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The State Giveth and Taketh Away: Public Sector Labour Law, the Legitimacy of the Legislative Override Power and Constitutional Freedom of Association in Canada

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This article investigates the role of courts and legislatures in the design and enforcement of labour laws in the context of public sector employment. It does so by focusing on government employers' legislative ability to temporarily override public sector labour rights, or to displace outcomes achieved under their processes. This issue is analysed through a case study of Canada, a country which offers constitutional protections for freedom of association, but which is also constructing a highly deferential approach to the constitutional review of override statutes. As a result of this deference, governments have been afforded significant leeway in the use and design of override legislation, which serves to undermine the legitimacy of the underlying public sector labour law regime. The result is to shake the confidence of public sector employees in the promise of workplace power redistribution and workplace voice and to undermine the legitimacy of public sector labour law. Because override legislation can so fundamentally undermine public sector labour rights, the courts should avoid excessive deference and instead undertake an active constitutional review of their use, where constitutional protections are available.

Keywords: Judicial Deference; Public Sector Labour Law; Legislative Override; Freedom of Association; section 2(D); The Canadian Charter of Rights and Freedoms; The Expenditure Restraint Act, Pre-Legislative Consultation; Legitimacy; Special Interests

1 INTRODUCTION

There is a structural legitimacy problem at the core of public sector labour law.[1] The problem is not, as some American pundits would have it, that public sector unions defend special interests that use bargaining to forward their agenda and

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[1] For the purposes of this article 'labour law' refers specifically to the rights of unionized workers. In Canada this is distinguished from 'employment law', which regulates the work of non-unionized employees. This article considers the collective bargaining rights of unionized public sector workers. The article also uses the concept of legitimacy and does so in three ways. The first addresses the trust that workers have in the impartiality and enforceability of the legal regime in question. The second refers to the debate about who holds the moral authority to speak in the public interest. The third refers to the legitimating function of the law.

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displace other social interests.[2] No. The real legitimacy problem arises because the state plays a dual role in public sector employment: it is both employer and legislator. This dual role shapes the inequality of bargaining power between the parties in public sector employment, because not only does the government employer hold greater economic power than its employees, it holds all the weight of state power, including the legislative capacity to temporarily change the rules governing labour-management relations as it deems necessary. The state's legislative power allows it to disregard the statutory limits it has placed on its own managerial authority, thereby undermining the employees' confidence in the promise of voice that public sector labour law provides.[3] Of course, in some jurisdictions, public sector employees do not have the right to unionize or have limited rights to act in concert. Any legitimacy issues that arise in that context do not do so from a false promise, because there is no legal regime offering any rights at all. Conversely, in many jurisdictions freedom of association is a value that is deeply embedded in law and political culture, which is not so easily displaced. But in some jurisdictions, labour rights, and in particular those relating to *public sector* labour law, are viewed as economic rights that can be appropriately overridden by other state priorities. In those jurisdictions, public sector labour law sits on shaky structural foundations.

The legitimacy problem created by the state's two hats has become increasingly visible over the last decades, as governments implement austerity measures through alterations to public sector wages and working conditions, regardless of existing legal requirements.[4] In countries such as Canada, those alterations are typically achieved through unilaterally imposed legislation that temporarily overrides existing bargained terms or circumscribes the scope of bargaining, rather than secured through collective bargaining concessions. Canada also offers constitutional protections for freedom of association under section 2(d) of the Charter of Rights and Freedoms, opening an avenue for constitutional scrutiny of override legislation.[5] In such a system, the

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2 The legitimacy debate over public sector unionism in the United States examines whether unionization provides preferential access to legislative policy formation in a way that distorts the democratic process. As we will *see* the issue is present in Canada but manifests in more subtle ways. For the contours of the American debate, *see* Martin Malin, *Does Public Employee Collective Bargaining Distort Democracy? A perspective from the United States*, 34(2) Comp. Lab. L. & Pol'y J. 277 (2013).

3 A similar situation exists in the electoral context, where the state has the capacity to redraw electoral boundaries to increase its chances of electoral success. For a discussion of the law and consequences of self-serving electoral legislative action, *see* Michael Pal, *Breakdowns in the Democratic Process and the Law of Canadian Democracy*, 57(2) McGill L. J. 299 (2011).

4 Isabel Ortiz & Matthew Cummins, *Austerity Measures in Developing Countries: Public Expenditure Trends and the Risks to Children and Women*, 19(4) Feminist Econ. 55 (2013); Vera Glassner & Andrew Watt, *Cutting Wages and Employment in the Public Sector: Smarter Fiscal Consolidation Strategies*, 45(4) Intereconomics 2012 (2010). *See* Table 1 for a list of public sector wage freezes in Europe enacted through unilateral governmental measures in response to the 2008 recession.

5 *Canadian Charter of Rights and Freedoms*, s. 33, Part I of the *Constitution Act, 1982* being Sch. B to the *Canada Act 1982* (UK) (1982), c 11.

judiciary can play an important role in addressing the public sector labour law legitimacy gap by undertaking an active constitutional review of government measures that temporarily override labour law processes.

The project of this Special Issue is to reflect on the respective roles of constitutional and statutory instruments, of legislatures and courts, in the design and enforcement of labour rights. This article contributes to that debate by addressing the question of role allocation in the context of public sector employment. More specifically, the article investigates how the legitimacy issue should shape the allocation of responsibility for public sector labour law as between legislatures, constitutions and courts. It does so through a case study of Canada, where the courts are in the process of building a deferential approach to assessing the constitutionality of override legislation, thereby leaving the legitimacy problem unaddressed. Drawing from the Canadian story, the article then offers some thoughts for other jurisdictions suffering from similar legitimacy problems about the role of the courts and the state in developing public sector labour law.

The article proceeds in the following manner: Part II explores the state's dual role in public sector employment and its consequences for the legitimacy of public sector labour law. Part III provides a brief overview of the current status of Canadian constitutional freedom of association principles and the role of deference in their enforcement. Part IV offers an analysis of constitutional case law assessing override legislation, focusing on challenges to the 2009 *Expenditure Restraint Act*.[6] With this analysis before us, Part V explores the significance of override case law on the perceived legitimacy of public sector labour, in Canada and elsewhere.

2 THE STATE'S TWO HATS IN CANADIAN PUBLIC SECTOR LABOUR LAW

2.1 Austerity governance and public sector employment

'How about some public-sector sacrifice, too?', reads a recent newspaper headline about the economic impact of the Corona virus of 2019 (COVID 19) in Canada.[7] Austerity governance has been the order of the day in Canada for the last forty years, characterized by the dismantlement of welfare state programs, public service provisioning, the retrenchment of labour rights, and public sector wage restraint initiatives.[8] Controls

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6 *Expenditure Restraint Act*, SC 2009, c 2, s. 393 [*ERA*].

7 Jack Mintz, *How About Some Public-Sector Sacrifice, Too?*, The Financial Post (13 May 2020), https://business.financialpost.com/opinion/jack-m-mintz-how-about-some-public-sector-sacrifice-too?utm_term=Autofeed&utm_medium=Social&utm_source=Twitter#Echobox=1589366285 (accessed 18 Oct. 2020).

8 Leo Panitch & Donald Swartz, *The Assault on Trade Union Freedoms* (Garamond Press 1988); Gene Swimmer & Mark Thompson, *Collective Bargaining in the Public Sector: An Introduction*, in *Public Sector*

on public sector labour costs are often justified as ensuring that public sector employees 'share the pain' of economic recession and bear part of the burden of deficit reduction strategies.[9] As the previous headline suggests, this narrative has already resurfaced in discussions about post-pandemic deficit reduction strategies.

AThe most recent wave of austerity programming in Canada, as elsewhere, was prompted by the Great Recession of 2008 . Amongst other things, the federal government enacted legislation capping public servants' wages, and provincial governments undertook privatization and spending reduction programs.[10] The majority of public sector employees are unionized in Canada, but for the most part, these spending measures were not secured through collective bargaining with public sector unions. Rather, they were mostly implemented through unilaterally imposed legislation that overrode existing collective agreements and bargaining processes then underway. Canadian governments have long 'resorted to legislation that overrides existing agreements' with its own employees, rather than seeking concessions through the bargaining processes they themselves design.[11]

2.2 The state's two hats

Implementing public sector labour cost reductions is easy if public sector employees do not have the right to unionize. But in a country like Canada where 75% of public sector employees are unionized, how is it that the state can simply end-run

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Collective Bargaining in Canada: The Beginning of the End or the End of the Beginning? 14–18 (Swimmer & Thompson eds, Kingston: Queen's University IRC Press 1995). As Robert Knox notes, in both the United Kingdom and the United States neoliberal governance gained ascendance by defeating labour in two very significant strikes, the mine workers strike in the UK and the Professional Air Traffic Controllers Organization (PATCO) airline pilots strike in the US. Indeed, he argues, the attack on trade unionism was central to the neo-liberal agenda, because the collective subjectivity of postwar trade unionism, rooted in solidarity and redistribution, represented 'a kind of 'counter-rationality' to the efficient individualist paradigm that neoliberalism was to create. *See* Knox, *Law, Neoliberalism and the Constitution of Political Subjectivity: The Case of Organised Labour*, in *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* 1, 102 (Honor Brabazon ed., Routledge 2018).

