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The "Second Labour Trilogy": A Comment On R. V. Advance Cutting, Dunmore V. Ontario, and R.W.D.S.U. V. Pepsi-Cola

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**THE “SECOND LABOUR
TRILOGY”:
A COMMENT ON *R. V. ADVANCE
CUTTING, DUNMORE V.
ONTARIO, AND R.W.D.S.U. V.
PEPSI-COLA***

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I. INTRODUCTION

2002 is a year of reckoning for the Charter of Rights and Freedoms.¹ The first 20 years of decision making have registered victories in the name of constitutional rights, and missed opportunities too. Much of the attention on this anniversary will place the jurisprudence under scrutiny, in an attempt to understand why the Supreme Court of Canada enforced the guarantees in certain instances and deferred to the democratic process in others.

At present, the pattern is one of astute decision making that is case-specific, and prefers to resolve issues on narrow grounds. In this, the Court negotiates a course between confrontation with legislatures and the public and its duty to enforce the Charter. Examples of trade-offs between the judiciary's responsibility to enforce the Charter and its perception of institutional vulnerability include

Little Sisters Books & Art Emporium v. Canada,² *R. v. Sharpe*,³ and *Suresh v. Canada (Minister of Citizenship and Immigration)*.⁴

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¹ Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

² [2000] 2 S.C.R. 1120 (concluding that Customs Canada had discriminated against Little Sisters and infringed its rights under s. 2(b), and refusing a remedy in the circumstances). See J. Benedet, “*Little Sisters Book & Art Emporium v. Minister of Justice: Sex Equality and the Attack on Butler*” (2001), 390 H.L.J. 197; and B. Ryder, “*The Little Sisters Case, Administrative Censorship and Obscenity Law*” (2001), 39 O.H.L.J. 207; see generally, J. Cameron, “*Anticipation: Expressive Freedom and the Supreme Court of Canada in the New Millennium*” (2001), S. Ct. L. Rev. 67.

³ [2001] 1 S.C.R. 45 (accommodating expressive freedom through an elaborate exercise in statutory interpretation while avoiding the furor which would have ensued had the *Criminal Code*'s

In this workmanlike approach to the Charter, much is predictable, and what is not is institutionally safe. It is difficult to imagine this a bold Court, or one that aspires to a vision of constitutional rights. Yet if that is the impression, counterexamples can still be found. For instance, the rise of the worker was easily the most notable development in the latter part of 2001 and early 2002. Against a backdrop of long-standing deference to legislative and administrative decision makers, the Court supported trade unions three times in succession. First, *R. v. Advance Cutting and Coring Ltd.* chose collective interests over individual rights to uphold a legislative scheme which imposed serious constraints on section 2(d)'s negative and positive entitlements.⁵ Then, *Dunmore v. Ontario (Attorney General)* all but abandoned precedent to hold a legislature accountable for not protecting the meaningful exercise of associational freedom.⁶ Finally, in *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West)*, the Court unanimously placed itself on the side of workers in a decision that set up common law limits on secondary picketing against the expressive freedom of picketers.⁷

Previously, workers had been perennial losers under the Charter. In that regard, though *Dolphin Delivery Ltd.* acknowledged in *dicta* that section 2(b) protects labour picketing,⁸ the pattern was set in 1987, when a majority of the Supreme Court gave section 2(d) what can only be described as a deadening interpretation. In concluding that associational freedom is an individual right and does not protect collective bargaining or the right to strike, the *Labour Trilogy* relegated the guarantee to irrelevance.⁹ This year, however, unions and

child pornography legislation been in part or in whole struck down). See Cameron, *id.* (commenting on this aspect of *Sharpe*).

⁴ 2002 SCC 1 (holding that it is unconstitutional to deport a refugee who faces a substantial risk of torture on *refoulement* and allowing, at the same time, that there may be exceptions to that rule).

⁵ 2001 SCC 70 (upholding provisions which compelled construction workers to join one of five unions designated by the statute).

⁶ 2001 SCC 94 (imposing a constitutional duty on the government to protect the s. 2(d) rights of agricultural workers).

⁷ 2002 SCC 8 (modifying the common law rule that secondary labour picketing is *per se* illegal).

⁸ *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 (concluding that the Charter did not apply and that secondary picketing could justifiably be limited); see also *BCGEU v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214 (upholding an injunction prohibiting union picketing of courthouses); but see *Lavigne v. O.P.S.E.U.*, [1991] 2 S.C.R. 211 (upholding the union's right to compel union dues from non-members for non-collective bargaining purposes); and *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083 [hereinafter "*KMart*"] (upholding a union's right to engage in "leafleting" at a secondary site).

⁹ The *Labour Trilogy* comprises *Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 [hereinafter the "*Alberta Reference*"]; *P.S.A.C. v. Canada*, [1987] 1 S.C.R. 424; and

their causes emerged victorious in the decisions above which are referred to in this article as the “second labour trilogy”. Exploring how and why the rights of workers caught the Court’s attention is the subject of this article. At the outset, it can be noted that, under existing authority, each of these decisions could have been decided differently. From that perspective, it becomes especially important to understand the significance of this trilogy.

Advance Cutting, Dunmore, and Pepsi-Cola may also have implications that extend beyond the constitutionalization of labour relations. After analyzing each in sequence, a concluding section considers their implications for other Charter issues. In doing so, it asks whether the second trilogy should be understood as a result-oriented expression of judicial sympathy for workers or seen, instead, as decisions that rest on principles of Charter interpretation. In either case, the trilogy demonstrates the McLachlin Court’s willingness to challenge the assumptions of the Charter’s early landmarks. Finally, the article closes by inviting the Court to re-think other assumptions of Charter interpretation and, in particular, the relationship between section 15’s equality guarantee and its limits under section 1.

1. Freedom of Association

In effect, the *Labour Trilogy* limited freedom of association to the formal right of individuals to establish, belong to, and maintain associations. Activities undertaken in association, by way of collective endeavour, had no status under section 2(d), *unless* the self same activity would be independently protected by the Charter if undertaken by an individual.¹⁰ Significantly, a majority of the judges on the *Trilogy* panel rejected a conception of the guarantee as collective in nature; to avoid the risk that associations might thereby be granted special

R.W.D.S.U. v. Sask., [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 (rejecting an association’s claim that it was entitled to be recognized for collective bargaining purposes); *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157 [hereinafter “CEMA”] (rejecting a claim that excluding egg producers from a marketing scheme violated s. 2(d); and *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989 [hereinafter “Delisle”] (rejecting the claim that excluding the RCMP from the federal government’s statutory labour regime violated s. 2(d)).

¹⁰ It is difficult to draw doctrine from the fragmented opinions by the Court’s panel of six in the *Alberta Reference*, the leading decision in the *Labour Trilogy*. At most, LeDain J., for the majority result, and McIntyre J., concurring, agreed that s. 2(d) protects the bare right to form an association, as well as associational activities that are protected by other Charter guarantees, such as s. 2(b). While McIntyre J. would also have included associational activities which would be lawful if undertaken by an individual, Dickson C.J. and Wilson J. dissented on the basis that a guarantee of associational freedom must include a collective element.

status under the Charter, they concluded that freedom of *association* should be regarded as an *individual* right.¹¹ In *Professional Institute v. Northwest Territories*, the late Sopinka J. synthesized the *Trilogy*'s conception of associational freedom in a four-point test.¹² A valiant attempt to propose concrete doctrine nonetheless floundered when the framework failed to attract majority support.¹³ As a result, labour union claims and freedom of association more generally lay dormant for the most part until the late 1990s, as there was little point litigating section 2(d) issues that could not succeed.¹⁴ As the millennium approached, the Supreme Court issued decisions in two freedom of association cases but rejected the claim both times; in doing so it impliedly endorsed *Professional Institute*'s four-point test, albeit without expressly adopting it.¹⁵

As LeBel J. acknowledged in *Advance Cutting*, deference was the organizing principle of the section 2(d) labour relations jurisprudence. There, he indicated that the Court's reluctance to accept that "the whole field of labour relations" should fall under the Charter was well established.¹⁶ After describing the judiciary's "non-intervention policy" in some detail, he declared that labour relations had deliberately been left "entirely to the political process, Parliament and provincial legislatures".¹⁷ His reasons in *Advance Cutting* confirm that LeBel J. supported this "hands-off policy" for removing "any Charter protection from the bargaining procedures and rights that have largely defined the role of un-

¹¹ As McIntyre J. explained in the *Alberta Reference*, *supra*, note 10, at 404, "[i]f Charter protection is given to an association for its lawful acts and objects, then the Charter-protected rights of the association would exceed those of the individual merely by virtue of the fact of association."

¹² The four-point framework declared: "... first, that s. 2(d) protects the freedom to establish, belong to and maintain an association; second, that s. 2(d) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association; third, that s. 2(d) protects the exercise in association of the constitutional rights and freedoms of individuals; and fourth, that s. 2(d) protects the exercise in association of the constitutional rights and freedoms of individuals. *Professional Institute*, *supra*, note 9, at 402.

¹³ Three of the panel's seven members dissented from Sopinka J.'s majority disposition, and three others wrote separately to support the result, without endorsing its reasoning.

¹⁴ See *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591 (invalidating restrictions on the freedom to form interprovincial law partnerships under s. 6 rather than s. 2(d)); and *R. v. Skinner*, [1990] 1 S.C.R. 1235 (concluding that *Criminal Code* provisions prohibiting the public solicitation of prostitution do not offend s. 2(d)); but see *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569 (concluding, without discussing s. 2(d) as an independent guarantee, that Quebec's statutory referendum framework violated s. 2(b) and (d)).

¹⁵ *CEMA*, *supra*, note 9, at 232; and *Delisle*, *id.*, at 1007 (stating that *CEMA* had cited the *Professional Institute* test "with approval").

¹⁶ *Advance Cutting*, *supra*, note 5, at para. 156.

