McGill Law Journal — Revue de droit de McGill

(RE)DISCOVERING THE PROMISE OF *FRASER*? LABOUR PLURALISM AND FREEDOM OF ASSOCIATION

*Bethany Hastie**

Section 2(d) of the *Canadian Charter of Rights and Freedom*, which guarantees freedom of association, has undergone substantial evolution at the Supreme Court of Canada in the past decade. In this article, I advance a purposive and pluralistic interpretation of section 2(d). I establish that section 2(d) communicates a bundle of rights available to collective workplace representation both within and beyond the traditional Wagner model of majoritarian, exclusive unionism. To support such an interpretation, I revisit the Supreme Court decision in *Ontario (Attorney General) v. Fraser*. I illustrate the commitment to labour pluralism advanced in *Fraser* and read the subsequent Supreme Court jurisprudence on section 2(d) in light of this commitment. Ultimately, this article aims to lay a robust foundation for further dialogue on the potential of freedom of association to effectively protect and advance labour rights in Canada in a plurality of contexts.

L'article 2(d) de la *Charte canadienne des droits et des libertés*, qui garantit la liberté d'association, a subi une évolution substantielle au cours de la dernière décennie. La présente étude propose une interprétation pluraliste et fondée sur l'objet de l'article 2(d). J'avance que l'article 2(d) contient un ensemble de droits disponibles à des fins de représentation collective au travail, aussi bien à l'intérieur qu'à l'extérieur du modèle Wagner de syndicalisme majoritaire-exclusif. Pour appuyer une telle interprétation, cette étude entreprend de réexaminer l'arrêt de la Cour suprême *Ontario (Procureur général) c. Fraser*. Elle démontre l'engagement de la Cour suprême dans *Fraser* envers une pluralité de formes de rapports collectifs au travail et revisite la jurisprudence subséquente à la lumière de cet engagement. Finalement, cette étude cherche à jeter les bases d'une plus grande réflexion sur la capacité du droit à la liberté d'association de protéger et de promouvoir les droits des travailleurs au Canada, et ce dans une pluralité de contextes.

* Assistant Professor, Peter A. Allard School of Law, University of British Columbia. This research was funded by the Social Sciences and Humanities Research Council of Canada. I wish to thank David Doorey, Debra Parkes, and James Stewart for their comments on earlier drafts of this article, and Alex Farrant for his research assistance in preparing this article for publication. I would also like to thank the anonymous reviewers of this article, and editorial team at the *McGill Law Journal*.

Citation: (2021) 66:3 McGill LJ 427 — Référence : (2021) 66:3 RD McGill 427

Introduction

Section 2(d) of the *Charter*, which guarantees freedom of association, has undergone substantial evolution at the Supreme Court of Canada in the past decade. Its current scope and content hold significant potential to extend robust protection and power in the workplace to a variety of models for collective workplace representation (CWR) beyond formal unionization. The dominant model of CWR in Canada has long been the Wagner model of labour relations, the hallmarks of which are majority representation and exclusivity of the bargaining agent.[1] Outside of Canada, various CWR models operate differently than the Wagner model, including minority unionism,[2] soft models for employee representation,[3] and other legislated regimes, such as Australia's *Fair Work Act 2009*.[4] Despite increasing recognition of and support for complementary CWR models in Canada—that is models outside of majority unionism—little research to date has actively explored what non-Wagner CWR models may look like and require to be effective and viable options in Canada.[5]

In this article, I advance a purposive interpretation of section 2(d), one that facilitates its expansion and application beyond the Wagner model of labour relations enshrined in labour statutes across Canada. I take up the Supreme Court decision in *Ontario (Attorney General) v. Fraser*[6] as a launching point for this analysis. In this paper, I revisit *Fraser* in light of

---

1 This is the model of majority unionism that exists within Canada, as reflected in provincial and federal labour relations statutes. As Doorey notes, this model is "[s]o called because of its origins in the 1935 American *National Labor Relations Act*, 29 USC §§ 151–169 (1935) [*NLRA*], also known as the *Wagner Act*" (David J Doorey, "Graduated Freedom of Association: Worker Voice Beyond the Wagner Model" (2012) 38:2 Queen's LJ 515 at 517, n 2 [Doorey, "Graduated Freedom"]).

2 See e.g. Brad Walchuk, "The Pitfalls of Embracing Minority Unionism" (2016) 6:3 J Workplace Rts 1; Alison Braley-Rattai, "Harnessing the Possibilities of Minority Unionism in Canada" (2014) 38:4 Labor Stud J 321 [Braley-Rattai, "Harnessing"]; Catherine Fisk & Xenia Tashlitsky, "Imagine a World Where Employers Are Required to Bargain with Minority Unions" (2011) 27:1 ABA J Labor & Employment L 1.

3 See e.g. David J Doorey, "Reflecting Back on the Future of Labour Law" (2021) 71:2 UTLJ 165 at 171–72 [Doorey, "Reflecting Back"] (for a discussion on soft models of employee representation such as work councils and other forms of internal governance).

4 (Austl), 2009/28. See also Alex Bukarica & Andrew Dallas, *Good Faith Bargaining Under the Fair Work Act 2009* (Sydney: Federation Press, 2012); Shae McCrystal, Breen Creighton & Anthony Forsyth, eds, *Collective Bargaining Under the Fair Work Act* (Sydney: Federation Press, 2018).

5 See e.g. Doorey, "Reflecting Back", *supra* note 3 at 188–89, 196–206 (for a brief summary of commonly proposed alternatives).

6 2011 SCC 20 [*Fraser*].

subsequent Supreme Court jurisprudence on section 2(d)[7] and read that subsequent jurisprudence in light of the Supreme Court's commitment to labour pluralism under section 2(d) as advanced in *Fraser*. I argue that there is fertile ground for a richer interpretation of section 2(d). Such an interpretation would communicate a bundle of rights available to legislated CWR models in a manner decoupled from the Wagner approach in Canada.

The legal regulation of work in Canada has changed remarkably little in the past decades, despite a dramatic shift in labour markets. This inertia has led to increasing dissonance between labour law and labour "on the ground." Neoliberal economic policy, globalization, the rise of the "gig economy," and the impact of technology, amongst many other factors, have led enterprises to shed direct-employment relationships in an effort to maximize profits and minimize risk and legal liability.[8] Alongside these trends sits a decline in unionization. This decline is particularly noticeable in private sectors and in North America, where the Wagner model has been the primary legal instrument for labour organization.[9] For example, union coverage in the private sector in Canada fell from 20.2 per cent in 2000 to 15.8 per cent in 2020.[10]

Unionization is increasingly out of reach, both formally and practically, for growing populations of workers. These populations include those who fall outside the direct-employment relationship,[11] and those whose

---

7 See *Mounted Police Association of Ontario v Canada (AG)*, 2015 SCC 1 [*MPAO*]; *Meredith v Canada (AG)*, 2015 SCC 2 [*Meredith*]; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 [*SFL*]; *British Columbia Teachers' Federation v British Columbia*, 2016 SCC 49 [*BCTF* SCC].

8 See e.g. Jim Stanford, "The Resurgence of Gig Work: Historical and Theoretical Perspectives" (2017) 28:3 Economic & Labour Relations Rev 382; Austin Zwick, "Welcome to the Gig Economy: Neoliberal Industrial Relations and the Case of Uber" (2018) 83:4 GeoJournal 679; David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Cambridge, MA: Harvard University Press, 2014); Mark Freedland, "New Trade Union Strategies for New Forms of Employment — A Brief Analytical and Normative Foreword" (2019) 10:3 European Labour LJ 179.

9 See e.g. Doorey, "Graduated Freedom", *supra* note 1 at 520–23; Doorey, "Reflecting Back", *supra* note 3 at 165–67; Alan Bogg & Tonia Novitz, eds, *Voices at Work: Continuity and Change in the Common Law World* (Oxford, UK: Oxford University Press, 2014).

10 See Statistics Canada, "Union Status by Industry" (last modified 28 February 2021), online: <www150.statcan.gc.ca> [perma.cc/TKA3-YTUJ].

11 See e.g. Guy Davidov, "The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection" (2002) 52:4 UTLJ 357; Judy Fudge, Eric Tucker & Leah F Vosko, "Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada" (2003) 10:2 CLELJ 193.

work may be characterized as precarious in nature.[12] For instance, falling in these categories are workers in the gig economy,[13] private home care,[14] agriculture,[15] and industries with high turnover and a reliance on casual labour, such as food services and retail. Many of these populations of workers would benefit from access to CWR in order to pursue common goals in the workplace. Under models that are more accessible and flexible to the current labour market landscape, they could improve their working conditions, security, and wages.

In light of the current labour market landscape, scholars in and outside of law have discussed the urgency and importance of rethinking approaches to labour relations.[16] For example, literature on union revitalization considers the roles and functions of unions beyond their historical core.[17] Less attention has been paid to considering how legal structures and institutions for collectively organizing in the workplace can function in ways that extend robust rights and protections for workers outside of traditional unionism, particularly in the Canadian context.[18] I aim to con-

---

12 See e.g. Bethany Hastie, "Human Rights and Precarious Workplaces: A Comment on *British Columbia Human Rights Tribunal v Schrenk*", Case Comment, (2019) 52:1 UBC Law Rev 169; Alan Bogg & Tonia Novitz, "The Purposes and Techniques of Voice: Prospects for Continuity and Change" in Bogg & Novitz, *supra* note 9 at 4. For commentary generally on precarious employment in Canada, see e.g. Leah F Vosko, ed, *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal: McGill-Queen's University Press, 2006); Stephanie Procyk, Wayne Lewchuk & John Shields, eds, *Precarious Employment: Causes, Consequences and Remedies* (Halifax: Fernwood, 2017); Mark P Thomas, *Regulating Flexibility: The Political Economy of Employment Standards* (Montreal: McGill-Queen's University Press, 2009).

13 But see *Canadian Union of Postal Workers v Foodora Inc*, 2020 CanLII 16750, 2020 CarswellOnt 2906 (OLRB) (a recent decision where the Ontario Labour Relations Board determined that Foodora couriers are dependent contractors, enabling them to unionize under provincial labour law). For commentary on gig work, see generally Stanford, *supra* note 8; Zwick, *supra* note 8.

14 See e.g. *Labour Relations Act 1995*, SO 1995, c 1, Sched A, s 3(a) [*LRA*].

15 While in most provinces agricultural workers are not formally excluded from unionization, but experience significant difficulty organizing, in Ontario, agricultural workers are formally excluded (see *ibid,* s 3(b.1)). The legislation at issue in *Fraser* created an alternate scheme for labour organizing for agricultural workers in the province under the *Agricultural Employees Protection Act, 2002* (SO 2002, c 16 [*AEPA*]; *Fraser*, *supra* note 6 at para 6).

16 See e.g. Doorey, "Reflecting Back", *supra* note 3 at 171, 187–190, 196–97; Eric Tucker, "Shall Wagnerism Have No Dominion?" (2014) 21 Just Labour 1.

17 See e.g. Christian Lyhne Ibsen & Maite Tapia, "Trade Union Revitalisation: Where Are We Now? Where to Next?" (2017) 59:2 J Industrial Relations 171; Doorey, "Graduated Freedom", *supra* note 1 at 521–22.

