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What Meaning in a Right to Strike? *MedReleaf* and the Future of the *Agricultural Employees Protection Act*

Bethany Hastie et Alex Farrant

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Résumé de l'article

En juin 2020, le Tribunal d'appel de l'agriculture, de l'alimentation et des affaires rurales de l'Ontario a rendu sa décision dans l'affaire *UFCW v MedReleaf Phase 2*. Cette décision portait sur une contestation constitutionnelle concernant le droit de grève en vertu de la *Loi de 2002 sur la protection des employés agricoles (LPEA)*, un régime législatif distinct pour les travailleurs agricoles qui sont exclus de la *Loi de 1995 sur les relations de travail (LRT) en Ontario*. Ce article explore l'argument du droit de grève tel qu'il a été présenté dans la décision *MedReleaf Phase 2* et met en évidence les tensions persistantes qui existent dans la définition et l'extension de l'application des droits du travail en vertu de l'alinéa 2(d) de la *Charte canadienne des droits et libertés* à des modèles de relation de travail autre que le modèle de la loi Wagner.

Nous soulignons en particulier comment les arguments et l'analyse de la décision *MedReleaf Phase 2* ont réduit la possibilité d'un examen et d'une interprétation plus approfondie de l'alinéa 2(d) ainsi que de la *LPEA* en se concentrant substantiellement sur la comparaison de la réglementation et des protections en matière de grève, telles que comprises dans la *LRT*. Ainsi, la décision *MedReleaf Phase 2*, risque d'interpréter le droit de grève en vertu de la *LPEA* comme un « simple droit » sans les protections nécessaires qui permettent aux travailleurs et travailleuses d'exercer efficacement ce droit. Nous poursuivons en avançant un argument qui stipule que de telles protections sont facilement accessibles aux travailleurs et travailleuses en vertu de la *LPEA*. Nous expliquons comment le langage même de la *LPEA* en plus de la jurisprudence de l'alinéa 2(d) et des principes fondamentaux de la primauté du droit, créent le fondement nécessaire pour faire du droit de grève une activité significative et protégée par la *LPEA*. Nous concluons par des commentaires sur l'avenir de la grève et de l'organisation syndicale en vertu de la *LPEA*.

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What Meaning in a Right to Strike? *MedReleaf* and the Future of the *Agricultural Employees Protection Act*

Bethany Hastie & Alex Farrant

IN JUNE 2020, the Ontario Agriculture, Food and Rural Affairs Appeals Tribunal released its decision in *UFCW v MedReleaf Phase 2.* This decision focused on a constitutional challenge regarding the right to strike under the *Agricultural Employees Protection Act, 2002* (*AEPA*), a separate statutory regime for agricultural workers, who are excluded from the *Labour Relations Act, 1995* (*LRA*) in Ontario. This article explores the right to strike argument as it unfolded in the *MedReleaf Phase 2* decision and highlights the enduring tensions that exist in articulating and extending labour rights under subsection 2(d) of the *Canadian Charter of Rights and Freedoms* to non-Wagner models of labour relations.

In particular, we highlight how the arguments and analysis in the *MedReleaf Phase 2* decision narrowed the opportunity for a richer examination and interpretation of subsection 2(d) and the *AEPA* by focusing substantially on a comparison with strike regulation and protections as understood under the *LRA*. As such, the *MedReleaf Phase 2* decision risks interpreting the right to strike under the *AEPA* as a "bare right" without necessary protections to enable workers to effectively exercise that right. We go on to craft an argument that such protections are readily available to workers under the *AEPA*. We establish that the language of the *AEPA* itself, coupled with the subsection 2(d) jurisprudence and fundamental rule

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of law principles, create the necessary foundation to make a right to strike a meaningful and protected activity under the *AEPA*. We conclude by offering commentary on the future of striking, and of labour organizing, under the *AEPA*.

poursuivons en avançant un argument qui stipule que de telles protections sont facilement accessibles aux travailleurs et travailleuses en vertu de la *LPEA*. Nous expliquons comment le langage même de la *LPEA* en plus de la jurisprudence de l'alinéa 2(d) et des principes fondamentaux de la primauté du droit, créent le fondement nécessaire pour faire du droit de grève une activité significative et protégée par la *LPEA*. Nous concluons par des commentaires sur l'avenir de la grève et de l'organisation syndicale en vertu de la *LPEA*.

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INTRODUCTION

The *Agricultural Employees Protection Act, 2002* (*AEPA*)[1] is an Ontario statute that regulates labour relations for farm workers, who are excluded from unionizing under the *Labour Relations Act, 1995* (*LRA*).[2] The *AEPA* has a fraught history, given its explicit purpose in excluding farm workers—often racialized migrants in Canada—from access to the robust rights and protections afforded through unionization. The *AEPA* was initially created following the Supreme Court of Canada's decision in *Dunmore v Ontario* (*AG*),[3] which held as constitutionally invalid the exclusion of farm workers from access to unionization under the provincial *LRA* without an alternative legislative scheme in place. Since then, the *AEPA* has been subject to multiple constitutional challenges at the Supreme Court of Canada, often following new pronouncements on the scope and content of subsection 2(d) of the *Canadian Charter of Rights and Freedoms* (the *Charter*).

A first challenge to the *AEPA* was laid to rest in the 2011 Supreme Court of Canada decision in *Ontario* (*AG*) *v Fraser*, which found the *AEPA* constitutionally compliant under subsection 2(d) of the *Charter*, which guarantees

* Bethany Hastie is an Assistant Professor at the Peter A Allard School of Law, UBC. Alex Farrant is a JD student at the Peter A Allard School of Law, UBC. The authors are grateful to the editorial board at *Ottawa Law Review*, and external reviewers of this article. This research was supported by the Social Sciences and Humanities Research Council of Canada.

1 SO 2002, c 16 [*AEPA*].

2 SO 1995, c 1, Sched A, s 3 [*LRA*].

3 2001 SCC 94 [*Dunmore*].

freedom of association.[4] Following the Supreme Court of Canada decision in *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*,[5] which found that subsection 2(d) guaranteed a right to a process of collective bargaining, *Fraser* sought to extend this to include a right to particular features of collective bargaining located under the *LRA*, though this was ultimately unsuccessful at the Supreme Court of Canada.

Most recently, in June 2020, the Ontario Agriculture, Food and Rural Affairs Appeals Tribunal (the Tribunal) released its decision in *UFCW v MedReleaf Phase 2*.[6] *MedReleaf* raised further questions about the right to collective bargaining under the *AEPA*,[7] as well as advancing arguments about the nature and scope of the right to strike. This followed the Supreme Court of Canada's 2015 decision in *Saskatchewan Federation of Labour v Saskatchewan* (*SFL*), which found that subsection 2(d) includes a right to strike.[8] The right to strike was the focal point in *MedReleaf Phase 2*, as the legislation at issue, the *AEPA*, is silent on this topic. While the Tribunal's decision in *MedReleaf Phase 2* recognized a right to strike under the *AEPA*, it has left open the possibility that this will be interpreted as a bare right without concomitant protections necessary for workers to confidently assert this right without repercussions.

This article explores the right to strike argument as it unfolded in the *MedReleaf Phase 2* decision and highlights the enduring tensions that exist in articulating and extending labour rights under subsection 2(d) of the *Charter* to non-Wagner models of labour relations. The Wagner model has been the historically dominant approach to labour relations under Canadian law. It requires the formation of a defined bargaining unit to facilitate a formalized collective bargaining process with the employer, and is characterized by the twin elements of majority representation and exclusivity of the bargaining agent.[9] Further hallmarks of the Wagner model include: a duty to bargain in good faith and make all reasonable efforts to

4 2011 SCC 20 at para 118 [*Fraser*].

5 2007 SCC 27 [*Health Services*].

6 2020 ONAFRAAT 8 [*MedReleaf Phase 2*].

7 See *United Food and Commercial Workers International Union v MedReleaf Corp*, 2018 ONAFRAAT 12 [*MedReleaf Phase 1*].

8 2015 SCC 4 at paras 75–76 [*SFL*].

9 This is the model of majority unionism that exists within Canada, as reflected in provincial and federal labour relations statutes. As Doorey notes, this model is "[s]o called because of its origins in the 1935 American *National Labor Relations Act*, 29 USC §§ 151–169 (1935) [*NLRA*], also known as the *Wagner Act*." See David J Doorey, "Graduated Freedom of Association: Worker Voice Beyond the Wagner Model" (2013) 38:2 Queen's LJ 515 [Doorey, "GFA"] at 513, n 2.

reach a collective agreement; the right to strike in the event of a bargaining impasse; and, detailed procedures for arbitration during both negotiation and administration of a collective agreement.[10]

The persistent decline in unionization in Canada has been attributed to both decreasing accessibility to unionization under the traditional Wagner model and changing nature of the labour landscape.[11] The processes required to organize and certify a union generates multiple difficulties for the increasing population of non-standard workers in Canada, given the fragmentation, casualization, and high turnover rate of labour in many industries, such as food services and retail.[12] As a result, non-standard workers are known to face myriad challenges in unionizing, due to both formal exclusion under labour law and practical barriers accessing the relevant mechanisms to unionize under labour law.[13] This has highlighted the need for new labour relations models and statutory approaches to collective workplace representation (CWR) in Canada.

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10 See *Health Services*, *supra* note 5; *Royal Oak Mines Inc v Canada (Labour Relations Board)*, [1996] 1 SCR 369, 133 DLR (4th) 129. See e.g. *LRA*, *supra* note 2, ss 16–44, 110–118.1.