¹⁷ *Id.*, at para. 161 (emphasis added).

ions".¹⁸ Testing his assertion that the Charter has remained "a neutral force" is a key objective of the discussion which follows.¹⁹

II. ADVANCE CUTTING AND CORING LTD. V. QUEBEC

Advance Cutting in some ways reprised the issues decided in *Lavigne v. O.P.S.E.U.*²⁰ There, an individual complained that mandatory dues check-off violated his negative entitlement under section 2(d) to be free from compelled association with his workplace labour union. In fact, Mr. Lavigne was not a member of and was not required to join the union; nor did he resist the obligation to pay Rand formula dues. Rather, he objected to that portion of mandatory dues which was deflected from collective bargaining purposes to support an assortment of non-workplace causes. In this, he complained that he was compelled to support and be affiliated with objectionable purposes, contrary to the Charter.

The scheme challenged in *Advance Cutting* was quite different. There, legislation sought to regulate Quebec's construction industry as comprehensively as possible. In terms of section 2(d)'s negative entitlement, provincial legislation compelled workers, as a condition of employment, to obtain a competency certificate and to choose membership in one of five government-recognized employee associations.²¹ By requiring workers to become union members, as a matter of law, the regime violated the Rand formula's compromise between the closed shop and the free rider. As Bastarache J. explained, in dissent, the formula balanced the interests of individuals in "*not being forced to associate with an organization against their will* with the interest of the majority in preventing a minority from acquiring the fruits of collective bargaining without having to pay for it".²² This landmark in Canadian labour relations entitled the unions to dues check-off, and allowed workers the choice of belonging to the organization or not. Under Quebec's scheme, however, construction workers were

¹⁸ *Id.*, at para. 162 (emphasis added).

¹⁹ *Id.*, stating that the Charter has remained "a neutral force" on questions related to labour relations.

²⁰ *Supra*, note 8.

²¹ The appellants were charged under s. 119.1 of an *Act Respecting Labour Relations, Vocational Training and Manpower Management in the Construction Industry*, R.S.Q., c. R-20, which prohibited employers from hiring workers, and workers from performing work in the industry, without a competency certificate as required by the statute. Section 28 provided that workers could not obtain a competency certificate without joining one of the five union groups designated by the legislation.

²² *Advance Cutting*, *supra*, note 5, at para. 4 (quoting *Trade Union Law in Canada*) (emphasis in original).

required to support the costs of collective bargaining *and* to become members of the union. Moreover, by setting conditions on access to employment, the statute also affected the freedom to associate.²³ In comparison to *Lavigne*, *Advance Cutting*'s consequences for associational freedom were drastic.

Returning briefly to *Lavigne*, all seven members of the panel rejected the individual's claim to be free from compelled financial association with the union's broader causes. While four judges found no breach of section 2(d), three found an infringement that was justifiable under section 1.²⁴ Ironically, though the *Labour Trilogy* defined freedom of association as an *individual* right, Mr. Lavigne lost because the union's *collective* interest in pursuing causes outside the workplace was paramount. Consequently, *Lavigne* counted as a victory for labour, but confirmed the near impossibility of establishing a breach under section 2(d). From that perspective, it is difficult to agree with LeBel J. who, in *Advance Cutting*, denied that freedom of association is an "inferior right, barely tolerated and narrowly circumscribed".²⁵ Under the jurisprudence prior to the second trilogy, an individualist conception of the guarantee spurned collective activities when the "positive" right was in issue, only to rally around collective endeavour, at the expense of an individual's freedom from compulsion, when the "negative" entitlement was at stake.

In testing the legislation regulating of Quebec's construction industry against the Rand formula, *Advance Cutting* exposed deep rifts among members of the Court. Four judges found no breach of the Charter, and four others were adamant that Quebec's compulsory membership scheme fundamentally compromised the guarantee of associational freedom. In the event, Iacobucci J. provided the decisive vote which found a breach which was saved under section 1.²⁶

²³ Under the legislation, workers were not eligible to work in the construction industry unless they had lived in Quebec the previous year, had worked at least 300 hours, and were under the age of 50. Regional quotas also limited the number of workers in each predetermined region in the province.

²⁴ Justice La Forest with Sopinka and Gonthier JJ., concurring, upheld the limit under s. 1; Wilson J., with L'Heureux-Dubé and Cory JJ., concurring, found no breach of s. 2(d)); and McLachlin J. likewise found no breach, albeit for different reasons; *Lavigne*, *supra*, note 8.

²⁵ *Advance Cutting*, *supra*, note 5, at para. 208.

²⁶ Oral argument was heard in March 2000, but the Court's decision was not released until October 2001, some 20 months later. Justice LeBel, with Gonthier and Arbour JJ., concurring, found no breach of s. 2(d); L'Heureux-Dubé J. wrote separate reasons concurring in that conclusion; Bastarache J., with McLachlin C.J.C. and Major and Binnie JJ. concurring, found a breach that could not be saved by s. 1; in a brief opinion that recalled Sopinka J.'s pivotal role in *Egan v. Canada*, [1995] 2 S.C.R. 513, Iacobucci J. agreed with the four judges who found a breach, and then supported the result advocated by the other four who upheld the legislation.

One element in the question whether section 2(d) should be seen as an individual or a collective entitlement is the symmetry, or lack thereof, between the guarantee's positive and negative entitlements. In logic, if the Charter prohibits the state from interfering with the exercise of fundamental freedoms, it must also prohibit the state from compelling individuals to exercise a fundamental freedom against their will. The Court's conclusion in *R.J.R.-MacDonald v. Canada (Attorney General)*, that the government's mandatory labeling provision failed the minimal impairment test, essentially recognized that principle.²⁷ The same principle found voice, earlier, in *R. v. Big M Drug Mart Ltd.*'s powerful statement that freedom is characterized by the absence of coercion or constraint, and that a person who is compelled by the state to a course of action or inaction which would not otherwise have been chosen is not truly free.²⁸ Even so, the asymmetry of this jurisprudence is that the Court remains hesitant to enforce claims based on an *individual's* freedom from compulsion.²⁹

With Gonthier and Arbour JJ. concurring, LeBel J. wrote for three of the four judges who found no breach of section 2(d) in *Advance Cutting*. In doing so, he rejected the suggestion that the guarantee's negative entitlement should be seen as a "simple mirror-image of the positive right of association".³⁰ He regarded it as necessary, in the interests of democracy, to place "some inner limits and restrictions" on section 2(d)'s potential for freedom from association.³¹ Thus he adopted LaForest J.'s rationale in *Lavigne*, that "forced associations which flow from the functioning of democracy cannot be severed" through the Charter's intervention.³² Put differently, association can be compelled if it serves such purposes, as "[d]emocracy is not primarily about withdrawal, but fundamentally about participation in the life and management of democratic institutions like unions".³³ Allowing individuals to withdraw would compromise their "group voice" and deny them "the benefits arising from an association".³⁴ Meanwhile, L'Heureux-Dubé J.'s sole concurrence advocated the more radical position that section 2(d) does not include a negative entitlement.³⁵

²⁷ [1995] 3 S.C.R. 199.

²⁸ [1985] 1 S.C.R. 295, at 336-37.

²⁹ In addition to *Lavigne*, *supra*, note 8, see *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038 (upholding a human rights tribunal decision, challenged under s. 2(b), which compelled an employer to write a designated letter of reference for a wrongfully dismissed employee).

³⁰ *Advance Cutting*, *supra*, note 5, at para. 206.

³¹ *Id.*, at para. 208.

³² *Id.*, at para. 207.

³³ *Id.*

³⁴ *Id.*, at para. 208.

³⁵ See, *e.g.*, *id.*, at para. 58 (stating that it is "antithetical to the purpose and scope" of s. 2(d) to protect a negative entitlement); para. 67 (declaring that if the purpose of associational freedom "

To answer what could not be disputed, that construction workers required by law to join one of five designated unions were placed under an involuntary regime of compelled association, LeBel J. insisted that the obligation had no more than a “limited impact” on the “asserted” right not to associate.³⁶ He was led to this conclusion by his conception of ideological conformity, which he adopted as the standard of breach for the negative entitlement. In this the judge relied on McLachlin J.’s concurrence in *Lavigne* and her finding, there, that ideological coercion was not inherent in the payment of mandatory dues.³⁷ Analogizing from dues to compelled membership, he declared that involuntary association is “neutral”, absent evidence of ideological conformity.³⁸

Further, LeBel J. observed that, in contrast to *Lavigne*, where the appellant had specified the causes to which he objected, “no witness came forward to assert that he felt or believed that joining a union associated him with activities he disapproved of”.³⁹ Likewise, there was no evidence of union practices that imposed values or opinions, no evidence about the internal life of construction unions, and no indication that the union limited free expression in a way that might trigger section 2(d)’s negative entitlement.⁴⁰ In LeBel J.’s view, the statute imposed little more than a “bare obligation to belong”, and did not create any mechanism to enforce ideological conformity.⁴¹

He conceded that it is well known and well documented that unions intervene in political and social debate. Still, he was far from persuaded that Quebec unions have “a constant ideology”, act “in constant support of a particular cause

‘is to permit the collective pursuit of common goals’, then the very concept of a ‘negative freedom of association’ becomes suspect.”); para. 75 (claiming that “judicial parsimony” is appropriate, in defining the scope of s. 2(d), because constitutional remedies are “powerful tools which ought to be used with prudence”); and para. 76 (describing the negative entitlement as having a “tainted pedigree” aimed at the right not to associate).

³⁶ *Id.*, at para. 278; see also para. 277 (stating that “[t]his limited form of compelled association respects fundamental democratic values” and that it requires “only a limited commitment from construction employees”); and para. 218 (describing the obligation to join a union as a “very limited one”).

³⁷ In *Lavigne v. O.P.S.E.U.*, [1991] 2 S.C.R. 211, McLachlin J. found no breach of s. 2(d) on the facts, because in her view the payment of union dues under the Rand formula could not reasonably be seen as compelling *Lavigne* into ideological conformity with the union’s causes. Meantime, while also recognizing ideological conformity as a factor, La Forest J. in *Lavigne* supported a broader conception of the negative right and found, specifically, that the compelled association violated s. 2(d) because it extended to areas outside the areas of common interest to which the Rand formula’s rationale applied.

