

ARTICLE

A NEW HOPE, OR A *CHARTER* MENACE? THE NEW LABOUR TRILOGY’S IMPLICATIONS FOR LABOUR LAW IN CANADA

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INTRODUCTION

Over the past three decades, the Supreme Court of Canada [SCC] has gradually and haltingly expanded the *Canadian Charter of Rights and Freedoms*' ("the *Charter*") protection of labour rights.¹ Recently, more dramatic changes in the *Charter*'s application to labour law have caused controversy. In this paper, I will demonstrate the benefits of the Court's most recent application of the *Charter* section 2(d) freedom of association to labour movements.² I argue that despite the uncertainty they have caused, these decisions are a necessary clarification of decades of incremental progress and articulate a helpful and progressive understanding of systemic inequalities in labour law.

The first section of this paper provides a historical overview of the interaction between labour law and the *Charter*, starting with the original 1987 "Labour Trilogy," tracking developments in labour law over the past 30 years, and culminating in 2015's "New Labour Trilogy." In the paper's second section, I address some potential criticism and uncertainties that remain to be resolved in the wake of these decisions. Specifically, I investigate whether the right to strike recognized in *Saskatchewan Federation of Labour v Saskatchewan* ("*SFL*") will extend to other strike-restricting scenarios,³ what the acknowledgment of collective rights under section 2(d) might mean for other *Charter* rights, and whether these decisions ought to be seen as victories from a workers-rights perspective. Ultimately, I conclude that New Labour Trilogy is a positive shift. Any uncertainty it causes is a necessary component of a living constitution that must adapt to increasingly nuanced understandings of rights and equity.

I. HISTORICAL OVERVIEW

The freedom of association under section 2(d) of the *Charter* is broadly understood as the freedom "to combine together for the pursuit of common purposes or the advancement of common causes."⁴ Historically, section 2(d) case law has primarily revolved around the protection of labour rights. This protection has had an uneven history. During the drafting of the *Charter*, NDP MP Svend Robinson proposed that section 2(d) be amended to explicitly state "freedom of association including the freedom to organize and bargain collectively."⁵ This amendment was defeated in a Special Joint Committee vote of twenty to two.⁶ Somewhat ironically given the jurisprudence that followed, the explanation for denying the amendment was that "freedom to organize and bargain collectively [is] covered by the freedom of association already in [...] the *Charter*."⁷ The members of the Special Joint Committee working group seemed to have assumed that freedom of association would obviously entail the protection of collective bargaining rights.⁸

1 Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11.

2 The title of my paper is inspired by the similarly-titled paper by Steven Barrett & Benjamin Oliphant, "The Trilogy Strikes Back: Reconsidering Constitutional Protection for the Freedom to Strike" (2014) 45:2 *Ottawa L Rev* 201 [Barrett].

3 *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245 [*SFL*].

4 *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 334, 38 DLR (4th) 161 [*Alberta Reference*].

5 Canada, *Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada*, No. 33 (9 January 1981) at 69 [Canada].

6 Dianne Pothier, "Twenty Years of Labour Law and the Charter" (2002) 40:3-4 *Osgoode Hall LJ* 369 at 371.

7 Canada, *supra* note 5.

8 There is much to be said about the distinction between freedoms and rights. For the purpose of this paper, I will roughly assume that enumerated freedoms have corresponding rights that attach, though this may be an oversimplification. For further discussion of freedoms, rights, and corresponding duties, see Brian Langille, "The Trilogy is a Foreign Country, They Do Things Differently There" (2014) 45:2 *Ottawa L Rev* 285.

Unfortunately for labour activists, this protection turned out to be far from obvious. Instead, leaving collective bargaining out of the *Charter* set the stage for a series of early cases that denied section 2(d) protection for the right to strike, the right to collective bargaining, and the existence of collective rights more generally. This section traces the evolution of section 2(d) *Charter* jurisprudence, from 1987's Labour Trilogy to the pivotal 2015 New Labour Trilogy, which effectively reversed the Court's original holdings.

A. Original Labour Trilogy – 1987

Soon after the implementation of the *Charter*, courts were called upon to address the role of section 2(d) in labour law disputes. In 1987, the SCC released three key cases concerning the protection of freedom of association: *Public Service Alliance of Canada v Canada* (“PSAC”),⁹ *RWDSU v Saskatchewan* (“Dairy Workers”),¹⁰ and most significantly the *Alberta Reference*. These cases, regularly referred to as the Labour Trilogy, denied the existence of collective rights in general, and specifically found that the right to strike and the right to collective bargaining did not exist under section 2(d). This was in keeping with a historical tendency for courts to allow control of labour law to be dictated by government policy and legislation.¹¹

In the *Alberta Reference*, the Lieutenant Governor in Council referred several questions to the Alberta Court of Appeal regarding the validity of Alberta's *Public Service Employee Relations Act*,¹² *Labour Relations Act*,¹³ and the *Police Officers Collective Bargaining Act*.¹⁴ The Court of Appeal found that it was *Charter*-compliant to legislatively prohibit strikes and instead unilaterally impose compulsory arbitration as a mechanism for resolution of disputes. The appellants, headed by the Alberta Union of Provincial Employees, appealed to the SCC.

Justice Le Dain, writing for the majority, upheld the finding from the Court of Appeal. In his brief decision he gave little in the way of reasons, writing simply that he rejected the perspective that freedom of association gave groups “the right to engage in particular activity on the ground that the activity is essential to give an association meaningful existence.”¹⁵ In addition, he argued that the right to strike and the right to bargain collectively are relatively recent creations of statute, the regulation of which require complex balancing of policy concerns beyond the expertise of the Court.¹⁶

Justice McIntyre, in a concurring judgment, expanded significantly on *why* freedom of association did not cover the right to collective bargaining or the right to strike. These reasons have been influential, and have been frequently quoted as precedent.¹⁷ In his reasons, Justice McIntyre held that freedom of association can advance group interests but ultimately belongs only to the individual.¹⁸ Because freedom of association protects only *individual* rights to associate, and collective bargaining is inherently a *group* activity,

9 *Public Service Alliance of Canada v Canada*, [1987] 1 SCR 424, 38 DLR (4th) 249 [PSAC].

10 *RWDSU v Saskatchewan*, [1987] 1 SCR 460, 38 DLR (4th) 277.

11 CED 4th (online), *Constitutional Law*, “Constitutional Law: Constitution Act, 1982: Fundamental Freedoms: Freedom of Association” (X.1.(b).(v)) at § 516.

12 RSA 1980, c P-33.

13 RSA 1980, c L-1.1.

14 SA 1983, c P-12.05.

15 *Alberta Reference*, *supra* note 4 at 391.

16 *Ibid.*

17 Judy Fudge & Heather Jensen, “The Right to Strike: The Supreme Court of Canada, the Charter of Rights and Freedoms and the Arc of Workplace Justice” (2016) 27:1 King's LJ 89 at 96 [Fudge, “Arc of Workplace Justice”].