9 Swimmer & Thompson, *supra* n. 8, at 14; Derek Decloet, *Public Sector Must Share the Pain of Deficit, The Globe and Mail* (23 Oct. 2009); Mintz, *supra* n. 7.

10 *See* Bryan Evans & Carlos Fanelli, *The Public Sector in an Age of Austerity: Perspectives from Canada's Provinces and Territories* (McGill-Queen's University Press 2018). Canada is a federal state and the regulation of employment is a matter of provincial jurisdiction. Each jurisdiction (the provinces, territories, and the federal government) have their own labour statutes that apply only within their boundaries. Federal labour law only applies to employees employed in the federal jurisdiction, which includes employees of employers who operate across the country, who engage in inter-provincial trade, and who are specifically so designated by the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, as implemented by the Canada Labour Code, Part I, Revised Statutes of Canada, c.L-1, at s. 2. Most provinces and territories have one general private sector labour relations statutes, and a number of separate public sector regimes.

11 Swimmer & Thompson, *supra* n. 9, at 1.

the outcome of legislative processes that the government itself designed for negotiating with its unionized employees?[12] How can it legislate the end of a strike that its employees have the legal right to undertake?

The current structure of Canadian labour law was put in place in the mid-twentieth century. It was to represent a grand bargain for labour, capital and society. The post-war compromise would statutorily endow trade unions with legal recognition, and would provide a mechanism 'to adjust, toward an increasing harmony, the interests of capital, labour and public in the production of goods and services' recognizing that 'the power of organized labour, the necessary co-partner of capital, must be available to redress the balance of what is called social justice'.[13] This system was to be supervised by the state, acting (in theory) as impartial umpire mediating between capital and labour. The post-war's grand bargain was crafted around *private sector* employment. Most public sector employees, other than municipal workers, gained the right to unionize and collectively bargain only as of the 1970s.[14] Rather than including them under the coverage of existing private sector statutes, public sector employees were mostly granted more limited rights (particularly in regards to the right to strike) under specific public sector regimes.[15] Despite the important differences between workplace dynamics in the public and private sectors, including the differences in gender representation between them, public sector labour law has been subsumed into the private sector narrative.[16] This pattern continues today: most Canadian jurisdictions hold one general private sector statute and several public sector regimes. The difference between the regimes does not stop at the right to strike, however. In particular, the structural inequality of bargaining

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[12] Statistics Canada, *Union Status by Industry*, Table 14–10-0132-01, https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1410013201 (accessed 18 Oct. 2020).

[13] Justice Ivan Rand, *Rand Formula*, 2150 Can. L. Reports 1251–1253 (1958), quoted in Panitch & Swartz, *supra* n. 8, at 18–19.

[14] In some cities municipal employees were able to gain bargaining rights in the 1940s and 50s. *See* S. Frankel & R Pratt, *Municipal Labour Relations in Canada*, The Canadian Federation of Mayors and Municipalities, and the Industrial Relations Centre 91 (McGill University 1954). Saskatchewan also included public sector employees under its initial labour relations statute in the 1940s.

[15] For details on the different statutory models of the public sector in Canada, *see* Bernard Adell, Allen Ponak & Michel Grant, *Strikes in Essential Services* (IRC Press, Industrial Relations Centre, Queen's University 2001). For a history of public sector unionism and labour law in Canada, *see* Harry Arthurs, *Collective Bargaining in the Public Service of Canada: Bold Experiment or Act of Folly?*, 67 Mich. L. Rev. 971 (1968–1969); Panitch & Swartz, *supra* n. 8; Joseph Rose, *Public Sector Bargaining: From Retrenchment to Consolidation*, 59(2) Indus. Rel./Relations industrielles 231 at 272–276 (2004); Bryan Evans, *When Your Boss Is the State*, in *Public Sector Unions in the Age of Austerity* (Stephanie Ross & Larry Savage eds, Halifax: Fernwood 2013).

[16] In 2019 72.6% of the public sector workforce was unionized, compared to 14.4% in the private sector. Statistics Canada. Table 14–10-0132-01 Union status by industry. In the federal public service, between 2015 and 2019 women accounted for 55.1% of the workforce, while men accounted for 44.8%. It is not clear whether people who do not place themselves in either category were accounted for.

power is shaped differently in the public and private sectors. In the public sector, the imbalance is shaped by the economic and institutional strength of the state, as well as its susceptibility to public opinion at the ballot box.[17] But, importantly, it is also shaped by the state's legislative power. In the private sector, the state's main role is as author of labour law legislation but not as a direct party to the relationship. By contrast, the state holds two functions in public sector employment: the state acts as employer in its executive capacity, and as sovereign legislator in its legislative role. Evans notes that just as the private sector employer, the state uses its managerial prerogative to control the costs of work and production. 'But unlike the capitalist owner, the state possesses the authority to write and enforce laws to suit its objectives'.[18] In the public sector, 'the state changes from informal umpire to a party of direct interest, with the ultimate power to modify the rules in the middle of the game'.[19] For this article, I will refer to the state's ability to rewrite the outcomes of labour relations processes as the 'labour law legislative override' power.[20] A permanent repeal of all or part of a labour statute would not fall under this category. Rather, override statutes are ones that leave a regime's general processes in place but change the outcomes achieved through them, that make certain rights temporarily unavailable, or that temporarily change the scope of a right. In Canada override legislation typically takes the form of ad hoc back-to-work legislation: statutes that change the terms of concluded collective agreements, and/or that impose parameters on the content of agreements while bargaining or arbitration is in course.

Labour law override statutes do not create a technical rule of law problem because the state has the legal authority to enact them. The issue is rather one of political legitimacy in the eyes of the rights holders, public sector employees, and of the role that law plays in legitimating state power. Temporarily overriding the terms of existing collective agreements, or bringing to an end a lawful strike, indicates to employees that

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17 Swimmer & Thompson, *supra* n. 11, at 1–2, identify several characteristics that set public sector employment apart from the private sector. The public ownership structure of the employer may create an employer interest in processes and outcomes other than profit maximization. The state often has a monopoly over the services it provides, such that a withdrawal of labour may have a more general rather than localized impact. Finally, electoral politics plays a central role in priority setting and relationship management. Public sector employers may be more motivated by re-election than longer-term goals. Public sector strikes typically save their employers money, because the state does not run its service for profits. For public sector unions, collective bargaining power derives less from imposing financial hardship on their employer than convincing the public of the rightness of their cause. And although governments are typically also concerned about financial efficiency, that concern is often targeted to ballot box results rather than long term financial viability.

18 Evans, *supra* n. 15, at 18.

19 Swimmer & Thompson, *supra* n. 11 at 1.

20 In Canada, the concept of a legislative override typically refers to section of 33 of the Charter, *supra* n. 5 which, when invoked, allows a government to enact a statute that otherwise violates the Constitution.

their labour rights are not truly enforceable – that their rights must give way to other political priorities of the state. For employees, the promise of labour law is that it provides them with a legal right to aggregate their bargaining power and participate in workplace decision-making on a more equal footing. Managerial discretion is replaced by bargained rules and processes. But the promise of this system becomes illusory if the state can statutorily unmake the results of bargaining when it wishes, or limits the exercise of statutory rights enjoyed by public sector employees. To be sure, in some countries, governments will exercise self-restraint in making use of their override power because labour rights are viewed as fundamental entitlements which cannot be displaced without political consequence. But in the absence of that self-restraint or political imperative, if the state gives public sector employees rights and then takes away the product of those rights, the rights have little meaning, and trust in the bargaining process fades away.

2.3 Who acts in the public interest?

There is a persistent view amongst some sections of the Canadian electorate that public sector labour law is just a method of claiming preferential access to public resources. Because governments are elected based on platforms that set out distributional priorities, and because they have the mandate and expertise, governments should be given wide latitude in setting labour law policy. From this perspective, it may be fair to provide public sector employees with some labour rights, but when the state finds itself in moments of crisis, or when other social groups have greater need for scarce resources, those rights should give way. In other words, from this point of view labour rights are not on the same level as other fundamental rights, like the right to free expression, or to vote, or to security of the person.

