

Dunmore v. Ontario (Attorney General): Freedom of Association at the Crossroads

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In this paper, the author argues that the recent decision in Dunmore, where the Supreme Court of Canada held that the exclusion of agricultural workers from a statutory labour relations scheme violated the constitutional guarantee of freedom of association, breathes new life into the possibility that s. 2(d) of the Charter may have a meaningful role in protecting associational activity by employees and unions. The Court departed from the principles articulated in its previous jurisprudence in three important respects: by expanding s. 2(d) to embrace at least some forms of collective action that can be exercised only in association; by incorporating an equality analysis in the determination of whether a freedom guaranteed by the Charter has been violated; and by defining the scope of the government's obligation to take affirmative action to protect constitutional rights and freedoms. However, the author questions whether the Court has fully recognized the logical consequences of its liberalized approach to freedom of association, which in his opinion compels a re-examination of whether s. 2(d) also extends protection to collective bargaining and strike activity.

1. INTRODUCTION

In this paper, I explore some of the doctrinal and practical implications of the Supreme Court of Canada's recent *Dunmore*¹ decision, in which the Court held that the exclusion of agricultural workers from collective bargaining legislation violated the freedom

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1 *Dunmore v. Ontario (Attorney General)* (2001), 207 D.L.R. (4th) 193 (S.C.C.) [hereinafter "*Dunmore*"].

of association guarantee in s. 2(d) of the *Charter*.² My primary focus is on the implications of *Dunmore* for the scope of protected associational activity under the freedom of association guarantee, particularly in the labour relations context. However, the Court's decision may also affect the interpretation and application of freedom of association outside the labour context, as well as other fundamental freedoms.

Dunmore's significance lies in the fundamental shift in approach to defining the scope of *Charter*-protected activity under s. 2(d), and in the Court's recognition that the *Charter* can, in appropriate circumstances, impose affirmative an obligation on government to safeguard fundamental freedoms. In this respect, *Dunmore* reconsiders prior freedom of association caselaw, which had consistently rejected the proposition that s. 2(d) protects activities that are uniquely associational in nature, in particular, collective activities inhering in trade union activity. Specifically in the labour context, *Dunmore* breathes life into the possibility of a meaningful role for s. 2(d) in protecting worker and trade union activity, including the fundamental right to organize, and as I argue below, to engage in collective bargaining and strikes, a role which most observers thought unattainable after a string of labour *Charter* defeats in the past 14 years. Nonetheless, as I would readily concede, it is not yet clear that the Court has recognized the logical and practical consequences of its new doctrinal approach to freedom of association for its prior holdings that neither collective bargaining nor the right to strike attract s. 2(d) protection.

2 Two caveats. First, in the interest of full disclosure, I appeared as counsel for the Canadian Labour Congress, which intervened in the Supreme Court of Canada in both *Delisle*, *infra*, note 24, and *Dunmore*, *supra*, note 1. I cannot dispute that there is some pleasure in being given a second opportunity to discuss the issues considered in this paper, albeit in a very different forum. Second, my exclusive focus in this paper is freedom of association in the positive sense, i.e. collective associational freedoms such as organizing, bargaining and the right to strike. Other cases, including *Lavigne v. O.P.S.E.U.*, [1991] 2 S.C.R. 211, and more recently *Advance Cutting & Coring*, *infra*, note 74, have considered freedom of association in the negative sense, i.e. freedom from association, and from collective activities such as paying union dues or belonging to a trade union. These cases raise separate doctrinal and conceptual issues, and are not considered here.

Moreover, for the first time, the Court in *Dunmore* unequivocally holds that the *Charter* may impose positive obligations on government to protect s. 2(d) and other fundamental freedoms, at least in the context of selective exclusion from legislative protection of such freedoms. On the other hand, certain aspects of the *Dunmore* decision can be read as restricting this positive obligation to the situation of those suffering extreme social, political and economic disadvantage, as in the case of agricultural workers.

As is clear by now, I believe that *Dunmore* is open to alternative readings. It can be read as opening the door to an expansive role for the freedom of association guarantee, particularly in the labour relations sphere where it tends to be most frequently litigated. A less generous view would regard the decision as making small concessions to a more robust vision of freedom of association, but in a manner which continues to confine the scope of associational activity protected by s. 2(d). I begin in Part 2 with an overview of the main components of the Supreme Court's earlier freedom of association caselaw, an understanding of which is essential to comprehending the breadth of the change in *Dunmore* and how the Court's approach to freedom of association may develop in the future. Part 3 then turns to a discussion of the reasons in *Dunmore*, analyzing the key shifts in the Court's understanding of the freedom of association, and exploring or at least identifying some of the mixed signals, happily leaving to future courts the job of resolving these tensions.

2. CASELAW PRIOR TO *DUNMORE*

(a) The 1987 Trilogy

While s. 2(d) applies to all associational activity, the arena in which it has been most litigated and its meaning most hotly contested has been that of labour relations. In the first years after the enactment of the *Charter*, the Court was faced with a series of challenges to legislation interfering with fundamental components of the collective bargaining system. In the *Alberta Reference*,³ the challenged legisla-

³ *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 [hereinafter "*Alberta Reference*"].

tion limited the right to strike of public sector workers. In the *Saskatchewan Dairy Workers*⁴ case, legislation ordering striking employees back to work was at issue. In *PSAC*,⁵ the legislation under challenge overrode freely negotiated collective agreements and imposed wage controls.

All three cases, which have since come to be known as the freedom of association trilogy, found their way to the Supreme Court of Canada at approximately the same time, were argued together in 1985 and decided in 1987, relatively early in the evolution of *Charter* jurisprudence. In all three decisions, labour's claims were denied, albeit without the emergence of a predominant or lasting theory of freedom of association. This was in part because only six members of the Court participated, and in part because three different sets of reasons were issued, which revealed a Court deeply split with respect to the nature and scope of the guarantee.

The main decision was issued in the *Albert Reference*. For three of the judges, freedom of association essentially meant no more than the right to join together, to form and constitute an association. On this view, the guarantee was not meant to extend in any way to the protection of collective activities, such as the right to strike or collectively bargain. Justice Le Dain (writing for himself and Justices Beetz and La Forest) rejected the argument that freedom of association extended to associational activities, including activities essential to an association's existence or the underlying purposes of the association:

... one must consider the implications of extending a constitutional guarantee, under the concept of freedom of association, to the right to engage in particular activity on the ground that the activity is essential to give an association meaningful existence.

In considering whether it is reasonable to ascribe such a sweeping intention to the *Charter* I reject the premise that without such additional constitutional protection the guarantee of freedom of association would be a meaningless and empty one. Freedom of association is particularly important for the exercise of other fundamental freedoms, such as freedom of expression and freedom of conscience and religion. These afford a wide scope for protected activity in association. Moreover, the freedom to work for the establishment of an association, to belong to an association, to maintain it, and to

4 *R.W.D.S.U. v. Saskatchewan*, [1987] 1 S.C.R. 460.

5 *P.S.A.C. v. Canada*, [1987] 1 S.C.R. 424 [hereinafter "*PSAC*"].

participate in its lawful activity without penalty or reprisal is not to be taken for granted.⁶

Thus, these judges restricted freedom of association to engaging in protected constitutional activity in association (something one would have thought was independently guaranteed by the specific constitutional protections at play), and to the formal, narrow, individual acts of forming and joining an association, and participating in those of its activities which are lawful to begin with (i.e. not subject to common law or statutory prohibition).

The apparent doctrinal or theoretical basis for this approach was a concern that protecting all group activities, or activities essential to an association's purposes, could potentially constitutionalize all or too great a range of activity engaged in by two or more individuals. In this respect, Justice Le Dain sought to avoid a result whereby collective activity would be constitutionally protected even if the same activity performed individually was neither constitutionally protected nor even lawful.⁷ If, as Justice Le Dain believed, freedom of association is anchored in the individual, the rights of individual members of a collectivity cannot be enlarged merely by the fact of association. Of course, this approach rejects outright any notion that an association is afforded constitutional protection on the basis of some independent or inherent value in group or collective activity.

