IN THE MATTER OF:

THE LABOUR RELATIONS CODE

– and –

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 401

Applicant

– and –

OLD DUTCH FOODS LTD.

Respondent

MINISTER OF JUSTICE and ATTORNEY GENERAL OF ALBERTA

Interested Party

FILE NO.: GE-05611

BOARD MEMBERS

Gerald A. Lucas, Q.C. – Vice-Chair
Douglas Cooper – Member
William Kondro – Member

APPEARANCES

For the Applicant: John Carpenter (Counsel), Tom Hesse (Advisor)

For the Respondent: Damon Bailey (Counsel), Dan Van Maarion (Advisor)

For the Interested Party: Rod Wiltshire (Counsel)

REASONS FOR DECISION

[1] On April 9, 2009 the United Food and Commercial Workers Union, Local 401 (the "Union") filed a complaint with the Board alleging that Old Dutch Foods Ltd. (the "Employer" or "ODF") violated sections 60 and 148(1)(a)(ii). Specifically, the complaint alleges that ODF is:

> (a) failing to bargain in good faith and make every reasonable effort to conclude a collective agreement by bargaining a Union security clause to impasse; and,
> (b) bargaining in bad faith, and committing an unfair labour practice by interfering with the Union's representation of the employees, by telling employees they must accept ODF's final offer by April 15, 2009 or lose retroactive pay.

In addition to these matters the Union also alleges the omission from the *Labour Relations Code* of a minimum union security provision akin to a RAND formula is a violation of section 2(d) of the *Charter of Rights*. Later, on May 29th, the Union amended its complaint by adding three named individuals employed by ODF as co-complainants and ODF consented to this amendment

[2] The Union gave notice of the constitutional question it intended to raise to the Minister of Justice and Attorney General of Alberta and to the Attorney General of Canada. In due course the Minister of Justice and Attorney General of Alberta ("Alberta A/G") gave notice of its intention to intervene and the Attorney General of Canada indicated it would not be appearing.

[3] In ODF's response, it denied there was any failure on its part to bargain in good faith as prior decisions of the Board have held that union security is a bargainable issue in Alberta. It further stated that during the last 38 years it had engaged in collective bargaining with United Food and Commercial Workers Union, Local 373A ("Local 373A") and throughout

that period ODF's position on union security has essentially remained unchanged. The collective bargaining with the Union which began in May 2008 is the first round since Local 373A advised ODF it had merged with the Union. ODF also submitted that the absence of a compulsory dues check-off provision in the *Code* does not infringe section 2(d) of the *Charter* as was held by the Alberta Court of Appeal in *AUPE v. PHAA et al* [2006] Alta.L.R.B.R. 276; [2006] A.J. No. 1480.

[4] The Board conducted hearings into the complaint on May 20 and 22, June 2, 3 and 4, and July 3, 2009 during which it heard the testimony of 10 witnesses, including 2 expert witnesses, and received 67 exhibits.

[5] There were few factual disputes between the parties. ODF is a food processor manufacturing potato chips at its plant in Calgary where it has approximately 180 employees. It also has unionized plants in Winnipeg, Manitoba; Lachine, Quebec; and Hartland, New Brunswick. The latter two plants were acquired in 2006 as part of its purchase of another potato chip manufacturer known as "Humpty Dumpty". The collective agreement at the Winnipeg plant contains a Rand formula which, we are told, is a requirement of Manitoba's labour legislation.

[6] Local 373A was certified as bargaining agent for the Calgary plant employees on February 9, 1971. Throughout the period from 1971 to 2004 it attempted without success to have included in its collective agreements with ODF what it considered to be a meaningful union security provision. However, ODF was only prepared to continue operating as an open shop although it did agree to a so-called voluntary dues check off provision that pretty much mirrored what was found in s. 108 of the *Alberta Labour Act* (eventually s. 27 of the *Code*).

[7] In 1990 Local 373A filed a complaint with the Board alleging that ODF's refusal to agree to a Rand formula was bad faith bargaining. In dismissing that complaint the Board (reported at [1990] Alta.L.R.B.R. 377) stated at 381:

> In this matter, there is no suggestion of surface bargaining by Old Dutch designed to avoid a collective agreement. The Company's position on this Union proposal is simply "no change". Because it is the only proposal remaining unsettled doesnot require Old Dutch to make a compromise on this item. Both parties have treated Union security proposals as bargainable issues for some twenty years. This round was no different. Old Dutch is not in violation of s. 58 [*now s. 60*] of the Code. The complaint is dismissed.

[8] The last collective agreement between Local 373A and ODF, covering the period from 2004 to 2008, added a form of maintenance of membership to the voluntary dues check off provision. As had been the practice in the past, Local 373A had entered into negotiations seeking an improved union security provision, either a union shop, or failing that something akin to a Rand formula. But, ultimately, it did accept the maintenance of membership as part of a proposal from ODF that was otherwise satisfactory to its members.

[9] The merger of Local 373A with the Union in 2007 came about, we are told, because Local 373A concluded it was too small to continue to represent the interests of the employees in this bargaining unit. As well, there had always been dissension between the members of Local 373A and the other employees who were not members over the payment of union dues. The so-called "free riders" would criticize the members for foolishly spending their money on services the free riders would receive for nothing. Ultimately, Local 373A had begun to refuse offering "additional services" to the non-members although it was still obliged to provide those services, such as processing grievances, that might have otherwise put the union in breach of its duty of fair representation.

[10] On January 22, 2008 the Union served notice to commence collective bargaining with ODF and eventually proposed a first meeting date of May 7, 2008. At that first meeting, the Union presented its bargaining proposals, some 70 in all of which 45 were "language" proposals and 25 were of a monetary nature. ODF had no proposals of its own. In terms of union security, the Union was seeking a union shop. Later, on June 4, 2008, the Union amended its union security proposal to a modified Rand formula, their intention being that those employees who were not members of the Union at the date of ratification could remain as dues paying non-members but new employees would have to become members and pay

dues. Unfortunately, the wording of this counter-proposal was not clear and ODF assumed it meant those persons who were employees prior to the date of ratification had the option to become members of the Union without being obliged to pay Union dues. However, notwithstanding ODF's assumption as to what it meant it did not ask any questions of the Union regarding this counter-proposal nor did it purport to accept it. Whether this counter-proposal was still outstanding became rather academic when the Union, on November 19, 2008 withdrew it and reverted to its original request for a union shop.

[11] The parties engaged in collective bargaining on June 3 and 4, July 8 and 9, September 2, 3 and 4, and November 18, 19 and 20, 2008 and during those sessions 32 of the 45 "language" proposals were agreed upon or withdrawn and 1 of the 25 monetary issues was agreed upon. Throughout the major issue was union security; ODF was insistent upon retaining the current collective agreement language and the Union was seeking to have that language improved upon. Both parties indicated their respective positions were at an impasse. During bargaining the chief spokesperson for ODF was Alain Laferriere and after he resigned his employment with ODF in December, 2008 he was replaced by either of Irene Treichel or Dan VanMaarion. The Union's chief negotiator was Al Olinek at least until September 3rd when Tom Hesse, the executive assistant to the Union's president, appeared and eventually assumed that role.

