

**Waiting for the Revolution:  
Democracy, Dialogue and *Dunmore***

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**DRAFT VERSION: NOT FOR CITATION**

This paper is about the effect of the *Charter of Rights and Freedoms* on labour law in Canada.<sup>1</sup> Particularly, our concern is with the long-term consequences which constitutional dialogue has between the courts, the legislature, and the eventual outcome of labour decisions. Our focus is on *Dunmore v. Ontario (Attorney General)* and the Ontario government's ultimate legislative response to that holding.<sup>2</sup> We argue that the opportunity for dialogue contained within the *Charter* can work to limit the prospects for progressive change emerging from the *Charter*. More broadly, we hope to put forth the beginning of a progressive challenge to the supposed merits of the dialogue theory.

The paper proceeds by first outlining the major progressive criticisms of the *Charter*. The second part of the paper sets out the dialogue theory. The third part recounts the trajectory of Supreme Court holdings on union issues, since the inception of the *Charter*. The fourth part of the paper summarizes the Supreme Court of Canada's holding in *Dunmore*. The fifth part assesses the dialogue that occurred between the Ontario legislature and the Court following the *Dunmore* decision. The final part offers our conclusions.

## **1. The Left Critique of the *Charter***

Many hold that the *Charter* has had a revolutionary effect on Canadian society.<sup>3</sup> With regards to labour law, however, the consequences of the *Charter* have been much less momentous. Dianne Pothier, in reviewing the Supreme Court's labour law decisions, has argued that the *Charter*, has "had only a marginal effect" on labour disputes.<sup>4</sup> The

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<sup>1</sup> *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 [*Charter*].

<sup>2</sup> 2001 SCC 94, 207 D.L.R. (4th) 193 [*Dunmore*].

<sup>3</sup> See e.g. Ted Morton and Rainer Knopff, *The Charter Revolution and the Court Party*, (Peterborough: Broadview Press, 2000); Peter W. Hogg "The *Charter* Revolution: Is it Undemocratic?" (2001) 12 Const. Forum Const. 1 (agrees with Morton and Knopff that there has been a revolution).

<sup>4</sup> Dianne Pothier, "Twenty Years of Labour Law and the *Charter*" (2002) 40 Osgoode Hall L.J. 369 at 370.

ultimate impact of the *Charter* on labour law was an open question at the outset of the *Charter* era. As Pothier reminds us, journalist Robert Fulford warned against the dangers posed by the *Charter*, while NDP labour critic Svend Robinson expressed hope that the *Charter* would reverse the litany of anti-labour legislation passed throughout the country.<sup>5</sup> Moreover, broad skepticism abounded on the left about the impact the *Charter* would have on Canadian society. Andrew Petter, for example, argues that the *Charter* was “regressive” legislation, destined to undermine the interests of the disadvantaged.<sup>6</sup> Petter argues that the *Charter*’s emphasis on liberal rights embodies the “belief that the main enemies of freedom are not disparities in wealth nor concentrations of private power, but the state.”<sup>7</sup> As such, progressive causes would be hamstrung by the focus on rights. A similar view has been put forth by Leo Panitch and Donald Swartz, who outlined a broad socio-economic critique of the Supreme Court’s handling of the Labour Trilogy cases in the 1980s, arguing that there is limited potential for progressive social change through the courts.<sup>8</sup>

Indeed, the rights guaranteed by the *Charter* are primarily negative in nature, with very little reference made to citizens’ positive entitlements. Thus, Petter notes a distinct bias in favour of those who see their interests threatened by the redistributive powers of the state. That is, fundamental rights in the contemporary world have more to do with limiting state takings, as opposed to ensuring an equitable society. Petter notes John Hart Ely’s observation that while jobs, food, or housing are important concerns, they are not

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<sup>5</sup> *Ibid.*

<sup>6</sup> Andrew Petter, “Immaculate Deception: The Charter’s Hidden Agenda” (1987), 45 *The Advocate* 857 at 857.

<sup>7</sup> *Ibid.*

<sup>8</sup> Leo Panitch and Donald Swartz, *The Assault on Trade Union Freedoms: From Wage Controls to Social Contract* (Toronto: Garamond, 1994).

widely viewed as fundamental within constitutionally protected rights.<sup>9</sup> Given this bias, Petter contends that the *Charter* stops well short of mandating positive state action to effect a more equitable distribution of wealth.

Thus, for critics such as Petter, the vales enshrined in the *Charter* were unable to address the problems of economic inequality in modern capitalist societies. The *Charter* works to impede progress on such issues by making the Court the centre of political action. The common law's affection for laissez-faire individual autonomy makes the political sphere more conducive to progressive change. As Petter notes, "with few exceptions [progressive change] has come in the democratic rather than the judicial arena."<sup>10</sup> More simply, left critics maintain that working within the justice system will not bear the same sort of fruit. Petter argues that the *Charter* limits the possibility of positive state action by making that action subject to the findings of the Court: "Most legislation ... was enacted to counteract the laissez-faire individualism of court-made common law. Courts ... remain suspicious of, and at worst hostile to, the 'eccentric principles of socialist philanthropy' upon which the welfare state is founded."<sup>11</sup> The victories won by disadvantaged groups in Canada have generally been won democratically "by harnessing the powers of the modern state to redistribute wealth and to place limits on the exercise of 'private' economic power."<sup>12</sup>

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<sup>9</sup> Petter, *supra* note 6 at 857; See also John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, (Cambridge: Harvard University Press, 1980) at 59 ("[W]atch most fundamental-rights theorists start edging toward the door when someone mentions jobs, food, or housing: those are important, sure, but they aren't *fundamental*. ... [T]he values judges are likely to single out as fundamental, to the extent that the selections do not simply reflect the political and ethical predispositions of the individuals concerned ... will be ... the values of what Henry Hart without irony used to call 'first-rate lawyers.'").

<sup>10</sup> *Ibid.* at 859.

<sup>11</sup> *Ibid.* (Petter is quoting Lord Atkinson in *Roberts v. Hopwood*, [1925] A.C. 578 at 594 (HL)).

<sup>12</sup> *Ibid.* at 858.

