



SUPREME COURT OF CANADA

CITATION: Société des casinos
du Québec inc. v. Association des
cadres de la Société des casinos
du Québec, 2024 SCC 13

APPEALS HEARD: April 20, 2023
JUDGMENT RENDERED: April 19,
2024
DOCKET: 40123

BETWEEN:

Société des casinos du Québec inc.
Appellant

and

Association des cadres de la Société des casinos du Québec
Respondent

- and -

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Alberta, Administrative Labour Tribunal, Canadian Association of Counsel to Employers, National Police Commissioned Officers Professional Association, Canadian Labour Congress, Ontario Principals' Council, Catholic Principals' Council of Ontario, Association des directions et des directions adjointes des écoles franco-ontariennes, Directors Guild of Canada – Ontario, Canadian Lawyers for International Human Rights, Public Service Alliance of Canada, Canadian Civil Liberties Association, Syndicat professionnel des ingénieurs d'Hydro-Québec inc., Association des cadres des collèges du Québec, Association des cadres municipaux de Montréal, Association des conseillers en gestion des ressources humaines du gouvernement du Québec, Association des cadres scolaires du Grand Montréal, Association des cadres supérieurs de la santé et des services sociaux, Association des directeurs et directrices de succursale de la Société des alcools du Québec, Association professionnelle des cadres de premier niveau d'Hydro-Québec, Association québécoise des cadres scolaires,

**Association québécoise du personnel de direction des écoles and Fédération
québécoise des directions d'établissement d'enseignement**
Intervenors

AND BETWEEN:

Attorney General of Quebec
Appellant

and

Association des cadres de la Société des casinos du Québec
Respondent

- and -

**Attorney General of Canada, Attorney General of Ontario, Attorney General
of Alberta, Administrative Labour Tribunal, Société des casinos du Québec
inc., Canadian Association of Counsel to Employers, National Police
Commissioned Officers Professional Association, Canadian Labour Congress,
Ontario Principals' Council, Catholic Principals' Council of Ontario,
Association des directions et des directions adjointes des écoles franco-
ontariennes, Directors Guild of Canada – Ontario, Canadian Lawyers for
International Human Rights, Public Service Alliance of Canada, Canadian
Civil Liberties Association, Syndicat professionnel des ingénieurs d'Hydro-
Québec inc., Association des cadres des collèges du Québec, Association des
cadres municipaux de Montréal, Association des conseillers en gestion des
ressources humaines du gouvernement du Québec, Association des cadres
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OFFICIAL ENGLISH TRANSLATION: Reasons of Côté J.

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Kasirer, Jamal and
O'Bonsawin JJ.

REASONS FOR Jamal J. (Karakatsanis, Kasirer and O'Bonsawin JJ.
JUDGMENT: concurring)
(paras. 1 to 58)

CONCURRING Côté J. (Wagner C.J. concurring)
REASONS:
(paras. 59 to 198)

CONCURRING Rowe J.
REASONS:
(paras. 199 to 221)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

Société des casinos du Québec inc.

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Interveners

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Société des casinos du Québec**

2024 SCC 13

File No.: 40123.

2023: April 20; 2024: April 19.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Kasirer, Jamal and O’Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Charter of Rights — Freedom of association — Statutory exclusion — Casino managers excluded from provincial statutory labour relations regime — Whether exclusion infringes managers’ guarantee of freedom of association — Canadian Charter of Rights and Freedoms, s. 2(d) — Charter of human rights and freedoms, CQLR, c. C-12, s. 3 — Labour Code, CQLR, c. C-27, s. 1(1)(1).

Administrative law — Judicial review — Standard of review — Standard of review applicable to findings of fact and findings of mixed fact and law made by administrative decision maker in connection with constitutional question.

The Association des cadres de la Société des casinos du Québec (“Association”) represents certain first-level managers working at four casinos run by the Société des casinos du Québec inc. (“Société”). The Association applied to the Commission des relations du travail (now the Administrative Labour Tribunal

(“ALT”)) to be recognized as a certified association representing first-level managers in the gaming sector at the Casino de Montréal in order to benefit from the protections of the Quebec *Labour Code*. Because s. 1(l)(1) of the *Labour Code* excludes managers from its statutory labour relations regime, including from the ability to obtain association certification, the Association sought a ruling that this statutory exclusion unjustifiably infringed its members’ freedom of association under s. 2(d) of the *Charter* and s. 3 of the Quebec *Charter*.

The Association succeeded at first instance before the ALT. The ALT characterized the Association’s claim as a negative rights claim and applied the two-part substantial interference test for analyzing an alleged infringement of freedom of association articulated in *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3. It concluded that the exclusion of managers unjustifiably infringed their freedom of association. On judicial review, the Superior Court quashed the ALT’s decision. In the Superior Court’s view, the Association sought to impose a positive obligation on the state, which must be analyzed under the framework in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016. The court ruled that the Association did not establish an infringement of its members’ freedom of association. On further appeal by the Association, the Court of Appeal followed *Mounted Police* and applied the two-part substantial interference test as the proper framework under s. 2(d), and restored the ALT’s decision.

Held: The appeals should be allowed.

Per Karakatsanis, Kasirer, **Jamal** and O’Bonsawin JJ.: Section 1(l)(1) of the *Labour Code* applies to the Association in its application for accreditation. The Association has not shown that, when the two-part substantial interference test, established in *Dunmore* and refined in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, and *Mounted Police*, is applied, the legislative exclusion of first-level managers from Quebec’s general collective labour relations regime infringes its members’ freedom of association under s. 2(d) of the *Charter* or s. 3 of the Quebec *Charter*.

There is only one framework for determining whether legislation or government action infringes s. 2(d) of the *Charter*. That two-step framework was established by the Court in *Dunmore* and examines, first, whether activities fall within the scope of the freedom of association guarantee, and second, whether the government action interferes with the protected activities in purpose or effect. Three factors circumscribing the possibility of successfully challenging underinclusive legislation under s. 2(d) of the *Charter* were also set out in *Dunmore*. They relate to whether the claim of underinclusion is grounded in a fundamental *Charter* freedom, rather than access to a particular statutory regime; the evidentiary threshold for showing an interference with such a fundamental freedom; and whether the state can be held accountable for the claimant’s inability to exercise the fundamental freedom. These three factors are relevant considerations when evaluating s. 2(d) claims, but they do not constitute a separate test or a distinct framework for evaluating constitutional

challenges to underinclusive legislation under s. 2(d). There is also only one threshold for evaluating all s. 2(d) claims — the threshold of substantial interference. A claimant alleging that underinclusive legislation infringes s. 2(d) need not meet an elevated threshold.

In *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, a s. 2(b) freedom of expression case, a majority of the Court refrained from deciding whether *Dunmore* continues to apply to s. 2(d) claims after the Court's decisions in *Mounted Police* and *Fraser*. The Court's s. 2(d) jurisprudence reveals that the Court has consistently applied a two-part framework that examines whether activities fall within the scope of s. 2(d) and whether government action has substantially interfered with those activities, in purpose or effect. The Court has also highlighted that its s. 2(d) jurisprudence since *Dunmore* should be viewed as a consistent body of case law. *Dunmore* was not overturned by the Court's decisions in *Mounted Police* or *Fraser*. Nor does the Court's jurisprudence create two tests, one for claims seeking positive intervention from the state and another for claims seeking negative protection against state interference. Although the *Dunmore* factors have not been identified and analyzed each time the Court has been asked to determine whether legislation or government action infringed s. 2(d) of the *Charter*, the underlying principles have been consistently reaffirmed. It is not always necessary to consider each *Dunmore* factor expressly. Sometimes, the state's responsibility in causing the substantial interference is self-evident.

The frameworks under ss. 2(b) and 2(d) of the *Charter* have evolved differently in the Court's jurisprudence. In the context of claims under s. 2(b) of the *Charter*, the threshold for proving positive freedom claims is substantial interference with freedom of expression. However, the threshold for negative rights claims involving freedom of expression is whether the purpose or effect of the government action merely restricts freedom of expression. In the freedom of association context, by contrast, the elevated threshold of substantial interference in the second *Dunmore* factor already applies to all claims involving both positive and negative duties. This helps explain why the distinction between positive freedoms and negative rights is not relevant in determining the applicable framework for s. 2(d) claims, even though it has been affirmed in the s. 2(b) context.

In applying the two-part substantial interference test to the Association's claim, the standard of correctness applies to the questions of law and mixed fact and law at issue. At the first step of the s. 2(d) framework, the Court must determine whether the activities that the members of the Association seek to engage in fall within the scope of s. 2(d) of the *Charter*, and therefore consider whether the Association can plausibly ground its action in a fundamental *Charter* freedom. The Association's claim does involve activities protected under s. 2(d) of the *Charter*, including the right to form an association with sufficient independence from the employer, to make collective representations to the employer, and to have those representations considered in good faith.

At the second step of the s. 2(d) framework, the Court must determine whether the legislative exclusion, in purpose or effect, substantially interferes with the protected s. 2(d) activities of the Association's members. In addressing this issue, the Court must consider whether the state is responsible for the members' inability to exercise their fundamental freedoms under s. 2(d). In the instant case, the purpose of the legislative exclusion is not to interfere with managers' associational rights. The legislature's purposes in excluding managers from the definition of "employee" under the *Labour Code* were to distinguish between management and operations in organizational hierarchies; to avoid placing managers in a situation of conflict of interest between their role as employees in collective bargaining and their role as representatives of the employer in their employment responsibilities; and to give employers confidence that managers would represent their interests, while protecting the distinctive common interests of employees. The Association has also failed to show, on the record before the Court, that the effect of the legislative exclusion is to substantially interfere with its members' rights to meaningful collective bargaining.

Per Wagner C.J. and Côté J.: The *Dunmore* framework remains applicable to constitutional challenges to the exclusion of workers from a labour relations regime. While in each case substantial interference is the applicable standard for finding an infringement of freedom of association and is at the heart of the analysis, the framework for analyzing freedom of association varies depending on whether the party is asking the state to refrain from interfering with a protected activity or is instead seeking state action to remedy its inability to engage in that activity without support or enablement.

The three-step *Dunmore* framework is better suited to the context of a positive claim and to the type of remedy sought in such cases. In this case, the application of the framework leads to the conclusion that the impugned legislative exclusion does not limit the freedom of association guaranteed by the Canadian and Quebec charters. Section 1(l)(1) of the *Labour Code* is therefore operable against the Association in the context of its petition for certification.

An overview of the Court's jurisprudence reveals that freedom of association under s. 2(d) of the *Charter* and s. 3 of the Quebec *Charter* protects against any substantial interference with the right of employees to meaningfully associate with others in the pursuit of collective goals relating to conditions of employment. This protection encompasses the right of employees to a meaningful process of collective bargaining, a process that includes the right to make collective representations to their employer and to have those representations considered in good faith, freedom of choice with respect to their representation, the independence of their association from their employer, and the right to strike. However, the Court has emphasized since *Dunmore* that s. 2(d) guarantees a process, not an outcome or access to a particular model of labour relations. Freedom of association is indeed non-statutory, but the manner of its exercise may be spelled out in legislation.

The three-step *Dunmore* framework applies in determining the circumstances in which positive state action may be required under s. 2(d) of the *Charter*, such that the legislature will be obliged to enact a particular labour relations

regime. First, claims made against the exclusion must be grounded in an activity protected by s. 2(d) itself and not in access to a particular statutory regime. Second, the exclusion must have the purpose or effect of substantially interfering with that activity. Third, it must be possible for the state to be held accountable for the substantial interference. When these three steps are satisfied, it must be concluded that the legislature's failure to provide a particular regime constitutes an infringement of s. 2(d) of the *Charter*.

Although the Court suggested in *obiter* in *Toronto (City)* that the applicability of the *Dunmore* framework was now uncertain in light of *Mounted Police* and *Fraser*, those decisions must not be read as overturning this framework *sub silentio*. The Court's jurisprudence has relied on *Dunmore* to develop the substantial interference framework, without ever reversing the higher threshold to be met for positive rights claims. The *Dunmore* approach therefore remains applicable to challenges relating to exclusion from a statutory regime.

The three-step *Dunmore* framework should not be set aside, because this framework better addresses positive claims and reflects the exceptional nature of the remedy sought. Distinguishing between the various steps of the framework, rather than incorporating them into the substantial interference standard, is preferable in several respects. Such an approach involves conceptual clarity based on the structure and language of the *Charter* and provides clear direction regarding the burden of proof to be met at each step. The first step excludes the possibility of seeking access to a

particular regime, given the distinction between s. 2(d) and s. 15; the second step requires that substantial interference be shown, as in any constitutional challenge under s. 2(d); and the third step, based on s. 32 of the *Charter*, takes into account the specific nature of the claim by requiring a causal link between the substantial interference and the legislative exclusion. This approach serves to maintain substantial interference as a single standard while necessitating legislative action only in exceptional circumstances, and it is therefore consistent with the separation of powers. Distinguishing between the three steps of the framework also avoids the risk that a constitutional challenge under s. 2(d) to a legislative exclusion will be transformed into a balancing of various factors or considerations, which would amount to overturning the *Dunmore* framework *sub silentio*. Under the three-step framework, it is quite possible that a group of employees excluded from a statutory labour relations regime will be able to demonstrate substantial interference with the exercise of freedom of association but will be unable to establish a causal link with the state's failure to legislate.

In this case, no deference is owed to the ALT's findings of law and findings of mixed fact and law, but only to its findings of pure fact. In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, the Court established a presumption that the standard of reasonableness applies to the judicial review of an administrative decision maker's decision. However, this presumption can be rebutted when the rule of law requires a consistent, determinate and final answer from the courts, which is the case with constitutional questions. The standard of correctness therefore applies to the findings of law made by the ALT in the context of

analyzing the constitutional question before it. The standard of correctness also applies to findings of mixed fact and law made in connection with a constitutional question, because it is important that constitutional questions be answered correctly. As for findings of pure fact that can be isolated from the constitutional analysis, a reviewing court must show deference to them. Such deference is based on considerations related to judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker. The rule of law does not require that there be a determinate and final answer to questions of pure fact, as they will vary from case to case.

To determine whether an infringement of s. 2(d) of the *Charter* and s. 3 of the Quebec *Charter* has been established, it is important to characterize the nature of the Association's claim, because the nature of the claim may affect the framework that applies. The content of several *Charter* freedoms has both positive and negative dimensions. A right's positive dimensions require government to act in certain ways, whereas its negative dimensions require government to refrain from acting in other ways. The characterization exercise is concerned with the nature of the obligation that the claim seeks to impose upon the state. In this case, the Association's claim seeks the recognition and enforcement of a positive state obligation, since any claim that seeks to eliminate the exclusion of a class of workers from the application of a general collective relations regime is essentially a claim for inclusion in a particular regime. The three-step *Dunmore* framework must therefore be applied to determine whether,

in light of this framework, the exclusion of the Association's members from the *Labour Code* regime infringes s. 2(d) of the *Charter* and s. 3 of the *Quebec Charter*.

The application of the first step of the *Dunmore* framework to the facts of this case shows that the Association and its members are seeking access to a particular statutory regime, that is, the regime provided for in the *Labour Code*. The Association's choice to proceed by way of a petition for certification shows that its ultimate goal is for its members to be subject to the collective labour relations regime in the *Labour Code*, especially since the ALT, which can neither make a formal declaration of unconstitutionality nor suspend the effects of its decision, would have no choice but to give the Association's members access to all of the rights and privileges flowing from the *Labour Code* if it granted the Association's claim. This conclusion is sufficient to allow the appeals. However, even if this step of the *Dunmore* framework were satisfied, the Association's claim would fail at the second and third steps of the framework.

With regard to the second step, the exclusion in s. 1(l)(1) of the *Labour Code* does not have the purpose or effect of substantially interfering with the freedom of association of the Association's members. Firstly, the Association has not shown that such a purpose existed in 1964 when the *Labour Code* was enacted. The record does not show that there was distrust of any association of first-level managers, and there is no basis for concluding that the Quebec legislature considered the role of manager to be fundamentally incompatible with the collective bargaining protected by freedom of association. Secondly, not every difference between the situation of the

Association's members and the situation they would be in if they were not excluded from the *Labour Code* regime constitutes substantial interference. It must be recognized that they have been able to associate. While certain aspects of the Société's conduct, in the absence of the protections conferred by the *Labour Code*'s provisions, do seem to interfere substantially with the freedom of association of the Association's members, the existence of alternative recourses is another important consideration in concluding that they are not unable to exercise their freedom of association. Furthermore, the Association is not without recourse in the event that the Société interferes with the conduct of its activities.

Finally, even on the assumption that the Société's impugned conduct constitutes substantial interference with the exercise of the freedom of association of the Association's members, this interference is not attributable to the state at the third step of the *Dunmore* framework. Establishing a link is crucial, as what is being challenged when the *Dunmore* framework is applied is the state's legislative action, not the employer's action alone. The analysis must be based on the factual context of the case. In this case, there is no link between the legislative exclusion being challenged and the Société's impugned conduct, which is due to its alleged failure to comply with its contractual undertakings and which can be sanctioned by the ordinary courts.

Per Rowe J.: The *Dunmore* framework should remain applicable to assess positive claims. While s. 2(d) can require positive actions from the state in order to make the freedom to organize meaningful, claims of this nature must be analyzed under

a distinct framework that takes into account the nature of this fundamental freedom, the necessary link to state action, and the separation of powers.

Under the purposive approach articulated in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, a freedom has both positive and negative dimensions. However, the distinction between these dimensions remains important when considering the nature of the obligation that the claim seeks to impose upon the state. A freedom, by nature, does not encompass the obligation for the state to facilitate its exercise. This is why a higher burden forces the claimants to demonstrate why, in their circumstances, a posture of restraint from the state is not enough. In effect, any positive obligation requiring the state to protect the freedom should arise only where the claimant would otherwise be substantially incapable of exercising the freedom. The Court has consistently described s. 2(d) as reflecting a right that is largely “negative” in nature. Thus, in most circumstances, it does not impose “positive” obligations of protection or assistance on the state. It is only in exceptional circumstances, identified under a distinct framework set out in *Dunmore* that s. 2(d) of the *Charter* can impose positive obligations on the state.