This approach constructs public sector trade unions as special interest groups. This framing originates in the design and subsequent interpretation of the Wagner model statutes enacted at the end of the Second World War. Although the labour statutes of the post-war era granted unions greater political legitimacy, they also circumscribed the scope of permissible union action. The statutes acted to suppress the broad political role of trade unions as social institutions, who could (and had) operated in the social, economic and political spheres to represent the interests of the working class.[21] Instead, the statutes' interpretation framed 'legitimate' trade union activity solely as the negotiation of direct terms and conditions of employment with a single employer. In this context, Evan argues, the state 'claims sole legitimacy to act in the interest of all citizens',

[21] Judy Fudge & Harry Glasbeek, *The Legacy of PC 1003*, 3 CLELJ 357 (1994–1995). The statutory system adopted in Canada at the tail end of the Second World War was modelled on the American Wagner Act model, with some notable differences.

and unions are 'rhetorically and ideologically defined as an economic special interest'.[22] This is particularly so for public sector employees, who are often depicted as unfairly insulated from the vagaries of the market. As we will see, this understanding of public sector unions and labour rights plays a large role in organizing the labour law override case law and is used to justify judicial deference to legislative labour law choices. The next sections examine how the contitutionally protected right to freedom of association in Canada has and could be used to limit the exercise of the state legislative override power.

3 CONSTITUTIONAL FREEDOM OF ASSOCIATION IN CANADA: A BRIEF OVERVIEW

Enacted in 1982, the Canadian Charter of Rights and Freedoms section 2(d) guarantees everyone the freedom to associate.[23] Canada already possessed a well-established statutory private sector labour law system when the Charter was enacted. The Charter applies to federal and provincial legislatures and governments – to the state's executive and legislative functions.[24] It does not apply to the judiciary or private parties. [25] The framework for Charter analysis begins by assessing whether a protected right or freedom has been infringed.[26] If a violation is found, section 1 of the Charter allows the government to justify its violation if it can show that the measure is a 'reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society'.[27]

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22 Evans, *supra* n. 15, at 29.

23 *Charter*, *supra* n. 5 at 2(d).

24 *Ibid*., at s. 32. Until the Charter was enacted in 1982, Canada was constituted as a federal system of Parliamentary sovereignty, 'alike in principle to the government of the United Kingdom'. The Charter's introduction now subjects legislative and executive action to constitutional scrutiny, although s. 33 of the Charter permits governments to enact violative legislation. In practice this override clause is rarely used. Like the United Kingdom, the executive and legislative branches are fused in Canada. The Executive designs legislative policy. The Legislative branch writes and enacts that policy into law, and the Executive branch then implements those laws into practice. Finally, the courts review the content and implementation of laws for Charter compliance.

25 *Dolphin Delivery Ltd v. RWDSU, Local 580,* [1986] 2 Supreme Court Report 573, 33 Dominion Law Report (4th) 174 [*Dolphin Delivery*]. It is for this reason that in the private sector s. 2(d) applies only to statutory labour law, while in the public sector it applies to the state as employer and the state as legislator. Note also that the Charter can indirectly apply to private parties insofar as Charter values are to be used in developing the principles of the common law.

26 Each of the rights and guarantees offered in s. 2 to 16 have their own infringement test, but the same s. 1 test is used to determine whether a legislative violation can be justified.

27 *R v. Oakes*, [1986] 1 SCR 103 [*Oakes*], at 73–74 sets out the s. 1 justification framework. To be a justified infringement government must show that (1) the measure is pressing and substantial; (2) there is proportionality between the objective and means because (1) there is a rational connection between the means and the objective, (2) the measure minimally impairs the right or freedom, (3) there is a proportionality between the effects of the measure and the law's objective. Note that because s. 1 of the Charter, the justification section, only covers 'measures prescribed by law', s. 1 does not apply to

In *Mounted Police Association of Ontario v. Canada* (MPAO) Justice McLachlin explains that section 2(d) jurisprudence falls into two broad eras.[28] In the first period of the 1980s and 1990s, the Court constructed a thin conception of 2(d) as protecting only an individual right to associate – to join a union in the labour context – but not the right to do *anything in association*, as a collective.[29] In the *Alberta Reference* Justice Le Dain held for the majority that, despite the constitutional entrenchment of freedom of association, labour rights were modern rights, not fundamental rights or freedoms. The design of labour law rights required policy choices about how to best balance legitimate competing interests 'in a field which has been recognized by the courts as requiring a specialized expertise'.[30] It was the Legislature that held this expertise, to which the courts should accordingly defer. Restraint was justified, in other words, because the courts understood labour law not as fundamental rights, but as political and policy-based choices best left to the democratically elected branches of the state.

Until the early 2000s, therefore, section 2(d) was effectively a judicial 'no-go zone'.[31] The second era was ushered in by *Dunmore v. Ontario (AG)* in 2001, where the majority of the Court shifted course and recognized for the first time that freedom of association must protect collective endeavours.[32] This suggestion was further developed in 2007 in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia* to recognize a constitutional right to collective

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Charter challenges to executive action. *See Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 2 SCR 1120, at 141.

28 *Mounted Police Assn of Ontario v. Canada (Attorney General)*, 2015 SCC 1 [*MPAO*] at 30.

29 The first Labour Trilogy included *Reference re Public Service Employee Relations Act (Alberta)*, 38 DLR (4th) 161 [*Alberta Reference]; PSAC v. Canada,* [1987] 1 SCR 424 [*Public Service Alliance]; RWDSU v. Saskatchewan*, [1987] 1 SCR 460 [*Sask Dairy Workers*]. Justice McIntyre explained that '[p]eople cannot, merely by coming together, create an entity that has greater constitutional rights and freedoms than they, as individuals, possess. Freedom of association cannot therefore vest independent rights in the group'. *See Alta Reference*, at 156.

30 *Alberta Reference*, *supra* n. 29 at 144, where Justice Le Dain noted that 'the rights for which constitutional protection is sought – the modern right to bargain collectively and to strike, involving correlative duties or obligations resting on an employer – are not fundamental rights or freedoms. They are the creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as requiring a specialized expertise. It is surprising that in an area in which this Court has affirmed a principle of judicial restraint in the review of administrative action we should be considering the substitution of our judgment for that of the Legislature by constitutionalizing in general and abstract terms rights which the Legislature has found it necessary to define and qualify in various ways according to the particular field of labour relations involved'.

31 *Health Services & Support-Facilities Subsector Bargaining Assn v. British Columbia*, 2007 SCC 27 [*Health Services*], at 26.

32 In *Dunmore v. Ontario*, 2001 SCC 94 the United Food and Commercial Workers (UFCW) challenged the exclusion of farm worker employees from coverage of the Ontario Labour Relations Act. In deciding that the exclusion violated s. 2(d), a majority of the Court, at 16–17, departed from the First Labour Trilogy's conception of constitutional freedom of association, and expanded the scope of 2(d) to include the protections of collective activities, because associations can be more than simply a composite of individuals.

bargaining.[33] Jurisprudence on the scope of 2(d) has taken several directions since then, but the most recent Supreme Court word on its content was issued in 2015, in what has become known as the New Labour Trilogy.[34]

In the New Labour Trilogy, the Court explained that the purpose of constitutional freedom of association is to protect the individual from 'state-enforced isolation in the pursuit of his or her ends'.[35] section 2(d) is designed to 'protect individuals against more powerful entities'; it helps empower 'vulnerable groups and helps them work to right imbalances in society'.[36] A purposive interpretation of 2(d) therefore requires protecting the right to join a union (to associate) and ensuring that employees have access to a process that permits them to 'meaningfully associate in the pursuit of collective workplace goals'. A meaningful process of collective bargaining is one which 'maintains a balance of bargaining power, or "equilibrium", between unions and employers'.[37] It includes a right to collective bargaining, which involves (1) a right to make collective submissions to one's employer and have them considered in good faith, including having access to a means of recourse if good faith consultations are absent,[38] (2) the ability to have 'effective and input into the selection of collective goals to be advanced by the association' (choice), (3) the 'ability to undertake activities free from managerial control' (independence),[39] and (4) the right to strike in support of collective bargaining.[40]

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33 *Health Services*, *supra* n. 31.

34 The major debates arose from the Court's decision in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 [*Fraser*]. There a majority of the Supreme Court reaffirmed the *Health Services* decision, *supra* n. 31, but also seemed to narrow its definition of collective bargaining. In parts of the *Fraser* decision the majority adopted *Health Services'* definition of collective bargaining as requiring good faith negotiations, in other parts the majority referred to a right to make submissions and consult in good faith. The majority in *Fraser* also sometimes referred to the infringement as 'substantial interference; as in *Health Services*, and in others as 'effective impossibility'. Confusion over both issues reigned in the proceeding case law, until the SCC in its New Labour Trilogy in 2015. The New Labour Trilogy consists of *MPAO, supra* n. 28, *Royal Canadian Mounted Police v. Canada*, 2015 SCC 2 [*Meredith]; SFL v. Saskatchewan*, 2015 SCC 4 [*SFL*]. In *MPAO* the Court reaffirmed the substantial interference test from *Health Services*. And in *SFL* the majority arguably returned to the standard of good faith bargaining.

