

2015

NEW LABOUR TRILOGY

CFLR
FORUM REPORT



Canadian Foundation
for Labour Rights
Labour rights are human rights



IVSTITIA



The Canadian Foundation for Labour Rights (CFLR) is devoted to promoting labour rights as an important means to strengthening democracy, social justice and economic equality here in Canada and internationally. The key objectives the Foundation has established for itself are to create greater public awareness and understanding of the critical role unions play in Canadian society and to build effective political momentum and public support for progressive labour law reform.

CFLR was established in 2010 by the National Union of Public and General Employees (NUPGE) and the United Food and Commercial Workers Canada (UFCW Canada).

Please visit the CFLR website—www.labourrights.ca—to obtain a deeper understanding as to why unions matter.

CFLR FORUM REPORT

Canadian Foundation
for Labour Rights

April 9, 2015

Forum

on the

January 2015

Supreme Court of
Canada decisions on
labour rights

and

the implications for
the Canadian labour
movement

June 2015



IVSTITIA

CONTENTS

Foreword	1
Summaries of the January 2015 Supreme Court of Canada Decisions and Their Impact on Labour Rights	4
The Impact of <i>Saskatchewan Federation of Labour</i> on Future Constitutional Challenges, by Paul Cavalluzzo	9
The Supreme Court of Canada’s Decision in <i>MPAO</i>: Constitutional Protection for Independent Trade Unions, by Steve Barrett	13
<i>Meredith V. Canada</i>: Constitutional Protection for the Right to Bargain Collectively under the Supreme Court of Canada’s New Labour Trilogy, by Fay Faraday	26
Essential Services Legislation after <i>SFL</i>, by Andrew Astritis	35
The Fall and Rise of a Good Idea: The Use of International Labour Law in the Interpretation of the <i>Charter of Rights and Freedoms</i>, by Michael Lynk	40
Contributors	47

Foreword

By James Clancy

National President of the National Union of Public and General Employees and founding member of the Board of Directors of the Canadian Foundation for Labour Rights

IN JANUARY 2015, the Supreme Court of Canada issued three important decisions impacting labour rights in Canada:

- *SFL v. Saskatchewan*, regarding the right of workers to strike
- *Mounted Police Association of Ontario v. Canada*, regarding the right of workers to join a union agent of their own choosing
- *Meredith v. Canada (Attorney General)*, regarding the constitutionality of legislative wage-restraint programs

These decisions are very significant for the labour movement, and, in fact, for Canadian society. Our chief justices have clearly affirmed that unions matter to our country and our communities. They have once again recognized the importance of labour rights as a cornerstone of Canada's democracy, and therefore deserving protection under Canada's constitution.

The Canadian Foundation for Labour Rights (CFLR) was established in 2010 as a national voice devoted to promoting labour rights as an important means to strengthening democracy, social justice and economic equality here in Canada and internationally. The key objectives the Foundation has established for itself



are to create greater public awareness and understanding of labour rights as critical components of human rights and to build effective political momentum and public support for progressive labour law reform.

On April 9, 2015, the CFLR gathered from across Canada some 50 prominent trade union lawyers, academics, and activists in Toronto for a day-long forum to examine particular aspects of the three decisions, discuss their implications for the Canadian labour movement and consider the impact the decisions will have on future Charter litigation by unions in Canada. Besides the CFLR Board of Directors, participants included members of the Canadian Labour Congress (CLC) Legal Challenges Committee and members of the Canadian Association of Labour Lawyers (CALL), representing union-side labour lawyers from across Canada.

These decisions have positive implications for workers' rights and workplace justice in Canada. Combined with previous Supreme Court decisions such as the 1991 *Lavigne v. Ontario Public Service Employees Union* decision, the 2001 *Dunmore v. Ontario (Attorney General)* decision, and the 2007 *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, we can now say

with confidence that the jurisprudence established by the 1987 Labour Trilogy has been finally overturned.

We now have a new Labour Trilogy in 2015, which affirms that Canadian workers have the constitutional rights allowing them to join a union of their own choosing, bargain collectively and take strike action against their employer.

I am optimistic that these decisions represent the beginning of a more robust and progressive interpretation of labour rights by the Courts in Canada. If the labour movement hopes to use these decisions to promote, strengthen and expand labour rights in Canada, then it's critical that we develop a common understanding of their meaning.

The April 9, 2015, CFLR Forum helped us achieve that objective. The Forum also reinforced the importance of cooperation and coordination amongst unions in being able to present strong and coordinated arguments before the courts in any future challenges to the constitutional rights of Canadian workers.

I believe this report offers valuable and timely material on the current state of labour rights in Canada. It provides a summary of each of the three decisions as well as a series of short papers from the presenters summarizing the presentations they gave at the CFLR forum. Each of the presenters provided analysis and interpretation of the decisions as well as insights on how they may be applied in current and future Charter litigation involving labour rights.

As importantly, the report is also a major contribution to the understanding that unions matter to all Canadians because unions are a force for democracy, social justice and economic equality.

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

Please visit the CFLR website—www.labourrights.ca—to obtain a deeper understanding as to why unions matter.

Summaries

Summaries of the January 2015 Supreme Court of Canada decisions and their impact on labour rights



Saskatchewan Federation of Labour v. Attorney General of Saskatchewan

The January 30, 2015, decision by the Supreme Court of Canada (SCC) is one of the most significant cases for the labour movement in the past three decades. The SCC confirmed in a five to two majority decision that the right to strike is a constitutional right for all workers in Canada, regardless of whether they work in the private sector or the public sector.

This case, brought forward by the Saskatchewan Federation of Labour and several of its affiliates, involved a Charter challenge against two labour laws passed by the Wall government in June 2008: Bill 5, the *Public Service Essential Services Act*, and Bill 6, *Trade Union Amendment Act*. The case, however, had been primarily against Bill 5, which broadened the scope of essential service employees to the point that the legislation effectively took away the right to strike of almost all public sector workers in Saskatchewan.

The SCC ruled that “the conclusion that the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations is supported by history, by jurisprudence, and by Canada’s international obligations” [para. 3] and therefore found the *Public Service Essential Services Act* unconstitutional.

The majority explicitly overturned the 1987 *Alberta Reference* case and endorsed the progressive and influential dissent in that judgment by then Chief Justice Dickson. The majority held that the right to strike is an “indispensable component” of collective bargaining and thus of freedom of association [see paras. 4 and 75].

Significantly, the Court also found that any legislation that “prevents designated employees from engaging in *any* work stoppage as part of the bargaining process” constitutes a violation of section 2 (d) of the Charter and must be justified by the government under

section 1 [see para. 78]. In other words, whenever a government abrogates the right to strike, there is a presumption that it violates the Charter, and the onus shifts to the government to demonstrate that the measure is rational, justifiable, and minimally impairs the right.

The Court also made it clear that restrictions on strikes for workers who perform essential services may be justifiable under section 1, but there must be an “independent review mechanism” to determine whether services are truly essential, and further there needs to be a “meaningful dispute resolution mechanism” to resolve the bargaining impasse for workers who can’t strike [para. 81]. This means

- An essential service cannot be unilaterally designated, but, properly interpreted, must be one “the interruption of which would threaten serious harm to the general public or to a part of the population” [para. 84, quoting Dickson]. In the same paragraph, Dickson quotes the ILO on essential services being those that, if interrupted, “would endanger the life, personal safety or health of the whole or part of the population” [see also para. 86].
- Affected employees should be required to perform only essential services, and not non-essential work during strike action [para. 91].
- The designation of essential services and the workers who must perform them needs to be subject to “an impartial and effective dispute resolution process” [para. 92]. In other words, the labour board must be involved.
- Where the right to strike must be abrogated to protect essential services, some kind of independent arbitration to deal with the bargaining impasse will “almost always” be required [see paras. 93 to 95].

The consensus is that this judgment is a landmark win for labour. It is particularly strong for public employees of any stripe—municipal, provincial, or federal—as the Court effectively constitutionalizes the meaning of “essential services” as those services that, if withdrawn, would seriously threaten or endanger public health or safety.

On a final note, the Court strongly supported the arguments on international law [paras. 62 to 71]. Among other things, the Court stressed that certain treaties explicitly protect the right to strike.

The Court did not explicitly endorse the rulings of the International Labour Organization's (ILO) Committee on Freedom of Association (CFA), however, it did point out that the CFA decisions are "relevant and persuasive." That said, the Court referred to the CFA decisions as "jurisprudence" and found that "it [the CFA] has been the leading interpreter of the contours of the right to strike" [para. 69].



***Mounted Police Association of Ontario and
British Columbia Mounted Police Professional
Association v. Canada***

The challenge concerned whether section 2 (d) of the Charter protects a worker's right to join a union for the purposes of collective bargaining. The initiators of the Charter challenge were the Mounted Police Association of Ontario (MPAO) and the B.C. Mounted Police Professional Association.

Section 2 (1) (d) of the *Public Service Labour Relations Act* excludes members of the RCMP from engaging in collective bargaining. Section 41 of the *Royal Canadian Mounted Police Act Regulations* prohibits members of the RCMP from publicly criticizing the police force. Section 96 of the *Regulations of the RCMP Act* establishes a separate scheme (different than collective bargaining) to deal with labour relations between RCMP officers and management.

The SCC ruled in favour of the two Mounted Police Associations. The SCC concluded that the Charter's

Section 2 (d) guarantee of freedom of association protects a meaningful process of collective bargaining that provides employees with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests. The current RCMP labour relations regime denies RCMP members that choice, and imposes on them a scheme that does not permit them to identify and advance their workplace concerns free from management's influence [para 5, 2015 SCC 1, Case number 34948].

