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Process and Outcome

David Mangan*

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Abstract: While *Saskatchewan Federation of Labour v Saskatchewan* remains the Supreme Court of Canada's headline decision for labour law in 2015, *Mounted Police Association of Ontario v Canada (Attorney General)* arguably further developed the Court's continuing reappraisal of freedom of association. *Mounted Police* provided some direction as to the content of a 'meaningful pursuit of workplace goals'. The guidance can be categorised in terms of process and outcome where the former constitutes the content of freedom of association and the latter is viewed as sitting outside of its protection.

I. Introduction

Dunmore v Ontario (Attorney-General) has been identified as a demarcation point for the interpretation of freedom of association.¹ In overruling the long-established rule from *Hersees of Woodstock v Goldstein*² in *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd.*,³ though, the Supreme Court signalled a willingness to depart from past precedents. Ever since its decision in *Health Services and Support – Facilities Subsector Bargaining Association v British Columbia*, where 'the concept of freedom of association [was interpreted as including the] notion of a procedural right to collective bargaining'⁴, there has been debate regarding the content of the freedom of association pursuant to s.2(d) of Canada's Charter of Rights and Freedoms.⁵ *Mounted Police Association of Ontario v. Canada (Attorney General)*,⁶ the focus here, supplemented the existing content of freedom of association.

While *Saskatchewan Federation of Labour v Saskatchewan*⁷ remains the headline decision for labour law in 2015, *Mounted Police* continued the elaboration of freedom of association. Certainly *Saskatchewan* changed Canadian labour law textbooks: s.2(d) of the Charter gives effect to a right to strike, thereby setting aside the interpretation from 1987 that freedom of association was an individual right, accorded a limited interpretation. Nevertheless, consider the legislation struck down. Through the Public

* The City Law School, City University London

¹ 2001 SCC 94 [*Dunmore*]. Bastarache J (for the majority) identified a purposive approach which recognized connections and differences between the individual and the collective: 'the law must recognize that certain union activities — making collective representations to an employer, adopting a majority political platform, federating with other unions — may be central to freedom of association even though they are inconceivable on the individual level.' This reasoning departed from that of Le Dain J (among others) who denied collective bargaining was a fundamental right or freedom: *Reference Re Public Service Employee Relations Act (Alberta)* [1987] 1 SCR 313 [*Alberta Reference*], 391.

² (1963), 38 D.L.R. (2d) 449 (ONCA) [*Hersees*].

³ 2002 SCC 8.

⁴ *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia* 2007 SCC 27 [*Health Services*], [66].

⁵ Canada Act 1982, c. 11, Sched. B (U.K.) [Charter].

⁶ 2015 SCC 1 [*Mounted Police*]. The Royal Canadian Mounted Police is a national police force with jurisdiction over matters crossing provincial borders. Where no other exists, it is also the local police force.

⁷ 2015 SCC 4 [*Saskatchewan*].

Service Essential Services Act,⁸ the provincial government granted itself unilateral authority to declare any public sector workers as ‘essential service employees’; prohibiting them from participating in strike action. The Act contained no meaningful mechanism for resolving bargaining impasses.⁹ Moreover, the identification of essential service employees was even beyond adjudication by a labour relations board. Given the scope of the legislation, surprise would have been slight that such a one-sided statute was found to have violated s.2(d). Instead, *Mounted Police* provided some further direction as to the content of a ‘meaningful pursuit of workplace goals’. The guidance can be categorised in terms of process and outcome where the former constitutes the content of freedom of association and the latter is viewed as sitting outside of the right.