35 *MPAO*, *supra* n. 28, at 58, quoting Justice Dickson's dissent in the *Alberta Reference, supra* n. 30, at 365.

36 In *MPAO*, *supra* n. 28, at 58 the majority explained that '[b]y banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society'.

37 *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2014 ONSC 965, aff'd by *Gordon v. Canada (Attorney General)*, 2016 ONCA 625 [*Gordon*], referring to *MPAO, supra* n. 28, at 72, 82; *SFL, supra* n. 34, at 56–57.

38 *SFL*, *supra* n. 34, at 1.

39 *MPAO*, *supra* n. 28, at 83.

40 *SFL, supra* n. 34, at 51. Many public sector statutes rely on essential services designation and eliminate the right to strike for workers so designated. The analysis in *SFL* suggests that all essential services designations are per violative of 2(d), but that they may be justified under s. 1 if the statute provides a suitable mechanism to resolve disputes.

The test for determining a 2(d) violation was set out in *Health Services*, most recently affirmed in *MPAO* and *Saskatchewan Federation of Labour v. Saskatchewan (SFL)*.[41] What 2(d) prohibits is governmental action/inaction that substantially interferes with constitutional freedom of association. To determine whether there has been a violation of the Charter's freedom of association guarantee, we first ask whether the impugned government measure *actually* interfered with collective bargaining, and if so, whether the interference is substantial. In practice, these two questions are often collapsed into one, such that the analysis focuses on whether the infringement is substantial. To determine whether the interference is substantial, we first ask at Step A whether the matter affected was sufficiently important to collective bargaining that interference with it negatively impacts on union members' capacity to come together and pursue collective goals in concert.[42] If so, at Step B we consider whether the manner in which the measure impacts on collective bargaining preserve the duty to consult and negotiate in good faith. In other words, a government measure will violate section 2(d) if it impacts on a matter of importance to collective bargaining by impeding the ability to bargain over it, thereby limiting workers' capacity to collectively act on important workplace goals. If so, the measure falls unless justified under section 1 as a reasonable limit on the right, because it is pressing and substantial and there is proportionality between the objective and the means.[43]

Canadian courts have generally built a measure of deference into their constitutional analysis, deployed in the section 1 *Oakes* test where the state seeks to justify its infringement.[44] Aileen Kavanagh explains that 'deference is a matter of assigning weight to the judgment of another, either where it is at variance with one's own assessment, or where one is uncertain of what the correct assessment should be'.[45] In determining what weight to give legislative and executive choices, Kavanagh suggests courts should continually assess which decision-maker has the greater institutional competence, expertise and moral authority, and weight their judgments accordingly.[46]

In the First Labour Trilogy, the question of competence led a majority of the Court to adopt a strong level of deference to state choices when designing labour

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41 *Health Services*, *supra* n. 31; *MPAO supra* n. 28; SFL, *supra* n. 34.

42 *Health Services*, *supra* n. 31, at 93, 95.

43 *See Oakes*, *supra* n. 27. There is proportionality where there is a rational connection between the objective and the means chosen to achieve it, the limit minimally impairs the right, and there is proportionality between the effects of the measure and the law's objective.

44 Guy Davidov, *The Paradox of Judicial Deference*, 12(2) Nat'l J. Con. L. 133 (2001).

45 Aileen Kavanagh, *Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication*, in *Expounding the Constitution: Essays in Constitutional Theory*, 184–216 (Grant Huscroft ed., Cambridge: Cambridge University Press 2008).

46 *Ibid*. Jeff King, *Judging Social Rights* (Cambridge: Cambridge University Press 2012), at Part II argues that the legislature has less democratic competence when the issue is one of (1) absolute obligation (2) procedural rights (3) clear or core cases and (4) the protection of marginalized groups.

laws. It did so by narrowing the definition of section 2d rights, rather than by widening the scope for justification at the section 1 analysis. In other words, in the early years of constitutional labour law the courts defined section 2(d) rights narrowly, as not applying to a host of collective activities to be regulated only by the state. The idea was that the courts should not interfere in matters of labour policy, which was best left to legislatures because they held greater expertise in the area and a democratic mandate on socioeconomic issues, a view that is still held by some jurists.[47] The problem with this approach is that it assumes that policy matters are separable from workers' day to day working conditions. But policy decisions about public sector spending are enacted *through* public sector working conditions. Decisions about high school class sizes, for instance, represent both an educational philosophy and the working conditions of teachers. A decision to privatize or contract out the administration of a public program is a political decision by the state that is implemented by terminating the employment of those currently in the job. A decision to reduce a government deficit through public sector wage freezes represents a general fiscal philosophy, but it is achieved through the terms and conditions of public servants' employment. There is no meaningful distinction between policy and principle in this context. For this reason, in the public sector labour law context, too much deference to the use of override legislation fundamentally undercuts the right to freedom of association. There may be good arguments in other labour law contexts for more deferential review, but to broadly defer to government choices in the use of override legislation renders public sector labour law effectively non-binding, thereby fundamentally undermining its legitimacy as a vehicle for worker voice.

The Supreme Court of Canada has considerably expanded the scope of section 2(d) in the years since the first Labour Trilogy. On the surface, its new jurisprudence declares an end to judicial restraint and deference, acknowledging the central importance of labour rights to dignity and equality. However, this expanded approach has not consistently taken hold in cases concerning the permissible scope of override statutes, where deference remains the order of the day thus maintaining the tradtionally thin conception of 2(d) rights. As will become clear over the next few pages, a quiet judicial debate is underway in Canada about whether and what role deference should play in the constitutional assessment of override legislation. Thus, reminiscent of the first Charter era, some judges are deploying deference through their interpretation of what activities fall within the scope of 2d at the infringement stage, rather than adopting a fullsome definition of

[47] *Alberta Reference*, *supra* n. 29. Justice Rothstein has since been the Supreme Court's most ardent supporter of legislative expertise in the area of labour law, causing to provide strong deference to government choices in many of his dissents through the second constitutional labour law era.

constitutional freedom of association, and then providing some scope for deference in the analysis of whether the infringement was justified. Some decisions expressly adopt a deferential approach, as did the British Columbia Supreme Court (BCSC) in *Federal Dockyard Workers*. There the Court explained that:

> Courts have traditionally recognized that labour relations raise complex policy issues that requires balancing multiple interests in a challenging factual environment. Courts have recognized that legislatures and government possess an institutional expertise to handle these matters that courts do not. As a result, there has been a tendency for courts to defer, where constitutionally appropriate, to the choices made by legislatures that attempt to resolve those policy issues and balance competing interests. The effect of this is to give a margin of appreciation to policymakers' choices without abdicating the ultimate responsibility of the courts to protect the Constitution.[48]

In most cases, however, the issue quietly animates the interpretation of the doctrinal requirements of the *Health Services* test used to determine whether a 2(d) infringement has occurred. As we will see, two different interpretations of the *Health Services* 'substantial interference' test have emerged in the case law that put forward contrasting views of the legitimacy of public sector labour law and of the use of override legislation, animated by competing visions of the 'public interest'.

4 THE LEGISLATIVE OVERRIDE CASE LAW

Canadian appellate courts have heard eight legislative override cases since *Health Services* in 2007, with many more coming before boards, tribunals and lower courts.[49] These cases have concerned the constitutionality of public sector spending and privatization statutes that override collectively bargained terms or

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[48] *Federal Government Dockyard Trades and Labour Council v. Canada (Attorney General)*, 2011 BCSC 1210 [*Dockyard Trades* SC], at 245, aff'd by 2013 BCCA 371 [*Dockyard Trades* BCCA 2013]; leave to appeal refused.

