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**The Right to Strike: The Supreme Court of Canada,  
The Charter of Rights and Freedoms and the Arc of Workplace Justice**

Judy Fudge and Heather Jenson

1. Introduction

In momentous decision, released on 30 January 2015, the Supreme Court of Canada ruled in *Saskatchewan Federation of Labour v. Saskatchewan (SFL)*<sup>1</sup> that the right to strike is protected by the Canadian Charter of Rights and Freedom's guarantee of freedom of association. Writing for the majority (5:2), Justice Abella asserted:

The conclusion that the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations is supported by history, by jurisprudence, and by Canada's international obligations.... The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right. It seems to me to be the time to give this conclusion constitutional benediction.<sup>2</sup>

The case is significant not only for the Court's conclusion that the freedom of associate protected in s. 2(d) of the Canadian Charter includes the right to strike, but also because it signalled that the gradual expansion of the scope of constitutional protection for labour rights that began in 2001 with *Dunmore*,<sup>3</sup> had not been reversed in 2011 in *Fraser*.<sup>4</sup> In fact, Justice Abella began her judgment in *SFL* by remarking that 'clearly the arc bends increasingly towards workplace justice'.<sup>5</sup>

The crucial issue before the Court was the constitutionality of provincial legislation that unilaterally designated public sector workers as essential and prohibited them from striking. The legislation did not provide a process for an independent tribunal to review whether or not the

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<sup>1</sup> *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 (SFL).

<sup>2</sup> SFL, para. 3

<sup>3</sup> *Dunmore v Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 (*Dunmore*) granted constitutional protection to such collective activities as making collective representations to an employer.

<sup>4</sup> In *Attorney General of Ontario v Fraser*, 2011 SCC 20 (*Fraser*) the Court refused to extend the collective bargaining legislation that pertained to most private sector employees to agricultural workers. See Judy Fudge, 'Constitutional Rights, Collective Bargaining and the Supreme Court of Canada: Retreat and Reversal in the Fraser Case' (2011) 41 *Indus LJ* 23.

<sup>5</sup> SFL, para. 1.

work performed by the designated workers was in fact necessary to prevent danger to life, health and safety. Nor did it provide a meaningful process for resolving collective bargaining disputes that went to impasse. The question the Court had to resolve was whether or not strike action was an essential part of collective bargaining. Concluding that the right to strike was a constitutionally protected component of collective bargaining, Justice Abella recognised that protecting health and safety was a legitimate and pressing objective that could justify limiting the scope of freedom of association. Nonetheless she held that the provincial government had failed to establish that the means it adopted to achieve this goal were ‘minimally impairing’ of the constitutional right.

Even more remarkable than the result, was the Court’s approach to interpreting the scope of freedom of association. It referred to the history of labour relations and collective bargaining law in Canada, canvassed the gamut of international and comparative law regarding the status of the right to strike, and reviewed its own jurisprudence to conclude that the right to strike was a constitutionally protected component of collective bargaining. Justice Abella’s sources ranged from the European Court of Human Right’s path breaking decision in *Demir and Baykara*, through international human and labour rights, to Anatole France’s ‘aphoristic fallacy’: ‘The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread’.<sup>6</sup>

In what follows, we will first explain the facts that gave rise to SFL decision and then we will situate the case in the relevant jurisprudence. We will briefly discuss the majority’s reasoning for extending the constitutional protection of freedom of associate to include the right to strike. Then we will consider three implications of the Supreme Court of Canada’s reasoning in SFL: first, the what the majority’s reasons indicate about how international human rights in general and the ILO’s supervisory bodies observations in particular will figure in future cases about the scope of constitutional protected associational activities; second, the scope of the constitutional protections for the right to strike; and third, the constitutionality of the revised essential services legislation that the Saskatchewan introduced in response to the Supreme Court’s ruling that the initial legislation was unconstitutional. To conclude, we will reflect upon

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<sup>6</sup> SFL, para. 56

what constitutional recognition means for the Canadian labour movement in particular and unions more generally

## 2. Essential Services Legislation Comes to Saskatchewan

Until 2008, the province of Saskatchewan, which historically has had a strong social democratic party that frequently formed the government, was the only jurisdiction in Canada that did not have comprehensive legislation to preserve the delivery of essential public services during strikes and lockouts.<sup>7</sup> Instead, provincial governments had used ad hoc back-to-work legislation in response to individual disputes that had a politically unacceptable effect. The Saskatchewan Party, a right of centre populist provincial political party that formed a majority government for the first time in 2007, was elected on a platform that included ‘rebalancing’ labour legislation in the province. Pointing to a strike of corrections workers and snowplough operators in December 2006, the potential for strikes of health care workers, and a 2007 a strike of support staff at two universities, the Saskatchewan party and business groups argued essential services legislation was needed.<sup>8</sup> In December 2007, the new government introduced The Public Service Essential Services Act (PSESA).

What distinguished the new Saskatchewan essential services legislation from public sector collective bargaining legislation in most other Canadian jurisdictions is that it did not provide a mechanism that enabled public sector unions to challenge the employer’s designation of services as essential and have that challenge reviewed by an independent tribunal. In effect, The Public Service Essential Services Act (PSESA) mandated an essential services agreement and, failing agreement, allowed the employers to determine which and how many employees could participate in a strike.<sup>9</sup>

The PSESA came into effect in May 2008. It defined ‘essential services’ broadly, to include any service provided by a public employer that prevents danger to life, health or safety, serious deterioration of machinery, equipment or premises, serious environmental damage or

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<sup>7</sup> In Canada, jurisdiction over labour relations is divided between the provinces, which have authority to legislate regarding enterprises in their territories, except those undertakings and enterprises that are federally regulated, such as banks, shipping and railways, that fall within exclusive federal jurisdiction.

<sup>8</sup> Mark Ferguson, ‘Union suggests hearings, review of proposed labour bills’ *The Star Phoenix*, February 14, 2008, A3. See also Emma Graney, ‘Timeline: The battle over essential services’ *The Star Phoenix*, October 16, 2015.

<sup>9</sup> The Public Service Essential Services Act, SS 2008, c P-42.2

disruption to the courts. Public employers included the government, all publicly owned corporations, all public health service providers, universities and colleges, municipalities, police services, and any other prescribed employer, which included, among other enterprises, several casinos and most liquor stores in the province. The Act gave employers the authority to state which services qualified as essential. In the months leading up to the renegotiation of a collective agreement, the public employer was required to provide to the union a list of the services it considered to be essential, as well as the job classifications, number of employees in each classification, and names of individual employees who were required to work during a strike or lock-out. The Act then required the public employer and union to negotiate for the purposes of reaching an essential services agreement, which would identify the services to be maintained during a strike and the employees required to provide those services. The parties were prohibited from considering whether members of management or any other persons could provide the essential services during the job action. If the union and employer did not agree, the employer was empowered to determine unilaterally what services were essential, how many persons in each job classification were required to continue working, and the names of the individual employees who were required to continue working and therefore, prohibited from participating in strike activity. Therefore, although the law required the parties to negotiate, the employer could impose its position at the end of the negotiation process. The review mechanism was limited; the Saskatchewan Labour Relations Board could review only the numbers of employees, but not the employer's decisions about which services were essential, which classifications were required, or which employees must work. Employees designated as essential were prohibited from participating in a work stoppage against their employer, and individual employees and unions faced fines for each day an employee designated as essential participated in a work stoppage.

