

ARTICLE

# IN PURSUIT OF EQUALITY: RETHINKING THE CONSTITUTIONALIZATION OF LABOUR RIGHTS AFTER *FRASER*

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CITED: (2013) 18 Appeal 81-103

## INTRODUCTION

When the Supreme Court of Canada (“the Court”) released its *Ontario (Attorney General) v Fraser* (“*Fraser*”) decision in late April 2011,<sup>1</sup> the labour movement had to reevaluate whether a legal strategy of constitutionalizing collective bargaining rights continued to make sense. For most of the twentieth century, courts consistently fettered and punished workplace organizing and militancy, engendering distrust toward the judiciary among trade unionists.<sup>2</sup> After the enactment of the *Canadian Charter of Rights and Freedoms* (“*Charter*”) in 1982,<sup>3</sup> there was some modest optimism that workers’ rights to collectively bargain and strike could find a place within the new Constitution’s listed rights and freedoms. The Court quickly extinguished such hopes in its *Labour Trilogy*, refusing to read the right to strike or bargain collectively into the ‘freedom of association’ guarantee listed under section 2(d) of the *Charter*.<sup>4</sup> However, within two decades of these decisions the Court shifted gears, with *Dunmore v Ontario (Attorney General)* (“*Dunmore*”)<sup>5</sup> and *Health Services and Support-Facilities Subsector Bargaining Association v British Columbia (Health Services)*<sup>6</sup> indicating a thawing of judicial antipathy towards labour. After three decades of diminishing membership and reduced political and economic clout, unions and their allies were understandably excited when Canada’s highest court stated that in

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

2 Eric Tucker, “The Constitutional Right to Bargain Collectively: The Ironies of Labour History in the Supreme Court of Canada,” (2008) 61 *Labour/LeTravail* 151 at 171.

3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*].

4 *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] SCR 313, 38 DLR (4th) 161 [*Alberta Reference*]; *Retail, Wholesale and Department Store Union v Saskatchewan*, [1987] 1 SCR 460, 38 DLR (4th) 277 [*RWDSU*]; *Public Service Alliance of Canada v Canada*, [1987] 1 SCR 424, 38 DLR (4th) 249. Although not directly touching upon the inclusion of labour rights within the *Charter*, *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573, 33 DLR (4th) 174 also signaled to unions that the new era of robust constitutionalism would offer little to organized labour.

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

6 *Health Services and Support—Facilities Subsector Bargaining Association v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*Health Services*].

certain circumstances the state has a positive obligation to ensure an “effective exercise” of freedom of association,<sup>7</sup> and held that collective bargaining was a right within the meaning of this freedom.<sup>8</sup> When the Court was asked in *Fraser* to elaborate on what this right constituted, however, a majority refused to tie any substantial procedural requirement to collective bargaining beyond the obligation to listen in good faith.<sup>9</sup>

While this rather hollow guarantee disappointed those who had hoped for a more robust constitutionalizing of collective bargaining rights, I believe the *Fraser* decision also provides an opportunity to reorient the focus of labour rights litigation. Envisioning the aspirations of organized labour through the lens of freedom of association has been a fruitful endeavour, but simultaneously limiting. This approach has focused on the importance of a procedural guarantee to collective bargaining, but has given less significance to the equality-advancing outcomes that workplace democracy and collective bargaining have sought to achieve. If the Court is now hesitant to use the section 2(d) freedom to describe what a collective bargaining system should look like, it may be worthwhile to gauge whether the *Charter*’s section 15 equality provision can better advance the goals of labour. In *Health Services*, the Court seems to have suggested as much, asserting that “one of the fundamental achievements of collective bargaining is to palliate the historical *inequality* between employers and employees” and that “[c]ollective bargaining [...] enhances the *Charter* value of *equality*.”<sup>10</sup>

In this paper, I will argue that unions should look more seriously to the *Charter*’s equality provision as an alternative avenue to advocate for the constitutionalization of labour rights, both because this would provide an additional line of argument to persuade the Court and because it may actually strengthen workers’ section 2(d) claims. Although the Court has refused to include employment status or class in the list of analogous grounds in its equality test, several concurrent opinions have suggested that this is not an insurmountable hurdle and that work and employment may be an essential element of a person’s identity.<sup>11</sup> The importance the Court assigned to equality concerns in collective bargaining rights litigation was most evident in the *Dunmore* decision, which was ultimately characterized as a section 2(d) case but nonetheless relied heavily on the language of equality to buttress the Ontario agricultural workers’ freedom of association claim. The Court’s understanding of equality and discrimination, however, has progressively narrowed over the years, with recent decisions refusing to deem certain treatments unequal if they fall outside of the parameters of stereotyping and prejudice.<sup>12</sup> The task of pushing the Court to better defend collective bargaining rights under section 15(1) will, therefore, require convincing the Court to embrace a broader understanding of discrimination—one which includes laws that maintain social and economic disempowerment.

This article will advance its argument in four parts. In Part I, I will examine how the Court has considered the question of collective bargaining since the emergence of the *Charter*, tracing the jurisprudence from the *Labour Trilogy* until *Fraser*, as well as the academic critiques that have emerged in response to the judiciary’s approach to the collective goals

7 *Dunmore*, *supra* note 5 at para 30.

8 *Health Services*, *supra* note 6 at para 2.

9 *Fraser*, *supra* note 1 at para 103.

10 *Health Services*, *supra* note 6 at para 84 [emphasis added].

11 Justice L’Heureux-Dubé in *Dunmore*, *supra* note 5 at para 166, acknowledged an equality breach in the Ontario government’s treatment of agricultural workers, although the Court felt that only in certain cases could an occupational category satisfy the enumerated and analogous grounds test. Justice Deschamps in *Fraser*, *supra* note 1 at para 319 gave a cautious endorsement, acknowledging that such an approach would be “more faithful to the design of the *Charter*.”

12 *Health Services*, *supra* note 6 at para 165; *Fraser*, *supra* note 1 at para 116.

and activities of workers. As mentioned above, most of these decisions dealt specifically with associational freedoms, but were nonetheless submerged in the lexicon of equality, as the Court attempted to decipher whether unions and their bargaining rights had a special institutional role within the Canadian polity. In Part II, I will examine the jurisprudence around the *Charter's* equality provision, which has fettered the labour movement's constitutional challenges by limiting the grounds on which one can claim discrimination and by narrowing what kinds of treatment amount to discrimination. Recent decisions have revealed tensions in the dominant doctrinal approaches to section 15(1), however, offering the possibility of expanding who the section protects and what type of actions are prohibited. This has prompted prominent labour law thinkers to explore whether collective bargaining rights can be pushed through section 15(1)—either directly or by strengthening workers' freedom of association claims—and to further explore the limitations of this approach. In light of this potentially broadened approach to the *Charter's* equality provision, Part III will explore the concept of equality in more depth, in the hope of demonstrating that the aspiration of substantive equality the Court has vocalized requires looking beyond stereotyping and prejudice. This will involve discussing the literature of equality among political and legal theorists over the last two decades, which has espoused visions of equality that integrate demands for the redistribution of wealth, the recognition of and respect for all citizens, and a deeper participation in societal decision-making. Lastly, Part IV and the Conclusion will attempt to show that the long history of unions and collective bargaining advancing societal equality, along with the growing number of voices recognizing collective bargaining as a fundamental human right, can persuade the Court to include the protection of collective bargaining within the realm of the *Charter's* equality provision.

## I. THE SUPREME COURT OF CANADA'S DELICATE DANCE WITH LABOUR

### A. The Birth of the *Charter* and the *Labour Trilogy*

During one of the many constitutional debates leading to the ratification of the *Canadian Charter of Rights and Freedoms*, Member of Parliament Svend Robinson introduced an amendment in the House of Commons to explicitly include “the freedom to organize and bargain collectively” within section 2(d). Solicitor General Bob Kaplan responded that the government's opinion was that those guarantees were covered within the meaning of ‘freedom of association,’ and Robinson's proposed amendment came to naught.<sup>13</sup> However, Kaplan's opinion quickly faded from the judicial debates that emerged shortly after the adoption of the *Charter*. This was hardly a surprise in light of Canada's long-held legal tradition of treating constitutional texts as ‘living trees,’ with minimal weight given to the intention of the framers.<sup>14</sup>

The year 1987 would see three cases hit the Court's docket, which dealt directly with the right to strike and collectively bargain. In its decisions, the Supreme Court made it clear that the *Charter* would “not be used in ways which threaten the economic and political status quo.”<sup>15</sup> Justice Le Dain, in a rather truncated majority decision in *Reference Re: Public Service Employee Relations Act (Alberta)* (“*Alberta Reference*”), reinforced the image of judicial antipathy toward the concerns of labour when he affirmed that the rights to collectively bargain and strike were “modern” and not “fundamental,” existing outside

13 Tucker, *supra* note 2 at 166-167.

14 *Edwards v Canada (AG)*, [1929] J.C.J. No 2, [1930] A.C. 124 at para 44.