18 But see Doorey, "Reflecting Back", *supra* note 3 at 174, n 35; Doorey, "Graduated Freedom", *supra* note 1 at 524, citing Federal Labour Standards Review*, Fairness at Work: Federal Labour Standards for the 21st Century* by Harry W Arthurs (Gatineau: Human

tribute to these conversations by demonstrating that attentiveness to the core content and commitments under section 2(d) may provide a robust foundation for the development of CWR models beyond majority unionism and extend meaningful rights and protections to workers.

I revisit the Supreme Court decision in *Fraser*[19] as a launching point for advancing this argument. *Fraser*[20] upheld the constitutional validity of the *Agricultural Employees Protection Act* (*AEPA*).[21] This statute stood in place of access for agricultural workers to the provincial *Labour Relations Act* (*LRA*).[22] In brief, the *AEPA* enables farm workers to form and join an "employees' association," participate in the lawful activities of the association, assemble, make representations to their employer concerning the terms and conditions of their employment, and be protected against interference, coercion, and discrimination in the course of exercising those rights.[23] The *AEPA* further provides that an employer must "give an employees' association a reasonable opportunity to make representations concerning the terms and conditions of employment,"[24] and sets out a number of non-exhaustive factors relating to assessing reasonableness.[25] Finally, the *AEPA* designates the Agriculture, Food and Rural Affairs Appeal Tribunal (AFRAAT) as the body responsible for hearing complaints and providing orders and remedies for contraventions under the Act.[26]

Fraser is one of only two Supreme Court decisions to consider the constitutionality of a non-Wagner model of labour relations. As the only decision to uphold such a model, it was met with widespread criticism at the time of the decision.[27] For some, *Fraser* represented a retreat from the Supreme Court's 2007 *Health Services and Support—Facilities Subsector*

Resources and Skills Development Canada, 2006). Outside of Canada, see e.g. Harvard Law School, "Clean Slate for Worker Power" (last visited 29 March 2021), online: *Harvard University* <lwp.law.harvard.edu [perma.cc/BHN4-2FS6].

19 See *supra* note 6.

20 *Ibid* at para 2.

21 See s*upra* note 15.

22 See *supra* note 14.

23 *Fraser, supra* note 6 at para 6. See also *AEPA*, *supra* note 15, ss 1(2), 8–10.

24 See *supra* note 15, s 5(1).

25 See *ibid*, s 5(3)–(4).

26 See *ibid*, s 11.

27 The other decisions considering a non-Wagner model of CWR are *MPAO* (see *supra* note 7) which was found not to be constitutionally compliant, and its companion decision, *Meredith* (see *supra* note 7).

Bargaining Assn. v. British Columbia[28] decision, which had been considered by some as constitutionally enshrining the Wagner model of labour relations. From this vantage point, the decision in *Fraser* was seen as a retreat or even threat because the reasoning suggested that Wagner-style majority unionism might not be the only path to collective bargaining.[29] Some took issue with specific pieces of the legislation in *Fraser*, particularly the lack of express statutory language giving effect to a duty to bargain in good faith.[30] For yet others, *Fraser* showed potential in expanding constitutional space under section 2(d) through its recognition of labour pluralism: the possibility of a plurality of constitutionally compliant and protected legislative models for and approaches to CWR.[31]

Since *Fraser*, a new trilogy of cases has proceeded to the Supreme Court. In its latest decisions, the Court has articulated new content required to give effect to section 2(d) and, thus, to a constitutionally valid scheme for labour organizing. Following from this recent trilogy, section 2(d) can be said to protect at least three key activities associated with collective workplace representation: (1) the right to collectively organize in the workplace free from employer reprisal;[32] (2) the right to engage in a process of good faith collective bargaining with the employer in order to advance workplace interests;[33] and, (3) a right to meaningful recourse (particularly, to strike) where an employer bargains in bad faith.[34] These cases shed new light on understanding the scope and content of section 2(d). In particular, these cases provide insight as to the structural requirements and considerations attending systems of collective bargaining. Read in light of *Fraser*'s commitment to labour pluralism, section 2(d)

---

28 2007 SCC 27 [*Health Services*].

29 See e.g. Veena Verma, "Canada: Report on the Fraser Decision" (2011) 18:2 Intl Union Rts 24; Steven Barrett, "The Supreme Court of Canada's Decision in *Fraser*: Stepping Forward, Backward or Sideways?" (2012) 16:2 CLELJ 331; Walchuk, *supra* note 2.

30 See e.g. Paul Cavalluzzo, "The Fog of Judicial Deference" (2011) 16:2 CLELJ 369 at 372 [Cavalluzzo, "Fog"]; Judy Fudge, "Constitutional Rights, Collective Bargaining and the Supreme Court of Canada: Retreat and Reversal in the *Fraser* Case" (2012) 41:1 Indus LJ 1 at 17; Braley-Rattai, "Harnessing", *supra* note 2 at 327; Alison Braley, "'I Will Not Give You a Penny More Than You Deserve': *Ontario v. Fraser* and the (Uncertain) Right to Collectively Bargain in Canada" (2011) 57:2 McGill LJ 351 at 364–65, 368.

31 See e.g. Roy Adams, "Another Perspective on the Canadian Fraser Decision" (2011) 18:3 Intl Union Rts 22; Richard Chaykowski, "Canadian Labour Policy in the Aftermath of *Fraser*" (2012) 16:2 CLELJ 291 at 303–04; Braley-Rattai, "Harnessing", *supra* note 2; Roy J Adams, "Bringing Canada's Wagner Act Regime into Compliance with International Human Rights Law and the *Charter*" (2016) 19:2 CLELJ 365.

32 See *Dunmore v Ontario (AG)*, 2001 SCC 94 [*Dunmore*].

33 See *Health Services*, *supra* note 28; *Fraser*, *supra* note 6 at para 51; *MPAO*, *supra* note 7.

34 See *SFL*, *supra* note 7.

may therefore extend meaningful protection to CWR models beyond the Wagner approach of majority exclusive unionism that remains the current dominant frame of reference.

In this article, I explore how *Fraser* works with, rather than against, the recent section 2(d) jurisprudence to provide a bundle of labour rights that may be accessible and effective beyond the Wagner model. In doing so, I aim to lay a foundation for further dialogue on the potential of freedom of association to effectively protect and advance labour rights and from which to consider alternative CWR models and their viability in the Canadian labour landscape. This article proceeds in five parts. In Part 1, I outline current theoretical debates regarding freedom of association. I explain the normative commitments I understand to be communicated by section 2(d), as well as the concept of labour pluralism. These elements provide a foundation for my inquiry into the jurisprudence. In Part 2, I review the Supreme Court decision in *Fraser* in greater detail. I discuss how *Fraser* opened the door to a pluralistic understanding of labour rights and section 2(d). Yet, as I examine, the decision also left uncertainty about how such rights—in this case, the right to a process of collective bargaining—would be interpreted outside a Wagner frame. In Part 3, I examine the relationship between *Fraser* and the Supreme Court's reasoning in *Mounted Police Association of Ontario v. Canada (Attorney General)* (*MPAO*) to elucidate in greater detail the content of the right to collectively organize in the workplace under a pluralistic approach to labour relations. In Part 4, I revisit the issue of a right to collective bargaining. I detail the critiques and debates that flowed from *Fraser*. I also evaluate how a decoupled right to *a process* of collective bargaining sits in relation to, and yet distinct from, the familiar Wagner-model iterations. Finally, in Part 5, I look to the Supreme Court decision in *Saskatchewan Federation of Labour v. Saskatchewan* (*SFL*). I argue that, read in light of *Fraser*'s commitment to labour pluralism, section 2(d) may provide protection for a broad range of dispute resolution mechanisms (or, "recourse mechanisms") for CWR models in the future. I explore what a "right to strike" might look like when untethered from the constraints imposed by Wagner-model legislation. I further argue that the underlying normative features of this right provide fertile ground for its extension to other forms of recourse, both within and beyond the process of collective bargaining.

I. Freedom of Association and Labour Pluralism

The evolution of section 2(d) at the Supreme Court in the past two decades has given way to substantial dialogue and debate about the nature of freedom of association and of constitutional interpretation. While the "original Trilogy," as it is now often referred to, adopted a formalist approach to section 2(d), conferring what critics have labelled as "bare" rights, the line of cases since *Dunmore* has seen the Court move towards

what it labelled, in *MPAO*, a "purposive approach" to freedom of association.[35] This purposive approach recognizes "the profoundly social nature of human endeavours" and "protect[s] the individual from state-enforced isolation in the pursuit of his or her ends."[36] This encompasses protection for:

> (1) individuals joining with others to form associations (the constitutive approach); (2) collective activity in support of other constitutional rights (the derivative approach); and (3) collective activity that enables "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."[37]

The purposive approach to freedom of association thus emphasizes its "empowering" function.[38]

In the course of this jurisprudence, the Court's analysis and approach to section 2(d) have generated significant debate. Prominently, Brian Langille and Benjamin Oliphant take issue with the Court's approach to adopting "derivative rights." Langille's interpretation of freedom of association is predicated on the idea that freedom of association encapsulates the freedom of an individual to do with others what they are free to do themselves.[39] From this perspective, the Supreme Court's current approach misinterprets the nature of fundamental freedoms, conflating the idea of rights with freedoms and imposing correlating duties on others.[40] In respect of the right-freedom distinction, Langille and Oliphant contend that the Supreme Court has been insufficiently attentive to the nature of

---

35 See e.g. Jason Harman, "2(d) as Harbinger of Substantive Justice: Toward the Creation of a *Meaningful* Freedom of Association" (2018) 39 Windsor Rev Leg Soc Issues 35; Bernard Adell, "Regulating Strikes in Essential (and Other) Services after the 'New Trilogy'" (2013) 17:2 CLELJ 413 at 442–46 [Adell, "Regulating Strikes"]; Brian Langille, "The Condescending Constitution (or, the Purpose of Freedom of Association is Freedom of Association)" (2016) 19:2 CLELJ 335 at 351 [Langille, "Condescending"]. See also *MPAO*, *supra* note 7 at paras 30–31, 41.

36 *MPAO*, *supra* note 7 at para 54, citing Dickson CJ in *Re Public Service Employee Relations Act*, [1987] 1 SCR 313 at 365, 38 DLR (4th) 161 [*Alberta Reference*].

37 *MPAO*, *supra* note 7 at para 54, citing *Alberta Reference*, *supra* note 36 at 366.

38 *MPAO*, *supra* note 7 at paras 43–55.

39 See e.g. Langille, "Condescending", *supra* note 35 at 355; Brian Langille & Benjamin Oliphant, "The Legal Structure of Freedom of Association" (2014) 40:1 Queen's LJ 249 at 268.