The Saskatchewan Federation of Labour (SFL), which is a provincial federation of trade unions with 37 affiliated union members representing 100,000 workers, launched a court challenge in July 2008, alleging that the PSESA violated workers' freedom of association, assembly, expression, that the legislation deprived workers of liberty and security of the person, and that the legislation violated the guarantee to equal protection and benefit of the law.<sup>10</sup>

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<sup>10</sup> See Saskatchewan Federation of Labour, 'About Us', online: <[www.sfl.sk.ca/about-us/our-movement](http://www.sfl.sk.ca/about-us/our-movement)>.

Eighteen individual unions, most of which were affiliates of the SFL, joined the SFL court challenge as plaintiffs. The same action also complained that several changes to The Trade Union Act violated workers' freedom of association and expression.<sup>11</sup> A complaint about the effect of the PSESA on freedom of association was also sent to the International Labour Organization.<sup>12</sup>

In addition to the Saskatchewan Federation of Labour's court challenge, four individual unions started independent legal actions claiming the legislation violated their freedom of association as protected by the Charter.<sup>13</sup> On the application of the SFL, the Court of Queen's Bench stayed the four individual union challenges to the legislation, directed that the SFL action to proceed first, and granted intervener standing at the trial level to the four unions that brought separate challenges. The trial proceeded by affidavit, with hundreds of pages submitted documenting the effect of the PSESA on certain unions affiliated with the SFL, the intervening healthcare unions and public employers, and the opinions of several expert witnesses. The trial judge, Mr. Justice Ball, who had served as a Chair of the Saskatchewan Labour Relations Board before his appointment to the Court of Queen's Bench, explained meaningful collective bargaining as requiring three interdependent elements: the right to organize and choose a bargaining representative; the right to bargain collectively with the employer through that representative; and the employees' right to strike.<sup>14</sup> The trial judge determined that the Act 'substantially interferes with the freedom of public sector employees in many workplaces to engage in meaningful strike action'.<sup>15</sup> In the absence of a fair and adequate alternate dispute resolution mechanism, or indeed any alternate dispute resolution mechanism, the trial judge decided the interference did not meet the proportionality standard required to justify a limitation on a Charter-protected right.<sup>16</sup>

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<sup>11</sup> In a brief four paragraphs the Court agreed with the trial judge that 'amendments to the process by which trade unions obtain (or lose) the status of bargaining representative . . . does not substantially interfere with the freedom to freely create or join association'. SFL, paras. 100, 99 – 102. We will not be discussing this aspect of the case.

<sup>12</sup> Case No 2645 (2010).

<sup>13</sup> The Saskatchewan Union of Nurses, the Saskatchewan Government and General Employees' Union, Service Employees International Union West and the Canadian Union of Public Employees (CUPE) each brought legal actions challenging the constitutionality of the PSESA.

<sup>14</sup> 2012 SKQB 62, paras. 60 and 115. See also 2015 SCC 4, para. 24.

<sup>15</sup> 2012 SKQB 62, para. 122.

<sup>16</sup> *Ibid.*, paras. 217-222

The Attorney General for Saskatchewan appealed the trial judge's decision to the Saskatchewan Court of Appeal. At the provincial appeal court level, 21 provincial public sector unions and employers and the federal attorney general appeared as interveners. The Saskatchewan Court of Appeal overturned the trial decision on the basis that there was Supreme Court of Canada precedent determining that freedom of association protected by s. 2(d) of the Canadian Charter of Rights and Freedoms does not include protection for the right to engage in strike activity.<sup>17</sup>

The SFL sought leave to appeal to the Supreme Court of Canada on questions whether the PSESA and changes to The Trade Union Act infringed workers' freedom of expression or freedom of association, and if so, whether the infringement was a reasonable and justified limit on the freedom. The Court granted leave on November 22, 2013.<sup>18</sup> At the Supreme Court of Canada five other provincial governments joined the already long list of interveners.

### 3. The Trajectory of Freedom of Association Jurisprudence in the Labour Context

The SFL decision represents a 180-degree shift in Supreme Court of Canada's answer to the question of whether or not the right to strike is protected by the Charter's guarantee of freedom of association. In its three decisions interpreting the Charter's guarantee of freedom of association, which were released simultaneously in 1987 and came to be known as the Labour Trilogy, a majority of the Supreme Court held that right to strike was not constitutionally protected.<sup>19</sup> The main reasons were delivered in the Alberta Reference, a case involving compulsory arbitration to resolve impasses in collective bargaining and a prohibition on strikes in the public sector. The six justices participating in the case issued three separate sets of reasons, which demonstrated sharp disagreement over whether or not freedom of association included the right to strike and to bargain collectively. The Labour Trilogy established both the judicial fault lines and the repertoire of arguments that have reappeared in the subsequent decisions.<sup>20</sup>

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<sup>17</sup> See SKCA, paras. 54, 66-68 referring to the Labour Trilogy, which is discussed in the next section.

<sup>18</sup> See Supreme Court of Canada, Docket 35423, history of proceedings of SFL v Saskatchewan, online: <<http://www.scc-csc.gc.ca/case-dossier/info/dock-regi-eng.aspx?cas=35423>>.

<sup>19</sup> The Labour Trilogy refers to three concurrently released appeals: Reference re Public Service Alliance of Canada [1987] 1 S.C.R. 424 (PSAC) and RWDSU v. Saskatchewan, [1987] 1 S.C.R. 460 (RWDSU).

<sup>20</sup> J Fudge, 'Freedom of Association' in Stéphane Beaulac and Errol Mendes, eds., Canadian Charter of Rights and Freedoms (5<sup>th</sup> ed.) (LexisNexis, 2013) 527-562.

Justice LeDain, whose reasons attracted the most support, gave the freedom of association a very restrictive interpretation; according to him, the freedom of association only encompassed the freedom to join in association for a common purpose and the association's activities insofar as they represented the exercise of another fundamental or constitutionally protected right or freedom.<sup>21</sup> Characterizing 'the modern rights to bargain collectively and to strike, involving correlative duties or obligations resting on an employer' as 'the creation of legislation', he held that they were 'not fundamental rights or freedoms'.<sup>22</sup> Notably, LeDain J. did not refer to any international law regarding the freedom of associate and labour rights, despite the fact the unions bringing the constitutional challenge had made extensive reference to it in their facts and oral arguments.<sup>23</sup> The final reason he offered for adopting a narrow interpretation of freedom of association in the context of labour relations was the need for judicial deference to the choices of the legislature.

