Freedom of Association and the Resurrection of Effective Impossibility? A Comment on *Société des casinos du Québec*

Bethany Hastie and Keegan Nicol

IN APRIL 2024, the Supreme Court of Canada released its decision in *Société des casinos du Québec*, which centres on a challenge to the managerial exclusion under Quebec's *Code du travail*. This case is the latest in a growing body of Supreme Court decisions that revisit the scope, content, and threshold for claims under section 2(d) of the *Charter*, which guarantees freedom of association, and works to enlarge the content of section 2(d) as well as its applicability in contexts outside of traditional labour relations regimes.

As we discuss in this comment, *Société des casinos du Québec* risks undoing much of this work—especially for workers who fall outside of those regimes. We argue that this decision may have implicitly resurrected the threshold of effective impossibility for establishing infringement of section 2(d) in non-statutory contexts. In doing so, it has the potential to create a higher threshold for accessing and exercising rights for workers who are not subject to a legislative framework for labour relations, and thus risks creating a tiered approach to accessing associational rights under section 2(d).

EN AVRIL 2024, la Cour suprême du Canada a rendu sa décision dans l'affaire *Société des casinos du Québec*, qui porte sur une contestation de l'exclusion des cadres supérieurs en vertu du *Code du travail* du Québec. Cette affaire est la dernière d'une série croissante de décisions de la Cour suprême qui réexaminent la portée, le contenu et le seuil des réclamations en vertu de l'article 2(d) de la *Charte*, qui garantit la liberté d'association et qui s'efforcent d'élargir le contenu de l'article 2(d) ainsi que son applicabilité dans des contextes autres que les régimes traditionnels de relations de travail.

Comme nous l'expliquons dans ce commentaire, l'arrêt *Société des casinos du Québec* risque d'annuler une grande partie de ce travail, en particulier pour les travailleurs et travailleuses qui ne relèvent pas de ces régimes. Nous soutenons que cette décision pourrait avoir implicitement ressuscité le seuil d'impossibilité effective pour établir la violation de l'article 2(d) dans des contextes non législatives. Ce faisant, elle risque de créer un seuil plus élevé pour l'accès et l'exercice des droits des travailleurs et travailleuses qui ne sont pas soumis à un cadre législatif pour les relations de travail, et risque donc de créer une approche à plusieurs niveaux pour l'accès aux droits d'association en vertu de l'article 2(d).

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I. INTRODUCTION

In April 2024, the Supreme Court of Canada released its decision in *Société des casinos du Québec* (*Société*).[1] This is the most recent in a growing body of cases that revisits the scope, content, and threshold for claims under section 2(d) of the *Charter*, which guarantees freedom of association. While there has been little academic commentary on this decision, it has the potential to undermine the recent trajectory of the Court towards a "generous and purposive" interpretation of section 2(d) in its application to labour contexts, established most prominently in *Mounted Police Association of Ontario* (*MPAO*) in 2015.[2] Building first from the 2001 *Dunmore*[3] decision, several Supreme Court of Canada decisions have worked to enlarge the content of section 2(d), as well as its applicability in contexts outside of traditional labour relations regimes. Yet, as we will discuss in this comment, *Société des casinos du Québec* risks undoing much of this work, particularly for workers who fall outside of those traditional labour regimes,

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1 *Société des casinos du Québec inc v Association des cadres de la Société des casinos du Québec*, 2024 SCC 13 [*Société* SCC].

2 *Mounted Police Association of Ontario v Canada* (*AG*), 2015 SCC 1 [*MPAO*].

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

and who thus already have fewer recognized and protected rights in the labour relations context.

At issue in the *Société* decision was whether the exclusion of managers from the Quebec *Labour Code* violated section 2(d) of the *Charter*.[4] This exclusion was, in many ways, unremarkable. Labour relations statutes across Canada have historically excluded managers from the scope of the legislation to prevent a conflict of interest for managers, who would otherwise find themselves on both sides of the bargaining table.[5] In other words, these exclusions sought to preserve the arm's-length nature of the manager-employee relationship at the centre of collective bargaining.[6] This ensures the undivided loyalty of managers to the employer they represent, and protects a union's internal affairs from managerial interference.[7] However, this case raises several interesting and intersecting issues in considering how section 2(d) protects, or fails to protect, associational rights outside of a statutory scheme, and how the test or threshold for determining a violation of section 2(d) is interpreted and applied in that context.

We begin section 2 by outlining the facts of this case and tracing its history through the Quebec courts. This draws out the key issues that come into play in the later Supreme Court of Canada decision. Then, in section 3, we review the history and trajectory of the Supreme Court of Canada jurisprudence on section 2(d) from *Dunmore* to *MPAO*, focusing specifically on how the Court has articulated the test for infringement under section 2(d). This section also highlights the expanding scope of activities protected by the guarantee of freedom of association. Finally, in section 4, we analyze the Supreme Court of Canada decision in *Société des casinos du Québec*, which is comprised of a majority opinion and two concurring opinions. Here, we argue that the majority has engaged in an overly narrow consideration of the concept and content of collective bargaining, and in doing so clings to the historical Wagner model understanding of the collective activities. At the same time, this approach may have implicitly resurrected the threshold

4 *Société* SCC, *supra* note 1 at para 1.

5 The Labour Law Casebook Group, *Labour and Employment Law: Cases, Materials, and Commentary*, 8th ed (Toronto: Irwin Law, 2011) at 173.

6 The managerial exclusion has been a source of much criticism and debate over the years. Critics have argued that it chills employee engagement in decisions about their own management and unfairly excludes "low-level" or supervisory managers such as the ones in this case. For more discussion of this topic see The Labour Law Casebook Group, *supra* note 5 at 187–88; Michael Lynk, *A Review of the Employee Occupational Exclusions under the Ontario Labour Relations Act 1995*, (Queen's Printer for Ontario, 2016) at 55–59.

7 See e.g. *Re Cowichan Home Support Society* (1997), BCLRB No B28/97 at para 88.

of effective impossibility for establishing infringement of section 2(d) in non-statutory contexts. We argue that this decision risks creating a tiered approach to accessing association rights under section 2(d)—one that presents increasing complications for workers falling outside of statutory regimes with clearly defined boundaries and direct access to dispute resolution mechanisms.

