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# Judicial Accountability, Michel Bastarache and the Charter's Fundamental Freedoms

Jamie Cameron \*

## I. JUDICIAL ACCOUNTABILITY

Michel Bastarache had a strong sense of justice, but he also valued principle and was committed to principled decision-making. His Supreme Court of Canada opinions were closely analyzed, rigorously argued and powerfully written. And, as one who was proud of the Court, he was not hesitant to defend the institution from accusations of judicial activism. Hence he wrote that sometimes criticism was “simply based on a misunderstanding of the facts”, and that often it was “just an attack on outcomes disguised as an attack on judicial activism”.<sup>1</sup> Justice Bastarache regarded attacks on the Court’s activism as a cover for disapproval of certain outcomes, and responded that judicial accountability was the answer to concerns about the Court’s work. As he explained, accountability “takes the form of reasons for judgments and demonstrating that the protection against arbitrariness is in the process of decision-making and the reality of judicial precedent”.<sup>2</sup> He proposed, in other words, that principled decision-making is a check — perhaps the best or even the only check — on judicial activism and outcome-oriented Charter interpretation.<sup>3</sup>

In 2008, the year of Michel Bastarache’s retirement from the Court, Osgoode Hall Law School’s 12th Annual Constitutional Cases Conference

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<sup>1</sup> Michel Bastarache, “Decision-Making in the Supreme Court of Canada” (2007) 56 U.N.B.L.J. 328, at 329.

<sup>2</sup> *Id.*

<sup>3</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 [hereinafter “the Charter”].

explored some of his contributions to the Charter jurisprudence.<sup>4</sup> Though he was known and admired, throughout his professional life, as a champion of minority language rights, Justice Bastarache was not one to favour some issues and to ignore others. Instead, he contributed at all levels of Charter interpretation, and over a period of 10 years on the Court, from September 30, 1997 to June 30, 2008, he participated actively across the spectrum of entitlements. As his fundamental freedoms jurisprudence demonstrates, his Supreme Court legacy is rich and complex.

Justice Bastarache wrote at least nine significant opinions on section 2 issues, six of which counted as majority opinions.<sup>5</sup> It is a surprising record, considering that more than once he wrote to backtrack from — and all but overrule — earlier decisions of his own. Initially, he decided *Thomson Newspapers v. Canada* in favour of expressive freedom and proposed a new and improved approach to section 2(b) decision-making.<sup>6</sup> *Thomson Newspapers* was followed, a few years later, by *Harper v. Canada* and *R. v. Bryan*, both of which went in the opposite direction.<sup>7</sup> Not only did the section 2(b) claim fail in these cases, Bastarache J.'s two majority opinions effectively abandoned the *Thomson Newspapers* methodology. Meanwhile, his first opinions under section 2(d) dismissed the associational freedom claims in no uncertain terms,<sup>8</sup> but within a space of two years led to his groundbreaking decision in *Dunmore v. Ontario*.<sup>9</sup> Here, as under section 2(b), his earlier and later decisions are difficult to reconcile. Even so, Bastarache J. spoke

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<sup>4</sup> See also James Hendry, “The Contribution of Justice Bastarache to Equality Law” (2009) 47 S.C.L.R. (3d) 341; and Michel Y. Hélie, “Michel Bastarache’s Language Rights Legacy” (2009) 47 S.C.L.R. (3d) 377.

<sup>5</sup> Under s. 2(a), see *Syndicat Northcrest v. Anselem*, [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551 (S.C.C.) [hereinafter “*Syndicat Northcrest*”] (dissenting opinion); under s. 2(b), see *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877 (S.C.C.) [hereinafter “*Thomson Newspapers*”]; *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, [2004] 1 S.C.R. 827 (S.C.C.) [hereinafter “*Harper*”]; *R. v. Bryan*, [2007] S.C.J. No. 12, [2007] 1 S.C.R. 527 (S.C.C.); and *Re Vancouver Sun*, [2004] S.C.J. No. 41, [2004] 2 S.C.R. 332 (S.C.C.) (dissenting in part); and under s. 2(d), see *Canadian Egg Marketing Agency v. Richardson*, [1998] S.C.J. No. 78, [1998] 3 S.C.R. 157 (S.C.C.) [hereinafter “*Canadian Egg*”] (joint majority opinion with Iacobucci J.); *Delisle v. Canada (Deputy Attorney General)*, [1999] S.C.J. No. 43, [1999] 2 S.C.R. 989 (S.C.C.) [hereinafter “*Delisle v. Canada*”]; *R. v. Advance Cutting and Coring*, [2001] S.C.J. No. 68, [2001] 3 S.C.R. 209 (S.C.C.) [hereinafter “*Advance Cutting*”]; and *Dunmore v. Ontario (Attorney General)*, [2001] S.C.J. No. 87, [2001] 3 S.C.R. 1016 (S.C.C.) [hereinafter “*Dunmore*”]. *Syndicat Northcrest*, *Re Vancouver Sun*, and *Advance Cutting* were dissenting opinions.

<sup>6</sup> *Thomson Newspapers*, *id.*

<sup>7</sup> *Harper* and *R. v. Bryan*, *supra*, note 5.

<sup>8</sup> See *Canadian Egg* and *Delisle v. Canada*, *supra*, note 5.

<sup>9</sup> *Supra*, note 5.

for the majority in each of these cases: when he shifted, the Court — albeit with some dissenters — tended to follow. As a result, he had a strong but uneven influence on the Charter’s fundamental freedoms: a rights-dampening impact on section 2(b) that is paired with a rights-enhancing effect on section 2(d).

