

# “I Will Not Give You a Penny More Than You Deserve”: *Ontario v. Fraser* and the (Uncertain) Right to Collectively Bargain in Canada

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Volume 57, Number 2, December 2011

URI: <https://id.erudit.org/iderudit/1007819ar>

DOI: <https://doi.org/10.7202/1007819ar>

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Publisher(s)

McGill Law Journal / Revue de droit de McGill

ISSN

0024-9041 (print)

1920-6356 (digital)

[Explore this journal](#)

Cite this article

Braley, A. (2011). “I Will Not Give You a Penny More Than You Deserve”: *Ontario v. Fraser* and the (Uncertain) Right to Collectively Bargain in Canada. *McGill Law Journal / Revue de droit de McGill*, 57(2), 351–374.  
<https://doi.org/10.7202/1007819ar>

Article abstract

This case comment first reviews the jurisprudence that most directly informed the Supreme Court’s ruling in *Health Services*. Second, this case comment applies the logic underpinning *Health Services* to the facts of the case at bar. The general argument is that *Ontario v. Fraser* represents an inconsistent application of two concepts that are central to the understanding of collective bargaining that the SCC had elucidated in *Health Services*: the meaning of “good faith” and “substantial interference”. The comment concludes that *Ontario v. Fraser* has narrowed the right to collectively bargain to a greater degree than both proponents and opponents of *Health Services* might have anticipated.

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“I WILL NOT GIVE YOU A PENNY MORE THAN YOU  
DESERVE”:\* *ONTARIO V. FRASER* AND THE  
(UNCERTAIN) RIGHT TO COLLECTIVELY  
BARGAIN IN CANADA

*Alison Braley*\*\*

This case comment first reviews the jurisprudence that most directly informed the Supreme Court's ruling in *Health Services*. Second, this case comment applies the logic underpinning *Health Services* to the facts of the case at bar. The general argument is that *Ontario v. Fraser* represents an inconsistent application of two concepts that are central to the understanding of collective bargaining that the SCC had elucidated in *Health Services*: the meaning of “good faith” and “substantial interference”. The comment concludes that *Ontario v. Fraser* has narrowed the right to collectively bargain to a greater degree than both proponents and opponents of *Health Services* might have anticipated.

Ce commentaire d'arrêt fait d'abord état de la jurisprudence ayant directement informé la Cour suprême dans sa décision *Health Services*. Ensuite, ce commentaire d'arrêt applique la logique sous-jacente de *Health Services* aux faits en l'espèce. L'argument général est que l'arrêt *Ontario c. Fraser* représente une application incohérente de deux concepts centraux, pour la compréhension du droit à la négociation collective, que la CSC a éucidés dans *Health Services* : le sens des concepts de « bonne foi » et d' « entraves substantielles ». Ce commentaire conclut que l'arrêt *Ontario c. Fraser* limite le droit à la négociation collective à un tel degré que tant les défenseurs que les opposants de l'arrêt *Health Services* n'auraient pu l'anticiper.

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\* Josh Finlayson & Andy Maize, “A Penny More” recorded by The Skydiggers, from the album *Restless*, (Toronto: FRE Records, 1992).

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## Introduction

On 29 April 2011, the Supreme Court of Canada (SCC) released its much-anticipated decision in *Ontario (Attorney General) v. Fraser*.<sup>1</sup> This decision held that the labour regime for agricultural workers in Ontario as set out in the *Agricultural Employees Protection Act*<sup>2</sup> is constitutional. The *Fraser* decision had the effect of overturning an Ontario Court of Appeal (OCA) ruling that had held that the *AEPA* was *unconstitutional*. The reason for the OCA's decision was that the *AEPA* did not extend to agricultural workers an adequate scheme for collective bargaining, a conclusion with which the SCC disagreed.

Unsurprisingly, employer groups are encouraged by *Fraser*, particularly the Ontario Federation of Agriculture (OFA), which enjoyed inter-vener status at early trial stages.<sup>3</sup> So too is the Government of Ontario.<sup>4</sup> The labour community, by contrast, is “shocked”<sup>5</sup> by the decision. Stan Raper of United Food and Commercial Workers Canada (UFCW) referred to the decision as less worthy than “fertilizer”.<sup>6</sup> It is arguable that one point upon which the employer and labour groups agree, however, is that this particular outcome was unanticipated. That is because the SCC's landmark decision in *Health Services*,<sup>7</sup> which provided a level of constitutional protection for collective bargaining, had seemingly changed the landscape of labour relations. Commentators claimed that the *Health Services* decision represented an “about-face”<sup>8</sup> and a new era of dialogue

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<sup>1</sup> 2011 SCC 20, [2011] 2 SCR 3 [*Fraser*].

<sup>2</sup> *Agricultural Employees Protection Act*, SO 2002, c 16 [*AEPA*].

<sup>3</sup> See Mark Wales, “Supreme Court Ruling is Good for Farming” (6 May 2011), online: Northumberland View <<http://www.northumberlandview.ca>>.

<sup>4</sup> Although the legislation was brought in by the Progressive Conservative government, the Liberal government, under Premier Dalton McGuinty, chose to challenge the Ontario Court of Appeal decision to strike it down.

<sup>5</sup> “Ont. Farm Workers ‘Shocked’ as Union Ban Upheld”, *CBC News* (30 April 2011), online: CBC News <<http://www.cbc.ca>>.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*Health Services*].

<sup>8</sup> Judy Fudge, “The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the *Health Services and Support* Case in Canada and Beyond”, online: (2008) 37:1 *Indus LJ* 25 at 25 <<http://ilj.oxfordjournals.org>>. See also Michael Lynk, “Supreme Court Boldly Affirms Labour Rights”, online: (2007) 54:9 *CAUT/ACPPU Bulletin Online* <<http://www.cautbulletin.ca>>.

with regard to labour rights.<sup>9</sup> Not all observers felt that this about-face was agreeable. Some felt that the decision was arbitrary and would ultimately lead the Canadian constitutional regime into a black hole of the SCC's own making.<sup>10</sup> On the whole, however, commentators agreed that, for good or ill, *Health Services* altered the discourse of labour relations in this country, even while uncertainty loomed over how much protection workers had actually gained from it.<sup>11</sup> The decision in *Fraser*, however, reveals a lesser level of protection for collective bargaining than supporters of the *Health Services* decision seemed to anticipate, cautiously optimistic as they were, and certainly less than the prognostications of its detractors.