[12] The main purpose behind Mr. Hesse's appearance at the bargaining table was to press ODF on why it was adopting an intransigent position on union security and was attempting to explain that position away as a philosophical concern that was somehow justified on the basis of the employees having a freedom of choice. He pressed for a business justification for the stance taken by the Employer and suggested it was not a position endorsed by ODF's bargaining committee but rather was forced upon it by the owner of the company (meaning the individual who resided in the United States and instructed the bargaining committee). Mr. Hesse also introduced what was arguably a new item, food safety. Apparently the Union had become concerned over the listeria outbreak in Eastern Canada and now wanted provisions in the collective agreement to protect the workers against any legal liability that might arise. At

the conclusion of the exchange, Mr. Laferriere indicated he wanted time to consider his position and would respond the next day.

[13] The following day, in Mr. Laferriere's response to Mr. Hesse's comments, he began by suggesting Mr. Hesse had behaved in an unacceptable manner and he did not intend to tolerate being insulted. But when pressed, Mr. Laferriere did not provide any particulars of Mr. Hesse's unacceptable conduct or of the insults he supposedly had made. With respect to the union security issue, Mr. Laferriere referred to the long history of collective agreements with Local 373A that did not contain union security of the type now being sought by the Union and mentioned the Labour Relations Board had previously decided that it was not bargaining in bad faith to refuse to include a Rand formula. He also mentioned that in the last collective agreement ODF had agreed to include a form of maintenance of membership and went on to mention that some senior employees had stated they would leave ODF if forced to join a union and speculated the recruitment of new employees might be hampered if they were forced to join a union. Finally, he stated if the law is flawed then the Union should take steps to have the law changed, but otherwise that was his last word on why ODF intended to maintain the current union security language.

[14] At the September bargaining sessions ODF had presented a wage proposal in anticipation the Union was also going to present one but the Union's bargaining committee had not yet completed its monetary proposal and still wanted to first conclude the non-monetary items. The next bargaining sessions were scheduled for November. In the meantime, on September 5, 2008, ODF issued a negotiations update to its employees that included the following comments:

> "…The UFCW's latest proposal would grandfather existing non union employees into an "open shop" but would make it mandatory for any new ODF employees to join the union.
>
> In contrast, ODF favours the concept of an "**open shop**", which is legal in Alberta. In an open shop any employee has to *(sic)* right and freedom to choose if they want to be a union member or not. As the union is obligated to represent and negotiate for all employees (member or not), UFCW argues that it is unfair for someone to benefit from a service and not pay for it. On the other hand, ODF

> believes that any current or future employee should have the democratic freedom to choose the affiliation they want…."

[15] The Union responded by issuing its own notice to all ODF employees on October 10, 2008 which, among other things, stated:

> "…it is important to understand why Old Dutch doesn't want you to be a union member! They are not being the heroes of "freedom choice" but are, instead, trying to ensure that you have a weaker union, a smaller wage increase, and fewer rights at work…"

[16] On November 14, 2008, ODF sent another communication to all of its employees in which it purported to answer questions apparently being asked of it by some employees. Among these were the following:

> "…**Do I have to join the Union?**
>
> Answer: **No,** under the current collective agreement, you don't have to join the Union and this is at the core as to why Old Dutch Foods is fighting to maintain the status quo of an "open shop". This principle leaves employees the option/freedom to choose whether they want to be part of the Union and pay dues or not. Even if you are not a member of the Union, the Union is obligated by law to represent you.
>
> …**Is it true that ODF will automatically become a closed-shop if they sign-up 90% of workers?**
>
> Answer: **Not true**. The close-shop is a negotiated item as long as both parties do not agree on it, the status quo prevails and Old Dutch Foods will remain an open shop.
>
> **Is the Company offering a raise?**
>
> Answer: **yes.** Old Dutch Foods is indeed offering a raise and now that it has been presented and the Union has been allowed ample time t comment on it, Old Dutch Foods can now present it to you…
>
> (a wage proposal covering 7 categories and 5 years was set out)…".

[17] The Union raised objections to this communication during the bargaining sessions on November 18th and subsequently wrote the following letter to ODF, dated December 5, 2008:

> "To be clear and to repeat our position at the bargaining table, we suggested to the Employer that if they choose to communicate directly with our members, that it must be done reasonably and accurately.
>
> Your communications thus far have neither been accurate or reasonable, and certainly not brought forward in a manner consistent with the Labour Relations Code.
>
> If your excuse is that we somehow gave you permission to undermine Collective Bargaining and you are in any way confused, please consider the permission that was not given to be withdrawn.
>
> Please immediately cease and desist all direct communications with our members regarding Collective Bargaining related matters and all other matter which are prohibited by law and not consistent with ethical behavior."

[18] On December 8, 2008 the Union received a letter from Mediation Services, dated December 4th, advising the Employer had applied for appointment of a mediator. In due course, meetings with the mediator and, from time to time with ODF, took place on February 9 and 10 and March 4 and 5, 2009. At the first mediation meeting on February 9th the Union endeavoured to have ODF re-examine its position regarding union security based on some additional information the Union provided. Although ODF indicated it would do so, the Union was later advised by the mediator that ODF was not prepared to alter its position and, further, was not prepared to engage in any more bargaining. It wanted the mediator to "write out" of the dispute. This resulted in the Union preparing a strongly worded letter to ODF complaining it was making a farce out of the mediation process and there were still many issues to be discussed between the parties. After the mediator delivered this letter ODF did agree to further mediation meetings on the other meeting dates previously agreed upon during which many other issues were discussed and some agreement was achieved.

[19] Since mediation failed to result in a collective agreement, ODF on March 5th presented a Final Offer. The Union arranged for a strike vote to be held on March 21st and ODF likewise arranged for a lockout vote. Also, on March 19th ODF sent a notice to all employees urging them to vote against a strike and outlining the monetary highlights of its Final Offer. Among other things, this notice included the following statement immediately below the wage schedule:

> "**RETROACTIVE PAY:**
>
> Under the terms of the Final Offer retroactive pay will **only** be payable by the Company **if the Collective Agreement is ratified on or before April 15, 2009**. The retroactive pay will be payable to the employees in the following installments: 50% on April 30, 2009, 25% on July 30, 2009 & 25% on October 29, 2009."

[20] On March 24th the Union's president, Douglas O'Halloran wrote a letter to ODF stating he was assuming responsibility as the Union's chief negotiator and that notwithstanding the results of the strike vote the Union wanted a settlement, not a strike. He asked that ODF refrain from locking out the employees and instead review its bargaining position with a view to moving toward a negotiated settlement. He asked that he be contacted to schedule bargaining dates. The Employer's letter of March 26th indicated that in view of the comments made by the Union's previous spokesperson, the results of the strike vote and ODF's firm commitment to its Final Offer there was little prospect of achieving a negotiated settlement. Therefore it decided to serve notice of its intention to lockout the employees at noon on Sunday, March 29th. However, it was still willing to meet with the Union on Friday, Saturday or Sunday in an effort to achieve a settlement. Mr. O'Halloran responded by saying the Union could meet anytime after 4:00 p.m. on March 28th to try to avert a lockout/strike and would provide an amended position at that time.

[21] In a notice to employees sent out by ODF on March 26th it informed them a lockout was to commence at noon, Sunday, March 29th and it also stated, in part:

> "…As a consequence, no work will be made available by the Company after that time.
>
> Please take all you personal belongings with you, as you will not be allowed on the Company premises during the lockout.
>
> We regret having to make this decision, but we feel we have no other choice. We have advised the Union that representatives of the Company's bargaining committee are prepared to meet tomorrow, Saturday or Sunday, in an effort to achieve a settlement."