³⁸ *Advance Cutting*, 2001 SCC 70, at para. 201.

³⁹ *Id.*, at para. 220.

⁴⁰ *Id.*, at para. 223.

⁴¹ *Id.*, at para. 218.

or policy”, or seek to “impose that ideology on their members”.⁴² Any such assumption, in his view, would indulge impermissible stereotypes of the union movement as “authoritarian and undemocratic”.⁴³ As far as LeBel J. was concerned, the appellants had based their case on a misguided notion of “some absolute right” which, absent concrete evidence of imposed conformity, “may not rest on a generalized suspicion of the nature of unions and their management of internal life”.⁴⁴

In discounting the infringement this way, LeBel J.’s reasons are strikingly formalistic. Though others could be added, two examples from equality jurisprudence illustrate the flaw in that approach. First, against the proposition that racially segregated schools do not discriminate against black children without proof of inequality on a school-by-school or student-by-student basis, the U.S. Supreme Court held in *Brown v. Board of Education* that separate is not equal.⁴⁵ Counting and comparing how many pencils, blackboards and playgrounds black and white children had was not the issue: segregation was a question of principle. Second, and by the same token, the affirmative action programs are not restricted to those who can prove that they themselves have directly suffered discrimination.⁴⁶ If the above parallels are not perfect, they are close enough to show that LeBel J.’s reasons rested on a formalistic conception of compelled association.

Meanwhile, Mr. Justice Bastarache’s passionate dissent drew concurrences from McLachlin C.J., as well as from Major and Binnie JJ. Though he disagreed with LeBel J.’s interpretation of ideological conformity, the meaning of democracy and its implications for forced association marked the true point of difference between the two. Without settling the content of associational freedom, Bastarache J. accepted, for purposes of *Advance Cutting*, that ideological conformity encompassed all aspects of the case. Therefore, whether or not forced association might be considered *prima facie* in breach of section 2(d), he

⁴² *Id.*, at para. 227.

⁴³ *Id.*

⁴⁴ *Id.*, at para. 232.

⁴⁵ U.S. 347 (1954) 483.

⁴⁶ Race or gender-conscious remedies are not particularly controversial when the individual benefitted is a direct victim of discrimination; accordingly, affirmative action programs must rest on the broader rationale that members of the group are eligible as beneficiaries, regardless whether they have suffered discrimination.

It is also useful to remember that a formalistic approach is not foreign to labour relations; in the early 20th century, during the infamous *Lochner* era, the U.S. Supreme Court invalidated statutory provisions aimed at equalizing the relationship between employees and their employers, on the ground that state interference offended the “equality of right” that each side in the employment relationship enjoyed. The fiction there was that the worker and his boss were formal, legal equals.

concluded, at the least, that the government must justify coerced association in circumstances where ideological conformity is imposed.⁴⁷

On the merits, Bastarache J. found that ideological conformity is unavoidable in a scheme of compelled union membership. That conclusion followed his characterization of the union movement as “a participant in the political and social debate at the core of Canadian democracy”.⁴⁸ Additionally and by way of prelude to his reasons in *Dunmore*, he remarked that “[t]he collective character of the right to associate is undeniable because collective activity is not equivalent to the addition of individual activities”.⁴⁹ That collective endeavour may be an important and distinctive function of an association did not mean, however, that membership can be compelled by the state. Recognizing that the collective force of union membership can be politically and socially potent, Bastarache J. held that it must be “constituted democratically” to conform to section 2(d).⁵⁰

More “independent evidence” of the ideological views of specific unions was unnecessary because unions designated by statute and granted a sinecure of coerced membership are fundamentally undemocratic. Whereas *Lavigne* did not compromise the democratic principle, Quebec’s legislation required adherence to a “scheme advocating *state-imposed* compulsory membership”.⁵¹ Justice Bastarache went on to state that “[i]deological constraint exists in particular where membership numbers are used to promote ideological agendas”, and added that “this is so *even where there is no evidence* that the union is coercing its members to believe in what it promotes”; in such circumstances, adherence is “*itself a form of ideological coercion*”.⁵² Describing the regime as a “system of forced association and state control over work opportunity”, he concluded that “the democratic rights of workers” had been taken away.⁵³ Emphatically, he declared that “[b]eing forced to accept and participate in a system that severely limits the democratic principle in the area of labour relations is a form of coercion that cannot be segregated totally from ideological conformity”.⁵⁴

The contrast was stark between Bastarache J., who regarded the scheme as a serious infringement of section 2(d)’s negative and positive entitlements, and

⁴⁷ *Advance Cutting*, *supra*, note 5, at para. 19.

⁴⁸ *Id.*, at para. 17.

⁴⁹ *Id.*

⁵⁰ *Id.*, at para. 27.

⁵¹ *Id.*, at para. 28 (emphasis added).

⁵² *Id.* (emphasis added). At para. 36, he explained that the Rand formula does not negate the democratic principle because a majority of workers choose accreditation and approve the collective agreement; that means workers can still choose to work in a non-unionized environment and where a union is in place, the ultimate forced association is justified by the majority principle.

⁵³ *Id.*, at para. 34.

⁵⁴ *Id.*

LeBel J., who regarded it as a limited interference with a negative entitlement which should be checked by internal limitations. Divergent interpretations of the right in turn prompted different views of the Charter’s evidentiary requirements. As far as LeBel J. was concerned, the appellants could not establish a breach without exposing the particulars of ideological conformity. Meanwhile, after characterizing compulsory unionization as ideological in nature, Bastarache J., quickly dismissed the government’s section 1 argument.⁵⁵ That left Iacobucci J. admitting that he found himself in an “unusual situation”.⁵⁶ Though he found, under section 2(d), that the legislation failed to provide “any justification” for compelled union association,⁵⁷ he concluded that the scheme was saved under section 1 by its “unique and complex historical context”.⁵⁸

In some respects, *Advance Cutting* signalled the second “trilogy” decision in *Dunmore v. Ontario*.⁵⁹ Though the positive entitlement was not at issue, *Advance Cutting* hinted that the Court might be prepared to reconsider the assumption that section 2(d) is an individual, rather than a collective, entitlement.⁶⁰ It is remarkable, as well, that a majority upheld a regime that derogated from the Rand formula, which has for years been a mainstay of Canadian labour law. Not only that, the infringement was much more severe in *Advance Cutting* than in *Lavigne*, because “being forced by the government to join one of five specified unions differs drastically from being forced to pay union dues”.⁶¹

At the same time, elements of *Advance Cutting* would prove inconsistent with the Court’s decision in *Dunmore*. Just as LeBel J. emphasized the principle of deference in labour relations, Madam Justice L’Heureux-Dubé’s concurring opinion repeatedly spoke of the need for judicial restraint, judicial parsimony, caution and prudence.⁶² Yet all members of the Court who deferred to the legislature in *Advance Cutting* joined Bastarache J.’s opinion in *Dunmore*, which was anything but deferential.

⁵⁵ *Id.*, at paras. 43-51 (explaining that even if the statute’s stated objectives were accepted, its provisions would fail the rational connection and minimal impairment tests).

⁵⁶ *Id.*, at para. 281.

⁵⁷ *Id.*, at para. 287.

⁵⁸ *Id.*, at para. 288.

⁵⁹ 2001 SCC 94.

⁶⁰ See *supra*, note 49 (*per* Bastarache J.). Meantime, while LeBel J. emphasized the individual conception of the right, to show that his opinion was consistent with the jurisprudence, he also stated that the Court “has never forgotten that the act of association brings together, for some common purpose, a group of human beings”, and that the case law has emphasized the “fundamental societal value of freedom of association”; *id.*, at para. 170.

⁶¹ *Id.*, at para. 32 (*per* Bastarache J.); see also para. 20 (reminding that LaForest J.’s discussions of constitutional issues in *Lavigne* had nothing to do with mandatory membership).

⁶² *Supra*, notes 16-19, as well as note 35 and accompanying text.

Finally, there is the question of evidence as a factor in *Advance Cutting*. Though LeBel J. maintained that the section 2(d) claim must fail because ideological conformity had not been proved, that standard would shift before long. In *Dunmore*, it was difficult to show that the agricultural workers' inability to organize was somehow the government's responsibility. Along with L'Heureux-Dubé J., the judges who joined LeBel J. in *Advance Cutting* also agreed in *Dunmore* that, despite the presence of systemic, causal factors in the industry, the government was accountable under the Charter for not intervening to secure the section 2(d) rights of agricultural workers.

Whether *Advance Cutting* will undermine the Rand formula in other contexts remains to be seen. Though LeBel J. stressed that compelled membership is a limited obligation and therefore not a serious infringement of section 2(d), the troubled history of Quebec's construction industry provides a basis for distinction in future cases. Even so, *Advance Cutting* can only be viewed as a significant victory for labour unions and the primacy of collective interests over individual freedom. For that reason, it provided the anchor in the Supreme Court's "second labour trilogy".

III. DUNMORE V. ONTARIO (ATTORNEY GENERAL)

*Dunmore v. Ontario*⁶³ challenged legislation which excluded agricultural workers from a provincial labour relations scheme. The workers, who had been excluded from the regime for some 50 years, had never been able to organize. During one short year, they enjoyed fleeting status under the *Agricultural Labour Relations Act* (the "ALRA"), which was then repealed following a change in government.⁶⁴ The appellants claimed that by reverting to the pre-ALRA scheme, Ontario had infringed their freedom of association under section 2(d), and violated section 15(1)'s guarantee of equality.

Prior to *Dunmore*, the Supreme Court had consistently held that section 2(d) imposes no obligation on government either to engage in collective bargaining or to recognize and include particular unions in its management of labour relations.⁶⁵ More modestly, the guarantee was aimed at statutes which imposed a direct prohibition on the right to form an association or which otherwise placed

⁶³ *Supra*, note 59. Justice Bastarache wrote the majority opinion, in which L'Heureux-Dubé J. separately concurred; Major J. dissented alone.

