The Right of Federal Inmate Workers to Unionize

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INTRODUCTION

The subject matter for this paper, on the right of federal inmate workers (FIWs) to unionize, is drawn from the complaints of a former federal inmate, David Jolivet, who attempted to unionize FIWs, but was denied the permission to sign up members. Mr. Jolivet represented himself and challenged the refusal under both the federal public service labour relations regime, the Public Service Labour Relations Board, in *Jolivet v. Treasury Board (Correctional Service of Canada)* (Jolivet),¹ and, through the private sector counterpart, the Canadian Industrial Relations Board in *Canadian Prisoners' Labour Confederation and Correctional Service Canada, Re (Confed).*² He lost on both counts. However, considering a broader scope of common law, constitutional arguments, and policy, I will argue that FIWs have been unjustly denied their right to unionize for the following reasons:

1) FIWs are wrongly denied “employees” status because
   a. they are wrongly told they cannot be employees because their work is rehabilitation;
   b. they are vulnerable.

2) The exclusion of FIWs from the *Public Service Labour Relations Act (PSLRA)*³ unjustifiably infringes s. 2(d) of the *Canadian Charter of Rights and Freedoms (Charter)*⁴, and is not saved by s.1.

3) If FIWs are rejected status under the *PSLRA*, then their exclusion from the *Canada Labour Code (CLC)*⁵ infringes their s. 2(d) *Charter* rights, and is not saved by s.1.

This paper will begin with a background on FIWs and the key facts of Mr. Jolivet’s attempts to unionize his fellow inmate workers. I will then proceed with the arguments in the order given above. The major point to be made by this paper is that no employees, whether free or incarcerated, should be denied their constitutional right to freedom of association under s. 2(d) of
the Charter, which entails a right to meaningful collective bargaining with a union of the FIWs’ choice. Should a new case for unionization of FIWs come forward, the arguments presented in this paper can provide a basis for a positive result.

BACKGROUND:

David Jolivet’s rejected efforts to unionize FIWs: Jolivet and Confed

David Jolivet was a FIW in the Kent Institution, a federal penitentiary in Agassiz, British Columbia. He and other inmates formed the Canadian Prisoners Labour Confederation (CPLC) to unionize FIWs. On October 18, 2011, he requested permission to access offenders in certain cellblocks to sign cards in support of the CPLC’s certification drive. On October 28, 2011, the warden denied the request on the ground that FIWs were not recognized under the Treasury Board, thus did not fall under the public service labour relations regime of the Public Service Labour Relations Act (PSLRA). Mr. Jolivet complained under paragraph 190(1)(g), “unfair labour practice”, under the PSLRA. He alleged that the Correctional Service of Canada (CSC) denied him and other organizers for CPLC the right to sign up members in the Institution. The case was heard through the PSLRB. The two issues were, (1) whether the FIWs were unjustly excluded from “employee” status due to the rehabilitative aspect of their program and, (2) whether FIWs were excluded from collective bargaining rights because they were not employees in the federal public service. The holding in Jolivet was:

*I do not have sufficient evidence to determine that offenders in federal penitentiaries who participate in employment programs are employed. However, even if they are considered employed in the common law sense of the word, I cannot find that they are employees within the meaning of subsection 2(1) of the PSLRA ... it is clear that to be employed in the public service, a person must have been appointed by the PSC to positions created by the Treasury Board.*
The facts of *Confed* are the same as *Jolivet*, only the complaint was filed through the Canadian Industrial Relations Board (CIRB) in the former. It was held in *Confed* that:

> The present Board is of the ... view that it cannot extend its jurisdiction on account that the PSLREA does not apply to the working prisoners, as confirmed in *Jolivet*, supra. The non-applicability of the PSLREA does not extend the scope of the Code when it otherwise does not apply.\(^{11} \)

**Federal Inmate Workers (FIWs)**

FIWs are employed as either, (1) institutional labour in the federal penitentiary that they are housed or, (2) through a Special Operating Agency (SOA) called Corcan, which exists under CSC as a body to manage the more “business like” inmate labour programs\(^ {12} \). To be clear, I will be making the case that all FIWs have the right to s. 2(d) of the *Charter*. Institutional labour makes up the bulk of FIW work. According to CSC,

> Institutions are the single largest employer of offenders at CSC (81% of all employment) ... Institutional employment programs include jobs like maintenance, custodial duties or kitchen work.\(^ {13} \)

Corcan employment covers the remaining inmate employees. It was created in 1992 to manage prison labour, prison services and production of goods, and is under the direction of Correctional Service Canada (CSC) and the Treasury Board of Canada.\(^ {14} \) Corcan is described by CSC as:

> ... a key rehabilitation program for CSC, CORCAN uses on-the-job training to help offenders develop and practice essential employment skills ... Through CORCAN, offenders can get valuable on-the-job training that prepares them for jobs in trades such as carpentry, cabinet making, mechanic, electronic, welding, and auto repair ...\(^ {15} \)

In *Confed*, FIW jobs were described as:

> ... varied and include maintenance and kitchen work within the detention facilities, as well as the production of goods and services used in the correctional facilities or sold by Corcan to other institutions and government departments. Remuneration is paid by the Treasury Board to each working prisoner for the time spent working, at a modest rate of pay below minimum wage standard. The revenues generated by the sales effected by Corcan support the costs of the operations\(^ {16} \).
ARGUMENTS