[49] A search on WestlawNext Canada reveals many more arbitral, board and lower court challenges to override legislation. The discussion in this article examines all the decisions in cases that received appellate consideration. The override cases are *Health Services, supra* n. 31; *Assn of Justice Counsel v. Canada (Attorney General)* 2011 Ontario Superior Court (ONSC) 6435, rev'd by 2012 Ontario Court of Appeal (ONSA) 530, leave to appeal refused [*Justice Counsel]; Royal Canadian Mounted Police v. Canada*, 2011 Fderal Court 735, rev'd by 2011 FC 735; aff'd by 2015 Supreme Court of Canada 2 [*Meredith]; Canada (Procureur général) c SCFP, local 675*, 2012 Quebec Court Supérieure, rev'd by 2014 Quebec Court of Appeal 1068, aff'd on other grounds 2016 Quebec Court of Appeal 163 [*Assn des réalisateurs]; Dockyard Trades* n. 48; *BCTF v. British Columbia*, 2011 BCSC 469 (*BCTF 1*), additional reasons 2014 BCSC 121 [*BCTF 2*], rev'd by 2015 British Columbia Court of Appeal 1184, rev'd by 2016 SCC 49 [*BCTF 2]; Gordon, supra* n. 37. Cases in the override category can also include challenges to back-to-work legislation, but none have so far reached an appellate level decision-maker. There was one case decided by the Ontario Superior Court, *CUPW/STTP v. Canada Attorney General*, 2017 ONSC 292, [*CUPW*], and at least one other that has been filed by Ontario Public Service Employees Union (OPSEU) against the back-to-work order given to end the College Faculty strike in 2018. OPSEU, 'OPSEU to file Charter challenge over college back-to-work law' (23 Nov.

circumscribe the scope of bargaining. Of these, six have been challenges to the federal *Expenditure Restraint Act* (ERA) passed by Stephen Harper's government in 2009 in response to the 2008 Great Recession.[50] One ERA case, *Meredith*, was heard by the Supreme Court as part of the New Labour Trilogy, with five others decided by the Quebec, Ontario, British Columbia and the Federal Court of Appeal.[51] The ERA cases will provide the basis for our exploration of the override constitutional case law. At each step of the analysis, two different analytical structures have emerged that each stake a claim on the deference question. These, in turn, reveal important fundamental judicial disagreements on the use of deference and of the general legitimacy of public sector labour law in Canada.

4.1 The substantial interference test: What is a matter important to collective bargaining?

The ERA was enacted in 2009 and imposed a wage cap on public sector salaries from 2006 to 2011.[52] The wage cap had different implications for different groups of public sector employees because some were in the midst of collective bargaining, others were making submissions to an arbitrator, and others had existing collective agreements. Overall, the ERA's effect was to prevent bargaining for a wage increase above the capped level for five years, and to replace any terms providing a higher increase with the levels stipulated in the legislation. Public sector unions across the country have brought constitutional challenges to the ERA, arguing that it substantially interferes with the constitutional right to collective bargaining.

To determine whether the ERA violated section 2(d) of the Charter, the unions at Step A first had to demonstrate that the statute interfered with a subject-matter important to collective bargaining. In *Health Services* the Court explained that the importance of the affected subject-matter is to be assessed in relation to its impact on workers' ability to undertake collective action. The Court noted that matters like the 'design of uniform, the layout and organization of cafeterias, of the location or availability of parking lots' would not have a sufficient impact on pursuing shared goals to constitute substantial interference.[53] However, the

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2017), online: *OPSEU*, https://opseu.org/news/opseu-to-file-charter-challenge-over-college-back-to-work-law/16950/ (accessed 18 Oct. 2020).

50 *ERA*, *supra* n. 6.

51 *Justice Counsel, Dockyard Trades, Assn des réalisateurs, Meredith, Gordon, supra* n. 37. A sixth case, *PIPSC v. Canada (Attorney General)*, 2014 ONSC 965, was joined with *Gordon*, *supra* n. 37 before the Court of Appeal.

52 The ERA therefore retroactively imposed a wage cap for two years prior to the recession which started in 2008.

53 *Health Services*, *supra* n. 31, at 96.

Court has offered little additional guidance on how to determine what is a subject important to collective bargaining.

One might think it obvious that wages are of central importance to collective bargaining such that Step A of the test is easily satisfied, but the issue has proved more complex. There is a near-unanimous split between trial and appellate level decisions on the analysis at Step A, which emerged because each court level appears to have asked different questions. For the most part, the initial trial level decisions easily concluded that wages were a matter of central importance to collective bargaining. The British Columbia (BC) Superior Court in *Dockyard Workers* noted that '[a]s a general matter, it is obvious that wages are of central importance in collective bargaining'.[54] In *Justice Counsel*, the Ontario Superior Court stated that '[i]t is difficult to regard salary as anything other than a very significant, if not pivotal, aspect of the employment relationship for most employees'.[55] The Quebec Superior Court in *Assn des réalisateurs* noted there is consensus amongst industrial relationists that if ever there is a matter essential to collective bargaining, it is wages.[56] The trial level courts analysed Step A by looking at the *general importance of the subject-matter* to collective bargaining.

The courts of appeal instead focused on the *significance of the impact* of the government measure on the outcomes of bargaining. In *Dockyard Trades* the BC Court of Appeal overturned the trial decision because, amongst other things, the ERA's impact on wages was not so 'draconian' as to violate section 2(d).[57] For the dockyard workers, it imposed a wage cap only for one year, the Court explained, could be renegotiated in the following round of bargaining. [58] The ERA did not reduce or freeze wages, and it did not unilaterally prohibit all future bargaining over wages. Thus although a 5.2% wage increase was certainly important to the employees, it was not 'antithetical to associational activity' to reduce it.[59] The

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[54] *Dockyard Trades*, *supra* n. 49 at the British Columbia Superior Court. In this case the parties had concluded a collective agreement that was reached through arbitration. The agreement matched the legislated wage increases except for one year in which a higher raise was agreed to. Despite finding that wages were central to collective bargaining, Justice Harris held that there was no breach because the scheduled wage increase in 2006–2007 was the result of arbitration, which was not an associational activity that was protected by 2(d). The BC Court of Appeal (BCCA) reversed on this ground in *Dockyard Trades* at the BCCA 203, *supra* n. 48, holding that collective agreements reached through arbitration were associational for the purposes of 2(d).

[55] *Justice Counsel* at the Quebec Superior Court (QCSC), *supra* n. 49.

[56] *Assn des réalisateurs QCSC*, *supra* n. 49, at 117–118.

[57] *Dockyard Trades* BCCA 2013, *supra* n. 48, at 52.

[58] This is because the wage rates in the collective agreement were the same as set in the *ERA* other than for one year. *Ibid*.

[59] *Dockyard Trades* BCCA 2013, *supra* n. 48, at 53. The Supreme Court sent back this decision to the CA for reconsideration after *Meredith* was decided, *see Dockyard Trades* BCCA 2016, *supra* n. 48. Similarly, the Quebec Court of Appeal in *Assn des réalisateurs* QCCA 2014, *supra* n. 49 overturned the trial level decision, and noted that the *ERA* does not freeze or reduce wages, rather it caps salaries. The workers here lose a portion of two pay increases, but again, this could not be considered a draconian measure

majority of the Supreme Court in *Meredith* concluded that the impugned statute in *Health Services* resulted in a much greater impact than did the ERA. Whereas the statute in *Health Services* made 'radical changes to significant terms' of collective agreements, the ERA capped wages at a comparable level to other workers in and outside the core public service, which means that they were consistent with negotiated outcomes.[60] The impact on bargaining could not be too significant, because many other topics could still be bargained over. The two appellate level decisions on the constitutionality of the ERA since *Meredith* have also concluded that it only had a limited impact on bargaining and so did not violate section 2(d).[61]

The majority in *Health Services* directs us to examine the 'importance of the matter affected to the process of collective bargaining, and more specifically, to the capacity of the union members to come together and pursue collective workplace goals'.[62] The trial level decisions do so, while the appellate decisions arguably do not. The trial level approach is process-oriented, while the appellate interpretation is concerned with outcomes.[63] In the trial decisions, the issue is whether the legislation impacted on an important bargaining topic and thus undermined the integrity of bargaining. If a government measure impacts on an important bargaining matter, even if the impact is only small, it shakes workers' confidence in the bargaining process. By contrast, the appellate-level approach is an outcome-oriented analysis which suggests that if the impugned statute has only a slight impact, even if the impact concerns a very important topic, the statute has not significantly affected the outcome of bargaining and therefore does not substantially interfere with collective bargaining. The appellate approach endows the state with greater freedom of action because it focuses on the significance of the impact of the impugned government measure on the whole scope of bargaining, rather than its impact on the capacity of workers to come together to bargain over the specific bargaining issue at hand.

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which undermined the bargaining process. This decision was sent back the Court of Appeal after *Meredith*, where the Court upheld its 2014 decision. This decision was also upheld by the QCCA after being sent back down by the Supreme Court after *Meredith*. *See Assn des réalisateurs* QCCA 2016, *supra*, n. 49.

60 *Meredith SCC*, *supra* n. 49, at 25,28. The comparison to the negotiated wages of provincial police forces arguably veers quite closely into a focus on outcomes rather than process, which the Court has repeatedly said is not protected. In any case, the majority then concluded that the *ERA* permitted a process of consultation about remuneration to continue, because the Treasury Board enacted increases to two non-wage benefits, based on input from the Pay Council after the *ERA* was enacted.

61 *Dockyard Trades* BCCA 2013, *supra* n. 48; *Gordon*, *supra* n. 37.

62 *Health Services*, *supra* n. 31, at 90, 92.

63 The Supreme Court has consistently affirmed that s. 2(d) provides a process right, not a right to substantive outcomes. *See* e.g. *MPAO, supra* n. 28, at 67.