The infringement giving rise to a negative claim under s. 2(d) is fundamentally different than the infringement leading to a positive claim. Given this difference, the standard to analyze positive claims should not be the same as for negative claims. The *Dunmore* framework was specifically designed to take into account the absence of direct state action giving rise to the infringement in the case of

positive claims, where the state has only failed to adequately protect the freedom from infringement by third parties, notably private actors. Under this framework, it remains part of the test to demonstrate that the freedom of association has been substantially impeded by the exclusion from the protective legislation. However, the claimant also has the burden of demonstrating that the claim is grounded in fundamental *Charter* freedoms rather than in access to a particular statutory regime and, more importantly, that the state can be held accountable in some ways for the inability to exercise these fundamental freedoms. The contribution of private actors to a violation is part of the factual context in which the review takes place but cannot in itself justify the imposition of a positive obligation on the state. Thus, this framework is particularly important in order to distinguish cases where the intervention of the state is warranted.

The elevated evidentiary threshold provided in the *Dunmore* framework also ensures that the adjudication of positive claims respects the separation of powers. It is not the proper role of the Court to confer constitutional status on a particular statutory regime. Labour relations regimes are a policy choice, designed to promote labour peace and bring certainty to the employment relationship, but they are not a constitutional imperative.

Cases Cited

By Jamal J.

Applied: *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3

S.C.R. 1016; **considered:** *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3; *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34; *Meredith v. Canada (Attorney General)*, 2015 SCC 2, [2015] 1 S.C.R. 125; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245; **referred to:** *Alliance des professionnels et des professionnelles de la Ville de Québec v. Procureur général du Québec*, 2023 QCCA 626, 75 C.C.P.B. (2nd) 1; *Procureur général du Québec v. Les avocats et notaires de l'État québécois*, 2021 QCCA 559; *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. Caron*, 2018 SCC 3, [2018] 1 S.C.R. 35; *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

By Côté J.

Applied: *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; **distinguished:** *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2

S.C.R. 391; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245; **considered:** *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989; *Meredith v. Canada (Attorney General)*, 2015 SCC 2, [2015] 1 S.C.R. 125; *In re The Maryland Drydock Co.*, 49 N.L.R.B. 733 (1943); *Packard Motor Car Co. v. Labor Board*, 330 U.S. 485 (1947); **referred to:** *Syndicat canadien de la fonction publique, section locale 3939 v. Société des casinos du Québec inc.*, 1995 CanLII 15922; *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34; *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322; *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *PSAC v. Canada*, [1987] 1 S.C.R. 424; *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460; *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211; *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 S.C.R. 209; *Québec (Procureur général) v. Confédération des syndicats nationaux (CSN)*, 2011 QCCA 1247; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, [2001] 2 S.C.R. 207; *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3; *Isidore Garon ltée v. Tremblay*, 2006 SCC 2, [2006] 1 S.C.R. 27; *Haig v. Canada*, [1993] 2 S.C.R. 995; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504;

Okwuobi v. Lester B. Pearson School Board, 2005 SCC 16, [2005] 1 S.C.R. 257; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3; *Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001); *Labor Board v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30, [2004] 1 S.C.R. 789; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134; *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28; *Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621; *de Montigny v. Brossard (Succession)*, 2010 SCC 51, [2010] 3 S.C.R. 64; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96; *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, [2020] 3 S.C.R. 426.

By Rowe J.

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APPEALS from a judgment of the Quebec Court of Appeal (Gagnon, Hogue and Beaupré JJ.A.), 2022 QCCA 180, [2022] AZ-51828174, [2022] Q.J. No. 661 (Lexis), 2022 CarswellQue 21330 (WL), setting aside a decision of Lamarche J., 2018 QCCS 4781, [2018] AZ-51543513, [2018] J.Q. n° 10547 (Lexis), 2018 CarswellQue 10361 (WL), allowing an application for judicial review of a decision of the Administrative Labour Tribunal, 2016 QCTAT 6870, [2016] AZ-51348664, 2016 LNQCTAT 1697 (Lexis), 2016 CarswellQue 14696 (WL). Appeals allowed.

Jean Leduc and Camille Grimard, for Société des casinos du Québec inc.

Michel Déom, Samuel Chayer, Caroline Renaud and Gabrielle St-Martin Deaudelin, for the Attorney General of Quebec.

Sophie Cloutier and Jean-Luc Dufour, for the respondent.

Sean Gaudet and Kirk Shannon, for the intervener the Attorney General of Canada.

Savitri Gordian and Rochelle Fox, for the intervener the Attorney General of Ontario.

Michael P. Wall and Leah M. McDaniel, for the intervener the Attorney General of Alberta.

Geneviève Bond Roussel, for the intervener the Administrative Labour Tribunal.

Timothy Lawson, Myriane Le François, Mathieu Bernier-Trudeau and Andrew Weizman, for the intervener the Canadian Association of Counsel to Employers.

Andrew Montague-Reinholdt and Malini Vijaykumar, for the intervener the National Police Commissioned Officers Professional Association.

Steven M. Barrett and Colleen Bauman, for the intervener the Canadian Labour Congress.

Caroline V. (Nini) Jones and Lauren Pearce, for the interveners the Ontario Principals' Council, the Catholic Principals' Council of Ontario, Association

des directions et des directions adjointes des écoles franco-ontariennes and the Directors Guild of Canada – Ontario.

Mae J. Nam, Rebecca Jones and James Yap, for the intervener the Canadian Lawyers for International Human Rights.

Andrew Astritis and Morgan Rowe, for the intervener the Public Service Alliance of Canada.

Catherine Fan and Danielle Glatt, for the intervener the Canadian Civil Liberties Association.

Claude Tardif, Catherine Massé-Lacoste and Marie-Laurence Lamarre, for the intervener Syndicat professionnel des ingénieurs d'Hydro-Québec inc.

Pierre Brun, Michel Gilbert and Guillaume Grenier, for the interveners Association des cadres des collèges du Québec, Association des cadres municipaux de Montréal, Association des conseillers en gestion des ressources humaines du gouvernement du Québec, Association des cadres scolaires du Grand Montréal, Association des cadres supérieurs de la santé et des services sociaux, Association des directeurs et directrices de succursale de la Société des alcools du Québec, Association professionnelle des cadres de premier niveau d'Hydro-Québec, Association québécoise des cadres scolaires, Association québécoise du personnel de direction des écoles and Fédération québécoise des directions d'établissement d'enseignement.

The judgment of Karakatsanis, Kasirer, Jamal and O’Bonsawin JJ. was delivered by

JAMAL J. —

I. Overview

[1] These appeals address whether the statutory exclusion of managers from the labour relations regime of the Quebec *Labour Code*, CQLR, c. C-27, infringes the guarantee of freedom of association under s. 2(d) of the *Canadian Charter of Rights and Freedoms* (“Canadian Charter” or “Charter”) and s. 3 of the Quebec *Charter of human rights and freedoms*, CQLR, c. C-12 (“Quebec Charter”).

[2] The impugned statutory provision, s. 1(l)(1) of the *Labour Code*, defines an “employee” broadly, as “a person who works for an employer and for remuneration”, but expressly excludes a person who is employed as a “manager, superintendent, foreman or representative of the employer in his relations with his employees”. This provision was constitutionally challenged under s. 2(d) of the *Canadian Charter* and s. 3 of the Quebec *Charter* by the Association des cadres de la Société des casinos du Québec (“Association”), which represents certain first-level managers working at four casinos run by the Société des casinos du Québec inc. (“Société”). The Association sought to be recognized as a certified association representing first-level managers in the gaming sector at the Casino de Montréal in order to benefit from the protections of the *Labour Code*.

[3] The Association succeeded at first instance before the Commission des relations du travail (now the Administrative Labour Tribunal (“ALT”). In response to the Société’s application for judicial review, the Superior Court of Quebec quashed the ALT’s decision. On further appeal, the Court of Appeal of Quebec allowed the appeal and restored the ALT’s decision, subject to a 12-month suspension of the effects of the ALT’s decision regarding the inoperability of the exclusion in s. 1(l)(1) of the *Labour Code*.

[4] I would allow the appeals. In my view, the impugned provision does not infringe the freedom of association guaranteed by s. 2(d) of the *Charter* or s. 3 of the Quebec *Charter*. I set out below what I see as the proper framework for analyzing an alleged infringement of freedom of association under this Court’s s. 2(d) jurisprudence.¹

[5] In *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, Bastarache J. for a majority of this Court set out a two-step framework for evaluating alleged infringements of freedom of association. First, a court considers whether activities fall within the range of activities protected under the freedom of association guarantee. Second, the court determines whether the legislation or

¹ The tests for evaluating alleged infringements of freedom of association under s. 2(d) of the Canadian *Charter* and s. 3 of the Quebec *Charter* are the same (*Alliance des professionnels et des professionnelles de la Ville de Québec v. Procureur général du Québec*, 2023 QCCA 626, 75 C.C.P.B. (2nd) 1, at para. 64; *Procureur général du Québec v. Les avocats et notaires de l’État québécois*, 2021 QCCA 559, at para. 60 (CanLII); see also *Quebec (Commission des normes, de l’équité, de la santé et de la sécurité du travail) v. Caron*, 2018 SCC 3, [2018] 1 S.C.R. 35, at para. 98). In what follows, I focus on the Canadian *Charter*.

government action, in purpose or effect, substantially interferes with those activities (paras. 13 and 25).

[6] Justice Bastarache also considered in *Dunmore* when underinclusive legislation engages state responsibility under s. 2(d) of the *Charter* and set out three factors circumscribing the possibility of successfully challenging such legislation. These factors relate to whether the claim of underinclusion is grounded in a fundamental *Charter* freedom, rather than access to a particular statutory regime; the evidentiary threshold for showing an interference with such a fundamental freedom; and whether the state can be held accountable for the claimant's inability to exercise the fundamental freedom (paras. 24-26).

[7] My colleague Justice Côté views these three factors listed in *Dunmore* as creating a distinct framework for evaluating constitutional challenges to underinclusive legislation under s. 2(d) — so-called “positive rights” claims — and as imposing a higher threshold for such challenges than for challenges to legislation or government action directly interfering with associational activities — so-called “negative rights” claims (Justice Côté's reasons, at paras. 133-34 and 149). I respectfully disagree. As I read this Court's jurisprudence, there is only one framework for evaluating whether legislation or government action infringes s. 2(d). That framework, originally enunciated in *Dunmore* and refined in later cases such as *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3,

and *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3, examines, first, whether activities fall within the scope of the freedom of association guarantee, and second, whether the government action interferes with the protected activities in purpose or effect. The three factors set out in *Dunmore* are relevant considerations when evaluating s. 2(d) claims, but they do not constitute a separate test.

[8] There is also only one threshold for evaluating all s. 2(d) claims — the threshold of substantial interference. In certain contexts, such as challenges to underinclusive legislation, it may be harder to satisfy the burden of proof to establish a substantial interference. But I respectfully disagree with my colleagues' view that, in cases of underinclusive legislation, there is a "higher threshold" than the threshold of substantial interference (Justice Côté's reasons, at paras. 137 and 149; see also Justice Rowe's reasons, at paras. 211 and 219).

[9] I conclude that the Association has not shown on the record before this Court that the legislative exclusion of first-level managers from Quebec's general collective labour relations regime infringes its members' freedom of association.

II. Background

[10] The Association represents certain operations supervisors working for the Société. The Société is a subsidiary of the Quebec government corporation Société des loteries du Québec and oversees four government-run casinos. Operations supervisors

are first-level managers in the Société's five levels of management and are responsible for ensuring the smooth operation of gaming activities and customer service. They supervise the croupiers, who are unionized employees running games in the casinos.

[11] The Association applied to the ALT for association certification under the *Labour Code*. Because s. 1(l)(1) of the *Labour Code* excludes managers from its statutory labour relations regime, including from the ability to obtain association certification, the Association sought a ruling that this statutory exclusion unjustifiably infringed its members' freedom of association under s. 2(d) of the *Charter* and s. 3 of the Quebec *Charter*.

[12] The ALT concluded that the exclusion of managers from the definition of "employee" unjustifiably infringed the freedom of association of the operations supervisors (2016 QCTAT 6870). The administrative judge drew a parallel between the Association's constitutional challenge and the constitutional challenge addressed in this Court's decision in *Mounted Police*, which also involved a challenge to a legislative exclusion from a general labour relations scheme. In the view of the administrative judge, the Association, as in *Mounted Police*, was not seeking to impose a positive obligation on the state to enact protective legislation. Rather, the Association was asking the state to refrain from disrupting the balance of power between its members and their employer through the legislative exclusion (paras. 368-78 (CanLII)).

[13] On judicial review, the Superior Court of Quebec quashed the ALT's decision (2018 QCCS 4781). In the Superior Court's view, the Association sought to impose a positive obligation on the state, which the court held must be analyzed under the framework in *Dunmore*, rather than under the framework in *Mounted Police*. The court did not regard the ALT's error in characterizing the Association's claim as determinative, since the administrative judge considered the three *Dunmore* factors in reaching her conclusion (paras. 71-83 (CanLII)). Still, the court held that the administrative judge erred in applying that test and ruled that the Association did not establish an infringement of its members' freedom of association.

[14] On appeal, the Court of Appeal of Quebec overturned the Superior Court's ruling and restored the ALT's decision, subject to a 12-month suspension of the declaration of inoperability of s. 1(l)(1) of the *Labour Code* (2022 QCCA 180). The Court of Appeal followed *Mounted Police* and applied the two-part substantial interference test as the proper framework under s. 2(d). The court noted that this Court's decision in *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, left open whether the *Dunmore* framework continues to apply in the labour relations context (para. 127 (CanLII)). In the Court of Appeal's view, on the one hand, if the distinction between positive and negative rights is no longer relevant to the framework for evaluating s. 2(d) claims, then the two-part test in *Mounted Police* applies. If, however, the distinction remains relevant, then the ALT correctly characterized the Association's claim as a negative rights claim, since the Association seeks freedom from government interference caused by the legislative exclusion (paras. 133-36).

III. Analysis

[15] In *Toronto (City)*, a s. 2(b) freedom of expression case, a majority of this Court refrained from deciding whether *Dunmore* continues to apply to s. 2(d) claims after the Court's decisions in *Fraser* and *Mounted Police*. The majority stated that “[w]e need not decide here whether *Dunmore* remains applicable to s. 2(d) claims”, which the majority called “an open question” after *Fraser* and *Mounted Police* (*Toronto (City)*, at para. 21).

[16] I agree with my colleague Justice Côté that *Dunmore* was not overturned by *Fraser* or *Mounted Police* and remains good law. At the same time, I respectfully disagree with her on how to interpret *Dunmore* given this Court's subsequent s. 2(d) jurisprudence.

A. *The Framework for Applying Section 2(d) of the Charter*

[17] The framework for determining whether legislation or government action infringes s. 2(d) of the *Charter* was established by this Court in *Dunmore*. Writing for the majority, Bastarache J. articulated the following two-part test:

In order to establish a violation of s. 2(d), the appellants must demonstrate, first, that such activities fall within the range of activities protected by s. 2(d) of the *Charter*, and second, that the impugned legislation has, either in purpose or effect, interfered with these activities [para. 13]

[18] The issue in *Dunmore* was whether the exclusion of agricultural workers from Ontario's statutory labour relations regime infringed s. 2(d) of the *Charter*. In that context, this Court considered whether underinclusive legislation could interfere with the exercise of a fundamental freedom. Justice Bastarache stated that although there is no constitutional right to protective legislation, underinclusive legislation could lead to an interference with the exercise of a fundamental freedom "in unique contexts" (para. 22). As he explained, "depending on the circumstances, freedom of association may, for example, prohibit the selective exclusion of a group from whatever protections are necessary to form and maintain an association, even though there is no constitutional right to such statutory protection *per se*" (para. 28).

[19] Justice Bastarache noted three factors that "function to circumscribe, but not to foreclose, the possibility of challenging underinclusion under s. 2 of the *Charter*" (para. 24). First, the claim must be "plausibly" grounded in a fundamental *Charter* freedom, rather than in access to a particular statutory regime (para. 24). Second, the evidence must show that the exclusion "permits a substantial interference" with the claimant's exercise of the fundamental freedom (para. 25 (emphasis in original)). Third, the state must be accountable for the claimant's inability to exercise the fundamental freedom, in that it "orchestrates, encourages or sustains the violation of fundamental freedoms" (para. 26).

[20] My colleague Justice Côté views these three factors as creating a distinct framework for claims seeking positive state intervention to enable the exercise of the

fundamental freedom of association. I respectfully disagree. As I will explain, I read this Court's jurisprudence as establishing only one framework for evaluating alleged infringements of freedom of association under s. 2(d). That framework asks whether activities are protected under s. 2(d) and whether the government action has, in purpose or effect, substantially interfered with those activities. The factors set out in *Dunmore* are relevant factors when considering whether s. 2(d) has been infringed, but they do not constitute a separate test.

(1) A Review of This Court's Jurisprudence

(a) *Dunmore (2001)*

[21] Justice Bastarache's analysis in *Dunmore* itself is instructive for understanding the interaction between the two-part test and what he called factors that "circumscribe, but [do] not . . . foreclose" the possibility of challenging underinclusive legislation under s. 2(d) of the *Charter* (para. 24). In considering whether the legislative exclusion of agricultural workers from Ontario's labour relations regime infringed s. 2(d), Bastarache J. readily concluded that the workers sought to engage in the protected s. 2(d) activity of the freedom to organize. He then considered whether the exclusion substantially interfered with the exercise of this associational activity, either in purpose or effect (paras. 30 and 35). Although Bastarache J. declined to find that the exclusion was intended to infringe the workers' freedom to organize (at paras. 31-33), he accepted that the effect of the exclusion was to substantially interfere with the workers' associational freedoms (paras. 34-48). He analyzed the effects of the

exclusion by considering the three circumscribing factors discussed earlier in his decision (para. 35).