1) (a) “Rehabilitation” does not exclude federal inmates from employee status

Balancing rehabilitation against work

Work in a rehabilitation or treatment program can impact whether an employment relationship will be found. The result depends on whether the workers pass the common law test of “employee”. In Re Kaszuba and Salvation Army Sheltered Workshop et al [Kaszuba]17, participants in a sheltered workshop program with the Salvation Army aimed for status as “employees” to gain the protections under Ontario’s Employment Standards Act. The issue was whether the rehabilitative aspect of the program prevented their work from being considered part of an employment relationship. The participants were excluded; however, the reasoning was tempered. It was pointed out that other results were possible, depending on the circumstances. The concurring reasons of Linden J. illustrate this point (my emphasis):

... cannot assume that (the workers) will automatically be exempted from the operation of the Employment Standards Act ... merely because their purpose is to assist disabled persons to perform useful work. ... other factors must also be considered ... such as, the method and the amount of payment, the profitability of the work, the hours of the work, the various conditions that must be met at work ...18

The emphasized portion of Linden J,’s reasoning points toward the factual details that can incrementally count towards an employment relationship. Key criteria – centering on control by the employer and dependency by the employee – are competition for positions, remuneration or wages paid by the employer, control by the employer over the method of work, and the power of the employer to discipline or dismiss.19
The analogy to educational workers

There are a number of cases that demonstrate inclusion of workers in educational programs under the definition of “employee”, which is analogous to the balancing exercise in the case of rehabilitative work programs. In *St. Paul’s Hospital (Re) [St. Paul’s]*, the British Columbia Labour Relations Board decided that interns at a hospital, who were fulfilling their work requirements as employees and as students for their educational program, were held to be employees who had the right to join a union (my emphasis):

… the working and educational functions of the house staff in the Hospital are largely overlapping and inseparable. Indeed, that is the raison d’être of any program of clinical education. But that fact is still no barrier to the legal coexistence of both employee and student status.20

In *University of Toronto (Governing Council) [U of T Case]*, post doctoral fellows (PDFs) were vying for recognition as employees to access collective bargaining rights. The issue was whether the “student” aspect of their work diminished their status as employees. The Ontario Labour Relations Board (OLRB) decided that the PDFs were employees.21 Regarding the effect of student status, the OLRB stated:

The fact that work provides an opportunity to learn, even a continuous opportunity to learn, does not transform what would otherwise be an employment relationship into a non-employment relationship for the purposes of the Act.22

In *Hotwire Electric-All Inc [Hotwire]*, a co-op student was held to be an employee.23 The OLRB stated that:

Spinosa was clearly a student, however, that is not all he was. His enrollment under OYAP had an educational purpose which was to participate in the electrical trade through work related experience in a manner not dissimilar to other electrician apprentices.24

The point to be made by the above worker-student cases is that an employment relationship can co-exist with an educational objective. There can be a dual purpose to the employment relationship. Analogously, the fact that FIWs are both engaged in rehabilitation as well as
performing work, whether through Corcan or institutional labour, does not inherently disqualify them from status as employees.

**The correct common law test to apply: real economic benefit**

In cases where a rehabilitation program at play, the common law threshold for an employment relationship needs to be balanced against the rehabilitative character of the program. In *Fenton*, patients of the Forensic Psychiatric Institute participated in a work program under the auspices of rehabilitation. The issue was whether they passed the correct common law test to establish an employment relationship. According to *Fenton*, the “real economic benefit” test is the proper legal test to apply in such cases (my emphasis):

> *Many programs, undeniably of significant therapeutic purpose and effect, might provide some incidental economic benefit to the institution. Indeed provision of some economic benefit is difficult to avoid. The test should be whether there is real economic benefit flowing to the institution from the work programs.*

The workers in *Fenton* did not succeed in gaining employee status; however, the case remains important for the purposes of this paper because it is the leading case on the proper common law employment test to apply when a rehabilitation program is at play: the real economic benefit test.

There is already support for including workers in a prison rehabilitation program as employees: *Amalgamated Meat Cutters & Butcher Workmen v. Guelph Beef Centre Inc (Amalgamated).* The case applied a balancing exercise that is, in essence, the real economic benefit test. In *Amalgamated*, a union was successful in a certification application that included both inmate and non-inmate workers. Inmates of the provincial Guelph Correctional Centre were employed in a private meat-packing plant, Guelph Beef Centre Inc. (referred to as the Abattoir). The employment relationship was part of a licence agreement between the Correctional Centre and
the company, with the point on rehabilitation as follows, “... The parties hereto recognize that the operation of the Abattoir forms an essential part of the Licensor's Inmate rehabilitation ...” The board did not agree with excluding the inmate workers from employee status based on the rehabilitative aspect of their work (my emphasis):

There can be no doubt that the rehabilitative aspect of the work, which the inmates perform while under the control and direction of the respondent, is the primary value of the license agreement from the Ministry's point of view. But from the point of view of the respondent, which is the alleged employer, the services provided by the inmates are an integral and significant part of its meat-packing operation.

Application to FIWs

Based on the above cases, it is clear that FIWs are employees if they pass the correct common law employment test. A real economic benefit test therefore needs to be applied to FIWs. This test has not yet been applied to FIWs in any case. In Jolivet, the real economic benefit test was not actually applied to the FIWs, due to a lack of evidence:

I have no real evidence of the nature of the work performed by offenders in federal institutions or the integration of that work into the respondent’s operations ... I could not conclude that offenders are employed rather than participating in work as rehabilitation.

In other words, necessary information was not presented before the tribunal. This determination is relevant for present purposes because it validates the contention that the rehabilitative nature of FIW programs does not necessarily preclude an employment relationship. In Confed, likewise, the board did not deal with whether FIWs were employees, thus did not preclude the possibility (my emphasis), “… In the Board’s opinion, any potential employment of the working prisoners is necessarily employment by her Majesty in right of Canada, to which the Code does not apply.”