18 *Ibid.*, at 397.

it follows that collective bargaining cannot be a constitutionally protected right. He concluded that the right to collective bargaining does not exist under the *Charter* and neither does the connected right to strike.¹⁹

These findings were reiterated in *Dairy Workers* and *PSAC*. In the former, the Court found that legislation prohibiting work stoppages for dairy workers was constitutional, because the right to strike was not *Charter*-protected. In the latter, the majority reiterated that the right to collective bargaining was not captured under freedom of association, and consequently it was constitutional for the government to introduce legislation that significantly limited collective bargaining by extending the terms of collective agreements and fixing wage increases.²⁰

Despite the majority findings, the SCC was not unanimous in its denial of these rights. Chief Justice Dickson wrote a strong dissent in the *Alberta Reference*, which held that the right to bargain collectively and the right to strike are both protected under section 2(d). This dissent would become crucial in later SCC decisions. In his reasons, he held that the purpose of section 2(d) is to ensure that individuals have “a voice in shaping the circumstances integral to their needs, rights and freedoms,”²¹ and to “protect the individual from state-enforced isolation in the pursuit of his or her ends.”²² Under his analysis, work is not merely an economic interest, but rather one of the most important components of a person’s life.

Chief Justice Dickson argued that the freedom to associate is a “cornerstone of modern labour relations”, and necessary to overcome “the inherent inequalities” between employers and employees.²³ A meaningful understanding of this freedom must not be limited to the right to merely combine together, but also to perform those activities for which the association was formed. If freedom of association did not protect those activities, it would be “legalistic, ungenerous, [and] indeed vapid.”²⁴ Thus, the freedom to associate within a unionized workplace must encompass the right to perform activities integral to that union, such as collective bargaining.²⁵ In turn, an effective system of collective bargaining requires the right to strike.²⁶ A regime that substantially limits the ability to strike will engage section 2(d) *Charter* protections, and this infringement will not be justified under section 1 of the *Charter* if an adequate alternative method of dispute is not provided.

Union-side labour lawyers were intensely critical of the majority’s findings in the Labour Trilogy, claiming that the decisions meant “governments were entitled to run roughshod over workers’ rights.”²⁷ The next section analyzes the aftermath of the original Labour Trilogy in Canadian case law.

19 *Ibid*, at 409-410.

20 *PSAC*, *supra* note 9 at 452-453.

21 *Alberta Reference*, *supra* note 4 at 334.

22 *Ibid*, at 365.

23 *Ibid*, at 334.

24 *Ibid*, at 363.

25 *Ibid*, at 368-369.

26 *Ibid*, at 371.

27 Judy Fudge, “‘Labour is Not a Commodity’: The Supreme Court of Canada and Freedom of Association” (2004) 67:2 Sask L. Rev 425 at 427 [Fudge, “Labour”].

B. The Intervening Years

i. Following the Labour Trilogy: A Divided Court – 1987-2000

With the Labour Trilogy, the Court had decisively failed to protect workers against government and employer power: collective bargaining was not protected by section 2(d), judicial deference was the preferred approach to labour law issues, and the *Charter* did not protect collective rights. From the beginning, though, it was clear that the SCC itself was deeply divided on the precedent that had been created.

The first major freedom of association case following the Labour Trilogy contained five separate written judgements; a clear demonstration of the conflicted and confused state of the law. In *Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner)* (“*PIPS*”), the Court considered whether refusing to formally recognize a labour association (thereby denying them collective bargaining power) constituted a violation of the association’s collective bargaining rights.²⁸ The majority, though fractured into four different concurring judgements, ultimately held that section 2(d) covered only the bare right to form a group and did not extend to associational activities like collective bargaining. Even Chief Justice Dickson deferred to the majority precedent in the *Alberta Reference*, agreeing that section 2(d) could only protect individual rights.²⁹ Because incorporation could only be a group right, not an individual right, section 2(d) could not extend to the right to formal recognition of an association.

The SCC was similarly divided in *Delisle v Canada (Deputy Attorney General)* (“*Delisle*”), which considered legislation banning the unionization of the RCMP.³⁰ The majority’s reasons closely followed the majority decision in *PIPS*; while section 2(d) granted the freedom to join an association, it did not include any right to have that association formally recognized by statute. The Court found that legislation prohibiting RCMP members from unionizing did not infringe RCMP members’ freedom of association, because this freedom does not include the right to a particular formally-recognized union. The majority’s reasons reiterated the importance of judicial deference in the “complex and political field of socio-economic rights”.³¹ In contrast, the minority once again attempted to employ a broader, more purposive conception of collective associational rights, and favourably cited the dissent in the *Alberta Reference*.³²

Overall, while these cases upheld the Labour Trilogy, it was abundantly clear that the SCC had not reached any kind of consensus about the appropriate application of the *Charter* to labour law. Labour activists continued to push for reform and unions continued to fight to carry cases to the SCC, hoping to finally find the protections they sought. Confusion reigned.

ii. Shift Toward Chief Justice Dickson’s Model – 2000-2007

The jurisprudence began to shift slightly at the turn of the millennium, moving gradually from the previous restrained approach toward an increasingly vigorous defence of unions.³³ In 2001’s *Dunmore v Canada (AG)* (“*Dunmore*”), the SCC tilted for the

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

29 *Ibid*, at 374.

30 *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989, 176 DLR. (4th) 513.

31 *Ibid*, at para 23.

32 *Ibid*, at para 63.

33 Section 2(b) freedom of expression cases first heralded a change in the SCC’s constitutional approach to labour law. See e.g. *UFCW Local 151 v KMart Canada Ltd*, [1999] 2 SCR 1083, 176 DLR (4th) 607.

first time toward a more robust application of section 2(d).³⁴ In that case, a surprisingly unified court found that the exclusion of agricultural workers from Ontario's labour relations legislation infringed section 2(d).

Agricultural workers in Ontario had been granted union and collective bargaining rights under the *Agricultural Labour Relations Act, 1994* ("ALRA").³⁵ This Act was repealed in 1995, leaving only the *Labour Relations Act, 1995* ("LRA"), which explicitly excluded agricultural workers.³⁶ Certain agricultural workers challenged the repeal of the ALRA and their exclusion from the LRA. Their challenge was successful, with a majority of eight judges finding that the appellants' freedom of association had been violated. The Court held that the agricultural workers had a constitutional freedom to organize a trade association that was substantially impeded by their exclusion from the LRA.³⁷

This case has been described as "a confusing decision that is not easily reconciled with prior jurisprudence."³⁸ Despite its obvious divergence from the Labour Trilogy, the Court made no explicit mention of reversing precedent. Justice Bastarache, writing for the majority, simply stated that in some situations associational freedoms will be violated even when the activities "cannot [...] be understood as the lawful activities of individuals."³⁹ He quoted Chief Justice Dickson's dissent from the *Alberta Reference* approvingly, saying that the passage on collective rights "was not explicitly rejected by the majority in the *Alberta Reference*."⁴⁰

While the majority continued to deny a constitutional right to collective bargaining, this decision marked a substantial shift toward a broader, more purposive understanding of section 2(d).⁴¹ Whatever clarity had remained from the Labour Trilogy seemed to be in doubt. Labour litigation, already marked by the jurisprudential divisiveness of the SCC, was less predictable than ever.

