

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF FREDERICTON

IN THE MATTER OF an Application pursuant to Rule 16.04(3) and Rule 16.04(j) of the *Rules of Court* and Section 24(1) and Section 52(1) of the *Canadian Charter of Rights and Freedoms*, the *Constitution Act*, 1982

B E T W E E N:

THE CANADIAN UNION OF PUBLIC EMPLOYEES AND ITS COUNCIL OF HOSPITAL UNIONS, CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 2745, CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1190, CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 963, NEW BRUNSWICK UNION OF PUBLIC AND PRIVATE EMPLOYEES, CINDY COLEMAN, EVELYN COMEAU, KAREN MAHONEY, AND JANET DEL FRATE,

Applicants;

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NEW BRUNSWICK,

Respondent.

Date of Hearing: July 24, 2006 & September 12, 2007

Date of Decision: June 17, 2009

Before: Madam Justice Paulette C. Garnett

Appearances:

Robert D. Breen, Q.C., for the Applicants.

Clyde D. Spinney, Q.C., and Gaétan Migneault for the Respondent.

GARNETT, J.

[1] The Applicants are Canadian Union of Public Employees and its Council of Hospital Unions, Canadian Union of Public Employees, Local 2745, Canadian Union of Public Employees, Local 1190, Canadian Union of Public Employees, Local 963, New Brunswick Union of Public and Private Employees, Cindy Coleman, Evelyn Comeau, Karen Mahoney, and Janet Del Frate.

[2] The union Applicants are certified bargaining agents for various employees of the Province of New Brunswick. For ease of reference I will refer to them all as the Unions. The individual Applicants are, or have been, casual employees of the Province.

[3] The Applicants ask the Court to declare that certain provisions of the *Public Service Labour Relations Act*, R.S.N.B. c. P-25 as amended (*PSLRA*), violate or deny rights which are guaranteed by the *Canadian Charter of Rights and Freedoms*.

The Legislation

[4] The Applicants say that sections 1, 5 and 7(3) of the *Act* violate or deny their *Charter* rights. Those sections read as follows:

1. In this Act

...

“employee” means a person employed in the Public Service, other than

...

- (e) a person employed on a casual or temporary basis unless the person has been so employed for a continuous period of six months or more, . . .

“employee organization” means an organization of employees the purposes of which include the regulation of relations between the employer and its employees for the purposes of this Act, and includes, unless the context otherwise requires, a council of employee organizations;

5. Every employee may be a member of an employee organization and may participate in the lawful activities of the employee organization of which he is a member.

7(3) Except as otherwise provided in a collective agreement no person

. . .

- (a) shall refuse to employ or to continue to employ any person, or otherwise discriminate against any person in regard to employment or any term or condition of employment because the person is a member of an employee organization or was or is exercising any right under this Act,
- (b) shall impose any condition on an appointment or in a contract of employment or propose the imposition of any condition on an appointment or in a contract of employment that seeks to restrain an employee or person seeking employment from becoming a member of an employee organization or exercising any right under this Act, or
- (c) shall seek by intimidation, by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or any other penalty or by any other means to compel an employee to become, continue to be, refrain from becoming or cease to be a member of an employee organization, or to refrain from exercising any other right under this Act,

but no person shall be deemed to have contravened this section by reason of any act or thing done or omitted in relation to a person employed, or proposed to be employed, in a managerial or confidential capacity.

[5] The Applicants say that the exclusion of “casual employees” from the definition of “employee” under the *PSLRA* has the effect of denying these employees “all rights pursuant to that legislation, including freedoms otherwise to be a member of a “employee organization”, to participate in lawful activities arising from that associational “right”, and to be free from intimidation or the threat of dismissal in the exercise of that “right”.

[6] The Respondent, Province of New Brunswick (the Province), says that the exclusion of “casuals” does not prevent them “from forming an employee association or exercising particular rights in relation thereto”.

Preliminary Issue

[7] The Province says that the Applicant unions do not have standing to bring this application. I do not propose to explore that issue on the grounds that, even if the unions lack standing, the four individuals named, do have standing. I will therefore deal with the application on its merits.

The Evidence

[8] Eight affidavits were filed on behalf of the Applicants.

[9] David Frank is a Professor of History at the University of New Brunswick who has a particular interest in Canadian labour history. He says at paragraph 2:

The purpose of this affidavit is to provide the historical and legislative context for understanding the anomalous position of casual workers under the *Public Service Labour Relations Act* of the Province of New Brunswick and to examine the extent to which this statutory distinction places workers in a position of disadvantage in seeking to exercise their right to participate in the political process in order to improve their wages and working conditions.