Necessary evidence for FIWs to pass the real economic benefit test factors in both the common law threshold for an employment relationship and, secondly, substance on the degree to which the labour is to the benefit of the employer. FIWs should easily pass the common law
threshold for an employment relationship: (1) **Competition for positions**: In *Jolivet*, the facts demonstrate that, “...offenders employed within the penitentiary must compete for a job and participate in a competition process in which only the best–qualified candidate is chosen.”

(2) **Remuneration or wages**: In *Confed*, the facts state, “Remuneration is paid by the Treasury Board to each working prisoner for the time spent working, at a modest rate of pay below minimum wage standard.”

(3) **Control over the method of work** - In *Jolivet*, evidence of control is noted in the facts by the statement, “The work is supervised, and rigorous performance evaluations are prepared quarterly.”

(4) **Power of employer to discipline or dismiss** – this will be dealt with under the next argument, re: vulnerability of FIWs.

It is also clear that CSC obtains a real economic benefit through the labour provided by FIWs. In the case of institutional inmate labour (non-Conrcan), CSC describes the social relations as follows (my emphasis):

*Institutional employment programs include activities such as maintenance, custodial duties or kitchen work. By contributing to institutional operation and maintenance, offenders help to reduce the costs to the government of their incarceration and rehabilitation.*

In the case of FIWs in the Corcan program, CSC clearly articulates the value of inmate labour to growing business operations (my emphasis):

*Successful business operations have created surpluses that have been re-invested in capital equipment or vocational training opportunities for offenders (...) Over the years, these core businesses have been augmented by the addition of new businesses and product lines. These help ensure that CORCAN continues to increase the number of offenders who benefit from the program, while ensuring the training and work experiences provided are relevant to today's labour market. (...) In recent years, CORCAN has ... begun to market its products and services to a greater number of departments.*

The representations are clear: through institutional labour, FIWs benefit CSC by reducing the operational costs of running the institutions, while through Corcan, inmates create value, which has been re-invested over the years, and has enabled operations of Corcan to grow. In both cases,
a real economic benefit can easily be demonstrated: the inmate labour is necessary for the operations to continue and grow. As made clear in the reasoning in Fenton, noted above, there can be both a rehabilitative purpose for the worker and a real economic benefit for the employer. Finally, if there is any ambiguity about whether there is a real economic benefit, the matter should be resolved in favour of an employment relationship on account of the vulnerability of unprotected workers, as noted in Re Rizzo and Rizzo Shoes Ltd [Rizzo], which will be discussed further in the next section.

1) (b) FIWs are precarious and vulnerable and should be protected by “employee” status

Definition of precarious and vulnerable workers

The terms “precarious worker” or “vulnerable worker” both result in the subject being in a vulnerable condition compared with other workers. As will be shown, increased vulnerability results in a greater justification for inclusion under protective regimes that employees enjoy. There is no formal definition of “precarious worker” or “vulnerable worker” in the common law or federal legislation. However, the Law Commission of Ontario (LCO) has provided legal description and analysis of these concepts that is instructive in providing some criteria. According to the LCO, precariousness is measured by, “… level of earnings, level of employer-provided benefits, degree of regulatory protection and degree of control or influence within the labour process.” In the 2012 LCO report,

Vulnerable Workers and Precarious Work”, precarious workers were defined as performing work that is, “characterized by job instability, lack of benefits, low wages and degree of control over the process.41

Vulnerability of workers is described by the LCO as referring to (my emphasis):

...not to the workers themselves, but to the situation facing them because they are engaged in precarious work and because of other disadvantages related to gender, immigration, racial status and other characteristics.42
Vulnerability of FIWs

The facts in *Jolivet* and *Confed* demonstrate many characteristics of precariousness and vulnerability of FIWs. In *Jolivet*, the facts note (my emphasis):

> The work is supervised, and rigorous performance evaluations are prepared quarterly. *(Jolivet)* stated that offenders employed within federal penitentiaries receive wages subject to deductions for room and board and other living expenses, as well as any fines and court costs levied against them, in addition to other contributions.

In *Confed*, the facts describing the work of FIWs state:

> Remuneration is paid by the Treasury Board to each working prisoner for the time spent working, at a modest rate of pay below minimum wage standard. The revenues generated by the sales effected by Corcan support the costs of the operations.

As pointed out by the LCO above, key features of precarious workers include a low “degree of control” over the labour process by workers, low levels of “regulatory protection”, and low “level of earnings.” FIWs demonstrate a low degree of control, evidenced by, “rigorous performance evaluations”. The greatest measure of control is the fact that the jailer is the employer, which will be addressed again below. The level of regulatory protection for FIWs is very low, as they do not even have “employee” status, thus do not even qualify for basic statutory employment protections; likewise, they cannot benefit from the rights under s. 2(d) of the *Charter*. The level of earnings of FIWs is also subject to deductions for room and board and other living expenses and is “below minimum wage”. According to inmate pay scales on the Commissioner of Corrections’ Offender Program Assignments and Inmate Payments, inmate pay ranges from $5.25 to $6.90 per day.