Not surprisingly, while some academics and labour activists heralded the *Dunmore* decision as "revolutionary,"⁴² many were not impressed. Lawyers criticized its "ambiguities and uncertainties,"⁴³ and labour rights supporters called it "[not] entirely satisfactory."⁴⁴ The parameters of section 2(d) became less clear. The case law thus far had been erratic and unpredictable, and previous precedent had not been officially overturned so much as conspicuously ignored. There was a lack of clarity over whether courts would return to the strict interpretation of the Labour Trilogy, or whether this case marked a permanent shift toward Chief Justice Dickson's *Alberta Reference* dissent. Over the next 10 years the SCC took the latter approach, continuing to move toward more expansive *Charter* protection of labour movements.

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

35 SO 1994, c 6.

36 SO 1995, c1 Sched A.

37 *Ibid*, at para 43.

38 John Craig & Henry Dinsdale, "A 'New Trilogy' or the Same Old Story?" (2003) 10 CLEJLJ 59 at 60 [Craig, "Same Old Story"].

39 *Dunmore*, *supra* 34 at para 16.

40 *Ibid*. This handily ignores that Chief Justice Dickson himself acknowledged in *PIPS* that the Court had denied the collective rights approach to freedom of association.

41 *Ibid*, at para 17.

42 Roy J Adams, "The Revolutionary Potential of *Dunmore*" (2003) 10 CLEJLJ 117.

43 Craig, "Same Old Story", *supra* note 38 at 82.

44 Patricia Hughes, "*Dunmore v Ontario (Attorney General)*: Waiting for the Other Shoe" (2003) 10 CLEJLJ 27 at 56.

iii. A Turning Point – 2007-2014

Explicit reversal of the Labour Trilogy’s precedent finally occurred in 2007. In *Health Services and Support-Facilities Subsector Bargaining Assn. v BC* (“BC Health Services”), the SCC found that “the grounds advanced in the earlier decisions for the exclusion of collective bargaining from the *Charter*’s protection of freedom of association do not withstand principled scrutiny and should be rejected.”⁴⁵ For the first time, the majority of the SCC recognized collective bargaining rights, albeit in a “narrowly circumscribed” way.⁴⁶ The Court held that collective bargaining was protected under section 2(d) for four main reasons.

First, the history of collective bargaining indicates that it has a long history as a fundamental right of the sort that ought to be protected by the *Charter*.⁴⁷ Second, international labour law supports recognizing the right to collective bargaining.⁴⁸ Third, protecting collective bargaining is “consistent with the *Charter*’s underlying values.”⁴⁹ The *Charter* is animated by values like “human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy,” all of which are promoted by the protection of collective bargaining.⁵⁰ Fourth and finally, the Court systematically refuted the reasons previously given for denying *Charter* protection of the right to collective bargaining: collective bargaining is not a recent legislative creation, judicial deference for policy issues should not create an entire “no go zone” for *Charter* jurisprudence, *Dunmore* had already determined that freedom of association is no longer restricted to individual rights, and the procedure of collective bargaining can be protected without constitutionally guaranteeing a particular outcome.⁵¹

Having addressed the reasons for denying *Charter* protection and explored a number of reasons supporting the inclusion of collective bargaining under freedom of association, the Court concluded that “section 2(d) should be understood as protecting the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining.”⁵²

While this decision was praised as a “symbolic and moral victory” for the Canadian labour movement, celebrations amongst labour supporters were nonetheless qualified.⁵³ The scope of the protection was limited. The Court was clear that freedom of association will only be engaged when legislation “substantially interferes” with the process of collective bargaining. Further, they avoided considering the right to strike.

Labour advocates’ fears were realized in *Fraser v Ontario (AG)* (“*Fraser*”).⁵⁴ In that case the SCC declined to interpret *BC Health Services*’ precedent in a purposive way. Farm workers in Ontario were excluded from Ontario’s *Labour Relations Act*, and were instead governed by the *Agricultural Employees Protection Act, 2002* (“*AEPA*”), which provided

45 *Health Services and Support-Facilities Subsector Bargaining Assn. v BC*, 2007 SCC 27 at para 22, [2007] 2 SCR 391.

46 Susanna Quail, “Labour Rights and Labour Politics under the *Charter*” (2014) 45:2 Ottawa L Rev 343 at 353 [Quail].

47 *Ibid.*, at para 40.

48 *Ibid.*, at para 70.

49 *Ibid.*, at para 80.

50 *Ibid.*, at para 81.

51 *Ibid.*, at paras 25-30.

52 *Ibid.*, at para 87.

53 Judy Fudge, “Eating Crow: The Emergence of a *Charter* Right for Workers and Unions to Engage in Collective Activities” (20 June 2007), *The Court* (blog), online: <<http://www.thecourt.ca/2007/06/page/2/>> archived at <<https://perma.cc/VE87-C4Z2>> [Fudge, “Eating Crow”].

54 *Fraser v Ontario*, 2011 SCC 20, [2011] 2 SCR 3 [Fraser].

much fewer collective bargaining rights.⁵⁵ *AEPA* protected the right of agricultural workers to make collective representations to their employers and to have those representations heard in good faith, but did not protect any other aspects of meaningful collective bargaining. Despite the fact that agricultural workers were denied majority representation, grievance-based dispute resolution, and other common components of collective bargaining, the Court found that the legislation did not violate section 2(d) because it did not make good faith resolution of workplace issues between employees and their employers “effectively impossible.”⁵⁶

This extremely narrow interpretation of *BC Health Services* reinforced confusions. Even if the existence of a *Charter*-protected right to collective bargaining had technically been acknowledged, did the Court really have any appetite to protect the labour movement from anti-union governments? Had the gradual but distinct expansion of *Charter*-protected labour law been halted, or was it merely in hiatus?⁵⁷

In short, the first three decades of jurisprudence on freedom of association and labour law were meandering and contradictory. Meanwhile, federal and provincial governments intensified their enactment of legislation that contributed to the erosion of labour rights.⁵⁸ Between 2007 and 2012 alone, the Canadian federal government tabled 6 different pieces of back-to-work legislation.⁵⁹ At the same time, multiple provincial governments introduced restrictive laws characterized by Jon Peirce as a “frontal assault on the labour movement.”⁶⁰ Facing these political challenges, unions had no certainty about the level of protection they could expect from the courts. While the SCC had increasingly departed from the Labour Trilogy’s original holdings, the actual scope of *Charter* protection remained unclear. In 2015, the SCC finally clarified its position.

C. New Labour Trilogy – 2015

In January 2015, the SCC released three important labour law decisions. This trilogy clarified the Court’s approach to freedom of association and provided much stronger protection for workers. Taken together, these decisions demonstrated three main points: first, the Court decisively confirmed that freedom of association encompasses collective rights; second, the Court applied a broad and purposive understanding of freedom of association that includes the right to collective bargaining; and finally, this right was expanded to specifically include the right to join a union of one’s choosing and the right to strike.

i. *Mounted Police Association of Ontario v Canada (AG)*

The first decision released was *Mounted Police Association of Ontario v Canada (AG)* (“*MPAO*”), wherein the SCC found that RCMP members had the right to join a union of their own choosing.⁶¹ In *MPAO*, the Court found in favour of RCMP workers who once

55 SO 2002, c 16.

56 *Fraser*, *supra* note 54 at para 9.