15 Judy Fudge, “Labour, the New Constitution and Old Style Liberalism,” (1988) 13 *Queen's LJ* 61 at 109.

the notion of guarantees protected under section 2 of the *Charter*.<sup>16</sup> Justice McIntyre went further in his concurring judgment, claiming that section 2(d) was limited to associational activities that were protected independently for individuals under the *Charter*.<sup>17</sup> He contended that although collective organizations were means by which individuals further realized their rights and aspirations, the associational activities themselves were not entitled to special privileges that existed exclusively for the group.<sup>18</sup> Because the right to collectively bargain and strike is not analogous to any individual right found in the *Charter*, it could not be “implied for the group merely by the fact of association.”<sup>19</sup>

Chief Justice Dickson, dissenting, disagreed with Justices Le Dain and McIntyre, offering not only an argument for the inclusion of the right to collectively bargain and strike within the meaning of ‘freedom of association,’ but also recognizing the special role that these rights played in promoting the goals of social and economic equality. Although agreeing with Justice McIntyre that this was an instance where the protected rights would have no analogy involving individuals, he did not believe that this fact should preclude constitutional protection of an innately collective activity.<sup>20</sup> In his view, the majority and concurring opinions’ narrow understanding of section 2(d) promoted a “legalistic, ungenerous, indeed vapid” freedom, where “the joining together of persons for common purposes” was protected “but not the pursuit of the very activities for which the association was formed.”<sup>21</sup>

Although it is unclear whether Chief Justice Dickson believed this reasoning would apply to all associational activities that did not have individual comparators, he appeared to acknowledge that the rights to collectively bargain and strike were special activities, promoting substantive outcomes that made them unlike other associational undertakings. The ability to form unions, negotiate as a group, and leverage their economic might allowed workers to “overcome the inherent inequalities of bargaining power in the employment relationship.”<sup>22</sup> Workers’ associational activities addressed not only “remunerative concerns” but also “health and safety in the work place, hours of work, sexual equality and other aspects of work fundamental to the dignity and personal liberty of employees.”<sup>23</sup> Collective bargaining advanced not only more balanced power relations but also industrial democracy, helping to “introduce into the work place some of the basic features of political democracy [and] the substitution of the rule of law for the rule of men in the work place.”<sup>24</sup>

Chief Justice Dickson’s dissent notwithstanding, the *Labour Trilogy* generated significant criticism; it was seen as yet another example of the judiciary placing barriers to the organizational goals of workers.<sup>25</sup> The majority’s reasoning, in particular, demonstrated the kinds of biases that the labour movement believed were inherent in the court system. The depiction of collective bargaining as “the consequence of modern political

16 *Alberta Reference*, *supra* note 4 at para 141-144.

17 *Ibid* at para 175.

18 *Ibid* at para 155.

19 *Ibid* at para 157.

20 *Ibid* at para 89.

21 *Ibid* at para 81.

22 *Ibid* at para 23.

23 *Ibid*.

24 Dickson CJ quoting the “Woods Task Force Report on Canadian Industrial Relations,” *Ibid* at para 93.

25 “The history of how judges have deployed the economic torts and injunctions against unions in labour disputes and how they have usurped the functions of arbitrators and labour relations boards through their review powers, is now part of labour folklore[...].” Geoffrey England, “Some Thoughts on Constitutionalizing the Right to Strike,” (1988) 13 *Queens LJ* 168 at 204.

compromise,” unworthy of constitutional protection, contrasted starkly with a long history of judicial deference to “the common law relations of property and contract,” which were deemed “essential to individual freedom.”<sup>26</sup>

The Court’s preference for relationships and social practices that were vital to the operation of the market economy confirmed many commentators’ suspicions that the *Charter* would mostly prop up capitalist interests. As Geoffrey England noted at the time, the *Labour Trilogy* served to reinforce fears within the labour movement that the omnipresent individualism that informed many of the rights conferred by the *Charter* would give “free rein for [judges’] anti-union sentiments and result in the *Charter* being used to weaken labour’s collective interests.”<sup>27</sup> Similarly, Judy Fudge expressed doubt that the courts would ever break from their “historic function [...] to protect individual property rights and facilitate free contracting” and use the *Charter* to “positively affect workers.”<sup>28</sup> With these misgivings so prevalent, it came as no surprise when Canadian Labour Congress Executive Vice-President Nancy Riche, only a few months after the release of the *Labour Trilogy*, stated that “we [will] take our chances with the political leaders and the lobby efforts and the pressure we could bring to bear on getting change as it affects the trade union movement as opposed to leaving it to the courts.”<sup>29</sup>

## B. *Dunmore* Opens the Door

With the Court’s rejection of a constitutional guarantee to bargain collectively, the strength of labour rights remained subject to the political winds, with governments changing labour statutes and regulations to express their particular ideological biases. In the early 1990s, British Columbia and Ontario New Democratic governments passed legislation facilitating workers’ ability to join unions, with the latter finally giving agricultural workers an opportunity to bargain collectively.<sup>30</sup> Subsequent conservative governments, however, rolled back many of these statutory gains for labour. For example, the Mike Harris government in Ontario rescinded agricultural workers’ right to unionize.<sup>31</sup> Mixed in with the introduction of neo-liberal trade agreements that further threatened labour standards and depleted union density in the Canadian economy,<sup>32</sup> the labour movement felt compelled to reengage in a litigation strategy, hoping that the judiciary had changed its attitude on whether labour rights were implied in the *Charter*.

It is in this context that *Dunmore* was decided. The United Food and Commercial Workers Union brought a challenge against Ontario’s *Labour Relations and Employment Statute Law Amendment Act* (“*LRESLAA*”)<sup>33</sup>, which excluded agricultural workers from the province’s *Labour Relations Act* (“*LRA*”).<sup>34</sup> The *LRESLAA* had replaced the *Agricultural Labour Relations Act*,<sup>35</sup> which for one year had allowed agricultural workers to unionize and collectively bargain. Since the *Labour Trilogy* the Court had affirmed

26 Fudge, *supra* note 15 at 109.

27 England, *supra* note 25 at 204.

28 Fudge, *supra* note 15 at 110.

29 Quoted in Larry Savage, “Organized Labour and Constitutional Reform Under Mulroney,” (2007) 60 *Labour/Le Travail* 137 at 146.

30 Kevin M Burkett, “The Politicization of the Ontario Labour Relations Framework in the 1990s,” (1998) 6 *Canadian Lab & Emp LJ* 161 at 168-174

31 *Ibid* at 175-177.

32 Clyde Summers, “The Battle in Seattle: Free Trade, Labor Rights, and Societal Values,” (2001) 22 *U Pa J Int’l Econ L* 61.

33 Ontario, Bill 7, *Labour Relations and Employment Statute Law Amendment Act*, 1st Sess, 36th Leg, Ontario, 1995

34 *Dunmore*, *supra* note 5 at para 1.

35 *Agricultural Labour Relations Act*, RSO 1994, c 6.

Justice McIntyre's position, as exemplified by Justice Sopinka's opinion in *Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner)* 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," but rather only protects "the exercise in association of the constitutional rights and freedoms of individuals [...] and] the lawful rights of individuals."<sup>36</sup> In *Dunmore*, however, Justice Bastarache's majority was not prepared to accept this limitation, holding that state prohibition of group activities that are not necessarily associational exertions of individual rights and freedoms could amount to a violation of section 2(d).<sup>37</sup> He noted that:

The collective is "qualitatively" distinct from the individual: individuals associate not simply because there is strength in numbers, but because communities can embody objectives that individuals cannot [...] to limit s. 2(d) to activities that are performed by individuals would, in my view, render futile these fundamental initiatives.<sup>38</sup>

Specifically, workers' associational activities and collective interests were not identical to those of individual workers. If the *Charter* only protected collective activities that were also lawful for the association's individual members, the association's capacity to function would be effectively undermined.<sup>39</sup>

In addition to rejecting the collective-versus-individual dichotomy, Justice Bastarache also affirmed that in certain circumstances the state had an obligation to take positive actions "to make a fundamental [*Charter*] freedom meaningful."<sup>40</sup> Although agricultural workers' employment circumstances were ostensibly private, that did not make their claim impervious to *Charter* scrutiny. The heightened vulnerability of agricultural workers made them "substantially incapable of exercising their fundamental freedom to organize without [a] protective regime."<sup>41</sup> The provincial government's decision to exclude agricultural workers from the *LRA* effectively removed their "only available channel for associational activity."<sup>42</sup> In this context, the government turning a blind eye to the private circumstances that impeded agricultural workers' ability to associate amounted to "an affirmative interference with the effective exercise of a protected freedom."<sup>43</sup> As such, the Court required the Ontario government to enact protective legislation that made section 2(d) rights meaningful to agricultural workers.