[22] Also, on March 26th the Union posted a notice on the bulletin board in the employee's lunch room that was headed "Urgent" and "Lockout and Strike Meeting" and stated:

> "The company has notified the Union that they will lock you out at noon on Sunday, March 29, 2009.
>
> The Union, as promised, has advised the company that we will respond with a strike starting at the same time.
>
> The company offer has not changed. However, we will review it again and vote on it at this meeting. The meeting will take place at the Glenmore Inn, Saturday March 28, 2009 from 2:00 pm – 4:00 pm.
>
> **Please attend this meeting. A strike and lockout will commence at noon on March 29, 2009.**"

The then current collective agreement provided that notices to be posted by the Union were to be approved and initialed by the Employer. A representative of management had handwritten on the Union's notice the words, "This meeting is for "ALL" employees".

[23] At the March 28th meeting the employees in attendance voted to reject ODF's Final Offer and authorized the Union to commence its strike.

[24] When the Union's negotiating committee met with ODF on March 28th the Union presented an amended union security position it described as a modified union shop that would require all new employees to become members and pay dues and all current employees would have to pay dues but those who were not members would not have to join. After ODF considered this offer it responded by stating it was prepared to accept the Union's proposal subject to two conditions: first, current employees who chose not to join would be exempt from paying dues; and second, the Union must agree to accept a collective agreement as proposed by ODF's Final Offer. If this was not acceptable to the Union, ODF would revert to its original position of maintaining the existing language regarding union security.

[25] In due course the Union replied by suggesting ODF's previous notices to employees only mentioned that current employees should have the choice to join the Union or not without making any mention of those employees also having a choice not to pay dues.

Therefore, the Union's proposal met the previous expectations of ODF and ODF could not now propose this new condition of permitting current employees the choice not to pay dues and at the same time refuse to bargain other terms and conditions of employment. In addition to the modified union shop proposal the Union outlined its position on a number of other outstanding terms that, if agreed upon, would lead to a recommended settlement. It also stated if this was rejected by ODF the Union reserved its right to revert to its prior bargaining position. ODF rejected the Union's position and the next day the lockout and strike began. Soon thereafter this complaint was filed.

[26] In addition to the evidence regarding the relationship of the Union and ODF, the Union also called Peter McInnis as an expert witness. He is an associate professor in the department of history at St. Francis Xavier University who had prepared an opinion paper on the historical context for union security in postwar Canada and in respect of which he testified. He was accepted as an expert although the Alberta A/G took issue with some of the comments in his paper that were argued to be matters beyond the expertise of the witness. The Alberta A/G took particular exception to Professor's McInnis' comment that "While density differentials are attributable to a number of causal factors, the lack of a statutory Rand formula does contribute significantly to lowered rates of union membership".

[27] Presumably that comment caused the Alberta A/G to call its own expert witness, Niels Veldhuis, the director of fiscal studies and senior economist with the Fraser Institute. He had been informed that during the oral testimony of Professor McInnis reference had been made to publications of the Fraser Institute in support of the comment about the impact of a statutory Rand formula on provincial unionization rate differentials. In the paper presented by Mr. Veldhuis he stated there was no publication of the Fraser Institute that has attempted to measure and therefore has not found support for Professor McInnis' comment. The publications of the Fraser Institute have so far been restricted to explaining differentials in unionization rates between Canada and the United States in which all Canadian jurisdictions are grouped together as all of them do permit collective agreements to include mandatory membership and dues payment provisions. The only academic study of which Mr. Veldhuis was aware that attempts to empirically estimate the impact of a statutory Rand formula on

provincial unionization rates was an early one (Martinello and Meng, 1992) that he did not believe presented sufficient empirical evidence to support Professor McInnis' comment. However, Mr. Veldhuis did concede there may be theoretical reasons, although not backed by empirical evidence, why the presence of a statutory Rand formula would increase unionization rates. That same sentiment was echoed in one of the studies he relied upon that had been undertaken by Professors Taras and Ponak of the University of Calgary, *Mandatory Agency Shop Laws As an Explanation of Canada – U.S. Union Density Divergence*, Journal of Labour Research, Volume XXII, Number 3, Summer 2001.

Decision

The Charter Issue and the Health Services Decision

[28] It was not surprising that much of what the parties had to say in their respective submissions dealt with the *Charter* issue and, in particular with what flowed from the decision of the Supreme Court of Canada in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia* [2007] 2 S.C.R. 391 ("*Health Services*"). There, the Court concluded, at para. 2, "…that the s. 2(d) guarantee of freedom of association protects the capacity of members of labour unions to engage in collective bargaining on workplace issues." In reaching this conclusion, the Court specifically overruled a number of its earlier decisions which had held that collective bargaining was not protected by s. 2(d). The Court also stated, at para. 19, that the case before it did not concern "the right to strike", which it had earlier determined not to be within the scope of the guarantee of freedom of association. Based on this decision the parties engaged in a debate as to whether the Board should now reconsider its earlier decisions dealing with bad faith bargaining complaints arising out of a breach of section 60 of the *Code* to the extent such complaints involved union security issues.

[29] Without question the *Health Services* decision has had and will continue to have a significant impact on labour relations throughout Canada. The decision that s. 2(d) of the *Charter* confers upon unions' members the right to engage in collective bargaining, notwithstanding that affected parties have been guided since 1987 by that Court's contrary conclusion, has given rise to much debate among numerous authors within the labour

relations community as to the effect of this decision. Its full impact is yet to be determined. As of the date of our hearings there were only three court decisions commented on by the parties that have given consideration to it. The Ontario Court of Appeal in *Fraser v. Ontario (Attorney General)* [2008] O.J. No. 4543 relies upon *Health Services* in setting aside the Ontario *Agricultural Employees Protection Act* ("AEPA") as being in violation of s. 2(d) of the *Charter* and not justified under s. 1. The court stated the AEPA substantially impairs the right of agricultural workers to bargain collectively because it provides no statutory protections for collective bargaining. That case is presently on appeal to the Supreme Court of Canada. The New Brunswick Court of Queen's Bench in *C.U.P.E. et al. v New Brunswick* 2009 NBQB 164 also relies upon *Health Services* in holding that the exclusion of casual employees from that province's *Public Service Labour Relations Act* is contrary to s. 2(d) as an infringement of their rights to engage in collective bargaining. Finally, in *Mounted Police Assn. of Ontario v. Canada (Attorney General)* [2009] O.J. No. 1352 the Ontario Superior Court of Justice relied upon *Fraser v. Ontario* and *Health Services* in holding that s. 96 of the RCMP Regulations which entrenched the Staff Relations Representative Program as the sole entity through which members of the RCMP could collectively interact with management in relation to labour relations issues interfered with the s. 2(d) rights of those members to associate for purposes of collective bargaining. There is a fourth decision that was not referred to that being the decision of the Quebec Superior Court in *Confederation des syndicates nationaux v. Quebec (Procurer general)* [2007] J.Q. No. 13421 (QL), presumably because an English language translation was not available.