11 Unionization in the private sector in Canada fell from 20% to 16% from 2000 to 2019 and follows a pattern of ongoing decline. See Statistics Canada, "Union Status by Industry", online: <www150.statcan.gc.ca/t1/tbl1/en/cv.action?pid=1410013201#timeframe>. Noted issues in respect of the current legislative regimes for unionization include the majority threshold for certification, the inability of workers in the same workplace to be represented by different unions reflecting their personal interests, and a disjuncture between the framework of the Wagner model and the realities of the modern workforce. See e.g. David Doorey, "Reflecting Back on the Future of Labour law" (2021) 71:2 UTLJ 165 [Doorey, "Reflecting Back"]; Alison Braley-Rattai, "Harnessing the Possibilities of Minority Unionism in Canada" (2013) 38:4 Labor Studies J 321; Roy J Adams, "Bringing Canada's Wagner Act Regime into Compliance with International Human Rights and the *Charter*" (2016) 19:2 CLELJ 365.

12 See e.g. Canada, Federal Labour Standards Review, *Fairness at Work: Federal Labour Standards for the 21st Century*, final report, by Harry W Arthurs (Gatineau, QC: Government of Canada, 2006); Kendra Coulter, "Raising Retail: Organizing Retail Workers in Canada and the United States" (2013) 38:1 Labor Studies J 47; Leah F Vosko, ed, *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal & Kingston: McGill-Queen's University Press, 2006).

13 See e.g. Judy Fudge, "Labour as a 'Fictive Commodity': Radically Reconceptualizing Labour Law" in Guy Davidov & Brian Langille, eds, *The Idea of Labour Law* (Oxford: Oxford University Press, 2011) 120; Judy Fudge, Shae McCrystal & Kamala Sankaran, eds, *Challenging the Legal Boundaries of Work Regulation* (Oxford: Hart Publishing, 2012). For a discussion on and examples of practical barriers in the context of transnational labour law and relations, see Adelle Blackett, "Transnational Labour Law and Collective Autonomy for Marginalized Workers: Reflections on Decent Work for Domestic Workers" in Adelle Blackett & Anne Trebilcock, eds, *Research Handbook on Transnational Labour Law* (Cheltenham, UK: Edward Elgar, 2015) 230.

As the only known non-Wagner labour relations statute to have survived constitutional challenge in Canada to date,[14] the *AEPA* presents fertile ground for examining how subsection 2(d) may operate to extend labour rights under a broader array of regulatory approaches. Today, subsection 2(d) can be considered to protect at least three key activities in the realm of labour relations: (1) protection against employer reprisals for engaging in collective action in the workplace;[15] (2) access to a process of collective bargaining with an employer;[16] and, (3) access to strike activity or dispute resolution to resolve a bargaining impasse.[17] We argue that, despite the many limitations and failures of the *AEPA* as a regulatory framework for extending labour rights and CWR, the protections afforded under subsection 2(d) may nonetheless provide a meaningful foundation for exercising associational rights under this statute. This sets the stage for a richer consideration of regulatory approaches to CWR and labour rights in Canada beyond the Wagner model. However, as we will discuss in this article, attachment to and benchmarking against the Wagner model has, in some ways, stunted progress and limited a robust understanding and application of the full panoply of rights and protections enunciated under subsection 2(d).

While the *MedReleaf* case advanced arguments about both the right to collective bargaining, and the right to strike, our article focuses exclusively on the latter. The right to strike as a protected activity under subsection 2(d) has been recognized much more recently than a right to collective bargaining and was not considered in the original challenge to the *AEPA* in *Fraser*.[18] Further, the silence of the *AEPA* in respect of strike activity invites a more nuanced examination of the scope, content and (potential) power of subsection 2(d) to fill statutory voids in respect of CWR frameworks. Finally, given both the historical and contemporary understandings of the nature, purpose, and function of strike activity, examining its practical

14 The only other identified legislation challenged had created an alternate regime for RCMP members; it was struck down in *Mounted Police Association of Ontario v Canada* (*AG*), 2015 SCC 1 [*MPAO*].

15 *Dunmore*, *supra* note 3.

16 See *British Columbia Teachers' Federation v British Columbia*, 2016 SCC 49; *Health Services*, *supra* note 5; *Fraser*, *supra* note 4; *MPAO*, *supra* note 14.

17 *SFL*, *supra* note 8.

18 The right to strike was first recognized in the Supreme Court of Canada's decision in *SFL*. *Fraser* explicitly considered and responded to the question of whether the *AEPA* extended a right to collective bargaining as protected under s 2(d), although the *MedReleaf Phase 1* decision added further detail and clarity as to how such a right operates under the statute.

availability outside of Wagner-style statutes holds particular value in considering future directions for CWR and labour law in Canada.

We begin, in section I, by reviewing the history and content of the *AEPA* and its previous constitutional challenge in *Fraser* to provide important background and context to the *MedReleaf* case. We describe, in section II, the arguments and analysis concerning the right to strike in the *MedReleaf Phase 2* decision, highlighting how these narrowed the opportunity for a richer examination and interpretation of subsection 2(d) and the *AEPA* by focusing substantially on a comparison with strike regulation and protections as understood under the *LRA*. This tendency to benchmark labour rights against the Wagner model has created enduring challenges for subsection 2(d) and the future of Canadian labour law.[19] We unpack the Tribunal's analysis in greater detail in section III and establish that the Tribunal, perhaps unsurprisingly, failed to add meaning and strength to how a right to strike might operate under the *AEPA*. In section IV, we outline and establish that the language of the *AEPA* itself, coupled with subsection 2(d) jurisprudence and fundamental rule of law principles, create the necessary foundation to make a right to strike a meaningful and protected activity under the *AEPA*. We go onto consider the potential future of the right to strike under the *AEPA* in section V, highlighting possible ramifications regarding a right to strike if agricultural workers are deemed as "essential services", or if the right to strike is otherwise restricted through future legislative action. Finally, we conclude by revisiting the enduring challenges of reliance on Wagner-model labour relations statutes as a benchmark and anchor for interpreting and applying freedom of association under the *AEPA*, and more generally in non-unionized environments.

I. THE *AEPA*: A BRIEF HISTORY

The *AEPA* was created by the Ontario legislature in direct response to the Supreme Court of Canada's decision in *Dunmore*.[20] That decision had found that the exclusion of agricultural workers from the *LRA* in Ontario, without providing an alternative legislative regime for labour organizing, violated subsection 2(d) of the *Charter*, which protects freedom of

19 See e.g. Benjamin J Oliphant "The Nature of the Fundamental Freedoms and the *Sui Generis* Right to Collective Bargaining: The Case of Vulnerable and Precarious Workers" (2018) 21:2 CLELJ 319; Brian Langille & Benjamin Oliphant, "The Legal Structure of Freedom of Association" (2014) 40:1 Queen's LJ 249.

20 *Dunmore*, *supra* note 3.

association.[21] The *AEPA* was, in response to the Supreme Court of Canada's decision in *Dunmore*, explicitly created to exclude farm workers from access to unionization, and in doing so, entrenched their precarity in the Canadian labour landscape. The inability to collectively bargain is inextricable from a historic trend of powerlessness experienced by farm workers attempting to assert and enhance workplace rights, gain control over workplace conditions, and who have faced an overall inaccessibility to justice.[22] The ongoing struggle of farm workers—who are often members of racialized communities, socioeconomically disadvantaged, and quite often migrant and temporary workers—underpinned the factual records in *Dunmore* and *Fraser*, and the inherently exclusionary purpose of the *AEPA* perpetuates longstanding vulnerabilities and "exceptionalism under the law" attached to farm workers in Canada.[23]

Despite being the product of a legislative agenda to deny farm workers a robust set of rights, the *AEPA* provides an opportunity to examine whether and how subsection 2(d) may work to extend meaningful labour

21 *Ibid* at paras 2, 22–48.

22 This is particularly so in the case of temporary and migrant farm workers. See generally Bethany Hastie, "The Inaccessibility of Justice for Migrant Workers: A Capabilities-Based Perspective" (2017) 34:2 Windsor YB Access Just 20. See also Eric Tucker, "Farm Worker Exceptionalism: Past, Present, and the Post-*Fraser* Future" in Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012) 30 at 30–56. Tucker provides a detailed description of the ongoing plight of farm workers in Canada.