4.2 The substantial interference test: A government duty to collectively bargain over the content of legislation?

Step B of the infringement analysis assesses how the challenged government measure impacts on collective bargaining by preserving the duty to consult and negotiate in good faith. Once again, two different interpretations of Step B are emerging in the case law. One of the main debates ostensibly turns on whether the government has a duty to consult with a public sector union over a statute that will impact on a topic important to collective bargaining. The fact of this debate is slightly strange, however, because by longstanding constitutional principles regarding the separation of powers, the legislator never has an obligation to consult about the content of legislation.[64] Where, then, did this debate come from?

The issue arises from contradictory comments in the *Health Services* decision.[65] On the one hand, the majority held that the state must not substantially interfere with a union's ability to exercise a 'meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith'.[66] To constitute a violation of section 2(d), the interference must be 'so substantial that it interferes not only with the attainment of the union members' objectives (which is not protected), but with the very process that enables them to pursue these objectives by engaging in meaningful negotiations with the employer. The Court noted that '[a]cts of bad faith, or *unilateral nullification of negotiated terms*, without any process of meaningful discussion and consultation may also significantly undermine the process of collective bargaining' (my italics).[67] In other words, *Health Services* represents a very strong endorsement of the substantive nature of the process of collective bargaining. The majority also, however, explained that '[e]ven where a matter is of central importance to the associational right, if the change has been made through a process of good faith consultation it is unlikely to have adversely affected the employees' right to

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[64] In *Authorson v. Canada (AG)*, 2003 SCC 39 Justice Major stated that the only procedure due to Canadian citizens by the legislature is three readings in the Senate and the House of Commons. Upon receiving Royal Assent, legislation within Parliament's competence is 'unassailable'. In *Mikisew Cree First Nations v. Canada*, 2018 SCC 40, a majority of the Court held the legislative branch does not hold a duty to consult in designing legislation. Justice Karakatsanis at 2 explained that 'two constitutional principles — the separation of powers and parliamentary sovereignty – dictate that it is rarely appropriate for courts to scrutinize the law-making process. The process of law-making does not only take place in Parliament. Rather, it begins with the development of legislation. When ministers develop legislation, they act in a parliamentary capacity. As such, courts should exercise restraint when dealing with this process. Extending the duty to consult doctrine to the legislative process would oblige the judiciary to step beyond the core of its institutional role and threaten the respectful balance between the three pillars of our democracy'.

[65] *See* Diane MacDonald, *The Effect of Pre-Legislative Consultation After Fraser*, 16(2) CLELJ 375 (2011–2012) for an assessment of the Supreme Court's commentary on this issue in *Health Services*.

[66] *Health Services supra* n. 31, at 90.

[67] *Ibid.*, at 92.31.

collective bargaining', and noted that the union in *Health Services* had no notice of the legislation before its enactment.[68] These comments seemed to suggest that there would be no violation if the government consulted with the union about the statute before its enactment, even if the statute also made it impossible to bargain over a topic important to collective bargaining. However, during the section 1 analysis, the majority also affirmed that the legislature does not hold a duty to consult regarding the content of legislation.[69] Justice Deschamps remarked on this apparent contradiction in dissent, noting that majority's decision, implied on the one hand that governments hold a duty to consult, but also reiterated the long-standing principle that 'legislators are not bound to consult with affected parties before passing legislation'.[70]

These seemingly contradictory statements in *Health Services* opened the door to competing interpretations of Step B's requirements. On one view Step B asks whether, despite the interference, *it is still possible to bargain over the impacted subject-matter* despite the impugned statute (interpretation 1). At the same time, it could also be understood as asking *whether the statute itself was bargained over* (interpretation 2) through pre-legislative consultation. In other words, does one need to be able to bargain over a subject-matter important to collective bargaining? Or does one need to be able to bargain over the content of a statute that may then limit the scope of collective bargaining? The second interpretation becomes possible, as Peter Carver suggests, if consultation over the statute is understood as equivalent to collective bargaining over terms and conditions of employment.[71] Whether that equivalence is appropriate depends on one's interpretation of what constitutional collective bargaining requires.

In *Fraser v. Ontario* the majority of the Supreme Court arguably narrowed the scope of collective bargaining from a right to good faith negotiations to a right to make submissions and have them considered in good faith by the employer. To the extent that constitutional collective bargaining is understood only as a right to consultation, there is some logic to viewing pre-legislative consultation as equivalent to bargaining. However, accepting this equivalence fundamentally changes the traditional understanding of collective bargaining. A right to consultation may require employers to consider employee representations in good faith, but it is still the employer that holds the decision-making authority. By contrast, bargaining implies that the outcome will be chosen by both parties through a give-and-take process – no one party can make the final decision on their own.[72] As Bogg and

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68 *Ibid.*, at 129.
69 *Ibid.*, at 157.
70 *Ibid.*, at 179.
71 *Health Services*, *supra* n. 31.
72 The scope of constitutional collective bargaining was most recently addressed in *SFL*, where Justice Abella interpreted *Fraser* to hold that constitutional collective bargaining provides unionized workers with the right to make collective representations to their employers, to have those representations

Ewing point out, 'even where there is a stronger duty to consult, this may simply be a process which invites "the exchanges of views and the establishment of dialogue", the employer not necessarily under a duty to negotiate about the points made by those with whom consultation have taken place'.[73]

The issue of pre-legislative consultation was first mentioned in *British Columbia Teachers Federation vs British Columbia* (*BCTF 1*) when Justice Griffin suggested that if the challenged statute provided an 'equivalent process of good faith consultation or negotiation' about the content of the statute there would be no infringement of section 2(d).[74] Despite this comment, some courts have held fast to the idea that a legislator has no duty to consult on the content of legislation, such as the Ontario Court of Appeal in *Gordon v. Canada (AG)*, and that the principle of parliamentary privilege removes the legislatures' internal processes from judicial consideration.[75] To hold otherwise, the Court noted in *Gordon*, would be to provide trade unions with greater participatory rights than others in the legislative process.[76] 'In short, the *Charter* does not interfere in the policy formulation process, and, in particular, does not require consultation before legislating'.[77] Pre-legislative consultation is relevant only at the step 1 justification stage.

However, others decide to run with Justice Griffiths suggestion from *BCTF 1* and have based their constitutionality analysis on whether pre-legislative consultation occurred. The appeal of this approach was explained by the majority of the British Columbia Court of Appeal (BCCA) in *British Columbia Teachers Federation v. British Columbia*.[78] Issued after the Supreme Court's new Labour Trilogy, both majority and dissent in *BCTF 2* held that pre-legislative consultation could substitute for collective bargaining.[79] The majority explained that it was necessary to permit the government to meet its 2(d) obligations by consulting with affected

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considered in good faith, and, importantly, to have a 'means of recourse should the employer not bargain in good faith'. *SFL*, *supra* n. 34, at 1.

73 Alan Bogg & Keith Ewing, *A (Muted) Voice at Work – Collective Bargaining in the Supreme Court of Canada*, 33(3) Comp. Lab. L. & Pol'y J. 379 at 387 (2012).

74 BCTF 1, *supra* n. 49, at 297.

75 *Meredith* FCA, *supra* n. 49, at 98; *Assn des réalisateurs* QCCA 2014, *supra* n. 49; *Gordon, supra* n. 37, at 111.

76 *Gordon*, *supra* n. 37, at 112. The Court explained that '[t]he appellants had the same right to participate in the democratic process leading to the introduction and passage of legislation as any Canadian. Government employees are not entitled to privileged stature in the legislative process by virtue of their employment relationship or their status as union members'.

77 *Gordon*, *supra* n. 37, at 113.

78 *BCTF 2* BCCA 2015, *supra* n. 49.

79 They explained the relevance of the duty slightly differently, however. The majority held that the legislature did not hold a duty to consult over legislation, but if it did so it would meet its 2(d) obligations. In dissent Justice Donald held that the government did hold an obligation to engage in pre-legislative consultations, and that doing so would be equivalent to collective bargaining. *BCTF 2 CA*, *supra* n. 49, at 288, 293.

trade unions before legislating, rather than through bargaining, because otherwise workers would be conferred 'with a presumptive constitutional veto, subject only to s. 1, over any significant legislative changes to their working conditions'[80]:

> If the infringement analysis evaluates only the content of legislation, then any legislation which significantly alters collective agreement terms necessarily infringes s. 2(d). The government could not implement policy changes if doing so would undermine a collective agreement unless government could meet the stringent s. 1 test. In substance, significant terms of collective agreements would be afforded constitutional status. This would be a dramatic change in the constitutional structure of Canada. Contracts have never been recognized as constitutionally protected.[81]

The majority could not have been clearer about its concerns. The government needs the ability to implement policy decisions, even if it impacts the content of collective agreements reached through statutorily mandated collective bargaining processes. Moreover, it needs to be able to do so without the burden of justifying itself to the courts on constitutional review. When a government consults about a statute prior to enactment and considers its workers' collective representation in good faith, its bargaining obligations are satisfied.[82] In other words, the constitutional right to freedom of association limits override legislation only to the extent of mandating pre-legislative consultation; no other investigation or justification is needed and the courts should have no greater reviewing role. Courts should adopt a position of self-restraint and deference and eliminate the need for a section 1 analysis.