[30] Among the authorities presented to us by ODF was the 2006 decision of our Court of Appeal in *AUPE v. PHAA*, dealing with the constitutionality of section 114 of the *Code*, which held that the absence of a compulsory dues check-off provision in the *Code* does not infringe s. 2(d) of the *Charter*. In reaching that decision the Court of Appeal said, in effect, (a) the right to collectively bargain was merely a right created by legislation and not a fundamental freedom; and, (b) the principle of judicial restraint should prevent the court from interfering with government regulation of labour relations which involve policy decisions best left to government. With respect to those conclusions the Court relied upon *Reference Re Public Service Employee Relations Act (Alberta)* [1987] 1 S.C.R. 313 (*"Alberta*

Reference"). But now the Supreme Court in *Health Services* has overruled its own decision in *Alberta Reference* and has held the statutory entrenchment of collective bargaining did not create that right but only afforded it protection which does not detract from its fundamental nature (para. 25) and that judicial restraint does not result in the courts avoiding policy matters since policy must reflect *Charter* rights and values (para. 26). Since our Court of Appeal did not consider that collective bargaining was a fundamental freedom, it was not prepared to conclude government had a positive obligation to enact legislation to codify the Rand formula in the *Code.* In reaching this conclusion it relied upon the requirements outlined in *Dunmore v. Ontario* [2001] 3 S.C.R. 1016 to be met in order to impose a positive obligation on government to enact legislation, the first of which was that the claim must be grounded in a fundamental freedom, rather than in access to a statutory scheme. But in light of the determination in *Health Services* that the process of collective bargaining is a fundamental freedom (see para. 66 and 87), the impact of the decision in *AUPE v. PHAA* has been considerably weakened.

[31] One of the problems we now face is in deciding what McLachlin, C.J. and LeBel, J. had in mind when they stated, at para. 29, "…it is entirely possible to protect the "procedure" known as collective bargaining without mandating constitutional protection for the fruits of that bargaining process". Both of the expert witnesses were agreed that the labour codes in effect in six provinces: British Columbia, Saskatchewan, Manitoba, Ontario, Quebec and Newfoundland; as well as that in effect in the federal jurisdiction, contain a form of statutory Rand formula. These provisions were adopted at various times during the period from 1977 to 1985. Presumably, in those jurisdictions it is unlikely any debate would arise as to whether the fundamental freedom protected by s. 2(d) includes this minimum union security provision as part of the procedure known as collective bargaining since their respective labour codes already include the Rand formula. Consequently, this statutory provision would not seem to fit within what the Court calls the "fruits of that bargaining process".

No Rand formula in Alberta

[32] On the other hand, Alberta (together with Nova Scotia, New Brunswick and Prince Edward Island), does not legislate a minimum level of union security. So the question arises as to whether in Alberta the omission to include in the *Code* some form of a minimum level of union security constitutes a violation of s. 2(d) as being an infringement of the fundamental freedom of association that protects the capacity of the members of the Union to engage in collective bargaining on workplace issues. As already mentioned our Court of Appeal in *AUPE v. PHAA* said this omission was not a infringement of s. 2(d) but that was before the *Health Services* case was decided by the Supreme Court of Canada and whether our Court of Appeal would still reach that same conclusion is uncertain. Accordingly, the Board does not consider it is bound by the decision in *AUPE v. PHAA* and instead must now consider the matter afresh in light of *Health Services.*

A Bit of Labour Relations History

[33] Does the right of employees to a process of collective bargaining that is protected by s. 2(d) extend to having a legislated minimum level of union security? First, a bit of the same labour relations history mentioned in the *Health Services* decision is necessary. The Court stated in that decision at para. 41

> "The history of collective bargaining in Canada reveals that long before the present statutory labour regimes were put in place, collective bargaining was recognized as a fundamental aspect of Canadian society. This is the context in which the scope of s. 2(d) must be considered."

[34] In *Ford Motor Company of Canada Limited v. International Union of United Automobile, Aircraft and Agricultural Implement Workers of America* (1946) C.L.L.R. 18,001, Mr. Justice Rand had been appointed as arbitrator to settle a lengthy strike in which the most contentious issue was union security. As a compromise, he proposed what became known as the Rand formula that provided employees in the bargaining unit would not be required to become union members but all employees would be required to pay dues to the union democratically chosen to be their exclusive bargaining agent. He attached conditions to this compulsory check-off, including that any employee who engaged in an illegal strike

would be subject to penalties; and, if the union declared an illegal strike or failed to repudiate one that had commenced it would be penalized by having the check-off of dues suspended for not less than two months and not more than six months. (A suspension of a dues check-off is still a penalty the Board can impose on a union for an illegal strike: see s. 114 of the *Code*.) Justice Rand commented in his award that he considered it "entirely equitable …that all employees should be required to shoulder their portion of the burden of expense for administering the law of their employment, the union contract; that they must take the burden along with the benefit."

[35] In 1968 the Report of the Task Force on Labour Relations (known as the Woods Report) was tabled in the House of Commons. It was a review of the state of Canadian labour policy that the Federal Government had asked to be undertaken. Among the recommendations in the Woods Report was the following with respect to union security:

> "An important ingredient in the Canadian collective bargaining system is that a union gains exclusive bargaining authority and with it the duty to represent all employees in the prescribed unit in the collective negotiation of terms and conditions of employment. These policies, in our view, give the union a claim to general support from employees in the unit in the union's capacity as their collective bargaining agent, whatever other functions it may perform as an instrument of social transformation.
>
> This rationale supports the agency shop form of union security. Under this form of union security an employee in a unit for which a union is the bargaining agent must pay the regular and reasonable dues of the union, whether he takes out membership or not, as an "agency fee". Such a fee is for services rendered and responsibilities assumed by the union in the collective bargaining system imposed as a matter of national labour policy.
>
> We recommend that the compulsory irrevocable check-off of regular and reasonable dues be available to a certified union as of right upon the negotiation of its initial collective agreement and thereafter, and that this right be extended to a union recognized voluntarily by the employer."

[36] The importance of the Rand formula in Canadian labour relations has been the subject of much favourable comment in the decisions of our courts. Perhaps the most notable of these is the decision of the Supreme Court of Canada in *Lavigne v. Ontario Public Service Employees Union* (1991) 81 D.L.R. (4th) 545. This was a case in which Mr. Lavigne objected

to paying union dues in accordance with a compulsory check-off contained in the collective agreement applicable to his workplace and also objected to the use made by the union of some portions of the dues it collected. Among the various concurring opinions of the members of this Court are the following comments:

> "…the purpose of the Rand formula is simply to promote industrial peace through the encouragement of collective bargaining. " (Wilson, J. at 589)
>
> "…Paul J. J. Cavaluzzo has canvassed the way in which the Rand Formula assists unions in his article, "Freedom of Association – Its Effect Upon Collective Bargaining and Trade Unions" (1988) 13 Queen's Law J. 267 at 287-8. These may be summarized as (1) to prevent "free riders", i.e. to compel all members to pay for union representation; (2) to assist in building employee solidarity; and (3) to inhibit employer attempts to undermine the trade union." (Wilson, J. at 597)
>
> "(In considering the *Oakes* test regarding the state's objective in compelling payment of dues)…The first (of two closely interrelated objectives) is to ensure that unions have both the resources and the mandate necessary to enable them to play a role in shaping the political, economic and social context within which particular collective agreements and labour relations disputes will be negotiated or resolved…" (LaForest, J. at 636)
>
> "The second government objective I have alluded to explains why government puts no limits on the uses to which contributed funds can be put. This objective is that of contributing to democracy in the workplace…". (LaForest, J. at 637)
>
> "…The (Rand) formula permits individual employees to choose not to belong to the union, but stipulates that they must pay union dues, in order to avoid the unfairness of giving non-union employees a "free ride". In essence, while not a member of the union, the person who opts out is required to pay dues on the basis that he or she benefits from the activities of the union on behalf of all employees." (McLachlin, J. (as she then was) at 644)
>
> "…Fairness dictates that those who benefit from the union's endeavours must provide funds for the maintenance of the union…." (McLachlin, J. at 646).