[22] In particular, Bastarache J. noted that the agricultural workers did not seek a right to be included in a specific labour relations regime extended to certain citizens. Rather, they challenged their exclusion from a regime designed “not simply [to] enhance”, but to “instantiat[e] the freedom to organize” (paras. 36-38). The record before the Court demonstrated that the workers were unable to organize without the protective regime (paras. 39-42). The legislative exclusion also substantially reinforced private interferences with the workers’ exercise of their freedoms by placing a chilling effect on non-statutory union activity, such that the state was partly responsible for their inability to associate (paras. 43-48).

[23] Ultimately, Bastarache J. concluded that the legislative exclusion substantially interfered with the agricultural workers’ freedom to organize and was not justified under s. 1 of the *Charter* (paras. 48 and 65). By framing his analysis around the two-part test, Bastarache J. showed that the general framework for evaluating s. 2(d) claims examines whether the purpose or effect of the government action substantially interferes with associational activity. Justice Bastarache considered the circumscribing factors in making this assessment. As he explained, the “burden imposed by s. 2(d) . . . focuses on the effects of underinclusion on the ability to exercise a fundamental freedom” (para. 28). However, these factors did not constitute a separate test for whether s. 2(d) was infringed.

(b) *Health Services (2007)*

[24] Six years later, in *Health Services*, this Court built on *Dunmore* and confirmed that the substantial interference test applies to all s. 2(d) challenges (paras. 90-92 and 109). The case did not involve a challenge to underinclusive legislation, but rather to legislation that directly interfered with collective bargaining by invalidating certain provisions of collective agreements and preventing future bargaining on certain matters. Speaking for the majority, McLachlin C.J. and LeBel J. referred to “the requirements set out in *Dunmore* for a breach of s. 2(d)” (para. 96) and confirmed that a party alleging a breach of s. 2(d) must show that the government action, either in purpose or effect, involves a substantial interference with the associational right of collective bargaining (para. 90). They also affirmed the principles, first articulated as circumscribing factors in *Dunmore*, that s. 2(d) does not guarantee access to a particular statutory regime and that a successful claim under s. 2(d) requires a claimant to establish that the government is responsible for the interference with the protected s. 2(d) right (para. 19). In essence, the majority in *Health Services* affirmed the three *Dunmore* factors as general principles and extended them beyond the specific context of underinclusive legislation to all s. 2(d) claims.

(c) *Fraser (2011)*

[25] In *Fraser*, McLachlin C.J. and LeBel J. for the majority reaffirmed the framework in *Dunmore* and *Health Services*. *Fraser* concerned the constitutionality of a separate labour relations regime in Ontario for agricultural workers introduced in

response to *Dunmore*. The regime protected the rights of agricultural workers to associate and to make collective representations to their employer but did not include other collective bargaining rights available under the general labour relations regime.

[26] The majority in *Fraser* affirmed that substantial interference can arise from legislative interference or exclusion from a legislative scheme. McLachlin C.J. and LeBel J. wrote that “[i]f it is shown that it is impossible to meaningfully exercise the right to associate due to substantial interference by a law (or absence of laws: see *Dunmore*) or by government action, a limit on the exercise of the s. 2(d) right is established” (para. 47). They also underscored that s. 2(d) does not guarantee access to a particular model for exercising associational freedoms (at para. 45) and that substantial interference must flow from state action rather than from the actions of private employers (para. 73).

[27] The majority in *Fraser* cautioned that a “bright line between freedoms and rights seems . . . impossible to maintain” (para. 67) and highlighted that this Court “has consistently rejected a rigid distinction between ‘positive’ freedoms and ‘negative’ rights in the *Charter*” (para. 69). In the majority’s view, “[a] purposive protection of freedom of association may require the state to act positively to protect the ability of individuals to engage in fundamentally important collective activities” (para. 70). As an example, the majority noted that “individuals have a right against the state to a process of collective bargaining in good faith, and that this right requires the state to

impose statutory obligations on employers” (para. 73, commenting on *Health Services*).

[28] Parenthetically, I note that several commentators agree that it is challenging to draw a bright line between positive freedoms and negative rights in the labour relations context. This is, in part, because the state has “deep and extensive involvement” in regulating the rights and freedoms of workers, “both by protecting, and by tightly circumscribing and restricting” associational activities (S. Barrett and E. Poskanzer, “What *Fraser* Means For Labour Rights in Canada”, in F. Faraday, J. Fudge and E. Tucker, eds., *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (2012), 190, at p. 193; see also pp. 196 and 223; see also F. Faraday, “Taking a Mulligan: Freedom of Association” in H. Kislowicz, K. A. Froc and R. Moon, eds., *Canada’s Surprising Constitution: Unexpected Interpretations of the Constitution Act, 1982* (2024 (forthcoming)), 335, at pp. 349-50). As Professor Judy Fudge has observed, in the labour relations context, while the distinction between positive obligations to provide legislative protection and negative duties to avoid legislative interference “initially seems plausible, it is difficult to defend since, in Canada as in most countries, freedom of association in the labour relations context is integrally bound up with statutory protection” (“Freedom of Association”, in E. Mendes and S. Beaulac, eds., *Canadian Charter of Rights and Freedoms* (5th ed. 2013), 527, at p. 553; see also J. Cameron, “Due Process, Collective Bargaining, and s. 2(d) of the *Charter*: A Comment on *B.C. Health Services*” (2006), 13 *C.L.E.L.J.* 233, at p. 256). Since in the labour relations context the fundamental freedom of association

is exercised mainly through statutory vehicles, one commentator has suggested that “[t]here is no black-and-white line between enabling and enhancing the exercise of a freedom” (S. M. Barrett, “*Dunmore v. Ontario (Attorney General): Freedom of Association at the Crossroads*” (2003), 10 *C.L.E.L.J.* 83, at p. 112).

[29] Finally, the majority in *Fraser* traced a straight line between the approach in that case and the earlier cases of *Dunmore* and *Health Services*. The majority stated that the “decision in *Health Services* follows directly from the principles enunciated in *Dunmore*” (para. 38; see also paras. 39 and 62) and affirmed that “*Health Services* applied the principles developed in *Dunmore*” (para. 43). The majority also drew parallels between the issues in *Dunmore* and *Health Services* and the issue in *Fraser*, stating that “[t]he question here, as it was in those cases, is whether the legislative scheme . . . renders association in pursuit of workplace goals impossible, thereby substantially impairing the exercise of the s. 2(d) associational right” (para. 48). Thus, despite the varied framing of the challenged government action in *Dunmore*, *Health Services*, and *Fraser* — underinclusive legislation, legislation directly interfering with association, and insufficiently robust legislation, respectively — in all three cases, this Court applied the same framework of substantial interference.

(d) *Mounted Police (2015)*

[30] A few years after *Fraser*, this Court in *Mounted Police* held that legislation excluding members of the Royal Canadian Mounted Police from collective bargaining under the general labour relations scheme for federal public servants, and imposing an

alternative labour relations regime, unjustifiably infringed s. 2(d) of the *Charter*. Writing for the majority, McLachlin C.J. and LeBel J. stated that s. 2(d) “protects associational activity for the purpose of securing the individual against state-enforced isolation and empowering individuals to achieve collectively what they could not achieve individually” (para. 62). The majority reiterated that s. 2(d) does not guarantee access to a specific statutory regime (at para. 67) and affirmed that “the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining” (para. 72). The majority in *Mounted Police* also underscored that this Court’s s. 2(d) precedents, from *Dunmore* to *Health Services* to *Fraser*, should be read and understood as consistent with each other, and that, “[m]ore generally, they must be understood consistently with this Court’s purposive and generous approach to s. 2(d)” (para. 77).

(e) *Meredith (2015)*

[31] The substantial interference framework for s. 2(d) claims was also set out in the companion case to *Mounted Police*, *Meredith v. Canada (Attorney General)*, 2015 SCC 2, [2015] 1 S.C.R. 125, where McLachlin C.J. and LeBel J. for the majority stated that, “[i]n s. 2(d) cases, the courts must ask whether state action has substantially impaired the employees’ collective pursuit of workplace goals” (para. 24).

(f) *Saskatchewan Federation of Labour (2015)*

[32] Most recently, the substantial interference framework was applied by Abella J. for the majority in *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245, which held that a statutory prohibition on the right to strike infringed s. 2(d) (para. 78).

(g) *Summary*

[33] To sum up, this Court's s. 2(d) jurisprudence reveals that the Court has consistently applied a two-part framework that examines whether activities fall within the scope of s. 2(d) and whether government action has substantially interfered with those activities, in purpose or effect. This Court has also highlighted that its s. 2(d) jurisprudence since *Dunmore* should be viewed as a consistent body of case law.

[34] *Dunmore* was not overturned by this Court's decisions in *Mounted Police* or *Fraser*. Nor does this Court's jurisprudence create two tests, one for claims seeking positive intervention from the state and another for claims seeking negative protection against state interference. Although the *Dunmore* factors have not been identified and analyzed each time the Court has been asked to determine whether legislation or government action infringed s. 2(d) of the *Charter*, the underlying principles have been consistently reaffirmed. These principles, or *Dunmore* factors, circumscribe the possibility of successfully challenging underinclusive legislation, but they do not constitute a separate test. Rather, they provide guidance to ensure the analysis is focused on determining whether legislation or government action substantially

interferes in purpose or effect with the claimant's ability to engage in activities within the scope of s. 2(d).

[35] It is not always necessary to consider each *Dunmore* factor expressly. Sometimes, the state's responsibility in causing the substantial interference is self-evident. Consider, for example, legislation that prohibits a type of associational activity, such as a ban on striking. The *Dunmore* factor of ensuring that the interference is attributable to the state rather than a private actor is still relevant, but it is so self-evident that the interference is attributable to the state that it need not be discussed expressly. In other cases, as Bastarache J. cautioned in *Dunmore*, a court must be careful in evaluating the evidence to disentangle the effects of the impugned legislation or government action from external elements and determine whether the legislation or government action "substantially orchestrates, encourages or sustains the violation" (para. 26).

[36] Nor does *Dunmore* establish a higher threshold for establishing an infringement of s. 2(d) in claims seeking state intervention. In all cases, the threshold for proving an infringement of s. 2(d) is substantial interference. This threshold was first explained in *Dunmore* (at para. 25) and has been consistently applied in this Court's subsequent s. 2(d) jurisprudence (*Health Services*, at paras. 19 and 90; *Fraser*, at paras. 2 and 47; *Mounted Police*, at para. 72; *Meredith*, at paras. 4 and 24-25; *Saskatchewan Federation of Labour*, at paras. 2 and 25).

[37] It may be harder for a claimant to meet their burden of proof when challenging underinclusive legislation or when seeking state intervention since, as noted above, 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. 22). In all cases, however, the threshold to establish an infringement of s. 2(d) remains substantial interference. A claimant alleging that underinclusive legislation infringes s. 2(d) need not meet an elevated threshold.

(2) Section 2(b) and Section 2(d) of the *Charter* Have Different Frameworks

[38] As noted above, the majority of this Court in *Toronto (City)*, at para. 21, a case involving freedom of expression under s. 2(b) of the *Charter*, had declined to consider and left open whether the *Dunmore* approach to s. 2(d) “remains applicable” after this Court’s decisions in *Fraser* and *Mounted Police*. I have addressed why this Court’s s. 2(d) jurisprudence already confirms that *Dunmore* remains good law and how this Court built on *Dunmore* in *Fraser* and *Mounted Police*.

[39] It is also useful to highlight briefly the different evolution of the frameworks under ss. 2(b) and 2(d) of the *Charter* to explain why the distinction between positive freedoms and negative rights is not relevant in determining the framework for s. 2(d) claims, even though it has been recently affirmed in *Toronto (City)* in the context of s. 2(b).

[40] At issue in *Toronto (City)* was whether legislation that reduced the number of wards in an ongoing municipal election infringed the electoral candidates' right to freedom of expression under s. 2(b) of the *Charter*. A majority of this Court affirmed the distinction between the tests for positive freedoms and negative rights claims in the context of s. 2(b), citing the Court's earlier decision in *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673, which had also applied the three *Dunmore* factors under s. 2(b) (*Baier*, at para. 30). In *Toronto (City)*, the majority refined the framework for positive freedoms claims involving freedom of expression, distilling the framework to the single question of whether the "claim [is] grounded in the fundamental *Charter* freedom of expression, such that, by denying access to a statutory platform or by otherwise failing to act, the government has either substantially interfered with freedom of expression, or had the purpose of interfering with freedom of expression" (para. 25).

[41] As a result, in the context of claims under s. 2(b) of the *Charter*, the threshold for proving positive freedom claims is *substantial* interference with freedom of expression (*Toronto (City)*, at para. 25). However, the threshold for negative rights claims involving freedom of expression, as explained in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, is whether the purpose or effect of the government action merely *restricts* freedom of expression (*Toronto (City)*, at para. 24, citing *Irwin Toy*, at p. 971, and *Baier*, at paras. 27-28 and 45).

[42] In the freedom of association context, by contrast, the threshold for both "positive" and "negative" freedom of association claims is the same: substantial

interference (see *Dunmore*, at para. 25; *Health Services*, at paras. 19 and 90; *Fraser*, at paras. 2 and 47; *Mounted Police*, at para. 72; *Meredith*, at paras. 4 and 24-25; *Saskatchewan Federation of Labour*, at paras. 2 and 25). There is not a more stringent threshold for positive rights claims under s. 2(d). For freedom of association claims, the “elevated threshold in the second *Dunmore* factor” (*Toronto (City)*, at para. 25) of substantial interference already applies to all claims involving both positive and negative duties (Fudge, at pp. 545-46 and 550).

[43] Academic commentators have also noted that the standard of breach for a s. 2(d) claim “is strict, and bears little resemblance to the analogous tes[t] for expressive . . . freedom under section 2(b)” (J. Cameron and N. Des Rosiers, “The Right to Protest, Freedom of Expression, and Freedom of Association”, in P. Oliver, P. Macklem and N. Des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution* (2017), 737, at p. 749; see also Faraday, at p. 353).

[44] In summary, the frameworks under ss. 2(b) and 2(d) have evolved differently in this Court’s jurisprudence. This helps explain why the distinction between positive freedoms and negative rights is not relevant in determining the applicable framework for s. 2(d) claims, even though it has been recently affirmed in the s. 2(b) context.

B. *Application*

[45] Having set out the proper framework under s. 2(d) of the *Charter*, I now apply that framework to the Association's claims here. In doing so, I agree with my colleague Justice Côté's comments on the standard of review and apply the standard of correctness to the questions of law and mixed fact and law at issue in these appeals (paras. 94-97).

(1) The Association's Claim Involves Activities Protected Under Section 2(d)

[46] At the first step of the s. 2(d) framework, the Court must determine whether the activities that the members of the Association seek to engage in fall within the scope of s. 2(d) of the *Charter*. In addressing this issue, the Court must consider whether the Association can "plausibly ground [its] action in a fundamental *Charter* freedom" (*Dunmore*, at para. 24).

[47] The Association argues that its members' statutory exclusion from the protections of the *Labour Code* prevents them from engaging in a process of meaningful collective bargaining with their employer, with constitutional protection for the Association, sufficient independence from the employer, and the right to recourses if the employer does not negotiate in good faith. The Association's claim involves activities protected under s. 2(d) of the *Charter*, which includes the right to form an association with sufficient independence from the employer, to make collective representations to the employer, and to have those representations considered in good

faith (*Saskatchewan Federation of Labour*, at para. 29; *Mounted Police*, at para. 81; see also Faraday, at p. 348).

[48] As a remedy, the Association asks this Court to declare the legislative exclusion of no force or effect in the context of its request for association certification. Unlike my colleague Justice Côté (at paras. 155-59), in my view the specific remedy the Association seeks is not a sufficient basis to dismiss the s. 2(d) claim because the Association can “plausibly ground [its] action in a fundamental *Charter* freedom” (*Dunmore*, at para. 24). This is because the Association’s claim is made to allow its members to exercise their right to a meaningful collective bargaining process, which, as previously noted, exists independently of the *Labour Code* as part of the associational activities protected under s. 2(d). The Association’s members are not merely seeking access to a statutory regime.

[49] It is of limited utility to focus on the remedy sought for another reason. Even if the Court were to determine that the legislative exclusion infringes the freedom of association of the Association’s members, the Court could leave to the legislature the discretion to determine how to give proper effect to the members’ s. 2(d) rights (Fudge, at p. 532; A. Bogg and K. Ewing, “A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada” (2012), 33 *Comp. Lab. L. & Pol’y J.* 379, at pp. 399-400). For example, although this Court in *Mounted Police* concluded that the exclusion of RCMP members from the general labour relations regime substantially interfered with the freedom of association, the Court stated that Parliament was not

obligated to include the RCMP in the general labour relations scheme and “remain[ed] free to enact any labour relations model it considers appropriate to the RCMP workforce, within the constitutional limits imposed by the guarantee enshrined in s. 2(d)” (para. 156).

(2) The Legislative Exclusion Does Not Substantially Interfere With the Members of the Association’s Section 2(d) Activities

[50] At the second step of the analysis, the Court must determine whether the legislative exclusion, in purpose or effect, substantially interferes with the protected s. 2(d) activities of the Association’s members. In addressing this issue, the Court must consider whether the state is responsible for the members’ inability to exercise their fundamental freedoms under s. 2(d).

[51] In my view, the purpose of the legislative exclusion is not to interfere with managers’ associational rights. As my colleague Justice Côté explains, the legislature’s purposes in excluding managers from the definition of “employee” under the *Labour Code* were to distinguish between management and operations in organizational hierarchies; to avoid placing managers in a situation of conflict of interest between their role as employees in collective bargaining and their role as representatives of the employer in their employment responsibilities; and to give employers confidence that managers would represent their interests, while protecting the distinctive common interests of employees (paras. 168-69).

[52] The Association has also failed to show, on the record before this Court, that the effect of the legislative exclusion is to substantially interfere with its members' rights to meaningful collective bargaining. The operations supervisors managed to group together to form the Association. The Montréal division of the Association was voluntarily recognized by the Société as the representative association of the operations supervisors. The Société and the Montréal division of the Association have successfully concluded a memorandum of understanding providing a framework for collaboration and consultation on working conditions and related issues. Under this framework, the Société and the Association have agreed to meet on request to discuss workplace concerns in order to find [TRANSLATION] "win-win solutions" (cl. 1(b), reproduced in A.R., vol. V, at p. 1). They have committed [TRANSLATION] "to act in a spirit of cooperation and collaboration in their relations with each other" (cl. 2(c)). The Société has also agreed for the Casino de Montréal to consult the Association before setting or changing the working conditions of operations supervisors in the gaming sector (cl. 2(b)).