In concurring reasons, Justice McIntyre J. agreed that the right to strike was not protected within the constitutional guarantee of freedom of association. Like Justice LeDain, he also ignored international law regarding the right to strike. However, he adopted a slightly broader approach than LeDain J., although he, too, was committed to state neutrality and deference. Justice McIntyre argued that the scope of freedom of association should include the protection of all activities pursued in association with others that a person could lawfully pursue as an individual.<sup>24</sup> He began with the generally accepted proposition that at the core of freedom of association 'rests a simple proposition: the attainment of individual goals, through the exercise of individual rights, is generally impossible without the aid and cooperation of others'.<sup>25</sup> But, from that premise he quickly moved to the much more controversial assertion that '[i]f Charter protection is given to an association for its lawful acts and objects, then the Charter-protected rights of the association would exceed those of the individual merely by virtue of the fact of association'.<sup>26</sup> He invoked the examples of gun and golf clubs to demonstrate how unacceptable

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<sup>21</sup>Alberta Reference, 391, Beetz and La Forest JJ. concurred with Le Dain J.

<sup>22</sup> Ibid., 391.

<sup>23</sup> K Ewing and J Hendy, 'Giving Life to the ILO – Two Cheers for the SCC' in F Faraday, J Fudge and E Tucker, eds., *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Irwin Law, 286, 292-32011)

<sup>24</sup>Alberta Reference, 407. This is sometimes called the equal protection approach.

<sup>25</sup> Ibid., 395.

<sup>26</sup>Ibid., 404.



it would be to protect the objects and activities of an association.<sup>27</sup> Thus it was crucial for him to limit constitutional protection to those associative activities that only an individual could do lawfully.

Having set out his framework, McIntyre J. turned to trade unions and their core activities. According to him, since '[m]odern labour relations legislation has so radically altered the legal relationship between employees and employers in unionized industries', no analogy 'may be drawn between the lawful actions of individual employees in ceasing to work and the lawful actions of union members in engaging in a strike'.<sup>28</sup> Thus, he concluded, 'that interpreting freedom of association to mean that every individual is free to do with others that which he is lawfully entitled to do alone would not entail guaranteeing the right to strike'.<sup>29</sup>

In his dissent in the Alberta Reference, Dickson C.J.C. adopted a purposive approach to interpreting freedom of association that was sensitive to the context of labour relations, emphasizing the distinctive nature of trade unions as public goods and the collective dimension of labour rights. According to him,

[t]he role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers. The capacity to bargain collectively has long been recognized as one of the integral and primary functions of associations of working people. While trade unions also fulfill other important social, political and charitable functions, collective bargaining remains vital to the capacity of individual employees to participate in ensuring fair wages, health and safety protections, and equitable and humane working conditions.<sup>30</sup>

He disagreed with McIntyre J. that constitutional protection should be limited to associational activities that only individuals could do lawfully since 'there will [be] occasions when no analogy involving individuals can be found for associational activity, or when a comparison between groups and individuals fails to capture the essence of a possible violation of associational rights'.<sup>31</sup> His characterization of the distinct, positive aspects of trade unions and

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<sup>27</sup> Ibid., 404-405.

<sup>28</sup> Ibid., 411-12.

<sup>29</sup> Ibid., 411-12.

<sup>30</sup> Ibid., 368.

<sup>31</sup> Ibid., 367. He stated that there was no individual analogue for collective bargaining and strikes.

the collective nature of organized labour's core activities provided him with warrants for his conclusion that it was crucial to interpret freedom of association to include some of the fundamental activities of trade unions.

Chief Justice Dickson found support for his purposive and contextual interpretation to the freedom of association in international law, stating that international legal norms 'provide a relevant and persuasive source for interpretation of the provisions of the Charter, especially when they arise out of Canada's international obligations under human rights conventions'.<sup>32</sup> Not only did he refer to two of the United Nations' human rights covenants, which Canada has ratified, noting that both contained specific provisions relating to freedom of association and trade unions, he also mentioned the International Labour Organization's (ILO) Convention 87, regarding the freedom of association, and the observations of the ILO supervisory bodies relating to the legislation that was the subject of the constitutional challenge.<sup>33</sup> He remarked 'there is a clear consensus amongst the I.L.O. adjudicative bodies that Convention No. 87 goes beyond merely protecting the formation of labour unions and provides protection of their essential activities — that is of collective bargaining and the freedom to strike'.<sup>34</sup> The Chief Justice concluded that collective bargaining and striking were essential if unions were to be able to attain their objects and thus were included under the freedom of association protected in the Charter.<sup>35</sup>

However, it is important to note that Dickson C.J. treated the right to strike as an essential element of collective bargaining, and it was for this reason that he considered strike activity to be protected by section 2(d). According to him, 'under our existing system of industrial relations, effective constitutional protection of the associational interests of employees in the collective bargaining process require concomitant protection of their freedom to withdraw collectively their services subject to section 1 of the Charter'.<sup>36</sup> He did not consider the right to strike independent of its connection with collective bargaining. Moreover, in determining whether the legislation constituted a justified and proportionate limitation on a constitutional right, Dickson C.J. was very deferential of the government's policy objectives and means. Only the absolute prohibition

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<sup>32</sup> Ibid., 249-50.

<sup>33</sup> Ibid., 355-58.

<sup>34</sup> Ibid., 359.

<sup>35</sup> Ibid., 371. In his section 1 analysis in each of the cases in the Labour Trilogy, Dickson C.J.C. was very deferential to the governments in upholding the limitations on the union's freedom of association. Wilson J. adopted a less deferential stance in both PSAC and RWDSU.

<sup>36</sup> Ibid., 371.

on strikes by public sector workers, which had already been found to be contrary to Convention 87 by the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR), did not survive constitutional scrutiny.<sup>37</sup>

For the next fourteen years, Justice McIntyre's approach to interpreting the scope of the Charter's protection of freedom of association, which limited constitutional protection to those associational activities that only an individual could do lawfully, prevailed. During this time, the majority of the members of the Court also ignored international law pertaining to the right to strike and to bargain collectively. In three subsequent cases, the Supreme Court of Canada affirmed that freedom of association did not include the right to strike or the right to bargain collectively.<sup>38</sup>

Despite his failure in the short term to 'attract sufficient collegial support to lift his views out of their dissenting status', in the longer term Dickson C.J.'s approach to Canada's commitments under international law proved 'to be a magnetic guide'.<sup>39</sup> Its pull was first felt in 2001 when the Supreme Court of Canada invoked Dickson C.J.'s dissent as the inspiration for relying on international labour law and human rights for the interpretation of freedom of association in the labour context. In its incremental expansion of the scope of freedom of association to include such collective activities as making collective representations to an employer, the Court referred to international human rights and the observations of ILO supervisory bodies as interpretive sources.<sup>40</sup> Yet, despite explicit reference to the ILO's Committee on Freedom of Association's observation that the exclusion of agricultural workers from collective bargaining was in violation of Canada's obligations under Convention 87, the Court did not extend its interpretation of freedom of association to include collective bargaining.<sup>41</sup>

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<sup>37</sup> Alberta Reference, 375, citing Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts in the Application of Conventions and Recommendations, Report III (Part 4B), ILO Geneva, 1983.