23 "Exceptionalism under the law" is a term used to describe the lack of legal and social protections afforded to farm workers as compared to other groups. See Greg Schell, "Farmworker Exceptionalism Under the Law: How the Legal System Contributes to Farmworker Poverty and Powerlessness" in Charles D Thompson, Jr & Melinda F Wiggins, eds, *The Human Cost of Food: Farmworkers' Lives, Labor, and Advocacy* (Austin: University of Texas Press, 2002) 139, cited in Faraday, Fudge & Tucker, *supra*, note 22 at 30. Exceptionalism is manifested in the creation of separate schemes, such as the *AEPA*, as well as express exclusion from general labour relations schemes, as discussed. The reality of exceptionalism is a constellation of thinner workplace and associational rights. In the context of migrant farm workers, there is the additional caveat of one's labour being "unfree" in which terms of employment are tied to a particular employer. This effectively reduces the leverage of migrant workers to negotiate the terms of their employment and impedes their ability to freely navigate the labour market. Concurrently, increased reliance on unfree, migrant labour has hindered the abilities of year-round farm workers to organize. See Faraday, Fudge & Tucker, *supra*, note 22 at 30–42. For a general discussion of unfree labour see also Aziz Choudry & Adrian A Smith, eds, *Unfree Labour? Struggles of Migrant and Immigrant Workers in Canada* (Oakland, CA: PM Press, 2016). For a more specific discussion of unfree labour in the context of seasonal and agricultural workers see Mark Thomas, "Producing and Contesting 'Unfree Labor' Through the Seasonal Agricultural Worker Program" in Choudry & Smith, *ibid* at 21–36.

rights to non-Wagnerian labour relations schemes. As a labour statute, the *AEPA* is firmly outside the Wagner model. First, it allows for the possibility of multiple employee associations, not a single and exclusive bargaining agent.[24] The legislation also does not prescribe any particular method or requirements to form and recognize an employee association in the workplace. An employees' association, under the *AEPA*, is simply defined as: "an association of employees formed for the purpose of acting in concert."[25] All employees operating under the *AEPA* have rights to: "form or join an employees' association"; "participate in the lawful activities of an employees' association"; "assemble"; "make representations to their employers through an employees' association"; and, "protection against interference, coercion and discrimination in the exercise of their rights."[26] The *AEPA* further sets out rules and regulations governing the right to make representations to an employer,[27] protections for workers operating under the *AEPA*,[28] and a complaints process for alleged violations under the *AEPA*.[29] The *AEPA* designates the Tribunal to hear complaints.[30]

We do not suggest that the *AEPA* provides a truly meaningful or robust alternative to the Wagner model of labour relations, nor do we ignore the context which gave rise to its enactment. The *AEPA* was unmistakably intended to provide farm workers with no more than the minimum requirements of a constitutionally compliant scheme, pursuant to the decision in *Dunmore*. The Minister of Agriculture and Food, at the time the *AEPA* was introduced, expressly claimed that the legislation was not designed to extend collective bargaining rights to farm workers.[31] In addition, the dispute resolution body—the Tribunal—is not equipped with industrial relations experts that are likely needed to navigate the particularly complex and sensitive relationships between farm workers and their employers.

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24 See Bethany Hastie, "(Re)Discovering the Promise of *Fraser*? Labour Pluralism and Freedom of Association" (2021) 66 McGill LJ [forthcoming in 2021] [Hastie, "(Re)Discovering"]; Doorey, "Reflecting Back", *supra* note 11 at 189; Doorey, "GFA", *supra* note 9 at 537. See also the express acknowledgement that the *AEPA* may recognize a plurality of employee associations in *MedReleaf phase 1*, *supra* note 7.

25 *AEPA*, *supra* note 1, s 2(1).

26 *Ibid*, s 1(2).

27 *Ibid*, ss 5–6.

28 *Ibid*, ss 8–10.

29 *Ibid*, s 11.

30 *Ibid*, ss 2(1), 11.

31 See Ontario, Legislative Assembly, *Official Report of Debates* (*Hansard*), No 46B (22 October 2002) at 2339, cited in Faraday, Fudge & Tucker, *supra* note 22. See also *Fraser*, *supra* note 4 at para 332, Abella J.

The Ontario Legislature's decision to deprive farm workers with access to specialists where labour relations breakdown is further demonstrative of their intentions in enacting the *AEPA*. Nonetheless, as we will explore in subsequent sections, the development of subsection 2(d) jurisprudence and protections do some work to overcome these intended limitations, creating the foundation for an extension of more meaningful labour rights, despite the intended limitations of the statutory language.

The *AEPA* was first challenged in *Fraser*.[32] That case had followed on the heels of the Supreme Court of Canada's decision in *Health Services*, which found that subsection 2(d) guaranteed a right to a process of collective bargaining.[33] As such, the arguments in *Fraser* revolved substantially around whether subsection 2(d) guaranteed a right to the specific mode of collective bargaining enshrined in the *LRA*. Under the *AEPA*, agricultural employees have a right to "make representations" to an employer.[34] As such, the respondents in *Fraser* argued that the *AEPA* violated subsection 2(d) by not requiring a process to "bargain collectively."[35] The respondents set out their argument along three axes: "(1) statutory protection for majoritarian exclusivity, meaning that each bargaining unit is represented by a single bargaining agent; (2) an *LRA*-type statutory mechanism to resolve bargaining impasses and interpret collective agreements; and (3) a statutory duty to bargain in good faith."[36]

The majority of the Supreme Court of Canada in *Fraser* affirmed that *Health Services* had enshrined a right to *a process* of collective bargaining, but not access to a particular model.[37] As such, the respondents' first argument, that subsection 2(d) essentially required access to a Wagner model of labour relations, failed. The majority also read in a statutory duty to bargain in good faith under the *AEPA* in order to find it constitutionally compliant.[38] This, in turn, was adopted and elaborated upon by the Tribunal in the *United Food and Commercial Workers International Union v MedReleaf Corp* (*MedReleaf Phase 1*) decision.[39] Finally, as regarded the respondents' argument that subsection 2(d) required access to an "*LRA*-type statutory mechanism to resolve bargaining impasses and interpret collective

32 *Fraser*, *supra* note 4.
33 *Health Services*, *supra* note 5 at para 39.
34 *AEPA*, *supra* note 1, s 1(2).
35 *Fraser*, *supra* note 4 at para 12.
36 *Ibid* at para 7.
37 *Ibid* at para 299.
38 *Ibid* at paras 34–43, 98–107.
39 *MedReleaf Phase 1*, *supra* note 7.

agreements," the majority in *Fraser* found that the respondents had not yet sufficiently "tested" the complaints process set up under the *AEPA*, and that their argument on that basis was thus premature.[40]

Presumably, the reference to an "*LRA*-type statutory mechanism"[41] by the respondents in *Fraser* included statutory regulation for strike activity, interest arbitration or grievance processes, and complaints processes to an administrative tribunal or court. Each of these are components of the *LRA* and general features of unionized workplaces in Canada. The *AEPA* explicitly provides only for a complaints process to the Tribunal,[42] and does not expressly permit or regulate strike activity or other dispute resolution mechanisms, such as arbitration. At the time *Fraser* was decided, a right to strike had not been recognized under subsection 2(d). When a right to strike was recognized in the 2015 *SFL* decision,[43] this created a foundation for a new constitutional challenge to the *AEPA*.

The decision in *Fraser* has been subject to ongoing debate and critique concerning whether and to what extent subsection 2(d) meaningfully protects labour organizing outside of unionization, and whether it ought to constitutionalize the Wagner model of labour relations.[44] On one side of the debate, critics have pointed out that increasing constitutional space for alternative forms of collective representation will weaken the foothold of organized labour in Canada. These critics further explain that new and alternative models will also fail to provide workers organizing under them with the full scope of rights and protections that the Wagner model necessarily provides.[45] Conversely, some commentators have noted in response to *Fraser* that expanded constitutional space for alternative CWR could provide workers—especially those workers that have traditionally been formally excluded from, or otherwise unable to access, the benefits of

40 *Fraser*, *supra* note 4 at paras 7, 108–113.

41 *Ibid* at para 7.

42 *AEPA*, *supra* note 1, s 11.

43 *SFL*, *supra* note 8.

44 See e.g. Hastie, "(Re)Discovering", *supra* note 24; Steven Barrett, "The Supreme Court of Canada's Decision in *Fraser*: Stepping Forward, Backward or Sideways? (2012) 16 CLELJ 331; Judy Fudge, "Constitutional Rights, Collective Bargaining and the Supreme Court of Canada: Retreat and Reversal in the *Fraser* Case" (2012) 41:1 Indus LJ 1; Alison Braley, "'I Will Not Give You a Penny More Than You Deserve': *Ontario v Fraser* and the (Uncertain) Right to Collectively Bargain in Canada (2011) 57:2 McGill LJ 351; Brad Walchuk, "The Pitfalls of Embracing Minority Unionism" (2016) 6:3 J of Workplace Rights 1; Doorey, "GFA", *supra* note 9.

45 Barrett, *supra* note 44; Walchuk, *supra* note 44.

the Wagner model in Canada—with a practical means of organizing and advancing their rights in the workplace.[46]

Despite ongoing debates over the normative implications of *Fraser* and subsection 2(d), it did clearly extend the reach of subsection 2(d) beyond the Wagner model, and specifically, to the *AEPA*. Moreover, the holdings in *Fraser*, especially in relation to the implied duty to bargain in good faith, were endorsed and built upon in the Tribunal's decision in *MedReleaf Phase 1*,[47] establishing some promise, if modest, for subsection 2(d) to craft a more robust framework for labour organizing under the *AEPA*.[48] Thus, despite its history and intended purpose of excluding farm workers from access to labour rights, the *AEPA* may, in fact, extend constitutionally protected labour rights to farm workers in Ontario when it is read in light of the contemporary jurisprudence on freedom of association.[49]

II. *UFCW V MEDRELEAF*: A NEW CONSTITUTIONAL CHALLENGE TO THE *AEPA*

The *MedReleaf* case arises from union organizing activities by MedReleaf Corp. employees in 2014. The dismissal of senior level employees led a

46 See Doorey, "GFA", *supra* note 9 at 531–538. See also Roy Adams "Bewilderment and Beyond: A Comment on the Fraser Case" (2012) 16:2 CLELJ 313 [Adams, "Bewilderment"]. For a further examination of the aftermath of the *Fraser* decision and its implications for s 2(d), see Hastie, "(Re)Discovering", *supra* note 24.

