The Supreme Court of Canada's Decision in *Fraser*: Stepping Forward, Backward or Sideways?

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1. INTRODUCTION

This paper addresses, in a preliminary way, some of the doctrinal and practical implications of the Supreme Court of Canada's *Fraser* decision.[1] In Part 2, I begin by considering the immediate ramifications of that decision for farm workers. Part 3 offers an overview of the holding in *Fraser* and what impact it may have on pending and future litigation, including challenges to wage control legislation, to restrictions on the scope of bargaining, to legislative alterations of bargaining rights and bargaining units, to other statutory exclusions, and to restrictions on the right to strike. I conclude in Part 4 with an outline of some of the underlying considerations which may have prompted the majority's approach to the freedom of association issues raised in *Fraser*, and what that may tell us about the prospects for future litigation on freedom of association.

2. IMPLICATIONS FOR FARM WORKERS AND OTHER EXCLUDED GROUPS

The most immediate implication of the Court's decision is that we can forget about meaningful collective bargaining for farm workers. Depending on your political and economic orientation and your sense of social justice, that may be a good thing or a bad thing. My own view is clear: from a political and moral perspective, there can be

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1 *Ontario (AG) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3.

no real debate about the social injustice of excluding agricultural workers — one of the most marginalized and vulnerable groups of workers in our economy — from the basic and virtually universal legislative scheme that makes collective bargaining both legally and practically possible in Canada. By ignoring the lived experience, history, and social and economic background of agricultural workers, and by urging and indeed requiring them to utilize a statutory process (the *Agricultural Employees Protection Act*, or AEPA) which falls far short of what is required for meaningful collective bargaining in Canada, the Court has left agricultural workers to face a judicially-imposed Catch-22. Those workers and the unions which represent them will be understandably reluctant to expend time, energy, risk and resources using what they know to be an inadequate and inferior statutory scheme. Yet, unless they do so, they will be met with the response that the scheme has not been adequately tested and shown to be wanting.

I will leave mostly to others the task of dissecting and explaining the majority's claim that the AEPA, as rewritten by the majority to include some kind of good faith bargaining duty,[2] will provide agricultural workers with access to meaningful collective bargaining. I will simply note my astonishment at the majority's conclusion that it is too early,[3] after almost 70 years of exclusion from basic legislative collective bargaining protections, to assess whether Ontario agricultural workers are disadvantaged in their ability to engage in collective bargaining. That conclusion contradicts what labour

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2 I do, though, find baffling the majority's decision to read that duty into the deliberately restrictive language of the AEPA, rather than to strike the statute down for excluding such an obligation and remit the matter to the legislative process. It is true that when legislation is ambiguous, there is good reason to give it the interpretation that best accords with constitutional rights and freedoms. However, the minority judgments at both ends of the spectrum in *Fraser* — Justice Abella in dissent at paras 329-332, and Justices Rothstein and Charron, concurring in the result, at paras 279-290 — show that the AEPA unambiguously and unequivocally does not provide for a duty to bargain in good faith, and demonstrate the utter implausibility of the majority's reading of such a duty into the statute. The majority's approach certainly does not accord with any "dialogue" theory of constitutional review; by reading in a duty to bargain, the judgment simply let the legislature off the hook.

3 See paras 108-112 of the majority judgment in relation to section 2(d) of the *Charter*, and para 116 in relation to section 15.

academics, labour neutrals, labour lawyers on both sides of the bar, and experienced management and union officials all know.[4] As a practical matter, no one could credibly suggest that a duty to consider employee representations in good faith, and that alone, is sufficient to result in meaningful collective bargaining, as it is understood in Canada and internationally.[5]

While the majority accepts the constitutional principle that section 2(d) of the *Canadian Charter of Rights and Freedoms* guarantees a meaningful process of collective bargaining, its decision fails to put this principle into practice. As Brian Langille has emphasized[6] (albeit in advancing the argument that challenges to exclusions from collective bargaining are better framed as equality claims rather than as freedom of association claims), Canadian labour relations statutes "are best conceived as our domestic version of a detailed and legally

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4 It is also inconsistent with the voluminous material before the Court on the inability of workers to engage in meaningful collective bargaining under the AEPA, and more generally on the prejudicial effect of excluding agricultural workers from collective bargaining legislation.

5 Nor is it fair on the part of the majority to suggest that agricultural workers and the union representing them should have tried to enforce the right to collective bargaining through the provisions of the AEPA, before going to court. No one — neither the government, nor the employer and union parties, nor the interveners — remotely imagined that the AEPA provided for any duty to bargain.

6 See B Langille, "The Freedom of Association Mess: How We Got into It and How We Can Get out of It" (2009) 54 McGill LJ 177. See also B Langille, "Why are Canadian Judges Drafting Labour Codes – and Constitutionalizing the Wagner Act Model?" (2009-2010) 15(1) CLELJ 101. For my rejoinder to Professor Langille's concerns about constitutionalizing the Wagner model, and to his preference for using an equality rights approach to give excluded employees a constitutional right to collective bargaining, see S Barrett, "The Mess Brian Langille Has Made of *Health Services*: Who Knows Why He Got into It, But Here's How to Help Him Out of It," available online at <http://www.usask.ca/law/sallows/papers/barrett_presentation_notes.pdf> [Barrett, "The Mess"]. Notably, Professor Langille ultimately agrees with the view that both the right to collective bargaining and the right to strike are constitutionally protected under section 2(d) of the *Charter*, and he argues that "arbitrary exclusion . . . from [labour relations] statutes is . . . simply arbitrary exclusion from the guarantee of freedom of association" ("Freedom of Association Mess," *supra* at 181 & 184). However, his criticisms of the Court's approach in *B.C. Health* are heavily relied on in the reasons of Justices Rothstein and Charron in *Fraser*. See, for example, paras 211-212, 228, 235, 243 & 248-249.

enforceable instantiation of the fundamental freedom of association." The Wagner model, in Langille's words, is "our way of actually making that freedom available to Canadian workers." Access to the essential elements of the statutory regime for instantiation of freedom of association is especially critical for agricultural workers. It flies in the face of reality to suggest that they have the capacity to engage in a meaningful collective bargaining process when the state has not only excluded them from the normative regime available to almost all other workers but has also relegated them to a statutory ghetto where they have even fewer rights than they would have in an imagined pre-Wagner state of nature. Nor can it be said that the state is not responsible for this denial of access to collective bargaining, given that it has deliberately singled out agricultural workers in the way it has.

Prominent labour relations scholar Roy Adams has suggested that the *Fraser* decision will help to move farm workers one step closer to meaningful collective bargaining, by removing the shackles of majoritarian exclusivity and imposing a duty to bargain on employers.[7] All that needs to be done, according to Professor Adams, is to add to the mix legislative protection for the right to strike (which he believes to be constitutionally protected), or a freely negotiated interest arbitration mechanism in its place.

There are several problems with this somewhat Panglossian view. First, although compelling arguments can be made that freedom of association includes the right to strike,[8] and indeed that agricultural workers have this right at common law and under the AEPA (which protects against discrimination and interference with the right of employees to engage in the lawful activities of an employee association),[9] the majority in *Fraser* does not address the right to strike.

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7 See, for example, Adams' posting on David Doorey's Workplace Law Blog, at <http://www.yorku.ca/ddoorey/lawblog/?p=3271>.

8 See the discussion in section 3(b)(v), below.

9 Section 1 of the AEPA prohibits interference with or discrimination on the basis of participation in the lawful activities of an employee association. Insofar as the right to strike is such a lawful activity, one could make a relatively strong argument that the AEPA gives some protection to employees who engage in strike action. See *Canadian Pacific Railway v Zambri*, [1962] SCR 609 at 615-618: "It is said that the Act does not in terms declare the right to strike, but I find myself in agreement with Mr. Lewis' argument that the right is conferred by s. 3, which reads . . . '[e]very person is free to join a trade union of his own choice and to participate in its lawful activities.' "

Indeed, the majority seems for the moment to take the position that the constitutional right to meaningful bargaining can be adequately safeguarded through a duty to bargain in itself.

Second, given the Court's finding in *Fraser* that the agricultural workers' challenge to the constitutionality of the AEPA was premature, it is unlikely that even if the courts come to accept that the right to strike is constitutionally protected by section 2(d), they will require the Ontario legislature to extend a statutory right to strike to agricultural workers in the near or intermediate future. As a result, farm workers will be left to the vagaries of the common law (which offers little protection to striking employees) and will be excluded from the longstanding statutory safeguards (such as protection against job loss for striking) that are available to virtually all other unionized Canadian workers.[10] Without these protections, it is not at all clear that agricultural workers would be able or willing to exercise the right to strike, in light of the economic and political disadvantages many of them suffer as members of migrant or immigrant communities.