57 Fudge, “Arc of Workplace Justice”, *supra* note 17 at 98.

58 Bernie Froese-Germain, “Labour Rights, Inequality and Democracy” (2013) Canadian Teachers’ Foundation Research & Information, online: <<http://www.ctf-fce.ca/en/Pages/Issues/Labour-Rights-Briefing-Document.aspx>> archived at <<https://perma.cc/SVT7-W6QS>> at 2.

59 Priya Sarin, “An Erosion of Labour Rights in Canada? It’s starting to look that way”, *Rabble* (May 31, 2012), online: <<http://rabble.ca/columnists/2012/05/erosion-labour-rights-canada-its-starting-look-way>> archived at <<https://perma.cc/MK4D-Y82X>>.

60 Jon Peirce, “Provinces Erode Public Sector Workers’ Rights” (2008) 34 *Communications Magazine*.

61 *Mounted Police Association of Ontario v Canada*, 2015 SCC 1, [2015] 1 SCR 3 [*MPAO*].

again challenged their exclusion from the *Public Sector Labour Relations Act* (“PSLRA”),⁶² and the imposition of a non-unionized labour regime.⁶³ Denied the union protections of the *PSLRA*, RCMP members were instead compelled to advance their workplace concerns through the Staff Relations Representative Program (SRRP).⁶⁴ This program was not “formed or chosen by members of the RCMP,” and was not independent from management’s influence.⁶⁵ This case was essentially a re-visitation of the same legislative scheme that the Court had considered in *Delisle*, but in this case it reached a very different conclusion. The Court justified overturning precedent in this case by referring to the incremental shifts toward a different interpretation of freedom of association enumerated in the case law above.⁶⁶

In its reasons, the Court endorsed a “purposive and contextual approach” to section 2(d) analyses. It stated that a “generous approach” to interpreting freedom of association in the field of labour relations was necessary to “[encourage] the individual’s self-fulfillment and the collective realization of human goals.”⁶⁷ It also clarified that “substantial interference” remains the legal test for finding an infringement of freedom of association (not “effective impossibility,” as implied in *Fraser*).⁶⁸

Taking this approach, the SCC found that the legislative scheme in question violated section 2(d). Meaningful understanding of the right to collective bargaining must encompass workers’ rights to identify and advance their workplace concerns free from management’s influence. Both choice and independence are essential features of a meaningful process of collective bargaining under section 2(d): “*Charter* compliance is evaluated based on the degrees of independence and choice guaranteed by the labour relations scheme, considered with careful attention to the entire context of the scheme.”⁶⁹ Considered in this context, the SRRP offered neither adequate choice nor independence.

ii. *Royal Canadian Mounted Police v Canada (AG)*

In *Royal Canadian Mounted Police v Canada (AG)* (“*Meredith*”), the second case from the New Labour Trilogy, the Court assessed a specific aspect of the RCMP labour regime from *MPAO*.⁷⁰ Non-unionized RCMP members challenged the *Expenditure Restraint Act*, which rolled-back scheduled wage increases for RCMP members. The Court held that this rollback did not violate RCMP members’ freedom of association rights because it did not substantially interfere with their right to collectively pursue workplace goals through collective bargaining.

Although *Meredith*’s “uniquely distinguishable facts” may make it difficult to draw direct analogies in the future, the decision is still notable for two key reasons.⁷¹ First, it holds that associational activity can still attract section 2(d) rights even in the absence of

62 SC 2003, c 22, as enacted by *Public Service Modernization Act*, SC 2003, c22, s 2, s 2(a) “employee” (d).

63 *Royal Canadian Mounted Police Regulations*, 2014, SOR/2014-281, s 56.

64 *MPAO*, *supra* note 61 at para 2.

65 *Ibid*, at para 26.

66 *Ibid*, at para 127.

67 *Ibid*, at para 46.

68 *Ibid*, at paras 75-77.

69 *Ibid*, at para 90.

70 *Royal Canadian Mounted Police v Canada*, 2015 SCC 2, [2015] 1 SCR 125 [*Meredith*].

71 Fay Faraday, “*Meredith v Canada*: Constitutional Protection for the Right to Bargain Collectively Under the Supreme Court of Canada’s New Labour Trilogy” (Paper delivered at the Canadian Foundation for Labour Rights Forum, Toronto, April 9 2015) online: <http://labourrights.ca/sites/labourrights.ca/files/documents/cflr_new_labour_trilogy_forum.pdf> archived at <<https://perma.cc/322U-2RMT>> at 26.

a constitutionally adequate process of collective bargaining.⁷² Second, it upholds the test from *BC Health Services* and reiterates that the correct legal test for a section 2(d) violation is substantial interference with employees' collective pursuit of workplace goals.⁷³

iii. *Saskatchewan Federation of Labour v Saskatchewan*

The third, and arguably most significant, of the New Labour Trilogy cases is *Saskatchewan Federation of Labour v Saskatchewan* (“*SFL*”).⁷⁴ In this case, the SCC decisively reversed the original Labour Trilogy and held that the *Charter* section 2(d) protects the right to strike.

In 2007 the Government of Saskatchewan introduced two pieces of legislation, the *Trade Union Amendment Act* (“*TUAA*”)⁷⁵ and the *Public Service Essential Services Act* (“*PSESA*”)⁷⁶. The *TUAA* made it easier for employees of a bargaining unit to have a union decertified as a bargaining representative. The *PSESA* allowed public sector employers to unilaterally designate employees as “essential” without any process for an independent party to review whether the employee’s work was in fact necessary to prevent danger to life, health, and safety. These employees were prohibited from any work stoppage, but were not provided with any meaningful alternative dispute resolution mechanism in the event of a collective bargaining impasse. The Saskatchewan Federation of Labour challenged the validity of these Acts, arguing that both infringed the right to freedom of association.

The SCC upheld the *TUAA* as constitutional because it did not substantially interfere with the freedom to freely create or join associations, even though the trial judge had acknowledged that the *TUAA* reduced the success rate of union applications for certification.⁷⁷ The Court’s approach to the *PSESA*, however, was much more dramatic.

Writing for the majority, Justice Abella held that the *PSESA* was unconstitutional. Overruling decades of precedent, the Court found that section 2(d) freedom of association encompassed a right to strike, which the *PSESA* violated by prohibiting striking for public service workers who were deemed “essential.” Employing the purposive and generous approach to freedom of association laid out in *MPAO*, Justice Abella embarked on an in-depth analysis of the national and international context, history and power dynamics of unionized workplaces and work stoppages. In doing so, she turned to the “magnetic guide” of Chief Justice Dickson’s *Alberta Reference* dissent.⁷⁸

Using that dissent as a grounding point, Justice Abella’s analysis was heavily animated by underlying concerns about justice, equity, and power imbalances within employment structures. She referenced the “deep inequalities that structure the relationship between employers and employees, and the vulnerability of employees in that context.”⁷⁹ Within this framework, striking is a necessary tool for employees to have their concerns and needs taken seriously, and an “indispensable component” of collective bargaining.⁸⁰

72 *Meredith*, *supra* note 70 at paras 4, 25.