[53] The framework also provides that the Société will collect union dues on behalf of the Association from its members. And the Société has agreed to release union representatives, with pay, for meetings with representatives of the Casino de Montréal and for Association meetings. The Société has also agreed to release union representatives, with pay, for union-related activities, with their pay later billed to the Association (cl. 4; see Justice Côté's reasons, at paras. 174-78).

[54] The terms of the memorandum of understanding demonstrate that the Association's members are able to associate and collectively bargain with their employer. Contrary to the conclusions of the ALT and the Court of Appeal, the voluntary nature of the Société's recognition of the Association and the consultation framework is not in itself a substantial interference with the right to meaningful collective bargaining. As observed by this Court in *Mounted Police*, "nothing in the *Charter* prevents an employee association from engaging willingly with an employer in different, less adversarial and more cooperative ways" (para. 97).

[55] The Société, as a government corporation, must respect the Canadian *Charter*. It must also respect the Quebec *Charter*. Although the record shows that the Société has neglected to properly respect the memorandum of understanding at times, the Association can seek remedies in court 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). In my respectful view, without evidence on the record that these remedies are inadequate, the Court of Appeal and the ALT could not conclude that the lack of access to a specialized dispute resolution mechanism or legislative protection of the right to strike causes a substantial interference with the members' freedom of association. The right to meaningful collective bargaining does not guarantee access to a particular model of labour relations (*Mounted Police*, at para. 67).

[56] Nor does the record show that the Société's failure to respect the memorandum of understanding or negotiate in good faith with the Association flows from the legislative exclusion. 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.

[57] Although my colleague Justice Côté reaches this conclusion partly by underscoring the absence of any "special vulnerability" of the operations supervisors (at paras. 129 and 131; see also paras. 130 and 133), I limit my conclusions strictly to the record, which fails to show a connection between the legislative exclusion and the Société's actions. Proof of additional vulnerability is not required if the evidence shows a causal link between the underinclusive legislation and the alleged s. 2(d) violation (see Barrett, at pp. 110-11). It is well recognized that freedom of association "specifically addresses power imbalances in society" (Faraday, at p. 342). Moreover, as the majority observed in *Mounted Police*, "[t]he guarantee entrenched in s. 2(d) of the *Charter* 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)" (para. 80, quoting *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344).

IV. Conclusion

[58] Applying the two-part substantial interference test that applies to all s. 2(d) claims, I conclude that the Association has not shown that the legislative exclusion of

first-level managers from Quebec’s general collective labour relations regime infringes its members’ freedom of association under s. 2(d) of the Canadian *Charter* or s. 3 of the Quebec *Charter*. I would allow the appeals with costs, set aside the Court of Appeal’s judgment, quash the ALT’s decision, and declare that s. 1(l)(1) of the *Labour Code* applies to the Association in its application for accreditation.

English version of the reasons of Wagner C.J. and Côté J. delivered by

CÔTÉ J. —

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I. Introduction

[59] The *Labour Code*, CQLR, c. C-27 (“L.C.”), governs the organization of most collective labour relations in Quebec. Section 1(l)(1) *L.C.* excludes from the scope of the *L.C.* any person who, in the opinion of the Administrative Labour Tribunal (“ALT”), “is employed as manager, superintendent, foreman or representative of the employer in his relations with his employees”.

[60] On May 5, 1995, a labour commissioner concluded that the gaming table supervisors working for Société des casinos du Québec inc. (“Société”) were line managers at Casino de Montréal, which excluded them from the scope of the *L.C.* because of the exclusion set out in s. 1(l)(1) of this statute. On September 21, 1995, that decision was upheld on appeal by the Labour Court (*Syndicat canadien de la fonction publique, section locale 3939 v. Société des casinos du Québec inc.*, 1995 CanLII

15922). In 2005, in the context of a restructuring, the position of table supervisor was abolished and the duties of that position were assigned to the newly created position of “operations supervisor” (“OS”). The higher supervisory level was also eliminated. The OSs therefore inherited greater supervisory responsibilities with respect to the croupiers.

[61] The proceeding brought by the Association des cadres de la Société des casinos du Québec (“Association”) concerns the constitutionality of the exclusion of these employees from the *L.C.* regime. The Association argues that the legislative exclusion in s. 1(l)(1) *L.C.* infringes the freedom of association guaranteed by s. 2(d) of the *Canadian Charter of Rights and Freedoms* (“*Canadian Charter*”) and s. 3 of the *Charter of human rights and freedoms*, CQLR, c. C-12 (“*Quebec Charter*”), in a manner that cannot be justified under s. 1 of the *Canadian Charter* and s. 9.1 of the *Quebec Charter*.

[62] These appeals provide the Court with an opportunity to clarify the status of the framework established in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016. As the Court noted in *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, at para. 21, *Dunmore* was discussed in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, and *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3 (“*MPAO*”), without being overturned. In my opinion, and for the reasons set out below, the

Dunmore framework remains applicable to constitutional challenges to the exclusion of workers from a labour relations regime.

[63] Applying this framework to the facts of this case, I arrive at the conclusion that the impugned legislative exclusion does not limit the freedom of association guaranteed by the Canadian and Quebec charters.

II. Background

[64] The Société, a subsidiary of the Société des loteries du Québec (“Loto-Québec”), manages four casinos in Quebec. The Association, created in 1997 under the *Professional Syndicates Act*, R.S.Q., c. S-40 (now CQLR, c. S-40), represents certain OSs. The OSs supervise the work of the croupiers, who are unionized employees, and also oversee the operations of the gaming sector, which includes the gaming tables, the slot machines, keno (a type of bingo) and the poker rooms. The OSs are the employers’ eyes and ears on the floor.

[65] On September 19, 2001, following negotiations, the Association and the Société entered into a memorandum of understanding (“Memorandum”) that was meant to govern certain aspects of collective labour relations between the table supervisors (later replaced by the OSs) and the Société. During the years after the Memorandum was entered into, numerous disputes arose concerning its application and the negotiation of certain conditions of employment.

[66] On March 18, 2003, the Association, together with the Confédération nationale des cadres du Québec, the Association des cadres supérieurs de la santé et des services sociaux and the Association des directeurs et directrices de succursale de la Société des alcools du Québec, filed a complaint with the International Labour Organization's Committee on Freedom of Association. In that complaint, the Association challenged the exclusion in s. 1(l)(1) *L.C.* under the International Labour Organization's *Convention (No. 87) concerning freedom of association and protection of the right to organize*, 68 U.N.T.S. 17, and *Convention (No. 98) concerning the application of the principles of the right to organise and to bargain collectively*, 96 U.N.T.S. 257.

[67] In its report, the Committee concluded that the exclusion in s. 1(l)(1) *L.C.* prevented managerial personnel from unionizing, although they were able to “form associations, which enjoy significant prerogatives” (Report No. 335 (2004), vol. LXXXVII, Series B, No. 3, at para. 459). The Committee recommended that the *L.C.* be amended “so that managerial personnel enjoy the right to benefit from the general provisions of collective labour law and form associations that enjoy the same rights, prerogatives and means of redress as other workers' associations” (para. 463).

[68] On September 5, 2007, in response to the Committee's report, the Quebec government proposed a good governance guide that was to apply [TRANSLATION] “to managerial personnel in the public and parapublic sectors (public service, education, and health and social services) represented by an association recognized by government

order or ministerial order” (A.R., vol. VI, at p. 273). The guide suggested, among other things, that there be an agreement setting out the process for consulting the associations when the state, the employer, wished to modify their members’ conditions of employment. The guide also contained suggestions about what form that process should take, and it proposed that disputes relating to compliance with the agreed consultation process be referred to the appropriate departmental authority. It should be noted that the guide did not apply to state-owned enterprises and therefore had no impact on collective labour relations at the Société.

[69] In 2009, the Association filed a petition with the Commission des relations du travail (now the ALT²) seeking certification under the *L.C.* Through its petition, the Association applied to represent the OSs in all divisions of the gaming sector of Casino de Montréal. At the time of the hearings, the Association represented 250 OSs assigned to the gaming tables at Casino de Montréal and Casino du Lac-Leamy, that is, 70 percent of the Société’s gaming table OSs. The Association’s membership also included OSs from divisions other than gaming tables.

[70] In response to the Association’s petition for certification, the Société raised an exception to dismiss based on the exclusion set out in s. 1(*l*)(1) *L.C.* It is important to note that this is the context in which the Association contends that this provision is unconstitutional.

² On January 1, 2016, the ALT, created by the *Act to establish the Administrative Labour Tribunal*, CQLR, c. T-15.1, s. 1, replaced the Commission des relations du travail.

III. Judicial History

A. *Administrative Labour Tribunal, 2016 QCTAT 6870 (Administrative Judge Zaiikoff)*

[71] The administrative judge was of the view that s. 1(I)(1) *L.C.* unjustifiably infringed the freedom of association of the persons covered by the Association's petition for certification. She accordingly declared the provision to be of no force or effect for the purposes of the petition.

[72] The administrative judge found that the Association was not seeking positive state action. In her opinion, the purpose of the petition was only to ensure that the Association's members were not deprived of adequate protection in their relations with the Société so that they were not impeded from exercising their freedom of association. Consequently, the administrative judge did not apply the framework established by our Court in *Dunmore* and *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673.

[73] The administrative judge held that the legislative exclusion had the effect of substantially interfering with the freedom of association of the Association's members. First, the judge was of the view that the legislative exclusion deprived the Association's members of protection from meddling or interference by the employer in the recognition of the Association's representative character. Second, she found that there was a power imbalance between the first-level managers and the executive that

affected collective bargaining. Indeed, in her opinion, the managers felt caught [TRANSLATION] “between ‘a rock and a hard place’” (para. 315 (CanLII)) and lacked resources like those of the Société, which was closely linked to the state apparatus. Third, the judge concluded from her review of the evidence that the Société was not open to discussing a number of subjects related to labour relations, such as the inclusion of conditions of employment in the Memorandum, the determination of the members represented by the Association, the conditions of employment affecting wages, and staff movement. Fourth, the legislative exclusion deprived the Association’s members of effective legal recourses for sanctioning non-compliance with the Memorandum or for resolving difficulties in its interpretation and application. Having recourse to the ordinary courts was not comparable, from the standpoint of accessibility and speed, to having recourse to a specialized tribunal, nor did it make it possible to obtain the remedies required in the collective labour relations context. Finally, the administrative judge was of the opinion that, in practice, the legislative exclusion took away the right to strike of the first-level managers who were the Association’s members. Indeed, outside of legislation governing this right, employees cannot cease to perform their work without facing disciplinary action.

[74] The administrative judge attributed responsibility for this interference to the state because, in her view, the exclusion of first-level managers was contrary to the state’s international commitments, as the International Labour Organization’s Committee on Freedom of Association had concluded.

[75] If the Association had been seeking positive state action, the administrative judge would have found that the requirements in *Baier* were met, because the Association was not trying to gain access to a particular statutory regime. The Association had shown that, in the absence of another statutory regime, the exclusion of its members from the *L.C.* regime substantially interfered with their freedom of association.

[76] In this regard, the administrative judge found from the evidence that Casino de Montréal was not giving full effect to the Association's recognition as the OSs' representative association. For example, Casino de Montréal had established a joint work schedule committee to which non-members were invited, which made membership in the Association less useful. The Association was not asked to participate in the work on the pension plan, group insurance or the guide on conditions of employment. Similarly, Casino de Montréal refused to consider any issue related to the Memorandum and to [TRANSLATION] "the question of deduction of dues, the increase in leave for representatives and the inclusion of conditions of employment in the Memorandum" (para. 400). Decision makers at various levels failed to respond to some of the Association's requests and hardly provided it with any follow-up. Casino de Montréal did not undertake to bargain with the Association but only to consult it and, for that matter, such consultation did not always occur.

[77] This infringement of freedom of association was not justified under s. 1 of the *Canadian Charter* or under s. 9.1 of the *Quebec Charter*. The objective identified

by the government was not pressing and substantial, because it had not been shown that the exclusion of managers arose from the *National Labor Relations Act*, Pub. L. No. 74-198, 49 Stat. 449 (1935) (also known as the “*Wagner Act*”), which had been the inspiration for the *L.C.* Indeed, the *Canada Labour Code*, R.S.C. 1985, c. L-2, and other statutes based on the *Wagner* model in the rest of Canada permitted the unionization of first-level managers.

[78] Even if the objective had been pressing and substantial, the means for achieving it were not proportionate. There was no rational connection between the exclusion and the objective identified by the government. The total exclusion of managers was not rationally connected to the concern for maintaining the managers’ duty of loyalty, ensuring that there were no conflicts of interest and preventing interference. Finally, the impairment of freedom of association was not minimal because the legislative exclusion was a total one despite the fact that other models, in Quebec as well as in Canada and at the international level, permitted the unionization of first-level managers.

B. *Quebec Superior Court, 2018 QCCS 4781 (Lamarche J.)*

[79] The Superior Court allowed the application for judicial review, quashed the ALT’s decision and declared the exclusion in s. 1(I)(1) *L.C.* to be constitutionally applicable, valid and operative.

[80] The trial judge first found that the standard of correctness applied because the issue was the constitutionality of s. 1(l)(1) *L.C.* However, the court acknowledged that it owed deference to the ALT's findings of fact.

[81] The Superior Court then held that the Association was seeking positive state action so that its members would be subject to the *L.C.* regime, and it therefore applied the *Dunmore* framework, which it called the [TRANSLATION] "*Dunmore* test" (para. 82 (CanLII)). In its view, the ALT had erred in concluding otherwise.

[82] At the first step of this framework, the Superior Court found that the Association was not seeking access to a particular statutory regime. Rather, it was seeking to [TRANSLATION] "exercise its right to a process of meaningful collective bargaining" (para. 100).

[83] At the second step of the *Dunmore* framework, the Superior Court was of the view that the purpose of the legislative exclusion was not to deprive the members of their freedom of association, which included the right to meaningful collective bargaining with respect to their conditions of employment. The exclusion was based on the *Wagner* model and was intended to [TRANSLATION] "create a community of interest for non-managerial employees and to facilitate their unionization while ensuring that the employer is able to trust its managers" (para. 123; see also paras. 124-30). With regard to the effects of the exclusion, the Superior Court criticized the ALT for having compared the situation of the Association's OS members to the situation of employees whose rights and obligations were set out in the *L.C.* That error

had led the ALT to conclude that a difference between the *L.C.*'s protections and the situation of the OSs amounted to substantial interference with their freedom of association.

[84] The Superior Court nevertheless recognized that the freedom of association of the Association's OS members was substantially interfered with in some respects. The evidence showed that the Société unilaterally changed the conditions of employment of the Association's OS members, without consulting it or providing any advance notice. By doing so, the Société undermined the meaningful bargaining process. The evidence also showed that the Société had no real intention of continuing to bargain on certain subjects. However, the ALT had been wrong in attributing responsibility for this interference to the state, as the interference resulted instead from the Société's conduct. The Association's claim therefore failed at the third step of the *Dunmore* framework.

C. *Quebec Court of Appeal, 2022 QCCA 180 (Gagnon, Hogue and Beaupré JJ.A.)*

[85] The Court of Appeal allowed the appeal, set aside the Superior Court's judgment, dismissed the application for judicial review and restored the ALT's decision, although it added a conclusion ordering the suspension, for a period of 12 months from the date of its judgment, of the [TRANSLATION] "effects of the ALT's declaration regarding the inoperative nature of the exclusion set out in s. [1(l)(1) *L.C.*]" (para. 194 (CanLII)).

[86] The Court of Appeal found that the applicable framework was the one applied in *MPAO*, which it called the [TRANSLATION] “substantial interference” test (para. 137). The Court of Appeal characterized the Association’s petition not as a claim for positive state action, but rather as a claim not to be subject to the exclusion in s. 1(l)(1) *L.C.*

[87] The Court of Appeal was of the view that the Superior Court had erred in failing to show deference to the ALT’s findings regarding the effects of the legislative exclusion on the OSs. Those findings were within the ALT’s specialized expertise and were based on its overall assessment of the evidence; they should have been upheld. As a result, the Court of Appeal concluded that there was substantial interference with the freedom of association of the Association’s OS members.

[88] Although the Court of Appeal did not think it necessary to do so given its finding that the *Dunmore* framework was inapplicable, it expressed its disagreement with the Superior Court’s conclusion that the Société and not the state was responsible for the substantial interference. The Société was a subsidiary of Loto-Québec, which was a state-owned enterprise, and the total exclusion of first-level managers from the scope of the *L.C.* constituted state action.

[89] At the stage of justification of the infringement, the Court of Appeal agreed with the ALT that the minimal impairment requirement was not met, since there were other statutory regimes in force in Canada that were more permissive with respect to the unionization of managers.

[90] Although the ALT had not made a general declaration that the exclusion in s. 1(l)(1) *L.C.* was of no force or effect, the Court of Appeal nonetheless thought it appropriate to suspend the effects of its own decision restoring the ALT's decision, given the impact that the ALT's decision would have on the organization of collective labour relations for managers in Quebec.

IV. Issues

[91] These appeals raise the following questions:

- Did the Court of Appeal err in holding that the Superior Court owed deference to the findings of fact and findings of mixed fact and law made by the ALT in the context of analyzing a constitutional question?
- Does the exclusion of managers provided for in s. 1(l)(1) *L.C.* infringe the freedom of association of the Association's OS members guaranteed by s. 2(d) of the *Canadian Charter* and s. 3 of the *Quebec Charter*? If so, is this infringement justified under s. 1 of the *Canadian Charter* and s. 9.1 of the *Quebec Charter*?
- If s. 1(l)(1) *L.C.* is declared unconstitutional, should the declaration be suspended and, if so, for how long?

