CONSTITUTIONAL DERADICALIZATION OF THE
WAGNER ACT MODEL:
THE IMPACT OF B.C HEALTH SERVICES AND FRASER

by

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**ABSTRACT**

For many years, workers petitioned the Supreme Court of Canada to intervene in labour relations to protect their collective bargaining rights. Finally, the Court answered the call, but the drastic changes made were not what workers expected. This thesis outlines the effect that the Court’s decision to intervene in labour relations had on the existing collective bargaining model. In making this determination, a historical analysis was done of the Court’s attitude towards using section 2(d) Freedom to Associate to protect collective bargaining, followed by a comparative analysis with United States jurisprudence to explain the effect of the Canadian decisions on the statutory provisions. The analysis revealed that the decisions had significantly weakened protections for workers’ rights, and provided the basis to conclude that the Supreme Court of Canada had used the *Canadian Charter of Rights and Freedoms* to deradicalize the existing collective bargaining model.
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# TABLE OF CONTENTS

CHAPTER 1 INTRODUCTION 1

CHAPTER 2 WAGNER ACT 3

(A) Implementation and Operation of the *Wagner Act* in the United States 3

(B) Implementation and Operation of the *Wagner Act* Model in Canada 4

CHAPTER 3 CONSTITUTIONAL FIX: THE SUPREME COURT OF CANADA’S TREATMENT OF *CHARTER* SECTION 2(D) FREEDOM OF ASSOCIATION 6

(A) The Previous Treatment of the Section 2(d) Right 7

(B) *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia* 14

  Majority Decision and Reasoning 15

  Dissent Decision and Reasoning 21

  Analysis of *B.C. Health Services* 23

(C) *Ontario (Attorney General) v. Fraser* 26

  Majority Decision and Reasoning 28

  Dissent Decision and Reasoning 33

  Analysis of *Ontario (Attorney General) v. Fraser* 35

CHAPTER 4 JUDICIAL DERADICALIZATION 39

(A) Karl E. Klare’s Judicial Deradicalization of the *Wagner Act* 39

(B) Constitutional Deradicalization by the Supreme Court of Canada 47

  (I) Duty to Bargain 47

  (II) Re-Scoping the *Charter* Section 2 (d) Right 53

CHAPTER 5 RECOMMENDATION 57

CHAPTER 6 CONCLUSION 60

BIBLIOGRAPHY 62
Chapter 1
INTRODUCTION

In 1935, the United States legislature implemented the National Labour Relations Act¹ (hereinafter the Wagner Act) that provided for significant changes in labour relations to benefit workers. This legislation allowed them to lawfully associate and to choose a worker representative that would bargain with the employer. In turn, the Act mandated that employers had a duty to recognize the chosen representative and to engage in collective bargaining with them over the terms and conditions of work. The desired end result was a collective agreement reflective of the wishes of both labour and management. However, the Wagner Act did not deliver the benefits that workers had hoped for as the United States Supreme Court kept cutting back these rights when they interpreted the legislation.

Subsequently, the Wagner Act Model (hereinafter the Wagner Model) was introduced in Canada, and unfortunately the same trend occurred as in the United States. But the Supreme Court of Canada instead of relying solely on statutory interpretation, utilized the Canadian Charter of Rights and Freedoms² (hereinafter the Charter) to carve back workers’ rights.

In light of the aforementioned, I will argue that the Supreme Court of Canada used the Charter to deradicalize the Wagner Model by carving back workers’ rights that the Model provided. This argument will be developed over three parts. In Part I, I will briefly examine the history of the implementation of the Wagner Act in the United States and

the Model in Canada and the reasons for doing so. In Part Two, I will explore the Supreme Court of Canada’s response to the request from workers to use *Charter* section 2(d) freedom of association to remedy the deficiencies in the administration of the Wagner Model. Finally, in Part Three, I will show how the Court used the *Charter* to deradicalize the Wagner Model, by comparing similar events which occurred in the United States.
Chapter 2

WAGNER ACT

(A) Implementation and Operation of the Wagner Act in the United States

The Wagner Act was introduced in the United States in 1935 in the midst of a severe economic depression.\(^3\) It represented a compromise with workers who had refused to cease striking until they obtained real protection of their right to organize and bargain.\(^4\) Workers were exercising these rights long before the Act, however they did not have statutory protection and so many workers were unable to join trade unions\(^5\) without harassment from employers. Section 7(a) of the National Industrial Recovery Act (NIRA), 1933\(^6\) was the first statute that officially recognized the right to organize and bargain, however workers were not given full substantial protection until the implementation of the Wagner Act.\(^7\)

Initially, the Wagner Act was pro-worker as it protected workers in their organizing drives from employer interference,\(^8\) punished employer unfair labour practice tactics,\(^9\) and preserved the workers’ right to strike.\(^10\) Subsequently, this changed as the Courts started rolling back these benefits by importing into statutory interpretation unarticulated

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\(^4\) Ibid. at 36-37.
\(^5\) Ibid. at 35.
\(^7\) Atleson, supra note 3 at 39-40.
\(^8\) NLRA, supra note 1, s.7.
\(^9\) Ibid., s. 8(5) (an example of an unfair labour practice was the employer’s refusal to bargain).
\(^10\) Ibid., s. 13.
values and assumptions about employers’ rights,\textsuperscript{11} which transformed the legislation into being pro-employer. This change was evident from the many benefits which employers now received, all geared towards protecting the business from disruption by work stoppages. A pertinent example was health and safety. The \textit{Wagner Act} provided that workers were allowed to cease work where they believed in good faith that the working conditions were dangerous, without this stoppage being deemed a strike.\textsuperscript{12} However, the courts read in the requirement that workers needed to provide “objective” evidence of this dangerous condition, in addition to the good faith belief, before they could exercise this right even though the statute did not require this.\textsuperscript{13} Accordingly, the worker’s belief in the hazardous nature of the working environment was insufficient justification to exercise their statutory right. As a result, the courts limited the statutory rights provided by the \textit{Wagner Act} for workers so that employers would still continue to enjoy their pre-\textit{Wagner} rights.

\textbf{(B) Implementation and Operation of the \textit{Wagner Act} Model in Canada}

Almost ten years after the \textit{Wagner Act} was introduced in the United States, Canada adopted the Model in 1944. Canada was also experiencing an economic depression, and the Wagner Model would help boost economic productivity by stabilizing the supply of labour who was also involved in numerous strikes.\textsuperscript{14} Like the United States, Canadian workers were already organizing and attempting to bargain with the employers long before the legislation was implemented, and their efforts were

\begin{itemize}
  \item \textsuperscript{11} Atleson, \textit{supra} note 3 at 82-83.
  \item \textsuperscript{12} \textit{NLRA}, \textit{supra} note 1, s.502.
  \item \textsuperscript{13} \textit{Gateway Coal Company v. United Mine Workers of America et al.}, 414 U.S. 368 at 386 (1974).
  \item \textsuperscript{14} Judy Fudge & Harry Glasbeek, “The Legacy of PC 1003” (1995) 3 Can. Lab. & Emp. L.J. 357 at 369 [Fudge, “The Legacy”].
\end{itemize}
also met with strong resistance especially from the judiciary and politicians who kept suppressing these efforts. With the adoption of the model organizing and bargaining were legitimized as workers’ actions were now protected by statute.

The model mirrored its American counterpart for the most parts. It prohibited employers from interfering with workers during organizing drives, certified unions that were selected by a majority of the workers in the approved bargaining unit, and limited the use of strikes and lockouts by the employer and union. Similarly, the legislature compelled the employer to recognize the chosen worker representative and to engage in bargaining with them. However, history repeated itself as the legislation that was meant to be pro-worker was interpreted as benefitting employers. The National Wartime Labour Relations Board, who was charged with developing and implementing policies based on the Model, developed policies which made it more difficult for workers to enjoy these rights. Unions who had managed to organize workers had to meet onerous requirements in order to be certified as the workers’ representatives, and the worker compliments that were deemed appropriate bargaining units for the unions, were smaller than desired and resulted in the workers becoming very fragmented. Consequently, the same trend of cutting back workers’ rights awarded by the Wagner Act that was prevalent in the United States was now being replicated in Canada.

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15 Ibid. at 364.
16 Ibid.
17 Ibid. at 370.
18 Ibid. at 364.
19 Ibid. at 371.
20 Ibid. (the union had to prove that a majority of all workers in the unit, as opposed to a majority of all the workers voting, were in favour of that union representing them. Also the Board certified local plant bargaining as opposed to enterprise, industry or regional bargaining units).
Chapter 3
CONSTITUTIONAL FIX: THE SUPREME COURT OF CANADA’S TREATMENT OF CHARTER SECTION 2(D) FREEDOM OF ASSOCIATION

This brief history of the adoption of the Wagner Model in Canada showcases the new statutory regime that would govern collective bargaining. It was evident that workers were at a disadvantage because they were unable to enjoy their statutory rights, and there was evidence that these rights would be rolled back even further.21 Based on the disadvantage that workers faced they turned to the Courts for help,22 even though the courts were portrayed as being anti-labour because they constantly awarded remedies against unions at the employers’ request.23 The hope was that the courts would include the statutory rights of workers to organize and collectively bargain under Charter section 2(d) freedom of association, because constitutional rights are entrenched and so not easily abrogated.

An early advocate for the use of the Charter in labour relations was David M. Beatty. In his book Putting the Charter to Work,24 he expressed the view that the Charter was the best way for workers to achieve some form of social justice in labour

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23 Paul C. Weiler, Reconcilable Differences: New Directions in Canadian Labour Law (Toronto, Canada: The Carswell Company Limited, 1980) at 290 (for example, employers continuously petitioned the courts for labour injunctions to prevent workers from picketing).
relations. This would be achieved by using the *Charter* to scrutinize the current labour laws to ensure that they were in line with its provisions, and where found wanting, the *Charter* would be used to correct the deficiencies present by outlining the required changes. Also, the *Charter* would be used to curtail the actions of both the legislature and the executive pertaining to labour relations, by requiring them to consider the *Charter's* underlying values of equality, the preservation of human dignity and self-determination, in their decision-making. Therefore, Professor Beatty saw the *Charter* as the way forward for labour relations, as the legislature and the executive who were normally heavily influenced by the political tide, could not be trusted to provide for disadvantaged workers.

(A) The Previous Treatment of the Section 2(d) Right

After approaching the courts to protect their statutory rights, workers soon learnt that judicial review was not going to improve or protect collective bargaining; rather the courts would continue to reinforce the current state of affairs by interpreting *Charter* section 2 (d) freedom of association in a manner that benefitted employers. The Courts did this by initially deciding that they were not going to be involved in labour relations or the rebalancing of the rights between unions and employers, as this was the

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27 David M. Beatty, “Ideology, Politics and Unionism” in Ken Swan & Katherine Swinton, eds., *Studies in Labour Law* (Toronto: Butterworth, 1983)299 at 306 [Beatty, “Ideology”] (some of these deficiencies were in breach of *Charter* provisions including section 2(d) freedom of association as the legislature had exempted many classes of workers from statutory protection).
28 Beatty, *Putting the Charter to Work*, supra note 24 at 10 (for example, workers can now agitate for an employment standard of good government and a fair decision making process which collective bargaining is unable to provide).
31 Pothier, *supra* note 22 at 372-373.
exclusive sphere of the legislature. They reinforced this view by continuously interpreting the *Charter* section 2(d) freedom to exclude collective bargaining.

