**What Happened to the Managerial Exclusion in *Casinos du Québec*?\***

Brian Langille\*\*

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\*\* Faculty of Law, University of Toronto. Thanks to Bethany Hastie and Eric Tucker for their comments and to Humphrey Yuan JD for excellent assistance.

**I The managerial exclusion – as we thought we knew it.**

The “managerial exclusion” is a very familiar fixture in our complex and comprehensive statutory law which governs collective work relations in Canada.[[1]](#footnote-1) Our understanding of the exclusion has been polished with countless lectures and exam answers in law schools, relying upon thousands of decisions from labour relations boards across this country. The exclusion may be controversial for some, including the International Labour Organization (“ILO”) which takes a dim view of it.[[2]](#footnote-2) But there is no doubt what it is, and why it is there. Managers are employees. Without the express managerial exclusion, managers would be covered by our statutes and entitled to their complex set of rights and freedoms “instantiating”[[3]](#footnote-3), or “embodying”[[4]](#footnote-4) — our constitutional freedom of association for workers.[[5]](#footnote-5) This new statutory distribution of rights and freedoms was designed to radically alter the pre-existing common law’s very different version of those rights and freedoms. As Eric Tucker felicitously puts it, the common law regime was one of “freedoms without rights”[[6]](#footnote-6). A fundamental legal strategy in, and a large point of, the statutes, was to add rights (with correlative duties) to those freedoms[[7]](#footnote-7). No one[[8]](#footnote-8) contests that the point of the exclusion is to explicitly and, as we shall see, purposefully, deny managers this “new” constellation of rights and freedoms constituting our law of freedom of association which are made available to non-managerial employees by our collective bargaining statutes. That is what it is designed to do.

Furthermore, this exclusion was put in place for a well-known and well-established rationale. Note that exclusions from the statute can be classified as either “rational” — meaning that the rationale for the exclusion flows from the logic and purposes of the statute itself, or “irrational” — meaning that, if a sound rationale for the exclusion exists, it does not flow from the statute but from an extraneous source of public policy inspiration. The managerial exclusion is a “rational” exclusion. The reason for its existence is that the purposes of the statute demand that it be there.[[9]](#footnote-9) Its logic is internal to the statute.

The purpose of statutes is to not only regulate collective bargaining between employers and employees but, as a precondition, to provide a radically new set of legally real, enforceable, and meaningful freedom of association rights and freedoms for Canadian employees. One of the true giants of Canadian labour law, Paul Weiler, best articulated the internal rationale for the exclusion when he, as Chair of the BC Labour Relations Board, offered his understanding of the exclusion in *Burnaby (District of) v CUPE, Local 23*[[10]](#footnote-10) — a case read by generations of law students. Weiler showed that the rationale does have two dimensions — one which seems obvious and one, perhaps for some, more subtle. The first and obvious rationale is that in order for collective bargaining to work, an employer requires the undivided loyalty of a cadre of senior employees, operating at arm’s length from the union, to advance its interests, and only its interests, at the bargaining table and in the workplace.[[11]](#footnote-11) The second and perhaps more subtle but more important reason is that the exclusion protects the freedom of association rights of non-managerial employees from interference by managerial employees.[[12]](#footnote-12) If we needed reminding of the fact, which we didn’t, the recent *Mounted Police Association of Ontario v Canada (AG)*[[13]](#footnote-13) decision makes it clear that the problem (i.e. impact on non-managerial employees) of management involvement in unions has long been, and is still, with us. Under clearly established case law, it makes no difference, under this two-fold rationale, whether the managers ask to have their own bargaining unit or ask to be represented by another union than the one representing the non-managerial workers. This is so both in jurisdictions which are said to have a narrower interpretation of the exclusion[[14]](#footnote-14) and those with a broader view.[[15]](#footnote-15) Even when a request is for a separate unit represented by a separate union, the exclusion is still applied if the test for managerial functions, however broad or narrow it is, is met. This is clearly the law — but it is also fully justified, given the purposes of the Act, in the eyes of our labour relations boards. As the Ontario Labour Relations Board explained in *Children’s Aid Society of Ottawa-Carleton*,

