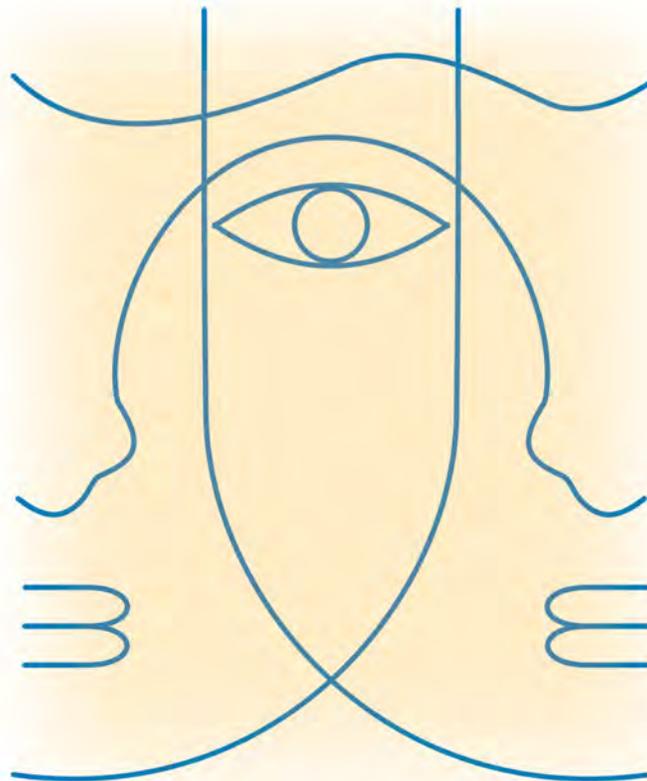


Brave New World

Fundamental Labour Rights
in the Charter Era



labour rights
are human rights

A union-side labour law practitioners' guide
to understanding the Supreme Court's path
to constitutionalizing labour rights in Canada

February 2019

CFLR The [Canadian Foundation for Labour Rights](#) (CFLR) is a national voice devoted to promoting labour rights as an important means to strengthening democracy, equality and economic justice here in Canada and internationally.

The key activities of the Foundation include:

- creating greater public awareness and understanding of labour rights as a key critical component of human rights;
- building effective political momentum and public support for progressive labour law reform;
- promoting fundamental labour standards in Canada that enhance union organizing and collective bargaining;
- providing a critical voice against any future regressive labour law being contemplated or introduced by a government in Canada; and
- monitoring and helping to coordinate legal challenges to regressive labour laws.

CFLR is a partner organization of the [Canadian Labour Institute for Social and Economic Fairness](#) (CLI).

CLI The goal of CLI is to strengthen Canadian society and contribute to positive social change by:

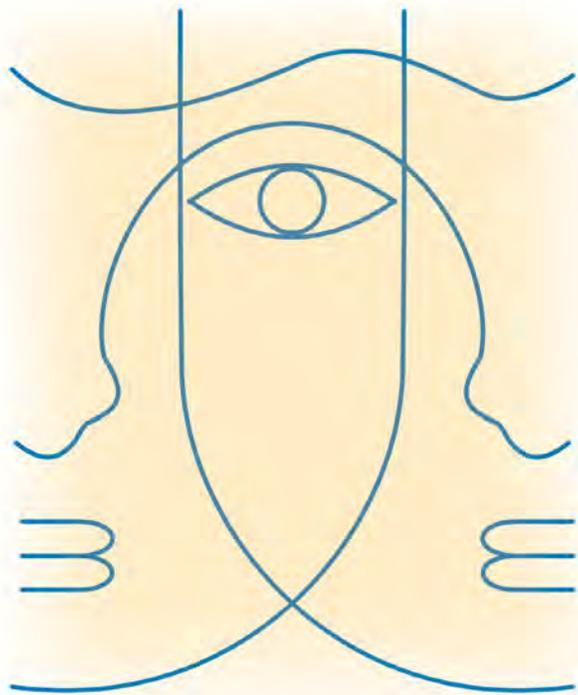
- providing progressive research, analysis and insights into the lives of everyday working Canadians;
- supporting policy development based on what we find; and
- planning and initiating campaigns in support of efforts to achieve social and economic fairness for all.

Both CFLR and CLI
gratefully acknowledge the support of
[NUPGE Canada.](#)

TABLE OF CONTENTS

Brave New World: Fundamental Labour Rights in the *Charter* Era

| | |
|---|-----------|
| Foreword | 1 |
| Introduction | 8 |
| I. Historical overview of the <i>Charter's</i> Section 2(d) development | 12 |
| II. Old Terrain: Background to the Third Labour Trilogy | 15 |
| i. First Labour Trilogy: Freedom of Association is an Individual Right | 15 |
| ii. 1987–2001: Maintaining an Uneasy Status Quo | 22 |
| iii. <i>Dunmore</i> and <i>BC Health Services</i> : The Revolution Begins | 25 |
| iv. <i>Fraser</i> : The Path Narrows | 30 |
| III. Reshaping the Terrain: The Third Labour Trilogy | 34 |
| i. <i>MPAO v Canada (Attorney General)</i> | 34 |
| ii. <i>Meredith v Canada (Attorney General)</i> | 38 |
| iii. <i>Saskatchewan Federation of Labour v Saskatchewan</i> | 40 |
| IV. Mapping the New Terrain: Jurisprudence After the Third Labour Trilogy | 47 |
| i. <i>Gordon v Canada (Attorney General)</i> | 47 |
| ii. <i>British Columbia v BCTF</i> | 52 |
| iii. <i>OPSEU v Ontario (Minister of Education)</i> | 54 |
| iv. <i>CUPW/STTP v Canada (Attorney General)</i> | 58 |
| V. Looking to the Horizon: The Shape of Section 2(d) Jurisprudence to Come | 62 |
| i. Boundaries around the Substantial Interference Test for Collective Bargaining | 62 |
| ii. Boundaries around the Right to Organize | 64 |
| iii. Boundaries around the Right to Strike | 64 |
| iv. Relationship Between Sections 2(B) and 2(D) with Respect to the Right to Strike | 65 |
| v. Role of International Labour Law in Future Section 2(D) Litigation | 67 |
| vi. Labour Relations Background of Future Supreme Court Justices | 69 |
| vii. Use of the Notwithstanding Clause to Pass Unconstitutional Labour Laws | 70 |
| VI. Conclusion | 72 |
| Acknowledgement | 74 |



labour rights
are human rights

Foreword

Over the past three decades, the Supreme Court of Canada (Supreme Court) has gradually and steadily expanded its interpretation of freedom of association, contained in Section 2(d) of the *Canadian Charter of Rights and Freedoms*.

In its first three labour rights decisions after the *Charter* was enacted known as the ‘First Labour Trilogy,’ the Supreme Court held that Section 2(d) provided little, if any, constitutional protection for labour rights. Almost three decades later in 2015, the Supreme Court released three labour rights decisions commonly known as the ‘Third Labour Trilogy.’ Those decisions were dramatic as they represented a complete reversal of the Supreme Court’s First Labour Trilogy and provided a far more expansive interpretation of Section 2(d). They affirmed that Canadian workers have the constitutional rights allowing them to join a union of their own choosing, to bargain collectively and to take strike action against their employer. Since then, the Supreme Court and lower courts have issued several more decisions that have endorsed this expanded interpretation of Section 2(d).

These decisions are significant for the labour movement, and, in fact, for Can-

The 'Third Labour Trilogy' affirmed that Canadian workers have the constitutional rights allowing them to join a union of their own choosing, to bargain collectively and to take strike action against their employer.

adian society. Our Supreme Court justices have clearly affirmed that unions matter to our country and our communities. They have once again recognized the importance of labour rights as a cornerstone of Canada's democracy, deserving of protection under Canada's Constitution.

They also provide a sense of judicial optimism for the Canadian labour movement, as they represent the beginning of a more robust and progressive interpretation of labour rights by the courts in Canada. If the labour movement hopes to use these decisions to promote, strengthen and expand labour rights in Canada, then it's critical that we develop a common and comprehensive understanding of their meaning.

It is for this reason the Canadian Foundation for Labour Rights (CFLR) has commissioned the following paper. The objective of the paper is to provide analysis and interpretation of the decisions, as well as insights into the impact they have on labour rights, union advocacy and future *Charter* litigation involving labour rights.

We also hope that the paper contributes to the understanding that unions matter to all Canadians because unions are a force for democracy, social justice and economic equality.

CFLR and its funding partner, the National Union of Public and General Employees (NUPGE), have had a long history of advocating within the Canadian labour movement for greater consultation, cooperation and cooperation amongst unions regarding *Charter* challenges against restrictive labour laws. We have always recognized that the labour movement must respect the autonomy of individual unions and their members when deciding which constitutional challenges to take forward. But we also argue that a constitutional challenge by a union will almost always have an impact on all other unions, and therefore we have a collective responsibility in trying to coordinate our collective efforts regarding constitutional

challenges.

In 2014, leading up to the Supreme Court of Canada's hearings into the three cases that made up 2015's Third Labour Trilogy, the Canadian Labour Congress took up our challenge and established its Labour Challenges Coordinating Committee (LCCC). The mandate of the Committee was:

- develop a common understanding of the Supreme Court rulings on labour rights in terms of their scope, limitations, and impact on future legal challenges involving labour rights in Canada;
- consult with a union's staff and legal counsel on pending or possible constitutional challenges that the union is considering against a specific labour law and discuss the potential impact on labour rights and the perceived strength of such a challenge;
- monitor all legal challenges to labour laws, with a view to strategically moving labour rights ahead in Canada;
- where appropriate, consider intervenor strategies for constitutional challenges which could involve the broader labour movement and/or civil society; and
- work with the leadership of CLC affiliated unions to the extent possible in examining the strength and sequences at which similar cases should be brought before the courts.

Both CFLR and LCCC played an instrumental role in coordinating labour's case before the Supreme Court leading up to each of Third Labour Trilogy decisions. For the first time in the history of the Canadian labour movement, we were able to bring together legal counsel for the appellant union and all intervenor unions and community partners to consider and develop a coordinated, strategic approach to the arguments

The objective of the paper is to provide analysis and interpretation of the decisions, as well as insights into the impact they have on labour rights, union advocacy and future Charter litigation involving labour rights.

The CFLR strongly encourages the CLC to renew with vigour the work of its LCCC. The task of consulting, co-operating and coordinating cases between unions is difficult but critical to the success of any future Charter challenges.

that each union-side party would be making at the Supreme Court hearings. We used the same approach for the 2016 Supreme Court hearing on a case brought forward by the BC Teachers' Federation, which also received a positive ruling.

Our efforts paid off, as we were able to help lead the Supreme Court justices to their current interpretation of Section 2(d). Even employer-side counsel at the Supreme Court hearings begrudgingly recognized that our coordinated efforts resulted in labour-side counsel being able to present the Court with much stronger and more consistent arguments than employers' counsel were able to provide.

The recent Supreme Court decisions have important implications for workers' rights and workplace justice in Canada. It is critical for the labour movement to have a clear understanding of the decisions and the principles on which they are based. It is also important to know their limitations and how they will impact future *Charter* litigation.

The labour movement must ensure all future labour rights decisions from the courts undergo the same degree of analysis and understanding as the decisions covered in this paper. It must maintain a clear and current knowledge of the what appears to be an evolving interpretation of Section 2(d). CFLR is committed to continuing its work in this area working with union-side legal counsel across the country.

In that regard, CFLR strongly encourages the CLC to renew with vigour the work of its LCCC. The task of consulting, co-operating and coordinating cases between unions is difficult but critical to the success of any future *Charter* challenges.

Unions also must resist the often-popular political strategy of filing a *Charter* challenge against a restrictive law without first fully weighing the pros and cons of a challenge. It is also important to note that the success of any challenge will often depend on the

amount and quality of fact-based evidence, clearly showing the harm of a restrictive law, that is provided. Gathering that type of fact-based evidence often takes time, but it's worth it: it's much more difficult to argue the impact of legislation when you have nothing to show what that impact looks like.

As important as it is to analyze labour rights decisions of the Supreme Court, it is equally important for the labour movement to track changes in the composition of the Court. It should be obvious that the background and experience of each Supreme Court justice will influence the decisions that they write. It's no coincidence that three of the justices who ruled on each of the Third Labour Trilogy decisions had some background in labour relations; their experiences were vital to the Supreme Court's understanding of the value of unions to Canadian society and their importance in enhancing the values of the *Charter*. Two of those three justices have now retired from the bench, and the current makeup of Supreme Court does not necessarily have the same understanding of unions and the role they play in society.

It's also fair to say that current public discourse helps shape the thinking of the Supreme Court on a wide range of issues. Labour rights are no different. We must therefore continue to build on the growing body of social science-based evidence that shows that unions play a valuable role in Canadian society, and that they enhance the values of the *Charter*.

As demonstrated in the CFLR 2014 publication, *Unions Matter*¹, there is a growing body of social science evidence that clearly shows that unions enhance democracy and promote economic equality and social justice. We need to reinforce in the minds of all Canadians that a constant legislative attacks on the rights of workers threatens our democracy and our

We need to reinforce in the minds of all Canadians that a continued legislative attack on the rights of workers threatens our democracy and our democratic institutions. And we need to continue to assert that human rights cannot flourish where workers' rights are not enforced.

1 Mathew Behrens, ed, *Unions Matter: Advancing Democracy, Economic Equality and Social Justice*, (Toronto: 2014, Between the Lines).

We need to continue to build greater awareness of Canada's international labour law obligations as a member state of the International Labour Organization (ILO).

democratic institutions. And we need to continue to assert that human rights cannot flourish where workers' rights are not enforced.

We also must build on the work we have done in the area of international labour law. We need to continue to build greater awareness of Canada's international labour law obligations as a member state of the International Labour Organization (ILO). The courts and governments have been slow to recognize the importance in this area but we now see greater recognition and attention the courts have given to international jurisprudence in guiding them to their decisions on labour rights. We must continue to nurture the role of international law in defining labour rights as human rights.

The labour movement must continue to build on this narrative and keep abreast of a growing body of evidence that links unionization rates to the economic and social health of individuals and the nation. Unions need to continue to dedicate the necessary resources into popularizing and publishing this new evidence on a regular and consistent basis.

In that regard, CFLR is committed to continuing to work with the Canadian Labour Congress, provincial and territorial Federations of Labour, the Canadian Association of Labour Lawyers, and the academics within labour studies programs that exist in various Canadian universities and colleges. We are also building a strong working relationship with the international labour law community through the newly formed International Lawyers Assisting Workers Network (ILAW Network), a membership organization that aims to bring together union-side labour lawyers and labour law scholars from around the world to exchange ideas and strategies designed to best represent the rights and interests of workers and their organizations wherever they may be. Together, our mission will continue to emphasize the importance of labour rights and the positive contribution of unions on the well-being of citizens and communities.

Finally, we should celebrate the fact that our efforts over the last several years have helped to create the political and legal environment for the Courts to give greater recognition to labour rights as basic human rights.

This is not to say that we can afford to sit around and rely on the courts to defend labour rights. We must continue to work diligently to ensure that the practical application of the recent Court rulings increases workplace rights of all Canadian workers and ultimately leads to progressive labour law reform across the country.

With this sense of positive change in the labour law environment reflected by our Supreme Court, we can think of no better time to embark on a national coordinated strategy for progressive labour law reform. This must be a central part of the labour movement's political agenda and an important component in helping us build the strength and size of our movement, as well as strengthening our communities to benefit more and more working people.

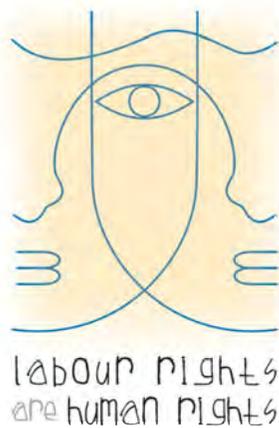
We encourage readers of this paper to become actively engaged with us in trying to create greater public awareness and understanding of the critical role unions play in Canadian society.