<sup>38</sup> In *International Longshoremen's and Warehousemen's Union — Canada Area Local 500 v. Canada*, [1994] S.C.J. No. 11, [1994] 1 S.C.R. 150 (S.C.C.); *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] S.C.J. No. 75, [1990] 2 S.C.R. 367 (S.C.C.); *Delisle v. Canada (Deputy Attorney General)*, [1999] S.C.J. No. 43, [1999] 2 S.C.R. 989 (S.C.C.).

<sup>39</sup> SFL, para. 63.

<sup>40</sup> Dunmore, para. 41.

<sup>41</sup> *Ibid.*, para 41.

In 2007, the Supreme Court overturned the precedent established 20 years earlier in the Labour Trilogy that collective bargaining was not protected by freedom of association. The majority decision in *Health Services*, which was written by McLachlin CJ and Le Bel J, characterized *Dunmore* as marking a new direction in freedom of association jurisprudence and expanded the activities protected under freedom of association to include aspects of collective bargaining, specifically the duty to bargain in good faith. The Court referred to history, international law, and Charter values to justify the expansion of constitutionally protected associational activities to include the right to strike.<sup>42</sup> Moreover, the Court adopted the position staked out by Dickson CJ in his dissent in the *Alberta Reference* to international human rights instruments that Canada has ratified; although not binding, they provide an important normative resource for interpreting the Charter's freedom of association guarantee.<sup>43</sup> The Court also noted the ILO's three main supervisory bodies, the CFA, the CEACR, and the Commission of Inquiry, had interpreted Convention 87 to include collective bargaining.<sup>44</sup> But, in light of the wide range of international legal sources to which it referred, it is striking that the Court omitted any reference to the recommendations of the CFA regarding the legislation in dispute. Equally remarkable is just how limited the right to collective bargaining that the Court considered to be protected by the Charter and the extent to which it departed from the understandings of the ILO supervisory bodies.<sup>45</sup> It also specifically mentioned that the case did not involve the right to strike, which had been considered in the Labour Trilogy.<sup>46</sup>

The consensus over the evolutionary expansion of freedom of association to include workers' collective rights and a contextual approach was abruptly broken in the 2011 decision *Fraser v. Ontario (Attorney General)*.<sup>47</sup> The extent of disagreement amongst members of the Court over the scope of collective bargaining influenced the tone and cogency of the reasoning in *Fraser*. Despite the fact that there was only a lone dissent, the judges who agreed that the

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<sup>42</sup> J Fudge, 'The Supreme Court of Canada and the Right to Bargain Collectively in Canada and Beyond' (2008) 37 (1) *Industrial Law Journal* 25-48.

<sup>43</sup> *Health Services and Support – Facilities Subsector Bargaining Association v British Columbia* [2007] 2 SCR 391, para 73-75 (*Health Services*)

<sup>44</sup> *Health Services*, para. 76.

<sup>45</sup> M Choko, 'The Dialogue between Canada and the ILO on Freedom of Association: What Remains after *Fraser*?' (2012) 28 *Int J Compar Labour L Industr Relat* 397, 412-17,

<sup>46</sup> *Health Services*, para. 19

<sup>47</sup>*Fraser*, 33.

legislation was constitutional were deeply divided over the scope of the constitutionally protected freedom of association in the labour relations context, and they issued three separate sets of reasons.

A large part (48 paragraphs out of a judgment that is 118 paragraphs long) of the majority judgment in *Fraser*, which was written by McLachlin C.J. and LeBel J., who were also the authors of the majority decision in *Health Services*, was taken up by a defence of the majority judgment in *Health Services* as a legally valid and binding precedent. They were responding to Rothstein J.'s concurring decision, which advocated that *Health Services* be overturned. Thus, their use of international labour law in *Fraser* was purely defensive, since Justice Rothstein also questioned the validity of the majority's handling of international labour law. The majority's decision ignored the CFA's interim observations regarding the whether the complained of legislation conformed to the principles of freedom of association.<sup>48</sup> Moreover, it appeared that *Fraser* marked the end of the incremental expansion of the scope of freedom of association in the labour context that began with *Dunmore*. The majority appeared to substitute 'impossibility' for 'substantial interference' as the standard to meet in establishing an interference with the exercise of the freedom of association.<sup>49</sup> It also emphasised that *Health Services* did not constitutionalise the prevailing model of collective bargaining in Canada.<sup>50</sup>

However, *Mounted Police Association of Ontario v. Canada (MPAO)*, which was released two weeks before *SFL*, signalled that *Fraser* marked a hiatus in, and not a halt to, the incremental expansion of the scope of protection provided by freedom of association in the Charter.<sup>51</sup> The Supreme Court of Canada made it clear that the test of whether or not the constitutionally protected right to bargain collectively had been violated was substantial interference. It went on to declare that freedom of association protects the 'right of employees to associate for the purpose of meaningfully pursuing collective workplace goals' and that a 'meaningful process of collective bargaining is a process that provides employees with a degree of choice and independence sufficient to enable them to determine their collective interests and

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<sup>48</sup> *Fraser*, para. 94. The interim Report was part of the record. Case No 2704 (Canada): Interim Report in Reports of the Committee on Freedom of Association, 358<sup>th</sup> Report, ILO, 309<sup>th</sup> Sess., GB.309/8 (November 2010) 335, at para 361.

<sup>49</sup> *Fraser*, 2, 32, 33, 34, 46, 47, 54, 64, and 84.

<sup>50</sup> *Ibid.*, 44-45.

<sup>51</sup> 2015 SCC 1.

meaningfully pursue them.<sup>52</sup> Thus, the question the Court had to resolve in the SFL case was whether or not strike action was an essential part of collective bargaining.

#### 4. The Tipping Point: Constitutional Protection for the Right to Strike

Justice Abella began her analysis of whether or not it was appropriate to depart from the precedent of the Labour Trilogy holding that the right to strike was not part of the activities constitutional protected under the Charter's protection of freedom of association by noting that the Supreme Court's approach to the interpretation of freedom of association had changed since the labour Tribology was decided. She pointed out that in MPAO the majority of the Supreme Court 'confirmed that freedom of association seeks to preserve "employee autonomy against the superior power of management" in order to allow for a meaningful process of collective bargaining.'<sup>53</sup> She therefore concluded that in light of the fundamental shift in the scope of the freedom of association jurisprudence since the Alberta Reference was decided, 'the trial judge was entitled to depart from precedent and consider the issue in accordance with the Court's revitalised interpretation of s. 2(d).'<sup>54</sup> She then turned to Dickson C.J.C.'s dissent in Alberta Reference, which sowed the seeds of the 'generous approach' to the freedom of association jurisprudence, to emphasise that he concluded that "effective constitutional protection of the associational interests of employees in the collective bargaining requires concomitant protection of their freedom to withdraw ... their services [collectively], subject s.1 of the Charter"<sup>55</sup>.