II. *SOCIÉTÉ DES CASINOS DU QUÉBEC*: A BRIEF HISTORY

The Société des casinos du Québec inc (Société) manages four casinos in Quebec as a subsidiary of the Société des lotteries du Québec (Loto-Québec). Their management structure has five levels, the lowest of which are the operational supervisors (SDOs), who oversee day-to-day operations on the floor of the casino.[8] According to the Quebec *Code du travail* (the *Code*) at section 1(*l*)(1) (the managerial exclusion), any employed manager or other representative of the employer is excluded from the scope and protections of the *Code*. In 1995, this provision was upheld and found to apply to the SDOs, who formed part of a bargaining unit unsuccessfully seeking union accreditation under the *Code*.[9]

The Association des cadres de la Société des casinos du Québec (Association) was created in 1997 to represent certain SDOs working for the Société.[10] They formed and entered into a memorandum of understanding with the Société in 2001, in which the Société formally recognized the Association as representing the interests of its members and agreed to certain terms. Among these terms was a system for deducting member contributions and releasing representatives from their workplace duties.[11] These terms also included agreements that the parties meet upon request to discuss workplace concerns, and that the Société consult with the Association before changing the working conditions of its members.[12]

Following the memorandum, representatives of the Association regularly met with management and made requests at the casinos. However, the Association found that very few of their recommendations made any headway, and they were either not consulted or outright excluded from

8 *Association des cadres de la Société des casinos du Québec and Société des casinos du Québec inc*, 2016 QCTAT 6870 at para 110 [*Société* QCTAT].

9 *Ibid* at para 113.

10 *Ibid* at paras 114–15.

11 *Ibid* at para 123.

12 *Ibid*.

discussions on important workplace issues such as salary, pension plans, and changes to the workplace manual.[13] In 2003, the Association, alongside other organizations representing first-level managers in Quebec, filed a complaint with the International Labour Organization (ILO) where they argued that the managerial exclusion provision of the *Code* infringed on their freedom of association. The ILO released a report recommending that the *Code* be amended to allow for managers to be included.[14] Following the report, and subsequent meetings with the organizations that filed the complaint, the Quebec government proposed a good governance guide for the public sector—but it excluded Crown corporations such as Loto-Québec.[15]

Between 2004 and 2009, the Association had discussions and sent applications to both the Société and Loto-Québec to increase its membership, address various working conditions of the operational supervisors, and amend the memorandum. Most of these overtures were rejected or ignored.[16] In November of 2009, the Association filed a request for accreditation under the *Code*. In the request, they claimed that the managerial exclusion was unconstitutional, as it substantially interfered with the right of the SDOs to a meaningful process of collective bargaining as protected by section 2(d) of the *Charter*.[17] The Société initially filed a motion to dismiss, which was itself dismissed, and then an application for judicial review of the decision to dismiss their motion. In 2014, the parties agreed to proceed to a hearing on the claim of a section 2(d) infringement.[18]

The case proceeded first to Quebec's Tribunal administratif du travail. In assessing the section 2(d) claim, the Tribunal looked to the purpose and effect of the managerial exclusion to determine whether it substantially interfered with the SDOs' freedom of association. They then went on to consider whether the state was responsible for that interference. The Tribunal found that the managerial exclusion served the purpose of preventing managers from bargaining collectively, and that in effect it infringed upon the SDOs freedom of association in several ways: it affected the independence of the Association by forcing them to rely on voluntary recognition; it limited their ability to engage in a meaningful process of

13 *Ibid* at paras 126–54.

14 *Ibid* at paras 71–74.

15 *Ibid* at para 93.

16 *Ibid* at paras 155–77.

17 *Ibid* at paras 188–91.

18 *Association des cadres de la société des casinos du Québec c Société des casinos du Québec inc*, 2022 QCCA 180 at paras 44–46 [*Société* QCCA].

collective bargaining; and it prevented them from exercising the right to strike that is available to accredited unions under the *Code*.[19] In respect of collective bargaining, the Tribunal further explained that the exclusion negatively impacted this right by creating a power imbalance between the SDOs and the Société.[20] It prevented negotiations on important workplace conditions and left the SDOs without access to a formal dispute resolution mechanism.[21] The Tribunal thus found that the legislation interfered with the SDOs' section 2(d) rights in both purpose and effect.[22] It also ruled that the Quebec government could be held responsible, largely because it failed to comply with the ILO's earlier recommendation.[23]

The Société appealed the Tribunal's decision, and in 2018 the Quebec Superior Court (QCCS) overturned the decision of the Tribunal. The QCCS first found that the Association was seeking access to a particular statutory regime, which in their view meant that a different, three-part test should have been used to determine whether an infringement of section 2(d) had occurred. This test asks: (1) whether the party is only seeking access to a particular statutory regime, or whether they are looking to exercise their constitutional rights under freedom of association; (2) whether the legislative exclusion, in purpose or effect, substantially interferes with their freedom of association; and (3) whether the State is responsible for the substantial interference.[24] In its analysis, the QCCS determined that the first two elements of the test were met, although it found that the Tribunal had erred on several points in their analysis when considering the effects of the managerial exclusion.[25] However, at the third step, the QCCS found that the interference with freedom of association flowed not from the managerial exclusion itself, but from the actions of the Société.[26] As a result, it concluded that the state was not responsible for the interference.[27] In the course of this finding, the QCCS highlighted the fact that other first-level managers in Quebec had been able to successfully organize

19 *Société* QCTAT, *supra* note 8 at paras 299–348.
20 *Ibid* at para 328.
21 *Ibid* at paras 312, 321, 328.
22 *Ibid*.
23 *Ibid* at paras 349–64.
24 *Société des casinos du Québec inc c Tribunal administrative du travail*, 2018 QCCS 4781 at para 87 [*Société* QCCS].
25 *Ibid* at paras 143–49.
26 *Ibid* at para 248.
27 *Ibid*.

and negotiate with their employers, showing that the rights protected by freedom of association can still be exercised in the absence of access to the *Code*.[28]

This decision was once again appealed, and in 2022 the Quebec Court of Appeal (QCCA) overturned the ruling of the QCCS and restored the decision of the Tribunal. The QCCA found that the QCCS had relied on the wrong test by mistakenly concluding that the Association was seeking to be granted access to a specific statutory regime, in this case the *Code*, which would require positive state action. Instead, in the QCCA's view, the Association was asking that the state refrain from interfering with their freedom of association by way of the managerial exclusion—in effect a negative action.[29] The QCCA thus relied on the substantial interference test, as laid out in previous freedom of association cases and which we will discuss in the following section. Simply put, the test asks whether the impugned action or law has substantially interfered with the claimant's ability to engage in a meaningful process of collective bargaining.[30] The QCCA determined that the Tribunal's analysis was consistent with this framework, that it was conducted and concluded correctly, and that the QCCS was wrong to substitute their own decision on certain matters that were within the scope of the Tribunal's expertise.[31] In their analysis, the QCCA cited several recent developments in the section 2(d) jurisprudence that the Tribunal had incorporated correctly: freedom of association exists to establish a balance of power between employers and employees; it relies on a threshold of substantial interference rather than effective impossibility; and it includes the constitutional right to strike.[32] The QCCA also went on to disagree with the QCCS's finding that the state could not be held responsible for the substantial interference.[33] It emphasized the government's unique role in regulating private activity and employer-employee relationships in the labour context, and the fact that the Société is overseen by Loto-Québec—itself a government-owned enterprise.[34]