73 *Ibid*, at para 24.

74 *SFL*, *supra* note 3.

75 SS 2008, c 26.

76 SS 2008, c P-42.2.

77 *SFL*, *supra* note 3 at para 100.

78 *Ibid*, at para 63.

79 *Ibid*, at para 55.

80 *Ibid*, at para 75.

The appropriate test for whether the *Charter*'s protection of freedom of association has been infringed is "whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with collective bargaining."⁸¹ Under this test, legislation that prevents employees from engaging in any work stoppage as part of the bargaining process would be a violation of section 2(d) and must be justified under section 1. Because of the lack of an independent review mechanism or meaningful alternative dispute resolution mechanisms, the *PSESA* was not minimally impairing under section 1 and therefore not *Charter* compliant. The SCC declared the legislation invalid, with a one-year suspension of invalidity to allow the Government of Saskatchewan to enact new legislation.

iv. Response to the New Labour Trilogy

Unions and labour advocates were thrilled with the rulings, triumphantly claiming the decisions as a "huge victory" for labour rights.⁸² Many heralding the rulings as a definitive sign that the SCC has abandoned its history of inadequate protection of workers.⁸³ In particular, the clear defense of the importance of collective bargaining and the reiteration that collective rights are an important part of equity movements in Canada were greeted as "progressive" and "optimistic."⁸⁴

This support, however, was far from unanimous. Critics derided the Court's lack of respect for precedent. Lawyer Asher Honickman called *SFL* "arguably [the SCC's] most troubling decision of the 21st century."⁸⁵ A common thread in critiques of this case was fear about the resulting uncertainty. Many debated whether the gradual shift in approach appropriately met the threshold of "significant change in the law" established in *Bedford v Canada* ("*Bedford*") as the requirement for overturning precedent.⁸⁶ The Court's arguably casual dismissal of precedent was unsettling, indicating the potential for disruptive uncertainty both in the realm of labour law and for *Charter* jurisprudence more broadly.⁸⁷

II. REFLECTION AND UNANSWERED QUESTIONS

The New Labour Trilogy does leave uncertainty for labour law, but not to an extent that should be cause for alarm.⁸⁸ For two main reasons, I argue that such concerns about the New Labour Trilogy overstate the extent of the uncertainty. First, freedom of association jurisprudence has never really been certain. Therefore, the concern that employers will

81 *Ibid*, at para 78.

82 Mary Thibodeau, "Solidarity Forever! A Right to Strike is Recognized in *Saskatchewan Federation of Labour v Saskatchewan*", *The Court* (February 4, 2015), online: <<https://www.thecourt.ca/solidarity-forever-a-right-to-strike-is-recognized-in-saskatchewan-federation-of-labour-v-saskatchewan/>> archived at <<https://perma.cc/6NXR-KU3G>>.

83 Fudge, "Arc of Workplace Justice", *supra* note 17 at 108.

84 Jim Clancy, "Foreword" (2015) Canadian Foundation for Labour Rights Forum Report online: <http://labourrights.ca/sites/labourrights.ca/files/documents/cflr_new_labour_trilogy_forum.pdf> archived at <<https://perma.cc/322U-2RMT>> at 3.

85 Asher Honickman, "A Troubling Decision on the Right to Strike", *The National Post* (February 11 2015), online: <<http://news.nationalpost.com/full-comment/asher-honickman-a-troubling-decision-on-the-right-to-strike>> archived at <<https://perma.cc/Y5N4-4JQ8>>.

86 *Bedford v Canada*, 2013 SCC 72, [2013] 3 SCR 1101.

87 Janelle Souter, "'Clearly the Arc Bends': *Stare Decisis* and *Saskatchewan Federation of Labour v Saskatchewan*" (2015) 78 Sask L Rev 397.

88 For the purposes of this paper, I will not address the broader questions of *Bedford* and *stare decisis* thresholds. Instead, I will focus on the New Labour Trilogy's substantive precedents.

now face a “wave of costly and time-consuming litigation” is exaggerated.⁸⁹ As discussed above, the divisiveness of the Court has always encouraged labour activists and unions toward litigation in attempts to disrupt the status quo. Second, while the New Labour trilogy does overturn precedent, this reversal is not an abrupt about-face but rather the reasonable culmination of decades of incremental shifting toward increased worker protection. As Justice Abella herself wrote in *SFL*, “clearly the arc bends increasingly toward workplace justice.”⁹⁰

With that said, there are still some marked areas of uncertainty that will need to be addressed. Although there are many issues at play, the second section of this paper will focus on three key questions. First, I will examine the extent to which the *Charter*-protected right to strike will be applicable to various different types of strike legislation. Second, I will explore the impact that this trilogy may have on collective rights in Canada more broadly. Third, I will speak to whether these decisions are truly indicative of decisive victories for the labour movement.

A. How Will *SFL* Impact Other Strike-Restricting Scenarios?

SFL's applicability to different types of strikes and legislation remains to be seen, but this uncertainty should not in itself be a cause for concern. While some have called these future cases “impossible to predict,” the reasoning in *SFL* is adequately robust and extensive for future courts to apply a similar analysis to different scenarios.⁹¹ While there is still some uncertainty regarding the particulars of how strike jurisprudence will evolve, the Court has provided a meaningful framework that can be generalized to different types of strike legislation.

SFL dealt with what was essentially a blanket prohibition on striking for the purposes of collective bargaining. The *PSESA* put a tremendous amount of unilateral power in the hands of public sector employers without offering any outside checks or meaningful alternatives for dispute resolution. It remains to be seen how the test for section 2(d) will apply to legislation that does not prohibit all work stoppages, especially in the case of back-to-work laws and non-collective bargaining strikes.

Lawyer Paul Cavalluzzo identified multiples types of strikes that could be impacted by this holding, notably: a) essential service limitations on public sector strikes (often called “controlled strikes” because the legislation controls which non-essential employees retain the right to strike); b) non-collective bargaining strikes, including strikes for political purposes; and c) back-to-work laws.^{92 93} It seems clear in some of these areas that a *Charter*-protected right to strike will be found to exist and the bulk of future discussion will take part in the section 1 analysis. In others, it is unlikely that a *Charter*-protected right to strike will be found at all.

89 John Craig & Christopher Pigott, “The New Labour Trilogy: Supreme Court Reshapes Labour Law (Again)” (March 11 2015), *Faskin Martineau DuMoulin LLP* online: <<http://www.fasken.com/the-new-labour-trilogy-the-supreme-court-of-canada-reshapes-labour-law-again/>> archived at <<https://perma.cc/7JUV-AR2G>> [Craig, “Trilogy”].

90 *SFL*, *supra* note 3 at para 1.

91 Craig, “Trilogy”, *supra* note 89.

92 Paul Cavalluzzo, “The Impact of *Saskatchewan Federation of Labour* on Future Constitutional Challenges” (Paper delivered at the Canadian Foundation for Labour Rights Forum, Toronto, April 9 2015) online: <http://labourrights.ca/sites/labourrights.ca/files/documents/cflr_new_labour_trilogy_forum.pdf> archived at <<https://perma.cc/322U-2RMT>> at 9 [Cavalluzzo].