[10] He examines the history of the labour movement in Canada and more particularly in New Brunswick. Union membership and collective bargaining rights were extended to public employees in New Brunswick in 1968, some thirty years after those rights had existed in the private sector (*Labour and Industrial Relations Act* (1938)). The new *Public Service Labour Relations Act* contained a definition of “employee” which was different from that in the public sector legislation. The definition excluded “a person employed on a casual or temporary basis, unless he has been so employed for a continuous period of six months or more”. That definition has remained (with some modifications from 1990 - 1993 which were removed) to the present day.

[11] Professor Frank then examines the Casual Labour Market. At paragraph 23 he says:

One of the major work force trends in recent decades has been the growth of part-time employment, especially among women. Total part-time employment in Canada in 1953 was less than four per cent of the work force and numbered less than 200,000 persons; by 1990, however, the significance of part-time employment was more than four times greater (17 per cent of the work force) and the actual numbers were more than ten times greater (more than 2 million people). New Brunswick trends have followed a similar pattern, and in 1996 part-time employment amounted to 17 per cent of the work force in the province. It is important to underline the fact that part-time work is a predominantly female experience. There were 38,000 part-

time women workers in New Brunswick in 1997, more than 71 per cent of the total part-time work force in the province. Both provincially and nationally the general picture is that more than one in four women work part-time but less than one in ten men do so.¹⁹

¹⁹Dave Broad, *Hollow Work, Hollow Society? Globalization and the Casual Labour Problem in Canada* (Halifax: Fernwood Books, 2000), pp. 13-16; N.B. Advisory Council on the Status of Women, “The Casualization of Public Sector Workers” (April 2000).

[12]

And at paragraph 26:

The use of casual and temporary workers in the province of New Brunswick has resulted in the distortion of employment relations in the public sector, particularly in areas such as the hospitals, schools and liquor stores where the use of casual workers has been particularly pronounced. The Canadian Union of Public Employees reports that the differences in earnings between casual workers and regular employees in these settings range from \$3.96 to \$4.50 an hour. Questionnaires collected by the union from casual workers in the hospital sector in all parts of the province in June 2004 have produced a variety of evidence of frustration and discouragement among workers who considered themselves subject to a number of unacceptable conditions, including unequal pay for equal work; lack of health, vacation or pension benefits; lack of security in their work assignments; lack of seniority in applying for better positions; lack of acknowledgement from supervisors and fellow workers; exposure to harassment of various kinds, and arbitrary scheduling without reference to family or other obligations. Despite years of work in some cases, short layoffs before the completion of six months service or regular reassignment to new duties and departments was regarded as a device for rendering long-term workers ineligible for employee status. The conditions described by these workers and their manifest frustration in seeking to activate their rights confirms the status of casual workers as a separate caste of disadvantaged workers with inferior access to rights under the law.²²

²²Canadian Union of Public Employees, New Brunswick, “Brief on Casuals Working in the Public Sector” (June 1999);

“Casual Campaign” [questionnaire survey of casual workers in hospitals conducted by CUPE NB Research, 2004].

[13] He points out that legislation in most jurisdictions in Canada includes casual workers within the definition of “employee” (paragraph 32).

[14] (It should be noted that “casual employee” is not synonymous with “part-time employee”. There is evidence that many “casuals” work full time but do not attain the status of “employee” within the definition in the *PSLRA*.)

[15] Joan McFarland is a Professor of Economics and Women’s Studies/Gender Studies at St. Thomas University. She says at paragraphs 2 and 3:

The intent of this affidavit is to examine theoretical, historical and ethnographic evidence which gives context to the matter of the inequality of treatment experienced by “casuals” in the New Brunswick public service. The examination will include attention to the gender dimension of this inequality.

Because they are not defined as “employees” under the NB Public Service Labour Relations Act (PSLRA), casuals do not have a statutory “right to associate” which separates them in terms of treatment both from other public servants in the province and from casual private sector workers who have the “right to associate” under the NB Industrial Relations Act.

[16] Professor McFarland then reviews and reports various studies and statistical data which illustrate the increase in the number of people working as “casuals”. She refers to a study done by the NB Advisory Council on the Status of Women at paragraphs 44 and 45:

The Council’s Brief brings forward a particularly striking case of nurses under the age of 25 (e.g. new graduates)

employed as casuals in the province's hospitals. In 1996, almost all of them - 96% - were casuals. The ACSW document quotes from a brief by the NB Nurses Union to the Premier describing the impact of such a situation: "The high casual rate has detrimental effects for both hospital staff and patients. Casuals and new graduates are often forced to adapt to unfamiliar settings, without the benefit of teaching, guidance and mentoring traditionally offered by experienced nurses who now lack time. The result is difficult working conditions for nurses, decreased quality of care and even potentially unsafe situations for patients."