The Société then appealed to the Supreme Court of Canada. As is evident from the above summary, the applicable legal test for determining an infringement of section 2(d) was a central issue, and one complicated by

28 *Ibid* at para 258.
29 *Société* QCCA, *supra* note 18 at para 135.
30 *Ibid* at para 137.
31 *Ibid* at paras 162–63.
32 *Ibid* at paras 146, 154, 156.
33 *Ibid* at paras 165, 168–69.
34 *Ibid* at paras 166, 169.

the fact that the claim was one of under-inclusion—that is, challenging an exclusion from an established statutory scheme. As we will discuss in section 4, while the Court affirms that section 2(d) protects associational rights and activities outside of established statutory schemes, this presents numerous complexities in understanding the nature and function of protected activities like collective bargaining, what will constitute "substantial interference", and when the state is responsible for such interferences. However, before moving on to an analysis of that decision, we will review the history and trajectory of section 2(d) jurisprudence at the Supreme Court of Canada, drawing out in greater detail the evolution and confusion that have attended its development in relation to the scope of protected activities, including collective bargaining, and the "substantial interference" test.

III. FREEDOM OF ASSOCIATION AT THE SUPREME COURT OF CANADA: FROM *DUNMORE* TO *MOUNTED POLICE ASSOCIATION OF ONTARIO*

Judicial interpretation of the guarantee of freedom of association has undergone significant, if at times uneven, evolution since its inception. An early line of cases released in 1987, known as the "original trilogy", ascribed limited content to section 2(d). They held that freedom of association was confined to three essential elements:

> (1) [T]he freedom to join with others in lawful, common pursuits and to establish and maintain organizations and associations… (2) the freedom to engage collectively in those activities which are constitutionally protected for each individual…and (3) the freedom to pursue with others whatever action an individual can lawfully pursue as an individual.[35]

Critics have referred to this as a "bare rights" or "formalist approach" to section 2(d), one which the Supreme Court of Canada has moved away from in its more recent line of cases, beginning with the 2001 *Dunmore* decision.[36] Since *Dunmore*, the Court has moved towards what it labelled

35 *Dunmore*, *supra* note 3 at para 14. See also *PSAC v Canada*, 1987 CanLII 89 (SCC); *Reference re Public Service Employee Relations Act (Alta)*, 1987 CanLII 88 (SCC); *RWDSU v Saskatchewan*, 1987 CanLII 90 (SCC).

36 Bethany Hastie, "(Re)Discovering the Promise of *Fraser*? Labour Pluralism and Freedom of Association" (2021) 66:3 McGill LJ 427 at 434–35. See also Jason M Harman, "2(d) as Harbinger of Substantive Justice? Toward the Creation of a *Meaningful* Freedom of Association" (2018) 39 Windsor Rev Legal Soc Issues 35; Bernard Adell, "Regulating Strikes in

in *MPAO* as a "purposive approach" to freedom of association, one which has grounded constitutional protection for numerous activities, including organizing and associating in the workplace, engaging in a meaningful process of collective bargaining, and undertaking strikes.[37]

Specifically, in delineating the scope and protection for a meaningful process of collective bargaining under section 2(d), the Court has emphasized the underlying values and significance of this activity as an integral component of realizing the guarantee of freedom of association. In their analysis in *Health Services*, decided in 2007, the majority pays particular attention to the equalization of bargaining power that is achieved through meaningful access to, and exercise of, a right of collective bargaining. The majority describes this as "the procedure through which the views of the workers are made known, expressed through representatives…through which terms and conditions of employment may be settled by negotiations between an employer and his employees on the basis of a comparative equality of bargaining strength."[38] This theme of equalizing power is picked up on again in *MPAO*, decided in 2015.[39] Here, the majority articulates that a "meaningful" process of collective bargaining must provide employees with the "power to pursue their goals", which in turn is secured through protection of "sufficient employee choice and independence to permit the formulation and pursuit of employee interests in the particular workplace context at issue."[40] Moreover, in *Fraser*, the majority notes that a process of collective bargaining is one which facilitates "good faith resolution of workplace issues between employees and their employer", alluding to the concept of a process of collective bargaining as an ongoing relationship which extends beyond any single resolution, transaction or agreement.[41]

In addition to the evolution in the substantive content of section 2(d), and especially the right to a process of collective bargaining, the Supreme

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Essential (and Other) Services After the 'New Trilogy'" (2013) 17:2 CLELJ 413 at 442–46; Brian Langille, "The Condescending Constitution (or, the Purpose of Freedom of Association is Freedom of Association)" (2016) 19:2 CLELJ 335 at 351; *MPAO*, *supra* note 2 at paras 30, 41.

37 *MPAO*, *supra* note 2 at para 43. See e.g. *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 [*Health Services*]; *Ontario (AG) v Fraser*, 2011 SCC 20 [*Fraser*]; *MPAO*, *supra* note 2; *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 [*SFL*].

38 *Health Services*, *supra* note 37 at para 29, citing Bora Laskin, "Collective Bargaining in Canada: In Peace and in War" (1941) 2:3 Food for Thought, J Can Assoc Adult Education 8.

39 *MPAO*, *supra* note 2.

40 *Ibid* at paras 71, 97.

41 *Fraser*, *supra* note 37 at para 98.

Court of Canada has developed a framework for assessing potential violations of section 2(d). This framework was the subject of divergent opinions in the *Société des casinos du Québec* decision, both at the lower courts, as discussed in the previous section, and at the Supreme Court of Canada, as we will discuss in the next section. Here, we review the evolution of this framework prior to the *Société des casinos du Québec*, focusing especially on the decisions in *Dunmore*, *Fraser*, and *MPAO*.