Despite diverging views regarding whether or not the decision in *Fraser* is ultimately correct, many employer and labour groups agree that this result represents a back-peddalling from the SCC's ruling in *Health Services*. At least one observer has called the *Fraser* decision a "significant rethinking of recent developments in Canadian labour and constitutional law" that opens the door to an ultimate reversal of *Health Services*.<sup>12</sup> In its judgment, the SCC rejects the characterization that *Fraser* represents a retreat from its decision in *Health Services*. Others agree with the SCC, claiming that this decision "represents the usual foot shuffling and clarification that takes place after the Court's jurisprudence has taken a significant step in any particular direction."<sup>13</sup>

By contrast, I believe that this decision does represent a significant back-peddalling principally because the *Fraser* decision is largely incoherent and has offered little in the way of clarification of what the right to bargain collectively entails. I will demonstrate that the SCC's assessment of the collective bargaining provisions in the *AEPA* is inconsistent with its assessment of what constituted a meaningful (and thereby constitutional) collective bargaining regime in *Health Services*. The SCC's inconsistent assessment reveals itself in two ways. First, the SCC applied different

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<sup>9</sup> See Ken Norman, "What's Right Is Right: The Supreme Court Gets It", online: (2008) 12 Just Labour: A Canadian Journal of Work and Society 16 at 16 <<http://www.justlabour.yorku.ca>>.

<sup>10</sup> See Geoff Plant, "Charter of Rights divides rather than unites Canadians", *The Lawyers Weekly* (17 August 2007), online: The Lawyers Weekly <<http://www.lawyersweekly.ca>>.

<sup>11</sup> See Fudge, *supra* note 8 at 40; Jakki Warkentin, "Health Services: Time to Celebrate?", *The Court* (21 June 2007), online: The Court <<http://www.thecourt.ca>>.

<sup>12</sup> Heenan Blaikie Labour Group, "Ontario v. Fraser—The Supreme Court of Canada Significantly Narrows the Scope of the Constitutional Protection of Collective Bargaining" (April 2011), online: Heenan Blaikie <<http://www.heenanblaikie.com>>.

<sup>13</sup> Christopher Hunter, "Defining the 'Meaningful'—Collective Bargaining and Freedom of Association (Ontario (Attorney General) v. Fraser) Part I", *The Court* (15 September 2011), online: The Court <<http://www.thecourt.ca>>.

standards to the term “good faith” in *Fraser* than it did in *Health Services*. Second, the SCC misapplied the substantial interference test elucidated in *Health Services* to the facts of the case in *Fraser*. Despite the optimistic predictions from some corners in the wake of *Health Services* regarding the future of collective bargaining in Canada, *Fraser* pays little more than lip service to the collective bargaining rights that the SCC had supported just a few years earlier.

## I. Relevant Jurisprudence and Developments

### A. Dunmore

Ontario’s agricultural workers have been consistently excluded from the protective provisions enacted in the Ontario *Labour Relations Act*,<sup>14</sup> except for a time in the early 1990s. In 1995, the *Labour Relations and Employment Statute Law Amendment Act*<sup>15</sup> was introduced. This legislation once again excluded agricultural workers from a labour regime that protected any right to form a union and to bargain collectively.<sup>16</sup> Subsequently, the *LRESLAA* was challenged under section 2(d) of the *Charter*.<sup>17</sup>

The establishment of an affirmative right to unionize and to bargain collectively has a recent history whose provenance is *Dunmore*<sup>18</sup> in 2001. In *Dunmore*, the SCC held that a right to associate included the right to join a union.<sup>19</sup> This right was held to be empty if conditions were such that its exercise was made all but impossible. The right must be made substantive by a legislative framework that would enable agricultural workers to associate, since their efforts to do so are otherwise frustrated by interference and threats of reprisal by employers.<sup>20</sup> *Dunmore* moved section 2(d) jurisprudence from protecting the so-called negative right enshrined in the *Charter* to holding that positive legislative action was sometimes required to protect the right to associate. Writing for the majority, Justice Bastarache concluded that in some (although not all) cases, the absence of

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<sup>14</sup> *Labour Relations Act, 1995*, SO 1995, c 1, Schedule A [*LRA*].

<sup>15</sup> *Labour Relations and Employment Statute Law Amendment Act, 1995*, SO 1995, c 1 [*LRESLAA*].

<sup>16</sup> See *Dunmore v Ontario (AG)*, 2001 SCC 94 at paras 3-4, [2001] 3 SCR 1016 [*Dunmore*]. It is worth noting that at this time Alberta was the only other provincial jurisdiction that excluded agricultural workers from a generalized labour relations regime.

<sup>17</sup> The *LRESLAA* has also been challenged under section 15 of the *Charter*. However, section 15 challenges have not been very fruitful to date.

<sup>18</sup> *Supra* note 16.

<sup>19</sup> See *ibid* at paras 37-38.

<sup>20</sup> See *ibid* at para 48.

positive protections to conduct union activities could “substantially interfere”<sup>21</sup> with the very right to associate. While the SCC determined that these cases would most likely appear in the labour relations context,<sup>22</sup> *Dunmore* stopped short of entrenching a positive right to collectively bargain. In keeping with jurisprudence until that point, it explicitly rejected this idea.<sup>23</sup>

The substance of the SCC’s elaboration of the meaning of section 2(d) jurisprudence in *Dunmore* consisted of the following: the SCC, following the dissent in the *Alberta Reference*,<sup>24</sup> recognized that individuals join associations for social intercourse and to achieve common goals.<sup>25</sup> The SCC further recognized that since individuals organize into unions to achieve goals that they can only achieve collectively, the right to join a union is not a repudiation of *Charter* protection of individual rights, but its vindication: “the law must recognize that certain union activities ... may be central to freedom of association even though they are inconceivable on the individual level.”<sup>26</sup> The *LRESLAA* was held to be unconstitutional because, by excluding agricultural workers from an affirmative framework in which the pursuit of the common goals associated with unionization could be achieved, the state was held to have substantially interfered with the agricultural workers’ right to associate.<sup>27</sup>

### **B. The Agricultural Employees Protection Act (AEPA)**

The Government of Ontario responded to the *Dunmore* decision with the *AEPA*, which came into effect in 2003. The *AEPA* addressed some of the particular concerns raised in *Dunmore*, namely the need for basic pro-

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<sup>21</sup> *Ibid* at para 22.

<sup>22</sup> See *ibid* at para 39, where the SCC notes that not all labour relations cases would require a positive framework in order to protect the right to associate. Notably, the SCC distinguished between the agricultural workers in *Dunmore* and the RCMP officers in *Delisle v Canada (Deputy AG)*, [1999] 2 SCR 989, 176 DLR (4th) 513 [*Delisle* cited to SCR]. Moreover, the SCC hinted as early as *Delisle* that there could be an exceptional case whereby a positive framework was required in order to protect against substantial interference even though that was not the case in *Delisle*: “[T]he fundamental freedoms protected by s. 2 of the *Charter* do not impose a positive obligation of protection or inclusion on Parliament or the government, *except perhaps in exceptional circumstances* which are not at issue in the instant case” (*ibid* at para 33 [emphasis added]).