One of Justice Abella's core concerns was to dislodge the right to strike from the specificities of the dominant legislative approach to protecting collective bargaining in Canada, which has come to be known as a Wagner-Style model.<sup>56</sup> In both Health Services and Fraser, the Supreme Court of Canada made it very clear that freedom of association does not mandate a particular legislative scheme of collective bargaining.<sup>57</sup> For this reason, Abella J. referred to

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<sup>52</sup> MPAO, para. 81.

<sup>53</sup> SFL, para 31.

<sup>54</sup> SFL, para 32.

<sup>55</sup> SFL, para 33, quoting Dickson, C.J.C. in the Alberta Reference, 371.

<sup>56</sup> The Wagner-model refers to collective bargaining that is patterned after the American National Labor Relations Act of 1935, 29 USC § 159-161 and adopted in Canada in the mid-1940s.

<sup>57</sup> Health Services, para. 91 and Fraser, paras. 45, 46

academic articles and books concerning the historical role of strikes in furthering collective bargaining to support her conclusion that

While strike action has variously been the subject of legal protections and prohibitions, the ability of employees to withdraw their labour in concern has long been essential to meaningful collective bargaining. Protection under s. 2(d), however, does not depend solely or primarily on the historical/legal pedigree of the right to strike. Rather, the right to strike is constitutionally protected because of its crucial role in a meaningful process of collective bargaining.<sup>58</sup>

She also referred to Canada's international obligations,<sup>59</sup> the emerging international consensus on the right to strike,<sup>60</sup> and Charter values<sup>61</sup> to support her conclusion 'that a meaningful process of collective bargaining requires the ability of employees to participate in the collective withdrawal of services for the purpose of pursuing the terms and conditions of their employment through a collective agreement.'<sup>62</sup> She rejected the dissenting judges' claim that the Court should defer to the legislature in interpreting the scope of the constitutional protection of the freedom of association, stating instead that rights should be interpreted generously and that deference to legislative choices only plays a role in determining whether the limitation of the Charter-protected right is proportionate.<sup>63</sup>

Justice Abella formulated the test for determining whether the Charter's protection of freedom of association has been violated as 'whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with collective bargaining.'<sup>64</sup> She concluded that the PSESA 'demonstrably meets this threshold since it prevents designated employees from engaging in any work stoppage as part of the bargaining process.'<sup>65</sup> Thus, the onus shifted to the government to justify the interference with the right to strike under section 1, which imposes a strict proportionality test. While Abella J. accepted that 'the maintenance of

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<sup>58</sup> SFL, para 51.

<sup>59</sup> See the discussion in the next section.

<sup>60</sup> Abella J also referred to the European Court of Human Rights decisions of *Demir v Turkey* and *Enerji Yapi-Yol Sen v Turkiye*, German and Israeli courts decisions, and constitutional protections of right to strike in France, Italy, Israel, Portugal, and South Africa; SFL paras 71–74.

<sup>61</sup> SFL, paras 53-55.

<sup>62</sup> SFL, para. 75.

<sup>63</sup> SFL, para 76.

<sup>64</sup> SFL, para 78.

<sup>65</sup> SFL, para 78.

essential services is self-evidently a pressing and substantial objective’ and the government’s objective in introducing the PSESA was rationally connected to it, she held that the provincial government had failed to establish that the means that it adopted to achieve this goal were ‘minimally impairing’ of the constitutional right.<sup>66</sup> In light of ‘the breadth of the essential services that the employer is entitled to designate unilaterally without an independent review process’ and ‘the absence of an adequate, impartial and effective alternative mechanism for resolving collective bargaining impasses’ she concluded that the PSESA impairs the freedom of association rights ‘of designated employees much more widely and deeply than is necessary to achieve its objective of ensuring the continued delivery of essential service.’<sup>67</sup>

## 5. The Breadth of the Arc of Workplace Justice: The Implications of SFL

SFL confirms the Supreme Court of Canada’s generous approach to the interpretation of the freedom of association and its practice of gradually expanding the scope of protected activities in the labour context. It is also a clear rejection of Rothstein J.’s individualist and deferential approach to the interpretation of the scope of constitutionally protected associational activities, as well as to his understanding of the role and content of international labour law. However, it is important to look beneath the Court’s evocative rhetoric and broad statements to consider the some implications of the decision. In this section, we focus on what the role of international law in interpreting the scope of constitutionally protected freedom of association, whether or not the right to strike is tethered to the collective bargaining, and the constitutionality of the Saskatchewan’s revised essential services legislation.

### i) The Role of International Labour Rights

Initially, the role of international law in general and international labour rights in particular in interpreting the scope of protection provided by the Charter’s guarantee to freedom of association was controversial.<sup>68</sup> The Canadian constitution, unlike the constitution of South

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<sup>66</sup> SFL, para. 79.

<sup>67</sup> SFL, para. 96.

<sup>68</sup> This section derives from J Fudge, ‘Constitutionalizing Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining, and Strikes’ (2015) 68 Current Legal Problems 267-305.



Africa, for example, does not refer to international law.<sup>69</sup> Canada adopts what is known as a dualist approach to international law, which means that in order to have legal effect within Canada an international treaty obligation must be incorporated within domestic legislation.<sup>70</sup> However, this dualist approach to ‘the domestic implications of international law has gradually but steadily been replaced by a much more relational understanding of the boundary between the international and national legal spheres.’<sup>71</sup> A prime example of this shift in approach is Dickson C.J.’s dissent in the Alberta Reference, where he set out what has since come to be the Supreme Court’s prevailing approach to international legal norms and instruments that Canada has ratified, which is that they will be used as a resource for interpreting the scope of rights and freedoms protected under the Canadian Charter.<sup>72</sup>

Justice Abella affirmed this approach in *SFL*. Referring to Dickson C.J.’s dissent in the Alberta Reference, she asserted that Canada’s international human rights obligations also mandate protecting the right to strike as part of a meaningful process of collective bargaining.<sup>73</sup> She referred to the explicit protections of the right to strike in the International Covenant on Economic, Social, and Cultural Rights and the Charter of the Organization of American States; the non-binding, but persuasive, decisions of the ILO supervisory bodies that freedom of association includes the right to strike; and the International Covenant on Civil and Political Rights, which incorporates Convention No. 87 and the obligations it sets out.<sup>74</sup>

This affirmation was especially important in light of the controversy at the ILO over the status of the right to strike and the authority of the ILO’s Committee of Experts. In June 2012, the International Organization of Employers (IOE), one of the three constituents of the ILO (along with Member States and the Workers’ Group), interrupted the usual proceedings of the annual International Labour Conference, to challenge the right to strike.<sup>75</sup> Although this

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<sup>69</sup> P Macklem, ‘The International Constitution’ in Fay Faraday, Judy Fudge and Eric Tucker, eds., *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Irwin Law 2012) 261, 262.

<sup>70</sup> Macklem, ‘The International Constitution’.