The ACSW Brief concludes: "It is clear that the practice of hiring casual workers has been over-used by the New Brunswick government in hospitals, in schools, in government departments and in Crown corporations. The rise of this category of underpaid, part-time workers, denied the usual rights and benefits afforded to public sector employees, is a troubling trend. The high casual employment rate has negative consequences not only for women, overrepresented in this group, but for society as a whole."

[17] She also reviewed data gathered by CUPE in New Brunswick. At paragraphs 49 and 50 she reports the results in relation to the seven hospital service regions:

The data show 2130 casual workers in the seven hospital service regions in 2003 who were excluded from being CUPE members. This compares to the approximately 6400 "employees" in jobs represented by CUPE in the seven service regions. In other words, casuals represented one quarter (24.97%) of persons working in such jobs in the hospitals in New Brunswick. The 2130 casuals worked 1,526,924.47 hours which are equal to 783.04 full-time equivalent positions (FTEs).

Of the 2130 casual workers in the seven hospital service regions, 480 or 22.54% were men and 1650 or 77.46% were women. This is a very large female majority and is consistent across the different health regions. The female majorities range from 67.45% in the lowest majority region

(Region 1 SE, Restigouche) to 82.37% in the highest majority region (Region 5, Moncton/Sackville).

[18] CUPE also sent questionnaires to casuals throughout New Brunswick and received 110 replies. Professor McFarland summarized some of these beginning at paragraph 53:

The qualitative data collected in the 110 questionnaires returned to CUPE not only from hospital workers but also from school bus drivers, probation officers, liquor store workers paint a very graphic picture of the disadvantages experienced by casuals in comparison to “employees” in the NB public service. Significantly, the questionnaire makes it clear that not a single casual in the group had chosen this status voluntarily. The disadvantages the casuals describe are in terms of job security, working conditions, wages, benefits, opportunity of advancement, status among workers, and protection against harassment, discipline and/or dismissal.

In terms of security, the workers describe the “undependable hours”. They “sometimes (work) often, sometimes none”. They are “not guaranteed any hours”. One worker talks of the consequences for him and his family of his hours being cut. He points out that he “needs (his) salary to live”.

Workers talk of the working conditions of casuals “on call”. They are “called on short notice”. They “can’t make plans”, even “schedule appointments”. Because of the “uncertainty of work”, they have to be “always ready”. One worker describes his career as “25 years - on call”.

The workers are quite aware that they receive “less pay” than others - those defined as “employees” - doing the same work. The casuals call for the opportunity for “equal pay for equal work”. In addition, they bring up the matter of “no benefits” - and “no vacation” either.

One of the major disadvantages arising from their status, as casuals point out, is that there is no possibility for advancement. For example, one says: “You don’t accumulate hours which prevents you from jobs you are

qualified for”. Another puts it: “You can’t build security” while another says “You return to “0” hours when the position ends”.

[19] The individual applicants, Cindy Coleman, Evelyn Comeau, Karen Mahoney and Janet Del Frate, also submitted evidence. Coleman has been a casual employee for the New Brunswick Liquor Corporation for 2½ years. She works from 20 - 60 hours weekly, averaging about 35 - 40 hours. She does the same work as part-time and full-time “employees” but is paid less. She does not have health benefits, paid holidays, vacation pay, sick days or guaranteed hours. “On many occasions” she and four or five other casuals are the only workers in the store. At paragraph 10 she says, “... every 6 months I am required to take 2 weeks off without pay, and this so as to ensure that I never attain employee status under the collective agreement.”

[20] Janet Del Frate has been employed by School District 24 since 1990. Until recently she received an all-inclusive pay rate with no benefits. As a Teaching Assistant she received \$8.20 per hour compared to \$14.20 per hour paid to Teaching Assistants who are “employees”. During some of the period she was on call. “... I regularly would get up in the morning, get myself dressed and ready to attend school and sit by the phone waiting for a phone call. If the call did not come, I would wait until the next day and do the same thing.” She describes moving from position to position and from school to school and never knowing whether she would have a job the next week, month or year. She pointed out, also, that “under the system as it exists casual employees are all really made to be in competition with each other for the casual work every day.”

[21] Karen Mahoney had been regularly employed for 13 years in the Finance and Purchasing Departments of, first, the hospital in Chatham and then the hospital in Miramichi (1991-2003). During all of that time she was a casual employee. In December 2003, she was summarily dismissed. At paragraph 4 she states:

At all times during my employment in the hospitals I have worked with approximately 40 people and, while looking to everyone as if a regular employee in the workplace, I have at no time obtained any of the benefits available to the regular employees, including sick leave, paid days off, pension, health benefits, insurance benefits or other employee benefits.