The same point is made by Allan Hutchinson, who cites (then) Justice Minister Jean Chrétien arguing that the *Charter* would do “a great service to Canada by taking problems away from political debate and allowing the matter to be debated, argued, coolly before the courts with precedent and so on.”<sup>13</sup> Hutchinson asserts that the *Charter*, by subjecting all political decisions to judicial review, has foreclosed the prospects for democratic social change. Wryly, Michael Mandel notes that a major selling point for the *Charter* was the positive effect it would have on democracy.<sup>14</sup> Of particular concern for Mandel is what he terms the “judicial factor,” meaning that as the rights guaranteed by the *Charter* are so sufficiently vague in their wording that reasonable people can easily disagree about what exactly is being protected.<sup>15</sup> In this way, too much decision-making power is given to the judiciary, thereby constraining democracy. For Mandel, the court is a political body which makes broad political decisions. While the legal independence of the courts often withdraws the political nature from their decisions, Mandel maintains that the Charter works to legalize politics, thus creating an environment of conservative permanency, allowing conservative, elite (and often wealthy) judges the ability to overrule the actions of elected officials.

From this assessment of the literature, we can maintain that the key difficulty that many of the critics on the left have with the *Charter* is that it limits the prospects for democratic social change. This theme – which also animates critical accounts from the

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<sup>13</sup> Government of Canada “Minutes of Proceedings and Evidence of the Special Committee of the Senate and the House of Commons on the Constitution” Issue 48 (1980-81), 110 cited in Allan C. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights*, (Toronto: University of Toronto Press, 1995) at 24.

<sup>14</sup> Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, Revised Edition (Toronto: Thompson, 1994) at 39.

<sup>15</sup> *Ibid.* at 41 (“If to a member of the Canadian Abortion Rights Action League the right of ‘everyone’ to ‘life, liberty and security of the person’ means the right of unimpeded access to safe and expeditious abortions, but to Campaign Life it means the right of the foetus to be protected from abortion, this is not because one of them is a stranger to the English language or otherwise misunderstands the meaning of any of the words.”).

right<sup>16</sup> – is present through the work of each of Petter, Hutchinson and Mandel. Joel Bakan, on the other hand, notes that the *Charter* could at least theoretically serve the cause of democracy by striking down legislation not supported by a majority of the public. However, this conceptualization of democracy – i.e. pure majoritarianism – is crude. Acknowledging this, Bakan notes that pure majoritarianism can result in the persecution of minorities. This being the case, however, we could say that the type of rights enforced by the *Charter*, to the extent that they limit such persecution, may also serve to promote democracy.<sup>17</sup>

Bakan argues that the *Charter* “is composed of words that describe the foundations of a just society: equality, freedom, and democracy.”<sup>18</sup> Although these words may sound just, it is their implementation that is vital. Thus, rather than the “living tree” espoused by the Court, Bakan argues that the *Charter* is akin to the paper upon which it is printed: a dead tree.<sup>19</sup> The *Charter* is unable to act on its own; the rights guaranteed must be implemented. However, Bakan insists that the realities of society – meaning the realities of liberal capitalism – shape how the *Charter* is implemented.

In making this argument, Bakan affirms a position similar to Petter’s, noting that “[d]espite the imperfections of representative institutions in Canada ... the historical record, at least of the period since the Second World War, arguably demonstrates that they have wider progressive potential and capacity in many areas of social policy.”<sup>20</sup>

Thus, a lack of democracy is the key difficulty that critics on the left have with the

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<sup>16</sup> See e.g. Morton and Knopff, *supra* note 3.

<sup>17</sup> Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs*, (Toronto: University of Toronto Press, 1997) at 7.

<sup>18</sup> *Ibid.* at 3.

<sup>19</sup> See *Edwards v. Canada (Attorney General)*, [1930] A.C. 123 and *Hunter v. Southam*, [1984] 2 S.C.R. 145.

<sup>20</sup> Bakan, *supra* note 17 at 7. See also at 35-37 (Bakan insists that skepticism about legislatures must also be leveled at the courts.).

*Charter*. Given the proven progressive potential of the legislatures, the left critics see the greater infusion of the Court into politics as a distinct limit on the prospects for progressive governmental action. In an attempt to answer criticisms concerning the democratic aspects of the *Charter*, the dialogue theory argues that under the *Charter* courts and legislatures work together. We next turn to an exploration of this theory to assess how well it responds to the concerns of the left criticisms.

## **2. The Dialogue Theory**

Lorraine Weinrib argues that the intention of the *Charter* from its inception was the creation of “a new institutional hybrid, a complex arrangement that would harness the strengths of both courts and legislatures to the project of rights protection.”<sup>21</sup> Discussing ss. 1 and 33 of the *Charter*, Weinrib asserts that the goal of these sections was not to create an ‘out’ by which legislatures did not need to grant the rights found by the Court. Instead, the *Charter* was meant to mark a new sort of constitutional arrangement by which the Court and the legislature would be enabled to work together to uphold the rights of citizens. This is affirmed by Kent Roach, who argues that dialogue was built into the *Charter* by way of both ss. 1 and 33. As such, the *Charter* was never supposed to create the type of rights supremacy seen in the United States. In short, the *Charter* was drafted so as to facilitate dialogue between the various branches of government.<sup>22</sup>

Roach defines dialogue as the “democratic debate of citizens whether the power of their elected governments to place limits on the Court’s decisions or even to override them by ordinary legislation should be exercised.”<sup>23</sup> At first blush, any opportunity for

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<sup>21</sup> Lorraine Weinrib, “Learning to Live With the Override” (1990) 35 McGill L.J. 541 at 564.

<sup>22</sup> Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 231.