<sup>71</sup> *Ibid.*, 262, citing Karen Knop, ‘Here and There: International Law in Domestic Courts’ (2000) 32 *NYU Int’l Law & Pol* 501.

<sup>72</sup> Macklem, ‘The International Constitution’.

<sup>73</sup> *SFL*, para. 62, citing Alberta Reference, 359. Unlike the European Court of Human Rights, the Supreme Court only refers to international instruments that Canada has ratified.

<sup>74</sup> *SFL*, para. 62, citing Alberta Reference, 359.

<sup>75</sup> C LaHovary, ‘Showdown at the ILO? A Historical Perspective on the Employers’ Group’s 2012 Challenge to the Right to Strike’ (2013) 42 *Industr L J* 338.

challenge was not unprecedented – since 1989 the IOE has regularly voiced opposition to the right to strike – it was the most dramatic.<sup>76</sup> The employer group refused to examine any case of serious non-compliance involving Convention 87 in the Tripartite Committee on the Application of Standard (CAS), which examines the reports of the Committee of Experts. The IEO claimed, correctly, that the right to strike is not expressly protected in Convention 87 on Freedom of Association,<sup>77</sup> and, further and more controversially, that the ILO’s Committee of Experts, which interpreted freedom of association as including by necessary implication the right to strike, does not have the legal mandate to interpret conventions.<sup>78</sup> In February 2015, a tripartite meeting convened by the ILO’s Governing Body negotiated a temporary solution to the three-year impasse over the right to strike. Although the agreement begins with the statement, that ‘the right to take industrial action by workers and employers in support of their legitimate industrial interest is recognized by the constituents of the International Labour Organization’, it defers the sticky jurisdictional question about the capacity of different supervisory bodies to issue observations about the right to strike to future negotiations.<sup>79</sup>

What is remarkable is that the SFL majority decision simply ignored the employer group’s claim that the right to strike is not part of the ILO’s *acquis*. This approach is in marked contrast to that adopted in the dissenting judgment, where Rothstein J claimed the ‘current state of international law on the right to strike is unclear’.<sup>80</sup> Moreover, the SFL decision should put an end to the objections raised by Canadian employers’ representative to the ILO ‘that it would be entirely inappropriate’ for the CEAR ‘to conclude that the carefully tailored restrictions on the strike activity, as adopted by democratically elected legislatures and consistently reaffirmed by independent courts, violated a “right to strike”’.<sup>81</sup> Now that the Supreme Court of Canada has affirmed that freedom of association protects the right to strike it is unlikely that Canadian

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<sup>76</sup> *Ibid.* Typically the IOE registered an objection.

<sup>77</sup> The ‘right to strike’ is not mentioned in either the ILO Constitution or in the two fundamental Convention No 87 and Convention No 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, 1949.

<sup>78</sup> It is clear from the ILO’s constitution that the International Court of Justice as the exclusive authority to interpret ILO conventions.

<sup>79</sup> ILO, Tripartite Meeting on the Freedom of Association and the Protection of the Right to Organise Convention, 1948 (no. 87), in relation to the right to strike and the modalities of strike action at the national level, Geneva 23–25 February 2013, TMFAAPROC/2015/2.

<sup>80</sup> SFL, para. 150, 153.

<sup>81</sup> CAS Observation, 102 ILC Session (2013).

employers will continue to prefer national approaches to interpreting the right to strike over those of the CEACR.

Although Justice Abella relied on international law, including ILO conventions, as a normative source for interpreting the constitutional guarantee of freedom of association, she made no reference to the observations of the CFA or CEACR that the legislation the constitutionality of which was before the Court violated the principles of freedom of association.<sup>82</sup> The majority's treatment of ILO norms in SFL is consistent with its previous practice of invoking the international labour rights that Canada has ratified to justify a change in the general direction of the jurisprudence. But, while the Court refers to international labour and human rights instruments and their interpretation by ILO supervisory bodies in order to give meaning to the freedom of association, at the same time it ignores the observations of those bodies regarding the specific legislation whose constitutionality is before it.<sup>83</sup> This technique allows the Court to preserve its exclusive jurisdiction, which is to determine the constitutionality of legislation or government action that is brought before it for scrutiny, instead of de facto delegating this role to ILO supervisory bodies by simply adopting their decisions. It also enabled the Court on two occasions to ignore the observations of ILO supervisory bodies that the specific collective bargaining legislation under review did not confirm to the ILO' freedom of association norms when ruling that the impugned legislation was constitutional.<sup>84</sup>

## ii) Tethering the Scope of the Right to Strike to Collective Bargaining?

Like the courts below and Dickson C.J.C.'s dissent in the Alberta Reference, the Supreme Court's definition of the right to strike in SFL was tightly tied to collective bargaining between

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<sup>82</sup> The CFA (Case No 2645 (2010)), see Reports of the Committee on Freedom of Association 371st Report of the Committee on Freedom of Association Governing Body 320th Session, Geneva, 13–27 March 2014 GB.320/INS/12, 8–9 to which the CEARC referred Observation (CEACR)—adopted 2012, published 102nd ILC session (2013).

<sup>83</sup> J Fudge, 'Constitutionalizing Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining, and Strikes', 280-286.

<sup>84</sup> See n. 56 supra and SFL, paras. 100, 99–102. The CFA (Case No 2645 (2010)), see Reports of the Committee on Freedom of Association 371st Report of the Committee on Freedom of Association Governing Body 320th Session, Geneva, 13–27 March 2014 GB.320/INS/12, 8–9 to which the CEARC referred Observation (CEACR)—adopted 2012, published 102nd ILC session (2013) considered the Trade Union Amendment Act to violate the principles of freedom of association.

unions and employers.<sup>85</sup> The Court emphasised that striking is recognized as a protected right because of its ‘unique role in the collective bargaining process’ and a means by which workers acting together through their union ‘exert meaningful influence over their working conditions through a process of collective bargaining.’<sup>86</sup> In fact, the Court framed the question for determining whether limits on strikes violate freedom of association as ‘whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with collective bargaining.’<sup>87</sup> On a narrow reading, it appears that the Court conceived of the strike as a component of collective bargaining, rather than as a direct form of associative activity itself.

However, the Court’s conception of a strike as a collective withdrawal of labour in support of collective bargaining processes to reach a collective agreement with an employer setting terms and conditions of employment should not necessarily be interpreted as an exhaustive statement of the protection for strike activity afforded by the Canadian Charter. The legislation in question authorised employers to prohibit strikes in order to resolve a bargaining impasse in connection with negotiating collective agreement negotiations in essential services and this constituted the factual matrix before the Court. It is important to recall that the Court has warned against determining the full scope of Charter rights in the absence of a factual foundation.<sup>88</sup> The constitutional status of other species of collective work stoppages taken in pursuit of goals not connected to the terms and conditions of employment was not before the Court and is, therefore, an open question.

