THE *DUNMORE* DEPARTURE: SECTION 1 AND VULNERABLE GROUPS

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INTRODUCTION: THE *DUNMORE* DEPARTURE

In the recent decision *Dunmore v. Ontario (A.G.)*,[1] the Supreme Court of Canada held that the complete exclusion of agricultural workers from Ontario's *Labour Relations Act*[2] was a violation of section 2(*d*) of the *Charter*[3] that could not be justified under section 1. *Dunmore* was a novel case; as Bastarache J. noted in the introduction to the majority decision, it represented "the first time" the Court had been called on to review "the total exclusion of an occupational group from a statutory labour relations regime, where that group is not employed by the government and has demonstrated no independent ability to organize."[4]

The uniqueness of the *Dunmore* claim compelled an equally original response from the Court, both in its section 1 analysis and in the remedy it prescribed to redress the section 2(*d*) infringement. In comparing the *Dunmore* decision to the relevant body of case law, it becomes clear that *Dunmore* represents a marked departure from established *Charter* adjudication norms in three important respects. First, the court in *Dunmore* applied a strict *Oakes*[5] test in its analysis of the impugned legislation despite the fact that the LRA was directed towards the protection of a vulnerable group (namely, family farmers in Ontario). The stringent section 1 inquiry in *Dunmore* stands in contrast to the deferential approach the Court has traditionally adopted when reviewing legislation aimed at the protection of vulnerable groups. Second, the Court in *Dunmore* offered an unblinking analysis of the context, purpose and effects of the impugned legislation, and explicitly declined to give the respondent Attorney General latitude when evaluating the appropriateness of the LRA.[6] This stands in contrast to the Court's traditionally cautious approach to labour relations cases and its previously-stated preference that labour issues be dealt with by the legislatures or by specialized tribunals.[7] Finally, the Court in *Dunmore* prescribed the unusual remedy that the LRA be amended to include agricultural workers, in order to safeguard the appellants' section 2(*d*) rights. This stands in contrast to the Court's position articulated by Bastarache J. in *Delisle* that "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."[8]

For all the above reasons, *Dunmore* was clearly an exceptional circumstance; this article examines why this was so. In Part II, I will compare the *Dunmore* treatment of section 1 to the one advocated in the landmark *Edwards Books* and *Labour Trilogy* decisions in order to illustrate the extent to which *Dunmore* represents a departure from the usual analysis of protective legislation,[9] especially in the labour relations

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1 *Dunmore v. Ontario (A.G.)*, [2001] 3 S.C.R. 1016 [*Dunmore*].

2 R.S.O. 1980, c. 228 [LRA].

3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

4 *Dunmore*, *supra* note 1 at para. 2. The majority consisted of McLachlin C.J.C., Gonthier, Iacobucci, Bastarache, Binnie, Arbour and LeBel JJ. Justice L'Heureux-Dubé wrote a concurring opinion. Justice Major dissented. The LRA exclusion was effected by the enactment of *the Labour Relations and Employment Statute Law Amendment Act* [LRESLAA], which repealed the short-lived *Agricultural Labour Relations Act* [ALRA]. The ALRA had extended trade union and bargaining rights to agricultural workers; the effect of the LRESLAA was to roll back these rights and instead subject agricultural workers to an exclusion clause in the LRA. For purposes of this discussion I will focus chiefly on the LRA, since it was that piece of legislation which explicitly excluded agricultural workers from the labour relations scheme, thus triggering the *Charter* claim.

5 *R. v. Oakes*, [1986] 1 S.C.R. 103.

6 *Dunmore*, *supra* note 1 at para. 57.

7 *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at para. 183 [*Alberta Reference*].

8 *Delisle v. Canada (Deputy A.G.)*, [1999] 2 S.C.R. 989 at para. 33 [*Delisle*].

9 By "protective legislation" I mean legislation aimed at the protection of vulnerable groups enacted in the state's benevolent capacity; this is in contrast to restrictive legislation in which the state acts as the "singular antagonist" of the

context. In Part III, I will account for that departure, using the Court's holding in *Delisle* as evidence that it was the vulnerability of those *excluded* from the LRA — not those protected by it — that was the decisive factor in *Dunmore*. In Part IV, I will conclude that *Dunmore* has effectively added another contextual factor for the courts to consider in future section 1 analyses of protective legislation: the relative status of those excluded from the protective regime.