In the 2001 Supreme Court of Canada decision in *Dunmore*, the Court was required to determine whether formal exclusion of agricultural workers from the Ontario *Labour Relations Act*, without any complementary legislation in place to facilitate labour organization in the workplace, violated the guarantee of freedom of association under section 2(d).[42] The Court ultimately ruled that the exclusion was a violation of section 2(d) as it had the effect of creating conditions in which the agricultural workers' rights under section 2(d) were substantially interfered with. In reaching this conclusion, the Court articulated a framework for determining when government action or legislation might amount to a violation of section 2(d). This framework asks, first, whether the activities in question fall within the scope of section 2(d), and second, whether the government action, in purpose or effect, "substantially interferes" with the ability to engage in those activities.[43]

In discussing an earlier line of cases considering claims of under-inclusion under section 2 of the *Charter*, the majority also highlights three concerns or limits that may be considered in determining whether substantial interference exists as a result of under-inclusion. First, that a claim of under-inclusion "should be grounded in fundamental *Charter* freedoms rather than in access to a particular statutory regime".[44] Second, that a proper evidentiary foundation must establish that the ability to exercise a "protected [section] 2(*d*) activity" was substantially interfered with, and not merely the requested access to a particular statutory regime.[45] And third, that the state may "be truly held accountable" for the inability to exercise the fundamental freedom, noting that this may include situations where legislation "'permits' private actors to interfere with protected [section] 2 activity" or where "failure to include someone in a protective

42 *Dunmore*, *supra* note 3 at para 2.

43 *Ibid* at paras 13, 22. We note that this articulation of the framework is contested in *Société* SCC, *supra* note 1, an issue discussed in the next section of this comment.

44 *Dunmore*, *supra* note 3 at para 24.

45 *Ibid* at para 25.

regime may affirmatively permit restraints on the activity the regime is designed to protect."[46] Regarding the third factor or concern, the majority notes that "underinclusive state action falls into suspicion…to the extent it substantially orchestrates, encourages or sustains the violation of fundamental freedoms."[47] Thus, the state may be held accountable not only where it directly suppresses the ability for individuals to engage in protected activity, but also where its action (or inaction) facilitates suppression by private actors.

The concept of "substantial interference" as a threshold for determining violations of section 2(d) was later complicated by the reasons of the majority in *Fraser*—a 2011 decision addressing whether the *Agricultural Employees Protection Act* (*AEPA*), an alternative statutory regime to govern labour organizing for agricultural workers, violated section 2(d) of the *Charter*.[48] Central to the arguments in this case was the holding in *Health Services* that section 2(d) protected a right to collective bargaining, and whether the *AEPA* provided sufficient statutory rules and protections to facilitate this. Therefore, the majority's analysis focused significantly on determining whether the legislation at issue "substantially interfered" with the workers' abilities to exercise the protected activity of collective bargaining.

In their analysis, the majority frequently characterizes the issue as whether the *AEPA* makes it "effectively impossible" to engage in the activities encompassed by the right to collective bargaining. For example, when discussing how interfering with the ability to pursue workplace goals or negotiate collectively may arise, the majority notes that "[a]nother way, just as *effective*" as outright banning employee associations, "is to set up a system that makes it *impossible* to have meaningful negotiations on workplace matters."[49] The majority found that in such cases, there would be a violation of section 2(d) that must be justified under section 1.[50] Similarly, the majority notes in paragraph 46 that "[l]aws or government action that make it impossible to achieve collective goals *have the effect* of limiting freedom of association, by making it pointless", thus framing the central question as "whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals."[51] The

46 *Ibid* at para 26 [emphasis in original].

47 *Ibid* at para 26.

48 *Fraser*, *supra* note 37; *Agricultural Employees Protection Act*, SO 2002, c 16 [*AEPA*].

49 *Fraser*, *supra* note 37 at para 42 [emphasis added].

50 *Ibid* at para 42.

51 *Ibid* at para 46 [emphasis in original and underline emphasis added].

majority concludes that "[i]f it is shown that it is *impossible* to meaningfully exercise the right to associate due to substantial interference by a law (or absence of laws: see *Dunmore*) or by government action, a limit on the exercise of the [section] 2(*d*) right is established, and the onus shifts to the state to justify the limit under [section] 1 of the *Charter*."[52] Finally, in applying its analysis to the facts at hand, the majority articulates once more the central question as "whether the *AEPA* makes meaningful association to achieve workplace goals *effectively impossible*".[53]

This use of the language of "effective impossibility" in the *Fraser* decision led to concerns and uncertainty about whether the threshold of "substantial interference" had been heightened. Rather than demonstrating "substantial interference" by showing that the impugned legislation, or absence of legislation, facilitated private interferences or violations, workers would now be required to show that it was *impossible* to exercise their rights or engage in the protected activities.[54] If the courts would now require applicants to show that the government action made it "impossible to act collectively to achieve workplace goals", this would have the effect of narrowing the scope of freedom of association.[55]

However, such concerns appeared to be put to rest by the majority's decision in *MPAO*, released four years later in 2015. The case addressed a constitutional challenge to a separate legislative regime for RCMP members to collectively organize and bargain, which was established due to RCMP members being prohibited from formally unionizing under federal labour law. In the course of their analysis, the majority emphasized that section 2(d) "must be interpreted in a purposive and generous fashion" that is attentive to the particular power imbalances between employer and

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

53 *Ibid* at para 98 [emphasis added].

54 See e.g. Judy Fudge, "Constitutional Rights, Collective Bargaining and the Supreme Court of Canada: Retreat and Reversal in the *Fraser* Case" (2012) 41:1 Indus LJ 1 [Fudge, "Retreat and Reversal"]; Judy Fudge, "Introduction: Farm Workers, Collective Bargaining Rights, and the Meaning of Constitutional Protection" in Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012) 1; Fay Faraday, "Envisioning Equality: Analogous Grounds and Farm Workers' Experience of Discrimination" in Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012) 109; Michael S Dunn, "Many Questions and a Few Answers: Freedom of Association After Saskatchewan Federation of Labour, Mounted Police Association of Ontario and Meredith" (2015) 71 SCLR 385.

55 Fudge, "Retreat and Reversal", *supra* note 54 at 21, citing *Fraser*, *supra* note 37 at para 46.

employees, and which seeks to minimize those imbalances by empowering employees through collective action.[56]

This attentiveness to the fundamental purpose of the freedom to associate was carried forward in the majority's analysis of the right to a meaningful process of collective bargaining, and of the threshold for determining violations on the basis of substantial interference.[57] Beyond making workers' rights effectively impossible to exercise, the majority identified other types of restrictions that may operate to reduce the effective power of workers, thus substantially interfering with their ability to exercise their section 2(d) rights:

> The balance necessary to ensure the meaningful pursuit of workplace goals can be disrupted in many ways. *Laws and regulations may restrict the subjects that can be discussed, or impose arbitrary outcomes. They may ban recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power. They may make the employees' workplace goals impossible to achieve. Or they may set up a process that the employees cannot effectively control or influence*. Whatever the nature of the restriction, the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that [section] 2(*d*) seeks to achieve, so as to substantially interfere with meaningful collective bargaining.[58]

Therefore, the majority in *MPAO* reaffirmed a broader, more generous and purposive interpretation of "substantial interference" in considering claims under section 2(d). This approach highlights the significance of addressing the underlying power imbalance of the employer-employee relationship and identifies a range of restrictions that can create substantial interference with workers' rights.