47 See the Tribunal's analysis for a list of six requirements for the duty to bargain in good faith to have any relevance under s 5 of the *APEA*: *MedReleaf Phase 1*, *supra* note 7 at 13.

48 For a more detailed analysis, please see Hastie, "(Re)Discovering", *supra* note 24.

49 Our proposition that the *AEPA* may provide a case study from which to consider experimentation with other forms of collective bargaining is akin to earlier observations of others, such as David Doorey and Roy Adams. Those authors note that, while the *AEPA* provides a thinner set of statutory rights than the Wagner model, the *AEPA* contemplates a plurality of employee associations and may foster experimentation with at least two forms of collective representation that do not currently exist in Canada: non-statutory employee representation and minority trade union representation. This is because the *AEPA*, as discussed, does not "rely on the twin principles of majoritarianism and exclusivity" and does not require that an employee association be a recognized trade union. Workers under the *AEPA* are therefore ostensibly entitled to form their own associations or gain representation by multiple, existing unions, and a single employer could be required to receive and consider multiple employee submissions in good faith. From this perspective, the *AEPA* offers workers organizing under it the kind of protection provided under s 7 of the United States' *National Labour Relations Act of 1935*, 29 U.S.C §157 (2021), which protects workers' rights to act in concert, in broad terms, without formal union representation. See Doorey, "GFA", *supra* note 9 at 525, 536–537; Adams, "Bewilderment", *supra* note 46; Doorey, "Reflecting Back", *supra* note 11 at 189.

group of employees at MedReleaf Corp. to seek representation by the United Food and Commercial Workers International Union (UFCW) to provide greater job security.[50] The UFCW attempted a failed certification drive at the Ontario Labour Relations Board (OLRB).[51] MedReleaf Corp. first challenged the jurisdiction of the OLRB, claiming that the employees were farm workers subject to the *AEPA*.[52] The OLRB, notwithstanding the jurisdictional challenge, allowed the UFCW to conduct a representational vote.[53] The UFCW failed to secure a majority of votes but alleged unfair labour practices in a submission to the OLRB.[54] The OLRB, in turn, decided that it did not have jurisdiction and the employees of MedReleaf Corp. were, in fact, subject to the *AEPA*.[55] During this period, several employees were dismissed from MedReleaf Corp.[56] The UFCW, representing three dismissed employees and one who departed following the organizing vote, brought a complaint to the Tribunal under section 11 of the *AEPA*, alleging unfair labour practices related to the employee dismissals, and launched a constitutional challenge to the *AEPA* on the basis of the right to strike.[57] The issues were bifurcated, and the first issue was settled in an initial decision released on August 29, 2018.[58] The decision addressing the constitutional challenge concerning the right to strike was subsequently rendered on June 17, 2020.

The constitutional challenge to the *AEPA* centred on two related issues: first, whether the absence of express regulation of strike activity violated subsection 2(d); and second, whether the absence of statutory job protections for engaging in strike activity violated subsection 2(d). The Tribunal concluded the *AEPA* was constitutional since it "does not prohibit or preclude employees from exercising their common law freedom to collectively withdraw services from their employer in pursuit of negotiating employment terms and conditions."[59] The Tribunal's analysis rested on three primary findings: first, that subsequent constitutional jurisprudence

50 *MedReleaf Phase 1*, *supra* note 7 at 4–5.

51 *Ibid.*

52 *Ibid* at 15–16. The UFCW also sought certification by the Canadian Industrial Relations Board, which determined it lacked jurisdiction over the matter following a challenge from MedReleaf Corp.

53 *Ibid* at 16.

54 *Ibid.*

55 *Ibid.*

56 *Ibid* at 17.

57 *Ibid* at 3–4.

58 *Ibid* at 3.

59 *MedReleaf Phase 2*, *supra* note 6 at para 134.

affirmed the Supreme Court of Canada's ruling in *Fraser* that subsection 2(d) does not guarantee access to a particular model of collective bargaining or labour relations; second, that the ruling in *SFL* holds that subsection 2(d) will be infringed where a statute imposes an express prohibition of strike activity without an alternative dispute resolution mechanism; and, third, that a challenge to the *AEPA* on this basis was premature, as no attempts to strike had been made by workers at MedReleaf Corp.

Turning first to the interpretation of subsequent jurisprudence, the Tribunal extended the interpretation of subsection 2(d) as open-ended and non-committal to a particular model of labour relations to find that legislation was not required to expressly regulate strike activity, nor to explicitly provide for particular remedies or protections in that regard. The Tribunal explained that the Supreme Court of Canada's 2015 decision in *Mounted Police Association of Ontario v Canada* (*AG*) (*MPAO*) reaffirmed the holding in *Fraser* that subsection 2(d) "confers the right to a process of collective bargaining, understood as meaningful association in pursuit of workplace goals, including the right of employees joining together and making collective representations to the employer, who must consider the representations in good faith."[60] This only provides the right to a process, not to a particular model of labour relations. This line of analysis led the Tribunal to further conclude that a legislative scheme that does not expressly contain a statutory right to strike, or otherwise regulate strike activity, is not unconstitutional,[61] those being specific components of *LRA*-style statutes, and not necessarily mandated under subsection 2(d).

Turning second to the issue of the right to strike in the context of the *AEPA*, the Tribunal held that *SFL* confirms that legislation which prohibits strike activity without an alternative dispute resolution mechanism infringes subsection 2(d) of the *Charter*.[62] On this interpretation, legislation that is silent about strike activity could be read as presumptively permitting it, which the Tribunal determined in relation to the *AEPA*: "while the *AEPA* is silent about the right to strike, such silence does not undermine its constitutional validity."[63] Linking this back to the first point of analysis regarding the intentionally plural approach to collective bargaining under subsection 2(d), the Tribunal reminded that the *AEPA* does not adopt a parallel

60 *Ibid* at para 54, citing *MPAO*, *supra* note 14 at para 45.

61 *MedReleaf Phase 2*, *supra* note 6 at para 92.

62 *Ibid* at para 94.

63 *Ibid* at para 95.

legal framework to the *LRA*, nor is it required to do so. Since employees are free to withdraw their services under the *AEPA*, subsection 2(d) is not infringed.[64]

The UFCW argued that a right to strike, absent statutory job protection, as is available under the *LRA*, amounts to a "right to collectively quit."[65] The Tribunal found, however, that the jurisprudence interpreting subsection 2(d) did not support a constitutional requirement for statutory job protection in order to give effect to the right to strike.[66] Rather, the Tribunal determined that the threat of strike activity was, itself, sufficient. The Tribunal found that MedReleaf employees exercised significant economic leverage over their employer "arising from [the nature of working with the marijuana crop] and the limited availability of a pool of readily trained replacement employees that could be hired in a timely fashion."[67]

Finally, the Tribunal concluded, as the Supreme Court of Canada had in *Fraser,* that the constitutional challenge was premature as the UFCW had not fully tested the protections offered by the *AEPA*.[68] The Tribunal therefore declined to discuss whether a failure to take proactive steps to reach an agreement or job action against employees for exercising their right to strike would engage the remedies available to the Tribunal under subsection 11(6) of the *AEPA*, such as ordering reinstatement or compensation.[69] In sum, the Tribunal expressly defined the scope of the right to strike under the *AEPA* as employees exercising the common law freedom to strike by collectively withdrawing their services.

Much of the *MedReleaf Phase 2* decision regarding the constitutional challenge appears to have been shaped by a comparison to the *LRA*, both in arguing for express statutory regulation of the right to strike, and for specific, statutorily-guaranteed job protection in the context of a strike. As the next section unpacks, this "tunnel vision" and tendency to benchmark against the *LRA* may operate in a way that is counterproductive to a richer and more nuanced understanding of subsection 2(d) and its application to non-Wagnerian statutory models for labour relations, including the *AEPA*.

64 *Ibid* at paras 96, 134.
65 *Ibid* at para 96.
66 *Ibid* at paras 96–97.
67 *Ibid* at para 100.
68 *Ibid* at paras 104, 108.
69 *Ibid* at para 106.

III. UNPACKING THE "RIGHT TO STRIKE" IN *MEDRELEAF*

Just as the constitutional challenge to the *AEPA* in *Fraser* led to clarification about the scope and content of a right to collective bargaining under subsection 2(d), the current *MedReleaf Phase 2* case held potential to add important insight into how the right to strike operates outside of the *LRA* and in relation to other protections and rights extended under subsection 2(d). However, the Tribunal's decision, and arguments of the UFCW as they were framed in that decision, appear to have relied substantially on a comparison with the *LRA*, which thwarted an important opportunity to bring much-needed clarity to this issue.[70] This tendency, in both litigation and scholarship, to "benchmark" against the Wagner model, may operate to limit the scope of creative thinking and hinder substantive progress in conceptualizing subsection 2(d) in a robust and meaningful way beyond the Wagner model, and especially under the *AEPA*.[71] As a consequence, in *MedReleaf Phase 2*, this approach resulted in extension of only a bare right to strike, reflective of now abandoned formalist approaches to interpreting subsection 2(d).[72]

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70 As the Tribunal explained, it was the "singular focus of the UFCW on the Wagner Act model of collective bargaining that is the UFCW's downfall, not the *AEPA*'s…[and] the UFCW has failed to look outside the traditional Wagner Act collective bargaining box and embrace alternative models to represent agricultural workers who desire such assistance": *ibid* at paras 112–113.