Although Justice Bastarache cautioned that the right to associate did not include the right to collectively bargain,<sup>44</sup> his decision nonetheless gave considerable weight to the special role that unions play in promoting equality in the work place and society as a whole. He acknowledged that trade unions "advocate on behalf of disadvantaged groups [...] present[ing] views on fair industrial policy" and play a function that is vital to the promotion of "a democratic market-economy."<sup>45</sup> The exclusion of agricultural workers from the *LRA* was not simply an infringement of associational rights, but was an express

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36 *Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner)*, [1990] 2 SCR 367, 72 DLR (4th) 1 at para 73.

37 *Dunmore*, *supra* note 5 at para 16.

38 *Ibid.*

39 *Ibid* at para 17.

40 *Ibid* at para 23.

41 *Ibid* at para 35.

42 *Ibid* at para 44.

43 *Ibid* at para 22.

44 *Ibid* at para 42.

45 *Ibid* at para 38.

suggestion that “workplace democracy had no place in the agricultural sector.”<sup>46</sup> Justice L’Heureux-Dubé’s concurring judgment struck a similar tone, stating that “[caught] in the labyrinth of modern industrialism and dwarfed by the size of corporate enterprise, [the worker] can attain freedom and dignity only by cooperation with others of his group.”<sup>47</sup> *Dunmore*, therefore, was not simply an affirmation that collective associational activities merit the same rights as the already-protected individual freedoms. Rather, the Court embraced this expanded interpretation of freedom of association because of the special character and goals associated with collective bargaining—be it leveling the unbalanced bargaining power between employer and employee or furthering democratic control of the workplace.

### C. From *Health Services* to *Fraser*: Pushing the Envelope and Closing the Door

While *Dunmore* gave pause to those who had been pessimistic about courts granting fundamental status to the rights of workers,<sup>48</sup> Justice Bastarache nonetheless hesitated to extend the meaning of section 2(d) too far. It took the British Columbia government’s hasty attempts to unilaterally restructure the collective agreements of provincial health care workers in 2002<sup>49</sup> to finally convince the Court to include the right to collectively bargain within the meaning of ‘freedom of association.’<sup>50</sup> Chief Justice McLachlin and Justice LeBel’s majority decision in *Health Services* represented a clean break from the *Labour Trilogy*. For them, section 2(d) guaranteed workers a “process through which [their associational] goals are pursued,” including a right to “unite, to present demands [...] collectively and to engage in discussions in an attempt to achieve workplace goals.”<sup>51</sup> While insisting that such guarantees do not favour any particular model of labour relations<sup>52</sup> nor “dictate the content of any particular [collective] agreement,”<sup>53</sup> Chief Justice McLachlin and Justice LeBel determined that they do impose on workers and employers a duty to bargain in good faith. Such a duty requires “meaningful dialogue” between the parties, the exchange and explanation of their respective positions, and “a reasonable effort to arrive at an acceptable contract.”<sup>54</sup>

Once again, the goal of social and economic equality was apparent throughout the decision. Chief Justice McLachlin and Justice LeBel stressed that the ability to influence workplace conditions through collective bargaining “enhances the human dignity, liberty and autonomy of workers” by giving them “control over a major aspect of their lives.”<sup>55</sup> They went as far as crediting collective bargaining for enhancing the values of equality that underlie the *Charter* by reducing the “historical inequality between employers and employees.”<sup>56</sup> One could come away from reading this decision believing that the section 2(d) rights the Court granted to trade unions, including the right to collective bargaining, are as tied to the concept of equality as they are to that of freedom of association.

46 *Ibid* at para 46.

47 *Ibid* at para 85, quoting Senator Wagner’s justification of the original collective bargaining regime in the United States.

48 See e.g. Judy Fudge, “Labour is Not a Commodity: The Supreme Court of Canada and the Freedom of Association,” (2004) 67 Sask L Rev 425 at 425.

49 *Health Services*, *supra* note 6 at para 7-12.

50 *Ibid* at para 2.

51 *Ibid* at para 89.

52 *Ibid* at para 92.

53 *Ibid* at para 99.

54 *Ibid* at para 101.

55 *Ibid* at para 82.

56 *Ibid* at para 84.

It appeared that *Health Services* could usher in an era of “coordinated and proactive litigation strategy to vindicate labour’s collective rights.”<sup>57</sup> Even Judy Fudge, once skeptical that the labour movement could use the *Charter* for its own ends, acknowledged the symbolic importance of marking collective bargaining rights as “worthy of constitutional protection” and providing “a halo of much needed legitimacy to one of organized labour’s core activities.”<sup>58</sup> Others remained quite cautious, however, unconvinced that *Health Services* marked a radical shift in labour rights litigation. Eric Tucker, for example, believed that the declining political and economic strength of unions allowed the court to embrace collective bargaining, arguing that while “[a] strong labour movement was feared [...] a weak one can safely be presented as a vehicle for advancing democracy and equality.”<sup>59</sup>

Despite this caution, the labour movement hoped that the Court in *Fraser* would add more substantive content to its definition of collective bargaining. Once again, Ontario agricultural workers were challenging legislation that outlined their workplace rights—in this case the *Agricultural Employees Protection Act* (“*AEPA*”)<sup>60</sup> that had replaced the *LRESLAA*. The new legislation gave farm workers greater protections in their efforts to form associations and required employers to listen to employee representations. However, it continued to exclude them from the *LRA*’s collective bargaining regime.<sup>61</sup> Chief Justice McLachlin and Justice LeBel, speaking for the majority, refused to conclude that the legislation had “substantially interfere[d] with the ability to achieve workplace goals through collective actions”<sup>62</sup> and held that the collective bargaining rights read into section 2(d) of the *Charter* in *Health Services* went no further than requiring parties to negotiate in good faith.<sup>63</sup> In overturning the Ontario Court of Appeal’s decision, the majority stated:

*Health Services* does not support [...] that legislatures are constitutionally required [...] to enact laws that set up a uniform model of labour relations imposing a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements [...] *what it protected is associational activity, not a particular process or result.*<sup>64</sup>

Unlike in previous decisions, the role of collective bargaining in advancing the goals of industrial democracy and social equality is starkly absent from the majority opinion in *Fraser*. Justice Rothstein’s concurring opinion, which sought to reverse *Health Services*, questioned whether it was ever prudent to consider such matters within the context of section 2(d). He cautioned the Court against granting normative importance to the particular activities of trade unions,<sup>65</sup> or granting a particular right because it allowed individuals to “do a particular activity more effectively.”<sup>66</sup> Justice Deschamps also expressed concerns about how expansive the meaning of *Health Services* had become, although she did not believe these matters were necessarily outside the parameters of *Charter* litigation. Rather, she believed that the goal of economic equality, so central to

57 Judy Fudge, “The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the *Health Services* and *Support* case in Canada and Beyond,” 37:1 *Indus LJ* 25 at 27.

58 *Ibid* at 39.

59 Tucker, *supra* note 2 at 172.

60 *Agricultural Employees Protection Act*, RSO 2002, c 16.

61 *Fraser*, *supra* note 1 at para 6.

62 *Ibid* at para 2.

63 *Ibid* at para 37.

64 *Ibid* at para 47 [emphasis added].

65 *Ibid* at para 214.

66 *Ibid* at para 202.



the recent jurisprudence on labour rights, “should not be accomplished by conflating freedom of association with the right to equality.”<sup>67</sup>

As Judy Fudge argues, *Fraser* marked the end of the judiciary’s incremental expansion of labour rights through the *Charter* guarantee of freedom of association,<sup>68</sup> raising the threshold for finding violations of section 2(d) and making the meaning of a duty to bargain in good faith, established in *Health Services*, substantially less meaningful.<sup>69</sup> The majority’s failure to even comment on the significant jurisprudence related to statutory duties to bargain points to a Court not wanting to impose any sort of concrete obligations onto the bargaining process.<sup>70</sup> The Court could have attempted to identify particular features or mechanics necessary to guarantee meaningful collective bargaining,<sup>71</sup> and as Justice Abella noted in her lone dissent, doing so would not have impeded future innovation to the Canadian labour relations model.<sup>72</sup> The preference of the Court, however, was to delay this discussion for another day.

Whether that discussion will happen under section 2(d), however, is doubtful. The composition of the Court is quickly changing, and Justice Rothstein’s desire to return to a *Labour Trilogy* version of section 2(d), where only associational expressions of individual rights are protected, may gain further supporters on the bench.<sup>73</sup> It appears unlikely that future decisions will give so expansive a reading of “freedom of association” as to include detailed collective bargaining rights. As such, it may be a prudent course for the labour movement to pursue the goals of greater industrial democracy and distributive justice through the *Charter*’s equality provisions.

## II. AN AWKWARD FIT: SECTION 15(1) AND LABOUR RIGHTS

The Court has stressed on numerous occasions that the equality provision embodied in section 15(1) of the *Charter* has at its heart the promotion of substantive equality, meaning its goal is “not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society [...]”<sup>74</sup> Chief Justice McLachlin and Justice Abella further reinforced this in *R v Kapp*, stating that “equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings deserving of concern, respect and consideration.”<sup>75</sup>

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67 *Ibid* at para 319.