The Court’s initial stance on the scope of section 2(d) was reflected in the decisions known as the *Labour Trilogy*. The lead decision was *Reference Re Public Service Worker Relations Act (Alberta)*. In that case, public sector trade unions had challenged some Alberta statutes that restricted collective bargaining for provincial government workers, firefighters, police and hospital workers. The statutes did this by prohibiting strikes, restricting bargaining scope and imposing compulsory arbitration. Justice LeDain, writing for the majority, held that “the constitutional guarantee of freedom of association in section 2(d) of the *Charter* does not include, in the case of a trade union, a guarantee of the right to bargain collectively and the right to strike.” Justice LeDain advanced both conceptual and institutional arguments in support of his limited interpretation of section 2(d). The conceptual view was that,

The rights for which constitutional protection is sought -- the modern rights to bargain collectively and to strike, involving correlative duties or obligations resting on an employer -- are not fundamental rights or freedoms. They are the creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as requiring a specialized expertise.

The conceptual argument of collective bargaining being a modern right, merged with the institutional argument, where he declared that the courts were not to seek to balance

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32 *Alberta Reference*, supra note 21 at para. 142.
34 *Alberta Reference*, supra note 21.
35 *Ibid.* (the other 2 judges were Justices Beetz and La Forest).
the competing interests in the labour arena because this required specialized expertise.\textsuperscript{37} Accordingly, his view of the scope of section 2(d) as only protecting the right to join a trade union, coupled with the view of collective bargaining as being a modern right created by the legislature, provided the basis for not interfering in labour relations by extending \textit{Charter} protection.\textsuperscript{38}

Justice McIntyre, in a separate but concurring opinion, limited the freedom to associate to all activities pursued in association with others that one could lawfully pursue as an individual. The thrust of his judgment was a distinction between individual and collective action, and he opined that “If \textit{Charter} protection is given to an association for its lawful acts and objects, then the \textit{Charter} protected rights of the association would exceed those of the individual merely by virtue of the fact of association.”\textsuperscript{39} Accordingly, he found it unacceptable to protect the objects and activities of an association\textsuperscript{40} and so he interpreted the provision as protecting individual rights only. However, he did not foreclose “the possibility that other aspects of collective bargaining may receive \textit{Charter} protection under the guarantee of freedom of association”\textsuperscript{41} in the future.

Chief Justice Dickson, in his dissent, was more willing to extend \textit{Charter} protection to associational activities. He stressed that, “Freedom of association is the cornerstone of modern labour relations. Historically, workers have combined to overcome the inherent inequalities of bargaining power in the employment relationship and to protect

\begin{itemize}
  \item \textsuperscript{37} Judy Fudge, “Labour is not a Commodity: The Supreme Court of Canada and the Freedom of Association” (2004) j67 Sask. L. Rev. 425 at para. 10. [Fudge, “Labour is not a commodity”].
  \item \textsuperscript{38} \textit{Alberta Reference}, \textit{supra} note 21 at para. 142.
  \item \textsuperscript{39} \textit{Ibid.} at para. 169.
  \item \textsuperscript{40} \textit{Ibid.}
  \item \textsuperscript{41} \textit{P.S.A.C.}, \textit{supra} note 33 at 453.
\end{itemize}
themselves from unfair, unsafe, or exploitative working conditions."\textsuperscript{42} He further stated that "If freedom of association only protects the joining together of persons for common purposes, but not the pursuit of the very activities for which the association was formed, then the freedom is indeed legalistic, ungenerous, and indeed vapid."\textsuperscript{43} On this basis, he concluded that the right to strike and collective bargaining, were essential for unions to achieve their objects and therefore were included under section 2(d) freedom of association and protected by the \textit{Charter}.\textsuperscript{44} It was evident that Chief Justice Dickson was more cognizant of the importance of the freedom to associate and the need for it to have an expansive interpretation that would include collective bargaining, since without this component, the right would be meaningless to trade unions. Consequently, without the recognition of this \textit{Charter} right, there would be less protection for the statutory rights granted under the Wagner Model.

The next major pronouncement on the section 2(d) scope was the case of \textit{Public Service of Canada (PIPS) v. Northwest Territories (Commissioner)}.\textsuperscript{45} Here, the union (PIPS) that had represented nurses under the federal government now attempted to retain its bargaining status where the nurses were transferred to provincial control to do the same job. The unions challenged the government’s failure to recognize and bargain with them and the Court held that freedom of association did not protect the right to bargain collectively. They reasoned that the government was under no obligation to

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{42} \textit{Alberta Reference, supra} note 21 at para. 23.
\item\textsuperscript{43} \textit{Ibid.} at para. 81.
\item\textsuperscript{44} \textit{Ibid.} at 371.
\item\textsuperscript{45} [1990] 2 S.C.R. 367, 72 D.L.R. (4th) 1 [PIPS cited to S.C.R.].
\end{enumerate}
\end{footnotesize}
provide a statutory scheme for collective bargaining by recognition or certification.\textsuperscript{46} Justice Sopinka in his reasons, affirmed the approach taken in \textit{Alberta Reference} by stating,

\begin{quote}
Upon considering the various judgments in the \textit{Alberta Reference}, I have come to the view that four separate propositions concerning the coverage of the section 2(d) guarantee of freedom of association emerge from the case: first, that section 2(d), protects the freedom to establish, belong to and maintain an association; second, that section 2(d) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association; third, that section 2(d) protects the exercise in association of the constitutional rights and freedoms of individuals; and fourth, that section 2(d) protects the exercise in association of the lawful rights of individuals.\textsuperscript{47}
\end{quote}

This case reaffirmed the narrow scope of \textit{Charter} section 2 (d) which only protected the individual right to associate, and did not extend to the collective activities that the individual would be involved in, even though these activities were foundational to the association. This decision would remain the last word on the scope of the freedom to associate for a while, and so as the law stood, the Supreme Court of Canada was not prepared to intervene in labour relations to aid workers by extending constitutional protection to collective bargaining.

This view on the limited scope of freedom of association persisted in other Supreme Court decisions\textsuperscript{48} until \textit{Dunmore v. Ontario (Attorney General)}.\textsuperscript{49} In that case,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{46} \textit{Ibid.} at 406.
\item \textsuperscript{47} \textit{Ibid.} at 401-402.
\item \textsuperscript{49} [2001] 3 S.C.R. 1016, 2001 SCC 94 [\textit{Dunmore} cited to S.C.R].
\end{itemize}
\end{footnotesize}
there was a slight shift in the ideology of the Court where they finally acknowledged that some activities were of a collective nature and so inconceivable on an individual level.

The facts were, that the trade union that had organized some agricultural workers, launched a Charter challenge against the Ontario government for repealing the Agricultural Labour Relations Act, 1994\textsuperscript{50} that had allowed agricultural workers to bargain collectively. The union argued that the government’s decision to exempt agricultural workers from the current labour relations regime had violated the workers’ right to associate. The violation occurred because the workers, without this protection, would not be able to join or participate in union activities without the fear of employer reprisal.

Eight of nine judges held that the exclusion of agricultural workers from labour relations legislation substantially interfered with their right to associate. While acknowledging the numerous concerns regarding allowing collective bargaining on the family farm, they were rejected as justification for the wholesale exclusion of all agricultural workers from statutory protection.\textsuperscript{51} The Court held that the repealing legislation was unconstitutional, but suspended the declaration for eighteen months in order to allow the government to make modifications.

Justice Bastarache, who delivered the reasons for the majority, posited that where “the ability to establish, join and maintain an agricultural employee association is substantially impeded in the absence of such statutory protection and that this

\textsuperscript{50} S.O. 1994, c. 6 as rep. by Labour Relations Act, 1995 S.O. 1995, c. 1, Sch. A, s. 80 (1) [LRA].

\textsuperscript{51} Dunmore, supra note 49 at para. 65.
impediment is substantially attributable to the exclusion itself, rather than to private action exclusively”, a positive obligation is placed on the government to protect the rights of vulnerable agricultural workers against unfair labour practices. He also acknowledged that the freedom had a collective dimension for which there was no comparative individual analogy, and this was confirmed both in Alberta Reference by Chief Justice Dickson, and by the International Labour Organization (ILO). He pointed out that the key question was whether the state had prohibited the activity because of the associational nature thereby discouraging the collective pursuit of common goals.

In spite of acknowledging the collective nature of workers’ actions, he refused to expand section 2(d) freedom of association to include collective bargaining and the right to strike, and only imposed this positive obligation on the government to act in cases involving vulnerable workers who were unable to associate like other workers. In making this decision, Justice Bastarache had relied on materials which stated that the Charter protected collective bargaining; however he still gave the right a narrow interpretation. Consequently, the Supreme Court was willing to entrench the individual right to associate and protect the collective exercise of that individual right as guaranteed by Charter section 2(d), but not the activities that the collective would engage in as this would result in entrenching aspects of the Wagner Model.

\[\text{\textsuperscript{52}}\text{Ibid. at para. 67.}\]
\[\text{\textsuperscript{53}}\text{Ibid. at para. 80.}\]
\[\text{\textsuperscript{54}}\text{Ibid. at para. 16.}\]
\[\text{\textsuperscript{55}}\text{Ibid.}\]
\[\text{\textsuperscript{56}}\text{Ibid. at para. 17.}\]
\[\text{\textsuperscript{57}}\text{Fudge, "Labour is not a Commodity", supra note 37 at paras. 43-48.}\]
\[\text{\textsuperscript{58}}\text{Pothier, supra note 22 at 379.}\]
In 2007, there was an unprecedented shift in the Court’s view on the scope of Charter section 2(d) freedom of association. In *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*[^59] the Supreme Court of Canada took a more liberal view of labour relations, and decided to address the current state of the jurisprudence that had limited the scope of the freedom to exclude collective bargaining. The Court decided that it would no longer see labour relations as a sphere solely for the legislature and a “no-go” zone for the courts[^60].

**B** *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*

In this case, the province of British Columbia was experiencing a severe rise in costs to which the health care system was a significant contributor[^61]. A great part of the health care costs was wage payment to workers. The provincial legislature, in a bid to combat the rising costs, introduced the *Health and Social Services Delivery Improvement Act* “permitting health care employers to reorganize the administration of the labour force and on making operational changes to enhance management’s ability to restructure service delivery”.[^62] The introduction of the Act breached various clauses in the collective agreements, and invalidated parts of collective agreements both past and future, which were inconsistent with, or would result in, the modification of Part II. In addition, the unions were precluded from meaningful collective bargaining on a number of specific issues.

[^60]: Ibid. at para. 26.
[^61]: Ibid. at para. 4.
[^62]: Ibid. at para. 5.
Part II of the Act was crucial, as it contained the significant changes which affected transfers and multi-worksite assignment rights, contracting out and the status of contracted out workers, job security programs, successorship, and layoffs and bumping rights. These were keys areas for the unions as the changes would affect the ability of the bargaining unit workers to retain their jobs, to continue to have union representation and to retain the benefits they gained under the collective agreements. But in spite of the importance of the issues, the Act was quickly passed without any meaningful consultation with the trade unions before it became law. The unions and members of the unions representing the various sectors challenged Part II’s constitutionality, alleging that it violated Charter section 2(d) freedom of association and section 15 equality.