II. The decision to reverse a recent precedent

In the opening of *Mounted Police*, Chief Justice McLachlin and Lebel J. (for the 6:1 majority) outlined this lengthy decision:

whether excluding members of the Royal Canadian Mounted Police (“RCMP”) from collective bargaining¹⁰ ... and imposing a non-unionized labour relations regime violates the guarantee of freedom of association in ... the *Canadian Charter of Rights and Freedoms*. This requires us to review the nature and interpretation of the right ... and to clarify the scope of the constitutional protection of collective bargaining [as outlined in the Court’s recent decisions on s.2(d) of the Charter.]¹¹

Long prohibited from unionizing¹² (even in the midst of significant unionization amongst Canadian public sector workers in the 1960s),¹³ RCMP members were barred from collective bargaining due to concerns over ‘loyalty and obedience’.¹⁴ While the decision to prohibit prevailed, it was not a unanimous sentiment at the time.¹⁵ RCMP members were subsequently placed under their own labour relations regime. Voluntary associations of RCMP members formed at their own initiative (consisting of the Mounted Police Associations of Ontario, British Columbia and Quebec; the two former initiated this case). These three associations offered many services akin to those of the standard union such as advice and assistance pertaining to discipline and grievances, political lobbying and education. Unlike most unions, these associations had no full-time staff nor were they recognised for collective bargaining purposes. Members could raise their workplace issues through the Staff Relations Representative Program (SRRP), but pay considerations were advanced through a separate process called the RCMP Pay Council. A third aspect of the system, the Mounted Police Members’ Legal Fund (funded through

⁸ SS 2008, c.P-42.2. The Trade Union Amendment Act 2008, S.S. 2008, c.26 was found to comply with the Charter; a matter returned to later.

⁹ *Saskatchewan* (n 7) [89]-[90].

¹⁰ Pursuant to the Public Service Labour Relations Act as enacted by the Public Service Modernization Act, SC 2003, c. 22, s. 2.

¹¹ *Mounted Police* (n 6) [1]. References omitted.

¹² Between 1918 and 1974, members were prohibited from engaging in all associational activities pursuant to Orders in Council P.C. 1918-2213 and later P.C. 174/1981 (1945).

¹³ With the adoption of the Public Service Staff Relations Act, S.C. 1966-67, c.72.

¹⁴ *Mounted Police* (n 6) [18].

¹⁵ While the *Report of the Preparatory Committee on Collective Bargaining in the Public Service*. (Queen’s Printer, 1965) recommended excluding RCMP members, another report, *Canadian Industrial Relations: The Report of the Task Force on Labour Relations* (Privy Council Office, 1968), suggested federal law enforcement officials have the right, subject to limitations.

membership dues) provided legal assistance to members relating to workplace issues.¹⁶ Of note, in 1999, the Supreme Court of Canada considered the exclusion of RCMP members from collective bargaining in *Delisle v Canada (Attorney-General)*.¹⁷ The Court then found no infringement of members' freedom of association.¹⁸

Distinguishing *Delisle*, the Supreme Court in 2015 found a violation of members' Charter rights attributable to the existing labour relations system denying members 'a degree of choice and independence sufficient to enable them to determine and pursue their collective interests' as well as precluding a process independent from 'management's influence'.¹⁹ Choice involved accountability: where members selected their representatives to work towards collective interests.²⁰ Independence reinforced the nexus between members' interests and the activities of the association.²¹ The majority offered two reasons as to why the matter was not engaged in 1999. First, *Delisle* predated the shift towards a purposive approach to s.2(d) promulgated by *BC Health and Ontario (Attorney-General) v Fraser*.²² Second, *Delisle* scrutinised only a portion of the labour relations system; whereas in *Mounted Police* the entire labour relations framework was challenged.²³ These bases may leave some dissatisfied with the explanation.²⁴ Still, *Mounted Police* added to the conversation by asserting the importance of choice and independence in selecting collective interests as a union.

In labour law decisions of the Supreme Court, Mister Justice Rothstein (retired as of 30 August 2015) has commonly written in dissent and in *Mounted Police* he continued his opposition. Rothstein J has consistently questioned the majority's rendering of the renovated freedom of association. In this function, his remarks are important contributions. In *Mounted Police*, the kernel of Rothstein J's criticism – that the majority constitutionalised the Wagner Act model of labour relations²⁵ – leads to a noteworthy consideration: have the revised parameters of the process effected a particular outcome? Rothstein J asserted that RCMP members operated within a labour relations system which gave effect to their s.2(d) rights. Recalling *Fraser* which acknowledged differing labour relations systems outside of the Wagner Act model, he characterised the SRRP as avoiding 'the adversarial, Wagner model of labour relations prevalent in much labour legislation in Canada'.²⁶

Throughout his labour law opinions, Justice Rothstein valued deference to the legislative

¹⁶ The SRRP and the Legal Fund satisfied the Ontario Court of Appeal, in part, that RCMP members could effect collective workplace goals: *Mounted Police Association of Ontario v Canada (Attorney General)* 2012 ONCA 363 [*Mounted Police* (ONCA)], [128].