68 Judy Fudge, “Constitutional Rights, Collective Bargaining and the Supreme Court of Canada: Retreat and Reversal in the *Fraser* Case,” 41:1 *Indus LJ* 1 at 15.

69 *Ibid* at 23.

70 Beth Bilson, “Developments in Labour Law: The 2010-2011 Term—Was *Health Services* a Mistake? The Supreme Court Decision in *Fraser v Ontario*,” (2011) 55 *SCLR* (2d) 285 at 295-296.

71 Fudge, *supra* note 68 at 25.

72 *Fraser*, *supra* note 1 at para 351.

73 Kirk Makin, “The coming conservative court: Harper to reshape the judiciary,” *The Globe and Mail* (13 May 2011). Online: The Globe and Mail < <http://www.theglobeandmail.com/news/politics/the-coming-conservative-court-harper-to-reshape-judiciary/article595398/>>.

74 *Eaton v Brant County Board of Education*, [1997] 1 SCR 241 at para 66.

75 *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 at para 15, quoting *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1 at 171 [“*Andrews*”].

### A. Section 15(1) and 2(d)'s Reluctant Dance

Despite these pronouncements and the above-mentioned affirmations that collective bargaining advances goals similar to those underlying section 15(1), the Court has hesitated to seriously consider whether substantive equality requires the government to enact labour rights' legislation. In *Delisle v Canada (Deputy Attorney General)*, Justice Bastarache, writing for the majority, took great pains to show that sections 2(d) and 15(1) operated very differently and should not inform each other when considering the statutory exclusion of a group from labour legislation.<sup>76</sup> Although the Royal Canadian Mounted Police officers' appeal was ultimately rejected in any case, the Court believed that their exclusion from the *Public Service Staff Relations Act* was best dealt with through the *Charter's* equality provisions, which "may require the government to extend the special status, benefit or protection it afforded to the members of one group to another group if the exclusion is discriminatory and is based on an enumerated or analogous ground of discrimination."<sup>77</sup> The Court determined that issues related to "inclusion in a statutory regime" were ill-suited to a section 2(d) analysis, since this provision requires "only that the state not interfere" with a protected activity.<sup>78</sup>

In *Dunmore*, Justice Bastarache appeared to have shifted from his earlier position when evaluating the exclusion of agricultural workers from Ontario's labour laws. Although he refused to consider the agricultural workers' section 15(1) claim, stating that an equality analysis would not alter the remedy he ultimately decided upon,<sup>79</sup> it is impossible to divorce the section 2(d) analysis Justice Bastarache relied on from the underlying equality concerns the agricultural workers had put forward to the Court. While the majority may have not felt, as Justice L'Heureux-Dubé did in her concurrent judgment, that the "effect of the distinction [in the legislation] is to devalue and marginalize" agricultural workers,<sup>80</sup> it did stress that the under-inclusiveness of Ontario's labour laws infringed on the claimants' "empowerment and participation in both the workplace and society at large."<sup>81</sup> While not formally rejecting Justice Bastarache's previous insistence that sections 2(d) and 15(1) require discrete and unrelated approaches, the overarching implication of *Dunmore* is that unequal access to associational rights fettered agricultural workers' ability to participate in Canadian society.<sup>82</sup> Issues traditionally falling within the domain of the *Charter's* equality provision had seeped into the Court's approach to freedom of association.

In *Health Services*, however, the Court reverted to a much more cursory analysis of a group's equality concerns when their section 15(1) claim intersected with collective bargaining issues. Even though this case involved a provincial government targeting health care workers, a traditionally female-dominated occupation,<sup>83</sup> Chief Justice McLachlin and Justice LeBel ignored the gendered character of the workforce and dismissed the section 15(1) claim on the basis that labour legislation often treated different sections of the labour force uniquely and such treatment did not "get a discrimination analysis off the ground."<sup>84</sup> The majority in *Fraser* came to a similar conclusion, affirming that a formal legislative distinction did not necessarily trigger section 15(1) unless it amounted to "substantive

76 *Delisle v Canada (Deputy AG)*, [1999] 2 SCR 989, 176 DLR (4th) 513

77 *Ibid* at para 25.

78 *Ibid*.

79 *Dunmore*, *supra* note 5 at para 2.

80 *Ibid* at para 168.

81 *Ibid* at para 11.

82 *Ibid* at para 39-42.

83 Judy Fudge, "Conceptualizing Collective Bargaining under the Charter: The Enduring Problem of Substantive Equality," (2008) 42 SCLR (2d) at 234.

84 *Health Services*, *supra* note 6 at para 165.

discrimination that impacts on individuals stereotypically or in ways that reinforce existing prejudice and disadvantage.”<sup>85</sup> They arrived at this conclusion without seriously considering the significance of evidence that agricultural workers were “heavily drawn from migrant and immigrant populations,” or assessing whether exclusion from legislative protection would further marginalize the status of these workers in Canadian society.<sup>86</sup>

The Court’s reasoning on this matter is problematic on a number of fronts. Firstly, it seems to be a retreat from the more robust pronouncements the Court has made regarding substantive equality. In both *Health Services* and *Fraser*, the majority appeared to imply that section 15(1)’s exclusive purpose is to remedy incidents of stereotype and prejudice<sup>87</sup> rather than, as the Chief Justice has herself suggested, “extend[ing] the guarantee of equality to matters beyond the scope of traditional anti-discrimination law.”<sup>88</sup> Secondly, despite ample evidence that the differentiation in the impugned legislation in these cases adversely impacted employees from traditionally marginalized groups, the Court demonstrated significant discomfort dealing with issues of intersectionality, and was unwilling to affirm a claim of discrimination even though a significant portion of the targeted group of workers shared an identity enumerated in section 15(1). Lastly, the majority has repeatedly and stubbornly refused to classify differential treatment of particular sectors of the labour force as discriminatory. Despite repeatedly stating the importance that work plays in the life of individuals, the Court has not considered one’s employment or class as something significantly essential to the human identity so as to make it worth protecting from discriminatory legislation.

## B. The Journey of Section 15(1)

Clearly something is amiss in how the doctrinal tests for section 15(1) handle what is arguably a major source of societal inequality. The Court’s initial approach to equality claims was quite broad, with Justice McIntyre asserting in *Andrews v Law Society of British Columbia* that any “distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge [of] discrimination.”<sup>89</sup> Although he was careful to note that the list of grounds under which one could claim discrimination were non-exhaustive, his decision emphasized that the enumerated categories were the “most common and probably the most socially destructive and historically practiced bases of discrimination.”<sup>90</sup> While the Court has recognized additional analogous grounds to those listed,<sup>91</sup> it has refused to extend such protection to class or occupational status. As Justice Bastarache stated in *Delisle*, analogizing professional status or employment to recognized groups ignores the mutable characteristic of employment “in a context of labour market flexibility.”<sup>92</sup>

When the Court revisited section 15(1) in *Law v Canada (Minister of Employment and Immigration)*, it proposed a higher threshold to demonstrate a breach of the *Charter*’s equality provision. *Law*’s approach involved locating a relevant comparator to the

85 *Fraser*, *supra* note 1 at para 116.

86 *Ibid* at para 348.

87 Fudge, *supra* note 83 at 216.

88 Beverly McLachlin, “Equality: The Most Difficult Right” (2001)14 SCLR (2d) 17 at 24.

89 *Andrews*, *supra* note 57 at para 19.

90 *Ibid* at para 20.

91 Sexual orientation in *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609, marital status in *Miron v Trudel*, [1995] 2 SCR 418, 124 DLR (4th) 693, citizenship in *Andrews*, *supra* note 84 and Aboriginals living off reserve in *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203, 173 DLR (4th) 1 [*Corbiere*].

92 *Delisle*, *supra* note 70 at para 44.

claimant<sup>93</sup> and demonstrating certain contextual factors to substantiate the claim.<sup>94</sup> Shifting away from the more inclusive *Andrews* criteria, the Court now felt that distinct treatment, based on an enumerated or analogous ground, was not sufficient to claim a violation of equality in a substantive sense unless the differentiation infringed upon an individual's human dignity.<sup>95</sup> For legislation to negatively impact one's human dignity it had to:

[impose] a burden upon or [withhold] a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society[...].<sup>96</sup>

In effect, *Law* narrowed legitimate section 15(1) claims to legislation or government action that was “premised upon a prejudicial stereotype” or that failed to “account [for] the social disadvantage of an individual or group.”<sup>97</sup> Legislative differentiation that fell outside of these categories, on the other hand, would be difficult to challenge.

Despite making it more difficult for claimants to prove discrimination, *Law* offered a glimmer of hope for the consideration of labour rights within the *Charter's* equality provision. Justice Iacobucci, for the Court, appeared willing to question the enumerated or analogous grounds requirement, stating that a “claimant is not required to establish membership in a sociologically recognized group in order to be successful.”<sup>98</sup> Despite the Court's reluctance to include class or employment as an analogous ground, it was now fathomable that a particular group of workers could show discrimination if legislative differential treatment was sufficiently egregious. In addition, Justice Iacobucci's strong emphasis on human dignity spoke directly to the attributes the Court has repeatedly credited to collective bargaining. If the purpose of section 15(1) is rooted in the “promotion of human dignity,”<sup>99</sup> legislation that denies a group access to an activity that advances those ends could be seen as violating equality guarantees. As it did in *Fraser*, however, the Court may again ignore such potential reasoning on the grounds that the infringement does not impact human dignity in a way that speaks to stereotyping or prejudice.