40 See Langille & Oliphant, *supra* note 39 at 267, 271–73, 278–79; Brian Langille, "Why the Right-Freedom Distinction Matters to Labour Lawyers—And to All Canadians" (2011) 34:1 Dal LJ 143 [Langille, "Right-Freedom Distinction"]. See also Brian Langille, "The Freedom of Association Mess: How We Got into It and How We Can Get out of It" (2009) 54:1 McGill LJ 177 [Langille, "Freedom of Association Mess"]; Langille, "Condescending", *supra* note 35.

the cases before it.[41] Langille and Oliphant point to specific issues with what they label the "diagonal application" of section 2(d).[42] The diagonal application looks to whether sufficient protections exist to ensure meaningful exercise of the right in question. Necessary protections may include recognition of a derivative right, such as a right against reprisal or to collectively bargain. A derivative right also imposes a correlative duty on a third party, like employers, such as not engaging in retaliation or reprisal or engaging in a process of collective bargaining.[43]

The Supreme Court has paid particular attention to the "diagonal" application of the *Charter* in cases regarding section 2(d) to ensure associational activities can be exercised meaningfully in the labour relations context. For example, this logic underscores the decision in *Fraser* in which the Court read in an implied duty of good faith bargaining into the *Agricultural Employees Protection Act*.[44] This logic was further used to ground the Court's determination of a right to strike as an "indispensable" component of the right to collective bargaining in *SFL*.[45] The Court has recognized that, for labour statutes to be constitutional, more than an absence of interference with protected associational activities may be required. However, for Langille and Oliphant, this may amount to a judicial sleight of hand, an improper reach beyond the role of the judiciary,[46] and an improper transformation of fundamental freedoms into a set of rights and correlative duties on others.

In addition to concerns about the application of section 2(d), concerns about whether section 2(d) is the appropriate venue for such claims have arisen. For example, Langille and Oliphant argue that cases concerning access to labour organizing for vulnerable or excluded workers are more properly the purview of a section 15 equality claim than a challenge un-

---

41 See Langille & Oliphant, *supra* note 39 at 268, 284. For a summary and response to this position, see Alan Bogg, "The Constitution of Capabilities: The Case of Freedom of Association" in Brian Langille, ed, *The Capability Approach to Labour Law* (Oxford, UK: Oxford University Press, 2019) 241 at 246.

42 See Langille & Oliphant, *supra* note 39 at 264–65, 278–79.

43 See Bethany Hastie & Alex Farrant, "What Meaning in a Right to Strike? *MedReleaf* and the Future of the *Agricultural Employees Protection Act*" (2021) 53:1 Ottawa L Rev 1 at 21; Langille & Oliphant, *supra* note 39 at 264–65, 278–79; Bogg, *supra* note 41 at 244–60. See e.g. *Dunmore*, *supra* note 32; *Fraser*, *supra* note 6.

44 See *supra* note 6 at paras 37–38. See also *Health Services*, *supra* note 28 at para 90.

45 See *supra* note 7 at para 3.

46 See Langille & Oliphant, *supra* note 39 at 280–83. See also Benjamin J Oliphant, "The Nature of the Fundamental Freedoms and the *Sui Generis* Right to Collective Bargaining: The Case of Vulnerable and Precarious Workers" (2018) 21:2 CLELJ 319 at 351 (discussing the existing use of the Wagner model as a benchmark and as creating a potential ceiling on entitlements under section 2(d) as a result).

der section 2(d).[47] This is so because, as they argue, the crux of the challenge before the courts is the exclusion of one group from a set of entitlements or benefits that other groups receive.[48] However, advancing a claim under section 15 would present challenges on numerous fronts. First, it would be difficult to identify and establish an appropriate "analogous ground" and, similarly, to establish what would likely be intersectional and adverse effects claims. Second, positioning the issue as an equality rights claim, as traditionally understood under the *Charter*, focuses attention away from the scope of labour rights as they ought to be understood under the constitution and towards the particular manifestation of those rights in specific statutory instruments. Moreover, some of the arguments advanced in favour of section 15 appear to rest on the formalist interpretation of section 2(d) and concerns about courts drafting a "judicial labour code."[49] However, if one accepts a thicker account of freedom of association, as described below, section 2(d) becomes an appropriate and ideal venue for the pursuit of labour rights claims.

Scholars, notably Alan Bogg, have argued that the Court's approach to contextualizing freedom of association in the labour relations context is both necessary and reconcilable with a thick conception of the nature of fundamental freedoms.[50] In particular, a thick account of the notion of "freedom" under a constitution necessitates the "valuation of freedoms"[51] and acknowledges that liberty or freedom is rarely protected in an "undifferentiated" manner.[52] In other words, from this perspective, substantive normative commitments to improve the position of disadvantaged groups, for example, is neither uncomfortable nor inappropriate. Flowing from this, restrictions on others' freedom—due to the imposition of duties as a result of the creation of "derivative rights"—is not inherently problematic. If the "freedom restricted by the duty is noxious or inconsequential, for example the freedom of the powerful to oppress the weak, that does not count as a strong reason against creating the derivative right."[53] Thus, a

---

47 See e.g. Oliphant, *supra* note 46 at 355–56; Langille, "Freedom of Association Mess", *supra* note 40 at 207–08, 211–12. See also Adell, "Regulating Strikes", *supra* note 35 at 430–31.

48 See Brian Langille, "Why are Canadian Judges Drafting Labour Codes – And Constitutionalizing the Wagner Act Model?", Case Comment, (2009) 15:1 CLELJ 101 at 106.

49 *Ibid* at 101, 106.

50 See e.g. Bogg, *supra* note 41. For responses to Langille's scholarship, see e.g. Alan Bogg & Keith Ewing, "A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada" (2012) 33:3 Comp Lab L & Pol'y J 379; Harman, *supra* note 35. See also Adell, "Regulating Strikes", *supra* note 35.

51 Bogg, *supra* note 41 at 250–51.

52 *Ibid*.

53 *Ibid* at 253.

contextual approach to section 2(d) that recognizes and seeks to ameliorate the disadvantage of workers, particularly by proscribing "noxious" interference from an employer, is not only permissible but necessary to the realization of a thick account of freedom of association.

This article advances a similarly "thick" contextual account of section 2(d) as that explained by Bogg. Each of the identified "rights" I discuss in this article—a right to a process of collective bargaining; a right to good faith negotiations in the process of collective bargaining; and a right to effective dispute resolution—may be characterized as "derivative rights" and a "diagonal application" of the *Charter*. The Supreme Court has, in its section 2(d) jurisprudence, adopted this approach of recognizing derivative rights, which are those necessary to ensure that the freedom may be realized in its specific contexts and having regard to its underlying purpose.[54] In other words, as Harman puts it, "[d]erivative rights allow the court to create a mechanism to bridge the void that exists between the two poles: the formal meaning and its purposive goal."[55] Derivative rights reflect the material conditions necessary to give effect to section 2(d)'s underlying purpose of equalizing bargaining power between an employer and workers, and empowering marginalized groups in society.[56] This articulation of the nature and function of derivative rights as "bridging" and as denoting necessary "material conditions" helpfully illustrates how and why recognizing these rights is essential to the effective realization of section 2(d) in the labour context.

In line with the Supreme Court's consistent affirmation that section 2(d) does not protect a *particular model* of collective bargaining,[57] I adopt a labour pluralism approach to examining section 2(d). I adopt the term labour pluralism as denoting a commitment to plurality and choice of organization amongst workers, but beyond the confines of trade unionism

---

54 In this vein, it bears reminding that, as such, derivative rights are not "universal" or acontextual. For example, while I go on to argue that section 2(d) necessitates a right to effective dispute resolution in the context of CWR, this does not mean that the *Charter* or section 2(d) would universally protect dispute resolution as a "right" in the abstract or in other contexts. See generally Harman, *supra* note 35 at 54, 57–58 for the proposition that derivative rights are necessarily contextual and specific to purpose. See Ritu Khullar & Vanessa Cosco, "The SCC Reimagines Freedom of Association in 2015" (2016) 25:2 Const Forum Const 27 (more generally on a purposive approach to *Charter* interpretation, discussing that recent section 2(d) jurisprudence invigorates the values underlying the *Charter*).

55 Harman, *supra* note 35 at 49.

56 See *SFL*, *supra* note 7 at paras 1–4, 28–31 (for more on the underlying purposes and core objectives of s 2(d)). See Bogg, *supra* note 41 at 246 (concerning the concept of "derivative rights" under s 2(d) more generally).

57 See *Health Services*, *supra* note 28 at para 91; *Fraser*, *supra* note 6 at paras 41–42; *MPAO*, *supra* note 7 at para 67.

(both majority and minority), expanding instead to encompass a potentially wide array of CWR models. This approach is consistent with the ILO definition of "trade union pluralism" as "the right of workers to come together and form organizations of their own choosing" with sufficient independence to pursue their interests[58] and with scholars' use of similar terms to date.[59] There is widespread agreement about the need for new CWR models that workers may use to collectively organize in the workplace. Yet, and despite the commitment to labour pluralism evidenced in existing section 2(d) jurisprudence, few options outside the Wagner model exist in Canada today. Drawing attention to the potentially fruitful foundations laid by section 2(d) for robust protection of other CWR models, as I aim to do in this article, may provide some grounding for enriched discussion and experimentation on this front. In that vein, the analysis that proceeds does not have a particular CWR model in mind as a comparator or contrast to the Wagner model, and would resist such an approach.[60] Rather, the labour pluralism approach I adopt is intentionally open-ended and noncommittal to any particular model of labour organization. I aim to explore how the section 2(d) jurisprudence may be understood when it is intentionally untethered from a particular model and, specifically, from the Wagner model that has long served as the benchmark—both implicit and explicit—in jurisprudence and scholarship on section 2(d).

---

58 International Labour Office, "Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association" (2018) at para 483, online (pdf): *International Labour Organization* <ilo.org> [perma.cc/ZZU7-MD3E] [ILO, "Freedom of Association"]. See also International Labour Office, "Trade Union Pluralism and Proliferation in French-Speaking Africa" (2010) at 11, online (pdf): *International Labour Organization* <ilo.org> [perma.cc/UCU4-MUQW]. The SCC has also employed the term "union pluralism" in the past (see e.g. *R v Advance Cutting & Coring Ltd*, 2001 SCC 70 at para 265).

59 See e.g. Louis-Marie Tremblay, "Le pluralisme de représentation ouvrière au niveau local" (1960) 15:3 RI 325; James G Samstad, "Corporatism and Democratic Transition: State and Labor During the Salinas and Zedillo Administrations" (2002) 44:4 Latin American Politics & Society 1 at 10–11; Samuel Amoako, "Black Board Struggles: Teacher Unionism Under the 'Democratic' Rawlings Regime 1992-2000" (2014) 17:1 Ghana Stud 7 at 31–32; George Martens, "Unity Eludes Africa's Trade Unions" (1985) 16:4 Industrial Relations J 85 at 87.

60 In existing Canadian scholarship, reference is often made to minority unionism as a seemingly natural counterpart to the Wagner model. However, in many ways, minority unionism could be seen as replicating certain hallmarks, such as in respect of collective bargaining rules and rights, and regulation of strike activity. For scholarship discussing minority unionism and other CWR models (or the need for them), see e.g. Walchuk, *supra* note 2; Tucker, *supra* note 16*;* Doorey, "Reflecting Back", *supra* note 3; Roy J Adams, "A Pernicious Euphoria: 50 Years of Wagnerism in Canada" (1994–1995) 3 CLELJ 321; Bernard Adell, "Establishing a Collective Employee Voice in the Workplace: How Can the Obstacles Be Lowered?" (Kingston, ON: Industrial Relations Centre Queen's University, 1986).