Both the trial judge and the Court of Appeal rejected the allegations. However, the Court of Appeal mentioned that if the scope of section 2(d) was to be extended to include collective bargaining, then the Supreme Court of Canada was the apt forum to do so. The unions appealed, and the questions before the Supreme Court were whether Part II breached Charter sections 2(d) and 15, and if so whether these actions were justified under Charter section 1.

Majority Decision and Reasoning

The majority of the Supreme Court found for the Unions in part, holding that the contracting out, layoffs and bumping provisions were unconstitutional and not justified
under Charter section 1. The Court also officially declared that Charter section 2(d) included the procedural right to collectively bargain on fundamental workplace issues.63

The judgment of the majority was delivered by Chief Justice McLachlin and Justice Lebel.64 They embarked on the jurisprudential change by firstly, dismissing the previous reasons given for the exclusion of collective bargaining which were: (1) the rights to strike and to bargain collectively were "modern rights" created by legislation, not "fundamental freedoms; (2) recognition of a right to collective bargaining would go against the principle of judicial restraint in interfering with government regulation of labour relations; (3) freedom of association protected only those activities performable by an individual; and (4) section 2(d) was not intended to protect the objects or goals of an association.65

In response, they advanced four (4) propositions which supported their decision to extend constitutional protection to collective bargaining and justified the repudiation of prior jurisprudence66 which excluded the right. They proposed: (1) that the general purpose of the Charter guarantees and the broad language of section 2(d) were consistent with a measure of protection for collective bargaining; (2) that the history of the collective bargaining right was neither of recent origin nor merely a creature of statute; (3) that Canada adhered to international documents which recognized a right to collective bargaining, and so these obligations required that the Charter be interpreted in a manner that would provide some level of protection to collective bargaining; and (4)

63 Ibid. at para. 2.
64 The other members of the majority were Justices Bastarache, Binnie, Fish and Abella.
65 B.C. Health Services, supra note 59 at paras. 25-29.
66 Alberta Reference, supra note 21; P.S.A.C, supra note 33; RWDSU, supra note 33.
that the inclusion of collective bargaining under section 2(d) was consistent with, and supportive of the values underlying the *Charter*, and the purposes of the *Charter* as a whole.

The Court elaborated on the content of the procedural collective bargaining right and the duties of the respective parties. The right meant that workers could organize and engage in discussions with the employers in an attempt to achieve workplace-related goals, and in turn the employer had a duty to meet and discuss with the workers. The right also constrained the actions of the legislature as they had to consider the protection awarded by the right when introducing new legislation. However, the protection was limited to workers associating and bargaining collectively with the employer, and did not include a right to a particular outcome in a labour dispute, or access to any particular statutory regime.

In order to access the constitutional protection, the claimant had to satisfy a two-prong test, while proving that the interference with the right was substantial. In terms of the test, the Claimant had to prove firstly, that state action whether directly or by effect, interfered with the right, and secondly, that the interference was substantial, in that, the state action prevented the workers from organizing to bargain with the

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67 *B.C. Health Services*, *supra* note 59 at para. 87 (the relevant parties were the workers, government employers, Parliament and provincial legislatures).
71 *Ibid.* at para. 90 (in establishing this test, the Court adopted the formulation laid down by Justice Bastarache in *Dunmore*, *supra* note 49 for proving substantial interference with the right to associate which asked whether the state action had targeted the activity because of its associational nature).
To prove substantial interference the claimant had to further satisfy two inquiries pertaining to the significance of the subject matter and the manner of the interference. The union would prove: (1) that the subject matter was very important, that is, interference with this subject matter affected the union’s collective bargaining ability; and (2) that the state action negated the duty to consult and negotiate before taking action. Only where the claimant proved substantial interference would there be a violation of section 2(d) and the onus would shift to the state to justify under *Charter* section 1 the reason for its actions.

After applying the test, the Court found that there was a breach of the section 2(d) right of freedom of association as there was substantial interference with the unions’ ability to collectively bargain over matters pertaining to contracting out, layoffs and bumping. This occurred because the Act removed the requirement for good faith bargaining and consultation with the union before these changes were implemented. On the contrary, there was no substantial interference and no *Charter* section 2(d) violation for transfers and reassignments because significant protections for these provisions remained in place in spite of the statutory modifications.

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74 *Ibid.* at para. 96 (the Court introduced into the law a delineation of bargaining subjects categorised as “important” and “unimportant”. The important subjects were working conditions and other significant negotiated terms in existing collective agreements, while the unimportant subjects included uniform design, the lay out and organization of cafeterias, and the location or availability of parking lots).
75 *Ibid.* at paras. 95 and 97.
In addition, the Court considered the successorship provisions which revoked the duties for workers and employers during contracting out,\(^\text{77}\) and the job security programmes which provided for training, assistance and financial support. They found that there was no interference with the collective bargaining right, and ultimately no section 2(d) breach because in both cases the unions never bargained for these provisions\(^\text{78}\) and so the legislature could unilaterally remove these benefits.

**Charter Section 1 Analysis**

After finding a section 2(d) violation for the contracting out, layoff and bumping provisions, the majority had to determine whether the government’s contravention of the right was justified under *Charter* section 1.\(^\text{79}\) The Court found that the government had failed to demonstrate that the limit on the collective bargaining right was justifiable.\(^\text{80}\) The government proved that the legislative changes were in order to fulfil a pressing and substantial objective, which was the improvement of the delivery of health care services, and that there was a rational connection between that objective and the means (legislation) chosen to fulfil the same.\(^\text{81}\) However, they failed to prove that the means chosen would impair the right as little as possible. They did not supply any evidence in support of the current choice made, nor did they show that the government

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\(^{77}\) *Ibid.* at paras. 121-123 (per the *LRA*, *supra* note 50, ss. 68-69 successorship entailed the new owner of a business being bound by the terms and conditions of the existing collective agreement concluded by the previous owner and the trade union).

\(^{78}\) *Ibid.* at paras. 122, 125 (the successorship benefit was awarded by the provincial *Labour Relations Code, R.B.S.C. 1996, c. 244*, and the job training programme was instituted on the government’s initiative).

\(^{79}\) The Court applied the test laid down in *R. v. Oakes* [1986] 1 S.C.R. 103 for establishing a *Charter* section 1 violation.

\(^{80}\) *Charter, supra* note 2 (s.1 stipulates that “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”).

\(^{81}\) *B.C. health Services, supra* note 59 at paras. 144 and 149.
had made attempts to take less drastic measures.\textsuperscript{82} While acknowledging that "legislators were not bound to consult with affected parties before passing legislations",\textsuperscript{83} the Court chided the government for not making a real effort to consult with the unions, even though they knew the importance of the changes to the unions and their workers, and the strong opposition towards the changes.\textsuperscript{84}

The Court found it unnecessary to consider the proportionality requirement, and so rendered the offending sections unconstitutional, but suspended the declaration for twelve months to allow the government to make the relevant changes.\textsuperscript{85}

\textit{Charter Section 15 Equality}

The Court then considered whether the remaining provisions (transfers and multi-worksite assignment rights, job security programs, and successorship) violated \textit{Charter} section 15 by discriminating against health care workers on an enumerated or analogous ground. The grounds included sex, employment in the health care sector, and status as non-clinical workers. The Court reaffirmed the lower Courts' decision that there was no discrimination, holding that the legislation differentiated these workers based on the work they did and not who they were, hence there was no evidence of any "stereotypical application of group or personal characteristics."\textsuperscript{86}

\begin{footnotes}
\footnotetext[82]{Ibid. at paras. 156 and 158.}
\footnotetext[83]{Ibid. at para. 157.}
\footnotetext[84]{Ibid. at paras. 159-160.}
\footnotetext[85]{Ibid. at para. 168.}
\footnotetext[86]{Ibid. at para. 165.}
\end{footnotes}
Dissenting Decision and Reasoning

Justice Deschamps delivered the dissenting judgment. She agreed with the majority’s conclusion that section 2(d) of the Charter included collective bargaining, and that there was no discrimination contrary to Charter section 15.\textsuperscript{87} However, she disagreed with the majority’s test for establishing a section 2(d) violation, and the justification of the same under Charter section 1.

Charter Section 2(d)

She criticized the majority judgment on numerous grounds including the formulation of the section 2(d) test,\textsuperscript{88} and the characterization of the manner in which the government action interfered with the right. In terms of the test formulation, she retained the two-prong enquiry, but reversed the order. She enquired firstly, into whether there was interference with the workers’ ability to associate and bargain with the employer, and then into the importance of the subject matter affected,\textsuperscript{89} because without any interference there would be no need to consider the significance of the subject matter. In turn, she reformulated the test which stipulated the type of laws or state actions that would amount to interference and thus violate the section 2(d) right. The test provided that:

\begin{quote}
Laws or state actions that prevent or deny meaningful discussion and consultation about significant workplace issues between employees and their employer may interfere with
\end{quote}

\textsuperscript{87} Ibid. at para. 170.
\textsuperscript{88} Ibid. at paras. 175 and 176.
\textsuperscript{89} Ibid. at para. 181.
the activity of collective bargaining, as may laws that unilaterally nullify negotiated terms on significant workplace issues in existing collective agreements.\textsuperscript{90}

In terms of the manner of interference, Justice Deschamps opined that the government’s duty to engage in good faith negotiation and consultation wrongly placed an onus on the legislature to consult before passing legislation, which was not required of them\textsuperscript{91}.

\textit{Charter Section 1 Analysis}

In performing the section 1 analysis, she instructed that the first consideration was the government’s objectives, and then secondly, the contextual factors\textsuperscript{92} that would aid in determining whether the government in acting was simply carrying out its objectives\textsuperscript{93} with the effect on the unions being incidental. After selecting and assessing the contextual factors, she concluded that substantial deference was owed to the provincial legislature and the decision to enact these provisions because of the careful balancing that the legislature had engaged in before acting.\textsuperscript{94} The majority on the other hand, had failed to defer to the legislature’s choices and had predetermined the cases in which this right could be justifiably limited.\textsuperscript{95}

\begin{flushleft}
\textsuperscript{90} ibid. at para. 180.
\textsuperscript{91} ibid. at para. 179.
\textsuperscript{92} ibid. at paras. 201-213 (the relevant factors were the nature of the harm, the vulnerability of the protected group, the apprehension of harm and ameliorative measures considered, and the nature of the affected activity).
\textsuperscript{93} ibid. at para. 213 (she noted that for the factor “nature of the affected activity” the government did consult and take recommendations from the various parties involved. However, there was no mention of the government accepting recommendations from the unions or workers, and she did not highlight this as being a serious blunder on the government’s part).
\textsuperscript{94} ibid. at paras. 194-195.
\textsuperscript{95} ibid. at para. 196 (she argued that the majority prejudged the circumstances that would qualify as a valid reason to interfere with the collective bargaining right, instead of approaching the matter on a case by case basis. In the instant case interference was only permitted on an exceptional and typically temporary basis).
\end{flushleft}
Justice Deschamps concluded that the legislation was enacted in pursuit of a pressing and substantial objective, and the limitations imposed were rationally connected with this objective. Unlike the majority, she found that the only violation of the section 2(d) right that was not justified under Charter section 1 was the contracting out provision. She reasoned that the government had failed to show that the requirement that they consult with the unions before contracting out would unreasonably restrict their actions, and so they impaired the collective bargaining right more than was necessary.\(^{96}\)