This article considers how this jurisprudence stands up to Justice Bastarache’s concept of judicial accountability. In sections which address his key majority opinions on expressive and associational freedom, the discussion examines the relationship between principles and outcomes in his decision-making.<sup>10</sup> The analysis reveals, once his reasons for judgment and treatment of precedent are explored, that Justice Bastarache changed his mind and, in doing so, promoted outcomes at the expense of principled decision-making. Yet his commitment to principle — and to the judicial accountability he advocated — caused him to ground his conclusions in elaborate reasoning. The difficulty is that his reasoning was convoluted and unpersuasive. To be blunt, he was a kind of “precedent bully”: though the term is unflattering, it describes what Justice Bastarache had to do to keep precedent on his side when it stood in the way of certain outcomes. The article concludes that he took judicial accountability seriously but was unable to reconcile its requirements with the demands of decision-making — as he perceived them — under the Charter’s fundamental freedoms guarantees.

## II. SECTION 2(b): ONE STEP FORWARD AND TWO BACK

The judges from Quebec who voted *en bloc* in *Thomson Newspapers v. Canada* might have been surprised to find themselves relegated to dissent.<sup>11</sup> From their perspective, the Court’s judgment in *Libman v. Quebec (Attorney General)*<sup>12</sup> supported their conclusion, which would have upheld Parliament’s blackout on opinion polls in the final 72 hours of a federal election campaign.<sup>13</sup> Despite invalidating the province’s *de facto* ban on third party spending, *Libman* found that the regulation of referendum spending advances one of expressive freedom’s objectives,

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<sup>10</sup> The paper does not discuss his opinions in *Syndicat Northcrest, Re Vancouver Sun*, or *Advance Cutting*, *supra*, note 5.

<sup>11</sup> *Thomson Newspapers*, *supra*, note 5. Justice Gonthier wrote a dissenting opinion which was signed by Lamer C.J.C. and L’Heureux-Dubé J., the other two judges from Quebec.

<sup>12</sup> [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569 (S.C.C.) [hereinafter “*Libman*”].

<sup>13</sup> *Canada Elections Act*, R.S.C., 1985, c. E-2 (now S.C. 2000, c. 9).

“namely the [voter’s] ability to make informed choices”.<sup>14</sup> In *Thomson Newspapers*, Gonthier J. found that the distorting effects of potentially inaccurate polls would undermine “the informed exercise of the right to vote” and a fundamental purpose of expressive freedom, which is to promote “informed participation in the electoral process”.<sup>15</sup> He stated that there was no suggestion, in the blackout provision, that members of Parliament had “any interest other than to foster the integrity of the electoral process”,<sup>16</sup> and he held, in the circumstances, that the Charter should not defeat “a reasonable attempt by Parliament to allay potential distortion of voter choice”.<sup>17</sup> The dissenting judges thought that deference was appropriate, because “[b]eing themselves the very objects of elections, members of Parliament were in the best position to assess the effects of polls in electoral campaigns and their impact on individual voters.”<sup>18</sup>

Justice Gonthier’s discussion of *Libman* and the informed voter was persuasive, but not persuasive enough. Michel Bastarache, who wrote the majority opinion in *Thomson Newspapers*, had joined the Court on September 30, 1997, just one week before *Libman* was decided. *Thomson* was one of his first panels, and it was argued, coincidentally, the day *Libman* was released.<sup>19</sup> Not only did Bastarache J.’s majority opinion reverse the Ontario Court of Appeal, in doing so it chose not to apply or expand *Libman*’s informed voter rationale. In striking down section 322.1 of the *Canada Elections Act*, Bastarache J. noted, more than once, that Parliament’s opinion poll blackout constituted a serious interference with expressive activity “at the core of s. 2(b)”.<sup>20</sup> Significantly, he introduced a methodology that retreated from the contextual approach of the 1990s, emphasized section 1’s requirement of harm, set an unflinching evidentiary standard of justification, and provided a serious analysis of the salutary benefits-deleterious consequences issue. It was a tour de force for a newcomer which seemed, by its methodology as well as by the outcome, to set section 2(b)’s prospects on a different, and more auspicious, plane.

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<sup>14</sup> *Libman*, *supra*, note 12, at 603-604 (citing *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712 (S.C.C.)). Quebec’s third party referendum spending limit of \$600 was so low that it effectively operated as a ban on participation.

<sup>15</sup> *Thomson Newspapers*, *supra*, note 5, at 908.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> The date was October 9, 1997.

<sup>20</sup> *Thomson Newspapers*, *supra*, note 5, at 945.

Three features of the Bastarache opinion worked in combination to create a strong methodology for section 2(b) adjudication. First was his recognition of the activity's value, and the consequences of Parliament's ban, which interfered with "the flow of information pertaining to the most important democratic duty which most Canadians will undertake in their lives: their choice as to who will govern them".<sup>21</sup> Second was his unwillingness to justify the limit in the absence of "more specific and conclusive" evidence that the prospect of inaccurate or misleading polls affected a large number of voters, or that "such possible distortions" in hypothetically flawed polls are significant to the "conduct" of an election.<sup>22</sup> In adopting that approach, Bastarache J. neatly distinguished a series of Supreme Court precedents — decided under the then-prevailing version of the contextual approach — which had minimized the requirement of harm in section 2(b) cases. Finally, given the conclusion that "the claims of widespread or significant harm ... are not compelling",<sup>23</sup> he declared his unwillingness to accept that *Thomson Newspapers* "warrants a significant level of deference to the government in fashioning means which trespass on the freedom of expression".<sup>24</sup> At this moment in time, Bastarache J. was firmly of the view that "little deference should be shown ... where ... the government has not established that the harm which it is seeking to prevent is widespread or significant".<sup>25</sup>

Justice Bastarache's majority opinion in *Thomson Newspapers* looked much like a breakthrough decision for section 2(b). Outside the open justice jurisprudence, the Court consistently upheld limits on expressive freedom during the 1990s, under a section 1 methodology styled "the contextual approach", which had the advantage — from the Court's perspective — of predetermining the outcome against expressive freedom.<sup>26</sup> Against that backdrop, it is no exaggeration to suggest that, apart from *Dagenais v. Canadian Broadcasting Corp.*,<sup>27</sup> *Thomson*

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<sup>21</sup> *Id.*, at 971.