II. *Ontario v. Fraser*: Opening the Door to Labour Pluralism

In *Fraser*, the Supreme Court was tasked with assessing the constitutionality of the *AEPA*. The *AEPA* was created in response to the Supreme Court's 2001 decision in *Dunmore*.[61] In that decision, the Supreme Court had found that the exclusion of agricultural workers from provincial labour law, without an alternate framework for labour relations, was unconstitutional under section 2(d). *Dunmore* established that section 2(d) may require a government to enact statutory protections to give effect to freedom of association.[62] However, it did not articulate the content or boundaries of the rights or protections afforded under section 2(d).[63] This opened the door to the possibility of a plural approach to labour rights under section 2(d), which the majority in *Fraser* advanced. The decision in *Fraser* explicitly decoupled access to section 2(d) from the Wagner model of labour relations and broadened its application to other legislative CWR approaches.

The legal challenge to the *AEPA* in *Fraser* centred on three components that the respondents argued were necessary for a model of labour organizing to

> meet the requirements of s. 2(d) under the *Charter*: (1) statutory protection for majoritarian exclusivity, meaning that each bargaining unit is represented by a single bargaining agent; (2) an *LRA*-type statutory mechanism to resolve bargaining impasses and interpret collective agreements; and (3) a statutory duty to bargain in good faith.[64]

The majority found that much of the legal challenge rested on a particular interpretation of its 2007 *Health Services* decision. This interpretation considered *Health Services* as having constitutionally enshrined the Wagner model of majoritarian, exclusive unionism.[65] As such, the Court spent some time explaining that the *Health Services* decision did not constitutionalize that particular form of collective bargaining.[66] As a result, the respondents' first argument that section 2(d) requires statutory protection for majoritarian exclusivity failed.

The majority opinion in *Fraser* barely mentioned the second argument the respondents had put forth, which was that a *Charter*-compliant model

---

61 See *supra* note 32. See also *Fraser*, *supra* note 6 at paras 5–6.

62 See *Dunmore*, *supra* note 32 at 19–30. See also *Fraser*, *supra* note 6 at para 34.

63 See *Fraser*, *supra* note 6 at para 34.

64 *Ibid* at para 7.

65 See *ibid* at paras 44–48.

66 See *ibid* at paras 34–47.

of labour relations requires a statutory mechanism to resolve bargaining impasses and interpret collective agreements. This argument reflects the need for an effective dispute resolution process. Labour relations statutes typically provide for both strike activity and a variety of procedural mechanisms, such as grievances and arbitration, to resolve disputes within and beyond the collective bargaining process. Dispute resolution mechanisms, particularly arbitrations, also function to interpret and apply collective agreement provisions. These kinds of processes or mechanisms are necessary to ensure good faith bargaining on the part of an employer. In fact, in *Fraser*, it was specifically argued that, without an effective dispute resolution mechanism, there was no practical ability to enforce a duty to bargain in good faith.[67] As will be taken up in greater depth in the fifth part of this article, effective recourse and dispute resolution processes are necessary to ensure that a CWR model can support the meaningful pursuit of collective goals in the workplace, the core purpose of freedom of association guaranteed under section 2(d). In the *Fraser* decision, the only remarks concerning this aspect of the challenge were to the effect that it was premature, as the complaints process available under the *AEPA* had not yet been sufficiently tested.[68]

The third proposed requirement of a duty to bargain in good faith was the focal point of the *Fraser* decision, and the critiques that followed it. On its face, the legislation provides that the employee association must be given a reasonable opportunity to make representations to an employer[69] and that an employer must "listen" to those representations or acknowledge receipt of written representations.[70] In other words, the legislation at issue did not explicitly impose a correlating duty or obligation on an employer to bargain in good faith. Prior to *Fraser*, the Court's decision in *Health Services* had directly considered the duty to bargain in good faith and held that section 2(d) must protect more than a mere right to make representations.[71] As such, the majority of the Court explained in *Fraser* that the "right of an employees' association to make representations to the employer and have its views considered in good faith is a derivative right under s. 2(d) of the *Charter*, necessary to meaningful exercise of the right to free association."[72] The majority referred back to its decision in *Health Services* that section 2(d) protects "good faith bargaining" and that this is not "limited to a mere right to make representations to

---

67 See *ibid* at para 108.

68 See *ibid* at paras 109–11.

69 See *AEPA*, *supra* note 15, s 5(1).

70 *Ibid*, s 5(6)–(7).

71 See *Fraser*, *supra* note 6 at paras 50–51.

72 *Ibid* at para 99.

one's employer, but requires the employer to engage in a process of consideration and discussion."[73] The majority in *Fraser* summarized the right to a process of collective bargaining under section 2(d) as including a requirement for parties to meet and engage in "meaningful dialogue"[74] and enabling a plurality of bargaining models, methods, processes and timelines to come within its scope.[75] It also clarified, however, that section 2(d) does not require parties to conclude an agreement, nor does it guarantee a legislated dispute resolution mechanism in the event of a bargaining impasse.[76]

Applying this to the *APEA*, the majority in *Fraser* found that sections 5(6) and 5(7) incorporated an implied duty to bargain in good faith on the part of an employer, satisfying the requirements of section 2(d).[77] Their conclusion rested on three considerations. First, a purposive interpretation of the relevant statutory provisions leads to the inevitable conclusion that more than *pro forma* listening is required. A purposive interpretation of these provisions would suggest that they are meant to provide assurance that an employer will consider the representations made.[78] Second, the presumption of *Charter* compliance supports this purposive statutory interpretation.[79] Third, Hansard documents evidence the legislature's intention to comply with the requirements of section 2(d) of the *Charter* in enacting the *AEPA*.[80] As a result, the majority concluded that the statutory provisions of the *AEPA* imply an obligation on an employer to consider the representations made in good faith.

The Court's reasoning on the issue of the duty to bargain in good faith was significant for several reasons. First, as mentioned above, the Court had identified the existence of this right under section 2(d) in its *Health Services* decision, though this was decided in the context of a Wagner model labour relations regime. Second, the concept of the "duty to bargain in good faith" has historically been interpreted with specific requirements in the context of provincial labour law, that is, the law that applies in unionized workplaces. Whether and to what extent this duty and its interpreted elements would apply to a CWR model outside of a unionized environment was of great interest, concern, and speculation. While the

---

73 *Ibid* at para 40, citing *Health Services*, *supra* note 28 at paras 90, 93–4, 130, 135.

74 See *supra* note 6 at para 41, citing *Health Services*, *supra* note 28 at paras 98, 100–01.

75 See *supra* note 6 at para 42, citing *Health Services*, *supra* note 28 at paras 91, 107.

76 See *Fraser*, *supra* note 6 at para 41, citing *Health Services*, *supra* note 28 at paras 102–03.

77 See *supra* note 6 at paras 101–02.

78 See *ibid* at para 103.

79 See *ibid* at para 104.

80 See *ibid* at paras 105–06.

Court's reasons in *Fraser* firmly decided that the duty to bargain in good faith did, in fact, extend to the *AEPA*, it did not identify whether the elements that had been developed under existing labour relations legislation were also imported to this new context, a matter I take up further in section 4.

Following the release of the *Fraser* decision, critiques from several vantage points began to surface. Many critiques presented an overarching concern that decoupling section 2(d) from the Wagner model of labour relations was a threat to the future of the union movement and labour relations.[81] Expanding constitutional space for other models of CWR, from this vantage point, necessarily weakens the labour movement, as such models themselves will be weaker or offer thinner rights than those afforded through the Wagner model. These critiques echo Justice Abella's dissent in *Fraser*, which emphasized the necessity of power created by majority exclusivity under Canada's model of labour relations.[82]

What is clear from the critiques and commentary flowing from *Fraser* is that the notion that section 2(d) extends protection to a plurality of labour models does not appear to be contested, though the strength and desirability of labour pluralism, itself, is. As such, it is relatively uncontroversial to state that *Fraser* explicitly enshrined a labour pluralism approach to and vision of section 2(d). The next section discusses the relationship between this outcome and the Supreme Court's subsequent analysis in *MPAO*. Together, they provide some clarity in understanding the necessary structure of a CWR model that will be compliant with section 2(d). Section 2(d) may also offer meaningful rights to non-Wagner labour models in respect of collective bargaining and dispute resolution. As I explore in subsequent sections, section 2(d) may thus lay a strong foundation for alternative CWR models to be effective vehicles for labour organizing and collective action in the workplace, countering existing critiques concerning the strength and desirability of non-Wagner labour models.

III. The Structure of Collective Bargaining under a Labour Pluralism Approach to Section 2(d)

While *Fraser* had firmly committed to a labour pluralism approach to section 2(d), it left many questions about what that meant, particularly given that most cases under section 2(d) relate to unionized environments. The Supreme Court's decision in *MPAO* provided renewed oppor-

---

[81] See e.g. Barrett, *supra* note 29; Walchuk, *supra* note 2.

[82] See *supra* note 6 at para 346.

tunity to clarify its approach to section 2(d) and how it operates, specifically, in relation to non-Wagner models of labour organizing. *MPAO* is a notable case because, like *Fraser*, it considered the constitutionality of a non-union CWR regime, for the Royal Canadian Mountain Police (RCMP). At the time of the case, the RCMP was excluded from unionization under the *Public Service Labour Relations Act*, and instead had an alternate regime set up through legislation.[83] The exclusion of the RCMP from access to unionization had been previously held not to violate the constitution.[84] The trial decision in *MPAO* was rendered prior to *Fraser* and had found that the legislation at issue was unconstitutional. However, the appeal, heard after the Supreme Court decision in *Fraser*, relied on that judgment to overturn the trial decision.[85] At the Supreme Court, the majority found the legislation unconstitutional under section 2(d).

The CWR regime at issue in *MPAO* was composed of three bodies. First, there was a Staff Relations Representation Program (the "SRRP") through which members could advance workplace concerns.[86] Second, "concerns regarding pay and benefits [were] communicated to management through the RCMP Pay Council process."[87] Third, the Mounted Police Members' Legal Fund, funded through membership dues, "provide[d] legal assistance to RCMP members for employment-related issues."[88] Among these three bodies, the SRRP was central to the regime and to the Court's consideration of the constitutional challenge.[89] The SRRP was the vehicle through which RCMP members addressed all non-pay work-related matters and was "the only form of employee representation recognized by management."[90] At the heart of the majority decision in *MPAO* were twin elements necessary to a meaningful structure of labour organizing and CWR: choice and independence. The legislation at hand did not allow either of these elements. The unilateral designation of organizational structure and representatives and their close ties to management under the legislative regime were found insufficient to enable a meaningful exercise of the rights attending freedom of association.

---

83 See *MPAO*, *supra* note 7 at paras 1–2.

84 See *Delisle v Canada (Deputy AG)*, [1999] 2 SCR 989, 176 DLR (4th) 513, cited in *MPAO*, *supra* note 7 at para 3.

85 See *Mounted Police Association of Ontario v Canada (AG)*, 2012 ONCA 363, cited in *MPAO*, *supra* note 7 at para 27.

86 See *MPAO*, *supra* note 7 at para 2.

87 *Ibid*.

88 *Ibid*.