Finally, the majority in *MPAO* directly addressed the question of "effective impossibility". They clarified that while it is one way in which government action can constitute substantial interference, it is not the threshold for determining what constitutes substantial interference or, *inter alia*, violates section 2(d). Rather, the majority explained that the language of "effective impossibility" was used in *Fraser* to describe the impugned legislative schemes at issue in that case (as well as *Dunmore* and *Health Services*, which it discusses) and not to describe the legal test or threshold

56 *MPAO*, *supra* note 2 at paras 47, 55–58.

57 *Ibid* at para 68.

58 *Ibid* at para 72, citing *Health Services*, *supra* note 37 at para 90 [emphasis added].

for infringement of section 2(d).[59] In other words, while the legislative scheme in those cases may have, in fact, made the exercise of section 2(d) rights effectively impossible, that is not the threshold for determining an infringement itself.

Thus, at the time when the *Société des casinos du Québec* case was proceeding through the courts and to the Supreme Court of Canada, the question of the legal test for infringement of section 2(d) appeared resolved. The standard had been reaffirmed as one of "substantial interference", and its interpretation, grounded in a consideration of the balance of power between employer and employee, was capable of recognizing multiple modes of restricting, impairing, or facilitating private interference with protected activities. However, as we will go on to discuss in the next section, the majority's reasoning in *Société des casinos du Québec* appears to unsettle these issues. In doing so, it may have resurrected the post-*Fraser* period of uncertainty about the true breadth and scope of protections afforded by section 2(d) — in this case as they relate to workers who do not have access to the rights and protections provided for by traditional labour relations regimes.

IV. *SOCIÉTÉ DES CASINOS DU QUÉBEC* AT THE SUPREME COURT OF CANADA

The Supreme Court of Canada rendered three separate opinions in the *Société des casinos du Québec* decision. The majority was written by Justice Jamal, with concurring opinions authored by Justices Côté and Rowe. All three reached the conclusion that there had been no infringement of section 2(d). However, the majority opinion and the concurring opinions differed in their need to distinguish between "negative rights" and "positive rights" claims under section 2(d), and as a result, whether there exist two tests for considering a potential infringement. In this section, we chart the majority's analysis of the section 2(d) infringement claim, drawing out two central concerns. First, the majority has engaged in an overly narrow consideration of a meaningful process of collective bargaining, which does not align with the "generous and purposive" approach established by prior Court jurisprudence. This narrow consideration shares certain similarities with the Wagner model of labour relations, despite the activities protected under section 2(d) being untethered from any particular model of labour relations. Second, the majority decision seems to implicitly resurrect

59 *Ibid* at paras 74–75.

the "effective impossibility" standard for cases of under-inclusion, where workers are seeking to assert their section 2(d) rights in the absence of a statutory regime for labour organizing. This interpretation is buttressed by the reasons of the two concurring opinions, where both Justices Côté and Rowe contend with the question of utilizing a higher threshold through the use of a separate test for cases dealing with under-inclusion. Ultimately, we caution that the *Société* decision may function to limit the expansive potential of section 2(d) that has been laid out by prior Supreme Court decisions, and which we discussed in the previous section.

As noted above, the major divergence between the majority and concurring opinions was on the issue of whether section 2(d) claims necessarily distinguish between "positive" and "negative" rights, and therefore, whether there exist two separate tests for claims under section 2(d).[60] The majority decision affirms that the two-step test from *Dunmore* (which mirrors the approach taken by the Tribunal and the QCCA) is the correct framework for determining whether freedom of association has been infringed, and that this test is to be applied in all section 2(d) cases.[61] The test asks: (1) whether the activities in question fall within the scope of section 2(d); and (2) whether the government action, in purpose or effect, "substantially interferes" with the ability to engage in those activities.[62] Justice Jamal goes on to explain that the three *Dunmore* factors, described in the previous section, do not create a separate test for positive rights claims, but instead are underlying principles that "provide guidance" to the Court's analysis, and which will be particularly important in cases of under-inclusion.[63] By contrast, Justice Côté argues that these factors were meant to form a separate test for cases involving a positive rights claim, which most notably adds direct consideration of state responsibility, and that this framework is the correct one for the case at hand.[64] Justice Rowe adopts the reasoning of Justice Côté but goes further in explaining the underlying rationale of maintaining the three-part framework for cases involving positive rights claims, which he sees as having the effect of creating a higher threshold for finding infringement: substantial incapability, rather than substantial interference.[65] Despite this conceptual split

60 *Société* SCC, *supra* note 1 at para 20.

61 *Ibid* at para 34.

62 *Ibid* at para 17, citing *Dunmore*, *supra* note 3 at para 13.

63 *Société* SCC, *supra* note 1 at paras 34–37.

64 *Ibid* at paras 122, 153.

65 *Ibid* at para 211.

between the majority and concurring opinions, their subsequent interpretation and application of the concepts of substantial interference and state responsibility appear to overlap in fundamental ways. This suggests that the Court may have implicitly returned to a higher threshold for determining infringement in section 2(d) cases involving underinclusive legislation.

Turning to the activities in question, Justice Jamal finds that the first step of the test, which asks whether the actions included within the claim before the Court fall within the scope of section 2(d), is satisfied. These activities are, as the Association framed it, a "process of meaningful collective bargaining with their employer … sufficient independence from the employer, and the right to recourses if the employer does not negotiate in good faith."[66] Justice Jamal notes that the right to a meaningful process of collective bargaining "exists independently of the *Labour Code* as part of the associational activities protected under [section] 2(d)."[67] Although the Association had presented their claim in the form of an application to be accredited under the *Code*, which was used by Justice Côté in her concurring opinion to find that the claim was not grounded in activities protected by freedom of association, Justice Jamal distinguishes this from the content of the claim itself.[68] He further recognizes that, were an infringement to be found by the Court, it could still be left to the legislature to determine how best to remedy the situation and provide the members of the Association with a means by which to exercise their section 2(d) rights.[69]

The majority then turns to the second step of the *Dunmore* test: whether the government action substantially interferes with the ability to engage in those activities. Here, the majority finds that the managerial exclusion does not, in either purpose or effect, substantially interfere with the SDOs' freedom of association. On the question of purpose, they look to the explanation provided by Justice Côté in her concurring opinion to determine that the managerial exclusion was implemented in order "to distinguish between management and operations in organizational hierarchies".[70] This in turn prevents a conflict of interest for managers and ensures that the distinct interests of each party are properly represented and protected during the collective bargaining process.[71] This accords with the historical

66 *Ibid* at para 47.
67 *Ibid* at para 48.
68 *Ibid* at paras 48, 155.
69 *Ibid* at para 49.
70 *Ibid* at para 51.
71 *Ibid*.

purpose of managerial exclusions from labour relations statutes. However, absent the parallel framework of rights contemporarily developed under section 2(d), this exclusion would, and historically did, serve the purpose of significantly weakening associational rights, particularly for lower end management workers.[72] Thus, the crux of the analysis turns on the effect that the managerial exclusion has on the ability of workers to engage in the protected activities in question.