<sup>22</sup> *Id.*, at 962.

<sup>23</sup> *Id.*, at 957.

<sup>24</sup> *Id.*, at 962.

<sup>25</sup> *Id.*, at 963.

<sup>26</sup> For an analysis and critique of this approach, see J. Cameron, "The Past, Present and Future of Expressive Freedom under the *Charter*" (1997) 35 Osgoode Hall L.J. 1.

<sup>27</sup> [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835 (S.C.C.).

*Newspapers* was the Court's most important section 2(b) decision since *Ford v. Quebec (Attorney General)*.<sup>28</sup>

At least to some, *Harper v. Canada* was something of a shock, not least because Bastarache J.'s majority opinion bore greater resemblance to Gonthier J.'s dissent in *Thomson Newspapers* than to his own majority opinion in that case.<sup>29</sup> *Harper* returned the Court to *Libman*'s third party spending issue, in the altered context of federal legislation and federal election campaigns. The question there was whether Parliament's spending limit of \$3,000 per individual was still too low, or was generous enough under *Libman* to pass constitutional muster.<sup>30</sup> For a variety of reasons, including but not limited to the number itself, it was unclear how the Court would respond. In the interim since *Libman*, the judges had upheld limits on expressive activity in two important cases — *Little Sisters*<sup>31</sup> and *R. v. Sharpe*<sup>32</sup> — though both engaged section 2(b) at the level of "low value" expression. On questions relating to the political process, the Court had decided in favour of expressive freedom three times in a row — in *Libman*, *Thomson Newspapers*, and *Figueroa v. Canada (Attorney General)*,<sup>33</sup> and the Alberta courts had invalidated Parliament's new spending limit.<sup>34</sup> Even so, *Libman* was an enigma, an anonymous and unanimous opinion which forged a careful compromise between those judges who thought that the limits on referendum participation were deservedly unjustifiable, and others who favoured an egalitarian approach which placed equality-based limits on rights of democratic participation.<sup>35</sup> The composition of the Court had also changed, and it

<sup>28</sup> [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712 (S.C.C.) (invalidating Quebec's sign language law). Other decisions, such as *RJR-MacDonald v. Canada (Attorney General)*, [1995] S.C.J. No. 17, [1995] 3 S.C.R. 199 (S.C.C.), invalidating Parliament's ban on tobacco advertising, and *R. v. Zundel*, [1992] S.C.J. No. 70, [1992] 2 S.C.R. 731 (S.C.C.), invalidating the *Criminal Code*, R.S.C. 1985, c. C-46, false news offence, are also important. What sets *Thomson Newspapers* apart from those is Bastarache J.'s methodology and approach to the harm requirement.

<sup>29</sup> *Harper*, *supra*, note 5.

<sup>30</sup> *Canada Elections Act*, S.C. 2000, c. 9, s. 350(1).

<sup>31</sup> *Little Sisters Book & Art Emporium v. Canada*, [2000] S.C.J. No. 66, [2000] 2 S.C.R. 1120 (S.C.C.) (concluding that customs officers violated the rights of a gay bookstore, but declining to invalidate the legislation).

<sup>32</sup> [2001] S.C.J. No. 3, [2001] 1 S.C.R. 45 (S.C.C.) (upholding the *Criminal Code*'s child pornography provisions, though at the same time reading two exceptions into the legislation).

<sup>33</sup> [2003] S.C.J. No. 37, [2003] 1 S.C.R. 912 (S.C.C.) [hereinafter "*Figueroa*"].

<sup>34</sup> *Harper v. Canada*, [2002] A.J. No. 1542, 223 D.L.R. (4th) 275 (Alta. C.A.).

<sup>35</sup> In that regard it is noteworthy that the Court's opinion in *Libman* gratuitously disagreed with the Alberta Court of Appeal decision in *Somerville v. Canada (Attorney General)*, [1996] A.J. No. 515, 136 D.L.R. (4th) 205 (Alta. C.A.), which had invalidated earlier federal spending limits, but not been appealed. See *Libman*, *supra*, note 12, at 604, 619 (stating baldly, that "we cannot accept the Alberta Court of Appeal's point of view").

was significant that the Court had earlier stayed the injunction in *Harper*.<sup>36</sup> That decision allowed limits on campaign spending which were declared unconstitutional to be enforced during an election campaign. In hindsight it seems the Court may have tipped its hand in leaving the provision in place and denying a constitutional remedy for the ongoing violation of a core constitutional right.