More recent decisions have offered uneven encouragement for advocates of the inclusion of labour rights within section 15(1). In *Kapp*, Chief Justice McLachlin and Justice Abella maintained that “human dignity is an essential value underlying the s. 15 equality guarantee,”<sup>100</sup> but also noted that as a legal test it had “become confusing and difficult to apply” and “an additional burden on equality claimants.”<sup>101</sup> Although interpreting equality through the lens of human dignity “has tended to emphasize self-worth and integrity [at the expense of] material and systemic factors,”<sup>102</sup> making human dignity a non-testable facet of an equality analysis could reduce its weight and thereby undermine

93 *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1 at para 56-58.

94 *Ibid* at para 62-87.

95 *Ibid* at para 53.

96 *Ibid* at para 88.

97 *Ibid* at para 80.

98 *Ibid* at para 66.

99 *Ibid* at para 47.

100 *Kapp*, *supra* note 75 at para 21.

101 *Ibid* at para 22.

102 Fudge, *supra* note 83 at 231.

the cause of labour rights litigation. After all, one of the strongest arguments encouraging the Court to embrace such litigation is labour's role in promoting human dignity.

In *Withler v Canada (Attorney General)*, Chief Justice McLachlin and Justice Abella maintained *Law's* narrow conception of inequality, which requires successful section 15(1) claimants to demonstrate that an impugned piece of legislation “impose[d] disadvantage by stereotyping members of the group.”<sup>103</sup> However, they also advocated a more flexible test that did not rely on identifying a single comparator group in order to prove discrimination. Chief Justice McLachlin and Justice Abella pointed out that “discrimination may not be discernible with reference to just one prohibited ground... but only in reference to a conflux of factors.”<sup>104</sup> As a result of removing the need “to pinpoint a particular group that precisely corresponds to the claimant group” the Court would have the “flexibility required to accommodate claims based on intersecting grounds of discrimination.”<sup>105</sup> This development could certainly assist labour rights cases that involve workforces comprised of marginalized communities, though the Court's failure to even attempt applying this approach in *Fraser*—which was released only one month after *Withler*—may caution the labour movement against being too optimistic.

### C. What's Work Got To Do With It? Fitting Labour Rights Into The Charter's Equality Provisions

While the Court has chosen not to use the current doctrinal test for section 15(1) to process labour rights, several concurring opinions have offered insights that may be fruitful for future litigation. While the Court has excluded one's job as a characteristic on par with the enumerated grounds, in *Slaight Communications Ltd v Davidson* Chief Justice Dickson's majority decision described “a person's employment [as] an essential component of his or her sense of identity.”<sup>106</sup> In *Fraser*, Justice Deschamps' concurring opinion echoed this sentiment, stating that “opening the door to the recognition of more analogous grounds” was a prudent approach, even if it would “entail a sea change in the interpretation of s. 15.”<sup>107</sup> Justice L'Heureux-Dubé had previously taken similar positions in *Delisle* and *Dunmore*, contending that “occupation and working life are often important sources of personal identity.”<sup>108</sup> She argued that in circumstances where the workers in question had limited employment mobility and could change their occupational status “only at great cost, if at all,” including employment status as an analogous ground would promote the overarching goals of section 15(1).<sup>109</sup> If the Court had embraced this approach in *Fraser* and *Health Services*, the workers in those cases could have argued more effectively that the impugned legislation's differential treatment of particular sectors of the labour force triggered the *Charter's* equality provision.

Despite the Court's reticence on the matter, the above pronouncements and the approach the Court adopted in *Dunmore* prompted prominent labour law theorists to explore the possibility of advancing collective bargaining rights through the *Charter's* equality provision. Nitya Iyer, writing after *Dunmore* but prior to *Health Services*, noted that the Court consistently shied away from equality claims that “challenged the distribution of economic resources and benefits,” preferring to only wield the sword of section 15(1)

103 *Withler v Canada (AG)*, 2011 SCC 12, [2011] 1 SCR 396 at para 36.

104 *Ibid* at para 58.

105 *Ibid* at para 63.

106 *Slaight Communications Ltd v Davidson*, [1989] 1 SCR 1038, 59 DLR (4th) 416 at para 20.

107 *Fraser*, *supra* note 1 at para 319.

108 *Delisle*, *supra* note 76 at para 8.

109 *Dunmore*, *supra* note 5 at para 169, citing *Corbiere*, *supra* note 91 at para 14.

to advance the “egalitarian liberal vision of equality as ‘equality of opportunity.’”<sup>110</sup> Leading up to *Dunmore*, however, many commentators had predicted that a successful result for the farmworkers would be rooted in their section 15(1) claim, which was conveniently situated within the Court’s comfort zone, since they “were seeking equality of opportunity: they wanted access to the same ground rules in order to compete for economic gain, not compensation for being unable to compete.”<sup>111</sup> Iyer and others were surprised when Justice Bastarache, despite his previous cautionary tone in *Delisle*, wrote a decision that interwove the farmworkers’ equality claim into his section 2(d) analysis.

Despite Justice Bastarache’s approach in *Dunmore*, Iyer believes that the choice to deal with the equality claim through section 2(d) illustrates an inherent limitation in pursuing collective bargaining claims through the *Charter*’s equality provision. Specifically, she argues that using section 15(1) “would [have been] more expansive of the reach of the *Charter* into the economic realm than applying s. 2(d)” and may have resulted in the Court limiting the consequences of its ruling through its section 1 analysis.<sup>112</sup> Iyer believes that the remedial choices available for a section 15(1) claim may have resulted in agricultural workers gaining full access to the Ontario *Labour Relations Act*’s collective bargaining system, which the Court may have deemed too broad an intrusion into the legislative sphere.<sup>113</sup> In contrast, section 2(d) provided a “narrower way to hold in favour of the claimants. All that the legislature had to be ordered to do was to give farm workers enough statutory rights to guarantee their freedom of association.”<sup>114</sup> The more restrained remedial choices available to the Court under a successful section 2(d) claim may have encouraged Justice Bastarache to steer clear of section 15(1), even when the facts of the case favoured an equality analysis. The Court’s approach in *Health Services* and *Fraser*, which eschewed even a modicum of acknowledgement of the equality issues at play in those cases, seems to strengthen Iyer’s thesis.

In contrast to Iyer’s position, Fay Faraday maintains a cautious optimism about advancing collective bargaining rights via the *Charter*’s equality provision, even after the *Fraser* decision. She harshly criticizes the direction of the Court during its second foray into the plight of agricultural workers, arguing that “[t]he courts’ failure to engage deeply with the equality argument yields an impoverished and decontextualized analysis which allows the differential and prejudicial treatment to persist.”<sup>115</sup> While Justice Bastarache’s decision in *Dunmore* “recognized that the [impugned] law can operate in a way that ‘substantially orchestrates, encourages and sustains’” the farmworkers’ disempowerment, Faraday believes that the majority in *Fraser* “located [the] vulnerability in the workers themselves rather than understanding it as the end product of a regulatory response to the social relationship of farm labour.”<sup>116</sup> Even though *Dunmore* was ultimately decided through the lens of freedom of association, the Court’s willingness to engage with

110 Nitya Iyer, “Disadvantaged Unions: The Merging of ss. 2(d) and 15(1) of the *Charter*,” 12 Canadian Lab & Emp LJ 1 (2005) at 2-3.

111 *Ibid* at 13.

112 *Ibid* at 15.

113 As such, Iyer argues “viewed from the perspective of ensuring that the *Charter*’s application in the economic sphere does not wander out of the domain of equality of opportunity and interfere with outcomes, this remedial concern makes sense of why the Court used s. 2(d) rather than s. 15(1) to find for the claimants in *Dunmore*. If it is important to the legislature to maintain the benefit in question, the impact of upholding of a claim under s. 15(1) in respect of an underinclusive benefit will always be greater than that of upholding the same claim under freedom of association.” *Ibid* at 16-17.

114 *Ibid* at 17.

115 Fay Faraday, “Envisioning Equality: Analogous Grounds and Farm Workers’ Experience of Discrimination,” in Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Press, 2012) 109 at 111.

116 *Ibid* at 126-127.

considerations of equality encouraged a more accurate assessment of the evidence than *Fraser*, and subsequently a better appreciation of the law's role in causing the inequality in bargaining rights that negatively impacted farmworkers.

