasonability. *This is part of public reasoning where focus on reasonability as the reconciliation to the social institutions*.

The duty of civility is reasonability involving willingness to listen to others and fairness to accommodate others views. Criteria of reciprocity require fair terms of co-operation.[160]

In labour relations this concept of reasonableness is a fundamental requirement.

The first requirement under s.1 contains the following proportionality test:

The means chosen to further the *pressing and substantial objective* must be proportionate in that

a) they are rationally connected to the objective;
b) they impair the right or freedom no more than is necessary to accomplish the objective; and
c) there is proportionality between the salutary and deleterious effects of the law.

The burden of persuasion with respect to those matters is on the party seeking to uphold the limit.

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[158] *Supra* notes 59, 60, 71, 80 and 82; Saskatchewan Federation of Labour. Brief to Minister Norris: Bill 5 and Bill 6 (Feb 15, 2008) online www.sfl.sk.ca <*http://www.sfl.sk.ca/pdfs/Bill%205%20and%206%20brief.pdf*>; Fenwick, Kevin. *Hearing Back: Piecing Together Timeliness in Saskatchewan's Administrative Tribunals* (December, 2007) Online www.ombudsman.sk.ca <*http://www.ombudsman.sk.ca/uploads/document/files/hearing-back-en.pdf*>; Cameron, Dan. "Big flaws built into essential services law." *The Regina Leader Post* (Jan 29, 2009)

[159] Muthu, S. *Freedom of Association and the Right to Strike: Industrial Relations Implications of the Charter,* unpublished, 1986

[160] Richard Cyert and James March. *Behavioral Theory of the Firm* (Oxford: Blackwell, 1963); Donald C. Langevoort, "Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stockmarket Investors and Cause Other Social Harms" (1997) 146 University of Pennsylvania Law Review 101; James G. March, "Bounded Rationality, ambiguity, and engineering of choice." (1978) 4 Bell Journal of Economics 587; Michael D. Cohen and James G. March and Johan P. Olsen. "A Garbage Can Model of Organizational Choice" (1972) 17 Administrative Science Quarterly 1; John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971)

The proportionality issues are neither brought out explicitly or in sufficient details in any written research papers, nor in the legislative debate speech by the Labour Minister. Is the objective a pressing one? Is it a substantial one? Is the objective of sufficient importance to warrant overriding a constitutionally protected freedom? Is there an imminent danger lurking around the corner in the labour relations domain?

2. "*Prescribed by law*": The limitation laid down must be through some rule of law in a positive fashion but not by mere implication. The expression "prescribed by law" covers not only statute but also unwritten law (common law). These laws must meet two conditions. First, the law must be adequately accessible. Secondly, a norm cannot be regarded as a "law" unless it is formulated with *sufficient precision* to enable citizens to regulate their conduct.

With the exceptions I have identified at the beginning of this section, namely a certain vagueness, overbreadthness, meaningless abstractions and decontextualization of substantive matters in labour relations, the government has basically met this requirement under S.1.

3. "*As can be demonstrably justified*": The cornerstone of this phrase is in the word "*justified*". The legal use of the word "justify" is to "show or maintain sufficient reason"; to show or maintain "the justice or reasonableness". It also connotes "adequate".

It is not a simple justification. *It must be "demonstrably justified*. Justification must be "evident", "proved clearly and conclusively". The standard of persuasion to be applied by the Court is a high one, if the limitation in issue is to be upheld as valid.

Our constitutional history has a bearing on the special meaning of these criteria. The original proposal contained the phrase "limits generally accepted". Because of the vagueness in this expression, "demonstrably justified" was substituted. *The standard to be applied is not "generally accepted limits" or "reasonably justified limits" but "reasonable limit demonstrably justified".*

The constitutional imperative is the cornerstone of our parliamentary democracy under the *Charter*. The burden of proof required from decision makers is high.

Did the government of Saskatchewan meet the third requirement under s.1? The answer is no. This requirement is predominantly based on procedural requirements with which this government has been found to be allergic.

4. "*In a free and democratic society*": This phrase imports *particularistic as well as universalistic standards*. Canada itself is a free and democratic society. It has developed its own standards and practices over a period of time in tune with the relevant societal facts and forces peculiar to it. The court may give due consideration to these particularistic factors in interpreting the *Charter*.

But it is arguable that the court *must* decide what is a reasonable limit demonstrably justifiable in a free and democratic society *solely by reference* to Canadian society and by the application of principles of political science. The phrase used is "a free and democratic society". From this it can be asserted that, at least in regard to fundamental freedoms, democratic rights, some of the mobility rights, the legal rights, and equality rights, what is to be examined is *not limited* to the free and democratic society which we know and have known in *Canada* and that the *court is at liberty, and even required, to look at what is done in other free and democratic societies*. *The court is bound to take judicial notice of international and comparative jurisprudence in Charter adjudication.*

Hitherto the governments of Canada, in the matters of the signed international covenants and conventions on labour relations, have frequently violated the rules of international law. Pleading virtually a "permanent exceptionalism"

from these commitments is glaringly at variance with Canada's claims as a respecter and promoter of human rights.