[22] Evelyn Comeau has, at various times, beginning in 1988, been employed by the Department of Transportation as a casual labourer in the Chatham District. She says that in her experience casual work of the kind she does depends on political connections; "... you have to go through politics ...". She states at paragraphs 4 and 5:

I first received work in and about 1988 through a good friend of mine who was a Liberal with influence in the Liberal party and who spoke to the Liberal MLA on my behalf confirming that I needed work. I was then hired in the Regional Garage and assigned to the dumpsite. I worked at the dumpsite for approximately 3 years during the summer seasons and from 1992 worked again the summer seasons, for 14-16 weeks on the work crew, the paving, shouldering, you name, it, I've done it.

At all times that I was hired I was required to sign a paper confirming that I didn't have any right to come back the next year and at all times while working I received an hourly wage without any benefits, any healthcare, any time off with pay or anything other than my daily pay. I have no pension or retirement monies and expect to work as I can until I reach age 65.

Ms. Comeau is 55 years old.

[23] Michael Robichaud is a Labour Relations Officer employed by the New Brunswick Union of Public and Private Employees which union represents 6,500 employees under the *Act*. He has worked with the union since 1975 and is familiar with “efforts to represent casuals employed in the bargaining units”. He says at paragraph 8:

In April 2005, there were approximately 1800 casuals employed in Part I of the public service in the Province of New Brunswick. From this number about forty percent would be persons employed as casuals doing the same work as employees in bargaining units represented by NB Union. The remainder would be in bargaining units represented by Canadian Union of Public Employees.

He says, also, that since the early 1970s the Province has insisted on wording in all collective agreements with the union which restricts coverage to employees as defined by the *Act*, that is, not casuals. The union has challenged the Province’s position in a number of cases without success.

[24] In comparing the working conditions of casual versus regular employees he says casuals usually perform the same work for the same number of hours. He says “in recent years” casuals have been paid the same pay “albeit at the bottom of the pay range without any movement upward over time ...” At paragraph 17 he says:

The real difference in working conditions is in the area of benefits. Casual benefits are usually governed by the minimum standards of the *Employment Standards Act*. None of the following benefits enjoyed by regular employees apply to casuals engaged in Part I bargaining units represented by NB Union: Overtime pay, statutory holiday pay provisions of collective agreements, vacation entitlement, shift differential and call-in pays. In addition casuals are not eligible for the various insurances provided by the employer or available on a group basis to regular employees such as long term disability insurance, accidental death and other life insurance and health

insurance plans such as Blue Cross. Finally, because casuals and even former casuals who attain status of employees under the *Public Service Labour Relations Act* do not fall within the definition of covered persons under the *Public Service Superannuation Act* they are not eligible to participate in the province of New Brunswick pension plan regardless of the number of years of service that they may ultimately attain.

He says “there are many examples of casuals being employed for many years along side regular employees doing the same work, but without the same employee benefits.”

[25] Raymond Léger is a Research Representative of the Canadian Union of Public Employees (CUPE) which union represents approximately 12,000 public sector employees in New Brunswick. Previous to 1997, Mr. Léger worked for a union governed by the *Industrial Relations Act* “which does not exclude casual employees from associational rights”. As well as research, his responsibilities include “the preparation of regional surveys on wages, working conditions and fringe benefits ...” He “coordinated the affidavits and evidence” which is contained in the Record in this matter. At paragraphs 13, 14 and 15 he states:

As a result of my research role with CUPE, I have personal knowledge of the fact that the National Union and its constituent Locals have over the last 30 years undertaken continuing efforts to bargain terms and protections on behalf of, and to act in a representative capacity for casual employees, as evidenced, *inter alia*, in successive collective agreements of CUPE Local 1190, CUPE Local 963, the New Brunswick Council of Hospital Unions, and CUPE Local 2745 since initial certifications.

The fact is that these bargaining agents have, since the initial certifications under the *Act*, separately attempted to negotiate enforceable terms and conditions of employment for casual employees including wages, casual seniority rights, work assignments and other basic employment protections.

...

The further fact is, however, that on those occasions in which attempts have been made by CUPE and its New Brunswick Local Unions to enforce negotiated rights on behalf of casual employees, legal challenges have been raised by Her Majesty in Right the Province of New Brunswick as employer, as well as the other separate Employers in the NB public sector, and this so as to deny the capacity for the CUPE or its constituent Councils or Locals as agents, and so too in the result the casual employees affected, to rely on any agreement as negotiated. This is in express contrast to similar rights negotiated for regular or part-time employees. Attached are decisions of the New Brunswick Public Service Labour Relations Board and New Brunswick Courts attesting to these challenges, as follows:

Saint John Regional West Hospital v. CUPE Local 1252, [1981] NBPSLRBD No. 20; online: Q.L. (PSLRB);
CUPE Local 963 v. N.B. Liquor Corp., [1986] NBPSLRBD No. 7; online: Q.L. (PSLRB);
N.B. v. CUPE Local 1190, [1989] NBPSLRBD No. 2; online: Q.L. (PSLRB);
Re Furlong, [1973] N.B.J. No. 154, online: Q.L. (NBQB);
Re Martin, [1981] N.B.J. No. 175, online: Q.L. (NBCA);
Re Clarke, [1983] N.B.J. No. 174, online Q.L. (NBCA);
Canadian Union of Public Employees v. N.B. (Board of Management), [1986] N.B.J. No. 828, online: Q.L. (NBQB), Appeal dismissed October 29/86;
Gallant v. Atlantic Health Services Corporation, [2000] N.B.J. No. 293, online: Q.L. (NBQB); and
N.B. Liquor Corp. v. CUPE Local 963, [1983] NBPSLRBD, upheld [1983] N.B.J. No. 2, quashed [1984] N.B.J. No. 1: online Q.L.

[26]

Dorine Taylor is the Assistant Deputy Minister, Labour Relations Services

for the Office of Human Resources, Province of New Brunswick. She disputes the

Applicant Union's capacity to bring this Application because casuals are neither "employees" nor members of the unions.

[27] She points out that the Applicant Unions do negotiate provisions in collective agreements which limit the use of casuals and which require the employer to offer casual work "to senior laid off permanent employees". The unions also sometimes "seek" to oblige the employer to pay casuals at a certain specified rate. At paragraph 4 she states:

In my experience, casual or temporary persons are typically employed in the public service to replace ill or absent employees, or to provide extra assistance when the temporary pressure of work necessitates, or when no qualified person is available for appointment as an "employee" at that time.

[28] And at paragraph 19:

Although the *Public Service Labour Relations Act* does limit collective bargaining rights in the public service to those who meet the definition of an "employee", I am not aware of any limitation, legislative or otherwise, on the right of persons employed on a casual or temporary basis to form, control and regulate the operations of their own associations for any purpose, including that of making collective representations to the employer. To my knowledge, at no time has the Respondent done anything to prohibit or discourage the creation of such associations.

[29] On the basis of all of the evidence, I am satisfied that:

1) "Casuals" do form a vulnerable group. Although they do not share all of the characteristics of agricultural workers as described in *Dunmore v. Ontario (Attorney General)* [2001] 3 S.C.R. 1016, 207 D.L.R. (4th) 193 and *Fraser v. Ontario*, [2008] 301 D.L.R. (4th) 335, they do have unique characteristics which render them

vulnerable. The Province says the “casuals” are “so employed in virtually every profession, trade or occupation” (Affidavit of Dorine Taylor, Record, Volume 4). In my view, this diversity is one of the negative factors which prevents them from forming a cohesive association designed to further their interests. The only thing that members of this group have in common is that they are employed by the Province as “casuals”. While some members of the group are well educated and relatively well paid, others are at the opposite end of the scale.

[30] Casuals are also vulnerable to reprisals because the employer has an unhampered ability to determine working conditions. Their working conditions are always less advantageous than those of “employees” and, as described in some of the affidavits before the Court, these conditions can continue for years. Casuals have lower status simply because they are casuals and are often prevented from achieving advancement.

[31] In addition, the evidence demonstrates that the Province has resisted any attempt by Unions to redress these conditions. As stated above, in this application, the Province submitted that the Unions have no standing.

[32] 2) The Province, in its role as employer, has used the exclusion of “casuals” from the legislative protection of the *PSLRA* to create a subgroup of employees. The most egregious practice is that of requiring long-term casuals to take two weeks unpaid holidays every six months so that they will not reach the six month target and become “employees” under the *Act*. By using the definition in this way, the Province turns what is really full-time, long-term employment into “casual or temporary

employment”. As a result, the Province gets the benefit of experienced, skilled employees without having to provide the benefits they would receive as “employees”.

Analysis

[33] Section 2(d) of the *Charter* reads:

2. Everyone has the following fundamental freedoms:

...

(d) freedom of association.

[34] Until recently, this provision has had limited application in the labour relations context, however, beginning in 2001, this has changed.

[35] In *Dunmore*, (supra), the Supreme Court of Canada determined that the exclusion of agricultural workers from the labour relations legislation of that province had the effect of interfering with those workers’ freedom of association and was therefore unconstitutional. Justice Bastarache, writing for the majority, held that in some circumstances s. 2(d) of the *Charter* may impose a positive obligation on the state to extend protective legislation to unprotected groups. The Ontario legislature was given 18 months to amend its legislation “to provide a statutory framework that is consistent with the principles established in this case.”