**Analysis of B.C. Health Services**

In light of the “non-interventionist” stance regarding labour relations that had plagued the Supreme Court of Canada, *B.C. Health Services* was seen as a welcomed break. The decision proved beneficial to workers because the Court constitutionalized parts of the Wagner Model by confirming the workers’ right to organize, to engage in discussions with the employer, and employers being mandated to reciprocate by meeting and discussing, as components of the Charter section 2(d) right. This was the outcome even though the Court had stated that the right would not grant access to any particular bargaining scheme. Due to this constitutionalization, collective bargaining was elevated to the status of a fundamental human right\(^{97}\) and now the government would be forced to justify its violation under Charter section 1. Although constitutionalization produced a limited right for workers by allowing them to launch a Charter challenge only

\(^{96}\) Ibid. at para. 242.

where the state enacted legislation or acted as an employer,\textsuperscript{98} the change was still beneficial. Workers benefitted because they were able to hold the government accountable for any action that would violate their collective bargaining rights.\textsuperscript{99} The government’s actions in the instant case showed the great lengths that it would go to overthrow collective bargaining and trample on the rights and freedoms of workers, where the courts would not protect them.\textsuperscript{100}

Another positive change was the subjection of the government to a duty to bargain with the workers’ chosen representative, over proposed changes that would result in detrimental impact.\textsuperscript{101} This mandatory duty did not prevent the legislature from enacting legislation to remove the collective bargaining right, but subjected this removal to a process of negotiation and consultation with the worker representative first.\textsuperscript{102} Hence, the decision transformed the process by which collective bargaining rights could be removed by making it more difficult for the state to do so.

Unfortunately, the revolutionary decision had serious negative repercussions. Firstly, the Court unduly limited the collective bargaining right by implementing a very stringent test for establishing a violation of \textit{Charter} section 2(d) freedom of association. The claimant had to show that the interference with the associational activity was substantial, the subject matter was important, and that the interference was related to a

\textsuperscript{98} \textit{B.C. Health Services}, supra note 59 at para. 88 (the state must either pass legislation or act as an employer).
\textsuperscript{100} \textit{Ibid.}
\textsuperscript{102} \textit{Ibid.}
procedural aspect, before there was any constitutional relief. Ultimately, this limits the number of claims by unions for breach of the section 2(d) collective bargaining right, as there is no relief unless the various requirements are satisfied. Secondly, the Charter right applied to only state action so private sectors workers can only challenge the actions of private employers by attacking the legislation for failing to adequately provide for the associational right. Thirdly, only a limited number of private sector workers can attack the legislation. To qualify the workers would need to be very vulnerable and find it next to impossible to organize without legislative help, and so only the destitute workers who could not organize would have constitutional protection against employer interference.

Fourthly, the right only protected what was bargained for and not what was awarded to the workers. Because the Court held this view, they approved the government’s unilateral elimination of the successorship provision that preserved collective bargaining rights, instead of denouncing it as substantial interference with the right. Obviously, the court did not consider the fact that this provision was protecting both workers’ benefits secured through bargaining and also the right to bargain with the new employer. Consequently, this is an indication of what the Court meant by the right not protecting any substantive or particular outcomes.

103 B.C. Health Services, supra note 59 at para. 91.
104 Fudge, “The Supreme Court of Canada”, supra note 97 at 34.
105 Ibid.
106 Etherington, supra note 99 at 732-733.
Finally, the Court abrogated its own view that the right only protected a process, by focusing on the substantive issues.\textsuperscript{107} By considering substance, including the importance of the subject matter, the Court diluted the test for proving a section 2(d) violation. The Court should have focused solely on the ability of workers to associate and bargain, not on whether the subject matter was important, because where members cannot engage in such activities the importance of the subject matter becomes irrelevant. Justice Deschamps had echoed these sentiments in her dissenting judgment where she reformulated the \textit{Charter} section 2(d) test to consider the importance of the subject matter after establishing that there was interference with the right.\textsuperscript{108} Accordingly, I believe that the majority got the test wrong; Justice Deschamps’ formulation is more appropriate.

\textbf{(C) \textit{Ontario (Attorney General) v. Fraser}}

Once again, the Supreme Court of Canada was asked to intervene in labour relations, this time to affirm the scope of the \textit{Charter} section 2(d) right created in \textit{B.C. Health Services}. This new challenge arose in \textit{Ontario (Attorney General) v. Fraser}.\textsuperscript{109}

In this case, the Supreme Court heard the appeal of the trade unions who had managed to organize workers under the \textit{Agricultural Workers Protection Act, 2002}\textsuperscript{110} (hereinafter the \textit{AEPA}), but were unsuccessful in concluding any collective agreements with the various agricultural employers. This legislation was implemented in response to

\begin{footnotesize}
\textsuperscript{107} \textit{Ibid.} at 731.
\textsuperscript{108} \textit{B.C. Health Services, supra} note 59 at para. 181.
\textsuperscript{110} S.O. 2002, c. 16.
\end{footnotesize}
the earlier Supreme Court decision of *Dunmore* that had imposed a positive obligation on the Ontario government to enact legislation to protect the right of agricultural workers to associate. This legislation allowed workers to associate without the fear of employer reprisal, but did not extend collective bargaining or the right to strike to them. When the unions realized that the agricultural employers would not bargain, they bypassed the tribunal established to administer the *Act*, and launched a *Charter* challenge. They alleged that section 3(b.1) of the *LRA* which stipulates that the *LRA* does not apply to farm workers, and the *AEPA* on a whole, were unconstitutional because of the failure to provide effective protection for the right to organize and bargain collectively. They further argued that the legislation violated *Charter* section 15 by excluding farm workers from the protections accorded to workers in other sectors.\(^{111}\)

The application was heard before the delivery of the decision in *B.C Health Services*, and the applications judge dismissed it on the ground that the *AEPA* did not prevent the workers from forming associations.\(^{112}\) He highlighted that the employer was only required to hear the representations but was not mandated to respond.\(^{113}\) He also dismissed the *Charter* section 15 discrimination claim. The union’s appeal to the Court of Appeal was allowed. The Court, in reliance on the newly rendered decision in *B.C Health Services*, held that the *AEPA* was unconstitutional. Chief Justice Winkler, speaking for the Court, found that “the *AEPA* substantially impaired the ability of agricultural workers to meaningfully exercise the right to bargain collectively which was

\(^{111}\) Fraser, *supra* note 109 at para. 12.

\(^{112}\) Ibid. at para. 13.

\(^{113}\) Ibid.
protected by s. 2(d) of the Charter.”\textsuperscript{114} This occurred because the Act failed to provide the minimum statutory protections\textsuperscript{115} to allow agricultural workers to exercise the right. The employers appealed to the Supreme Court of Canada.

The issue before the Court was whether the AEPA was constitutional in light of \textit{B.C. Health Services} that had decided that Charter section 2(d) included collective bargaining.

**Majority Decision and Reasoning**

A majority\textsuperscript{116} of the court overturned the Court of Appeal’s decision by holding that the AEPA was constitutional and was not in violation of Charter section 2(d) or section 15. They attempted to justify \textit{B.C. Health Services} by stating that this pronouncement on the requirement to prevent interference with, and undermining of, the section 2(d) right, had developed in \textit{Dunmore}, and \textit{B.C. Health Services} was simply providing a more wholesome explanation. Nevertheless, they interpreted \textit{B.C. Health Services} as holding that workers only had a constitutional right to make collective representations and to have them considered in good faith.\textsuperscript{117} Further, the majority recast the collective bargaining right as now being a derivative right, which meant that workers would only receive constitutional protection if they were unable to associate to achieve collective goals in the first place.\textsuperscript{118}

\textsuperscript{114} \textit{Ibid.} at para. 15.
\textsuperscript{115} \textit{Ibid.} (these were “(1) a statutory duty to bargain in good faith; (2) statutory recognition of the principles of exclusivity and majoritarianism; and (3) a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements”).
\textsuperscript{116} Consisting of Justices Binnie, Charron, Cromwell, Deschamps, Fish, LeBel, and Rothstein JJ and Chief Justice McLachlin.
\textsuperscript{117} Fraser, supra note 109 at para. 51.
\textsuperscript{118} Ibid at paras. 45-46.
The majority rejected the challenges from both Justices Deschamps and Rosthein impeaching the decision of *B.C. Health Services*. They rejected Justice Deschamps’ narrow characterization of the right as allowing workers to make representations only, without the employer being mandated to consider these collective representations in good faith.\(^\text{119}\) They rejected Justice Rosthein’s interpretation of *B.C. Health Services* as constitutionalizing the Wagner model, and his call to overturn it since it was no longer good law.\(^\text{120}\) They highlighted that *B.C. Health Services* was in line with the principles established in *Dunmore* which had recognized section 2(d) as protecting collective rights, and pointed out that what the decision rejected was the "no go" zone for labour relations.\(^\text{121}\)

The majority then interpreted *AEPA* section 5 which stated,

5. (1) The employer shall give an employees’ association a reasonable opportunity to make representations respecting the terms and conditions of employment of one or more of its members who are employed by that employer.

. . . .

(5) The employees' association may make the representations orally or in writing.

(6) The employer shall listen to the representations if made orally, or read them if made in writing.

(7) If the representations are made in writing, the employer shall give the association a written acknowledgment that the employer has read them.

They interpreted sections 5(6) and (7) as requiring employers to consider worker

\(^{119}\) *Ibid.* at paras. 49-51.

\(^{120}\) *Ibid.* at para. 58.

\(^{121}\) *Ibid.* at paras. 62 and 79.
representations in good faith, even though it was not expressly stated. The reasons in support were: (1) an attempt to give meaning and purpose to the provisions of the Act; (2) that Parliament and the legislature were presumed to intend to comply with the Charter; and (3) based on the Minister’s expressions of desiring to provide for workers the necessary protection to ensure meaningful use of the freedom. They further clarified that the Minister’s statement of not intending to extend collective bargaining to agricultural workers was limited to the current Wagner Act model of collective bargaining, not to all types of bargaining.

Also, they chided the unions for not exploring all the remedial options provided by the legislation before petitioning the Court. They opined that the unions should have utilised the option of launching a complaint to the tribunal who was empowered by AEPA section 11 to make findings of employer violation and to order remedies accordingly.

Charter Section 15

After considering the Charter section 15 discrimination claim they dismissed it as well. They found that the claim was premature and that the distinction created under the AEPA did not engage any analogous or enumerated ground. Furthermore, there was no substantive discrimination as there were no unfair stereotypes used or the perpetuation of existing prejudice and disadvantage.