Accordingly, the SCC allowed the appeal and found both acts infringe on section 2 (d) of the Charter and that neither infringement is justified under section 1 of the Charter.

The most fundamental implication of the decisions is that section 2 (d) of the Charter provides constitutional protection for a demo-

cratic and independent trade union movement, and confirms that trade unions have the constitutional right on behalf of workers to engage in meaningful collective bargaining. The *SFL* decision reinforces the right to meaningful bargaining, constitutionally backed up by the right to strike (or arbitration for essential service workers).

Furthermore, both decisions unequivocally find that freedom of association protects both individual rights and collective rights. This strengthens the claims of trade unions that, under the Charter, they have independent protection from legislative interference.



Meredith v. Canada (Attorney General)

The challenge was concerning whether section 2 (d) of the Charter protects workers from substantial interference by governments in collective bargaining.

The initiators of the Charter challenge were the Canadian Police Association, the Mounted Police Members' Legal Fund and L'Association des Membres de la Police Montée du Québec. The challenge was against the *Expenditure Restraint Act* (ERA), as part of the federal government's 2009 *Budget Implementation Act* (Bill C-10), which imposed caps on salary increases for federal government employees, prohibited any additional compensation increases such as allowance, bonus, differential or premium, and prohibited any changes to the classification system that resulted in increased pay rates. In several cases, the legislation denied previously negotiated collective agreements containing wage increases above the imposed salary caps.

The SCC ruled against the challenge and dismissed the appeal. The SCC concluded that the ERA did not amount to a "substantial interference" in the associational activities of RCMP officers, "despite its constitutional deficiencies."

The SCC noted that the ERA resulted in a rollback of scheduled wage increases for RCMP members and eliminated other anticipated benefits. However, the Court found the process followed to impose the wage restraints did not disregard the substance of the usual procedure, and consultations on other compensation-related issues, either in the past or in the future, were not precluded. The SCC concluded "the ERA and the government's course of conduct

cannot be said to have substantially impaired the collective pursuit of the workplace goals of RCMP members” [para. 30, 2015 SCC 2, Case number 35424].

Compared to the decision of the SCC in June 2007 (in the case *Health Services and Support*) against the *BC Health and Social Services Delivery Improvement Act, 2002*, in which the Court found the act to be unconstitutional, the difference was that the SCC noted that the ERA did not have “radical changes to the BC legislation.”



The facts of *Health Services* should not be understood as a minimum threshold for finding a breach of section 2 (d). Nonetheless, the comparison between the impugned legislation in that case and the ERA is instructive. The *Health and Social Services Delivery Improvement Act* introduced radical changes to significant terms covered by collective agreements previously concluded. By contrast, the level at which the ERA capped wage increases for members of the RCMP was consistent with the going rate reached in agreements concluded with other bargaining agents inside and outside of the core public administration, and so reflected an outcome consistent with actual bargaining processes. The process followed to impose the wage restraints thus did not disregard the substance of the former procedure. And the ERA did not preclude consultation on other compensation-related issues, either in the past or in the future [para. 28, 2015 SCC 2, Case number 35424].

In other words, the Court found in 2007 that the *BC Health and Social Services Delivery Improvement Act* was a substantial interference by government in collective bargaining, while in 2015 it found the ERA was not.

Analysis

The impact of *Saskatchewan Federation of Labour* on future constitutional challenges



By **Paul Cavalluzzo**

Senior Partner at Cavalluzzo Shilton McIntyre Cornish and founding member of the Board of Directors of the Canadian Foundation for Labour Rights

This paper assesses the impact of the *Saskatchewan Federation of Labour* case (*SFL*) on *future* litigation respecting constitutional challenges to legislation restricting the right to strike. Although *SFL* was an essential services or a controlled strike case, this paper focuses on challenges to other forms of “strike laws” for the purposes of discussion. Essential service issues were discussed by others at the Forum.

Generally, there are four categories of constitutional challenges to legislation that restrict the right to strike in Canada. The first category is found in the public sector and usually involves two kinds of laws. The first kind of restrictive public sector law is one that prohibits workers from participating in any work stoppage because they perform essential services such as police, firefighting and health services.

However, a fair, independent and adequate process must be provided to resolve bargaining impasses as a substitute for depriving essential service workers of the right to strike. The second kind of public sector collective bargaining law provides for a controlled strike under which employees in the bargaining unit who do not perform essential services are entitled to strike. The fighting ground is usually whether determinations of what is an essential service, and the scope and extent of such services, are made in a fair and independent way and in a manner that leaves the union with reasonable bargaining power.

The second category of challenge relates to legal restrictions on the right to strike that are provided for in a Wagner-model law.

The third category is a sub-set of the second category. This challenge relates to what is referred to as a political strike, or more broadly, a strike for non-collective bargaining purposes. This situation raises the question of whether an applicable collective bargaining law also restricts non-collective bargaining strikes.

The fourth category of challenge relates to a back-to-work law, which prohibits or terminates a strike of workers who are granted the right to strike by law.

Essential Services or Controlled Strike Laws

Besides current and potential essential services law challenges, there are certain aspects of *SFL*, an essential services case, that are relevant to the other kinds of legal restrictions on the right to strike that are currently being challenged in Courts.

First, the test for a section 2 (d) violation is whether the law's interference with the right to strike amounts to a substantial interference with collective bargaining. This means that the court confined its holdings to collective bargaining strikes. In the court's view, although "the right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right." This limitation on the scope of the right to strike became apparent during oral argument when many questions and comments from the bench suggested a concern that the court not declare a wide-ranging right to strike. This the author will expand on in the comments below on political strikes.

The second aspect of the case that is important to all strikes is that a deprivation of the right to strike will generally meet the s. 2 (d) threshold. Most of the debate will be under s. 1. In particular, essential services laws will normally be found to be enacted for pressing and substantial objectives. The issue in dispute will usually be whether the legislative means adopted to attain these objectives are reasonable and proportional in the circumstances. The other kinds of legal restrictions on the right to strike will raise other s. 1 analyses.

The third aspect is that the issue of the substitution of a fair, independent and adequate process for the right to strike is resolved at the s. 1 and not the s. 2 (d) stage of the analysis. There had been some academic debate on this issue before *SFL*. Apart from the holding that s. 2 (d) protects the right to strike, these three aspects

of the case are very relevant to the other categories of constitutional challenges.

Wagner-Model Restrictions

The Wagner Model has timing restrictions on the right to strike—no recognition strikes before bargaining rights are acquired; no strikes during the life of a collective agreement, and no strikes during bargaining until the conciliation process is exhausted. The *quid pro quo* in each case is that the state provides other rights in consideration for having the timing of the strike delayed, such as certification, final and binding grievance arbitration and statutory freeze on working conditions during bargaining respectively.

Any challenge to these Wagner-model restrictions would likely fail, as only the timing of the right to strike is delayed, for which a *quid pro quo* is given. Moreover, each jurisdiction in North America has similar restrictions, which suggests that they are reasonable.

Political Strikes

It is clear from *SFL* that the court confined its constitutional holding to collective bargaining strikes. This raises the question of whether s. 2 (d) protects non-collective bargaining strikes like political strikes. This question arose before labour boards across Canada before *SFL*. In one Ontario case, *General Motors of Canada* [1996] OLRB Rep. 409, the Ontario Labour Relations Board ruled that a political strike was expressive activity protected by s. 2 (b) (freedom of expression). However, it ruled that the restriction on strikes during the life of a collective agreement was justified under s. 1 of the Charter in that it was intended to regulate industrial conflict and thereby promote industrial peace. The Board found this to be a pressing and substantial concern, which was addressed by proportionate legislative means. A court would likely rely heavily on this finding by this expert tribunal in any future challenge to a political strike.

Back-To-Work Laws

There currently are two challenges relating to the constitutionality of back-to-work laws in the federal sector. Both relate to the pre-emptive interference by the federal government in two lawful strikes—one at Canada Post Corporation and the other at Air Canada. These two situations appear to be part of a frontal attack by the Harper government on the right to strike.

In each case, the federal government effectively took away the statutory right to strike and substantially interfered in the bargaining that had reached an impasse. The right granted to workers to break the impasse, the right to strike, was cavalierly taken away by the federal government. Each back-to-work law also contained a very unfair arbitration process which favoured each employer. There was no evidence to suggest that either back-to-work law was justified in light of the prevailing circumstances at the time each law was enacted.

Certainly each back-to-work law did not meet the international law standard that the work stoppage must endanger the life, personal safety or health of the public before the right to strike can be removed. Even if serious economic harm to third parties was a justification, there was no such evidence in either case. The back-to-work laws should be found to be unconstitutional in light of *SFL* in that they substantially interfered with collective bargaining for no justifiable reason. Unfortunately, these two back-to-work laws reflected a pattern of federal government interference with the right to strike in the federal sector. Other back-to-work laws have been enacted by the Harper government.

In closing, *SFL* is definitely a great victory for labour. However, it must be used strategically and in a coordinated manner in the future. There should be a consensus in labour as to what challenges go forward in the future. The impact of *SFL* could be diluted by the wrong case being brought forward in an unconsidered way.



Analysis

The Supreme Court of Canada's decision in *MPAO*:
Constitutional protection for independent trade unions



By **Steve Barrett**

*Managing Partner at Sack Goldblatt Mitchell LLP
and founding member of the Board of Directors of
the Canadian Foundation for Labour Rights*

On January 16, 2015, the Supreme Court of Canada released its decision in *Mounted Police Association of Ontario v. Attorney General of Canada (MPAO)*.

Overview

In the *MPAO* decision, the Court confirmed that freedom of association protects the right of workers to engage in meaningful collective bargaining through democratically chosen, independent trade unions.