PROTECTIVE LEGISLATION AND SECTION 1 SCRUTINY

In applying the *Oakes* test to determine if a *Charter* violation can nonetheless be justified under section 1, Robert Sharpe and Katherine Swinton observe that "the court has explicitly stated that a more relaxed standard of scrutiny is called for where the legislation challenged represents an attempt by the legislature to … protect vulnerable groups."[10] This deferential approach was first articulated by Dickson C.J.C. in *Edwards Books*:

> In interpreting ... the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.[11]

The Court expanded on the idea of a relaxed section 1 inquiry under certain circumstances in *Irwin Toy*. Again writing for the majority, Dickson C.J.C. held that when legislatures are called on to mediate between the "justified demands" of competing groups and are thus forced to make "difficult choices" about the allocation of scarce resources, the courts should be respectful of the outcome. He wrote: "as courts review the results of the legislature's deliberations, *particularly with respect to the protection of vulnerable groups*, they must be mindful of the legislature's representative function."[12] Based on this reasoning, the Court has upheld under section 1 legislation directed at the protection of, *inter alia*, retail workers (*Edwards Books*), children under age thirteen (*Irwin Toy*), Jews (*Ross v. New Brunswick School District*), women (*Prostitution Reference*), and ethnic minorities (*Keegstra*).[13]

While the Court is generally deferential to the legislatures when evaluating what I have termed "protective legislation," it has been remarkably reluctant to review labour relations legislation in particular. This approach was clearly articulated in the *Alberta Reference*, one of the *Labour Trilogy* cases which first defined the scope of section 2(*d*). Writing for the majority in the *Alberta Reference*, LeDain J. held that labour relations were so fraught with social and political issues that "[t]he resulting necessity of applying s. 1 of the *Charter* to a review of particular legislation in this field demonstrates … the extent to which the Court becomes involved in a review of legislative policy for which it is really not fitted."[14] This judicial anxiety was echoed in McIntyre J.'s oft-cited concurring judgment, where he wrote: "Judges do not have the expert knowledge always helpful and sometimes necessary in the resolution of labour problems … it is scarcely contested that specialized labour tribunals are better than courts for resolving labour problems."[15] Justices Cory and Iacobucci, writing in *Delisle*, affirmed the deferential approach first articulated in the *Labour Trilogy*: "We agree that, in many if not most cases, it will be found appropriate to defer to the legislature in its determination of how best to strike the delicate balance among labour, management, and public interests."[16]

One might therefore have expected the Court in *Dunmore* to follow this approach of lenience, since the impugned legislation in that case was ostensibly directed towards the protection of the vulnerable family farm industry in Ontario. And indeed, the Court was clearly sensitive to the precedent of judicial deference. Justice Bastarache, writing for the majority in *Dunmore*, stated that when drafting legislation, governments are not required to "produce the result most desirable to this Court," and that "one might be tempted to conclude that a wide margin of deference is owed to the enacting legislature" given the complexity

individual.

10 R.J. Sharpe & K.E. Swinton, *The Charter of Rights and Freedoms* (Toronto: Irwin Law, 1998) at 50. In contrast, a strict *Oakes* test is employed for legislation directed towards the criminally accused; in these cases the state is characterized as the "singular antagonist" of the individual.

11 *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at para. 141 [*Edwards Books*].

12 *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at 993 [emphasis added] [*Irwin Toy*].

13 *Edwards Books*, *supra* note 11; *Irwin Toy*, *ibid.*; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *R. v. Keegstra*, [1990] 3 S.C.R. 697.

14 *Alberta Reference*, *supra* note 7 at para. 144. For a critical analysis of the *Alberta Reference* decision, see Harry Arthurs, "'The Right to Golf': Reflections on the Future of Workers, Unions and the Rest of Us Under the *Charter*" (1988) 13 Queen's L.J. 17.

15 *Alberta Reference*, *ibid.* at para. 183. It is therefore not surprising that the body of s. 2(*d*) case law is markedly smaller than that of other s. 2 collections.

16 *Delisle*, *supra* note 8 at para. 127.

of the interests at stake.[17] However, Bastarache J. qualified, the Court in *Edwards Books* also held that the legislature must "attempt very seriously to alleviate the effects" of its laws on those whose rights have been infringed, and that the holding in *Thomson Newspapers* established that "political complexity is not the deciding factor" in deciding the margin of deference under section 1.[18] These caveats weighed against the respondent Attorney General in *Dunmore*.