Principles of Labour Legislation

[37] Labour legislation in Alberta, as with most of the other jurisdictions in Canada, adopts principles of majoritarianism, which provides that the union with the majority of union support represents the bargaining unit; exclusivity, which provides that only one union represents the bargaining unit; and fair representation, which provides that the democratically

chosen union has a duty to represent all members of the bargaining unit whether or not they are members of the union. As well, the *Code* does provide for secret ballot votes to determine the certification of a union as bargaining agent and the revocation of a union's bargaining rights; it contains provisions regarding the timing and regulation of strikes and lockouts; it imposes a duty on the employer and union to bargain collectively in good faith and to make reasonable efforts to enter into a collective agreement; and it requires collective agreements to contain certain provisions including a method for the settlement of differences relating to the interpretation, application or operation of the agreement or whether the agreement has been contravened, and whether such differences can be the subject of arbitration. However, the *Code* does not require that a collective agreement contain a compulsory check-off for all members of a bargaining unit, even though it does adopt other of Mr. Justice Rand's recommendations including the prohibition of strikes during the term of the collective agreement and the suspension of union dues in response to an illegal strike.

[38] So, we are back to the question of whether, in Alberta, a statutorily mandated minimum level of union security is merely part of the "fruits" of collective bargaining and, therefore outside the protection afforded by s. 2(d), or is inherently part of the process of collective bargaining that is protected by this provision of the *Charter*. There would seem to be no doubt the inclusion in a collective agreement of a form of union security in excess of that encompassed by the Rand formula, such as a union shop or a closed shop, as is permitted by section 29 of the *Code*, could properly be considered "fruits" of the collective bargaining process. But, what the Union argues is that the omission from the *Code* of a mandated Rand formula weakens its negotiating power and its ability to represent employees and significantly and adversely impacts the process of voluntary, good faith collective bargaining. Such a provision, while not guaranteeing the outcome of collective bargaining over workplace conditions, would serve to preserve the integrity of the collective bargaining process.

Comments from the Health Services Decision

[39] The Union suggests that support for its position is found among the comments of McLachlin, C.J. and LeBel, J. in the *Health Services* decision. The human dignity, liberty

and autonomy of employees is enhanced by their right to bargain collectively with an employer (para 82). “Collective bargaining also enhances the *Charter* value of equality” and one of its fundamental achievements is “to palliate the historical inequality between employers and employees” (para 84). The constitutional right to collective bargaining “is supported by the *Charter* value of enhancing democracy” as it permits employees to achieve a form of workplace democracy and they gain a voice to influence the establishment of rules that control a major aspect of their lives (para 85).

[40] The Court points out that in *Dunmore* it was held that s. 2(d) does not apply solely to individual action carried out in common, but also to associational activities themselves. The protected right of collective bargaining allows for employees to unite together, to present demands to employers collectively and to engage in meaningful discussions in an attempt 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” (para 89).

[41] The Court also states that s. 2(d) does not protect all aspects of the associational activity of collective bargaining but only against “substantial interference” with associational activity. However, it is not essential there be intent to interfere with the associational right of collective bargaining to establish breach of s. 2(d) of the *Charter*. “It is enough if the *effect* of the state law or action is to *substantially interfere* with the activity of collective bargaining, thereby discouraging the collective pursuit of common goals. It follows that the state must not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith” (para. 90).

[42] The Court pointed out the right to collective bargaining is a limited right, it is a right to a process and “does not guarantee a certain substantive or economic outcome. Moreover the right is to a general process of collective bargaining, not to a particular model of labour relations, not to a specific bargaining model”. The interference “must be substantial – so substantial that it interferes not only with the attainment of the union members’ objectives

(which is not protected), but with the very process that enables them to pursue these objectives by engaging in meaningful negotiations with the employer" (para 91).

[43] The Court also states that "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. … 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" (para. 92).

[44] Determining whether a government measure amounts to substantial interference involves two inquiries: first, what is the importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of union members to come together to pursue common goals in concert; and second, what is the manner in which the measure impacts on the collective right to good faith negotiation and consultation (para. 93).

[45] With respect to the first inquiry, "the essential question is whether the subject matter of a particular instance of collective bargaining is such that interfering with bargaining over that issue will affect the ability of the union to pursue common goals collectively." The importance of an issue to the union and its members is not determinative but the more important the matter the more likely that there is substantial interference with the s. 2(d) right (para. 95).

[46] Laws or state actions that prevent or deny meaningful discussion and consultation about working conditions between employees and their employer may substantially interfere with the activity of collective bargaining, as may laws that unilaterally nullify significant negotiated terms in existing collective agreements. On the other hand, measures affecting less

important matters such as the design of uniform, the lay out and organization of cafeterias, or the location or availability of parking lots may be far less likely to constitute significant interference with the s. 2(d) right of freedom of association (para. 96).

[47] Regarding the second inquiry, the question is whether the legislative measure or government conduct in issue respect the fundamental precept of collective bargaining – the duty to consult and negotiate in good faith. So long as it does, there is no violation of s. 2(d), even if the content of the measures might be seen as being of substantial importance to collective bargaining concerns, since the process confirms the associational right of collective bargaining (para. 97).

[48] In its discussion of the meaning of the duty to consult and the requirement to negotiate in good faith, the Court drew an analogy to an employer's duty to bargain in good faith under labour legislation (paras. 98-106). Later in the decision the Court also stated that:

> "114 …the right to bargain collectively protects not just the act of making representations, but also the right of employees to have their views heard in the context of a meaningful process of consultation and discussion. …the right to collective bargaining cannot be reduced to a mere right to make representations…."

[49] Here, we are not dealing with a law that prevents or denies meaningful discussion and consultation but, rather, with an omission by the state to make provision for a claim grounded in the fundamental *Charter* freedom of association. In *Health Sciences* the following comment is made at para. 34:

> "Finally, *Dunmore*, recognized that, in certain circumstances, s. 2(d) may place positive obligations on governments to extend legislation to particular groups. Underinclusive legislation may, "in unique contexts, substantially impact the exercise of a constitutional freedom" (para 22). This will occur where the claim of underinclusion is grounded in the fundamental *Charter* freedom and not merely in access to a statutory regime (para. 24); where a proper evidentiary foundation is provided to create a positive obligation under the *Charter* (para. 25); and where the state can truly be held accountable for any inability to exercise a fundamental freedom (para. 26). There must be evidence that the freedom would be next to impossible to exercise without positively recognizing a right to access a statutory regime."

[50] The Ontario Court of Appeal in *Fraser v. Ontario* had this to say regarding the positive obligation of government to legislate with respect to collective bargaining:

> "52 In summary, the combined effect of *Dunmore* and *B.C. Health Services* is to recognize that s. 2(d) protects the rights of workers to organize and to engage in meaningful collective bargaining. The decisions also recognize that, in certain circumstances, s. 2(d) may impose obligations on government to enact legislation to protect the rights and freedoms of vulnerable groups.
>
> 53 The test for determining whether a claimant making a positive rights claim under s. 2(d) is entitled to government action was initially laid down in *Dunmore*. The Supreme Court subsequently expanded the test for positive rights claims under s. 2 of the *Charter* in *Baier v. Alberta* [2007] 2 S.C.R. 673, para. 30 ("*Baier*"). Applying the *Baier* test in this context involves the following five inquiries:
>
> 1. Are the activities for which the appellants seek s. 2(d) protection associational activities?
> 2. Are the appellants seeking a positive entitlement to government action, or simply the right to be free from government interference? If the former, then the so-called "*Dunmore* factors" must be considered.
> 3. Are the claims grounded in a fundamental freedom protected by s. 2(d), rather than in access to a particular statutory regime?
> 4. Have the appellants demonstrated that exclusion from a statutory regime has the purpose or effect of substantially interfering with the freedom to organize or the right to bargain collectively?
> 5. Is the government responsible for the inability to exercise the fundamental freedom?"

