***Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*:**

**The Supreme Court of Canada’s Misguided Gamble That Liberal Voluntarism Provides Meaningful Access to Collective Bargaining**

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On April 19 of this year, the Supreme Court of Canada (SCC) unanimously ruled that the exclusion of managerial employees from Quebec’s normative statutory collective bargaining regime, combined with the failure to provide them with access to any statutory regime that protected their freedom of association, did not violate their constitutional labour rights.[[1]](#footnote-1) Although the seven judges signed onto three different opinions, all reached the same conclusion. The case raises many questions about the future of constitutional labour rights at the court but in this brief comment I want to address what arguably might be its biggest takeaway for workers like the casino managers whose freedom of association is poorly or entirely unprotected by statutory rights.

*Background*

In Quebec, as in the United States and other Canadian jurisdictions, managerial workers are excluded from statutory collective bargaining regimes. The exclusion originated in the United States but was not part of the original *Wagner Act* (1935). Rather, it was added by the *Taft Hartley Act* (1947), passed in response to intense business lobbying seeking to deny supervisory employees access to collective bargaining based on the belief that unionization undermined their loyalty.[[2]](#footnote-2) Post-war Canadian collective bargaining laws modeled on the *Wagner Act* followed this precedent. However, the exclusion has been controversial. For example, the 1968 federal *Task Force on Labour Relations* noted that excluded employees “are effectively denied access to any form of collective bargaining” and that this exclusion was “unjust in the case of supervisory and junior managerial employees.”[[3]](#footnote-3) As a result, the *Canada Labour Code* was amended to permit the certification of bargaining units comprised of or including employees whose duties include supervision of other employees.[[4]](#footnote-4) Other Canadian jurisdictions narrowly interpret the managerial exclusion to reach a similar result.[[5]](#footnote-5) The exclusion in Quebec, however, is broader, covering “a person who, in the opinion of the Tribunal, is employed as a manager, superintendent, foreman or representative of the employer in his relations with his employees.”[[6]](#footnote-6)

In 1997 first level managers at Quebec casinos formed the Association des cadres de la Société des casinos du Québec to bargain with their employer, the Société des casinos du Québec inc. The employer recognized the Association as the representative of the managers and in 2001 entered into a memorandum of understanding that provides a framework for collaboration and consultation on working conditions. The employer also agreed to collect dues on behalf of the Association and to provide paid release time for association representatives to attend meetings. These arrangements are voluntary and, as the record showed, were not consistently respected by the employer.

As a result, in 2003 the Association, along with other associations of excluded managerial employees in Quebec, filed a complaint with the International Labour Organization’s (ILO) Committee on Freedom of Association (CFA), alleging that their exclusion from the statutory collective bargaining scheme violated Conventions 87 and 98, the two principal ILO conventions protecting freedom of association and the rights to organize and bargain, both of which have been ratified by Canada. The Committee concluded that, while under the current system the management associations enjoy an “embryonic form of legal recognition,” it is “precarious” and that the protection against acts of employer interference and domination “leave much to be desired.” The Committee requested that the Government amend its labour code to provide managerial employees with the same labour rights as other employees.[[7]](#footnote-7)

The Quebec government responded in 2007 by proposing a good governance guide that applied to managerial personnel in the public and parapublic sectors represented by an association. The guide made various recommendations about having agreements that set out a process for consultations etc., all of which were voluntary.

In 2009 the Association sought certification under the Quebec *Labour Code* alleging that the managerial exclusion infringed the *Charter*. The administrative tribunal agreed, finding that the exclusion substantially interfered with the Association members’ *Charter*-protected freedom of association. The Superior Court quashed the Tribunal’s decision, but its judgment was overturned by the Quebec Court of Appeal.[[8]](#footnote-8) That decision was appealed to the Supreme Court of Canada which unanimously allowed the appeal in a majority and two concurrent judgments. The remainder of the comment focuses primarily on the reasoning of Jamal J.’s majority judgment.

*The Supreme Court of Canada*

 *One Test or Two – Does it Matter?*

The principal issue that divided the court was whether there should be different tests depending on whether the claim arose out of underinclusion or state action. The majority opinion of Justice Jamal (Karakatsanis, Kasirer and O’Bonsawin JJ. concurring) held that for either claim there should be one test that had two parts: first, whether the activities fall within the scope of the freedom of association guarantee and second, whether the government action has, in purpose or effect, substantially interfered with the protected activities. However, the majority agreed that the *Dunmore* factors (discussed below) should be considered when determining whether there was substantial interference. The two concurring opinions, by Justice Côté (Wagner C.J. concurring) and by Justice Rowe favoured a separate three-part test derived from the SCC’s judgment in *Dunmore*.[[9]](#footnote-9) Under that test, to succeed in a claim of a failure to protect (underinclusion), the plaintiff must show: 1) that the claim is for an activity covered by freedom of association and not access to a particular statutory regime; 2) that the exclusion must have the purpose or effect of substantially interfering with the protected activity; and 3) that the state can be held accountable for the substantial interference with the protected activity.