<sup>23</sup> *Ibid.* at 240.

this sort of dialogue emerging from the *Charter* seems limited at best. One might argue that either that legislatures must follow the dictates of the courts, or that the emergence of democracy from judicial pronouncements is not tenable.<sup>24</sup> At the very least, we can say that Roach's description seems to reach too far, as it attempts to encompass all citizens in a debate which at best is between the courts and legislatures. A less lofty definition of dialogue is provided by Peter Hogg and Allison Bushell (Thornton) who hold that "[w]here a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue."<sup>25</sup>

Hogg and Thornton allege that the dialogue thesis is particularly relevant to Canada because of its unique endeavour – as noted by Weinrib and Roach – at developing a bill of rights which attempts to balance the importance of parliamentary responsible government with the independence of judicial actors. In particular, the authors point to four aspects of the *Charter* which specifically act to facilitate dialogue. These include the s. 33 override clause, the section 1 reasonable limits clause, the qualified rights under ss. 7, 8, 9, and 12 and s. 15 (1) which guarantees equality rights.<sup>26</sup> Under this framework, s. 33 is particularly important because it allows the legislature to have the final say in any judicial decision that has struck down or amended legislation under the Charter's fundamental freedoms (s. 2) and the legal and equality rights sections

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<sup>24</sup> See *e.g.* Hutchinson, *supra* note 12 at 170 ("The truncated dialogue of adjudication will always be dominated by lawyers and operate within a framework of institutional coercion and normative violence. ... It is almost perverse to liken judicial review to a dialogue or debate between citizens and the state about the reasonableness of government action.").

<sup>25</sup> Peter W. Hogg and Allison A. Bushell, "The Charter Dialogue between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997) 35 *Osgoode Hall L.J.* 75 at 79.

<sup>26</sup> *Ibid.* at 82-92.



(ss. 7-15).<sup>27</sup> According to Hogg and Thornton, this function allows the legislature to weigh the importance of individual rights against the collective goals of society, specifically those that challenge the status quo under the provision of equality rights. The reasonable limits clause is another strong component of the dialogue thesis, primarily because it allows political disputes to contest the supremacy of rights in dealing with controversial and highly partisan issues. Finally, the ambiguous wording of many of the qualified and equality rights outlined in the Charter allow the legislatures to devise policy which can fall under the broad discretionary language interpreted by the judges.<sup>28</sup>

Although Hogg and Thornton acknowledge that not all judicial overrides are capable of producing dialogue, they maintain that a high majority of judicial decisions aimed at amending public policy have resulted in legislative responses, thereby enhancing the quality of government policy making.<sup>29</sup> When dialogue is effective, legislative responses combined with judicial decision-making allows for a more detailed and thorough policy review which respects the fundamental rights outlined in the Charter. Ultimately, for Hogg and Thornton, the dialogue thesis answers the left critics' assumption that judicial review is undemocratic, primarily because the power to create, amend and implement policy is still in the hands of elected governments. In the majority of cases, if there is a democratic will then there is a legislative way for governments to

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<sup>27</sup> Peter Russell has argued elsewhere that section 33 generates a dialogue of sorts between the courts and legislatures, although he labels this interaction more of a democratic conversation than a dialogue. See Peter H. Russell, "Standing Up For Notwithstanding" (1991) 29 Alta. L. R. 239.

<sup>28</sup> Hogg and Thornton's example includes the discretionary language of section 8, which condemns unreasonable search and seizure. As they maintain, this right does not forbid search and seizure, just "unreasonable" search and seizure. New laws can be devised to fit the judicial interpretation of what has been determined to be "reasonableness."

<sup>29</sup> Indeed as Patrick Monahan, Marie Finkelstein and Julie Jai have previously shown, both provincial and federal governments have altered their decision making structures so that possible Charter challenges are first and foremost on the decision making table. See Patrick Monahan and Marie Finkelstein, "The Charter of Rights and Public Policy in Canada" (1992) 30 Osgoode Hall L.J. 501. Also Julie Jai, "Policy, Politics and Law: Changing Relationships in Light of the Charter" (1998) 9 N.J.C.L. 1.

implement their policy objectives.<sup>30</sup>

Hogg and Thornton demonstrate the existence of court/legislature dialogue through an exploration of sixty-five cases in which legislation was struck down on *Charter* grounds. In each case, the authors examined the “legislative sequel” that followed the court’s ruling. Based on these empirical claims, Hogg and Thornton contend that judicial decision-making is a progressive form of policy conversation that can enhance substantive public debate in which “*Charter* values play a more prominent role than had there been no judicial decision.”<sup>31</sup> These *Charter* values – which the authors assume are more meaningful than regular partisan politics – would then allow for more normative public policy debate because it situates policy under the scrutiny of human rights, equality and freedom. In this manner, the judicial interpretation of the *Charter* acts as a catalyst to ignite a two-way dialogue between various institutions of government, including the parliament, bureaucracy and the courts. This exchange between court and legislatures will rarely act as an absolute barrier to democratic institutions, but will rather situate the range of policy possibilities within a framework defined by the values of human rights.<sup>32</sup>

Under this theory, when government legislation is challenged as a *Charter* claim, the courts will either amend the legislation, partially strike down certain aspects of the proposed policy or will completely overrule the legislative attempts as unconstitutional. Since the courts have rarely declared an entire government policy as unconstitutional, Hogg and Thornton maintain that the legislatures are left with a variety of policy options

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<sup>30</sup> Hogg and Bushell, *supra* note 25 at 105.

<sup>31</sup> *Ibid.*, 79.

<sup>32</sup> *Ibid.* 80-1.

which will then correspond to the rights outlined in the *Charter*.<sup>33</sup> It is this important exchange between courts and legislature which constitute the key principles of *Charter* dialogue.

Not surprisingly, the dialogue theory has generated a great deal of attention amongst both supporters and critics of the Charter. The most prominent dialogue criticisms have come from Christopher Manfredi, James Kelly, and F.L. Morton who have argued that the dialogue thesis is flawed because it resembles a hierarchy of decision making with the judges doing the talking and the legislatures mostly listening.<sup>34</sup> Indeed, Morton has claimed that the judicial/legislative dialogue outlined by Hogg and Thornton resembles more of a judicial monologue rather than a dialogue between equal policy makers. According to Morton, the judicial dialogue thesis does not resemble a true democratic process because it fundamentally challenges the policy status quo (PSQ), forcing the government to take a policy stance, regardless of the political or economic consequences. In essence, when a judicial ruling declares a policy unconstitutional, it transfers the political advantage from one group of special interests, to another. This transfer, he argues, alters the PSQ, which severely limits the available choices a government has to alter public policy. Although Morton agrees that the notwithstanding clause is a potential instrument to allow true dialogue, he contends that in actuality, this

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<sup>33</sup> As Ian Greene has shown, more often than not, legislatures are always left with options after a judicial ruling. See Ian Greene, "The Courts and Public Policy" in Michael M. Atkinson, ed., *Governing Canada: Institutions and Public Policy* (Toronto: HBJ, 1993), 179-205. (Greene's model is an adaptation of B. Hogwood and L. Gunn's policy model in their book, *Policy Analysis for the Real World* (Oxford and New York: Oxford University Press, 1984)).