In *Thomson Newspapers*, Bastarache J., writing for the majority, suggested four contextual factors for judges to consider, the presence of any of which might favour a deferential approach. These are: (1) that the legislature has sought a balance between competing groups; (2) that the legislature has sought to defend a vulnerable group, where that group has a subjective apprehension of harm; (3) that the legislature has chosen a remedy whose effectiveness cannot be measured scientifically; and (4) that the value of the activity which the legislation infringes is relatively low.[19] Justice Bastarache noted that this list did not represent "categories of standard of proof which the government must satisfy, but are rather factors which go to the question of whether there has been a demonstrable justification."[20] Indeed, the considerations mentioned in *Thomson Newspapers* can be found in earlier cases like *Edwards Books* and *Irwin Toy* and should not be read as a new supplement to the *Oakes* test, but rather as a sort of "roadmap" to indicate how and why the section 1 analysis has been undertaken.

With these issues in mind, the Court in *Dunmore* undertook an analysis of the impugned LRESLAA and LRA. At the first stage of the section 1 inquiry, the Court in *Dunmore* found that the protection of family farms in Ontario was a sufficiently pressing objective to justify the infringement of section 2(*d*) of the *Charter*. The Court was not persuaded by the appellants' claim that the family farm was on the decline in Ontario, and so its protection was of diminished importance. On the contrary, Bastarache J. wrote, the overtaking of the family farm by "corporate farming and agribusiness" increased the need for protection of family farms. The Court went on to accept the respondent's economic evidence that the agricultural industry in Ontario "occupies a volatile and highly competitive part of the private sector economy, that it experiences disproportionately thin profit margins and that its seasonal character makes it particularly vulnerable to strikes and lockouts."[21] Given these factors, the Court found that the protection of the vulnerable family farm met the first stage of the *Oakes* test.

Next, the Court examined whether the impugned legislation met the *Oakes* rational connection test. That is, it set out to determine if the objective of protecting family farms was advanced by the exclusion of agricultural workers from the LRA. The outcome of this analysis was foreshadowed in the opening line of the section: "At this stage," Bastarache J. wrote, "the question is whether the wholesale exclusion of agricultural workers from the *LRA* is carefully tailored to meet its stated objectives."[22] The Court agreed with the respondent that unionization, insofar as it involves the formalized right to strike and bargain collectively, might threaten the flexible family farm dynamic. However, Bastarache J. went on to caution that this concern "ought only be as great as the extent of the family farm structure in Ontario and it does not necessarily apply to the right to form an agricultural association." In cases where the employment relationship is already formalized, he wrote, "preserving 'flexibility and co-operation' in the name of the family farm is not only highly irrational, it is highly coercive."[23]

Furthermore, the Court found that the economic rationale for protecting the agricultural sector — which had been accepted at the first stage of the section 1 inquiry — did not meet the rational connection requirement. Though it may be true that the agricultural sector suffers from thin profit margins, unstable production cycles and other vulnerabilities, Bastarache J. wrote, these are liabilities faced by many industries in Ontario. Therefore while denying agricultural workers the right of association might be a rational policy "in isolation," Bastarache J. held, "it is nothing short of arbitrary" where this right has been extended to "almost every other class of worker in Ontario."[24]

The Court then turned to the minimum impairment test and, after excerpting the lengthy catalogue of "agricultural workers" excluded from the LRA, it found

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17 *Dunmore*, *supra* note 1 at paras. 60, 57.

18 *Ibid*. at para. 60, citing *Edwards Books*, *supra* note 11; *Dunmore*, *ibid.* at para. 57.

19 *Thomson Newspapers Co. v. Canada (A.G.)*, [1998] 1 S.C.R. 877 at para. 90 [*Thomson Newspapers*].

20 *Ibid*. The *Thomson Newspapers* "contextual factors" make for a circular application. Their purpose is ostensibly to help the Court assess whether a strict or relaxed s. 1 approach is warranted. However, the Court will only be able to consider many of these factors during a s. 1 analysis (especially within the minimal impairment test). Therefore an assessment of the *Thomson Newspapers* factors seems to follow the s. 1 analysis, not precede it.