71 On this point, see Hastie, "(Re)Discovering", *supra* note 24. David Doorey also offers words of caution against using constitutional litigation to embed features of the Wagner Model within the framework of s 2(d): see David J Doorey, "Clean Slate and the Wagner Model: Comparative Labor Law and a New Plurality" (2020) 24:1 Employee Rts & Employment Pol'y J 95 [Doorey, "Clean Slate"] at 105–106. This litigation strategy has resulted in, at best for those who have adopted it, a mixed response from the courts. For example, the constitutional right to strike was arguably born of this strategy, yet the decision in *Fraser* serves as a forceful statement from the Supreme Court of Canada that asking the courts to constitutionalize specific features of the Wagner model is unlikely to be a fruitful means of realizing constitutional labour rights. By extension, benchmarking non-Wagnerian legislation, such as the *AEPA*, against the Wagner Model in litigation, is likely to be equally unprofitable. Scholars such as Judy Fudge further remind us that the Wagner model continues to be less effective, and that seeking to constitutionalize the Wagner model through court battles is unlikely to "turn the economic and political tide that has undermined the basis for transforming these rights into job security and improved wages for working people": See Judy Fudge, "Conceptualizing Collective Bargaining Under the *Charter*: The Enduring Problem of Substantive Equality," (2008) 42 SCLR 213 at 246. See also in Doorey, "Clean Slate", *ibid* at 105.

72 The original "trilogy" under s 2(d) in the late 1980s is emblematic of a formalist approach that conferred what critics have labelled as "bare" rights, that is, rights to do collectively what one could do individually, without related protections or supports to make the

In this section, we critically analyze core aspects of the *MedReleaf Phase 2* decision that highlight how the Tribunal's analysis extends only a bare right to strike, on its face, contrary to recent direction provided by the Supreme Court of Canada and the arc of subsection 2(d) jurisprudence towards a meaningful and more substantive interpretation of freedom of association. This sets the stage for the next section (IV), where we demonstrate how existing constitutional jurisprudence, coupled with the language of the *AEPA* itself, is capable of extending necessary protections to provide workers with meaningful access to their rights under subsection 2(d).

At the heart of the Tribunal's analysis in this decision was, first, whether the *AEPA* had to give positive effect to, or regulation of, strike activity in order to pass constitutional muster, and second, whether subsidiary protections were required under legislation in order to give effect to the right to strike.[73] The Tribunal determined that, absent express prohibition, the legislation would be read as permitting strike activity.[74] Since there was no express prohibition against striking under the *AEPA*, MedReleaf employees were free to strike: to withdraw their services in order to exert economic leverage on their employer in negotiating terms of employment.[75] The Tribunal's finding that workers are free to exercise their right to strike even where legislation is silent on the matter is consistent with the general ruling of the Supreme Court of Canada in *SFL*.[76] As a result, workers operating under the *AEPA* are protected from "vertical" interference with their right to strike, *vis-à-vis* legislation or government activity that expressly prohibits a withdrawal of labour.[77] This is, in fact, a promising outcome in clarifying that the right to strike, as guaranteed under subsection 2(d),

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exercise of such rights a viable or meaningful option. See e.g. Jason M Harman, "2(d) as Harbinger of Substantive Justice: Toward the Creation of a Meaningful Freedom of Association" (2018) 39 Windsor Rev Legal Soc Issues 35. See also Bernard Adell, "Regulating Strikes in Essential (and Other) Services after the New Trilogy" (2013) 17:2 CLELJ 413 at 442–446; Brian Langille, "The Condescending Constitution (Or, the Purpose of Freedom of Association Is Freedom of Association)" (2016) 19:2 CLELJ 335 at 351 [Langille, "Condescending Constitution"].

73 Subsidiary protections referring to the kinds of legal protections that would be necessary to "support" the ability for workers to exercise a right to strike, such as protection against employer reprisal, or, as the UFCW was arguing for in *MedReleaf*, protection against termination and a right to reinstatement following a strike.

74 *MedReleaf Phase 2*, *supra* note 6 at paras 94–96.

75 *Ibid* at para 96.

76 *SFL*, *supra* note 8 at para 3.

77 Langille, "Condescending Constitution", *supra* note 72 at 351. See also Langille & Oliphant, *supra* note 19.

does extend beyond unionized environments, and presumptively operates in a plurality of labour relations contexts.

Despite the recognition of a right to strike, the Tribunal failed to clarify whether and how subsidiary protections operate to make that right a meaningful option for workers to exercise. In doing so, the Tribunal legitimized skepticism about its ability to engage with labour and constitutional issues with sufficient expertise, sensitivity, and attentiveness to context.[78] The UFCW had argued that, absent subsidiary protections, a right to strike was effectively a "right to collectively quit."[79] The language of the decision indicates that the UFCW was arguing for the same statutory job protection rights that are explicitly extended to workers under the *LRA*. These provisions guarantee job security and reinstatement for workers who go on strike, as it is understood and regulated under that statute.[80] The Tribunal rejected the arguments concerning subsidiary protections because it determined that it was without the necessary factual foundation to decide such a question.[81] It is a well-established rule that constitutional questions should only be decided incrementally and based on the factual matrix before a court or tribunal.[82] However, at issue in this decision was whether the *AEPA* was constitutional given the absence of express provisions pertaining to the right to strike. This context, and the particular arguments raised concerning subsidiary protections, invited the Tribunal to clarify the existing constitutional and statutory foundation on which the right to strike may be exercised under the *AEPA*.

The Tribunal's analysis regarding subsidiary protections focused substantially on demonstrating that strike activity itself provides workers with sufficient leverage and power against their employer. It therefore implied that statutory job protection is necessary only to supplement bargaining power in the labour relations context. It would be a mischaracterization

78 Skepticism about the Tribunal's ability to engage fully with labour issues and serve as a meaningful dispute resolution mechanism appears to have informed the UFCW's decision to challenge the *AEPA*'s validity in *Fraser* before having "fully explored and tested" its processes: *Fraser*, *supra* note 4 at para 109. This skepticism also flows from the context in which the *AEPA*, and the Tribunal, were created. See e.g. Braley, *supra* note 44 at 369–371; Doorey, "GFA", *supra* note 9 at 537–538.

79 *MedReleaf Phase 2*, *supra* note 6 at para 96.

80 *LRA*, *supra* note 2, ss 43(14)(a)–(b).

81 *MedReleaf Phase 2*, *supra* note 6 at para 104.

82 Paul Cavalluzzo wisely reminds us of this principle in critiquing decisions relating to *Charter* rights. See Paul Cavalluzzo, "The Impact of *Saskatchewan Federation of Labour* on Future Constitutional Challenges to Restrictions on the Right to Strike" (2016) 19:2 CLELJ 463 at 470 [Cavalluzzo, "Impact of *Saskatchewan Federation of Labour*"].

of subsection 2(d), *SFL*, and the right to strike to suggest that protections against employer reprisal for engaging in associational activity are surrendered where leverage exists as a product of strike activity, yet one might read the Tribunal's decision in this light. Essentially, the Tribunal indicated that once striking, or the threat of it, might achieve its intended purpose—to increase employee power and promote industrial peace through (the threat of) economic sanction—it would no longer require the kind of protections that make its exercise a viable option at the outset.[83] However, subsidiary protections do not operate to increase the bargaining power employees can exert under a strike but operate as a pre-condition to make striking a viable option and tool for workers to use to exert power in the context of collective bargaining. In other words, subsidiary protections function along the axis of "diagonal" application of the *Charter* to enable the effective exercise of the rights guaranteed under subsection 2(d).[84]

Diagonal application of the *Charter* looks to whether there exists sufficient protections to ensure meaningful exercise of the right in question, such as derivative rights that may impose correlative duties on third parties like employers,[85] or subsidiary protections as we have described them. An infringement of constitutional rights may thus arise from a failure to create sufficient conditions within which to exercise the right.[86] The Supreme Court of Canada has paid particular attention to diagonal application of the *Charter* in cases regarding subsection 2(d) to ensure associational activities can be exercised meaningfully in the labour relations context. For example, this logic underscores the decision in *Fraser* in which the Court read-in an implied duty to consider employee representations in good faith.[87] This logic was further used to ground the Court's determination of a right to strike as an "indispensable" component of the right to collective bargaining.[88] The Court has recognized, through these cases, that for labour statutes to be constitutional, more than an absence of interference with protected associational activities may be required.

The underlying concern that likely grounded the UFCW's argument regarding statutory job protection was the need to ensure sufficient conditions to enable workers to practically access the right to strike in

83 *SFL*, *supra* note 8 at para 48. See also *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8 at para 25.

84 Langille, "Condescending Constitution", *supra* note 72 at 351.

85 *Ibid.*

86 *Ibid.*

87 *Fraser*, *supra* note 4 at para 37. See also *Health Services*, *supra* note 5 at para 90.