The recognition of constitutional protection for the right of workers to choose and be represented by independent trade unions means that governments and legislatures must respect the associational activities of freely functioning trade unions. Thus, for example, any attempt to undermine trade unions and collective bargaining by imposing Wisconsin-like restrictions would likely run afoul of the freedom of association guarantee.

The *MPAO* case involved a challenge to two separate but related aspects of the legal regime governing RCMP members. The first aspect was the imposition of a non-union representational structure on RCMP members, the Staff Relations Representative Process (SRRP). The SRRP prevented them from democratically choosing and bargaining through their own independent bargaining agent. The second aspect was the long standing exclusion of RCMP members from the *Public Service Labour Relations Act (PSLRA)*.

By a 6–1 majority, the Supreme Court of Canada held that members of the RCMP have the right to be represented by an independent association of their own choosing. The Court held that s. 2 (d) of the Charter requires that employees be provided with a degree of choice and independence sufficient to enable them to determine and pursue their collective workplace goals, and in particular, to engage in meaningful collective bargaining. As the Court concluded in striking down the SRRP and the legislative exclusion, “The current RCMP labour relations regime denies RCMP members that choice, and imposes on them a scheme that does not permit them to identify and advance their workplace concerns free from management’s influence” [para. 5].

While the earlier *Health Services* decision recognized s. 2 (d) protections for a process of collective bargaining, the Court had not previously explicitly recognized employee selection of trade union representation, and trade union independence, as core aspects of the s. 2 (d) guarantee.

Purpose and Scope of Section 2 (d) Freedom of Association Guarantee

The majority decision, written by LeBel J. and McLachlin C.J., affirms a purposive, generous and contextual approach to defining the scope of the s. 2 (d) guarantee of freedom of association, noting that “freedom of association is empowering, and that we value the guarantee enshrined in s. 2 (d) because it empowers groups whose members’ individual voices may be all too easily drowned out” [para. 55]. The Court emphasized that “the s. 2 (d) guarantee of freedom of association protects a meaningful process of collective bargaining that provides employees with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests” [para. 5].

According to the Court, the fundamental purpose of s. 2 (d) is:

to protect the individual from “state-enforced isolation in the pursuit of his or her ends”: *Alberta Reference*, at p. 365. The guarantee functions to protect individuals against more powerful entities. By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It

protects marginalized groups and makes possible a more equal society. [para. 58]

However, not all associational activities are protected. For example, the Court stated that “associational activity that constitutes violence is not protected by s. 2 (d)” [paras. 59 to 60]. Nonetheless, the Court was clear that where associational activity relates to “reducing social imbalances” or joining “with others to meet on more equal terms the power and strength of other groups or entities” [para. 66], that activity will be constitutionally protected.

The Court’s description of the purpose of s. 2 (d) as redressing inequality and imbalances in power, and its broad definition of associational activities as embracing non-violent associational activities necessary to “reduc[e] social imbalances,” which includes the right to join “with others to meet on more equal terms the power and strength of other groups or entities,” may well have broader implications for workers beyond collective bargaining and for other civil society associations outside of the workplace context.

Application to Collective Bargaining Context

However, applying these principles specifically to the collective bargaining and workplace context, the Court concluded

As we have seen, s. 2 (d) functions to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power. Nowhere are these dual functions of s. 2 (d) more pertinent than in labour relations. Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals.

The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in a meaningful way (*Health Services, Fraser*). Yet a process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals. As this Court stated in *Health Services*: “One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees” [para. 84]. A process that substantially interferes with a meaningful process of collective bargaining by reducing employ-

ees' negotiating power is therefore inconsistent with the guarantee of freedom of association enshrined in s. 2 (d).

The balance necessary to ensure the meaningful pursuit of workplace goals can be disrupted in many ways. Laws and regulations may restrict the subjects that can be discussed, or impose arbitrary outcomes. They may ban recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power. They may make the employees' workplace goals impossible to achieve. Or they may set up a process that the employees cannot effectively control or influence. Whatever the nature of the restriction, the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2 (d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining: (*Health Services*, at para. 90). [paras. 70 to 72]

Significantly, the Court recognizes that legislative measures, which substantially reduce the ability of employees to negotiate, will undermine the freedom of association guarantee. Moreover, the Court includes in its list of measures that substantially interfere with meaningful bargaining any laws and regulations that "restrict the subjects that can be discussed, or impose arbitrary outcomes." This certainly lends support to the view that measures that restrict the scope of the subject matter of collective bargaining, or that impose collective bargaining outcomes, are inconsistent with the s. 2 (d) guarantee.

Freedom of Association Protects both Individual and Collective Rights

Significantly, the majority also recognized that both individual rights and collective rights are essential for full Charter protection [paras. 62 to 65]. Although the Charter generally speaks of individuals as rights holders, the majority held that there is a collective aspect to s. 2 (d) rights and that "recognizing group or collective rights complements rather than undercuts individual rights." As the Court reasoned:

Section 2 (d), we have seen, protects associational activity for the purpose of securing the individual against state-enforced isolation and empowering individuals to achieve collectively what they could not achieve individually. It follows that the associational rights protected by s. 2 (d) are not merely a bundle of individual rights, but collective rights that inhere in associations. [para. 62]

The view that freedom of association protects both individual rights and collective rights strengthens the claims of trade unions for independent protection from legislative interference under the Charter. For example, if Parliament were to enact Bill C-377, the *MPAO* decision suggests that, apart from any impact on individual employee rights, the adverse impact on the functioning of trade unions would also be subject to challenge in the courts.

Choice and Independence Integral to Meaningful Collective Bargaining

Having found that freedom of association mandates a “meaningful process,” the majority went on to identify “the features essential to a meaningful process of collective bargaining under s. 2 (d),” concluding that “a meaningful process of collective bargaining is a process that provides employees with a degree of choice and independence sufficient to enable them to determine their collective interests and meaningfully pursue them.” To quote the Court:

Collective bargaining constitutes a fundamental aspect of Canadian society which “enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work” (*Health Services*, at para. 82). Put simply, its purpose is to preserve collective employee autonomy against the superior power of management and to maintain equilibrium between the parties. This equilibrium is embodied in the degree of choice and independence afforded to the employees in the labour relations process. [para. 82]

But choice and independence are not absolute: they are limited by the context of collective bargaining. In our view, the degree of choice required by the Charter for collective bargaining purposes is one that enables employees to have effective input into the selection of the collective goals to be advanced by their association. In the same vein, the degree of independence required by the Charter for collective bargaining purposes is one that ensures that the activities of the association are aligned with the interests of its members. [para. 83]

Independence and choice are complementary principles in assessing the constitutional compliance of a labour relations scheme. Charter compliance is evaluated based on

the *degrees* of independence and choice guaranteed by the labour relations scheme, considered with careful attention to the entire context of the scheme. The degrees of choice and independence afforded should not be considered in isolation, but must be assessed globally always with the goal of determining whether the employees are able to associate for the purposes of meaningfully pursuing collective workplace goals. [para. 90]

The Court identified, as the hallmark of employee choice in the collective bargaining context, “the ability to form and join new associations, to change representatives, to set and change collective workplace goals, and to dissolve existing associations”. [para. 86]

So far as the requirement for independence from management is concerned, the Court held it was necessary “that the activities of the association reflect the interests of the employees, thus respecting the nature and purpose of the collective bargaining process” [para. 89]. As the Court went on to state:

Just as with choice, independence from management ensures that the activities of the association reflect the interests of the employees, thus respecting the nature and purpose of the collective bargaining process and allowing it to function properly. Conversely, a lack of independence means that employees may not be able to advance their own interests, but are limited to picking and choosing from among the interests management permits them to advance. Relevant considerations in assessing independence include the freedom to amend the association’s constitution and rules, the freedom to elect the association’s representatives, control over financial administration and control over the activities the association chooses to pursue. [para. 89]

At the same time, the Court emphasized that no one representational model is required to give effect to employee choice and independence:

Employee choice may lead to a diversity of associational structures and to competition between associations, but it is a form of exercise of freedom of association that is essential to the existence of employee organizations and to the maintenance of the confidence of members in them. [para. 86]

A variety of labour relations models may provide sufficient employee choice and independence from management to permit meaningful collective bargaining. As discussed, choice and independence are not absolute in the context of collective bargaining. [para. 92]

This Court has consistently held that freedom of association does not guarantee a particular model of labour relations (*Delisle*, at para. 33; *Health Services*, at para. 91; *Fraser*, at para. 42). What is required is not a particular model, but a regime that does not substantially interfere with meaningful collective bargaining and thus complies with s. 2 (d) (*Health Services*, at para. 94; *Fraser*, at para. 40). What is required in turn to permit meaningful collective bargaining varies with the industry culture and workplace in question. As with all s. 2 (d) inquiries, the required analysis is contextual. [para. 93]



Majoritarian-Exclusivity Model Consistent with Freedom of Association

The Court was clear that the Wagner model of a democratically chosen exclusive bargaining agency within an appropriate bargaining unit, upon which virtually all Canadian collective bargaining legislation is based, meets the twin s. 2 (d) requirements of choice and independence:

The *Wagner-Act* model of labour relations in force in most private sector and many public sector workplaces offers one example of how the requirements of choice and independence ensure meaningful collective bargaining. That model permits a sufficiently large sector of employees to *choose* to associate themselves with a particular trade union and, if necessary, to decertify a union that fails to serve their needs. The principles of majoritarianism and exclusivity, the mechanism of “bargaining units” and the processes of certification and decertification—all under the supervision of an independent labour relations board—ensure that an employer deals with the association most representative of its employees. [para. 94]

s[ection] 2 (d) does not require a process whereby *every* association will ultimately *gain* the recognition it seeks... As we said, s. 2 (d) can also accommodate a model based on majoritarianism and exclusivity (such as the *Wagner-Act* model) that imposes restrictions on individual rights to pursue collective goals. [para. 98]