FIWs as a group are inherently vulnerable, under the category of “other characteristics” noted by the LCO. Their employer, CSC, has the power to discipline FIWs though a system
where disciplinary offences can impact release, as noted in the *Corrections and Conditional Release Act* (CCRA) (my emphasis):

38. *The purpose of the disciplinary system established by sections 40 to 44 and the regulations is to encourage inmates to conduct themselves in a manner that promotes the good order of the penitentiary, through a process that contributes to the inmates' rehabilitation and successful reintegration into the community.*

40. *An inmate commits a disciplinary offence who (p) without reasonable excuse, refuses to work or leaves work.*

These statutory provisions show that FIWs exist in a very vulnerable condition where they may be subject to discipline by their jailer-employer if they are seen to be unreasonably refusing directions of their employer, which can impact their rehabilitation score and their release date. Additionally, FIWs do not have ease of access to media or the outside world in general to ply public pressure in such cases where FIWs feel the employer has done them injustice at the workplace, which increases their vulnerability.

**Employee status required for basic protections**

Status of “employee” is a gateway to minimum protections under statutory regimes, leaving those workers without it in more vulnerable position. In *Re Rizzo and Rizzo Shoes Ltd* [*Rizzo*], the SCC determined that the status of “employee” conferred minimum standards, such that the courts should interpret employee status, “*in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.*” A generous interpretation of FIWs, considering their high degree of vulnerability, is to see them as employees.

A similar application arises out of *Mounted Police*, regarding inclusion under s. 2(d) *Charter*, to insure protection of the vulnerable. McLachlan CJC stated (my emphasis),

*By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires. In this way, the*
guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society.\textsuperscript{51}

According to Mounted Police, freedom of association rights under s. 2(d) of the Charter serve to “right imbalances in society” between the more powerful employers and weaker individual employees. In the case of FIWs, the imbalance is tipped quite significantly in favour of employers on account of the reasons noted in this section. A necessary precondition to righting this imbalance is recognition of FIWs as employees, since only employees can unionize.

2) \textbf{The exclusion of FIWs from the PSLRA industrial relations is unconstitutional}

Exclusion by the Treasury Board

Upon passing the real economic benefit test, and thereby qualifying as employees under the common law, FIWs have an additional hurdle to overcome: the fact that FIWs have not had their positions created by the Treasury Board nor have they been appointed to their positions by the federal Public Service Commission. These were held in Jolivet to be the fundamental reasons for denying certification of the CPLC union.\textsuperscript{52} Regarding the PSLRA labour relations regime, it was noted in Canada (Attorney General) v. Public Service Alliance of Canada (Econosult) that:

\begin{quote}
... There is quite simply no place in this legal structure for a public servant without a position created by the Treasury Board and without an appointment made by the Public Service Commission.\textsuperscript{53}
\end{quote}

If FIWs are indeed part of the public service, as accepted in Jolivet\textsuperscript{54} and Confed,\textsuperscript{55} the federal Treasury Board ought to formally authorize the existence of their positions. Failure to include a set of workers under a legislative scheme to safeguard s. 2(d) Charter rights will likely be found as unconstitutional if there is substantial interference with the exercise of the right. In Dunmore v. Ontario (Attorney General), exclusion of agricultural workers from collective
bargaining rights under the Ontario’s Labour Relations Act was at issue.\textsuperscript{56} The majority of the SCC reasoned,

\ldots underinclusive state action falls into suspicion not simply to the extent it discriminates against an unprotected class, but to the extent it substantially orchestrates, encourages or sustains the violation of fundamental freedoms.\textsuperscript{57}

The effect of excluding agricultural workers from the Labour Relations Act was that they were denied s. 2(d) Charter rights in their entirety.\textsuperscript{58} The majority said that this exclusion was unconstitutional because it, “delegitimizes associational activity and thereby ensures its ultimate failure.”\textsuperscript{59} In Ontario (Attorney General) v. Fraser, this standard was described as the “substantial impossibility of exercising their freedom of association.”\textsuperscript{60} In a similar vein, the majority in SCC case of Machtinger v. HOJ Industries Ltd noted the importance of inclusion of all employees under statutory minimum protections:

\ldots an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not.\textsuperscript{61}

**Exclusion by the Public Service Commission and the effect of Mounted Police**

Upon creation of FIW positions by the Treasury Board, inmate employees ought to be appointed to those positions as “employees”. The Public Service Commission has the power to appoint as well at to exclude employees from the PSLRA’s through the application of the Public Service Employment Act (PSEA). The powers of appointment and exclusion under the PSEA, respectively, are as follows:

**29 (1)** Except as provided in this Act, the Commission has the exclusive authority to make appointments, to or from within the public service, of persons for whose appointment there is no authority in or under any other Act of Parliament.\textsuperscript{62}

**20 (1)** Where the Commission decides that it is neither practicable nor in the best interests of the public service to apply this Act or any of its provisions to any position or person or
class of positions or persons, the Commission may, with the approval of the Governor in Council, exclude that position, person or class from the application of this Act or those provisions.63

Based on Mounted Police, there is now a constitutional basis to allow inclusion of employees previously excluded from collective bargaining rights under through PSLRA.