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122 Ibid. at para. 102.
123 Ibid. at paras. 103-105.
124 Ibid. at para. 106.
125 Ibid. at para. 116.
126 Ibid.
Justice Rothstein

In a separate but concurring judgment, Justice Rothstein, agreed with the outcome but not the reasoning of the majority. He argued that based on previous pronouncements on the scope of Charter section 2(d), this right only protected the right of individual workers to associate and interact. It did not include the creation of group rights, the protection of all the activities of the association including collective bargaining, and the imposition of bargaining duties on any party including the employer. He further argued that B.C. Health Services and Dunmore protected different sets of rights. B.C. Health Services focused on constitutionalizing collective bargaining in order to make association meaningful, and on the protection of group rights which may even be unconnected with, or even supersede, the individual right. Dunmore on the other hand, focused on the ability of the workers to actually associate, as well as the protection of group rights which while qualitatively different from individual action, was still connected in some sense to the individual’s rights. Accordingly, he found that B.C. Health Services diverged from prior jurisprudence, because it constitutionalized collective bargaining, which was a goal of association, as opposed to the right to exercise the freedom itself.

In addition, Justice Rothstein advocated for judicial deference to legislative actions

127 Ibid. at para. 159.
128 Ibid. at paras. 125, 159 and 275.
129 Ibid. at paras. 154 and 183.
130 Ibid. at paras. 153, 164 and 183.
131 Ibid. at para. 155.
regarding labour relations. He pointed out that while previous decisions\textsuperscript{132} did not exhaust the scope of the section 2(d) right,\textsuperscript{133} \textit{B.C. Health Services} went beyond what was required for this right, thus violating the rule of legislative deference. He emphasized that Courts needed to defer to legislative measures regarding labour relations, as the courts were ill-equipped to deal with the subject matter involved because of the policy decisions that were made, and which required a balancing of the rights of labour and management.\textsuperscript{134} Based on the foregoing issues, along with other grounds,\textsuperscript{135} he called for \textit{B.C. Health Services} to be overruled.

\textbf{Justice Deshamps}

Similarly Justice Deshamps, in separate but concurring reasons, also agreed with the outcome of the decision but not the reasoning. She argued that \textit{B.C. Health Services} did not have the broad scope attributed to it by the majority, as it did not impose a duty on employers to bargain in good faith, instead \textit{Charter} section 2(d) only protected the worker’s right to associate and to act in common to achieve shared goals regarding workplace terms and conditions of employment.\textsuperscript{136} She further argued that the decision in \textit{B.C. Health Services} was limited to the particular facts of that case, as

\begin{footnotes}
\footnote{\textit{PIPS, supra} note 45; \textit{Delisle, supra} note 48.}
\footnote{\textit{Fraser, supra} note 109 at para. 162.}
\footnote{\textit{Ibid.} at para. 126.}
\footnote{\textit{Ibid.} at para. 275 (Justice Rothstein stated that \textit{B.C. Health Services} should be overthrown on the following grounds: (1) the departure from sound principles established in prior jurisprudence; (2) the reasons advanced for protecting collective bargaining under section 2(d) did not support conferring a constitutional right to collective bargaining and imposing a duty on employers to engage in collective bargaining; and (3) the majority’s approach to collective bargaining in particular, and section 2(d) in general, was unworkable).}
\footnote{\textit{Ibid.} at para. 275 (Justice Rothstein stated that \textit{B.C. Health Services} should be overthrown on the following grounds: (1) the departure from sound principles established in prior jurisprudence; (2) the reasons advanced for protecting collective bargaining under section 2(d) did not support conferring a constitutional right to collective bargaining and imposing a duty on employers to engage in collective bargaining; and (3) the majority’s approach to collective bargaining in particular, and section 2(d) in general, was unworkable).}
\footnote{\textit{On the contrary, Justice Deschamps stated in \textit{B.C. Health Services, supra} note 59 at para. 170 that she was “in general agreement with the Chief Justice and LeBel J. concerning the scope of freedom of association under s. 2(d) of the \textit{Canadian Charter of Rights and Freedoms} in the collective bargaining context.” The majority interpreted the scope to include the employer being under a duty to bargain and she did not deny this, hence we can conclude that she was in agreement with the contents of the s. 2(d) right).}
\end{footnotes}
the Court answered a question that was not asked, by finding that employers had a good faith duty to bargain, where the question pertained to the extent of the government’s legislative powers.\textsuperscript{137} In light of the foregoing, Justice Deschamps also opined that the court should have deferred to the legislative choices in labour relations, but she differed by stating that if the court was going to intervene they should have done so under \textit{Charter} section 15 equality provision and not section 2(d).\textsuperscript{138}

\textbf{Dissenting Decision and Reasoning}

Justice Abella in dissent, agreed with the majority for including the protection for collective bargaining under section 2(d), and for refuting Justice Rothstein’s decision to reconsider the correctness of \textit{B.C. Health Services} on his own motion.\textsuperscript{139} However, she disagreed with their decision that the \textit{AEPA} met the \textit{B.C. Health Services} constitutional standard, and their reinterpretation of “clear statutory language and express legislative intention” to protect collective bargaining rights, which was never the intent of the statute.\textsuperscript{140} She dismissed the appeal.

She reiterated that the \textit{AEPA} was created in response to the command in \textit{Dunmore} to provide a means for agricultural workers to associate.\textsuperscript{141} Hence, the protection that was required was determined by the particular context, and in this case “this required ancillary protection for the freedom to assemble, to participate in the lawful activities of the "employees' association" and to make representations, along with

\begin{flushleft}
\textsuperscript{137} \textit{Ibid.} at para. 305.  \\
\textsuperscript{138} \textit{Ibid.} at paras. 301 and 319.  \\
\textsuperscript{139} \textit{Ibid.} at para. 321.  \\
\textsuperscript{140} \textit{Ibid.} at para. 322.  \\
\textsuperscript{141} \textit{Ibid.} at para. 323.\
\end{flushleft}
the right to be free from interference, coercion and discrimination in the exercise of those freedoms.”

Accordingly, the AEPA in implementing Dunmore’s instructions only required the employer to read, listen, and acknowledge worker representations without the duty of providing a response, which was a different requirement from what was laid down in *B.C. Health Services*. Instead of declaring the Act unconstitutional, the majority attempted to mould the AEPA to fit the *B.C. Health Services* framework and in turn created a meaningless right, because there was no way for workers to realize the right without the other trappings which allowed the Wagner Model to work.

Justice Abella further pointed out that the Court was providing instructions to the tribunal that if complied with would result in the tribunal exceeding its jurisdiction in protecting workers’ rights. The tribunal under the AEPA, even though empowered to remedy violations of the Act under section 11, was powerless to remedy an employer’s failure to engage in good faith bargaining because the Act did not provide for this. This judicial direction was therefore contrary to the Court’s jurisprudence. As a result of the impotence of the tribunal, she concluded that the tribunal had “No mandate, no jurisdiction; no jurisdiction, no remedy.”

*Charter Section 1 and Section 15*

After applying the Charter section 1 analysis, she found that the government of Ontario did not establish that their sole option was to exclude all types of agricultural

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144 *Ibid.* at paras. 339 and 343 (the other trappings were the ability to ensure that employers would comply and the need for an exclusive majority since employers were implementing their own worker associations).
workers from engaging in collective bargaining. She based her decision on evidence that showed (a) that many of the “traditional” family farms had transformed into big manufacturing enterprises;147 (b) that there was room to accommodate collective bargaining for agricultural workers;148 and (c) that other provinces had allowed agricultural workers to collectively bargain without this resulting in great detriment.149 This evidence proved that collective bargaining was more than possible for the agricultural sector.

In terms of the section 15 equality rights claim, she did not make any pronouncements.

**Analysis of Ontario (Attorney General) v. Fraser**

In analyzing the decision of Fraser, it is obvious that the Court’s focus was on the correctness of B.C. Health Services rather than the reason why the Charter challenge was initially launched: the right of workers to collectively bargain. The majority made all attempts to defend the decision and affirm the previous stance taken on the scope of Charter section 2(d), but instead of affirming the stance, the decision and reasoning diverged from what was laid down in B.C. Health Services, and workers’ lost all hope of ever obtaining constitutional protection.

Firstly, they rendered the AEPA constitutional although it failed to meet the B.C. Health Services test. Even though the Court in Fraser refused to accept it, B.C. Health Services did constitutionalize parts of the Wagner Model by stipulating that the

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147 Ibid. at para. 357.
148 Ibid. at para. 359.
149 Ibid. at para. 364.
provincial government in British Columbia was under a duty to meet, listen to the workers’ representatives and engage in good faith bargaining with them.\(^\text{150}\) On the contrary, the AEPA provided only for the workers’ representative to meet with, and present arguments to, the employer which fell short of what \textit{B.C. Health Services} required. Based on this significant difference, is it unbelievable that the Court still found the AEPA constitutional and not in breach of \textit{Charter} section 2(d). Clearly, both cases approved two different constitutional requirements for the scope of one right, but the Court in \textit{Fraser} attempted to reverse this controversy by reinterpreting the holding in \textit{B.C. Health Services} to mean what the Court now believed that the right covered. Hence, the \textit{Charter} section 2(d) right now meant “that workers have a constitutional right to make collective representations and to have their collective representations considered in good faith.”\(^\text{151}\) This drastic move shows that the Court was grappling with the reality that these two decisions could not be reconciled, and the fact that a fair decision had to be made that would not tip the scale too much in favour of either the union or the employer.

Secondly, the Court seemed to be more out of touch with the realities of labour relations. The majority argued that the trade unions should have utilized the statutory remedy in place for dealing with employer violations under the \textit{Act}, because "labour tribunals enjoy substantial latitude when applying their constituent statutes to the facts of a given case."\(^\text{152}\) However, they ignored the fact that tribunals will not act without clear wording in the legislation for fear of being subjected to judicial review, and even

\(^{150}\) \textit{B.C. Health Services}, supra note 59 at para. 89.  
\(^{151}\) \textit{Fraser}, supra note 109 at para. 51.  
\(^{152}\) \textit{Ibid.} at para. 112.
when there is clear expressed wording, they will err on the side of caution by interpreting the provisions narrowly.\textsuperscript{153} Furthermore, the Court did not consider the significant fact that changes in labour relations are usually implemented through the courts or the legislature. These two entities are the only ones who possess the jurisdiction to rebalance the rights of employers and unions, which is evident from the labour relations legislations implemented and the ground-breaking decisions rendered by the Supreme Court of Canada. Labour tribunals have no jurisdiction to implement such drastic changes, and so are useless where labour is seeking a significant change in labour policy. Therefore, the court being out of touch with the intricacies of adjudication at the tribunal level overlooked the reasons why the trade unions were clamouring for protection similar to that awarded under the Ontario \textit{Labour Relations Act}.\textsuperscript{154}

Finally, members of the court failed to realize the atrocities that can result from strict deference to legislative policy. Justices Rothstein and Deschamps advocated for legislative deference and so promoted a “non-interventionist” stance for the courts in labour relations, in spite of the state’s blatant disregard for the rights of labour. This was evident in both \textit{B.C. Health Services} and \textit{Fraser}. In the former decision, the Government in British Columbia decided to institute changes that abrogated current collective agreement provisions, in spite of the detriment that workers would face. In the

\textsuperscript{153} An apt example is \textit{Canadian Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers, Local No. 304 v. Canada Trustco Mortgage Company}, [1984] O.R.L.B. Rep 1356 at 1363-1365 (where the Ontario Labour Relations Board concluded that the employer was only engaged in “hard bargaining” where they would not consider paying a higher wage to the branches that had been organized. The Board highlighted that the \textit{LRA}, \textit{supra} note 50, s. 17 required the parties to bargain in good faith and attempt to conclude a collective agreement, but it did not require that a collective agreement had to be concluded or that it had to contain certain terms. As a result, they did not see the employer’s actions of maintaining one position without any real discussion, as a bid to frustrate the statute’s requirements, and refused to impose their own decision-making model on the parties).