Justice Le Dain also offered an additional policy basis for narrowly reading the s. 2(d) guarantee, at least as it applies in the labour relations context, namely, an appeal to the principle of judicial deference as an aid to interpretation.⁸ As Justice Le Dain wrote:

⁶ *Alberta Reference*, *supra*, note 3, at pp. 390-391.

⁷ As will become apparent below, and as the Court recognizes in *Dunmore*, this concern may well be legitimate on its own terms, but it fails to consider whether there is a meaningful or principled basis for protecting some associational activity, and/or for distinguishing between different forms and types of associational activity. In other words, while it may be that s. 2(d) does not protect all associational activity, or all activity essential to an association's purpose, this is not to say that s. 2(d) does not protect any associational activity.

⁸ This is to be compared to the broad, purposive and generous approach which the Supreme Court of Canada has normally taken in interpreting the scope of *Charter* rights and freedoms, leaving considerations of deference to s. 1 analysis and application. For example, in *Irwin Toy Ltd. v. Quebec (Attorney General)*,

The rights for which constitutional protection are sought — the modern rights to bargain collectively and to strike, involving correlative duties or obligations resting on an employer — are not fundamental rights or freedoms. They are the creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as requiring a specialized expertise. It is surprising that in an area in which this Court has affirmed a principle of judicial restraint in the review of administrative action we should be considering the substitution of our judgment for that of the Legislature by constitutionalizing in general and abstract terms rights which the Legislature has found it necessary to define and qualify in various ways according to the particular field of labour relations involved. The resulting necessity of applying s. 1 of the *Charter* to a review of particular legislation in this field demonstrates in my respectful opinion the extent to which the Court becomes involved in a review of legislative policy for which it is really not fitted.⁹

In the view of the remaining three judges, the scope of freedom of association was not so narrow. While joining with Justice Le Dain in holding that denial of the right to strike did not violate the freedom of association, Justice McIntyre articulated, at least in theory, a more liberal approach to the meaning of s. 2(d). Justice McIntyre interpreted the guarantee as protecting some aspects of associational activity, namely, the right of individuals to pursue activity together which was not prohibited when an individual acted alone. Applying this approach to the right to strike, however, Justice McIntyre concluded that because there is no lawful or analogous individual counterpart to the right to strike, it could not be said that the group had been denied a right which an individual acting alone could exercise.¹⁰

[1989] 1 S.C.R. 927, dealing with the *Charter* guarantee of freedom of expression under s. 2(b), the Court rejected a distinction between belief and action, and held that s. 2(b) protects any activity intending to convey meaning, i.e. all expressive activity, violent activity being the only exception. By contrast, the majority in the *Alberta Reference* held that no purely or inherently associational activity, regardless of its nature or purpose, is protected at all.

⁹ *Alberta Reference*, *supra*, note 3, at pp. 391-392.

¹⁰ *Ibid.*, at pp. 410-411; but see D. Beatty & S. Kennett, "Striking Back: Fighting Words, Social Protest and Political Participation in Free and Democratic Societies" (1988), 67 *Can. Bar Rev.* 573, at pp. 587-593, arguing that under the McIntyre approach (freedom of association protects the right of individuals to engage collectively in activity where it is lawful to engage in that activity on an individual basis), the Court should reconsider its view that collective withdrawal of services in a strike does not have an analogous and lawful individual counterpart in the right of employees to quit their employment. Applying the same

Significantly, Justice McIntyre agreed with Justice Le Dain in rejecting altogether the notion that s. 2(d) extended protection to any associational activity because of its uniquely associational or collective aspects. In Justice McIntyre's opinion, it was not possible

... to accord an independent constitutional status to the aims, purposes, and activities of the association, and thereby confer greater constitutional rights upon members of the association than upon non-members. It would extend *Charter* protection to all the activities of an association which are essential to its lawful objects or goals, but, it would not extend an equivalent right to individuals. The *Charter* does not give, nor was it ever intended to give, constitutional protection to all the acts of an individual which are essential to his or her personal goals or objectives. If *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. The unacceptability of such an approach is clearly demonstrated by Peter Gall in "Freedom of Association and Trade Unions: A Double-Edged Constitutional Sword" in *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (1986), at p. 247:

A brief example illustrates this point. One of our levels of government may decide to ban the ownership of guns. This would not infringe any individual right under the *Charter*. But if some individuals have combined to form a gun club, does the *Charter*'s protection of freedom of association mean that the principal activity of the gun club, namely the ownership and use of guns, is now constitutionally protected? One is quickly forced to the conclusion that it does not. The *Charter* does not protect the right to bear arms, regardless of whether that activity is carried out by an individual or by an association. The mere fact that it is the principal activity of the gun club does not give it a constitutional status. I doubt whether there would be much, if any, disagreement on this point. Thus, by referring to this hypothetical situation we see that the principal activities of associations are not necessarily protected under the concept of freedom of association.¹¹

approach to collective bargaining, insofar as individuals are not prohibited from bargaining with their employer, it would also seem that s. 2(d) should protect the freedom of individuals to engage collectively in bargaining activity, i.e. to engage in *collective* bargaining. Put another way, no law seeks to interfere with individual bargaining; it is only when bargaining takes on an associational or collective aspect that legislative restrictions are imposed. This may be why Justice McIntyre left open the possibility that collective bargaining may be protected under s. 2 (d): see text at note 19, below.

11 *Ibid.*, at pp. 404-405. The gun example clearly illustrates the limitations of a theory of freedom of association which protects associational activities solely because they are essential to the group's purpose; if some associational activities

Justice McIntyre also made an appeal to the need for judicial deference to the legislature in matters relating to labour relations, referring to the sensitivity, instability and inherently dynamic nature of labour law; the delicate balance between organized labour and employers; the need to constantly reassess traditional approaches to labour law and policy; the importance of the role of the provinces as “‘laboratories for legal experimentation with our industrial relations ailments’”; the lack of judicial expertise in labour law; and a corresponding concern with the incapacity and imprudence of judicial application of s. 1 of the *Charter* to reconsider and intrude upon the balance struck by the legislature.

By contrast, Chief Justice Dickson and Justice Wilson, the two dissenting judges in the *Alberta Reference*, held that freedom of association included protection for the right to collectively bargain and to strike. Their conclusion was founded on an approach to s. 2(d) which, as set out in Part 3 below, ultimately came to form part of the basis for the Court’s reasoning in *Dunmore*.

In his reasons, Chief Justice Dickson rejected as “legalistic” and “vapid” the constitutive definition of freedom of association adopted by Justice Le Dain:

At one extreme is a purely constitutive definition whereby freedom of association entails only a freedom to belong to or form an association. On this view, the constitutional guarantee does not extend beyond protecting the individual’s *status* as a member of an association. It would not protect his or her associational *actions*.

...

If freedom of association only protects the joining together of persons for common purposes, but not the pursuit of the very activities for which the asso-

are to be protected under s. 2(d), another basis for distinguishing between protected and non-protected activity must be found. However, the gun example fails to respond to the argument that s. 2(d) should protect at least some inherently associational activity, i.e. activity with no individual analogue, where the state is targeting that activity precisely because of its associational or collective nature: see the discussion of Chief Justice Dickson’s dissenting reasons in the *Alberta Reference*, below. Under this approach, if gun ownership by individuals were banned, a ban on ownership by groups of individuals would not be aimed at the associational nature or aspect of their activity, but rather at the ownership and use of guns, whether by individuals or groups of individuals, and so would not run afoul of the s. 2(d) guarantee.

ciation was formed, then the freedom is indeed legalistic, ungenerous, indeed vapid.¹²

Chief Justice Dickson believed, instead, that the scope of freedom of association must be determined in the context of a recognition that association is the critical mechanism through which individuals are able to contest the actions of more powerful institutions:

Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict.¹³

However, as Chief Justice Dickson pointed out, not all associational activity attracts constitutional protection merely because it is engaged in by more than one person:

. . . this is not an unlimited constitutional license for all group activity. The mere fact that an activity is capable of being carried out by several people together, as well as individually, does not mean that the activity acquires constitutional protection from legislative prohibition or regulation.¹⁴

Thus, Chief Justice Dickson would have limited protection to those activities which are proscribed precisely because of their collective or associational aspect.