In these circumstances, *Harper v. Canada* marked a turning point for section 2(b). Given a choice between *Libman*'s invitation to regulate third party spending, and the rights-protective *Thomson Newspapers* methodology, Bastarache J. returned to *Libman* and upheld Parliament's strict limits on third party spending in federal election campaigns. As a result of this choice, expressive activity which was at the core of section 2(b) in *Thomson Newspapers* did not compel a strict standard of justification in *Harper*, and Parliament's limit was upheld though section 1's requirement of harm was not met. More to the point, Bastarache J.'s majority opinion retreated from each of the key elements of his methodology in *Thomson Newspapers*. Whereas the opinion poll case put the expressive activity on show — and was proud to defend its Charter status — *Harper* minimized the value of third party participation in election campaigns. For instance, Justice Bastarache had little choice but to concede that democratic participation is at the core of section 2(b), but added that in some circumstances — which were not specified — “third party advertising will be less deserving of constitutional protection”.<sup>37</sup> He also refused to apply *Figueroa*'s principle of meaningful participation to campaign spending.<sup>38</sup> In place of *Thomson Newspapers* and its methodology, Bastarache J. revived *Libman*'s “informed voter” and interpreted *Figueroa*'s concept of meaningful participation to produce a conclusion that “equality in the political discourse is necessary”.<sup>39</sup> Under this view, voters are informed when their access to information is controlled for equality, and participate meaningfully when information is

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<sup>36</sup> *Harper v. Canada (Attorney General)*, [2000] S.C.J. No. 58, [2000] 2 S.C.R. 764 (S.C.C.) [hereinafter “*Harper I*”] (Major J., dissenting).

<sup>37</sup> *Harper v. Canada*, *supra*, note 5, at para. 85.

<sup>38</sup> *Figueroa*, *supra*, note 33. There, and in the context of s. 3 of the Charter, Iacobucci J. made a series of uninhibited and untethered pronouncements about the scope and importance of participation in the electoral process. For instance, he spoke of the right “to a certain level of participation” (at 934); stated that each citizen “must have a genuine opportunity to take part in the governance of the country through participation in the selection of elected representatives” (at 936); and declared that participation has “an intrinsic value independent of its impact on the actual outcome of elections” (at 935). His colleague Michel Bastarache concurred in that opinion.

<sup>39</sup> *Harper v. Canada*, *supra*, note 5, at para. 72.



curbed, rather than made freely available, to ensure the egalitarian presentation of ideas.

Moreover, while *Thomson Newspapers* insisted on evidence of harm, and refused to uphold the opinion poll blackout in its absence, *Harper* effectively dispensed with the requirement. In answer to evidence that third-party advertising has had no impact on elections, Bastarache J. retorted that the findings “do not allow us, however, to conclude that third-party advertising will never have an impact in Canadian elections”.<sup>40</sup> In addition, he alarmingly declared that “[s]urely Parliament does not have to wait for the feared harm to occur before it can enact measures to prevent the possibility of harm occurring or to remedy the harm, should it occur.”<sup>41</sup> In effect, this constituted an invitation to Parliament to pre-empt expressive activity — which is not only guaranteed by the Charter but is found at its core — in case it might at some hypothetical date cause previously unknown harm.

Finally, after taking care in *Thomson Newspapers* to dissociate himself from the concept, Bastarache J. openly embraced deference in *Harper*. Thus he criticized the lower courts for failing to “give any deference to Parliament’s choice of electoral model”, stated that “[g]iven the right of Parliament to choose Canada’s electoral model and the nuances inherent in implementing this model, the Court must approach the justification analysis with deference,” and concluded that “[o]n balance, the contextual factors favour a deferential approach to Parliament in determining whether the third party advertising expense limits are demonstrably justified.”<sup>42</sup> His position on deference in *Harper* enabled him to overcome the evidentiary deficit that would have been fatal under the *Thomson Newspapers* methodology. In addition, it allowed him to disguise his support for an egalitarian concept of democratic participation, which reduced expressive activity at section 2(b)’s core to “an equal right not to participate”.<sup>43</sup> It is extraordinary, in that regard, that his majority opinion referenced equality or an egalitarian conception of participation more than 25 times. Justice Bastarache deferred to Parliament, not because the government demonstrated that third party spending is harmful or met the requisite standard of justification, but because he — and others in the majority — agreed with the limit and

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<sup>40</sup> *Id.*, at para. 98.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*, at paras. 64, 87, and 88.

<sup>43</sup> See J. Cameron, “Governance and Anarchy in the Section 2(b) Jurisprudence: A Comment on *Re Vancouver Sun* and *Harper v. Canada*” (2004) 17 N.J.C.L. 71, at 94-100.

modified their concept of review under section 1 to support that conclusion.<sup>44</sup>

Justice Bastarache's next, and last, decision on election law confirmed that *Harper* was not isolated, and that he had changed his mind since *Thomson Newspapers*. The issue in *R. v. Bryan* was whether section 329 of the *Canada Elections Act*, which prohibited the reporting of election results in any part of Canada where polls were still open, was unconstitutional.<sup>45</sup> Here, too, he wrote for a majority which upheld the provision. Ironically, the key elements of his erstwhile *Thomson Newspapers* methodology are found in Abella J.'s dissent. In challenging the majority opinion's analysis she emphasized the nature of the activity — the transmission of election results — and its status as a “core democratic right”;<sup>46</sup> she articulated the requirement for “clear and convincing evidence” to justify limits on the availability of the information;<sup>47</sup> and she focused on the absence of evidence to demonstrate that “informational inequality” in access to election results harms the electoral process in any way.<sup>48</sup> That approach led her to the conclusion that the legislative provision was unconstitutional and could not be upheld.

Justice Bastarache essentially had two responses to Abella J.'s claim that section 329 was an unnecessary remedy for an “undemonstrated problem” and an “overbroad intrusion on a *Charter* right”.<sup>49</sup> Relying on his own opinion in *Harper*, he stated that it is established principle that “courts ought to take a natural attitude of deference toward Parliament when dealing with election laws”.<sup>50</sup> As *Harper* showed, the advantage of deference is that it can cure most deficits of evidence and defects of proportionality under the *Oakes* test. Second, Bastarache J. discounted the expressive activity in *Bryan*, referring to it as “the putative right to receive election results before the polls close” and placing it at “the

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<sup>44</sup> Chief Justice McLachlin and Major J. wrote a dissent, in which Binnie J. concurred.