In Mounted Police, RCMP employees were challenging their exclusion from collective bargaining rights under the PSLRA. Paragraph (d) of the definition of "employee" in s. 2(1) of the PSLRA excluded RCMP employees from the application of the Act, stating that an “employee” was an employee in the public service other than:

(d) a person who is a member or special constable of the Royal Canadian Mounted Police or who is employed by that force under terms and conditions substantially the same as those of one of its members.64

Labour relations for the RCMP were managed through a body called the Staff Relations Representative Program, which was within the RCMP management hierarchy, and not an independent union representing the employee’s interests exclusively.65 The reason for excluding the RCMP employees from the PSLRA, according to the Attorney General of Canada, was to, “maintain and enhance public confidence in the neutrality, stability and reliability of the RCMP by providing a police force that is independent and objective.”66

Applying a Charter s. 1 analysis, under the proportionality component of the Oakes test,67 the SCC found that there was no rational connection between the government’s stated objectives and exclusion of the RCMP from employee status under the PSLRA. The test for rational connection68 was described as, “... a reasonable inference that the means adopted by the government will help bring about the objective ... The assessment is a matter of causal relationship."69 In their reasoning, the SCC majority determined, “...it is not apparent how an exclusion from a statutorily protected collective bargaining process ensures neutrality, stability
or even reliability.” The case was decided on a failure of the rational connection test. The exclusion of RCMP employees also failed on minimal impairment, but this result was not essential to the finding of unconstitutionality. The SCC majority declared that the paragraph which excluded the RCMP employees from the definition of employee, S. 2(d) of the PSLRA, was of no force and effect pursuant to s. 52 of the Constitution Act, 1982.

The reasoning in Mounted Police goes a long way to assisting the cause of FIWs for inclusion as federal public service employees by the PSC. As is clear from Jolivet, the Attorney General of Canada has already made an issue of FIWs being ineligible for employee status on account of the rehabilitative aspects of their work. Therefore, it is likely that in a new case for FIW unionization, the issue of rehabilitation would surface again through an argument for exclusion under section 1 of the Charter. As such, the issue of rehabilitation must be addressed again, particularly through the lens of s. 1 of the Charter.

Rehabilitative exclusion of FIWs from PSLRA not saved by s. 1 Charter

There is no issue with whether there is a pressing and substantial objective (whether the reasons are beyond trivial) to rehabilitation programs through CSC. The Act that governs the relationship between CSC and inmates is the Corrections and Conditional Release Act (CCRA). Sections 3 and 5 of the CCRA state the objectives of rehabilitation as follows:

3. The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by:
   (b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.

5. There shall continue to be a correctional service in and for Canada, to be known as the Correctional Service of Canada, which shall be responsible for
   (a) the care and custody of inmates;
(b) the provision of programs that contribute to the rehabilitation of offenders and
to their successful reintegration into the community.\textsuperscript{75}

The objectives of Corcan, which is described above as a rehabilitation program,\textsuperscript{76} are described in the Corrections and Conditional Release Regulations (CCRR) as:

105. CORCAN shall ensure that an inmate who participates in CORCAN activities:
(a) is fully, regularly and suitably employed in a work environment that strives to achieve private sector standards of productivity and quality so that the inmate will be better able to obtain and hold employment when the inmate returns to the community; and
(b) is provided with programs and services that facilitate the inmate’s re-entry into the community.\textsuperscript{77}

In the case of FIWs, in order to meet the rational connection test under s. 1 of the Charter, the s. 2(d) Charter infringing activity – exclusion of FIWs from “employee” status – would have to be causally connected to the above-noted objectives in the CCRA and CCRR. In my submission, the rehabilitative ground for exclusion fails the rational connection test. The objective of rehabilitation under s. 3 of the CCRA, “assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens”,\textsuperscript{78} is not causally connected to exclusion from s. 2(d) Charter rights. The noted objectives are actually assisted by entitlement of FIWs to unionization rights under s. 2(d) Charter. Through unionization, some or all FIWs would learn how to conduct lawful certification and collective bargaining, how to negotiate with the employer, and peaceful labour relations in general, all of which assist in better economic and social peace overall.\textsuperscript{79} Further, the objectives stated under s. 105(a) of the CCRR, that the inmate, “is fully, regularly and suitably employed” and “better able to obtain and hold employment”,\textsuperscript{80} are in no way causally connected to denying s. 2(d) Charter rights to FIWs. Unionized workplaces tend to offer more secure and long-term employment.\textsuperscript{81}

A rehabilitative exclusion of the FIWs from the public service labour relations regime should fail the minimal impairment step of the Oakes test as well. If FIWs are found to be
employees, the exclusion of FIWs entirely from the collective bargaining rights under PSLRA cannot possibly pass the minimal impairment test, which operates as follows:

... whether the measure impairs the s. 2(d) right as little as possible in order to achieve the government's objective. The government is not required to pursue the least drastic means of achieving its objective, but it must adopt a measure that falls within a range of reasonable alternatives.\textsuperscript{82}

There are alternatives short of outright denial. As made clear in Fraser, there is legislative flexibility in establishing collective bargaining processes as long as there is a process that satisfies meaningful collective bargaining, where there is no “substantial interference” with s. 2(d) Charter rights.\textsuperscript{83} The remainder of the proportionality aspects of the Oakes test are unnecessary for this case, as the point is already made on the rational connection and minimal impairment.

“Management flexibility” exclusion of FIWs from PSLRA not saved by s.1 Charter

The only other foreseeable s. 1 challenge might be an exclusion of FIWs in Corcan from the PSLRA because Corcan is a Special Operating Agency (SOA), which confers, “management flexibility”. SOAs have been described by the Treasury Board of Canada Secretariat as follows (my emphasis):

SOAs give service delivery units increased management flexibility in return for agreed upon levels of performance and results. SOAs are not independent legal entities - no legislation is required to establish an SOA. They remain part of their departmental organization, their employees continue as public servants and union representation stays intact. They remain accountable to their home department for results.\textsuperscript{84}

No contention is being made against a pressing and substantial objective to Corcan choosing the SOA model. As well, I accept that there is a rational connection between “increased management flexibility” and denial of 2(d) Charter rights. Management flexibility would clearly be aided, in a causal manner, by the exclusion of FIWs from s. 2(d) Charter rights. However, denying s. 2(d) Charter rights entirely should soundly fail the minimal impairment branch of the
Oakes test. The objective of increased management flexibility can be met with far less infringing action than denying s. 2(d) Charter rights entirely, for reasons noted in the previous section.