Third, as Justice Abella points out in her dissent in *Fraser*, it is doubtful that exclusivity is a barrier to unionization rather than a vehicle to protect it, particularly in the case of vulnerable and marginalized workers. In her words:

> The reason for [majoritarian exclusivity] is grounded in common sense and the pre-1944 experience. A lack of exclusivity allows an employer to promote rivalry and discord among multiple employee representatives in order to "divide and rule the work force," using tactics like engaging in direct negotiations with individual employees to undercut "the credibility of the union . . . at the bargaining table."[11]

The record before the Court included material about a large agricultural operation, which, as Justice Abella noted, was "unrestrained by the legal requirement to bargain only with one bargaining agent, [and] sponsored its own 'employee association' in direct competition with the union that had the workers' majority support."[12] In her

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10 See, for example, section 80(1) of the Ontario *Labour Relations Act, 1995*, SO 1995, c 1, Sch A, which requires employers to reinstate any lawfully striking employee who "makes an unconditional application in writing to the employee's employer within six months from the commencement of the lawful strike to return to work . . . ."

11 *Supra* note 1 at para 346 [citations omitted].

12 *Ibid* at para 347.

words, "[t]hat is precisely the kind of conduct that . . . led Canada's Labour Ministers [in 1944] to include exclusivity among what were considered to be indispensible protections for collective bargaining rights."[13]

Professor Adams' tireless optimism is to be applauded, and there is considerable support for his view that freedom of association should be interpreted to include the right to strike. However, as a practical matter, the Court in *Fraser* invites — and indeed requires — unions and agricultural workers to wander in a pre-Wagner Act desert, expending their limited time and resources, for who knows how much longer (another 40 years?), in order to demonstrate the futility of the AEPA regime. I cannot help but think that the Court seems to see those workers as having an endless capacity for quixotic windmill-tilting.

3. IMPLICATIONS FOR PENDING AND FUTURE LITIGATION

(a) What the Court Decided

The majority in *Fraser* professes fidelity to the Court's earlier judgment in *B.C. Health*,[14] both in its continued recognition of the idea that freedom of association extends constitutional protection to a process of collective bargaining and in its firm rejection of an attempt by two members of the Court — Justices Rothstein and Charron — to reverse the holding in *B.C. Health*.

The *Fraser* majority does indeed remain faithful to many of the principles articulated in *B.C. Health*, particularly that decision's doctrinal approach to freedom of association and its holding that legislative interference with negotiated collective agreements and legislative imposition of restrictions on the scope of bargaining infringes the freedom of association guarantee. Repeatedly, the *Fraser* majority affirms that it is an infringement of section 2(d) to override important collective agreement terms or to prohibit future bargaining over such

13 *Ibid.*

14 *Health Services and Support-Facilities Subsector Bargaining Ass'n v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*B.C. Health*].

terms.[15] Moreover, the Court arguably expanded the reach of both *Dunmore*[16] and *B.C. Health*, by pronouncing that "individuals have a right against the state to a process of collective bargaining in good faith, and that this right requires the state to impose statutory obligations on employers."[17] This statement seems to point to a constitutional entitlement on the part of Canadian workers generally to a process of good faith bargaining, and to a corresponding constitutional obligation on government to legislate such a process.[18]

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15 *Supra* note 1 at paras 34 36, 40 & 76. Already, lower courts have begun to consider the impact of *Fraser* on legislative attempts to override important collective agreement terms or to block free collective bargaining. For two decisions confirming that after *Fraser*, freedom of association continues to preclude such legislation, see *Meredith v Canada (AG)*, 2011 FC 735, 392 FTR 25 (unilateral executive and legislation cancellation of an agreed-to and scheduled wage increase for RCMP members infringes freedom of association), and *Ass'n of Justice Counsel v Canada (AG)*, 2011 ONSC 6435, 108 OR (3d) 516 (wage control legislation infringes section 2(d) by restricting salary increases and preventing bargaining over salaries). For a somewhat different view, see *Federal Government Dockyard Trades & Labour Council v Canada (AG)*, 2011 BCSC 1210, 26 BCLR (5th) 75 (wage control legislation did not infringe section 2(d) by overriding wage increases awarded at interest arbitration, because a collective agreement wage term awarded at interest arbitration does not result from a constitutionally protected process of collective bargaining).

16 *Dunmore v Ontario (AG)*, 2001 SCC 94, [2001] 3 SCR 1016.

17 *Supra* note 1 at para 73.

18 Notably, *Fraser* does not explicitly refer to the requirement articulated in *Dunmore* that workers must be found to be vulnerable before a positive obligation arises on government to extend to them the legislative protection needed to instantiate their constitutional freedom to associate. This is not to say that the distinction drawn in *Dunmore* between agricultural workers and RCMP members, in the context of forming an association and organizing, can properly be extended to the process of collective bargaining. Insofar as bargaining is concerned, the Supreme Court has consistently recognized that the imbalance of power between employers and employees applies generally. See *Shafron v KRG Insurance Brokers (Western) Inc*, 2009 SCC 6, [2009] 1 SCR 157 *per* Rothstein J at paras 22-23, and *UFCW, Local 1518 v KMart Canada Ltd*, [1999] 2 SCR 1083. More broadly, in *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701 at para 93, the Court reiterated its reference in earlier cases to the "unequal balance of power" between employers and employees, and added that "the vulnerability of employees is underscored by the level of importance which our society attaches to employment." See also Arthurs *et al*, *Labour Law and Industrial Relations in Canada*, 4th ed (Markham, Ont: Butterworths, 1993) at para 430: "With the removal of criminal prohibitions against union organizations in the last quarter of the nineteenth century, workers were, in principle, free to join unions and to participate in their collective bargaining and related activities. However, this theoretical freedom was translated into practice only relatively infrequently, and with great difficulty."

On the other hand, the *Fraser* majority appears to have made a deliberate choice to adopt a narrow approach to the kind of protections that governments will be affirmatively obliged to enact in order to instantiate the section 2(d) protection of a meaningful collective bargaining process. This narrow approach is indicated by the majority's emphasis on the centrality of a freestanding and abstract bargaining duty, by its description of the constitutional right to bargain collectively as a "derivative right" (at least insofar as the implied good faith bargaining obligation is concerned),[19] by its occasional references to "impossibility"[20] as a threshold for establishing interference with the right to collective bargaining, and by its blanket refusal to consider the possibility that denying certain workers important statutory protections (including access to exclusive bargaining rights and to a statutory mechanism for resolving collective bargaining impasses) could amount in purpose or effect to the denial of a meaningful process of collective bargaining. Certainly, in its seeming removal from a real-world labour relations context, the majority's approach appears inconsistent with its professed commitment to the principle that the section 2(d) guarantee "must be interpreted generously and purposively, in accordance with Canadian values and Canada's international commitments."[21]

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19 *Supra* note 1 at paras 46, 54, 66 & 99.

20 Some employer commentary on *Fraser* has made much of the majority's use of the word "impossible" in this context. In fact, the majority judgment uses various formulations, including "substantial interference" (paras 2 & 33), "substantially impossible" or "substantial impossibility" (paras 32 & 34), both "impossible" and "substantial interference" or "substantial impairment" in the same paragraph (paras 47 & 48), "effectively useless" and "substantially impair" in another (para 54), "substantially impair" in describing the "fundamental inquiry" (para 64), and "effectively impossible" (para 98). As Justice Heneghan of the Federal Court said in *Meredith*, *supra* note 15 at para 77: "The word 'impossible' must be taken in the context of other words such as 'meaningfully' and 'effectively,' and the phrase 'good faith.' If legislation makes it possible for employees to make collective representations that are ineffective or not meaningful, or if representations are possible but government action demonstrates a lack of good faith, a breach of subsection 2(d) of the *Charter* will still have occurred."

21 *Supra* note 1 at para 32.

In the result, in the name of ensuring that the Wagner model will not be constitutionalized for all time[22] — an idea that, as set out below, was not in fact advanced by the trade union or by its supporting interveners in *Fraser* — the majority rejects the contextual and practical understanding (expressed by Chief Justice Winkler in the Ontario Court of Appeal)[23] of what agricultural workers need if they are to have a meaningful process of good faith collective bargaining (namely, some form of exclusivity and an effective dispute resolution mechanism). Instead, the majority holds, on a formal and definitional level, that section 2(d), should be restricted to a "general process of collective bargaining,"[24] understood as a " 'process of collective action to achieve workplace goals,' requiring engagement by both parties," and also as one "that allows employees to make representations and have them considered in good faith by employers, who in turn must engage in a process of meaningful discussion."[25]

Finally, it is important to acknowledge that the majority does appear to realize that as time passes, it may well become clear that the good faith bargaining obligation (and its enforcement by an administrative tribunal under the AEPA) is not sufficient to protect the constitutional entitlement of farm workers to "meaningful processes by which they can pursue workplace goals."[26] Although the Court thus seems to recognize that something more than a good faith bargaining duty may be constitutionally required to give effect to the section 2(d) promise, it gives no specific indication of what this further protection might be. This provides cold comfort to farm workers and their union. One can only conclude that the AEPA scheme, with or without a duty to bargain, leaves agricultural workers without any real possibility of meaningful collective bargaining. Perhaps ironically, Justices Rothstein and Charron recognize that reality in their reasons in *Fraser*, in the following terms:

> [F]or a duty to bargain in good faith not to be an illusory benefit, there must be both a way of dealing with bargaining impasses as well as an effective

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22 *Ibid* at para 47.

23 2008 ONCA 760, 92 OR (3d) 481.

