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Many Questions and a Few Answers: Freedom of Association after *Saskatchewan Federation of Labour,* *Mounted Police Association of* *Ontario and Meredith*

Michael S. Dunn*

I. INTRODUCTION

Since 2007, the Supreme Court of Canada has radically altered the landscape of Canadian law in the area of labour relations. The Court's decision in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*¹ reversed 20 years of jurisprudence by holding that the section 2(d) of the *Canadian Charter of Rights and Freedoms*² protection of freedom of association includes a right to collectively bargain. The Court held that violations of section 2(d) could be established where government unilaterally alters existing collective agreements in relation to important workplace issues, or precludes future bargaining on such issues. The scope of the section 2(d) right was somewhat narrowed in

* Counsel in the Constitutional Law Branch of the Ministry of the Attorney General for Ontario. The author was counsel on *Mounted Police Association of Ontario v. Canada and Meredith v. Canada*, discussed below. The views expressed herein reflect only the author's views, and do not reflect the views of the Ministry of the Attorney General or the Government of Ontario. I am deeply indebted to Justice Robert E. Charney, Robin K. Basu, Rochelle S. Fox and Sarah Wright for our thought-provoking discussions on the scope of the right protected by s. 2(d) of the Charter, and to Matthew Horner for kindly agreeing to read a draft of this article on very short notice. Of course, any mistakes are my own.

¹ [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391 (S.C.C.) [hereinafter "*Health Services*"]. The Court overruled the so-called "labour trilogy" of *Reference re Public Service Employee Relations Act (Alberta)*, [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313 (S.C.C.) ("*Alberta Reference*"); *Public Service Alliance of Canada v. Canada*, [1987] S.C.J. No. 9, [1987] 1 S.C.R. 424 (S.C.C.) and *Retail, Wholesale and Department Store Union v. Saskatchewan*, [1987] S.C.J. No. 8, [1987] 1 S.C.R. 460 (S.C.C.).

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

Ontario (Attorney General) v. Fraser,³ when the Court upheld a statutory labour relations regime that lacked most of the features commonly associated with Canadian labour codes.

Perhaps recognizing the difficulty in reconciling these cases, the Court has now attempted to clarify the scope of section 2(d). In *Mounted Police Assn. of Ontario v. Canada (Attorney General)*⁴ the Court struck down federal legislation limiting the ability of RCMP members to form independent employee associations, and described the right to collectively bargain in sweeping terms. In *Saskatchewan v. Saskatchewan Federation of Labour*,⁵ the Court recognized a right to strike, again reversing long-standing precedent. These two decisions can be seen as a departure from *Fraser*, back towards the broader conception of section 2(d) found in *Health Services*. At the same time, the Court in *Meredith v. Canada (Attorney General)*⁶ dismissed a constitutional challenge brought by RCMP employees whose agreement in respect of wages was unilaterally set aside. The Court found it unnecessary to resort to section 1, finding no violation of section 2(d).

The purpose of this article is to trace the development of the Court's section 2(d) jurisprudence, beginning with the seeds of a right to collectively bargain in *Dunmore*; the recognition of a right to collectively bargain in *Health Services*; the narrowing in *Fraser*, where the Court held that section 2(d) does not guarantee a particular model of labour relations; and the broadening of the right in *SFL* and *MPAO*. While it would appear that the Court has moved back towards *Health Services*, the eventual outcome of the issues raised by what I will call the 2015 trilogy is, at this point, far from certain. This is particularly so in relation to the legislative imposition of significant terms in collective agreements (the issue in *Meredith*), as well as the scope of the right to strike protected by *SFL*.

II. THE ROAD TO *HEALTH SERVICES* — *DUNMORE V. ONTARIO*

Although it was not obvious at the time, the decision in *Dunmore v. Ontario (Attorney General)*⁷ marked a significant step towards *Health Services* and beyond. *Dunmore* arose out of the enactment of the

³ [2011] S.C.J. No. 20, [2011] 2 S.C.R. 3 (S.C.C.) [hereinafter "*Fraser*"].

⁴ [2015] S.C.J. No. 1, [2015] 1 S.C.R. 3 (S.C.C.) [hereinafter "*MPAO*"].

⁵ [2015] S.C.J. No. 4, [2015] 1 S.C.R. 245 (S.C.C.) [hereinafter "*SFL*"].

⁶ [2015] S.C.J. No. 2, [2015] 1 S.C.R. 125 (S.C.C.) [hereinafter "*Meredith*"].

⁷ [2001] S.C.J. No. 87, [2001] 3 S.C.R. 1016 (S.C.C.) [hereinafter "*Dunmore*"].

Labour Relations and Employment Statute Law Amendment Act, 1995 (“LRESLAA”).⁸ The LRESLAA in turn repealed the *Agricultural Labour Relations Act, 1994*,⁹ which granted statutory protection to the labour relations activities of farm workers, who had previously always been excluded from statutory labour regimes.¹⁰

This decision recognized a constitutional right to statutory associational rights for agricultural workers. Presumably because the Supreme Court had repeatedly rejected claims that section 2(d) protected a right to collectively bargain, the claimants challenged the legislation as restricting the “wider ambit of union purposes and activities”, such as the social and political activities undertaken by unions. Although *Dunmore* was cited in *Health Services* for the proposition that it opened the door to protecting collective bargaining under section 2(d),¹¹ the *Dunmore* Court noted that the Court had repeatedly held that no such protection existed.¹²

On the facts in *Dunmore*, the Court accepted that there was a positive obligation on the state to ensure that agricultural workers had the freedom to organize. As the Court put it, “exclusion from a protective regime may in some contexts amount to an affirmative interference with the effective exercise of a protected freedom”.¹³ This conclusion may be supportable on the facts of *Dunmore*, although it has caused significant analytical difficulty in subsequent cases. Unlike the case of *Delisle*,¹⁴ where RCMP officers were unable to show that they could not associate without being included in a statutory bargaining regime, the workers in *Dunmore* had an evidentiary record to support their claims.

The Court in *Dunmore* accepted that, without inclusion in some statutory regime, the claimants would be unable to exercise their constitutional right to associate — that is, to form or join a union. It should

⁸ S.O. 1996, c. 1.

⁹ S.O. 1994, c. 6.

¹⁰ *Dunmore*, *supra*, note 7, at para. 2.

¹¹ *Health Services*, *supra*, note 1, at paras. 31-35.

¹² *Dunmore*, *supra*, note 7, at para. 17.

¹³ *Id.*, at para. 22. The Court set out three conditions that had to be met before a claim of underinclusion could successfully be made. First, the claim must be grounded in a fundamental freedom, rather than access to a particular statutory regime. Second, a proper evidentiary foundation must exist — it is not enough that the claimant can show that they seek access to a particular regime. Presumably, the claimant must show that access to at least some regime is necessary for the exercise of the right. Third, the state must be truly accountable for the inability to exercise the fundamental freedom: *Dunmore*, *id.*, at paras. 22-26.

¹⁴ *Delisle v. Canada (Deputy Attorney General)*, [1999] S.C.J. No. 43, [1999] 2 S.C.R. 989 (S.C.C.). In *Delisle*, which will be discussed further below in relation to *MPAO*, the Court rejected a challenge by RCMP officers to a right to a process of collective bargaining.

be noted that the Court, in so finding, accepted that the claimants could establish a breach of section 2(d) if they were not able to associate for their desired purpose (that is labour relations). The workers were not prevented from associating for purposes unrelated to labour relations and collective bargaining. Although the Court does not say so explicitly, underlying its conclusion is an acceptance that the purposes of associations in the labour context, or at the very least the core right to organize, should receive protection under section 2(d).