¹⁷ [1999] 2 SCR 989 [*Delisle*].

¹⁸ A further review (The SRR Challenge 2000 Review) arose soon afterwards. Although it brought about changes, limitations remained.

¹⁹ *Mounted Police* (n 6) [5], [97].

²⁰ *Mounted Police* (n 6) [87].

²¹ *Ibid* [88].

²² *Ibid* [125]. 2011 SCC 20 [*Fraser*].

²³ *Ibid* [126].

²⁴ The Ontario Court of Appeal considered the matter 'disposed' by the Supreme Court of Canada in *Delisle: Mounted Police* (ONCA) (n 16) [127].

²⁵ *Mounted Police* (n 6) [165].

²⁶ *Ibid* [164].

branch; particularly with regards to socio-economic policy²⁷ which he submitted required flexibility because court decisions may ‘expand *Charter* rights in such a way as to prevent governments from responding to new information or changing social and economic conditions.’²⁸ This meant courts should not trench upon labour law but instead ‘must respect that concerns such as maintaining “the balance between employees and employer” and attaining “equilibrium” in labour relations ... fall within the proper role and expertise of governments and legislatures, not the judiciary.’²⁹ A response to the deference argument was not as plainly put in *Mounted Police* as it was by Madam Justice Abella (for the 5:2 majority) in the later decision of *Saskatchewan*: ‘If the touchstone of *Charter* compliance is deference, what is the point of judicial scrutiny?’³⁰

III. Refining freedom of association

Mounted Police served as an opportunity for explication on some matters. Looking back to the *Health Services* decision, the right may have been viewed as derivative insofar as collective bargaining was the ‘most significant collective activity through which freedom of association [may be] expressed in the labour context’.³¹ The majority in *Mounted Police* clarified: freedom of association ‘is not a derivative of ... other rights. It stands as an independent right with independent content, essential to the development and maintenance of the vibrant civil society upon which our democracy rests.’³² The Court continued to rely on the purposive analysis of the right which it defined as requiring ‘courts to consider the most concrete purpose or set of purposes that underline[d] the right or freedom in question.’³³ Drawing on Dickson CJ’s dissent in the *Alberta Reference*, the Court’s purposive analysis as applied to s.2(d) and labour relations was one of power imbalance:³⁴

Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict.³⁵

And so, three classes of activity were identified for s.2(d) protection: ‘(1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities.’³⁶

Another difficulty the Supreme Court addressed in *Mounted Police* was the test for infringement; specifically what was ‘effective impossibility’.³⁷ In rejecting RCMP

²⁷ *Ibid* [161].

²⁸ *Ibid*.

²⁹ *Ibid* [162].

³⁰ *Saskatchewan* (n 7) [76].

³¹ *Health Services* (n 4) [66]. See also *Fraser* (n 22) [46].

³² *Mounted Police* (n 6) [49].

³³ *Ibid* [50].

³⁴ *Ibid* [59]. The Court also referred to this as ‘social imbalance’.

³⁵ *Alberta Reference* (n 1) 365-366; cited in *Mounted Police* (n 6) [57] (emphasis added in *Mounted Police*).

³⁶ *Mounted Police* (n 6) [66].