89 See *ibid* at para 9.

90 *Ibid* at para 10. See *ibid* at paras 9–25 (for a more detailed review of the history and structure of the SRRP).

The majority in *MPAO* was explicit in drawing attention to "the desirability of various forms of workplace representation."[91] It signalled that section 2(d) is capable of extending rights and obligations to various CWR models and affirmed a labour pluralism approach to freedom of association.[92] The majority located a "right to collective bargaining" within the broader "right of employees to meaningfully associate in the pursuit of collective workplace goals" protected by section 2(d).[93] Where a process or structure "substantially interferes with the possibility of having meaningful collective negotiations on workplace matters," it will impair freedom of association.[94] For example, measures that disrupt the balance of power between employer and employees or that reduce the negotiating power of employees may substantially interfere with meaningful collective bargaining and thus violate section 2(d).[95] In its opinion, the majority further described "a process of collective bargaining" as "meaningful association in pursuit of workplace goals."[96] Such a process "includes the employees' rights to join together, to make collective representations to the employer, and to have those representations considered in good faith."[97] This suggests that "a process of collective bargaining" should not be understood in a narrow sense as the specific part of a labour relationship during which active negotiation of terms and conditions of work takes place. Rather, the Supreme Court may be adopting a broader understanding of this concept that inherently connects to the larger structure of labour organizing through which the act of bargaining takes place.

The majority concluded 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."[98] Elaborating on the role of choice, the majority determined that employees must be able to exercise a sufficient degree of choice in relation to "the ability to form and join new associations, to change representatives, to set and change collective workplace goals, and to dissolve existing associations."[99] In other words, a CWR model should adopt a "labour pluralism" approach as that term has

---

91 *Ibid* at para 96.

92 See *ibid* at para 96. See also Doorey, "Reflecting Back", *supra* note 3 at 182–83.

93 *MPAO*, *supra* note 7 at para 67.

94 *Ibid* at para 68.

95 See *ibid* at paras 71–72.

96 *Ibid* at para 45.

97 *Ibid*.

98 *Ibid* at para 81.

99 *Ibid* at para 86.

been used in its more traditional sense—a choice of representative body.[100] Moreover, this criterion of choice reflects an understood link between the structure of a CWR model and a "meaningful" process of collective bargaining. A choice of representative body for workers will operate to place greater power in the hands of workers, and this in turn better ensures that their interests will be advanced in negotiations with an employer.

Along with choice, employees must have sufficient independence from management within which to exercise their choice, control associational activities, and have accountable representatives. Together with choice, the criterion of independence better "ensures that the activities of the association reflect the interests of the employees."[101] These two elements—choice and independence—aim to support a meaningful process of collective bargaining, as understood in the narrower sense of active negotiation and in the broader sense of shaping the structure and operation of a CWR model and its representative body. Moreover, the majority in *MPAO* reminded that, while the Wagner model is one model that will satisfy these requirements, it is not the only model, reaffirming its labour pluralism approach to section 2(d) and the right to a process of collective bargaining, broadly conceived of.[102] Thus, while section 2(d) does not guarantee "access to a *particular model* of labour relations,"[103] it does guarantee *particular features* of a CWR model: choice and independence. *MPAO* explicitly connected the significance of the organizational criteria to the right to a process of collective bargaining, illustrating how structural considerations attending CWR models in turn influence the ability for the right of collective bargaining to be meaningfully realized. The next section turns to examine this right—to a process of collective bargaining—directly.

IV. Collective Bargaining and Good Faith Negotiations under a Labour Pluralism Approach to Section 2(d)

A right to collective bargaining under section 2(d) had been recognized by the Supreme Court four years prior to *Fraser*, in *Health Services*, in the context of a unionized environment where statutory protections surround the collective bargaining process. *Fraser* was the first case to adjudicate a right to collective bargaining outside the unionized environment. The majority in *Fraser* affirmed that a right to a process of collective bar-

---

[100] See e.g. ILO, "Freedom of Association", *supra* note 58 at para 483. But see *MPAO*, *supra* note 7 (discussing designated agent bargaining models at para 95).

[101] *MPAO*, *supra* note 7 at para 89.

[102] See *ibid* at paras 94–97.

[103] *Ibid* at para 67 [emphasis added].

gaining existed generally under section 2(d) and articulated criteria adhering to this right, including engagement in "meaningful dialogue."[104] Nonetheless, the outcome in *Fraser* generated substantial critique and numerous questions about whether and how the rights typically attending collective bargaining in a unionized environment would apply under the *AEPA* and, more generally, outside of the union context. This section reviews these critiques and the subsequent jurisprudence at both the Supreme Court and the AFRAAT to explore the contours of a right to collective bargaining under a labour pluralism approach to section 2(d).

Critiques of *Fraser* generally ran along two axes, one procedural and the other substantive. The procedural axis of critique questioned the Court's jurisdiction to read in an implied duty to bargain in good faith in the *AEPA*, while the substantive critique focused on whether the content of that duty was watered down by the language of the *AEPA*. Reading the duty to bargain in good faith into the *AEPA* was seen as a questionable step for a number of reasons. First, none of the parties argued that it included such a duty. Second, there was nothing in the language of the statute that suggested the existence of such a duty. Third, the Ontario government explicitly stated that the statute was not designed to "extend collective bargaining to agricultural workers."[105] Further, the Ontario legislature had passed the *AEPA* five years before the Supreme Court rendered the *Health Services* decision. Some argued that to read in a presumption that the legislature intended to comply with the *Charter* amounted to a "judicial sleight of hand" in circumstances where the content of *Charter* rights had dramatically changed since the legislation's passage.[106]

In addition, several scholars argued that the content of the right to collective bargaining was weakened by *Fraser*, "water[ing] down the right to bargain collectively from imposing a duty to bargain in good faith to one requiring good faith consideration."[107] In *Health Services*, the duty to bargain in good faith, as detailed by the Court, was strongly influenced by labour board jurisprudence.[108] *Fraser*, however, seemed to create "a much more ambiguous and seemingly less robust obligation under subsection 2(d)."[109] In particular, the requirement of good faith bargaining, read as a

---

104 See *supra* note 6 at para 41, citing *Health Services*, *supra* note 28 at paras 98, 100–01.

105 Cavalluzzo, "Fog", *supra* note 30 at 372–73. See also Fudge, *supra* note 30 at 17–18.

106 Fudge, *supra* note 30 at 18. See also Braley, *supra* note 30 at 369.

107 Fudge, *supra* note 30 at 23. See also Bogg & Ewing, *supra* note 50 at 384–85.

108 See Michelle Flaherty, "The Trilogy and Labour Boards: Where Has All the Good Faith Gone?" (2013–2014) 45:2 Ottawa L Rev 247 at 255.

109 *Ibid*.

duty to "consider" employee representations in *Fraser*, could be seen as a failure to impose any substantive obligations on an employer, such as providing a real opportunity for discussion or detailed response to representations.[110] While confirmation of having received and reviewed representations would likely comport with the requirements of the *AEPA*, this kind of response would more likely be seen as insufficient to satisfy the duty of good faith bargaining as it applies in the union context.[111] This has been posited as creating two tiers of the duty to bargain in good faith. Per *Fraser*, the lower tier, applying to legislation outside of the *LRA*, requires only "meaningful discussion" and the right to make representations.[112] Whereas, for employees formally represented by a union under provincial labour law, the Court in *Health Services* spoke of the duty to bargain in good faith in a more robust manner, including engagement in meaningful dialogue between the parties and a willingness to exchange and explain their positions.[113]

Overall, the thrust of substantive critiques following *Fraser* appears to rest on a comparison with Wagner model statutory requirements attending collective bargaining. From this vantage point, there is a resulting dissatisfaction that section 2(d) was not interpreted to constitutionalize the right to collective bargaining as it is understood in that specific context.[114] It makes sense that the Court in *Health Services* drew heavily on labour relations jurisprudence, given that the dispute at issue arose in a unionized environment.[115] Conversely, in *Fraser*, the Court was presented with a statute that adopted the language of "representations". As such, its reasons incorporated that terminology, while explaining that section 2(d) required meaningful dialogue and good faith consideration.[116] Although the differences between *Health Services* and *Fraser* go beyond a

---

110 See Braley, *supra* note 30 at 368. See also Bogg & Ewing, *supra* note 50 at 385–86.

111 See Braley, *supra* note 30 at 368.

112 Flaherty, *supra* note 108 at 251–52.

113 See Braley, *supra* note 30 at 367; Fudge, *supra* note 30 at 21–22. See also Maude Choko, "The Dialogue Between Canada and the ILO on Freedom of Association: What Remains After *Fraser*?" (2012) 28:4 Int'l J Comp L & Ind Rel 397 (for a restrictive interpretation of *Fraser* as compared to *Health Services* and the scope of section 2(d)).

114 See e.g. Braley, *supra* note 30; Fudge, *supra* note 30; Choko, *supra* note 113; Flaherty, *supra* note 108.

115 See e.g. Fudge, *supra* note 30 at 21–22 (commenting on the lengthy discussion of good faith bargaining in the context of labour law jurisprudence in *Health Services*, and its absence in *Fraser*).

116 See e.g. Roy J Adams, "Bewilderment and Beyond: A Comment on the *Fraser* Case" (2012) 16:2 CLELJ 313 (for an interpretation of *Fraser* that suggests alignment with, rather than retreat from, *Health Services*). See also Barrett, *supra* note 29 (interpreting Fraser as explicitly requiring good faith bargaining at 337).

distinction in terms,[117] they relate more directly to differences in the existing statutory regimes than a different standard or scope of section 2(d). While the specific application of section 2(d) in *Health Services* and *Fraser* may be different, given the different statutory contexts under which the cases were decided, the jurisprudence nonetheless evidences similar substantive commitments regarding freedom of association.

Bogg and Ewing identified three aspects of good faith bargaining left unclear in the wake of *Fraser*: a "duty to engage in dialogue about the representations," a "duty to negotiate about the representations," and a "duty to conclude an agreement relating to the representations."[118] Subsequent jurisprudence has affirmed that section 2(d) does not include a duty to conclude an agreement as it does not guarantee a particular outcome.[119] However, subsequent jurisprudence supports a likely interpretation that the right to collective bargaining requires dialogue and negotiation of some kind—an active exchange and consideration of each parties' positions and interests—and will not be satisfied by a mere right to make representations or by *pro forma* listening or receipt of such.

The Supreme Court's decision in *MPAO* reaffirmed the core purpose and function of the right to a process of collective bargaining, one that evidences a purposive approach to interpreting section 2(d). Such an interpretation would thus work against a formalist, narrowed, or thin understanding of the right, as some critiques following *Fraser* suggested.[120] At the time that *MPAO* was decided, it is reasonable to think the Supreme Court was alive to the lingering questions and debates about the right to collective bargaining left in the wake of *Fraser*.[121] In *MPAO*, the majority took up the opportunity to affirm their consistent position from *Health Services* and *Fraser* that the right to a process of collective bargaining requires meaningful dialogue and engagement, beyond *pro forma* listening

---

[117] See e.g. Braley, *supra* note 30 at 367–69.

[118] Bogg & Ewing, *supra* note 50 at 386.