<sup>34</sup> Christopher Manfredi and James Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 *Osgoode Hall L.J.* 513; F.L. Morton, "Dialogue or Monologue?" *Policy Options* (April 1999), 23-6.

has become a moot point.<sup>35</sup> Not only does he recognize the practical political limitations of the notwithstanding clause, he further observes that if the notwithstanding clause were to become a mainstream policy instrument, then those who currently champion judicial dialogue would no longer be so willing to agree that this is a legitimate use of governmental power.

In a similar vein, Manfredi and Kelly share much of the same difficulties with the dialogue thesis, although they are much more critical of the empirical data put forward by Hogg and Thornton as evidence of dialogue.<sup>36</sup> They maintain that because Hogg and Thornton categorize *any* legislative response to a judicial ruling as evidence of dialogue instead of analysing the actual options available to legislatures when re-shaping a policy, they have severely limited their ability to gauge the potential impact of new policy. Only when the new policy is analysed from the policy options available to the legislatures can true dialogue be said to exist. Accordingly, in using this expanded analysis, Manfredi and Kelly show that the actual number of dialogue cases in which only minor legislative changes were needed to alter a policy are minimal.<sup>37</sup> Consequently, they conclude that Hogg and Thornton's analysis cannot be identified as true dialogue because the relationship between institutional actors is intrinsically hierarchical, with judges being the guardians of constitutional values and legislatures being clearly subordinate actors.

Manfredi and Kelly have continued their critique of Hogg and Thornton's dialogue theory, further stressing the political ramifications of the Supreme Court's policy making functions.<sup>38</sup> For Manfredi and Kelly, the most glaring theoretical omission

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<sup>35</sup> Morton, *ibid* at 24-25.

<sup>36</sup> Manfredi and Kelly, *supra* note 34.

<sup>37</sup> *Ibid.* at 520-521.

in Hogg and Thornton's theory of dialogue is the political consequences of their decision making. As they have argued:

The Supreme Court is a political institution that makes policy not as an accidental by-product of its legal function, but because it believes that certain legal rules will be socially beneficial. The *Charter of Rights and Freedoms* increases the opportunity for judicial policy-making because it expands the range of social and political issues subject to the Court's jurisdiction.<sup>39</sup>

This implies that the power to constitutionally shape public policy gives the court a powerful advantage to dictate policy vis-à-vis elected legislatures. From this perspective the democratic potential of dialogue is severely limited precisely because the relationship between judicial actors and policy makers is not a relationship of equals. Rather, Manfredi and Kelly claim that there is little evidence of the Court actually acquiescing on the ability to interpret constitutionally protected rights. Indeed, as Manfredi and Kelly further show, even in cases where dialogue may be argued to have taken place, as in the *Mills* decision on the rape shield, the eventual changes to the criminal code followed the court's decision almost word for word.<sup>40</sup> In this regard, Manfredi and Kelly show that dialogue is not characterized through an equal exchange between judicial and parliamentary actors, but is rather reminiscent of judicial activism *par excellence*.

Yet, despite the empirical evidence presented by Manfredi and Kelly, Hogg and Thornton continue to assert the critics of dialogue, and of the *Charter* in particular, assume that judicial actors maintain a political agenda that is fundamentally at odds with elected representatives. Rather than playing centre stage in the majority of policy disputes, Hogg and Thornton contend that judicially imposed constitutional norms will

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<sup>38</sup> Christopher P. Manfredi and James B. Kelly, "Dialogue, Deference and Restraint: Judicial Independence and Trial Procedures," (2001) 64 Sask. L. Rev. 323.

<sup>39</sup> *Ibid.* at para. 14.

<sup>40</sup> *R. v. Mills*, [1999] 3 S.C.R. 668, 180 D.L.R. (4th) 1.

rarely override a desired policy. Moreover, the majority of judicial decision-making is not designed to impose judicial values but rather to act as an arbitrator in the evolving nature of public policy. They assert that decisions of courts, whether they be right or wrong, will rarely preclude a legislative sequel.<sup>41</sup> Since the critique of *Charter* dialogue rests on the non-accountability of judicial actors, Hogg and Thornton continue to claim that the dialogue thesis severely restrains *Charter* critics because it argues that judicial actors play an important and democratic role in policy making.

Manfredi and Kelly have, however, maintained that the institutional capacity of parliament can be improved to a point where constitutional interpretation could resemble a true democratic dialogue.<sup>42</sup> Indeed, recent literature has argued that institutional reform of parliament, guided by the values outlined in the *Charter* is the first step to enhancing the dialogue between government institutions.<sup>43</sup> As a result, despite the criticism from the right-wing *Charter* critics, the dialogue thesis ensures the supporters of the current system that the language of public policy, both in the courts and in the legislature, will be firmly embedded under the framework of liberal individualism. However, seen in this light, it is important to ask if it is possible for the dialogue thesis to address the critiques of the *Charter* raised by the left-wing critics?

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<sup>41</sup> Peter W. Hogg and Allison Thornton, "Reply to Six Degrees of Dialogue" (1999) 37 Osgoode Hall L.J. 529.

<sup>42</sup> Manfredi and Kelly, *supra* note 34 at 524. Here Manfredi and Kelly state that "genuine dialogue only exists when legislatures are recognized as legitimate interpreters of the constitution and have an effective means to assert that interpretation."