In this respect, agreeing with Justice McIntyre, Chief Justice Dickson ruled that freedom of association must at least embrace “the liberty to do collectively that which one is permitted to do as an individual.”¹⁵ So, in addition to the narrow interpretation advanced by Justice Le Dain, Chief Justice Dickson’s approach to s. 2(d) extended protection to associational activity in which an individual could lawfully engage. The basis for this view is that an attack on activity performed in association where the same activity is permitted if performed by an individual acting alone is aimed at the “collective or

12 *Ibid.*, at pp. 362-363 [emphasis in original].

13 *Ibid.*, at pp. 365-366.

14 *Ibid.*, at p. 366.

15 *Ibid.*

associational aspect” of the activity, and not the activity itself. As Chief Justice Dickson observed:

Certainly, if a legislature permits an individual to enjoy an activity which it forecloses to a collectivity, it may properly be inferred that the legislature intended to prohibit the collective activity because of its collective or associational aspect. Conversely, one may infer from a legislative proscription which applies equally to individuals and groups that the purpose of the legislation was a *bona fide* prohibition of a particular activity because of detrimental qualities inhering in the activity (e.g., criminal conduct), and not merely because of the fact that the activity might sometimes be done in association.¹⁶

However, this principle of equal treatment of the individual and the collectivity cannot be the “exclusive touchstone for determining the presence or absence of a violation of s. 2(d),” since it fails to recognize that some associational activity does not have an analogous individual counterpart:

There will, however, be occasions when no analogy involving individuals can be found for associational activity, or when a comparison between groups and individuals fails to capture the essence of a possible violation of associational rights. This is precisely the situation in this case. There is no individual equivalent to a strike. The refusal to work by one individual does not parallel a collective refusal to work. The latter is *qualitatively* rather than quantitatively different. The overarching consideration remains whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits. The legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature.¹⁷

For this reason, under Chief Justice Dickson’s approach, s. 2(d) also covered certain inherently or uniquely associational activities, i.e. activities not having an individual counterpart, such as the right to strike. Where it is established that the restriction is “aimed at foreclosing a particular collective activity because of its associational nature,”¹⁸ the legislation or administrative action in question would be held to interfere with constitutionally protected associational activity. Thus, in contrast to the view expressed by Justice McIntyre, the fact that the right to strike had no individual analogue was not a reason to deny it protection, but rather signalled that it was a form of

16 *Ibid.*, at p. 367.

17 *Ibid.* [emphasis in original].

18 *Ibid.*, at p. 371.

activity which had a unique associational aspect warranting protection. Indeed, because there was no individual equivalent to a strike, which he believed to be qualitatively different than a refusal to work by one individual, Chief Justice Dickson held that the denial of the right to strike was aimed at preventing a particular collective activity precisely because of its associational nature, and so constituted an infringement of s. 2(d) of the *Charter*.¹⁹

To be clear, Chief Justice Dickson's reasons do not necessarily mean that all inherently or uniquely collective or associational activity would receive s. 2(d) recognition. In this respect, his conclusion that collective bargaining and strike activity merit protection under s. 2(d) can also be read as including an assessment of a number of factors, including (1) the importance of collective bargaining and strikes to advancing equality and dignity in the workplace; (2) the vital importance of collective bargaining throughout history to the capacity of workers to overcome their vulnerability as individuals to the strength of employers; (3) the extent to which collective bargaining is an integral and primary function of associations of working people; (4) the extent to which the right to strike is an indispensable part of our collective bargaining system and our democracy; (5) a recognition that if workers were not permitted to collectively refuse to work, they could not bargain collectively; and (6) the protection at international law (including under treaties to which Canada is signatory) of the right to collectively bargain and to strike as elements of the freedom of association. However, it is unclear whether, under Chief Justice Dickson's approach, the presence of these or similar or additional factors is necessary before purely associational activity would be deemed entitled to constitutional protection.

In the result, labour regarded the trilogy as a mixed blessing. On the one hand, despite the unequivocal meaning of freedom of association under international law as including the rights to organize, bargain and strike, the Court had taken a significantly more narrow and conservative approach to the interpretation of the freedom of association guarantee in the Canadian *Charter*. On the other hand, the

19 However, as set out in note 10, above, it can be argued that even under a more restrictive view of freedom of association, one that limits protection to collective activities having a lawful and analogous individual counterpart, the right to strike should be protected.

strong appeal to judicial deference in labour relations resonated with labour, which has been historically sceptical about the role of the courts in labour law, and as a result viewed a deferential judicial approach as a potentially positive development, particularly when it came to challenges brought against trade union and collective bargaining rights by dissident employees or employers.

At the same time, despite the fact that the majority in each of the three cases held that freedom of association had not been violated, it seemed possible that the split in the Court over the scope of the guarantee would lead to recognition of the constitutional status of some aspects of collective trade union activity. For example, collective bargaining could conceivably be held to be constitutionally protected on the ground that individual bargaining was also lawful. This possibility was reinforced by Justice McIntyre in *PSAC*, where he stated:

For the reasons I expressed in the [*Alberta Reference*] (judgment delivered concurrently), I am of the opinion that s. 2(d) of the *Charter* does not include a constitutional guarantee of a right to strike. *My finding in that case does not, however, preclude the possibility that other aspects of collective bargaining may receive Charter protection under the guarantee of freedom of association.*

In my opinion, the *Public Sector Compensation Restraint Act*, S.C. 1980-81-82-83, c. 122, does not interfere with collective bargaining so as to infringe the *Charter* guarantee of freedom of association. The Act does not restrict the role of the trade union as the exclusive agent of the employees. It requires the employer to continue to bargain and deal with the unionized employees through the Union. It also permits continued negotiations between the parties with respect to changes in the terms and conditions of employment which do not involve compensation. The effect of the Act is simply to deny the use of the economic weapons of strikes and lockouts for a two-year period. This may limit the bargaining power of the trade union, but it does not, in my view, violate freedom of association.²⁰

At the very least, it appeared that implicit in this passage was a recognition that collective bargaining might be constitutionally protected, presumably on the basis of the application of the principle that s. 2(d) protects the right to collectively engage in activity which is individually lawful, in this case, bargaining.

Nonetheless, any apparent doctrinal basis for optimism as to the possible utility of deploying s. 2(d) to contest governmental

²⁰ *PSAC*, *supra*, note 5, at pp. 453-454 [emphasis added].

interference in core trade union and worker collective activities was seemingly laid to rest in the next two instalments of labour freedom of association cases.

(b) The *PIPS* Case

P.I.P.S. v. Northwest Territories (Commissioner),²¹ decided by the Court four years after the trilogy, involved a claim that the legislative inclusion of a group of unionized workers represented by one union in a larger bargaining unit represented by another union gave rise to a breach of s. 2(d). Writing for what can fairly be regarded as a narrow four-to-three majority, Justice Sopinka rejected the challenge, which he characterized as being rooted in a claim that collective bargaining — in this case, choosing one's bargaining agent — was constitutionally protected.

Justice Sopinka summarized his reading of the *Alberta Reference* in the following four propositions:

... 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 lawful rights of individuals.²²

Applying this conception of freedom of association to the case before him, Justice Sopinka concluded:

... collective bargaining is not an activity that is, without more, protected by the guarantee of freedom of association. Restrictions on the *activity* of collective bargaining do not normally affect the ability of individuals to form or join unions. Although collective bargaining may be the essential purpose of the formation of trade unions, the argument is no longer open that this alone is a sufficient condition to engage s. 2(d). Finally, bargaining for working conditions is not, of itself, a constitutional freedom of individuals, and it is not an individual legal right in circumstances in which a collective bargaining regime has been implemented: see McIntyre J. in the *Alberta Reference*, at pp. 411-12. Apart from the reasons given in the *Alberta Reference*, the conclusion that collective bargaining does not fall within s. 2(d) accords with the results in the

21 *P.I.P.S. v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 [hereinafter "*PIPS*"].