\textsuperscript{154} \textit{LRA}, \textit{supra} note 50.
latter, the Government in Ontario refused to provide protection for agricultural workers to associate, even though it was highly recognized that they were a very vulnerable group who faced grave atrocities at the hands of agricultural employers.\textsuperscript{155} Under these circumstances, it begs the question as to why the legislature or the government should determine the intricacies of labour relations, if they have already communicated clearly that they will not provide adequately for workers' needs, or respect workers' rights. Consequently, this stance communicates that where the legislature or the government is concerned, the Court must refrain from intervention in spite of the abuse being meted out to workers.

\textsuperscript{155} Fraser, supra note 109 at paras. 115, 307 and 348.
Chapter 4
JUDICIAL DERADICALIZATION

The approach that the Supreme Court of Canada has taken to the interpretation of Charter section 2(d) has had a profound effect on the Wagner Model, similar to the fate suffered by the United States Wagner Act. Karl E. Klare provided an explanation of why the United States Wagner Act that was initially intended to be pro-worker was transformed into a pro-employer Act.

(A) Karl E. Klare’s Judicial Deradicalization of the Wagner Act

In his article Judicial Deradicalization of the Wagner Act and the Origins of the Modern Legal Consciousness, 1937-1941, Karl E. Klare examined the effect that competing ideologies had on the United States Supreme Court as it defined the scope of the Wagner Act, and the interpretive and remedial powers of the Labour Relations Board. Professor Klare’s main argument was that the United States Supreme Court contributed to the deradicalization and the integration of the working class into the existing social order, instead of allowing workers to pursue avenues beneficial to them. This occurred even though the New Deal Wagner Act was supposed to revolutionize labour relations and inevitably class relations because of the numerous provisions made for workers’ rights. The Court engaged in deradicalization by: (a) adopting certain political ideas and theories which dictated the passive role that labour leadership was to play in revolutionizing labour relations; and (b) foreclosing paths in

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157 Ibid. at 268-270.
doctrinal development that would have benefitted workers. This resulted in the delineation of the boundaries for labour activities.\textsuperscript{158}

Throughout the piece, he explored the idea that the \textit{Wagner Act}, in addition to the other existing factors, \textsuperscript{159} helped to stabilize and preserve the existing social order, instead of changing it.\textsuperscript{160} This analysis was done under three (3) main themes: the importance of the historical context, the various reasons for enacting the Wagner Act, and the role of the court in deradicalizing the \textit{Wagner Act}.

\textit{(I) The Importance of the Historical Context}

The historical climate preceding and immediately following the passing of the \textit{Wagner Act}, helped to determine the revolutionary effect that the Act would have on labour relations. As stated previously, the Act was passed in the midst of the Great Depression\textsuperscript{161} which was characterized by severe class conflict, rampant labour restlessness accompanied by constant strikes, and evolving political and legal theories\textsuperscript{162} that influenced the Court's approach to making and applying legal rules. The result was that these legal theories influenced the opinions that judges held in the interpretation and application of the tenets of the \textit{Wagner Act}.\textsuperscript{163}

\textsuperscript{158} Ibid.
\textsuperscript{159} Ibid. (New Deal era affirmed the class struggles which surrounded the early years of the \textit{Wagner Act} rather than changed them).
\textsuperscript{160} Ibid. at 275.
\textsuperscript{161} Atleson, supra note 3 at 36-37.
\textsuperscript{162} Ibid. at 271-275, 277-278, 280 (initially, the popular theory was conceptual formalism which promoted the idea that deriving and applying legal rules could be a value free objective process involving mainly analytical deductive reasoning. Realism, contradicted formalism by stating that adjudication was impossible without interpreting social policy as well. Finally, social conceptualism, emerged which was a hybrid of the first two theories and it required adjudicators to consider the social and political realities in adjudicating).
\textsuperscript{163} (an example of this is the decision of \textit{Phelps Dodge Corp v. NLRB} 313 U.S. 177 (1941) which is discussed below).
(II) The Various Reasons for Enacting the Wagner Act

This historical context and the various events surrounding the period also informed the reasons for implementing the Act. The benefits that labour derived from the Act which included widespread collective bargaining, unions playing a significant role in partisan politics, and the working-class experiencing improved standard of living and job security, were only incidental. These benefits were granted in furtherance of the main goal of preserving the existing market system which was under threat from the constant disruptive labour strikes. This reason for the enactment was evident from the underlying goals of the Act that survived judicial interpretation. The underlying goals were:

1. **Industrial Peace**: the encouragement of collective bargaining in order to subdue "strikes and other forms of industrial strife or unrest," which interfered with interstate commerce;

2. **Collective Bargaining**: the enhancement of collective bargaining for its own sake because of its presumed "mediating" or "therapeutic" impact on industrial conflict;

3. **Bargaining Power**: the promotion of "actual liberty of contract" by redressing the unequal balance of bargaining power between employers and workers;

4. **Free Choice**: the protection of the free choice of workers to associate amongst themselves and to select representatives of their own choosing for collective bargaining;

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164 Klare, *supra* note 156 at 266.
5. *Underconsumption*: the promotion of economic recovery and to prevent future depressions by increasing the earnings and purchasing power of workers; and

6. *Industrial Democracy*: worker participation in the industry, since they are able to participate in democratic government as citizens.

The goals that survived the onslaught of judicial interpretation were industrial peace, underconsumption, free choice, and the idea of a restructured worker free power. Collectively, these goals would have fostered the peaceful environment for businesses to thrive resulting in a benefit to employers. However, the goals that would have greatly benefitted workers by providing greater power in the bargaining relationship floundered. These included redistribution, equality of bargaining power, and industrial democracy. Accordingly, the goals identified under the *Wagner Act* that would have benefited workers more, were the goals that judges deliberately retarded their development.

(III) The Role of the Court in Deradicalizing the Wagner Act

The courts aided employers in preserving the current economic system by deradicalizing the *Wagner Act*. This occurred because the United States Supreme Court obtained the task of interpreting the *Act* due to the diverging views held by employers, labour leadership and workers on what the *Act* represented. In this interpretation process, the Court gleaned from the historical, political and social climate the principles

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167 Ibid. at 293.
168 Ibid.
169 Ibid. at 286, 289-290.
that would now govern the Act. This process unfortunately placed the reins in the hands of the Court to determine the revolutionary effect it would have, and the reins remained even though the National Labour Relations Board was charged with its administration.

In the course of interpretation, the Court retained the old contractualist doctrine, and adopted various political and legal theories evident from the various opinions. In terms of contractualism, the Court refused to create a new doctrinal basis for labour relations in spite of the unequal bargaining strength of the unions in comparison to that of employers. Unsurprisingly, the Court also ignored the concerns over the continued use of contractualism and continued its promotion often holding that worker organization did not prevent the employer from operating the business as desired, and would not force the courts to inquire into the fairness of the wage bargaining between employers and unions. There was also support for the employer’s uninhibited power to do what was necessary to protect the business even if it meant employing permanent replacements for striking workers, or firing workers where there was supposedly a breach of contract. The Court’s approach showed that it was not prepared to intervene in the employment relationship, in the face of the serious injustice that workers were experiencing.

170 Ibid. at 291.
171 Ibid. at 294-295. (the essence of contractualism is the freedom to contract, where the courts would enforce the terms of a contract entered into as long as the parties had the capacity to do so and the opportunity to bargain for satisfactory terms.)
172 Ibid. at 297 (others continued to oppose the contractual model as they saw the labour contract as being oppressive and morally defective because wage bargaining was inherently an unequal exchange. The wages paid did not equal the profits made, and the wage relationship was more than a legal relationship as it entailed employer domination in the workplace).
173 NLRB v. Jones & Laughlin Steel Corp, 301 U.S. 1 at 45-46 (1937).
175 NLRB v. Sands Manufacturing Co., 306 U.S. 332 at 344-345 (1939) (the court found a breach of contract because the union refused to have workers return to work unless the collective agreement was interpreted in a certain manner).
The Court’s desire to make the Wagner Act employer friendly was evident in the judicial opinions regarding the deference owed to the decisions made by the National Labour Relations Board. The Board gained popularity because of the criticisms levied against the Court for placing private and group interests above that of the public.\textsuperscript{176} In an attempt to divert attention away from the Court’s actions, the Board was made the center of attraction by showcasing it as being in the public’s interest.\textsuperscript{177} The result was that labour became dependent on the Board’s kindness as its decisions most times greatly benefited them by affirming the activities pursued.\textsuperscript{178} Initially, the Court’s response was strict deference to the board’s decision\textsuperscript{179} but later they were being overturned in a bid to restrict the scope of labour’s activities and union power.\textsuperscript{180} The Courts circumscribed the unions’ power by arguing that unions had an institutional role that set them apart from their membership, and so the causes pursued should be in the public interest,\textsuperscript{181} and by formulating the function of the union as being wage bargaining only.\textsuperscript{182} The result was that union leadership was used to keep the membership in line and to reproduce the alienation that had historically characterized the work process.\textsuperscript{183}

\begin{itemize}
  \item[\textsuperscript{176}] Klare, supra note 156 at 310.
  \item[\textsuperscript{177}] Ibid. at 311.
  \item[\textsuperscript{178}] Ibid. at 317.
  \item[\textsuperscript{179}] Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261 (1940) at 265-269 (Chief Justice Hughes declared that the labour relations board had the discretion to determine a matter and where it chose not to act there was no remedy against the decision).
  \item[\textsuperscript{180}] Klare, supra note 156 at 317 (labour became dependent on the labour board’s decisions in order to be able to exercise their statutory rights and privileges).
  \item[\textsuperscript{181}] Ibid. at 319.
  \item[\textsuperscript{182}] Ibid. at 320 (wage bargaining entailed the unions determining the basis for exchanging labour for wages).
  \item[\textsuperscript{183}] Ibid. at 319-320.
\end{itemize}
A perfect example of the Court’s rolling back of workers’ benefits under the Wagner Act was the decision of *Phelps Dodge Corp v. NLRB*. The United States Supreme Court had to consider *inter alia* (1) whether the employer had engaged in discrimination in violation of section 8 (3) by not hiring applicants who were involved in, or affiliated with the union; (2) whether the board could reinstate the workers who had obtained substantial employment elsewhere; and (3) whether there was a worker duty to mitigate damages.

The Court answered in the affirmative for each question but with differing majorities cast along political theory lines. Justices Stone and Roberts and Chief Justice Hughes, traditional conceptualists, agreed that the board had remedial ability but not to order reinstatement, and so they attempted to read down the Board’s power to reinstate under section 10(c) of the *NLRA* to exclude workers who had suffered the unfair labour practice but had obtained employment elsewhere. In contrast, Justices Murphy, Black and Douglas, realists, adhered strictly to the idea of deference to the board’s decisions in spite of the possible unreasonable outcomes. They were only concerned with the board deciding within a “permissible range” of outcomes and based on “statutory standards”, concepts, which they did not define.