Indeed, the Court explicitly recognized that there are other collective bargaining representation models that also are consistent with s. 2 (d), in that they accommodate “choice and independence in a way that ensures meaningful collective bargaining” [para. 95]. In this respect, the Court specifically referred to the bargaining-agent-designation model under teachers’ collective bargaining legislation in Ontario. The Court observed that “although the employees’ bargaining agent under such a model is designated rather than chosen by the employees, the employees appear to retain sufficient choice over workplace goals and sufficient independence from management to ensure meaningful collective bargaining.” [para. 95]

As the Court concluded:

The search is not for an “ideal” model of collective bargaining, but rather for a model which provides sufficient employee choice and independence to permit the formulation and pursuit of employee interests in the particular workplace context at issue. Choice and independence do not *require* adversarial labour relations; nothing in the Charter prevents an employee association from engaging willingly with an employer in different, less adversarial and more cooperative ways. This said, genuine collective bargaining cannot be based on the suppression of employees’ interests, where these diverge from those of their employer, in the name of a “non-adversarial” pro-

cess. Whatever the model, the Charter does not permit choice and independence to be eroded such that there is substantial interference with a meaningful process of collective bargaining. Designation of collective bargaining agents and determination of collective bargaining frameworks would therefore not breach s. 2 (d) where the structures that are put in place are free from employer interference, remain under the control of employees and provide employees with sufficient choice over the workplace goals they wish to advance. [para. 97]

Imposed RCMP Representational Scheme Undermines Freedom of Association

Turning to the constitutionality of the Staff Relations Representative Process (SRRP), the Court held that both its purpose and effect violated s. 2 (d). As the Court concluded:

We conclude that the flaws in the SRRP process do not permit meaningful collective bargaining, and are inconsistent with s. 2 (d). The SRRP process fails to respect RCMP members' freedom of association in both its purpose and its effects. [para. 105]

Section 96 of the RCMP Regulations imposed the SRRP on RCMP members as the sole means of presenting their concerns to management. Section 56 of the current-day RCMP Regulations, 2014, continues to impose the SRRP under nearly identical terms. RCMP members are represented by an organization they did not choose and do not control. They must work within a structure that lacks independence from management. Indeed, this structure and process are part of the management organization of the RCMP. The process fails to achieve the balance between employees and employer that is essential to meaningful collective bargaining, and leaves members in a disadvantaged, vulnerable position. [para. 106]

The Attorney General appears to concede that the SRRP continues to be imposed on members of the RCMP for the purpose of preventing collective bargaining through an independent association. Its position is rather that s. 2 (d) does not guarantee RCMP members a right to form and bargain through an association of their own choosing. We have rejected this view. Accordingly, it follows that the purpose of the imposition of the SRRP, to prevent the formation of independent RCMP members'

associations for the purposes of collective bargaining, is unconstitutional. [para. 110]

Simply put, in our view, the SRRP is not an association in any meaningful sense, nor a form of exercise of the right to freedom of association. It is simply an internal human relations scheme imposed on RCMP members by management. Accordingly, the element of employee choice is almost entirely missing under the present scheme. [para. 118]

These constitutional defects in the SRRP are not cured by the election of SRRs. On this point we agree with the conclusion of the application judge, that “agreeing to populate a structure created by management for the purpose of labour relations cannot reasonably be construed as a choice not to conduct labour relations through an association of the members’ own making (para. 63). [para. 120]

Exclusion of RCMP Members from Collective Bargaining Legislation Also Violates Freedom of Association

Furthermore, with respect to section 2 (1) (d) of the *Public Service Labour Relations Act (PSLRA)*, which excluded RCMP members from the protections of that Act, the Court reversed its 1999 decision in *Delisle* (where the Court had found that the exclusion did not breach s. 2 (d)). The Court reasoned that at the time *Delisle* was decided, the right to collective bargaining had not been recognized under the Charter. Further, the majority found that this appeal gave it the opportunity to view the exclusion of RCMP members in its full context, including the impact of the SRRP scheme, which had not been directly challenged in *Delisle*.

The majority found that the government’s purpose in excluding RCMP members from the PSLRA was itself unconstitutional, as it was “designed to prevent the exercise of the s. 2 (d) rights of RCMP members.” As the Court reasoned:

The exclusion of RCMP members from the *PSSRA* in 1967—the only vehicle available for meaningful collective bargaining in the federal public service—was intended to prevent them from engaging in collective bargaining. The then Commissioner of the RCMP acknowledged this in correspondence to the Solicitor General of Canada in 1980, stating: “There is no enabling legislation which allows members to collectively bargain and we

must infer that Parliament has not intended that members of the Force have that right” (see A.F., at para. 106). [para. 134]

The *PSSRA*’s successor, the *PSLRA*, reduced the categories of excluded public servants. RCMP members, however, continued to be excluded in identical terms as under the *PSSRA*, and no other statute permitted RCMP members to engage in a process of collective bargaining. [para. 135]

However, the majority also noted that its conclusion—that the exclusion breached the freedom of association guarantee—did not mean that Parliament was necessarily required to include RCMP members within the *PSLRA* in the future. And further, that “it remains open to the federal government to explore other collective bargaining processes that could better address the specific context in which members of the RCMP discharge their duties” [para 137]. As is typical in successful Charter challenges, the Court suspended the effect of its decision for a period of 12 months to provide the government an opportunity to respond with new legislation.

This aspect of the *MPAO* decision may carry positive implications for other groups of workers still excluded from collective bargaining legislation, both in the private and public sectors. The 1999 *Delisle* decision had seemingly closed the door to these challenges. Yet the *Dunmore* decision had opened the door for more vulnerable employees such as agricultural workers. *MPAO* suggests that where it can be established that the purpose of legislation is to deprive employees of the only mechanism available for meaningful collective bargaining, this may be a violation of s. 2 (d).

Court Removes “Impossibility” and “Derivative” Restrictions on Establishing Interference with Freedom of Association

From a doctrinal perspective, the decision is also noteworthy due to the majority’s clarification of two key aspects of the *Fraser* decision, which some lower courts, and the government, had relied on in an attempt to narrow the scope of s. 2 (d) protections.

Court Rejects Impossibility Threshold for Establishing a Section 2 (d) Breach

First, the majority acknowledged that “some passages in *Fraser* seem to unnecessarily complicate the analysis” by suggesting that the right to collective bargaining is violated only where legislation makes collective bargaining “impossible.” By this means, the

majority confirmed that the proper test is the lower threshold of “substantial interference.” This would constitute the legal test for infringement of freedom of association.

In the context of other fundamental freedoms (for example, freedom of religion), the Court has held that a trivial or insubstantial interference does not amount to a Charter violation. To the extent that the requirement for a substantial interference with freedom of association is intended to ensure that trivial or insubstantial interference would not violate s. 2 (d), it is to be hoped that the Court has now brought the test for freedom of association in line with that applied elsewhere. For that requirement of substantial interference is the test for breaches of s. 2 (d).

Collective Bargaining is Not Merely a “Derivative” Right

The majority’s reasons also clarify that collective bargaining is not a “derivative right.” The Ontario Court of Appeal, and some other courts, after *Fraser*, had characterized collective bargaining as being merely a “derivative” right. This meant that it was only protected “where employees establish that it is effectively impossible for them to [otherwise] act collectively to achieve workplace goals.” However, the Court firmly rejected this view in *MPAO*:

To the extent the term “derivative right” suggests that the right to a meaningful process of collective bargaining only applies where the guarantee under s. 2 (d) is otherwise frustrated, use of that term should be avoided. Furthermore, any suggestion that an aspect of a Charter right may somehow be secondary or subservient to other aspects of that right is out of keeping with the purposive approach to s. 2 (d). [para.79]

What Next for RCMP Members?

In *MPAO*, the Court was careful to emphasize that its decision that excluding RCMP members from the federal public sector labour relations regime in PSLRA breached their constitutional rights. Yet this decision did not mean that Parliament must include the RCMP in that scheme. Rather, according to the Court, “it remains open to the federal government to explore other collective bargaining processes that could better address the specific context in which members of the RCMP discharge their duties” [para. 137].

Of course, in its earlier *Fraser* decision, the Supreme Court of Canada held that s. 2 (d) was not breached by the legislation *Agricultural Employees Protection Act* (AEPA). AEPA provided only for protection against unfair labour practice and for a framework for employees to engage in good faith bargaining with their employer. But AEPA did not provide for majoritarian exclusivity or statutory dispute resolution (such as the right to strike or arbitration) to resolve collective bargaining impasses.

This raises the question of whether it would be open to Parliament to simply enact an AEPA-like regime for RCMP members. Such a regime would provide only for a statutory right of RCMP members to be represented by an independent association they have chosen, with the employer obligated only to listen to and respond to representations in good faith.

However, in considering the constitutional adequacy of an AEPA-like regime for RCMP members, it is important to recognize that while the AEPA scheme at issue in *Fraser* did not provide affirmative protection for the right to strike, at the same time, it did not preclude agricultural employees from engaging in strike action. In fact, the AEPA provided positive statutory protection against reprisals for engaging in the lawful activities of an employee association. And a strong argument can be made that the lawful activities of an association include exercising the common law right to strike. In this sense, by providing statutory protection against reprisal for engaging in lawful activities of an employee association, the AEPA therefore provided statutory protection for strike activity. As a result, when the Court in *Fraser* upheld the AEPA, it was not upholding a statutory scheme that prohibited the right to strike, but one that protected it against employer reprisal.