Clearly, the justices favouring a three-part test for underinclusion claims believed that the courts should be more reluctant to require positive state protection of constitutional freedoms than to prohibit direct and substantial interference. However, there seems to be little disagreement with this view in Justice Jamal’s majority judgment, which explicitly endorses the *Dunmore* factors when considering whether the state has substantially interfered with protected activities (para. 20). Indeed, Jamal J. goes out of his way to explain that the *Dunmore* factors “circumscribe the possibility of successfully challenging underinclusive legislation” (para. 34). He further states,

It may be harder for a claimant to meet their burden of proof when challenging underinclusive legislation or when seeking state intervention since…the effects of underinclusive legislation can be hard to disentangle from other factors. As this Court noted in *Dunmore*, it will be in ‘unique contexts’ that underinclusive legislation amounts to substantial interference (para. 37).

In sum, while there may be small degrees of difference in the justices’ antipathy to requiring positive state protection of constitutional labour rights, as a practical matter the likelihood of such claims succeeding remains exceedingly low even under the majority’s two-part test.

*Purpose of the Legislative Exclusion*

 The majority had no difficulty finding that the Association’s claim involved activities protected by the *Charter* (para. 47) and turned its attention to the second part of the test, whether the exclusion substantially interfered with those protected activities in purpose or effect. Jamal J. asserted that the purpose of the legislative exclusion was not to interfere with associational rights (para. 51). Rather, he found that the exclusion’s purpose is to provide employers with assurance that managers would represent their interests in the context of hierarchically organized workplaces. This seems backwards. Clearly, the intent of the legislation was to deprive managerial workers of access to a statutory collective bargaining scheme and presumably meaningful access to collective bargaining. The justification for the denial of statutory collective bargaining rights was the employer belief that collective bargaining undermines the loyalty of managerial employees. Employers hold all kinds of beliefs about why collective bargaining is detrimental to their interests and will offer these as justifications for restricting access. If the legislature acts on these beliefs to deprive employees of meaningful access to collective bargaining, should we not say that the denial is its legislative purpose, not the justification?

Framing the issue in this way is not merely a philosophical quibble. It has important legal consequences. For if the purpose is to deprive workers of access to collective bargaining, then the burden is on the government to defend its violation of freedom of association by making a section 1 argument that the infringement is demonstrably justified in a free and democratic society.

This is precisely the path taken by the SCC in the *MPAO* case.[[10]](#footnote-10) The government justified its refusal to provide RCMP members with meaningful access to collective bargaining on the basis that it would undermine the government’s ability to depend on their loyalty (paras. 17-18). Yet the court had no problem finding that the exclusion of RCMP members was “designed to interfere with the right to freedom of association (para. 130).” That was its purpose, not securing the loyalty of RCMP members. This required the government to defend the interference under section 1. It was unsuccessful. While the court accepted that the need for an independent and objective police force was a pressing and substantial objective (para. 142), it rejected the argument that the denial of access to a collective bargaining regime was rationally connected to the achievement of that goal (para. 148). Arguably, the government should have encountered similar difficulties defending the exclusion of managerial workers under Quebec law since, as noted at the outset, the Quebec exclusion is broader than in most other Canadian jurisdictions and, as we shall see, is antithetical to international labour norms. The court in the *Casino* case never explains why it did not follow the approach taken in MPAO.

 *Liberal Voluntarism Fails to Provide Meaningful Access to Collective Bargaining*

The court then turned its attention to whether the effect of the legislative exclusion, combined with the failure to provide any other protection of associational freedoms, deprives the affected workers with meaningful access to collective bargaining. Fundamentally, the case raises the question of whether a legal regime that provides little or no protection of workers’ freedom to form associations, bargain collectively or strike can pass constitutional muster. The court’s answer is yes.