<sup>45</sup> *R. v. Bryan*, *supra*, note 5.

<sup>46</sup> *Id.*, at para. 110. *Bryan* was a 5-4 vote, with McLachlin C.J.C., as well as Binnie and LeBel JJ. concurring in her opinion; Justices Deschamps, Charron and Rothstein joined Bastarache J.'s majority opinion, and Fish J. wrote concurring reasons which supplemented the Bastarache opinion.

<sup>47</sup> *Id.*

<sup>48</sup> As she stated, “[a]ny evidence of harm to the public’s perception or conduct in knowing the election results from Atlantic Canada before they vote is speculative, conclusive and largely unsubstantiated” and that “[t]he harm of suppressing core political speech” is profound; *id.*, at para. 107.

<sup>49</sup> *Id.*, at para. 133.

<sup>50</sup> *Id.*, at para. 9.

periphery of the s. 2(b) guarantee”.<sup>51</sup> He also minimized the effect of the ban in order to enhance the importance of “informational equality” as a principle of electoral fairness in Canada. At least in *Harper* he admitted that the harm of third party spending was not established by the record. After observing that breach of informational equality is in a “class of harms” that cannot be measured, *Bryan* skirted the harm requirement altogether. Justice Bastarache’s majority opinion failed to define what informational equality is, or to identify what harm follows from early access to results, other than to reference the need for public confidence and to cite evidence from one public survey.<sup>52</sup>

Yet Bastarache J. was once again able to sway a majority to uphold the provision, and though *Thomson Newspapers* took an important step forward, *Harper* and *Bryan* took significant steps backward. As the dissents in both later cases reveal, it would have been difficult — if not impossible — to uphold the *Harper* and *Bryan* provisions under the *Thomson Newspapers* methodology. From that perspective, it seems clear that Bastarache J. changed his mind about the relationship between section 2(b) and Parliament’s authority to regulate the electoral process. Yet more troubling than the outcomes in these cases was Bastarache J.’s approach to decision-making and his abandonment of principle, specifically, the suggestion in *Harper* and *Bryan* that the Court should defer to Parliament when it infringes constitutionally protected activity at the heart of the democratic process, and the relaxation of review under section 1, where expressive activities which are not harmful are limited nonetheless.<sup>53</sup>

While Bastarache J. substituted a methodology of deference for his rights-protective approach to section 2(b) in *Thomson Newspapers*, his interventions in the section 2(d) jurisprudence went in the opposite direction. There, he moved from majority opinions which entrenched rights-restricting doctrine to a breakthrough which all but stood precedent on its head.

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<sup>51</sup> *Id.*, at para. 30.

<sup>52</sup> See *id.*, at para. 25 (discussing a poll which found that 70 per cent of Canadians surveyed thought that voters should not know the results from other provinces before voting in their home province).

<sup>53</sup> For comments see C. Bredt & M. Finley, “*R. v. Bryan*: The Supreme Court and the Electoral Process”, in *Constitutional Cases 2007* (2008) 42 S.C.L.R. (2d) 63 [hereinafter “*Cases, 2007*”]; and R. Haigh, “The Technology of Political Communication: *R. v. Bryan* and the Knowledgeable Voter in the 21st Century”, *Cases, 2007, id.*, at 91.

### III. SECTION 2(d): FROM NEGATIVE TO POSITIVE

*Dunmore v. Ontario* could be Michel Bastarache's most important Charter decision.<sup>54</sup> Despite stopping short of overruling the Court's foundational section 2(d) precedents, he effectively achieved that result by concluding that it was unconstitutional for the province to exclude agricultural workers from its labour relations scheme, and imposing a positive obligation on Ontario to ensure the meaningful exercise of their right of associational freedom. That conclusion placed the Court's decision in *Dunmore* openly in conflict with *Delisle v. Canada*, which had reached the opposite conclusion only two years earlier, in a case involving RCMP officers.<sup>55</sup> Justice Bastarache authored both majority opinions.

The drama began when he took the lead in both of the Court's pre-*Dunmore* opinions, *Canadian Egg* and *Delisle*.<sup>56</sup> It would not be entirely accurate to state that Bastarache J. simply followed precedent in these cases, because the Court had been unable to agree on a basic doctrine for section 2(d) up to that point. In the follow-up from the *Labour Trilogy*, which failed to produce a majority position on associational freedom, Sopinka J. proposed a four-point framework in *Professional Institute*, which did not secure majority support either.<sup>57</sup> For these reasons the section 2(d) doctrine was not settled until Bastarache J. arrived and participated actively in *Canadian Egg* and *Delisle*. In doing so, he cemented the status of doctrines which gave section 2(d) a narrow and restrictive interpretation — one which had stoutly resisted the constitutionalization of labour relations.

Though it is not generally considered a significant decision, the joint opinion by Iacobucci and Bastarache JJ. in *Canadian Egg* had the

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<sup>54</sup> *Supra*, note 5.

<sup>55</sup> *Delisle*, *supra*, note 5.

<sup>56</sup> *Canadian Egg*, *supra*, note 5, and *Delisle*, *id.* Included in his contributions on s. 2(d) issues, but not discussed here, is his dissenting opinion in *Advance Cutting*, *supra*, note 5, which also supported the entitlement in the contentious context of freedom from compelled association with labour unions, which Quebec made a statutory condition of employment in the construction industry. For a comment which praises his dissent, see J. Cameron, "The 'Second Labour Trilogy': A Comment on *R. v. Advance Cutting*, *Dunmore v. Ontario*, and *R.W.D.S.U. v. Pepsi-Cola*" (2002) 16 S.C.L.R. (2d) 67, at 71-79 [hereinafter "Cameron, 'The 'Second Labour Trilogy'"]].