³⁷ *Ibid* [74]-[76].

officers' claim, the Ontario Court of Appeal relied upon the Supreme Court in *Fraser* for its interpretation of the right;³⁸ namely that a Wagner Act Model has not been 'constitutionalized'.³⁹ The Ontario court concluded that (unlike RCMP labour relations) only where law or government action rendered achieving collective goals 'effectively impossible' for workers would there be a violation of s.2(d).⁴⁰ Refining the test in *Mounted Police*, the premise remained the balance in labour relations between workers pursuing workplace goals and (presumably though it is not explicitly stated) employers' focus on the business interests of the undertaking. Within this context, 'the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining . . .'.⁴¹ Underlying the notion of disrupting balance was the idea of power imbalance that has historically been developed in labour relations.⁴² The dual purpose of the freedom of association was 'to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power'.⁴³

IV. Freedom of association as parameters to a process

Canadian courts remain empowered to enforce Charter principles and it has been from this premise the Supreme Court has based its reasoning. Grounding the departure from the 1980s line of authority established in *Dunmore*⁴⁴ was the 'full range of associational activity' contemplated by the Charter as well as the meaning given to freedom of association by international documents Canada had ratified.⁴⁵

Criticism of the 21st century freedom of association decisions from Canada's highest court has centred on the term 'constitutionalizing': linking constitutional rights with the labour relations legal apparatus.⁴⁶ Specifically, constitutionalizing labour rights has been characterized as part of the 'much more pervasive global constitutionalization that characterizes our contemporary world.' Continuing her assessment, Professor Fudge defined global constitutionalism as precipitating 'a shift in law's legitimacy from constituent power, the will of the people, and democracy to rights in which 'courts are the hinge elements in the emergence of a comprehensive transnational 'constitutionalism, which integrates and systematically consolidates political institutions operating in the national, supranational and transnational domains of global society'.⁴⁷ *Mounted Police* further exemplified how 'political actors exercise and legitimate their power'.⁴⁸

³⁸ *Mounted Police* (ONCA) (n 16) [109], [111].

³⁹ *Ibid* [91]; *Fraser* (n 22) [44]-[45].

⁴⁰ *Mounted Police* (ONCA) (n 16) [111].

⁴¹ *Ibid* (n 6) [72] (emphasis in original). Applied in *Saskatchewan* (n 7) [77].

⁴² *Ibid* (n 6) [68].

⁴³ *Ibid* (n 6) [70].

⁴⁴ *Dunmore* (n 1) [30].

⁴⁵ C087 – Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87) (entry into force: 4 July 1948; ratified by Canada: 23 March 1972).

⁴⁶ Thoroughly discussed in R. Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (OUP, 2014).

⁴⁷ J. Fudge, 'Constitutionalizing Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining and Strikes' (2015) 68 *Current Legal Problems* 267-305 [Fudge], 269.

⁴⁸ *Ibid* 275.

Comparison amongst differing labour relations frameworks inevitably leads to questions. A prescient query within this discussion (how does the Supreme Court in *Fraser* fit with *Mounted Police*?) is one with some history to it. In *Dunmore*, Bastarache J ruled that, as compared to RCMP officers in *Delisle*,⁴⁹ Ontario agricultural workers were not ‘strong enough to look after [their] interests without collective bargaining legislation’ and for this reason the impugned legislation violated agricultural workers’ freedom of association. With *Fraser*, the Agricultural Employees Protection Act 2002⁵⁰ was found to provide for a s.2(d) compliant framework permitting collective representations concerning terms and conditions of work to be made to an agricultural employer (though maintaining the exclusion from Ontario’s labour relations legislation)⁵¹ and requiring that employer to listen to or read representations.⁵² *Fraser* has been characterized as a ‘retreat’⁵³ (as well as a ‘hiatus’)⁵⁴ because the statute protected only a right to make representations. The provision teetered at the ‘weaker end’ of the scale of trade union activity because representation alone has been a diluted form of action.⁵⁵ To distinguish amongst different labour relations processes in *Mounted Police*, the Wagner Act model was identified as ‘one example of how the requirements of choice and independence ensure meaningful collective bargaining.’⁵⁶ The threshold to be met in that case was for employees to retain sufficient choice over workplace goals and adequate independence from management to ensure meaningful collective bargaining. In this context, these are understandable additions to the interpretation of s.2(d) insofar as it clarified the content of a meaningful pursuit of workplace goals. Situated within the line of recent decisions, however, difficulties arise.