Effect of Duty of Fair Representation on Unionization

[51] The *Charter* violation regarding union security that is advanced by the Union is based on the assertion that Alberta has adopted a certain model of labour relations that includes the principles of majoritarianism, exclusivity, and fair representation, but omits to include a key component of that model, being a Rand formula union security clause, and this omission substantially interferes with the right to bargain collectively.

[52] As part of the model of labour relations, labour legislation in Canada, imposes a duty of fair representation on trade unions (see section 153 of the *Code*) that not only requires unions to fairly represent all employees in the bargaining unit with respect to their rights

under the collective agreement but, in so doing, obliges the unions not to act arbitrarily or in bad faith or in a discriminatory manner. Unions are bound by this duty regardless of whether the employees in question are union members and regardless of whether the employees provide the financial contribution necessary to support that representation.

[53] The Union further argued that presumably the Alberta legislature, like the other legislatures in Canada, concluded that the principle of fair representation is to be balanced and operate in conjunction with the majoritarianism and exclusivity principles and is necessary to facilitate industrial peace and stability and to decrease the number and volatility of industrial disputes. The number and complexity of issues covered, directly or indirectly, by collective agreements, such as those requiring a consideration of human rights legislation or the provisions of the *Charter*, has led to the duty of fair representation becoming more complicated and difficult. The jurisdictions which contain a mandatory union security provision in their labour relations statutes presumably have concluded such a provision is a necessary component in the balancing of the interests at stake in such statutes as a whole. Alberta has no such provision yet the *Code* puts the same obligations on unions as is found in those other jurisdictions, including the duty of fair representation.

[54] In the expert opinion of Professor McInnes, stated at para. 24 of his paper:

> "Alberta undertook many of the postwar reforms of 'modern' industrial pluralism but did not include a statutory Rand formula. Statistics on trade unions by province from Human Resources and Skills Development Canada (HRSDC) indicate Alberta has the lowest union density - membership as a proportion of the work force. While density differentials are attributable to a number of causal factors, the lack of a statutory Rand formula does contribute significantly to lowered rates of union membership."

In his testimony, Professor McInnis stated there were unnamed academic studies in support of this conclusion but did not provide citations for them as he would have if this had been an academic paper. Mr. Veldhuis in his expert opinion took issue with this statement by Professor McInnis on the basis there was a lack of empirical evidence to support it. However, Mr. Veldhuis did concede the existence of an "old" study (Martinello and Meng, 1992) that "attempts to empirically estimate the impact of a statutory Rand formula on provincial

unionization rates". But for a variety of reasons he felt this study does not provide sufficient empirical evidence to support Professor McInnis' claim. It was also Mr. Veldhiuis' view that, "While there may be theoretical reasons that the lack of a statutory Rand formula in some Canadian provinces would increase [decrease?] unionization rates, the theory is not backed by empirical evidence".

[55] In the study undertaken by Professors Taras and Ponak they comment on the Martinello and Meng study as follows, at 558:

> "…does the positive protection of union security increase union membership, union organizing and union strength? There is remarkably little empirical research on this question, but the sole available study suggests that mandatory agency shop legislation increases union density. Relying on labour force survey data, Martinello and Meng (1992) examined the effects of inter-provincial labour legislation differences on the likelihood that an individual would be unionized. They focused on certification procedures, strike replacement restrictions and union security. They found that the presence of mandatory agency shop legislation boosted the long-run probability of union coverage by 17.6 percent. The other two labour legislation variables used in the model had no impact on union coverage.
>
> We believe there are sound theoretical reasons for Martinello and Meng's study's findings. The stronger the form of union security, the more revenues flow into union coffers. …".

The professors also state earlier in their study, at 549:

> "…The four provinces which do not provide a mandatory agency shop, Prince Edward Island, Nova Scotia, New Brunswick, and Alberta, also contain the highest proportion of contracts with no union security provisions at all, from 14 percent to over 20 percent. This suggests that the law matters – unions are not always capable of successfully negotiating these provisions without facilitating legislation. The absence of legislation setting a minimum agency shop translates into weaker union security provisions for some unions."

Effect of Health Services Decision on Need to Legislate a Rand Formula

[56] In the opinion of the Board some empirical evidence appears to exist to support the fact the lack of a statutory Rand formula is one causal factor that contributes significantly to lowered rates of union membership in Alberta. But the absence from the *Code* of the Rand

formula as a contributing factor to lower rates of union membership in Alberta is not the primary issue in these proceedings. Instead, in this case what is of concern is the effect of the *Health Services* decision. In that context the Board notes that in its experience where a union security provision requiring payment of dues by all employees forms part of the collective bargaining dispute, especially in first contract negotiations, the presence of a mandatory dues check off provision in the *Code* would undoubtedly have had a salutary effect by reducing what are often lengthy periods of collective bargaining that can give rise to protracted and bitter labour disputes. The reasons for the disputes over union security are much the same as those noted by the Supreme Court of Canada in *Lavigne* and include dissension among bargaining unit members caused by the presence of "free riders", problems faced by an underfunded union in effectively servicing the unit, and fears of employer retaliation against those employees who sign voluntary check offs: In that regard we were referred to the Board's decisions in *Dynamic Furniture Corp.* [2000] Alta.L.R.B.R. 138; *Southam Inc.* [2000] Alta.L.R.B.R. 177; and *Economic Development Edmonton* [2002] Alta.L.R.B.R. 313. Those were cases in which the Board noted the absence of a statutory Rand formula and commented voluntary dues deductions may result in the union being without adequate resources to adequately service the bargaining unit. In turn, this can create dissension in the bargaining unit due to the presence of "freeloaders" and lead to dissatisfaction on the part of those who are paying dues (*Dynamic*, para. 182). The Board is aware of employer resistance to a Rand formula, especially in first agreement bargaining, which by itself is not a failure to bargain in good faith, but is a circumstance to be scrutinized as part of a broader enquiry into evaluating whether the employer was negotiating without the intent of entering into a collective agreement (*Southam*, para. 71). This is especially so where the employer seeks to avoid a Rand formula provision that is standard on an industry or broader basis and refuses to provide reasonable information in support of its refusal (*Southam*, para 79). The Board also commented that a Rand formula is of great importance to the union while being virtually cost free to the employer. Since justification for denying a Rand formula is not self evident the employer owes an obligation to the union to justify its position in detail (*Southam*, para. 85). A failure to do so can lead to the conclusion the employer has failed to make reasonable efforts to enter into a collective agreement (*Southam*, para. 93; *Economic Development*, para. 157).