This issue has regained a significant recognition in *Health Services*. The Supreme Court has extensively relied (para 69 to 79 inclusive) on I.L.O. Convention 87 and on the International Covenant on Economic, Social, and Cultural Rights, in determining the content of the fundamental freedoms under s.2. (b), (c) and (d). With this explicit juristic reliance on these principles of international labour laws and human rights by the Supreme Court of Canada, not only Section 11 rights have undergone internationalization, but also have culminated into constitutionalization and charterization. Consequently, workers freedom of association and their concerted and solidaristic activities have acquired the status of human rights in Canada.

The *Charter* values and the values of the above instruments, with Canada being a signatory, coincide as human rights. Therefore, the governments in Canada are equally bound by the constitutional as well as the international law and for the same reason the adjudicative bodies have jurisdiction to enforce them strictly.

The following are the reasons for strict enforcement: If there is a categorical necessity to claim exemption from the law, either that claimant-Government must meet S.1 conditions, and if that were to be impossible, then political etiquette requires that the Government should opt for S.33 — not-withstanding-clause. To conveniently ignore either of these options and the Government to go ahead and do as it pleases, such a conduct is dictatorial, unjust, as well as unconstitutional.

The limit imposed by law must be no more extensive than can be demonstrably justified in a free and democratic society, not only in a particular frame of reference but also in a universalistic standard depending upon the issue in dispute.

Requirements 1 and 3 overlap with 4 in Section 1 analysis. The failure to meet the requirements of 1 and 3 produces a contaminating effect in meeting the requirements of 4 which demand law makers to take notice of jurisprudential developments in other democratic countries, as well as the well established and accepted international laws and conventions.

This omission has occurred in spite of the fact that in *Health Services*, the Supreme Court has not only overruled the old trilogy of 1987, but also made a new breakthrough in constitutional law jurisprudence in 2007. One wonders whether Bill 5 and Bill 6 have undergone a thorough *Charter* check.

The following observation made by the Supreme Court in *Health Services* is worth noting in this context (at para. 157):

> Legislators are not bound to consult with affected parties before passing legislation. *On the other hand, it may be useful to consider, in the course of the S.1 justification analysis, whether the government considered other options or engaged consultation with the affected parties, in choosing to adopt its preferred approach. The court has looked at pre-legislative considerations in the past in the context of minimal impairment.* This is simply evidence going to whether other options, in a range of possible options, were explored. [emphasis added]

My argument is that the Saskatchewan government did not meet the requirement of minimal impairment. Therefore, the labour law changes are not protected under S.1 requirements. In this context, the legislature appears to have lost the privilege of judicial deference.

Is the *TUA* amendment to S.11(1)(a) *intra vires* the Constitution? Only the judiciary has the plenary authority and competence to answer this question with finality.

Appendix "A"
Chart I: Managerial Ideologies

From Charles Perrow's *Complex Organizations: A Critical Essay* (Glenview, Illinois: Scott, Foremans and Co., 1972) at p. 73

Justifications for management rule and worker obedience

Explanatory Doctrine	*Characterization of Owners or Managers*	*Period and Doctrine*	*Positive Characterization of Employees*	*Explanation of Employee Failure*
Survival of the fittest	Superior individuals	1870: Spencer's Social Darwinism	Independence, initiative, aggressiveness	Biologically unfit
Survival of the best	Moral superiority and willpower	1895-1915: New Thought Movement	Proper thoughts, willpower	Will not try
The fit dictate conditions of success	Power by virtue of position and success	(Unionization)	Compliancy, worthiness of management's respect	Insubordinate, unworthy
Scientific determination	Skillful utilization of labor, efficiency	1915-, Scientific Management	Trainability, utilization of capabilities to the fullest	Will not work or learn
Manipulation	Personality skills	Post World War I: Dale Carnegie	Cooperation by inducement, stable expectations and rewards	Will not cooperate as a partner
Natural cooperation, rational assessment of whole person	Personality, skills, statesmanship, rationality, and logic	Mid-1930s: Elton Mayo	Nonlogicality, desire for security and recognition	Not handled correctly

Appendix "B"
Chart II: Managerial Ideologies

From Budd, John W. Budd, "Fairness at Work, and Maybe Efficiency But Not Voice: An Evaluation of The Arthurs' Commission Report" (2008) 29 Comparative Labour Law & Policy Journal 475 at 481

Models of the Employment Relationship and Government Regulations

Model	*View of Labor*	*View of Labor Markets*	*View of Employee-Employer Objectives*	*Resulting View of Government Regulation*
Egoist	A commodity; a rational self-interested economic agent	Perfectly competitive	Emphasis is on self-interest; exchanges occur when self-interests align	Minimal. Fix market failures only when regulation does not do more harm than good
Unitarist	A psychological being	Imperfectly competitive	Emphasis is on shared employer-employee interests, alignment occurs with effective human resources policies.	Low. Promote cooperation and prevent destructive competition.
Pluralist	An economic and psychological being; a democratic citizen with rights	Imperfectly competitive	Emphasis is on a mixture of shared and conflicting interests	Essential. Establish safety nets and equalize bargaining power to balance efficiency, equity, and voice.
Critical	An economic and psychological being; a democratic citizen with rights	Imperfectly competitive; part of a broader, unequal institutional structure	Emphasis is on inherent conflicts of interest; power differentials lead to exploitation.	Mixed. Important for protecting employees. Inadequate because of systemic imbalances inherent in capitalism.

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