It will be helpful to put the legal regime in which the Casino managers find themselves in historical perspective. In other work, Professor Fudge and I described this legal regime as liberal voluntarism.[[11]](#footnote-11) As the name implies, such a regime consists of freedoms without rights. Historically, this was the regime created in Canada in the late-nineteenth century with the enactment of the *Trade Union Act* in 1872 and the repeal of criminal liability for ordinary breaches of employment contracts by workers in 1877. Workers were free to form associations and bargain collectively and, within the limits of contract and tort law, to strike, but employers were also free to retaliate against workers for forming associations, to refuse to recognize or bargain with unions and to fire or otherwise penalize striking workers. In short, it was a world of freedoms and no rights.

Liberal voluntarism began to be superseded in the early twentieth century with the enactment in 1907 of the *Industrial Disputes Investigation Act.* The Act compelled conciliation prior to engaging in strikes or lockouts in covered industries. Apart from that element of compulsion, however, legal voluntarism prevailed. Hence, we dubbed this new regime of industrial legality Industrial Voluntarism. This regime was short-lived because it was relatively ineffective both in promoting collective bargaining and in reducing industrial conflict. Elements of a new regime began to be enacted in Canada piecemeal, beginning in the 1930s with trade union freedom of association laws that prohibited retaliation against employees for engaging in associational activities. Indeed, such interference was criminalized by an amendment to the *Criminal Code* in 1939, a provision that remains on the books.[[12]](#footnote-12)

The *Wagner Act* model, with its provisions for compulsory recognition, a duty to bargain in good faith, prohibitions against retaliation for engaging in associational activities and partial protection of the freedom to strike, was first introduced during World War II as an emergency measure and then subsequently entrenched by statute in the post-war period. Modified versions were subsequently enacted to cover public and parapublic sector workers. But statutory protection of the freedom to associate, bargain and strike, was not extended to all Canadian employees, including agricultural employees in Ontario, RCMP officers and managerial employees. These groups of employees remained subject to a liberal voluntarist regime in which they enjoyed labour freedoms without labour rights.[[13]](#footnote-13) These groups began to challenge their situation after the *Charter* came into force in 1982, alleging that the liberal voluntarist regime violated their *Charter*-protected freedom of association.

This is not the place to review this body of litigation, but one thing is clear: the SCC has consistently stated that freedom of association does not provide a right to be included in a particular statutory regime. Then what does the constitution require for workers left behind in liberal voluntarist legal regimes? The difficulty is compounded by the refusal of the court to recognize that the *Charter* applies to the common law unless it is the basis for government action. In short, if exclusion from a particular statutory collective bargaining regime is not in itself unconstitutional, is it constitutional to leave workers in the common law liberal voluntarist regime without any positive protection of freedom of association?

The outrageous consequence of such a position was too much for the court in *Dunmore* when the SCC was confronted in 2001 by the plight of agricultural workers who faced a long history of exclusions from protective labour and employment laws and who were unable to exercise associational freedoms in the absence of state protections.[[14]](#footnote-14) As discussed above, the court recognized that the state could be constitutionally obliged to take steps to protect the exercise of *Charter* freedoms when it could be demonstrated that the absence of protection permitted substantial interference with their exercise and where underinclusive state action encouraged or sustained that interference (paras. 26-27). In that case, decided before the SCC recognized that freedom of association extended to collective bargaining, the court required the government positively to protect farmworkers’ freedom to organize.

The SCC was next confronted in 2015 with a claim from another excluded group, RCMP officers, in *MPAO*, cited above. However, although the officers were excluded from the general *Public Sector Labour Relations Act* (PSLRA), they were covered by a specialized regime of representation. As a result, the focus of the court’s judgment was on whether that specialized regime provided meaningful access to collective bargaining, which in 2007 it had recognized was protected by freedom of association. The court found that the scheme did not. In the result, the court held that their exclusion from the PSLRA substantially interfered with the officers’ freedom of association but left it open to the government to either include RCMP officers in the PSLRA or enact another model that provided meaningful access to collective bargaining. Leaving RCMP officers to the common law regime of liberal voluntarism, without any positive protection of their freedom of association, was not an option contemplated by the court, which stated:

80. To recap, s. 2(*d*) protects against substantial interference with the right to a meaningful process of collective bargaining.  Historically, workers have associated in order “to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict”, namely, their employers:  *Alberta Reference*, at p. 366.  The guarantee entrenched in [s. 2(](https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html#sec2parad_smooth)d) of the [Charter](https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html) cannot be indifferent to power imbalances in the labour relations context.  To sanction such indifference would be to ignore “the historical origins of the concepts enshrined” in s. 2(*d*): *Big M Drug Mart*, at p. 344.  It follows that the right to a meaningful process of collective bargaining will not be satisfied by a legislative scheme that strips employees of adequate protections in their interactions with management so as to substantially interfere with their ability to meaningfully engage in collective negotiations.