22 *Ibid.*, at p. 402.

s. 2(d) trilogy of cases. In those cases, this Court upheld not merely restrictions on the right to strike, but also the imposition of binding arbitration without negotiation, and the imposition of terms of employment without negotiation. It is difficult, therefore, to conceive of a principle that could bring other aspects of the collective bargaining relationship within the purview of s. 2(d), and yet not overrule the trilogy.

...

It is simply no longer open to an association (union or otherwise) to argue that the legislative frustration of its objects is a violation of s. 2(d) if the restriction is not aimed at and does not affect the establishment or existence of the association — unless the association's activity is another *Charter*-protected right, or an activity that may *lawfully* be performed by an individual . . . it is equally plain that, as a result of the *Alberta Reference*, the activity for which constitutional protection is sought (collective bargaining for working conditions) satisfies neither of the tests for protected activity.²³

(c) *Delisle*

Another eight years had elapsed when, in 1999, the Court again considered the ambit of freedom of association in a labour law context. In *Delisle v. Canada (Deputy Attorney General)*,²⁴ the Court rejected, by a five-to-two majority, a s. 2(d) challenge to the outright exclusion of RCMP officers from access to any legislative collective bargaining scheme. Writing for four of the seven judges on the panel, Justice Bastarache drew on the previous freedom of association jurisprudence to outline the limited scope of s. 2(d):

The outcome of the case at bar has largely been determined by the previous decisions of this Court which have defined the concept of freedom of association, guaranteed in s. 2(d) of the *Charter*. The three cases of the 1987

23 *Ibid.*, at pp. 404-405 [emphasis in original]. Ironically, Chief Justice Dickson was the "swing vote" in *PIPS*. His own judgment makes clear that had he maintained the position he adopted in the *Alberta Reference*, he would have joined with the dissenting judges and so formed part of a four-to-three majority. However, in the face of the trilogy, by which he felt bound, he considered himself constrained to hold that collective bargaining is not protected by s. 2(d), and that s. 2(d) confers only an individual and not a group right. As a result, "reluctantly . . . and not without considerable hesitation," he ruled in favour of dismissing the appeal.

24 *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989 [hereinafter "*Delisle*"].

trilogy . . . are especially determinative of this issue as they explore the concept in the labour relations context. In a recent decision, *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, this Court had the opportunity to confirm its position. In that case, the majority of the Court cited with approval at para. 112 the following excerpt from the reasons of Sopinka J., which was taken from *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367, at p. 402:

. . . 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 lawful rights of individuals.²⁵

Then, applying the previous caselaw to the exclusion of RCMP officers from collective bargaining legislation, Justice Bastarache concluded:

In accordance with the decision of the majority of this Court in [*PIPS*], there is no violation of s. 2(d) of the *Charter* when certain groups of workers are excluded from a specific trade union regime . . . Freedom of association does not include the right to establish a particular type of association defined in a particular statute; this kind of recognition would unduly limit the ability of Parliament or a provincial legislature to regulate labour relations in the public service and would subject employers, without their consent, to greater obligations toward the association than toward their employees individually. I share the opinion expressed by McIntyre J. in *Reference Re Public Service Employee Relations Act (Alberta)*, *supra*, at p. 415, when he states that labour relations is an area in which a deferential approach is required in order to leave Parliament enough flexibility to act.²⁶

Thus, not only do we see the application of the same restrictive approach to freedom of association originally articulated in the labour relations trilogy, but also the return of an appeal to deference in defining the scope of s. 2(d) rights, at least in the context of labour relations.

Equally significant, Justice Bastarache rejected outright the proposition that government was under a positive obligation to enact legislation protecting or advancing constitutional rights. In his opinion, such an obligation would arise only in exceptional circumstances.

²⁵ *Ibid.*, at para. 11.

²⁶ *Ibid.*, at para. 33.

In this respect, Justice Bastarache emphasized the differences between the fundamental freedoms protected by s. 2 of the *Charter* and the equality guarantee contained in s. 15:

The structure of s. 2 of the *Charter* is very different from that of s. 15 and it is important not to confuse them. While s. 2 defines the specific fundamental freedoms Canadians enjoy, s. 15 provides they are equal before and under the law and have the right to equal protection and equal benefit of the law. The only reason why s. 15 may from time to time be invoked when a statute is underinclusive, that is, when it does not offer the same protection or the same benefits to a person on the basis of an enumerated or analogous ground . . . is because this is contemplated in the wording itself of s. 15. The distinguishing feature of s. 15 is that the *Charter* may require the government to extend the special status, benefit or protection it afforded to the members of one group to another group if the exclusion is discriminatory and is based on an enumerated or analogous ground of discrimination. However, while the letter and spirit of the right to equality sometimes dictate a requirement of inclusion in a statutory regime, the same cannot be said of the individual freedoms set out in s. 2, which generally requires only that the state not interfere and does not call upon any comparative standard.²⁷

...

On the whole, the fundamental freedoms protected by s. 2 of the *Charter* do not impose a positive obligation of protection or inclusion on Parliament or the government, except perhaps in exceptional circumstances which are not at issue in the instant case.²⁸

In her concurring reasons, Justice L'Heureux-Dubé was more hopeful that s. 2(d) might be found to impose positive obligations on government in a future case:

. . . where the employer does not form part of government, there exists no *Charter* protection against employer interference. In such a case, it might be demonstrated that the selective exclusion of a group of workers from statutory unfair labour practice protections has the purpose or effect of encouraging private employers to interfere with employee associations. It may also be that there is a positive obligation on the part of governments to provide legislative protection against unfair labour practices or some form of official recognition under labour legislation, because of the inherent vulnerability of employees to pressure from management, and the private power of employers, when left unchecked, to interfere with the formation and administration of unions.²⁹

27 *Ibid.*, at para. 25.

28 *Ibid.*, at para. 33.

29 *Ibid.*, at para. 7.

Despite Justice L'Heureux-Dubé's view to the contrary, when the Court granted leave to appeal in *Dunmore*, it would have been reasonable to expect, based on earlier s. 2(d) decisions and Justice Bastarache's majority reasons in *Delisle*, that the Court's primary interest was in the s. 15 discrimination claim, and that unless there was a revolutionary change in approach, the s. 2(d) claim would be dismissed.

3. *DUNMORE*

Of course, as it turned out, Justice Bastarache, writing for the majority in *Dunmore*, upheld the s. 2(d) claim, resurrecting Chief Justice Dickson's approach to freedom of association in the *Alberta Reference* and adopting Justice L'Heureux-Dubé's reasons in *Delisle* to hold that in certain circumstances government is indeed under a positive obligation to extend protection to core s. 2 freedoms. Thus, having shut the door on trade union freedom of association claims in five previous cases over the course of a 14-year period, the Court ruled that the exclusion of agricultural workers from the statutory labour relations scheme, or at least some aspects of it, violated the *Charter*.

How did the Court reconcile this result with its five earlier decisions? It did so in three ways: by expanding its doctrinal approach to the s. 2(d) guarantee to embrace collective action uniquely exercised in association; by adding an equality element to the protection of fundamental freedoms; and by refining its overall approach to the government's obligation to protect rights and freedoms guaranteed by the *Charter*.

(a) *Protecting Collective Activities Per Se*

As noted above,³⁰ until *Dunmore*, the scope of freedom of association was defined by the following four propositions set out by Justice Sopinka in *PIPS*:³¹

³⁰ See text at note 25.

³¹ The only minor inroad to this narrow view of s. 2(d) was made in a non-labour case, *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, where a majority of the Court picked up on a distinction raised by Chief Justice

... 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 lawful rights of individuals.

Put simply, *Dunmore* rejects this narrow view of freedom of association, expanding its scope to include at least some independent elements of associational activity.