James Clancy
Director
Canadian Foundation for Labour Rights

We should celebrate the fact that our efforts over the last several years have helped to create the political and legal environment for the Courts to give greater recognition to labour rights as basic human rights.

Introduction



THE FREEDOM of association under section 2(d) of the 1987 Canadian *Charter of Rights and Freedoms* (the *Charter*) is broadly understood as the freedom “to combine together for the pursuit of common purposes or the advancement of common causes.”² Within the context of modern history, the case law of section 2(d) has revolved around defining the scope and meaning of labour rights. The jurisprudence arising from the Supreme Court of Canada (Supreme Court) around section 2(d) has an uneven history.

Over the past three decades, Supreme Court decisions have evolved from the position that the constitutional guarantee of freedom of association in section 2(d) does not include a guarantee of the right to bargain collectively and the right to strike to an almost completely opposite position that freedom of association encompasses the right to join a union of one’s choosing, the right to collectively bargain, and the right to strike.

Consider, for example, the three foundational cases—the First Labour Trilogy released by the Supreme Court in 1987—in which six judges wrote eleven decisions between them: four in *PSAC v Canada*,³ four in *RWDSU v Saskatchewan*,⁴ and three in the *Alberta Reference*.⁵ Three years later, the next major section 2(d) decision from the Supreme Court, *PIPSC*, saw seven judges produce five decisions.⁶ This tension continued in subse-

2 *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 334, 38 DLR (4th) 161 [*Alberta Reference*].

3 *PSAC v Canada*, [1987] 1 SCR 424 [*PSAC*].

4 *RWDSU v Saskatchewan*, [1987] 1 SCR 460 [*RWDSU*].

5 *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 [*Alberta Reference*].

6 *Professional Institute of the Public Service of Canada*

quent decisions such as *Lavigne*⁷ and *Delisle*.⁸ This lack of a clear consensus among the members of Canada's Supreme Court left the jurisprudence on section 2(d) on shaky ground.

That ground shifted in the new millennium with the release of the Supreme Court's decisions in *Dunmore*⁹ and *BC Health Services*,¹⁰ which held, respectively, that section 2(d) protects a right to unionize, at least in certain circumstances, and a right to collective bargaining, at least on fundamental workplace issues. The terrain proved to be unstable in 2011 when the Supreme Court's decision in *Fraser* appeared to restrict the application of *BC Health Services*.¹¹ Four years later, however, the topography was reshaped by the decisions in the Third Labour Trilogy: *MPAO*,¹² *Meredith*,¹³ and *Saskatchewan Federation of Labour*.¹⁴

The three decades of section 2(d) jurisprudence regard-

v Northwest Territories (Commissioner), [1990] 2 SCR 367 [PIPSC].

7 *Lavigne v OPSEU*, [1991] 2 SCR 211 [*Lavigne*], in which a panel of seven judges produced three full sets of reasons.

8 *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989 [*Delisle*], in which seven judges likewise produced three sets of reasons. See also *R v Advance Cutting & Coring*, 2001 SCC 70, which yielded four sets of reasons from nine judges.

9 *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 [*Dunmore*].

10 *Health Services & Support-Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 [*BC Health Services*].

11 *Fraser v Ontario (Attorney General)*, 2011 SCC 20 [*Fraser*].

12 *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 [MPAO].

13 *Royal Canadian Mounted Police v Canada (Attorney General)*, 2015 SCC 2 [*Meredith*].

14 *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 [*Saskatchewan Federation of Labour*].

The three decades of jurisprudence regarding labour rights has evolved from our Supreme Court justices rejecting any constitutional protection of labour rights to clearly recognizing the importance of labour rights as a cornerstone of Canada's democracy, and therefore deserving protection under Canada's constitution.

ing labour rights has had a significant impact on the labour movement, as well as on Canadian society. It has evolved from our Supreme Court justices rejecting any constitutional protection of labour rights to clearly recognizing the importance of labour rights as a cornerstone of Canada's democracy, and therefore deserving protection under Canada's constitution.

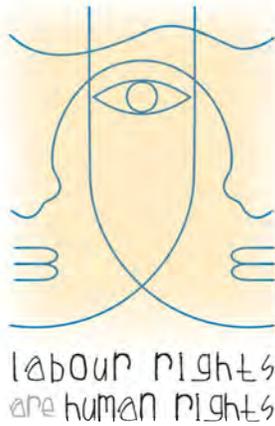
The Third Labour Trilogy decisions have important implications for workers' rights and workplace justice in Canada. They have the potential to reverse what has been a slow and steady erosion of labour rights in Canada¹⁵ and to help reinvigorate union organizing in Canada. It is critical therefore for the labour movement to have a clear understanding of the breadth and scope of these decisions and the principles on which they are based. These decisions also have important implications for governments on the drafting of new labour laws, and the impact they will likely have on future *Charter* litigation by unions in Canada.

The paper was prepared for the Canadian Labour Institute (CLI), and its Canadian Foundation for Labour Rights (CFLR). Its purpose is to map the new terrain for labour rights established by the courts in recent years from a trade union perspective. The objective is to provide labour-side union practitioners with analysis and interpretation of section 2(d) decisions, as well as insights of the impact they have on labour rights, union advocacy and future *Charter* litigation involving labour rights.

To that end, this paper is broken into five parts. The first is a brief historical overview of the political debate around the inclusion and meaning of freedom of association during the drafting of the *Charter* in the

15 Every jurisdiction in Canada has experienced a major violation of the bargaining rights of its citizens. The federal and provincial governments in Canada passed 225 pieces of legislation since 1982 that have restricted, suspended or denied collective bargaining rights for Canadian workers. For more information see: www.labourrights.ca

early 1980s and the lack of involvement by the labour movement in that debate. The second is a survey of the decisions leading up to the Third Labour Trilogy. The third maps the three decisions of the Third Labour Trilogy in detail. The fourth addresses four key subsequent decisions to assist in charting the still-shifting landscape. The fifth and final section sketches out two of the areas still in need of the greatest exploration.



Historical overview of the *Charter's* Section 2(d) development

THE ENSHRINEMENT of a bill of rights in the Canadian constitution had been a long-time dream of civil rights activists, trade unionists and social democrats. Prominent proponents in the 1940s and 1950s included civil rights lawyers such as Frank Scott and Andrew Brewin, and trade union leaders such as Charles Millard. They were appalled by the arbitrary loss of rights suffered by Japanese-Canadians during the Second World War, and wanted entrenched legal rights to prevent such recurrence.¹⁶ Later, in 1960, Prime Minister John Diefenbaker enacted the Canadian *Bill of Rights*, a noble statute which proclaimed a number of fundamental rights, but lacked any constitutional teeth to strike down discriminatory laws and government actions.¹⁷ During the 1960 and 1970s, constitutional reform was regularly debated at the national level, but without substantial consensus, proposals for entrenching fundamental rights languished.

The possibility of an entrenched charter of rights re-emerged following the February 1980 federal election, which swept Pierre Trudeau back into power after a short hiatus. During the subsequent Quebec referendum on independence in May 1980, Trudeau promised a new constitutional package, which would patriate the *British North America Act* to Canada and embed

¹⁶ S. Bangarth, “‘Their Equality is My Equality’: F. Andrew Brewin and Human Rights Activism, 1940s-1970s” in D. Goutor & S. Heathorn, eds, *Taking Liberties: A History of Human Rights in Canada* (Oxford University Press, 2013), chapter 4.

¹⁷ SC 1960, c44.

a set of fundamental rights.¹⁸ After an initial draft of the proposed charter of rights was released later in 1980, Canadians engaged in an extraordinary political debate over the next year, with strong public support for an entrenched charter, but with various views expressed about its content.

The Canadian labour movement was not an active participant in the national debate around the drafting of Canada's *Charter*.¹⁹ In deference to the Quebec Federation of Labour's opposition to the *Charter*, the Canadian Labour Congress did not participate in hearings of the Special Joint Committee of the Senate and the House of Commons, which examined its terms in detail and recommended amendments.²⁰

As Leila Geggie Hurst has described, during the process of the drafting of the *Charter*, NDP MP Svend Robinson made a motion before the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada that the proposed language of section 2(d) be amended to read "freedom of association including the freedom to organize and bargain collectively."²¹ That motion was soundly defeated when the Solicitor-General, Robert Kaplan, forwarding the government's position in response to this proposed amendment, stated that the rights to organize and to bargain collectively were already protected in the freedom of association, as provided by the *Universal Declaration on Human Rights*,²² the *International*

The Canadian labour movement was not an active participant in the national debate around the drafting of Canada's *Charter*.

18 R. Graham, *The Last Act: Pierre Trudeau, the Gang of Eight and the Fight for Canada* (Allen Lane Canada, 2011).

19 Derek Fudge, *Collective Bargaining in Canada: Human Right or Canadian Illusion?* (2006) (Nova Scotia: Fernwood Publishing) at 70.

20 *Ibid.* p.71

21 Leila Geggie Hurst, "A New Hope, or a *Charter* Menace? The New Labour Trilogy's Implications for Labour Law in Canada" (2017) 22 *Appeal* 25 at 26 [*Hurst*].

22 GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) [*UDHR*].

Several unions warned that the *Charter* could be a double-edged sword for the labour movement and strongly lobbied for a coordinated approach in bringing forward *Charter* cases. Those unheeded warnings proved to be correct.

Covenant on Economic, Social, and Cultural Rights,²³ the *International Covenant on Civil and Political Rights*,²⁴ and in the *Charter*, and furthermore, by singling out association for collective bargaining, “one might diminish all the other forms of association intended to be protected.”²⁵ It is clear, then, that the drafters of the *Charter* considered freedom of association to include the right to bargain collectively.

With the right to freedom of association contained in the *Charter*, the labour movement held the view that this would provide an opportunity to challenge the multitude of restrictions on union activities, including limitations on the right to collective bargaining and the right to strike. It was assumed that the jurisprudence from the International Labour Organization (ILO) declaring the right to collective bargaining and the right to strike were an essential and implied component of “freedom of association.”

During the debate however, several unions warned that the *Charter* could be a double-edged sword for the labour movement and strongly lobbied for a coordinated approach in bringing forward *Charter* cases to advance labour rights.²⁶ Those unheeded warnings proved to be correct.

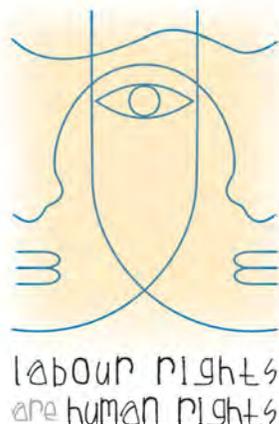
23 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976, accession by Canada 19 May 1976) [*ICESCR*].

24 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*].

25 CPAC, “Joint Committee on the Constitution—January 22, 1981 (Part 2 of 3)” online: <http://www.cpac.ca/en/programs/cpac-special/episodes/90010002> at at 01h:02m:55s [*Joint Committee*]. Mr. Robinson does not go as far as to suggest that the amendment entrench the right to strike.

26 The National Union of Public and General Employees was the first union in Canada to sound the alarm. It prepared research material on the *Charter* and trade union rights with the publication of *The Canadian Charter of Rights and Freedoms: A Doubled-Edged Sword for Unions?* in January 1986.

II Old Terrain



Background to the Third Labour Trilogy

Understanding the decisions in the Third Labour Trilogy requires situating them in the context of the history of the Supreme Court’s jurisprudence on section 2(d) of the *Charter*. For the purposes of this paper, this history may be divided into three periods.

The First began with the release of the First Labour Trilogy in 1987, exemplified by the decision in the *Alberta Reference*, in which the Supreme Court, which held that freedom of association was a right belonging to individuals and thus section 2(d) provided no protection for collective rights, such as the right to collectively bargain or the right to strike.

The Second period began with *Dunmore* in 2001 and spanned more than a decade with *BC Health* in 2007 and *Fraser* in 2011. This Second Labour Trilogy is characterized by a deeply divided Court that continued to uphold the First Labour Trilogy despite persistently strong dissenting opinions.

The Third Labour Trilogy—*MPAO*, *Meredith*, and *Saskatchewan Federation of Labour*—is defined by the ascendancy of what had previously been the minority opinion that section 2(d) should be read as protecting collective rights, particularly the right to bargain collectively.

i. The First Labour Trilogy: Freedom of Association is an Individual Right

For decades, the leading cases on section 2(d) of the *Charter* were the First Labour Trilogy, and chief among these was the *Alberta Reference*. In 1983, the Alberta

Legislature enacted amendments to the *Public Service Employee Relations Act*²⁷ and the *Labour Relations Act*²⁸ and enacted the *Police Officers Collective Bargaining Act*.²⁹ The result was a prohibition against strikes by Albertan public service employees, firefighters, hospital employees, and police officers. In place of strike activities, the legislative schemes provided that disputes arising out of the collective bargaining process were to be resolved by compulsory arbitration. At issue was whether these legislative schemes were inconsistent with the *Charter*, particularly whether they violated the freedom of association guaranteed by section 2(d).

As previously mentioned, the panel of six produced three judgments between them. The decision with the highest number of signatories, penned by Le Dain J. with Beetz and La Forest J.J. concurring, was only four paragraphs long. Le Dain J. wrote that freedom of association must be understood broadly as applying to “a wide range of associations or organizations of a political, religious, social or economic nature.”³⁰ As different activities are appropriate to different organizations, Le Dain J. declined to find that any particular activity was protected by section 2(d). Instead, he held that:

the constitutional guarantee of freedom of association in section 2(d) of the *Canadian Charter of Rights and Freedoms* does not include, in the case of a trade union, a guarantee of the right to bargain collectively and the right to strike.³¹

Rather than understanding the freedom of association as protecting collective rights, such as the right

27 *Public Service Employee Relations Act*, RSA 1980, c P-33 as amended by SA 1983, c 34, c 96.

28 *Labour Relations Act*, RSA 1980, c L-1.1 as amended by SA 1983, c 34.

29 *Police Officers Collective Bargaining Act*, SA 1983 c P-12.05.

30 *Alberta Reference*, *supra* note 4 at 390.

31 *Ibid.*

to collective bargaining or the right to strike, Le Dain J. understood the freedom of association as protecting the exercise of fundamental, individual freedoms, such as freedom of expression and freedom of conscience and religion.³² Le Dain J. also found that collective bargaining and striking were statutory rights, not fundamental freedoms, and should be left to the legislatures, which had a higher level of expertise in balancing the competing interests involved.³³

In a separate opinion, McIntyre J. accepted that the *Charter* should be given “a liberal and not overly legalistic” interpretation, but cautioned against regarding the *Charter* as “an empty vessel to be filled with whatever meaning we might wish from time to time.”³⁴ Recognizing that freedom of association strengthened social order, promoted democracy, and advanced group interests, McIntyre J. nevertheless held that it was “a freedom belonging to the individual and not to the group formed through its exercise.”³⁵ As neither collective bargaining nor striking represent individual rights—they necessarily may be exercised only by a group—McIntyre J. declined to find that these two rights were protected under the freedom of association.

Dickson C.J.C., with Wilson J. concurring, wrote what has proven to be one of the most influential dissenting opinions in the modern history of the Supreme Court. In contrast to Le Dain and McIntyre J.J., who approached the freedom of association from a more generic and decontextualized standpoint, Dickson C.J.C. recognized freedom of association to be “the cornerstone of modern labour relations,”³⁶ thus lo-

32 *Ibid* at 391.

33 *Ibid* at 391-92. See Finn Makela, “The Supreme Court on the Relationship Between the General Law and Collective Labour Relations Regimes: 1875-2016” (2017) 78 SCLR (2d) 380 at 400.

34 *Alberta Reference*, *supra* note 4 at 394.

35 *Ibid* at 397.

36 *Ibid* at 334.