Despite this trend, Faraday maintains that a section 15(1) analysis “addresses most directly the political and socio-economic dynamics of disempowerment” that exclusionary collective bargaining regimes create.<sup>117</sup> Faraday notes the judicial comments suggesting that employment could be considered an analogous ground, and pushes this idea further, emphasizing that “work is both one's calling card and a key mechanism for distributing social, economic and legal power.”<sup>118</sup> Since the Court has recognized that work relationships are “inherently one[s] of unequal power”<sup>119</sup> and that collective bargaining is a mechanism through which workers can “moderate...the imbalance of power at work,” legislation that denies workers the ability to bargain collectively “deprives them of a remedy for their pre-existing disadvantage.”<sup>120</sup> As such, legislation that denies a group of workers access to true collective bargaining touches directly upon the type of state action that section 15(1) aims to eradicate.

As helpful as Iyer's and Faraday's arguments are in understanding the potential and limits of approaching collective bargaining rights through the *Charter's* equality provision, their analysis does not completely settle the matter. The remedial options available under section 2(d) may make it a more palatable approach for the Court, but the contrasting results in *Dunmore* and *Fraser* also highlight how the Court's receptiveness (or lack thereof) to robust section 15(1) arguments can strengthen or weaken workers' freedom of association claims. Similarly, Faraday's reasoning runs into the problem that the economic equality she advocates has not been embraced as “an equality right for the purposes of s. 15 of the *Charter*.”<sup>121</sup> To successfully further labour rights through section 15(1), advocates will have to prod the Court to embrace a more robust concept of equality than the jurisprudence has demonstrated up to this point.

### III. RETHINKING EQUALITY AND THE CHARTER

As Sandra Fredman has noted, “distributive issues have always been problematic for courts.”<sup>122</sup> As such, constitutional equality guarantees have tended to focus on status-based inequalities, leaving socio-economic inequalities to the purview of the welfare state.<sup>123</sup> The Canadian equality jurisprudence has followed suit, limiting the concept of “substantive equality to identity-based recognition issues [...] channel[ing] redistributive claims outside of the *Charter's* guarantee of equality.”<sup>124</sup> While Chief Justice McLachlin has stated that the “equal benefit of the law and equal protection from the law's burden [can] extend the guarantee of equality to matters beyond the scope of traditional antidiscrimination law,”<sup>125</sup> the Court has repeatedly foreclosed the possibility of considering equality beyond the lens of stereotyping and prejudice. Even attempts to “reformulate socio-economic inequality as a status-based wrong” have met unsympathetic

117 *Ibid* at 111.

118 *Ibid* at 132.

119 *Ibid* at 133.

120 *Ibid* at 136.

121 *Fraser*, *supra* note 1 at para 315.

122 Sandra Fredman, “Redistribution and Recognition: Reconciling Inequalities,” (2007) 23 SAJHR 214 at 215.

123 *Ibid* at 214.

124 Judy Fudge, “Substantive Equality, The Supreme Court of Canada, and the Limits of Redistribution” (2007) 23 SAJHR 235 at 241-242.

125 McLachlin, *supra* note 88 at 24.

ears,<sup>126</sup> as exhibited in the Court’s dismissive approach to intersectional equality claims in *Health Services* and *Fraser*. Instead of adhering to its once-stated goal of substantive equality, the Court has embraced a guiding philosophy of ‘maximalist equality of opportunity’, under which legislative discrimination based on the personal attributes of an individual is prohibited but persistent structural inequalities are tolerated.<sup>127</sup> For labour rights to find a home in a section 15(1) analysis, the Court will have to accept a more robust version of equality than this—one that embraces as essential the goals of redistribution, recognition, and participation.

### A. Three Pillars of Equality

Despite the Court’s reluctance to embrace distributive justice in the section 15 jurisprudence, many political and judicial theorists of equality have long advocated for a more egalitarian distribution of society’s material wealth. In *A Theory of Justice*, John Rawls noted that his two principles of justice<sup>128</sup> were a subset of a broader concept of justice that “[a]ll social values—liberty and opportunity, income and wealth, and the bases of self-respect—are to be *distributed equally* unless an unequal distribution of any, or all, of these values is to everyone’s advantage.”<sup>129</sup> The more conservative legal theorist Ronald Dworkin has also articulated that an equal distribution of resources, at least in the initial stage of an individual’s life, is a vital element of a just society.<sup>130</sup> In her landmark essay “What Is the Point of Equality?,” Elizabeth Anderson posits that in order to “create a community in which people stand in relations of equality to others,”<sup>131</sup> individuals must have access to the “personal, material and social resources [...] necessary for functioning as an equal citizen in a democratic state,”<sup>132</sup> including “effective access to the means of sustaining one’s biological existence [...] and access to the basic conditions of human agency.”<sup>133</sup> Every significant assessment of equality or egalitarian justice has attempted to address what the Court has refused to—the issue of redistribution of resources. Although the Court has highlighted the underlying goal for section 15(1) as “protecting equal membership and full participation in Canadian society,”<sup>134</sup> it is difficult to imagine accomplishing such a goal while refusing to consider redistributive outcomes.

While a more equal distribution of wealth is certainly an essential element, this does not displace the importance of respect and recognition. Status-based inequalities, such as disparagement or stereotyping of disadvantaged groups because of their identity, are not reducible to merely distributive concerns; rather, they are intimately tied to what Nancy Fraser calls ‘injuries of misrecognition’.<sup>135</sup> A common remedy sought by oppressed groups in response to such ‘injuries of misrecognition’ is to “construct a collective identity that

126 Fredman, *supra* note 122 at 217.

127 Alex Callinicos, *Equality* (Cambridge: Polity Press, 2000) at 38.

128 Rawls’ theory of ‘justice as fairness’ was divided into two main principles, the first being that each person should have equal right to an extensive system of basic liberties and the second being that social and economic inequalities should be arranged so that they are “to the greatest benefit of the least advantaged” and “attached to offices and positions open to all under conditions of fair equality and opportunity.” *Ibid* at 45.

129 John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1999) at 62 [emphasis added].

130 Callinicos, *supra* note 127 at p 59-60.

131 Elizabeth S Anderson, “What is the Point of Equality?” (January 1999) 109 *Ethics* 287 at 289.

132 *Ibid* at 316.

133 *Ibid* at 317.

134 *Gosselin v Quebec (AG)*, 2002 SCC 84, [2002] 4 SCR 429 at para 23.

135 Nancy Fraser, “From Redistribution to Recognition? Dilemmas of justice in a ‘postsocialist’ age,” in Steven Seidman & Jeffrey C Alexander, eds, *The New Social Theory Reader: Contemporary Debates* (London: Routledge, 2001) 285 at 286.



[...] gives a new and positive evaluation of the difference on the basis of which they suffer discrimination.”<sup>136</sup> Substantive equality appears to align with such a goal, encouraging the “promot[ion of] respect for the equal dignity and worth for all, [including] the positive affirmation of [...] differing identities.”<sup>137</sup> The Court has acknowledged that section 15(1) has this aim, stating that equality “entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.”<sup>138</sup> While this positive recognition is essential to any satisfactory understanding of equality, it cannot be the end of the matter. Fredman correctly points out that groups subject to ‘injuries of misrecognition’ suffer disproportionately from economic inequality. Any “understandings of inequality which focus *only* on individual prejudice or misrecognition [will leave] structures of inequality [...] intact” if they do not concern themselves with issues of wealth redistribution.<sup>139</sup>

A satisfactory theory of equality must also embrace the advancement of agency and participation for its redistributive and recognitive goals to become meaningful and sustainable. While the notion of substantive equality under section 15(1) has mostly focused on outcomes, be they material or symbolic, much scholarship has highlighted the ‘procedural dimension’ of equality. Rawls, for example, correlated the goal of political liberty to the existence of equal rights of political participation, including the equal opportunity to attain positions of political authority, the means to become informed about political issues, and the ability to propose alternatives to the political agenda.<sup>140</sup> Although these requirements fit well with most conceptions of modern liberal democracy, more recent works have advocated for a much deeper notion of participation. Anderson, for example, argues that equal citizenship is not satisfied solely through political agency but also through enabling people to effectively “participate in the various activities of civil society [...] including participation in the economy [and] freedom of association.”<sup>141</sup> More recently, Colleen Sheppard has supported a vision of ‘inclusive equality’ that demands “more democratic and participatory structures of power and decision-making in the institutional contexts of daily life.”<sup>142</sup> There is a growing consensus that equality involves not only the redistribution of material wealth and recognition, but also the redistribution of access to society’s decision-making processes.

The failure of the Court to embrace such a broad concept of equality, however, is not the fault of the wording of section 15(1) nor of the intention behind the provision. The debates and discussions surrounding the construction of the provision, as well as the Court’s early statements, suggest that the meaning of ‘discrimination’ under section 15(1) was much broader than subsequently applied by the Court.<sup>143</sup> The Court’s narrow application of the provision to discrimination that amounts to stereotype and prejudice, in fact, has done a great disservice to those seeking to use section 15(1) to quash a wide variety of unequal treatments that fall outside of the Court’s equality rubric. As Sophia Moreau argues, “depriving some of a benefit available to others, in circumstances where

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136 Callinicos, *supra* note 127 at 80.