Whatever else one might say about liberal voluntarism, it is a regime that is “indifferent to power imbalances in the labour relations context” and does not provide employees with any, let alone adequate protection of their labour freedoms.

*Where does Quebec Casino take the law?*

This brings us to the Quebec casino workers who were excluded from Quebec’s general collective bargaining law and not covered by an alternative one. In short, they were left to the liberal voluntarist regime, which is indifferent to power imbalances.[[15]](#footnote-15) As noted, the managers formed an association, gained voluntary recognition and entered into a Memorandum of Understanding that promised consultation prior to any alteration of labour conditions, deduction of union fees and paid leaves to association representatives to participate in meetings with the employer. This arrangement, however, proved to be precarious. On several occasions the employer unilaterally altered conditions without prior consultation and reduced paid time off to attend to associational business. It was, after all, a voluntary arrangement.

Despite finding that the employer “neglected to properly respect the memorandum of understanding at times,” the SCC still found that the liberal voluntarist legal regime on which it was based provided meaningful access to collective bargaining.[[16]](#footnote-16) To support that finding, the majority held that the association can seek remedies “for any substantial interference with its members’ right to meaningful collective bargaining, including their right to strike, which is protected under s. 2(d) even without an enabling legislative framework (*Saskatchewan Federation of Labour*, at para. 61).”[[17]](#footnote-17)

Two comments are in order. First, the court does not say that the voluntary agreement is legally enforceable as a contract. Indeed, common law judges have long refused to enforce collective agreements on the basis that there is no intention to create legal relations.[[18]](#footnote-18) Thus, it is only if a *government employer* interferes with its members’ right to meaningful collective bargaining that an association can go to court because the *Charter* applies to all government action, not just legislation. But the court does not say that the government employer’s violations of the agreement in this case – the casino being a governmental body – interfered with the constitutional right of the members to bargain collectively. So, what would it take? More importantly, the proposed enforcement mechanism is not available to excluded private sector managerial workers whose employers are not bound by the *Charter*. They depend entirely on the state to create legal regimes that make collective agreements enforceable and thus provide for meaningful access to collective bargaining.

Second, the court seems to say that the *right* to strike is protected even without an enabling legislative framework. But up to now Canadian common law has protected only the *freedom* to strike, within the limits of tort and contract law. It does not provide a *right* to strike because it does not impose a duty on employers not to interfere with the exercise of that freedom. Absent legislation, private sector employers can take adverse action against strikers, including terminating their employment in accord with the common law of employment.[[19]](#footnote-19) Or is the SCC *sub silentio* changing the common law so that going forward it will protect the right to strike by imposing a duty on all employers, including private sector employers, not to take adverse action against striking workers? I do not know if that was its intent. The SCC may be assuring public sector workers whose employers are bound by the *Charter* that they are protected against adverse state action. But this leaves private sector workers dependent on statutory protections, which are not available to excluded employees.

It is also ironic that the majority judgment cites paragraph 67 of the *Saskatchewan Federation of Labour (SFL)* judgment for the proposition that the right to strike is not dependent on enabling legislation because that paragraph discusses the recognition of the right to strike in international, not Canadian law. Did Justice Jamal intend to say that international labour law is determinative of Canadian law? The SCC has not explicitly gone that far, although in paragraph 64 of the *SFL* case the SCC reiterated its longstanding position that “the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.”[[20]](#footnote-20)

If the SCC had applied that standard in this case, then it should have found that the managerial exclusion, combined with the failure to provide these workers with a regime that protects their labour freedoms, is unconstitutional. This is because, as a general matter, the exclusion of managerial workers is inconsistent with international labour norms ratified by Canada.[[21]](#footnote-21) More egregiously, the majority failed to even acknowledge that the International Labour Organization’s Committee on Freedom of Association upheld the casino workers’ complaint and requested that the Quebec government remove the exclusion.[[22]](#footnote-22)

The court also upholds the liberal voluntarist regime on the basis that “Unlike in *Dunmore*, there is no evidence that the legislative exclusion orchestrates, encourages, or sustains a violation of the fundamental freedoms of the Association’s members.” (para. 56). Yet it is precisely the state’s action of excluding managerial employees from statutory protections that permits and therefore sustains the casino’s practice of refusing to bargain or ignoring voluntary agreements. As well, the court evades its responsibility for the common law regime it created in which these practices are perfectly legal.