24 *Supra* note 1 at para 41.

25 *Ibid* at para 54.

26 *Ibid* at para 117.

> remedy for persistent breaches of a duty to bargain in good faith. The first requires that there be some default mechanism for resolving the dispute in case an impasse is reached — such as striking or binding arbitration — while the second may require, in extreme circumstances, the imposition by an arbitrator of particular terms of a collective agreement.[27]

In summary, *Fraser* leaves intact the essential holding in *B.C. Health* — that section 2(d) extends constitutional protection to the process of collective bargaining, that a good faith bargaining duty is an integral component of that protection, and that it is unconstitutional to preclude free collective bargaining over important terms and conditions of employment by overriding freely negotiated agreements or by other means. However, pending and future constitutional challenges that seek to impose positive legislative obligations on government (challenges which I look at in the next part of this paper) will have to take account of the *Fraser* Court's aversion to "constitutionalizing" specific components of the Canadian collective bargaining regime.

(b) Pending and Future Cases

(i) *Wage Controls*

At the time of writing, at least three freedom of association claims have been decided by lower courts concerning wage control legislation imposed by the federal government,[28] and additional challenges are still outstanding at the trial level. In my view, these claims are all squarely supported by what the *Fraser* majority understands *B.C. Health* to say, and affirms, namely that "legislating to undo . . . existing collective bargaining arrangements and . . . hampering future collective bargaining on important workplace issues . . . [substantially interferes] with the s. 2(d) right of free association . . . ."[29]

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27 *Ibid* at paras 258-262 & 268 [citations omitted].

28 Those decisions, referred to in note 15, *supra*, will likely be appealed.

29 *Supra* note 1 at para 37. See also paras 34 & 76.

(ii) *Restrictions on the Scope of Bargaining*

Similarly, restrictions on the ability of trade unions to negotiate and enter into agreements on other important terms and conditions of employment would appear to infringe the constitutional right to engage in good faith bargaining, since that right must at the very least include the capacity to enter into a binding agreement. For example, a recent B.C. Supreme Court decision[30] striking down restrictions on the ability of teachers to bargain over such matters as class size seems to be consistent with *Fraser*. That decision was handed down shortly before *Fraser* was released, and after *Fraser* the B.C. government announced that it will not appeal it.

Governments and employers may well argue that the *Fraser* decision permits governments to require that collective bargaining over all or some terms and conditions of employment be carried on outside the existing Wagner model, as long as some process is preserved which obligates the employer to consider and respond in good faith to union proposals. However, it is difficult to conceive of a meaningful collective bargaining process in which all important workplace matters cannot be dealt with together, or in which the parties are precluded from negotiating certain items through the normal bargaining process or from including those items in a collective agreement. Moreover, as discussed in section (v) below, ultimately the most important question may well be whether workers have a constitutional right to strike — both as an integral component of the section 2(d) guarantee and as a necessary precondition to ensuring that workers can engage in a process of collective bargaining rather than one of collective begging.

(iii) *Altering or Terminating Representational Rights and Bargaining Unit Structures*

Other pending and potential claims include challenges to attempts by legislatures to alter bargaining unit structures and representational rights. Already, the *Fraser* decision has had an impact in

30 *BCTF v British Columbia*, 2011 BCSC 469.

this area, as reflected in the Quebec Court of Appeal's post-*Fraser* decision to reverse a pre-*Fraser* Superior Court ruling that section 2(d) of the *Charter* was infringed by a statute which restructured bargaining units in the health care sector and removed certain issues from the central bargaining table.[31]

Even more recently, in the *Independent Electricity System Operator* case,[32] Ontario's Court of Appeal upheld the decision of the province's Divisional Court reversing an Ontario Labour Relations Board ruling that the non-construction employer provisions of the *Labour Relations Act* infringed section 2(d), by invalidating collective agreements with non-construction employers and stripping employees of union representation in the construction sector. On the basis of its view of the facts,[33] the Court of Appeal accepted employer and government arguments that the unions were improperly seeking to constitutionalize inclusion under a particular statutory bargaining structure (in this case, the specialized construction employer provisions of the LRA). In the Court of Appeal's opinion,

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31 *Confederation des syndicates nationaux v Quebec (AG)* (No 500017-018968-043, 31 October 2008), reversed by the Quebec Court of Appeal: *Quebec (AG) v Confédération des syndicats nationaux*, 2011 QCCA 1247. Leave to appeal to the Supreme Court of Canada has now been denied. For a similar result in a pre-*Fraser* judicial review decision, see *AUPE v Alberta Health Services*, 2010 ABQB 344, 491 AR 115.

32 *Independent Electricity System Operator v Canadian Union of Skilled Workers*, 2012 ONCA 293 [*IESO*], released 8 May 2012 (upholding the Divisional Court decision at 2011 ONSC 81, released 18 February 2011). Chief Justice Winkler observed — perhaps with some irony, as it was his own decision that had been reversed in *Fraser* — that "the majority decision in *Fraser* reaffirms the Supreme Court's earlier decision in *B.C. Health Services*."

33 In the Court's view, relevant circumstances included the facts that (a) no employees of the IESO (the non-construction employer before the Court) had ever worked in the construction industry; (b) the unions had never been selected by IESO employees as their bargaining agent ("the appellants cannot point to any individuals who have joined together to have CUSW or the Labourers certified as their bargaining agent with respect to IESO"); (c) no IESO employees were or would in future be affected by the termination of the bargaining rights or the collective agreement; and (d) the unions' collective agreements with construction contractors and subcontractors were not affected by the legislative provisions ("the Unions' members are able to continue to bargain with their construction employers and to seek to organize more construction employers").

the situation was unlike the outright prohibition against bargaining in *B.C. Health*, because employees of a non-construction employer retained the right to seek certification or voluntary recognition under the general provisions of the LRA. Therefore, the Court of Appeal reasoned, since "construction employees of non-construction employers [were] still able to engage in a process of collective bargaining," and section 2(d) had been held in *B.C. Health* and *Fraser* not to guarantee access to a particular statutory regime; no infringement of section 2(d) had been made out.

Thus, it appears on the strength of these decisions by the Quebec Court of Appeal and the Ontario Court of Appeal that unions will have difficulty succeeding in any section 2(d) challenge to legislative determinations concerning particular bargaining or representational structures, or to modifications to those structures (assuming a process remains available whereby employees can continue to engage in collective bargaining).[34]

In mounting these kinds of challenges, unions will no doubt persist in the argument that respect for a process of good faith bargaining necessarily includes respect for longstanding bargaining rights and negotiated collective agreements, such that the restructuring of bargaining units, the overriding of collective agreements, and the termination of representation rights are all constitutionally impermissible. On the other hand, we can expect employers and governments to take the position that because there is no constitutional guarantee for particular statutory bargaining structures, all that is required is the ability to engage in good faith bargaining through whatever legislative mechanism is made available.

(iv) *Total Exclusion from Access to any Bargaining Regime*

The exclusion of certain groups of workers from access to collective bargaining continues to be the subject of constitutional

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34 While the Ontario Court of Appeal did not appear to accept this, there is a potentially relevant distinction between the *IESO* case and the Quebec and Alberta decisions referenced in note 31, *supra*. In contrast to the legislation at issue in *IESO*, the legislation restructuring bargaining rights and collective agreement coverage in the Quebec and Alberta cases did not deprive affected employees of union representation or a collective agreement.

challenges. One such challenge involves an application for judicial review of a Quebec Labour Relations Board decision[35] striking down, on grounds of both equality and freedom of association, the exclusion of agricultural workers from access to any statutory collective bargaining scheme in enterprises in which fewer than three workers are employed on a permanent, year-round basis. The Quebec Labour Relations Board decision is currently being argued before the Quebec Superior Court on a judicial review application brought by the government.

Another challenge involves the issue of whether the legislative imposition of a representational structure precluding RCMP members from choosing their own bargaining representative, as well as excluding them from federal collective bargaining legislation, infringes section 2(d). As discussed more fully below, in a recent decision released on June 1, 2012, the Ontario Court of Appeal ruled that neither restrictions on choice of bargaining agent nor the exclusion of RCMP members from collective bargaining legislation interferes with freedom of association.[36] In reaching this determination, the Court reversed the lower court decision which, while upholding the exclusion from collective bargaining legislation, had found the restrictions on choice of bargaining agent to be unconstitutional.[37]

In contrast to *Fraser*, neither the Quebec farm worker nor the *RCMP* challenge appears to involve an alternative AEPA-like regime which could be interpreted as safeguarding the right to require the employer to bargain in good faith. Moreover, in the case of the RCMP officers, the employer is government and is therefore likely to be directly bound to bargain in good faith, no matter what the statute says.

Thus, in both cases, a reasonably strong argument can be made that the failure to include the workers in a regime providing for a duty to bargain in good faith and protection against unfair labour practices is inconsistent with *Dunmore* and *Fraser*. At the same time, this would not necessarily mean that as a remedial matter, Quebec farm workers or RCMP members could demand inclusion in the mainstream labour relations regime, as it may be open to the provincial government to enact an AEPA-like regime for them.