Justice Bastarache begins by identifying the purpose of s. 2(d), which, in his view, offers an “enduring source of insight into the content of s. 2(d).” This purpose, he asserts, is to advance “the collective action of individuals in pursuit of their common goals.” He then infers that “the purpose of s. 2(d) commands a single inquiry: has the state precluded activity *because* of its associational nature, thereby discouraging the collective pursuit of common goals?”³²

Based on this underlying purpose, Justice Bastarache rejects as overly restrictive the previous approach to freedom of association:

In my view, while the four-part test for freedom of association sheds light on this concept, it does not capture the full range of activities protected by s. 2(d). In particular, there will be occasions where a given activity does not fall within the third and fourth rules set forth by Sopinka J. in [*PIPS*], but where the state has nevertheless prohibited that activity solely because of its associational nature. These occasions will involve activities which (1) are not

Dickson between “the associational aspect of the activity and the activity itself,” suggesting that s. 2(d) may extend to activities with an associational aspect, although without further elaboration (at para. 111). At the same time, the Court in *Egg Marketing* emphasized that s. 2(d) does not protect “activities that are not constitutionally protected when done by individuals, simply by virtue of the fact that individuals have associated for the purpose of carrying on these activities” (at para. 113). Thus, both in labour and non-labour cases, the dominant concern was that freedom of association not give greater rights to the group than those accorded to individuals, i.e. there was no independent protection for associational activity *per se*. Until *Dunmore*, the four-part test articulated in *PIPS* remained firmly anchored in the individual.

32 *Dunmore, supra*, note 1, at pp. 212-213 [emphasis in original]. While this test as articulated involves an inquiry into the government’s or legislature’s motive for suppressing associational activity, the Court’s application of the test makes clear that, as with other *Charter* rights and freedoms, both purpose and effect are assessed in determining whether there has been an infringement.

protected under any other constitutional freedom, and (2) cannot, for one reason or another, be understood as the lawful activities of individuals. As discussed by Dickson C.J. in the *Alberta Reference*, *supra*, such activities may be *collective* in nature, in that they cannot be performed by individuals acting alone. The prohibition of such activities must surely, in some cases, be a violation of s. 2(d) (at p. 367):

There will, however, be occasions when no analogy involving individuals can be found for associational activity, or when a comparison between groups and individuals fails to capture the essence of a possible violation of associational rights . . . *The overarching consideration remains whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits.* The legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature.³³

Having resuscitated the Dickson approach, Justice Bastarache proceeds to emphasize the importance of recognizing “that the collective is ‘qualitatively’ distinct from the individual: individuals associate not simply because there is strength in numbers, but because communities can embody objectives that individuals cannot.”³⁴ Indeed, echoing Chief Justice Dickson, Justice Bastarache raises the concern that “[t]o limit s. 2(d) to activities that are performable by individuals would, in my view, render futile these fundamental initiatives.”³⁵ In support of this broader interpretation, Justice Bastarache also draws on international human rights law (as did Chief Justice Dickson) to establish that there is a “range of activities that may be exercised by a collectivity of employees,” and that freedom of association “‘is not only a human right; it is also, in the present circumstances, a collective right, a public right of organisation.’”³⁶

Without explicitly reversing the labour relations trilogy, *PIPS* and *Delisle*, this passage appears to remove their entire doctrinal underpinning. Those cases squarely held that collective activities which could not be performed by individuals acting alone were not covered by s. 2(d); in *Dunmore* the Court says the precise opposite. Indeed, the extent to which the majority’s reasoning in the labour

33 *Ibid.*, at p. 213 [emphasis in original].

34 *Ibid.*

35 *Ibid.*

36 *Ibid.*, at p. 214.

relations trilogy has been reversed is reflected in the Court's assertion that the Dickson approach (adopted in *Dummore*) "was not explicitly rejected by the majority in the *Alberta Reference* or in *PIPS*." While no judge in the *Alberta Reference* explicitly rejected the Chief Justice's dissenting reasons, the doctrinal approach taken to s. 2(d) by Justices Le Dain and McIntyre squarely excluded any room for protection of "activities . . . *collective* in nature, in that they cannot be performed by individuals acting alone."³⁷ As set out in Part 2 above, rejection of this expansive view of freedom of association formed the entire basis of their approach.³⁸ Equally if not more significant, Chief Justice Dickson's reasoning led to the logical and practical result that collective bargaining and strike activity merited protection under s. 2(d) of the *Charter*. This too had been squarely rejected, with respect to the right to strike in the trilogy itself by a four-to-two majority, and with respect to the right to collective bargaining at least by Justice Le Dain,³⁹ and by the time of *PIPS*, by a narrow majority of the Court. Clearly, if the Court has now adopted the Dickson approach — inherent in which, as I have tried to demonstrate — is protection of the right to bargain collectively and to strike, the Court's position is incompatible with the result in earlier cases.

(b) Identifying Protected Collective Activities

Having recognized that some collective activities engage s. 2(d), Justice Bastarache moves on to consider the scope of the protection of collective union activities, concluding that "certain union activities . . . may be central to freedom of association even though they are inconceivable on the individual level." He refers specifically to "making collective representations to an employer, adopting a majority political platform, [and] federating with other unions."⁴⁰ Later in his reasons, he refers to "the freedom to organize, that is, the freedom to collectively embody the interests of individual workers."⁴¹

37 *Ibid.*, at p. 213 [emphasis in original].

38 As Chief Justice Dickson himself recognized in *PIPS*: see note 22, above.

39 See text at note 20 for Justice McIntyre's view on collective bargaining.

40 *Dummore*, *supra*, note 1, at p. 215.

41 *Ibid.*, at p. 224.

According to Justice Bastarache, “certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning.” Picking up on the earlier *Egg Marketing* decision, he states that “a purposive approach to s. 2(d) demands that we ‘distinguish between the associational aspect of the activity and the activity itself.’” Thus, in addition to the four propositions articulated in *PIPS*, the guarantee of freedom of association protects against legislation which “has targeted associational conduct because of its concerted or associational nature.”⁴² In the specific context of *Dunmore*, according to Justice Bastarache, this is significant, since agricultural workers seek protection not only for “the exercise in association of the constitutional rights and freedoms (such as freedom of assembly) and lawful rights of individuals, but the exercise of certain collective activities, such as making majority representations to one’s employer.”⁴³ At the same time, he adds, this does not mean that “all such activities are protected by s. 2(d), nor that all collectivities are worthy of constitutional protection.”⁴⁴

What about the associational activities of collective bargaining and striking? While Justice Bastarache notes that “this Court has repeatedly excluded the right to strike and collectively bargain from the protected ambit of s. 2(d),” citing the pre-*Dunmore* caselaw, the reality is that in *Dunmore* the Court returned to and adopted Chief Justice Dickson’s dissenting opinion in the *Alberta Reference*. The Dickson approach included protection from legislation aimed at suppressing bargaining or strike activity, precisely because, to cite Justice Bastarache’s test in *Dunmore*, such legislation necessarily “preclude[s] activity *because* of its associational nature, thereby discouraging the collective pursuit of common goals.”⁴⁵

Moreover, in discussing why the freedom to organize “lies at the core of the *Charter*’s protection of freedom of association,” the Court in *Dunmore* refers to the following factors:

The freedom to organize lies at the core of the *Charter*’s protection of freedom of association. So central is this freedom to s. 2(d) that, during the leg-

42 *Ibid.*, at pp. 215-216.

43 *Ibid.*, at p. 224.

44 *Ibid.*, at p. 215.