88 *SFL*, *supra* note 8 at para 3.

a meaningful and effective manner under the *AEPA*. In other words, the argument was likely animated by a concern about diagonal application of the *Charter* under the *AEPA*. Without protection against termination, for example, a worker has a strong disincentive to engage in a strike, even if they are ostensibly entitled to do so. Although the Tribunal notes in the *MedReleaf Phase 2* decision that the workers at MedReleaf Corp. were "skilled, trained, received good wages, benefits, shares in the corporation and worked in a highly regulated and inspected facility,"[89] this does not necessarily mean that they do not suffer from any economic disadvantage, nor that they would not experience serious disincentives to undertake a strike absent any guarantee of job security. These workers may operate in a limited labour market with short supply; they may have significant debts or financial obligations that would make a gap or disruption in income unmanageable. There are, in short, many reasons why the absence of protection for employment would make even "secure" or "economically advantaged" workers hesitant to engage in strike activity in the absence of subsidiary protections under law. Moreover, although we acknowledge that the Tribunal must decide questions of law with regards to the factual matrix before it, the reality is that many, if not most, farm workers in the province possess significantly less security than the workers at MedReleaf Corp. This means that a bare right to strike, without any guarantee of protections for employment, will be even less viable for a substantial proportion of farm workers in Ontario.

Thus, despite the economic leverage that agricultural workers may be able to exert against their employer through the threat of strike activity, a point the Tribunal emphasized in its decision,[90] such leverage must be balanced against the consequences workers may face or perceive that they may face if they engage in strike activity. The potential leverage or power workers might hold may, in fact, be neutralized due to their individual economic concerns or circumstances, even for workers in higher paying and more secure occupations or sectors within the agricultural industry. A bare right to strike fails to account for this wider context in which rights are exercised, and for the supports that are necessary to allow for the exercise of rights. This illustrates why subsidiary protections, extended through diagonal application of the *Charter*, are necessary to give effect to the right to strike in all labour contexts. Further, the underlying constitutional

89 *MedReleaf Phase 2*, *supra* note 6 at para 25.

90 *Ibid* at paras 96, 100.

jurisprudence of subsection 2(d) not only establishes a need for some form of protection, but also a legal basis for its existence and application to the *AEPA*.

IV. BUILDING A MEANINGFUL RIGHT TO STRIKE UNDER THE *AEPA*: A ROADMAP

As the previous section demonstrated, the *MedReleaf Phase 2* decision failed to clarify the scope and content of existing subsidiary protections that may be available to support a robust and meaningful interpretation of the right to strike in that context. As such, it could be interpreted as extending only a bare right to strike: a right which provides workers only with common law protections against incurring criminal or tortious liability for striking, or from being ordered back to work.[91] The existence of only a bare right to strike prompts concerns about whether and how that right functions to advance the interests of workers, particularly those in vulnerable and precarious employment.[92] As we discussed in the previous section, the right to strike, conceived of as a bare right, is insufficient to meet its purpose in this regard. Rather, as the Supreme Court of Canada has consistently articulated, derivative rights and correlative duties are often necessary to realize the full guarantee of freedom of association in the labour relations context,[93] a point of analysis the Tribunal failed to engage with in *MedReleaf Phase 2*.

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91 *Ibid* at para 134.

92 Adell, *supra* note 72 at 444. Although there are many instances, both historically and contemporarily, where workers may engage in "illegal" strikes or strike-like activities without the benefit of subsidiary protection, this article and section focuses on the question of whether protected strike activity ought to include subsidiary protections under s 2(d), particularly as it relates to interpreting the core elements of a labour statute and assessing these in relation to minimum constitutional compliance. While workers may otherwise choose to engage in strike-like activities absent subsidiary protections, a lack of protection for strike-like activities, particularly where that activity is contemplated in the context of negotiations or bargaining with the employer, may produce significant disincentives and deterrents for employees to make use of that right.

93 Alan Bogg explains how derivative rights and correlative duties are often necessary for citizens to realize the full guarantee of their freedoms. As Bogg notes, the Supreme Court of Canada has recognized this truth in recent freedom of association jurisprudence. Moreover, the majority in *Fraser* expressly rejected a hardline distinction between freedoms and rights to find that freedom of association necessitates the creation of derivative rights. See Alan Bogg, "The Constitution of Capabilities: The Case of Freedom of Association" in Brian Langille, ed, *The Capability Approach to Labour Law* (Oxford, UK: Oxford University Press, 2019) 241–267; *Fraser*, *supra* note 4 at paras 67–73.

We argue that existing constitutional jurisprudence, coupled with the language of the *AEPA* itself and foundational rule of law principles, work together to offer the very kind of protection needed to give meaningful effect to the right to strike under the *AEPA*, specifically protecting workers against employer reprisals in this context. In this section, we take up the challenge of constructing that argument; we establish how protections against employer reprisals, properly understood in their existing constitutional and statutory contexts, could meaningfully protect workers who may engage in strike activity under the *AEPA*.

The Supreme Court of Canada's decision in *Dunmore* is most instructive in providing a constitutional foundation for the claim that the right to strike requires, and indeed already includes, subsidiary protections similar in purpose, if not in substance, to the UFCW's argument in *MedReleaf Phase 2*. *Dunmore* centred on a challenge under subsection 2(d) to the exclusion of agricultural workers from the *LRA*. In finding that subsection 2(d) required access to some legislative scheme for labour organizing for agricultural workers, the majority of the Court determined that subsection 2(d) protects workers' rights to organize "without penalty or reprisal," and that "without the necessary protection, the freedom to organize could amount 'to no more than the freedom to suffer serious adverse legal and economic consequences.'"[94] Indeed, the same can be said regarding the right to strike. A right to strike, without any protection against penalty or reprisal, would amount to no more than the freedom to suffer serious adverse consequences, making it akin to a "right to quit" as the UFCW had argued in *MedReleaf Phase 2*. As such, *Dunmore* can be understood as recognizing the right to engage in associational activity, which now includes strike activity,[95] free from employer reprisal or penalty for doing so.

The *AEPA* itself also contains clear language concerning protections against employer reprisal or penalty for engaging in associational activity or for exercising rights under it. Section 8 of the *AEPA* expressly protects workers against employer interference with "the formation, selection or administration of an employees' association, the representation of employees by an employees' association or the lawful activities of an employees' association."[96] Section 9 protects employees from employer reprisals for

94 *Dunmore*, *supra* note 3 at para 22, citing HW Arthurs et al, *Labour Law and Industrial Relations in Canada*, 4th ed (Deventer, the Netherlands: Kluwer Publishing, 1993) at 431. See *Reference Re Public Service Employee Relations Act*, [1987] 1 SCR 313 at 391, 38 DLR (4th) 161.

95 *SFL*, *supra* note 8 at paras 3, 77.

96 *AEPA*, supra note 1, s 8.

engaging in associational activity and for exercising their rights under the *AEPA*, expressly prohibiting employers from taking various actions, such as threatening dismissal.[97] Section 10 further protects workers from threats and coercion meant to induce employees into joining or refraining from joining an employer or employee organization.[98] Together, and complementary to the decision in *Dunmore*, sections 8–10 of the *AEPA* expressly provide a statutory foundation for protections against penalty or reprisal by an employer for employees exercising their rights under the *AEPA*, which the Tribunal found does include a right to strike. Reprisal or penalty is defined under the *AEPA* as including threat of, or actual, termination of an employee, as well as discrimination against an employee regarding the terms and conditions of their employment.[99]

In addition to offering substantive protection against employer reprisals, the *AEPA* provides a clear pathway for complaints and broad remedial authority to the Tribunal for alleged violations under the *AEPA*. Section 11 allows complainants to bring claims to the Tribunal for alleged contraventions under the *AEPA*.[100] This comports with general rule of law principles that identify access to courts and to a legal remedy as necessary.[101] Moreover, as is characteristic of administrative tribunals, the *AEPA* grants broad remedial authority to the Tribunal. Such authority includes: allowing the Tribunal to make orders compelling a person to do, or refrain from doing, something in respect of an *AEPA* contravention;[102] to make orders to a person or organization to cease doing or rectify the acts complained of;[103] or to order reinstatement in employment, to compensate the complainant, or to provide other employment benefits.[104] As such, while it would be beyond the Tribunal's proper role and function to read-in a guarantee of reinstatement into the *AEPA* itself,[105] it is expressly within the Tribunal's remedial powers to order reinstatement where a worker has been dismissed for engaging in strike activity. Further, where dismissal

97 *Ibid*, ss 9(a)–(c).

98 *Ibid*, s 10.

99 *Ibid*, ss 8–9.

100 *Ibid*, s 11.

101 See Mary Liston, "Governments in Miniature: The Rule of Law in the Administrative State" in Lorne Sossin & Colleen Flood, eds, *Administrative Law in Context*, 3rd ed (Toronto: Emond Montgomery, 2013) 39 at 61.

102 *AEPA*, *supra* note 1, s 11(5).

103 *Ibid*, ss 11(6)(a)–(b).

104 *Ibid*, s 11(6)(c).

105 This being the proper role of the legislature under Canada's doctrine of the separation of powers.

was established to have been made in reprisal for exercising the right to strike, reinstatement would be the logical and natural remedy to order, absent extenuating circumstances, such as business closure.

However, while we have established in the preceding paragraphs that the *APEA*, coupled with the subsection 2(d) jurisprudence and rule of law principles, expressly provides protection against employer reprisal, and sufficient remedial authority for the Tribunal to properly redress any reprisal in that regard, substantive access to and confidence in these protections are far from certain. The Tribunal's failure to engage with or comment on this issue in their decision may also operate to entrench a lack of confidence in and existing negative perceptions held about the Tribunal's competency and bias. Moreover, the silence of the Tribunal on this issue leaves farm workers in a doubly precarious position. Given the history of the *AEPA*, the already precarious status of many farm workers in Ontario, the remaining uncertainty about the scope of available protections, and the significant burden of litigation, this creates an unreasonable, but possibly intended, deterrent in exercising rights under the *AEPA*.