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184 *Supra* note 163.
185 Klare, *supra* note 156 at 277-278 (this promoted the idea that deriving and applying legal rules could be a value free objective process involving mainly analytical deductive reasoning).
186 *Supra*, note 1.
187 *Phelps*, *supra* note 163 at 210 -212 (they argued that the courts were reluctant to compel specific performance of personal service contracts and Congress could not have intended for the employer to reinstate persons who had never worked at the business).
188 Klare, *supra* note 156 at 277-278 (this stated that this task of adjudication was impossible without interpreting social policy as well).
189 Ibid. at 329.
190 Ibid; *Phelps*, *supra* note 163 at 206.
The most colourful opinion was provided by Justice Frankfurter who fused various ideas and theories together. He had agreed with the deference to be paid to the board's reinstatement decision, but on remand of the case back to the board circumscribed the board's use of discretion by stipulating the factors\textsuperscript{191} that the board needed to consider before ordering reinstatement. He went a step further by holding that the worker had a duty to mitigate any of their losses, and the board had a duty to deduct not only for actual earnings, but also losses wilfully incurred.\textsuperscript{192} Professor Klare opined that the effect of Justice Frankfurter's opinion was to overrule a policy judgment considered by the board, and to undercut effective enforcement of the Act.\textsuperscript{193}

In examining this case, the various opinions revealed the persuasions of the judges. The majority were clearly pro-employer. Justices Stone and Roberts and Chief Justice Hughes allowed employers to benefit from the wrong committed by unduly limiting the forms of redress that were open to workers against employers. Justice Frankfurter took a round-a-bout approach in showing his pro-employer view. He pretended to support the idea of deference to the Labour Relations Board's decision, but then eliminated the possibility of creating a labour relations regime that would subject employers' actions to challenge through the actions of the Labour Board. He therefore chose to unduly restrict the remedies that the Board could award against an employer. On the other hand, Justices Murphy, Black and Douglas appeared pro-workers, because they chose to defer to the board selected to administer the Act, rather

\textsuperscript{191} Ibid., supra note 163 at 193-197 (he highlighted that the board had to consider the factor of whether or not the worker had substantially obtained equivalent employment before reinstating).

\textsuperscript{192} Ibid. at 197-198.

\textsuperscript{193} Klare, supra note 156 at 334.
than impose the will of the Court on the Board. Therefore, it is obvious that the Courts would capitalize on the expansive provisions of the Wagner Act by reading in as many restrictions as possible to ensure that workers would never fully benefit from the rights provided therein to the employer’s detriment.

(B) **Constitutional Deradicalization by the Supreme Court of Canada**

Professor Klare described the judiciary’s use of statutory interpretation to deradicalize the Wagner Act in the United States. After comparing the actions of the Supreme Court of Canada with that of the United States Supreme Court, it is evident that the same thing was occurring: deradicalization. However, this time the judiciary relied on the constitution as the deradicalizing tool by interpreting the Charter section 2(d) freedom of association right in a manner that reduced constitutional protection for workers’ rights, and in turn carved back the workers’ benefits derived from the Wagner Model adopted. This deradicalization occurred as a result of two (2) courses of action that the Supreme Court undertook: (a) delineating the bargaining subjects under the duty to bargain; and (b) re-scoping the Charter section 2(d) right.

(I) **Duty to Bargain**

The Supreme Court in deciding to intervene in labour relations by constitutionalizing collective bargaining created a great benefit for workers, as this in turn resulted in the constitutionalization of aspects of the Wagner Model. This would have made it more difficult for the provisions of the model to be eliminated without proper justification as required by section 1 of the Charter. But in the same breath, the
Court in *B.C. Health Services* rolled back some of the workers’ victory by introducing into the Model a delineation of the bargaining subjects into the categories of “important” and “unimportant”. It was clearly stated in *Pulp and Paper Industrial Relations Bureau and Canadian Paper Workers Unions*, a decision rendered long before *B.C. Health Services*, that the delineation of bargaining subjects was not a part of the Canadian law.

Chairman Paul Weiler who presided over the hearing in *Pulp and Paper* stated,

> The whole point of a system of free collective bargaining is to leave it to the parties to work out their own boundary lines between the area of mutual agreement and the area of unilateral action, whether the action be taken by the employer or by the union. And in the final analysis, the test of whether a particular objective is sufficiently pressing to one party to have moved into the area of mutual agreement is the price that that party is willing to pay for such a move: either by concessions elsewhere in the contract or by the losses inflicted by a work stoppage. The wrong method is to rely on rigid controls, administered by an external tribunal, with the risk this poses that the ebb and flow of the collective bargaining regime might be frozen into the currently conventional pattern.

Accordingly, labour boards did recognize that the parties would determine whether a particular issue was so significant to warrant utilizing economic sanctions to obtain mutual agreement. In light of the above jurisprudential view, and the Supreme Court’s own acknowledgement that this division in bargaining subjects was not a part of Canadian law, it is beyond belief that they still decided to introduce it. One can only speculate as to what factors the Court considered in making such a move as they did not explain the need to delineate the bargaining subjects.

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195 Ibid. at 79-80.
196 *B.C. Health Services*, supra note 59 at para.106.
A possible explanation is the United States approach to the issue of bargaining subjects in the duty to bargain. Initially, when the *Wagner Act* was introduced in the United States there was no express delineation of bargaining subjects on the face of the *Act*, only a list of items that the elected worker representative was going to be the exclusive bargaining agent with the employer over.\(^{197}\) Subsequently, the United States Courts read in the mandatory/permissive distinction for bargaining subjects\(^{198}\) to reduce the scope of labour economic activity.\(^{199}\) Since Canada has followed in the footsteps of the United States by implementing this change in the said model that it adopted from there, one can only conclude that Canada introduced this change for the same reason: the reduction in the scope of labour activity. However, whatever the real reason was, it is clear that they did not recognize the detrimental effect that this would have on workers’ rights.

Firstly, the Court in creating this delineation clearly did not focus on the importance of the duty to bargain in labour relations. The duty has dual purposes: it mandated employers to recognize the trade union as bargaining agent, and it fostered rational, informed discussion between employer and trade union.\(^{200}\) Without this statutory duty, workers had no basis on which to compel employers to discuss any course of action,\(^{201}\) and to prevent them from unilaterally acting to destroy the bargaining unit. Furthermore,

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\(^{197}\) Atleson, *supra* note 3 at 115; *NLRA*, *supra* note 1, s. 9(a)( stated “Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment”).


\(^{201}\) *B.C. Health Services*, *supra* note 59 at paras. 89-90.
during the course of negotiations, the bargaining subjects themselves served as economic leveraging tools for trade unions because they were able to bargain to impasse and then strike for those subjects that employers refused to admit into the collective agreement.\textsuperscript{202} However, with this new delineation the Court has reduced the bargaining power of the unions. Employers would still engage in discussions with the unions, but now they would be under no obligation to bargain over the “unimportant” matters that would remain in their purview, and unions could not bargain to impasse and strike to ensure that these matters remain on the table. Consequently, employers benefit from the delineation.

Secondly, the Court failed to consider the already limited nature of the duty to bargain. Trade unions are constrained to bargaining only at the precise times dictated by the labour relations legislation, which include initial negotiation and renegotiation of the collective agreement.\textsuperscript{203} Outside of those periods the powers of the parties are clearly designated. Employers are under no duty to consult with trade unions over matters that arise and actions taken, the unions cannot strike over the failure of the employer to discuss the matter before acting, and arbitrators cannot adjudicate on this new issue as it would not form part of the already negotiated collective agreement which governs their jurisdiction.\textsuperscript{204} Consequently, as collective bargaining stands, trade unions are clearly at a disadvantage because of the limited times when employers are

\textsuperscript{202} \textit{LRA}, supra note 50, s. 79 (this section stipulated when and how a union strike can be carried out).
\textsuperscript{203} Langille, “Equal Partnership”, \textit{supra} note 198 at 512.
\textsuperscript{204} Donald J.M. Brown et al, \textit{Canadian Labour Arbitration}, loose leaf (consulted on March 31, 2011), 4\textsuperscript{th} ed (Canada: Thomson Reuters Canada Ltd, 2011) ch. 2 at 2-6.
mandated to bargain with them, and now they are at a worse disadvantage because the employers have even more subjects matters that will be under their microscope.

Thirdly, the detrimental impact of this delineation is even more far-reaching when we consider the fact that the labour relations boards can consider the substance of the collective agreement.\(^\text{205}\) Labour relations boards are responsible for administering labour legislations, however in the administration process boards are often influenced by various unarticulated values and assumptions about the rights that employers are entitled to exercise.\(^\text{206}\) At times labour tribunals and arbitrators will yield to these implicit employers’ rights even though they result in serious disadvantage for workers.\(^\text{207}\) This delineation has now provided the Board with further opportunity to scrutinize the proposed collective agreement terms and to determine whether or not the terms are really “important”. More than likely, this opportunity will arise in cases where the union and employer cannot conclude an agreement because of a dispute over the terms, and the parties have decided to use their economic weapons. The employer under these conditions can ask the board to declare the strike illegal because the union is striking over an “unimportant” term,\(^\text{208}\) and so the board will have to investigate to determine the truthfulness of the allegation. Consequently, this opportunity for the

\(^{205}\) LRA, supra note 50, s. 43(2) (this allows the labour relations board to impose a first contract where the parties cannot agree on the presented terms).

\(^{206}\) Patrick Macklem, “Property, Status, and Workplace Organizing” (1990) 40 U. Toronto L.J. 74 at 81 (for example, the Ontario Labour Relations Board in interpreting the LRA will seek to prevent incursion on the employer’s private property right by unions seeking to organise employees).

\(^{207}\) Re United Steelworkers of America and RusselSteel Limited, (1966) 17 LAC 253(Ontario) (Arthurs) (the board decided that without explicit prohibition in the collective agreement, the employer was entitled to contract out services even though this would result in job losses for the bargaining unit workers).

\(^{208}\) LRA, supra note 50, s.100.
labour boards to categorize the bargaining subjects has provided another chance for workers’ benefits under the Wagner Model to be rolled back in favour of the employers.

Finally, it has become very clear that this delineation in bargaining subjects is a permanent fixture in the constitutional jurisprudence. This is evident from the fact that in *B.C. Health Services* Justice Dechamps, even though dissenting, did not condemn the introduction of this delineation. She was only concerned with the importance of the subject matter being determined before establishing that there was any interference with the *Charter* section 2(d) right.\(^{209}\) Further, this delineation was later confirmed by *Fraser\(^{210}\) where none of the judges who heard this decision commented on the introduction of this detrimental change to the duty to bargain component. This drives home the fact that workers will not be able to petition the Courts to reverse this deradicalization, in light of the support it has received from both *B.C. Health Services* and *Fraser*. Neither can workers petition the legislature to remove this distinction, because based on past history the legislature is more prone to roll back the scope of labour’s rights than to expand them. With the two main actors who can protect workers’ rights seeking to contract them, the question remains as to what workers can do to reverse the change.

In light of the foregoing, it is clear that the Court was not solely concerned with protecting workers’ rights but with also balancing the scales between employers and workers. In making this unprecedented move, I opine that the Court realized that they had tipped the scales in workers’ favour when they constitutionalized the collective

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\(^{209}\) *B.C. Health Services*, supra note 59 at para. 180.