⁶⁴ S.O. 1994, c. 6. Section 80 of the *Labour Relations Act, 1995*, ("LRESLAA") S.O. 1995, c. 1, repealed the ALRA in its entirety, thereby subjecting agricultural workers to s. 3(b) of the *Labour Relations Act 1948* ("LRA"), S.O. 1948, c. 51, which excluded them from the LRA's labour relation's regime. Section 80 also terminated any certification rights of trade unions, and any collective agreements certified, under the ALRA.

⁶⁵ See, e.g., the *Labour Trilogy*, *Professional Institute*, and *Delisle*, *supra*, note 9.

certain restrictions on collective activity.⁶⁶ Against governing authority, the appellants argued that, in the absence of status under the LRA, it was impossible for agricultural workers to organize. At trial, Sharpe J., as he then was, found “*nothing* in Ontario’s statutory labour law regime that prohibits or even actively discourages agricultural workers from forming trade unions”.⁶⁷ Inasmuch as their efforts to organize might be resisted or undermined by private employers or the common law, he concluded that their complaint was about private power, not state action. Effectively, the appellants were attempting to “impose upon the province a positive duty to *enhance* the right of freedom of association” through a legislative scheme “conducive to the enjoyment of” their rights under section 2(d).⁶⁸ Justice Sharpe’s conclusion that both claims must fail was upheld by the Ontario Court of Appeal, before being reversed by the Supreme Court of Canada.⁶⁹

To assume that the outcome in *Dunmore* was driven by its particular facts obscures the significance of a decision which shifted section 2(d) in a new direction and effectively collapsed the distinction between the public and the private.⁷⁰ Moreover, the Court could only impose a positive obligation on the province through an attenuated conception of causation that linked legislative inaction to the inability of private sector employees to organize. In the end, the Court held that Ontario was obliged to ensure that its agricultural workers could exercise their right of associational freedom *vis-a-vis* private employers in a meaningful way.

That conclusion was impeded by virtually all the section 2(d) jurisprudence, including the Court’s immediately preceding decision in *Delisle v. Canada*.⁷¹ There, Bastarache J. held that the Charter did not require the federal government to include RCMP employees in its statutory labour relations regime. As he explained, “[i]t is because of the very nature of freedom that section 2 generally imposes a negative obligation on the government *and not a positive*

⁶⁶ *Supra*, note 12 (*Professional Institute’s* four-part test for s. 2(d)).

⁶⁷ (1998), 37 O.R. (3d) 287, at 299 (emphasis added).

⁶⁸ *Id.*, at 300 (emphasis added).

⁶⁹ *Id.*, at 312 (rejecting the equality claim, because there was no evidence to indicate that agricultural workers as a group can be identified by any combination of the grounds enumerated in s. 15(1), or by any *personal characteristic* thereto; emphasis in original); see (1999), 182 D.L.R. (4th) 471 (stating, *per* Krever J.A. that “[w]e agree with the judgment of Sharpe J., both with the result at which he arrived and his reasons”).

⁷⁰ At certain junctures the Supreme Court took care to highlight the distinctive history of agricultural labour relations. *Dunmore*, *supra*, note 59, at para. 22 (stating that under-inclusive legislation may, “in unique contexts”, impact the exercise of a constitutional freedom); para. 41 (discussing the distinguishing features of agricultural workers); and para. 47 (explaining why association is all but impossible in the *agricultural* sector in Ontario).

⁷¹ [1999] 2 S.C.R. 989.

obligation of protection or assistance".⁷² To that he added, "[i]t is accordingly settled that the exclusion of a group of workers from a specific statutory scheme" does not preclude the establishment of parallel, independent associations, and that there is no violation of section 2(d) "because one group of workers is included in the regime which another is not".⁷³ In *Delisle* Bastarache J. was firmly of the view that "it must be open to the government to determine which association or forms of expression are entitled to special support or protection".⁷⁴

On its face *Dunmore* appeared to raise an indistinguishable issue; but not so, said the judge who wrote the majority opinion in both cases. To avoid *Delisle*'s force as precedent, Bastarache J. identified two key differences between the RCMP and Ontario's agricultural workers. First, he pointed out that while the RCMP's employer is the government, agricultural workers are part of the private sector. Ordinarily, that difference would give the RCMP a stronger claim, as government is bound by the Charter and private employers are not. Yet he turned the tables by claiming that *Delisle* was limited, as precedent, to the circumstances of a public employer. It is arguable, he explained, that *Delisle* "was not intended to apply where private employers are involved", because *dictum* by L'Heureux-Dubé J. on that point "was not rejected by the *Delisle* majority".⁷⁵ In other words, the Court was at liberty to grant greater rights to agricultural workers employed privately than to federal government employees, because the majority opinion in *Delisle* had not expressly answered a *dictum* which appeared in a sole concurrence. Second, he emphasized that RCMP employees had been able to form organizations, despite their exclusion from the scheme, but agricultural workers had not. Though excluding the RCMP had little or no effect on the exercise of their freedom of association, the same was not true of Ontario's agricultural workers.⁷⁶

Setting the circumstances of these workers aside for a moment, *Dunmore* is of transcending importance for its interpretation of section 2(d). In re-casting the Court's conception of associational freedom, Bastarache J. denied that the Supreme Court had endorsed *Professional Institute*'s framework,⁷⁷ and dis-

⁷² *Id.*, at 1015 (emphasis added).

⁷³ *Id.*, at 1017 (emphasis added).

⁷⁴ *Id.*, at 1018.

⁷⁵ *Dunmore*, *supra*, note 59, at para. 21.

⁷⁶ *Supra*, note 71, at 1018; and *Dunmore*, *id.*, at para. 41. As explained below, however, *Delisle* was based on a different and narrower definition of the right than the decision in *Dunmore*, which expanded s. 2(d) to include the meaningful exercise of certain collective activities, including the right to make majority representations to the employer.

⁷⁷ *Id.*, at para. 15. Specifically, he said that *Professional Institute* provided "little assistance to this Court" in *CEMA*; it is true that *CEMA*, [1998] 3 S.C.R. 157, at 232, cites the four-part test

counted it as a test that “sheds light” but does not “capture the full range of activities protected by section 2(d)”.⁷⁸ Thus freed from its constraints, he left no doubt that a collective dimension had been added to the scope of the guarantee. Invoking Dickson C.J.’s dissent in the *Alberta Reference*, which he also described as not “explicitly rejected by the majority” on this point, Bastarache J. declared that the collective is qualitatively different: individuals associate “not simply because there is strength in numbers, but because communities can embody objectives that individuals cannot”.⁷⁹ Accordingly, to limit section 2(d) to activities which can be performed by individuals would “render futile these fundamental initiatives”.⁸⁰ In doctrinal terms, he reduced the guarantee to a single inquiry: has the state precluded activity *because* of its associational nature, thereby discouraging the collective pursuit of common goals?⁸¹ Without dismantling it, Bastarache J. displaced *Professional Institute*’s four-part test by changing the nature of the inquiry and focusing on whether the legislature targeted associational conduct *because of its concerted or associational nature*.⁸²

Albeit reluctant to overrule the *Labour Trilogy* or the *Professional Institute*’s test, Bastarache J. was determined, nonetheless, to shift the Court’s conception of section 2(d) from its focus on the individual.⁸³ On a close reading of key paragraphs there is no mistaking his support for an interpretation of associational freedom that extends to collective activities. For all practical purposes, *Dunmore* adopted then Dickson C.J.’s *Labour Trilogy* dissent. Though the decision left intact the doctrine linking section 2(d) to the rights of individuals, as noted earlier, the Charter’s guarantee of associational freedom was a dismal failure under that definition of the entitlement. By proposing a “single inquiry” to determine whether the state interfered with activity because it is *collective* in

without explicitly endorsing it. As to *Delisle*, he stated in *Dunmore, id.*, that “this Court did not have to rule on the validity of the existing framework”; to be precise, though, *Delisle, supra*, note 71, at 1007, states that *CEMA* confirmed the *Trilogy* and “cited with approval” the *Professional Institute* test.

⁷⁸ *Id.*, at para. 16.

⁷⁹ *Id.*, at para. 16; see also para. 17 (stating that “the very notion of ‘association’ recognizes the qualitative differences between individuals and collectivities” because “the community assumes a life of its own and develops needs and priorities that differ from those of its individual members”).

⁸⁰ *Id.*

⁸¹ *Id.* (emphasis in original).

⁸² *Id.* (emphasis added).

⁸³ Even so, Bastarache J. was careful to note, *id.*, at para. 17, that “this Court has repeatedly excluded the right to strike and collectively bargain from the protected ambit of s. 2(d)”. Moreover, on the question of remedy, he stated, “I neither require nor forbid the inclusion of agricultural workers in a full collective bargaining regime”; *id.*, at para. 68.

nature, *Dunmore* injected vitality into a guarantee that was barely alive in the first 20 years of Charter interpretation.

Redefining the scope of section 2(d) enabled the Court to find a breach in the circumstances. As noted above, Sharpe J. rejected the claim because nothing in the statute prohibited the agricultural workers from establishing, belonging to, or maintaining a labour union.⁸⁴ Nor did the statute interfere with associational activities that were constitutionally protected or were otherwise lawful if performed by an individual.⁸⁵ Yet the appellants maintained that it was impossible for them to organize because of their exclusion from the statutory regime. In response to the claim, Bastarache J. framed the central question in these terms: can excluding agricultural workers from a statutory labour relations regime, *without expressly or intentionally prohibiting association*, constitute a “substantial interference” with freedom of association?⁸⁶ Pursuant to his revitalized conception of the guarantee, Bastarache J. expanded section 2(d) to include “certain collective activities”, which, he maintained, must be recognized if the freedom to form and maintain an association is to have any meaning.⁸⁷

The next step in the analysis explained how the province violated the Charter by not legislating to protect the “meaningful exercise” of section 2(d)’s guarantee.⁸⁸ Not only did the trial judge attribute the workers’ problems to the private actions of their employers, there was little authority in the Charter jurisprudence for the imposition of positive obligations on the government. To transform a question of private employment relations into a breach of the Charter, Bastarache J. transposed section 15’s concept of underinclusion to section 2(d). The statute’s exclusion of agricultural workers avoided the public/private dichotomy through the following reasoning. If underinclusion can state a claim under section 15(1), he suggested, it can also ground a breach of section 2 when the underinclusion results in “the denial of a fundamental freedom”.⁸⁹ Put differently, a claim that should be brought under section 15 is viable under section 2 when the legislature’s inaction has adverse consequences for one of its fundamental freedoms.