The parties placed before me several authorities dealing with the purpose of the managerial exclusion in the Act, which was the starting point for each of their arguments in the present case. The following excerpt from *The Corporation of the City of Thunder Bay* . . . is perhaps the most often-cited discussion of the statutory goals represented by section 1(3)(b):

2. Section 1(3)(b) excludes from collective bargaining persons who in the opinion of the Board exercise managerial functions. The purpose of the section is to ensure that persons who are within a bargaining unit do not find themselves faced with a conflict of interest as between their responsibilities and obligations as managerial personnel, and their responsibilities as trade union members or employees in the bargaining unit. Collective bargaining, by its very nature, requires an arm’s length relationship between the “two sides” whose interests and objectives are often divergent. Section 1(3)(b) ensures that nei­ther the trade union, nor its members will have “divided loyalties”. . . .

*Ford Motor Company of Canada Limited* . . . reiterated . . . the purposes served by the managerial exclusion “in order to protect the institutional interests of both employers and unions”. . . . The Board reviewed many of the examples of “conflicting interests on the shop floor” which have traditionally driven the exclusion of managers from the bargaining units they supervise, but also considered whether the purposes of the managerial exclusion are engaged by a grouping of supervisors into a separate unit:

14. In addition to the obvious examples of conflicting interests on the shop floor, there are broader, systemic concerns which require the exclusion of “management” from participation in trade union activities. For if management personnel were treated like ordinary employees, and were free to organize or promote particular trade unions, the freedom of these other workers could be undermined and the independence of their trade unions could be jeopardized. And this problem may not be resolved merely, as here, by segregating the “supervisors” into their own bargaining unit.

16. This is not an academic concern either. What distinguishes “management” from ordinary “employees” is the power that managers exercise over the economic security of their fellow workers — a power which, in the Board’s experience, “foremen” have sometimes used to interfere with the right of those workers to engage in collective bargaining through a trade union of their choice. . . . That is why section 1(3)(b) is but one of a constellation of statutory provisions designed to segregate “employees” from “management,” and ensure that the employees and their unions are entirely independent of managerial influence.

17. . . . Collective bargaining might well be a useful tool for managerial employees, just as it is for ordinary workers. **However, the Legislature has determined that the process is better served if those obliged to act on behalf of the employer are completely segregated from the union institutions and the collective bargaining mechanism that employees use to promote their interests**.[[16]](#footnote-16)

To put it bluntly, managers are excluded from unionization at all. They are excluded from the statute — and not simply from the units or unions of those they manage. And this is done, in the eyes of our labour relations boards, explicitly to protect the associational rights and freedoms of those they manage.[[17]](#footnote-17)

It has long been clear that a *Charter* challenge to the intentional exclusion of managers was to be expected. And I think most knowledgeable Canadian lawyers expected the case to proceed as follows. The denial to managers of the s.2(d) freedom[[18]](#footnote-18) is so complete and comprehensive, and its intention to do so being so obvious (indeed embraced as a key component of the two parts of its legitimating rationale), that the only issue would be whether the long-standing internal justification, just reviewed, would pass s.1[[19]](#footnote-19) muster. The safe money was on judicial deference to the internal rationale.

**II Where happened to the exclusion in *Casinos de Quebec*?**

In light of this background, it takes a little time to get one’s mind around what happened in *Société des casinos du Québec inc v Association des cadres de la Société des casinos du Québec*.[[20]](#footnote-20)

At first blush, all is well, and the expected outcome was achieved. The long-expected *Charter* challenge to the managerial exclusion failed. The managerial exclusion is constitutionally, it seems, valid. But at this point, the expected stops — and we go down what I see as a rather remarkable constitutional rabbit hole.

This takes a moment to absorb — but the basic holding seems to be as follows: **The managerial exclusion is constitutionally valid. It is still with us.** Managers can be excluded from the complete set of rights and freedoms which our statutes establish to form unions, collectively bargain, strike, and all the rest, which is provided for non-managerial employees. But this is not because there is a violation of s. 2(d) of the *Charter* which is combined with a good reason (i.e. our well-understood two-fold, standard, labour relations board, rationale just reviewed) to exclude them (which satisfies s. 1 of the *Charter*). Rather, it is because managers do have the constitutional right to form unions, collectively bargain, strike, and all the rest. (And on the facts of the case, the managers had achieved some measure of exercise of those rights and freedoms — but one with which they were obviously very dissatisfied and sought the full regime available to non-managerial employees.[[21]](#footnote-21)) **So, in the courts, the managerial exclusion is no longer with us.**

**The statutory managerial exclusion is constitutionally valid because it is constitutionally invalid.** Our statutes can deny, in a constitutionally legitimate way, managers’ freedom of associational rights and freedoms (including the “right” to strike) because the Constitution guarantees those rights and freedoms (including the right to strike) through the courts.