III. *HEALTH SERVICES AND FRASER*

Much has been written about the Court's decisions in *Health Services* and *Fraser*, and I do not want to repeat it all here.¹⁵ Nor is the purpose of this article to argue that the Court was wrong or right in *Health Services* to recognize a right to collective bargaining under section 2(d). However, a review of these cases is required in order to understand where we find ourselves today, as some of the key problems that I identify in the 2015 trilogy have their origins in these cases.

1. *Health Services* (2007)

Health Services arose out of a reorganization of the health care sector in British Columbia. The government was of the view (and this was not seriously challenged in the Supreme Court) that both demand for and costs of health care had escalated, and that the province was struggling to fund the costs of the system. The province enacted the *Health and Social Services Delivery Improvement Act*¹⁶ in response. The Act gave health care sector employers significantly more flexibility in labour relations matters. In particular, the Act introduced changes to transfers and multi-worksites assignment rights, contracting out, the status

¹⁵ See, only by way of example, B. Langille, "The Freedom of Association Mess: How We Got into It and How We Can Get out of It" (2009) 54 McGill L.J. 177; B. Oliphant, "Exiting the Freedom of Association Labyrinth: Resurrecting the Parallel Liberty Standard under 2(d) & Saving the Freedom to Strike" (2012) 70:2 U.T. Fac. L. Rev. 36; R.E. Charney, "The Contract Clause Comes to Canada: The British Columbia Health Services Case and the Sanctity of Collective Agreements" (2007/2008) 23 N.J.C.L. 65; R.K. Basu, "Revolution and Aftermath: B.C. Health Services and Its Implications" (2008) 42 S.C.L.R. (2d) 165; J. Cameron, "The Labour Trilogy's Last Rites: B.C. Health and a Constitutional Right to Strike" (2009-2010) 15 C.L.E.L.J. 297.

¹⁶ S.B.C. 2002, c. 2.

of employees under contracting out arrangements, job security programs, and lay-off and bumping rights. Importantly, the Act permitted employers to reorganize in respect of these issues in ways that would not have been permitted under existing collective agreements, and explicitly provided that the Act prevailed over existing agreements. Future bargaining on issues covered by the Act was prohibited.¹⁷

A group of affected unions challenged the Act under section 2(d) of the Charter. At both trial and appellate level, the British Columbia courts were unwilling to find that collective bargaining was protected by section 2(d), and accepted that the law on this point was unchanged by *Dunmore*. The Supreme Court itself, however, decided that this case presented an opportunity to revisit this issue. The Court articulated four reasons for concluding that section 2(d) protects a right to collective bargaining:

First, a review of the s. 2(d) jurisprudence of this Court reveals that the reasons evoked in the past for holding that the guarantee of freedom of association does not extend to collective bargaining can no longer stand. Second, an interpretation of s. 2(d) that precludes collective bargaining from its ambit is inconsistent with Canada's historic recognition of the importance of collective bargaining to freedom of association. Third, collective bargaining is an integral component of freedom of association in international law, which may inform the interpretation of *Charter* guarantees. Finally, interpreting s. 2(d) as including a right to collective bargaining is consistent with, and indeed, promotes, other *Charter* rights, freedoms and values.¹⁸

The most relevant of these for the purposes of this article are the first and second. It is these two that the Court uses to elevate the right to associate in the labour relations context (the fact that, in my view, underlies the Court's decision in *Dunmore*) into a distinct category from other associational rights, where the purposes of the association are themselves protected by section 2(d).

The Court started by reviewing the Court's prior decisions rejecting a right to collectively bargain. The underlying theme of this analysis was to elevate the dissenting reasons of Dickson C.J.C. in the *Alberta Reference*¹⁹ into somewhat of a guide to the Court's approach to section 2(d).

¹⁷ *Health Services*, *supra*, note 1, at paras. 8-12 contains an overview of the legislation; more detailed discussions of the changes can be found at paras. 116-128.

¹⁸ *Health Services*, *id.*, at para. 20.

¹⁹ *Reference re Public Service Employee Relations Act (Alberta)*, [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313 (S.C.C.).

A secondary theme that emerges from both *Health Services* and subsequent cases is the idea that, while collective bargaining (and other associational rights in the labour context) are heavily regulated by statute, they are not “creations” of statute. This gave the Court a reason to avoid its previous admonition that labour policy, including how to balance the rights of employees and employers, was an area best left to the legislatures. The Court did not explicitly distance itself from this proposition, but instead held that “worker organizations historically had the right to bargain collectively outside statutory regimes”, and that “[p]olicy itself should reflect *Charter* rights and values.”²⁰

The Court held that the prior decisions had taken a “decontextualized” approach to the section 2(d) right. By this, the Court meant that the prior case law had failed to account for the difference between labour unions and other associations. As the Court wrote:

The generic approach of the earlier decisions to s. 2(d) ignored differences between organizations. Whatever the organization — be it trade union or book club — its freedoms were treated as identical. The unfortunate effect was to overlook the importance of collective bargaining — both historically and currently — to the exercise of freedom of association in labour relations.²¹

This, to my mind, is the logical corollary of *Dunmore*. The Court finds here that labour unions are different than book clubs from the perspective of the type of protections that section 2(d) provides. Presumably, both have the right to form associations (a law prohibiting book clubs would be as vulnerable to challenge as a law prohibiting unions), but the Court’s view of the historical importance of labour unions means that they receive greater protections for the activities that are fundamental to their existence. This reasoning supports both the recognition of a right to collectively bargain in *Health Services*, and a right to strike as recognized in *SFL*.

Although I view *Health Services* as flowing in some ways from *Dunmore*, the way the Court reasons to this conclusion lacks coherence. It is worth quoting paragraph 35 in its entirety to make this point:

Bastarache J. reconciled the holding in *Dunmore* of a positive obligation on government to permit farm workers to join together to bargain collectively in an effective manner with the conclusion in

²⁰ *Health Services*, *supra*, note 1, at para. 26.

²¹ *Id.*, at para. 30.

Delisle v. Canada (Deputy Attorney General), [1999] 2 S.C.R. 989, that the federal government was not under a positive obligation to provide RCMP officers with access to collective bargaining by distinguishing the effects of the legislation in the two cases. Unlike the RCMP members in *Delisle*, farm workers faced barriers that made them substantially incapable of exercising their right to form associations outside the statutory framework (*per* Bastarache J., at paras. 39, 41 and 48). The principle affirmed was clear: Government measures that *substantially interfere* with the ability of individuals to associate with a view to promoting work-related interests violate the guarantee of freedom of association under s. 2(d) of the *Charter*.²²

The Court in *Dunmore* certainly affirmed that measures that “substantially interfere” with the ability of individuals to associate (in the labour context, to organize into a union) could violate section 2(d). As the *Dunmore* Court said, “the freedom to organize constitutes a unique swatch in Canada’s constitutional fabric, as difficult to exercise as it is fundamental, into which legislative protection is historically woven”.²³

However, the second proposition (that measures interfere with the ability of workers to associate for the purpose of promoting work-related interests) amounts to a significant extension of *Dunmore*. While it is true that one of the purposes of associating with others in the labour context is a desire to engage in collective bargaining, the Court in *Dunmore* attempted to draw a distinction between a right to organize and the right to collectively bargain. There was no question in *Dunmore* that the agricultural workers had a section 2(d) right to associate — the only question was whether they were entitled to a regime of labour relations that would allow them to fully exercise this right. The Court in *Health Services* ignores the particular context of *Dunmore*, where the record showed that the agricultural workers were substantially incapable of exercising their right to organize in the absence of statutory protections.