[57] What is before us, at least with respect to what flows from the *Charter* issue, is whether the protection afforded by s. 2(d) that now extends to the process of collective bargaining, requires that the *Code* contain a provision to compel all employees in the bargaining unit to pay union dues to the trade union regardless of their membership in the trade union. Decisions of the Supreme Court of Canada dealing with s. 2(d) of the *Charter*, at least those of them that involved trade unions and that pre-date *Health Services*, have described freedom of association as the freedom to join together in the pursuit of collective activities or for the purpose of achieving common goals. Indeed, in *Lavigne*, LaForest, J.at 627 commented that, "In the *Reference re Public Service Employee Relations Act (Alta.)* [1987] 1 S.C.R. 313 (*"Alberta Reference"*) four aspects of association were identified: the right to establish, belong to and maintain organizations, and to participate in their activities." He also states, at 626, "…I think it is fair to construe payment of dues which are used to further the objects of the union as "maintaining" or "participating in" this particular association…" Later, at that same page, he states, "Having concluded that financial contribution to an organization alone may constitute association within the meaning of the Charter…"

[58] Given that the freedom of association now extends to protecting the process of collective bargaining and accepting that payment of dues to a trade union falls within the scope of this freedom, it would seem to follow that a Rand formula type of union security is included within the protection that s. 2(d) provides to the members of the Union to engage in the process of collective bargaining with the Employer. We so declare. But the Union is seeking more than a mere declaration of the rights it and those of its members employed at the ODF facility may possess. It advances a positive rights claim entitling it and its members to government action and, in particular, seeks appropriate amendments to the *Code* to require all employees in the bargaining unit to pay union dues. In order to determine whether government is obliged to enact legislation it becomes necessary to consider the *Baier* test described in the quotation taken from *Fraser v. Ontario* that is set out in paragraph [50] above.

Deciding Whether Alberta Should Legislate a Rand Formula

[59] The first inquiry in the *Baier* test is: Are the activities for which the appellants seek s. 2(d) protection associational activities? The Union argues the absence from the *Code* of a mandatory Rand formula violates s. 2(d) by interfering with the right of employees to maintain or participate in their chosen trade union through which they seek to achieve common goals thereby depriving them and the union of their right to engage in collective bargaining. It is our view the activities of joining together to pursue collective activities and to engage in collective bargaining are associational activities, so this first aspect of the test is satisfied.

[60] The second inquiry of the test is: Are the appellants seeking a positive entitlement to government action, or simply the right to be free from government interference? As is clear from what has already been discussed, the Union and its members seek a positive entitlement to government action by claiming the *Code*, through its omission of a mandatory Rand formula, is underinclusive giving rise to the violation of their freedom of association. To remedy this violation they seek to have the government amend the *Code* to include this union security provision and say this is fundamental to the Union's members in organizing an association and engaging in collective bargaining. As this aspect of the test is satisfied it is necessary to consider the three *Dunmore* factors.

[61] The third inquiry is: Are the claims grounded in a fundamental freedom protected by s. 2(d), rather than in access to a particular statutory regime? In *Dunmore*, Bastarache, J. stated, "…a constitutional freedom to organize a trade association…exists independently of any statutory enactment…While it may be that the effective exercise of this freedom requires legislative protection in some cases, this ought not to change the fundamentally non-statutory character of the freedom itself." (para. 24). Of a similar nature is what the Court stated in *Health Services*, "…Legislatures… have historically viewed collective bargaining rights as sufficiently important to immunize them from political interference. The statutes they passed did not create the right to bargain collectively. Rather they afforded it protection. There is nothing in the statutory entrenchment of collective bargaining that detracts from its fundamental nature." (para. 25). Based on this, we are of the opinion that the claims of the

Union and its members are grounded in the fundamental freedom of association rather than in a denial of access to a process founded only on the *Code*.

[62] The fourth inquiry is: Have the appellants demonstrated that exclusion from a statutory regime has the purpose or effect of substantially interfering with the freedom to organize or the right to bargain collectively? As provided in *Health Services* the protection afforded by s. 2(d) does not extend to all associational activity but only protects against state law or action that has the effect of substantially interfering with the activity of collective bargaining. The Court said, "…the state must not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith" (para. 92). Also, in *Dunmore* it was held that underinclusive legislation could be challenged under s. 2 so long as the claim of underinclusion is grounded in a fundamental freedom rather than in access to a particular statutory regime. In the case before us, as already mentioned, we accept the Union's claim that the *Code* is underinclusive because it fails to provide adequate statutory protection to enable it and its members to engage in meaningful collective bargaining, the effect of which is to substantially interfere with the fundamental freedom of association.

[63] We had before us evidence of attempts made by Local 373A during the period of 1971 to 2004 to have ODF agree to a Rand formula type of union security, but apart from obtaining the inclusion of a maintenance of membership provision in the 2004 agreement, these attempts were without success. Then, in 2008, the Union initiated collective bargaining for what it considered to be a first agreement and in respect of which it sought a union shop, later changed to a modified union shop, but it too had no success in achieving this goal. ODF justified its opposition to a union security provision of this sort on the basis of unexplained "philosophical reasons", but subsequently expanded on this to include a stated belief in the right of employees to have freedom of choice, a concern that some senior employees had indicated they would quit if forced to join a union or pay union dues, and a worry that it might hinder future attempts to recruit new employees. With respect, ODF's concern for the right of employees having a freedom of choice cannot extend to overcoming the choice made by the majority of employees to have a bargaining agent. While those in the minority may be

free to choose not to become members of the trade union, unless and until such time as ODF and the Union may agree otherwise, they are no longer free to choose to avoid paying union dues. As explained above that choice was removed from them when *Health Services* recognized the process of collective bargaining is protected by s. 2(d) and, as we have found based on *Lavigne*, this is inclusive of a Rand formula type of union security.

[64] In *Health Services*, at para. 93, the Court stated:

> "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."

These same inquiries are applicable to the determination of whether circumstances exist imposing an obligation on government to enact legislation to protect the process of collective bargaining. The requirement that all members of the bargaining unit pay union dues is important to the process of collective bargaining and to the capacity of those persons to come together and pursue collective goals in concert. If the trade union is financially weakened when sufficient members of the bargaining unit fail, for whatever reason, to pay dues this has the effect of depriving those dues paying members of the unit of their right to freedom of association. A trade union thus weakened is not able to carry on the collective right of its members to engage in good faith negotiation with the employer over workplace issues. Instead it has to expend its time and resources trying to negotiate with the employer over its own financial strength and viability and while that issue remains outstanding the process of collective good faith negotiation is skewed to enfeeble the union's ability to secure a fair outcome regarding workplace issues. A statutory Rand formula does not guarantee the outcome of collective bargaining about workplace issue but it does preserve the integrity of the collective bargaining process. Accordingly, the answer to the fourth inquiry is that the Union has demonstrated that the absence of a Rand formula from the *Code* substantially interferes with s. 2(d) by depriving the members of the Union of sufficient protection to enable them to engage in a meaningful process of collective bargaining.

[65] The fifth and last inquiry is: Is the government responsible for the inability to exercise the fundamental freedom? The Alberta A/G argues that the absence from the *Code* of a statutory Rand formula does not preclude or impede the process of collective bargaining as is evidenced by the fact this process is regularly engaged in by a variety of employers and unions throughout Alberta. So the government cannot be found responsible for the Union's inability to obtain from ODF a Rand formula type of union security. We can do no better than to quote from *Fraser v. Ontario*, where the Court was considering a similar argument that the government had done nothing to actively preclude or impede collective bargaining and, therefore could not be found to be responsible, and it stated:

> "103 *Dunmore* answers this argument. There the Supreme Court recognized that a government actor could be held responsible for the inability of workers to exercise their s. 2(d) rights against private employers, even if the government had not actively interfered with those rights. Applying *Dunmore*, I am satisfied that the government's legislative actions in the realm of labour relations are responsible for the appellants' inability to engage in a meaningful process of collective bargaining."

Alberta Should Legislate a Rand Formula

[66] In enacting the *Code* the government of Alberta adopted the recommendations of Mr. Justice Rand, apart from the compulsory check-off of union dues for all members of the bargaining unit. As well, it adopted the same labour relations principles as most other jurisdictions in Canada and imposed the same obligations on unions to fairly represent all members of the bargaining unit but did so without including what can be fairly described as a balancing of all these principles and obligations with a statutory requirement that all members of a bargaining unit pay union dues.