The jurisprudence under subsection 2(d), particularly the holding in *Dunmore* that subsection 2(d) must protect workers' ability to engage in associational activity free from employer reprisal, along with the specific prohibitions against employer reprisal activity under sections 8–10 of the *AEPA*, create a legal foundation for protection against termination and other punitive actions taken in response to strike activity under the *AEPA*. Further, the remedial powers of the Tribunal expressly include reinstatement as an available remedy under the *AEPA*, which it would have a compelling reason to use if an employee were indeed terminated for engaging in strike activity. As such, the right to strike under the *AEPA* should not be seen only as a bare right: a "right to quit," nor as a reason to terminate workers. While it does not follow that we find the *AEPA* to be the "best" alternative to the Wagner model, or even adequate to meet the full scope of needs of workers organizing under it, we conclude that the legal framework extends the very kind of protections, in substance if not form, that the UFCW argued for in *MedReleaf Phase 2*. Moreover, regardless of the particular jurisdictional location or composition of the Tribunal, it is required under law to discharge its duties in accordance with fundamental rule of law and administrative principles, and with sufficient competence, including in interpreting the statute, and hearing and adjudicating disputes. Should a case concerning the above arguments come before the Tribunal in the future, it may add further clarity on the scope of subsidiary protections

under the *AEPA*. Unfortunately, given the Tribunal's reticence to add depth and nuance to this issue in *MedReleaf Phase 2*, certainty in this regard will be held in abeyance unless or until new cases are brought forward.

V. THOUGHTS ON THE FUTURE OF THE RIGHT TO STRIKE UNDER THE *AEPA*

In addition to questions about the right to strike and subsidiary protections left unanswered in *MedReleaf Phase 2*, the decision highlighted several more issues that linger under the *AEPA*. In particular, several individuals appeared to offer testimony that raises a question about whether agricultural work is essential in nature, a characterization which has only strengthened in the context of the COVID-19 pandemic.[106] In looking to the future, we offer preliminary analysis and insight about the possibility of future abrogation on the right to strike for agricultural workers. We first review elements of the decision that give rise to this as a potential future issue, focusing especially on the question of whether agricultural work could be deemed as an "essential service."[107] We then go on to discuss how the legal principles as affirmed most recently in *SFL* would apply to future legislative amendments restricting or displacing the right to strike under the *AEPA*.

Turning first to the question of essential services, the *MedReleaf Phase 2* decision recounts testimony offered by several individuals that aims to provide context for understanding the agricultural industry in Ontario. This evidence provided context, as the Tribunal described it, to understanding

106 See e.g. Bethany Hastie, "The Coronavirus Reveals the Necessity of Canada's Migrant Workers" (12 May 2020), online: *The Conversation* <theconversation.com/the-coronavirus-reveals-the-necessity-of-canadas-migrant-workers-136360>.

107 "Essential services" have been historically defined under provincial labour relations statutes, for the purpose of limiting or excluding strike activity for workers in those occupations. See e.g. Adell, *supra* note 72; Cavalluzzo, "Impact of *Saskatchewan Federation of Labour*", *supra* note 82. As noted in-text, the recent COVID-19 pandemic has prompted renewed dialogue about what kinds of work or services are essential in the current Canadian economic landscape, which may, in turn, shift or expand such classifications under labour law. Much attention had already been paid, following the decision in *Saskatchewan Federation of Labour,* to what services constitute "essential" services as well as how the decision impacts rights of those providing those services to engage in strike activity. See e.g. Cavalluzzo, "Impact of *Saskatchewan Federation of Labour*", *supra* note 82; Brian Etherington, "The Right to Strike Under the *Charter* after *Saskatchewan Federation of Labour*: Applying the New Standard to Existing Regulation of Strike Activity" (2016) 19:2 CLELJ 429; Alison Braley-Rattai, "Canada's Statutory Strike Models and the New Constitutional Landscape" (2018) 21:2 CLELJ 461 [Braley-Rattai, "Statutory Strike Models"].

the "havoc" that a strike by agricultural workers could have on farms in Ontario.[108] This evidence came from three farms that employ mostly temporary foreign workers, as well as from Portia MacDonald-Dewhirst, who testified for the Attorney General.[109] The Tribunal noted that the evidence provided by the farms was "more or less aligned about the withdrawal of services by their employees creating economic havoc in those farming operations due to factors such as the health, safety and welfare of livestock and the perishability of the crops and the need for ongoing crop maintenance."[110] The evidence further established that there is a limited pool of labour in the agricultural sector in Ontario and increasing demand.[111] This evidence all suggests that the agricultural industry would be ill-equipped to cope with a sudden withdrawal of the labour force, which could be used to argue for abrogation of the right to strike.

Despite the Tribunal's lack of attention to subsidiary protections attending the right to strike, the decision clearly acknowledged that the right to strike broadly provides the freedom to withdraw services under the *AEPA*. The logical corollary of the decision is that substantial, vertical interference with the withdrawal of services would in most cases amount to infringement with the subsection 2(d) guarantee of freedom of association. In other words, a complete prohibition or severe restriction on strike activity would likely constitute a violation of freedom of association. Following *SFL,* labour lawyers and scholars have posited that abrogation of the right to strike will generally result in a breach of subsection 2(d) and require justification under section 1.[112] The more sweeping a prohibition on striking, the more likely the law will be found unconstitutional. By extension, the question is whether that infringement could be demonstrably justified in a free and democratic society under section 1 of the *Charter*.

Whether the regulation or abrogation of agricultural workers' right to strike under the *AEPA* would be justifiable under section 1 is interwoven with whether they may be classified as essential workers, this being, historically, the basis upon which restrictions on strike activity have been imposed in Canadian labour law. The *AEPA* applies to all agricultural employees. "Agriculture" is defined under the *AEPA* broadly, and includes

108 *MedReleaf Phase 2*, *supra* note 6 at paras 87–91.

109 *Ibid*.

110 *Ibid* at para 88.

111 *Ibid* at para 90.

112 See e.g. Cavalluzzo, "Impact of *Saskatchewan Federation of Labour*", *supra* note 82; Adell, *supra* note 72; Brian Etherington, *supra* note 106; Braley-Rattai, "Statutory Strike Models", *supra* note 106.

a wide array of industry and crops, such as dairy, beekeeping, aquaculture, livestock, agricultural commodities, maple products, mushrooms, tobacco, and ornamental horticulture.[113] As such, abrogation of the right to strike would apply broadly to a variety of workers and settings under the *AEPA*, ranging from temporary foreign workers and low-wage farm labour to more "skilled" and higher wage labour such as that in *MedReleaf Phase 2* (as the Tribunal characterized it).

In *SFL*, the Supreme Court of Canada appeared to endorse the International Labour Organization (ILO) Committee on Freedom of Association's definition of what constitutes a class of essential service workers: those services needed to prevent "clear and imminent threat to the life, personal safety or health of the whole or part of the population."[114] It is questionable whether, absent the kind of emergency situation posed by the COVID-19 pandemic, for example, agricultural work could properly be interpreted in line with the ILO definition. While wholescale shutdown of agriculture across Canada may pose a "clear and imminent threat" to health, given the impact on Canada's food supply chain, this is not generally how strike activity works. A withdrawal of labour at one farm would not ostensibly affect the much larger food supply chain in a meaningful way. Moreover, the *AEPA* only governs agricultural workers in Ontario. Strike activity would, however, and as the Tribunal emphasized, impact the short-term economic gains and production of an individual farm. The pressure that farm workers exert over their employers is economic, such as through risking crop ruin, and is precisely the type of leverage which striking (or the threat of) is intended to provide for workers,[115] as the Tribunal also acknowledged in *MedReleaf Phase 2*. Notably absent from the ILO definition of "essential services" is criteria relating to economic impact. In light of the very purpose of strike activity, this makes sense. To allow for the abrogation of strike activity on the basis of economic consequences would provide justification for the abrogation of strike activity in all contexts.

Regardless of the characterization of agricultural work as essential or not, the legislature may otherwise impose restrictions on strike activity under the *AEPA* in the future. Restrictions may range from a total prohibition on strike activity to regulation of strike activity in relation to time,

113 *AEPA*, *supra* note 1, s 2(1).

114 *SFL*, *supra* note 8 at para 92, citing International Labour Organization, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th ed (Geneva: International Labour Office, 2006) at para 581.

115 See Hastie, "(Re)Discovering", *supra* note 24.

duration, place, manner, and other criteria. A total prohibition on strike activity will constitute "substantial interference" with the right to collective bargaining and thus violate subsection 2(d);[116] other restrictions may, or may not, constitute a violation depending on their particular character and impact on workers.

Where restrictions amount to substantial interference with the guarantee of freedom of association, the restrictions will be subject to a demanding section 1 analysis, particularly at the minimal impairment stage.[117] The onus will be on the government to establish a compelling objective or purpose for the restrictions, and that the restrictions imposed minimally impair the exercise of the right to strike. Following *SFL*, included in this stage will be a consideration about whether an effective, alternative dispute resolution mechanism is provided where the right to strike is abrogated. Again, as noted above, preventing adverse economic impact to an individual farm, or even a sector of the Ontario agricultural industry, would not likely be understood as a compelling objective, given that economic impact is precisely the point of striking in the labour relations context. Moreover, in light of the particular purpose of labour law as protecting and advancing workers' rights, a purpose that is shared by the *AEPA*,[118] restriction or abrogation on the right to strike ought not to be considered as a balancing exercise between employer and employee interests. This means that the government has a significant burden to meet in demonstrating that any restrictions on the right to strike that constitute a substantial interference under subsection 2(d) are justifiable under section 1.