<sup>43</sup> This is the conclusion which Janet Hiebert has made in her most recent research. She has argued that public policy that is crafted through parliamentary procedures allows for the potential of both courts and parliament to engage in dialogue under the guise of *Charter* rights. See Janet L. Hiebert, "Wrestling With Rights: Judges Parliament and the Making of Social Policy" *IRPP Choices* 5 (July 1999), 1-36. See also Janet L. Hiebert, "Parliamentary/Judicial Dialogue: It Sounds Like a Nice Idea. But What Does It Really Mean?" Paper Presented to the Annual Meeting of the Canadian Political Science Association Quebec City July 2000.

### 3. Dialogue and Labour Decisions

As noted earlier, Pothier argues that the *Charter* has had a minimal impact on labour law. We can clearly see this through a brief recital of the Court's labour decisions. The key case is the lead case in the so-called Labour trilogy, *Reference re Public Service Employee Relations Act (Alberta)*, wherein the Supreme Court held that statutes which removed the right to strike from various public sector workers were constitutional.<sup>44</sup> McIntyre J. held that freedom of association, although useful in advancing group interests, was "a freedom belonging to the individual and not to the group formed through its exercise."<sup>45</sup> Thus, freedom of association did not guarantee the right to strike. McIntyre J. reasoned that "[s]ince the right to strike is not independently protected under the *Charter*, it can receive protection under freedom of association only if it is an activity which is permitted by law to an individual."<sup>46</sup> As the law does not contemplate solo strikes, a group consequently does not enjoy a right to strike.<sup>47</sup>

McIntyre J. noted further reasons for not guaranteeing the right to strike. For instance, he pointed out that the general approach of the *Charter* is to protect individual rather than group rights, and that the *Charter*, with few exceptions, does not protect economic rights. Further, although strikes are common, there is no specific protection of the right to strike in the *Charter*, even though it was open to the drafters to include such a right. Finally, he argued the right to strike is relatively new, and as such has not attained

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<sup>44</sup> [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161 [*Alberta Reference* cited to S.C.R.].

<sup>45</sup> *Ibid.* at 397.

<sup>46</sup> *Ibid.* at 409.

<sup>47</sup> This is a controversial conclusion to draw from the reasons. See e.g. David Beatty and Steven Kennett, "Striking Back: Fighting Words, Social Protest and Political Participation in Free and Democratic Societies" (1988) 67 Can. Bar Rev. 573.

that status of “an immutable, fundamental right, firmly embedded in our traditions, our political and social philosophy.”<sup>48</sup>

Justice McIntyre went on to claim that the specifics of labour law are best determined by the legislatures, due to the delicate and dynamic balance of interests in that area. Economic changes occur, and the legislature must be equipped to deal with such changes as they arise. As such, granting a constitutional right to strike would freeze labour relations at a certain stage, and consequently hinder flexibility within the economy.<sup>49</sup> This judgment is reflective of what Petter has in mind when he discussed the Court’s unwillingness to take part in interest balancing. Instead, the court is clearly attempting to maintain a boundary between the market order and the regulatory order.

In noting the resounding losses that unions suffered at the hands of the Court for the first seventeen years of the *Charter*,<sup>50</sup> Bakan – offering an “external” appraisal – argues that even if unions had prevailed, the victories would not have been significant. Much more important, stresses Bakan, is the massive erosion of union power at the hands of the globalizing economy. In other words, to Bakan the Free Trade Agreement made things much worse for unions than the Supreme Court ever could.<sup>51</sup> This argument goes too far; certainly, if the unions had won, the victories would have been welcome. While we can say that broader economic forces would have exerted a toll on unions, this ought not to detract from the very real advances that at least some workers would have seen had the Court gone the other way. Yet even if there is a role for the state in alleviating such

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<sup>48</sup> *Alberta Reference*, *supra* note 44 at 413.

<sup>49</sup> *Ibid.* at 414-20.

<sup>50</sup> Potier, *supra* note 4 at 400 (“In the first seventeen years of the *Charter* and labour law in the Supreme Court of Canada, there was a lot of ink spilled simply to stand still.”).

<sup>51</sup> Bakan, *supra* note 17 at 85-86.



difficulties, Bakan asserts that the *Charter* does not contemplate such action.<sup>52</sup> The *Charter*, by this view, simply does not provide the necessary tools to have any substantial effect on the operation of trade unions.

Given this, it can hardly come as a surprise that there has not been a ‘revolution’ in labour law litigation since the implementation of the *Charter*. The lack of a *Charter* revolution in labour law is partially traceable to the conservatism of the Court. While judges are independent it is worthwhile to ask, as Ralph Miliband did, “independent of what?”<sup>53</sup> Answering his own question, Miliband argues that judges are not and “cannot be, independent of the multitude of influences, notably of class origin, education, class situation and professional tendency, which contribute as much to the formation of their view of the world as they do in the case of other men.”<sup>54</sup> For the first seventeen years of the *Charter*, the leading decisions in labour law demonstrated this as the Court was “[b]linded by individualism” treating “freedom of association as though it potentially amount[ed] to a threat to democracy.” This has been characterized as the “jurisprudence of fear” as the Court could have done much more to aid unions.<sup>55</sup> However, since 1999 the Court has softened its stance on labour issues. This softening – particularly visible in *Dunmore* – gives us the opportunity to explore the role that dialogue plays in the ultimate decision-making process.

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<sup>52</sup> *Ibid.* (Bakan points to strengthened employment standards laws, better access for union organizers, penalizing companies for moving plants, better social programs, etc. as steps which would improve the power of workers in Canada.).

<sup>53</sup> Ralph Miliband, *The State in Capitalist Society*, (London: Weidenfeld and Nicolson, 1969) at 138.

<sup>54</sup> *Ibid.*

<sup>55</sup> Patrick Macklem, “Developments in Employment Law: The 1990-91 Term” (1992) 3 Sup. Ct. L. Rev. (2d) 227 at 240.