More significantly, in its *SFL* decision, i.e., in finding in s. 2 (d) constitutional protection for the right to strike, the Supreme Court of Canada also held that restrictions on the right to strike for essential service workers can be justified only under s. 1 of the Charter through enactment of a legislated form of independent and binding arbitration. As a result, it would seem clear that if Parliament were to treat RCMP members as essential service workers and prohibit them from striking (which seems somewhat likely), this restriction would be justified under the Charter only if the legislation went further than the AEPA scheme, and provided for a statutory independent and binding-interest arbitration regime in place of restrictions on the right to strike.

Analysis

Meredith v. Canada: Constitutional protection for the right to bargain collectively under the Supreme Court of Canada's new labour trilogy



By **Fay Faraday**

Faraday Law, Visiting Professor, Osgoode Hall Law School and Board member of the Canadian Foundation for Labour Rights

The Supreme Court of Canada's new Charter trilogy on freedom of association addresses three critical phases of collective action by workers: 1. the right to join a union—*Mounted Police Association of Ontario v. Canada (Attorney General)* [MPAO, 2015 SCC 1]; 2. the right to bargain collectively—*Meredith v. Canada (Attorney General)* [*Meredith*, 2015 SCC 2]; and 3. the right to strike—*Saskatchewan Federation of Labour v. Saskatchewan* [SFL, 2015 SCC 4]. Of these three, the right to bargain collectively appears to pose the greatest difficulty for the Court. Moreover, because of its uniquely distinguishable facts, the ruling in *Meredith* provides the least direction on how the new jurisprudence will be applied on this issue moving forward. Nevertheless, the trilogy provides the most robust constitutional protection yet for the right to bargain collectively and articulates a strong principled foundation for that support.

These comments review

(a) the scope of protection that is now afforded to the right to bargain collectively under s. 2 (d) of the *Canadian Charter of Rights and Freedoms*;

(b) how to understand *Meredith* in light of its unique facts and in its relation to the other ongoing challenges to the *Expenditure Restraint Act*; and

(c) issues to anticipate in future cases invoking s. 2 (d) protection for the right to bargain collectively.

Constitutional Protection for the Right to Bargain Collectively

The new freedom of association trilogy marks a significant advance in the jurisprudence because it articulates a principled and purposive basis for understanding why freedom of association is protected as a constitutional right. The Court expressly adopts and expands upon Chief Justice Dickson's influential dissent in the 1987 *Labour Trilogy*, ultimately anchoring s. 2 (d) protection in an analysis of how power operates in social relations. The core principles for interpretation are set out in detail in *MPAO*.

Section 2 (d) protects “effective participation in society” because through freedom of association, “individuals are able to ensure that they have a voice in shaping the circumstances integral to their needs, rights and freedoms” [*Alberta Reference, supra* at 334 (per Dickson C.J.C.) and at 395 (per McIntyre J.)]. As the Court stated in *MPAO*: “we value the guarantee enshrined in s. 2 (d) because it empowers groups whose members’ individual voices may be all too easily drowned out” [*MPAO, supra* at para. 55]. In endorsing this purposive interpretation of s. 2 (d), *MPAO* adopted the following key statement by Chief Justice Dickson from the 1987 *Labour Trilogy*:

Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfill their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict. [*Alberta Reference, supra* at 365 to 366 (per Dickson C.J.C.); *MPAO, supra* at 57, 54, 66 and 80]

Emphasizing that s. 2 (d) functions to prevent individuals “from being overwhelmed by more powerful entities” and to “enhance their strength through the exercise of collective power,” in *MPAO* the Court stated that:

Nowhere are these dual functions of s. 2 (d) more pertinent than in labour relations. Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals.

The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in a meaningful way. [MPAO, *supra* at paras. 70 to 71]

Recognizing that workers associate in order to meet on more equal terms the power and strength of their employers, the Court further stated that:

The guarantee entrenched in s. 2 (d) of the Charter cannot be indifferent to power imbalances in the labour relations context. To sanction such indifference would be to ignore “the historical origins of the concepts enshrined” in s. 2 (d) . . . It follows that the right to a meaningful process of collective bargaining will not be satisfied by a legislative scheme that strips employees of adequate protections in their interactions with management so as to substantially interfere with their ability to meaningfully engage in collective negotiations. [MPAO, *supra* at para. 80 [emphasis added]; also *SFL*, *supra* at para. 55]

Freedom of association, then, guarantees to workers protection for “the effective exercise of their associational rights”¹ through a “meaningful”² and “substantive”³ process of collective bargaining.⁴ The notion that collective bargaining is a “derivative right” was explicitly rejected. Instead, collective bargaining is protected directly as an exercise of freedom of association [MPAO, *supra* at para. 79]. That collective bargaining process will be constitutionally sound only if it maintains a balanced relationship between the parties that allows workers “to exert *meaningful influence* over

1 *Fraser*, *supra* at paras. 18, 39. See also *Dunmore*, *supra* at para. 30.

2 *MPAO*, *supra* at paras. 45, 67, 68, 70 to 72, 74 to 75, 80. See also, *Fraser*, *supra* at paras. 26, 31 to 34, 38, 41 to 43, 47, 50, 54, 60, 65 to 66, 68, 98 to 99, 105-106, 117; *B.C. Health Services*, *supra* at paras. 90 to 92, 96, 101, 111; *Dunmore*, *supra* at paras. 20, 23, 67.

3 *Fraser*, *supra* at para. 32.

4 The protection of collective bargaining as an exercise of freedom of association also enjoys a secure legal footing in international human rights law: see *B.C. Health Services*, *supra* at paras. 69 to 79 and Macklem Report, AB Tab 31 at paras. 13 to 80.

working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith” [MPAO, *supra* at paras. 71 to 72; *B.C. Health Services, supra* at paras. 90, 97] [emphasis added].

Meredith confirmed that the test established in *B.C. Health Services* still applies to assess whether state interference with the right to bargain collectively violates s. 2 (d) [*Meredith, supra* at para. 24]. So the Court will continue to examine (a) whether the issue that is affected by state interference is important to the collective bargaining process and the reasons why workers act collectively, and (b) whether the degree of interference is substantial.⁵ The “ultimate question to be determined is whether the measures disrupt the balance between employees and employers that s. 2 (d) seeks to achieve so as to substantially interfere with meaningful collective bargaining” [MPAO, *supra* at para. 72].

In *MPAO*, the Court identified a broad range of actions that would substantially interfere with a meaningful process of collective bargaining and linked them to the analysis of power imbalances as follows:

Yet a process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals. As this Court stated in *Health Services*: “One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees . . . ” (para. 84). A process that substantially interferes with a meaningful process of collective bargaining by *reducing employees’ negotiating power* is therefore inconsistent with the guarantee of freedom of association enshrined in s. 2 (d).

The balance necessary to ensure the meaningful pursuit of workplace goals can be disrupted in many ways. Laws and regulations may *restrict the subjects that can be discussed, or impose arbitrary outcomes*. They may *ban recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power*. They may *make the employees’ workplace goals impossible to achieve*. Or they may *set up a process that the employees cannot effectively control or influence*. Whatever the nature of the restriction, the ultimate question

⁵ *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391 at paras. 93 to 98. Note that in *MPAO, supra* at paras. 73 to 77 the Court explicitly rejected the argument that after *Fraser v. Ontario (Attorney General)*, 2011 SCC 20, [2011] 2 S.C.R. 3 the threshold to prove a violation was interference that made freedom of association “impossible” or “effectively impossible” to exercise.

to be determined is whether the measures *disrupt the balance between employees and employer* that s. 2 (d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining. [*MPAO, supra* at para. 71 to 72 [emphasis added]; *SFL, supra* at para. 77]

Understanding and Distinguishing Meredith

The Court's ruling in *Meredith* provides little insight into how the Court will apply the principled analysis set out in *MPAO* because the facts of *Meredith* distinguish it and narrowly constrain its precedential value.

Meredith arose in a context where employees did not engage in collective bargaining with their employer. Instead, workers participated in the RCMP's non-unionized labour relations scheme through a Pay Council composed of worker and employer representatives. The Charter claim was brought by two members of the RCMP who were elected to the national executive of the Staff Relations Representative Program (SRRP) which participated in the Pay Council process.

While the Court accepted that the Pay Council process involved a degree of collective activity by workers, in both *MPAO* and *Meredith* the Court emphasized exactly how limited that collective process was. It was not bargaining. There were no actual negotiations with the employer. There was no collective agreement. Instead, the worker and employer representatives on the Pay Council could make non-binding recommendations to the RCMP Commissioner, who in turn could make non-binding recommendations to Treasury Board. At all times, "the Treasury Board can act unilaterally as it is not obliged to consult or negotiate with the Pay Council or Staff Relations Representatives with respect to wages and benefits" [*Meredith, supra* at para. 19 to 20; *Meredith v. Canada*, 2013 FCA 112 at paras. 80, 91].

In June 2008, the Treasury Board announced salary increases of 3.32%, 3.5% and 2% for 2008–2010 that reflected the recommendations developed through the Pay Council process. In October–November 2008, as the global financial crisis emerged, the federal government announced plans to introduce legislation to restrain public sector wages. Before the RCMP wage increases took effect, in December 2008, Treasury Board unilaterally revised its wage decision downwards to provide annual increases of only 1.5% for 2008–2010. This revision matched the annual wage caps the government announced would be imposed through the pending wage restraint legislation. Those wage caps were in fact legislated in

March 2009 through the *Expenditure Restraint Act* (ERA) [S.C. 2009, c. 2, s. 393]. *Meredith* challenged the constitutionality of the government's decision, and of the ERA, which together rolled back the wage increases that were originally promised.