45 See text at note 32.

islative hearings preceding the *Charter's* enactment, an express right to unionize was opposed on the grounds that "that is *already covered* in the freedom of association that is provided already in . . . the *Charter*" (see *Minutes of Proceedings of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, Issue No. 43, January 22, 1981, at pp. 69-70 (Kaplan)). As recently as *Delisle, supra*, L'Heureux-Dubé J. noted that "the right to freedom of association must take into account the nature and importance of *labour* associations as institutions that work for the betterment of working conditions and the protection of the dignity and collective interests of workers in a fundamental aspect of their lives: employment" (para. 6 (emphasis original)). These remarks echo those of Dickson C.J., who noted in the *Alberta Reference, supra*, that "[w]ork is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society" (p. 368) . . . Moreover, the importance of trade union freedoms is widely recognized in international covenants, as is the freedom to work generally. In my view, judicial recognition of these freedoms strengthens the case for their positive protection. It suggests that trade union freedoms lie at the core of the *Charter*, and in turn that legislation instantiating those freedoms ought not be selectively withheld where it is most needed.⁴⁶

However, it is readily apparent that, freed of the dead weight of precedent, this list of factors applies not only to the freedom to organize, but also to collective bargaining and the right to strike:

- (a) The Court refers to the legislative hearings preceding the *Charter's* enactment as confirming the centrality of the freedom to organize. In fact, what Justice Minister Kaplan was responding to was a request to include an express right to bargain collectively, not to organize. It was the right to engage in collective bargaining that the Minister stated was already covered by the freedom of association. Thus, if the legislative hearings are an indication of core s. 2(d) interests, collective bargaining qualifies.
- (b) The Court refers to Justice L'Heureux-Dubé's observation in *Delisle* that the right to freedom of association must take into account the nature and importance of labour associations as institutions that work for the betterment of working conditions, and the protection of the dignity and collective interests of workers. In fact, labour associations do this primarily through collective bargaining.

⁴⁶ *Dunmore, supra*, note 1, at pp. 227-228 [emphasis in original].

- (c) The Court observes that Chief Justice Dickson noted in the *Alberta Reference* that “[w]ork is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society”; in fact, he did so in the context of providing support for his conclusion that s. 2(d) protects the right to bargain and to strike.
- (d) The Court emphasizes that trade union freedoms are widely recognized in international covenants. In fact, international law equally and firmly protects the right to organize, bargain and strike under the umbrella of freedom of association on the basis that protecting workers’ right to organize without extending a concomitant right to bargain is a hollow vision of freedom of association.

So, while it is undeniably true, as Justice Bastarache states, that not all union activities are protected by the freedom of association guarantee (presumably because under any accepted approach to freedom of association, not all associational activities are protected), the fundamental shift in paradigm flowing from *Dunmore* should in an appropriate case compel re-examination of the now-anachronistic holding that neither collective bargaining nor strike activity can ever secure s. 2(d) protection.⁴⁷ Workers join trade unions not for the sake of belonging itself, and trade unions engage in organizing activities not for the sake of the organizing campaign itself; rather, this joining and organizing activity would not take place if it did not permit unions to deal with employers on a more equal footing through collective bargaining. It is simply not possible to recognize the constitutional and associational significance of the joining and organizing activity, yet attempt to treat it separately for constitutional purposes

47 Indeed, as the Court notes at the outset of its reasons (at pp. 209-210), the appellants in *Dunmore* did not argue that s. 2(d) protected collective bargaining *per se*, but rather “unionization,” or the right to organize. To that extent, the issues of collective bargaining and the right to strike did not arise before the Court in *Dunmore*, and so while the Court noted the limits of its previous holdings, it was not called upon to work through or reconsider the implications of its new approach to freedom of association.

from the collective bargaining activity with which it is inextricably linked. If the one (joining and organizing) is protected because of its uniquely associational nature, or because of its importance to worker equality and democracy in the workplace, or because of the nature and role of trade unions in a free and democratic society, or because it is recognized at international law as a human right, so too must its logical and practical counterpart — collective bargaining, including the right to collectively withdraw services — be protected.⁴⁸

Justice Bastarache states that the freedom to organize exists “independently of any statutory enactment,” and contrasts it with the right to bargain collectively and to strike, which were characterized in the *Alberta Reference* as “modern rights.” However, it must be recognized that the characterization of collective bargaining and the right to strike as being exclusively modern or statutory emanates largely from Justice Le Dain’s narrower and now-abandoned approach to freedom of association in the *Alberta Reference*.⁴⁹ In this

48 Another approach to freedom of association contends that certain associational activities should be recognized as falling within the ambit of s. 2(d) because they are essential to preserving and sustaining a free and democratic society, and promoting the underlying values of the *Charter*. Under this approach, a distinction is to be made between associational activity which promotes fundamental *Charter* values and is essential to a free and democratic society, and other associational activity. For example, Beatty & Kennett, *supra*, note 10, at pp. 601-603, have suggested that a distinction should be made between collective bargaining and other forms of associational activity, since

... collective bargaining, like speech or thought or assembly, is an activity which is integral to the deeper moral value of autonomy and personal self-government which underlies our whole theory and tradition of liberal democratic government.

Similarly, Macklem has suggested in “Developments in Employment Law: The 1990-91 Term” (1992), 3 Supreme Court L.R. (2d) 227, at p. 239, note 53:

Another approach ... would be for the judiciary to begin to make substantive judgements about the merits and importance of different types of groups and group activity in light of the purposes of the *Charter*. Some activities essential to some groups may well deserve substantive protection against governmental interference, subject to s. 1 of the *Charter*, simply because of their centrality and importance to social and democratic life.

Under this approach, a strong case can be made that organizing, bargaining and strike activity qualify for s. 2(d) protection.

49 *Supra*, note 3, at p. 391.

respect, Justice Bastarache's insistence in *Dunmore* that "the effective exercise of this freedom requires legislative protection in some cases . . . ought not change the fundamentally non-statutory character of the freedom itself"⁵⁰ applies equally to the right to bargain collectively and to strike. To hold otherwise would be to ignore a great deal of labour history and trade union struggle.

(c) Equality as an Integral Component of Fundamental Freedoms

Having significantly expanded the theoretical underpinnings of the freedom of association guarantee beyond the doctrinal orthodoxy he had affirmed in *Delisle* just two years earlier, Justice Bastarache then turns to the issue of whether the exclusion of agricultural workers from a statutory collective bargaining scheme amounts to interference with protected associational activity. Here again, the Court notably refines its approach to government's obligation to respect fundamental freedoms, by effectively reading an equality component into s. 2.

As Justice Bastarache states, exclusion from a legislative regime may not only implicate s. 15 of the *Charter* (where an enumerated or analogous group is denied a statutory benefit accorded to others), but may also engage s. 2 of the *Charter*, since exclusion from legislation which protects fundamental freedoms can substantially interfere with the exercise of those freedoms:

Where a group is denied a statutory benefit accorded to others, as is the case in this appeal, the normal course is to review this denial under s. 15(1) of the *Charter*, not s. 2(d) . . . This was properly recognized by Sharpe J. [in the court below] who noted that "by 'dipping its toe in the water,' and affording or enhancing the rights of some," the government is not obliged to "go all the way and ensure the enjoyment of rights by all" (p. 207). However, it seems to me that apart from any consideration of a claimant's dignity interest, exclusion from a protective régime may in some contexts amount to an affirmative interference with the effective exercise of a protected freedom. In such a case, it is not so much the differential treatment that is at issue, but the fact that the government is creating conditions which in effect substantially interfere with the exercise of a constitutional right . . . This does not mean that there is a constitutional right to protective legislation *per se*; it means legislation that is

50 *Dunmore, supra*, note 1, at p. 220.

underinclusive may, in unique contexts, substantially impact the exercise of a constitutional freedom.⁵¹

This means that where a legislative regime can be characterized as protective of fundamental *Charter* freedoms, denial of the benefit of that protection can constitute an infringement of s. 2, irrespective of whether the denial meets the discrimination and enumerated or analogous grounds requirements of s. 15. As Justice Bastarache observes in summarizing this new approach: “freedom of association may, for example, prohibit the selective exclusion of a group from whatever protections are necessary to form and maintain an association, even though there is no constitutional right to such statutory protection *per se*.”⁵² One need only recall the rejection of this principle in *Delisle* to understand the importance of the shift. Now, “[a]s long as the appellants can plausibly ground their action in a fundamental *Charter* freedom,”⁵³ s. 2 of the *Charter* may include an equality component. Whereas s. 15 “focuses on the effects of underinclusion on human dignity,” the equality component of s. 2(d) “focuses on the effects of underinclusion on the ability to exercise a fundamental freedom.”⁵⁴

Including an equality component within the framework for assessing whether there has been an interference with fundamental freedoms is a novel and significant development in the evolution of *Charter* jurisprudence. The key consideration then becomes the test or standard for determining when unequal treatment in relation to the exercise of associational activity or any other activity protected as a fundamental *Charter* freedom will amount to a *Charter* breach.