⁸⁴ This is point one in the four-point *Professional Institute* test, [1990] 2 S.C.R. 367, at 402.

⁸⁵ Points three and four of the test explain that associational activities are covered by s. 2(d) if the same activities would be protected if undertaken by individuals: *id.*

⁸⁶ *Dunmore*, 2001 SCC 94, at para. 23 (emphasis added).

⁸⁷ *Id.*

⁸⁸ *Id.*, at para. 20 (asking whether, in order to make the freedom to organize “meaningful”, s. 2(d) imposes a positive obligation on the state to extend protective legislation to unprotected groups).

⁸⁹ *Id.*, at para. 28 (adding, as well, that “while it is generally desirable to confine claims of underinclusion to s. 15(1)”, it is not appropriate to do so at the expense of a fundamental freedom).

This did not mean that the Charter would oblige the state to act in all cases. After noting that the Court should guard against reviewing legislative silence, Bastarache J. indicated that *Dunmore*'s circumstances were different. Thus he maintained that it is formalistic to consign the relationship between employer and employee to the private sphere when the government has regulated the relationship generally, though in a way that selectively excluded some workers. Should the Court impose a positive obligation on the state to protect private workers from their private employers, he stated, “that is only because such imposition is justified in the circumstances”.⁹⁰

That left unanswered the question whether the statutory exclusion had in fact substantially interfered with the section 2(d) rights of these workers. Even if the province failed to intervene, it was not self-evident that the government's inaction was the reason Ontario's agricultural workers were without a union. Still, on the strength of their history, Bastarache J. found that there would be “no possibility for association as such without minimum statutory protection”.⁹¹ Nor did he regard agricultural workers, who are marked by “their political impotence, their lack of resources to associate without state protection and their vulnerability to reprisal by their employers”, as comparable to the RCMP in *Delisle*.⁹² In the circumstances, he concluded that the workers' plight was re-inforced by legislation that failed to provide minimum protection and isolated agricultural workers from the general regime of labour relations.

As a result, Ontario's revival of the LRA did not “simply allow private circumstances to subsist; it re-inforced those circumstances by excluding agricultural workers from *the only available channel for associational activity*”.⁹³ By extending statutory protection to nearly every other class of worker, and selectively excluding these workers, the LRA discredited their efforts and placed a chilling effect on their non-statutory union activity.⁹⁴ On the question of breach, Bastarache J. found that the difficulties inherent in organizing farm workers, along with threats of economic reprisal from employers, could only partly explain why association was “all but impossible” in Ontario's agricultural sector; equally important were the known and foreseeable effects of the legisla-

⁹⁰ *Id.*, at para. 29.

⁹¹ *Id.*, at paras. 39-42, and especially para. 40 (stating that the repeal of the ALRA was not the decisive issue; rather, it was the combined effect of the LRESLAA and LRA, which “implicates the *decades-long exclusion* of agricultural workers from the labour relations regime”; emphasis added).

⁹² *Id.*, at para. 41.

⁹³ *Id.*, at para. 44 (emphasis added).

⁹⁴ *Id.* See also L'Heureux-Dubé J., at paras. 148-53 (explaining that the chilling effect of the impugned provisions forced agricultural workers to abandon associational efforts and to restrain from further associational activities).

tion which, in excluding agricultural workers, substantially interfered with their fundamental freedom to organize.⁹⁵

Having found that the legislation failed under section 1, in large part because its categorical exclusion of all agricultural workers failed minimal impairment, Bastarache J. addressed the level of statutory protection section 2(d) would require.⁹⁶ Without committing the Court to a specific remedy, he stated that the principles outlined in the decision “require at a minimum a regime that provides agricultural workers with the protection necessary for them to exercise their constitutional freedom to form and maintain associations”.⁹⁷ In further explanation, he indicated that section 2(d) also necessitated whatever protections are “judged essential” to the meaningful exercise of associational freedom, “such as freedom to assemble, to participate in the lawful activities of the association and to make representations, and the right to be free from interference, coercion and discrimination in the exercise of these freedoms”.⁹⁸

At face value, *Dunmore* stands for the novel proposition that the government has a constitutional obligation to protect private employees from private employers. As a matter of Charter interpretation, however, the Court’s reconceptualization of section 2(d), some 15 years after the *Labour Trilogy*, is nothing less than a breakthrough. For escaping the constraints of the *Labour Trilogy* and *Professional Institute*, Bastarache J.’s opinion should be applauded.⁹⁹ Moreover, it is evident that agricultural workers are disadvantaged, and that categorical exclusions, such as the LRA’s, should be difficult to justify. At the same time, it was next to impossible for the Court to find a breach of section

⁹⁵ *Id.*, at para. 48. On the evidence, Sharpe J., at trial, and Major J., at the Supreme Court of Canada, are surely correct that factors other than the statutory exclusion explain the inability of these workers to organize. Thus Major J. concluded that the appellants failed to establish that the state is causally responsible for the inability of agricultural workers to exercise a fundamental freedom, and that s. 2(d) does not impose a positive obligation of protection or inclusion on the state in this case: *id.*, at paras. 212-14.

⁹⁶ *Id.*, at paras. 57-59 (discussing the margin of deference owed the legislature and concluding that the categorical exclusion of agricultural workers could not be justified).

⁹⁷ *Id.*, at para. 67. The remedial dilemma was that striking down the LRESLAA would re-enact the repealed statute, the ALRA, and the Court rightly concluded that it should not “constitutionalize” the ALRA. At the same time, striking the LRA’s exclusion clause would have the effect of extending collective bargaining rights to these workers, and that could not be done without overruling the prior s. 2(d) jurisprudence. To avoid both prospects, Bastarache J. struck the exclusion clause but suspended the order for 18 months to give the province time to decide on an appropriate response.

⁹⁸ *Id.*

⁹⁹ See J. Cameron, “Back to Fundamentals: Multidisciplinary Partnerships and Freedom of Association Under s. 2(b) of the *Charter*” (2000), 50 U.T.L.J. 161, at 269-78 (urging the Court to reconsider the purposes of s. 2(d)).

2(d) under existing authority: the jurisprudence and *Delisle v. Canada*, in particular, did not easily permit it, and nor did prevailing assumptions about the public/private distinction. And never before had the Court shown such eagerness to impose a positive obligation on government, especially in the field of labour relations. In fact, as *Advance Cutting* confirmed, less than two months earlier, deference was tantamount to an absolute rule in labour cases.¹⁰⁰

If the outcome in *Dunmore* appears driven by politics rather than principle, it also reveals how impoverished the Charter doctrine is, under section 15 as well as under section 2(d).¹⁰¹ A conventional analysis would have analyzed the statute's exclusion of agricultural workers as a violation of equality. By being selectively excluded from the statutory scheme, these workers were not treated the same way and were unequal, relative to other workers. Unfortunately, the Court's definition of equality is so encumbered by criteria and assumptions about human dignity it could not accommodate a claim that was a better fit under section 15 than under section 2(d). To avoid a result it considered unacceptable, the Court had to alter the scope of associational freedom, deconstruct the public/private distinction, and support a conclusion that the statute, not the nature of the industry, was the cause of the workers' inability to organize. Under a more constructive definition of equality, these distortions would have been unnecessary.

It is too early to predict *Dunmore*'s impact. Attempts to apply its principle of collective endeavour to other contexts could be met with the answer that *Dunmore* was a labour relations case or, more precisely, a labour relations case particular to the circumstances of agricultural workers. At the same time, there is little in Bastarache J.'s discussion of section 2(d) to suggest that his conception of collective activity was specific to the circumstances of the case. Likewise, he was also able to dismiss concerns about the public/private distinction and the authority of *Dolphin Delivery* by declaring that the Court's understanding of state action had "matured" since that decision, and might mature "further in light of evolving Charter values".¹⁰² If *Advance Cutting* presaged *Dunmore* in a certain way, these comments about *Dolphin Delivery*'s declining stature could hardly have provided a more explicit cue to the third decision in the trilogy.

¹⁰⁰ *Supra*, notes 16-19 and accompanying text.

¹⁰¹ Though Bastarache J. did not address the s. 15 claim, L'Heureux-Dubé J.'s concurring reasons concluded that the occupational status of agricultural workers constituted an analogous ground under s. 15(1); *Advance Cutting*, 2001 SCC 70, at paras. 165-70.

¹⁰² *Id.*, at para. 26.

IV. R.W.D.S.U. v. PEPSI-COLA CANADA BEVERAGES (WEST)¹⁰³

As noted, *Dunmore* held that the relationship between farmers and their employees was not private. In a decision that directly implicated *Dolphin Delivery*, *Pepsi-Cola* extended the constitutionalization of private relations in a common law context. One of the Supreme Court's early landmarks, *Dolphin Delivery* held that the Charter does not apply to common law actions between private parties, and that section 2(b) would not protect labour unions in proceedings brought to enjoin secondary picketing.¹⁰⁴ There, McIntyre J.'s *dicta* was clear that picketing, which is included in section 2(b)'s guarantee of expressive freedom, could justifiably be limited under section 1. Undeterred by precedent, *Pepsi-Cola* held, to the contrary, that the common law must be modified to accommodate the Charter's protection of picketing, whether primary or secondary.