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35 *Travailleurs et travailleuses unis de l'alimentation et du commerce, Section locale 501 v Johanne L'Écuyer & Pierre Locas*, 16 April 2010.

36 *Mounted Police Ass'n of Ontario v Canada (AG)*, 2012 ONCA 363 [*RCMP*].

37 *Mounted Police Ass'n of Ontario v Canada (AG)* (2009), 96 OR (3d) 20 (Sup Ct J).

As well, because the Quebec farm worker legislation effectively precludes unionization of seasonal and migrant workers, a strong challenge to the statute has been made on the basis of section 15 of the *Charter* — the equality rights provision. In this respect, the *Fraser* decision may have opened the door to a more expansive approach to the recognition of analogous grounds under section 15 — an approach which would concentrate less on whether a particular characteristic is immutable, and more on the extent to which the group is disadvantaged. The *Fraser* majority does take the position that despite the obvious benefits of inclusion in the more protective *Labour Relations Act* regime, it is too early to tell whether the AEPA regime "inappropriately disadvantages farm workers." However, the majority explicitly preserves the possibility that agricultural workers as a group might receive section 15 protection if, in a subsequent case, it is "established that the [AEPA] regime utilizes unfair stereotypes or perpetuates existing prejudice and disadvantage."[38] For her part, in her concurring reasons in *Fraser*, Justice Deschamps suggests that "[t]o redress economic inequality, it would be more faithful to the design of the *Charter* to open the door to the recognition of more analogous grounds under section 15 . . . ."[39] Justices Rothstein and Charron alone rejected the section 15 argument on the ground that the socioeconomic situation of agricultural workers does not "rise to the level of an immutable (or constructively immutable) personal characteristic that would merit protection against discrimination."[40]

As noted above, the Ontario Court of Appeal has now issued its reasons in the *RCMP* case. At the outset, the Court correctly set out the issue as being whether section 2(d) "guarantees workers the right to be represented in their [collective bargaining] relationship with their employer by an association of their own choosing. . . [through a] vehicle . . . structurally independent of management."[41] It then proceeded, through a course of analysis that can only be described as devoid of real-world labour relations understanding, to conclude that a representation structured based on a "company union" — initiated and imposed top-down by the legislature or by a government employer — does not prevent employees from exercising their

38 *Supra* note 1 at para 116.
39 *Ibid* at para 319.
40 *Ibid* at para 295.
41 *Supra* note 36 at para 2.

freedom of association. In effect, reversing the lower court's ruling, the Court decided that workplace freedom of association does not even provide employees with the right to choose an independent vehicle for the purpose of seeking to engage in collective bargaining. How did the Court arrive at this extraordinary conclusion?

According to Juriansz J.A., the lower court judge had, without the benefit of *Fraser*, wrongly relied on *B.C. Health* to find that the imposition of a "company union" structure infringed section 2(d) by preventing representation by an independent association formed or chosen by RCMP members, and by mandating a limited process of consultation while precluding good faith bargaining. Applying its conception of *Fraser*, the Court of Appeal reasoned that the approach taken by the lower court judge failed to appreciate the "derivative nature" of the right to engage in collective bargaining and wrongly "brought to bear values [i.e. the right to choose an independent union as representative] from the Wagner model."[42] In the Court of Appeal's opinion, the principle that "the employees' bargaining representative be structurally autonomous and independent of the employer"[43] is merely a feature of the Wagner Act model, not a fundamental element of freedom of association. Accordingly, on the Court of Appeal's view of the matter, the "constitutional right to form an independent association for the purpose of collective bargaining" is not in and of itself protected by section 2(d); rather, "if it exists, [it] would be a facet of the derivative right to collective bargaining . . . ." Moreover, according to the Court, there is no basis for deriving such a right since it is not "impossible" for RCMP members to pursue workplace goals through the legally mandated Staff Relations Representative Program (SRRP).[44]

The Court of Appeal's approach is flawed in a number of respects. First, nothing in *Fraser* suggests that the right to form an independent association for the purpose of attempting to carry out associational activities — be they collective bargaining or any other collective activity, and whether or not the activities themselves are constitutionally protected — is a derivative component of freedom of association. Nor is there any basis for deeming the right to form an independent association to be unworthy of stand-alone section 2(d)

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42 *Ibid* at para 139.

43 *Ibid* at para 28.

44 *Ibid* at para 136.

protection, merely because it is also a fundamental premise of freedom of association under the Wagner Act model. The Court of Appeal's reasons ignore the extent to which, far from being derivative, the act of forming and establishing an independent association is a necessary precondition to any attempt to engage in collective associational activities. They also ignore the historical struggle, in Canada and elsewhere, against employer-dominated unions, and the intrinsic value of associations formed and established by workers independently of governments and employers.[45]

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45 As Professor Doorey has pointed out, the Court of Appeal's decision can be criticized for effectively sanctioning, as being consistent with Canadian constitutional protection for freedom of association, the Chinese model of trade unions and collective bargaining, in which "the state creates the only union allowed." In Doorey's words, the Ontario Court of Appeal found that

> . . . a government is free to impose a non-independent association on workers and to decree that the employer only needs to acknowledge that association. As long as the employer goes through the motion of meeting with the state-created, non-independent association, nodding along to the suggestions it makes, there will be no violation of Section 2(d).
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> Can you see why our model of freedom of association is beginning to look like the Chinese model? The main difference between the Chinese model of forced state unionization and the RCMP model is that the police can still form and join their own independent association. But that independent, employee-selected association has no legal rights at all, so it is largely meaningless. The employer can simply ignore it, with the explicit approval of the Canadian state. Only the government created, non-independent union has any legal status.
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> The OCA effectively breaks the freedom to associate up into its component parts and then treats them all as distinct pieces rather than as a coherent whole. It confirms that Section 2(d) includes a *right of workers to form an independent employee association*, and to make *collective representations to the employer and to have those representations considered in good faith* (as *per Fraser*). But the new twist introduced by the OCA is that it need not be the chosen independent association that makes the representations on behalf of the employees. Rather, the state can create a non-independent organization to do the representation part of freedom of association, while the employee-selected, independent union sits by and twiddles its thumbs. I didn't see that one coming, I confess. I actually thought that the SCC meant that the employees had a right to make collective representation *through their chosen collective organization* . . . .

See D Doorey, "Ontario Court of Appeal: State Mandated, Non-Independent Employee Association Not a Violation of Charter," online at <http://yorku.ca/ddoorey/lawblog/?p=5328> [emphasis in original].

Moreover, the Supreme Court of Canada has consistently recognized the importance of international law in interpreting the scope and content of section 2(d), above all in *B.C. Health* and in *Fraser*. ILO Convention 87,[46] Article 8 of the *International Covenant on Economic, Social and Cultural Rights*, and Article 22 of the *International Covenant on Civil and Political Rights* — international agreements binding on Canada — all protect as a core, self-standing element of freedom of association the right of workers to form an independent association of their own choosing for the purpose of pursuing collective workplace interests.

Another problem with the Court of Appeal's approach is its treatment of the case before it as one involving a positive rights claim. It is not at all clear that the RCMP members, in their challenge to the legislatively imposed SRRP, were contending that Parliament was under an affirmative obligation to enact protective legislation. Rather, it would seem that this aspect of the challenge was directed at establishing that, both in design and effect, the legislation precluded RCMP members from attempting to bargain through their chosen representative vehicle or association.[47] As a result, the Court of Appeal's single-minded focus on whether the prerequisites for finding a "derivative" right had been met (a focus which it recognized is appropriate only in a positive rights case[48]) were misplaced. In the *RCMP* case, it was the legislative and governmental measures imposing the SRRP which themselves were alleged to interfere with freedom of association. This was not a claim for positive legislative protection, but a claim to be free from negative legislative restrictions. The only claim

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46 See, for example, *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th revised ed, 2006, at paras 339 to 345.

47 As Doorey, *supra* note 45, points out: "By mandating a non-independent association as the only entity that the employer must acknowledge, the statutory model signals to workers and the employer that they have no legal right to make collective representations through their chosen association. The fact that they can still 'join' an independent union that can then be completely ignored by the employer doesn't provide them with even the thin version of freedom of assocation that agricultural workers can access under the AEPA. As a result, the RCMP officers are unable to exercise the very rights that the SCC said in *Fraser* and *B.C. Health* are protected under Section 2(d)."

48 See the discussion at paras 98 to 111 of the Court of Appeal's reasons.

for positive legislative protection which arguably arose in the case was the challenge to provisions under the *Public Service Labour Relations Act* excluding RCMP members from the collective bargaining regime under that legislation.