In his analysis of the effects of the legislation, Justice Jamal cites the successes of the SDOs as part of his rationale for finding that the exclusion does not constitute substantial interference:

> The operations supervisors managed to group together to form the Association. The Montréal division of the Association was voluntarily recognized by the Société as the representative association of the operations supervisors. The Société and the Montréal division of the Association have successfully concluded a memorandum of understanding providing a framework for collaboration and consultation on working conditions and related issues.[73]

In this passage, two aspects of the analysis become evident. First, that the ability to form an association is a focal point, even though this is a separate activity protected by section 2(d) and not at the core of the Association's claim of infringement. Second, that the core activity at issue–a meaningful process of collective bargaining—is constructed in narrow terms as the ability to conclude and administer a written agreement, without robust consideration of the concept of a meaningful process of collective bargaining as extending beyond the production and content of written agreements. Justice Jamal goes on in his decision to state plainly that "[t]he terms of the memorandum of understanding demonstrate that the Association's members are able to associate and collectively bargain with their employer."[74] This approach is also taken by Justice Côté who lists the terms of the memorandum as proof of the SDO's ability to associate in accordance with the rights afforded by section 2(d).[75]

Previous section 2(d) jurisprudence has articulated a broader concept of collective bargaining: one that is intentionally and necessarily untethered to the form and content of collective bargaining found under the Wagner

72 Lynk, *supra* note 6 at 56–57.

73 *Société* SCC, *supra* note 1 at para 52.

74 *Ibid* at para 54.

75 *Ibid* at paras 174–78.

model. Rather, the broader concept of collective bargaining articulated in the line of previous decisions encompasses activities related to "negotiation on workplace matters", "good faith negotiations and consultation", "a process that permits meaningful pursuit of [workplace] goals", and which serves the underlying function of "protect[ing] individuals against more powerful entities".[76] Importantly, as many cases have stated, the right to a meaningful process of collective bargaining is not a right to a particular outcome or model of labour relations, but to a *process*.[77] The concept of collective bargaining as a protected activity under section 2(d) has been interpreted as thus including two key points: first, that there is *meaningful* access, which prompts a consideration of available recourse when one party is acting in bad faith, such as by ignoring representations or the terms of settled negotiations; and, second, that the concept of collective bargaining is broader than the narrowly defined process of negotiations leading to a written agreement as located under the Wagner model.

When one disconnects the concept of collective bargaining from its Wagner model origins, it is questionable to assume that this activity ends where a written document is produced. Under that traditional model of labour relations, as reflected in federal and provincial labour codes, a written agreement is, in many ways, the "end result". It is treated as a binding contract, and clear mechanisms for dispute resolution during the administration of that agreement are set out in statute.[78] However, this does not necessarily mean that such a technical understanding of collective bargaining is, or should be, transplanted in other, or non-, statutory contexts. As such, production of a written agreement should not necessarily be treated as equivalent to the *process* of collective bargaining that section 2(d) protects. Rather, in line with the generous and purposive approach of the Court as set out in *MPAO*, this concept should encompass a broader understanding of the process—one that considers the administration of any settled terms of negotiations and recognizes the need for meaningful and clear access to some mechanism for dispute resolution—whether that is in the course of negotiations or in carrying out the settled terms of negotiation.

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76 *MPAO*, *supra* note 2 at paras 58, 68; *Health Services*, *supra* note 37 at para 107; *Fraser*, *supra* note 37 at para 38. See also *Fraser*, *supra* note 37 at para 42; *MPAO*, *supra* note 2 at para 98.

77 *Health Services*, *supra* note 37 at para 89; *Fraser*, *supra* note 37 at paras 42–43; *MPAO*, *supra* note 2 at para 67.

78 See e.g. *Canada Labour Code*, RSC 1985, c L-2, ss 56–69; *Labour Relations Code*, RSBC 1996, c 244, ss 81–114.

The questionable conclusion of relying on the production of a written agreement as an "end point" for establishing access to meaningful collective bargaining outside of a statutory regime is all the more evident by the fact that the Association established a history of the Société ignoring the terms and conditions set out in it—despite the existence of a written memorandum in this case. The Supreme Court of Canada acknowledged in *Dunmore* that substantial interference can occur in cases of legislative exclusion where that exclusion operates to facilitate private interferences with workers' abilities to exercise their rights, such as by placing a "chilling effect" on activity.[79] Where the legislative exclusion enables private interferences by allowing parties, and especially the employer (in light of the routinely acknowledged power imbalance between the parties), to act in bad faith and with relative impunity, this could similarly be said to therefore constitute a substantial interference. In other words—and to again borrow language from *Dunmore*—substantial interference can occur where the legislation or government action "substantially orchestrates, encourages or sustains the violation".[80] To conclude that the mere ability to produce some form of agreement on paper is sufficient to constitute "meaningful collective bargaining", even when its administration or terms may be ignored with few consequences or recourse, is to unduly limit the understanding of that associational activity. It also appears to enable actors to act in bad faith, which risks rendering the protected activity of collective bargaining a "paper right" for workers associating outside of a formalized statutory regime.[81]

The difficulty of accessing "meaningful" collective bargaining or associational activity in the labour context in the absence of a statutory regime is acknowledged by the majority. At paragraph 28, Justice Jamal acknowledges the "deep and extensive involvement" of the state in "regulating the rights and freedoms of workers", and that labour relations in Canada, as with many countries, is "integrally bound up with statutory protection" and "exercised mainly through statutory vehicles".[82] As such, while the Court has consistently affirmed in its jurisprudence that section 2(d) broadly protects associational activity and is not confined to a particular model or statutory regime, it has rarely grappled with interpreting and applying those rights in the absence of any applicable statutory regime.

79 *Société* SCC, *supra* note 1 at para 22, citing *Dunmore*, *supra* note 3 at paras 43–48.

80 *Dunmore*, *supra* note 3 at para 26.

81 *Fraser*, *supra* note 37 at para 38.

82 *Société* SCC, *supra* note 1 at para 28.