“[Work is] one of the most fundamental aspects in a person’s life ... [employment] is an essential component of [an individual’s] sense of identity, self-worth and emotional well-being,”

Chief Justice Dickson’s famous dissent in *Alberta Reference*, [1987] 1 S.C.R. 313 at 91

cating the freedom of association squarely within the context of labour relations. Drawing on jurisprudence from a number of sources—the Judicial Committee of the Privy Council, other Canadian cases, and the United States—as well as international law, Dickson C.J.C. held that the freedom of association “is most essential in those circumstances when the individual is liable to be prejudiced by the actions of some larger and more powerful entity.”³⁷ The employer-employee relationship is one in which one party is larger and more powerful than the other. Acknowledging both that work was “one of the most fundamental aspects in a person’s life” and that employment was “an essential component of [an individual’s] sense of identity, self-worth and emotional well-being,” Dickson C.J.C. held that the purpose of the *Charter* guarantee of freedom of association is, at least in part, to protect these fundamental and essential aspects of human life.³⁸ As collective bargaining protects these “important employee interests” and the “collective bargaining process requires concomitant protection of [employees’] freedom to withdraw collectively their services,” Dickson C.J.C. held that collective bargaining and the right to strike were protected under section 2(d).³⁹ “If freedom of association only protects the joining together of persons for common purposes, but not the pursuit of the very activities for which the freedom of association was formed,” wrote Dickson C.J.C., then it is a hollow freedom.⁴⁰

The scholarly response to the First Labour Trilogy can be divided into three primary schools of thought. The “industrial pluralists”⁴¹ were critical of the courts’ treatment of labour rights and believed that courts had no business in or aptitude for decision-making in labour relations, and should leave it to the legisla-

37 *Ibid* at 365.

38 *Ibid* at 368

39 *Ibid* at 371.

40 *Ibid.*

41 For example, Paul Weiler and Joseph Weiler.

tures. The “critical realists”⁴² were disappointed that freedom of association was left powerless but doubted that courts would ever be able to “get it right” in labour relations due to the biased judicial attitude in this highly politicized area of law. Lastly, there were the “*Charter* romantics,”⁴³ who believed that while the courts were incorrect in deciding the First Labour Trilogy, labour rights were fundamental rights and a return to court for the fight was absolutely necessary. Brian Etherington noted that the outcome of the Trilogy was a result of “the political and social context of the 1980s in which judicial review of labour law under the *Charter* began.”⁴⁴ In the aftermath of the First Labour Trilogy, scholars predicted that *Charter* review would become consistent if “judges adopted an activist approach of a generous interpretation of the rights and freedoms and a stringent approach to the application of s.1.”⁴⁵

One focal point of the academic debate was the use of the courts to achieve union goals. Scholars found it of interest that unions were attempting to use the *Charter* to “preserve or extend their collective strength in light of the history of the courts’ unsympathetic, re-

42 For example, Judy Fudge, Paul Cavalluzzo, Geoffrey England, and Harry Arthurs.

43 For example, Brian Langille, David Beatty, and Steven Kennett.

44 “An Assessment of Judicial Review of Labour Laws under the *Charter*: Of Realists, Romantics, and Pragmatists” (1992) 24 *Ottawa L Rev* 685 at 685–686 [*Etherington*]. This paper notes: “It was a time in which conservative government policies were dominant and the language of deregulation was prevalent. It was a time of retrenchment by governments on their commitment to protection for forms of collective activity by workers. This meant the vast majority of claims under the *Charter* were brought by workers and unions and it was relatively easy for courts to express and demonstrate, for the most part, a commitment to deference to legislatures in review of labour law.”

45 *Ibid* at 727.

“If freedom of association only protects the joining together of persons for common purposes, but not the pursuit of the very activities for which the freedom of association was formed then it is a hollow freedom.”

Chief Justice Dickson’s famous dissent in *Alberta Reference*, [1987] 1 S.C.R. 313 at 81.

pressive response to workers' collective action"⁴⁶ given that the Supreme Court displayed a "fundamental misunderstanding of basic labour law principles" in the Trilogy.⁴⁷ Conversely, other scholars have argued that even if the courts had taken an activist or interventionist stance, the union position would not have improved since the reforms that would best benefit unions could not be achieved under the *Charter*.⁴⁸

Another focal point of the academic discussion was the courts' deference to the legislature. Some scholars appreciated it, for they shared the institutional concerns expressed by McIntyre J. in the *Alberta Reference*, namely that the courts are not the appropriate forum to strike the delicate balance of interests involved in labour relations.⁴⁹ At such an early stage of the *Charter*, scholars noted, the courts were not capable of arriving at "a proper balance between competing political, democratic, and economic interests that are the stuff of labour legislation."⁵⁰

There was significant scholarly critique of specific sets of reasons. For example, Le Dain J.'s analysis, dismissing the rights to strike and to bargain collectively on the basis that they were statutory creations, was widely criticized. Judy Fudge notes, for example, that Le Dain J.'s decision ignored "the fact that many of what we now consider to be core fun-

46 Judy Fudge, "Labour, the New Constitution and Old-Style Liberalism" (1998) 13 Queen's LJ 61 at 110 [*Fudge*].

47 Dianne Pothier, "Twenty Years of Labour Law and the *Charter*" (2002) 40 Osgoode Hall LJ 369 at 374.

48 Geoffrey England, "Some Thoughts on Constitutionalizing the Right to Strike" (1988) 13 Queen's LJ 168 at 203–04 [*England*].

49 Paul JJ Cavalluzzo, "Freedom of Association—Its Effect upon Collective Bargaining and Trade Unions" (1988) 13 Queen's LJ 267 at 272 [*Cavalluzzo*].

50 JM Weiler, "The Regulation of Strikes and Picketing under the *Charter*" in JM Weiler and RM Elliot, eds, *Litigating the Values of the Charter* (Toronto: Carswell, 1986) at 226.

damental rights and freedoms in a constitutional democracy, such as equality and freedom of religion, depended upon the enactment of statutory regimes for their realization.”⁵¹ Other scholars noted that the rights to strike and to collectively bargain were not statutory creations but rather social rights resulting from historical working class action.⁵² McIntyre J.’s judgment was also met with criticism. Many scholars noted the flaw in the reasoning that only lawful individual rights could be protected under the collective exercise of freedom of association: in fact, “workers have an individual right to bargain with their employers, and an individual right not to come to work until an acceptable agreement is reached,” which means workers must have a collective right to bargain and to strike.⁵³

The decisions in *Alberta Reference* and in the Labour Trilogy overall exposed a fundamental divide in the Supreme Court regarding the proper understanding of the freedom of association. The majority held that the freedom of association, like other fundamental rights guaranteed by the *Charter*, was necessarily a right belonging to individuals. Because of this, the majority held, it must be understood as protecting only those rights that could be exercised by individuals. Since collective bargaining and striking are necessarily collective activities, the majority held,

51 Judy Fudge, “Freedom of Association” in Errol Mendes & Stephane Beaulac, eds, *Canadian Charter of Rights and Freedoms*, 5th ed (Markham: LexisNexis Canada Inc, 2013) 527 at 530 [*Fudge in Mendes*], citing Otto Kahn-Freund in Lord Wedderburn, “Freedom of Association or Right to Organise? The Common Law and International Sources” in Lord Wedderburn, ed, *Employment Rights in Britain and Europe* (London: Lawrence and Wishart, 1991) at 142.

52 England, *supra* note 47 at 175.

53 Brian Langille, “The Freedom of Association Mess: How We Got Into It and How We Can Get Out Of It” (2009) 54 McGill LJ 177 as cited in David Doorey, “The *Charter* and the Law of Work: A Beginner’s Guide” (2012) York University 1 at 1 <http://ssrn.com/abstract=2150279>.

it would be inconsistent to consider access to these activities as rights under section 2(d). In contrast, a minority understood freedom of association to be sufficiently expansive as to include rights to these collective activities. In the years since, this division in the Supreme Court has remained, although the balance of power has shifted, and Dickson's C.J.C. understanding has come to dominate the more recent jurisprudence.

**ii. 1987–2001:
Maintaining an Uneasy Status Quo**

That shift did not come about quickly. In *PIPSC*, a decision rendered three years after the First Labour Trilogy, the majority continued to support the position that section 2(d) guaranteed only an individual right to associate. Interestingly, Dickson C.J.C. flipped his position from that in the *Alberta Reference* and rejected the position that section 2(d) guaranteed collective bargaining rights, although he appeared to do so more out of a reluctance to upset the majority decision in the *Alberta Reference*.⁵⁴ This desire to maintain the status quo was not shared by the minority—Cory, Wilson, and Gonthier J.J.—whose decision has been described as “a transparent effort to reverse the Court’s holding in the *Alberta Reference*.”⁵⁵ A year later in *Lavigne*, the Supreme Court remained sharply divided, although the majority continued to support the individual rights view.⁵⁶ This time, it was Gonthier J. who flipped to side with those who understood section 2(d) as protecting only individual rights.⁵⁷ Both of

54 *PIPSC*, *supra* note 5 at 374.

55 John Craig & Henry Dinsdale, “A New Trilogy or the Same Old Story” (2003) 10 CLELJ 59 at 64.

56 *Lavigne*, *supra* note 6.

57 *Lavigne* and *R v Advance Cutting & Coring Ltd v Quebec* [2001] 3 SCR 209, which was decided two years later, were both freedom from association cases, and were considered “shield victories” for unions. A “shield victory” is a case in which the *Charter* is used as a shield to protect unions, in a manner analogous to the doctrine of estoppel in contract law.

these cases show the Supreme Court's willingness, in this period, to fight anew the battles from the *Alberta Reference*.

Canadian Egg Marketing Agency v Richardson followed in 1998, citing the PIPSC approach to section 2(d) with approval.⁵⁸ *Canadian Egg Marketing* was the sole major section 2(d) case that was not set in the labour relations context. Nonetheless, it confirmed that section 2(d) did not create a right to do in association what is unlawful for an individual to do, thus affirming McIntyre J.'s individual rights approach to section 2(d).⁵⁹

The 1999 *Delisle* decision warrants a more fulsome inspection. Like two of the cases in the Third Labour Trilogy, *Delisle* dealt with the unionization of RCMP members. At the time, RCMP members had established a number of employee associations, but RCMP members were excluded from the protections of the *Public Service Staff Relations Act*,⁶⁰ of which section 2(e) defined "employee" to exclude RCMP members, and the *Canada Labour Code*,⁶¹ of which section 6 provided that certain provisions did not apply to employees of Her Majesty in right of Canada. The appellant argued that "the purpose of the impugned provisions [was] to prevent formation of a union" of RCMP members in violation of section 2(d) of the *Charter*.⁶² The Court split three ways, with Bastarache J. writing on behalf of himself and Gonthier, McLachlin, and Major J.J., L'Heureux-Dubé J. writing a separate concurring opinion, and Cory and Iacobucci J.J. in dissent.

In what has been described as a "thinly veiled attempt by Cory and Iacobucci J.J. to resurrect previous dis-

58 *Canadian Egg Marketing Agency v Richardson* [1998] 3 SCR 157 at para 112 [*Canadian Egg Marketing*].

59 *Ibid* at para 113.

60 *Public Service Staff Relations Act*, RSC 1985, c P-35.

61 *Canada Labour Code*, RSC 1985 c L-2.

62 *Delisle*, *supra* note 7 at 1027.

While the division within the Supreme Court was sharp and deep, the view that freedom of association did not afford collective rights consistently carried the day. With the turn of the millennium, however, came a revolution in the Supreme Court's approach.

senting opinions of the Court,"⁶³ the two judges held that section 2(d) of the *Charter* protects both the right to freedom of association generally and the freedom to join a trade union specifically. They held that "a fundamental purpose of the freedom of association guarantee is to preserve and promote the existence of associations which assist in the attainment of individual goals and individual self-fulfillment."⁶⁴ In support of the claim that a right to join a trade union promotes the attainment of individual goals and individual self-fulfillment, Cory and Iacobucci J.J. quoted the famous comment of Dickson C.J.C., referenced above, that work is "one of the most fundamental aspects in a person's life"⁶⁵ and that, on this basis, a right to form a trade union was protected under section 2(d) of the *Charter*. In this way, the dissenting opinion of Dickson C.J.C. in the *Alberta Reference* was once again revived, but as was the case in *PIPSC* and *Lavigne*, it was supported only in dissent.

In contrast, the majority held that section 2(d) protected only the freedom of association generally. In other words, RCMP employees possessed the right to form independent employee associations, but there was no *Charter* right to have these associations recognized as trade unions with collective bargaining powers under the *Public Service Staff Relations Act*.⁶⁶ The majority's reasons were telling:

[t]he outcome of the case at bar has largely been determined by the previous decisions of this Court which have defined the concept of freedom of association, guaranteed

63 Craig & Dinsdale, *supra* note 54 at 69.

64 *Delisle*, *supra* note 7 at 1036.

65 *Ibid.* This quotation was a favourite of Iacobucci J, who cited it in a number of employment decisions. See, for example, *Machtiger v HOJ Industries Ltd*, [1992] 1 SCR 986 at 1002; *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701 at 741-42; and *McKinley v BC Tel*, 2001 SCC 38 at para 53.

66 *Ibid* at 1007.

in section 2(d) of the *Charter*. The three cases of the 1987 trilogy [...] are especially determinative of the issue as they explore the concept in the labour relations context.⁶⁷

Despite the unrelenting and consistent objections of a minority of the Supreme Court since the First Labour Trilogy, the majority in *Delisle* held that the interpretation of section 2(d) had been settled by the First Labour Trilogy and that the *status quo* should be maintained.

Delisle was emblematic of the Supreme Court's jurisprudence on the freedom of association in the decade following the Labour Trilogy. A minority of judges returned to the arguments made by Dickson C.J.C. in an attempt to give the freedom of association a broad reading, while a majority upheld the decision of the majority in the *Alberta Reference* and the individual rights approach it embodied. While the division within the Supreme Court was sharp and deep, the view that freedom of association did not afford collective rights consistently carried the day. With the turn of the millennium, however, came a revolution in the Supreme Court's approach.

iii. The Second Labour Trilogy: The Revolution Begins with *Dunmore* and *BC Health Services*

This revolution came in two stages and together made up the Second Labour Trilogy. In the first stage the Supreme Court recognized that the freedom to unionize is protected by section 2(d) of the *Charter*, at least in certain circumstances. This was the holding of a nearly unanimous panel in *Dunmore*, which concerned the operation of the *Labour Relations and Employment Statute Law Amendment Act*,⁶⁸ and Ontario's *Labour Relations Act*⁶⁹ in preventing

67 *Ibid* at 1006–07.

68 *Labour Relations and Employment Statute Law Amendment Act, 1995*, SO 1995 c 1 [“*LRESLAA*”].

69 *Labour Relations Act, 1995*, SO 1995 c 1, Schedule A.

Dunmore was also notable because it resurrected, from Dickson C.J.C.'s dissent in the *Alberta Reference*, the influence of international labour law on *Charter* jurisprudence.

agricultural workers from unionizing. In 1994, the New Democratic Party government of Ontario had extended trade union and collective bargaining rights to agricultural workers in the province for the first time since 1943. The next year, the Progressive Conservative Party came to power under Premier Mike Harris, and the *LRESLAA* was passed to rescind those rights. Agricultural workers were once more prohibited from unionizing, and any trade unions that had been certified were no longer recognized as bargaining agents for their members. The appellants sought to have their rights to unionize recognized as being constitutionally protected under section 2(d) of the *Charter*.