In any event, even if the challenge to the SRRP system were properly to be treated as a positive rights claim, the Court of Appeal appears to have misunderstood the nature of the good faith bargaining requirement articulated in *B.C. Health* and *Fraser*. According to the Court of Appeal, *Fraser* stands for the proposition that "a positive obligation to engage in good faith collective bargaining will only be imposed on an employer when it is effectively impossible for the workers to act collectively to achieve workplace goals."[49] On this point, the Court of Appeal found that it was not "impossible" for RCMP members to "act collectively to achieve workplace goals," taking into account several considerations — namely, that RCMP members can form voluntary associations pursuant to the *Delisle* decision, that the SRRP provided for a consultative process sufficient to meet what the Court regarded as the "collaboration" requirements under section 2(d), and that RCMP members had formed a fund to provide legal assistance. For these reasons, the Court of Appeal concluded, RCMP members were "unable to claim the derivative right to collective bargaining," and consequently "there [was] no constitutional obligation on the government to take positive action . . . to facilitate the exercise of the RCMP members' s. 2(d)-protected freedom."[50]

Unfortunately, the Court of Appeal's analysis fundamentally misconstrues the import of the Supreme Court of Canada's approach in *Fraser* to the good faith bargaining obligation. In *Fraser*, the majority regarded this obligation as a general principle and requirement of freedom of association, applicable in all cases, and not as a matter to be determined (or re-determined) on a case-by-case basis. In this respect, the *Fraser* majority emphasized the extent to which

> [i]t is difficult to imagine a meaningful collective process in pursuit of workplace aims that does not involve the employer at least considering, in good faith, employee representations. The protection for collective bargaining in

49 See paras 111 & 120 of the Court of Appeal's reasons.

50 See paras 121 to 135 of the Court of Appeal's reasons.

> the sense affirmed in *Health Services* is quite simply a necessary condition of meaningful association in the workplace context.[51]

Indeed, in response to Justice Deschamps' and Justice Rothstein's criticisms of the majority's holding that freedom of association in the workplace extends to a process of good faith collective bargaining, the majority in *Fraser* repeatedly affirmed that freedom of association was recognized in *B.C. Health* as encompassing the right of workers "to make collective representations *and* to have their collective representations considered in good faith."[52] The majority in *Fraser* went on to summarize the holding in *B.C. Health* as recognizing "a derivative right to collective bargaining, understood in the sense of a process that allows employees to make representations and have them considered in good faith by employers, who in turn must engage in a process of meaningful discussion." As the Court said, "[t]he logic that compels this conclusion, following settled *Charter* jurisprudence, is that the effect of denying these rights is to render the associational process effectively useless and hence to substantially impair the exercise of the associational rights guaranteed by s. 2(d)."[53]

In the *RCMP* case, the Court of Appeal turned the *Fraser* majority's approach on its head. The Court of Appeal examined the particular workplace before it, inquired into whether it was effectively impossible for RCMP members to act collectively to achieve workplace goals, concluded that in its view the existence of the SRRP system made possible such collective action, and on this basis, found that RCMP members could not claim a derivative right to collective bargaining. This runs contrary to the principle enunciated in

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51 *Fraser*, *supra* note 1 at para 43.

52 *Ibid* at para 51 [emphasis added].

53 *B.C. Health*, *supra* note 14 at paras 49-51 & 54. Indeed, the notion that the majority's reasons in *Fraser* did not establish an employer good faith bargaining obligation as an essential element of the right to collective bargaining, protected by section 2(d), would be a surprise to Justice Rothstein, given that his lengthy dissenting reasons were in large measure an attempt to rebut precisely that proposition. For a fuller discussion, analysis and critique of Justice Rothstein's reasons, see S Barrett & E Poskanzer, "What Fraser Means for Labour Rights in Canada" in F Faraday, J Fudge & E Tucker, *Constitutional Labour Rights in Canada* (Toronto: Irwin Law, 2012) 190.

B.C. Health and *Fraser* that a process of good faith collective bargaining is itself a necessary precondition to workers' ability to act collectively to achieve workplace goals.[54]

In any event, the reasons given by the Court of Appeal for finding that RCMP workers were not precluded from a meaningful process of achieving workplace goals through collective bargaining are largely unresponsive to the constitutional claim before the Court, i.e. that the SRRP was constitutionally deficient because the process it required precluded meaningful good faith collective bargaining, conducted through an independent association freely chosen by RCMP members. The fact that RCMP members had formed their own associations is not particularly responsive to the claim that they were nonetheless precluded from attempting to bargain through this very association. The fact that the SRRP scheme permits limited collaboration is no answer to the claim that it imposes a process which falls short of the section 2(d) requirement for good faith bargaining. And the fact that RCMP members have voluntarily formed a legal services vehicle which does not even attempt to engage in collective bargaining — and which would not be allowed to do so — is no answer to the claim that the SRRP precludes both choice of bargaining representative and good faith collective bargaining.

Moreover, as noted above, even if the Court of Appeal was correct in its finding that the limited bargaining process permitted under the SRRP scheme met the constitutional requirements for meaningful collective bargaining, this would not provide an answer to the separate constitutional claim that employees have a section 2(d) right to freely join together to pursue collective workplace interests through

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54 In its reasons, the Court of Appeal also observed that there is "more than one conception of collective bargaining." pointing to European works councils as described in an affidavit submitted by Professor Richard Chaykowski, and to other academic commentary (see paras 31-32 & 139). While an analysis of works councils is beyond the scope of this paper, it is important to note that the Court of Appeal does not appear to have been aware of the degree to which the operation of European works councils is premised on the coexistence of independent trade unions with meaningful collective bargaining rights. In any event, the majority in *Fraser* was, if anything, overly concerned with not "constitutionalizing" elements of any aspect of the prevailing labour relations model — despite finding a good faith bargaining obligation to be essential to the section 2(d) requirement for meaningful collective bargaining.

an association of their own choosing. Having wrongly characterized the right to form an independent association for the purposes of collective bargaining as being merely "a facet of the derivative right to collective bargaining," and having wrongly concluded that there was no basis for "deriving" a right to collective bargaining, it was perhaps inevitable that the Court of Appeal would hold that the right to an independent association "does not arise in this case."[55] However, the Court of Appeal's suggestion that section 2(d) is not implicated where employees are precluded from choosing their own associational representative — at least where they are afforded a collaborative process with their employer[56] — simply ignores the critical importance to freedom of association of assuring to workers the right to engage their employer through an independent associational vehicle.[57]

The Court of Appeal articulates one other basis for rejecting the argument that the right to select one's bargaining agent is an essential and free-standing component of freedom of association: it reasons that, if individuals had the constitutional freedom to attempt to bargain through an independent and freely chosen association, this could require an employer to deal with a multiplicity of minority

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55 See, for example, paras 136 & 140 of the Court of Appeal's reasons.

56 See para 120 of the Court of Appeal's reasons.

57 For a judicial recognition of the importance to freedom of association principles of permitting employees to select their bargaining representative, see the comments of Justice Ball (a former Chair of the Saskatchewan Labour Relations Board), in *Saskatchewan v Saskatchewan Federation of Labour*, 2012 SKQB 62 at para 263, 390 Sask R 196. In his view, section 2(d) necessarily requires

> . . . a rudimentary structure that protects the essential components of collective bargaining. Although it is well beyond the scope of this decision to definitely determine those basic elements they likely include:
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> (1) the identification of a group of employees;
> (2) the assessment of the freely expressed wishes of the majority concerning a bargaining representative; and
> (3) a requirement that the employer bargain exclusively with that representative.
>
> These are not necessarily elements derived from a Wagner Act model. Any system that does not operate by Government decree (that is, any system with constitutional protections for freedom of association) will have those rudiments in place.

associations, which in turn would render the Wagner Act model of exclusive bargaining agency unconstitutional. However, whether the bargaining model is one of exclusive majoritarian unions or minority unions, constitutional protection for freely and democratically chosen independent associations remains a vital element of freedom of association. Moreover, it is by no means self-evident that a model of exclusivity runs afoul of section 2(d). In the Canadian context, exclusivity may be found to enhance (rather than substantially interfere with) meaningful collective bargaining, and thus not to constitute an infringement of the section 2(d) guarantee. In any event, exclusivity would likely be found by the courts to be a reasonable limit under section 1 of the *Charter*.[58]

Ultimately, the Court of Appeal's reasons in the *RCMP* decision are highly problematic in both doctrinal and practical labour relations terms. They also serve to illustrate the extent to which the *Fraser* majority's reasons have provided less than certain guidance to both lower courts and potential litigants. Most importantly, if allowed to stand, the effect of the Court of Appeal's approach would be to establish — as the section 2(d) constitutional guarantee or standard — a right to be represented by a non-independent "company union" imposed by the employer or by legislation, and to engage in a process that at best is charitably described as providing for the opportunity to "meet and greet" the employer and to take part in the activity of "collective begging." Given the significant concern of the Supreme Court to avoid "constitutionalizing" a particular model of labour relations, this would be an ironic result indeed, and certainly not an outcome

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58 The Court of Appeal relied on Roy Adams' view that a minority association of employees should have the right to collectively bargain with their employer (see paras 117 & 132 of its reasons). Notably, however, the Court fails to recognize that Adams also concludes that where a majority of workers supports an exclusive bargaining agent, a system of majoritarian exclusivity would be neither unconstitutional nor inconsistent with international law. See also Doorey, *supra* note 45, for the observation that "in *Fraser*, the SCC approved of the *Agricultural Employees Protection Act*, which grants rights to any group of employees who form or join an association, majority or otherwise, to make collective representations to the employer free from threat of reprisal, and requires the employer to consider all such representations 'in good faith.' In other words, the SCC approved in *Fraser* the precise model the OCA rejects as 'unwieldy' in the *RCMP* case."

that remains true to the Court's professed commitment to protecting a meaningful process of collective bargaining.