21 *Dunmore*, *supra* note 1 at para. 53.

22 *Ibid.* at para. 54.

23 *Ibid*.

24 *Ibid.* at para. 55.

that the impugned legislation was unjustifiably overbroad.[25] Interestingly, Bastarache J. prefaced this conclusion with reference to the *Edwards Books* decision by describing the tailored features of the *Retail Business Holidays Act*[26] exemption clause which had satisfied the Court in that case. By contrast, he wrote, "neither enactment in this case includes a concrete attempt to alleviate the infringing effects on agricultural workers."[27] Justice Bastarache instead found that the LRA and LRESLAA impaired the appellants' section 2(*d*) "more than is reasonably necessary" first by denying the right of association "to every sector of agriculture," and second by denying every aspect of that right to them.[28]

Justice Bastarache concluded his section 1 analysis by rejecting the respondent's submission that distinguishing between sectors within the agriculture industry required "an impossible line-drawing exercise" which the legislature was empowered to avoid.[29] The fact that other provinces have enacting nuanced labour codes containing exclusions for smaller or family-run farms, the Court held, "suggests that such an exercise is eminently possible, should the legislature choose to undertake it."[30] Finally, Bastarache J. wrote that the respondent had provided no justification for the exclusion of agricultural workers from all aspects of association, and no evidence that the protection of agricultural workers under the LRA would pose a threat to the family farm.

When viewed in light of the Court's landmark section 1 analysis in *Edwards Books*, it is clear that the Court in *Dunmore* had solid precedent upon which to uphold the impugned legislation. As in *Dunmore*, the Court in *Edwards Books* was called on to assess the constitutionality of a piece of provincial legislation which protected one group of people, but violated the section 2 rights of another. In that case the Court acknowledged that Ontario's Sunday closing law infringed the appellants' section 2(*a*) *Charter* guarantee of freedom of religion, but that such infringement was justified under section 1. Whereas the Court in *Dunmore* found that the targeting of the agricultural industry in the LRA failed the "rational connection" requirement of *Oakes*, in *Edwards Books* it found that the singling-out of an industry for legislative scrutiny was not necessarily arbitrary for purposes of the rational connection test. On the contrary, in *Edwards Books*, Dickson C.J.C. wrote that "[I]n regulating industry or business it is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy."[31] That statement seemed to give the Court in *Dunmore* ample latitude to find that the protection of the rapidly-disappearing family farm made the LRA exclusion reasonable. Moreover, at the least restrictive means stage of the section 1 inquiry, Dickson C.J.C. in *Edwards Books* held that when legislatures undertake to prioritize the needs of various groups, "[t]he courts are not called upon to substitute judicial opinion for legislative ones as to the place at which to draw a precise line."[32] This seems to have given the *Dunmore* Court licence to accept the respondent's submission that the LRA exclusion was the only way to protect the family farm.

Given these considerations, one may read the *Dunmore* majority's section 1 analysis in one of two ways: either the Court was inclined to adopt an *Edwards Books*–style approach to the legislation but found it so egregiously overbroad as to be unsalvageable; or the Court, persuaded by the context of the legislation, felt that a relaxed test was simply not in order. One might surmise that the former explanation is the accurate one, especially since *Dunmore* dealt with labour relations, an area in which the Court has traditionally been uncomfortable and highly deferential to legislative choice. Surprisingly though, the Court in *Dunmore* — far from feeling constrained by the labour relations context — felt compelled to adopt a strict section 1 approach, ultimately leading to its conclusion that the impugned legislation was unconstitutional.

DUNMORE, *DELISLE* AND VULNERABLE GROUPS

Delisle v. Canada (Deputy A.G.) provided the Court in *Dunmore* with an important point of reference — and of departure — in its assessment of the LRA exclusion. In *Delisle*, the appellant argued that the exclusion of RCMP officers from the federal *Public Service Staff Relations Act*[33] was an infringement of his section 2(*d*) guarantee of freedom of association. The

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25 *Ibid.* at para. 56. The LRA s. 3(*b*) exclusion clause defined agriculture workers as persons employed in, *inter alia*, dairying, beekeeping, aquaculture, the raising of traditional and non-traditional livestock, mushroom growing, maple, egg, and tobacco harvesting.