In any event, the Court in *Health Services* was willing to extend section 2(d) to include a right to collectively bargain. As it would later do with the right to strike, the Court emphasized in *Health Services* that collective bargaining has a fundamental place in the history of Canadian labour relations, and emphasized its role in the dominant *Wagner Act*

²² *Id.*, at para. 35 (italics in original; underlining added).

²³ *Dunmore*, *supra*, note 7, at para. 35 (emphasis added).

model of labour relations.²⁴ The Court also cited a number of international law sources for the proposition that the right to collectively bargain forms part of a right to associate, and held that the protection of collective bargaining accords with other Charter values such as human dignity, liberty, autonomy and enhancing democracy.²⁵

Having articulated a rationale in support of the decision to recognize a right to collectively bargain under section 2(d), the Court then attempted to define the contours of the right. The Court, presumably still mindful of the complexity of labour policy, sought to give guidance without being overly prescriptive. The Court defined the right as a right to a process of collective bargaining. The right therefore does not include a right to a particular outcome. However, while the Court insisted that no outcome was guaranteed, the Court also held that unilateral government interference with specific outcomes could amount to a violation of section 2(d). If unilaterally nullifying the results of a process of collective bargaining has the effect of rendering the previous bargaining meaningless, then a violation of the right may be established.²⁶

The question as framed by the Court was first, whether the matter affected was sufficiently important to the process of collective bargaining as to be brought within the protections of section 2(d). Unilateral governmental interference in matters of little import²⁷ is less likely to give rise to a section 2(d) violation. Even if the matter is sufficiently important, the Court will ask whether the interference by government is sufficiently serious as to give rise to a violation of section 2(d). In defining this threshold, the Court again referred to the duty to bargain in good faith, holding that the right is to a process of good faith consultation and discussion, with the parties having an obligation to come together and seek an agreement in good faith.²⁸

On the facts of *Health Services* itself, the Court found that the issues of contracting out, layoffs and bumping dealt with matters of sufficient importance to the unions that unilaterally removing the employees' say in

²⁴ See *Health Services*, *supra*, note 1, at paras. 56-63, where the Court discusses the dominant model of labour relations in North America, which is modelled on the 1935 *National Labor Relations Act* (U.S.), commonly referred to as the *Wagner Act* after its sponsor Senator Robert Wagner.

²⁵ *Health Services*, *id.*, at paras. 80-86.

²⁶ *Id.*, at para. 96.

²⁷ The Court gave the examples of uniform design, the layout and organization of cafeterias, or the location or availability of parking lots as matters unlikely to be sufficiently important: *Health Services*, *id.*, at para. 96.

²⁸ *Health Services*, *id.*, at paras. 100-106.

these matters violated the right to a process of collective bargaining. However, the Court found that interference with provisions related to transfers and reassignments were not sufficiently serious. In the Court's view, these were "relatively minor modifications to in-place schemes for transferring and reassigning employees. Significant protections remained in place".²⁹

A few things were clear from the decision in *Health Services*. First, government action was required. That is, either government must enact legislation (that unilaterally determines which matters may be subject to negotiation or specifies terms of agreements), or act as employer. Although the Court did not avert to this factor explicitly, it surely had an impact on the analysis that the employers in *Health Services* were delivering public services. The government's rationale for the changes to the process of collective bargaining had less to do with government policy with respect to labour relations, and more to do with an attempt to rationalize the health care sector in an effort to improve the delivery of these health care services. The Court also noted that at least part of the government objective was to save costs.³⁰ Whether or not these were the true goals, or sufficiently important to justify a limit on the section 2(d) Charter right, is not important for the purpose of this article. The point is that the government was attempting to reform an area of society for which it had direct responsibility, rather than mediating between two private interests. As we will see in the *Fraser* case, the Court did not come to the same conclusion when addressing private sector bargaining.

Second, the Court was at pains to note that it was not guaranteeing a right to a particular process of collective bargaining or a particular model of labour relations:

... as the right is to a process, it does not guarantee a certain substantive or economic outcome. Moreover, the right is to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method. As P.A. Gall notes, it is impossible to predict with certainty that the present model of labour relations will necessarily prevail in 50 or even 20 years.³¹

The Court was seeking to distance itself from an argument that it was essentially constitutionalizing the *Wagner Act*, notwithstanding the

²⁹ *Id.*, at paras. 130-131.

³⁰ *Id.*, at paras. 143-147.

³¹ *Id.*, at para. 91, citation omitted.

extensive reference to the *Wagner Act* and concepts such as good faith bargaining. While this makes eminent sense, the difficulty for courts and lawyers after *Health Services* remained that the *Wagner Act* model was the foundation of much of what the Court had said in *Health Services*.³²

2. *Ontario (Attorney General) v. Fraser* (2011)

In *Ontario (Attorney General) v. Fraser*,³³ the Supreme Court revisited *Health Services*. Because of the eventual conclusions of the Court in the 2015 trilogy, I will address in some detail the reasons of the Court of Appeal in this case, as they appear to underlie at least part of the reasoning in the 2015 trilogy.

The Ontario legislature responded to *Dunmore* with the *Agricultural Employees Protection Act* (“AEPA”).³⁴ The AEPA continued to exclude farm workers from the *Labour Relations Act, 1995*³⁵ applicable to most employees in Ontario, but extended certain statutory rights to agricultural workers. In particular, they were given the right to form and join employees’ associations, make representations to their employers through their associations on the terms and conditions of their employment, and not to be subject to interference, coercion or discrimination in respect of the exercise of these rights. The employer had a duty to listen to these representations and read them. Finally, a Tribunal was tasked with determining certain disputes under the Act.

Unions seeking to represent employees in the agricultural sector challenged the AEPA under section 2(d) of the Charter.³⁶ Justice Farley rendered his decision in 2006, prior to *Health Services*.³⁷ Relying upon the Supreme Court’s decision in *Dunmore* and earlier cases, he dismissed the constitutional challenge on the basis that section 2(d) did not protect

³² There are a number of other troubling aspects to the decision in *Health Services* that are beyond the scope of this article. For example, the Court’s s. 1 analysis refers to the fact that there was no consultation with the affected unions prior to introducing the legislation in question. Consideration of this as a factor under s. 1 would appear to be at odds with the Court’s affirmation, two paragraphs earlier, that “Legislators are not bound to consult with affected parties before passing legislation.” See paras. 159-160, 157.

³³ *Fraser*, *supra*, note 3.

³⁴ S.O. 2002, c. 16.

³⁵ S.O. 1995, c. 1, Sch. A.

³⁶ Like in *Dunmore* and *Health Services*, the legislation was also challenged pursuant to s. 15(1) of the Charter.