As the claim in *Meredith* was brought by the Staff Relations Representatives, the case did not challenge the validity of the SRRP process per se. *Meredith* was, however, heard by the Court together with *MPAO*. The Charter claim in *MPAO* was brought by independent, voluntary private associations of RCMP members that were organized at the initiative of members themselves. *MPAO* directly challenged the imposition of the SRRP regime and the exclusion from the *Public Service Labour Relations Act* as violating freedom of association on the basis that each of these deprived RCMP members of the freedom to choose their own, independent union. In *MPAO*, the Court ruled that both the SRRP and the exclusion from the PSLRA violated s. 2 (d) of the Charter. With respect to the SRRP, the Court held that “the purpose of the SRRP [is] to prevent the formation of independent RCMP members’ associations for the purposes of collective bargaining” and that this purpose was unconstitutional [*MPAO, supra* at para. 110]. Moreover, the Court found that RCMP members cannot “genuinely advance their own interests through the SRRP, without interference by RCMP management [*MPAO, supra* at para. 111]. The Court found that the SRRP is not independent of RCMP management but is instead “squarely under its control” and “is part of the labour-management structure of the RCMP” [*MPAO, supra* at para. 113].

Simply put, in our view, the SRRP is not an association in any meaningful sense, nor a form of exercise of the right to freedom of association. It is simply an internal human relations scheme imposed on RCMP members by management. [*MPAO, supra* at para. 118]

Having ruled that the entire SRRP process—including the Pay Council process—violated the Charter, the Court faced the difficulty in *Meredith* of how to address whether there was interference with the minimal collective action that occurred in what was an unconstitutional scheme. As the Court stated:

The Pay Council process is part of the scheme found to be constitutionally inadequate in *MPAO*.

This creates difficulties in the present appeal, as we must determine whether s. 2 (d) can apply in the absence of a constitutionally adequate process of collective bargaining . . . In our view, despite the deficiencies in the

Pay Council process, it nonetheless constitutes associational activity that attracts Charter protection. The question to be determined on this appeal is whether the ERA amounted to substantial interference with that activity despite its constitutional deficiencies. [*Meredith, supra* at para. 4; also para. 25]

The Court's approach was to examine whether the existing process was itself compromised by the ERA. The Court ruled that it was not. It must be stressed that in this model, Treasury Board at all times had unilateral authority to set the wages. The Pay Council's ability to make non-binding recommendations, combined with the Treasury Board's ability to act unilaterally, was unchanged by the ERA. The ERA did not prevent the same non-binding process from moving forward. Moreover, s. 62 of the ERA specifically carved out an exception—available only to the RCMP—which authorized Treasury Board to change or introduce allowances that awarded increases beyond the legislated wage caps. The Pay Council made representations in respect of such allowances that the Treasury Board implemented.

At the end of the day, the decision is highly distinguishable. In its conclusions, the Court explicitly confined its ruling to the unique facts and emphasized that the scheme as a whole fails to comply with the Charter:

Simply put, the Pay Council continued to afford RCMP members a process for consultation on compensation-related issues *within the constitutionally inadequate labour relations framework that was then in place*. The ERA and the government's course of conduct cannot be said to have substantially impaired the collective pursuit of the workplace goals of RCMP members. This said, *our conclusions, as they relate to the ERA's impact on the Pay Council process, should not be taken to endorse the constitutional validity of that process or of similar schemes*. [*Meredith, supra* at para. 30] [emphasis mine]

As a result, *Meredith* does not resolve whether the ERA is constitutional in the context where freedom of association is exercised within a constitutionally valid collective bargaining system. Several Charter challenges to the ERA remain active before provincial appellate courts that will squarely address this. Two of those cases—which involved the *Federal Government Dockyard Trades and Labour Council* in B.C. and the *Association des réalisateurs* in Québec—had been heard and decided by the respective provincial appellate courts before *Meredith* was heard and decided. In both

cases, the unions applied for leave to appeal to the SCC. That *Meredith* is not the last word on the ERA is clear, as after *Meredith* was released, the SCC decided the leave applications by remitting both appeals to be reargued before the respective provincial appellate courts in light of the new jurisprudence.⁶ Two other appeals with respect to the ERA are also proceeding before the Ontario Court of Appeal.⁷ Together these appeals will provide insight into how the new jurisprudence will be applied to examine what in practice constitutes interference with meaningful collective bargaining.

Themes to Watch Going Forward

The new jurisprudence does provide more robust protection to meaningful collective bargaining. *SFL*'s recognition of constitutional protection for the right to strike ensures that interference with collective bargaining must be understood in light of its impacts on that full exercise of collective action. As such, the trilogy refutes the notion that there are phases of the collective bargaining process that fall outside of constitutional protection and ensures that dispute resolution mechanisms that substitute for the right to strike must be justified under s. 1. Yet there are still areas that will be important to watch in future cases to ensure that the promise of the jurisprudence is delivered:

- Unions must remain vigilant to ensure that the boundaries between s. 2 (d) and s. 1 of the Charter remain distinct. Government's economic justifications for interfering with collective bargaining must be confined to analysis under s. 1 and must be supported by evidence.
- It will be necessary to ensure that courts carry through on the purposive analysis of freedom of association that addresses the power imbalance between employers and employees.
- In assessing whether there is a s. 2 (d) violation, courts continue to exhibit inappropriate and erroneous slippage away from analysis of whether there is interference with the *bargaining process* into analysis of whether the depth of incursion into the *bargaining outcome* is considered acceptable. In effect, through this slippage, the focus shifts from whether the collective action was impaired—which is the proper sphere of constitutional

⁶ *Federal Government Dockyard Trades and Labour Council v. Canada (Attorney General)*, 2011 BCSC 1210, aff'd 2013 BCCA 371, remanded back to the BC CA by the SCC, 29 January 2015 (SCC File 35569); *Association des réalisateurs c. Canada (Procureur général)* 2012 QCCS 3223, rev'd 2014 QCCA 1068, remanded back to QCCA by the SCC 29 January 2015 (SCC File 36013).

⁷ *PIPSC v. Canada (Attorney General)*; *PSAC v. Canada (Attorney General)*, 2014 ONSC 965 on appeal to the Ontario Court of Appeal as Court Files No. C58502 and C58201.

inquiry—to whether the deal can be considered reasonable—which is not. On one hand, unions are told that they are not entitled to constitutional protection of bargaining outcomes, but on the other hand bargaining outcomes are held against them to argue there is no breach of s. 2 (d). It will be necessary to ensure that in its application to the specific facts of interference, the analysis remains rigorous, principled and focused on the impairment of freedom of association.

- It will be necessary to ensure that a clear and principled distinction is made between *meaningful collective bargaining*—the interference with which violates s. 2 (d)—and the concept of *consultation*—which should be relevant only under s. 1. Even in this context, consultation is only relevant to whether the government met its obligation under s. 1 to ensure that any impairment of s. 2 (d) was minimal because the government genuinely considered alternate less impairing options. The question of whether government “consulted” with unions before taking legislative action that impairs meaningful collective bargaining should not form part of the s. 2 (d) analysis, as it relies on the flawed notion that parties can consent to a violation of their constitutional rights.



Analysis

Essential services legislation after *SFL*



By **Andrew Astritis**

Partner at Raven, Cameron,
Ballantyne and Yazbeck

For almost 50 years, the operation of labour regimes across Canada has demonstrated that it is possible to maintain essential services while also protecting a meaningful right to strike. Recently, however, the Government of Saskatchewan abandoned the established approach to essential services, undermining the bargaining strength of its workers. It did so primarily by granting public service employers—instead of labour boards—the unilateral authority to determine whether a public service is essential and, if so, which employees would be prohibited from striking in order to maintain that service. This skewed approach resulted in significant increases in the number of employees prevented from participating in otherwise lawful strikes.

The Supreme Court of Canada's recent recognition of a constitutional right to strike restores a more balanced approach to this issue. In recognizing this right, the Court in *Saskatchewan Federation of Labour v. Saskatchewan (SFL)* [2015 SCC 4] limited the ability of governments to undermine workers' rights, while ensuring that the public interest in maintaining essential services is effectively protected. This paper will outline the key elements of this ruling and its implications for essential services legislation in Canada.

When Will Essential Services Legislation Violate Section 2 (d)?

The Supreme Court's decision in *SFL* recognized the right to strike as an indispensable part of the right to collective bargaining. The analytical path to that conclusion included over 70 paragraphs of discussion of its legal, historical and international bases. In setting out the test to be met and applying it to the essential services legislation at issue, however, the Court was brief and to the point [2015 SCC 4 at para. 78]

The test, then, is whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with collective bargaining. The PSESA demonstrably meets this threshold because it prevents designated employees from engaging in any work stoppage as part of the bargaining process. It therefore means that it needs to be justified under section 1 of the Charter.

Simply put, the Court ruled that Saskatchewan's essential services legislation was, on its face, a violation of section 2 (d) because of the restrictions it placed on the right to strike. In reaching this conclusion, the Court did not address the particular elements of the legislation or the evidentiary record advanced by the unions in that case. The Court's reasons suggest that essential services legislation, by its very nature, presumptively violates the right to strike and must be justified under section 1.

What Constitutes an Essential Service?

The Court's decision in *SFL* limits the range of services that will be considered to be essential going forward. The Saskatchewan Government had established a broader definition of essential services than is typically found elsewhere in Canada, which included the "destruction or serious deterioration of machinery, equipment or premises" [*Public Sector Essential Services Act*, SS 2008, c. P-42.2, subsection 2 (c)].