Given that the Supreme Court had rejected the argument that section 2(d) protects a right to unionize only two years earlier in *Delisle*, it was surprising when eight members of the Supreme Court found for the agricultural workers in *Dunmore*. The majority were swayed by the argument that agricultural workers, unlike RCMP members, were “substantially incapable of exercising their constitutional right to associate” without statutory protections.⁷⁰ Citing the fact that “agricultural workers are isolated, seasonal and relatively under-educated,” the majority concluded that “the ability of agricultural workers to associate is only as great as their access to legal protection.”⁷¹ As a result, the majority held that the agricultural workers’ “freedom to organize” was infringed by the impugned legislation.⁷² In doing so, the majority held that section 2(d) protects a right to form a trade union specifically, rather than merely the freedom of association generally, if a vulnerable group may not otherwise exercise its right to freely associate. By emphasizing the imperative to protect vulnerable groups, the majority

70 *Dunmore*, *supra* note 8 at para 39. See also paragraph 42, “I readily conclude that the evidentiary burden has been met in this case: the appellants have brought this litigation because there is no possibility for association as such without minimum statutory protection.”

71 *Ibid* at paras 43, 45.

72 *Ibid* at para 48.

built upon the understanding of section 2(d) first developed by Dickson C.J.C. in the *Alberta Reference*: that association is one way to balance power between vulnerable and more powerful entities.

Dunmore was also notable because it resurrected, from Dickson C.J.C.'s dissent in the *Alberta Reference*, the influence of international labour law on *Charter* jurisprudence. Bastarache J. asserted that section 2(d) should be interpreted purposively if it was to "protect the full range of associational activity contemplated by the *Charter* and to honour Canada's obligations under international human rights law."⁷³

Further, *Dunmore* suggested that there can be a positive obligation on the part of a government to provide legislative protection against unfair labour practices. This idea was put forth by L'Heureux-Dube in *Delisle*,⁷⁴ where Bastarache J. also acknowledged that a positive obligation could apply in "exceptional circumstances."⁷⁵ In *Dunmore*, those circumstances were at bar, and the positive obligation was recognized.⁷⁶

Scholars noted that while the majority may have recognized a right to unionize in certain circumstances, the decision in *Dunmore* failed to provide much guidance for what that right entailed. While many scholars credited *Dunmore* with ushering in a revolution in section 2(d) jurisprudence,⁷⁷ others criticized it for its failure to provide any real clarity on whether, for example, a trade union formed by agricultural workers would have the right to collectively bargain or to strike, and for instead deferring to the legislature

While the majority may have recognized a right to unionize in certain circumstances, the decision in *Dunmore* failed to provide much guidance for what that right entailed.

73 *Ibid* at para 13. Bastarache specifically references the jurisprudence of the ILO bodies (at paras 16, 30) and that of Convention No 87 (at para 27).

74 *Delisle*, *supra* note 7 at paras 7, 33.

75 *Ibid* at paras 33, 38.

76 *Dunmore*, *supra* note 8 at paras 22, 80.

77 Roy J Adams, "The Revolutionary Potential of *Dunmore*" (2003) 10 CLELJ 117 at 117 [*Adams*].

“ [Section 2(d)] should be understood as protecting the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining.”

***Health Services v. British Columbia*, [2007] 2 S.C.R. 391**

to provide guidance on such issues.⁷⁸ It appears that the majority’s decision was restricted to recognizing a trade union’s role in “promoting workplace democracy, protecting employees from abuses of managerial power, pooling resources, and expressing the views of workers ‘cogently and forcefully.’”⁷⁹ But, as Roy Adams argues, it was not clear what to make of this—the Supreme Court seemed to be adopting a position that was “confusing and seemingly contradictory.”⁸⁰ At the very least, it seems odd to recognize a right to unionize without also recognizing a right to what are arguably the most significant activities in which a trade union engages: collective bargaining and striking.⁸¹

At the second stage of the revolution, the Supreme Court recognized one of these: collective bargaining. The litigation in *BC Health Services* arose from a challenge to British Columbia’s *Health and Social Services Delivery Improvement Act*,⁸² which was enacted in an effort to curtail rising healthcare costs. This legislation, which was imposed by the British Columbian government without meaningful consultation with the affected unions, altered existing collective agreements in the healthcare sector. The question before the Court was whether this violated a right to bargain

78 *Ibid* at para 68.

79 *Ibid* at para 12.

80 *Ibid* at 130. It is worth noting, however, that Professor Adams proposed that the apparent contradiction could be resolved if “the Supreme Court might be convinced to change its position and include the right to strike under the umbrella of freedom of association” (Adams at 130). In this way, he anticipated the decision in *Saskatchewan Federation of Labour*, *supra* note 13.

81 John Craig and Henry Dinsdale, in “A New Trilogy or the Same Old Story?” (2003) 10 CLELJ 59 at 59, 77 [Craig] speculate that the reason the Supreme Court declined to include these activities is that Bastarache J, writing for the majority, was unwilling to overturn the result in the Alberta Reference, and so this reasoning represented a compromise.

82 *Health and Social Services Delivery Improvement Act*, SBC 2002 c 2.

collectively, which, of course, first required an affirmation of that *Charter* right. In recognizing a right to bargain collectively, a nearly unanimous Court held that section 2(d) “protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues.”⁸³ The earlier jurisprudence in the *Alberta Reference* and *PIPSC*, holding that the *Charter* guarantee of freedom of association does not protect collective bargaining rights, was considered and rejected as being out of step with the Supreme Court’s inclination to interpret the *Charter* purposively.⁸⁴

As a result, the Supreme Court conducted what was, in effect, a *de novo* analysis of section 2(d) and its relationship to the right to bargain collectively. Citing historical evidence of collective bargaining in Canadian society, Canada’s commitments to international agreements, and underlying *Charter* values of human dignity, equality, liberty, and respect for autonomy, the Supreme Court reversed its position in the First Labour Trilogy. In *BC Health Services*, a unanimous Court held that section 2(d) “should be understood as protecting the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining.”⁸⁵ Yet, having recognized this right, the Supreme Court was quick to limit it. The right to the process of collective bargaining, it held, did not protect an outcome of that process, a specific model of labour relations, or a specific bargaining method.⁸⁶ Despite these limitations, *BC Health Services* marked a significant step forward for labour rights by recognizing *Charter* protection for the right to bargain collectively.

BC Health Services marked a significant step forward for labour rights by recognizing *Charter* protection for the right to bargain collectively.

83 *BC Health Services*, *supra* note 9 at para 19 (emphasis added).

84 *Ibid* at para 30.

85 *Ibid* at para 87. Deschamps J. wrote a dissenting opinion on the majority’s application of the *Oakes* test, but accepted the majority’s conclusion that the right to a process of collective bargaining falls within the scope of section 2(d) of the *Charter* (*BC Health Services*, *supra* note 9 at para 174).

86 *Ibid* at para 91.

Academics responding to *BC Health Services* sought an explanation for the sudden shift from a narrow interpretation of s 2(d) in *Dunmore* to a broad expansion of the freedom that included the right to collective bargaining. Some scholars argued that this was because a narrow reading of s 2(d) was becoming much more difficult to justify in light of the expansive interpretation given to section 2(b) in the labour relations context.⁸⁷ In addition, international human rights law had been moving closer to the forefront of jurisprudential discussions.⁸⁸ Finally, the Supreme Court's declaration of total abstinence from protecting the right to collective bargaining seemed to embolden provincial and federal legislatures to ignore and trample upon labour rights.⁸⁹ Another takeaway from the *BC Health Services* decision was the Supreme Court's incremental adoption of Canada's international labour obligations in their interpretation of freedom of association.⁹⁰ Some scholars believed that in doing so, the Supreme Court opened the door of constitutional protection far enough on the basis of international labour law to allow the right to strike to come to fruition given an appropriate case.⁹¹

iv. The Second Labour Trilogy Continues: The Path Narrows with *Fraser*

The decisions in *Dunmore* and *BC Health Services* effectively reversed the thrust of the First Labour Trilogy, but significant questions remained regarding the application of the Supreme Court's new direction.

87 Judy Fudge, "The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the *Health Services and Support* Case in Canada and Beyond" (2008) 37:1 *Indus LJ* 25 at 26.

88 *Ibid.*

89 Brian Etherington, "The British Columbia *Health Services and Support* Decision – The Constitutionalization of a Right to Bargain Collectively in Canada: Where Did It Come from and Where Will It Lead?" (2009) 30 *Comp Lab L & Pol'y J* 715 at 747 [*Etherington CLLPJ*].

90 *Ibid* at 43.

91 *Ibid.*

And so, when the Court handed down its surprising decision in *Fraser*, even more questions arose. For one thing, this 2011 decision cast doubt as to whether the test for infringement of section 2(d) rights was that of substantial interference, as set out in *BC Health Services*, or of impossibility. For example, McLachlin C.J.C. and Lebel J. wrote for the majority in *Fraser*:

[i]f it is shown that it is impossible to meaningfully exercise the right to associate due to substantial interference by a law (or absence of laws) or by government action, a limit on the exercise of the section 2(d) right is established, and the onus shifts to the state to justify the limit under s. 1 of the *Charter*. [...] The question here, as it was in [*Dunmore and BC Health Services*], is whether the legislative scheme (the *AEPA*) renders association in pursuit of workplace goals impossible, thereby substantially impairing the exercise of the section 2(d) associational right.⁹²

But there were other complications arising out of *Fraser* as well. In a move reminiscent of the approach taken by the minority contingents in *PIPSC* and *Delisle*, two judges in *Fraser*—Rothstein and Charron J.J.—held that section 2(d) of the *Charter* did not protect a right to collective bargaining and therefore *BC Health Services* had been incorrectly decided.⁹³

For academics, *Fraser* was a cryptic judgment. Most scholars agreed that the debate in *Fraser* over the correctness, clarity, and validity of *BC Health Services* distracted from the question of whether the legislation at issue actually provided for a meaningful process of collective bargaining.⁹⁴ The *Fraser* decision was also

92 *Fraser*, *supra* note 10 at paras 47–48 (emphasis added, citations removed).

93 *Ibid* at paras 124, 127.

94 Judy Fudge, “Introduction: Farm Workers, Collective Bargaining Rights, and the Meaning of Constitutional Protection” in Fay Faraday, Judy Fudge & Eric Tucker, eds, Constitu-

criticized for rendering the “invisibility of Ontario’s agricultural workers,”⁹⁵ whose story got lost in the myopic jurisprudential focus of the decision.⁹⁶ In *Dunmore*, the Court was explicitly concerned with the vulnerability of agricultural workers, but in *Fraser*, only Abella J. focused on the plight of the agricultural workers.⁹⁷ To make matters worse, the majority’s conclusion that the claim was premature flew in the face of the fight for collective bargaining fought by farm workers for over forty years.⁹⁸ There was as much evidence present in *Fraser* as there was in *Dunmore*, but the majority failed to refer to the complete history under the *AEPA*, including the ILO’s Committee on Freedom of Association decision.⁹⁹ *Fraser* was seen as a setback by many scholars because the Supreme Court failed to engage in a contextual and fact-specific inquiry,¹⁰⁰ and stepped back from its strong enforcement of the duty to bargain in good faith, in-

tional Labour Rights in Canada: Farm Workers and the *Fraser* Case (Toronto: Irwin Law Inc, 2012) 1 at 6, 15 [*Fudge in Faraday*].

95 Eric Tucker, “Farm Worker Exceptionalism: Past, Present, and the post-*Fraser* Future,” in Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law Inc, 2012) 30 at 30 [*Tucker in Faraday*].

96 Fudge in Faraday, *supra* note 93 at 1–2. See also Paul JJ Cavalluzzo, “The *Fraser* Case: A Wrong Turn in a Fog of Judicial Deference” in Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law Inc, 2012) 155 at 157 [*Cavalluzzo in Faraday*]. In *Fraser*, “all of the judges, except Abella J, participated in a larger political battle concerning intervening governments and lobby groups than the constitutional claim presented in the record before them. As a result, the plight of farm workers in Ontario was given inadequate focus and attention.”

97 Fudge in Faraday, *supra* note 92 at 12.

98 Cavalluzzo in Faraday, *supra* note 95 at 165, *Fraser*, *supra* note 10 at para 116.

99 Cavalluzzo in Faraday, *supra* note 95 at 165.

100 Tucker in Faraday, *supra* note 94 at 49.

stead deploying “other, often circuitous, phrasings” and failing to explain “what conduct would amount to ‘good faith consideration.’”¹⁰¹

In addition, many scholars have criticized the majority’s judgment in *Fraser* for “providing an interpretation of the *AEPA* that none of the parties advocated for and that the record did not support,” and have criticized Rothstein J.’s dissent in the same vein for seeking to “overrule *BC Health Services* on his own motion without any party calling for the overruling of this recent president.”¹⁰² Furthermore, no one argued that the *AEPA* contained a duty to bargain in good faith, and the language of the statute, as well as the legislative intent in its enactment, were clear that the legislature did not intend to provide collective bargaining rights.¹⁰³ The enactment of the *AEPA* happened before *BC Health Services* constitutionalized the right to collective bargaining, and the Supreme Court in *Fraser* failed to assess the legislation in light of the new scope of protection under s 2(d). As a result, the majority implied a duty to bargain in good faith that was never intended by the enacting government.¹⁰⁴

And so, although *Dunmore* and *BC Health Services* signaled a change in approach from the Supreme Court, it was clear after *Fraser* that the jurisprudence on the extent of protection offered by section 2(d) was far from settled.

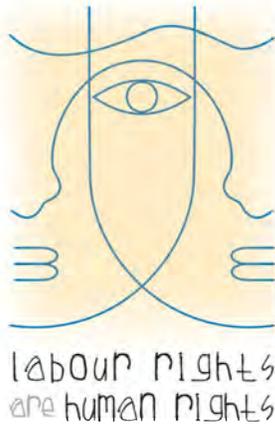
Although *Dunmore* and *BC Health Services* signaled a change in approach from the Supreme Court, it was clear after *Fraser* that the jurisprudence on the extent of protection offered by section 2(d) was far from settled.

101 *Ibid.*

102 Cavalluzzo in Faraday, *supra* note 95 at 176, 180.

103 *Ibid* at 176–178.

104 *Ibid* at 179.



III

Reshaping the New Terrain

The Third Labour Trilogy

THE THREE DECISIONS in the Third Labour Trilogy were released eight years after *BC Health Services* and four years after *Fraser*. Building on the decisions in both *Dunmore* and *BC Health Services*, the Supreme Court solidified the constitutional protection of collective bargaining rights and, for the first time, recognized a constitutionally protected right to strike under section 2(d) of the *Charter*. This section explores these three cases.

i. *MPAO v Canada (Attorney General)*

In many ways, *MPAO* and its companion case *Meredith* were an opportunity for the Supreme Court to revisit its decision in *Delisle*, which, as addressed in the preceding section, appeared to be irreconcilable with the Court's subsequent decision in *Dunmore*. At the very least, these cases were a second kick at the can for RCMP members who remained prohibited from unionizing. Instead, officers had access to three programs which represented their collective interest on workplace concerns, remuneration, and employment-related legal assistance: the Staff Relations Representative Program ("SRRP"), the RCMP Pay Council, and the Mounted Police Members' Legal Fund.¹⁰⁵ The SRRP was the central focus of the matter before the Supreme Court in *MPAO*. Under the SRRP, officers elected Staff Representation Representatives who in turn consulted with management on "human resource initiatives and policies with the understanding that the final word always rest[ed] with management."¹⁰⁶ Despite arguments that the SRRP allowed RCMP members to

105 *MPAO*, *supra* note 11 at para 2.

106 *Ibid* at para 12.

make collective representations on workplace issues, six judges of a panel of seven held that the program was “simply an internal human relations scheme imposed on RCMP members by management” and not a meaningful opportunity to exercise the freedom of association under section 2(d).¹⁰⁷ In doing so, the majority made three important contributions to section 2(d) jurisprudence.