Writing to the point of differing models, the Court identified Ontario’s School Boards Collective Bargaining Act, 2014⁵⁷ as another regime (‘designated bargaining model’ where members’ bargaining agent ‘is designated [by statute] rather than chosen by the employees’).⁵⁸ Ontario teachers are a rich (and enduring) source of labour law discussion. Since the release of *Mounted Police*, the Ontario teachers’ collective bargaining framework has become more complicated. In October 2015, a media investigation revealed that since the Ontario Government changed the collective bargaining system for Ontario teachers (after 2003), it had been reimbursing teachers’ unions for their expenses during rounds of collective bargaining.⁵⁹ Critics of the Supreme Court’s line of freedom of association decisions may

⁴⁹ *Dunmore* (n 1) [41] referring to the words used in *Canadian Industrial Relations: The Report of the Task Force on Labour Relations* (Ottawa: Privy Council Office, 1968), [253]-[254] as well as Bastarache J’s decision in *Delisle* [31] when he wrote of RCMP officers’ strength to form employee associations despite their exclusion from the relevant legislation.

⁵⁰ S.O. 2002, c.16 [AEPA]

⁵¹ Labour Relations Act 1995, SO 1995, c.1, Sched A, s.3(b.1) as amended by the AEPA, s.18.

⁵² AEPA (n 50) s.5(6)

⁵³ A Bogg & K Ewing, ‘A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada’ (2011-2012) 33 *Comparative Labor Law and Policy Journal* 379-416 [Bogg & Ewing], 379.

⁵⁴ Fudge (n 47) 284.

⁵⁵ Bogg & Ewing (n 53) 385.

⁵⁶ *Mounted Police* (n 6) [94].

⁵⁷ SO 2014, C.5.

⁵⁸ *Mounted Police* (n 6) [95].

⁵⁹ ‘Ontario Government’s payments to teachers unions tops \$3.7 million’

<http://www.theglobeandmail.com/news/national/ontario-premier-wynne-delivers-ultimatum-to-elementary-teachers/article26950978/> (last accessed: 5 February 2016).

rely on the reimbursement situation to, for example, argue the power imbalance against workers has been overstated. Moreover, the instance recalled the debate regarding public sector unions and their involvement in politics. One view held that public sector unions have disproportionate influence on the political process to the point that distortions will arise if not held in check.⁶⁰ Another perspective reflected on the more singular circumstances of public sector labour relations insofar as commercial influences (as found in the private sector) are replaced by political; suggesting the political is the venue for this form of labour relations.⁶¹

The reference to the School Boards Collective Bargaining Act 2014 raised another side to the threshold of sufficiency of choice and independence over workplace goals. Ontario teachers' collective bargaining had been conducted between the local unit of the relevant union and the local school board. The 2014 Act bifurcated the process so that 'central' and 'local' bargaining takes place. Preeminent was the scope of bargaining at the 'central' level,⁶² as there has been no provision outlining the content of local bargaining. Finally, the current influence of Ontario teachers' unions raised a question as to what the Supreme Court may have endorsed by using them as a reference. Relations between teacher unions and school boards became increasingly acrimonious between 1969 and 1975.⁶³ Labour unrest amongst teachers steadily increased to the point that in the mid-1970s the situation reached impasse. Strike action being unlawful, teachers employed the only remaining substitute, mass resignations.⁶⁴ Though reluctant to intervene, the Ontario Government established a statutory labour relations framework exclusive to public sector education, the School Boards and Teachers' Collective Negotiations Act.⁶⁵ The School Boards Collective Bargaining Act 2014 stood as the latest version of the 1970s example. The chances of another cohort (such as agricultural workers) effecting a similar response would be slight. The question then is where there has been a weak history of collective pursuit of common workplace goals there will be a lower threshold for meeting the standard of a meaningful process, than a situation where there has been a framework of labour relations borne out of a history of industrial conflict where a strong union (or unions) has emerged.