(d) When Does Exclusion from Legislation Interfere with the Exercise of Fundamental Freedoms?

As Justice Bastarache observes, accepting that a s. 2 analysis includes an equality component “does not, of course, mean that exclusion from that regime automatically gives rise to a *Charter* violation.” Rather, in order to establish a violation of this equality

51 *Ibid.*, at p. 218 [emphasis in original].

52 *Ibid.*, at p. 223.

53 *Ibid.*, at p. 220.

54 *Ibid.*, at p. 223.

component, and effectively impose an obligation on government to extend legislative protection, a claimant must demonstrate that “exclusion from a statutory regime permits a *substantial* interference with the exercise of protected s. 2(d) activity,” and not solely that the claimant seeks “a particular channel for exercising his or her fundamental freedom.”⁵⁵

Applying this test to the factual record before him respecting the effect of the statutory exclusion of agricultural workers on their ability to exercise the freedom to organize, the Court makes a distinction between groups who are “ ‘strong enough to look after [their] interests without collective bargaining legislation’ ” and those “ ‘who have no recourse to protect their interests aside from the right to quit.’ ”⁵⁶ Agricultural workers fall into the latter category. Apart from the undisputed evidence that without inclusion in a collective bargaining regime, agricultural workers simply do not unionize, the Court also considered a range of factors somewhat similar to those considered in determining whether a disadvantaged group is analogous within the meaning of s. 15 of the *Charter*. These include “their political impotence, their lack of resources to associate without state protection and their vulnerability to reprisal by their employers” as well as the fact that they are “ ‘poorly paid, face difficult working conditions, have low levels of skill and education, low status and limited employment mobility.’ ”⁵⁷ Thus, Justice Bastarache concludes, “legislative protection is absolutely crucial if agricultural workers wish to unionize . . . there is no possibility for association as such without minimum statutory protection.”⁵⁸ In short, without legislative protection, agricultural workers “are substantially incapable of exercising their constitutional right to associate.”⁵⁹

On this basis, Justice Bastarache distinguishes his earlier reasons in *Delisle*. First, in *Delisle*, RCMP members had succeeded in forming an association in some Canadian provinces. Thus, by contrast with agricultural workers, the RCMP officers in *Delisle* were “a group that proves capable of associating despite its exclusion from a

55 *Ibid.*, at pp. 220-221, 229 [emphasis in original].

56 *Ibid.*, at p. 230.

57 *Ibid.*, at p. 230.

58 *Ibid.*, at p. 231.

59 *Ibid.*, at p. 229.

protective regime"; this, according to the Court in *Dunmore*, is attributable to their relatively advantaged status and financial resources, as well as to the fact that RCMP officers, as government employees, are directly protected by the *Charter* from employer interference with the s. 2(d) freedom to organize.⁶⁰ Second, the agricultural workers in *Dunmore* were seeking inclusion in the statutory regime to "safeguard" their ability to exercise a fundamental freedom at all, whereas the RCMP members in *Delisle* were seeking inclusion in order to "enhance" the exercise of a fundamental freedom.⁶¹

Thus, it appears that two of the conditions for establishing that exclusion from protective legislation substantially interferes with the exercise of fundamental freedoms are that the claimants are unable to effectively engage in constitutionally protected activity as a result of significant political, social or economic disadvantage and vulnerability, and that the purpose of their claim is to acquire the capacity to exercise a fundamental freedom, as opposed to enhancing this capacity. These, according to the Court, are the two key distinguishing features of *Dunmore* as compared to *Delisle*.

While it is understandable that the Court in *Dunmore* sought to distinguish its holding in *Delisle*, particularly since it was issued only two years earlier, too rigid an attachment to these ostensible bases for distinction may well prove overly restrictive. While disadvantage or vulnerability may be one indication that an excluded group is unable to engage in constitutionally protected activity without inclusion in protective legislation, it should not be a prerequisite. Rather, the focus should remain on the underlying question of whether legislative exclusion has the effect of substantially interfering with the exercise of fundamental freedoms. A group may well be relatively advantaged in terms of social or economic status, but the factual record may establish that their exclusion from a protective legislative regime effectively precludes members of the group from meaningfully engaging in constitutionally protected activity.

On this basis, in a future case, even the result in *Delisle* should be open to reconsideration, based on a full assessment of the doctrinal advances in *Dunmore*. While it is true that some limited number

60 *Ibid.*, at pp. 229-230.

61 *Ibid.*, at p. 229.

of RCMP members were courageous enough to form associations, the fact was, as the dissenting judges pointed out, that historically there had been a “dearth” of RCMP member associations across the country, and in most provinces there was no such association.⁶² Moreover, while RCMP officers do enjoy significantly greater social status and economic resources than agricultural workers, as the dissenting judges pointed out, “RCMP members continue[d] to be subject to practices that would likely be enjoined as unfair labour practices” under labour legislation.⁶³ These included the establishment by the employer of an employee representational process (or what would otherwise be fairly described as a company union), a regulatory prohibition on promoting alternatives to the employer-created and employer-designated representational process, and the institution of disciplinary proceedings against several individuals seeking to establish independent representative associations and structures, including against Delisle himself. Thus, despite a relatively advantaged social and economic position, it should be open to a group excluded from protective legislation to show that the purpose or effect of the exclusion is to make its members substantially incapable of engaging in protected constitutional activity.⁶⁴

62 *Delisle, supra*, note 24, at para. 106.

63 *Ibid.*, at para. 103.

64 Another distinguishing feature of *Delisle* was that, as government employees, RCMP members already had *Charter* protection and so, according to the Court, did not necessarily require additional legislative protection. Indeed, Justice Bastarache goes so far as to suggest in *Dunmore* that “a government employer [as in *Delisle*] is less likely than a private employer to take exclusion from protective legislation as a green light to commit unfair labour practices, as its employees have direct recourse to the *Charter*” (at p. 233). However, history teaches that a government employer may have no greater propensity to respect the associational rights of its employees than a non-government employer, as illustrated by the numerous occasions on which governments have overridden the collective bargaining rights of their employees. Moreover, there are practical and procedural obstacles to the enforcement of *Charter* rights which do not arise when those rights are secured by a legislative regime containing more accessible and effective, and less costly, enforcement mechanisms. And, as the Court recognized in *Dunmore*, exclusion from a protective regime sends a message delegitimizing associational activity on the part of those excluded (see text at notes 70 and 72, below). While a governmental employer may in some cases be less likely to act on this message, this should be a question of fact, not an *a priori*

Similarly, instead of distinguishing between the bare capacity to engage in constitutionally protected activity at all, and an enhanced capacity to do so, the focus should be on the extent to which exclusion from a protective regime impairs the exercise of fundamental freedoms. There is no black-and-white line between enabling and enhancing the exercise of a freedom; rather, it should be sufficient to demonstrate that legislative exclusion has the purpose or effect of significantly diminishing the extent to which a claimant can engage in the exercise of constitutionally protected activity.⁶⁵

(e) When Is Government Accountable?

Having concluded that exclusion from a legislative regime substantially prevents agricultural workers from engaging in protected s. 2(d) activity, Justice Bastarache goes on to consider whether this impediment could be sufficiently attributed to state action, rather than to the private actions of agricultural employers. In this respect, if the exclusion had no separate or independent impact on the ability of agricultural workers to engage in associational activity, there was no causal connection between the government action and the infringement, and therefore no violation of the *Charter*.