<sup>23</sup> See *Dunmore*, *supra* note 16 at para 42.

<sup>24</sup> *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313, 38 DLR (4th) 161 [*Alberta Reference* cited to SCR].

<sup>25</sup> See *Dunmore*, *supra* note 16 at para 15.

<sup>26</sup> *Ibid* at para 17.

<sup>27</sup> See *ibid* at para 70.

tections in order for agricultural workers to organize into a union. Among other things, it offered agricultural workers the right to join a union and participate in its lawful activities;<sup>28</sup> the right to be protected against interference, coercion, and discrimination;<sup>29</sup> the right to make “representations”<sup>30</sup> to the employer about terms and conditions of work, either verbally or in writing;<sup>31</sup> and the right to have these representations listened to,<sup>32</sup> or, if submitted in writing, receive an acknowledgment that they had been read.<sup>33</sup> The *AEPA* also included a right to apply to a tribunal to deal with complaints regarding the application of the Act.<sup>34</sup> Notably, the *APEA* did *not* include any right to receive an explanation as to the employer’s position on the union’s representations, nor any acknowledgement by the employer beyond that provided for above.

Following the implementation of the *AEPA*, the UFCW attempted to negotiate collective agreements with two separate agricultural employers. Ultimately the UFCW was stymied, and was unable to even begin—much less conclude—a series of negotiations.<sup>35</sup> Subsequent to this failure, the *AEPA* was challenged on the basis that it offered inadequate protection to make section 2(d) of the *Charter* substantive.<sup>36</sup> Central to the several claims of the applicants was that the *AEPA* did not guarantee a scheme for meaningful collective bargaining.<sup>37</sup>

### C. *The AEPA at Trial*

The constitutional challenge to the *AEPA* was heard in the first instance by Justice Farley in 2006.<sup>38</sup> Of great importance is that he heard the case at trial prior to the SCC ruling in *Health Services*. For Justice Farley, the issue was not whether the *AEPA* was ideal legislation, but

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<sup>28</sup> See *AEPA*, *supra* note 2, ss 1(2)(1)-(2).

<sup>29</sup> See *ibid*, s 1(2)(5).

<sup>30</sup> *Ibid*, s 5(1).

<sup>31</sup> See *ibid*, s 5(5).

<sup>32</sup> See *ibid*, s 5(6).

<sup>33</sup> See *ibid*, s 5(7).

<sup>34</sup> See *ibid*, s 11.

<sup>35</sup> See *Fraser*, *supra* note 1 at paras 9-11.

<sup>36</sup> See *ibid* at para 12.

<sup>37</sup> See *ibid* at para 7. The respondents also claimed that “majoritarian exclusivity” and a scheme to resolve a bargaining impasse were necessary.

<sup>38</sup> See *Fraser v Ontario*, [2006] 79 OR (3d) 219, 263 DLR (4th) 425 (Ont Sup Ct) [*Fraser (Ont Sup Ct)*].



“whether the minimum ha[d] been achieved.”<sup>39</sup> There are three things that are particularly noteworthy with regard to Justice Farley’s decision. The first is that he correctly interpreted that judicial precedent did not, at this time, protect a positive right to bargain collectively, but only the right to join a union.<sup>40</sup> He concluded that the *AEPA* provided the framework necessary for employees to (a) join a union;<sup>41</sup> and (b) pursue the common goals associated with union activities.<sup>42</sup> Importantly, the right to pursue collective activities did not constitute a positive right to engage in any and all associational activity. Indeed, the SCC in *Dunmore* made it clear that “activity itself”<sup>43</sup>—no matter how fundamental to a group’s purpose—was not to be given constitutional protection. However, to the extent that no clear distinction, no bright line, can be made between an individual’s right to associate and (at least some of) the reasons for which the individual chooses to do so, the SCC acknowledged that the pursuit of some activities was necessarily protected by virtue of protecting the right to associate in the first place: “certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning.”<sup>44</sup> If one of the key reasons for which individuals associate is to achieve common goals, and if the common goal of collective bargaining was not to be afforded constitutional protection, what union activities was *Dunmore* thought to protect? According to Justice Farley, protected union activities included the right of an “employees’ association [to] make representations to an employer concerning the terms and conditions of employment.”<sup>45</sup>

The second thing of particular note is that Justice Farley concluded that the requirement that the employer both listen and read any presentations made by the union implied that the presentations also be *considered*. According to Justice Farley, “the concept of listening and reading respectively involves the aspect of comprehending and considering the representations.”<sup>46</sup>

Third, and indeed the most telling part of Justice Farley’s decision, is his claim that while it might have been desirable to compel the employer by legislation to not only comprehend and consider, but also to *respond* to the representations, this would then “involve the parties in a form of col-

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<sup>39</sup> *Ibid* at para 13.

<sup>40</sup> See *ibid* at para 29.

<sup>41</sup> See *ibid* at para 16.

<sup>42</sup> See *ibid* at para 15.

<sup>43</sup> *Dunmore*, *supra* note 16 at para 18.

<sup>44</sup> *Ibid* at para 17.

<sup>45</sup> *Fraser (Ont Sup Ct)*, *supra* note 38 at para 19.

<sup>46</sup> *Ibid*.

lective bargaining.”<sup>47</sup> Since, at this time, there was no constitutionally protected right to collectively bargain, he ruled that the *AEPA* did not need to include a provision for the employer to respond to the union’s representations in order for the act to pass constitutional muster. For our purposes, the most important aspect of this remark regards what, in Justice Farley’s view, the collective bargaining process minimally required, which is a considered response on the part of the employer.

#### D. Health Services

With the *Health Services* decision in 2007, the terrain shifted even further in the direction of constitutionalizing certain workers’ rights. In 2005, the Government of British Columbia instituted the *Health and Social Services Delivery Improvement Act* (Bill 29).<sup>48</sup> Sections of Part 2 of Bill 29 were held to be unconstitutional because they “invalidated important provisions of collective agreements then in force, and effectively precluded *meaningful collective bargaining* on a number of specific issues.”<sup>49</sup> *Health Services* was a landmark decision that reversed over twenty years of *Charter* jurisprudence, which had until then explicitly rejected that collective bargaining was to be afforded constitutional protection.