Positive obligation to include FIWs under PSLRA

The potential s.1 Charter exclusion of FIWs from the PSLRA by the PSC is somewhat distinguishable from the case in Mounted Police, in that FIWs are not explicitly excluded, but do not exist as employees under federal law. The exclusion of FIWs is an omission. As will be explained next, there are legal authorities that demonstrate Mounted Police is still applicable on account of the identical effects of exclusions and omissions. A series of SCC Charter cases demonstrate this point. The majority in Dunmore stated the following (my emphasis):

... exclusion from a protective regime may in some contexts amount to an affirmative interference with the effective exercise of a protected freedom. In such a case ... the government is creating conditions which in effect substantially interfere with the exercise of a constitutional right.\(^85\)

(...)

... claims of underinclusion should be grounded in fundamental Charter freedoms rather than in access to a particular statutory regime.\(^86\)

This point on substantial interference was affirmed in Fraser (supra).\(^87\) In Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia (Health Services), which concerned the content of s. 2(d) Charter rights, these principles from Dunmore and Fraser were augmented by the following:

... in certain circumstances, s. 2(d) may place positive obligations on governments to extend legislation to particular groups ... There must be evidence that the freedom would be next to impossible to exercise without positively recognizing a right to access a statutory regime.\(^88\)

In the s. 15 Charter case of Vriend v Alberta, an omission from the Alberta Individual Rights Protection Act, was at issue. It was stated that omissions could be put to Charter scrutiny:
If an omission were not subject to the Charter, underinclusive legislation which was worded in such a way as to simply omit one class rather than to explicitly exclude it would be immune from Charter challenge. If this position was accepted, the form, rather than the substance, of the legislation would determine whether it was open to challenge. This result would be illogical and more importantly unfair.  

FIWs should meet the threshold for an exceptional application of a positive obligation on the federal government to include them under labour relations protections through the PSLRA. The effect of omission of FIWs from the PSLRA is the same as formal exclusion of RCMP employees from the PSLRA (prior to the holding in Mounted Police): both deny access to s. 2(d) Charter rights. By the federal government denying FIW’s status under the PSLRA, FIWs are subjected to substantial interference of their constitutional right to s. 2(d) of the Charter. The only regime through which employees in the federal public service acquire collective bargaining rights is the PSLRA. It must be emphasized that such interference goes beyond mere access to a statutory regime *per se*, but is a threshold to accessing s. 2(d) rights under the Charter, thus passing the conditions for an unjustifiable infringement as per Dunmore and Fraser, *supra*. Without inclusion, FIWs face the “impossibility” of access to the s. 2(d) of the Charter as per Health Services, *supra*. Finally, the fact that FIWs are omitted from the federal public service labour relations regime, rather than explicitly excluded should not matter. As pointed out in Vriend, *supra*, it is “illogical” and “unfair” to allow an interpretation that renders the Charter inapplicable simply because the relevant government actor failed to include a particular group in legislation.

The principle of inclusiveness is further strengthened by international law. In 1972, Canada ratified the International Labour Organization’s *Freedom of Association and Protection of the Right to Organise Convention* [Convention 87]. That convention states, under Article 2 (my emphasis),

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Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

This ILO convention was referenced as applicable international law to s. 2(d) of the Charter in Dunmore, Fraser and Saskatchewan Federation of Labour v. Saskatchewan. Regarding interpretation of such international law principles, Sullivan on the Construction of Statutes, is instructive:

[T]he legislature is presumed to comply with the obligations owed by Canada as a signatory of international instruments and more generally as a member of the international community. In choosing among possible interpretations, therefore, courts avoid and interpretation that would put Canada in breach of International obligations.

Viewing article 2 of Convention 87 through Sullivan’s lens, the position of international law validates the FIWs’ rights to freedom of association and inclusion under the PSLRA. If FIWs are employees, they should not be given the “distinction” of exclusion from freedom of association rights; nor should they be forced into a regime that mandates “previous authorization.”

3) **If FIWs are not covered under the PSLRA, they should fall under the CLC**

**Application of the CLC**

In Confed, Mr. Jolivet failed in his efforts to have a union of FIWs certified through the CLC. However, his argument was limited to the suggestion that FIWs who were employed through Corcan fell under the CLC because Corcan was a Crown corporation, falling under s. 5 of the CLC:

This argument was rejected:

*Corcan is itself an internal agency of Correctional Service Canada with no distinct or separate corporate status, such that none of the respondents are subject to the Code’s application …*  

It was further ruled that Corcan, “was not created by statute or by royal charter and, according to the submissions, it does not constitute an independent legal entity from Correctional Service
Nothing was explicitly stated about institutional labour, so *Confed* should only be taken to apply to Corcan FIWs.