[36] Justice Bastarache explicitly rejected the principle that 2(d) applied only to the activities of individuals. He found that in some cases 2(d) protects activities which are inherently collective in nature in that they cannot be performed by individuals. He emphasized that although individuals do not have a right to the protection of a specific

legislative scheme, there are circumstances in which the *Charter* imposes a positive obligation on government “to extend protective legislation to unprotected groups”. In framing the question he said, “... I shall ask whether s. 2(d) obliges the state simply to respect trade union freedoms, or additionally to protect trade union freedoms by prohibiting their infringement by private actors” (paragraph 13).

[37] In discussing the scope of state responsibility under 2(d) he said at paragraph 20:

However, history has shown, and Canada's legislatures have uniformly recognized, that a posture of government restraint in the area of labour relations will expose most workers not only to a range of unfair labour practices, but potentially to legal liability under common law inhibitions on combinations and restraints of trade. Knowing this would foreclose the effective exercise of the freedom to organize, Ontario has provided a statutory freedom to organize in its LRA (s. 5), as well as protections against denial of access to property (s. 13), employer interference with trade union activity (s. 70), discrimination against trade unionists (s. 72), intimidation and coercion (s. 76), alteration of working conditions during the certification process (s. 86), coercion of witnesses (s. 87), and removal of Board notices (s. 88). In this context, it must be asked whether, in order to make the freedom to organize meaningful, s. 2(d) of the Charter imposes a positive obligation on the state to extend protective [page 1044] legislation to unprotected groups. More broadly, it may be asked whether the distinction between positive and negative state obligations ought to be nuanced in the context of labour relations, in the sense that excluding agricultural workers from a protective regime substantially contributes to the violation of protected freedoms.

[38] In discussing “a proper evidentiary foundation” he said that the applicants must “demonstrate that exclusion from a statutory regime permits a substantial interference with the exercise of protected s. 2(d) activity. (Emphasis added) He said the

cases “do not require that the exercise of a fundamental freedom be impossible, ... they do require that the claimant seek more than a particular channel for exercising his or her fundamental freedoms” (paragraph 25). And at paragraph 26 he concludes that “... it is not a quantum leap to suggest that a failure to include someone in a protective regime may affirmatively permit restraints on the activity the regime is designed to protect.”

[39] In *Health Services & Support - Facilities Subsector Bargaining Assn. v. British Columbia* (2007) 283 D.L.R. (4th) 40, [2007] 2 S.C.R. 391, (*Health Services*), the Supreme Court of Canada revisited the issue of whether the *Charter* protects collective bargaining rights. In doing so, the Court reexamined three cases which were decided in 1987 and are known as the labour trilogy: *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 S.C.R. 313 (Alberta Reference); *PSAC v. Canada*, [1987] 1 S.C.R. 424; and *RWDSU v. Saskatchewan* [1987] 1 S.C.R. 460. In a fourth case, *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)* [1990] 2 S.C.R. 367, the Supreme Court again decided that collective bargaining was not protected by s. 2(d) of the *Charter*.

[40] In *Health Services*, the Supreme Court reviewed the reasoning in these cases and determined that the grounds advanced “do not withstand principled scrutiny and should be rejected” (para. 22). It was noted that the principle that “freedom of association protects only those activities performable by an individual” was rejected in *Dunmore*.

[41] The court noted that “*Dunmore* clarified three developing aspects of the law: what constitutes interference with the “associational aspect” of an activity; the need

for a contextual approach to freedom of association; and the recognition that s. 2(d) can impose positive obligations on government” (para. 31).

[42] The court then reviewed the history of the labour movement in Canada and the impact of international conventions and treaties in order to determine “whether *Charter* values favour an interpretation of s. 2(d) that protects a process of collective bargaining” (para. 39). At paragraph 81 they concluded that “Human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy are among the values that underlie the *Charter*: *R. v. Zundel*, [1992] 2 S.C.R. 731; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 100; *R. v. Oakes*, [1986] 1 S.C.R. 103. All of these values are complemented and indeed, promoted, by the protection of collective bargaining in s. 2(d) of the *Charter*.”

[43] At paragraph 88, it is emphasized that the “*Charter* applies only to state action” and the state may act both as legislator and as employer (about which more below).

[44] The ratio of the decision is stated in paragraphs 19, 20 and 89 as follows:

19 At issue in the present appeal is whether the guarantee of freedom of association in s. 2(d) of the *Charter* protects collective bargaining rights. We conclude that s. 2(d) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of “collective bargaining”, as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime. What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals. If the government substantially interferes with that right, it violates s. 2(d) of

the *Charter: Dunmore*. We note that the present case does not concern the right to strike, which was considered in earlier litigation on the scope of the guarantee of freedom of association.