93 *Ibid*, at 9-10.

i. Essential Services Legislation and Controlled Strikes

The Court will likely find that a right to strike exists in scenarios analogous to *SFL*, when other essential services legislation controls or limits the right to strike for particular categories of public sector workers. The Court in *SFL* established that deprivation of the right to strike will meet the section 2(d) threshold of substantial interference with collective bargaining rights. Future cases are therefore likely to hinge on the section 1 analysis, as the burden shifts to the government to prove that the legislation is demonstrably justified in a free and democratic society. To do so, the government must first demonstrate that the objective of the legislation is pressing and substantial, and then show that the means used are proportional, rationally connected to the objective, and minimally impairing of rights.⁹⁴ Because of the uncontroversial importance of maintaining citizens' health and safety, it seems likely that essential services legislation will generally be considered a pressing and substantial objective. Therefore, future court challenges will likely revolve around "whether the legislative means adopted to attain these objectives are reasonable and proportional in the circumstances."⁹⁵

While the exact parameters binding strike-infringing legislation have not been thoroughly established, the Court in *SFL* provided some clear signposts. As discussed above, the SCC has indicated two critical components of a minimally-impairing legislative response: access to a meaningful dispute mechanism process to resolve collective bargaining impasses, and an independent body to review which employees are designated as "essential." What exactly a meaningful dispute resolution looks like has not yet been authoritatively established, and future cases will almost certainly call for "careful consideration."⁹⁶ At the very least, the New Labour Trilogy provides an outline for future analysis.

ii. Non-Collective Bargaining Strikes, Including Political Strikes

The Court in *SFL* ties the entirety of its section 2(d) analysis to the importance of collective bargaining, and distinguishes collective bargaining strikes from other strikes.⁹⁷ There is little established framework on which to base an argument for the protection of non-collective bargaining strikes. As a result, the *Charter* is least likely to protect work stoppages occurring outside of scheduled collective bargaining.

With that said, the Court has clearly been on a path of broadening the scope of freedom of expression, with a focus on inequality and the importance of collective labour movements in addressing workplace power discrepancies. It is conceivable that this trend could continue into the realm of non-collective bargaining strikes, especially political strikes that are used to protest the working conditions and environment of workers. For example, in *General Motors of Canada Ltd v CAW-Canada*, GM workers staged a strike contrary to the *Labour Relations Act* and GM's collective agreement.⁹⁸ This strike was deliberately intended to protest the proposed labour policies of the recently elected provincial government. The union argued that the employer had the resources and power to participate in government lobbying, and would benefit from proposed legislative changes to the detriment of the union. The union's work stoppage attempted to address this inequality in political power by "adopting a means tailored to the social situation of workers [...] who lack the resources available to employers."⁹⁹ Ultimately, the Ontario

94 *R v Oakes*, [1986] 1SCR 103, 26 DLR (4th) 200.

95 *Ibid*, at 10.

96 Barrett, *supra* note 2 at 240.

97 *SFL*, *supra* note 3 at paras 43-45.

98 *Bedford v Canada*, [1996] OLRB Rep 409, 1996 CarswellOnt 4196 at para 2.

99 *Ibid*, at para 35.

Labour Relations Board found that the strike constituted expressive activity for the purposes of section 2(b),¹⁰⁰ but that legislation prohibiting striking during a collective agreement was demonstrably justifiable under section 1.¹⁰¹

With the SCC having since indicated a willingness to expand 2(d) for equity-driven reasons, this tribunal decision may hold relevant analogies. If a government is passing legislation that erodes the rights of workers and unions while in the middle of a collective agreement, and individual employees combined do not have lobbying power that is equal to corporations, union-endorsed strikes could be an effective tool to promote equality. It is possible that the nature of power dynamics in a workplace and the recognized effective nature of work stoppages could lead the Court to recognize the right to political strikes.

However, there are strong practical and ideological reasons to limit striking to collective bargaining. This restriction came into being as a “trade-off”: employers received the guarantee of stability that came from limiting striking to certain contexts and workers received “a bundle” of significant, enforceable rights in exchange, including the right to keep their job after a strike.¹⁰² Allowing work stoppages to occur erratically outside of collective bargaining undermines the stability and fairness of this trade-off. Even if the right to political strikes is recognized under the *Charter*, section 1 analyses will likely justify the constitutionality of legislation restricting strikes to collective bargaining periods.

iii. Back to Work Laws

Finally, the Court will have to determine how the precedent from *SFL* will apply to back-to-work legislation. In these scenarios, union workers are not pre-emptively denied the right to strike but are forced back to work by the passage of legislation after a collective bargaining strike has already begun. In 2015, Cavalluzzo argued that these laws “should be found unconstitutional [...] in that they substantially interfere with collective bargaining for no justifiable reason.”¹⁰³

The Ontario Superior Court recently endorsed this perspective in *CUPW/STTP v Canada (AG) (CUPW)*, where Justice Firestone held that the *Restoring Mail Delivery for Canadians Act*¹⁰⁴ was unconstitutional.¹⁰⁵ This legislation, passed in response to a labour dispute between Canada Post and the Canadian Union of Postal Workers that had escalated to rotating strikes and a nation-wide lockout, forced “the immediate resumption of postal services.”¹⁰⁶ In doing so, the Act imposed an arbitration process wherein the arbitrator, unilaterally selected by the government, would select one party’s final offer in its entirety rather than drawing on both.¹⁰⁷

Justice Firestone held that this legislation engaged section 2(d) right to strike protections, and was not justified under section 1. Even though this legislation did not prohibit the *possibility* of engaging in work stoppages, it still substantially interfered with collective bargaining because it disrupted the balance between employer and employees.¹⁰⁸ The work stoppages had been actively “contributing to a meaningful process of collective

100 *Ibid*, at para 137.

101 *Ibid*, at para 173.

102 Judy Fudge & Eric Tucker, “The Freedom to Strike in Canada: A Brief Legal History” (2010) 15:2 CLEJ 333 at 350.

103 Cavalluzzo, *supra* note 92 at 12.

104 SC 2011, c 17.

105 *CUPW/STTP v Canada (AG) (CUPW)*, 2016 ONSC 418, 130 OR (3d) 175 [CUPW].

106 *Ibid*, at para 1.

107 *Ibid*, at para 18.

108 *Ibid*, at para 183.

bargaining” when they were taken away.¹⁰⁹ In his section 1 analysis Justice Firestone accepted that the back-to-work legislation was pressing and substantial.¹¹⁰ However, he held that it was not minimally impairing because the arbitration regime imposed was “ineffective...inadequate,” and was not impartial.¹¹¹

Throughout the case, Justice Firestone relied heavily on *SFL*, applying the same test and analysis. His judgment is a clear example of how the precedent can be meaningfully applied to different scenarios.

Overall, while *SFL* may have been restricted to a particular fact scenario, the clear reasoning and thoroughly-explored motivations should provide helpful signposts for future courts and litigants. A measure of uncertainty will likely persist until the courts have decisively analysed the right to strike in a variety of different contexts. The uncertainty raised in this area overall, however, is surmountable.