Ponder that for a moment. Can we make sense of that? Is the managerial exclusion still with us? Or not? I think it is clear that it is not. The managerial exclusion appears to not be part of the constitutional scheme of things. But we are never told why this is so. We are never told why what all Canadian labour lawyers know to be the two-fold rationale for the exclusion has “been disappeared.” This rather fundamental point is simply not addressed.

The obvious way of trying to square this circle is to say that now we have truly and undeniably entered the predicted[[22]](#footnote-22) parallel universes of a constitutional labour code drafted by judges. In this world, simply because you are booted out of the statutory version of freedom of association for workers does not mean you don’t have the constitutional version to fall back on. Rather, you have been punted into a parallel universe. This universe is conjured out of the three words “freedom of association” in 2 (d) and one, which as demonstrated so clearly in *Casinos du Québec*, seems, and is alleged to, be completely indifferent to the legislative version which has governed collective labour law in Canada for decades.[[23]](#footnote-23) But in reality, the constitutional version is a cut-and-paste job — a (watered-down) version of the statutory scheme. In *Casinos du Québec* the managerial exclusion was not cut from the statutory regime but also not pasted into the constitutional one.

**III What are we to make of that?**

 Our collective bargaining statutes are amazing legal creations. Their point was to completely eliminate the common law of freedom of association (a very complex distribution of right/duties and freedoms) and replace it on every point of law: Can unions exist? Can they demand that an employer bargain? Must an employer bargain? Can the employer fire workers who join unions? Who can strike? Can employees be fired for striking? Are strikes for recognition permitted? Are collective agreements enforceable? How? And on and on and on and on. Not only was the common law exiled, so were the judges who created and enforced that law. This procedural/institutional shift to arbitrators and labour relations boards was part of the political/legal package which is “The Wagner Act Model.”

Furthermore, the statutes are very complex, containing major “gives” and “takes” for workers. There are major trade-offs involved. For example, your freedom to join a union is still protected. But employees have a new right/duty relationship with their employer, which places a duty on the employer not to fire an employee who does so. Put another way, employees still have the freedom to strike, which they had at common law, but now it is protected by a new right/duty relationship (which did not exist at common law), which places a duty on the employer not to fire you if you do strike. But these new legal relationships come with strings attached. Complex strings in the form of new restrictions on the freedom to strike — you can no longer strike for recognition. That is now illegal. Collective agreements are now, unlike at common law, enforceable. But your freedom to strike to complain about a violation is taken away — and replaced by compulsory grievance arbitration. You have the freedom to strike, protected by the new (correctly called, in my view, “derivative”[[24]](#footnote-24) right/duty relationship not to be fired for so doing) but only for one purpose — to obtain a collective agreement. And then only after exhausting an exhausting statutory “timetable” (with compulsory conciliation, strike votes, “cooling off” periods, etc.). And on and on and on and on.

You can see, dear reader, where this is going. What will be the answer, in the parallel judicial/*Charter* regime, now applicable to managers, to all these questions? What will be the complex set of trade-offs once we leave the *terra firma* of the Wagner Act Model and set sail with the Supreme Court of Canada (“SCC”) on board the good ship 2(d) into, not uncharted, but Chartered legal waters? Two things are clear. First, the judges **are** at the helm. Having been shown the plank, along with their common law, they have found a way back on board. Second, the judges **will** answer all of the questions, one way or another — either expressly, or by forgetting to ask (as seems to have happened in *Casinos du Québec*.[[25]](#footnote-25))