*Conclusion*

The Supreme Court of Canada continues to struggle with claims by workers that the state has failed to adequately protect their associational freedoms. At least in *Dunmore* the court required the state to protect organizational rights, within a scheme that otherwise fails to provide agricultural workers with meaningful access to collective bargaining.[[23]](#footnote-23) As well, in *MPAO* the court required the state to provide more robust protection of labour freedoms. In this case, the court took a step backward and left the managerial workers in a regime of liberal voluntarism in which freedom of association is totally unprotected. Surely such a regime cannot be said to provide meaningful access to collective bargaining. The decision in this case is a step backward.

1. *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13. [↑](#footnote-ref-1)
2. Jean-Christian Vinel, *The Employee: A Political History* (Philadelphia: U. of Pa. Press, 2013). [↑](#footnote-ref-2)
3. *Canadian Industrial Relations: Report of the Task Force on Labour Relations* (Ottawa: Privy Council Office,

1968), at para. 437. [↑](#footnote-ref-3)
4. *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 27(5). [↑](#footnote-ref-4)
5. George Adams, *Canadian Labour Law*, 2nd edition, §6:3. [↑](#footnote-ref-5)
6. *Quebec Labour Code*, CQLR, c. C-27, s. 1(l)(1). [↑](#footnote-ref-6)
7. Report No. 335 (2004), vol. LXXXVII, Series B, No. 3. [↑](#footnote-ref-7)
8. 2016 QCTAT 6860; 2018 QCCS 4781; 2022 QCCA 180. [↑](#footnote-ref-8)
9. *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94. [↑](#footnote-ref-9)
10. *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1. [↑](#footnote-ref-10)
11. Judy Fudge and Eric Tucker, *Labour Before the Law: The Regulation of Workers’ Collective Action in Canada, 1900 to 1948* (Toronto: University of Toronto Press, 2004). [↑](#footnote-ref-11)
12. *Criminal* Code, R.S.C., 1985, c. C-46, s. 425. [↑](#footnote-ref-12)
13. Compulsory conciliation and administrative protection against discrimination for joining or engaging in trade union activities were rolled into post-war collective bargaining laws. Hence, workers who are excluded from these laws do not enjoy the reforms enacted in the first half of the twentieth century, with the exception of the *Criminal Code* prohibition which is widely acknowledged as ineffective. [↑](#footnote-ref-13)
14. Eric Tucker, “Farm Worker Exceptionalism: Past, Present and the post-*Fraser* Future” in Fay Faraday, Judy Fudge and Eric Tucker, eds., *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012), 30-56. [↑](#footnote-ref-14)
15. The managers formed an association under the *Professional Syndicates Act*, CQLR, c. S-40. While the Act may facilitate the exercise of freedom of association, it does not protect *Charter*-protected labour freedoms. [↑](#footnote-ref-15)
16. There is some irony here. The court found that the purpose of the exclusion was to ensure the loyalty of managerial employees by denying them access to the province’s statutory collective bargaining regime. Yet here it finds that the legislative purpose was defeated because managerial employees still had meaningful access to collective bargaining and thus their loyalty was now at risk. [↑](#footnote-ref-16)
17. *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13, para. 55. [↑](#footnote-ref-17)
18. *Young v. Canadian Northern Railway* Company, [1929] 4 D.L.R. 452; [1930] 3 D.L.R; [1931] 1 D.L.R. 645. [↑](#footnote-ref-18)
19. Judy Fudge and Eric Tucker, “The Freedom to Strike in Canada: A Brief Legal History” (2010) 15 C.L.E.L.J. 333. [↑](#footnote-ref-19)
20. SFL, para. 64. [↑](#footnote-ref-20)
21. For a discussion of the interpretation by the ILO’s Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations of Conventions 87 and 89 in relation to exclusions, see Michael Lynk, “A Review of the Employee Occupational Exclusions under the Ontario *Labour Relations Act, 1995*” (prepared for the Ontario Ministry of Labour to support the Changing Workplaces Review of 2015), online at https://cirhr.library.utoronto.ca/sites/default/public/research-projects/Lynk-11-Exclusions%20Under%20LRA.pdf. [↑](#footnote-ref-21)
22. Case No. 2257, 18 March 2003, upheld Committee on Freedom of Association, International Labour Organization. [↑](#footnote-ref-22)
23. This is not the place to engage in a critique of the *Agricultural Employees Protection Act* (AEPA), the Ontario legislature’s response to *Dunmore* and the litigation that followed. I have expressed my views elsewhere (see “Farm Worker Exceptionalism”) and was an expert witness in the *UFCW*’s latest unsuccessful challenge to the AEPA. See *UFCW v. Medreleaf Phase 2 (Re)*, 2020 ONAFRAAT 8. [↑](#footnote-ref-23)