The only case to consider this context in the modern jurisprudence prior to the *Société* decision was *Dunmore*, which found that the lack of access to statutory protections did constitute an infringement of section 2(d), thereby requiring the Ontario government to enact legislation enabling agricultural workers to properly exercise their rights.[83]

Although the majority acknowledges that the Société "has neglected to properly respect the memorandum of understanding at times", they suggest that the Association could "seek remedies in court for any substantial interference with its members' meaningful collective bargaining, including their right to strike, which is protected under [section] 2(d) even without an enabling legislative framework".[84] This reference to untested legal remedies is similar to the analysis of the Court in *Fraser*, though a notable distinction exists between these two cases.[85] In *Fraser*, the workers were attempting to organize under a statutory regime that set out a clear mechanism for dispute resolution (although the mechanism was critiqued as inadequate, both by the workers themselves and in subsequent academic commentary).[86] The Court ruled that the parties had brought their constitutional challenge before attempting to resolve the dispute through the statutory mechanism, and so the statutory regime could not be found to have infringed upon section 2(d).[87] By contrast, in *Société* there is no defined dispute resolution mechanism because there is no applicable statutory scheme for labour organizing—only the "remedies" alluded to by the majority, including the right to strike. While workers may have a constitutional right to strike, how this is interpreted and applied in a non-statutory context has yet to be tested. This creates serious uncertainty about the viability of such an approach for workers to pursue dispute resolution or advance their interests, which could lead to a real or perceived

83 We note that the Supreme Court of Canada also considered lack of access to a statutory regime for labour relations in *Delisle v Canada* (*Deputy Attorney General*), 1999 CanLII 649 (SCC). However, that case was decided prior to *Dunmore* at a time when, as critics have noted, section 2(d) was, in effect, a bare right (see Hastie, *supra* note 36; Harman, *supra* note 36; Adell, *supra* note 36). It is debatable whether *Delisle* would be similarly decided today, in light of the evolution of section 2(d), but see *Société* SCC, *supra* note 1 at para 100, Côté J, concurring, where *Delisle* is suggested to be "similar" to the facts at hand.

84 *Société* SCC, *supra* note 1 at para 55.

85 *Fraser*, *supra* note 37 at para 109–12.

86 *Ibid* at para 108; David J Doorey, "Graduated Freedom of Association: Worker Voice Beyond the Wagner Model" (2012) 38:2 Queen's LJ 511 at 514, 533–34.

87 *Fraser*, *supra* note 37 at 109–12.

threat of recourse from their employer.[88] As such, this conclusion by the majority—which is not elaborated upon or explained—may be read as an ill-considered response to the issue of accessing meaningful collective bargaining. It fails to address the lack of a satisfactory dispute resolution mechanism for workers who do not have statutory protections under an existing labour regime.

The majority also highlights the fact that the Société is a public entity, and as such their actions must be consistent with the *Charter*. This is yet another distinction from both *Fraser* and *Dunmore*, which involved private employers. The majority's analysis places significant weight on the fact that the Association challenged the Société directly rather than the managerial exclusion in the Quebec *Labour Code*. This distinction seems to justify its conclusion that the Association had access to a dispute resolution mechanism sufficient to satisfy section 2(d), even when the employer ignored the agreement's terms.[89] Alongside the right to strike, the option of direct action against the Société is characterized as a sufficient remedial vehicle through which the Association can assert its rights to a meaningful process of collective bargaining. This is another point at which the majority and concurring opinion converge, as Justice Côté likewise raises these arguments in her decision. She acknowledges that "certain aspects of the Société's conduct…[do] seem to interfere substantially with the freedom of association of the Association's members".[90] But she also finds that, in contrast to the situation of the agricultural workers in *Dunmore*, the Association's members in the case at hand have access to potential recourse through the courts, either by bringing a claim against the Société directly, or by exercising their constitutional right to strike.[91]

The Court relied heavily on the public nature of the employer in this case to find no substantial interference. That reliance, creating the availability of a direct *Charter* claim and possibility of protected strike action absent statutory entitlement, raises at least two pressing questions for freedom of association and labour organization moving forward. The first is how similar section 2(d) cases will be decided in non-statutory contexts involving private employers, as was the case in *Dunmore*. The second is whether the content of freedom of association, and the test for its infringement, should

88 See e.g. Bethany Hastie & Alex Farrant, "What Meaning in a Right to Strike? *MedReleaf* and the Future of the *Agricultural Employees Protect Act*" (2021) 53:1 Ottawa L Rev 1.

89 *Société* SCC, *supra* note 1 at para 55.

90 *Ibid* at para 180.

91 *Ibid* at paras 180–84.

differ in public versus private employment contexts. The Court has left these questions unanswered, and it leaves workers, especially those seeking to exercise their section 2(d) rights without the protection of existing labour legislation, with less certainty about the scope of their rights under section 2(d). Thus, the Court's decision risks further complicating or fragmenting the section 2(d) framework in future cases and broader contexts, as well as potentially dissuading workers from attempting to exercise their section 2(d) outside of traditional statutory contexts.

The majority completes their analysis by engaging with the question of state responsibility, which they had interpreted as one of the three underlying principles from *Dunmore* that should guide their analysis and engagement with the substantial interference test. Without offering a definitive answer on whether the actions of the Société itself amounts to substantial interference—which may have grounded a separate *Charter* challenge through the courts as noted above—the majority concludes that those actions, summarized as a "failure to respect the memorandum of understanding or negotiate in good faith", do not flow from the managerial exclusion under the legislative framework.[92] This mirrors the findings of Justice Côté on the same issue—although the majority disagrees with her considering the absence of any "special vulnerability" on the part of the claimants to be a relevant factor.[93]

As set out above, section 2(d) requires meaningful access to a process of collective bargaining, broadly conceived, and allows for a finding of substantial interference where the absence of, or exclusion from, legislation facilitates private interferences with workers' rights. This broader interpretation is further buttressed by the core underlying consideration that the Court articulates in *MPAO* that "the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that [section] 2(*d*) seeks to achieve".[94] In this case, it seems clear on the facts that the absence of some kind of statutory protections "disrupts" that balance of power by enabling private interferences with workers' ability to engage in meaningful collective bargaining with relative impunity, and with no clear recourse for workers to resist or respond to such interferences.

Despite this set of circumstances, the majority and concurring judgments of the Supreme Court of Canada in this case found no infringement

92 *Ibid* at para 56.

93 *Ibid* at para 57.