[119] See *MPAO*, *supra* note 7 at para 67; *SFL*, *supra* note 7 at para 117. This follows from the Court's holdings in *Health Services* (*supra* note 28 at paras 102–03) and *Fraser* (*supra* note 6 at para 45). For further commentary on *Fraser*, see Daphne Taras, "Nonunion Representation in Law and Practice" (2017) 20:1 CLELJ 175 at 186–87.

[120] See Braley, *supra* note 30 at 373. See also Bogg & Ewing, *supra* note 50 at 384–85; Flaherty, *supra* note 108 at 254; Fudge, *supra* note 30 at 21–22; Choko, *supra* note 113 at 410–11.

[121] In *MPAO*, the Court cites an extensive array of academic scholarship, including authors who directly engage with questions about the implications of *Fraser* and collective bargaining under section 2(d). Moreover, the majority spent some time explaining the history, evolution, and current scope and content of section 2(d) (see *MPAO*, *supra* note 7 at paras 47–99), including specific arguments and responses regarding the *Fraser* decision and its implications (see especially *ibid* at paras 73–80).

or receipt of representations. Evidence of this interpretation is grounded, especially, in the majority's explanation of the purposive approach to section 2(d), as well as its consistent use of the language of "negotiation."[122]

The majority in *MPAO* affirmed that the right to collective bargaining and duty to bargain in good faith requires negotiation and, thus, more than a mere "consideration" of employee representations. The majority found that section 2(d) protects a "right to a meaningful collective bargaining process," including a right to collective bargaining.[123] In describing this right, the majority noted that "[j]ust as a ban on employee association impairs freedom of association, so does a labour relations process that substantially interferes with the possibility of having *meaningful collective negotiations* on workplace matters."[124] In light of their purposive approach to section 2(d) and the right to collective bargaining, the majority reiterated that a meaningful right to collective bargaining must protect employees' negotiating power.[125] Moreover, in discussing the twin elements of choice and independence, the majority linked them to the ability to engage in meaningful pursuit of workplace goals and negotiation vis-à-vis the employer.[126] This suggests an understanding that the right to collective bargaining is effected through negotiation and dialogue, not only through *pro forma* receipt of representations.

The majority's discussion and articulation of the "purposive approach" to section 2(d) in *MPAO* should allay lingering concerns about a narrow or formalistic interpretation of section 2(d) outside of unionized contexts. Specifically, *MPAO* confirms that section 2(d) ought to be interpreted to require meaningful or active dialogue or negotiation in the context of collective bargaining and will not be satisfied through only formal receipt of or *pro forma* listening to representations.[127] The majority in *MPAO* spent some time discussing how section 2(d) must be interpreted in a "purposive manner," which connects constitutive activities to their underlying goals and functions.[128] From this vantage point, section 2(d) would necessarily require more than *pro forma* engagement; otherwise, the ability for employees to pursue and advance workplace goals would be rendered meaningless.

---

[122] *MPAO*, *supra* note 7 at paras 54–55, 71.

[123] *Ibid* at paras 67, 71.

[124] *Ibid* at para 68 [emphasis added].

[125] See *ibid* at para 71.

[126] See *ibid* at paras 85–89.

[127] Regarding the arc of section 2(d) jurisprudence towards a purposive approach and focus on "meaningful" exercise of rights, see Harman, *supra* note 35.

[128] See *supra* note 7 at paras 47–66.

This purposive approach to understanding the scope and content of a right to collective bargaining was further affirmed by Justice Donald's dissenting opinion in *British Columbia Teachers' Federation v. British Columbia*.[129] In his analysis, Justice Donald explicitly decoupled the "constitutional good-faith" element of section 2(d) from particular "Wagner-style" elements.[130] He adopted a purposive approach to section 2(d) to discuss how a right to a process of collective bargaining must scrutinize conduct that would render it meaningless, such as by continually being under threat of nullification, bad faith bargaining, or a refusal to consider submissions.[131] Justice Donald found that consultation may be a significant factor in evaluating a potential breach under section 2(d), further supporting an interpretation of the right to collective bargaining as requiring active negotiation or dialogue.[132] Finally, in his analysis, Justice Donald directly addressed the idea of "good faith negotiation" as developed in *Health Services* and *Fraser*.[133] Illustrating the compatibility between *Fraser* and other Supreme Court cases, Justice Donald summarized the constitutional right to collective bargaining and requirement of good faith bargaining, untethered to the Wagner model:

> To summarize, good faith negotiation, from a constitutional perspective, has been described by the Supreme Court of Canada as requiring parties to meet and engage in meaningful dialogue where positions are explained and each party reads, listens to, and considers representations made by the other. Parties' positions must not be inflexible and intransigent, and parties must honestly strive to find a middle ground.[134]

This opinion was expressly endorsed by the Supreme Court in its bench ruling in this case. It thus further affirms the Court's consistent position that the requirement of good faith bargaining under section 2(d) requires meaningful dialogue and negotiation and will not be satisfied by *pro forma* listening or receipt of representations.

While *Fraser* may have left ambiguous what the duty to bargain in good faith meant in a non-unionized environment, a recent decision by the AFRAAT in *United Food and Commercial Workers International*

---

129 2015 BCCA 184 [*BCTF* CA]. See also *BCTF* SCC, *supra* note 7 (for the endorsement of Justice Donald's dissenting opinion by the Supreme Court).

130 *BCTF* CA, *supra* note 129 at paras 277, 283–93.

131 See *ibid* at paras 285–86.

132 See *ibid* at paras 283–304.

133 *Ibid* at paras 330–49.

134 *Ibid* at para 334.

Union v. MedReleaf Corp.[135] independently affirmed a more robust understanding of this right. *MedReleaf 2018* centred on allegations of bad faith bargaining in contravention of section 5 of the *AEPA*, the same legislation that had been at issue in *Fraser*. The AFRAAT set out a list of factors it considered necessary in order for section 5 of the *AEPA* to function properly and effectively. This list included that the employer must consider the representations "with an open mind and beyond mere pro forma listening or reading" and that "the parties must meet and engage in meaningful dialogue where positions are explained."[136] The AFRAAT further explained that "the duty to consider representations in good faith requires that the parties meet and engage in meaningful dialogue where positions are explained" and where the employer "considers the representations with an open mind."[137] This largely resolves the concerns about how to interpret, at least doctrinally, the "duty to consider representations" under the *AEPA*. At minimum, the duty requires not only *pro forma* listening or receipt of representations, but also active dialogue and an explanation of positions. The interpretation of the duty to bargain in good faith in *MedReleaf 2018* further provides some indication of the content that may attach to a right to collective bargaining outside of the Wagner model and under section 2(d) more generally.

Nonetheless, there remain unanswered questions about the extent to which the duty to bargain in good faith does, or ought to, mirror traditional labour relations contexts. In a unionized environment, the duty to bargain in good faith requires the parties to make "every reasonable effort" to conclude a collective agreement.[138] It also includes the duty to "meet and be prepared to negotiate," to "provide information and respect the union's role," to "be honest" and disclose relevant information and plans, and to not engage in "surface bargaining."[139] While some of the underlying normative commitments reflected by these rules, such as a commitment to honestly consider and exchange positions, may align with the purpose and function of a general right to collective bargaining under section 2(d), others, such as the duty to make all reasonable efforts to reach a collective agreement, may not. The continued reliance on Wagner model

---

[135] 2018 ONAFRAAT 12 at 13 [*MedReleaf 2018*]. For the second decision in this case, addressing the right to strike, rendered in 2020, see *UFCW v MedReleaf Phase 2*, 2020 ONAFRAAT 08 (CanLII) [*MedReleaf Phase 2*].

[136] *MedReleaf 2018*, *supra* note 135 at 13.

[137] *Ibid.*

[138] *Royal Oak Mines v Canada (Labour Relations Board)*, [1996] 1 SCR 369 at paras 41–42, 133 DLR (4th) 129. See also David J Doorey, *The Law of Work: Industrial Relations and Collective Bargaining* (Toronto: Emond, 2017) at 146 [Doorey, *Law of Work*].

[139] Doorey, *Law of Work, supra* note 138 at 147–52.

rules and criteria as a benchmark for section 2(d) is causative of the lingering confusion over its potential application to other labour models. Thus, it may be clear, so far, that section 2(d) protects a right to collective bargaining, understood as good faith negotiation or exchange of positions. But, it is less clear which particular rules and procedures would satisfy that right.

V. Collective Bargaining and Dispute Resolution under a Labour Pluralism Approach to Section 2(d)

One of the issues put forth in *Fraser* concerned access to "*LRA*-type" mechanisms to resolve bargaining impasses and interpret collective agreements.[140] The trial judge in *Fraser* had determined that the *AEPA* was compliant with section 2(d), in part, because it "provides a tribunal for the resolution of disputes."[141] This suggests that section 2(d) can protect a variety of recourse mechanisms within the context of collective bargaining, as well as more generally in relation to CWR. Despite arguments advanced about the adequacy of dispute resolution mechanisms in *Fraser*, these were largely neglected in the Supreme Court's decision, evidently because the mechanisms available under the *AEPA* had not yet been sufficiently tested.[142] Just as the arguments concerning effective dispute resolution were sidelined in the Supreme Court's decision in *Fraser*, so too were they neglected in dominant conversations and critiques flowing from the ruling.[143] As such, there has been minimal consideration, to date, of the question of recourse or dispute resolution mechanisms in relation to section 2(d).

The Supreme Court's recent decision in *SFL* provides renewed opportunity to consider the availability of both strikes and other forms of recourse or dispute resolution, both within and beyond the narrow context of collective bargaining, and how these may operate outside of a unionized environment. At issue in *SFL* was the constitutionality of legislation that unilaterally designated large classes of unionized public employees as providing "essential services" and prohibited them from engaging in any form of strike activity.[144] The unilateral and sweeping designations, which prohibited strike activity, formed the basis of the challenge under section

---

[140] See *supra* note 6 at para 7.

[141] See *ibid* note 6 at para 109.

[142] See *ibid* note 6 at paras 109–13.

[143] For a consideration of the limitations of the AFRAAT and other dispute resolution mechanisms unavailable under the *AEPA* (*supra* note 15), see Doorey, "Graduated Freedom", *supra* note 1 at 534, 536–38.

[144] See *supra* note 7 at paras 5–17 (for details on the legislation at issue).

2(d). In its decision in *SFL*, the majority of the Supreme Court constitutionally enshrined a right to strike.

In discussing the indispensability of strike activity as a component of meaningful collective bargaining models, the majority highlighted the power and purpose of strike activity as a tool to negotiate conditions of employment and achieve "meaningful participation" in collective bargaining.[145] Without such tools, the ability for employees to collectively pursue workplace goals—the central objective that section 2(d) itself protects —is not meaningful. In other words, "a process of collective bargaining will not be meaningful if it denies employees the *power* to pursue their goals."[146] Strike activity—the ability to collectively withdraw services or labour—is one mechanism through which employees may seek recourse when their employer fails to negotiate in good faith; resort to conciliation processes may be another. As the majority noted, "[s]trike activity itself does not guarantee that a labour dispute will be resolved in any particular manner, or that it will be resolved at all."[147] But it does provide a tool, a recourse mechanism, to attempt to effect resolution. As such, absent compelling justification and the availability of an alternative recourse mechanism, legislation that prohibits the rights of employees to strike may constitute a "substantial interference" with the right to collective bargaining under section 2(d).