The decision of the majority in *Health Services* begins with a long and exacting review of the reasons for which the *Charter* must be read to include a right to bargain collectively. The SCC acknowledged that the hitherto “decontextualized” and “generic approach” to the section 2(d) right in the *Charter* had had the “unfortunate effect” of “[overlooking] the importance of collective bargaining—both historically and currently.”<sup>50</sup> In short, *Health Services* revealed that the SCC no longer felt that its precedents concerning section 2(d) jurisprudence could withstand critical scrutiny owing to the conclusion in *Dunmore* that occasionally individual rights can only be protected by protecting the ability to engage in collective action. This is the case when the purpose for which the individual joins an organization is attaining a goal that can only be achieved in concert with others.

The limits in *Dunmore* are clearly relevant here, for although *Dunmore* explicitly rejected the notion that collective bargaining was to be offered any constitutional protection, it provided no good test, no *principled reasons*, for deciding which union activities deserve protection as corollary

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<sup>47</sup> *Ibid.*

<sup>48</sup> SBC 2002, c 2.

<sup>49</sup> *Health Services*, *supra* note 7 at para 11 [emphasis added].

<sup>50</sup> *Ibid* at para 30.

to the right to associate and which do not. It excluded collective bargaining *simpliciter*, and then went from there. In fact, the SCC in *Dunmore* was encouraged in this vein by the claims made by the appellants themselves. For instance, the appellants drew the SCC's attention to the many activities undertaken by unions *other* than collective bargaining.<sup>51</sup> These included "making collective representations to an employer, adopting a majority political platform, [and] federating with other unions."<sup>52</sup> The SCC thereby sought to inoculate its judgment from requiring collective bargaining because at least some other union activities could be protected. Specifically, the SCC was satisfied that by focusing on the *associational* nature of the right, it could distinguish between this and the activities *qua* activities that the association chose to undertake. The problem is that the SCC's own analysis in *Dunmore* supported the conclusion that the SCC could compel a positive legal framework to protect the right to associate only by relying upon a purposive understanding of the nature of the association itself. In other words, in *Dunmore*, the right to associate and the purposive function of the association were not seen as discrete factors.

If only certain union activities are to be protected as a corollary of the right to associate, it is impossible to discern which activities these should be without elucidating a principled distinction among activities. Writing for the majority in *Health Services*, Chief Justice McLachlin and Justice LeBel finally concluded that "[collective bargaining] emerges as the most significant collective activity through which freedom of association is expressed in the labour context," and therefore that section 2(d) must include "a procedural right to bargain collectively."<sup>53</sup>

### 1. The Right to a Meaningful Process

The SCC determined in *Health Services* that there existed a constitutional right to not just a process of collective bargaining, but to a *meaningful* collective bargaining process. At different times, the SCC said this was to include "meaningful discussion and consultation,"<sup>54</sup> which means that the parties must be "willing to *explain* and *exchange* their positions."<sup>55</sup> Also, the union must have the ability "to exert meaningful influence over working conditions,"<sup>56</sup> and the parties must "make a reasonable effort to

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<sup>51</sup> *Dunmore*, *supra* note 16 at para 12.

<sup>52</sup> *Ibid* at para 17.

<sup>53</sup> *Health Services*, *supra* note 7 at para 66.

<sup>54</sup> *Ibid* at para 92.

<sup>55</sup> *Ibid* at para 101 [emphasis added].

<sup>56</sup> *Ibid* at para 90.

arrive at an acceptable contract.”<sup>57</sup> Language emphasizing the *consultative* portion of the collective bargaining process is found throughout the judgment as determinative of what the SCC understood to constitute *meaningful*, rather than *pro forma*, collective bargaining. Wanting to ensure that this point was clear, Chief Justice McLachlin and Justice LeBel wrote: “We pause to reiterate briefly that the right to bargain collectively protects not just the act of making representations, but also the right of employees to have their views heard in the context of a meaningful process of consultation and discussion.”<sup>58</sup>

Importantly, the SCC qualified the right. The justices wrote that “[s]ection 2(d) does not guarantee the particular objectives sought through this associational activity.”<sup>59</sup> Moreover, the SCC stipulated that the right to a meaningful collective bargaining process was not the right to a particular statutory scheme of collective bargaining.<sup>60</sup> Finally, section 2(d) was not to protect all aspects of this associational activity; it was to protect only against substantial interference with meaningful collective bargaining.<sup>61</sup>

## II. *Ontario v. Fraser*

In *Fraser*, the SCC (Justice Abella dissenting)<sup>62</sup> overturned an OCA ruling that had deemed the *AEPA* unconstitutional because it lacked provisions for “(1) a statutory duty to bargain in good faith; (2) statutory recognition of the principles of exclusivity and majoritarianism; and (3) a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements.”<sup>63</sup> In defending its position, the SCC offered two main considerations. First, the SCC maintained that it was a “meaningful process”<sup>64</sup> of collective bar-

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<sup>57</sup> *Ibid* at para 101.

<sup>58</sup> *Ibid* at para 114.

<sup>59</sup> *Ibid* at para 89.

<sup>60</sup> See *ibid* at para 19.

<sup>61</sup> See *ibid*.

<sup>62</sup> Three justices chose to provide reasons concurring in the result. Justices Rothstein and Charron did not accept that section 2(d) included a right to bargain collectively and found no constitutional issue with the *AEPA* for that reason. Justice Deschamps, however, noted that although collective bargaining is not protected by section 2(d), *some* collective activity is protected by the *Charter*. She also suggested that section 15 might provide a more fruitful avenue for redress of the kind of “economic inequality” (*ibid* at para 319) that is germane here.

<sup>63</sup> *Fraser v Ontario (AG)*, 2008 ONCA 760 at para 80, 92 OR (3d) 481 [*Fraser (Ont CA)*].

<sup>64</sup> *Fraser*, *supra* note 1 at para 42.

gaining that was to have constitutional protection, thereby reiterating the qualifier it espoused in *Health Services* that no *particular* bargaining regime was to be given constitutional protection. The SCC then determined that the three requirements the OCA had held to be lacking from the *AEPA* amounted to the imposition of the Wagner model of collective bargaining and therefore amounted to a *particular* statutory regime of bargaining. Second, the SCC reiterated its expectation that legislatures are to comply with the *Charter* and that all legislation must be reviewed in this light. The SCC held that “[s]ince *Health Services*, it has been clear that this requires employers to consider employee representations in good faith. Any ambiguity in the *AEPA* should be resolved accordingly.”<sup>65</sup>

### A. Analysis

#### 1. The Wagner Model of Collective Bargaining

My first difficulty is with the SCC’s characterization of the Wagner model of collective bargaining. The SCC claimed that the OCA misunderstood *Health Services* to have constitutionalized “a full-blown Wagner system of collective bargaining”<sup>66</sup> and that this holding was in error since *Health Services* specifically rejected the idea that a particular statutory regime could be protected. I reject the SCC’s characterization of the Wagner model as a statutory labour relations regime, and argue that it is better thought of as a *paradigm* of labour relations within which many different statutory requirements might fit. The point here is that the Wagner *model* might refer to *any* statutory regime of collective bargaining that includes some provisions for substantiating the principles that were elucidated in the last paragraph of the preamble of the 1935 *Wagner Act* from which it gets its name.<sup>67</sup> This is certainly how the OCA understood the issue, for it suspended its judgment for twelve months in order “to permit the government time to determine the method of statutorily pro-

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<sup>65</sup> *Ibid* at para 104.