In addressing this issue, the Supreme Court identified a narrow range of services that could be considered essential under section 1. The Court adopted Justice Dickson's conclusion in the *Alberta Reference* that a service would be "essential" where its interruption "would threaten serious harm to the general public or to part of the population." It also endorsed Justice Dickson's reference to the decisions of the ILO's Committee on Freedom of Association, which define an essential service as one "whose interruption would endanger the life, personal safety or health of the whole or part of the

population.” [Dickson C.J.C. quoting the ILO in the *Alberta Reference*, para. 68]. Mere inconvenience to the public is not enough.⁸

The urgency of the threat to the public also plays a role in this analysis. The Court in *SFL* again looked to the ILO for guidance, adopting statements of the Committee on Freedom of Association that an essential service is one that is needed to prevent a “*clear and imminent threat* to the life, personal safety or health of the whole or part of the population” [*SFL, supra* at para. 92]. It follows that concerns regarding safety or security should prevent employees from striking only at the point at which the *continued* suspension of the service poses an immediate risk to the public.

Finally, the reasons in *SFL* indicate that the Government must demonstrate that a service is essential in the *context of a strike*. The question is not whether certain employees are essential to the operation of a service, such as a school, national park, or airline; rather, it is whether those services are, in themselves, essential to the safety and security of the public such that they must continue operating in the event of a strike.

What Are the Basic Requirements of a Charter-Compliant Essential Services Regime?

The Supreme Court’s section 1 analysis rejected a number of features of the Saskatchewan essential services regime that went beyond what was necessary to maintain the safety and security of the public during a strike. In doing so, the Court expressed a clear willingness to hold governments to an exacting standard on these issues.

Unilateral Employer Determinations of Essential Services

Perhaps the most egregious element of the Saskatchewan regime was the unilateral authority it granted to government employers to determine whether a service is essential and whether particular workers are necessary to provide the service. The record in *SFL* documented numerous instances in which employers had abused this authority.⁹ The Court, however, did not rely on these specific abuses, concluding instead that the mere fact that such authority

⁸ *SFL, supra* at para 84; Justice Dickson’s dissent in the *Alberta Reference* also accepted that workers who are necessary to maintain the administration of the rule of law and national security would also be included.

⁹ Similar abuses have been identified in the federal jurisdiction following the recent passage of Bill C-4, which amended the essential services provisions of the *Public Service Labour Relations Act* SC 2003 c. 22, s. 2 to broadly mirror the Saskatchewan legislation at issue in *SFL*.

was granted to the employer disqualified the regime under section 1.

Failure to Have Regard for the Availability of Other Employees to Perform Essential Services

The Court ruled that, in determining the number of employees necessary to maintain an essential service, consideration must be given to the availability of others who could provide the service, including managers. The failure of the Saskatchewan regime to have regard for other means to provide the essential service thus failed to satisfy section 1.

Requirement to Perform Non-essential Duties

The Court further held that the minimal impairment test would be violated where designated employees could be required to perform duties beyond those that are essential. This element of the Court's decision further limits the ability of governments to undermine the effectiveness of a strike by maintaining services that are unnecessary for the safety or security of the public. In the context of a public service strike, where the work stoppage generally does not impose financial losses on the employer as in the private sector, the Court ensured that governments could not use essential services as a pretext for maintaining other programs. *SFL* confirms that a strike is not business as usual.

Absence of a Meaningful Dispute Resolution System

Finally, the Court concluded that a meaningful dispute resolution process such as interest arbitration must be available where essential service designations would undermine the effectiveness of a strike. The Court agreed with Professor Weiler, who stated: "If we pull all the teeth of a union by requiring provision of imperative public safety services, such that any remaining strike does not afford the union significant bargaining leverage, then I believe the union should have access to arbitration at its option [*SFL, supra* at para. 93]." The Court likewise endorsed Justice Dickson's statement that the purpose of such a mechanism is "to ensure that the loss in bargaining power through legislative prohibitions of strikes is balanced by access to a system which is capable of resolving in a fair, effective and expeditious manner disputes which arise between employees and employers [*SFL, supra* at para 94]."

The implications of these pronouncements for workers are significant. First, a union should have access to an alternative dispute resolution process at its option. Regardless of the number of em-

ployees designated, a union cannot be forced into arbitration if its members wish to engage in strike activity. Second, in order to access such a system, a union must demonstrate that it no longer has “significant bargaining leverage” or that there has been a “loss in bargaining power”—it need not prove that a strike would be entirely meaningless. Third, the process must be adequate, impartial and effective [*SFL, supra* at para. 96]. An interest arbitration process that favours the employer is unacceptable.

Conclusion

The Supreme Court’s ruling in *SFL* prevents governments from establishing essential services regimes that limit the right to strike more than is necessary to protect the safety and security of the public. In doing so, it calls into question the constitutional validity of other legislation in Canada, including the recent enactment of the *Essential Health and Community Services Act* in Nova Scotia. This is particularly the case for the amendments to the essential services regime in the federal public service, which modeled the now-defunct approach in Saskatchewan.

For these rights to be truly realized, however, labour boards and reviewing courts must also ensure that essential services regimes are applied in such a way as to minimize intrusions on the right to strike. The indispensable role of the right to strike in collective bargaining must inform the identification of essential services, the determination of the level at which the service will be maintained, and the designation of the employees necessary to maintain the service, ensuring that each step of this analysis limits the right to strike as little as possible. While the Supreme Court has rejected the most blatant abuses of essential services by governments, the ability of workers to mount effective strikes and engage in meaningful collective bargaining will depend on whether these principles are applied in a manner consistent with their powerful articulation in *SFL*.

Analysis

The fall and rise of a good idea: the use of international labour law in the interpretation of the *Charter of Rights and Freedoms*



By **Michael Lynk**

Professor, Faculty of Law,
University of Western Ontario

Introduction

Not so very long ago, when Canadian labour lawyers thought about international labour law—that is, when they thought about it at all—they imagined a distant and lighter-than-air body of vague rules and soft law that had nothing to do with their daily legal practice. And they were right. The conventions of the International Labour Organization (ILO), the rulings of the ILO's Committee on Freedom of Association and the various international human rights treaties did not have any effective application in Canadian labour law. International labour law had played no role in shaping Canadian labour law, and, with the Supreme Court of Canada rulings in the 1980s and 1990s that the *Charter of Rights and Freedoms* provided no meaningful protection for fundamental workplace rights, the lofty principles from Geneva seemed destined to remain there.

Now, a decisive corner has been turned. The Supreme Court's January 2015 decision in *Saskatchewan Federation of Labour v. Saskatchewan* [2015 SCC 4] has provided a full-blooded endorsement of international labour law as a seminal source for the protection and evolution of fundamental rights at work in Canada. While the Supreme Court had planted the seeds of this endorsement in

earlier rulings, the *SFL* decision has solidified the new role of international labour law in Canada, even as the exact reach of its application remains an open question. In this short essay, I will lay out the background and the implications of *SFL* for the role of international labour law in our industrial relations and workplace legal system.

What is International Labour Law?

Simply put, international labour law is the body of legal principles emanating principally from the International Labour Organization that seeks to establish and raise the floor of fundamental employment rights in workplaces around the globe. Different countries and regions have adopted different legal systems to regulate industrial relations and workplace rights. Thus, the body of rules that makes up international labour law has to be general enough to be broadly applicable across different legal regimes, yet specific enough to provide direction and clarity on a range of workplace issues. Among the issues that international labour law seeks to protect are the rights of workers to form and join unions, protections for collective bargaining, the right of workers to strike, the enforceability of bargained rights, and the right of unions and employer organizations to be free from government interference.

The primary source for international labour law is the International Labour Organization. The ILO is a body of the United Nations, founded in 1919 and based in Geneva, which is devoted to improving employment standards and rights. It is a tripartite organization, with equal voice given to unions, employers and governments in shaping its policies and rules. Among the ILO's contributions to international labour law are its 189 conventions and the many rulings of its Committee on Freedom of Association on fundamental workplace rights. Also considered part of international labour law are the leading treaties on human rights law (such as the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*), the judgements of various national and regional courts, and the writings of legal academics.

The Supreme Court of Canada and International Labour Law

The Background

Early in the Charter era, the Supreme Court of Canada was entirely indifferent to the arguments from unions that international

labour law should be relied upon when deciding whether section 2 (d) of the Charter—“freedom of association”—encompassed the three fundamental rights to organize unions, to collectively bargain, and to strike. In a string of early rulings, the Supreme Court stated that section 2 (d) protected only individual, not collective, rights, and therefore these three fundamental rights did not enjoy constitutional protection in Canada.¹⁰ The Court majorities in these cases consigned international labour law to the constitutional margins, making barely any mention of it.

However, Chief Justice Brian Dickson, in the most influential dissent in Supreme Court history, stated in *Re Alberta Reference* in 1987 that international law should play a leading role in shaping Charter rights in Canada. He famously wrote:

Furthermore, Canada is a party to a number of international human rights Conventions which contain provisions similar or identical to those in the Charter. Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the Charter. The general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in Charter interpretation

The content of Canada’s international human rights obligations is, in my view, an important indicia of the meaning of “the full benefit of the Charter’s protection.” I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified. [*Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, at para. 59]

After a long fallow period, the shift in the Supreme Court’s position towards constitutional rights, freedom of association and the transplantation of international labour law began with its 2001 decision in *Dunmore v. Ontario*, dealing with the lack of access to collective bargaining by agricultural workers in Ontario [2001 SCC 94]. For the first time, the Supreme Court endorsed a liberal reading of “freedom of association,” and allowed a union’s claim that access to collective representation was protected by s. 2 (d). As part

¹⁰ *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313; *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460; *PSAC v. Canada*, [1987] 1 S.C.R. 424; *PSISC v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367; *Delisle v. Canada*, [1999] 2 S.C.R. 989.

of its change in direction, the Court in *Dunmore* adopted the thrust of Dickson's 1987 dissent on international labour law, acknowledging that: "The collective dimension of s. 2 (d) is also consistent with developments in international human rights law, as indicated by the jurisprudence of the [ILO's] Committee of experts on the Application of Conventions and recommendations and the ILO Committee on Freedom of Association." [*Dunmore* 2001 SCC 94, para. 15] A further ringing endorsement of international labour law was given by the Court in its 2007 ruling in *B.C. Health Services* [2007 SCC 27].