<sup>57</sup> See *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] S.C.J. No. 75, [1990] 2 S.C.R. 367, at 402 (S.C.C.). The *Labour Trilogy* comprises *Reference re Public Service Employee Relations Act (Alberta)*, [1987] S.C.J. No. 10, [1987] 1 S.C.R. 313 (S.C.C.) [hereinafter "*Alberta Reference*"]; *P.S.A.C. v. Canada*, [1987] S.C.J. No. 9, [1987] 1 S.C.R. 424 (S.C.C.); and *Retail, Wholesale and Department Store Union v. Saskatchewan*, [1987] S.C.J. No. 8, [1987] 1 S.C.R. 460 (S.C.C.).

distinction of endorsing the *Labour Trilogy*'s distinction between an association and its activities and bringing the *Professional Institute* framework into a majority opinion for the first time.<sup>58</sup> In *Delisle*, Bastarache J. went further and confirmed the status of the section 2(d) doctrine, including the *Labour Trilogy* and the four-point framework from *Professional Institute*, which — he clarified — had been “cited with approval” by *Canadian Egg*.<sup>59</sup> Neither case provided any indication that he, or other members of the Court in the majority, were willing to entertain any other conception of associational freedom.<sup>60</sup>

To the contrary, Bastarache J.'s opinion in *Delisle* dismissed the claim without reservation. There, the question was whether it was impermissible for the federal government to exclude the RCMP from its statutory labour relations scheme. The conclusion could scarcely have been clearer to him, and Bastarache J. resoundingly rejected the suggestion that the legislature's decision to exclude the RCMP had any consequences for their freedom of association.<sup>61</sup> In his view, the legislation created no obstacle or impediment to associational activity, any failure by the RCMP to organize and bargain as an association was not caused by or attributed to state action, and the state had no positive obligation to facilitate the associational activities of police officers by granting them recognition under the statute. He was unreceptive to Cory J.'s claim, in dissent, that the workers in *Delisle* were vulnerable and in need of the Charter's protection.<sup>62</sup> At this time, Bastarache J. shared the view expressed by McIntyre J. in the *Alberta Reference* that “labour relations is an area in which a deferential approach is required in order to leave Parliament enough flexibility to act”.<sup>63</sup>

When *Dunmore* raised the same issue, he discovered how difficult it was to reach a different conclusion and follow precedent at the same

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<sup>58</sup> *Canadian Egg*, *supra*, note 5, at 231-32.

<sup>59</sup> *Delisle*, *supra*, note 5, at 1106-1107.

<sup>60</sup> There were dissents in both cases: in *Canadian Egg*, McLachlin J. (as she then was) (with Major J. concurring) dissented, and because she would have found a violation of mobility rights she did not discuss section 2(d); in *Delisle*, Cory J. dissented and was joined by Iacobucci J., who had co-written the opinion with Bastarache J. in *Canadian Egg*.

<sup>61</sup> His opinion was particularly forceful on two key points. First, he emphasized that it is settled that the government's failure to include certain workers in its collective bargaining scheme creates no barrier and has no impact on the workers' freedom to create and organize an independent association. Second, he maintained that s. 2's concern is with negative obligations and that the guarantee does not constrain the government's freedom to choose which employee associations to bargain with, or whether to bargain at all: *Delisle*, *id.*, at 1015-1019.

<sup>62</sup> *Id.*, at 1039.

<sup>63</sup> *Id.*, at 1019.

time. In this, section 2(d) was unlike section 2(b), where the contextual approach allowed the Court to vary its evidentiary standard and conception of harm with the circumstances. The wiggle room of the Court's expressive freedom methodology simply did not exist under section 2(d) doctrine, which was rigid and exclusionary. There a claim had only succeeded once before, in *Libman*, where associational freedom rode the coattails of the section 2(b) claim.<sup>64</sup> Not only had the section 2(d) jurisprudence excluded all labour claims from the Charter, the equality case law did not allow the Court to treat *Dunmore* as a case of under-inclusiveness under section 15.<sup>65</sup>

Yet the circumstances in *Dunmore* were compelling, and so Bastarache J. found a way to claim obedience to precedent while finding in favour of the agricultural workers. Rather than admit that *Delisle* was wrongly decided, he went to great lengths to explain how a different and contrary result in *Dunmore* could be reconciled with existing authority. To do so he manufactured an argument to suit the facts. He maintained that *Dunmore*'s agricultural workers were differently situated, because the province's decision to exclude them from the statutory labour relations scheme *caused* them — unlike their RCMP counterparts in *Delisle* — to be unable to associate freely. That is why Ontario's failure to include these workers in the scheme violated their right of meaningful association and led to a positive obligation on the province to create the statutory conditions which would promote their section 2(d) rights. Not only did the task at hand require Bastarache J. to wholly distinguish agricultural workers from the RCMP, it also forced him to sidestep some of *Delisle*'s unconditional statements, explain how government inaction resulted in violations of the workers' freedom to associate, and then to show how a positive obligation to promote meaningful associational freedom could be imposed on the government.<sup>66</sup>

*Dunmore* has its merits and in many ways it is a brave decision. Never mind that he had only just endorsed it in *Canadian Egg* and

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<sup>64</sup> *Libman*, *supra*, note 12.