³⁷ [2006] O.J. No. 45, 79 O.R. (3d) 219 (Ont. S.C.J.) [hereinafter “*Fraser SCJ*”].

a right to collectively bargain.³⁸ There was nothing in the AEPA that prevented a union from organizing agricultural workers into an employee association, which was what he viewed as the core protection granted by *Dunmore*. As summarized by the Supreme Court, he held that the statutory protections:

... confer the power to organize (s. 1); protection against denial of access to property (s. 7); protection against employer interference with trade union activity (s. 8); protection against discrimination (s. 9); protection against intimidation and coercion (s. 10); protection against alteration of working conditions during the certification process (ss. 9-10); protection against coercion of witnesses (s. 10); and removal of Board notices (s. 10).³⁹

In a finding that would be significant in the Supreme Court, Farley J. held that the unions had not given the Tribunal the opportunity to address any alleged abuses under the Act.⁴⁰

The Court of Appeal, applying *Health Services*, found a violation of section 2(d) that was not saved under section 1. The Court of Appeal, *per* Winkler C.J.O., held that the claimants had not established that the AEPA failed to protect their right to organize.⁴¹ However, the Court of Appeal concluded that the AEPA was constitutionally infirm in that it did not protect a right to collectively bargain. As the Court said:

If legislation is to provide for meaningful collective bargaining, it must go further than simply stating the principle and must include provisions that ensure that the right can be realized. At a minimum, the following statutory protections are required to enable agricultural workers to exercise their right to bargain collectively in a meaningful way: (1) a statutory duty to bargain in good faith; (2) statutory recognition of the principles of exclusivity and majoritarianism; and (3) a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements.⁴²

Chief Justice Winkler's reasons in support of each principle were cogent, assuming that a right to collectively bargain is protected by section 2(d). For example, with respect to the duty to bargain in good

³⁸ *Id.*, at para. 29.

³⁹ *Fraser*, *supra*, note 3, at para. 14.

⁴⁰ *Fraser SCJ*, *supra*, note 37, at para. 28.

⁴¹ [2008] O.J. No. 4543, 2008 ONCA 760, at paras. 98-100 (Ont. C.A.) [hereinafter "*Fraser OCA*"].

⁴² *Id.*, at para. 80.

faith, there was ample language in *Health Services* itself that supported this conclusion:

- The state “must not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith”.⁴³
- The state must “preserve a process of consultation and good faith negotiation”.⁴⁴
- The duty to negotiate in good faith “lies at the heart of collective bargaining”.⁴⁵

On the subject of dispute resolution, Winkler C.J.O. was of the view that “the bargaining process is jeopardized if the parties have nothing to which they can resort in the face of fruitless bargaining”, and that there must also be a process to resolve disputes as to the interpretation of the agreement, as “[i]f an employer is able to unilaterally interpret the agreement that results from bargaining, that bargaining might as well have never occurred.”⁴⁶

This was not raised directly in *Health Services*, but certainly flowed as a logical corollary. If section 2(d) could be breached where government unilaterally took certain issues off the bargaining table, surely the same could be true where the Court had already held that the exercise of the section 2(d) right would be frustrated without statutory protection, and the statute provided no dispute resolution mechanism. How, otherwise, would the employees ensure that their right to engage in “meaningful” collective bargaining was not frustrated?

Chief Justice Winkler concluded that majoritarian exclusivity⁴⁷ was also constitutionally required, having regard to similar factors employed by the Supreme Court in recognizing a right to collective bargaining. Majoritarian exclusivity has historically been a part of Canadian labour relations. He also accepted that exclusivity furthers the Charter values of

⁴³ *Health Services, supra*, note 1, at para. 90.

⁴⁴ *Id.*, at para. 94.

⁴⁵ *Id.*, at paras. 98-107.

⁴⁶ *Fraser OCA, supra*, note 41, at paras. 82-83.

⁴⁷ Majoritarian exclusivity refers to the system of labour relations whereby once a trade union has acquired bargaining rights for a particular bargaining unit, it has exclusive representational rights for all members of that unit, whether or not they are members of that union. See *Fraser OCA, id.*, at paras. 86-90.

granting employees an effective voice in negotiating with their employers. Finally, exclusivity has been shown to be both workable and fair for employees and employers. It ensured that employers would negotiate with the employees, and not have to negotiate with an unlimited number of potentially competing organizations.⁴⁸

When the case reached the Supreme Court, the Court was deeply divided on the issue, but a five-judge majority found no violation of section 2(d).⁴⁹ Notwithstanding the ringing endorsement of a right to collective bargaining in *Health Services*, the Court now described the right to a process of collective bargaining as “derivative” of the right to associate:

... what s. 2(d) protects is the right to associate to achieve collective goals. Laws or government action that make it impossible to achieve collective goals have the effect of limiting freedom of association, by making it pointless. It is in this derivative sense that s. 2(d) protects a right to collective bargaining However, no particular type of bargaining is protected. In every case, the question is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals.⁵⁰

In the majority’s view, *Health Services* did not require that the legislature provide any of the elements described by the Court of Appeal. So long as the AEPA provided agricultural workers with a process through which they could make representations to their employers on important workplace issues, and the employers were required to listen to those representations in good faith, no violation of section 2(d) would be found. The Court was willing to read into the AEPA a requirement that the employer listen to the representations in good faith, and held that the claimants had not attempted to make use of the Tribunal process established by the AEPA.⁵¹

This conception of the right to collectively bargain was much closer to *Dunmore* than *Health Services*. It appeared to recognize that the core of the section 2(d) right is an ability to come together in association. In the labour context, that most obviously includes a right to organize. Although

⁴⁸ *Fraser OCA, id.*, at paras. 87-93.

⁴⁹ Justice Rothstein (Charron J., concurring) held in a lengthy concurrence that the Ontario Court of Appeal had correctly interpreted *Health Services*, but that *Health Services* should be overruled. Justice Abella dissented, and would have upheld the Ontario Court of Appeal. Justice Deschamps would have restored the decision of Farley J., for separate reasons.

⁵⁰ *Fraser, supra*, note 3, at para. 46.

⁵¹ *Id.*, at paras. 109-112.

I think that this is closer to a consistent reading of the section 2(d) right (in that it does not favour particular types of organizations), it is not consistent with the recognition of a constitutional right to collectively bargain in *Health Services*.

3. Irreconcilable Differences — *Health Services* and *Fraser* in the Courts, 2011-2015

In the wake of *Fraser*, Canadian courts were presented with two decisions that were very difficult to reconcile. On the one hand, *Health Services* affirmed that section 2(d) protected a right to collectively bargain. On the other hand, when dealing with a vulnerable category of workers in *Fraser*, the Court held that the full panoply of *Wagner Act* protections was not constitutionally required.

Predictably, this resulted in inconsistent decisions. Some cases matched up nicely with *Health Services*, in the sense that they involved challenges to the structure of collective bargaining in various sectors of the economy. Thus, in *CSN c. Québec (Procureur général)*, the trial judge struck down a law providing for the reorganization of Quebec's social services sector, which legislatively determined certain bargaining units, and made other amendments to the negotiation process for these employees.⁵² In *Saskatchewan Federation of Labour v. Saskatchewan*,⁵³ the Court of Queen's Bench recognized a right to strike. In *Mounted Police Assn. v. Canada*,⁵⁴ the Ontario Superior Court found that the labour relations regime applicable to RCMP officers breached section 2(d).

A second category of these cases involved trial level challenges to expenditure restraint legislation enacted by the federal government in the wake of the 2008 financial crisis. For example, the Superior Court of Justice in Ontario found that lawyers working for the federal Department of Justice had established a breach of section 2(d) because the *Expenditure Restraint Act*⁵⁵ prevented meaningful negotiation over salaries.⁵⁶ Similarly,

⁵² [2007] J.Q. no 13421, [2008] R.J.D.T. 87 (Que. S.C.), revd [2011] J.Q. no. 8444, 2011 QCCA 1247 (Que. C.A.), leave to appeal refused [2011] S.C.C.A. No. 424 (S.C.C.).