[67] Now that the Supreme Court has concluded that the protection of freedom of association afforded by s. 2(d) extends to the process of collective bargaining, and that the payment of union dues has been recognized as part of the freedom of association, the obvious conclusion is that the continued absence from the *Code* of a statutory Rand formula is a violation of s. 2(d) that can only be remedied by government action. It follows that the inability of the ODF workers to bargain collectively is linked to the absence from the *Code* of

a statutory Rand formula. The Union has demonstrated to our satisfaction that this absence is solely attributable to government and is a violation of the fundamental right of these workers under s. 2(d) right to bargain collectively. The evidence adduced by the Union includes (a) the history of Local 373A's inability to achieve a Rand formula resulting in dissension among the members of the bargaining unit and eventually leading to its inability to service the bargaining unit, (b) the Union's own frustrations in not convincing ODF to provide meaningful information in support of its refusal to agree to a Rand formula, (c) the collective agreement ODF has at its plant in Winnipeg contains a mandatory check off of union dues, apparently due to the requirements of Manitoba's labour legislation, and the collective agreements in effect at its recently acquired plants in Lachine, Quebec and Hartland, New Brunswick also contain mandatory dues deductions, and (d) in the food industry in Alberta union security akin to or in excess of a Rand formula appears to be standard.

[68] The Alberta A/G did not present arguments in satisfaction of the onus resting on it to assert that section 1 of the *Charter* would justify a continued absence from the *Code* of a statutory Rand formula.

[69] Although we have declared the absence from the *Code* of a statutory Rand formula provision is a violation of s. 2(d) of the *Charter*, we suspend this declaration for a period of 12 months to allow the government to address the repercussions of this decision.

The Section 60 and the Section 148 Complaints

[70] The effect of *Health Services* is such that no longer is it possible to accept as a blanket statement that union security can be the subject of collective bargaining in Alberta. Now, it is only those forms of union security greater than the Rand formula, such as a union shop or a closed shop that remains subject to collective bargaining, as they are what the Court described as "the fruits of that bargaining process" and lie outside the scope of the constitutional protection provided by s. 2(d) of the *Charter*. But the Rand formula itself forms part of the freedom of association that is protected by s. 2(d) and can no longer be considered an issue capable of being the subject of collective bargaining. The result of this is

that bargaining to impasse a Rand formula type of union security would constitute a failure to bargaining in good faith as required by section 60 of the *Code*.

[71] Prior to the commencement of the strike/lockout, the Union was attempting to secure a union security provision in excess of a Rand formula. At the last meeting of the parties on March 28, 2009, the Union offered a "modified union shop" by which it meant that new employees would have to become members of the union and pay dues and that all current employees who were not already members would not have to become members but would be required to pay union dues. The response of ODF was not an unconditional acceptance of what the Union was offering as it was not prepared to require current employees who were not members of the Union to pay Union dues and also it would require the Union to accept all other collective agreement terms as outlined in its last proposal. The Union refused this attempt by ODF to impose unacceptable modifications to its proposal and the strike/lockout began. However, on June 2, 2009 the Union's president wrote a letter to ODF in a further effort to settle the dispute offering to change its union security proposal to that of accepting a full Rand formula which was explained to mean that all current or future employees would have the option to join the Union but all such employees would consent to the deduction of union dues. This letter also stated that upon acceptance of that proposal the Union was prepared to meet and negotiate in respect of all other matters with or without a mediator as ODF might choose. ODF responded by its letter dated June 5, 2009 indicating it was not prepared to accept the Union's offer of a full Rand formula and that its position on this issue remained unchanged, that is, staying with the current language of the last collective agreement. This exchange of correspondence was received in evidence without objection.

[72] The relevant portion of section 60 states:

> *60(1) When a notice to commence collective bargaining has been served under this Division, the bargaining agent and the employer or employers' organization, not more than 30 days after the notice is served, shall*
>
> *(a) meet and commence, or cause authorized representatives to meet and commence, to bargain collectively, in good faith, and*
> *(b) make every reasonable effort to enter into a collective agreement.*

[73] In light of *Health* Services, the refusal by ODF to agree to a Rand formula is now considered by the Board to be a failure to bargain in good faith. Even if that were not so, its failure would, given the circumstances of its conduct, be a factor in evaluating its overall bargaining conduct. In that regard the quality of its discussion of union security is relevant to this analysis. Its justification for refusing the Rand formula was not self-evident and when it moved beyond a simple philosophical concern over employees having a freedom of choice, it said its objection was based on a belief some employees would resign if forced to pay union dues and also was concerned an obligation to pay dues might create difficulties in hiring new employees. The concern some employees might resign was eventually revealed to be confined to one or two who ODF chose not to identify and its concern over the recruitment of new employees was hypothetical that reflected a tight labour market that previously but no longer existed. There was no evidence ODF had difficulties in the management of its Winnipeg plant where the collective agreement contained a mandatory check off of union dues. Nor was there evidence of any other business justification ODF had for its position. Although the Union had acquired its bargaining rights as the successor to Local 373A it was in the position of negotiating its first agreement with ODF and, as such, was owed an obligation by ODF to provide a detailed justification for opposing the Union's proposal for union security. In the end, the justification was not forthcoming and we find that ODF has failed to make "every reasonable to enter into a collective agreement". We find that this conduct on ODF's part was a violation of section 60.

[74] As for the remedy that should flow from this breach of the *Code* by ODF the Board has concluded the following steps are to be followed:

> (a) the existing lockout/strike shall be suspended effective from the second day following the date of this Decision, and lasting until such time as the balance of the steps outlined below have been completed;
>
> (b) the parties' negotiating committees shall forthwith resume their collective bargaining on the basis the Rand formula as described in the Union's letter of June 2, 2009 is an agreed term of the collective agreement and shall continue until such time

as they have negotiated in good faith the balance of the outstanding issues in their dispute;

(c) if the negotiating committees have not reached a collective agreement to be ratified by their respective principals (and they are not agreed to continue with their collective bargaining) within 30 days from the resumption of their collective bargaining, or such longer time as they may mutually agree, the suspension of the lockout/strike shall be lifted as of that date and shall continue as if no suspension had been imposed.

[75] The complaint dealing with section 148(1)(a)(ii) is based on the position taken by ODF in its communication to the employees of March 19, 2009 urging they vote against the strike, in which it stated that under the terms of its Final Offer retroactive pay will only be payable if the Collective Agreement is ratified by April 15, 2009. The Union alleges this statement is evidence of an "anti-union posture" on the part of ODF and thus constitutes interference by ODF in the Union's representation of the employees. This statement was not a misrepresentation of the contents of the Final Offer as it did contain a provision to this effect. So the March 19th communication, attempting to induce employees to vote against a strike in the vote to be conducted two days later, cannot to the extent this notice contained commentary upon ODF's own Final Offer be held to be an interference with the Union's representation of the employees. The views expressed by ODF were not of the sort that would otherwise be found to be impermissible. Obviously this notice did not have the effect ODF hoped as the employees voted in favour of a strike. And a week later the employees also voted to reject the Final Offer. Accordingly this particular complaint is dismissed.

ISSUED and DATED at the City of Edmonton in the province of Alberta this 9th day of November, 2009 by the Labour Relations Board and signed by its Vice-Chair.

Gerald A. Lucas, Q.C., Vice-Chair