20 Our conclusion that s. 2(d) of the *Charter* protects a process of collective bargaining rests on four propositions. First, a review of the s. 2(d) jurisprudence of this Court reveals that the reasons evoked in the past for holding that the guarantee of freedom of association does not extend to collective bargaining can no longer stand. Second, an interpretation of s. 2(d) that precludes collective bargaining from its ambit is inconsistent with Canada's historic recognition of the importance of collective bargaining to freedom of association. Third, collective bargaining is an integral component of freedom of association in international law, which may inform the interpretation of *Charter* guarantees. Finally, interpreting s. 2(d) as including a right to collective bargaining is consistent with, and indeed, promotes, other *Charter* rights, freedoms and values.

...

The scope of the right to bargain collectively ought to be defined bearing in mind the pronouncements of *Dunmore*, which stressed that s. 2(d) does not apply solely to individual action carried out in common, but also to associational activities themselves. The scope of the right properly reflects the history of collective bargaining and the international covenants entered into by Canada. Based on the principles developed in *Dunmore* and in this historical and international perspective, the constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment. In brief, the protected activity might be described as employees banding together to achieve particular work-related objectives. Section 2(d) does not guarantee the particular objectives sought through this associational activity. However, it guarantees the process through which those goals are pursued. It means that employees have the right to unite, to present demands to health sector employers collectively and to engage in discussions in an attempt to achieve workplace-related goals. Section 2(d) imposes corresponding duties on government employers to agree to meet and discuss with them. It also puts constraints on the

exercise of legislative powers in respect of the right to collective bargaining, which we shall discuss below.

[45] At paragraph 92 and 93 the court sets out what the issue is and the “two inquiries” which must be pursued:

92 To constitute *substantial interference* with freedom of association, the intent or effect must seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer that we call collective bargaining. Laws or actions that can be characterized as “union breaking” clearly meet this requirement. But less dramatic interference with the collective process may also suffice. In *Dunmore*, denying the union access to the labour laws of Ontario designed to support and give a voice to unions was enough. Acts of bad faith, or unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation may also significantly undermine the process of collective bargaining. The inquiry in every case is contextual and fact-specific. The question in every case is whether the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted.

93 Generally speaking, determining whether a government measure affecting the protected process of collective bargaining amounts to substantial interference involves two inquiries. The first inquiry is into the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective goals in concert. The second inquiry is into the manner in which the measure impacts on the collective right to good faith negotiation and consultation.

[46] In response to *Dunmore*, Ontario passed the *Agricultural Employees Protection Act (AEPA)* which established a separate statutory regime for agricultural workers but provided fewer rights to them than to other workers. When workers unions were unsuccessful in getting factory farm employers to engage in collective bargaining

with them, they brought another application to the Ontario Court seeking a declaration that the *AEPA* was invalid as it violated 2(d) of the *Charter*. The court of first instance, which did not have the benefit of the *Health Services* decision from the Supreme Court of Canada, dismissed the application ((2006) 263 D.L.R. (4th) 425). The court held that the *AEPA* met the minimum standards of freedom to associate in the labour context and that rights to form unions and bargain collectively were not constitutionally protected.

[47] In *Fraser* (supra), the Ontario Court of Appeal allowed the appeal and held that the *AEPA* substantially impaired the capacity of agricultural workers to meaningfully exercise their right to bargain collectively and therefore breached their s. 2(d) *Charter* rights. In April 2009, leave to appeal to the Supreme Court of Canada was granted.

[48] Justice Winkler, speaking for the court, said that *Health Services* concluded that the freedom of association protected the “right of employees to associate for the purpose of advancing workplace goals through the process of collective bargaining”. He said that the *AEPA* impaired the “capacity of agricultural workers to meaningfully exercise their right to bargain collectively”.

[49] Justice Winkler framed the issue as follows at paragraph 10:

10 Therefore, the central issues on this appeal are whether the impugned legislation violates s. 2(d) of the *Charter* by failing to provide agricultural workers in Ontario with sufficient statutory protections to enable them to exercise (a) their freedom to organize and (b) their right to bargain collectively.

[50] After examining the legislation he said, “It is important to note what is missing from the *AEPA*. It does not impose an obligation on employers to bargain in good faith ... or, indeed, to bargain at all ... with an employees’ association” (Para. 28).

[51] He concludes at paragraph 66 that the legislation “substantially interferes with the ability of agricultural workers to bargain collectively” but not with their freedom to organize. At para. 80 he states:

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

[52] In argument, the Province submitted also that as government employees “casuals” enjoy the protection of other legislation such as the *Human Rights Act*, the *Employment Standards Act* and the *Charter of Rights*. While I accept that these *Acts* do provide certain protections and remedies to individuals, this case is about collective rights and these statutes are not designed to provide remedies to the whole class.