⁵³ [2012] S.J. No. 49, 2012 SKQB 62 (Sask. Q.B.), revd [2013] S.J. No. 235, 2013 SKCA 43 (Sask. C.A.), revd [2015] S.C.J. No. 4, [2015] 1 S.C.R. 245 (S.C.C.).

⁵⁴ [2009] O.J. No. 1352, 96 O.R. (3d) 20 (Ont. S.C.J.), revd [2012] O.J. No. 2420, 2012 ONCA 363 (Ont. C.A.), revd [2015] S.C.J. No. 1, [2015] 1 S.C.R. 3 (S.C.C.).

⁵⁵ S.C. 2009 c. 2, s. 393.

⁵⁶ *Association of Justice Counsel v. Canada (Attorney General)*, [2011] O.J. No. 4873, 108 O.R. (3d) 516 (Ont. S.C.J.), revd [2012] O.J. No. 3710, 2012 ONCA 530 (Ont. C.A.), leave to appeal refused [2012] S.C.C.A. No. 430 (S.C.C.) (discussed *infra*).

in *Association des réalisateurs c. Canada (Procureur général)*⁵⁷ the Quebec Superior Court held that provisions of the *Expenditure Restraint Act* that overrode wage terms of pre-existing collective agreements between the CBC and two unions and prevented further negotiation on wages for the period of the legislation violated section 2(d). On the other hand, the British Columbia Supreme Court held in *Dockyard Trades* that no infringement occurred when the *Expenditure Restraint Act* set aside an arbitral award, as the arbitration provisions were not the result of a process of collective bargaining.⁵⁸ In *Meredith v. Canada (Attorney General)*,⁵⁹ the trial division of the Federal Court found that the *Expenditure Restraint Act* infringed the rights of RCMP officers when it set aside a previously agreed-to pay increase.

With the exception of *Dockyard Trades*, violations of section 2(d) were found where the government was found to have set aside important terms of collective agreements, or rendered bargaining on these issues meaningless by taking particular issues off the table. This would appear to be exactly the situation contemplated by *Health Services*.

However, after *Fraser*, Courts of Appeal generally came to the opposite conclusion. Thus in *Association of Justice Counsel*, the Ontario Court of Appeal found that no section 2(d) violation had been established, as the parties had been able to engage in a lengthy process of collective bargaining prior to the *Expenditure Restraint Act* coming into force.⁶⁰ In *Dockyard Trades*, the British Columbia Court of Appeal held that no section 2(d) violation had been established. Although the cancellation of a wage increase was important to the workers, it did not nullify other aspects of the collective bargaining relationship, and permitted future bargaining

⁵⁷ [2012] J.Q. no 6770, 2012 QCCS 3223 (Que. S.C.), rev'd [2014] J.Q. no 4930, 2014 QCCA 1068 (Que. C.A.), application for leave to appeal remanded [2015] S.C.C.A. No. 351 (S.C.C.) (discussed *infra*).

⁵⁸ *Federal Government Dockyard Trades and Labour Council v. Canada (Attorney General)*, [2011] B.C.J. No. 1697, 2011 BCSC 1210 (B.C.S.C.), aff'd [2013] B.C.J. No. 1802, 2013 BCCA 371 (B.C.C.A.), application for leave to appeal remanded [2015] S.C.C.A. No. 404 (S.C.C.) (discussed *infra*). The trial judge's decision that the constitutional analysis depends entirely on whether the agreement was a result of arbitration instead of a process of negotiation was specifically rejected by the Court of Appeal, although the Court of Appeal agreed in the result. Having regard to the fact that the process of collective bargaining available to the workers in *Dockyard Trades* included arbitration, it seems to me that little if anything should turn on the question of whether the award was the result of negotiation only, or negotiation followed by arbitration.

⁵⁹ [2011] F.C.J. No. 948, 2011 FC 735 (F.C.), rev'd [2013] F.C.J. No. 465, 2013 FCA 112 (F.C.A.), aff'd [2015] S.C.J. No. 2, [2015] 1 S.C.R. 125 (S.C.C.).

⁶⁰ [2012] O.J. No. 3710, at para. 41, 2012 ONCA 530 (Ont. C.A.), leave to appeal refused [2012] S.C.C.A. No. 430 (S.C.C.).

on this and other issues.⁶¹ And in *Meredith*, the Federal Court of Appeal found no violation of section 2(d), as the RCMP officers were still able to act collectively to achieve workplace goals.⁶²

Governments also successfully defended claims that did not involve expenditure restraint after *Fraser*. The Quebec Court of Appeal found no section 2(d) violation with respect to the reorganization of bargaining units in *CSN v. Québec*.⁶³ The Saskatchewan Court of Appeal held that section 2(d) did not protect a right to strike in *Saskatchewan Federation of Labour v. Saskatchewan*, although part of that decision can be explained by that court's respect for the doctrine of *stare decisis*.⁶⁴ And in *Mounted Police Assn. of Ontario*, the Ontario Court of Appeal held that the officers had not established a substantial interference with their ability to associate.⁶⁵

Prior to 2015, it therefore seemed that the courts had retreated from an expansive view of the right to collectively bargain, and that a claimant would have to show that the state action interfering with collective bargaining made it effectively impossible to associate.

IV. THE NEW TRILOGY

This all changed again in 2015, when the Supreme Court had the opportunity to address three of the cases discussed above: *Saskatchewan Federation of Labour*, where the Court recognized a constitutional right to strike; *Mounted Police Assn. of Ontario v. Canada*, where the Court effectively overruled *Delisle* and struck down the labour relations regime applicable to RCMP officers; and *Meredith v. Canada*, where the Court found that expenditure restraint legislation did not infringe the section 2(d) rights of RCMP officers (and did not require section 1 justification).

⁶¹ [2013] B.C.J. No. 1802, at paras. 52-54, 2013 BCCA 371 (B.C.C.A.).

⁶² [2013] F.C.J. No. 465, 2013 FCA 112 (F.C.A.), aff'd [2015] S.C.J. No. 2, [2015] 1 S.C.R. 125 (S.C.C.).

⁶³ [2014] J.Q. no 4930, 2014 QCCA 1068 (Que. C.A.), application for leave to appeal remanded [2015] S.C.C.A. No. 351 (S.C.C.).

⁶⁴ [2013] S.J. No. 235, 2013 SKCA 43 (Sask. C.A.), rev'd [2015] S.C.J. No. 4, [2015] 1 S.C.R. 245 (S.C.C.).

⁶⁵ [2012] O.J. No. 2420, at paras. 119-120, 2012 ONCA 363 (Ont. C.A.), rev'd [2015] S.C.J. No. 1, [2015] 1 S.C.R. 3 (S.C.C.).

1. *Mounted Police Assn. of Ontario v. Canada (Attorney General)* (“MPAO”)

In *MPAO*, the Court had its first opportunity since *Health Services* to consider a challenge to the labour relations regime applicable to a segment of the public sector. It was also the Court’s first chance to consider and attempt to reconcile *Health Services* and *Fraser*. While not overruling *Fraser*, the Court appears to have limited its scope in important ways.

RCMP officers have always been excluded from collective bargaining under the *Public Service Labour Relations Act*⁶⁶ and its predecessors. Indeed, the evidence showed that the purpose of excluding the RCMP officers from collective bargaining was to make it more difficult for them to associate, so as to avoid a concern about “divided loyalties”.⁶⁷ Instead, the RCMP had put in place a separate employee relations regime for RCMP officers, the Staff Relations Representative Program (“SRRP”). This program was not independent of the command structure of the RCMP, but did make representations to management on workplace issues. In the Court’s view, however, the SRRP was more accurately described as “an internal human relations scheme imposed on RCMP members by management”.⁶⁸

RCMP members had formed voluntary associations (including the Mounted Police Association of Ontario). These organizations had unsuccessfully challenged their exclusion from the PSLRA in *Delisle*. After *Health Services*, the same organizations again challenged the SRRP. As noted above, the Associations were successful at the trial level, but were unsuccessful on appeal.