In dissent Justice Donald acknowledged valid concerns with holding collective bargaining over terms and conditions equivalent to pre-legislative consultations. He noted that it was of great worry that 'government can unilaterally delete provisions in a collective agreement, and "cure" such unconstitutional behaviour through the notion of "consultation"'.[83] The problem is that bargaining can be 'rendered futile by unilateral nullification of previous agreements' because it discourages future bargaining. But, Justice Donald explained, pre-legislative consultation could be equivalent to collective bargaining if the process was truly meaningful. It would be meaningful if the government consulted in good faith and the courts undertook a 'sufficiently probing analysis' to ensure that had occurred. Moreover, if the parties consult in good faith and reach impasse, the government will likely 'have satisfied its constitutional duty and may unilaterally pass necessary legislation consistent with that consultation process', and in

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80 *BCTF 2 CA*, *supra* n. 49 at 73.
81 *Ibid.*, at 74.
82 *Ibid.*, at 37.
83 *Ibid.*, at 298.

situations of emergency override statutes may not violate 2(d) if there was time to consult.[84] On this basis, he explained:

> The central issue in this case … is whether this unilateral nullification came after a point of impasse following good faith consultation, and thus gave effect to the BCTF's right to a form of collective bargaining, or whether the Province's "consultation" was treated merely as a formality preceding the passage of equivalent legislation to what was already found to be unconstitutional.[85]

Despite being issued a few months after the New Labour Trilogy, where the majority of the Court arguably clarified that constitutional collective bargaining requires good faith negotiations, here both the majority and dissenting opinion based their decisions on the premise that constitutional collective bargaining is equivalent to good faith consultations.

The Supreme Court sidestepped the issue of pre-legislative consultation in Meredith. There was some hope it would be clarified when the SCC granted leave to appeal in *BCTF 2* but despite vigorous argument by the parties and numerous intervenors, the SCC instead issued its decision in two sentences. 'The majority of the Court would allow the appeal, substantially for the reasons of Justice Donald. Justices Côté and Brown would dissent and dismiss the appeal, substantially for the reasons of the majority in the Court of Appeal'.[86] As Eric Tucker points out, there is little we can do with this decision. Because the majority of the SCC did not fully adopt Justice Donald's dissent, and the minority did not fully adopt the majority decision in *BCTF*, we do not know which elements of the Court of Appeal decision won Supreme Court approval and which did not. We are thus left with no greater clarity about the relevance of pre-legislative consultation and the role of deference in assessing the constitutionality of override statutes.

The differing approaches to Step B outlined above are each animated by different understandings of the scope of the 2(d) right. The first approach is focused on protecting unionized employees' right to participate in workplace decision-making through collective bargaining. It understands constitutional collective bargaining as a process of joint decision-making.[87] By contrast, the second approach understands the right to be one of consultation, where decision-making authority remains in the employer's hands, even if it has seriously considered workers' representations. From this perspective, it matters little if the consultation

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84 *Ibid.*, at 293.
85 *Ibid.*, at 311.
86 *BCTF 2* SCC, *supra* n. 49.
87 The scope *of* constitutional collective bargaining was most recently addressed in *SFL*, where Justice Abella interpreted *Fraser* to hold that constitutional collective bargaining provides unionized workers with the right to make collective representations to their employers, to have those representations considered in good faith, and, importantly, to have a 'means of recourse should the employer not bargain in good faith'. *SFL*, *supra* n. 34, at 1.

is directly about terms and conditions of employ or whether it is about the content of a statute that will impose terms and conditions of employ.

Similarly to Step A, at play here are opposing views on whether or not the legislature ought to hold a broad margin of appreciation when legislating policies that impact on public sector labour rights, thereby limiting the scope of constitutional review. This position was clearly explained by the majority in the BCCA's decision in *BCTF 2* and *Dockyard Trades* post-*Meredith*. In *Dockyard Trades* the court explained that the ERA did not substantially interfere with constitutional freedom of association, because:

> Fiscal and economic context cannot be ignored. The government met its constitutional obligations through its attempts to negotiate [over the legislation] until the last moment, and to signal the potential effects of the impending legislation. Its response was proportional to the looming fiscal emergency.[88]

The government consulted but no agreement was reached, and it needed to get on with addressing an economic emergency. Labour rights simply needed to give way to the spending decisions of the government, that should not have to justify itself to the courts.

4.3 Override legislation and the thinning of 2(d)

As the foregoing analysis demonstrates, the current trend of making section 2d rights more robust has not taken in a good portion of override cases. Indeed, more than offering a measure of deference to government justifications of infringement, many courts have sought to insulate governments from a finding of that any infringement occurred at all through their interpretations of the *Health Services* test.

The Supreme Court has consistently maintained that section 2(d) protects the right to a meaningful process of collective bargaining. In *Health Services* the Court held that the protected activity could be described as 'employees banding together to achieve particular workplace goals'.[89] The majority stressed that section 2(d) does not protect the outcomes or objectives of bargaining, but the process through which the goals are pursued. In *MPAO* the majority explained that at its core section 2(d) 'protects associational activity for the purpose of securing the individual against state-enforced isolation and empowering individuals to achieve collectively what they could not achieve individually'.[90] They went on to note that '[b]y banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and

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88 *Dockyard Trades* BCCA 2016, *supra* n. 49, at 93.
89 *Health Services*, *supra* n. 31, at 89.
90 MPAO, *supra* n. 28, at 62.

desires'.[91] Surely, if section 2(d) provides a meaningful process of collective bargaining, then a purposive approach requires finding that legislatively overriding bargaining outcomes fundamentally guts the legitimacy of the process. 'What could more clearly undermine the process of "voluntary, good faith collective bargaining" than a statute which removes the very clauses that have been negotiated?'.[92] If one purpose of section 2(d) is to allow individual workers to associate to equalize their bargaining power with their employer, and one the clearest expression of the government employer's additional power is the legislative override, then some sort of limit needs to be placed on when and how that power is exercised. On a plain reading of what is required for a meaningful process of collective bargaining, any statutory modification of bargained terms on issues important to collective bargaining, or temporary narrowing of the scope of possible bargaining, substantially interferes with section 2(d) unless there remains a way to bargain over the impacted topic.[93] The infringement analysis, therefore, should examine whether the override statute impacts on a topic that is important to collective bargaining, and whether the challenged statute prevents the parties from bargaining over it. Substantial interference with just one bargaining topic that is important to a group of workers will suggest that they cannot rely on a process of collective bargaining to collectively choose and pursue their workplace goals.[94] Where collective agreements are rewritten without their consent, employees will understand that their employer does not feel bound to negotiate important workplace conditions, and will not comply with or respect any terms on which they reach an agreement. Respect for the bargaining process is whittled away, as is the ability of workers to collectively achieve what they could not on their own. The infringement analysis is not the place for deference to state choices, because the very purpose of constitutional protections is to ensure that the state does not violate constitutional rights as it goes about the business of governing.

The context of the infringement is appropriately considered at the justification stage, where it will, in some instances, help the government to demonstrate that the state chose a minimally impairing option in the context at hand.[95] Bu writing

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91 *Ibid.*, at 58.

92 MacDonald *supra* n. 65, at 379.

93 Some, like the majority of the Court of Appeal in *BCTF 2 CA*, conclude that this approach serves to constitutionalize collective agreements - the outcomes. But, as pointed out by Justice Donald in dissent, it is actually the reverse. This approach is entirely focused on protecting the process of bargaining. The agreement itself receives protection only because not doing so indicates that there is no weight to the process.

94 *See* Justice Donald's dissent in *BCTF 2* CA, *supra* n. 49, at 284–285.