\(^{210}\) *Fraser*, supra note 109.
bargaining right, as now trade unions would have a powerful constitutionalized economic weapon against government employers. Not only would government have to consult, discuss and negotiate, but this would be over every subject matter that is important to workers, and the Court did not want the government to be held hostage where it sought to make changes in various areas. Hence, they rebalanced by granting the collective bargaining right and then reducing its scope of application. However, delineating the bargaining subjects was an unnecessary move as the challenges that accompany launching a *Charter* claim, including the procedural and evidentiary hurdles, high costs and time consumption, makes such a claim in and of itself a deterrent to frivolous litigation. Therefore, it was honourable for the Court to intervene in labour relations but they did so to workers’ detriment.

(II) Re-Scoping the *Charter* Section 2 (d) Right

The Wagner Model suffered further deradicalization at the hands of the Supreme Court of Canada in *Fraser*, when the Court decided to re-scope the boundaries of the section 2(d) freedom of association right in order to reconcile the *AEPA* with the decision in *B.C. Health Services*.

As per *B.C. Health Services*, *Charter* section 2(d) freedom of association included the right to collectively bargain.\(^{211}\) The purpose of the right was to ensure that workers would now have a say in the implemented terms and conditions of work, an opportunity they would never have had under a regular contract of employment. This would provide the opportunity for the terms and conditions of work to possibly benefit workers.

\(^{211}\) *B.C. Health Services*, supra note 59 at para. 89.
However, with the Supreme Court of Canada’s decision in Fraser to re-scope the Charter section 2(d) right to protect only the right to organize and make representations to the employer, the benefit that workers would have enjoyed has dissipated.

Firstly, the Court has created a useless right. The majority chided Justice Dechamps for providing a narrow characterization of the right which provided only for workers to organize and make representations to the employer. However, adding the requirement that employers must consider these collective representations in good faith adds nothing to the right that will benefit workers. In my opinion, the employer is being asked to do the same thing in both characterizations of the right: to listen to the representations made. Neither characterization places any onus on the employer to respond to the representations or to agree to implement what was requested, which is what the workers needed to happen. The fact that the employer is asked to acknowledge in writing the receipt of a written representation[^212] cannot be characterized as a response, as a response or the lack thereof, is geared towards providing insight into the other party’s opinion. In this case, the unions and workers will have no clue as to what the employer’s view is on the representation made, and will have to await the employer’s subsequent actions.

Furthermore, the workers have no recourse to ensure that the terms and conditions of work implemented will be of any benefit to them. With the implementation of the Wagner Model, employers were mandated to bargain with unions and unions were granted economic sanctions that could be used to compel employers to heed to

[^212]: AEPA, supra note 110, ss. 5(5)-(7).
their terms and conditions. With this limited protection unions have faced enormous challenges in compelling employers to comply with their wishes, so it will be next to impossible for workers to obtain any benefit from the employer without these statutory protections in place. Workers cannot force the employer to communicate with them and they cannot strike to force the employer to include provisions favourable to them. Consequently, this “new” right is simply a reversion to the original position that the Court held in *Alberta Reference* which established that the section 2(d) right only covered the right to associate.

Secondly, this re-scoping has again weakened the constitutional protection of workers’ rights, and in turn has weakened the protection that the Wagner Model affords. The unions turned to the Supreme Court to protect their right to bargain and to ensure that employers bargained with them. By limiting constitutional protection to the right to associate and make representations, the Court has left a significant part of the Wagner Model vulnerable to legislative attack. Even though the legislatures have yet to do so, they have more leeway to modify the labour relations legislations to remove the requirement for employers to engage in bargaining with workers. It is not an answer to say that legislatures would not take this route as the duty to bargain is a central part of the current bargaining scheme. The legislatures have proven that collective bargaining rights are not sacred and that they will trample all over them in a bid to satisfy employers and keep businesses and the economy going. In this case, such a move would be easier as legislatures would not have to justify the change to the Court under the constitution as there would be no abrogation of a constitutional right. Consequently,

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213 For example, *Canada Trustco Mortgage Company*, supra note 153.
this re-scoping amounts to a total disregard of the historical struggles and abuse that workers have encountered at the hands of employers and the legislature.

Finally, this has resulted in a gross over tipping of the scale in favour of employers. It is evident that the Supreme Court was trying to balance the scale between employer and workers’ rights, since they decided to intervene in labour relations. *B.C Health Services* did it by implementing a stringent test which made it extremely difficult for unions to prove that their section 2(d) right was infringed. Now *Fraser* attempted to do the same thing but in a more extreme way. Based on the decision to uphold the *AEPA*, they have given the employer the upper hand altogether with no benefits whatsoever accruing to the worker. Agricultural employers can continue to implement whatever terms and conditions they believe will make farming profitable to the detriment of workers. Furthermore, even though agricultural workers are subject to some sort of protection under the *Employment Standards Act, 2000* (hereinafter the *ESA*)\(^{214}\) regarding working conditions, they are subject to special rules that make it easier for the employer to derive the benefit over them.\(^{215}\) Even if employers are in violation of their duties under the *ESA*, it is unreasonable to believe that agricultural workers will utilise the complaint provisions to report such violations knowing that they could face employer reprisal. Therefore, it is obvious that the Supreme Court of Canada has robbed workers of the possible chance of finally rebalancing the power between themselves and the employers where they would have a representative advocating for their rights.

\(^{214}\) S.O. 2000, c. 41 [*ESA*].

\(^{215}\) *Exemptions, Special Rules and Establishment of Minimum Wage*, O.Reg 285/01, s.25. (for example, in s. 25 (5) the worker will be paid a certain wage if the employer is deemed to have provided room or board to the worker, and the regulation does specify the condition that the room should be in, but there is no provision for monitoring these conditions).
Chapter 5
RECOMMENDATION

It is very clear, that the Supreme Court of Canada has deradicalized the Wagner Model and the question is now what can possibly be done, if anything, to reverse this grave injustice. Professor Fudge highlighted that even though the Supreme Court of Canada developed its jurisdiction on a case-by-case basis, and has a great deal of discretion and flexibility in responding to the facts of particular cases, broader shifts in public and elite opinion, and international law, the court still has constraints in acting.\(^\text{216}\) She noted that some constraints were immediate, such as the courts’ inability to completely control the cases that come before it, and the fact that some cases were more compelling than others. While other constraints were long-term and focused more on the courts’ institutional legitimacy,\(^\text{217}\) in that the Courts do not want to appear as if they are seeking to usurp the authority of the other state arms\(^\text{218}\) in their adjudication. Accordingly, the existence of constraints provides insight into the cautious response of the Court to workers’ plea to intervene in labour relations and rebalance the rights.

In light of these limitations, one recommendation is to refocus the attention on the administrative model and remove labour relations from the Courts. It is duly noted that tribunals are heavily influenced by underlying values and assumptions, and this does influence the use of their discretion. However, based on the discussion thus far, it is evident that judges are no less susceptible. Judges have their own preconceived

\(^{216}\) Fudge, "Labour is not a Commodity", supra note 37 at para. 28.
\(^{217}\) Ibid.
\(^{218}\) (the legislature and the executive).
notions of what the state of affairs should be and this is reflected in the opinions that they provide and the decisions made. But there is greater concern regarding judicial adjudication because of the weight that such decisions carry, and the great damage that a wrong decision can do to labour relations in comparison to a tribunal decision. Generally, tribunal decisions are non-binding on other adjudicators, but adjudicators may rely on them in order to inject some certainty into decision-making.\(^{219}\) On the other hand, judicial decisions are binding and are more difficult to depart from without good reason. In light of this, it is best to restore faith in the administrative model by creating a labour tribunal that has secure tenure like the Courts, and so less susceptible to the political whims and fancies, and the change of government. This tribunal would be chaired by labour adjudicators who are regarded as experts in the field because of their vast knowledge base on labour relations and the techniques required to preserve the employer/labour relationship. Accordingly, we need to create an atmosphere where specialized labour tribunals can thrive, rebalance the parties’ rights, and in turn develop a more transparent and just labour law.

Another recommendation is to rely on the underlying *Charter* principle of equality to determine the scope of Freedom of Association. Brian A. Langille had made this suggestion in his analysis of the impact of *B.C. Health Services* on the *Charter* section 2(d) freedom of association right.\(^ {220}\) He suggested that the Courts needed to allow the *Charter* section 15 equality provision to do the work that it was designed to do, that is, to

\(^{219}\) Brown, *supra* note 204 at 1-13.

protect the freedom of equality for all,\textsuperscript{221} instead of trying to correct labour relations through section 2(d). This would entail the Courts requiring the government to justify the exclusion of some workers from statutory protection, even though the legislature has jurisdiction to institute various policies pertaining to labour relations.\textsuperscript{222} By taking this approach, the courts would not be involved in line drawing between the rights that they believe that workers and employers should have. Instead, all workers would have constitutional protection against employer interference for organizing and engaging in collective bargaining, and then the legislature would determine the type of bargaining system that should be in place to govern these relations. Justice Deschamps in \textit{Fraser} had also suggested relying on \textit{Charter} section 15 to provide protection for agricultural workers,\textsuperscript{223} but she failed to provide guidance as to how workers would establish such a claim.

It must be duly noted that neither of these recommendations are mutually exclusive. Workers would benefit greatly if they all had access to collective bargaining, and if there is a labour tribunal that would have the freedom to act to really balance the competing rights of employers and workers. Accordingly, both recommendations apart or in combination would be of great benefit to workers.

\textsuperscript{221} \textit{Ibid.} at para. 93.
\textsuperscript{222} \textit{Ibid.} at para. 95.
\textsuperscript{223} \textit{Fraser, supra} note 109 at para. 319.
Chapter 6
CONCLUSION

In conclusion, the Supreme Court of Canada’s intervention in labour relations has resulted in there being “one step forward but two steps backwards”. The Wagner Model was implemented for various reasons including the statutory protection of the workers’ right to organize and bargain with the employer. However, these statutory protections were eventually transformed into employer benefits by the various tactics deployed by the government and the legislature. Labour asked the Courts to intervene, hoping that this would reverse this whittling away of their rights under the Model, but the Courts instead of reversing, propelled this course of action. Now workers have only basic limited constitutional protection which does not cover half of the rights provided by the Wagner Model, and therefore are at the mercy of the legislature in terms of whether they will roll back these statutory rights eventually.

In light of this sad state of affairs, I have recommended the way forward as being either a return of labour relations into the hands of an entrenched labour tribunal, or the reliance on the Charter section 15 equality right as a yardstick that guarantees all workers statutory protection, with the legislature being mandated to justify any failure to provide this protection. There is also the possibility of a combination of both options as having a tribunal that can balance the competing employer and workers’ rights, is still compatible with the idea that all workers should be protected unless just cause is shown. However, both these options require either the Courts or the legislature to act, and they have proven that they are unsympathetic to the plight of workers. Consequently, the task is left with workers and their unions to continuously lobby until
they can force the courts or the legislature to extend collective bargaining to all workers, and to preserve and improve the Wagner model instead of eroding it.
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SECONDARY MATERIALS: MONOGRAPHS


**SECONDARY MATERIALS: ARTICLES**