(v) *The Right to Strike*

Finally, when it comes to the scope of section 2(d) in the labour relations context, the proverbial elephant in the room is the right to strike. It is fair to say that the *Fraser* majority appears to have ruled out the idea that section 2(d) affirmatively requires legislatures to impose a statutory dispute resolution mechanism *per se*, including a statutory right to strike or a process of interest arbitration, "in all cases and for all industries."[59] However, *Fraser* simply does not address the prior question of whether freedom of association includes the right to strike, such that section 2(d) would be infringed by legislation which actively or directly prohibits or restricts that right rather than merely fails to provide positive legislative support for it. Nothing in the AEPA prohibits agricultural workers from engaging in strike action; if it did, the issue before the Court in *Fraser* would have been very different.

It is not within the scope of this paper to fully canvass the question of whether (and on what basis) the right to strike forms an essential element of freedom of association and free collective bargaining. However, very strong arguments could be made that the underlying doctrinal rationale embraced by the Supreme Court of Canada in *Dunmore*, *B.C. Health* and *Fraser* leads to the conclusion that freedom of association necessarily comprehends the right to strike.[60] It is

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59 *Supra* note 1 at para 47.

60 For an early Ontario decision finding both collective bargaining and the right to strike to be protected under section 2(d), see *SEIU, Local 204 v Broadway Manor Nursing Home* (1983), 44 OR (2d) 392, 4 DLR (4th) 231. Because that case was decided before the *Alberta Reference*, *infra* note 63, it later received little attention. However, given the resurrection of freedom of association in the collective bargaining context in *Dunmore*, *B.C. Health* and *Fraser*, the following comments of Justice Galligan (at paras 61-63) seem particularly apposite:

> [A]s Mr. Sack put it, fortunately often enough to finally get through to me, freedom of association contains a sanction that can convince an employer to recognize the workers' representatives and bargain effectively with them.

widely recognized in international law that the right to strike forms part of freedom of association. This is true under (among other instruments) ILO Convention 87 and the *International Covenant on Economic, Social and Cultural Rights*, both of which Canada has

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> That sanction is the freedom to strike. By the exercise of that freedom the workers, through their union, have the power to convince an employer to recognize the union and to bargain with it.
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> In the absence of a statute like the *Labour Relations Act* which regulates the collective bargaining process the freedom of association includes within it the sanction that makes it a worthwhile freedom. If that sanction is removed the freedom is valueless because there is no effective means to force an employer to recognize the workers' representatives and bargain with them. When that happens the raison d'être for workers to organize themselves into a union is gone. Thus I think that the removal of the freedom to strike renders the freedom to organize a hollow thing.
>
> The infringement of freedom to organize or choose one's union might not be serious if a statutory right is substituted for it. But if the statutory right is removed and at the same time the freedom to apply sanctions that make the freedom to organize worthwhile is removed, then it seems to me that the combined effect is a serious infringement upon workers' freedom to organize and choose their union which, as I have said, are important constituents of workers' freedom of association.

See also the comments of Justice Smith in the same decision, at paras 197-198:

> The right to organize and bargain collectively is only an illusion if the right to strike does not go with it. The main reason that the right to organize and bargain collectively is assured employees is that they may effectively bargain with their employer. To take away an employee's ability to strike so seriously detracts from the benefits of the right to organize and bargain collectively as to make those rights virtually meaningless. If the right to organize and bargain collectively is to have significant value then the right to strike must also be a right included in the expression "freedom of association," and I conclude that it is.
>
> The fact that it is almost universally accepted . . . that those working in essential services may be denied the right to strike if such denial is accompanied by adequate alternative safeguards for workers' rights, such as impartial and speedy conciliation and arbitration procedures, is no indication that the right to strike is less than essential to the right to organize and bargain collectively. Rather, it confirms that the right to strike is so essential to the interest of workers that if it is removed then the State must replace it with a State-given right that will adequately protect these interests.

ratified), and under the *European Charter of Human Rights*.[61] In *Fraser*, as in *B.C Health*, the majority of the Supreme Court emphasized that the level of protection for freedom of association under section 2(d) should be at least as great as under Canada's international law commitments.

Moreover, as recognized in international law and by many scholars, there can be no meaningful collective bargaining without the right to strike or some other independent and binding dispute resolution mechanism.[62] In view of the majority's emphasis in *Fraser* that the purpose of section 2(d) is to guarantee a meaningful process of collective bargaining, it is difficult to see how the need for such a mechanism could now be denied. Indeed, 25 years ago, Chief Justice Dickson's dissent in the *Alberta Reference*[63] (a dissent which was, from a doctrinal perspective, largely adopted by Justice Bastarache in *Dunmore*,[64] and subsequently by the Court in *B.C. Health*)

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61 The European Court of Human Rights has found that the right to strike is protected by the freedom of association guarantee in Article 11 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*. That court relied on the affirmation in international law that the right to strike is an essential means of ensuring the effective exercise of the right to collective bargaining. See *Enerji Yapi-Yol Sen v Turkey*, No 68959/01, 21 April 2009. See also the European Court's earlier groundbreaking decision in *Demir and Baykara v Turkey*, No 34503/97, 12 November 2008. These cases are discussed by KD Ewing & John Hendy, "The Dramatic Implications of *Demir and Baykara*" (2009-2010) 15(2) CLELJ 165.

62 In the words of Otto Kahn-Freund (quoted in B Hepple, "The Right to Strike in an International Context" (2009-2010) 15(2) CLELJ 133 at 140):

> The power to withdraw their labour is for the workers what for management is its power to shut down production, to switch it to different purposes, to transfer it to different places. A legal system which suppresses that freedom to strike puts the workers at the mercy of their employers. This — in all its simplicity — is the essence of the matter.

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

64 For a fuller discussion of the doctrinal implications of *Dunmore*, see my earlier paper, "*Dunmore v. Ontario (Attorney General)*: Freedom of Association at the Crossroads" (2004) 10 CLELJ 83 [Barrett, "*Dunmore*"].

underlined that the right to strike is an integral component of freedom of association and collective bargaining.[65]

In their minority judgment in *Fraser*, Justices Rothstein and Charron sought to reverse the holding in *B.C. Health* that section 2(d) imposes positive obligations on the state to require employers to bargain in good faith. However, even they recognized that freedom of association protects the right of workers to come together, organize and attempt to bargain collectively with their employer on terms and conditions of employment. They did so in large measure on the basis that because individuals are generally free to bargain over terms of employment, and because freedom of association protects the right of individuals to do in association what they can lawfully do alone, it necessarily follows that individuals have the right to bargain together and collectively with their employer.[66] As has been pointed out by others, including Professor Langille,[67] this approach dictates recognition of a right to strike, since individuals are generally free to withdraw their services.

In pending and future constitutional challenges, the courts will have to wrestle with whether section 2(d) protects the right to strike, and with whether particular legislative restrictions interfere with that right. One court has already endorsed the view that freedom of association must include the right to strike, in a case involving a challenge in Saskatchewan to legislation designating certain workers as essential and precluding them from engaging in strike action. In *Saskatchewan v. Saskatchewan Federation of Labour*,[68] Justice Ball of the Saskatchewan Court of Queen's Bench ruled that the provincial government's *Public Services Essential Services Act* (Bill 5) infringed section 2(d), because it deprived employees of what he found to be the constitutionally protected right to strike. Pointing out

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65 For recent academic commentary on whether the right to strike is a component of freedom of association, see the articles in (2009-2010) 15(2) CLELJ, originally presented at an international symposium organized by Brian Langille entitled, "Is There a Constitutional Right To Strike in Canada?"

66 *Supra* note 1 at paras 125 & 270-271.

67 See, for example, B Langille, "What is a Strike?" (2009-2010) 15(2) CLELJ 355 at 369-370.

68 *Supra* note 57. The Saskatchewan government has filed an appeal with the province's Court of Appeal.

that the right to strike, and the countervailing right to lock out, were the "primary drivers" of the collective bargaining process, Justice Ball concluded that Fraser did not derogate from the principles adopted in B.C. Health, and that the two decisions necessarily led to the acceptance of a constitutional right to engage in strike action. As he concluded:[69]

> . . . the right to strike is a fundamental freedom protected by s. 2(d) of the *Charter* along with the interdependent rights to organize and to bargain collectively. That conclusion is grounded in Canada's labour history, recent Supreme Court of Canada jurisprudence and labour relations realities. It is also supported by international instruments which Canada has undertaken to uphold. Governments may enact laws that restrict or prohibit essential service workers from striking, but those prohibitions must be justified under s. 1 of the *Charter*.

Most recently, the federal government mounted a legislative assault on the right to strike at Air Canada and Canada Post.[70] The pending challenges to the postal back-to-work legislation by the Canadian Union of Postal Workers and by various Air Canada unions will likely raise not only the question of whether the government as employer failed to meet its constitutional duty to bargain in good faith, but also whether the legislative prohibition of the strike, as well as the imposition of terms, interfered with a constitutionally protected right to strike.