There had been some indication in prior caselaw that, in theory, government may be under an affirmative obligation to protect *Charter* rights and freedoms. However, outside of the s. 15 underinclusion context, such claims have generally been rejected in practice. After *Dunmore*, we know that, in appropriate circumstances, the state can be regarded as having hindered a claimant's ability to exercise a fundamental freedom as a result of exclusion from a protective statutory regime. What are those circumstances? According to Justice Bastarache:

assumption. In the case of *Delisle*, there was a strong argument that the government, as employer and legislator, both authored and implemented the anti-associational message of the legislative exclusion.

⁶⁵ The difficulty of distinguishing between the capacity to exercise a fundamental freedom, and enhancing that capacity, is illustrated by the lower court's decision in *Dunmore*, where Justice Sharpe found that agricultural workers were attempting to impose upon the government a positive duty to "enhance" their s. 2(d) rights: (1998), 37 O.R. (3d) 287 (Gen. Div.), at p. 299.

. . . failure to include someone in a *protective* regime may affirmatively permit restraints on the activity the regime is designed to protect. The rationale behind this is that underinclusive state action falls into suspicion not simply to the extent it discriminates against an unprotected class, but to the extent it substantially orchestrates, encourages or sustains the violation of fundamental freedoms.⁶⁶

Thus, in the context of the history of labour relations legislation, there is a

. . . profound connection between legislative protection and the freedom to organize. It may be suggested that legislative protection is so tightly woven into the fabric of labour relations that, while there is no constitutional right to protective legislation *per se*, the selective exclusion of a group from such legislation may substantially impact the exercise of a fundamental freedom.⁶⁷

In this case, the impugned legislation excluded agricultural workers “from the only available channel for associational activity.” More significantly, according to Justice Bastarache, “it must be presumed that the legislature understood the history of labour relations and remained of the view that a protective regime was essential to the exercise of freedom of association in this area.” Describing the “most palpable effect” of the exclusion as being to place a “chilling effect on non-statutory union activity,” he held that “[b]y extending statutory protection to just about every class of worker in Ontario, the legislature has essentially discredited the organizing efforts of agricultural workers,”⁶⁸ created “a stimulus to interfere with organizing activity,”⁶⁹ and sent a “known and foreseeable” “message . . . which delegitimizes associational activity and thereby ensures its ultimate failure.”⁷⁰ Moreover, this impact was particularly severe because of “the relative status of agricultural workers in Canadian society.”⁷¹

66 *Dunmore, supra*, note 1, at p. 221 [emphasis in original].

67 *Ibid.*, at pp. 226-227.

68 *Ibid.*, at p. 232.

69 *Ibid.*, at p. 233.

70 *Ibid.*, at p. 234.

71 *Ibid.*, at p. 232. In her article “The ‘Second Labour Trilogy’ ” (2002), 16 Supreme Court L.R. (2d) 67, Professor Cameron is critical of the Court’s conclusion that the legislative exclusion resulted in the inability of agricultural workers to organize (see p. 86 and note 95, suggesting that the court below was correct in finding that factors other than the exclusion were responsible). However, as the Court’s analysis makes clear, the impact of the exclusion was to

In the context of the enactment of labour relations legislation intended precisely to enable workers' fundamental freedom to organize, "the exclusion of an entire category of workers . . . can only be viewed as a foreseeable infringement of their *Charter* rights,"⁷² quite apart from the particular situation of agricultural workers. Thus, the Court concludes, the way in which the exclusion of agricultural workers paralyzes organizing activity is "substantially attributable to the exclusion itself, rather than to private action exclusively."⁷³

4. CONCLUSION

Unquestionably, *Dunmore* offers the possibility of a very different approach to the *Charter*'s freedom of association guarantee than that previously taken by a majority of the Court. At least at the doctrinal level, the approach is as much borrowed as new. As Justice Bastarache acknowledges, the shift towards protection of certain collective activities is rooted in Chief Justice Dickson's dissent in the *Alberta Reference*. The other judges who took part in the trilogy, and subsequently in *PIPS* and *Delisle*, clearly rejected the proposition that protection attaches to collective activities, unless there exists a counterpart in lawful individual activity.

Clearly, the Court has indicated a willingness to embrace a richer, more purposive and meaningful view of freedom of association, even in the labour context. This may be explained by a number of factors, including an increased appreciation of the importance of international law in interpreting *Charter* rights and freedoms, a recognition that the same broad and purposive approach taken by the Court to other rights and freedoms was at odds with the narrow and

contribute significantly to the inability of agricultural workers to exercise their associational rights. Put another way, while private agricultural employers may well commit unfair labour practices interfering with the associational rights of employees, the fact is, as the Court notes at p. 230, that the state has " 'regulated, structured and channeled' the method through which Canadian workers are able to organize, to the point where organizing a workers' association is 'virtually synonymous' with unionizing under the legislative scheme." Accordingly, exclusion from the legislative scheme can hardly be regarded as an act of state neutrality or legislative silence immune from *Charter* scrutiny.

72 *Ibid.*, at p. 234.

73 *Ibid.*, at p. 246.

deferential approach taken to freedom of association,⁷⁴ and a growing comfort in general with the Court's role in protecting constitutional rights and freedoms.

To be sure, there are a number of unresolved issues. How are courts to identify uniquely or inherently associational activities, which are eligible for s. 2(d) protection, and to distinguish them from collective activities with an individual analogue? While associational activities are not protected simply because they are essential to an association's purposes, are all uniquely associational activities to be protected, or only some? If only some, by what criteria will the courts determine which are entitled to protection, and which are not? Indeed, ought the line to be drawn on the basis of whether an activity is uniquely associational, or on some other basis pertaining to the nature of the association and the activity, its value in preserving and enhancing the purposes of the freedom and of the *Charter*, and its importance to sustaining a free and democratic society?⁷⁵

It will also take future *Charter* challenges to determine whether the courts will extend the logical implications of this new approach to freedom of association to include collective bargaining and strike activity, or whether the courts will maintain a distinction between collective organizational and representational activity — now clearly constitutionally protected — and collective bargaining and the right to strike. In my view, any such distinction would run contrary to the meaning of freedom of association at international law, to the underlying rationales and purposes of the freedom of association guarantee, to the historical and practical realities of labour relations in Canada, and to the logical and practical doctrinal implications of *Dunmore* itself.

74 This shift in the Court's approach to defining the scope of *Charter* rights and freedoms in the labour context was already evident in decisions preceding *Dunmore*. Thus, a concern with the legitimacy of judicial intervention in labour relations did not prevent the Court from ruling, in *R. v. Advance Cutting & Coring Ltd.* (2001), 205 D.L.R. (4th) 385 (S.C.C.), that s. 2(d) protects the negative freedom from association, a ruling which has far-reaching implications for the union security and exclusivity arrangements fundamental to our longstanding labour relations regime. Nor did it prevent the Court from according meaningful protection to union picketing and leafleting under s. 2(b) of the *Charter*: see *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083.

75 See discussion at note 48.

Also uncertain at this point are the precise contours of any affirmative obligation on government to ensure that individuals are able to effectively exercise their *Charter* rights and freedoms. *Dunmore* marks a shift towards a heightened and sophisticated recognition by the Court of the restrictive effect which legislative exclusion, and indeed legislative or governmental inaction, can have on the ability of individuals to exercise fundamental freedoms. Future decisions will no doubt refine the application of this new recognition, both with respect to freedom of association and to other fundamental freedoms. Perhaps more significantly, *Dunmore* also opens the door to the possibility that courts may extend this reasoning beyond the area of legislative exclusion to embrace free-standing claims to affirmative legislative and governmental action needed to secure the political, social and economic preconditions for the effective exercise of rights and freedoms guaranteed to all individuals. In this sense, *Dunmore* may represent a tentative first step towards a recognition by the Court that legislative or government action is sometimes necessary to give meaningful effect to the fundamental freedoms guaranteed by the *Charter*.