[53] I am aware that the circumstances in this case differ in a number of respects from those in *Dunmore* and *Fraser*. In those cases the workers all belonged to the same occupational group — agricultural workers who were specifically excluded from the protection of the relevant *Act*. In *Dunmore*, the Supreme Court was concerned

with protecting that group from “private actors”. In this case, the Province is both the legislator and the employer.

Issue

[54] To paraphrase Justice Bastarache, the issue is whether excluding “casual” or “temporary” employees from the *PSLRA* substantially contributes to the violation of protected freedoms. The inquiry is whether the legislation “either in purpose or effect” has interfered with the freedoms protected by s. 2(d) of the *Charter*. As Justice Bastarache stated at paragraph 33, “The difficulties of assessing legislative intent cannot be overemphasized.” That is particularly true when, as here, the provision was passed over forty years ago. I do not therefore propose to delve into the legislature’s intent for including the definition in the legislation. When one reads the definition of “employee” along with the relevant exclusion, it is, on its surface, benign. I am satisfied by the evidence however, that the Province, as employer, has, for at least twenty years, used this definition to create a sub-class of workers in a way which has interfered with their fundamental rights under 2(d) of the *Charter*. I accept the evidence of the Province that various unions representing “employees” have bargained so as to diminish the use of “casuals”. Unions have also attempted to “negotiate enforceable terms and conditions for casual employees including wages, casual seniority rights, work assignments and other basic employment standards”. Raymond Leger says that when those unions have attempted to enforce those rights, the Province has raised the defence that the unions lacked “the capacity” to raise the issue. (As stated above, the Province raised the same issue in this application.)

[55] Even if unions representing “employees” were able to negotiate and enforce provisions for the benefit of “casuals”, there are issues where the interests of “casuals” may be in conflict with those of “employees” and the unions which represent the latter have a duty to protect their members.

[56] The Province says that it has not done anything to prevent “casuals” from forming associations and bargaining for improved conditions. As stated above, I find that “casuals” are a vulnerable group as were the agricultural workers in *Dunmore*. As Justice Bastarache stated in that case, “history has shown” that “a posture of government restraint” will “expose most workers ... to a range of unfair labour practices ...” The evidence in this matter shows that history has repeated itself. For many years the Province as employer has subjected “casuals” to practices which can only be described as unfair. As a result, I find that this is one of those situations in which the *Charter* imposes a positive obligation on government “to extend protective legislation to unprotected groups”. More specifically, I find that the exclusion of “casuals” from the protection of the *PSLRA* has had the effect of infringing their rights under s. 2(d) of the *Charter*.

[57] The Applicant also submitted that the legislation impairs their *Charter* rights under sections 7 and 15 of the *Charter*. I find that it does not. Section 7 reads:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[58] In *Irwin Toy Ltd. v. Quebec* [1989] 1 S.C.R. 927, the Supreme Court of Canada held that economic rights as generally encompassed by the term “property” are not within the protection of section 7. The Court refrained from deciding whether

economic rights “fundamental to human life or survival” could attract the protection of section 7.

[59] In *New Brunswick v. J.(G.)*, [1999] 3 S.C.R. 46, the Supreme Court ruled that section 7 extended only to certain kinds of state action, those “that occur as a result of an individual’s interaction with the justice system and its administration.” This view was also expressed in *Reference Re Section 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123 and in *Blencoe v. British Columbia*, [2000] 2 S.C.R. 397.

[60] Section 15 reads:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

15. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[61] In *Law v. Canada* [1999] 1 S.C.R. 497, the Supreme Court sets out three questions which must be asked to determine whether the legislation amounts to discrimination:

- a. Does the impugned law draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or, fail to take into account the claimant’s already disadvantaged position within Canadian society resulting in substantially different treatment between the claimant and others on the basis of one or more personal characteristics?

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

- c. Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant, in a way which either reflects stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of promoting the view that the individual is less capable or worthy of recognition as a human being?

[62] Even if the Applicants were able to satisfy the first test, I find that they do not satisfy the second. Being a “casual” employee does not fall into one of the enumerated grounds nor does it correspond with any of the analogous grounds. It is not an immutable personal characteristic.

[63] The Province does not assert that the legislation is justified under s. 1 of the *Charter*.

Remedy

[64] Although the finding of the Court of Appeal in *Fraser* is not binding on this Court, I agree with Justice Winkler’s reasoning as to the minimum legislative requirements necessary to protect the associational and collective bargaining rights of the casual employees in this case.

[65] I find that the exclusion in the *PSLRA* is contrary to s. 2(d) of the *Charter*; however, I suspend the declaration of invalidity for 12 months to allow the legislature to provide a statutory framework that is consistent with the principles discussed above.

[66] The Applicants are entitled to \$7,500 in costs.

Paulette C. Garnett, J.C.Q.B.