In the first 20 years, it was difficult to predict whether and when the Court would defer to the legislature or enforce the Charter; whether and when the common law would be modified to reflect Charter values was little different. On that question, the Court has both declined the opportunity, claiming that it is the legislature's prerogative to change the law, and taken the initiative, on grounds that the common law is judge-made and that it is the court's responsibility to ensure that its evolution is compatible with the Charter. *R. v. Salituro* spoke to the ambivalence of this dynamic in stating that "[j]udges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country", and adding the qualification that there are "significant constraints on the power of the judiciary to change the law".¹⁰⁵

In *Hill v. Church of Scientology of Toronto*, for example, the Court refused to modify the law of defamation to accommodate the constitutional status of expressive freedom.¹⁰⁶ As Cory J. explained, the judiciary has "traditionally been cautious regarding the extent to which they will amend the common law", and that "[f]ar-reaching changes to the common law must be left to the legislature".¹⁰⁷ In *Pepsi-Cola*, however, the joint opinion of McLachlin C.J. and LeBel J. declared that statutory silence should not be interpreted as a legislative intent to crystallize the common law. In their view, when the legislature chose not to address or alter the common law of secondary picketing, the lawmakers "must

¹⁰³ 2002 SCC 8.

¹⁰⁴ [1986] 2 S.C.R. 573.

¹⁰⁵ [1991] 3 S.C.R. 654, at 670.

¹⁰⁶ [1995] 2 S.C.R. 1130.

¹⁰⁷ *Id.*, at 1171. Note that although the Court refused to alter the substantive elements of the tort or to place limits on the award of damages, it did expand the concept of qualified privilege.

be taken” to have understood that the common law is subject to change at the hands of the judiciary.¹⁰⁸

Prior to *Pepsi-Cola*, Charter values had not been applied in litigation between purely private parties.¹⁰⁹ The two precedents closest on point were *Dolphin Delivery* and *Hill v. Church of Scientology*, and though the Charter claim failed each time, *Pepsi-Cola* relied on both. First the joint opinion invoked *Dolphin Delivery* and McIntyre J.’s much-studied remark that, even when it does not apply, the Charter is “far from irrelevant to private litigants whose disputes fall to be decided at common law”.¹¹⁰ There, in *dictum*, he suggested that the judiciary ought to develop and apply the principles of the common law in a manner consistent with the fundamental values of the Constitution.¹¹¹ Without repeating *Dunmore*’s observation that the Court’s understanding of *Dolphin Delivery* had matured, the joint opinion in *Pepsi-Cola* added that the common law “does not grow in isolation from the Charter, but rather with it”.¹¹² Accordingly, the judges found that the common law reflects Charter values, that freedom of expression is one such value, and that the common law must be modified to accommodate section 2(b)’s interest in protecting secondary labour picketing.

Second, in explaining its Charter values methodology, the joint opinion in *Pepsi-Cola* referred to *Scientology*, which balanced expressive freedom against reputation, and found that the Charter value at stake was not strong enough to demand modifications to the law of defamation. Though *Pepsi-Cola* described *Scientology*’s as a “flexible balancing” approach, the purpose of flexibility in that case was to make it difficult for one private party to invoke the Charter in a contest against another private party.¹¹³ In fact, the decision expressly cautioned against importing into private litigation the analysis which applies in cases involving government action.¹¹⁴ Accordingly, Cory J. declared that a section 1 analysis was unnecessary in settings which posed a conflict between principles; in such circumstances, it was sufficient for the Court to weigh Charter values, framed in general terms, against the underlying principles of the common law.¹¹⁵

¹⁰⁸ *Supra*, note 103, at para. 17.

¹⁰⁹ *R. v. Salituro*, *supra*, note 105; *R. v. Swain*, [1991] 1 S.C.R. 933; and *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 each modified a common law rule in the context of a criminal proceeding.

¹¹⁰ *Supra*, note 103, at para. 19 (quoting McIntyre J. in *Dolphin Delivery*).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*, at para. 22.

¹¹⁴ *Supra*, note 106, at 1169-70.

¹¹⁵ *Id.*

On the merits Cory J. attributed significant value to the protection of reputation and then found, in comparison, that defamatory statements are “very tenuously connected to the core values which underlie section 2(b)”.¹¹⁶ In the circumstances, expressive freedom did not stand a chance in the balancing of values, and though *Scientology* and *Pepsi-Cola* both concerned private relations, the Charter modified the common law in one but not the other. The difference between the two was that secondary labour picketing is high value expression and defamatory statements are not.

Though it worked in favour of expressive freedom, *Pepsi-Cola* reverted to a methodology that rests on a subjective assessment of the value of expression. Pursuant to that approach, the joint opinion declared that picketing, and especially labour picketing, engages the “highest constitutional values”.¹¹⁷ In the view of the judges, expression on working conditions “contributes to self-understanding as well as to the ability to influence one’s working and non-working life”.¹¹⁸ Moreover, as the presumptive imbalance between the employer’s power and the worker’s vulnerability informs “virtually all aspects of the employment relationship”, free expression plays a “significant role in redressing or alleviating this imbalance”.¹¹⁹ Last but not least, by bringing debate on labour conditions into the public realm, this expressive activity benefits society as a whole.¹²⁰

The specific issue at stake in *Pepsi-Cola* was whether secondary picketing is illegal *per se* at common law. Any such principle would be difficult to sustain under a conventional section 1 analysis, as the minimal impairment element of proportionality looks askance at blanket prohibitions and categorical rules. According to *Scientology*, though, common law rules do not have to be justified under section 1. Though it claimed to follow that approach, the joint opinion blurred two Charter methodologies that *Scientology* indicated should be kept separate.¹²¹

A further complication was *KMart* which, only a few year earlier, had extended constitutional status to secondary labour *leafleting*, by arguing that appeals to persuasion and should not be equated with *picketing*, which is coer-

¹¹⁶ *Id.*, at 1174.

¹¹⁷ *Supra*, note 103, at para. 32.

¹¹⁸ *Id.*, at para. 34.

¹¹⁹ *Id.*, at para. 34.

¹²⁰ *Id.*, at para. 34.

¹²¹ *Id.*, at paras. 36 and 37, stating that s. 2(b) is subject to justificative limits under s. 1, and that the same applies in interpreting the common law; also that freedom of expression is the starting point and limits are permitted only to the extent reasonably and demonstrably necessary in a free and democratic society.

cive and can therefore be regulated.¹²² Though *KMart* did not purport to address the status of secondary picketing at common law, the Court was explicit in that case that picketing and leafleting have “fundamentally different effects”. More specifically, Cory J. declared that “[w]hile the former uses coercion and obedience to a picket line to impede public access to an enterprise”, the latter “attempts to rationally persuade consumers to take their business elsewhere”.¹²³ Though the viability of that distinction is questionable, it was adopted by all members of the panel in *KMart* and therefore invited a response in *Pepsi-Cola*.

KMart emphasized the “signalling effect” of a picket line, which acts as a barrier and coerces individuals not to cross. Without overruling *KMart*’s analysis, the joint opinion indicated that the signalling effect should be “carefully assessed”.¹²⁴ The Chief Justice and LeBel J. pointed out that picketing may have a coercive signal effect, but that does not mean the activity is not expression and worthy of protection.¹²⁵ Rather than state a special rule for picketing, the courts should acknowledge its status as expression and determine the permissibility of limits on a case-to-case basis. In reply to Cory J.’s *KMart* distinction between coercion and an appeal to persuasion, the judges added that section 2(b)’s protection is not contingent on rationality, either on the part of the speaker or the listener.¹²⁶ The judges thought that to proceed otherwise would suggest that labour expression is “fundamentally less important” than expression in other contexts.¹²⁷ In any case, they noted, it is a mistake to conclude that picketing’s coercive effect *is* effective, or that picketing is coercive rather than persuasive in all cases.¹²⁸

The joint opinion expressed the concern that a common law rule designating secondary picketing as illegal would constitute a “special rule for unions”.¹²⁹ By way of rectification, *Pepsi-Cola* declared that all picketing is allowed,

¹²² [1999] 2 S.C.R. 1083.

¹²³ *Id.*, at 1116.

¹²⁴ *Pepsi-Cola*, 2002 SCC 8, at para. 95.

¹²⁵ *Id.*, at para. 96 (stating that it is difficult to see “how a signal can be other than expressive”, and that the underlying concern of *KMart* is that “the signal will express too much, that it will be too effective”).

¹²⁶ *Id.*, at para. 97 (stating that irrationality may result in particular kinds of speech being accorded less protection, without justifying the denial of all protection).

¹²⁷ *Id.*, at paras. 96 and 97; see also para. 80 (indicating concern that an independent tort of secondary picketing applies only in a labour context and creates a distinction between labour and other picketing that is difficult to justify).

¹²⁸ *Id.*, at paras. 95 and 98.

¹²⁹ *Id.*, at para. 97.

whether primary or secondary, unless it involves tortious or criminal conduct.¹³⁰ Though there might be anomalies, the joint opinion stated that “it is safe to assert that a wrongful action-based approach will catch most problematic picketing” and that the law of tort can be expected “to develop in accordance with Charter values”.¹³¹ For all intents and purposes, *Pepsi-Cola* constitutionalized the common law pertaining to labour disputes, and effectively overruled *Dolphin Delivery*. Though the Court argued that *Dolphin Delivery* left the issue of secondary picketing open, McIntyre J. was clear that private relations are not subject to the Charter.¹³² Through *Pepsi-Cola*’s application of a values analysis, the Charter became as binding on private parties as it would have been on legislation enacted by the government.

As the crucial aspect of the decision, *Pepsi-Cola*’s constitutionalization of the common law between private litigants will attract comment and encourage new claims. Rather than engage that issue, this paper draws attention to related anomalies which are created by the Court’s decision to constitutionalize relations between a union and a third party stranger to a labour dispute. From a methodological perspective, the difference between the Court’s Charter values analysis in *Church of Scientology* and in *Pepsi-Cola* is significant. In *Scientology*, Cory J. declared that changes to the common law should be made by the legislature, that the rules that apply in cases involving government should not be imported into private litigation, that dual burdens should be imposed on those invoking the Charter against other private parties, and that common law limits on Charter values do not require formal justification.