V. Analysis

A. *Applicable Standard of Review*

[92] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, our Court established a presumption that the standard of reasonableness applies to the judicial review of an administrative decision maker's decision (paras. 16 and 23-32). This presumption can be rebutted when the rule of law requires a consistent, determinate and final answer from the courts, which is the case with constitutional questions:

The Constitution — both written and unwritten — dictates the limits of all state action. Legislatures and administrative decision makers are bound by the Constitution and must comply with it. A legislature cannot alter the scope of its own constitutional powers through statute. Nor can it alter the constitutional limits of executive power by delegating authority to an administrative body. In other words, although a legislature may choose what powers it delegates to an administrative body, it cannot delegate powers that it does not constitutionally have. The constitutional authority to act must have determinate, defined and consistent limits, which necessitates the application of the correctness standard.

(*Vavilov*, at para. 56; see also paras. 53 and 55.)

[93] The parties agree that the standard of correctness applies to the findings of law made by the ALT in the context of analyzing the constitutional question before it. Their disagreement concerns the standard that should apply to findings of mixed fact and law and findings of fact made in connection with a constitutional question.

[94] In my view, the standard of correctness applies to the former type of findings. “Mixed” findings are those that determine “whether the facts satisfy the applicable legal tests” (*Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322, at para. 38). In this case, determining whether the exclusion from the *L.C.* regime constitutes substantial interference with the freedom of association of the Association’s members is not a simple question of fact. Such an inquiry involves weighing “the constitutional significance” of the findings of fact made on the basis of the members’ situation by reference to freedom of association (*Westcoast Energy*, at para. 39). To some extent, this amounts to defining the constitutional standard of “substantial interference”.

[95] The definition of this standard requires a determinate and final answer (*Vavilov*, at paras. 53 and 55). In *Westcoast Energy*, cited with approval in *Vavilov*, at para. 55, our Court noted that no deference is owed in respect of questions of mixed fact and law that arise in connection with a constitutional question because it is important that constitutional questions be answered correctly (paras. 39-40).

[96] It follows that the Superior Court did not owe deference to the ALT’s findings of law and findings of mixed fact and law, but only to the findings of fact made by that tribunal.

[97] A reviewing court must show deference to findings of pure fact that can be isolated from the constitutional analysis (*Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407, at para. 26). Such

deference to findings of this kind is based on considerations related to “judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker” (*Vavilov*, at para. 125). The rule of law does not require that there be a determinate and final answer to questions of pure fact, as they will vary from case to case.

B. *Content of Freedom of Association*

[98] Before any further discussion of the Association’s claim, it is appropriate to provide an overview of our Court’s jurisprudence on the freedom of association guaranteed by s. 2(d) of the *Canadian Charter* and s. 3 of the *Quebec Charter*.

[99] Historically, our Court interpreted freedom of association in a restrictive manner. In what is now known as the “1987 trilogy” in labour law, the Court held that freedom of association did not include the right to bargain collectively or the right to strike (*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (“*Alberta Reference*”); *PSAC v. Canada*, [1987] 1 S.C.R. 424; *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460; see also *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367, and, in a non-labour relations context, *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, decisions that confirmed the restrictive interpretation of the majority in the trilogy). For several decades, the predominant interpretation of freedom of association encompassed only the right to form associations and the collective exercise of individual freedoms.

[100] This restrictive interpretation of freedom of association greatly influenced the outcome of the appeal in *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989. In that case, which was similar to this one, the Court was considering a challenge to the exclusion of members of the Royal Canadian Mounted Police (“RCMP”) from the regime of the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 (“PSSRA”). Writing for the majority, Bastarache J. found that the exclusion of RCMP members from the PSSRA regime did not infringe s. 2(d). In doing so, he noted that freedom of association did not impose “a positive obligation” on the state to include RCMP officers in a particular regime (para. 33).

[101] A few years later, in 2001, our Court rendered its decision in *Dunmore*. That decision marked the turning point toward a new era in the interpretation of s. 2(d). This new era had been foreshadowed by *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, and *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 S.C.R. 209, in which our Court, in considering the freedom *not* to associate, had endorsed a purposive interpretation of s. 2(d).

[102] Like *Delisle*, *Dunmore* concerned the constitutionality of a legislative exclusion, this time the exclusion of Ontario’s agricultural workers from the collective bargaining regime created by the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A. That exclusion resulted from the repeal of the *Agricultural Labour Relations Act, 1994*, S.O. 1994, c. 6 (see the *Labour Relations and Employment Statute Law Amendment*

Act, 1995, S.O. 1995, c. 1, s. 80), the only collective labour relations regime that had until then applied to the province's agricultural workers.

[103] In his analysis of s. 2(d), Bastarache J., writing for the majority, first determined that the state may be obliged in certain circumstances to take positive action to safeguard the exercise of freedom of association (*Dunmore*, at paras. 19-29). He then held that the "effective" exercise of freedom of association "may require not only the exercise in association of the constitutional rights and freedoms (such as freedom of assembly) and lawful rights of individuals, but the exercise of certain collective activities, such as making majority representations to one's employer" (para. 30). This results in the well-established rule that any legislation that has the purpose or effect of substantially interfering with the ability of workers to engage in associational activities and to act in common to reach shared goals infringes s. 2(d) of the *Canadian Charter*.

[104] In *Dunmore*, Bastarache J. found that Ontario's agricultural workers "are substantially incapable of exercising their fundamental freedom to organize without the protective regime" (para. 35). He noted that the situation was different from the one in *Delisle* because the RCMP officers in that case had been able to organize and negotiate their working conditions outside of the union certification regime (para. 25). For that reason, Bastarache J. determined that the exclusion of agricultural workers from Ontario's general collective relations regime substantially interfered with their freedom of association (at para. 48) and that the interference could not be justified under s. 1 (paras. 49-65).

[105] As a remedy, Bastarache J. declared the provision excluding agricultural workers from the general regime unconstitutional but suspended the effects of the declaration for 18 months, emphasizing that the legislature was under no obligation to fully include the workers in the general regime (paras. 66-68). Indeed, because of its “non-statutory character”, freedom of association does not guarantee “access to a particular statutory regime” (para. 24).

[106] Six years later, in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, our Court completely broke away from the trilogy and overruled the cases composing it (see *Alberta Reference*; *PSAC*; *RWDSU*) because of the evolution in the jurisprudence signalled by *Dunmore*. It was recognized in *Health Services* that freedom of association “does not apply solely to individual action carried out in common, but also to associational activities themselves” (para. 89). Writing for the majority, McLachlin C.J. and LeBel J. found that s. 2(d) protects “the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining” (para. 87).

[107] This right to participate in a process of collective bargaining means that freedom of association requires the existence of a process that permits employees “to unite, to present demands to . . . employers collectively and to engage in discussions in an attempt to achieve workplace-related goals” (para. 89) and that imposes

corresponding duties on the employer, particularly the duty to consult employees and to bargain in good faith (paras. 90 and 97).

[108] However, s. 2(d) does not protect “all aspects of the associational activity of collective bargaining”; it protects only against “substantial interference” with this activity (para. 90, citing *Dunmore*, at para. 23). Furthermore, like Bastarache J. in *Dunmore*, McLachlin C.J. and LeBel J. made a point of stating that the right to participate in a process of collective bargaining guarantees neither “a certain substantive . . . outcome” nor “the right . . . to a particular model of labour relations” (para. 91).

[109] In *Fraser*, rendered in 2011, the Court was again called upon to determine the constitutionality of the labour relations regime applicable to Ontario’s agricultural workers. Relying on the “logic of *Dunmore* and *Health Services*” (para. 46), McLachlin C.J. and LeBel J., for the majority, held that s. 2(d) of the *Canadian Charter* was not infringed by the *Agricultural Employees Protection Act, 2002*, S.O. 2002, c. 16, enacted in response to *Dunmore*.

[110] McLachlin C.J. and LeBel J. reaffirmed in *Fraser* that freedom of association protects the right to a “meaningful” process of collective bargaining, which includes the duty to consult and to bargain in good faith (paras. 33 and 40). However, and more relevantly for our purposes, the majority strongly reiterated that freedom of association protects “associational activity” itself, “not a particular process or result” (para. 47; see also para. 45, citing *Health Services*, at para. 91).

[111] In light of these principles, the majority concluded that the particular regime established for agricultural workers was constitutional because it gave them the right to associate, to join an association and to contribute to it by participating in its activities, as well as the right to make, through their association, representations to their employer with respect to their working conditions.

[112] In 2015, our Court decided a second trilogy of cases, *MPAO, Meredith v. Canada (Attorney General)*, 2015 SCC 2, [2015] 1 S.C.R. 125, and *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245. These decisions affirmed “the central holdings” in the earlier cases to the effect that freedom of association guarantees the right to participate in a meaningful process of collective bargaining, not the right to a substantive outcome or access to a particular labour relations regime (*MPAO*, at para. 67).

[113] In *MPAO*, our Court considered the constitutionality of the entire labour relations regime applicable to RCMP members. Federal regulations imposed on them a form of representation they had not chosen, the Staff Relations Representative Program, and prohibited them from bargaining through an independent union or an employee association. They were also excluded from the collective bargaining regime in the *Public Service Labour Relations Act*, as enacted by *Public Service Modernization Act*, S.C. 2003, c. 22, s. 2 (“*PSLRA*”, now titled *Federal Public Sector Labour Relations Act*). The Court therefore had to revisit in part its decision in *Delisle*. It is

important to specify that in *Delisle*, only the exclusion of RCMP members was directly challenged, not the constitutionality of the imposed regime as a whole.

[114] Before considering the constitutionality of the regime imposed on RCMP members, McLachlin C.J. and LeBel J., for the majority, emphasized the shift in the case law toward a purposive, generous and contextual interpretation of freedom of association. In their view, s. 2(d) protects three classes of activities: “. . . (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities” (para. 66; see also the companion case *Meredith*, at para. 24).

[115] In the labour context, this means that “s. 2(d) protects against substantial interference with the right to a meaningful process of collective bargaining” (*MPAO*, at para. 80). On the basis of the purposive interpretation of freedom of association gleaned from the jurisprudence, McLachlin C.J. and LeBel J. found that s. 2(d) must take account of “power imbalances” between employees and employers (para. 80). A meaningful process of collective bargaining thus requires that employees be able to define their collective goals, which implies freedom of choice with respect to their representation as well as the independence of their association from management (paras. 85-90).

[116] In that case, the majority held that the regime imposed on RCMP members infringed their freedom of association. It is important to note here that the Court did

not find that the legislative exclusion, viewed in isolation, infringed s. 2(d). Rather, it concluded that the complete scheme “is clearly intended to prevent associational activity protected under s. 2(d) of the *Charter*”:

Second, in *Delisle*, only part of the scheme governing the labour relations of RCMP members — their exclusion from the *PSSRA* — was before this Court. In the present appeal, the challenge targets the entire labour relations scheme — the exclusion from the application of the *PSLRA* and the imposition of the labour relations regime that we have found is intended to deny RCMP members the right to form an independent association capable of engaging in a meaningful process of collective bargaining. In other words, the majority in *Delisle* found that the legislative exclusion, viewed in isolation, did not prevent the creation of an independent association, but the Court now considers the complete scheme which is clearly intended to prevent associational activity protected under s. 2(d) of the *Charter*. [Emphasis added; para. 126.]

[117] The content of freedom of association was also revisited in *Saskatchewan Federation*. The issue in that case was whether prohibiting designated public sector employees from participating in strike action infringed the right guaranteed by s. 2(d) of the *Canadian Charter*. Reversing the opinion expressed by our Court in the *Alberta Reference*, the majority, per Abella J., determined that the right to strike is “essential” to the collective bargaining process (at para. 54) and is even the “irreducible minimum” of the freedom to associate (para. 61, quoting P. Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (1980), at p. 69).

[118] Applying the substantial interference standard, Abella J. therefore held that the ban on strike action in that case infringed the public sector employees’ freedom of association. Indeed, the legislation at issue in that case prohibited employees designated

as “essential services” providers from participating in a work stoppage. Under that legislation, public employers other than the government were asked to enter into an agreement with the union association concerning the concept of “essential services”. If there was no such agreement, the services considered to be essential could be determined unilaterally by the employer, without any review by the province’s specialized tribunals or any other recourse for employees.

[119] It is clear that striking is not an end in itself but rather a means of action whose ultimate purpose is to enable workers to exercise the right to a meaningful process of collective bargaining. As Abella J. stated, “the ability to collectively withdraw services for the purpose of negotiating the terms and conditions of employment — in other words, to strike — is an essential component of the process through which workers pursue collective workplace goals” (para. 46). Legislation substantially interfering with a meaningful bargaining process by limiting the right to strike might nevertheless be justified under s. 1, as long as an appropriate alternative mechanism is put in place (para. 25).

[120] This brief overview reveals that freedom of association under s. 2(d) of the *Canadian Charter* and s. 3 of the *Quebec Charter* protects against any substantial interference with the right of employees to meaningfully associate with others in the pursuit of collective goals relating to conditions of employment. This protection encompasses the right of employees to a meaningful process of collective bargaining, a process that includes the right to make collective representations to their employer

and to have those representations considered in good faith, freedom of choice with respect to their representation, the independence of their association from their employer, and the right to strike.

[121] That being said, our Court has emphasized since *Dunmore* that s. 2(d) guarantees a process, not an outcome or access to a particular model of labour relations. Freedom of association is indeed non-statutory, but the manner of its exercise may be spelled out in legislation. It is therefore in light of these considerations that the Association's claim must be assessed, which is what I turn to now.

C. *The Association Is Seeking Positive State Action*

[122] It is important to begin by characterizing the nature of the Association's claim, because the nature of the claim may affect the framework that applies. This is so because, in *Dunmore*, our Court set out a three-step framework for determining the circumstances in which respect for the freedoms guaranteed by the *Canadian Charter* requires the state to take positive action. If the Association is seeking positive state action, our Court will have to decide whether the framework it established in *Dunmore* and drew inspiration from in *Baier* remains applicable. In such a case, the Association will have to show not only that its claim is not grounded in access to a particular regime and that there has been substantial interference with its members' freedom of association, but also that the state, in its capacity as lawmaker, is responsible for the interference.

[123] The Association contends that it is not seeking positive action because it is asking that its members not be subject to the exclusion in the *L.C.* The ALT and the Court of Appeal both agreed with it on this point. In other words, since the Association wants its members to be *excluded* from the legislative exclusion, the true nature of its claim is negative; it seeks to have the state refrain from engaging in conduct that infringes freedom of association (that is, maintaining the total legislative exclusion of first-level managers). With all due respect, I am not persuaded by this argument.

[124] The content of several freedoms guaranteed by the *Canadian Charter* has both positive and negative dimensions, which is why the distinction between a positive right and a negative right is sometimes blurred (*Toronto (City)*, at para. 20). As a general rule, a “right’s positive dimensions require government to act in certain ways, whereas its negative dimensions require government to refrain from acting in other ways” (para. 20, quoting P. Macklem, “Aboriginal Rights and State Obligations” (1997), 36 *Alta. L. Rev.* 97, at p. 101). The characterization exercise is concerned with the “nature of *the obligation* that the claim seeks to impose upon the state” (para. 20 (emphasis in original)).

[125] In its unanimous reasons, the Court of Appeal stated that the *L.C.* regime [TRANSLATION] “is in some ways the ordinary law” in the collective relations context (para. 135, quoting *Québec (Procureur général) v. Confédération des syndicats nationaux (CSN)*, 2011 QCCA 1247, at para. 87 (CanLII)). In its opinion, the claim therefore does not seek inclusion in a [TRANSLATION] “legislative scheme [that is]

underinclusive” (para. 135). On the contrary, since the Association is asking that its members *not be subject* to the legislative exclusion in s. 1(l)(1) *L.C.*, its claim is negative and not positive. I disagree, for two reasons.

[126] In my view, this conflates the scope of the *L.C.* with its function in Quebec’s legal order. It is true that the *L.C.* governs the organization of most collective labour relations in the province. However, this does not mean that it is the ordinary law in this area. There is no provision in the *L.C.* equivalent to the *Civil Code of Québec*’s preliminary provision, which makes that code the *jus commune* of Quebec and the foundation of all other laws. It also follows from the preliminary provision that the *Civil Code of Québec* “must be interpreted broadly so as to favour its spirit over its letter and enable the purpose of its provisions to be achieved” (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, at para. 15). This interpretive approach applies in relation to labour legislation.

[127] Unlike the *Civil Code of Québec*, the *L.C.* does not have the function of making up for silences or filling gaps in special legislation. This was the basis on which the Court determined, for example, that the *L.C.* only partially codified the duty of an association to perform its representative function properly, thus leaving room for the application of the ordinary law of civil liability (*Noël v. Société d’énergie de la Baie James*, 2001 SCC 39, [2001] 2 S.C.R. 207, at paras. 46-47; *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3, at paras. 60-61), and that the *Civil Code of Québec*’s provisions can apply in the collective labour relations context insofar as they

are compatible with the collective regime (*Isidore Garon ltée v. Tremblay*, 2006 SCC 2, [2006] 1 S.C.R. 27, at para. 54).

[128] Even if the *L.C.* were assumed to be the “ordinary law” regime, this would tell us little about the nature of the obligation that the Association’s claim seeks to assert.

[129] This is not a case in which the state is being asked to refrain from suppressing an activity in which the Association and its members would “otherwise be free to engage, without any need for any government support or enablement” (*Baier*, at para. 35; see also *Toronto (City)*, at paras. 20 and 26). Unlike the situation in *Health Services, Saskatchewan Federation* and *MPAO*, the Association is not seeking to be shielded from a legislative provision or government action that limits or prevents a guaranteed activity in which its members would otherwise be free to engage — a claim for non-interference by the state.

[130] Indeed, in *Health Services*, the impugned legislation changed certain elements put in place in the applicable collective agreements, without the employees having been consulted, and prohibited the making of collective agreements that were contrary to the new elements of the regime. The legislation challenged in *Saskatchewan Federation* expressly withdrew or restricted the right to strike for employees covered by the general collective relations regime. And as I mentioned above, in *MPAO*, the Court considered the constitutionality of a statute that imposed on employees a form of representation not chosen by them.