<sup>66</sup> *Ibid* at para 44.

<sup>67</sup> *National Labor Relations Act*, c 372, § 1, 49 Stat 449 at 449-50 (1935) (codified as amended at 29 USC § 151-169 (2006)) [*Wagner Act*]:

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

protecting the rights of agricultural workers to engage in meaningful collective bargaining.”<sup>68</sup>

The *Wagner Act* elaborates specific processes and timelines with regard to virtually every aspect of the bargaining process: what constitutes an unfair labour practice;<sup>69</sup> what constitutes legal and illegal picketing;<sup>70</sup> exact timelines for serving notice to bargain<sup>71</sup> and filing for mediation;<sup>72</sup> notifications of intent to strike;<sup>73</sup> procedures for election of union representatives;<sup>74</sup> the make-up and mandate of the *National Labour Relations Board*;<sup>75</sup> how to deal with essential services;<sup>76</sup> and suspension of the Act during emergencies,<sup>77</sup> among many, many more. In this way, the *Wagner Act* is a *specific* regulatory regime, specifying regulatory processes for virtually every aspect of union-employer relations, including all those associated with collective bargaining.

The *Wagner model*, by contrast, is not such a regime. Within statutory regimes that follow the model are found *varied* requirements. Such variations can include, among other things, the process by which a union notifies the employer of its intention to bargain; how a union comes to be recognized as the bargaining agent (such as through card check, as was the case in Ontario prior to the 1995 election of the Conservative government, or through secret ballot as is now the case<sup>78</sup>); and what happens with regard to impasses at bargaining. For instance, is there to be a mandatory conciliation before either party can enter into a legal strike or lockout position? If so, what conditions and requirements are to moderate the conciliation process? Alternately, is strike/lockout to be jettisoned in favour of mandatory arbitration, as is now the case with those service workers deemed essential? What will be the process for determining who is an es-

<sup>68</sup> *Fraser (Ont CA)*, *supra* note 62 at para 139.

<sup>69</sup> See *Wagner Act*, *supra* note 67, § 8. For current version, see 29 USC § 158(a)(1)-(5) (2006).

<sup>70</sup> *Wagner Act*, *supra* note 67, § 8. For current version, see 29 USC § 158(b)(7)(A)-(C) (2006).

<sup>71</sup> *Wagner Act*, *supra* note 67, § 8. For current version, see 29 USC § 158(7)(d)(1) (2006).

<sup>72</sup> *Wagner Act*, *supra* note 67, § 8. For current version, see 29 USC § 158(7)(d)(3) (2006).

<sup>73</sup> *Wagner Act*, *supra* note 67, § 8. For current version, see 29 USC § 158(7)(g) (2006).

<sup>74</sup> *Wagner Act*, *supra* note 67, § 9. For current version, see 29 USC § 159 (2006).

<sup>75</sup> *Wagner Act*, *supra* note 67, §§ 10, 11. For current version, see 29 USC §§ 160, 161 (2006).

<sup>76</sup> For current version, see 29 USC § 173.

<sup>77</sup> See *ibid.*, § 176.

<sup>78</sup> The exception to this is the construction industry, which retains card check certification.

sential worker and who is not?<sup>79</sup> Will this option include anti-scab legislation as presently exists in British Columbia, Quebec, and under the *Canada Labour Code*, but not, for instance, in Ontario? Shall the employer be enabled to bypass the union and offer an agreement directly to the membership, as is now (but was not always) the case in Ontario? If so, how many times? (For instance, in Ontario this may happen only once.)

In this way, the Wagner *model* does not amount to a particular regime of collective bargaining, but rather to some set of provisions deemed necessary to make collective bargaining meaningful. While those provisions may be more or less robust, what is unequivocal is that some positive legislative provisions are necessary in order to claim that a positive right exists. In its judgment, the OCA did no more than claim that these nominal provisions included *some* statutory requirement that the employer bargain in good faith, *some* means to determine how the bargaining agent shall be recognized, and *some* means of determining impasses and disputes. The criteria for the means established need be no wider than is necessary to render them capable of achieving that to which the workers have a right: a meaningful process of consultation and negotiation.

But my point is not to substitute my judgment for that of the SCC's by establishing what is necessary to make the right in question meaningful. Rather, my point is to establish the ways in which the instant case departs from the recent jurisprudence that has led to it. With that in mind, I note that even if we were to agree with the SCC's position that the basic requirements mandated by the OCA amounted to a particular statutory regime, this would not have been adequate for the SCC to overturn the OCA's finding. Rather, the SCC could have elucidated a lesser standard, and still have upheld the OCA's conclusion that the *AEPA* was unconstitutional, even if it offered dissenting reasons for doing so. The SCC, therefore, had to determine that the statutory provisions already extant in the *AEPA* were adequate to provide a meaningful collective bargaining process, based upon its elucidation in *Health Services* of what that meant. This, it tried—unsuccessfully—to do.

The plain language of the *AEPA* requires nothing more from employers than a guarantee—qualified at that—of listening to employee repre-

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<sup>79</sup> For instance, under the *Public Service Essential Services Act*, SS 2008, c P-42.2, the Saskatchewan government gave itself the power to unilaterally determine what was and was not an essential service. (This was despite provisions contained within the collective agreement of the Saskatchewan Government and General Employees' Union, outlining a process through which the parties, jointly, are to arrive at an essential services designation.) By contrast, Ontario's *Crown Employees Collective Bargaining Act, 1993* requires that the employer and the union that represents workers who are covered by the act jointly negotiate an essential services agreement (SO 1993, c 38).

sentations and acknowledging that those submitted in writing have been read.<sup>80</sup> Given that *Health Services* rejected as inadequate the “mere right to make representations,”<sup>81</sup> on what logic might the SCC have been relying to determine that the *AEPA* met the bar of what constitutes a meaningful bargaining process? Predominantly, the SCC relied upon the implied requirement to bargain in good faith, which it read in to the *AEPA*’s requirement that employers listen and read employee representations. The SCC concluded that these provisions of the *AEPA* neither included by word nor expressly ruled out the requirement to bargain in good faith. The SCC concluded that, by implication, “they include such a requirement.”<sup>82</sup> Anything short of comprehending and considering is a mere “*pro forma*.”<sup>83</sup> This brings us to the first discrepancy between the standard in *Health Services* and the one elucidated in *Fraser*: the use of a weaker standard to constitute good faith in the latter than in the former.