The Supreme Court in *MPAO* held that the exclusion of RCMP officers from the PSLRA, and the imposition of the SRRP, infringed section 2(d) in both purpose⁶⁹ and effect. The Court had little trouble concluding that the effect of the SRRP was to undermine collective bargaining, and found an infringement of section 2(d) on this basis. Of particular concern to the Court was the SRRP’s lack of independence

⁶⁶ S.C. 2003 c. 22, s. 2 [hereinafter “PSLRA”].

⁶⁷ *MPAO*, *supra*, note 4, at paras. 17-21. This history is canvassed in *Delisle v. Canada (Deputy Attorney General)*, [1999] S.C.J. No. 43, at paras. 92-107, [1999] 2 S.C.R. 989 (S.C.C.), *per* Iacobucci and Cory JJ., dissenting.

⁶⁸ *MPAO*, *supra*, note 4, at para. 118.

⁶⁹ The purpose of excluding officers from organizing had the express goal of preventing the officers from associating for the purpose of engaging in collective bargaining. The imposition of the SRRP was therefore invalid on this basis alone: *MPAO*, *id.*, at para. 110.

from RCMP management.⁷⁰ The Court found that these infringements were not justified under section 1. In my view, this reasoning rested largely on the Court's conclusion that there was no good reason to exclude police officers from collective bargaining, having regard to the fact that other police services engage in collective bargaining.⁷¹

The Court could likely have concluded that the SRRP did not sufficiently ensure a process of collective bargaining based on *Health Services* and *Fraser*. There was certainly an argument that the associations could meet the *Fraser* requirement that it was "effectively impossible" for the employees to associate for the purpose of engaging in collective bargaining because of the lack of independence from management. However, the Court instead took this opportunity to again review at length the nature of the section 2(d) protection of collective bargaining. The Court explicitly distanced itself from *Fraser* in two ways. First, the test for infringement is not whether government action makes it effectively impossible to associate; rather, the claimant must show that government action substantially interferes with freedom of association.⁷² Second, the right to collectively bargain is not "derivative" of the right to associate; it is a necessary precondition to the meaningful exercise of this right.⁷³ It would be preferable if the Court explicitly overturned *Fraser* on these points rather than indicating that it was clarifying *Fraser*. For example, it would appear obvious (as pointed out by Rothstein J. in dissent in *MPAO*) that the Court in *Fraser* chose the words "effective impossibility" with care.⁷⁴

In any event, the rights protected under the approach advocated by the Court were summarized as:

... (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and

⁷⁰ *MPAO, id.*, at paras. 116-118. Although the Court considered both the purpose and effect of the imposition of the SRRP, it considered only the purpose of the exclusion from the PSLRA. This distinction seems arbitrary, given that, as the Court found, the imposition of the SRRP operated in tandem with the exclusion from the PSLRA to prevent the members from engaging in meaningful collective bargaining. One explanation for this seeming inconsistency may be that the Court was being cautious in not finding that the effect of the exclusion from the PSLRA was to infringe s. 2(d), so as to not give the impression that the result of this case is the mandatory inclusion of RCMP officers in the PSLRA. See para. 137.

⁷¹ *MPAO, id.*, at para. 147; see also *MPAO* (Ont. S.C.J.), *supra*, note 56, at paras. 95-98, finding that the RCMP is the only police force in Canada without a collective agreement.

⁷² *MPAO, supra*, note 4, at paras. 74-75.

⁷³ *MPAO, id.*, at paras. 78-79.

⁷⁴ *MPAO, id.*, at paras. 213-217, *per* Rothstein J., dissenting.

(3) the right to join with others to meet on more equal terms the power and strength of other groups or entities.⁷⁵

In order to give meaning to these rights, employees must have access to a meaningful process of labour relations that allows them to pursue workplace goals in concert. According to the Court, the “essential features” of such a process are choice and independence. In the case of choice, the basic question is whether employees have sufficient input into the selection of their collective goals.⁷⁶ Not only must employees have choice, their associations must be independent of management. The degree of independence required is that the interests of the association must align with the interests of the membership.⁷⁷

2. *Saskatchewan Federation of Labour v. Saskatchewan*

In the wake of a number of public sector strikes, Saskatchewan enacted the *Public Service Essential Services Act*⁷⁸ (“PSESA”) and the *Trade Union Amendment Act, 2008*.⁷⁹ The PSESA required public employers and unions to negotiate an essential services agreement, and prohibited any “essential services employee” from participating in a work stoppage against their employer. Both “essential services” and “public employer” were broadly defined. Employers could unilaterally determine who should be designated as an essential services employee, in the event that no agreement was reached. The Labour Relations Board had a limited power to review the number of employees required to work in a particular classification during a strike, but had no power “to review whether any particular service is essential, which classifications involve the delivery of genuinely essential services, or whether specific employees named by the employer to work during the strike have been reasonably selected”.⁸⁰

As I have already noted, the Court of Queen’s Bench had found that the PSESA infringed section 2(d) of the Charter, on the basis that *Health Services* supported a right to strike.⁸¹ The Court of Appeal allowed the

⁷⁵ *MPAO, id.*, at para. 66.

⁷⁶ *MPAO, id.*, at paras. 85-87.

⁷⁷ *MPAO, id.*, at para. 88.

⁷⁸ S.S. 2008, c. P-42.2.

⁷⁹ S.S. 2008, c. 26.

⁸⁰ *SFL, supra*, note 5, at para. 13.

⁸¹ [2012] S.J. No. 49, 2012 SKQB 62 (Sask. Q.B.). The trial judge dismissed the challenge to the *Trade Union Amendment Act*, which introduced changes to the certification and decertification processes and permitted broader employer communication to employees. See paras. 223-279.

government appeal, holding that the Supreme Court had not yet reversed its previous jurisprudence rejecting a constitutional right to strike. However, it is worth noting that the Court of Appeal was also alive to a potential issue flowing from the case. As the Court noted, “workers have always had the root capacity to collectively down their tools in an effort to extract concessions from their employers”.⁸² What was sought in this litigation was not the “pre-statutory” right, as the Court of Appeal called it, but rather the modern right to strike as it generally exists in Canadian labour relations statutes:

... SFL and the unions do not wish to return to a world where employees can withdraw their labour in concert, but where employers are not obliged to recognize unions, where union representation is based on something other than exclusive majoritarianism, where employers are not required to bargain, or to bargain in good faith, where employees who participate in strikes can be dismissed for breach of their employment contracts and so forth. The reality is that, in the year 2013, the “right to strike” which SFL and the unions seek to protect is deeply integrated into, and in many ways can be seen as a function of, a specific statutory system.⁸³

In the Supreme Court, the majority was willing to overlook these potential issues, and recognize the right to strike in sweeping terms. Undertaking an analysis similar to that in *Health Services*, the Court looked to the legal history of strike action, its centrality to the *Wagner Act* model and internationally, and its “crucial role in a meaningful process of collective bargaining”. The test in each case will be “whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with collective bargaining”.⁸⁴ On the facts of this case, the Court found that the PSESA infringed section 2(d), as the employees were prohibited from engaging in any work stoppage as part of a bargaining process. Interestingly, the majority was of the view that alternative dispute resolution mechanisms (such as binding arbitration) should be considered under section 1, rather than as part of the section 2(d) analysis.⁸⁵

⁸² [2013] S.J. No. 235, at para. 62, 2013 SKCA 43 (Sask. C.A.).