The argument I am asserting is distinguishable from the one presented by Mr. Jolivet. I am submitting that if FIWs are not found to be public service employees covered by the *PSLRA*, then all of them (institutional labour and Corcan) should be covered by the definition of “employee” under s. 4 of the *CLC*: “*federal work, undertaking or business*”:

4. *This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers’ organizations composed of those employees or employers.*

To fall under s. 4 of the *CLC*, the employee must qualify as part of a “federal work, business or undertaking.” *Dart Aerospace Ltd. v Duval* provides an overview of the requirements to fit under this section:

*There are two circumstances under which a court may find federal jurisdiction: (1) where the employer in question is itself engaged in a core federal work or undertaking that falls within section 91 of the Constitution, and (2) where the employer's undertaking, while not federal on its own, is vital, essential or integral to a core federal work or undertaking.*

**Application to FIWs**

Employees of the CSC fall under the federal Department of Public Safety and Emergency Preparedness. Jurisdiction over CSC is a federal power, under s. 91 of the *Canadian Constitution Act 1867*, s. 28, “The Establishment, Maintenance, and Management of Penitentiaries.” An employee will be under a “*federal work, undertaking of business*”, if their work is deemed “integral” to the core of federal power in question. The fact that federal inmate labour is classified as part of a rehabilitation program, and that rehabilitation is an integral objective of CSC under the *CCRA and the CCRR* has already been covered under previous sections of this paper. FIWs are clearly federal workers based on these rehabilitative objectives. As federal workers,
FIWs will fall under either the public service labour relations regime through the PSLRA or under the private labour regime of the CLC. Unlike the case of the PSLRA, there is no prior authorization of positions required under the CLC. If a new federal “work, undertaking or business” arises, and forms an employment relationship within the context of s. 4 or 5 of the CLC, those employees are eligible for inclusion under the CLC labour relations regime. Finally, “public service” is specifically defined in s. 2(1) of the Public Service Employment Act (PSEA) to include positions under certain departments and agencies under federal jurisdiction (my emphasis):

Public service, except in Part 3, means the several positions in or under
(a) the departments named in Schedule I to the Financial Administration Act;
(b) the other portions of the federal public administration named in Schedule IV to that Act; and
(c) the separate agencies named in Schedule V to that Act.102

The Correctional Service of Canada falls under Schedule IV of the Financial Administration Act.103 However, if any positions under the CSC do not exist “in or under” the noted sections of Financial Administration Act, those positions must not be part of the public service. Any federal employee in such a position must fall under the CLC by default.

This default position is a matter of legal necessity. As soon as the threshold of “employee” has been crossed, FIWs must fall either under either the federal public service or the federal private sector. They cannot be rendered legally non-existent simply because the federal government failed to list them under either the federal public service or refuses to allow inclusion under the private service, casting them out from both the PSLRA and the CLC. Therefore, I am submitting that the statement by the CIRB in Confed is an error of law (my emphasis):

The present Board is of the same view that it cannot extend its jurisdiction on account that the PSLREA does not apply to the working prisoners, as confirmed in Jolivet, supra. The non-applicability of the PSLREA does not extend the scope of the Code when it otherwise does not apply.
There is no issue of extending jurisdiction, but only of exercising power that already exists under the \textit{CLC}. As a matter of law, exclusion or omission of FIWs from both labour relations regimes negates access to s. 2(d) \textit{Charter}, therefore is afoul of the principle set in \textit{Fraser} (my emphasis):

\begin{quote}
\textit{Laws or state actions that substantially interfere with the ability to achieve workplace goals through collective actions have the effect of negating the right of free association and therefore constitute a limit on the s. 2(d) right of free association, which renders the law or action unconstitutional unless it is justified under s. 1 of the Charter.}^{104}
\end{quote}

The principle is clear. According the s. 2(d) of the \textit{Charter}, all employees have the right to associate to collectively pursue workplace goals, unless they are justifiably excluded under s. 1 of the \textit{Charter}. The potential s. 1 arguments, and rejections of them, are the same as in argument (2) of this paper, and need not be repeated.

\section*{CONCLUSION}

FIWs have been unjustifiably excluded from s. 2(d) if the \textit{Charter}, freedom of association. They are employees and are owed the freedom of association rights that other employees enjoy. As established through the above authorities on rehabilitative and educational work programs, FIWs should clearly pass the threshold of a real economic benefit analysis needed to establish an employment relationship in such cases. Without the cheap institutional labour of FIWs, federal institutions would not run at the relatively lower costs that they do. Without the relatively low cost inputs of FIWs in Corcan, the business could not have experienced the same level of success and expansion CSC has noted; nor could CSC and other federal government departments benefit from relatively cheaper products and services provided through the program.

The fact that FIWs are vulnerable, on account their great disparity in power compared with their jailer-employers, favours inclusion of FIWs under the status of “employee”. Through such
status, FIWs would have access to statutory employee protections, including to s. 2(d) Charter rights, therefore they would be in a better position to counteract the degree of their vulnerable condition. If there remains a doubt as to the employee status of FIWs, the benefit of the doubt, towards inclusion, needs to be given to FIWs on account of the “generous interpretation” required by Rizzo.

Based on the reasoning in the SCC cases Dunmore, Fraser, Health Services and Vriend, if FIWs are part of the federal public service, the Treasury Board should not be permitted to refuse authorization of their positions. These cases collectively demonstrate that it is unconstitutional to substantially interfere with access to s. 2(d) Charter rights to the point that access to its protections are rendered impossible. Under the PSLRA, only those employee positions created by the Treasury Board are covered by the PSLRA.

Any attempts by the PSC to exclude FIWs from s. 2(d) Charter rights through s. 1 of the Charter, either based on the rehabilitative aspect of federal inmate work programs or possibly on the “management flexibility” of SOAs, simply could not withstand the proportionality analysis under the Oakes test. Based on Mounted Police, a section 1 Charter exclusion due to the rehabilitative aspects of FIW programs would fail because there is no rational connection between the objectives of rehabilitation under the CCRA and CCRR and exclusion from s. 2(d) Charter rights. Section 1 Charter exclusion due to “management flexibility” of SOAs would fail by not minimally impairing s. 2(d) Charter rights.

