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Freedom of association in Canada: freedom without domination?

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Topic and importance

Freedom of association in section 2(d) of the Canadian Charter of Rights and Freedoms (Charter) is often treated as a classic liberal freedom. On that view, freedom mostly means protection from state interference. But that description can be too thin for real working life. Many of the strongest limits on a worker's freedom do not come from the state. They come from the workplace itself. Employment is a private relationship, but it is also an unequal one. Employers often control wages, scheduling, discipline, and working conditions. In practice, a worker can be vulnerable to decisions made with little accountability.

However, we can understand the freedom of association in a way that takes those power differences seriously. This can be done by using a civic republican idea of freedom, where being free is not only about being left alone. Freedom also means not living under another person's unchecked power, even when that power is not always used. This shift from non-interference to non-domination helps explain why labour rights like collective bargaining and the right to strike should count as part of meaningful freedom of association under the Charter.

Main arguments

When the Charter was adopted, unions mostly ignored or distrusted it, seeing it as built around old-style individual rights. An attempt to explicitly add collective bargaining protection to section 2(d) failed. The Court's early cases used a similarly narrow, individual-focused view of the section. By 1987, the Court mostly treated section 2(d) as protecting an individual's choice to join a union, but not the union's key activities, like bargaining collectively or striking. This matched a view of freedom as mainly freedom from government interference.

Soon after the early labour cases, another debate emerged: does freedom of association also include a right not to associate? This issue came up in challenges to mandatory union dues or mandatory union membership. The Court generally resisted turning section 2(d) into a tool to dismantle the collective bargaining system. However, it accepted that some compelled association can be compatible with the Charter, especially where it supports a stable labour relations framework. Underneath this dispute sat a deeper structural question: whether a "freedom" that sounds like non-interference can ever generate positive duties or protections.

Dunmore v. Ontario (Attorney General) marked a turning point because it dealt with workers being completely excluded from labour protections. The Court recognized that for vulnerable workers, the state may have a positive obligation to protect associational rights, so the freedom is real rather than symbolic. The decision also tied freedom to equality by recognizing that under-inclusion can effectively deny a fundamental freedom, even if the law does not openly ban association.

In Health Services and Support — Facilities Subsector Bargaining Assn. v British Columbia (Health Services), the Court shifted by recognizing constitutional protection for meaningful collective bargaining. The Court concluded that section 2(d) protects the bargaining process by requiring good-faith bargaining and by limiting substantial interference with that process. At the same time, it emphasized that the Charter does not guarantee a particular bargaining model or a particular outcome. What the Charter guarantees is only a protected process. The decision also intensified questions about how far section 2(d) can go in creating rights and duties rather than just preventing government obstruction.

After Health Services, the jurisprudence became difficult to map cleanly because earlier tests fit poorly with uniquely collective labour tools. Critics argued the Court lacked a stable standard for deciding what counts as unconstitutional interference and that the law became unpredictable. A further complication was conceptual: if employers have a constitutional duty to bargain in good faith, then someone must hold the corresponding right, but it was not always clear whether that “holder” is individual workers, a union, or the collective entity acting on their behalf.

The Court’s recognition of a constitutional right to strike in Saskatchewan Federation of Labour v. Saskatchewan was framed as completing the logic of meaningful collective bargaining. The dispute between the majority and the minority in recognizing a constitutional right to strike was really about whether strikes are an indispensable part of bargaining or a separate tool that should remain mainly under legislative control.

The workplace cannot be assumed to be a space of freedom simply because it is private rather than governmental. Modern workplaces are organized around centralized authority. Employers often have ongoing authority backed by workplace sanctions. In such a setting, workers are subject to rules they did not make and have little effective voice in how power is exercised over them. The formal freedom to leave a job does not adequately protect liberty, because exit is frequently constrained by economic necessity, which makes domination possible even in the absence of constant interference.

Freedom must be understood as freedom from domination and not as the absence of interference. A person can be formally free yet unfree in practice if another actor holds unchecked power to interfere arbitrarily in that person's life. This understanding fits the workplace particularly well. Individual workers cannot realistically secure freedom from domination on their own.

Equality and freedom are not competing values, but mutually reinforcing ones. Inequality is not only about differences in income or resources, but about social relationships in which some people are placed in positions of subordination, exclusion, or dependency. In the workplace, hierarchical authority structures can generate forms of inequality that undermine workers' ability to participate as equals in social and economic life. Collective mechanisms such as bargaining and strikes help transform these relationships by reducing domination and enabling workers to stand in relations of equality with employers. Freedom from domination requires not just formal rights, but social conditions that allow individuals to exercise those rights on equal footing.

Concerns about judicial overreach arise when courts constitutionalize labour protections that have traditionally been shaped by legislatures. However, protecting freedom from domination necessarily involves state action, and law can serve as a non-dominating form of interference when it constrains arbitrary power. Courts do not replace legislatures when they articulate constitutional principles; rather, they define the boundaries within which democratic decision-making must occur.

Conclusion and additional considerations

Freedom of association in Canada has evolved from a narrow focus on individual liberty toward a recognition that meaningful freedom in the workplace requires collective power. Collective bargaining and the right to strike function as mechanisms that counter private domination and reduce relational inequality. Freedom of association works best when it is understood as protection from domination, not only protection from government interference. That approach makes room for constitutional protection of collective bargaining and striking, because those tools reduce unchecked private power at work.

This approach also raises hard questions about institutions. Labour law involves balancing the interests of workers, employers, and the public. When courts constitutionalize parts of that balance, legislatures may have less flexibility to design labour systems. At the same time, if workplace domination is a real threat to freedom, leaving everything to ordinary politics may not be enough.