<sup>65</sup> See *Dunmore v. Ontario*, [1999] O.J. No. 4947, 37 O.R. (3d) 287 (Ont. Gen. Div.), aff'd [1999] O.J. No. 1104, 182 D.L.R. (4th) 471 (Ont. C.A.), *per* Sharpe J. (Ont. Gen. Div.), concluding that Ontario's labour relations legislation was under-inclusiveness in a way that treated agricultural workers unequally, but that the claim could not be recognized under the Court's equality doctrine. The case was so clear, under the Supreme Court's ss. 2(d) and 15 precedents, that the Ontario Court of Appeal dismissed the workers' appeal in a single paragraph which stated, in part (at para. 1), that "[w]e did not call on counsel for the respondents because the submissions of counsel for the appellants ... did not create any doubt in our minds about the correctness of the judgment in appeal."

<sup>66</sup> For a comment that calls Bastarache J.'s reasoning to account, see J. Cameron, "The 'Second Labour Trilogy'", *supra*, note 56, at 80-88.

*Delisle*, Bastarache J. took the monumental step in *Dunmore* of breaking free from the *Professional Institute*<sup>67</sup> framework and supplanting it with a “single inquiry test” which was based on a conception of associational freedom as a collective, rather than an individual, right.<sup>68</sup> In this, the majority opinion began the significant task of moving the Court away from the *Labour Trilogy*, which had all but neutered section 2(d). From an outcome-based point of view, there was much for labour advocates to applaud.

And yet, the decision in *Dunmore* could not stand alongside *Delisle* or other Charter precedent.<sup>69</sup> In such circumstances, Bastarache J. had to distort precedent<sup>70</sup> and exaggerate the difference between categories of workers to reach the conclusion he did. Here, it can be noted that he was inconsistent in his approach to the role of evidence in Charter decision-making. As discussed above, Bastarache J.’s majority opinions in *Harper* and *Bryan* discounted and even ignored the evidence because it did not satisfy the *Thomson Newspapers* requirement of harm. But in *Dunmore* his conclusion depended on fastidious attention to the evidence because that was the only way he could plausibly escape the consequences of *Delisle*. It is further indication of the strain *Dunmore* placed on principled decision-making. Whatever the decision’s merits may be for agricultural workers, labour relations and the Charter, or section 2(d) more generally, “the reasoning in *Dunmore* is incoherent”.<sup>71</sup>

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<sup>67</sup> Justice Bastarache was clearly sensitive about *Dunmore*’s relationship to *Canadian Egg* and *Delisle* and their endorsement of the earlier section 2(d) precedent; he distanced himself from his endorsement of doctrine in those cases by stating, in *Dunmore*, *supra*, note 5, at para. 14, that the *Professional Institute* framework provided “little assistance” to the Court in the *Canadian Egg* case, and that the Court never ruled on the “validity of the framework” in *Delisle*, *supra*, note 5.

<sup>68</sup> *Dunmore*, *id.*, at para. 16, stating that the purpose of s. 2(d) commands a single inquiry: “has the state precluded activity *because* of its associational nature, thereby discouraging the collective pursuit of common goals?” (emphasis in original).

<sup>69</sup> See, e.g., *Dunmore* (at trial), *supra*, note 65, at 299 (stating, in reference to *Dolphin Delivery*, that the workers’ claim “collides directly with a fundamental holding of the Supreme Court of Canada ... that the *Charter* has no application to private action”).

<sup>70</sup> For an example of the analytical contortions he used to stay within precedent, see *Dunmore*, *supra*, note 5, at para. 16 (suggesting that a key passage in Dickson C.J.C.’s *Alberta Reference* dissent is good law because the passage relied upon “was not explicitly rejected by the majority”) and at para. 21 (stating that it can be argued that the reasoning in *Delisle* does not apply to private employers because of a dictum in L’Heureux-Dubé J.’s concurrence which “was not rejected by the *Delisle* majority”).

<sup>71</sup> B. Langille, “The Freedom of Association Mess: How We Got Into It and How We Can Get Out of It” (2009) 54 McGill L.J. 177, at 208 (stating that the Court “attempted to stuff what was really a section 15 claim into section 2(d)” and adding that “[t]his particular rabbit cannot come out of this particular [section 15] hat, and everyone can see from which hat it actually did emerge [*i.e.*, section 2(d)]”).

Regardless of its shortcomings, *Dunmore* has been enormously influential. Emboldened by the decision, the Court has since taken the extraordinary step of overruling its pre-*Dunmore* section 2(d) precedent, with the notable exception of *Delisle v. Canada*, which was spared.<sup>72</sup> As a result of *B.C. Health Services*, the constitutionalization of labour relations under section 2(d) of the Charter has begun, and there can be little doubt that the momentum for that development sprang from the Bastarache opinion in *Dunmore*.<sup>73</sup> Ironically, while opening up the scope of associational freedom, at the same time *Dunmore* has had a dampening effect on section 2(b). Even though *Dunmore* addressed the exceptional circumstances which warranted the imposition of a positive obligation under the Charter — and is limited, in principle, to that setting — it has been applied under section 2(b) in place of *Irwin Toy*'s minimal threshold for breach to restrict the scope of expressive freedom.<sup>74</sup> Not only does *Baier v. Alberta*<sup>75</sup> illustrate how unstable the principles of Charter decision-making can be, it also shows, regrettably, that as long as it can be misconceived and misapplied, precedent is not an obstacle to outcome-based Charter interpretation. And that, despite the elaborate analysis he provides, is the problem with Justice Bastarache's section 2(b) and 2(d) jurisprudence.

#### IV. ACCOUNTABILITY AND JUSTICE BASTARACHE

It is neither realistic to expect, nor desirable to seek, complete consistency in judicial decision-making. Not only is what consistency means and requires open to dispute, too much consistency suggests

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<sup>72</sup> See *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391 (S.C.C.) [hereinafter "*B.C. Health Services*"]. See J. Cameron, "Due Process, Collective Bargaining, and s. 2(d) of the Charter: A Comment on *B.C. Health Services*" (2007) 13 C.J.E.L.J. 323; R. Charney, "The Contract Clause Comes to Canada: The British Columbia *Health Services* Case and the Sanctity of Collective Agreements" (2007/2008) 23 N.J.C.L. 65.