[131] In contrast, the Association's position is based on the premise that its members cannot meaningfully exercise their freedom of association without legislative protection, and thus without support or enablement from the state. It is for this reason that the Association is seeking support from the state, so that its members will be included in the *L.C.* regime and will therefore be able to exercise their freedom of association. Its claim is one that calls upon the state to take positive action by agreeing to include its members in a particular regime. Any claim that seeks to eliminate the *exclusion* of a class of workers from the application of a general collective relations regime is essentially a claim for *inclusion* in a particular regime.

[132] Having found that the Association's claim seeks the recognition and enforcement of a positive state obligation, I must consider the applicability of the *Dunmore* framework.

D. *Section 2(d) Framework*

[133] Since *Dunmore*, it has consistently been held that substantial interference is the applicable standard for finding an infringement of freedom of association (*Dunmore*, at para. 23; *Health Services*, at para. 90; *Fraser*, at para. 33; *MPAO*, at para. 80; *Saskatchewan Federation*, at paras. 77-78). While substantial interference is at the heart of the analysis in each case, the framework for analyzing freedom of association varies depending on whether the party is asking the state to refrain from interfering with a protected activity or is instead seeking state action to remedy its inability to engage in that activity without support or enablement.

[134] The three-step *Dunmore* framework is better suited to the context of a positive claim and to the type of remedy sought in such cases. Indeed, this approach makes it possible to determine the circumstances in which positive state action may be required under s. 2(d) of the *Canadian Charter*, such that the legislature will be obliged to enact a particular labour relations regime. In *Dunmore*, Bastarache J. explained that, in exceptional circumstances, the exclusion of a class of persons from a statutory labour relations regime may lead to an infringement of those persons' freedom of association guaranteed by s. 2(d) of the *Canadian Charter*.

[135] Bastarache J. described these circumstances as follows. First, claims made against the exclusion must be grounded in an activity protected by s. 2(d) itself and not in access to a particular statutory regime. Second, the exclusion must have the purpose or effect of substantially interfering with an activity protected by s. 2(d) of the *Canadian Charter*. Third, it must be possible for the state to be held accountable for the substantial interference with the activity protected by s. 2(d). On this last point, the exclusion becomes constitutionally suspect because it “substantially orchestrates, encourages or sustains” the infringement of s. 2(d) (para. 26; see also paras. 19-25). When these three steps are satisfied, it must be concluded that the legislature's failure to provide a particular regime constitutes an infringement of s. 2(d) of the *Canadian Charter*.

[136] In *Toronto (City)*, at para. 21, our Court suggested in *obiter* that the applicability of the *Dunmore* framework was now uncertain in light of *MPAO* and

Fraser, without elaborating. This question was not the one the Court had to decide in that case, which concerned freedom of expression and access to a statutory platform. However, this question is at the heart of these appeals.

[137] The Association submits that the *Dunmore* framework has been inapplicable since *MPAO* and *Fraser*. I disagree. Those decisions did not overturn *Dunmore*. On the contrary, our Court's jurisprudence has relied on that case to develop the substantial interference framework, without ever reversing the higher threshold to be met for positive rights claims. The *Dunmore* approach therefore remains applicable to challenges relating to exclusion from a statutory regime. Let me explain.

[138] First, *Fraser* was not a case in which state action was sought. Thus, the case was not a proper one for the application of the *Dunmore* framework. Ontario had enacted legislation governing collective labour relations in the agricultural sector in response to the declaration of unconstitutionality made by our Court in *Dunmore*. In *Fraser*, it was argued that the legislation in question was unconstitutional because it did not offer protections deemed equivalent to those provided by the general regime, the *Labour Relations Act, 1995*.

[139] The majority in *Fraser* stated that the distinction between rights (imposing positive obligations) and freedoms (imposing negative obligations) should not be a rigid one, because the *Canadian Charter* "cannot be subdivided into two kinds of guarantees — freedoms and rights" (para. 67). These *obiter* comments cannot be interpreted as repudiating the distinction drawn in *Dunmore* between a claim for

positive action and a claim for non-interference by the state. Indeed, a dogmatic and rigid application of the distinction between “rights” and “freedoms” had already been cautioned against in *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1039, which preceded *Dunmore* and was drawn upon in that case. Moreover, it should be noted that the majority in *Fraser* relied on *Haig* and *Dunmore* in suggesting that freedom of association, like freedom of expression, may impose positive obligations on the state (paras. 67-72).

[140] Second, *MPAO* must be distinguished from the situation in these appeals and from the one that led to *Dunmore*. At first blush, *MPAO* may seem to cast doubt on the applicability of the *Dunmore* framework, because the majority analyzed the question of the statutory regime imposed, that is, the Staff Relations Representative Program, separately from the question of the exclusion set out in the *PSLRA*. But even though the imposition of a particular regime on employees was analyzed separately from their exclusion from the general collective relations regime, the exclusion was examined mainly from the perspective of the imposition of the constitutionally defective regime:

The *PSSRA*'s successor, the *PSLRA*, reduced the categories of excluded public servants. RCMP members, however, continued to be excluded in identical terms as under the *PSSRA*, and no other statute permitted RCMP members to engage in a process of collective bargaining (*Delisle*, at para. 85, per Cory and Iacobucci JJ., dissenting; R. MacKay, “The Royal Canadian Mounted Police and Unionization”, Parliamentary Research Branch, September 3, 2003, at p. 20). Nothing indicated that the purpose of the initial exclusion of RCMP members from collective bargaining had changed: *Interpretation Act*, R.S.C. 1985, c. I-21, at s. 44(f); see also [*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295], at p. 335. Indeed, the *PSLRA*

exclusion makes possible the current imposition of the [Staff Relations Representative Program], which we have found to substantially interfere in both purpose and effect with RCMP members' right to a meaningful process of collective bargaining. Working in tandem with P.C. 1918-2213, the *PSSRA* exclusion had similarly sought to deny the members of the RCMP the exercise of their right to freedom of association. The simple re-enactment of this exclusion in the *PSLRA* did not cure this constitutionally impermissible purpose. The *PSLRA* exclusion is but a part of a constitutionally defective regime of labour relations, designed to prevent the exercise of the s. 2(d) rights of RCMP members. We therefore conclude that the purpose of the *PSLRA* exclusion infringes s. 2(d) of the *Charter*. [Emphasis added.]

(*MPAO*, at para. 135)

[141] In other words, it was the imposition of the Staff Relations Representative Program, made possible by the exclusion from the general statutory regime applicable to the public service, that was found to be unconstitutional. For further confirmation of this, one need only look at how the Court in *Meredith*, a decision rendered at the same time, described what was held in *MPAO*:

Section 2(d) guarantees a right to a meaningful labour relations process, but it does not guarantee a particular outcome. What is guaranteed is the right of employees to associate in a meaningful way in the pursuit of collective workplace goals. In *MPAO*, we concluded that the imposition of the [Staff Relations Representative Program], combined with a prohibition on collective bargaining by RCMP members, infringes this right. At the same time, the record here establishes that, in the absence of a true collective bargaining process, RCMP members used the Pay Council to advance their compensation-related goals. In our view, the *Charter* protects that associational activity, even though the process does not provide all that the *Charter* requires. The legal alternatives available are not full collective bargaining or a total absence of constitutional protection. Interference with a constitutionally inadequate process may attract scrutiny under s. 2(d). Accordingly, we must examine whether the [impugned legislation] substantially interfered with the existing Pay Council process, so as to infringe the appellants' freedom of association. [Emphasis added; para. 25.]

[142] It is important to specify that in the case before us, no statutory regime has been imposed on the Association's members. The appeals concern only the exclusion set out in s. 1(l)(1) *L.C.*

[143] *Fraser* and *MPAO* must not be read as overturning the *Dunmore* framework *sub silentio*. Our Court does not overturn its precedents lightly (*MPAO*, at para. 127, citing *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489). When our Court reconsidered *Delisle* in *MPAO*, it took care to explain why the foundations of that decision had been eroded by the subsequent case law. The same was true when the *Alberta Reference* was reconsidered in *Saskatchewan Federation*. Nothing of the kind has been said about *Dunmore*. Quite the opposite is true: in both *MPAO* and *Fraser*, our Court described *Dunmore* as a new stage in the development of the jurisprudence under s. 2(d) of the *Canadian Charter*, a new stage that included *Health Services*, from which *MPAO* and *Fraser* also drew support (*Fraser*, at paras. 26-43; *MPAO*, at paras. 43-44 and 51 et seq.).

[144] I pause here to discuss the approach taken by the Court of Appeal to our Court's reasons in *Toronto (City)*, where the majority applied *Baier* in dealing with a claim for state action with respect to freedom of expression. Although the Court of Appeal took note of the majority reasons, recognizing that the decision in *Baier* was based on the *Dunmore* framework, it nevertheless relied on the minority reasons to justify its conclusion that our Court had abandoned the framework in *Fraser* and

MPAO. With respect, it was an error for the Court of Appeal to rely on the minority's approach in *Toronto (City)* to reach that conclusion.

[145] The Association and certain interveners invite our Court to discard the distinction drawn in *Dunmore* between claims seeking recognition of a positive state obligation and claims seeking the enforcement of a negative state obligation, and to set aside the resulting framework. I respectfully decline that invitation, because I am of the view that the three-step *Dunmore* framework better addresses positive claims and reflects the exceptional nature of the remedy sought.

[146] It must not be forgotten that the "leap" made by our Court in *Dunmore*, as significant as it may have been, was meant to recognize that state responsibility under s. 2(d) can be "positive" in nature only in exceptional circumstances. In making that leap, our Court did not intend to import considerations relating to the right to equality into the framework for analyzing freedom of association. As Bastarache J. stated in *Delisle*, exclusion from a particular statutory regime does not dictate a requirement of inclusion by virtue of s. 2(d); this is "[t]he distinguishing feature of s. 15" (para. 25; see also *Dunmore*, at para. 28). Freedom of association does not guarantee access to a particular labour relations regime or to a particular model of collective bargaining (*Dunmore*, at para. 14; *Health Services*, at para. 91; *Fraser*, at paras. 44-47; *MPAO*, at paras. 67, 93 and 137).

[147] The first step of the *Dunmore* framework reflects this consideration by requiring that claims of exclusion be grounded in an activity protected by freedom of

association as such and not in access to a particular labour relations regime. In the context of a positive claim, such a requirement means that the state is not obligated to include the class of employees in the regime in question in order to fulfill its constitutional obligation, but may instead enact a particular regime that meets the minimum requirements of s. 2(d). The reason for this is to avoid creating, in practice, a constitutional right to the general collective labour relations regime in force in a given province or territory. Such an outcome would be contrary to the idea that freedom of association exists independently of any statutory enablement (*Dunmore*, at paras. 22-24 and 35).

[148] The second step of the framework requires that the exclusion have the purpose or effect of substantially interfering with an activity protected by s. 2(d) of the *Canadian Charter*. While the substantial interference standard was initially presented by Bastarache J. as one of the considerations circumscribing “the possibility of challenging underinclusion under s. 2 of the *Charter*” (*Dunmore*, at para. 24), this standard now applies in every case where freedom of association is alleged to have been infringed (*Health Services*, at para. 90; *Fraser*, at para. 33; *MPAO*, at para. 80; *Saskatchewan Federation*, at paras. 77-78).

[149] The third step of the framework requires that a causal link be shown between the substantial interference with freedom of association and the state’s failure to legislate. This is an additional burden of proof to be met in order to establish an infringement of freedom of association. This step of the analysis flows not from

substantial interference, which is the standard of assessment under s. 2(d), but rather from s. 32, which “demands a minimum of state action before the *Charter* can be invoked” (*Dunmore*, at para. 28). Because the cases in which the state can be held accountable for substantial interference resulting from a legislative exclusion are not “common” (*ibid.*), a higher threshold must be met under the *Dunmore* framework.

[150] In this way, the *Dunmore* framework ensures that courts do not unduly interfere with the exercise of legislative power and the development of public policy (*Toronto (City)*, at para. 19). This point cannot be stressed enough. Only in exceptional circumstances can the courts require the state to legislate (*Dunmore*, at para. 28). Even though the courts must show deference to the legislature with respect to the type of regime to be enacted to give effect to freedom of association, regardless of the nature of the claim, such deference will not take the same form in every case. When it comes to negative claims, the courts may declare legislation that has already been enacted unconstitutional on the basis that it substantially interferes with freedom of association. Under the *Dunmore* framework, the courts may require that the legislature enact legislation to remedy the exclusion, leaving it some discretion to determine the content of the legislation. The approach laid down in *Dunmore*, which is meant to limit the cases in which legislative action is necessary to promote the exercise of freedom of association to those in which exceptional circumstances exist, is consistent with the separation of powers.

[151] Distinguishing between the various steps of the framework, rather than incorporating them into the substantial interference standard, is preferable in several respects. Such an approach involves conceptual clarity based on the structure and language of the *Canadian Charter* and provides clear direction regarding the burden of proof to be met at each step. The first step excludes the possibility of seeking access to a particular regime, given the distinction between s. 2(d) and s. 15; the second step requires that substantial interference be shown, as in any constitutional challenge under s. 2(d); and the third step, based on s. 32 of the *Canadian Charter*, takes into account the specific nature of the claim by requiring a causal link between the substantial interference and the legislative exclusion. This approach serves to maintain substantial interference as a single standard while necessitating legislative action only in exceptional circumstances. With respect, there is an inherent contradiction in the position of my colleague Jamal J., who finds that a single standard — substantial interference — can lead to different outcomes depending on the nature of the claim. On the one hand, he states that the approach to be taken should not vary according to the nature of the claim, given that substantial interference is of universal application. On the other hand, however, he states: “It may be harder for a claimant to meet their burden of proof when challenging underinclusive legislation or when seeking state intervention since, as noted above, the effects of underinclusive legislation can be hard to disentangle from other factors” (para. 37).

[152] Distinguishing between the three steps of the framework also avoids the risk that a constitutional challenge under s. 2(d) to a legislative exclusion will be

transformed into a balancing of various considerations or factors, which would amount to overturning the *Dunmore* framework *sub silentio*. Under the three-step framework, it is quite possible that a group of employees excluded from a statutory labour relations regime will be able to demonstrate substantial interference with the exercise of freedom of association but will be unable to establish a causal link with the state's failure to legislate.

[153] Having found that the Association's claim seeks the recognition and enforcement of a positive state obligation and that the *Dunmore* framework applies to claims of this nature, I will now consider whether, in light of this framework, the exclusion of the Association's members from the *L.C.* regime infringes s. 2(d) of the *Canadian Charter* and s. 3 of the *Quebec Charter*.

E. *Does the Exclusion of the Association's Members From the L.C. Regime Infringe Freedom of Association?*

(1) The Association and Its Members Are Seeking Access to a Particular Labour Relations Regime, the *L.C.*

[154] The first step of the *Dunmore* framework involves determining whether the Association is seeking access to a particular labour relations regime or whether its claim is actually grounded in freedom of association as such (*Dunmore*, at para. 24).

[155] This case does not arise from a challenge instituted in a superior court. In contrast to the way the agricultural workers' challenge proceeded in *Dunmore*, the

Association's challenge forms part of a petition for certification under the *L.C.* In my opinion, the procedural vehicle used by the Association is far from a purely technical consideration, contrary to what the ALT and the Superior Court suggested (ALT reasons, at para. 380; Sup. Ct. reasons, at para. 100). While not determinative, this consideration is important in assessing the basis for the Association's claim. In this case, the Association's choice to proceed by way of a petition for certification shows that its ultimate goal is for its members to be subject to the collective labour relations regime in the *L.C.*, as can in fact be seen from one of the conclusions sought in the petition for certification:

[TRANSLATION] **RECOGNIZE** that the petitioning association has all the rights and privileges resulting from the application of the *Labour Code*. [Emphasis in original.]

(A.R., vol. II, at p. 7)

[156] The decision to proceed by way of a petition for certification is all the more relevant for the purposes of analysis because of the fact that the ALT, if it granted the Association's claim, would have no choice but to give its members access to all of the rights and privileges flowing from the *L.C.* Proceeding before a superior court is preferable insofar as such a court has the power to make a formal declaration of unconstitutionality and to suspend the declaration in order to give the legislature all the latitude it needs to enact a particular regime that meets the minimum constitutional requirements of s. 2(d).

[157] It must be kept in mind that, according to *Dunmore*, the appropriate remedy in the case of a positive claim is a declaration of unconstitutionality that is suspended so as not to oblige the legislature to extend the “panoply of . . . rights” under the general regime to excluded employees (para. 66). However, the ALT can neither make a formal declaration of unconstitutionality (*Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, at p. 17; *Nova Scotia (Workers’ Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 33; *Okwuobi v. Lester B. Pearson School Board*, 2005 SCC 16, [2005] 1 S.C.R. 257, at paras. 44-45; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 153) nor suspend the effects of its decision. This is so because the effects of a decision rendered by the ALT cannot be suspended under the *Act to establish the Administrative Labour Tribunal*, CQLR, c. T-15.1, or under the test established in *Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629, assuming that it applies. A declaration of inoperability, which has effect only between the parties to the case, cannot meet the requirement that the government demonstrate a “compelling public interest” based on the public’s entitlement to the benefit of legislation or on the need for legislative action (*G*, at paras. 126 and 139).

[158] The Association properly argues that, in this case, the parties are not [TRANSLATION] “dealing with a claim seeking a declaration *erga omnes* of invalidity”, the effects of which may be suspended, but only with a petition for certification “that, incidentally, seeks to have the exclusion in section [1(l)(1) *L.C.*] declared inoperable against the [Association] and its members” (R.F., at para. 116). Such a declaration by

the ALT has effect only between the parties and leads to them being convened [TRANSLATION] “for a decision on the petition for certification, as though the provision were not in force” (R.F., at para. 118). While this observation is correct in law (*Cuddy Chicks*, at p. 17; *Martin*, at para. 33; *Okwuobi*, at para. 44; *Mouvement laïque*, at para. 154), it only serves to support my conclusion regarding the purpose of the Association’s claim.

[159] All of this shows that the Association and its members are seeking access to a particular statutory regime, that is, the regime provided for in the *L.C.* This conclusion is sufficient to allow the appeals. However, even if I had found that this step of the *Dunmore* framework was satisfied, I am of the view that the Association’s claim would fail at the second and third steps of the framework.