⁶⁰ R Clark Jr., 'Politics and Public Employee Unionism: Some Recommendations for an Emerging Problem' (1975) 44 *University of Cincinnati Law Review* 680-689, 680: 'collective bargaining in the public sector must take place in a political environment. ... too little attention has been paid to the political aspects of public sector collective bargaining and the potential problems and distortions of the political process that will result if remedies are not instituted.'

⁶¹ S Fredman & G S Morris *The State as Employer: Labour Law in the Public Services* (Mansell 1989), 7-8: 'the government derives the revenue to pay its employees primarily from taxation and ... this allows governments when dealing with their employees to override commercial concerns in favour of political and macroeconomic factors. This has a particularly important impact on the role of industrial action in the public services. It is unusual for industrial action to have a substantial financial effect on government. Instead, trade unions rely on the political pressure which may result from the disruption in services to the public. However, governments may decide to ignore whatever political pressure is generated and withstand a strike if such a strategy is deemed to be politically desirable.'

⁶² Sections 24 and 28.

⁶³ B M Downie, *Collective Bargaining and Conflict Resolution in Education: The Evolution of Public Policy in Ontario* (Industrial Relations Centre Queen's University 1978) 6.

⁶⁴ There had been fairly significant success in this tactic: S Lawton, G Bedard, D MacLellan and X Li, *Teachers' Unions in Canada* (Detselig Enterprises Ltd 1999) 31.

⁶⁵ SO 1975, c.72; repealed by Education Quality Improvement Act, SO 1997, c.31.

V. Scope for a government-directed outcome

The opinion in *Mounted Police* suggested scope for steering a process without effecting a particular outcome. Between process and outcome, government can affect a labour relations system.

In *Mounted Police*, the majority refined the basis for enforcement: first, there must be disruption to the balance between employees and employers; and second, this disruption must substantially interfere with meaningful collective bargaining.⁶⁶ These points were referenced to *Health Services*⁶⁷ which relied upon Bastarache J's ruling in *Dunmore*.⁶⁸ This benchmark (which the *Mounted Police* majority viewed as the proper construction instead of its earlier formulation of 'effective impossibility') recalibrated the interaction between workers (through union representation) and their employers.⁶⁹ The majority perceived a need for reassessment that reduced imbalances.⁷⁰ *Mounted Police* left open the scope beyond the process of selection of representatives and the collective interests pursued. It omitted guidance on the apparatus of labour relations, particularly the expanse between interference and substantial interference. It is this area that remains relatively uncharted, except to the point that the guide through the terrain has been identified as the court.

Released on the same day, *Meredith v Canada (Attorney General)*⁷¹ fits within this discussion. Against the backdrop of the Great Recession, the plaintiff RCMP members of the National Executive Committee of the Staff Relations Representative Program challenged, pursuant to s.2(d), both the (December 2008) decision of the Treasury Board as well as the Expenditure Restraint Act⁷² which imposed a limit of 1.5% on wage increases in the public sector for the 2008 to 2010 fiscal years. The legislation contained an exception for RCMP members, permitting them the opportunity to negotiate additional allowances (an opportunity that was taken up resulting in 'significant benefits').⁷³ The challenge did not extend to the constitutionality of the RCMP labour relations process. The majority of the Supreme Court (Abella J dissenting) ruled that rolling back wages without consultation did not violate s.2(d) of the Charter because 'the level at which the ERA capped wage increases for members of the RCMP was consistent with the going rate reached in agreements concluded with other bargaining agents inside and outside of the core public administration and so reflected an outcome consistent with actual bargaining processes.'⁷⁴ It was striking that a costs order was made against the RCMP members considering Abella J's dissent: 'The absence of any real opportunity to make representations about the extent and impact of the rollbacks before they were approved by Treasury Board had the effect of completely nullifying the right to a meaningful consultation process and thereby denied members their s. 2(d) Charter rights. ... [bearing

⁶⁶ *Mounted Police* (n 6) [72].

⁶⁷ *Health Services* (n 4) [90].

⁶⁸ *Dunmore* (n 1) [16], [23].

⁶⁹ 'Strengthen' would be a debateable term (as others noted herein have done); considering that the power to assess labour relations systems more clearly rests with the courts.