The majority in *SFL* connected the "crucial" availability and access to a meaningful recourse mechanism to the bargaining power and leverage it provides workers.[148] Without such a recourse mechanism, there exists a "profound bargaining imbalance" between workers and employers.[149] Quoting from Chief Justice Dickson, as he then was, in the *Alberta Reference*: "[t]he purpose of such a mechanism is to ensure that the loss in bargaining power ... 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."[150] In other words, the overriding aim of

---

145 *Ibid* at paras 46–47, citing Bob Hepple, "The Right to Strike in an International Context" (2009–2010) 15:2 CLELJ 133 at 139.

146 *MPAO*, *supra* note 7 at paras 70–71, cited in *SFL*, *supra* note 7 at para 55 [emphasis added].

147 *SFL*, *supra* note 7 at para 57.

148 *Ibid* at para 93, citing Paul Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto: Carswell, 1980) at 237.

149 See *SFL*, *supra* note 7 at para 94.

150 *Ibid*, citing *Alberta Reference*, *supra* note 36 at 380 (in the quoted passage, Dickson CJ is quoting from the Alberta International Fire Fighters Association factum [at 22] and is commenting on the need for alternative recourse mechanisms where striking is prohibited).

ensuring protection for recourse, such as through strike activity, is to equalize the power of employees vis-à-vis their employer.[151]

The majority was careful to buttress the protection of the right to strike with support from international and comparative law sources and within the specific legislative context and labour history in Canada. The reliance on international and comparative law sources, in particular, evidences the Court's attentiveness to decoupling the right to strike from Wagner model labour relations.[152] This extension of such a right beyond the Wagner model context is further supported by Justice Abella's discussion of *Fraser* in *SFL*. She noted that *Fraser* extended section 2(d) to include the right to a meaningful process of collective bargaining, requiring an employer to consider representations in good faith and "having a means of recourse should the employer not bargain in good faith."[153]

Commentary flowing from the *SFL* decision has substantially focused on the impact of this decision on unionized environments.[154] Scholars have been, in this vein, largely preoccupied with determining whether and to what extent the recognition of a right to strike will alter existing approaches to strike regulation under labour relations legislation.[155] This focus is understandable, both in light of the statutory context in which *SFL* was decided and in light of the many trade-offs and compromises that exist and which limit strike activity under Wagner model legislation. Nonetheless, this preoccupation has limited a more creative examination of the potential scope and content of section 2(d)'s recognition of a right to strike. It has prevented a consideration of how a right to strike might op-

---

151 See *SFL*, *supra* note 7 at para 55, citing *MPAO*, *supra* note 7 at paras 70–71.

152 See *SFL*, *supra* note 7 at paras 72–74. But see Doorey, "Reflecting Back", *supra* note 3 at 183–84. See also Roy L Heeman, "*Saskatchewan Federation of Labour* and Strikes in the Public Sector: Confusing Social Rights with Fundamental Ones" (2016) 19:2 CLELJ 399 (critiquing the Court's reliance on international sources at 399–405).

153 *SFL*, *supra* note 7 at para 29.

154 See e.g. Brian Etherington, "The Right to Strike Under the *Charter* after *Saskatchewan Federation of Labour*: Applying the New Standard to Existing Regulation of Strike Activity" (2016) 19:2 CLELJ 429; Paul Cavalluzzo, "The Impact of *Saskatchewan Federation of Labour* on Future Constitutional Challenges to Restrictions on the Right to Strike" (2016) 19:2 CLELJ 463 [Cavalluzzo, "Impact"]; Richard P Chaykowski, "Labour Relations Policy and Practice, and the Regulation of the Right to Strike in the Broader Public Sector: The Implications of *Saskatchewan Federation of Labour*" (2016) 19:2 CLELJ 483 [Chaykowski, "Labour Relations Policy"]; Alison Braley-Rattai, "Canada's Statutory Strike Models and the New Constitutional Landscape" (2018) 21:2 CLELJ 461 [Braley-Rattai, "Strike Models"]; Judy Fudge & Heather Jensen, "The Right to Strike: The Supreme Court of Canada, the Charter of Rights and Freedoms and the Arc of Workplace Justice" (2016) 27:1 King's LJ 89.

155 See Etherington, *supra* note 154; Cavalluzzo, "Impact", *supra* note 154; Chaykowski, "Labour Relations Policy", *supra* note 154; Braley-Rattai, "Strike Models", *supra* note 154.

erate outside of a unionized environment. It additionally hampered an examination of the underlying normative commitments reflected in this right. Such an examination could have explored how these commitments attach to a variety of recourse or dispute resolution mechanisms outside of the Wagner model context.

The right to strike as found in *SFL*, while not limited to unionized environments, may be implicitly interpreted in a manner that remains tethered to such a context. This is similar to the way in which *Health Services* produced lingering attachment to the particular instantiation of collective bargaining found under the Wagner model. The significance of strike activity in many industries, as part of the history of the union movement, and its current operation today, cannot be understated. As the Court in *SFL* discussed, this is an activity protected under a variety of CWR models around the world, and not only a particular feature of the Wagner model.[156] However, in Canada, part of its strength comes from the concomitant protections afforded under labour relations statutes.[157] Further, the prevalence and dominance of strike activity as a recourse mechanism in unionized environments gives it a special quality that may not be readily transferrable outside this context.[158] As such, the absence of concomitant protections outside the unionized environment could produce similar critiques as was seen in respect of collective bargaining following *Fraser*.[159] A right to strike may be argued to be less effective or weaker without the attending legal rules that exist for unionized workers.[160]

---

156 See *supra* note 7 at paras 67–75.

157 See e.g. Doorey, *Law of Work*, *supra* note 138 at 158–66. These labour relation statutes also typically include rules about when and how a strike can unfold. In some jurisdictions, they may also include a prohibition on hiring replacement workers during a strike (see *ibid* at 165). In addition, workers in a unionized environment receive strike pay, and whether and how a CWR organization would financially support workers in other contexts depends on the particular set-up and resources of that organization (see *ibid* at 159). Finally, while section 2(d) has been found to protect workers against reprisals for engaging in associational activities (see *Dunmore*, *supra* note 32), it remains unconfirmed how this would be interpreted in relation to the right to strike outside of the unionized environment.

158 For example, while only BC and Quebec legally prohibit the use of replacement workers (see Doorey, *Law of Work, supra* note 138 at 165), informal norms against "crossing a picket line" may be seen as a highly influential factor for both workers and employers engaged in an industrial conflict dispute. These kinds of norms may operate to exert additional pressure on both sides to return to the negotiating table and reach an agreement, particularly in light of the long-term nature of the union-employer-worker relationship. See also Chaykowski, "Labour Relations Policy", *supra* note 154 at 508 (discussing the relative strength of strike activity in the public versus private sector).

159 The recent decision in *MedReleaf Phase 2* (*supra* note 135 at paras 93–94) provides a foundation for such concerns. The AFRAAT, in that case, appeared to interpret the

Yet, untethering a right to strike from the Wagner model also frees it from significant constraints. Strike activity became heavily regulated as part of the trade-offs and compromises in the Wagner era.[161] Today, recognition strikes and wildcat strikes, for example, are prohibited, and when and how a strike can occur during the process of collective bargaining is also regulated in detail.[162] Outside of these statutory constraints, a right to strike—to withdraw labour in recourse against an employer—may offer broader protection and a more robust negotiating tool to workers.[163]

Moreover, the reasons in *SFL* may, in fact, support a more expansive and inclusive interpretation of section 2(d). In its narrower sense, such an interpretation would protect effective recourse to dispute resolution in the context of collective bargaining as a tool to be deployed during the active negotiation process. In its broader sense, it could also protect effective recourse as part of the larger structure that is necessary to give effect to a meaningful process of collective bargaining, understood as the overall regime for collective workplace representation. When articulated in this way, the particular method of dispute resolution—a strike or another mechanism—becomes less of a dividing line for determining the scope of section 2(d)'s protection. Moreover, it moves away from Wagner model benchmarking, allowing for a richer examination of the possibilities of freedom of association in the context of labour pluralism. To be clear, what I am advocating here is a normative argument about how section 2(d) should, or could, be interpreted in the future. It is far from clear that it will be interpreted in this manner and it certainly has not been interpreted this way yet.

SFL makes clear that the duty to bargain in good faith requires meaningful recourse where an employer fails in this duty. In other words,

---

right to strike as a "bare" right not requiring concomitant protections (see Hastie & Farrant, *supra* note 43 at 6).

160 See Hastie & Farrant, *supra* note 43 at 18–20.

161 See e.g. Cavalluzzo, "Impact", *supra* note 154 (discussing that most compromises on strike activity under the Wagner model would not likely be found to violate section 2(d) at 466–69). Removed from this sphere, though, the certainty with which restrictions on strike-related activity would be permissible under s 2(d) remains contestable. See also Braley-Rattai, "Strike Models", *supra* note 154 at 485–86; *SFL*, *supra* note 7 at para 44, citing Judy Fudge & Eric Tucker, "The Freedom to Strike in Canada: A Brief Legal History" (2009–2010) 15:2 CLELJ 333 at 350.

162 See Cavalluzzo, "Impact", *supra* note 154 at 466–69; Braley-Rattai, "Strike Models", *supra* note 154.

163 See e.g. Cavalluzzo, "Impact", *supra* note 154 (asking whether strike activity might be a more effective means of enforcing an agreement, rather than the complicated and lengthy grievance arbitration system in place today at 467).

where an employer bargains in bad faith, workers must have recourse to some form of dispute resolution mechanism or tool in order to give meaning and effect to the right of collective bargaining under section 2(d). In fact, Justice Abella, writing for the majority, attributed this to the Court's decision in *Fraser*,

> where the court accepted that a meaningful process [of collective bargaining] includes employees' rights to join together to pursue workplace goals, to make collective representations to the employer, and to have those representations considered in good faith, *including having a means of recourse should the employer not bargain in good faith.*[164]

A means of recourse is necessary to equalize the bargaining power between employees and employer. Such means, whether striking or access to a tribunal or dispute resolution body to hear complaints, as was available in the *AEPA* in *Fraser*, ensure the ability of workers to meaningfully exercise their rights under section 2(d).[165] While the majority in *SFL* was particularly concerned with preserving the right to strike, this should not be read as explicitly excluding other forms of recourse or dispute resolution from protection under section 2(d). The majority briefly addressed alternative dispute resolution mechanisms (ADR) and noted that they have historically been found not to constitute associational activities protected by section 2(d).[166] As such, they are not generally understood as benefiting from similar protection under section 2(d) as strike activity. Rather, where abrogation of the right to strike can be justified, an alternative dispute resolution mechanism must be put in its place in order to satisfy the "minimal impairment" test under section 1.[167] However, this line of reasoning flows from the Wagner model context, where ADR is positioned as an *alternative to*, or as *opposed to*, strikes and lock-outs. From that vantage point, ADR mechanisms would be seen as suppressing the collective interests of workers who may otherwise wish to engage in strike activity in order to exert pressure on their employer in the context of collective bargaining. While a prohibition on or abrogation of the right to strike may substantially and unjustifiably interfere with section 2(d), this does not mean that the availability of additional and complementary dispute resolution mechanisms is outside of the scope of section 2(d) where the possi-

---

164 *SFL*, *supra* note 7 at para 1 [emphasis added].