Finally, the two federal labour relations regimes, the PSLRA and the CLC, cannot be allowed to make access to s. 2(d) impossible. If FIWs are employees, and are not part of the federal public service, they must be part of the federal private sector, and must have access to the CLC labour relations regime. FIWs cannot continue to be left wandering in the unconstitutional territory
in which s. 2(d) of the Charter is entirely unavailable. The exclusion is even more problematic if the employees are vulnerable and in greater need of protective measures. In Dunmore, it was held that employees who were particularly vulnerable should not be excluded from legislative protection of 2(d) Charter rights. International law, namely Convention 87, also favours inclusion of FIWs through s. 2(d) Charter protections. All roads lead to providing FIWs the opportunity to rectify their circumstances through application of s 2(d) of the Charter. As put by the majority in Health Services:

The right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work.105

If a new case were to come forward to argue for the rights of FIWs under s. 2(d) of the Charter, the arguments I have presented can help provide a foundation for finally affording FIWs a measure of dignity they have been missing in their working lives in prison, a union.
ENDNOTES

1 Jolivet v. Treasury Board (Correctional Service of Canada) 2013 PSLRB 1 [Jolivet].
2 Canadian Prisoners' Labour Confederation and Correctional Service Canada, Re 2015 CIRB 779 [Confed].
3 Public Service Labour Relations Act, S.C. 2003, c. 22, s. 2. [PSLRA]
4 Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11
7 Jolivet, supra note 1 at para 1.
8 PSLRA, supra note 3.
9 Jolivet, supra note 1 at para 2.
10 Ibid at para 44.
11 Confed, supra note 2 at para 29.
14 Correctional Service of Canada, supra note 12.
16 Confed, supra note 2 at para 5.
17 Re Kaszuba and Salvation Army Sheltered Workshop et al. 41 O.R. (2d) 316 [Kaszuba].
18 Ibid at p. 3.
20 St. Paul's Hospital (Re) Between: St. Paul's Hospital (Hospital), and Professional Association of Residents and Interns (Applicant), [1976] B.C.L.R.B.D. No. 43 at 12 [St. Paul’s].
21 University of Toronto (Governing Council), [2012] O.L.R.D. No. 179 at para 107 [U of T Case].
22 Ibid at para 89.
23 Hotwire Electric-All Inc. [2016] O.L.R.D. No. 896
24 Ibid, at para 93.
26 Ibid at 40
28 Ibid at para 3.
29 Ibid at para 14.
30 Jolivet, supra note 1 at para 35
31 Confed, supra note 2 at para 31
32 Jolivet, supra note 1 at para 33.
33 Confed, supra note 2 at para 5
34 Jolivet, supra note 1 at para 16.
35 Correctional Service of Canada, supra note 13, “Executive Summary: background”.
36 Correctional Service of Canada, supra note 12, “Introduction”.
37 Some institutional labour is performed through the Corcan program as well, as noted in Confed, supra note 2 at para 5, “The tasks are varied and include maintenance and kitchen work within the detention facilities.”
38 Fenton, supra note 25 at 35 and 40.
42 Ibid at 1.
43 Jolivet at para 16.
44 Confed, supra note 2 at para 5.
46 Confed, supra note 2 at para 5.
48 LCO Report, supra note 42
51 Mounted Police, supra note 6 at para 58.
52 Jolivet, supra note 1 at para 44.
54 Jolivet, supra note 1 at para 40.
55 Confed, supra note 2 at para 31.
56 Dunmore v. Ontario (Attorney General), 2001 SCC 94 [Dunmore].
57 Ibid at para 26.
58 Ibid at paras 36 and 44.
59 Ibid, at para 48
60 Ontario (Attorney General) v. Fraser, [2011] 2 S.C.R. 3 at para 34 [Fraser].
62 Public Service Employment Act, S.C. 2003, c. 22, s. 29(1).
63 Ibid, s. 20(1).
64 PSLRA, supra note 3, s. 2(d).
65 Mounted Police, supra note 6 at para 12.
66 Ibid at para 142.
69 Mounted Police, supra note 6 at para 142.
70 Ibid at para 146.
71 Ibid at paras 152 and 153.
72 The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11
73 Jolivet, supra note 1 at para 34.
74 Oakes, supra note 67 at para 73.
75 CCRA, supra note 49, ss. 3 and 5.
76 Correctional Service of Canada, supra note 15.
77 Corrections and Conditional Release Regulations, SOR/92-620, s. 105 [CCRR].
78 CCRA, supra note 49, s. 3.
80 CCRR, supra note 77, s. 105(a).
82 Mounted Police, supra note 6 at para 149.
83 Fraser, supra note 60, at para 47.
85 Dunmore, supra note 56 at para 22.
86 Ibid at para 24.
87 Fraser, supra note 60 at para 34.
90 International Labour Organization, Convention (No. 87) concerning freedom of association and protection of the right to organise, 68 U.N.T.S. 17, s. 2 [Convention 87].
91 Dunmore, supra note 56 at para 26.
92 Fraser, supra note 60 at para 94.
95 Confed, supra note 2 at para 31.
96 Confed, supra note 2 at para 6.
99 The Constitution Act, 1867 (UK), 30 & 31 Victoria, c 3.
101 See notes 75 and 77.
103 Financial Administration Act, R.S.C., 1985, c. F-11, Schedule IV.
104 Fraser, supra note 60 at para 2.
105 Health Services, supra note 88 at para 82.