First, the majority fully incorporated Dickson’s C.J.C. dissenting opinion in the *Alberta Reference*, thus completing the process that was begun in *Dunmore* and *BC Health Services*. In particular, the majority accepted the three approaches in interpreting section 2(d) identified by Dickson C.J.C.: the constitutive, derivative, and purposive approaches. The constitutive approach protects an individual’s right to form an association with others. In contrast, the derivative approach protects derivative associational activities related to other constitutional rights, such as the freedom of religion. Finally, the purposive approach recognizes that the freedom of association protects individuals from isolation and helps to protect the vulnerable from those with greater power. In following the approach taken by Dickson C.J.C. and endorsing the purposive approach, the majority in *MPAO* concluded that the purposive approach subsumed the other two. As a result, three classes of activities are protected: (i) the individual right to form an association, (ii) the right to pursue other constitutional rights in association with others, and (iii) the right “to join with others to meet on more equal terms the power and strength of other groups or entities.”¹⁰⁸

In the majority’s view, the goal of balancing inequalities of power entailed that there must be associational rights that are *collective* rights. It is through acting as a group that otherwise vulnerable individuals are able to amass their power and confront the powerful on more equal terms. In order to achieve this social

It is through acting as a group that otherwise vulnerable individuals are able to amass their power and confront the powerful on more equal terms.

107 *Ibid* at para 118.

108 *Ibid* at para 66.

Section 2(d) protects not only individual rights but also “collective rights that inhere in associations.”

***MPAO v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3 at 62.**

good—which was the purpose attributed by the majority to section 2(d)—the collective actions of the group must be protected. As a result, the majority held that section 2(d) protects not only individual rights but also “collective rights that inhere in associations.”¹⁰⁹

The second important contribution stems from the above argument. In the labour context, there is an imbalance of power between employee and employer. It follows that collective actions that provide greater balance in this relationship by strengthening the position of employees should be protected under the purposive interpretation endorsed by the majority. This led the majority to reaffirm the holding in *BC Health Services* that section 2(d) protects a “right to a meaningful process of collective bargaining.”¹¹⁰

The third important contribution was a clarification of the test for interference with the right to collective bargaining. As addressed in the previous section, the majority in *Fraser* had appeared to vacillate between two tests: substantial interference and impossibility. The majority took the opportunity presented by *MPAO* to endorse the substantial interference test. Gone was any mention of impossibility, replaced instead with the clear statement that “the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that section 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining.”¹¹¹ At the same time, the majority expanded on the test by clarifying the two areas in which substantial interference may violate the right to a meaningful process of collective bargaining: employee choice and independence from management. The former requires that employees have “effective input into the selec-

109 *Ibid* at para 62.

110 *Ibid* at para 71.

111 *Ibid* at para 72 (emphasis added). See also paragraph 80: “To recap, section 2(d) protects against substantial interference with the right to a meaningful process of collective bargaining.”

tion of their collective goals.”¹¹² In this context, the ability to change representatives, to hold representatives to account, to form new associations, and to dissolve old ones were highlighted as key indicia of employee choice.¹¹³ Turning to the second area, independence from management requires that an association’s activities be “aligned with the interests of its members” and not those of management.¹¹⁴ Employee choice and independence from management may be achieved in many ways—a meaningful process of collective bargaining does not require adherence to the Wagner model—but actions of government and public institutions that substantially interfere with these two areas will be found to violate the protections of section 2(d) of the *Charter*.

Even Rothstein J. was more restrained in dissent in *MPAO* than he had been in *Fraser*. While continuing to describe the majority’s approach in *BC Health Services* as a departure from earlier decisions, he acknowledged that “[s]ince the decisions in *BC Health Services* and *Fraser*, employees have had a constitutional right to make collective representations, which their employer must consider in good faith.”¹¹⁵ This approach brought much needed unanimity to the Supreme Court on the interpretation of section 2(d). While obviously remaining opposed to the decision *BC Health Services*, Rothstein J.’s carefully measured language supported the majority’s interpretation of section 2(d) as being the law of the land. Rothstein J. focused primarily on what he considered to be a hasty expansion in *MPAO* of the right recognized in *BC Health Services* and the failure of the majority in *MPAO* to apply the impossibility test, which he held to be the test adopted in *Fraser*.¹¹⁶ Rather than criticizing the collective rights

Section 2(d) protects a “right to a meaningful process of collective bargaining.”

***MPAO v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3 at 62.**

112 *Ibid* at para 85.

113 *Ibid* at paras 86–87.

114 *Ibid* at para 88.

115 *Ibid* at para 170.

116 *Ibid* at paras 173, 213. Here, Rothstein J notes that in *Fraser*, the majority stated the test as “effective impossibility” or “substantial impossibility” no less than twelve times,

In *MPAO*, the Supreme Court upheld the view that section 2(d) of the *Charter* protected the right to a meaningful process of collective bargaining.

understanding of section 2(d), Rothstein J. used his dissent to criticize the majority's expansion of this already recognized approach.

ii. *Meredith v Canada (Attorney General)*

In *MPAO*, the Supreme Court upheld the view that section 2(d) of the *Charter* protected the right to a meaningful process of collective bargaining. Released the same day, the decision in *Meredith* provided guidance as to the reasonable limits on that right. At issue in *Meredith* was whether wage restraints imposed by the *Expenditure Restraint Act*¹¹⁷ violated the RCMP members' *Charter*-protected right to a meaningful process of collective bargaining. Shortly prior to the Great Recession of 2008, the RCMP Pay Council recommended certain pay increases for RCMP members, which were ultimately approved. As a result of the Great Recession and the attendant decline in government revenues, the *ERA* was enacted to generate cost savings for the Federal Government by, for example, imposing certain wage restraints. As a result, the previously approved wage increases were rolled back, and the *ERA* was challenged by RCMP members.

In finding that the *ERA* did not violate the *Charter* protection to a meaningful process of collective bargaining, the majority clarified the extent of the protections afforded by section 2(d) of the *Charter*. First, the majority held that section 2(d) protections apply to "associational activity" even if there is not "a true collective bargaining process."¹¹⁸ This was a crucial step, for, in this case, the majority held that the RCMP Pay Council process did "not provide all that the *Charter* requires."¹¹⁹ As the process was used by RCMP members with the aim of "advanc[ing] their compensation-related goals," the process was held to be still

and so it seemed to intellectually dishonest for the majority in *MPAO* to depart from it so readily.

117 *Expenditure Restraint Act*, SC 2009, c 2 (*ERA*).

118 *Meredith*, *supra* note 12 at para 25.

119 *Ibid.*

protected under section 2(d).¹²⁰ In other words, *Charter* protections will be triggered by employees' collective efforts to negotiate compensation, whether or not these efforts are part of a formal process of collective bargaining.

More significantly, the majority appeared to identify three limits placed on governmental action by section 2(d). First, "radical changes" to concluded collective agreements will not be permitted, which is how the majority here characterized the approach taken by the British Columbia government in *BC Health Services*.¹²¹ Instead, a government may be permitted to alter agreements insofar as those alterations are "consistent with the going rate reached in agreements concluded with other bargaining agents" in comparable areas.¹²² The majority appeared to have been swayed by the fact that the restraints imposed by the *ERA* "reflected an outcome consistent with actual bargaining processes" with trade unions.¹²³ This decision, however, appears to have left unresolved the question of whether radical changes to collective agreements may be allowed if those radical changes are consistent with other collectively bargained agreements.

The second limit identified by the majority was that imposed wage restraints must not "preclude consultation on other compensation-related issues."¹²⁴ While the details of this second limit were not fleshed out in any detail, the third limit appears to be closely related. Government imposed alterations to a labour agreement must "not prevent the consultation process from moving forward."¹²⁵ In this case, section 62 of the *ERA* permitted negotiation for additional increases to the wages of RCMP members. As these negotiations resulted in "significant benefits as a result of subsequent

120 *Ibid.*

121 *Ibid* at para 28.

122 *Ibid.*

123 *Ibid.*

124 *Ibid.*

125 *Ibid* at para 29.

proposals brought forward through the existing Pay Council process.”¹²⁶ In other words, the *ERA* did not prevent a meaningful process of bargaining between RCMP members, through the RCMP Pay Council and the Treasury Board, as RCMP members were still able to advance their collective interests. Section 2(d) does not protect the outcome of a collective bargaining process—i.e., specific wage increases are not guaranteed—and it appears here as if the Supreme Court is signalling that courts will not interfere as long as the bargaining process itself remains available.

iii. *Saskatchewan Federation of Labour v Saskatchewan*

Insofar as they reinforced and clarified the majority’s decision in *BC Health Services*, neither *MPAO* nor *Meredith* broke new ground. The third decision in the Third Labour Trilogy, however, reconfigured the jurisprudential landscape. The majority in the *Alberta Reference* had shaped section 2(d) jurisprudence on three main points: (i) the right to associate freely was held to be an individual, not collective, right, (ii) a right to collective bargaining was held not to be protected, and (iii) a right to strike was likewise not protected. As discussed above, the Supreme Court did away with the first of these in *MPAO*, and abandoned the second in *BC Health Services*. Even when the Supreme Court began to shift its approach in *Dunmore*, however, it still shied away from the third issue. Where the right to strike had arisen in the period since *Dunmore*, the Court had held that ruling on a potential right to strike was not necessary to decide the case at bar. In *Saskatchewan Federation of Labour*, however, the issue had to be confronted head on, and, in recognizing that section 2(d) provided Charter protection for the right to strike, the majority finally completed the undoing of the understanding of section 2(d) advanced by *Le Dain* and *McIntyre J.J.* in the *Alberta Reference*.

The case was a response to two pieces of legislation enacted by the Government of Saskatchewan: The

126 *Ibid.*

Public Service Essential Services Act¹²⁷ and The Trade Union Amendment Act.¹²⁸ The latter made amendments to the processes for certifying and decertifying a trade union. The former prohibited work stoppage of any kind by public employees engaged in essential services, with both “public employees” and “essential services” being defined quite broadly. The PSESA also did not provide an alternative dispute resolution mechanism in place of employees withdrawing their labour in a work stoppage. It took only four paragraphs for the majority to conclude that The Trade Union Amendment Act did not violate the Charter on the basis that the amendments to the certification and decertification processes did not have the effect of substantially interfering with the right to create or join a trade union,¹²⁹ and so the preponderance of the judgment was devoted to analyzing the PSESA.

The foundation for the majority’s decision, written by Abella J., was the recognition in *BC Health Services* that section 2(d) of the Charter-protected a right to a meaningful process of collective bargaining. Drawing from *MPAO*, a meaningful process of collective bargaining was held to require independence from management and effective input on the part of employees. Insofar as it contributes to this process, the right to strike was held to be protected by section 2(d) of the Charter: “the right to strike is constitutionally protected because of its crucial role in a meaningful process of collective bargaining.”¹³⁰ Without the right to strike, “bargaining risks being inconsequential—a dead letter.”¹³¹ In other words, collective bargaining without the risk of a work stoppage lacks teeth—it is bark without bite—and this undermines the meaningfulness of the collective bargaining process. As the majority held, “the

“The right to strike is constitutionally protected because of its crucial role in a meaningful process of collective bargaining.”

SFL v. Saskatchewan, 2015 SCC 4, [2015] 1 S.C.R. 245 at 51.

127 *Public Service Essential Services Act*, SS 2008, c P-42.2 (PSESA).

128 *Trade Union Amendment Act, 2008*, SS 2008, c 26.

129 *Saskatchewan Federation of Labour*, *supra* note 13 at paras 99–102.

130 *Ibid* at para 51.

131 *Ibid* at para 55.

Without the right to strike,
“bargaining risks being
inconsequential—a dead letter.”

***SFL v. Saskatchewan*, 2015
SCC 4, [2015] 1 S.C.R. 245 at
55.**

right of employees to strike is vital to protecting the meaningful process of collective bargaining.”¹³² Elsewhere, this was phrased slightly differently: “the right to strike is constitutionally protected because of its crucial role in a meaningful process of collective bargaining” and “[t]he right to strike is protected by virtue of its unique role in the collective bargaining process.”¹³³

The majority, therefore, held that the right to strike is protected on the basis that it contributed to a meaningful process of collective bargaining. However, this appears to give rise to a tension in the majority’s understanding of the nature of the right to strike, for the majority also described the right to strike as not dependent on the right to bargain collectively: “[t]he right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right.”¹³⁴ In their dissent, Rothstein and Wagner J.J. questioned the apparent inconsistency of the majority’s approach on this point:

Contrary to Fraser, the majority now says that “[t]he right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right.” However, the majority also says that the right to strike is protected simply because “the right to strike is an essential part of a meaningful collective bargaining process.” This must mean that the right is indeed derivative—a right to strike is protected only because it derives from the right to collective bargaining, a right which was itself derived from the protection of freedom of association.¹³⁵

How to reconcile these two claims—that the right to strike is not derivative of the right to a meaningful

132 *Ibid* at para 24.

133 *Ibid* at paras 51, 77 (emphasis added).

134 *Ibid* at para 3.

135 *Ibid* at para 136 (references removed).

process of collective bargaining and that the right to strike is protected because it contributes to such a process—was not made clear in the majority’s decision. Time will tell whether this unresolved tension will create mischief or not.

The dissenting justices shared the view of McIntyre J. in the *Alberta Reference* that “democratically elected legislatures are responsible for determining the appropriate balance between competing economic and social interests in the area of labour relations”¹³⁶ and so to constitutionalize the right to strike tipped “the balance of power against employers and the public.”¹³⁷ In response to this assertion, however, Abella J. noted that “attributing equivalence between the power of employees and employers,” the “fundamental power imbalance which the entire history of modern labour legislation has been scrupulously devoted to rectifying” is ignored, which goes against the very purpose of the freedom of association, namely workplace justice.¹³⁸

Rothstein and Wagner J.J. also criticized the majority for “so inflat[ing] the right to freedom of association that its scope is now wholly removed from the words of section 2(d).”¹³⁹ Their argument appears to be that the majority abandoned the language of section 2(d) of the Charter and substituted their own view of “workplace justice” in its place. This argument, however, overlooks the fact that the drafters of the Charter considered the language of 2(d) to be expansive.¹⁴⁰

If one accepts the majority’s position that the right to bargain collectively must include a right to strike in order to be meaningful, then the majority’s position is

“The right to strike is protected by virtue of its unique role in the collective bargaining process.”

***SFL v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245 at 51 and 77.**

136 *Ibid* at para 118.

137 *Ibid* at para 127.

138 *Ibid* at para 56.

139 *Ibid* at para 106.

140 See Section 1. of this paper - Historical overview of the *Charter’s* section 2(d)development

“The test, then, is whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with collective bargaining.”

***SFL v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245 at 78.**

implied by the words of section 2(d).¹⁴¹ Contrary to the assertion of Rothstein and Wagner J.J., the majority’s interpretation of section 2(d) remained true to the intent of the drafters of the Charter.

Regardless of whether the right to strike is independent of the right to bargain collectively, the test applied by the majority for an infringement of the right was the same as the test for an infringement of the right to a meaningful process of collective bargaining adopted in *BC Health Services* and affirmed in *MPAO*: “[t]he test, then, is whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with collective bargaining.”¹⁴² The *PSESA* failed this test on the basis that it prohibited “any work stoppage as part of the bargaining process.”¹⁴³ Furthermore, a number of inadequacies of the *PSESA* entailed that it was not saved by application of section 1 of the Charter: the unreasonable breadth in how essential services were defined, the ability for the employer to unilaterally dictate which services are essential, the requirement that essential services workers perform both essential and non-essential work tasks during a work stoppage, and the failure to provide a meaningful alternative process for unresolved collective bargaining disputes.

A final issue arising out of *Saskatchewan Federation of Labour* is worthy of remark. The appellants made alternative submissions that the right to strike was protected as free speech under section 2(b) of the Charter. As the majority decided the case under section 2(d), it

141 Against this must be set the suggestion of McIntyre J. that the drafters of the *Charter* understood the right to strike “to be separate and distinct from the right to bargain collectively” (*Alberta Reference*, *supra* note 4 at 412–13). Even if the right to strike is separate from the right to bargain collectively, the former may still be entailed by the latter.