165 See generally *ibid* (for a brief discussion of how the right to strike is not "merely derivative" of the right to collective bargaining at para 3). See also Etherington, *supra* note 154 at 450.

166 See *SFL*, *supra* note 7 at para 60.

167 See *ibid*. For a discussion of the role of section 1 and ADR mechanisms, see also Chaykowski, "Labour Relations Policy", *supra* note 154 at 502–04; Cavalluzzo, "Impact", *supra* note 154 at 478–80.

bility of strike activity also exists. In other words, just because abrogation of one *requires* the presence of the other does not mean that the presence of the first precludes the option of the second.

While in *SFL* the focus was on strike activity, a purposive interpretation of section 2(d) should not limit its understanding and protection of meaningful recourse only to strike activity. Rather, section 2(d) should protect a choice and range of recourse options. This understanding of section 2(d) would better reflect the plurality of interests and needs that workers in various contexts and under various CWR models may have. It would also decouple the scope of section 2(d) from the Wagner model. It is further an available interpretation in light of the normative commitments underlying the right to strike to ensure effective recourse and dispute resolution for workers and equalize their power vis-à-vis an employer.

As the Court explained in *MPAO*, "a process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals."[168] Therefore, measures that reduce the negotiating power of employees may constitute a substantial inference with their exercise of rights under section 2(d).[169] For some employees, strike activity will be seen as undesirable or impractical as a means to advance their position, equalize power, and push forward negotiations with their employer. Workers in some environments may prefer recourse mechanisms other than striking to resolve disputes or impasses with their employer. Workers may have short-term economic concerns, may desire a quicker or more "cooperative" resolution, or may have other motivations that make striking less desirable.[170] Consequently, they may prefer other options, such as binding interest arbitration, submitting a complaint to a dispute resolution body, or engaging the employer in mediation or a similar conciliation process.[171]

---

168 *Supra* note 7 at para 71.

169 See *ibid.*

170 See Hastie & Farrant, *supra* note 43 at 22.

171 For example, after a 194-day strike, and following rejection of a proposed mediated agreement by the employer, Unifor Local 594 asked Saskatchewan Premier Scott Moe to legislate workers at Regina's Co-op Refinery Complex back to work (see "Unifor Workers Rally, Ask Sask. Government to Legislate Them Back to Work", *CBC News* (15 June 2020), online: <cbc.ca> [perma.cc/4VMS-9GEW]). Another example is found in Legal Aid Ontario's (LAO) submission to Ontario's *Changing Workplaces Review*. LAO sought the ability to better organize legal professionals and, recognizing the professional and ethical dilemmas which might arise if lawyers engage in work stoppages, recommended that Ontario craft a separate labour relations regime that emphasizes alternative dispute resolution mechanisms, such as arbitration (see Legal Aid Ontario, "Submission to the Changing Workplaces Review" (October 2016), online

Just as section 2(d) does not limit its application or scope of protection to only one model of collective workplace representation, neither should it be limited to protecting only one recourse or dispute resolution mechanism. Rather, a purposive and forward-looking interpretation would suggest that section 2(d) should protect a range of dispute resolution choices for employees. It would build on the underlying purpose of section 2(d), the concept and importance of worker "choice" as set out in *MPAO*, and the particular purpose and need for means of recourse as discussed in *SFL*. A range of dispute resolution choices would support employees to make decisions about what kinds of recourse mechanisms to pursue in the context of bargaining or disputes with their employer. However, it does not follow that it would equally create space to permit legislation to limit employee choice by prohibiting or constraining certain recourse mechanisms, such as strikes, absent the ability to justify such conditions under section 1.

The argument I advance here resists an "either or" scenario that would enable legislatures to narrow or exclude certain recourse mechanisms, such as striking, absent the ability to justify such an approach under section 1. It would rather support an expansive and inclusive approach to protecting a variety of dispute resolution mechanisms that workers may choose from and use in line with what will enable effective recourse against an employer in light of the particular dispute and context at hand. Further, this argument moves beyond the challenge of whether such mechanisms are themselves "associational in nature." Indeed, it grounds the need for and access to dispute resolution mechanisms as a necessary corollary or "diagonal" right to the effective realization of section 2(d)'s core purpose and the right to a process of collective bargaining. Moreover, recognition of dispute resolution mechanisms, such as recourse to the AFRAAT as designated under the *AEPA*, already exists and has been found to be compatible with a right to strike.[172]

The significance and importance of dispute resolution mechanisms as a means through which employees can exert power and meaningfully pursue their interests in the workplace is not, in reality, limited only to the bargaining context. Having access to a meaningful dispute resolution

---

(pdf): *University of Toronto Centre for Industrial Relations & Human Resources* <cirhr.library.utoronto.ca> [perma.cc/AF7R-Q78K]).

Furthermore, in the construction industry, there has been a documented shift away from strike activity and towards more "labour-management cooperation" and new forms of dispute resolution (see generally Joseph B Rose, "Reforming the Structure of Collective Bargaining: Lessons from the Construction Industry" (2013) 17:2 CLELJ 403 at 407–09).

[172] See *MedReleaf Phase 2*, *supra* note 135 at para 105. See Hastie & Farrant, *supra* note 43 at 24–25.

mechanism is generally necessary to protect the rights extended under section 2(d). For example, if an employer engages in reprisal against a worker involved in labour organizing, this violates the *Charter*.[173] However, for a worker to have effective recourse in that scenario—the ability to enforce their *Charter* rights—requires a competent body to hear the complaint, and with sufficient power to address and respond to it. Similarly, for a right to strike to have meaning for workers, there must be concomitant protections available in law. This includes a mechanism for recourse and remedy when those protections are disregarded by an employer, such as by terminating workers who strike.

The Supreme Court's comments in *Fraser* provide further support for the proposition that section 2(d) does, or could, be interpreted to protect recourse to effective dispute resolution mechanisms beyond striking and beyond the collective bargaining process (narrowly understood). Despite ruling that the challenge regarding access to "*LRA*-type mechanisms" was premature, the majority's reasons appear to confirm that recourse to dispute resolution mechanisms comes within the ambit of section 2(d) and may be understood as a necessary component of effective realization of rights under section 2(d). In addressing this aspect of the challenge at the Supreme Court, the majority in *Fraser* found that the union had not made a "significant attempt" to make the dispute resolution process work, that the process had not been "fully explored and tested," and that, as the trial judge had noted, the complaint on this point was thus premature.[174] The majority referred back to the trial judge's comments, noting that he had "expressed cautious hope" that the tribunal would be an effective means of recourse under the *AEPA*.[175] Further, the majority found that the tribunal had broad interpretive and remedial authority, which made it a potentially powerful tool, similar to labour tribunals.[176] These comments, while not determinative, suggest that the majority considered the challenge not to be beyond the purview of section 2(d), but simply brought too soon and without sufficient evidence. The majority also hinted at criteria on which dispute resolution mechanisms may be assessed, such as their expertise and composition, their interpretive powers, and their remedial authority and options. The majority's identification of these criteria similarly suggests that a purposive interpretation of section 2(d) may invite a consideration of the existence and quality of dispute resolution mechanisms.

---

[173] See *Dunmore*, *supra* note 32.

[174] See *supra* note 6 at paras 109–11.

[175] *Ibid* at para 111.

[176] See *ibid* at para 112.

The qualities of dispute resolution mechanisms are further elucidated in *SFL*. Although considering the issue under a section 1 analysis, the Supreme Court identified that effective dispute resolution mechanisms must be adequate, impartial and effective.[177] Chaykowski builds on this in his analysis of the *SFL* decision. He suggests that an acceptable dispute resolution mechanism will fulfill three criteria. First, it will be of a type generally accepted as legitimate in industrial relations, such as arbitration. Second, it will be a meaningful method of dispute resolution, in particular if it varies from the accepted arbitration standard. Third, it will be decided upon through a meaningful process of engagement between management and workers.[178] "Meaningful" processes may further be identified through factors enunciated by the majority in *SFL*, such as "impartial" and "effective."[179] These factors should impact both the process of identifying the mechanism, and of the operation of the mechanism itself, per Chaykowksi's criteria above. Braley-Rattai further affirms the criterion of impartiality, while adding that of independence of the decision-maker and process.[180]

Overall, while *SFL* enshrines a right to strike—to withdraw labour in the course of collective bargaining—it also provides a robust foundation for further examination and dialogue concerning the scope and application of protection for recourse or dispute resolution mechanisms under section 2(d). Building on this foundation, future examinations must work to elucidate the scope and content of dispute resolution under section 2(d) within and beyond the process of collective bargaining outside of the Wagner model, and untethered to the constraints imposed by that legislative regime.

Conclusion

This article has used the *Fraser* decision as a launching point for reconsidering the potential of section 2(d). The article's interpretation of *Fraser* establishes that freedom of association can offer robust protection for complementary models of collective workplace representation, which exist outside of and alongside the dominant Wagner model of unionism enshrined in existing labour relations statutes across Canada. As I have demonstrated, re-reading *Fraser* in light of subsequent jurisprudence and reading that jurisprudence in light of *Fraser's* commitment to labour plu-

---

177 See *SFL*, *supra* note 7 at para 96. See also Etherington, *supra* note 154 (commenting on these criteria and their application in future cases at 455–56).

178 Chaykowski, "Labour Relations Policy", *supra* note 154 at 503–04.

179 *Ibid* at 498–99.

180 See Braley-Rattai, "Strike Models", *supra* note 154 at 479–80.

ralism sheds greater light on the potential of section 2(d). In particular, I have demonstrated that section 2(d) contains a bundle of four rights that extends beyond the Wagner model of labour relations. First, this bundle includes a right to associate in the workplace in order to meaningfully pursue workplace-related goals. Second, it contains a right to choice of and independence in forming an association. Third, it encompasses a right to a process of good faith collective bargaining, which includes an obligation to engage in dialogue and negotiate in respect of positions. Finally, it involves a right to collective withdrawal of labour and to other recourse mechanisms in the context of bad faith bargaining and bargaining impasse. Moreover, I have argued that section 2(d) is capable of being interpreted to extend meaningful protection for accessing dispute resolution mechanisms more broadly, and as a necessary corollary to enforce the other enunciated rights under section 2(d). Effective access means not only providing for a (choice of) recourse mechanism(s), but also ensuring that prescribed mechanisms meet minimum requirements or possess certain qualities. This is particularly important where a legislative CWR model designates a particular method of dispute resolution or administrative body to hear complaints, whether in relation to collective bargaining or more generally.

Through the examination of section 2(d) in this article, I aim to bring to the fore the richer potential of section 2(d) to extend meaningful power to CWR beyond the Wagner model and to contribute to ongoing dialogue and experimentation in that regard. Future research will add detail and depth to understanding the specific content of the above-articulated rights under section 2(d) and to examining the various manifestations they may take under a labour pluralism approach to CWR. In addition, building on the arguments for establishing the existence of the right to recourse and dispute resolution mechanisms, future analysis and scholarship will focus on articulating what these requirements and qualities include and how to evaluate them in relation to non-Wagner models for CWR, including under the *AEPA*.