(2) The Exclusion in Section 1(l)(1) L.C. Does Not Have the Purpose or Effect of Substantially Interfering With the Freedom of Association of the Association’s Members

[160] A legislative provision cannot substantially interfere with freedom of association, either in purpose or in effect, without infringing s. 2(d) of the *Canadian Charter* and s. 3 of the *Quebec Charter* (*Dunmore*, at para. 13). Neither in purpose nor in effect does s. 1(l)(1) *L.C.* substantially interfere with the freedom of association of the Association’s members.

(a) *The Purpose of the Exclusion in Section 1(l)(1) L.C. Is Not To Substantially Interfere With the Freedom of Association of the OSs as First-Level Managers*

[161] Caution must be exercised before ascribing an unconstitutional purpose to the exclusion. This is particularly true when considering the exclusion of employees from a general collective relations regime. This is so because, as our Court has stated many times, the *Wagner* model is not the only collective bargaining model that is constitutionally valid (*Dunmore*, at paras. 67-68; *Health Services*, at para. 91; *Fraser*, at paras. 44-46). If the mere existence of the exclusion made it possible to conclude that it has an unconstitutional purpose, this step of the *Dunmore* framework would be drained of all substance.

[162] Indeed, it is especially difficult to show that a provision has an unconstitutional purpose because, as Bastarache J. noted in *Dunmore*, “[s]uch an assessment strikes at the heart of the rapport between the legislatures and the courts and, if undertaken lightly, can become a rather subjective process of induction” (para. 33). The purpose of a provision or statute is identified by reference to the time at which it was enacted (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at pp. 334-36).

[163] The exclusion of first-level managers has been in the *L.C.* since its enactment in 1964. I note in passing that the exclusion was also found in the predecessor of the *L.C.*, the *Labour Relations Act*, S.Q. 1944, c. 30, s. 2(a)1. Like the *Labour Relations Act*, the *L.C.* is largely modelled on the *Wagner Act* enacted in 1935 by the United States Congress (F. Morin et al., *Le droit de l’emploi au Québec* (4th ed. 2010), at para. IV-46; *Health Services*, at para. 43).

[164] The main objects of the *Wagner Act* included enhancing collective bargaining and redressing the unequal balance of bargaining power between employees and their employer (*Health Services*, at para. 57, quoting K. E. Klare, “Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941” (1978), 62 *Minn. L. Rev.* 265, at pp. 281-84).

[165] At the time of its enactment in 1935, the *Wagner Act* did not specifically exclude first-level managers, such as supervisors, from its scope. However, the administrative tribunal responsible for administering that statute, the National Labor Relations Board, sometimes excluded supervisors from bargaining units that included the employees they supervised, depending on the relationship the supervisors had with management or the extent of their authority. Such exclusions were motivated by the absence of a community of interest between the supervisors and the employees whose work they supervised (W. L. Daykin, “The Status of Supervisory Employees Under the National Labor Relations Act” (1944), 29 *Iowa L. Rev.* 297, at pp. 317-19; *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001), at p. 718). For example, in *In re The Maryland Drydock Co.*, 49 N.L.R.B. 733 (1943), which dealt with the inclusion in a bargaining unit of forepersons with substantial managerial authority, the National Labor Relations Board concluded as follows:

To hold that the [*Wagner Act*] contemplated the representation of supervisory employees by the same organizations which might represent the subordinates would be to view the statute as repudiating the historic prohibition of the common law against fiduciaries serving conflicting interests.

...

... We are of the opinion that in the present stage of industrial administration and employee self-organization, the establishment of bargaining units composed of supervisors exercising substantial managerial authority will impede the processes of collective bargaining, disrupt established managerial and production techniques, and militate against effectuation of the policies of the Act. [pp. 740-41]

[166] In 1947, in *Packard Motor Car Co. v. Labor Board*, 330 U.S. 485, the United States Supreme Court determined that supervisors were employees within the meaning of the *Wagner Act* and could form an appropriate bargaining unit. Douglas J. dissented. In his view, the majority's decision ignored the distinction between management and workers as well as the workers' particular situation vis-à-vis the employer. The same year, in response to that decision, Congress amended the *Wagner Act* to exclude supervisors from its application, essentially agreeing with Douglas J. (29 U.S.C. § 152(3) (2018); *Labor Board v. Bell Aerospace Co.*, 416 U.S. 267 (1974), at p. 279).

[167] Although this is of limited assistance in assessing the purpose of the exclusion in s. 1(l)(1) *L.C.*, I note that similar exclusions can be found in other statutes in this country that are based on the *Wagner* model. For example, in Alberta, the *Labour Relations Code*, R.S.A. 2000, c. L-1, s. 1(1)(l)(i), the *Public Service Employee Relations Act*, R.S.A. 2000, c. P-43, s. 12(1)(a), and the *Managerial Exclusion Act*, R.S.A. 2000, c. M-3, s. 2(1), exclude employees who perform managerial functions from their scope (in Nova Scotia, see the *Trade Union Act*, R.S.N.S. 1989, c. 475, s. 2(2)(a); in Prince Edward Island, see the *Labour Act*, R.S.P.E.I. 1988, c. L-1,

s. 7(2)(b); and in Newfoundland and Labrador, see the *Labour Relations Act*, R.S.N.L. 1990, c. L-1, s. 2(1)(m)). This is also the case in Ontario, where the *Crown Employees Collective Bargaining Act, 1993*, S.O. 1993, c. 38, s. 1.1(3) 9, and the *Labour Relations Act, 1995*, s. 1(3)(b), exclude from their scope employees “exercising managerial functions or employed in a confidential capacity in relation to labour relations”, except in the education sector, where the *School Boards Collective Bargaining Act, 2014*, S.O. 2014, c. 5, s. 8, specifically excludes “[s]upervisory officers, principals and vice-principals” from the regime. Sometimes the regimes do not exclude all managerial employees but only those with particular functions, such as work allocation and discipline (in Nova Scotia, see the *Civil Service Collective Bargaining Act*, R.S.N.S. 1989, c. 71, ss. 2(f) and 11(1)(e)). With regard to employees under federal jurisdiction, the *Canada Labour Code* excludes, among others, persons who perform management functions (s. 3(1)). Moreover, the *PSLRA*, which applies to employees in the federal public sector, excludes from its regime, among others, certain persons who occupy managerial positions (s. 2(1)).

[168] Like the *Wagner Act* and the various statutes modelled on it throughout the country, the *L.C.* is premised on this distinction, in the organization of work, between the employer and the workers. The exclusion of managers from the *L.C.* regime brings [TRANSLATION] “to the forefront the fundamental idea flowing from the concept of *organization*, according to which businesses must be structured at two levels of operation: that of management, on the one hand, and that of execution, on the other” (R. Blouin, “La qualification des cadres hiérarchiques par le Code du travail” (1975),

30 *I.R.* 478, at p. 483 (emphasis in original)). By drawing such distinctions in the definition of “employee” in s. 1(*l*) *L.C.*, the legislature intended to [TRANSLATION] “attach specific legal consequences to the fact that management authority is concentrated in the hands of those in charge of the scientific organization of businesses and allocated among them in a hierarchical manner at various levels or tiers” (p. 483).

[169] The exclusion of managers was also intended to make it possible for the employer to trust its representatives, to prevent employee-employer role conflicts, conflicts of interest and even the domination of unions by the employer, and to ensure a community of interest for employees (F. Morin, *Rapports collectifs du travail* (2nd ed. 1991), at para. I-59; F. Morin, *L’élaboration du droit de l’emploi du Québec: Ses sources législatives et judiciaires* (2011), at p. 197; M. Coutu et al., in collaboration with F. Laporte-Murdock, *Droit des rapports collectifs du travail au Québec*, vol. 1, *Le régime général* (3rd ed. 2019), at para. 129). In other words, the Quebec legislature’s purpose in excluding managers from the general collective relations regime by means of s. 1(*l*)(1) *L.C.* was to *promote* the freedom of association of the employees so defined, not to deprive managers of any collective bargaining.

[170] It must not be concluded from this that managers have no protection under s. 2(d) of the *Canadian Charter* and s. 3 of the *Quebec Charter* or that the legislature did not otherwise legislate to enable their freedom of association. Indeed, it is important to make clear and to reiterate that, despite this exclusion from the *L.C.* regime, first-level managers are “employees” under the *Professional Syndicates Act*. Since the

enactment of that statute in 1924, they have been able to join together and form associations or professional syndicates, which have “exclusively for object the study, defence and promotion of the economic, social and moral interests of their members” (s. 6). Managers can also make representations to the employer (R. Chartier, “Le syndicalisme de cadres et la législation québécoise du travail” (1965), 20 *I.R.* 278, at p. 284). In these circumstances, it can hardly be argued that the purpose of the legislative exclusion in the *L.C.* was to prevent managers from associating.

[171] For these reasons, I cannot accept that the purpose of the exclusion of first-level managers from the *L.C.* is to substantially interfere with the freedom of association of the Association’s members. In my view, the Association has not shown that such a purpose existed in 1964 when the *L.C.* was enacted. In contrast to the history laid out in *MPAO*, the record does not show that there was distrust of any association of first-level managers. There is no basis for concluding that the Quebec legislature considered the role of manager to be fundamentally incompatible with the collective bargaining protected by freedom of association.

(b) *The Legislative Exclusion Does Not Have the Effect of Substantially Interfering With Freedom of Association*

[172] After completing its analysis, the ALT concluded that the legislative exclusion has the effect of substantially interfering with the freedom of association of the Association’s OS members.

[173] The administrative judge found substantial interference particularly because the Société's recognition of the Association as the representative of the OSs is voluntary and because the Société has discretion in reviewing the Association's representativeness. Moreover, the Association's members would not be protected if their employer interfered with or impeded associational activities. The Court of Appeal agreed with that conclusion. In my view, it is erroneous and the Superior Court was correct in law in setting it aside.

[174] Not every difference between the OSs' situation and the situation they would be in if they were not excluded from the *L.C.* regime constitutes substantial interference. It must be recognized that the OSs have been able to associate. They joined together and formed the Association, the Montréal section of which is recognized by the Société - Casino de Montréal for the purposes of labour relations at the casino, pursuant to the Memorandum. In *Dunmore*, Bastarache J. stated that "a group that proves capable of associating despite its exclusion from a protective regime will be unable to meet the evidentiary burden required of a *Charter* claim" (para. 39). Of course, that statement must be qualified in light of the subsequent evolution of the jurisprudence with respect to the content of freedom of association. That being said, this is an essential consideration in determining the effect of the exclusion on the ability of the Association's members to exercise their freedom of association.

[175] The Memorandum recognizes that the Association - Section Montréal can represent other first-level managers if it proves its representativeness where they are

concerned to the Société - Casino de Montréal (cl. 1(a), reproduced in A.R., vol. V, at p. 1). However, the Société - Casino de Montréal reserves the right to [TRANSLATION] “terminate” the Memorandum if the Association “no longer represents the majority of Casino de Montréal table supervisors eligible hereunder” (cl. 1(c)).

[176] The Memorandum provides that the Association - Section Montréal and the Société - Casino de Montréal agree to meet at the request of either party to discuss and share the parties’ concerns [TRANSLATION] “with a view to seeking win-win solutions” (cl. 1(b)). It also states that the Société - Casino de Montréal will not modify the conditions of employment of the members of the Association - Section Montréal without consulting it and that the parties [TRANSLATION] “agree to act in a spirit of cooperation and collaboration in their relations with each other” (cl. 2(c); see also cl. 2(b)).

[177] Moreover, the Memorandum provides that the Société - Casino de Montréal will deduct the regular dues required by the Association - Section Montréal from its members’ wages and remit the amounts collected to the Association (cl. 3). The Société - Casino de Montréal also agrees to grant leave with pay for two representatives of the Association - Section Montréal to meet with representatives of Casino de Montréal and for three representatives to participate in the five annual meetings of the Association - Section Montréal (cl. 4(a) and (b)). The Société - Casino de Montréal undertakes to pay wages to the table supervisors acting as representatives of the Association - Section Montréal who request leave for reasons related to the

Association - Section Montréal, but it nevertheless bills the Association for any monetary contribution made for the benefit of its representatives who are granted such leave (cl. 4(c)).

[178] Lastly, the Memorandum refers to the duty of loyalty that the table supervisors owe to the Société - Casino de Montréal because they are its [TRANSLATION] “primary allies in the achievement of its mission, the pursuit of its objectives and the overall smooth running of its operations” (cl. 2(a)).

[179] In itself, the voluntary nature of this recognition does not constitute substantial interference. Such recognition is certainly a departure from the model chosen by the *L.C.* However, as our Court stated in *MPAO*, the *Wagner* model, under which the certification process is overseen by an independent administrative body, is not “the only model capable of accommodating choice and independence in a way that ensures meaningful collective bargaining” (para. 95). Similarly, “nothing in the [Canadian] Charter prevents an employee association from engaging willingly with an employer in different, less adversarial and more cooperative ways” (para. 97).

[180] Without making any definitive pronouncement on the matter, I acknowledge that certain aspects of the Société’s conduct, in the absence of the protections conferred by the *L.C.*’s provisions, do seem to interfere substantially with the freedom of association of the Association’s members: the modification of conditions of employment without consulting the Association, contrary to what is provided for in the Memorandum, and the refusal or failure to negotiate certain

conditions of employment despite the Association's requests. Such conduct may seem contrary to the duty to bargain in good faith, which is central to a meaningful process of collective bargaining. However, the existence of alternative recourses is another important consideration in concluding that the Association's members are not unable to exercise their freedom of association.

[181] Furthermore, the Association is not without recourse in the event that the Société interferes with the conduct of its activities. In contrast to the situation of the agricultural workers in *Dunmore*, any conduct by the Société that infringes freedom of association would not be immune from review by the courts, even with the legislative exclusion.

[182] First, as a subsidiary of a company that is a mandatary of the state, the Société may be subject to the *Canadian Charter*, which means that the Association may have a remedy under s. 24(1) thereof. In any case, there is no doubt that the *Quebec Charter* allows the Association to go to court and seek a remedy under s. 49. Both s. 24(1) of the *Canadian Charter* and s. 49 of the *Quebec Charter* give the courts broad powers to grant appropriate remedies that serve to uphold the purpose of the right infringed (with regard to s. 24(1) of the *Canadian Charter*, see *Mills v. The Queen*, [1986] 1 S.C.R. 863, at pp. 965-66; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at paras. 24-25, 55-59 and 87; with regard to s. 49 of the *Quebec Charter*, see *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30, [2004]

1 S.C.R. 789, at paras. 24-28; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789, at para. 103). For example, depending on the context and the right, such remedies may include an injunction (*Doucet-Boudreau*, at paras. 70 and 73; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134) or an award of damages (*Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, at paras. 20-21, 31 and 45; *Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621; *de Montigny v. Brossard (Succession)*, 2010 SCC 51, [2010] 3 S.C.R. 64).

[183] The Association argues that recourse to the ordinary courts is so inefficient and so unsuited to the context of collective labour relations that the lack of a specialized dispute resolution mechanism constitutes substantial interference. However, this argument is not supported by the evidence. The record, as it stands, does not show any attempt to obtain a remedy through the ordinary courts for an infringement of the freedom of association of the Association's OS members.

[184] In the same vein, the Association has not established that it is prevented from striking in the absence of a statutory regime governing it and that this represents substantial interference with its members' freedom of association. Indeed, no law prevents the Association's members from striking. On the contrary, if the members decided to take part in a work stoppage for the purposes of negotiating their conditions of employment, s. 2(d) of the *Canadian Charter* and s. 3 of the *Quebec Charter* would

apply so as to confer certain protections on them. It is also important to bear in mind the broad remedial power granted to the ALT by s. 128 of the *Act respecting labour standards*, CQLR, c. N-1.1, in cases of dismissal without good and sufficient cause.

[185] Accordingly, I am of the view that the exclusion does not have the effect of substantially interfering with the freedom of association of the Association's OS members. I am also of the view that, even if I had concluded otherwise, the state could not have been held accountable for the substantial interference, for the reasons I explain below.

(3) On the Assumption That There Is Substantial Interference, the State Cannot Be Held Accountable for the Interference at the Third Step of the *Dunmore* Framework

[186] Even on the assumption that the Société's impugned conduct constitutes substantial interference with the exercise of the freedom of association of the Association's members, I am of the view that this interference is not attributable to the state within the meaning of *Dunmore*. In *Dunmore*, Bastarache J. rejected the argument that any exclusion from a regime aimed at safeguarding a fundamental freedom results in an infringement (para. 39). This last step of the analysis exists in order to determine "whether the state can truly be held accountable" for any substantial interference with freedom of association (para. 26).

[187] Establishing a link is crucial, as what is being challenged when the *Dunmore* framework is applied is the state's *legislative* action, not the employer's

action alone. The analysis must be based on the factual context of the case. For example, in *Dunmore*, a majority of our Court held that without the protection of Ontario's labour relations legislation, agricultural workers were incapable of exercising their freedom of association due to their special vulnerability. In that specific context, there was therefore a link between the lack of legislative protection and the substantial interference (paras. 39-42). Without being a strict requirement, the special vulnerability of the excluded group may be indicative of state responsibility.

[188] There is, of course, a relationship of subordination between the Société's executive and the OSs. This is the essence of any employer-employee relationship. However, the vulnerability inherent in this relationship of subordination is not a sufficient basis for finding a link between the legislative exclusion and the Société's impugned conduct. Cases in which a legislative exclusion amounts to an infringement of freedom of association are rare (*Dunmore*, at para. 30), as there is no general right to legislative protection (para. 35). Here, there is no link between the legislative exclusion being challenged and the Société's impugned conduct, which is due to its alleged failure to comply with its contractual undertakings and which, it cannot be overemphasized, can be sanctioned by the ordinary courts.

[189] Despite this absence of special vulnerability, the Court of Appeal held the state accountable on two bases: first, there was a causal link between the state's improper conduct as employer and the legislative exclusion; second, this link could be established as a result of the state's breaches of the international conventions applicable

in Canada, particularly because of its refusal to act on the recommendations of the International Labour Organization's Committee on Freedom of Association. I examine each of these two bases below.