142 *Saskatchewan Federation of Labour*, *supra* note 13 at para 78.

143 *Ibid* (emphasis in original).

declined to address the section 2(b) argument.¹⁴⁴ This left open the possibility that a right to strike may be protected under both Charter provisions. The implications of this are addressed in the next section, which examines the subsequent jurisprudence of lower courts.

Some scholars were skeptical of the relevance of the Third Labour Trilogy in an age when Canada's labour movement was already declining such that victories for unions would not apply to most workers.¹⁴⁵ They felt that for this reason, the Third Labour Trilogy would be incapable of revolutionizing the labour relations regime unless the decisions could become a catalyst for a new social movement with respect to labour rights.¹⁴⁶ Other scholars felt that while Saskatchewan Federation of Labour enjoyed the spotlight, it was in fact MPAO that was most influential for unions since it was where "much of the heavy lifting had been accomplished" and thus set the stage for Saskatchewan Federation of Labour.¹⁴⁷

However, the Third Labour Trilogy remains important to many scholars for a number of reasons, especially its recognition of Charter values.¹⁴⁸ Saskatchewan Federation of Labour has been touted as an affirmation of the "equality, respect and dignity that Canadian workers deserved in their collective struggle to enjoy social and economic security in an age fraught with

Saskatchewan Federation of Labour has been touted as an affirmation of the "equality, respect and dignity that Canadian workers deserved in their collective struggle to enjoy social and economic security in an age fraught with inequality and economic insecurity."

144 *Ibid* at para 98.

145 *Hurst, supra* note 20 at 35.

146 Judy Fudge and Heather Jensen, "The Right to Strike: The SCC, the *Charter* of Rights and Freedoms and the Arc of Workplace Justice" (2016) 27:1 King's LJ 89 at 103 [*Fudge and Jensen*].

147 Brian Etherington, "The Right to Strike Under *Charter* After *Saskatchewan Federation of Labour*: Applying the New Standard to Existing Regulation of Strike Activity" (2016) 19 CLELJ 429 at 446-447 [*Etherington CLELJ*].

148 Ritu Khullar & Vanessa Cosco, "The SCC Reimagines Freedom of Association in 2015" (2016) 25:2 Const Forum Const 27 at 34 [*Khullar and Cosco*].

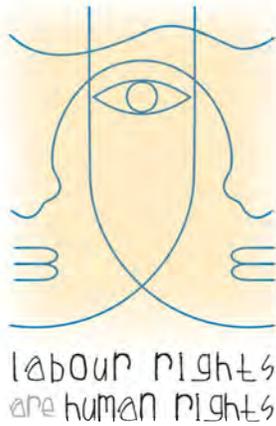
inequality and economic insecurity.”¹⁴⁹ Some scholars suggest that as a result, government action would be more cautious in restricting the right to strike through essential services and back-to-work laws.”¹⁵⁰ MPAO was viewed as support for the notion that “the goals of autonomy, self-fulfillment and dignity can sometimes only be achieved by joining with others to meet on more equal terms the power and strength of other groups or entities.”¹⁵¹ Thus, despite any uncertainty that the Third Labour Trilogy has brought, it provided a “necessary clarification of decades of incremental progress” and any uncertainty it caused was “a necessary component of a living constitution that must adapt to increasingly nuanced understandings”¹⁵² of the systemic power imbalance in labour relations.

149 Paul Cavalluzzo, “The Impact of *Saskatchewan Federation of Labour* on Future Constitutional Challenges to Restrictions on the Right to Strike” (2016) 19 CLELJ 463 at 480 [*Cavalluzzo CLELJ*]. Khullar and Cosco, *supra* note 141 at 34: “It violates people’s personal autonomy, self-fulfillment and dignity, both individually and collectively, for the state to compel them to continue working against their will. The freedom to withdraw labour also helps redress the power imbalance between public sector employers backed by the state on the one hand, and employees on the other.”

150 Cavalluzzo CLELJ, *supra* note 148 at 480.

151 Khullar and Cosco, *supra* note 147.

152 Hurst, *supra* note 20 at 26.



IV. Mapping the New Terrain

Jurisprudence after the Third Labour Trilogy

IF THE THIRD LABOUR Trilogy reshaped the landscape of section 2(d) jurisprudence, then subsequent lower court decisions have helped to define the features of that still-fluid landscape. This section considers four of the most significant of these: *Gordon v Canada (Attorney General)*, *British Columbia v BCTF*, *OPSEU v Ontario (Minister of Education)*, and *CUPW/STTP v Canada (Attorney General)*.¹⁵³ Each of these decisions demonstrates that the Third Labour Trilogy did not serve to settle section 2(d) jurisprudence. A number of outstanding issues remain, including the test for a section 2(d) violation, the place of good faith bargaining under section 2(d), whether the right to strike is absolute, the role that the balance of power between parties has to play in section 2(d) analysis, and the relationship between sections 2(d) and 2(b) in understanding the right to strike. These issues are explored in the subsections below.

i. *Gordon v Canada (Attorney General)*

Like Meredith, the dispute in *Gordon* arose in response to the ERA, which, it will be recalled, was enacted in an effort to restrain wages for government employees as part of a Federal cost containment strategy in response to the Great Recession. The appellant unions challenged the ERA on a number of bases, particularly that “provisions in the ERA substantially interfered with their right to a meaningful collective bargaining

153 *Gordon v Canada (Attorney General)*, 2016 ONCA 625 [*Gordon*]; *British Columbia v BCTF*, 2015 BCCA 184 [*BCTF*], rev’d 2016 SCC 49; *OPSEU v Ontario (Minister of Education)*, 2016 ONSC 2197 [*OPSEU*]; and *CUPW/STTP v Canada (Attorney General)*, 2016 ONSC 418 [*CUPW*].

“important to the legal analysis in this case” specifically, it would be reasonable to expect the Court to have made specific reference to how the substantial interference test was conceptualized and applied in these cases.¹⁵⁷

In *Gordon*, however, a unanimous Court of Appeal looked to neither of these precedents and instead returned to the test as formulated in *BC Health Services*.¹⁵⁸ Following *BC Health Services*, the Court in *Gordon* understood the substantial interference test as requiring consideration of two things: (i) “the significance of the matter in issue to the collective bargaining process,” and (ii) “the degree of interference with the collective bargaining process.”¹⁵⁹ The Supreme Court’s commitment to this formulation of the substantial interference test is evidenced by the manner in which it applies the test. First, the Court overturned the application judge’s finding and held that the matter of wages was central to the process—it was “significant to the collective bargaining process.”¹⁶⁰ It then concluded that the enactment of the ERA did not significantly interfere with the collective bargaining process on the basis that “the legislated caps on wage increases were consistent with what the bargaining units would have achieved even without the caps.”¹⁶¹ The substantial interference test as articulated and applied by the Court in *Gordon* followed the approach laid out in *BC Health Services*, not the precedent set in the Third Labour Trilogy.

Complicating matters further was the Court’s discussion of good faith bargaining in its analysis of whether the ERA violated section 2(d) of the Charter. Drawing on comments made by the Supreme Court in *BC Health Services*, the Court of Appeal in *Gordon* held that “[c]onsideration of the duty to negotiate in good

157 *Gordon*, *supra* note 152 at paras 1, 33.

158 *Ibid* at para 43.

159 *Ibid* at para 56.

160 *Ibid* at para 122.

161 *Ibid* at para 123.

“Labour relations legislation and section 2(d) of the *Charter* both aim to establish and preserve the balance of power between the employer and unions.”

***SFL v. Saskatchewan*, 2015
SCC 4, [2015] 1 S.C.R. 245 at
78.**

faith which lies at the heart of collective bargaining may shed light on what constitutes improper interference with collective bargaining rights’ for the purposes of section 2(d).”¹⁶² In *BC Health Services*, the majority considered the duty to negotiate in good faith in the context of the second step of the substantial interference test.¹⁶³ In *Gordon*, however, the good faith analysis appeared to be divorced from the substantial interference test. It was not presented in conjunction with a discussion of the first step (the significance of the matter), nor was it framed in terms of the second step (interference with a process of collective bargaining). Instead, it appeared as if the Court understood the issue of bargaining in good faith to be a separate ground on which section 2(d) of the *Charter* may be violated.

On top of this, the Court of Appeal appeared also to reduce the question of whether the Federal Government bargained in good faith to whether there was “a significant disparity of bargaining power between the Government and the unions in bargaining.”¹⁶⁴ Certainly, the Court pointed to the equality of bargaining power between the parties as evidence of good faith bargaining. For example, the Court pointed to the facts that both sides were constrained by the same legislation, had similar tool chests, were well-resourced and well-advised, and faced the same risks in running afoul of public opinion.¹⁶⁵ As justification for this approach, the Court observed that “[l]abour relations legislation and section 2(d) of the *Charter* both aim to establish and preserve the balance of power between the employer and unions,” citing three Supreme Court decisions as evidence for this claim: *MPAO*, *BC Health Services*, and the *Alberta Reference*.¹⁶⁶ There is no evidence in these three decisions, however, that the Supreme Court intended the question of whether

162 *Ibid* at para 73.

163 *BC Health Services*, *supra* note 9 at para 97–98.

164 *Gordon*, *supra* note 152 at para 98.

165 *Ibid* at para 99.

166 *Ibid* at para 97.

there was a significant disparity of bargaining power to serve as a test for good faith bargaining.

To see this, it is necessary to consider each of the passages cited by the Court of Appeal in support of its approach. Paragraphs 58 and 59 of MPAO acknowledged that freedom of association was meant to empower vulnerable groups and that section 2(d) had the aim of reducing social imbalances. Paragraph 71 of MPAO cited paragraph 84 of *BC Health Services* for the proposition that collective bargaining aimed to palliate inequalities between employers and employees to support the claim that reducing employees' negotiating power is inconsistent with section 2(d). Paragraph 80 of MPAO claimed that the "guarantee entrenched in section 2(d) of the Charter cannot be indifferent to power imbalances in the labour relations context." Paragraph 84 of *BC Health Services* established that collective bargaining "enhances the Charter value of equality." Finally, the general theme of pages 365 to 369 of the *Alberta Reference* was that freedom of association protects vulnerable members of society from those with greater power and thus this freedom protects vulnerable employees from stronger employers. Although each of these passages support the proposition that freedom of association is intended to provide balance in power to otherwise unbalanced parties, none of these passages address this in the context of good faith bargaining, nor do any of these passages establish that the test for good faith bargaining is whether the parties are balanced in power.

Based on the above, it is not clear what to make of the decision in *Gordon*. The Court of Appeal acknowledged the importance of the Third Labour Trilogy and the Supreme Court's support of the substantial interference test therein, but it looked to *BC Health Services* for the content of that test. Moreover, it muddied the waters by ignoring the substantial interference test in concluding that the Government had bargained in good faith—and thereby did not violate section 2(d)—and it complicated matters even further by basing its good faith analysis on an inquiry into whether there

"Collective bargaining also enhances the Charter value of equality. One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees."

***Health Services v. British Columbia*, [2007] 2 S.C.R. 391 at 84.fundamental**

was an inequality of bargaining power between the Government and the appellant unions. If section 2(d) raises the requirement to bargain in good faith to the status of a Charter-protected right, a potential violation of this right should be evaluated by the same test as any other violation of section 2(d), i.e., the substantial interference test. In short, the decision in *Gordon* reaches the same conclusion as in *Meredith*, but it does so on rather different grounds.

ii. *British Columbia v BCTF*

Questions of substantial interference with the right to a meaningful process of collective bargaining and the duty to bargain in good faith also featured prominently in *BCTF*. Released only three months after the Third Labour Trilogy, the British Columbia Court of Appeal’s decision relied heavily on *Meredith*. At issue was whether the Education Improvement Act¹⁶⁷ violated section 2(d) of the Charter. The EIA nullified the existing collective agreement between the British Columbia Teachers’ Federation and the British Columbia Public School Employers’ Association, which had regulated such things as class sizes and teaching loads. It also prohibited collective bargaining on certain issues for a specified time period. In a split decision, the Court held that the impugned legislation did not violate section 2(d). This judgment was reversed by the Supreme Court in a brief decision: “[t]he majority of the Court would allow the appeal, substantially for the reasons of Justice Donald.”¹⁶⁸

In “substantially” endorsing the dissenting opinion of Donald J.A. of the Court of Appeal without greater clarification, the majority of the Supreme Court missed an opportunity to clear up some of the uncertainty identified in the previous subsection. Donald J.A. had analysed the case as turning on the issue of good faith consultation, but he looked to *BC Health Services and Fraser* for the test of this. Specifically, Donald J.A. held that good faith consultations or negotiations require

167 *Education Improvement Act*, SBC 2012, c 3 (*EIA*).

168 *BCTF*, *supra* note 152 at para 1.

parties “to meet and engage in meaningful dialogue where positions are explained and each party reads, listens to, and considers representations made by the other.”¹⁶⁹ Donald J.A. then pointed to the fact that the British Columbia Government failed “to even read the clauses that underlay [the] entire dispute for a full five months” as evidence that the Government had failed to read or listen to the representations of the unions.¹⁷⁰ Additionally, he held that taking an unreasonable position, as was the case here, could also support a finding of bad faith bargaining.¹⁷¹

As was the case with the decision of the Ontario Court of Appeal in *Gordon*, Donald J.A. offered no guidance as to how the test for good faith bargaining fit into the section 2(d) analysis of the Supreme Court in *MPAO* or *Meredith*. Does a finding of bad faith bargaining necessarily entail a section 2(d) violation? That appeared to be the approach adopted by Donald J.A.—and subsequently endorsed by the Supreme Court—but how does this relate to the Supreme Court’s concern for employee choice and a lack of interference from management as identified as the test for substantial interference in *MPAO*?

The judgment of Donald J.A. also mirrored that of the Ontario Court of Appeal in *Gordon* by emphasizing the need for both parties to be balanced in power: “[t]o be meaningful, the bargaining parties must consult from an assumed position of ‘approximate equality.’”¹⁷² Unlike the Court in *Gordon*, Donald J.A. did not appear to equate inequalities in bargaining power to bad faith bargaining, but he does consider it to be a necessary component of meaningful collective bargaining. But, as seen above, the Supreme Court in *MPAO* identified two requirements for meaningful collective bargaining: employee choice regarding the selection of collective goals, and independence from

169 *Ibid* at para 338.

170 *Ibid* at para 362.

171 *Ibid* at paras 357–58.

172 *Ibid* at para 291.

management. These are preconditions for establishing an association that may allow its members to bargain from a more powerful position, but they do not ensure “approximate equality” in bargaining power. Donald J.A.’s discussion of the need for balanced parties in order to have a meaningful process of collective bargaining therefore seemed to be at odds with the Supreme Court’s formulation of the test for an infringement of section 2(d) in *MPAO*. Because the Supreme Court only “substantially” agreed with Donald J.A. without providing any further detail, it missed an opportunity to clarify how the decision in *MPAO* should be interpreted.

iii. *OPSEU v Ontario (Minister of Education)*

This case arose out of collective bargaining between the Government of Ontario [“Ontario”] and a number of education unions in 2012. As part of a pattern of financial restraint following the 2008 recession, Ontario sought significant concessions from the unions, including a salary freeze and changes to sick leave. On July 5, 2012, Ontario entered into a memorandum of understanding with one of the provincial education unions in which Ontario succeeded in obtaining a number of concessions. Ontario made known that this agreement was to be a roadmap for collective bargains with the remaining education unions.¹⁷³ Faced with the prospect of significant, automatic salary increases to teachers if new collective bargains were not in place by August 31, 2012, Ontario announced on August 10, 2012 that it would introduce legislation “mandating terms and conditions to be included in all education sector collective agreements across the province” if agreements were not reached. Subsequently, Ontario enacted the *Putting Students First Act*,¹⁷⁴ which required, *inter alia*, that all education sector collective agreements must be “substantially identical in all relevant aspects” to the July 5, 2012 memorandum of understanding. As a number of unions were unable to reach collective agreements on these terms, On-

173 *Ibid* at paras 77, 79–80, 82–84

174 *Putting Students First Act, 2012*, SO 2012, c 11.

tario imposed collective agreements on these unions on January 2, 2013. At issue in this case was whether Ontario's actions violated section 2(d) of the Charter.