#### 4. The Decision in *Dunmore*

It is only since 1999 that labour law has palpably changed as a result of the *Charter*. In *UFCW, Local 1518 v. KMart Canada Ltd.*, the Court allowed acted to give additional protection to leafleting, by distinguishing between consumer leafleting and picketing.<sup>56</sup> Although this was a small change, Pothier argues that the change did “signify that the earlier judicial deference to legislative policy choices in labour law has its limits.”<sup>57</sup> This shift in the Court has been affirmed in *Dunmore*.<sup>58</sup>

In that case, the Court was asked to rule on whether or not the Ontario government’s exclusion of agricultural workers from the province’s collective bargaining regime was consistent with the *Charter*’s guarantee of freedom of association. The combined effect of the Ontario Conservative government’s repeal of the *Ontario Agricultural Labour Relations Act* (ALRA) and its amendments to the province’s *Labour Relations Act* (LRA)<sup>59</sup> was to prohibit farm workers from forming unions. The UFCW, which represented a group of agricultural workers in Leamington, Ontario brought an application challenging the amendments to the LRA, on the basis that it infringed their rights under ss. 2(d) and 15 of the *Charter*.

In *Dunmore*, the Court was asked to deal with several areas relating to s.2(d), including whether freedom of association under the *Charter* is strictly an individual right versus a collective right, whether there is a positive obligation on the part of the state to allow certain groups to organize and, for the purposes of s. 15, whether the occupational status of agricultural workers represent an analogous group. According to the court, this

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<sup>56</sup> [1999] 2 S.C.R. 1083 [*KMart*].

<sup>57</sup> Pothier, *supra* note 4 at 400.

<sup>58</sup> *Dunmore*, *supra* note 2.

<sup>59</sup> R.S.O. 1995, c. 1.

is the first time that they have been asked to review the total exclusion of an occupational “group,” from a labour relations regime, where that group is not employed by the government and has demonstrated no independent ability to organize.

The union’s position was simple and straightforward. It argued that farm workers were unfairly excluded from the province’s labour relations regime and that the Charter’s guarantee of freedom of association should give agricultural workers the right to bargain collectively and strike. However, the Ontario government maintained that it was the protection of the family farm that was of most importance in repealing the ALRA, thus ensuring that the labour relationship remained a private action between individual farmers and employees.

In finding for the union, Justice Bastarache, writing for seven of his colleagues, argued that the issue arising from the appeal was not one of fundamental rights for union freedoms (i.e. the right to collectively bargain or strike). Rather, at issue for Bastarache J. was whether or not the legislation restricted the “wider ambit of union purposes and activity.”<sup>60</sup> According to the court, there is a four-pronged test that aids in defining the freedom of association. First, it protects the freedom to establish, belong to and maintain association. Second, freedom of association does not protect an activity solely on the grounds that the activity is a foundational or an essential purpose of an association. Third, freedom of association protects the exercise in association of the constitutional rights and freedoms of individuals. Finally, the fourth principle protects the lawful rights of individuals. Although there is, the court admits, less judicial support for the last two (freedom of association as an individual right), Bastarache J. argues, following Dickson C.J.C.’s dissent in the *Alberta Reference*, “certain collective activities must be recognized

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<sup>60</sup> *Ibid.* para. 12.

if the freedom to form and maintain an association is to have any meaning.”<sup>61</sup> Yet, Bastarache J. is clear that this freedom is limited, and must be distinguished “between the associational aspect of the activity and the activity itself.”<sup>62</sup> In other words, there may be a positive freedom to collectively associate, but this will not include the positive freedom to bargain collectively or the freedom to collectively engage in a strike or work stoppage.

Following this reasoning, the court asks whether in the age of expanding Charter values there was a “positive” obligation for the state to enact protective legislation for vulnerable groups in the context of labour relations. In Bastarache J.’s opinion, the central concern in *Dunmore* – whether exclusion of agricultural workers from a statutory labour relations regime, without deliberate or intentional prohibition of association – does constitute a substantial interference with freedom of association. Ultimately, Bastarache concluded that the state could in some circumstances be held accountable for any inability to exercise a fundamental freedom. In coming to this conclusion, the court affirms that the under-inclusion of agricultural workers does indeed infringe freedom of association. The court distinguished, however, between an inclusion analysis based on s. 2(d) and one arising under s. 15(1). Here they argued that a claim for inclusion should not automatically fail a s. 2(d) analysis.

...depending on the circumstances, freedom of association may 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 right per se. In this sense, the burden imposed by s. 2(d) differs from those imposed by s. 15(1): while the later focuses on the effects of human dignity the former focuses on the effects of under inclusion on the ability to exercise a fundamental freedom.<sup>63</sup>

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<sup>61</sup> *Ibid.* para. 17.

<sup>62</sup> *Ibid.* para. 18.

<sup>63</sup> *Ibid.* paras. 28-29.

Since there is a positive responsibility of the state to regulate the constitutional freedoms of vulnerable workers, Bastarache J. argued that it would be “unduly formalistic to consign that relationship to a “private sphere” that is impervious to Charter review.” It is unclear, however, why this same reasoning could not also apply the collective bargaining regime or rights to strike, which the state equally regulates.

Nonetheless, because the court determined that agricultural workers represented a vulnerable section of the workforce, and that their exclusion from state protection implied that they were physically unable to associate, the court ruled that the LRA violated s. 2(d) of the *Charter*. In making this claim, the court reasoned that there was little reason to move to a section 15 analysis because agricultural workers represented a vulnerable, and therefore, unique group. It is the classification of agricultural workers as vulnerable which leads to this positive freedom, which was not the case in *Delisle v. Canada (Deputy Attorney General)*, where an RCMP officer argued that his freedom to associate was violated by federal legislation restricting his right to join a trade union.<sup>64</sup>

In *Dunmore*, the court argued that the collective strength of the police as workers provided that there was not a positive obligation for the state to protect their freedom of association. Using this logic, the court maintained that in order for a labour group to have associational rights, they must be politically and economically weak such as they show no independent ability to organize or act politically. In *Dunmore*, then, the court argued that there was no possibility for association without a minimum statutory protection.