Moreover, Justice Abella’s reasoning does not foreclose future arguments that freedom of association protects strikes or collective protests outside of the collective bargaining context. Although she did not address collective work stoppages for other purposes or broader political protest, Abella J. explained the rationale for Charter protection of freedom of association as a means of protecting the essential needs and interests of working people.<sup>89</sup> In her general comments about the purpose of providing constitutional protection of freedom of association she referred to both Health Services and MPAO, which emphasised the goals of respecting the autonomy of a person, enhancing democracy, and protecting the individual ‘from state enforced

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<sup>85</sup> 2015 SCC 4 at para. 2, 46.

<sup>86</sup> SFL, para.77.

<sup>87</sup> SFL, para. 78.

<sup>88</sup> *Danson v Ontario (Attorney General)*, [1990] 2 SCR 1086 at paras. 26-31.

<sup>89</sup> SFL, para. 33 quoting Dickson’s dissent in the Alberta Reference.

isolation in the pursuit of his or her ends'.<sup>90</sup> Referring to MPAO, she recognized that freedom of association helps groups work to right imbalances in society and makes possible more equal society.<sup>91</sup> She also dismissed the dissenting judges' concern that constitutional protection for the right to strike ignores the interests of employers in establishing 'true workplace justice' on the ground that they attribute a false equivalence between the power of employees and employers.<sup>92</sup> Thus, the majority's analysis provides a basis for loosening the tie between the right to strike and collective bargaining.

The Supreme Court's approach to interpreting the scope of labour-related activities protected by the Charter's guarantee of freedom of associate also provides a basis for expanding the right to strike beyond the narrow confines of collective bargaining. The Court has repeatedly asserted that freedom of association does not 'constitutionalise' a specific legislative model of collective bargaining and since *Dunmore*, which was decided in 2001, and it has consistently referred to the ILO norms that Canada has ratified in interpreting the scope of freedom of association.

Even within the labour relations context, the Court's definition of strike activity in *SFL* is narrowly framed. Locating the right to strike as a component of collective bargaining fits neatly into the dominant Canadian model of statutory regulation of labour relations. In the Canadian legislative context, the right to strike is predicated on having legally-recognised associations who assert the right.<sup>93</sup> However, conceptualised more broadly within the labour relations context and not linked to any particular statutory regime, a strike can be thought of as the engine that propels several aspects of employees acting together in pursuit of common workplace goals. As the trial judge in the *SFL* case recognized, 'from the perspective of Charter interpretation, it is important to recall that workers have not needed any particular statutory definition, nor any particular statutory "regime", nor indeed any statute at all, to refuse to work in concert with one another in order to achieve collective goals.'<sup>94</sup> Labour legislation in Canada did not create strike activity but instead, curtailed strikes in support of union recognition, contract negotiations, contract

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<sup>90</sup> *SFL*, para. 53

<sup>91</sup> *SFL*, para. 53.

<sup>92</sup> *SFL*, para. 56. It is in this context that Abella J. referred to Anatole France's 'aphoristic fallacy'.

<sup>93</sup> Judy Fudge and Eric Tucker, 'The Freedom to Strike: A Brief Legal History' (2010) 15 *Canadian Labour and Employment Law Journal* 333-352.

<sup>94</sup> 2012 SKQB 62, para. 57.

enforcement, and other goals.<sup>95</sup> Since *Health Services*, the Supreme Court has taken great pains to emphasise that freedom of association does not ‘constitutionalise’ a particular legislative collective bargaining regime.<sup>96</sup> Thus, it is conceivable that in the absence of a legislative mechanism that compels an employer to bargain with a trade union that represents its employees, any governmental restrictions on the right of employees to strike in order to induce their employer to recognise their bargaining representative would constitute a violation of the right to strike that would have to be justified as proportionate. The rights of individuals who do not succeed in forming a union with legal recognition as the exclusive bargaining agent of the employees or the rights of individuals to work together to advance their interests outside of or beyond what can be achieved through the union as an institution are not contemplated, but also not excluded, in the Supreme Court’s conceptualization of the right to strike in *SFL*.

Moreover, the Court has consistently resorted to the general surveys and digests of opinions of the ILO’s supervisory bodies, the CEAR and CFA, to interpret the freedom of association in the labour relations context. Neither the CEAR nor the CFA have restricted the right to strike to collective bargaining. According to the CEAR, the right to strike is an essential and intrinsic element of the activities set out in Article 3 of Convention 87, which Canada has ratified:

The right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interest. These interests not only have to do with better working conditions and pursuing collective demands of an occupation nature, but also with seeking solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to the workers.<sup>97</sup>

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<sup>95</sup> See *Health Services*, para. 25. Fudge and Tucker, ‘The Freedom to Strike: A Brief Legal History’.

<sup>96</sup> See especially Fraser, para. 47.

<sup>97</sup> ILO, Freedom of Association and General Survey by the Committee of Experts on the Application of the Conventions on Freedom of Association, the Right to Organise and Collective Bargaining and the Convention and Recommendation concerning Rural Workers’ Organisation, Report III (Part 4B), International Labour Conference, 69<sup>th</sup> Session, 1 200 and 205, affirmed in ILO, Freedom of Association and General Survey by the Committee of Experts on the Application of the Conventions on Freedom of Association and the Right to Organise (Convention No. 87), 1948 and the Right to Organise and Collective Bargaining Convention (No. 48) 1949, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 81<sup>st</sup> Session, Report III (Part 4B), Geneva, para. 47.

The CFA also recognises that the right to strike ‘is an intrinsic corollary to the right to organise protected by Convention No. 87.’<sup>98</sup> If the Supreme Court follows its now well-established practice of interpreting the scope of constitutionally protected freedom of association in light with the international obligation that Canada has voluntarily undertaken, the link between the right to strike and collective bargaining is not necessary in order to provide protection for strikes for workers and their representatives who are pursuing concerns of direct interest to workers.

#### c) The Constitutionality of Saskatchewan’s New Essential Services Legislation

In what has become a routine practice when the Supreme Court of Canada finds legislation violates the rights and freedoms guaranteed in the Canadian Charter, it suspended its declaration of invalidity for 12 months, thus allowing the PSESA to remain in place while the government formulated its response. In the immediate aftermath of the decision, Saskatchewan’s Premier mused publically about using the notwithstanding clause of the Charter, which allows a government to enact or continue a law in spite of the fact that it violates a Charter-protected fundamental freedom for renewable five year terms. However, on October 15, 2015, the government introduced new essential services legislation, which it claimed addresses the concerns raised by the Supreme Court of Canada.<sup>99</sup>

The revised legislation does not define the term ‘essential services’, and uses a broad definition of ‘public employer’, and therefore potentially applies to a broad range of collective bargaining relationships. It also continues to require employers and employees to negotiate what essential services will be maintained during a work stoppage, but provides for an essential services tribunal to determine issues in the event the parties cannot agree. This tribunal has broader powers to decide ‘essential services’ that must be maintained and the job classifications required to maintain essential services. The legislation builds on and extends lengthy notice periods and procedural steps before legal strike action can be taken. Where an essential services agreement or tribunal decision requires so many employees to continue working during a strike

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<sup>98</sup> ILO, *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (5<sup>th</sup> ed), International Labour Office, Geneva 2006, para. 523.