It remains undetermined whether agricultural workers will be considered essential service workers, however, *SFL* does tether the right to strike to the process of collective bargaining. Therefore, a legislative decision to strip away the economic leverage held by often precariously employed farm workers will likely constitute substantial interference with collective bargaining and require justification under section 1 of the *Charter*. This is precisely why leverage is a question better left to a justificatory analysis under section 1, not as a consideration in defining the scope of constitutional rights. This is in keeping with our previous conclusions

116 *SFL*, *supra* note 8 at para 108.

117 We agree, as Brian Etherington notes, that the majority of the Supreme Court of Canada in *SFL* subjected the *Public Services Essential Services Act* to a demanding s 1 analysis. See Etherington, *supra* note 107 at 453.

118 *AEPA*, *supra* note 1, s 1.

that leverage should not (and does not) define the extent of the right to strike, nor the protections necessary to exercise it.

CONCLUSION: THOUGHTS ON THE FUTURE OF LABOUR ORGANIZING UNDER THE *AEPA*

Beyond the core issue of strike activity, the *MedReleaf* case brings renewed attention to the enduring question of what a non-Wagner model of labour relations looks like, how it works, and what it offers for workers. The limitations associated with continued benchmarking against the Wagner model, as we noted earlier, have prevented a fuller and richer conversation about the *AEPA* and experimentation under it. However, while the Tribunal appeared to urge movement in this very direction in *MedReleaf Phase 2*, the Tribunal failed to provide the kind of certainty and security required to create a context in which such a goal can be meaningfully pursued by workers. We conclude this article by returning to this enduring tension and offer brief comments on the future of labour organizing under the *AEPA*.

In its decision, the Tribunal brought explicit attention to the ways in which the full potential of the *AEPA* was being hampered by what it essentially described as the UFCW's attempts to superimpose the *LRA* onto the *AEPA*: "[i]t is [the] singular focus of the UFCW on the Wagner Act model of collective bargaining that is the UFCW's downfall, not the *AEPA*'s."[119] The Tribunal noted that the UFCW had not attempted any representational activity under the *AEPA*, beyond activities that follow the Wagner model, and found that the UFCW had not advised any workers of their rights under the *AEPA*.[120] Thus, the Tribunal determined "the UFCW [had] failed to look outside the traditional Wagner Act collective bargaining box and embrace alternative models to represent agricultural workers who desire such assistance."[121] Indeed, to argue that the *AEPA* is constitutionally insufficient specifically for falling short of the protections proffered under the *LRA* is all but doomed to fail, given the Supreme Court of Canada's holdings in *Fraser* and *MPAO* that subsection 2(d) does not guarantee access to a particular model of collective bargaining.

Nonetheless, workers operating under the *AEPA* may begin to consider how to collectively organize and advance their workplace interests in new ways, drawing inspiration perhaps from other models of collective

119 *MedReleaf Phase 2*, *supra* note 6 at para 112.

120 *Ibid.*

121 *Ibid* at para 113.

workplace representation such as workers' councils, as adopted in Europe,[122] and employee representation centres, as they exist in the US.[123] Workers may further draw inspiration from wide-scale one-day strikes engaged in by Amazon and Whole Foods workers, amongst others, in the United States.[124] These kinds of strikes aim to communicate as much with the consumer and public as with the direct employer, by illustrating the depth and breadth of reliance on these kinds of workers and work through the wholescale withdrawal of their labour. This kind of "public facing" campaign may be an effective route for agricultural workers,[125] whose voices have largely been left out of public and political conversations in Canada. Each of these mediums and methods for organizing have a solid constitutional and legal foundation for the protection of workers under subsection 2(d) and the *AEPA*.

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122 For a discussion of German work council models, see Thomas Haipeter, "Erosion, Exhaustion, or Renewal? New Forms of Collective Bargaining in Germany" in Katherine VW Stone & Harry Arthurs, eds, *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (New York: Russel Sage Foundation, 2013) 115 at 117–119. Scholars such as Paul Weiler, David Beatty, and Roy Adams have long advocated for Canadian versions of German workers councils. See e.g. Paul Weiler, *Governing the Workplace: The Future of Labor and Employment Law* (Cambridge, Massachusetts: Harvard University Press, 1990) at 282–295; Roy Adams, "Should Works Councils Be Used as Industrial Relations Policy?" (1985) 108:7 Monthly Lab Rev 25; David Beatty, *Putting the Charter to Work: Designing a Constitutional Labour Code* (Montreal & Kingston: McGill-Queen's University Press, 1987). Of further note, David Doorey discusses these scholars' contributions and the openness of the Supreme Court of Canada in *SFL* to alternative models of representation, such as German work councils. See Doorey "Reflecting Back", *supra* note 11; *SFL*, *supra* note 8 at paras 72–74.

123 See e.g. Manoj Dias-Abey, "Justice on Our Fields: Can 'Alt-Labor' Organizations Improve Migrant Farm Workers' Conditions?" (2018) 53:1 Harv CR-CLL Rev 167; Ruth Milkman "Back to the Future? US Labour in the New Gilded Age" (2013) 51:4 British J of Industrial Relations 645.

124 See Rachel Lerman & Nitasha Tiku, "Amazon, Instacart Workers Launch May Day Strike to Protest Treatment During the Coronavirus Pandemic" (1 May 2020), online: *Washington Post* <www.washingtonpost.com/technology/2020/05/01/amazon-instacart-workers-strike>; Michael Sainato, "Retail Workers at Amazon and Whole Foods Coordinate Sick-Out to Protest Covid-19 Conditions" (1 May 2020), online: *The Guardian* <www.theguardian.com/world/2020/may/01/retail-workers-at-amazon-and-whole-foods-coordinate-sick-out-to-protest-covid-19-conditions>.

125 See e.g. Bethany Hastie, "Platform Workers and Collective Labour Action in the Modern Economy" (2020) 71 UNBLJ 40; Maite Tapia & Gabriella Alberti, "Social Movement Unionism: A Toolkit of Tactics or a Strategic Orientation? A Critical Assessment in the Field of Migrant Workers Campaigns" in Jürgen R Grote & Claudius Wagemann, eds, *Social Movements and Organized Labour: Passions and Interests* (London, UK: Routledge, 2019); Tanya Basok & Ana Lopez-Sala, "Rights and Restrictions: Temporary Agricultural Migrants and Trade Unions' Activism in Canada and Spain" (2016) 17:4 J of Intl Migration & Integration 1271.

In this article, we have established that the *AEPA*, read in light of constitutional jurisprudence and from a purposive interpretation of its own provisions, does indeed provide similar protections, in purpose but not form, as those contained under the *LRA*. It is this focus on purpose, rather than form, which may be a particularly useful frame in shifting away from direct comparisons to, and benchmarking against, the Wagner model in the future. It is, relatedly, a lack of evident attention to underlying purpose that appeared to shift the parties' arguments and Tribunal's analysis away from a meaningful engagement with the issues before it, and thus failed to bring real clarity to the full scope and content of the *AEPA* and of the right to strike under it.

As discussed in sections II and III, the Tribunal was correct in finding that workers are free to exercise their right to strike even where legislation is silent on the matter. Constitutional benediction was given to that right in *SFL*.[126] Therefore, workers are protected from "vertical" interference with that right, *vis-à-vis* legislation or government activity that expressly prohibits a withdrawal of labour.[127] However, the Tribunal failed to consider the "diagonal" application of the *Charter* and the availability of subsidiary protections attending the right to strike in that regard.[128] This leaves workers operating under the *AEPA* with substantial uncertainty about how that right will be interpreted in future cases. This, in turn, provides strong disincentives to test the waters and engage in a strike without certainty or clarity regarding the consequences, both practically and legally.

The reasons, if not outcome, in *MedReleaf Phase 2* are disappointing precisely because it was within the purview of the Tribunal to make clear the scope and extent of available protections that exist under the *AEPA*, in compliance with subsection 2(d) jurisprudence. Read purposively, the available protections and remedial authority extended under the *AEPA* provide the very kind of protection that likely animated the UFCW's arguments for statutory job protection. By failing to take up this line of inquiry, the Tribunal failed, possibly at a critical juncture in time, to bring together freedom of association jurisprudence and the *AEPA* in order to clearly delineate how a non-Wagner-style model of labour relations legislation functions *vis-à-vis* the *Charter*, and importantly, provides tangible protection to workers who engage in strike activity in an environment where that is not explicitly regulated by statute. Moreover, by focusing solely

126 *SFL*, *supra* note 8 at para 3.

127 Langille, "Condescending Constitution", *supra* note 72 at 351.

128 *Ibid.*

on whether there existed vertical interference with the right to strike, the full scope of the right to strike and its subsidiary protections, as already grounded in subsection 2(d) jurisprudence, was neglected. As such, the decision provides only incremental progress for workers operating under the *AEPA* and fails to ameliorate the significant concerns and disincentives that workers will have in assessing whether or not to engage in strike activity. This will likely have ripple effects into the future, limiting the progress towards a fuller realization of labour organizing under the *AEPA* in a truly "non-Wagner" fashion.