94 *MPAO*, *supra* note 2 at para 72.

of section 2(d). This begs the question of what would be required to establish an infringement in the absence of a statutory regime. From the majority opinion, it appears that workers who attempt to associate collectively outside of a statutory regime may be required to show that it is "effectively impossible" to associate and bargain collectively, or to have exhausted all other available avenues of recourse, as proof of substantial interference in a section 2(d) claim. Where the evidence establishes *some ability* of the workers to engage in protected activities, even if this is only surface engagement, this may be sufficient for the Court conclude that their rights have not been substantially interfered with. Thus, even though the majority endorses the two-step framework from *Dunmore* and the threshold of "substantial interference" for all section 2(d) claims, their application of that test in a non-statutory context seems to give way to a higher threshold, akin to "effective impossibility", for workers who organize outside of a formal labour relations regime—and particularly for workers who are employed by an entity directly subject to the *Charter*.

This reading of the decision is accentuated by further consideration of the concurring opinions, in which Justice Côté acknowledges the existence of a higher threshold and Justice Rowe explicitly argues for one. Justice Côté finds that this case is properly framed as a positive rights claim; in other words, this is "not a case in which the state is being asked to refrain from suppressing an activity that the Association and its members would 'otherwise be free to engage, without any need for any government support or enablement'".[95] Rather, as Justice Côté articulates it, "the Association's position is based on the premise that its members cannot meaningfully exercise their freedom of association without legislative protection, and thus without support or enablement of the state."[96] Based upon this finding, Justice Côté proceeds to engage with the three-step framework from *Dunmore*, which she characterizes as creating a higher threshold by way of the added requirement of state responsibility or accountability.[97] However, as we have shown, the structure of her analysis, and in many ways the substance, essentially mirrors that of the majority. Justice Côté appears to acknowledge this fact herself, stating that her articulation of the test, compared with the majority's, serves more to offer "conceptual clarity" than a

95 *Société* SCC, *supra* note 1 at para 129, citing *Baier v Alberta*, 2007 SCC 31 at para 35. See also *Toronto (City) v Ontario (AG)*, 2021 SCC 34 at paras 20, 26.

96 *Société* SCC, *supra* note 1 at para 131.

97 *Ibid* at paras 135, 149.

substantive difference in application.[98] The foundation laid by her analysis is then picked up on and expanded in Justice Rowe's concurring opinion.

In his concurring opinion, Justice Rowe first sets out a similar analysis to Justice Côté describing how and why negative and positive rights claims under section 2(d) should be distinguished. He argues that, in this case, the issue is properly framed as a positive rights claim, instantiating a higher threshold for establishing infringement of freedom of association.[99] In delineating the core difference between negative and positive rights claims and why this should give rise to distinct legal thresholds for infringement, Justice Rowe relies on the notion that in negative rights claims, the state action directly interferes with the freedom.[100] In contrast, in positive rights cases, the claim is based on a *failure* of the state to act, or act sufficiently, to protect against interference by *private* actors.[101] Turning to the applicable legal framework, Justice Rowe expresses the threshold for infringement as such: that "any positive obligation requiring the state to protect the freedom should arise *only where the claimant would otherwise be substantially incapable of exercising the freedom*".[102] Justice Rowe is explicit in his reasoning against the standard of substantial interference for what he deems positive rights claims: "[b]y applying the same standard for positive claims, every time a private employer would substantially interfere with the freedom of association of its employees, the employees could sue the government for not passing legislation to stop [them]".[103] However, this appears to exacerbate both the extent to which a lack of protection exists for employee groups under existing labour legislation, and the extent of state responsibility that exists under the majority's unified approach to section 2(d). In other words, Justice Rowe's evident concerns of a floodgate of litigation appear ill-founded, based both on the factual circumstances and legal framework in place for section 2(d) claims. Nonetheless, in his opinion, Justice Rowe appears to go further than Justice Côté in arguing explicitly for the adoption of a higher threshold—one higher than substantial interference—in cases of under-inclusion, and where the alleged

98 *Ibid* at para 151.

99 *Ibid* at paras 203–07.

100 *Ibid* at paras 212–13.

101 *Ibid* at paras 212–13.

102 *Ibid* at para 211 [emphasis added], citing Brian Langille & Benjamin Oliphant, "The Legal Structure of Freedom of Association" (2014) 40:1 Queen's LJ 249 at 291. See also *Dunmore*, *supra* note 3 at para 23.

103 *Société* SCC, *supra* note 1 at para 213.

interferences must be the result of private actors and actions, rather than direct state action.

Ultimately, each of the three opinions rendered in *Société*, despite presenting distinct articulations of the applicable legal principles, reach similar conclusions in their application. While the majority opinion eschews, on the page, the distinctions made by the concurring opinions of Justice Côté and Justice Rowe as concerns the relevance of distinguishing between negative and positive rights claims under section 2(d), the implications remain the same: for workers falling outside of an established statutory labour relations regime, the decision in *Société* risks being interpreted as resurrecting a threshold of "effective impossibility" for establishing section 2(d) infringements. This has the potential to foster similar uncertainty and confusion about the applicable legal framework for assessing freedom of association claims as that which followed *Fraser*. Moreover, the decision risks creating a tiered system of labour rights under section 2(d), with those falling outside of a particular labour relations regime bearing a greater onus to assert and exercise their rights, despite their greater vulnerability, and despite the Supreme Court of Canada's consistent insistence that section 2(d) protects association in the labour context separately and distinctly from any statutory model. Finally, the decision in *Société* risks being interpretated as upholding "paper rights" due to the lack of robust engagement with what is required to ensure *meaningful* associational activity outside of access to a statutory framework for labour organizing. Taken together, the decision thus presents a stark contrast to the trajectory set by recent jurisprudence of the Court.

V. CONCLUSION

The guarantee of freedom of association under section 2(d) of the *Charter* has undergone substantial evolution in the 21st century. Beginning with *Dunmore*, the Supreme Court of Canada has appeared to increasingly adopt a generous, purposive, and even pluralist approach to the content and operation of section 2(d). Importantly, this approach has consistently resisted the constitutionalization of the "Wagner model" of labour relations, insisting on an untethered understanding of its purpose, scope, and content.

Yet, with the *Société* decision, the Court has potentially undermined the work of these previous cases. In this comment, we have established how the *Société* decision risks an interpretation that creates a tiered system of

labour rights under section 2(d) of the *Charter*, establishes a higher threshold for accessing and exercising rights for workers who are not subject to a legislative framework for labour relations, and narrows the potential understanding of collective bargaining to one more closely linked with traditional labour relations under the Wagner model. How this decision will be interpreted and influence future court decisions on legislative exclusions and other recurring labour relations issues remains to be seen. As access to labour rights becomes increasingly difficult for workers, even those who have formal access under existing statutory frameworks, the true impact of this decision in the line of growing section 2(d) jurisprudence at the Supreme Court of Canada will undoubtedly be revealed.