But, once we and they see what it is they have signed up for, will they continue with their quest? We can see, as noted above, one possible future in *Ontario (AG) v Fraser*[[26]](#footnote-26) and here in *Casinos du Québec* — the parallel universe will be a faded, partial, weak, mealy-mouthed version of “the real thing” — i.e. the statute. While they insist, as always, that they are not constitutionally privileging any particular statutory regime,[[27]](#footnote-27) they will do the opposite and cut and paste, in a weaker form, the Wagner Act Model. There will not be a real duty to bargain - in *Fraser,*[[28]](#footnote-28) the SCC saw that it had in *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*[[29]](#footnote-29) bitten off more than it knew, and could chew. Ditto in *Casinos du Québec* for the managers. This is a constitutional Wagner Act model manqué. This is a basic point of both Hastie and Nicol’s[[30]](#footnote-30) and Tucker’s critiques[[31]](#footnote-31) of *Casinos du Québec*. I believe their critiques are entirely accurate and justified.

**IV There is more**

But here I am trying to go further — and point out the sheer scale and thus unlikelihood of any such judicial effort, because of not only its folly and improbability, but normative perversity and illegality — that is, unconstitutionality. To this end, I also wish to remind us as well of a legitimate legal route which avoids the legal fiasco which is being visited upon us. The basic point is that there cannot be, legally and constitutionally, parallel and unequal universes of legal “embodiment” or “instantiation” of our fundamental freedoms This is not only because of the undesirability of judicial overreach (combined, in some admixture, with both incompetence and enthusiasm for the job) but because the demand for equality in the legal instantiation of fundamental freedoms will not countenance it.

There is a lot that should be said here. It cannot all be said here. I wish to move quickly to my larger quarry — how did we get here, and how can we get out?[[32]](#footnote-32) But we should repeat some points made thus far, not only because it is worth doing but because they put what follows in perspective in terms of the legal scale of argumentative ambition. First, recall that the result in *Casinos du Québec* is achieved without addressing the validity of the statutory exclusion within the statutory scheme, or without, from a constitutional point of view. We never get a constitutional, i.e. s. 1, assessment of the widely accepted twofold justification. As our jurisprudence makes clear, the purpose of the exclusion was exclusion. From collective bargaining, and striking, and enforceable collective agreements, and all the rest. For good reasons basic to the purposes of the statute — including, crucially, protecting the rights and freedoms of non-managers. To say that what was denied by statute is open to managers (in a parallel system) is to either misunderstand, or simply reject, or both, the (rational) purposes of the exclusion. And, as a result, undermine it.

The constitutional question in *Casinos du Québec* was whether this exclusion was constitutionally justified. This question is unavoidable. It is certainly not avoidable with the assertion, “it does not matter because you have a common law set of rights and freedoms, as read through a constitutional lens, outside of the statute.” What, one has to ask, is the status of the exclusion in the parallel system? What is that system’s view? What must be confronted from a constitutional point of view is whether the exclusion is justified. This task is shunned by the SCC in *Casinos du Québec*. In one of the most remarkable sentences ever to be written in the history of Canadian labour law jurisprudence, the majority asserts, “In my view the purpose of the legislative exclusion is not to interfere with managers’ associational rights.”[[33]](#footnote-33) I am not sure what to make of that. It is not simply that it is wrong. It is that it is unbelievable. Tell it to the managers who brought this case. Tell it to contemporary Canadian relations boards. Tell it to generations of labour lawyers.[[34]](#footnote-34)

Second, we have here, as already noted,[[35]](#footnote-35) another *Fraser* result — a complete reading down of the content of, the meaning of, in constitutional terms, collective bargaining and so on, “outside” the statutory regime as compared to inside.

But these points, important as they are, need to be put in perspective. The parallel universe project point is big. Really big. So big in fact we can’t see the end of it. But we do know that it will, it must, in fact, occupy all the space currently occupied by our statutory and common law of freedom of association.[[36]](#footnote-36)

**V A way out?**

1. **Cleaning up our 2(d) cases**

The point of going further, and digging deeper, is to find a way back to port from the wide and wild seas onto which the SCC in cases such as *Casinos du Québec,* like the sirens, beckons us. There is a path forward, but to see it, we have to look backwards. We need to place this case in a constitutional jurisprudential perspective. This is not an attractive task. But it is a reasonably simple one if we stick to some legal basics.