Like Gordon and BCTF, this central concern of this case was understood to be one of good faith bargaining. Lederer J. framed the issue thusly:

The issue at hand is whether the actions of Ontario substantially interfered with “a meaningful process of collective bargaining”. [...] What is required is a fact-based inquiry into “...whether the process of voluntary, good faith collective bargaining between employees and the employer has been...significantly and adversely impacted.”¹⁷⁵

In holding that Ontario had violated section 2(d) of the Charter, Lederer J. found that “Ontario was being both inflexible and intransigent” and thereby “created a situation which made meaningful collective bargaining impossible.”¹⁷⁶ It is worth observing that, in reaching his decision on this basis, Lederer J. did not employ the test for a section 2(d) violation developed in *MPAO*, nor did he consider the criteria identified in *Meredith*. Instead, Lederer J. appeared to take an approach that was similar to that taken by Donald J.A. in *BCTF*. Ontario's “inflexible and intransigent” behaviour essentially consisted of abstaining from reading, listening to, or considering representations made by the relevant unions.

Two other issues addressed by Lederer J. have significance for the development for section 2(d) jurisprudence. The first of these stems from his treatment of sections 8(4)–(6) of the *Putting Students First Act* that curtailed the education employees' right to strike. Lederer J. described the effect of these sections as follows:

175 *OPSEU*, *supra* note 146 at para 133 (references removed).

176 *Ibid* at para 148.

If it “appeared” that they [i.e., the unions] were not able to arrive at an arrangement with their respective employers (the school boards) that fulfilled the direction to comply with the OECTA deal [i.e., the July 5 agreement] or if they had not settled, consistent with that direction, by December 31, 2012, Ontario could remove the only remaining arrow in their collective bargaining quiver, the right to strike.¹⁷⁷

Based on “the particular facts of this case,” Lederer J. held that there was a right to strike as part of the right to collectively bargain, and this right had been interfered with by Ontario.¹⁷⁸ In doing so, however, he signalled that he interpreted Saskatchewan Federation of Labour as, at least potentially, not supporting an unqualified right to strike.

In support of this position, Lederer J. first observed that “the idea that any impingement on the right to strike is inexorably a breach of section 2(d) of the Charter” comes from the minority in Saskatchewan Federation of Labour, not the majority.¹⁷⁹ He further observed that the majority were careful to limit their discussion of the right to strike to the particular case at bar.¹⁸⁰ Additionally, Lederer J. considered the fact that “the ability to strike is highly regulated,” which suggested that there is not a standalone right to strike.¹⁸¹ Although he found that the right to strike had been violated in this case, Lederer J. clearly indicated that he understood the question of whether section 2(d) protects an absolute right to strike as remaining an open one after Saskatchewan Federation of Labour: “[w]hatever develops from this point forward, whether the right to strike is absolute unless justified under s. 1 or whether the question of the presence of a breach of section 2(d), is

177 *Ibid* at para 187.

178 *Ibid* at para 203.

179 *Ibid* at para 198.

180 *Ibid* at paras 199–200.

181 *Ibid* at para 203.

subject to the facts of each case [...].”¹⁸²

The second issue of significance for the development of section 2(d) jurisprudence in this case arises out of the Lederer J.’s apparent rejection of one of the arguments endorsed in *Meredith*. In *Meredith*, the majority relied on the fact that “the level at which the ERA capped wage increases for members of the RCMP was consistent with the going rate reached in agreements concluded with other bargaining agents” and thus the imposed wage restraint “reflected an outcome consistent with actual bargaining processes.”¹⁸³ In other words, the right to a meaningful process of collective bargaining could not have been significantly impaired by the enactment of the ERA because the result was consistent with what other parties had been able to achieve through collective bargaining.

In *OPSEU*, Lederer J. was presented with a similar set of facts. The restraints imposed by the *Putting Students First Act* were in line both with the July 5 memorandum of understanding, which resulted from a process of collective bargaining, as well as with a number of other collective agreements with other education unions that had been reached using that memorandum as a template. Lederer J. distinguished these facts from those in *Meredith* on the basis that “[t]he idea that consistency with other agreements can be taken as a demonstration that the freedom of association was not breached pre-supposes that those prior agreements were fairly and freely negotiated through collective bargaining.”¹⁸⁴ First, Lederer J. rejected the agreements based on the July 5 memorandum. As the Government had announced that the July 5 memorandum was “to act as a roadmap” and “the parameters it set out were non-negotiable,” Lederer J. held that the agreements reached after the July 5 memorandum “were not the result of fair and open collect-

“The idea that consistency with other agreements can be taken as a demonstration that the freedom of association was not breached pre-supposes that those prior agreements were fairly and freely negotiated through collective bargaining.”

***OPSEU v Ontario (Minister of Education)*, 2016 ONSC 2197 at 163.**

182 *Ibid* at para 208.

183 *Meredith*, *supra* note 12 at para 28.

184 *OPSEU*, *supra* note 146 at para 163.

ive bargaining.”¹⁸⁵ As for the July 5 memorandum, Lederer J. held that was only one example of the outcome of a process of collective bargaining, and a “single agreement does not stand in for the comparison on which the determination in Meredith was made.”¹⁸⁶

The takeaway from this is that the Third Labour Trilogy did not serve to settle a number of outstanding questions. The role of good faith bargaining in an analysis of an alleged section 2(d) violation, the nature of the right to strike, and the appropriateness of considering collective agreements reached by other bargaining units all remained ongoing matters of jurisprudential concern in OPSEU. Even after the Third Labour Trilogy, Lederer J. was able to find that the interpretation of section 2(d) of the Charter was a “difficult and continuously evolving area of our law.”¹⁸⁷ The final case to be considered in this section illustrates just how true this claim is.

iv. CUPW/STTP v Canada (Attorney General)

Unlike the three cases above, the application in this case was prompted by back-to-work legislation, the Restoring Mail Delivery for Canadians Act.¹⁸⁸ This legislation ordered striking postal workers back to work, prohibited additional strike or lockout activity, extended the expired collective agreement, and mandated an arbitration process in the event that further negotiations were unsuccessful. Additionally, the legislation dictated certain terms of the new collective agreement, including the length of the agreement and the extent of wage increases. The union challenged this legislation as a violation of both sections 2(b) and 2(d) of the Charter.

In deciding in favour of the applicant union, Firestone J. recognized the Third Labour Trilogy to mark “a

185 *Ibid* at para 164.

186 *Ibid* at para 167.

187 *Ibid* at para 273.

188 *Restoring Mail Delivery for Canadians Act*, SC 2011, c 17.

watershed period in the freedom of association jurisprudence,” and described Saskatchewan Federation of Labour as “a historic ruling.”¹⁸⁹ It is of no surprise, therefore, that he applied the test set out by the majority in Saskatchewan Federation of Labour: “the test is ‘whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with collective bargaining.’”¹⁹⁰ In Saskatchewan Federation of Labour, it took the majority only one line to conclude that the impugned legislation violated section 2(d) of the Charter on the basis that it prevented “designated employees from engaging in any work stoppage as part of the bargaining process.”¹⁹¹ Given that the Restoring Mail Delivery for Canadians Act also prohibited any work stoppage, it might have been expected that Firestone J. would likewise have disposed of the matter along similar lines.

Instead, Firestone J. expanded the test: “[t]he disruption of balance between the parties is therefore the measure of substantial interference.”¹⁹² In support of this, Firestone J. cited the following passage from MPAO, which had also been quoted by the majority in Saskatchewan Federation of Labour when discussing the substantial interference test:

[t]he balance necessary to ensure the meaningful pursuit of workplace goals can be disrupted in many ways. Laws and regulations may restrict the subjects that can be discussed, or impose arbitrary outcomes. They may ban recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power...Whatever the nature of the restriction, the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that section 2(d)

189 CUPW, *supra* note 152 at para 112.

190 *Ibid* at para 181.

191 Saskatchewan Federation of Labour, *supra* note 13 at para 78 (emphasis in original).

192 CUPW, *supra* note 152 at para 182.

The ultimate question to be determined is whether the measures disrupt the balance between employees and employer that section 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining.

OPSEU v Ontario (Minister of Education), 2016 ONSC 2197 at 132

seeks to achieve, so as to substantially interfere with meaningful collective bargaining.¹⁹³

As a result of his focus on the balance of power between the parties, Firestone J. looked to the effects of the impugned legislation, rather than to the content of the legislation as was the case in *Saskatchewan Federation of Labour*. Noting that CUPW immediately softened its bargaining position after the tabling of the impugned legislation and Canada Post contrarily hardened its position, Firestone J. concluded that “[t]hese facts emphatically demonstrate the disruption in the balance between the parties wrought by the Act.”¹⁹⁴ The approach taken by Firestone J. unnecessarily complicated the straightforward substantial interference test adopted by the majority in *Saskatchewan Federation of Labour*.

This is not the only matter on which Firestone J. broke from the approach adopted by the majority in *Saskatchewan Federation of Labour*. Having found a violation of section 2(d), the majority in *Saskatchewan Federation of Labour* found it to be “unnecessary to realign the arguments under s. 2(b).”¹⁹⁵ Curiously, Firestone J. choose to also analyze the *Restoring Mail Delivery for Canadians Act* through the lens of section 2(b), concluding that the Act violated this Charter section as well. On his understanding, sections 2(b) and 2(d) protect different aspects of strike activity. According to Firestone J., section 2(d) “focuses on the ability of workers to use economic leverage in a collective bargaining dispute with their employers.”¹⁹⁶ In contrast, section 2(b) “focuses on whether individual members and their union are able to use strike action to symbolically express their ideas, concerns, and, most im-

193 *Saskatchewan Federation of Labour*, *supra* note 13 at para 77 (emphasis in original).

194 *CUPW*, *supra* note 152 at para 193.

195 *Saskatchewan Federation of Labour*, *supra* note 13 at para 98.

196 *CUPW*, *supra* note 152 at para 223.

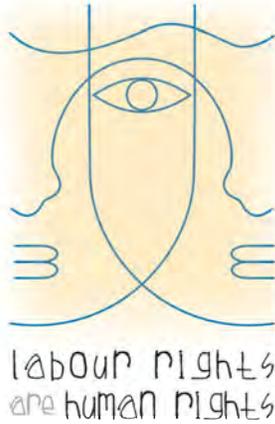
portantly, their human dignity.”¹⁹⁷

There are several difficulties with Firestone J.’s approach here. First, he emphasized the connection between human dignity and section 2(b) of the Charter, but in doing so he appeared to overlook the connection between human dignity and section 2(d) drawn by the majority in *Saskatchewan Federation of Labour*.¹⁹⁸ More significantly, Firestone J. appeared to ignore the argument raised by the respondent that sections 2(b) and 2(d) “have different thresholds for violation: respectively, they are mere and substantial interference with the protected freedom.”¹⁹⁹ As the Respondent noted, there would be no need to conduct a section 2(d) analysis, as the Supreme Court did in *Saskatchewan Federation of Labour*, if the right to strike was also protected by section 2(b), which has a lower threshold to establish a violation. The Respondent described this as an “absurd result,” and it is difficult to see otherwise.

197 *Ibid.*

198 *Saskatchewan Federation of Labour*, *supra* note 13 at paras 53–54, 74.

199 *CUPW*, *supra* note 152 at para 89.



V. Looking to the Horizon

The Shape of Section 2(d) Jurisprudence to Come

The New Labour Trilogy reshaped the landscape of section 2(d) jurisprudence, however, there are several areas of the terrain that need to be explored further. This section explores those issues.

i. Boundaries Around the Substantial Interference Test for Collective Bargaining

The right to collectively bargain remains the first among equals of the three protected labour rights, yet it remains ill-defined by the courts. There needs to be greater certainty regarding the proper test, or tests, for a violation of section 2(d).

As noted above, the Supreme Court committed to the substantial interference test in *MPAO*: “the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that section 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining.”²⁰⁰ In this context, the majority in *MPAO* described meaningful collective bargaining in terms of employee choice and independence from management, yet none of the major decisions following *MPAO* have adopted the same approach.

Instead, most of the cases considered in this paper have been argued in terms of good faith bargaining: *Gordon*, *BCTF*, and *OPSEU*. This is despite the fact that the courts in these decisions acknowledged that good faith in the context of section 2(d) has not been ad-

200 *MPAO*, *supra* note 11 at para 72.

dressed in great detail by the Supreme Court. For example, the majority in *BCTF* acknowledged that the “meaning of good faith in the section 2(d) context has not figured prominently in any of the jurisprudence,” and, other than some discussion in *BC Health Services* and *Fraser*, it was a “novel issue.”²⁰¹ Similarly, the Court in *Gordon* could only frame the issue negatively:

[There is] nothing in the case law suggesting that good faith bargaining for Charter purposes is different from good faith bargaining as required under ordinary labour relations legislation [...] Nor is there anything in the 2015 labour trilogy to suggest that the Supreme Court intended to change the law with respect to good faith bargaining as that concept has been developed in ordinary labour law.”²⁰²

While it is presumably more familiar for labour cases to be argued within the framework of the requirement for good faith bargaining, greater clarification needs to be given as to its relationship to section 2(d).

In particular, questions remain regarding the appropriateness of pursuing allegations of bargaining in bad faith through Charter remedies. The duty to bargain in good faith is already embodied in statute.²⁰³ In addition to this statutory requirement, is a Charter requirement for good faith bargaining automatically triggered whenever the employer is a government or public institution? This would appear to create two classes of employees, one whose rights to expect a process of good faith bargaining are protected by ordinary statute alone, and one whose rights enjoy additional Charter protections. It seems reasonable that Charter protections should be triggered only when a

201 *BCTF*, *supra* note 152 at paras 137–38.

202 *Gordon*, *supra* note 152 at para 73.

203 See, for example, *Canada Labour Code*, RSC 1985, c L-2, s 50(a)(i); *Labour Relations Act*, RSO 1990, c L2, s 15.

While some of the post-2015 section 2(d) cases on collective bargaining explored some further boundaries, the extent of the right to collectively bargain, including the boundaries around the substantial interference test, remain uncertain.

government uses its legislative power to thwart the good faith bargaining process, rather than in those instances when it merely engages in bad faith bargaining as an employer. While some of the post-2015 section 2(d) cases on collective bargaining explored some further boundaries, the extent of the right to collectively bargain, including the boundaries around the substantial interference test, remain uncertain.

ii. Boundaries Around the Right to Organize

Also unclear is where the boundaries around the right to organize lie. In *MPAO*, the Supreme Court explicitly stated that section 2(d) protects a meaningful process of collective bargaining that provides employees with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests. This is a much more robust right to organize than the Supreme Court offered up for agricultural workers in *Fraser*, where that right was limited merely to joining an employees' association and to make representations to their employer, with the only corresponding obligation on the employer that they read or listen to the representations. Although the Supreme Court did not explicitly overturn *Fraser*, it left it wounded. Added to this, there still are several occupational groups named in collective bargaining laws across Canada, such as professionals, agricultural workers, domestic workers, and military personnel, who are still excluded from the right to join a union of their choosing. Based on *MPAO*, these exclusions should not survive a Charter challenge, but to explore the full scope of *MPAO* will require further litigation.

iii. Boundaries Around the Right to Strike

Similarly, the scope around the right to strike is untested. While Saskatchewan Federation of Labour provides great promise, there remain several instances in Canadian labour laws where employees are explicitly denied the right to strike, or where the law is silent with respect to it. Saskatchewan Federation of Labour was centred around essential services legislation designed to deny the right to strike for large groups of public

sector workers. Almost all jurisdictions in Canada still have essential services legislation on the books; the scope of these laws and the limitations they place on striking vary across jurisdictions in terms of the legislative means chosen by governments to meet the objective of providing essential service during a strike. Although the Supreme Court in *Saskatchewan Federation of Labour* provided useful guidance on how essential services can be maintained without unconstitutional limitations on the right to strike,²⁰⁴ none of the essential services laws have been tested in Court. Litigation is still before the courts challenging Ontario's 2011 Toronto Transit Commission Labour Disputes Resolution Act, which declared the Toronto Transit Commission an essential service and took away its workers' right to strike. It should also be noted that there have been a number of instances in the last couple of years where back-to-work legislation was passed which suspended the right to strike; in all cases the legislation sent the dispute in question to binding arbitration.

iv. Relationship Between Sections 2(b) and 2(d) with Respect to the Right to Strike

Another significant issue the Supreme Court will need to clarify is the relationship between sections 2(b) (which protects freedom of expression) and 2(d) with regard to the right to strike. There is precedent for analyzing the right to engage in strike activities through the lens of section 2(b) of the Charter. For example, in *RWDSU v Dolphin Delivery Ltd*, the Supreme Court held that picketing "involve[s] the exercise of the right of freedom of expression."²⁰⁵ Picketing is, of course, only

Another significant issue the Supreme Court will need to clarify is the relationship between sections 2(b) (which protects freedom of expression) and 2(d) with regard to the right to strike.