## 2. The Two Senses of Good Faith

Michael Bendel writes:

The obligation of an employer to enter into negotiations upon request with a view to arriving at a collective agreement is the most important consequence to flow from the certification of a trade union as bargaining agent by a labour relations board. In legislation, the employer’s obligation to negotiate finds expression as the duty to bargain in good faith, a duty which, with some variations, is a feature of almost every piece of labour relations legislation in North America.<sup>84</sup>

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<sup>80</sup> See *AEPA*, *supra* note 2, ss 5(6), (7). The obligation of employers to give employees’ associations a reasonable opportunity to make representations is qualified in the *AEPA* by the following considerations: “The timing of the representations relative to planting and harvesting times,” “the timing of the representations relative to concerns that may arise in running an agricultural operation, including, but not limited to, weather, animal health and safety and plant health,” and the “[f]requency and repetitiveness of the representations” (*ibid*, s 5(3)). The representation process itself, then, is subject to constraints that offer wide interpretive leeway as to when and how frequently presentations may be made, as well as to what constitutes repetitiveness. Moreover, these considerations suggest an expectation that the process is subordinate to employers’ non-labour business concerns. For all intents and purposes, these parameters are to be interpreted by the employer, with the presumption that an unsatisfactory interpretation could be challenged before the tribunal—with no guarantee, of course, as to the outcome.

<sup>81</sup> *Health Services*, *supra* note 7 at para 114.

<sup>82</sup> *Fraser*, *supra* note 1 at para 101.

<sup>83</sup> *Ibid* at para 103.

<sup>84</sup> Michael Bendel, “A Rational Process of Persuasion: Good Faith Bargaining in Ontario” (1980) 30:1 UTLJ 1 at 1.



When we say that one has acted in good faith in everyday parlance, it generally means that one has acted honestly and on the information that one had available to them at the time, from a sincere motive to act without malice or with any attempt to mislead or defraud others. In this sense—the common sense interpretation of the term—good faith refers to the principle itself: the expectation that one has acted in accordance with a sincere motivation about which one is forthcoming. This is the first sense of good faith. There is no test to determine whether or not someone has acted in good faith. It would be difficult to imagine how one might administer such a test outside of statutory duties, and statutory duties are not the stuff of our everyday personal interactions. When a friend or loved one says that when they did something they were acting in good faith, we simply trust that to be the case. In this sense, the common sense understanding evinces a weak standard.

Within the labour relations context, by contrast, the requirement to act in good faith generally refers to something other than the principle as elucidated above. The term “good faith” in the labour relations context refers to a series of statutory duties that give expression to the principle—that give, in Bendel’s words, “substance” to the underlying “requirement”.<sup>85</sup> This is the second sense of good faith. Since the employment relationship is not analogous to that between friends and loved ones, it is understandably the case that statutory duties must attach to what it is we determine others are legally required to do. Importantly, these statutory requirements may vary, and in this sense it can be said that more than a single statutory scheme for collective bargaining is possible, as was elucidated above. Section 50 of the *Canada Labour Code*, for instance, requires that employers and employee associations bargain “in good faith” and that they make “every reasonable effort to enter into a collective agreement.”<sup>86</sup> More to the point, it allows for either party to “bring a complaint to the *Canada Industrial Relations Board* on the basis that the other party has failed in either or both of those duties.”<sup>87</sup> While reiterating that the duty

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<sup>85</sup> *Ibid* at 31.

<sup>86</sup> *Canada Labour Code*, RSC 1985, c L-2, ss 50(a)(i), (ii).

<sup>87</sup> Legal and Legislative Affairs Division, Parliament of Canada, *Collective Bargaining under the Canada Labour Code—Remedies when Parties Fail to Resolve Labour Disputes* by Sebastian Spano (Ottawa: Library of Parliament, 2009). In the United States, the *National Labor Relations Act* requires good faith in bargaining between employers and unions (*supra* note 67, § 8(a)(5)). So, too, do most provincial labour codes in Canada, as well as those of other commonwealth countries. In Australia, the recently enacted *Fair Work Act 2009* (Cth), s 228(1), sets out the following duties that give expression to the implied requirement to bargain in good faith:

(a) attending, and participating in, meetings at reasonable times;

does not extend to the content or outcome of any agreement arrived at through that process, Justice Bastarache noted that the duty to bargain in good faith includes the principles elucidated in the *Canada Labour Code* and within most of the provincial labour codes of Canada.<sup>88</sup> What is important about the existence of statutory duties to bargain in good faith is that they render substantive and meaningful the implied requirement. In the labour relations context this means that (a) it is possible to demonstrate one party's failure to act in good faith; and that (b) the statutory duties actually act to ensure that to which one has a right. A good faith requirement without attached statutory duties is meaningless, for then there is no way to determine whether or not the requirement has been met.

In *Health Services*, the justices determined that, at minimum, meaningful collective bargaining means that “[t]he parties have a duty to engage in meaningful dialogue and they must be willing to exchange and explain their positions.”<sup>89</sup> They concluded that employees had a right to “engage in discussions” with their employers.<sup>90</sup> They further elucidated that the *Charter* imposes “corresponding duties” on government employers to “agree to meet and discuss” demands with union representatives.<sup>91</sup> Furthermore, the SCC determined that a stance of hostility toward the bargaining process itself, or an “inflexible and intransigent” bargaining position, may be evidence of what is known as “surface bargaining”, as opposed to “hard bargaining”.<sup>92</sup> The SCC, appropriately, acknowledged a distinction between the two. The latter is the adoption of a tough stance,

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(b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;

(c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;

(d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;

e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;

(f) recognising and bargaining with the other bargaining representatives for the agreement.

<sup>88</sup> See *Health Services*, *supra* note 7 at para 99.

<sup>89</sup> *Ibid* at para 101.

<sup>90</sup> *Ibid* at para 89.

<sup>91</sup> *Ibid*. While the SCC specified that the *Charter* imposed “corresponding duties” to “meet and discuss” on government employers specifically, this quotation further suggests that meaningful bargaining of any stripe requires, at the very least, dialogue between two parties.

<sup>92</sup> *Ibid* at para 104.

aimed at bending the will of the other party to your way of thinking, but does not constitute a violation of the duty to bargain in good faith. The former, by contrast, is the apparent but false desire to actually arrive at a collective agreement and constitutes a “breach of the duty to bargain in good faith.”<sup>93</sup> While it is often difficult to determine in practice which of the two might be in play in any given instance, for present purposes it suffices to note that surface bargaining constitutes a violation of the duty to bargain in good faith.