<sup>99</sup> See Charter at section 33. ‘Saskatchewan could use opt-out clause in labour ruling, Premier Wall says’ *The Globe and Mail*, February 4, 2015. Government of Saskatchewan, News Release, “Government Introduces New Essential Services Legislation” (15 October 2015), online: <<https://www.saskatchewan.ca/government/news-and-media/2015/october/15/essential-services-legislation-amendments>>.

or lockout as to creates a substantial interference with the work stoppage, the new legislation requires interest arbitration to set the terms of the collective bargaining agreement. If the parties cannot agree on an interest arbitrator, the government appoints the arbitrator, who must consider a range of factors in determining the terms of the collective agreement, including the wages of unionized and non-unionized employees in the public and private sectors, opportunities for employment, and the general economic conditions of the province.<sup>100</sup>

The lack of definition of ‘essential service’, the delays imposed before workers can elect to go on strike, the role of government in appointing the interest arbitrator, and the list of mandatory considerations that the arbitrator must consider raise real concerns about whether Saskatchewan’s new essential services legislation provides for the kind of impartial and effective dispute resolution process required to compensate for the loss of the right to strike.<sup>101</sup> In SFL, Justice Abella called for clearly demarcated limits on what services qualify as essential, adopting the ILO definition of ‘services whose interruption would endanger the life, personal safety or health of the whole or part of the population’ as the proper limit on the type of services that would justify abrogating the right to strike.<sup>102</sup> Whether or not the legislation’s failure to define ‘essential services’ proves to be an interference with the right to strike will depend upon how the essential services tribunal interprets the term.

Where maintaining essential services does prevent a strike, the Court was clear that in order for the interference with the Charter-protected right to strike to be considered proportionate, an adequate, impartial and effective alternative mechanism for resolving collective bargaining impasses must be provided.<sup>103</sup> This requirement is similar to the position of the ILO’s supervisory bodies, which have stated any arbitration system should be impartial, speedy, and permit the parties concerned to take part at every stage. As well, the arbitration system should have the confidence of both sides and its outcomes should not be predetermined by legislative criteria.<sup>104</sup>

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<sup>100</sup> A copy of the Bill is available online: <<http://docs.legassembly.sk.ca/legdocs/Bills/27L4S/Bill27-183.pdf>>.

<sup>101</sup> See SFL, paras 92-93.

<sup>102</sup> SFL, paras 84-86.

<sup>103</sup> SFL, para. 96.

<sup>104</sup> Case no 2277, (Canada/Alberta), report no 333, vol. LXXXVII, 2004, Series B, no1, paras. 240- 277; ILC, 81st session (Geneva, 1994), Freedom of Association and Collective Bargaining, Report III (Part 4B), ILO, Geneva, 1994, §§136–176; ILO, Freedom of Association. Digest of Decisions, paras. 569 and



However, under the new essential services legislation, the government appoints the interest arbitrator despite the fact that it has become common practice in some public sector collective bargaining for government representatives to sit at the bargaining table as observers. Thus, the legislation does not provide assurance of institutional or structural impartiality in interest arbitration process and it requires the arbitrator to consider a range of factors that benefit the public employers and not the public sector workers.<sup>105</sup>

Despite the obvious shortcoming with the new essential services legislation, any union challenging it will have to establish clear evidence that the government would fail to act with impartiality in its appointments.<sup>106</sup> Even more significantly, any constitutional challenge to the revised essential services needs to contend with the general unwillingness of all levels of court, including Canada's Supreme Court, to interfere with the precise mechanism a government adopts in response to the Court's ruling.<sup>107</sup>

## 6. Conclusion

The Supreme Court of Canada's ringing endorsement that the right to strike is a form of constitutionally protected freedom of association is the culmination of the Court's generous approach to the interpretation of the Canadian Charter in the labour context. It also gives a boost to the private and public sector unions which brought constitutional challenges to legislation enacted by the former Conservative federal government that severely restricted their right to strike.<sup>108</sup> Constitutional review of legislation by judges could legitimately be used to foster democratic deliberation and to ensure that any restrictions on labour rights are proportionate to the goals and means that governments have chosen. It could also be used to ensure that

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595; see also A.M. Trebilcock (ed.), *Remedies and sanctions in industrial action; preliminary relief*, Geneva, ILO, 1995.

<sup>105</sup> SFL, para 90.

<sup>106</sup> Fraser, para. 98. See the discussion in Paul JJ Cavalluzzo, 'The Fraser Case: A Wrong Turn in a Fog of Judicial Deference' in Fay Faraday, Judy Fudge and Eric Tucker, eds., *Constitutional Labour Rights in Canada*, 155, 164- 166.

<sup>107</sup> See Fudge, 'Constitutional Rights, Collective Bargaining and the Supreme Court of Canada: Retreat and Reversal in the Fraser Case'.

<sup>108</sup> Canadian Foundation for Labour Rights, *Summary of current Charter challenges and their impact on union security in Canada*, March 2015, <http://labourrights.ca/research-publications/summary-current-charter-challenges-and-their-impact-union-security-canada>

governments live up to their international human rights commitments to provide freedom of association for all workers.

However, constitutional protection of the right to strike will not solve the problem of organised labour's slow decline in Canada, where we have seen the incidence of strike drop over the past twenty years.<sup>109</sup> In *Workers: Worlds of Labour*, the historian Eric Hobsbawm claimed that human rights are the natural language of groups who are excluded and oppressed.<sup>110</sup> They are moral aspirations that inspire protest movements, and the goal is to change the social consensus so that labour rights become political agreements that are legally enforceable. However, labour rights need a social force, typically a social movement, behind them to give them a progressive social meaning; favourable Court decisions are not enough. Industrial capitalism generated a ready-made constituency and political basis for resistance to the commodification of workers' lives. Industrial Unions were the institutions that made the declarations of labour rights contained in international human rights instruments and national constitutions effective. Labour law is, as Bob Hepple reminded us, 'the outcome of struggles between different social actors and ideologies, of power relationships.'<sup>111</sup> The open question is whether strikes can become a catalyst for, and expression of, a new rejuvenated labour movement, one which is able to develop new techniques to take on corporate retail and fast-food giants such as Wal-Mart and McDonald.<sup>112</sup>

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<sup>109</sup> Eric Tucker, 'Can Worker Voice Strike Back? Law and the Decline and Uncertain Future of Strikes' in Alan Bogg and Tonia Novitz, eds., *Voices at Work: Continuity and Change in the Common Law Work* (Oxford 2014) 454.

<sup>110</sup> Eric Hobsbawm, *Workers: Words of Labour* (Pantheon 1985).

<sup>111</sup> Bob Hepple, 'Factors Influencing the Making and Transformation of Labour Law in Europe' Guy Davidov and Brian Langille, eds, *The Idea of Labour Law* (Oxford 2011) 31.

<sup>112</sup> Tucker, 'Can Worker Voice Strike Back?', 473.