4. WHAT IS REALLY BEHIND THE *FRASER* DECISION?

The reasons set out in the four judgments by members of the Supreme Court in *Fraser* are obviously of some assistance in assessing the immediate and longer-term implications of the decision. However, it is also useful to look behind those reasons in search of the underlying jurisprudential, policy and political considerations which led to the startling conclusion that the AEPA is an adequate constitutional vehicle for respecting the right of agricultural workers to engage in meaningful collective bargaining. When we do that, we

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69 *Ibid*; see especially paras 91-92 & 114-115.

70 Bill C-5, *Continuing Air Service for Passengers Act*, 41st Parliament, 1st Session, First Reading, 16 June 2011; Bill C-6, *Restoring Mail Delivery for Canadians Act*, SC 2011, c 17.

have to recognize that the Court is not only an adjudicative institution but also a political one. Of necessity, it struggles with its own legitimate concerns (and the concerns of others) about its role as the primary institution of government charged with reviewing executive and legislative action for constitutional compliance, and about its particular role in the highly contested field of labour relations.

(a) The Background to *B.C. Health*

The *B.C. Health* decision came as something of a surprise to many in the legal and labour relations communities. It is true that *Dunmore* had opened the door to a more expansive view of freedom of association in the workplace, by resurrecting Chief Justice Dickson's dissenting view in *Alberta Reference* that certain activities of individuals acting collectively were deserving of constitutional protection precisely because of their associational nature, and that the purpose of section 2(d) was undermined by legislation which precluded such activities or targeted associational conduct precisely because of its collective or associational nature.[71]

According to Chief Justice Dickson in *Alberta Reference*, the logical implications of his approach to section 2(d) were that the protections of that provision extended to collective bargaining and strike activity. Nonetheless, in *Dunmore*, despite adopting Chief Justice Dickson's approach, the Court limited its application to a right to make collective representations and the freedom to organize, reiterating the view of the majority in *Alberta Reference* that the right to strike and collectively bargain were not included in section 2(d). Thus, although it had a compelling doctrinal basis on which to conclude that the constitutional freedom of association, as informed by international law, must include the right of workers to engage in collective bargaining as well as the right to strike, the *Dunmore* Court clearly tried to stop short of that result. It was willing to find a positive constitutional obligation to enact legislation protecting agricultural workers from being fired for engaging in organizing activity, but when it came to bargaining and strike activity, the *Dunmore* Court wanted to hold the line.

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71 See Barrett, "*Dunmore*," *supra* note 64.

To some observers, this could be explained by the Court's shift in the late 1970s and early 1980s to a more deferential and non-interventionist approach to labour relations, reflecting a sensitivity to the view that the legislature is better able than the courts to gauge the delicate balance that is needed in this area. The Court's professed concern was that if collective bargaining or strike activity was protected, the courts would inevitably become involved in recalibrating the balance struck between labour and management by the legislature, as opposed to carrying out what it saw as their legitimate role in policing the outer limits of that balance. In turn, this hands-off approach to labour relations was reinforced by a perception that collective bargaining was more in the nature of an economic right than a human right.

(b) The Context of *B.C. Health*

The Court's efforts to maintain what it referred to in *B.C. Health* as a judicial "no-go" zone around collective bargaining was ruptured by the compelling facts of that case, as well as by the increasing acceptance (particularly in international law) of collective bargaining as a fundamental human right rather than merely an economic activity.[72] *B.C. Health* presented the Court with a government that could be said to have abandoned its role as honest broker between labour and management, and to have used its legislative power in a self-interested way to upset the balance that had been struck through free collective bargaining under an existing statutory process. These factors led the Court to abandon the distinction between the right to organize and the right to bargain, and to

72 On the evolution of international law on collective bargaining as a fundamental human right and an integral component of freedom of association, see R Adams, "Collective Bargaining: The Rodney Dangerfield of Human Rights" (1999) 50 Lab LJ 204; A Blackett, "Mutual Promise: International Labour Law and *B.C. Health Services*" (2009), 48 Sup Ct L Rev 365 at 369-377; J Bellace, "ILO Fundamental Rights at Work and Freedom of Association" (1999) 50 Lab LJ 191.

recognize collective bargaining as a fundamental right — one which promoted the core *Charter* values of dignity, equality, autonomy and democracy — rather than a mere statutory or economic right. The Court also recognized that modern collective bargaining legislation was an important instrument for incorporating or instantiating the constitutionally protected process of collective bargaining.

(c) The Reaction to *B.C. Health*

Since *B.C. Health*, however, it has become clear that the Court's embrace of collective bargaining as a fundamental constitutional right was not unqualified, and that the Court still had an aversion to second-guessing the balance between labour and employers which has been struck by the legislature and applied by administrative tribunals.

The Court's 2009 decision in *Plourde v. Wal-Mart Canada Corp.*[73] gave some clues to the reasons for its reluctance. The following passage from the majority judgment in that case, written by Justice Binnie, reflects concerns about the role of the judiciary in reviewing labour relations decisions by legislatures and tribunals insofar as a more active stance could affect the relative bargaining power of employers and employees, and suggests palpable unease with the implications of extending strong section 2(d) protection to collective bargaining:

> The legislature has crafted a balance between the rights of labour and the rights of management in a way that respects freedom of association. No argument was raised by the appellant or any of the interveners . . . that in its entirety the [Quebec *Labour Code*] fails to respect freedom of association.
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> . . .
>
> Care must be taken not only to avoid upsetting the balance the legislature has struck in the *Code* taken as a whole, *but not to hand to one side (labour) a lopsided advantage because employees bargain through their union (and can*

73 2009 SCC 54, [2009] 3 SCR 465.

> *thereby invoke freedom of association) whereas employers, for the most part, bargain individually.*[74]

The *Fraser* appeal was argued in the Supreme Court only three weeks after the Court's decision in *Wal-Mart*. No fewer than six governments and five employer organizations appealed to the Court to limit the reach of *B.C. Health* (particularly insofar as it extended to private-sector employers). Their position was based on concerns that the courts should respect the legislative role in crafting a labour relations balance, that they should refrain from deciding which elements of the statutory scheme were essential to meaningful collective bargaining, and most significantly (and repeatedly), that they should avoid constitutionalizing aspects of the Canadian collective bargaining model and thereby locking into place an antiquated and adversarial paradigm of labour relations.

In fact, as I have pointed out elsewhere,[75] the unions did not argue in *Fraser* that the existing statutory model was perfect, or that it should be constitutionally entrenched for all time. They contended that the effect of the exclusion of certain workers from legislative protections that were given to almost all other workers had to be assessed in its practical and real-world context, and more specifically that excluding agricultural workers (a particularly marginalized and vulnerable group), and relegating them to an inferior and more restrictive regime, meant that they were denied any meaningful ability to engage in collective bargaining. The unions also asserted that extending such pro-

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74 *Ibid* at paras 56-57 [emphasis added]. Responding to Justice Binnie's suggestion that employers are somehow disadvantaged when workers are accorded fundamental collective bargaining freedoms, Hepple (*supra* note 62 at 144-145) has written:

> Wal-Mart "ranks alongside major industrialised nation states when revenues and GDP are compared . . . adds one outlet to its empire per day and is able to cease operations in an entire country" (as it did in Germany). The workers it employs in insecure jobs are often drawn from the most disadvantaged sections of the work force, including women and immigrants, at relatively low wages. The equation of this globally powerful transnational corporation's activities to bargaining with "individual" employers is bizarre, to say the least. Unless the courts are willing to embrace a more realistic view of what a "balance" between capital and labour means in the postmodern globalized economy, and to recognize the comparative advantages of freedom of association and the right to strike, there will be little if any dividend from investing much time and effort into constitutionalization.

75 Barrett, "The Mess," *supra* note 6

tections flowed from the Court's recognition in *B.C. Health* (and in *Dunmore* before it) that the rights set out in modern labour statutes were not merely legislative creations but were the legislative embodiment of the fundamental freedom to associate.[76] This proposition directly followed from the *Dunmore* Court's observation, made in the context of employee and union organizing, that "the history of labour relations in Canada illustrates the profound connection between legislative protection and the freedom to organize."[77] The same principles, the unions argued, applied with equal force to collective bargaining.

Those arguments fell on deaf ears. By the time of the *Fraser* decision, the Court once again seemed nervous about intervening in labour relations, appearing to be uncertain about and uncommitted to the principle that labour rights are human rights. It had been sternly warned by employers, governments and some academics not to

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76 Indeed, in *B.C. Health*, *supra* note 14, the Court adopted the conclusion of the 1968 Woods Task Force Report (which itself had emphasized that "collective bargaining legislation establishes rights and imposes duties derived from these fundamental freedoms"), characterizing the freedom to associate and act collectively as "root freedoms of the existing collective bargaining system" (at para 64). For this reason, the Court recognized and emphasized the extent to which labour relations statutes in Canada reflect, incorporate and instantiate the constitutionally protected freedom to engage in collective bargaining (at paras 25, 60 & 63):

> [T]he fundamental importance of collective bargaining to labour relations was the very reason for its *incorporation into statute* . . . . The statutes . . . did not create the right to bargain collectively. Rather, they *afforded it protection*. There is nothing in the statutory entrenchment of collective bargaining that detracts from its *fundamental nature*.
>
> . . .
>
> By adopting the Wagner Act model, governments across Canada recognized the fundamental need for workers to participate in the regulation of their work environment. *This legislation confirmed what the labour movement had been fighting for over centuries and what it had access to in the laissez-faire era through the use of strikes — the right to collective bargaining with employers*. [emphasis added]

However, only four years later, in the context of the positive claim in *Fraser* for extension of legislative protection to collective bargaining, the majority revived the notion that it is the constitutional freedom to collectively bargain which itself is somehow derivative in nature, and apparently forgot that the statutory rights are the embodiment of the fundamental freedom to collectively bargain, so that exclusion from the statutory scheme amounts to exclusion from protection of the constitutional freedom itself.