Let us now apply this standard to the putative requirements of the *AEPA*. Imagine the following scenario: The union spends months talking to workers, and over several meetings it puts together a series of proposals that have been democratically decided upon. The union captures these proposals in a comprehensive and well-articulated twenty-page document detailing the purpose of the proposals, the consequences to workers if the proposals are not adopted, and the impact of their adoption on the employer. After several months of meticulous research and work, it presents these to the employer. The employer responds one week later with the following: “I have read your submission.” It is unclear how, under the plain language of the *AEPA*, this would not be considered satisfactory. After all, the *AEPA* includes no language requiring consultations of any kind, much less any requirement that the employer respond to the employees’ bargaining proposals. The problem, then, with the SCC’s particular understanding of good faith in the instant case is that it has been read to mean little more than comprehension and consideration, and there is no way to determine whether this has, in fact, been accomplished. The SCC has simultaneously asserted an affirmative constitutional right to a meaningful collective bargaining process that does not impose any corresponding duties to require that an actual discussion ever take place. It might be possible to determine that the employer had not properly comprehended or considered a submission if, for instance, the employer were to reply to a twenty-page document with the acknowledgement that it had been read, a mere five minutes after receiving it. Under other circumstances, however, how is one to guarantee that the employer has not simply allowed a submission to sit on a desk for a week before finally sending off the requisite acknowledgement that it had been duly “read”? More substantially, in what way does the employer’s comprehension and consideration, even if undertaken in good faith, amount to a *negotiation* between parties of relatively equal bargaining power, or provide the union with the “means of exerting meaningful influence over the outcome of the

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<sup>93</sup> *Ibid.*

process,”<sup>94</sup> the absence of which provided the SCC with its rationale for overturning certain sections of Bill 29?<sup>95</sup>

The SCC’s reliance on the minister of agriculture’s 2002 comments clarifying how the *AEPA* ought to be interpreted has only added to the vagaries surrounding what exactly good faith bargaining requires in the case of agricultural workers. In 2002, the minister of agriculture indicated that the government took its responsibility with regard to agricultural workers seriously, and in light of the *Dunmore* decision, would act to ensure that the right to associate was meaningful. Of course, the minister was referring to the right to associate and not the right to bargain collectively. In fact, the minister expressly stated that the *AEPA* “does not extend collective bargaining to agricultural workers.”<sup>96</sup> In Justice Rothstein’s dissenting reasons in *Fraser*, he writes: “As with the words of the *AEPA*, I read the words of the Minister plainly as presented. The comments ... indicate that the *AEPA* was intended to meet the obligations in *Dunmore*, which did *not* include an obligation on employers to engage in collective bargaining.”<sup>97</sup> By contrast, the majority chose to interpret the minister’s statements to mean that the *AEPA* would not extend a *particular* model of collective bargaining, but did not see in the minister’s comments a refusal to extend collective bargaining per se. The SCC updated the minister’s comment to indicate the government’s intention to now meet the requirement set out in *Health Services*.<sup>98</sup> One explanation for the SCC’s arguably generous interpretation of the minister’s comment is its own directive that all legislation must be read to include SCC rulings, even when legislation predates such rulings. The SCC concluded that the tribunal remedy contained within the *AEPA* had not yet been tested and that it was too early to dismiss it as a possible means of dealing with complaints regarding an employer’s refusal to negotiate in good faith with agricultural workers.<sup>99</sup>

### 3. The Tribunal

Even if one were to argue that the existence of the tribunal as a kind of mediator effectively establishes that the *AEPA* meets constitutional muster because it has established a bi-partite panel “for the resolution of

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<sup>94</sup> *Health Services*, *supra* note 7 at para 159.

<sup>95</sup> See *ibid.*

<sup>96</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 37th Parl, 3d Sess, No 46B (22 October 2002) at 2339 (Helen Johns).

<sup>97</sup> *Fraser*, *supra* note 1 at para 289 [emphasis added].

<sup>98</sup> See *ibid* at para 106.

<sup>99</sup> See *ibid* at paras 111-12.

disputes,”<sup>100</sup> the tribunal cannot enlarge its own mandate and cannot, therefore, effect the requirement to meet the statutory duties necessary to render bargaining meaningful. Justice Abella noted in her dissent:

Section 11 of the *AEPA* gives the Tribunal authority to grant a remedy for a contravention of the *AEPA*. But it is not a contravention of the *AEPA* to refuse to engage in a good faith process to make reasonable efforts to arrive at a collective agreement. It is therefore not part of the Tribunal’s mandate.<sup>101</sup>

As such, no remedy is available in this instance.

Is Justice Abella’s dissent prescient? After all, as mentioned, the SCC took pains to explicate that it *is* part of the *AEPA*’s requirement to bargain in good faith. Additionally, at least one observer predicts that the SCC’s prescription that the tribunal should be expected to read its mandate in the event of any complaint in a purposive and meaningful way “likely extends to having ‘discussions’ with the representatives of the employees.”<sup>102</sup> Aside from the questionable effectiveness of such “discussions,” there is no certainty of even this much. In the first place, let us imagine that the tribunal were utilized and, as Justice Abella maintains, that it did *not* view its mandate as requiring discussions, but took the *AEPA* at face value and required no more than that employee submissions be listened to, read, and acknowledged as having been so. What then? The constitutional remedy has already been exhausted with the finding that the tribunal has the responsibility to deal with the application of the *AEPA*, albeit in a purposive and meaningful way. After all, if the SCC believed that a purposive and meaningful interpretation of good faith required statutory provisions that prescribe collective bargaining beyond the mere right to make representations, then here was its opportunity to elaborate on what these were. It could have made these clear (or clearer) and upheld the OCA’s finding, even if it offered dissenting reasons for doing so. By putting the focus back on the tribunal, the SCC has retreated from its stance in *Health Services* and determined that a collective bargaining process need not require that any discussion ever take place for it to pass constitutional muster.

The only possible alternative is to treat the tribunal like a teenager one has entrusted with the car in order to see if he or she will use that privilege responsibly, and to take appropriate action if he or she does not.

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<sup>100</sup> *Ibid* at para 109.

<sup>101</sup> *Ibid* at para 341.

<sup>102</sup> Paul E Broad, “The *Fraser* Decision: The Supreme Court of Canada Revisits Scope of Charter-Protected Collective Bargaining Rights” (3 May 2011), online: Hicks Morley <<http://www.hicksmorley.com>>.