204 *Guide to Negotiating Essential Services: Based on a Supreme Court of Canada decision: SFL v. Saskatchewan*. Canadian Foundation for Labour Rights, (Ottawa: January 2015) https://www.labourrights.ca/sites/labourrights.ca/files/documents/cflr_guide_to_negotiating_essential_services.pdf

205 *RWDSU, Local 580 v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at 588 [*Dolphin Delivery*]. See also *K Mart Canada Ltd v UFCW, Local 1518*, [1999] 2 SCR 1083 [*K-Mart*]; *Pepsi-Cola Canada Beverages (West) Ltd v RWDSU, Local 558*, 2002 SCC 8 [*Pepsi-Cola*].

one form of strike activity, and Firestone J. was correct in his analysis that “[e]xpressive meaning in the labour context can go beyond mere picketing and leafleting.”²⁰⁶ As a result, there is a *prima facie* argument to be made that strike activities should also be protected under section 2(b). However, this *prima facie* argument should be rejected for two reasons.

First, the picketing cases—Dolphin Delivery, K-Mart, and Pepsi-Cola—were not originally argued on the basis of section 2(d) of the Charter. Although Dolphin Delivery was decided three years before the Alberta Reference, the appellant union abandoned its section 2(d) appeal and proceeded only on the basis that its freedom of expression had been infringed. K-Mart and Pepsi-Cola were both decided in the era of the First Labour Trilogy where the established view was that section 2(d) did not protect union activity. It is not unreasonable to expect that if these cases were to be decided today under the regime of the Third Labour Trilogy, they would be decided under section 2(d) analysis, especially given the Supreme Court’s decision not to address the section 2(b) argument in Saskatchewan Federation of Labour.

Secondly and more significantly, as argued by the Respondent in OPSEU, protecting the right to strike under both sections 2(b) and 2(d) would create an absurdity in the law. The test for infringement of section 2(b) requires establishing three things: (i) that the activity in question had expressive content, (ii) that the method or location of the activity did not remove its section 2(b) protection, and (iii) that the purpose or effect of the impugned governmental action infringed the expressive activity.²⁰⁷ The threshold to be met is relatively low: any interference with the freedom of expression that is more than trivial or insubstantial is sufficient to establish a violation of section 2(b).²⁰⁸ In contrast,

206 *CUPW*, *supra* note 152 at para 222.

207 *Canadian Broadcasting Corp v Canada*, 2011 SCC 2 at para 38.

208 *Alberta v Hutterian Brethren of Wilson Colony*, 2009

the test for infringement of section 2(d) requires proof of substantial interference in the exercise of the right to freely associate.

It would be untenable for the right to strike to be protected under two separate Charter rights with such different thresholds. Given the ease with which a plaintiff can establish a section 2(b) infringement, there would be virtually no meaningful role for the more stringent substantial interference test of a section 2(d) infringement. By ignoring the Supreme Court's decision not to resolve the case on section 2(b) grounds in *Saskatchewan Federation of Labour*, Firestone J. let the genie out of the bottle, so to speak, in *OPSEU*. It is inevitable that future litigants will attempt to advance their right to strike claims by appealing to section 2(b), and the Supreme Court will need to rule definitively on the appropriateness of this. Given both the decision in *Saskatchewan Federation of Labour* and the inconsistency with respect to the thresholds in the respective tests, it seems unlikely that the Supreme Court would uphold the approach taken by Firestone J. in *OPSEU*.

v. Role of International Labour Law in Future Section 2(d) Litigation

The Third Labour Trilogy also turned a decisive corner on the importance of international labour law in helping guide Supreme Court justices in section 2(d) jurisprudence.²⁰⁹ The primary source for international labour law is the International Labour Organization (ILO), which provides a solid international legal platform for anchoring freedom of association. The ILO is a body of the United Nations, founded in 1919 and

The Third Labour Trilogy also turned a decisive corner on the importance of international labour law in helping guide Supreme Court justices in section 2(d) jurisprudence.

SCC 37 at para 32.

209 For a more detailed historical analysis of the Supreme Court of Canada's position regarding International labour law in section 2(d) jurisprudence, see *The fall and rise of a good idea: the use of international labour law in the interpretation of the Charter of Rights and Freedoms* by Michael Lynk in 2015 New Labour Trilogy; A CFLR Forum Report. Canadian Foundation for Labour Rights (Ottawa: April 2015) at 40-46.

based in Geneva, which is devoted to improving employment standards and rights. It is a tripartite organization, with equal voice given to unions, employers and governments in shaping its policies and rules. Among the ILO's contributions to international labour law are its 190 conventions and the many rulings of its Committee on Freedom of Association on issues of fundamental workplace rights. Also considered part of international labour law are the leading treaties on human rights law (such as the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*), the judgments of various national and regional courts, and the writings of legal academics.

The acceptance by Supreme Court justices of international labour law to help guide their decision-making on section 2(d) cases mirrored the narrowing and then broadening interpretation of section 2(d). In the early days of its jurisprudence, the majority of the Supreme Court justices ignored international labour law, while Dickson C.J.C.'s most influential dissent from the First Labour Trilogy planted the seed for future courts to consider it. During the period following, it is fair to say that the Supreme Court justices took a muddled approach towards international labour law. The shift in the Supreme Court's position began with its 2001 decision in *Dunmore*, dealing with the lack of access to collective bargaining by agricultural workers in Ontario. For the first time, the Supreme Court adopted the thrust of Dickson's 1987 dissent on international labour law, acknowledging that "The collective dimension of section 2(d) is also consistent with developments in international human rights law, as indicated by the jurisprudence of the [ILO's] Committee of experts on the Application of Conventions and recommendations and the ILO Committee on Freedom of Association."²¹⁰ A further ringing endorsement of international labour law was given by the Court in its 2007 ruling in *BC Health Services*. Then, the wheels seemingly fell off. In *Fraser*, the Supreme Court failed

210 *Dunmore*, para 15.

to mount any principled or substantive defence of international labour law, in spite of a vigorous attack on the use of it by Rothstein J. in dissent.

The Supreme Court's 2015 ruling in *Saskatchewan Federation of Labour* was both a return to, and an advancement beyond, its earlier commitments from *Dunmore* and *BC Health Services* to the integral role of international labour law in section 2(d) analysis. The decision provided a full-blooded endorsement of international labour law as a seminal source for the protection and evolution of fundamental rights at work in Canada. It solidified the new role of international labour law in Canada, even as the exact reach of its application remains an open question.

Saskatchewan Federation of Labour was an important endorsement from Canada's highest court on the centrality of international law in general, and international labour and human rights law in particular, to the interpretation of our fundamental Charter rights. In the immediate future, the use of international labour law will continue to be directed, in all likelihood, towards constitutional challenges on the breadth and scope of the three fundamental workplace rights: the right to organize, the right to collectively bargain and the right to strike.

vi. Labour Relations Background of Future Supreme Court Justices

One contributing explanation for the broader interpretation by the Supreme Court to section 2(d) was the presence of three justices who had extensive labour law experience: Justice Rosalie Abella acted as chair of the Ontario Labour Relations Board from 1984 to 1989 and was the sole Commissioner of the 1984 federal Royal Commission on Equality in Employment; Justice Thomas Cromwell was a labour arbitrator in Nova Scotia while teaching law at Dalhousie University from 1982 to 1992; and Justice Louis Lebel was a union-side labour lawyer in Quebec City before he was appointed to the Quebec Court of Appeal in 1984. This critical mass of judges with direct

labour relations experience brought to the Supreme Court an empathy for and sensitivity to workplace issues that had not been present before. Since the Supreme Court hearings which led to the Third Labour Trilogy, Justices Cromwell and Lebel have retired from the Supreme Court and have been replaced by Justice Clément Gascon and Justice Suzanne Cote. Of those two justices, only Justice Gascon has a background in labour relations, having worked as a management-side lawyer for the labour law firm Heenan Blaikie for 21 years. The key point to consider here, especially as it relates to future section 2(d) litigation is that obviously, the background and experiences of each of the current Supreme Court justices will influence the decisions they write. It is no coincidence that three of the justices noted above were vital to the Court's understanding of the value of unions to Canadian society and their importance in enhancing the values of the Charter.

vii. Use of the Notwithstanding Clause to Pass Unconstitutional Labour Laws

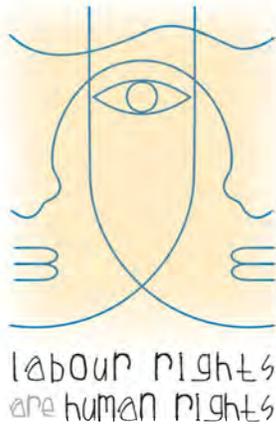
A small but important point to consider when looking to the horizon and the shape of future section 2(d) jurisprudence is the possibility of current and future conservative governments using section 33 of the Charter, the notwithstanding clause, to protect defeats they experience in the courts around restrictive labour legislation. That possibility was given rare credence in September 2018 when the new Premier of Ontario, Doug Ford, threatened to take the rare step of invoking Section 33—for the first time in the province—after an Ontario Superior Court judge ruled that his provincial government's legislation to cut the number of Toronto city councillors was unconstitutional. The fear is that Ford's alarming pledge will embolden premiers, urged on by anti-union groups, to use the clause to roll back constitutional labour rights. It is worth noting that outside of Québec, only Saskatchewan has lawfully proclaimed a bill invoking the notwithstanding clause; Conservative Premier Grant Devine wielded it in 1986 in order to protect a back-to-work law from Charter scrutiny by the Supreme Court. And in 2015,

Saskatchewan's then premier Brad Wall mused publicly about using the notwithstanding clause to override the Supreme Court's Saskatchewan Federation of Labour ruling against the province.

It would be prudent for the leadership of the Canadian labour movement to consider the possibility of section 33 being used again to override Supreme Court rulings against regressive labour laws and what the labour movement's response would be to such an inappropriate use of the clause. The labour movement should consider pushing Parliament and provincial legislatures to adopt specific legislation that would restrict the use of section 33 to shielding truly vital legislation, and not allow its promiscuous use. Support should also be given for legislation similar to that of bills, which have been introduced in both the federal Parliament and the Ontario legislature, which would require the government to table a report setting out any potential effects on Charter rights of each government bill introduced — and to do so regardless of whether the government intends to use the notwithstanding clause.²¹¹

211 *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, 42nd Legislature 1st Session, 2018 (First Reading as October 29, 2018) c73 and, Bill 49, *Charter Rights Transparency Act*, 2018, 42nd Parliament, 1st Session Canada, 2017, (Third Reading in the Senate as October 29, 2018)

Conclusion



THE GEOGRAPHY of section 2(d) jurisprudence has long been fluid, and battles between warring Supreme Court factions have destabilized and reshaped the landscape over the last thirty years. This paper's review of Section 2(d) jurisprudence reveals such a trajectory—from early beginnings where Supreme Court justices did not even recognize a pulse in section 2(d), to a slow and cautious revival, to the broad constitutional embrace of freedom of association.

The long and winding path towards the constitutional recognition of freedom of association can be best described with three distinct stages: (i) outright rejection, but with the seed planted with Dickson C.J.C.'s dissent in the 1987 *Alberta Reference*, which unquestionably was the most famous and admired dissent in Canadian labour law history; (ii) a cautious, partial and hesitant acceptance, beginning with *Dunmore* in 2001 and *Health Services* in 2007, but with fierce dissents and the incomprehensible setback of *Fraser* in 2011; and (iii) the broader and more robust interpretation of section 2(d) in 2015 with the Third Labour trilogy, which has carried forward in decisions from lower courts involving all constitutional labour law challenges since.

It is also important to reflect on how jurisprudence that has brought section 2(d) to its current state has firmly planted labour rights as a critical component of human rights. Dickson C.J.C.'s powerful dissent and the present state of section 2(d) jurisprudence, has helped lay the foundation for establishing the centrality of labour rights within the broad context of human rights.

As Judge Abella pointed out in her decision for the majority in *Saskatchewan Federation of Labour*, the constitutional protection of labour rights is consistent with the Charter’s underlying values, like “human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy.”²¹²

The Supreme Court’s increasing recognition that labour rights are human rights has certainly helped build and reinforce an important narrative about the valuable role unions play in society in terms of enhancing our democracy and advancing economic equality and social justice for all Canadians.

There is good reason to be optimistic that recent section 2(d) jurisprudence represents the beginning of a more robust and progressive interpretation of labour rights by the courts in Canada. If the labour movement hopes to use these decisions to promote, strengthen, and expand labour rights in Canada, then it is critical that we develop a common understanding of their meaning.

It is also critical that the labour movement continue to encourage greater consultation, cooperation, and coordination amongst unions to present strong and coordinated arguments before the courts in any future challenges to the constitutional rights of Canadian workers.

212 *Saskatchewan Federation of Labour*, *supra* note 13 at para 53.

Acknowledgement

CFLR would like to acknowledge and thank the team of writers involved in preparing this paper.

The genesis of the paper was the result of several discussions CFLR had with Professor Michael Lynk, Associate Professor at the Faculty of Law, Western University, in London, Ontario and a long-time supporter of CFLR.

Professor Lynk generously agreed to assist the CFLR in undertaking a scholarly review of the major labour rights decisions of the Supreme Court of Canada and lower courts over the past decade, exploring from a trade union perspective the important implications these decisions have on workers' rights and workplace justice in Canada. One of the key objectives we identified for the paper was to assist union-side labour law practitioners in understanding the past, current and possibly future constitutional landscape of the Charter's Section 2(d) with respect to labour rights in Canada.

Professor Lynk worked with CFLR Senior Research Associate, Derek Fudge, my CLI colleague Cliff Andstein, and myself in preparing an outline for the paper. He then helped identify two Faculty of Law students at Western University to write papers based on the outline.

The two students, William Nicholas Fawcett and Teodora Prpa, under the supervision of Professor Lynk, completed two excellent papers as an independent research project for their Faculty of Law studies. Those two papers were combined into one paper by legal editor Anna Bowness. Professor Lynk, Derek Fudge and I then finalized the paper, including extensive work on the introduction and conclusion.

As a result of this collaborative effort, CFLR is able to publish this comprehensive paper.



James Clancy
Director
Canadian Foundation for Labour Rights



Canadian Labour Institute for Social and Economic Fairness

www.canadianlabourinstitute.org



Canadian Labour Institute



Canadian Labour Institute



Canadian Foundation for Labour Rights
<https://labourrights.ca>



Canadians for a Modern Industrial Strategy
<https://industrialstrategy.ca>



Public Service Foundation of Canada
<https://publicservicesfoundation.ca>