B. What Will This Mean for Collective Rights in Canada?

The New Labour Trilogy also raises questions about whether future *Charter* analyses will similarly adopt a more nuanced, less individualistic view of rights. Collective rights are embedded in the *Charter* in three key areas: the protection of minority language rights in section 23, Aboriginal and treaty rights in section 25, and the multicultural interpretive provision in section 27.¹¹² The rest of the *Charter*, and the vast majority of *Charter* case law, has been heavily focused on the discrete rights of the individual.

The original Labour Trilogy typified this individualistic approach. Despite the inherently collective connotations of association, Justice McIntyre refused the possibility of collective section 2(d) rights, stating that “people, by merely combining together, cannot create an entity which has greater constitutional rights and freedoms than they, as individuals, possess.”¹¹³

This standpoint, already thrown into question in *Dunmore*, was decisively set-aside in *MPAO*. “Recognizing group or collective rights complements rather than undercuts individual rights,” the Court held. “Both are essential for full *Charter* protection.”¹¹⁴ This holding is consistent with academic scholarship that has critiqued individualistic human rights approaches as a neoliberal regime incapable of adequately addressing equity concerns.¹¹⁵ Not only is it difficult for an individual alone to effectively overcome entrenched systemic inequalities, a purely individualistic rights-based approach can actually “reinforce rather than challenge” existing social inequities.¹¹⁶ “[B]y framing struggle and resistance in terms of legal and individual remedies which, if successful, lead to small individual improvements and a marginal re-arrangement of the social edifice,” individual human rights analyses obscure the systemic roots of inequality and resistance.¹¹⁷

109 *Ibid*, at para 186.

110 *Ibid*, at para 201. Thereby declining to accept a section 1 analysis of 2(d) wherein *only* essential services legislation could be considered pressing and substantial.

111 *CUPW*, *supra* note 105 at paras 214, 217.

112 Errol P Mendes, “The *Charter* and its Constitutional Lineage: An Evolving Template of Distributive Justice for Reconciling Diversity, Collective Rights of National Minorities and Individual Rights?” (2007) 22:1 NJCL 61 at 80 [Mendes].

113 *Alberta Reference*, *supra* note 4, at para 156.

114 *MPAO*, *supra* note 61 at para 65.

115 See e.g. Maureen Ramsay, *What’s Wrong with Liberalism? A Radical Critique of Liberal Philosophy* (New York: Continuum, 2004).

116 Costas Douzinas, “The Paradoxes of Human Rights” (2013) 20:1 Constellations: an International Journal of Critical and Democratic Theory 51 at Thesis 5.

117 *Ibid*, at Thesis 5.

MPAO addresses the limitations of individual rights within the specific context of labour law. At its heart, “section 2(d) of the *Charter* is aimed at reducing social imbalances.”¹¹⁸ These imbalances are deeply entrenched in the workplace, where employers hold substantially more systemic and structural power than employees do individually. The SCC acknowledges that a collective approach is needed to address these inequalities, and that a purposive reading of section 2(d) protects “the right to join with others to meet on more equal terms the power and strength of other groups and entities.”¹¹⁹

The analysis in *MPAO* indicates a deeper and more nuanced understanding of the structures of inequality than the original Labour Trilogy. However, I suggest that this decision likely does not indicate that the SCC will immediately introduce further uncertainty by recognizing collective rights in other areas of the *Charter*. The analysis provided within *MPAO* is confined specifically to labour movements, and provides little in the way of examples of how this could play out outside of section 2(d) of the *Charter*. In addition, “association” seems inherently and almost explicitly collective, as are the other sections where collective rights have been recognized. Other *Charter* rights are much more explicitly framed as individual rights. It seems unlikely that the Court will drastically overhaul its analysis of those *Charter* rights in the near future.

Even if *MPAO* does not signify a dramatic shift in substantive approach, it does show an inclination toward a more sensitive analysis. If nothing else, this decision indicates that the SCC is thinking about rights in a more nuanced, less individualistic way. This is good news, as legal scholar Errol Mendes suggests that collective rights are “the very marrow of minority rights.”¹²⁰ The Court’s willingness to endorse some of the animating principles behind collective rights, such as recognition of the realities of structural and systemic inequality, is hopeful for future analyses of other *Charter* rights.

This shift in mindset is a welcome one. A purely individualistic approach to rights has, at best, been ineffective in addressing inequalities.¹²¹ There are strong arguments that achieving meaningful equality requires recognizing group rights in conjunction with universal human rights.¹²² Collective rights, if employed by a disadvantaged group to “limit the economic or political power exercised by the larger society over the group,” can effectively move diverse societies toward equality without undermining individual rights.¹²³ The fact that the SCC has gradually moved toward adopting this framework of analysis is a hopeful shift away from neoliberal analyses toward a more robust understanding of complex inequalities.

Overall, the explicit recognition of collective rights in the New Labour Trilogy is unlikely to substantially disrupt future *Charter* jurisprudence. Rather, it provides an illuminating example of a multi-layered critical analysis that is sensitive to the realities of power.

C. To What Extent Will These Cases Benefit Labour Law in Canada?

Even from a pro-labour perspective, there are reasons to be concerned that the New Labour Trilogy may not live up to expectations. The final section of this paper will canvas three critiques of the New Labour Trilogy that have been advanced from a labour-rights perspective: one, that *SFL* still contains an unsettling precedent that could allow

118 *MPAO*, *supra* note 61 at para 59.

119 *Ibid*, at para 66.

120 Mendes, *supra* note 112 at 75.

121 Samuel Moyn, “A Powerless Companion: Human Rights in the Age of Neoliberalism” (2014) 77:4 *Law & Contemp Probs* 147 at 151.

122 See e.g. Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995).

123 *Ibid*, at 7.

governments to erode union power; two, that the relevance of unions has shrunk in recent years, and victories for labour movements are inadequate to protect the majority of workers and workplace inequalities; and three, that the shift of union mobilizing from the political realm to the courts erodes the power of grassroots workers and perpetuates unequal distributions of power.

I argue that these concerns are legitimate and that the New Labour Trilogy on its own cannot address the increasing power of political and corporate interests against workers' rights. With that said, *Charter* litigation still has an important and effective role to play in achieving workplace equality when used in conjunction with grassroots workers' movements. Although the New Labour Trilogy is not a panacea, it has the potential to be an effective tool for unions and pro-labour lawyers.

i. Does *SFL* Allow Governments to Continue Undermining Union Power?

Despite being widely praised by labour advocates, *SFL* still raises cause for concern. While issuing a suspended declaration of invalidity for strike-prohibiting sections of the *PSESA*, the SCC nonetheless upheld the constitutionality of the *TUAA*. As discussed above, this legislation introduced stricter requirements for a union to be certified and loosened the requirements for decertification.¹²⁴ The Court held that this did not constitute substantial interference with the collective bargaining process. In doing so, the Court left room for governments hostile to labour movements to erode union power. The right to strike applies only to unionized workplaces. By allowing governments to create bureaucratic roadblocks to certified unionization, the Court left the door open to government intervention with labour movements.