⁷⁰ *Mounted Police* (n 6) [59].

⁷¹ 2015 SCC 2 [*Meredith*].

⁷² S.C. 2009, c. 2 [ERA].

⁷³ *Meredith* (n 70) [29]

⁷⁴ *Ibid* [28].

in mind that] almost every other bargaining agent in the core public service was consulted.⁷⁵ It remains unclear if anything can be drawn from the labour relations system in *Mounted Police* being found deficient under s.2(d), whilst a facet of that system was upheld in *Meredith*.

The questions from *Meredith* were later engaged to some extent in *Saskatchewan* with respect to the Supreme Court's upholding of the Trade Union Amendment Act, 2008. Several provisions narrowed the parameters for certification: increasing the level of written support from 25% to 45% for certification; reducing from 6 to 3 months the time period for receiving such support; eliminating automatic certification where over 50% of employees have provided written support; excluding an employer's communication (regarding facts and opinions) with workers during a certification drive from the scope of an unfair labour practice. Adding a certain amount of pressure to unions, decertification could be achieved with the written support of 45% of membership (down from 50%). While these changes were found 'not [to] substantially interfere with the freedom to freely create or join associations',⁷⁶ these types of amendments are rarely (if ever) put forward to better facilitate freedom of association. Though utilizing international documents to ground its decisions in the area,⁷⁷ the Supreme Court also laid down a clear distinction: it would not go so far as ILO bodies in interpreting the mechanisms for protection of freedom of association.⁷⁸ Furthermore, the highest court would also permit government-initiated changes to the labour relations system that could interfere with freedom of association.

With this in mind, while the Labour Trilogy of the 1980s has been reconsidered, these decisions retain pertinence in some respect. Consider McIntyre J's explication of labour law as 'based upon a political and economic compromise between organized labour – a very powerful socio-economic force – on the one hand, and the employers of labour – an equally powerful socio-economic force – on the other.'⁷⁹ Here was a mixture of the pre-*Dunmore* perspective with a consideration persisting through to the current purposive approach to freedom of association. An imbalance between labour and employing entities grounded (in part) the purposive approach and so a departure from the *Alberta Reference* was discernible. However, the notion of balance remains. With the more recent decisions, this rests more with the legislative branch. The facts of the twenty-first century labour decisions each spoke of degree within the process: the BC Government was required to consult with public sector unions (*Health Services*); a non-Wagner Act system may be a sufficient framework for workers to make representations (*Fraser*); the unilateral power a government vested in itself to determine what constituted essential services (including the absence of any framework for review by a labour board) failed to meet a minimum threshold for s.2(d) (*Saskatchewan*); a labour relations system must have 'a degree of

⁷⁵ *Ibid* [50].

⁷⁶ *Saskatchewan* (n 7) [100]. Abella J also noted the trial judge's assessment that these 'requirements [were] not an excessively difficult threshold'.

⁷⁷ *Saskatchewan* was called the 'high water mark' for the Court's 'embrace of international labour rights as a basis for interpreting of the Charter's protection': Fudge (n 47) 284.

⁷⁸ Professor Fudge further suggested that this 'interpretive technique allows the Court to preserve its exclusive jurisdiction ... to determine the constitutionality of legislation or government action': Fudge (n 47) 286.

⁷⁹ *Alberta Reference* (n 1) 414.

choice and independence sufficient to enable [members] to determine and pursue their collective interests'.⁸⁰ Beyond these thresholds, the notion of balance has not been meaningfully engaged, thereby leaving open the question of to what extent Canadian courts will intervene in the details of a labour relations system. The Canadian Supreme Court has set out some of the elements of freedom of association, but it has left scope for political and economic compromise, providing for a spectrum of conduct for government. The fact of establishing these requirements of degree is not diminished here for it does set a new floor of protection in s.2(d). However, the facts of the decisions since *Dunmore* have not provided for consideration beyond. A difficulty raised by *Mounted Police* has been discerning what constitutes balance. Consider the following.