95 *Health Services*, *supra* n. 31, at 157. Davidov, *supra* n. 44, at 2–3 makes the point that there is a tendency in Canadian constitutional law to refer to contextual and deferential analysis as the same thing in reference to the requirements of section. Contextual analysis is just part of the s. 1 test, while deference is the degree of force and precision i.e. required to convince justify the infringement.

for the majority, Justice Abella in *SFL* elegantly addressed the question of deference. She stated:

> In their dissenting reasons … my colleagues urge deference to the legislature in interpreting the scope of s 2(*d*). This Court has repeatedly held that the rights enumerated in the *Charter* should be interpreted generously … It is not clear to me why s. 2(*d*) should be interpreted differently … In the context of constitutional adjudication, deference is a conclusion, not an analysis. It certainly plays a role in s. 1, where, if a law is justified as proportionate, the legislative choice is maintained. But the whole purpose of *Charter* review is to assess a law for constitutional compliance. If the touchstone of *Charter* compliance is deference, what is the point of judicial scrutiny?[96]

Even at the justification stage, the courts should require some precision in its assessment of governmental means and ends. To do otherwise is to reinforce the idea that labour rights are not so fundamental or important as other rights because they are socioeconomic and policy-based, and that public sector unions are simply 'defenders of sectional rather than public interests'.[97] This entrenches the idea that the state's policy choices are in the interest of the whole, while public sector employees are interested only in themselves. When that approach is adopted, labour rights become expendable. Public sector workers have the statutory and constitutional right to collectively bargain, but those rights must give way when some other interest arises. It therefore ibecomes increasingly acceptable for the state to go straight to its legislative override power and bypass the need for bargaining at all. When the state does so, the contingent nature of public sector labour rights is revealed. This is not to say that constitutional review is a panacea, or indeed that unions should be relying so heavily on constitutional adjudication for the protection of their rights at the expense of organizing public support, but it is to say that challenges to labour law override statutes are not the time for broad judicial restraint.

In *Whigs and Hunters* EP Thompson explains:

> The rhetoric and the rules of a society are something a great deal more than sham. In the same moment they may modify, in profound ways, the behaviour of the powerful, and mystify the powerless. They may disguise the true realities of power, but, at the same time, they may curb that power and check its intrusions.[98] … [T]he law … . may be seen instrumentally as mediating and reinforcing class relations and, ideologically, as offering to these a legitimation. … If the law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class' hegemony. [99]

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[96] *SFL*, *supra* n. 34 at 76.

[97] Stephanie Ross & Larry Savage, *Public Sector Unions in the Age of Austerity* 9 (Halifax: Fernwood Publishing 2013).

[98] Edward P. Thompson, *Whigs and Hunters* 265 (Penguin Books 1990, first published 1975).

[99] *Ibid.*, at 262–263. Thompson's description of the role of law in mediating class relations, along with Douglas Hay's mediation on the property and criminal law in eighteenth-century England, provides a

A state in possession of strong public sector labour law systems sends a message about the legitimacy of labour law and unionization. It also sends a message about itself, suggesting that the government is a reasonable entity willing to limit its own power to equalize the employment relationship. Although frontal attacks on public sector labour laws have become more common over the last decades, the traditional Canadian approach is to maintain public sector labour law regimes – to maintain the façade of equity – but to unmake its content piece by piece. This is what the use of override legislation represents. It provides the state with an image of fairness and equity in employment and suggests the willingness to equalize its employment relationships, all the while reasserting that power through the back door.

To state the obvious, in most political systems the state holds the power to grant labour rights and the ability to repeal them. It holds the constitutional authority to legislatively impose terms into collective agreements and replace bargained terms with statutory ones, in the public and private sectors.[100] The ability of governments to exercise these powers is limited by constitutional requirements, where they exist, and normative political commitment in favour of robust union protections. In Canada, it would probably be viewed as suspect for the state to legislatively impose pay cuts or wage freezes into private sector collective agreements. However, as the previous analysis demonstrates, the practice is quite common in the public sector. In other countries, the political commitments may be reversed, there could be very little commitment to collective bargaining at all, or it could be viewed as a foundational part of the social contract. The legitimacy question will therefore be differently constructed based on local circumstances. Still, while there is the general question about the strength of labour rights in a given country, there is also the particular issue of labour law legitimacy in the public sector. In the public sector, the legislator is not a force outside the employment relationship, it is a party to the employment relationship. Where public sector employees are granted unionization rights or freedoms, those rights become shaky when the employer holds the legal power to exempt itself from its collectively bargained obligations. When it does so, it weakens the legitimacy of the government itself.

Some will read this analysis and think the existing state of things is entirely correct. There is a difference between the public interest and public servants' interest. Collective bargaining inappropriately impedes the state's ability to govern in the interest of all because it prioritizes the needs of one group over others. In

useful analysis of the law's role in legitimating state power and class relations. I disagree, however, with Thompson's musings on the nature of the rule of law and of law itself.

[100] In some countries the Constitution lays down detailed labour rights, significantly limiting the scope of legislative decision-making in the area. Portugal is an example of this kind of country.

this context, why should the state bargain at all when it can simply legislate its desired outcomes? The idea that public sector labour rights clash with the public interest rests on a false distinction because, for all the reasons Thompson explains, *it is in the public interest to enforce public sector labour rights*, whether through the actions of the government as employer, of courts as constitutional supervisors, or by workers undertaking collective action.[101] Consider the following. The governments of Ontario and Quebec suspended the operation of collective agreements in the education and health sectors by executive order during the first few weeks of the Covid-19 pandemic.[102] These measures were to permit the rapid staff redeployment of teachers and healthcare workers during the crisis. Most people would agree that, at least in the healthcare context, the ability to staff as needed has been essential. But was it essential to legislatively suspend existing agreements, when health sector and teachers' unions stood ready to work collaboratively with the government to achieve those ends?[103] Was it necessary to exclude these workers from decision-making that would impact on their health and safety?

Whether collective bargaining is statutorily enshrined and protected, whether it arises from the balance of power between the parties, or from the centrality of social dialogue in the governance of the state, overriding bargained terms fundamentally undermines the idea that employees, banding together, can hold a measure of collective power when interacting with their state employer. Whatever one might think of the appropriate role distribution between legislatures and courts in the design and implementation of labour rights, in the context of public sector labour law, where constitutional labour rights protections exist, the courts should use their reviewing power to scrutinize the exercise of the override power. When they fail to do so, they further undermine the legitimacy of public sector labour and make clear the overwhelming power of the government as an employer.

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[101] Public sector trade unions also play an important socioeconomic role in advancing general workplace justice issues.

[102] Order Made Under Subs. 7.02(4) of the Act, O.Reg 74/20; Craig S Rix et al, *COVID-19 and Staffing – Province Issues Emergency Order for Health Service Providers* (22 Mar. 2020), https://hicksmorley.com/2020/03/22/covid-19-and-staffing-province-issues-emergency-order-for-health-service-providers/ (accessed 18 Oct. 2020); Québec, Gazette Officielle du Québec, *Ministerial Order Number 2020–004 of the Minister of Health and Social Services Dated 15 March 2020*, vol. 152 No 12A (Québec, 18 Mar. 2020) at 765A.

[103] CUPE, *Order Waiving Contract Protections for Hospital Staff Is Unnecessary, Disrespectful and Coercive* (23 Mar. 2020), https://cupe.ca/order-waiving-contract-protections-hospital-staff-unnecessary-disrespectful-and-coercive (accessed 18 Oct. 2020).

5 CONCLUSION

Governments across Canada, and the world, have begun planning for the recession that will likely follow the pandemic. The government of Manitoba has recently announced its intention to initiate deep cuts to government programs and public sector labour costs, which may require opening up existing agreements to put in place. Amidst the pandemic, the province of Alberta is attempting to reduce doctors' compensation, despite the existence of binding collective agreements.[104] The chances are that some or all of these measures will be implemented by legislative override and that more will come.

As indicated above, pundits are already calling for the introduction of public sector wage restraint initiatives, because public sector workers are not suffering economically to the degree of others. Nurses, doctors, teachers, garbage collectors, public transit drivers, the public servants that built the infrastructure for emergency governmental support programs, these are the workers who must 'share the pain' that they are otherwise sheltered from. They are considered self-interested actors who unfairly avoid the harms the market imposes on others, rather than workers who are putting their bodies on the line for the community. Based on the case law examined here, it remains to be seen whether section 2(d) of the Charter will offer some protection against austerity labour measures imposed through override legislation. Other countries may face similar issues, even if structured in different ways. If the past is any indication, the legal response to this question will turn on whether the Supreme Court has truly opted for a purposive approach to freedom of association, and whether section 2(d) is seen as a legitimate constitutional right or a conditional one that should give way in the face of more pressing needs. The courts' choice on this matter will dictate whether public sector employees actually possess a right to bargaining, or whether the 'act of associating [has become] essentially futile'.[105]

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[104] Jesse Hajer & Lynne Fernandez, *Austerity and COVID-19: Manitoba Government Creating, Not Solving, Problems*, *CBC* (21 Apr. 2020), online, https://www.cbc.ca/news/canada/manitoba/manitoba-government-economy-covid-19-1.5539666; Caleb Henry, *The Alberta Government Versus Its Physicians: Is Freedom of Association at Risk?* (4 May 2020), online: *Canadian Law of Work Forum*, http://lawofwork.ca/the-alberta-government-versus-its-physicians-is-freedom-of-association-at-risk/ (accessed 18 Oct. 2020).

[105] *BCTF 2* BCCA 2015, *supra* n. 49, at 298.