Then, the wheels seemingly fell off. In a highly curious and confused decision in *Fraser v. Ontario*, the Supreme Court in 2011 rejected a Charter challenge by agricultural workers in Ontario that the sparse bargaining legislation enacted by the Ontario legislation in the aftermath of *Dunmore* was not a breach of the freedom of association guarantees. While the Court majority did not repudiate its earlier endorsements of international labour law, neither did it mount any principled or substantive defence of it, in spite of a vigorous attack on the use of international law by Mr. Justice Rothstein in dissent. Many labour lawyers were left wondering whether the Supreme Court of Canada was going to unspool its hard-won, enlightened approach towards international labour law.

Saskatchewan Federation of Labour

The Supreme Court's ruling in *SFL* was both a return to, and an advancement beyond, its earlier commitments from *Dunmore* and *B.C. Health Services* to the integral role of international labour law in s. 2 (d) analysis. Madam Justice Rosie Abella, writing for the 5-2 majority, made three important statements on international labour law that will likely shape its application in future Charter litigation on freedom of association. However, her judgement also left unresolved some of the detailed implications of international labour law.

First, Justice Abella re-embraced Chief Justice Dickson's famous dissent in full. After acknowledging that his judgement had been initially relegated, she pointed to its subsequent revival and that it now served as "a magnetic guide" on Canada's commitments under international law. In particular, Abella J. endorsed two of the most significant principles on international law adopted by Dickson in 1987. First, courts in Canada have to ensure consistency between their interpretation of the Charter, on the one hand, and "Canada's international obligations and the relevant principles of international law on the other." And second, "the Charter should

be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified" [*SFL, supra*, note 1, at paras. 63 to 64]. If applied purposively in subsequent constitutional litigation, both of these principles have the potential to raise some of the more troubling areas of Canadian labour law and human rights law to international standards.

The second significant statement emerging from *SFL* is that the Court is inching closer to the principle that "labour rights are human rights." In her judgement, Madam Justice Abella referred to two of the foundational documents on international human rights law to find that the right to strike was embedded within the core principles of international law. The *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) both expressly protect the right to form and join unions, and the ICESCR specifically endorses the right to strike, as fundamental features in international human rights law.¹¹ The Supreme Court did not specifically endorse the principle that labour rights are human rights, but the connection is obvious: if core labour rights find their legal source in globally recognized human rights agreements that Canada has ratified, then they must be part of the family of human rights and should therefore be treated with the same breadth and seriousness. Among other things, this would mean that, like other human rights in Canada, core labour rights should be interpreted broadly and purposively, and exemptions to these core rights should be applied narrowly.

And third, the Court's majority decision made extensive use of rulings from national and regional supreme courts as well as provisions in the constitutions of other democracies. The Court cited recent judicial decisions or constitutional provisions on the right to strike from, among other countries, Germany, France, Italy, South Africa and the European Court of Human Rights. As Abella J. recognized, "there is an emerging international consensus that, if it is to be meaningful, collective bargaining requires a right to strike" [*SFL, supra*, note 1, at para. 71]. This use of comparative law is timely. We are entering into a new era of international and comparative constitutional law, where judicial rulings and embedded constitutional rights are now being regularly relied upon by other national courts as they chart their way through similar constitutional problems. In the world, the Supreme Court of Canada has

¹¹ ICESCR, 993 U.N.T.S. 3; and ICCPR, 999 U.N.T.S. 171. Both of these Covenants were adopted by the United Nations in 1966 and entered into international law in 1976. Both were ratified by Canada in May 1976. The relevant provisions on trade union rights are in ICESCR, Article 8 and ICCPR, Article 22.

become regarded as a “constitutional superpower,”¹² partly because of its willingness to pay close attention to emerging international trends on constitutional thinking on equality and human rights. This should strengthen the Court’s commitment to relying upon international and comparative law in future Charter litigation on freedom of association.

Left unresolved in the *SFL* ruling on international labour law was whether the Supreme Court has endorsed some of the implications of international labour law’s detailed discussion of the right to strike. In *SFL*, the Court accepted the general principles of the right to strike as laid out in the *Digest of Decisions and Principles of the Freedom of Association Committee of the ILO*, which is one of the essential compendiums on the various fundamental rights at work in international labour law [*SFL*, *supra*, note 1, at para. 68]. This *Digest* sums up the foundational principles on these various rights, as expressed through the more than 3000 rulings issued by the Committee on Freedom of Association since 1950. For example, the *Digest* tells us that the right to strike is a broad right, and can be legitimately restricted by governments only in narrow circumstances where the health or safety of part or all of the population would be clearly threatened. Restrictions of the right to strike must be based on the minimal and proportional rule, so as to allow for as comprehensive an exercise of the right as possible in the circumstances. The decision in *SFL* by the Saskatchewan Court of Queen’s Bench did endorse some of these details from the *Digest* [(2012) 7 W.W.R. 743 (Sask. C.A.), at para. 128], but the Supreme Court’s ruling is more oblique. Only through future litigation on back-to-work legislation or public sector strike-restriction legislation will the application of these details on the fundamental rights in international labour law be developed.

Conclusion

SFL is an important endorsement from Canada’s highest court on the centrality of international law in general, and international labour and human rights law in particular, to the interpretation of our fundamental Charter rights. In the immediate future, the use of international labour law will continue to be directed, in all likelihood, towards constitutional challenges on the breadth and scope of the three fundamental workplace rights: the right to organize, the right to collectively bargain and the right to strike. However, constitutional and human rights have a habit of spilling over their preconceived boundaries into new and surprising areas. One

12 D. S. Law & M. Versteeg, “The Declining Influence of the United States Constitution” (2012), 87 *New York University Law Review* 1.

area where one might see international labour and human rights law become applied in Canadian labour law would be in human rights cases before labour arbitrators or human rights tribunals. Specifically, labour lawyers might rely upon important human rights treaties, such as the UN *Convention on the Rights of Persons with Disabilities*, or the *International Convention on the Elimination of All Forms of Racial Discrimination*, as compelling authorities to fill gaps in our human rights laws when they are advancing grievances or complaints about workplace human rights. A second area where international labour law might have a future would be in litigation before labour relations boards, where cases involve core policy issues of labour relations, such as whether the exclusion of employee categories from statutory coverage, or whether bargaining unit designations, comply with broad rights—such cases would be tested against the international requirements.

International labour and human rights law is now here to stay in Charter litigation on freedom of association and equality rights. The enduring promise of the Charter—that it is to be given a broad, generous and liberal interpretation when considering the rights of Canadians—is several steps closer because of this [*R. v. Big M Drug Mart*, (1985) 1 S.C.R. 295].



CONTRIBUTORS

Andrew Astritis is a partner at Raven, Cameron, Ballantyne and Yazbeck, practicing in the areas of labour, human rights, administrative and constitutional law. Andrew's practice focuses on judicial review and appellate litigation and has engaged a range of issues such as family status accommodation, public service pension litigation and the collective rights of workers under the Charter. Andrew clerked for the Honourable John Evans at the Federal Court of Appeal and has law degrees from Osgoode Hall Law School and Oxford University.

Steven Barrett is a managing partner of Sack Goldblatt Mitchell LLP. He practices in the areas of labour law, constitutional litigation, and public interest litigation. Steve has represented trade union clients in numerous appeals before the Supreme Court of Canada and has argued many judicial review applications and appeals before Ontario courts. He is a member of the Canadian Association of Labour Lawyers, the Canadian Bar Association, and the Canadian Foundation for Labour Rights.

Paul Cavalluzzo is the senior partner of Cavalluzzo Shilton McIntyre & Cornish LLP. He is a leading constitutional labour law lawyer and has argued significant cases before the Supreme Court of Canada. Most recently, he represented UFCW Canada in the *Fraser* case all the way to the Supreme Court of Canada. He is a board member of the Canadian Foundation for Labour Rights. In 2005, Paul was awarded the Law Society Medal of Upper Canada, and in 2012, he received the Order of Ontario.

James Clancy has been the National President of the 360,000-member National Union of Public and General Employees (NUPGE) since 1990. Prior to that, he was President of NUPGE's largest component, the Ontario Public Service Employees Union. James is also a General Vice-President of the Canadian Labour Congress and a board member of the Canadian Foundation for

Labour Rights. Under his leadership, NUPGE has gained a strong reputation for its aggressive defence of labour rights as human rights, in Canada and internationally.

Fay Faraday is a human rights lawyer and a Visiting Professor at Osgoode Hall Law School, where she teaches courses in ethical lawyering, the Charter, and human rights law. She is the co-author/co-editor of three books, including, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (2012). Fay holds an Innovation Fellowship with the Metcalf Foundation, where she is engaged in research addressing the rights of migrant workers.

Michael Lynk is a professor at the Faculty of Law, University of Western Ontario, where he teaches labour, human rights, constitutional, and administrative law. Michael is the co-author of *Trade Union Law in Canada* (Canada Law Book, 2004), and the co-editor, with John Craig, of *Globalization and the Future of Labour Law* (2006). He is a senior co-editor of the *Labour Law Casebook* (7th and 8th eds.).