⁸³ *Id.*, at para. 63.

⁸⁴ *SFL, supra*, note 5, at para. 78.

⁸⁵ *SFL, id.*, at para. 60. Again, the Court referred approvingly to the dissent of Dickson C.J.C. in the *Alberta Reference, supra*, note 1, on this point.

On the question of section 1, the Court accepted that the provision of “essential services” was pressing and substantial, and that the legislation met the rational connection test.⁸⁶ However, it was not minimally impairing, as there was no evidence that unilateral decision-making (as opposed to a collaborative model) was required. Further, any employee designated as “essential” would have to perform non-essential work in addition to the truly essential work.⁸⁷ Finally, the lack of access to an impartial dispute resolution mechanism was fatal to the government argument, as the Court was of the view that it left the employees without any means to counter the bargaining power of the employer.⁸⁸

3. *Meredith v. Canada (Attorney General)*

The final case in the 2015 trilogy is an odd fit. Unlike *MPAO* and *SFL*, *Meredith* did not involve a challenge to a model of labour relations imposed by government. Rather, it was the first (and so far only)⁸⁹ case arising out of the *Expenditure Restraint Act* to reach the Supreme Court.

Recall that *Meredith* was brought by RCMP officers who were members of the SRRP. They claimed that Treasury Board’s decision to set aside a scheduled wage increase for their members violated section 2(d), and argued that pursuant to *Health Services*, this amounted to the unilateral nullification of an important term of a collective agreement. The case was heard together with *MPAO*, although the issues raised were very different. On the one hand, *MPAO* challenged the structure under which employees made representations, in which the claimants argued that the entire SRRP was unconstitutional. On the other hand, *Meredith* was a challenge where the participants in the SRRP wished to protect what they viewed as the fruits of that process. The main thing they had in common was that both involved RCMP officers.

Having found the SRRP process unconstitutional in *MPAO*, the Court in *Meredith* nonetheless held that the SRRP process could attract Charter protection.⁹⁰ As the Court put it, the question was whether the *Expenditure*

⁸⁶ *SFL, id.*, at para. 79.

⁸⁷ *SFL, id.*, at paras. 90-91.

⁸⁸ *SFL, id.*, at paras. 92-95.

⁸⁹ Leave to appeal was refused in the *Association of Justice Counsel* case discussed, *supra*, note 56: [2012] S.C.C.A. No. 430 (S.C.C.).

⁹⁰ *Meredith, supra*, note 6, at para. 4.

Restraint Act “substantially interfered with the existing Pay Council process, so as to infringe the appellants’ freedom of association”.⁹¹

Although the *Expenditure Restraint Act* had the effect of setting aside a scheduled wage increase that had been accepted by Treasury Board, the Court found no violation of section 2(d). It appears that three factors underlay this conclusion: first, unlike in *Health Services*, where the legislation radically altered significant terms of collective agreements, the Act capped wages at the “going rate” achieved in other federal agreements, thus reflecting an outcome consistent with actual bargaining processes (although not, of course, the bargaining process engaged in by the claimants). Further, the claimants were able to consult on other compensation related matters, either past or future.⁹² Finally, the Act left room for the RCMP members to negotiate additional allowances, and the record showed that they had successfully done so.⁹³

As I argue below, *Meredith* is hard to reconcile with *MPAO* and *SFL*, as the Court spends only three paragraphs discussing why the *Expenditure Restraint Act* did not infringe section 2(d).

V. IMPLICATIONS OF THE 2015 TRILOGY

1. *MPAO* and *SFL*: More Questions than Answers?

SFL and *MPAO* make a certain amount of sense when read together. In *MPAO*, the Court articulates an expansive view of section 2(d) that protects the ability of employees to come together, and to even the playing field as between employees and employers. A right to strike, as the key economic weapon available to employees in a bargaining process, fits with this view of section 2(d).

One question left open by *SFL* is the nature of the section 2(d) right to strike. As pointed out by the Saskatchewan Court of Appeal, the right to strike sought in *SFL* is not merely the right to withdraw services in concert. It would seem obvious that section 2(d) protects this right, since this is basically a right not to be compelled to work. Limitations on an employee’s right to withdraw services would require justification under section 1, presumably in a situation where serious harm would result

⁹¹ *Id.*, at para. 25.

⁹² *Id.*, at para. 28.

⁹³ *Id.*, at para. 29.

from an immediate withdrawal of services. In the case before the Court, essential services employees were prohibited from engaging in any work stoppage, upon penalty of conviction. The Court could therefore have held that the scope of the right to strike was limited to cases such as *SFL* itself, where employees are prohibited from ceasing to work.⁹⁴

It is, however, quite different to say that the constitutional right to strike includes the statutory protections typically offered in modern labour relations statutes (including the important right not to have the employer treat the fact of a strike as an abandonment or breach of the employment relationship).⁹⁵ The Court is certainly correct when it finds in *SFL* that strikes long pre-date the enactment of statutory labour relations regimes.⁹⁶ While strikes themselves may be fairly characterized as existing prior to their regulation by labour relations statutes, it is much more difficult to argue that the statutory protections for employees engaged in a strike fall into the same category. The Court's failure to draw this particular distinction (between a right to withdraw services in concert, and the right to do so with certain minimum protections) leaves a great deal of undesirable uncertainty for both unions and employers. If the Court were recognizing only a limited right to withdraw services, it would be better to say so. Such an approach would reconcile *SFL* with *Fraser*, where striking was neither protected nor prohibited by the legislation upheld by the Court.

A second question is the extent of the latitude left by the Court in terms of limits on the right to strike. The *Wagner Act* model itself imposes significant limits on the right to strike, including voting requirements, timing requirements, and restrictions on the conduct of a strike itself. Do these all require justification under section 1? I think that the answer is likely "no", given what I see as the Court's preference for the *Wagner Act* model in recent cases. The Court has also left the door open when it finds that the PSESA infringes section 2(d) "because it prevents designated employees from engaging in *any* work stoppage as part of the bargaining process".⁹⁷ The Court does not answer the question of whether or not legislation that prevents employees from engaging in

⁹⁴ PSESA, s. 20; *Trade Union Act*, R.S.S. 1978, c. T-17, s. (1)(k.1) ("strike") (repealed and replaced by *Saskatchewan Employment Act*, S.S. 2013, c. S-15.1).

⁹⁵ See, e.g., *Labour Relations Act*, 1995, S.O. 1995 c. 1, Sch. A, s. 1(2): "For the purposes of this Act, no person shall be deemed to have ceased to be an employee by reason only of the person's ceasing to work for the person's employer as the result of a lock-out or strike ..."

⁹⁶ *SFL*, *supra*, note 5, at paras. 38-41.

⁹⁷ *Id.*, at para. 78 (emphasis in original).

“many” work stoppages, or limits the times when these work stoppages may occur (*i.e.*, every Canadian labour relations statute) also infringe section 2(d) and require justification.