The extent to which this precedent will allow governments to undercut unionization remains to be seen. In *MPAO* the Court was clear that workers have the right to join a union. In *Meredith*, the Court found that section 2(d) could apply to collective action even outside of a formally-recognized union structure. The finding in *SFL* has not removed these protections, but merely found that the government's interference did not meet the threshold for substantial interference in that particular scenario. Given the hostility of recent governments to labour movements, however, allowing room for governments to stifle effective union certification is still concerning.¹²⁵ This concern is particularly acute given the decline in union power discussed in the following section.

ii. Are Labour Movements Irrelevant for Workers' Rights?

A common critique of the New Labour Trilogy is that the labour movement is on the decline and that victories for unions are increasingly less relevant for the majority of workers. Between 1981 and 2012, unionization rates declined in every Canadian province, from a federal average of 38% of Canadian workers to 30%.¹²⁶ At the same time, wages for unionized workers have "stagnated."¹²⁷ Unions are increasingly seen as unwilling or unable to play the radically political, workers-rights-driven role that they historically held.¹²⁸

124 *SFL*, *supra* note 3 at paras 14-15.

125 Canadian Foundation for Labour Rights, "Restrictive Labour Laws in Canada", updated January 2016, online: <<http://labourrights.ca/print/61>> archived at <<https://perma.cc/P9FU-VRAV>>.

126 Diane Galarneau & Thao Sohn, "Long-term Trends in Unionization" (2013) *Insights on Canadian Society*, Statistics Canada Catalogue no 75-006-X [Galarneau].

127 Quail, *supra* note 46 at 357.

128 See e.g. Brad Walchuk, "Union Democracy and Labour Rights: A Cautionary Tale". (2011) 2:2 *Global Labour J* 106.

Within this context, it remains to be seen whether constitutional protection can revitalize collective bargaining and unions, or whether they will continue to slide toward obscurity. Judy Fudge, an eminent labour movement lawyer and scholar, suggests that “while it is heartening for people who are concerned with the dignity of workers that the SCC has elevated collective bargaining to a constitutional right, it is unlikely that defensive battles fought in courts can turn the economic and political tide that has undermined the basis for transforming these rights into job security and improved wages for working people.”¹²⁹ On the other hand, Susanna Quail suggests that the SCC’s approach to constitutionalizing collective movements has been sufficiently flexible that it should be relevant to future labour movements, even if current union structures fall to disuse.¹³⁰

I would add two brief comments to this discussion: first, the statistics tell a slightly more complicated story about the decline of unionization. Decline in Canadian unionization was precipitous between 1981 and 1999, but rates between 1999 and 2012 held relatively steady and even rose in some provinces.¹³¹ In particular, it is interesting to note that unionization rates have *not* declined for women workers.¹³² From an equity-driven perspective this may be significant given the historic and ongoing vulnerability of female workers,¹³³ who are more likely to be precariously employed,¹³⁴ and who continue to experience a “wage gap” relative to men for paid labour.¹³⁵

Second, the Court’s recent shift toward addressing workplace inequalities has not been limited to labour law. The SCC found in 2016 that federally-regulated employers could not fire non-unionized employees without cause.¹³⁶ While the bulk of the Court’s reasons were concerned with the appropriate standard for judicial review, it is still interesting to see the expansion of non-unionized employee protections so soon after a series of cases expanded protections for unionized workers.

iii. Does *Charter* Litigation Erode the Political Effectiveness of Labour Movements?

Finally, labour activists have criticized the overall trend of shifting the labour movement into the legal sphere. Unions have historically often played a radical and deeply political role: they have been at the forefront of agitating for crucial rights such as shorter workweeks, workplace safety standards, and parental benefits.¹³⁷ But as the struggle moves “from workplaces and public spaces to courtrooms, control shifts from the hands of workers to the hands of union bureaucrats and lawyers.”¹³⁸ This shift risks perpetuating the very inequalities of power that unions are intended to combat.

129 Fudge, “Eating Crow”, *supra* note 53.

130 Quail, *supra* note 46 at 358-359.

131 Galarneau, *supra* note 126 at 3.

132 *Ibid.*, at 2.

133 On the feminization of poverty in Canada generally, see e.g. Monica Townson, “A Report Card on Women and Poverty”, (2000) Canadian Centre for Policy Alternatives, online: <http://policyalternatives.ca/sites/default/files/uploads/publications/National_Office_Pubs/women_poverty.pdf> archived at <<https://perma.cc/BE67-3WGH>>.

134 “Women and Precarious Work: a Framework for Policy Recommendations”, (2005) Oxfam Canada at ii.

135 *The Global Gender Gap Report 2016*, World Economic Forum, online: <http://www3.weforum.org/docs/GGGR16/WEF_Global_Gender_Gap_Report_2016.pdf> archived at <<https://perma.cc/H5US-7DQK>>.

136 *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29, 2016 CarswellNat 2998.

137 Canadian Labour Congress, “History of Labour in Canada”, (2015) online: <<http://canadianlabour.ca/why-unions/history-labour-canada>> archived at <<https://perma.cc/5RG5-64Q3>>.

138 Quail, *supra* note 46 at 356.

This issue is a very real concern, and labour advocates and organizers should be cautious. However, it does not completely invalidate the victories in the New Labour Trilogy. First, a large part of the labour critique of litigation is that the *Charter's* “fundamentally liberal, individualized conception of rights” is inherently incompatible with labour values, and “to pursue these claims in court is to accept and buttress a paradigm fundamentally opposed to the organizing principles and political underpinnings of unionism.”¹³⁹ As discussed above, though, the New Labour Trilogy is *not* based on individualistic rights-doctrines, but rather on a complex understanding of collective movements and power.

Second, it is not clear that *Charter* litigation and grassroots movements are necessarily mutually exclusive. Litigation has been one strategy used when governments hostile to labour movements have reduced the effectiveness of other mobilization tactics.¹⁴⁰ It is possible that the legal affirmation of labour rights, coupled with the recent change in federal government, may shift the political environment sufficiently that grassroots political organizing can once again become a powerful and effective tool. In this sense, the New Labour Trilogy both increases the legal strength of unions and workers, and reaffirms the importance and power of collective action. It does not confirm that litigation is the only effective strategy, but does show that litigation can be used in conjunction with other grassroots mobilization as an important tactical tool.

CONCLUSION

After 30 years of convoluted case law that simultaneously failed to produce clarity and failed to provide any meaningful protection to workers, the New Labour Trilogy is a welcome development. These cases raise serious questions as to how freedom of association will develop within the field of labour law, and deeper questions about the fundamental nature of *Charter* rights. This uncertainty is not negligible; courts, lawyers, and workers will have to work to produce answers. But Canada has long recognized that “growth and expansion” are critical aspects of our constitution,¹⁴¹ and accepting the status quo can mean accepting ongoing marginalization and oppression. As the Court increasingly comes to apply a more nuanced and equity-driven critical lens to *Charter* questions, it will have to upset historical decisions and overturn precedent. These changes can be startling and produce great uncertainty. However, they are nonetheless a necessary component of a living constitution that must adapt to an evolving understanding of rights, freedoms, and equality.

139 *Ibid.*, at 359-360.

140 *Ibid.*, at 364.

141 *Reference re a Reference as to Meaning of Word “Persons” in Section 24 of British North American Act, 1867*, [1929] UKPC 86, 1929 CarswellNat2 at para 54.