[190] First, the Court of Appeal held the state accountable because of the ties between the Société and Loto-Québec, which is a mandatary of the state. In the Court of Appeal's view, the Superior Court's conclusion that [TRANSLATION] "the infringement of the freedom of association guaranteed to the Association's members is the exclusive responsibility of the Employer, and that the state is therefore entirely uninvolved", is "difficult to reconcile with the fact that the Employer is a subsidiary of Loto-Québec and with the ties that exist between the latter and the state" (C.A. reasons, at para. 169). With respect, the state whose responsibility must be established at this step of the analysis is the state as lawmaker, not the state as employer. This is because it is the constitutionality of the legislation that is being challenged (*Health Services*, at para. 88). Indeed, the remedy normally sought in such circumstances is a declaration that a law is of no force or effect under s. 52(1) of the *Constitution Act, 1982*, which "provides a remedy for laws that violate [Canadian] Charter rights either in purpose or in effect" (*R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 61 (emphasis in original)).

[191] I note that, in *Dunmore*, the evidence showed that the agricultural workers were "substantially incapable" of forming or maintaining an association without a protective regime (para. 35). That conclusion flowed from the finding that exclusion

from the protective regime reinforced the agricultural workers' vulnerability and precarious position:

Distinguishing features of agricultural workers are their political impotence, their lack of resources to associate without state protection and their vulnerability to reprisal by their employers; as noted by Sharpe J., agricultural workers are “poorly paid, face difficult working conditions, have low levels of skill and education, low status and limited employment mobility” (p. 216). Moreover, unlike RCMP officers, agricultural workers are not employed by the government and therefore cannot access the [Canadian] Charter directly to suppress an unfair labour practice (*Delisle*, at para. 32).

(*Dunmore*, at para. 41)

In addition to the particular status of the agricultural workers, the Court noted their exclusion from the scope of other legislation related to employment standards and occupational health and safety, their lack of access to a remedy under the *Canadian Charter* and their limited knowledge of their rights. These factors as a whole were what led the Court to conclude that the state could be held accountable to the extent that it “orchestrates, encourages or sustains” the substantial interference with the agricultural workers' freedom of association (*Dunmore*, at para. 26).

[192] As I have already explained, the situation of the Association's OS members is completely different. As first-level managers, they are subject to the *Act respecting labour standards*, s. 3(6), the *Act respecting industrial accidents and occupational diseases*, CQLR, c. A-3.001, s. 2, and the *Pay Equity Act*, CQLR, c. E-12.001, s. 8. Moreover, if the Société does anything contrary to freedom of association, the OSs

certainly have a remedy under ss. 3 and 49 of the *Quebec Charter* as well as a potential remedy under ss. 2(d) and 24(1) of the *Canadian Charter*.

[193] The interference alleged by the Association is said to arise not from the legislative exclusion being challenged but rather from the Société's failure to comply with some of the undertakings it made in the Memorandum and its failure to bargain in good faith. Given the nature of the conduct impugned by the Association, the state could be held accountable only as employer. Indeed, the acts in question are attributable to the Société, which means that the state could not be held accountable in its capacity as lawmaker.

[194] Second, the Court of Appeal accepted the ALT's conclusion that the exclusion of managers is problematic in light of the international conventions applicable in Canada and found that the state could be held accountable based on the government's refusal to follow the recommendation of the Committee on Freedom of Association and eliminate the legislative exclusion of first-level managers. With respect, this argument rests on a misconception of the place of international instruments in constitutional interpretation, and the state cannot be held accountable on such a basis.

[195] The decisions of the Committee on Freedom of Association are not binding in Canadian law (*Saskatchewan Federation*, at para. 69; see also *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, [2020] 3 S.C.R. 426, at paras. 43-44). Similarly, these decisions are not binding even within the International Labour Organization's system (B. Langille, "Why Are Canadian Judges Drafting

Labour Codes — And Constitutionalizing the Wagner Act Model?” (2009), 15 *C.L.E.L.J.* 101, at p. 118). The Committee is not a judicial body but rather a political body (p. 119). As Professor Langille notes, “[a]s important as the work of the [Committee on Freedom of Association] is, it is not designed for constitutional legal analysis and this fact alone should give us pause before we hand over the interpretation of our constitution to the [Committee]” (p. 119).

[196] Even if the Committee could be considered a judicial body, this would at most give its decisions persuasive value. In *9147-0732 Québec inc.*, a majority of our Court, per Brown and Rowe JJ., noted that non-binding international instruments, like the decisions of international tribunals, are “relevant and persuasive, but not determinative, interpretive tools” for analyzing the rights guaranteed by the *Canadian Charter* (para. 35; see also para. 43). It follows that such instruments do not give rise to the presumption of conformity. On the contrary, they have only persuasive value, insofar as they support or confirm “the result reached by way of purposive interpretation” (para. 22).

[197] The foregoing does not mean that the absence of a statutory framework does not indirectly have disruptive effects on the ability of the OSs to engage in collective bargaining. These effects, however, arise mainly from circumstances unrelated to the legislative exclusion, namely the Société’s alleged conduct. In this sense, the substantial interference at issue here, even if it existed, would not result from

the *L.C.* exclusion. Accordingly, I am of the view that the exclusion does not have the effect of infringing the freedom of association of the Association's OS members.

VI. Disposition

[198] For these reasons, I would set aside the judgment of the Quebec Court of Appeal, allow the application for judicial review, quash the decision of the Administrative Labour Tribunal and declare s. 1(*l*)(1) *L.C.* to be operable against the Association in the context of its petition for certification, with costs throughout.

The following are the reasons delivered by

ROWE J. —

I. Introduction

[199] I adopt the reasons by Justice Côté. These are separate reasons concurring in the result. These appeals require the Court to examine the scope of the state's responsibility in respect of freedom of association under s. 2(d) of the *Canadian Charter of Rights and Freedoms*.

[200] This Court has consistently described s. 2(d) as reflecting a right that is largely "negative" in nature. Thus, in most circumstances, it does not impose "positive" obligations of protection or assistance on the state. It is only in exceptional

circumstances, identified under a distinct framework set out in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, that s. 2(d) of the *Charter* can impose positive obligations on the state.

[201] In the present case, the respondent and some interveners invite this Court to reject the distinction between positive and negative rights and, incidentally, the *Dunmore* framework, which was adapted in *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673 (see R.F., at paras. 15-18; I.F., Canadian Labour Congress, at paras. 7 and 9; I.F., Public Service Alliance of Canada, at paras. 8-10, 14, 16-19 and 21; I.F., Canadian Civil Liberties Association, at paras. 3, 8, 16, 20-21 and 24). The Court of Appeal of Quebec agreed that [TRANSLATION] “the distinction between positive and negative rights and the *Baier* framework are not necessarily appropriate in freedom of association cases” (2022 QCCA 180, at para. 133 (CanLII)) but did not resolve the issue, having erroneously concluded that the claim in the present case was negative instead of positive (paras. 135-36; see also Justice Côté’s reasons, at paras. 125-132).

[202] The question of the application of the *Dunmore* framework for claims under s. 2(d) was left open by the majority in *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, at para. 21. In my view, the *Dunmore* framework should remain applicable to assess positive claims. In the present reasons, I wish to emphasize the rationale underlying the use of a distinct framework to assess positive claims under s. 2(d). My reasons proceed in two parts. First, I explain the relevance of distinguishing

between positive and negative claims. Second, I explain why the *Dunmore* framework remains a sound way to assess positive claims under s. 2(d).

II. The Distinction Between Positive and Negative Claims Under Section 2(d)

[203] As I mentioned at the outset, the state's responsibility under s. 2(d) has consistently been described as "negative" in nature rather than imposing "positive" obligations of protection or assistance. This means that, in most cases, Parliament and the provincial legislatures need only refrain from interfering (either in purpose or effect) with protected associational activity. Conversely, s. 2(d) of the *Charter* generally does not oblige the state to take affirmative action to safeguard or facilitate the exercise of the freedom of association (*Dunmore*, at para. 19; see also *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, at para. 25; *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1035; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at para. XII-5.39).

[204] Where the state itself directly attacks protected associational activity by passing a law interfering with individuals exercising their freedom, a claim targeting this action will be qualified as negative, since the state has violated an obligation *not* to interfere. Indeed, the corollary of the individual's right to freedom of association is the state's obligation not to infringe this freedom. Such an infringement may occur where a statute prohibits the inclusion, in future collective agreements with health sector employees, of provisions dealing with specified matters (*Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27,

[2007] 2 S.C.R. 391) or where a statute expressly limits the ability of public sector employees who perform essential services to strike (*Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245).

[205] This Court has also recognized that, in exceptional circumstances and in order to make the freedom to organize meaningful, s. 2(d) can impose positive obligations on the state, notably to extend an existing protective legislation to unprotected groups (*Dunmore*, at paras. 20-21; *Delisle*, at para. 33; Brun, Tremblay and Brouillet, at para. XII-5.40; for a parallel analysis relating to s. 2(b), see also *Toronto (City)*, at para. 17; *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, at pp. 651-52; *Haig*, at p. 1039).

[206] Through a positive claim under s. 2(d), a claimant seeks to impose an obligation on the state to take action in order to protect the freedom from attacks by third parties, including *private actors*. In such cases, the state has not failed to “respect” the freedom of association by passing a law directly impinging upon it; rather, it has failed to adequately protect or enhance the freedom from the coequal freedom of third parties, notably private actors (B. Langille and B. Oliphant, “The Legal Structure of Freedom of Association” (2014), 40 *Queen's L.J.* 249, at pp. 263 and 266; see also *Baier*, at para. 35; *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at para. 35). This will be the case, for example, where vulnerable workers are excluded from the general labour relations scheme, even in the absence of any state

action that could impede them to unionize or to engage in collective bargaining, insofar as they establish their incapacity to exercise their freedom of association without the assistance of the state (*Dunmore*, at para. 67).

[207] Positive claims raise unique concerns that emphasize the need for a different standard — the *Dunmore* framework provides such a standard. Below, I explain these concerns and how the *Dunmore* framework effectively addresses them.

III. Reasons Why the *Dunmore* Framework Must Be Maintained

A. *Nature of the Fundamental Freedoms*

[208] A freedom, by nature, does not encompass the obligation for the state to facilitate its exercise. For instance, the fact that individuals have the *freedom* to distribute false news does not mean that the state must in some way *facilitate* this conduct or pass legislation to prevent private actors from terminating employment on the basis of such conduct in the workplace (Langille and Oliphant, at pp. 267-68). Concluding otherwise would force the state to enact a scheme to actively protect every individual.

[209] I pause here to note that I do not endorse a rigid dichotomy between “freedoms” as being solely negative and “rights” as being solely positive. Such an interpretation would depart from the purposive approach articulated in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, and under which “a situation might arise in which, in

order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required” (*Haig*, at p. 1039). Accordingly, a “right” can impose negative obligations of non-interference. Similarly, a “freedom” can impose positive obligations in order to make the exercise of the freedom meaningful. This has been recognized by this Court in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at paras. 67-72 (see also *Haig*, at p. 1039).

[210] However, the fact that a freedom has both positive and negative dimensions does not mean that these dimensions are irrelevant and should not be distinguished. The distinction between these dimensions remains important when considering the nature of the obligation that the claim seeks to impose upon the state (*Toronto (City)*, at para. 20; see also B. Langille, “Why the Right-Freedom Distinction Matters to Labour Lawyers — And to All Canadians” (2011), 34 *Dal. L.J.* 143, at p. 157; *Dunmore*, at para. 108, per L’Heureux-Dubé J., concurring).

[211] A freedom does not always give rise to an obligation for the state to facilitate its exercise. This is why a higher burden forces the claimants to demonstrate why, in their circumstances, a posture of restraint from the state is not enough. In effect, any positive obligation requiring the state to protect the freedom should arise only where the claimant would otherwise be substantially *incapable* of exercising the freedom (Langille and Oliphant, at p. 291; see also *Dunmore*, at para. 23).

B. *Absence of Direct State Action*

[212] The infringement giving rise to a negative claim under s. 2(d) is fundamentally different than the infringement leading to a positive claim. In the case of a negative claim, *the state itself* attacks the freedom by passing a law having the purpose or effect of interfering with individuals exercising their freedom. In contrast, in the case of a positive claim, the state did not infringe the freedom by any direct action but has only failed to adequately protect the freedom from infringement *by third parties*, notably private actors.

[213] Given this difference, the standard to analyze positive claims should not be the same as for negative claims. For negative claims, the claimant only has to establish that the statute or the state action in cause constitutes a “substantial interference” with the freedom of association (*Health Services*, at para. 90). By applying the same standard for positive claims, every time a private employer would substantially interfere with the freedom of association of its employees, the employees could sue the government for not passing legislation to stop employers from interfering with their freedom to associate (Langille, at p. 157; see also *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at pp. 261-63). The state would be forced to justify, under s. 1, any decision not to provide protection to a group or not to extend a protection to every individual.

[214] The *Dunmore* framework was specifically designed to take into account the absence of direct state action giving rise to the infringement in the case of positive claims. In *Dunmore*, agricultural workers challenged the constitutionality of their

exclusion from Ontario's labour relations regime. There was clear evidence of infringement of the freedom of association of the agricultural workers, but these violations were caused by private employers, not by any direct state action. The agricultural workers were legally free to associate. No government law or state action prevented them from combining in groups and making collective representations to an employer or from refusing to work without an acceptable contract, and no state action as such had the effect of impeding association. What precluded association was the fact that the private employers were free to refuse to bargain with them, to not hire unionized employees or to terminate striking workers in the absence of legislation protecting these activities, as they are protected for the majority of unionized workers in Ontario.

[215] The majority in *Dunmore* recognized that there is no "constitutional right to protective legislation *per se*", but that "legislation that is underinclusive may, in unique contexts, substantially impact the exercise of a constitutional freedom" (para. 22 (emphasis in original)). The three-step framework established in *Dunmore* was designed in order to identify those exceptional circumstances where legislative intervention is required despite the absence of direct state action.

[216] Under this framework, it remains part of the test to demonstrate that the freedom of association has been substantially impeded by the exclusion from the protective legislation. However, the claimant *also* has the burden of demonstrating that the claim is grounded in fundamental *Charter* freedoms rather than in access to a

particular statutory regime and, more importantly, that the state can be held accountable in some ways for the inability to exercise these fundamental freedoms. The contribution of private actors to a violation is part of the factual context in which the review takes place but cannot in itself justify the imposition of a positive obligation on the state. Thus, this framework is particularly important in order to distinguish cases where the intervention of the state is warranted. Even where a claimant can establish that their freedom to organize has been substantially impeded, it is still incumbent on them to *link* this impediment to the state, not just to private action (*Dunmore*, at paras. 26 and 43; see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650, at para. 78, per LeBel J., dissenting; Brun, Tremblay and Brouillet, at para. XII-5.40).

[217] This link to the state can be established by the demonstration of the vulnerability of the claimant group. In *Dunmore*, the agricultural workers established that they were substantially incapable of exercising their constitutional freedom to associate without the assistance of the state. The conditions of the agricultural workers were reinforced by their exclusion from the labour relations scheme. They established that their exclusion, essentially, placed a chilling effect on any non-statutory union activity. In the absence of a framework focused on the state's responsibility, s. 2(d) could be misused to further the position of the relatively privileged (*Dunmore*, at paras. 39 and 43-45).

C. *Separation of Powers*

[218] Positive claims also raise unique concerns about the separation of powers. Choices about who to grant further protection to, and the mechanisms by which this is given effect, rest with the legislature (*Toronto (City)*, at para. 19). As emphasized by the majority in *Dunmore*, “by ‘dipping its toe in the water’, and affording or enhancing the rights of some”, the government is not obliged to “go all the way and ensure the enjoyment of rights by all” (para. 22, quoting *Dunmore v. Ontario (Attorney General)* (1997), 155 D.L.R. (4th) 193 (Ont. C.J. (Gen. Div.)), at p. 207). The fact that a regime aims to safeguard a fundamental freedom does not mean, in itself, that exclusion from that regime automatically gives rise to a *Charter* violation (para. 39).

[219] It is not the proper role of the Court to confer constitutional status on a particular statutory regime. Labour relations regimes are a policy choice, designed to promote labour peace and bring certainty to the employment relationship, but they are not a constitutional imperative (see *Dunmore*, at para. 24; *Haig*, at p. 1041). While the Court may strike down legislation considered incompatible with a *Charter* provision, the “Court is not in a position to enact such detailed legislation, nor to confer constitutional status on a particular statutory regime” (*Dunmore*, at para. 66; see also Langille and Oliphant, at p. 271). As the majority of this Court underlined in *Toronto (City)*, “choices about whether and how to design a statutory or regulatory platform are best left to the elected orders of the state” (para. 19; see also *McKinney*, at p. 263). Thus, the elevated evidentiary threshold provided in the *Dunmore* framework ensures that the adjudication of positive claims respects the separation of powers.

IV. Conclusion

[220] I believe that my reasons answer the question left open in *Toronto (City)*, and I am left with the conclusion that the *Dunmore* framework must be maintained to assess positive claims.

[221] While s. 2(d) can require positive actions from the state in order to make the freedom to organize meaningful, claims of this nature must be analyzed under a distinct framework that takes into account the nature of this fundamental freedom, the necessary link to state action, and the separation of powers.

APPENDIX

Relevant Constitutional and Statutory Provisions

Canadian Charter of Rights and Freedoms

Rights and freedoms in Canada

1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental freedoms

2 Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

Enforcement of guaranteed rights and freedoms

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Charter of human rights and freedoms, CQLR, c. C-12

3. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

49. Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.

In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.

52. No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter.

Labour Code, CQLR, c. C-27

1. In this Code, unless the context requires otherwise, the following expressions mean:

...

(l) “employee”: a person who works for an employer and for remuneration, but the word does not include:

(1) a person who, in the opinion of the Tribunal, is employed as manager, superintendent, foreman or representative of the employer in his relations with his employees;

12. No employer, or person acting for an employer or an association of employers, shall in any manner seek to dominate, hinder or finance the formation or the activities of any association of employees, or to participate therein.

No association of employees, or person acting on behalf of any such organization, shall belong to an association of employers or seek to dominate, hinder or finance the formation or activities of any such association, or to participate therein.

Appeals allowed with costs.

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