The Court’s emphasis in *MPAO* on independence from management is understandable, and I take no issue with this part of the Court’s reasoning. However, I have more difficulty with the Court’s use of “choice” as a touchstone for section 2(d). In the typical *Wagner Act* model, one aspect of choice is the ability of employees to be able to decertify their union.⁹⁸ However, the Court also comments favourably on the “designated bargaining model” in place in Ontario’s education sector, where employees choose their representatives, but their bargaining agent is designated by statute.⁹⁹ The Court comments that these employees retain control over the selection of workplace goals, although they lack some of the other choices available in the *Wagner Act* model. However, the Court also says later that, “If employees cannot choose the voice that speaks on their behalf, that voice is unlikely to speak up for their interests. It is precisely employee choice of representative that guarantees a representative voice.”¹⁰⁰ In *MPAO* itself, the members of the RCMP were able to elect the SRRs, although they (like others in designated bargaining regimes) lack the ability to “to join associations that are of their choosing and independent of management, to advance their interests”.¹⁰¹ If “choice” only means that employee representatives must be able to determine which goals are the most important, these sentences are unnecessary and create further uncertainty.

The Court’s approach to minority or dissenting union members is also unclear. For example, the respondents in *MPAO* argued that a broad view of section 2(d) would require an employer to recognize and bargain with any association of employees. The Court responded that:

Freedom of association requires, among other things, that no government process can substantially interfere with the autonomy of employees in creating or joining associations of their own choosing, even if in so doing they displace an existing association. It also requires that the employer consider employees’ representations in good faith, and engage in meaningful discussion with them. But s. 2(d) does not

⁹⁸ As recognized by the Court in *MPAO*, *supra*, note 4, at para. 94.

⁹⁹ *MPAO*, *id.*, at para. 95.

¹⁰⁰ *Id.*, at para. 101.

¹⁰¹ *Id.*, at para. 112 (emphasis added); see also the trial decision of MacDonnell J. for a discussion of the election and organization of the SRRP: *MPAO* (Ont. S.C.J.), *supra*, note 56, at paras. 14-19, 28-31.

require a process whereby every association will ultimately gain the recognition it seeks As we said, s. 2(d) can also accommodate a model based on majoritarianism and exclusivity (such as the *Wagner Act* model) that imposes restrictions on individual rights to pursue collective goals.¹⁰²

The Court avoids the question of whether the government employer (1) may listen to the representations of only the majority employee group; or (2) must listen to representations from all groups (in the sense that employees wishing to associate with a minority union also have rights under section 2(d) that must be respected); or (3) is prohibited from entertaining these representations (because of the principle of majoritarian exclusivity). The Court says in *MPAO* that majoritarian exclusivity passes constitutional muster, but what of the other two options? Do they require section 1 justification?

It seems to me to be no answer to say that a minority association “may not gain the recognition it seeks”. If the right to associate for the purpose of collectively bargaining is a constitutional right that exists independent of labour statutes, these employees would also have section 2(d) rights to collectively bargain and have their representations considered in good faith. The Court could have held that, while the *Wagner Act* model may infringe on these employees’ rights to collectively bargain, such an infringement is justified under section 1. But it did not do so. The conclusion that only those employees represented by the majority bargaining unit have a right to associate and have their representations considered in good faith does not accord with the Court’s other recent pronouncements on section 2(d). Presumably, the Court will have to address this issue in coming cases.

Finally, what are we to make of the negative aspect of section 2(d)? The Court has previously held that section 2(d) protects a right not to associate.¹⁰³ However, the Court has also rejected claims that section 2(d) is violated by virtue of the fact that even non-members of a union may be required to pay dues to the union, on the theory that these members also get the benefit of the activities of the union. Is there a right not to collectively bargain? The right not to associate was decided in a legal landscape where there was no constitutional right to collectively bargain,

¹⁰² *MPAO, id.*, at para. 98.

¹⁰³ *Lavigne v. Ontario Public Service Employees Union*, [1991] S.C.J. No. 52, [1991] 2 S.C.R. 211 (S.C.C.); *R. v. Advance Cutting & Coring Ltd.*, [2001] S.C.J. No. 68, 2001 SCC 70 (S.C.C.); *Bernard v. Canada (Attorney General)*, [2014] S.C.J. No. 13, at paras. 37-39, 2014 SCC 13 (S.C.C.).

and no constitutional right to strike. If those employees have a constitutional right not to associate with their fellow employees, and the Court has now recognized a right to collectively bargain as equally important to the right to association, should not dissenting employees also have the right not to collectively bargain? Put differently, if the right to come together and bargain collectively is so fundamental to the section 2(d) right, and it was sufficiently important that some employees not be required to join unions that a right not to associate found protection in the Charter, should not the right of dissenting employees not to collectively bargain also find constitutional protection? These issues were not raised by the 2015 trilogy, and these cases provide little guidance on whether the Supreme Court would be willing to take this next step.

2. Expenditure Restraint Cases — What about *Meredith*?

I have left this issue to the end, as it is the most difficult to reconcile with the existing case law. On the one hand, the Court has affirmed that section 2(d) protects both a right to strike, and a right to engage in a process of collective bargaining through an independent representative chosen by the employees. However, when a group of employees who have no right to strike actually reach an agreement, and that agreement is unilaterally set aside, the Court finds no violation of section 2(d), in part based on agreements reached with other bargaining agents.

One way to attempt to reconcile these cases is to focus on the difference between substance and outcome. While the Court has taken the opportunity to provide constitutional protection to elements of the *Wagner Act* model, it may be that it remains hesitant about guaranteeing the substantive outcomes of collective bargaining. This issue was not really raised in *Health Services*, since the Court was able to say that it was providing a process through which the employees could negotiate. The parties were then encouraged to go back and bargain. It is, perhaps, quite a different matter to actually provide a constitutional guarantee that the outcome of a particular process may not be set aside without justification.

Of course, the Court in *Meredith* did not have to confront the extent to which legislatively overriding the fruits of the SRRP might impact on future bargaining under the SRRP. Having struck down the SRRP in *MPAO*, the Court did not need to inquire as to whether future bargaining under the SRRP could still be meaningful in light of its conclusion in *Meredith*.

The same is not true for the other *Expenditure Restraint Act* cases, where the courts will have to consider the effect, if any, of the Act in respect of ongoing collective bargaining relationships. Shortly after the release of *Meredith* and *MPAO*, the Court remitted *Dockyard Trades* and *Association des réalisateurs* for disposition in accordance with *Meredith* and *MPAO*. On its face, this is somewhat surprising, as the *Expenditure Restraint Act* was upheld in *Meredith*, and also in both Court of Appeal cases. The fact that these two cases (as well as a pending challenge brought in the Ontario Court of Appeal¹⁰⁴) will be reheard in the Courts of Appeal suggests that the extent to which government may impose expenditure restraint without infringing section 2(d), or whether such restraint may be justified, remains a live issue.

VI. CONCLUSION

It will be clear by this point that I have significant difficulty with the analysis undertaken by the Supreme Court in the 2015 trilogy. In my view, by protecting such a broad conception of a right to collectively bargain, the Court is inevitably weighing in on matters of labour policy. The question of what other models that deviate from the *Wagner Act* may be constitutionally acceptable will have to be determined. Similarly, the extent to which setting aside agreed-upon collective agreements interferes with section 2(d) will require the Court to confront head on the issues it avoided in *Meredith*, requiring the Court to consider the extent to which any such interference may be justified under section 1, and on what basis.

¹⁰⁴ This case involves a challenge by the Professional Institute of the Public Service of Canada and the Public Service Alliance of Canada to the *Expenditure Restraint Act*. The constitutional challenge was dismissed by Lederer J. (*Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, [2014] O.J. No. 732, 2014 ONSC 965 (Ont. S.C.J.)), but the appeal was put on hold pending the outcome of *Meredith* and *MPAO*.