By extending statutory protection to just about every class of worker in Ontario, 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. In *Delisle*, supra, I linked RCMP officers' ability to associate to their relative status, their financial resources, comparing them with the armed

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<sup>64</sup> [1999] 2 S.C.R. 989, 176 D.L.R. (4th) 513 [*Delisle*].

forces, senior executives in the public service and judges. The thrust of this argument was that if the *Public Service Staff Relations Act* 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 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 a protection exists neither in statutory nor constitutional form. ... In this context, the effect of the LRA is not simply to perpetuate an existing inability to organize, but to exert the precise chilling effect I declined to recognize in *Delisle*.<sup>65</sup>

The majority decision in *Dunmore* acknowledged that vulnerable workers have a right to associate with a union and that the state has a certain obligation not to restrict that right. It said little, however, about the limitations imposed by the state on the ability and restrictions to organize per se. In this sense, rights to collective bargaining and to strike are clearly off the table.<sup>66</sup>

L'Heureux-Dubé J., in concurring with the majority, moved further than her colleagues with regards to the rights of organized labour under s. 2(d) and s. 15(1). L'Heureux-Dubé J. agreed that there was a positive obligation by the state to protect the freedom of association of agricultural workers. Yet, she came to this conclusion from a more simplistic manner, arguing in fact that the *Charter* creates a threshold of constitutional guarantees of which freedom of association is an important part. For L'Heureux-Dubé J., the failure of the Ontario legislature to adequately define which associational activities "are to be protected from management retaliation creates a chilling effect for agricultural workers. The concept of chilling effect is premised on the idea that individuals anticipating penalties may hesitate before exercising constitutional rights. In a constitutional democracy, not only must fundamental freedoms be protected

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<sup>65</sup> *Dunmore*, *supra* note 2 at para. 45.

<sup>66</sup> *Ibid.* paras. 42, 51.

from state action, they must also be given ‘breathing space.’<sup>67</sup> Without state protection, L’Heureux-Dubé J. reasoned that, freedom of association for agricultural workers is an empty right, because the ability to organize would amount to little more than the freedom to suffer at the hands of the employer. Contrary to her colleagues in the majority, L’Heureux-Dubé J. argued that for the purpose of s. 15(1), occupational status can constitute an analogous group, and therefore apply to vulnerable labour workers. While powerful workers (such as the RCMP) could not be considered as vulnerable workers, in the context of agricultural work, these workers could indeed “constitute a suspect marker of discrimination.”<sup>68</sup>

In coming to this conclusion, L’Heureux-Dubé J. and here colleagues in the majority argued that it was the vulnerability of agricultural workers in the labour market which determined their rights in the *Charter*. By extension, were these workers able to maintain a lasting social or economic strength, it is unlikely that the court would have been willing to extend *Charter* protection to these workers. In this regard, the jurisprudence that has advanced the rights of other vulnerable groups has a formative effect on the outcomes of those cases. Although the court was split on the extent to which the vulnerability of workers extends to ss. 2(d) or 15(1), ultimately the court came to this decision precisely because of their agreement on the vulnerability of agricultural workers. What is more, because the court was only willing to extend s. 2(d) to the organizational aspect of union activity rather than the full ambit of labour relations rights which would include the collective right to bargain and strike, the court left vulnerable workers in a weakened position vis-à-vis the employer and the state. This contradiction was utilized

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<sup>67</sup> *Ibid.* para.148

<sup>68</sup> *Ibid.* paras. 167-170.

by the Ontario government in its response to the Court's decision in *Dunmore*. This response can be analyzed in order to shed light on the dialogue theory.

### **5. The Legislative Response to *Dunmore***

Building on the contradiction, the Ontario government responded to the *Dunmore* decision through the (ironically) titled *Agricultural Employees Protection Act* (AEPA).<sup>69</sup> In the AEPA, the government acknowledges the Supreme Court's recognition that farm workers have a legal right to associate, but stressed that those rights do not extend to the collective bargaining and strike rights enshrined in the LRA. Essentially, under the AEPA, agricultural workers are legally entitled to seek representation to an arms length Agricultural tribunal on behalf of what the government defines as a labour 'association.' In using this language, the AEPA maintains the letter of the *Dunmore* decision (by guaranteeing the right to freedom of association) but does not expressly give agricultural workers the same rights guaranteed to other unionized workers under the LRA, including the rights to collectively bargain and the right to strike.

As stated above, Bastarache J. followed the Court's jurisprudence back to the *Alberta Reference* in holding that s. 2(d) rights did not include collective bargaining rights. Nevertheless, Justice Bastarache's exploration of the Ontario government's arguments in his s. 1 analysis of the legislation is instructive for the dialogue which ensued when the Ontario legislature responded to the holding. Importantly, Bastarache J. held that it would be "highly arbitrary" to allow the economics of the agricultural sector to dictate the scope of rights afforded to workers in that sector.<sup>70</sup> Bastarache J. went on to state that the s. 1 submissions from the Ontario government suffered from "from the

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<sup>69</sup> R.S.O. 2002, c. 16 [AEPA].

<sup>70</sup> *Dunmore*, *supra* note 2 at para. 55.



lack of a recognition of the evolving nature of Ontario agriculture ... ignor[ing] an increasing trend in Canada towards corporate farming and complex agribusiness.”<sup>71</sup> Moreover, to the extent that the family farm does still exist in Ontario, Bastarache J. held that “that family involvement does not suffice to alter the essential qualities of an employment relationship.”<sup>72</sup>

The Court in *Dunmore* was clear that the Ontario government’s submissions, in so much as they were based on some supposed uniqueness of the agriculture trade, were ineffective. In determining the remedy in *Dunmore*, the Court held that in so much as the impugned legislation forbade freedom of association for agricultural workers, the provisions in question were contrary to the *Charter*. Thus, the minimal level of compliance directed by the Court was “the statutory freedom to organize in s. 5 of the LRA ought to be extended to agricultural workers, along with protections judged essential to its meaningful exercise.”<sup>73</sup> Bastarache J. was clear that he “neither require[d] nor forbid the inclusion of agricultural workers in a full collective bargaining regime.”<sup>74</sup> Thus, while the Court set a floor with a minimum level the legislature had to reach, the Court did not set a ceiling.