By contrast, *Pepsi-Cola* began from a different set of assumptions. The joint opinion emphasized that “free speech is near the top of the values that Canadians hold dear”, and indicated more than once that expressive activity is particularly valuable in the area of labour relations.¹³³ Not only was labour expression valuable to its speakers, in stirring public debate the Court found that it had wider value. To back-track yet again, the litigation in *Scientology* arose after the Church decided to publicize its concerns about a Crown attorney who exercised significant powers in relation to the criminal process. Given the plaintiff’s position as an officer of the Crown and the courts, it is arguable that the private litigation there had a more compelling public dimension than *Pepsi-Cola*’s

¹³⁰ See, e.g., *id.*, at para. 78 (stating, as well, that picketing which breaches the criminal law or the *specific* torts like trespass, nuisance, intimidation, defamation or misrepresentation will be impermissible).

¹³¹ *Id.*, at para. 106.

¹³² *Id.*, at para. 43 (claiming that because *Dolphin Delivery* assumed that the proposed picketing would be tortious, the Court never addressed the question whether secondary picketing is illegal *per se*).

¹³³ *Id.*, at para. 91.

strike between a private employer and its employees.¹³⁴ The statements by the Church were malicious and the plaintiff would have succeeded under almost any standard that modified the balance between reputation and expressive freedom. Yet the Court failed to grasp that, defamatory though they were, the Church’s statements spoke to the accountability of public servants.

Because the content of secondary picketing was deemed important, the Court found that the “starting point” must be freedom of expression, and that limitations are permitted but “only to the extent” that is justified under section 1.¹³⁵ In this there is little resemblance between the approach followed in *Scientology*. As *Pepsi-Cola* indicated, “[t]he preferred methodology is to begin with the proposition that secondary picketing is *prima facie* legal, and then impose such limitations as may be justified in the interests of protecting third parties”¹³⁶

On the question of limits and the harm secondary picketing would inflict on neutral third parties, it is instructive to compare the Court’s approach to harm in other contexts. As *R. v. Keegstra*, *R. v. Butler* and other decisions confirm, section 1 does not require proof of concrete or particular harm.¹³⁷ It was sufficient, in the past, that the expressive activity offended subjective perceptions or principles of equality. Moreover, *Scientology* upheld an unprecedented award of damages for harm to reputation, in circumstances where the evidence of any impact on the individual’s standing in the community was weak, if not non-existent. By assuming that valueless expression must also be harmful, the Court equated value and harm in these cases.

Most recently, *Pepsi-Cola*’s joint opinion reasoned that if primary picketing can permissibly have a harmful impact on third parties and the public, there is little reason to treat secondary picketing differently.¹³⁸ In this, the joint opinion glossed the distinction between the harm neutrals might indirectly suffer as the result of successful primary picketing, and secondary picketing’s direct infliction of harm on parties who, as strangers to the dispute, have little power or influence to affect its resolution.¹³⁹ In *Dolphin Delivery*, for example, McIntyre

¹³⁴ The lawsuit in *Scientology* was linked to government action because the plaintiff was a public servant defending himself from criticism of his actions as a Crown attorney, and was funded in the litigation by his employer, the Attorney General; *Scientology*, [1995] 2 S.C.R. 1130, at 1161-63.

¹³⁵ *Pepsi-Cola*, *supra*, note 124, at para. 37.

¹³⁶ *Id.*, at para. 67.

¹³⁷ [1990] 3 S.C.R. 697; and *R. v. Butler*, [1992] 1 S.C.R. 452; see also *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825.

¹³⁸ *Pepsi-Cola*, *supra*, note 124, at para. 90 (stating that the rationale for restricting secondary picketing also applies to primary picketing).

¹³⁹ According to the Court’s account of the facts, the secondary activities in this bitter strike included the picketing of certain retail outlets, which prevented deliveries and dissuaded store staff

J. stated that secondary picketing differs “because the third party is not concerned in the dispute” and “the basis of our system of collective bargaining is that the parties themselves should, whenever possible, work out their own agreement.”¹⁴⁰ To that he added “[i]t is reasonable to restrain picketing so that the conflict will not escalate beyond the actual parties”.¹⁴¹ Moreover, in contrast to the cases above, which imposed limits on expressive activity linked to non-particularized psychological and perceptive harm, *Pepsi-Cola* accepted that economic harm can be directly inflicted on third parties.¹⁴² Though the Court acknowledged the permissibility of limits by its “wrongful action” exception to picketing, the point is that its perception of harm varies from case to case, depending on its approval or disapproval of the expressive activity in question.

In its section 2(b) jurisprudence last year, there were indications that a majority of the Court might be prepared to step away from a “values methodology”.¹⁴³ Insofar as a “values analysis” is undertaken, in circumstances when the Charter does not formally apply, *Pepsi-Cola* demonstrates that the Court remains willing to base the level of constitutional protection it assigns an activity on its value as expression. The question *Pepsi-Cola* raises is whether the common law in other litigation between private parties will also be constitutionalized, and whether the infliction of harm will be considered valuable in other contexts, as it was here. If the answers to those questions are no, then *Pepsi-Cola* will have exchanged the common law’s special rule for another special rule for unions under the Charter.

V. A FINAL RECKONING

It cannot be a coincidence, especially given labour’s bleak prospects in the first 20 years of Charter interpretation, that unions emerged as winners in the “second labour trilogy”. Yet as suggested above, the result could easily have gone the other way in any or all of these cases. Though the close vote in *Advance Cutting* speaks for itself, siding with the workers in *Dunmore* required the Court to reverse the lower court decisions and revisit the facts as well as the law. As for the third decision, though a *per se* rule about secondary labour picketing would ordinarily be vulnerable under the Charter if contained in

from accepting deliveries, as well as placard carrying outside the hotel where some of the substitute work force was staying; *id.*, at para. 4.

¹⁴⁰ *Dolphin Delivery*, [1986] 2 S.C.R. 573, at 590.

¹⁴¹ *Id.*, at 591.

¹⁴² *Pepsi-Cola*, *supra*, note 124, at para. 25.

¹⁴³ Neither *Little Sisters*, [2000] 2 S.C.R. 1120 nor *Sharpe*, [2001] 1 S.C.R. 45, relied on a “values methodology” or contextual approach under s. 1, though the dissenting opinion in *Sharpe* did.

legislation, the Court could not modify the common law in *Pepsi-Cola* without turning its back on *Dolphin Delivery* and explaining away *KMart's* vital distinction between conventional picketing and leafleting.

At the least then, these decisions suggest the following. *Advance Cutting's* retreat from the Rand formula implies that when a choice must be made between collective and individual interests, the collective can be expected to prevail. Next under *Dunmore*, the government can be held responsible for not guaranteeing the meaningful exercise of associational freedom by private sector employees. Finally, in the wake of *Dunmore's* conclusion that the government has a duty to intervene in private relations, *Pepsi-Cola* undermined *Dolphin Delivery's* assumption that the public and private must remain separate, lest the Charter smother the common law. Once having discounted that concern through a values analysis, *Pepsi-Cola* dismissed *Dolphin Delivery's dictum* that the common law principles which limit secondary labour picketing are justified. By reaching in every way the second trilogy shows how far the Court was prepared to go in securing the rights of workers.

Though the trilogy's consequences for labour relations and the Charter remain unknown at present, a further question is whether its principles will translate to other issues. If the private became public in *Dunmore*, and the Charter modified the common law in *Pepsi-Cola*, it is dubious that other private relations or fixtures of the common law will now be subject to review as a matter of reflex. In this, it should be noted that *Dunmore* is replete with qualifications: underinclusion should be addressed under section 15; the Court should guard against reviewing legislative silence; other decisions which refused to impose a positive obligation were different; and the plight of *Dunmore's* workers was explained by their particular history. The Court can also minimize *Pepsi-Cola's* impact on the common law in private litigation by reviving the principle from *Scientology*, that the initiative for change belongs to the legislature, or invoking *Scientology's* other rationale, that the activity in issue is not valuable enough to displace common law principle. The Court's eagerness to distinguish the trilogy decisions in future cases will either confirm or undercut the impression that the trilogy established special rules for unions.

Another indication that the trilogy's principles might not translate to other contexts can be found in *Suresh v. Canada*.¹⁴⁴ There, a Convention refugee faced refolement to his mother country, in circumstances which placed him at risk of being tortured upon his return. He challenged the constitutionality of the grounds for deportation, as well as the deportation order itself. Essentially,

¹⁴⁴ 2002 SCC 1. It is appropriate to disclose that I acted as counsel for FACT (Federation of Associations of Canadian Tamils), which was granted intervenor status in the appeal to the Supreme Court of Canada.

section 19 of the *Immigration Act* provides that a refugee can be deported when there are reasonable grounds to believe that person is a member of an organization that there are reasonable grounds to believe has engaged in terrorism, either in the past or at present.¹⁴⁵ While the Court found that a deportee could not generally be deported to face a substantial risk of torture, and specified the procedures that are required by section 7 before an order can be made, it neglected to address the constitutionality of section 19.

Once the Court concluded that the deportation order could not stand, it became unnecessary to deal with section 19. Still, its willingness to overlook provisions which, on the face of it, represent a serious interference with expressive and associational freedom, is disturbing. This is especially troubling because the activity which prompted the deportation order was fund-raising, which is not only constitutionally protected but also, in appellant's case, was remote in time and place from the commission of any terrorist acts.¹⁴⁶ Yet the Court showed no interest in the legislation's implications for section 2(b) and (d), including its unavoidable chilling effects on refugee and immigrant populations.¹⁴⁷ Whereas the deportation order was specific to Suresh, section 19, which might inhibit any number of individuals from exercising their constitutional rights, stayed in place.