137 Fredman, *supra* note 122 at 225-226.

138 Kapp, *supra* note 75 at para 15.

139 Fredman, *supra* note 122 at 218 [emphasis added].

140 Rawls, *supra* note 129 at 197.

141 Anderson, *supra* note 131 at 317-318.

142 Colleen Sheppard, *Inclusive Equality: The Relational Dimension of Systemic Discrimination in Canada* (Montreal: McGill-Queen’s University Press, 2010) at 12.

143 Fay Faraday, Margaret Denike & M Kate Stephenson, “In Pursuit of Substantive Equality,” in Fay Faraday, ed., *Making Equality Rights Real: Securing Substantive Equality Rights Under the Charter* (Toronto: Irwin Law, 2006) 9 at 12.

the treatment is unfair to them” need not involve prejudice or stereotype.<sup>144</sup> Legislation that “perpetuates oppressive power relations [...] further entrenching or reinforcing power imbalances,” for example, may result indirectly from “institutional structures [...] not designed deliberately to harm the individuals in question, or express contempt for them, but nevertheless perpetuate the social and political domination of certain groups.”<sup>145</sup> Those negatively affected by such legislation should be able to turn to section 15(1) even though their oppression does not result from stereotype or prejudice.

If the *Charter*'s equality provision is to protect collective bargaining rights, the Court will have to reconsider its narrow understanding of discrimination to take into account the fact that unequal treatment under the law may engage section 15(1) without necessarily involving prejudice or stereotyping. Integrating the concerns of redistribution, recognition, and participation into the legal tests and reasoning that the section 15(1) jurisprudence has relied on would be a significant step toward accomplishing this goal.

#### IV. LABOUR RIGHTS AND THE PURSUIT OF EQUALITY

For over one hundred years, unionized workers have been at the forefront of advancing the type of societal equality laid out in Part III. While union efforts have been imperfect and uneven, collective bargaining has generally improved wages, helped counter systemic inequalities of groups most affected by ‘injuries of misrecognition,’ and provided avenues for workers to democratically shape the content of their working lives. The particular mechanisms of the *Wagner Act* model<sup>146</sup> have produced several shortcomings that demand alternative forms of industrial democracy, but the general process of collective bargaining is essential in securing the equality that section 15(1) sets out to achieve.

One of the greatest benefits unions claim is the wage premium their members are able to obtain through collective bargaining. Instead of the whims of supply and demand setting the price at which workers are able to sell their labour, unions can use their position as monopoly bargaining agents and the threat of workers striking to negotiate wages above the competitive level that a pure free market would reward.<sup>147</sup> This is a generally accurate depiction, although the way that union premium wages play out is often complex, especially when considering whether collective bargaining has enhanced a more equal distribution of wealth in society as a whole.

Unions have certainly had success at increasing workers’ wages in large monopoly or oligopoly industries, where employers can often meet additional wage costs by passing

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144 Sophia Moreau, “The Wrongs of Unequal Treatment,” in Fay Faraday, ed, *Making Equality Rights Real: Securing Substantive Equality Rights Under the Charter* (Toronto: Irwin Law, 2006) 31 at 32.

145 *Ibid* at 40-41.

146 The *Wagner Act* was the defining labour legislation of the New Deal in the United States, providing the legal framework for union recognition and collective bargaining for the first time in North America. Most Canadian jurisdictions adopted similar pieces of legislation after World War Two, prompting the wave of unionization across the private, and then the public sector, that followed the war. See Donald M. Wells, “Origins of Canada’s Wagner Model of Industrial Relations: The United Auto Workers in Canada and the Suppression of ‘Rank and File’ Unionism, 1936-1953, 20:2 *Canadian Journal of Sociology* 193.

147 Alex Bryson, “The Effect of Trade Unions on Wages,” (2007) 46 *Reflète et Perspectives* 33, contends that unionized workplaces may offer higher wages for reasons that are not directly attributable to collective bargaining, noting that it is difficult to identify a counterfactual, a sufficiently comparative society that has an absence of unions. Although there is certainly a diverse set of factors that determine wage rates (including the choices that workers of different skills sets make and the choices unions make in deciding which industries to organize) it is specious to understate the role that monopoly bargaining rights and the potential to strike have had in achieving pecuniary and non-pecuniary benefits for unionized workers.

them on to the consumer without fear of being undercut by non-existent or also-unionized competitors.<sup>148</sup> This is reflected most obviously by the decades of high wages and good benefits that auto and steel workers have been able to negotiate in Canada and the United States.<sup>149</sup> Public sector employees, since they won the right to bargain collectively, have also secured relatively good pecuniary remuneration, with their government employer able to pass on additional costs to the taxpayer.<sup>150</sup> During periods of economic austerity, unionized workers have also been more adept at resisting downward pressures on wages than the non-unionized—a tendency that is especially evident when one compares the increases in wage inequality in Canadian and American workforces over the last three decades. Although it has depleted since its height in the 1970s, Canadian union density has remained significantly higher than in the United States. As a result, employers' attempts to decrease the monetary benefits of unionized workers have been less successful in Canada.<sup>151</sup> It is also possible that the threat of unionization has compelled non-union employers to raise wages to avoid a formal collective bargaining process.<sup>152</sup> This may be one of the most significant—though indirect—redistributive effects of collective bargaining, helping to increase the overall material wealth of all workers.

This relative strength of unionized workers vis-à-vis the non-unionized, however, does not always mean a more generalized reduction of societal income inequality. For male workers, studies have shown that unions promote a more balanced distribution of wages, significantly reducing the wage variation in society. For female workers, however, unionization actually tends to increase wage variance in the workforce.<sup>153</sup> Union concentration levels in the private and public sector, as well as the choices employees of different skill levels tend to make, can partially explain this phenomenon. Highly skilled women are more likely to pursue employment in the unionized public sector than highly skilled men, who are more likely to choose non-unionized work environments in the private sector.<sup>154</sup> While the collective bargaining process has given highly skilled women access to better wages, the result is that the wage disparity grows between them and lower-skilled women, who tend to concentrate in industries with less union density and lower pay.<sup>155</sup> On the other hand, unionization in the private sector tends to concentrate in male-dominated mid- to low-skill industries, allowing unionized male workers to reduce the wage disparity with those in more highly skilled fields.<sup>156</sup> While it is not false to argue that unionization has advanced redistributive justice in society, since collective bargaining has not extended to all workers, unionization has never been able to produce the kind of egalitarian redistribution of society's material wealth the labour movement had once promised.

While collective bargaining has largely focused on the economic needs of workers, it would be a mistake to belittle the leverage unions use to challenge society's 'injuries of misrecognition,' especially in the realm of racial and gender oppression. The collective bargaining process provides a very concrete way to address economic and non-economic inequalities that are rooted in discrimination. Workers were able to negotiate entitlements

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148 *Ibid* at 33.

149 Thomas Lemieux, "Unions and Wage Inequality in Canada and the United States," in David Card & Richard B Freeman, eds, *Small Differences That Matter: Labor Markets and Income Maintenance in Canada and the United States* (Chicago: University of Chicago Press, 1993) at 70-71.

150 *Ibid* at 75-77.

151 *Ibid* at 95.

152 Bryson, *supra* note 147 at 34.

153 In 1986-87 it was estimated that unions reduced wage variance by 14.5 percent for men, and increased the variance by 4.1 percent for women in the workforce (Lemieux, *supra* note 149 at 92).

154 *Ibid* at 87-88.

155 *Ibid* at 80-81.

156 *Ibid* at 81-82.

such as pay equity, affirmative action, employment equity, and anti-harassment measures well before governments addressed these issues.<sup>157</sup> In the auto industry, for example, unions negotiated seniority rights, as well as rules about job postings and transfer rights, that allowed Black autoworkers to overcome discriminatory promotion practices and move into better positions in the factories.<sup>158</sup> In the 1970s, as the feminist movement gained traction in Canadian society, unions became a forum in which women could campaign for equal pay legislation, maternity leave, and abortion rights.<sup>159</sup> Trade unions offered “organizational continuity [and] material resources” for feminists as they campaigned for change in the workplace and society at large.<sup>160</sup>

Despite these proactive efforts to advance equality of recognition, the dominant collective bargaining models have also produced significant obstacles to more extensive equal rights for marginalized and gendered communities. Pamela Sugiman notes that the unity forged between Black and White workers in the post-war auto plants was a solidarity of ‘brotherhood,’ which excluded women from union politics and subordinated the needs of the few female autoworkers to those of “their UAW brothers.”<sup>161</sup> Adelle Blackett and Colleen Sheppard also point out that the collective bargaining paradigm that entrenched itself in North America after the Second World War was ideally suited for the male-dominated Fordist factory, but less nimble for dealing with other kinds of workplace organization. As a result, trade unions have faced particular difficulties in applying *Wagner Act* models of collective bargaining to the less stable and service-oriented sectors of the economy, which tend to have workforces with higher representation of women and people of colour. This is starkest in the agricultural and domestic economies, where workers are often completely excluded from industrial relations legislation or ignored by unions’ organizing efforts.<sup>162</sup> Even one of the most important achievements of the labour movement, the seniority system that provides rights and protection to employees based on time of service rather than arbitrary management discretion, has proven problematic for gendered and racialized workers. Women workers, who are often employed intermittently because of familial duties, and workers of colour, who are often immigrants joining the workforce later in life, tend to accumulate less seniority than white male workers, meaning that “seniority rules can both accentuate the effects of past exclusion and reinforce the privileges of ‘insiders.’”<sup>163</sup> Although collective bargaining has helped weaken injustices of ‘misrecognition,’ its structural limitations continue to perpetuate some of the more entrenched oppressions in Canadian society.