<sup>73</sup> *B.C. Health Services*, *id.* See *Fraser v. Ontario (Attorney General)*, [2008] O.J. No. 4543, 92 O.R. (3d) 481 (Ont. C.A.), leave to appeal granted April 2, 2009, [2009] S.C.C.A. No. 9 (S.C.C.) (invalidating Ontario's post-*Dunmore* agricultural workers legislation); and *Mounted Police Assn. of Ontario v. Canada (Attorney General)*, [2009] O.J. No. 1352 (Ont. S.C.J.) (finding that Parliament's exclusion of the RCMP from the regulatory scheme for labour relations in the federal public service violates s. 2(d) of the Charter).

<sup>74</sup> *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.). See *Baier v. Alberta*, [2007] S.C.J. No. 31, [2007] 2 S.C.R. 673 (S.C.C.). Justice Bastarache did not join Rothstein J.'s majority opinion but instead signed LeBel J.'s concurring opinion.

<sup>75</sup> *Baier v. Alberta*, *id.*



inflexibility and an inability of courts or judges to entertain an organic conception of law. Whatever it might mean, consistency was not a priority for Justice Bastarache; to the contrary, there is an element and a streak of not being accountable in his decision-making. An example not discussed in this article is so compelling it should be mentioned just the same. It is found in the Court's section 7 jurisprudence.

In *Gosselin v. Quebec (Attorney General)*, Bastarache J. vented against Arbour J.'s admittedly groundbreaking proposal for a substantive interpretation of that guarantee.<sup>76</sup> The issue there was whether section 7's entitlement clause — the life, liberty and security of the person guarantee — could ground a free-standing claim to social or economic benefits, falling entirely outside the principles of fundamental justice and the administration of justice criterion in the section 7 jurisprudence. Though McLachlin C.J.C.'s majority opinion refused to join issue with Arbour J. on that issue, Bastarache J. did not hesitate. Instead, he wrote a fierce response to her analysis, which reviewed the authorities and arguments at length before declaring, unequivocally and more than once, that “at the very least, in order for one to be deprived of a s. 7 right, some determinative state action, analogous to a judicial or administrative process, must be shown to exist”.<sup>77</sup> The purpose of his intervention in *Gosselin* was to refute Arbour J.'s suggestion that section 7 does have a role to play in monitoring and enforcing social and economic benefits.

Given the force of his dissent in *Gosselin* it is amazing that Bastarache J. provided McLachlin C.J.C. and Major J. with a key vote in *Chaoulli v. Quebec (Attorney General)*.<sup>78</sup> The question there was whether legislation which prohibited access to private health insurance, for publicly funded services, violated section 7 of the Charter. Justice Bastarache joined the joint opinion of McLachlin C.J.C. and Major J., which found the provision arbitrary and unconstitutional, rather than that of Binnie and LeBel JJ. On its face that opinion was more consistent with the Bastarache dissent in *Gosselin*, because it cited the administration of

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<sup>76</sup> [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429 (S.C.C.).

<sup>77</sup> *Id.*, at para. 216. Justice Bastarache might have been provoked to respond in *Gosselin* by Arbour J.'s inventive use of *Dunmore v. Ontario*, *supra*, note 5, to support her proposal for a substantive interpretation of s. 7 and the imposition of positive obligations on the state to provide certain social and economic entitlements.

<sup>78</sup> [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 (S.C.C.). The votes among the seven members of the panel in *Chaoulli* were critical because the Court divided 3-3-1; with Deschamps J. basing her decision in the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, a majority invalidated the provision. The judges who addressed the issue divided evenly under s. 7 of the Charter.

justice criterion and opposed the use of section 7 to monitor policy decisions which were unconnected with the justice system. Even though Arbour and Bastarache JJ. dissented in *Gosselin* and the obligation to follow precedent was not an issue in *Chaoulli*, consistency surely was. In the absence of explanation, in the form of concurring reasons, it is difficult to resist the conclusion that Justice Bastarache simply changed his mind, and did not feel that he was accountable in *Chaoulli* for the position he had so unambiguously taken in *Gosselin*.

Michel Bastarache's style of decision-making at the Supreme Court was certain and authoritative. He was not hesitant to state his conclusions, and nor did he equivocate — or doubt — the correctness of his decisions, even when he appeared to be changing his mind. It was a style that served him well, because he persuaded a majority to sign his opinions in the six fundamental freedoms decisions that have been discussed in this article. At the same time, his authoritative manner left him little room to shift or retreat from the consequences of his own precedent. When forced with a choice between what principle suggested or even required, and his own perception of what justice demanded in the context of particular circumstances, he favoured the outcome at the expense of principle and precedent. In doing so he seemed unwilling or unable to accept that the circumstances required him to choose between the two.

Principled decision-making does not permit judges to disregard precedent, distort the analysis, or change their minds without explanation, and nor does it lead — against all hope — to the outcome a judge favours. That is the burden and the responsibility of principled decision-making, and in large part what makes it so challenging. Michel Bastarache's attachment to principle, and to the rigours of principled decision-making are evident, and honourable. But, as the jurisprudence shows, he was wilful too, and determined, through force of will and implausible lines of analysis, to win a majority for the outcomes he preferred. Justice Bastarache was right about judicial accountability and yet not fully able, in his fundamental freedoms jurisprudence, to meet its standard.