The problem here is that if the tribunal does not interpret the *AEPA* to include the requirement to “discuss” and “exchange” positions and reasons as Justice Abella opines,<sup>103</sup> the SCC’s only alternatives are either to let it be, thus retreating from its standard in *Health Services* and ultimately rendering the tribunal meaningless to effect any right to collectively bargain; or to override it, rendering it largely superfluous. At issue is the role the judiciary ought to play in the review of administrative action, a role that is already contentious and ambiguous. It is not clear that a tribunal decision upholding the plain language of the *AEPA* would meet the standard of “correctness and reasonableness” that the SCC has most recently espoused as necessary to undertake judicial review of administrative action.<sup>104</sup> In other words, it is unclear that taking the *AEPA* at face value, and thereby failing to incorporate any requirement to negotiate, could result in administrative review even if the result was a failure to provide a means of meaningful negotiation between agricultural employers and the unions that represent their employees.

#### 4. Substantial Interference

The second inconsistent application of the rationale in *Health Services* to the facts of the case in *Fraser* is the standard that the SCC had set to determine substantial interference. Any positive legislative framework is guaranteed only once its absence has been ascertained to have substantially interfered with the exercise of the right. In *Health Services*, the SCC claimed that by contravening certain significant provisions of existing collective agreements and nullifying any future requirement to negotiate specific terms on certain significant issues, the legislature had evinced—by deed if not by intention—a substantial interference in the right to collectively bargain.<sup>105</sup> What is most interesting is what the SCC determined constitutes substantial interference. The SCC held that a particular section of the Government of British Columbia’s Bill 29 was unconstitutional even though it did not “strictly speaking, prohibit consultations”<sup>106</sup> on the matters at hand. In that instance, the SCC held that “declaring that any clause in a collective agreement providing for consultation is void is an invitation to employers not to consult”<sup>107</sup> and that “taking consultation, which is an important component of the collective bargaining process, off

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<sup>103</sup> *Fraser*, *supra* note 1 at para 330.

<sup>104</sup> *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 34, [2008] 1 SCR 190.

<sup>105</sup> See *Health Services*, *supra* note 7 at para 11.

<sup>106</sup> *Ibid* at para 242.

<sup>107</sup> *Ibid*.

the table is also a disproportionate measure.”<sup>108</sup> Remember that, here, consultation is being taken off the table only in the sense that Bill 29 voided the *requirement* to consult. In response to the respondents’ arguments that Bill 29 did not render consultation strictly prohibited, and consequently that the impugned portions of Bill 29 did *not* substantially interfere with the right to collectively bargain, the SCC stated that “the right to collective bargaining cannot be reduced to a mere right to make representations.”<sup>109</sup>

Notably, the question of what constitutes substantial interference is not removed from the relative capacities of different groups to effectively engage their employers in a scheme of negotiation. This principle was elucidated in *Delisle* where RCMP officers excluded from the *Public Service Staff Relations Act (PSSRA)* were not considered to have had their *Charter* right to associate violated because they had strength enough to form associations despite their exclusion from the *PSSRA*.<sup>110</sup> By comparison, the SCC in *Dunmore* recognized that agricultural workers were marginalized owing to their poor education, low status, lack of employment mobility, and political impotence, and as such their exclusion from a positive legislative scheme was an instance of substantial interference with the right to associate.<sup>111</sup> The SCC accepted as evidence of the agricultural workers’ weakness relative to that of the RCMP members the fact that an agricultural workers’ union in Ontario had never existed apart from one created during the short time in the early 1990s when agricultural workers were brought under the aegis of the *LRA*, and which was subsequently extinguished.<sup>112</sup>

By the same logic, it would seem reasonable for the SCC to have held that the *AEPA*’s lack of positive protection for anything beyond the making of representations was, likewise, tantamount to an invitation not to consult, thus reducing the right to collectively bargain to little more than the right to make representations. Moreover, it would seem integral that the SCC take more seriously what Justice Abella noted in her dissent, which is that there was hitherto no evidence that a collective agreement had ever been negotiated between an agricultural employer and an agricultural workers’ union in Ontario, or that a single negotiation had ever

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<sup>108</sup> *Ibid* at para 249.

<sup>109</sup> *Ibid* at para 114.

<sup>110</sup> See *Delisle*, *supra* note 22 at paras 31-33.

<sup>111</sup> See *Dunmore*, *supra* note 16 at para 41.

<sup>112</sup> See *ibid* at para 42.

taken place under the auspices of the *AEPA* since it came into effect in 2003.<sup>113</sup>

The substantial interference test in *Health Services* resulted in the majority of the SCC deeming unconstitutional those portions of Bill 29 that did not positively affirm a right to consult and negotiate, whereas in *Fraser*, the SCC held that no such positive legislation was required. The relative strength of the British Columbia health workers vis-à-vis that of Ontario's agricultural workers would seem to prescribe at least an equal—if not lesser—standard to determine substantial interference in the instant case. However, the SCC in *Fraser* was satisfied in requiring a stronger standard, effectively making it even more difficult for agricultural workers in Ontario to negotiate significant terms of their employment than is the case for British Columbia's health care workers.

## Conclusion

*Fraser* undoubtedly provides a setback for workers' collective bargaining rights in Canada. More to the point, however, is that the majority's rationale in *Fraser* is inconsistent with the characterization of meaningful collective bargaining that the SCC elucidated in *Health Services*. Specifically, the lack of statutory duties to bargain in good faith provides little more than an opportunity for the employer to exercise exclusive jurisdiction over this "collective" process, since the term has been interpreted to mean little more than the duty to "consider" and "comprehend", neither of which can be guaranteed to have taken place. Moreover, even assuming that employers engage in good faith bargaining on the measure of what *Fraser* has taken that to mean, nothing in this provides for the robust consultation and negotiation to which the SCC maintains workers have a right.

Furthermore, *Fraser* is inconsistent with the rationale developed in *Dunmore* and elaborated in *Health Services* with regard to "substantial interference", which in the former case provided a degree of protection based upon the relative power of the groups in question. In *Fraser*, the SCC has applied a lesser level of protection to a group that it had already ascertained in *Dunmore* to require a greater-than-average level of legislative protection. The SCC has recognized, but set aside, evidence of the relative powerlessness of agricultural workers to achieve the collective ends to which the SCC maintains they have a right, even though it readily adopted almost identical evidence in *Dunmore*.

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<sup>113</sup> See *Fraser*, *supra* note 1 at para 334.



Finally, the putative requirement that employers negotiate in good faith without any attendant statutory duties has rendered the right to collectively bargain not only less robust than might have been expected, but also less clear. If workers have a constitutional right to a meaningful process of collective bargaining, but this right does not correspond with any duty on employers beyond what amounts to little more than surface bargaining, it is impossible to ascertain what, exactly, workers have a positive right to, other than the right to make representations (which the SCC has claimed is inadequate). The SCC's retreat from its decision in *Health Services* has amounted to the SCC coming right back to the point from which it had claimed to be departing in *Dunmore*: formalizing principles that are undergirded by little meaning or substance.

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