As the Court has acknowledged, trade unions have played a central role in advancing industrial democracy in Canadian society.<sup>164</sup> As Geoffrey England argues, “the hallmark of collective bargaining, which distinguishes it from all other forms of job regulation, is that management and the union, *jointly* author the rules of the workplace.”<sup>165</sup> England claims, somewhat over-optimistically, that “collective bargaining help[s] liberate work

157 Hans Rollman, “Disproportionately Disenfranchised: Gendered Impacts of Interference in Collective Bargaining,” 17:18 *Just Labour: A Canadian Journal of Work and Society* 70 at 79.

158 Pamela Sugiman, “Privilege and Oppression: The Configuration of Race, Gender, and Class in Southern Ontario Auto Plants, 1939 to 1949,” (2001) 47 *Labour/Le Travail* 83 at 102.

159 Heath Jon Maroney, “Feminism at Work,” in Bryan D Palmer, ed, *The Character of Class Struggle: Essays in Canadian Working-Class History, 1850-1985* (Toronto: McClelland and Stewart, 1986), 160 at 162.

160 *Ibid* at 164.

161 Sugiman, *supra* note 158 at 97.

162 Adelle Blackett and Colleen Smith, “Collective Bargaining and Equality: Making Connections,” 142:4 *International Labour Review* 419 at 423.

163 *Ibid* at 434.

164 *Health Services*, *supra* note 6 at para 85.

165 England, *supra* note 25 at 177.

from the unilateral control of capitalists,” and that strikes and collective bargaining prepare workers for “industrial self-government and [...] for governance of the state.”<sup>166</sup> Yet the very same regime that encouraged more democratic say in the operations of the workplace has also promoted the receding of rank-and-file activity among actual workers. The *Wagner Act* model that emerged during and after the Second World War obligated employers to negotiate with majority-supported unions and punished unfair labour practices that discriminated against pro-union employees. However, it also removed the freedom to strike during the term of a collective agreement and the need for recognition strikes.<sup>167</sup> This promoted industrial peace, but also turned collective bargaining into a bureaucratically-controlled process. Union leadership mobilized its members during contract negotiations, but otherwise discouraged rank-and-file activism that would have been at the heart of a healthy industrial democracy. While collective bargaining has advanced the participation in societal decision-making that is essential to equality, the “democratic deficit” in present-day industrial relations may speak to the limits of the *Wagner Act*’s model of collective bargaining, which is neither the ideal nor only form of industrial democracy.<sup>168</sup> Any discussion about constitutionalizing labour rights, therefore, should involve a consideration of different models of workplace democracy, which could be significantly less bureaucratic, involve a much broader level of participation in workplace decision-making, and even extend to workers who are not unionized.

## CONCLUSION: LABOUR RIGHTS AS HUMAN RIGHTS AND BEYOND

The return of the boom-bust cycle in the 1970s ushered in the era of neoliberalism, with many governments hastening the deregulation and liberalization of the economy by diluting labour legislation.<sup>169</sup> Weaker collective bargaining rights, including more burdensome processes to obtain them, have fueled a thirty-year widening of the income gap between the richest and poorest in Canadian society.<sup>170</sup> This has encouraged many voices to push for the formal recognition of labour rights as fundamental human rights, in hopes of hastening the momentum against societal inequality.<sup>171</sup> Although prompted by the growth of inequality, the emergence of this ‘labour rights as human rights’ discourse may be useful in persuading the Court that the protection of collective bargaining rights is fundamental to the promotion of equality in Canadian society and deserving of section 15(1) protection.

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166 *Ibid* at 185-186.

167 Jeremy Webber, “The Malaise of Compulsory Conciliation: Strike Prevention During World War II,” in Bryan D Palmer, ed, *The Character of Class Struggle: Essays in Canadian Working-Class History, 1850-1985* (Toronto: McClelland and Stewart, 1986) 138 at 142-143.

168 The *Wagner Act* model may well fall within the scope of such a guaranteed right, but other forms of democratic workers’ control should not be excluded. Eric Tucker, for example, argues that constitutionalized workplace democracy could include “works councils” that operate in a similar fashion to occupational and health and safety committees that already exist for numerous work environments, Tucker, *supra* note 2 at 175. The system of compulsory collective representation under which the Quebec construction industry operates could also fall within the rubric of workers’ democracy. There are many similar examples of employee control that extend beyond formal collective bargaining regimes, such as the German *Betriebsrat* or the *Délégués du Personnel* in France.

169 Fudge, *supra* note 48 at 427-428.

170 Burkett, *supra* note 30.

171 Judy Fudge canvases the various writings of those wanting to broaden the concept of human rights to include social rights, such as access to collective bargaining, in “The New Discourse of Labour Rights: From Social to Fundamental Rights?” (2007-2008) 29 *Comp Lab L Pol’y J* 29.

Advocates for the recognition of labour rights as fundamental human rights succeeded in obtaining some formal recognition of their position, with the International Labour Organization (ILO) passing its Declaration of Fundamental Principles and Rights at Work in 1998 (“Declaration”) and the European Union adopting a comparable measure within its 2000 Charter of Fundamental Rights (“the Charter”).<sup>172</sup> Similar to the language the Court has adopted in considering the *Charter’s* equality provision, the ILO’s Declaration describes labour rights as going to “the essence of human dignity at work, touching upon bedrock values of freedom and equality.”<sup>173</sup> While the labour rights affirmed in the Declaration and the Charter are not enforceable through individual adjudication, “casting labor rights as international human rights has transformed ‘the legal matter at hand into a moral one—the moral and unjust denial of human dignity.’”<sup>174</sup>

While the lack of teeth in these measures may seem counterproductive for those pushing for the constitutionalization of collective bargaining rights, this approach may in fact offer new means to encourage the Court to broaden its understanding of equality and to fit labour rights within the rubric of section 15(1), either directly or indirectly. As Iyer notes, the Court has mostly shirked at acknowledging social rights—such as collective bargaining—as justiciable, preferring to leave these matters to the purview of the legislature. This has made it particularly difficult for labour advocates to convince the Court that collective bargaining rights should be included within the *Charter’s* equality provision, since doing so could force the Court to intervene aggressively in the policy domain of government. The human rights discourse works well with this judicial hesitancy, preferring to “function as interpretive norms and principles of institutional design.”<sup>175</sup> In effect, this is how the Court imported the principles underlying section 15(1) into its section 2(d) analysis in *Dunmore*. Justice Bastarache used the principles of societal equality to strengthen the more remedially modest associational rights of farmworkers, furthering their social rights indirectly by giving farmworkers the tools to advance their equality goals through self-activity.

The Court’s approach to equality in *Health Services* and *Fraser*, however, raises some concerns for those hoping to advance access to collective bargaining through section 15(1); these cases may reflect a growing conservatism in the Court, which could fetter the promotion of all social rights—not just labour rights—through constitutional litigation. Nonetheless, there are several reasons to continue to argue that collective bargaining merits protection from the *Charter’s* equality provision. Firstly, as noted in Part II of this article, several justices have indicated that section 15(1) may be a preferable forum in which to discuss these issues. The increased willingness of the Court to deal with intersectional claims, as expressed in *Withler*, may further strengthen equality arguments for organizing efforts involving traditionally oppressed communities. Secondly, while the Court may remain reluctant to discuss equality and discrimination outside of the ‘stereotype and prejudice’ box, advancing robust equality claims may indirectly strengthen plaintiffs’ associational arguments by imbuing them with a stronger moral character. Similar to the goals of the ‘labour rights as human rights’ discourse, and following the reasoning that Justice Bastarache used in *Dunmore*, advancing a broader vision of equality and highlighting the role collective bargaining in promoting this vision, can shape the interpretive norms the Court has relied on when considering workers’ freedom of association rights.

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172 *Ibid* at 30.

173 *Ibid* at 39.

174 Francis Maupain, Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers’ Rights, 16 EUR J INT’L L 439 (2005) cited in *ibid* at 40.

175 *Ibid* at 42.

None of this guarantees success, but with income disparity growing and reduced workplace rights becoming the industrial norm,<sup>176</sup> labour advocates have a responsibility to highlight the role unions have played in advancing equality in Canadian society. They must continue to argue that constitutionally-protected collective bargaining rights are essential for unions to continue to this pursuit. The success or failure of these arguments will heavily shape the future of equality in Canadian society.

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176 *Ibid* at 29-30.