26 R.S.O. 1980, c. 453.

27 *Dunmore*, *supra* note 1 at 60.

28 *Ibid.* at para. 60.

29 *Ibid.* at para. 64.

30 *Ibid*.

31 *Edwards Books*, *supra* note 11 at para. 130.

32 *Ibid.* at para. 147. Peter Hogg suggests that the *Edwards Books* case demonstrated to the Court that the "least drastic means" requirement in *Oakes* was unreasonably strict, and that a "margin of appreciation" for legislative choice was necessary. P.W. Hogg, *Constitutional Law of Canada*, student ed. (Scarborough: Carswell, 2001) at 762.

33 R.S.C. 1986 (2d Supp.), c. 33 [PSSRA].

majority decision, written by Bastarache J., held that there was no such infringement. The Court instead found that the right to freedom of association exists independently of any legislative framework, and that exercising this did not require the appellant's inclusion in the PSSRA or any other labour relations regime. The very notion of a constitutionally-recognized "freedom," Bastarache J. wrote, "generally imposes a negative obligation on the government and not a positive obligation of protection or assistance."[34] Moreover, a survey of section 2(*d*) case law indicated that the exclusion of a group of workers from a protective regime "does not preclude the establishment of a parallel, independent employee association, and thus does not violate s. 2(*d*) of the *Charter*."[35]

By contrast, in *Dunmore* the Court found that the effect of the exclusion in the LRESLAA and the LRA (and possibly its purpose) was to prevent unionization of agricultural workers, thus violating their section 2(*d*) rights. Here Bastarache J. wrote that the purpose of the LRA was to "safeguard the exercise of a fundamental freedom, rather than to provide a limited statutory entitlement to certain classes of citizens." As such, the LRA "provides the only statutory vehicle by which employees in Ontario can associate to defend their interests, and, moreover, recognizes that such association is, in many cases, otherwise impossible."[36] However, the Court went on to qualify that exclusion from a statutory labour relations regime does not automatically gives rise to a *Charter* violation, as evidenced by *Delisle*. "[A] group that proves capable of associating despite its exclusion from a protective regime will be unable to meet the evidentiary burden required of a *Charter* claim," Bastarache J. wrote. This is the essential difference between *Delisle* and *Dunmore*.

In *Delisle*, the Court was not persuaded that this evidentiary burden had been met. First, it rejected the appellant's submission that the "specific and exclusive" segregation of RCMP members from the PSSRA had a chilling effect on their freedom of association, since it indicated they could not unionize or form associations to protect their labour interests. The Court instead found that the PSSRA only excluded them from the protection of trade union representation, not from forming other independent associations. As well, the Court noted that the exclusion of RCMP members from statutory labour regimes is not exclusive; "[n]umerous other groups such as the armed forces, senior executives in the public service, and indeed judges are in a similar situation," Bastarache J. wrote.[37] Most significantly, the Court noted that the appellant's exclusion under the PSSRA did not render him defenseless against unfair labour practices on the part of his employer. As public servants working for a branch of the government within the meaning of section 32(1) of the *Charter*, RCMP members have direct access to the *Charter* in such a circumstance.[38]

Again by contrast, the appellants in *Dunmore* successfully established that they were incapable of exercising their freedom of association without the protection of the LRA. The Court accepted the distinction between those who are "strong enough to look after [their] interests" without protective legislation, and those "who have no recourse to protect their interests aside from the right to quit."[39] The appellant in *Delisle* fell into the former category; the Court placed the appellants in *Dunmore* squarely in the latter. "Distinguishing features" of agricultural workers as the Court identified them were "political impotence," "lack of resources to associate without state protection," and "vulnerability to reprisal by their employers." Further, the Court agreed with the lower court's finding that agricultural workers are "poorly paid, face difficult working conditions, have low levels of skill and education, low status and limited employment mobility."[40] Moreover, "unlike RCMP officers," Bastarache J. noted, agricultural workers are not government employees and therefore do not have direct access to the *Charter* in the face of unfair labour practices.[41]

The Court in *Dunmore* then went on to agree that the effect of the LRESLAA and the LRA was "to place a chilling effect on non-statutory union activity. By extending statutory protection to just about every class of worker in Ontario," Bastarache J. wrote, "the legislature has essentially discredited the organizing efforts of agricultural workers. *This is especially true given the relative status of agricultural workers in Canadian society*."[42] This was precisely the complaint that the Court declined to acknowledge in *Delisle*. Justice Bastarache accounted for the difference:

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34 *Delisle*, *supra* note 8 at para. 26.
35 *Ibid.* at para. 28.
36 *Dunmore*, *supra* note 1 at paras. 35–36.
37 *Delisle*, *supra* note 8 at para. 30.
38 *Ibid.* at para. 32.
39 *Dunmore*, *supra* note 1 at para. 41, citing *Canadian Industrial Relations: The Report of the Task Force on Labour Relations* (1968) at paras. 253–54.
40 *Ibid*.
41 *Ibid*., citing *Delisle*, *supra* note 8 at para. 32. The appellants were able to link their inability to associate to the government via the legislative exclusion; the Court agreed that the LRA exclusion "reinforced" the private barriers faced by agricultural workers by excluding them from "the only available channel for associational activity." *Dunmore*, *ibid.* at para. 44.
42 *Ibid.* at para. 45 [emphasis added].

> In *Delisle*, *supra*, I linked RCMP officers' ability to associate to their relative status, comparing them with the armed forces, senior executives in the public service and judges. The thrust of this argument was that if the PSSRA sought to discourage RCMP officers from associating, it could not do so in light of their relative status, their financial resources and their access to constitutional protection. By contrast, it is hard to imagine a more discouraging legislative provision than s. 3(*b*) of the LRA. The evidence is that the ability of agricultural workers to associate is only as great as their access to legal protection, and such protection exists neither in statutory nor constitutional form.[43]

Of course, Bastarache J.'s claim that *Delisle* equated RCMP officers with judges and other public servants is somewhat misleading; this connection was made in *Delisle* to counter the appellant's argument that the PSSRA targeted the RCMP "exclusively." Nevertheless, the above passage makes clear that it was the vulnerable, low status of the appellants in *Dunmore* that distinguished their case from *Delisle.*

While the majority in *Delisle* did not find a section 2(*d*) violation and therefore did not need to embark on a section 1 analysis, the dissenting opinion by Cory and Iacobucci JJ. offered a thorough discussion of the application of section 1 to the PSSRA. In the *Delisle* dissent, Cory and Iacobucci JJ. considered the factors set out in *Thomson Newspapers* and found that, despite the labour relations context, a deferential approach was not indicated. One of the problems that led Cory and Iacobucci JJ. to this conclusion was that the PSSRA "is not designed to protect a vulnerable group in Canadian society."[44] While it is true that the public might be vulnerable in the event of a police strike, they wrote, "the general public is not a vulnerable group in the sense understood in this Court's s. 1 jurisprudence."[45]

Rather, the justices found, the vulnerable group in the *Delisle* case was the RCMP members themselves. The dissenters did not directly challenge the majority's finding that RCMP officers enjoy good standing in Canadian society; they acknowledged that "police officers are not generally considered a vulnerable group within the overall fabric of Canadian society."[46] However, Cory and Iacobucci JJ. qualified, "[police officers] are members of a vulnerable group in a relative sense insofar as they are employees."[47] This is a fairly sweeping statement, and if it is to be accepted, one that would undermine or even reverse the Court's previous position on labour relations and judicial deference. After all, if employees by their nature constitute vulnerable groups, then a strict section 1 analysis will be warranted in all cases where the government restricts the actions or associations of employees, even though the legislation at issue deals with labour relations. This is presumably not what the justices intended this statement to imply, and it was not mentioned by the Court in *Dunmore*.

The majority in *Dunmore* did, however, briefly discuss the validity of enacting legislation as restrictive as section 3(*b*) of the LRA in order to protect the family farm. Although the Court in *Dunmore* did not go so far as to say that family farmers did not actually constitute a vulnerable group in Canadian society, it did question the extent to which the existence of the "family farm" — characterized by informal working relationships — was truly reflective of the farm industry in the twenty-first century. The respondent's own agricultural expert agreed that "the modern viable family farm no longer consists of twenty acres and a few cows, but typically represents a sophisticated business unit with a minimum capital value of $500,000 to $1,000,000 depending on the commodity." This evidence led the Court to conclude that it was "over-inclusive to perpetuate a pastoral image of the 'family farm,'" and that some if not all such farms would not be negatively affected by the creation of agricultural employee associations.[48] It would therefore not have been a great leap for the majority in *Dunmore* to conclude — as the dissent in *Delisle* did — that the impugned legislation not only violated the rights of a group that was in need of protection, but did so to justify the protection of a group that was not.