The type of remedy settled on by the Court in *Dunmore* readily lends itself to dialogue. There is, as Hogg and Thornton put it, ample room for the legislature to reverse, modify, or avoid the Court’s holding.<sup>75</sup> As a demonstration of this, one might turn to the debate surrounding the second reading of the AEPA in the Ontario legislature.

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<sup>71</sup> *Ibid.* at para. 62.

<sup>72</sup> *Ibid.* at para. 63.

<sup>73</sup> *Ibid.* at para. 67. (The protections the Court deemed essential to the exercise of the freedom to associate were “freedom to assemble, to participate in the lawful activities of the association and to make representations, and the right to be free from interference, coercion and discrimination in the exercise of these freedoms.”).

<sup>74</sup> *Ibid.* at para. 68.

<sup>75</sup> Hogg and Bushell, *supra* note 25 at 80.

Helen Johns, the province's Minister of Agriculture and Food, made clear the impetus for the AEPA, stating that the Ontario government introduced the bill "to comply with the Supreme Court of Canada decision regarding the rights of agricultural workers to associate."<sup>76</sup> The Minister went on to state

The government is advised that the Supreme Court of Canada decision regarding *Dunmore* versus Ontario obligates the government to extend legislative protections to agricultural workers. It obligates us to do this to ensure that employees have the right to form and join associations, as well as have the protection necessary to ensure that the freedom of association is meaningful. The government of Ontario will meet these obligations.<sup>77</sup>

While extending the right to form associations to agricultural workers, the Ontario government sought to strike a "balance" between the minimal demands of the Court and the perceived needs of the agricultural sector. These perceived needs are much the same as those that Bastarache J. found to be unproven. Specifically, the government returned to the themes focused on the unique nature of the agriculture sector. The declared purpose of the AEPA was to protect agricultural workers while "having regard to the unique characteristics of agriculture, including, but not limited to, its seasonal nature, its sensitivity to time and climate, the perishability of agricultural products and the need to protect animal and plant life."<sup>78</sup>

Consider this purpose in light of Bastarache J.'s comments that the restrictions

sought by s. 3(b) of the *LRA* is the protection of the family farm, the legislature should at the very least protect agricultural workers from the legal and economic consequences of forming an association. There is nothing in the record to suggest that such *protection* would pose a threat to the family farm structure, and if demonstrated that it would in some cases, the legislature could create the appropriate exceptions.<sup>79</sup>

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<sup>76</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 37:3 (22 October 2002) (Hon. Helen Johns).

<sup>77</sup> *Ibid.*

<sup>78</sup> AEPA, *supra* note 69, s. 1(1)

<sup>79</sup> *Dunmore*, *supra* note 2 at para. 65.

The same logic could be applied to the AEPA. As NDP MPP Peter Kormos stated in the legislature, the legislative response did not need to be about the right to strike. Indeed, the legislation repealed by the Conservative government, while granting agricultural workers the ability to bargain collectively, did not grant agricultural workers the right to strike. Instead, due to the “disastrous impact” which a strike in the agricultural sector could have, the right to strike was replaced with compulsory arbitration.<sup>80</sup> This is not to say that the legislation passed by the NDP government was the only way forward. Rather, it is meant to exhibit that there were many ways in which the government could have moved forward after receiving guidance from the Court. Moreover, the Court’s guidance could readily be read as suggesting that agricultural workers ought to be treated similarly to other workers, with as few restrictions as possible.

There was a dialogue following the *Dunmore* decision. The Ontario government moved forward with legislation which met the minimum requirements set by the Court. In crafting that legislation, the government ignored much of what the Court said in order to create the AEPA which deeply constrains the ability of agricultural workers to unionize.

## **6. A Speculative Assessment of Dialogue from the Progressive Perspective**

Given the *Dunmore* decision and the subsequent legislation, we can make a few speculative observations about the impact of dialogue on progressive causes. As has been made clear above, the Court has for the most part been unfriendly towards labour issues. In *Dunmore*, the Court softened its stance. In doing so, it set a minimum standard for the legislature to achieve. This floor was not all that the Court saw as being possible;

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<sup>80</sup> Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 37 (23 October 2002) at 1510 (Peter Kormos).

the door was left wide open by the Court allowing the legislature to go further. In the ensuing dialogue, the government was clear that they were legislating in order to fulfill the Court's instructions. In keeping with this, the legislation enacted by the Ontario government did the bare minimum required by the Court. However, in enacting the minimum with the AEPA, the government relied upon reasons which the Court had already ruled unconvincing. This is clearly problematic given the possibility of a further legal challenge – a possibility the Court entertained in its holding.<sup>81</sup>

This action by the government is also problematic as it demonstrates the extent to which dialogue can hamper progressive causes. Dialogue, as we have seen, was included in the *Charter* in order to bolster its democratic attributes. In *Dunmore*, though, this democracy amounts to little more than the legislature doing the absolute minimum it is legally required to do. The setting of the minimum by the Court, leaving it to the legislature to do more, is facilitative of a democratic exchange. Clearly, it gives the legislature leeway in determining how to craft legislation in response to the Court's holding.

In *Dunmore*, however, this opportunity for dialogue serves to limit the opportunity for progressive change. Bastarache J., in his holding, clearly rejects arguments concerning the uniqueness of the agricultural sector. It is clear from this that the Court is suggesting that workers in that sector be given similar rights to other workers throughout the province. The Court stops short of mandating this, instead allowing dialogue to run its course. If the Court had gone further in its holding and mandated in no uncertain terms that agricultural workers ought to have broadly the same rights as other workers, the legislature would have had to respond with a very different piece of

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<sup>81</sup> *Dunmore*, *supra* note 2 at para. 69.

legislation. The extent to which the Court holds back helps what may be called a democratic exchange, however it clearly hampers progressive change.

This is an interesting development given the left critiques explored above, which held that the reduction of democracy would limit progressive change. *Dunmore* seems to suggest that dialogue between the Courts and the legislatures, even though it may inject a certain measure of democracy into the process, does little to aid progressive causes. Rather, the *Charter's* construction around the ideal of dialogue can serve to deliver the worst aspects of judicial review and legislative action by allowing each side to do only the minimum with regard to progressive causes.

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