As noted above, the majority and concurring opinions in *Dunmore* found that legislative inaction placed an impermissible chill on the organizational activities of Ontario's agricultural workers. This is an unusual interpretation of a doctrine whose underlying principle is that over-reaching by the legislature might catch constitutionally protected activity as well as activity that can justifiably be limited. The essence of the doctrine is the inhibiting and self-censoring impact of government regulation that sweeps too broadly and thereby "chills" legitimate activity.¹⁴⁸ In *Dunmore*, neither Bastarache J. nor L'Heureux-Dubé J. cited authority for the proposition that the state can chill the exercise of constitutional rights by doing nothing at all; in fact, L'Heureux-

¹⁴⁵ See s. 19(1)(f)(iii)(B) (the membership provisions), and s. 19(1)(f)(ii) (the terrorism provision) of the *Immigration Act*, 1985, R.S.C., C-1-2.

¹⁴⁶ Suresh's link to terrorism was that he engaged in fund-raising for Tamil organizations in Canada. Though the activity in question was legal and Suresh had committed no crime, his deportation was based on the opinion of security authorities that he was linked to the LTTE (Tamil Tigers), the rebel party in Sri Lanka's civil war, through organizations in Canada. *Id.*, at 10.

¹⁴⁷ The Court did not so much as mention the legislation's implications for freedom of association; even as to freedom of expression, it went no farther than to make equivocal remarks about the constitutionality of s. 19, as incorporated into s. 53, the deportation provision; *id.*, at paras. 103-8.

¹⁴⁸ See, e.g., *Keegstra*, *supra*, note 137, at 850 (*per* McLachlin J., dissenting, and explaining that the intrusiveness of a limitation on expressive freedom must extend to those who may be deterred from legitimate activity by uncertainty as to whether they might be convicted).

Dubé J. stated that the concept is premised on the idea that individuals *anticipating penalties* might hesitate before exercising their rights.¹⁴⁹ Assuming that chilling effects can be sustained through government action or *inaction*, the quirky use of the concept in *Dunmore*, when set against *Suresh*, which presented a classic example, reinforces the impression that the Court established special rules for unions in these cases.

The decision whether to enforce a guarantee or acquiesce in the status quo, whether under statute or common law, will depend on the Court's perception of what justice requires in the circumstances. Disagreement as to the meaning and demands of justice is inevitable, as is the tension between a result-oriented jurisprudence and one that values principle. If the justness of principle can provoke almost as much disagreement as debate about a just or unjust result, at the least, principle provides a standard by which results can be compared from case to case. How successfully the Court demonstrates its commitment to principle should be the true test of its jurisprudence.

Looking at the second trilogy from that perspective, it is difficult to conclude that principle was consistently applied in these cases. For instance, *Advance Cutting* and *Dunmore* cannot be easily reconciled, for those who comprised the majority in *Advance Cutting* abandoned their fealty to deference in labour relations and accepted a lenient standard of proof on the question of breach in *Dunmore*. The appellants' claim was against the weight of authority, and there was no other way for the workers to win in that case.

The extension of the Charter to private relations is another key feature of these decisions. Once under a statutory regime, in *Dunmore*, and then again, under the common law in *Pepsi-Cola*, the Court discounted two well-established assumptions of Charter interpretation. First, in imposing a positive constitutional obligation on the government to protect one party from another in private relations, *Dunmore* ventured some distance from the boundaries marked by the Court's previous Charter jurisprudence. Then the principle that the Charter does not apply to common law litigation between private parties vanished in *Pepsi-Cola*. The Court achieved this feat through a values analysis, which plays a role when the Charter does not apply. The artifice was pressed into service to avoid open contradiction between *Pepsi-Cola* and *Dolphin Delivery*, which was directly on point. Still, the result was the same, in substantive terms, as it would have been had the Court overruled *Dolphin Delivery* and formally applied the

¹⁴⁹ *Dunmore*, 2002 SCC 8, at para. 148 (emphasis added). Though she cited *Big M*, [1985] 1 S.C.R. 295, there the exercise of religious freedom was coerced or inhibited by the government's mandatory Sunday closing law; in other words, the adverse consequences for s. 2(a) arose from statutory action, not inaction.

Charter. Once again, workers would not have won in *Dunmore* or *Pepsi-Cola* under the existing jurisprudence.

Time will tell whether the second trilogy should be understood as a series of decisions favourable to workers, or otherwise result in applications to other Charter claims.

A final point arises from *Dunmore* and its brief consideration of the choice between sections 2(d) and 15. As noted earlier, it would have made better analytical sense to place the statute's defect of underinclusion under section 15's jurisdiction. In light of doctrine, the claim could not easily succeed under either guarantee, and so the Court chose to alter its definition of associational freedom. How that might affect the relationship between sections 2(d) and 1 did not enter the discussion, for the likely reason that it was not considered relevant.

Lavoie v. Canada (Public Service Commission), the most recent equality decision, is mentioned here because it shows, after many years and the arrival of the *Law* test, that the Court remains as transfixed as ever by the relationship between section 15 and section 1.¹⁵⁰ The question for answer in *Lavoie* was whether a citizen's preference in access to federal public service employment violated the equality rights of non-citizens and, if so, whether the limit was justifiable under section 1. Though the Court upheld the preference by a vote of 6 to 3, Arbour J. challenged Bastarache J.'s section 15 analysis.¹⁵¹ At this stage of an article on the rights of workers, there is not time or space to launch an analysis of their disagreement, and little percentage taking sides between the two. Rather, the idea is to offer a few modest observations.

The starting point is that, in truth, section 15 has largely been an exercise in frustration. Albeit with exceptions, disagreement among members of the Court may be the defining characteristic of the equality jurisprudence. The Supreme Court of Canada's indecision as to the scope of the guarantee was, for years following its initial interpretation in *Andrews v. Law Society of British Columbia*, a source of uncertainty and irritation.¹⁵² Then it seemed possible to imagine a new era when all members of the Court endorsed Iacobucci J.'s framework for section 15 analysis in *Law v. Canada (Minister of Employment and Immigration)*.¹⁵³ If agreement on a standard marked a step forward, unfortunately it came in the form of a methodology that is abstract and unwieldy.

¹⁵⁰ 2002 SCC 23.

¹⁵¹ Bastarache J. (Gonthier, Iacobucci and Major JJ., concurring) found a justifiable breach of s. 15; Arbour J. (LeBel J. concurring on that point) would not have found a breach of s. 15; McLachlin C.J., and L'Heureux-Dubé J., with Binnie J. concurring, found a breach that was not justifiable under s. 1.

¹⁵² [1989] 1 S.C.R. 143.

¹⁵³ [1999] 1 S.C.R. 497.

Without recounting the details, the disagreement between Bastarache J. and Arbour J. in *Lavoie* centred on the "human dignity" test and, in particular, the relative importance of subjective and objective perceptions of what offends an individual's dignity under section 15.¹⁵⁴ As the exchange between the judges demonstrates, *Law* can support a generous interpretation of the guarantee and just as easily lead to internal limits on the right. As a result, both could claim that their analysis in *Lavoie* was faithful to the *Law* methodology.¹⁵⁵ The difference between the two approaches is that a more generous interpretation conceptualizes the relationship between the right and its limits under section 1 a different way than its alternative, which would restrict the scope of the guarantee.

For that reason, the debate on this point between Bastarache J. and Arbour J. should be understood as an important one. Far from providing a reliable structure for section 15 analysis, the human dignity branch of the *Law* test has further obfuscated the meaning of equality under the Charter. And, as Arbour J.'s reasons in *Lavoie* demonstrate, the third inquiry can easily become the off-site location of a section 1 analysis.¹⁵⁶ In the absence of content, it provides a mechanism for the Court to expand or contract section 15 at will, on a case to case basis.

The main point here is that *Law* failed to resolve the Court's fundamental ambivalence toward section 15. As a result, the real question whether the analysis should be concentrated on section 15 or more readily shunted to sec-

¹⁵⁴ The third part of the *Law* test requires the Court to determine whether the differential treatment offends human dignity, according to a battery of criteria which includes the way it is subjectively and objectively perceived; *Lavoie, supra*, note 150, at para. 38 (setting out the *Law* test).

¹⁵⁵ For instance, Bastarache J. defended his conclusion that s. 15 had been breached, stating "[i]t is the very structure of the Charter that mandates [a distinction between the right and its limits], as well as the methodology adopted by the Court since *Andrews*"; *Lavoie, supra*, note 150, at para. 49. Meantime, in holding that s. 15 was not infringed, Arbour J. claimed that "the broader reach given to s. 15 the more likely it is that it will be deprived of any real content", *id.* at para. 84; that the third branch of the *Law* test should be allowed "to do the kind of sorting it was intended to do", *id.*, at para. 87, and that a lack of rigour in application would result in "irrevocable damage to the *Law* methodology", *id.*, at para. 81.

¹⁵⁶ Arbour J. argued that Bastarache J. had so privileged the subjective element of the test as to strip equality rights of any meaningful content. In her view, this approach compromised the *Law* test and undercut the function of s. 1. She supported an objective test that would respect the need for internal limits. Looking at *Law*'s objective criterion, the problem is that asking whether a reasonable person, similarly situated, would understand the distinction as an affront to human dignity is shorthand for the question whether the inequality is justifiable. In this, Arbour J.'s analysis shows the degree to which her approach would conduct a s. 1 analysis in s. 15. If a reasonable person would not be affronted by the consequences for her human dignity then s. 15 is not breached, but what is reasonable is also inherently justifiable.

tion 1 will be diverted, and in its place there will be more of the skirmishes over subjective and objective perceptions of dignity that erupted in *Lavoie*. Yet the answer to this quandary will not be found in any fresh insights into the condition of human dignity; instead, it is contingent on the Court's intellectual and institutional determination to settle the relationship between sections 15 and 1.

This question has nagged the Court from the outset, and it continues to trouble the Court today. In that regard, it is worth remembering that section 15 will not celebrate its 20th anniversary until 2005. This year's second labour trilogy proves that the Court is capable of shifting directions and rethinking the assumptions of the early jurisprudence. If the McLachlin Court can revisit the *Labour Trilogy's* definition of associational freedom, there is no reason it cannot also reconsider its approach to section 15.

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