The final point of comparison between *Delisle* and *Dunmore* with respect to vulnerable groups is the remedy prescribed in *Dunmore*. As discussed earlier, the Court in *Delisle* found that those who were excluded from the PSSRA were nonetheless strong enough to exercise their section 2(*d*) rights even without its protection, and so the statute was found to merely "enhance" the exercise of freedom of association.[49] This led the Court to conclude that "[o]n the whole, the fundamental freedoms protected by s. 2 ... do not impose a positive obligation of protection or inclusion on Parliament or the government, except perhaps in exceptional circumstances."[50] The Court in *Delisle* did not go on to elucidate what those "exceptional circumstances" might be, but it is clear that such conditions were present in *Dunmore.* After all, in that case the Court found that the LRA was so essential to associational activity, and those excluded from it so vulnerable and powerless, that they had no way to exercise their section 2(*d*) rights in the absence

43 *Ibid*.
44 *Delisle*, *supra* note 8 at para. 130.
45 *Ibid*.
46 *Ibid*.
47 *Ibid*.
48 *Dunmore*, *supra* note 1 at para. 62.
49 *Ibid.* at para. 39.
50 *Delisle*, *supra* note 8 at para. 33.

of its protection. In this way, the LRA was found to "safeguard" the freedom of association, and so the Court held that the Ontario government would have to extend the labour relations regime to the appellant agricultural workers.[51]

LESSONS FROM *DUNMORE*

In *Dunmore*, none of the usual rules of *Charter* adjudication applied. The *Labour Trilogy* should have led the Court to adopt a deferential approach to the LRESLAA and the LRA, since these were labour laws that engaged political, social and economic issues. *Edwards Books* should have led the Court to apply a relaxed *Oakes* test when the section 2(*d*) violation was found, since the acts were aimed at the protection of a vulnerable group; *Thomson Newspapers* reinforced that principle. Certainly *Delisle*, which paralleled *Dunmore* so closely, should have led the Court to decline even to recognize a *Charter* violation; at the very least, it suggested that there would be no positive state obligation attached to section 2(*d*). But instead, the Court in *Dunmore* acknowledged a breach of section 2(*d*), then applied a strict *Oakes* test which led it to conclude that the Government of Ontario was compelled to redress this breach through inclusive legislation. What can account for the departure?

The answer is that none of the adjudicative tools discussed above are equipped to deal with a situation where the impugned legislation, enacted to protect a vulnerable group, effectively strips the *Charter* rights of the group which has been excluded in order to achieve the desired result. For all the Court's discussion of "vulnerable groups" and *Charter* protection, its principal focus has — until now — been on the group protected rather than on the group excluded. One could argue that a consideration of the relative status of groups left out of protective legislative regimes is addressed by the "deleterious effects" portion of the section 1 proportionality review, but that would assume that the Court (a) adopted a sufficiently stringent analysis of the legislation to reach the section 1 stage, and (b) adopted a similarly stringent *Oakes* test at that stage. However, the Court favours deference in the face of protective legislation, so the "deleterious effects" test will not be enough to protect vulnerable groups whose *Charter* rights have been infringed by these types of laws.

In this way, *Dunmore* can be seen as giving the Court a new tool of *Charter* adjudication, one that considers the vulnerability of groups left out of protective regimes as well as of those whom governments seek to protect. *Dunmore* stands for the proposition that the Court will take a holistic approach when reviewing protective legislation, and will not defer to governments when the fundamental freedoms of vulnerable groups are at stake. Moreover, *Dunmore* has illustrated that *Charter* rights are, under certain circumstances, positive ones which in turn require positive state action in order to safeguard them. As we embark on the next twenty years of *Charter* jurisprudence, we can expect that *Dunmore* will have an important role to play.

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[51] *Dunmore*, *supra* note 1 at para. 67. In prescribing this remedy, the Court neither required nor forbade the inclusion of agricultural workers in a full collective bargaining regime. The *Labour Trilogy* had previously established that the scope of section 2(*d*) did not include the rights to strike and bargain collectively.