(a) Time limits for the process

Underlining the developing nature of this area, the consequential effects of the Supreme Court's reading of s.2(d) remain to be considered. One such matter is the time period for a meaningful collective bargaining process in pursuit of employees' goals. Take the example of reinstatement of a striking worker to her original position after the end of strike action. In the province of Ontario, s.80 of the Labour Relations Act 1995 contemplated a six-month (continuous) period for lawful strike action; for workers must make an 'unconditional application in writing' for reinstatement within six months of the commencement of the strike action. Would this provision disrupt the 'balance necessary to ensure the meaningful pursuit of workplace goals' or would it be constitutional under s.2(d)? If the latter, does the six-month period suggest a timeline for a meaningful collective bargaining process? On the issue, other provinces do not have a similar timeline. Alberta's Labour Relations Code,⁸¹ s.90, provided for a two-year period from the commencement of a strike or lockout and did not require a settlement for reinstatement to occur. Manitoba's Labour Relations Act,⁸² ss.11-13, did not expressly state any timeline.

(b) Imposing a labour relations framework

Professor Ewing argued that one result of compliance by the state with its obligations in international law is that back-to-work legislation 'would have to be confined to sectors which are essential services "in the strict sense of the term" in the way that term is defined by the ILO supervisory bodies.'⁸³ On this point, in December 2015, several Ontario public school teacher and staff unions challenged the means by which a collective agreement was reached in 2012; alleging the government had violated their Charter rights.⁸⁴ Once the government had negotiated an agreement with the Catholic teachers union, it sought to establish the same terms and conditions with the remaining

⁸⁰ *Mounted Police* (n 6) [5].

⁸¹ SA 2000 c L-1.

⁸² CCSM c L10.

⁸³ K D Ewing, "'The Lady Doth Protest Too Much, Methinks'" – The Right to Strike, International Standards and the Supreme Court of Canada' (2014-2015) 18 *Canadian Labour and Employment Law Journal* 518-555, 549.

⁸⁴ 'Teachers' unions launch court fight over despised anti-strike bill'

<http://www.thestar.com/yourtoronto/education/2015/12/14/teachers-unions-launch-court-fight-over-despised-anti-strike-bill.html> (last accessed: 5 February 2016).

three teachers unions through the Putting Students First Act 2012⁸⁵ which contained provisions explicitly enforcing these same parameters. The Charter challenge asserted, in part, that collective bargaining had been pre-determined by this tactic. With the Act's adoption on 'an exceptional and temporary basis',⁸⁶ this litigation focused not only on the process of freedom of association but also a government's capacity to achieve an outcome (to 'protect the Government's initiatives for students and preserve jobs' (as the Act's Preamble stated)) within the parameters of a purposive approach to s.2(d).

VI. Conclusion

The focus of the present work has been to underline, first, that *Mounted Police* is part of an on-going consideration of the protection afforded to freedom of association by the Charter. Second, the points made here are intended to contribute to that discussion by noting certain matters for further clarification. Carrying on from the labour law decisions of 2015, Canadian labour law continues to deliberate upon important queries. The question of constitutionalizing labour rights continues; as do the concerns that such a movement diminishes the political efforts of unions to effect change for workers or that the courts will prevail over the experts, thereby leaving a dysfunctional legislative scheme.⁸⁷ For workers, the legal avenue and the political strategy have been pursued concurrently for some time. It is only more recently, after many years of litigation, that the legal route has borne some measure of success.

⁸⁵ S.O. 2012, c.11 (Royal Assent: 11 September 2012). The Act was repealed 23 January 2013: http://news.ontario.ca/edu/en/2013/01/ontario-to-repeal-putting-students-first.html?utm_source=ondemand&utm_medium=email&utm_campaign=p (last accessed: 5 February 2016).

⁸⁶ Federal anti-inflation legislation had been upheld in 1976 based on the financial circumstances then faced and the temporary nature of the statute: *Re Anti-Inflation Act* [1976] 2 SCR 373.

⁸⁷ H Arthurs, 'Constitutionalizing the Right to Organize, Bargain and Strike: The Sight of One Shoulder Shrugging' (2010) 15 *Canadian Labour and Employment Law Journal* 373-387.