77 See *Dunmore*, *supra* note 16 at paras 35 & 44.

"constitutionalize" a particular model of labour relations.[78] As a result, it may have become more wary of reading section 2(d) in a way that required positive legislative protection for statutory rights — protection available to workers in some provinces and under certain regimes but not in others. All of this might have made the Court more susceptible to the argument that robust recognition of the collective bargaining rights of workers would somehow give them an unfair advantage. In this context, the Court may have perceived a need to put on the brakes (for now at least, given the majority's prematurity analysis) in determining the extent to which *Dunmore* and *B.C. Health* could ground anything more (in terms of positive obligations on government) than an obligation to provide unfair labour practice protection, coupled with some form of a good faith bargaining duty.

Moreover, as we can see from the four diverse sets of reasons issued in *Fraser*, it appears that internal debate and division raged within the Court over the course of its 17 months of deliberation on that case. Ultimately, as discussed above, two members of the *Fraser* Court who had not participated in the *B.C. Health* decision (Justices Rothstein and Charron) wrote of their serious misgivings about the correctness of *B.C. Health*, particularly its holding that a duty to bargain formed part of freedom of association under section 2(d). Much of the majority judgment in *Fraser* is taken up with a response to the criticisms by Justices Rothstein and Charron of that aspect of *B.C. Health*. This attack from within the Court on *B.C. Health*, a mere four years after it was decided, may well have led to the *Fraser* majority's reluctance to give section 2(d) the more generous and realistic interpretation advanced by Chief Justice Winkler in the Ontario Court of Appeal.

(d) The Majority's Misplaced Fears about Statutory Protections for Farm Workers

The *Fraser* majority attempted to reconcile the tensions which surfaced in the appeal by suggesting that an entitlement on the part of

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78 For her part, Justice Abella's dissenting reasons recognized (at para 351) that the concern with constitutionalizing the Wagner model for all time was a red herring.

farm workers merely to have a bargaining proposal considered in good faith gives them a real and meaningful right to collective bargaining. However, as I have suggested in relation to the right to strike, it is not the Wagner model's statutory duty to bargain that gives workers a capacity to freely and meaningfully negotiate with their employer. The majority's notion that extending constitutional protection to this particular component of the model will give farm workers (or, for that matter, any other workers) a genuine capacity to exercise their constitutional right to bargain collectively ignores both labour history and workplace reality.

This is not to say that for all time and in all industries or sectors, freedom of association automatically requires the same model or process for collective bargaining; the Court rightly held that it does not. However, the Court should have recognized, without fear of permanently constitutionalizing all elements of the existing statutory scheme, that in a context in which legislatures across the country had enacted a more or less uniform model for making collective bargaining possible, the exclusion of a group of vulnerable and marginalized workers from that model was tantamount to excluding them from the possibility of a real process of collective bargaining. Upholding the Court of Appeal's judgment in *Fraser* would not have precluded legislatures from modifying the balance struck within the statutory scheme, from developing innovative approaches to extending collective bargaining rights (including extending such rights to workers left out of the Wagner model), from enacting needed reforms in response to changing social conditions and labour market forces, or even from adopting different collective bargaining and representational mechanisms altogether. Ultimately, section 2(d) requires only that any such legislative reforms promote rather than frustrate access to a meaningful process of collective bargaining.

However, for as long as the Wagner model offers the only statutory framework for such a process, it is hard to see how the exclusion of agricultural workers, without the provision of any functional equivalent, can be said to meet a constitutional standard in which freedom of association is understood to include protection for collective bargaining. Concerns about overriding the so-called delicate legislative balance seem particularly misguided where a vulnerable and marginalized group has been excluded from the very balance struck by the legislature for the rest of the workforce.

(e) What Is the Way Forward?

In assessing the impact of the *Fraser* decision, it is important to emphasize the differences in the nature of the constitutional challenge brought in *B.C. Health* and that in *Fraser*. *B.C. Health* was an archetypal claim to be left alone — a challenge against legislative interference with a negative freedom. By contrast, *Fraser* was conceived of by the Court, and argued before it, as a claim to positive state action — as an assertion that freedom of association entitles workers to affirmative legislative protection.[79] As noted above, what may have largely animated the Court in *Fraser* was a reluctance to

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79 This distinction was recognized by the Ontario Court of Appeal in *RCMP*, *supra* note 36 at paras 80 & 89. However, as discussed above, the Court's decision can be criticized for incorrectly treating the case before it as a positive rights case, and for misapplying the principles set out in *B.C. Health* and *Fraser*. For a compelling critique of the application of the "impossibility" standard in the context of a challenge to legislation or government action which interferes with the exercise of a fundamental freedom (including freedom of association), see B Langille, "Why the Right-Freedom Distinction Matters to Labour Lawyers — And to All Canadians" (2011) 34 Dal LJ 143 at 158-164. As Langille points out, while the impossibility standard may play some role in a case in which the applicants seek affirmative legislative protection (what he calls a "going to bat for"/promoting "positive rights" case), it should not play any part in a case involving the right to be free of legislative or governmental interference in the exercise of a fundamental freedom (what he calls a "taking a bat to"/ "respect" case):

> The idea that there is a stringent test of impossibility to be deployed here [in a "taking a bat to" case] is very odd if you think about it. It is inconsistent with our basic understanding of the *Charter*. If the government interferes with my freedom of speech — or religion — or any other freedom — the test is not, has not been, and should not be, "has the state made it impossible to exercise the freedom?" The test is, rather, whether the state has interfered with the freedom in a way that cannot pass s. 1 muster under some version of the *Oakes* test.

As Langille emphasizes, in a "taking a bat to" case of alleged interference with the exercise of a fundamental freedom, "the test cannot be one with a heavy onus on the citizen. It must rather rest heavily on the state — i.e. the party seeking to limit the freedom. *Fraser* gets this very wrong. It reverses the onus in our basic and easy constitutional cases. It stands *Oakes* on its head."

apply the principles, accepted by the Court in *Dunmore* when it came to organizing activity, in a way that would require legislatures to positively enact protections for the collective bargaining aspects of the Wagner model (as opposed to its organizing aspects). The Court might have been concerned that the judiciary would be required to decide which, if any, of a wide range of contested statutory rules were truly indispensable to meaningful collective bargaining — for example, first contract arbitration, card-based certification, or anti-strikebreaker provisions. To the extent that the Court gave effect to this concern, *Fraser* represents a setback for claimants' ability to invoke the *Charter* in order to obtain positive legislative protections.[80]

At the same time, a strong majority of the Court in *Fraser* firmly rebuffed the attack on *B.C. Health* by Justices Rothstein and Charron. As a result, whatever the basis for the Court's reluctance to examine the actual impact of the legislative exclusion at issue in *Fraser*, that reluctance should not extend to legislation which directly restricts or overrides free collective bargaining. That is the sort of legislation which was challenged in *B.C. Health*, where the claim was not to positive legislative protection but to legislative forebearance from interfering with free collective bargaining. *Fraser* leaves in place the constitutional shield put up by *B.C. Health* against government action that directly seeks to deny or restrict the right of workers to engage in free collective bargaining.[81]

Ultimately, the role to be played by the constitutional guarantee of freedom of association in the trade union context will depend to a large degree on whether the Supreme Court of Canada comes to fully accept collective bargaining as a basic human right. As the Court

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80 For a recent illustration of this tendency, see *Saskatchewan v Saskatchewan Federation of Labour*, *supra* note 57, in which the Court dismissed a section 2(d) challenge against the legislative repeal of card-based certification, as well as the conferral of a statutory right on employers to communicate facts and opinions to employees.

81 This is particularly important in light of the legislative assault on public-sector collective bargaining. Concerns in this regard are magnified by the Canadian federal government's recent legislative interference with free collective bargaining at Canada Post and Air Canada. See *supra* note 70.

noted in *B.C. Health*,[82] an international consensus holds that collective bargaining forms an integral component of freedom of association — a consensus which also recognizes the right to strike as falling within the scope of freedom of association. For this reason, it is difficult to see, regardless of any change in the Court's composition, how it could credibly retreat to the pre-*B.C. Health* view that collective bargaining is outside the scope of freedom of association. However, unless the Court resolves its ongoing ambivalence about the role and importance of trade unions and collective worker action in giving life to freedom of association, we will likely continue to see doctrinal incoherence, inconsistent results, and a divided Court — slipping neither forward nor backward, but sideways.

82 *Supra* note 14 at paras 69-79.