The decision in *Casinos du Québec* is structured, and as a result, undermined by some basic and avoidable legal mistakes about Canadian constitutional labour law. Some of these are just jurisprudential missteps. For example, the Court misunderstands the real legal issue in *Casinos du Québec*[[37]](#footnote-37) by confusing the distinction between “positive and negative” duties with the distinction between “public and private” actors.[[38]](#footnote-38) As a result, it fails to understand the origins of, and as a result, confirms, without any justification (because none is available), a stricter (“substantial interference”) test for **all** violations of s. 2(d) (as opposed to other freedoms such as freedom of speech). This relegates our constitutional freedom of association to a second-class status (some freedoms are now clearly more fundamental than others, despite what the *Charter* says).[[39]](#footnote-39)

Central to these rather disappointing, if not shocking, points is the fact that the *Casinos* decision seeks to place all of our constitutional labour law of freedom of association on a single foundation — the foundation of the 2001 decision of the Court in *Dunmore v Ontario (AG).*[[40]](#footnote-40)This presents a very serious problem for our law going forward. This is because we have in Canada two basic sorts of freedom of association cases, not one. They present very different constitutional issues. They have different legal structures. They do not rest on a single foundation.[[41]](#footnote-41)

Some of our constitutional cases involve the state itself “taking a bat to” freedom of association as in the (constitutionally inexplicable, given the *Saskatchewan Federation of Labour v Saskatchewan*[[42]](#footnote-42) decision) recent flurry of “back to work” laws. Or the “restraint” line of cases.[[43]](#footnote-43) Challenges to such laws involve simple and pure “vertical” — i.e. state to citizen — application of the *Charter*. We need the state to lay off the freedom.

Other cases have a very different legal structure. They are cases in which workers claim that the state must “go to bat for” for the freedom by creating “derivative” rights for workers, not against the state but against other private actors — i.e. employers. The object is to get the state to get employers to lay off the freedom. The most basic of these derivative rights — the right not to be fired for freely associating — is what was in issue in *Dunmore.*[[44]](#footnote-44)This is not vertical application of the *Charter*. It is, in principle, “horizontal” (citizen-citizen) application. But, due to other holdings of our Court, we are not permitted to proceed in this manner.[[45]](#footnote-45) I cannot allege a *Charter* breach by my employer for firing me for exercising my freedom to associate. But I can make a constitutional claim against the state for failing to pass a statute altering the existing common law rule which permits such firings. This is, legally speaking, what was requested, and happened, in *Dunmore*.[[46]](#footnote-46) This is, in legal terms, the legal result achieved by the agricultural workers. This is what I have labelled “diagonal” application of the *Charter*.[[47]](#footnote-47)

Most of these “diagonal” cases involve what the court is fond of calling, as in *Casinos du Québec,* “under inclusion.” This is a weak formulation which does not capture, and actually obscures, what is really going on. The word the court should be using is “express exclusion.” The wrong is that specific groups are singled out for exclusion from our collective bargaining statutes which would otherwise apply to them as much as they apply to all other employees. The managers in the *Casinos* *de Quebec* case **are** employees. Without the exclusion, the law would apply to them. But they are expressly identified and cut out of the law — i.e. excluded from our Canadian law instantiating/embodying our 2 (d) freedom of association. As were the agricultural workers in *Dunmore*[[48]](#footnote-48) and *Fraser*.[[49]](#footnote-49)

Once we see this, then we can more clearly see that the gravamen of the constitutional complaint in those cases is not s. 2(d) but s.15.[[50]](#footnote-50) The complaint is one of unjustified exclusion of some employees from protection of a fundamental freedom when such protection is given generally to other employees. Note that this is the very deep reason why the reasoning in *Dunmore*[[51]](#footnote-51) cannot be the foundation for any of our cases. That case involved an equality claim, an equality argument, and an equality remedy. It even, eerily, involved equality reasoning but impossibly masquerading as freedom of association reasoning. But it dared not speak the word equality. Our law would be so much better off if these points had not been avoided in the final *Dunmore* decision. What the agricultural workers wanted in that case, and got, was what all other employees had — unfair labour practice protection — i.e. ss. 70 and 72 of the *Ontario* *Labour Relations Act*[[52]](#footnote-52) (in my language derivative right/duties not part of the common law — created to protect the freedom (derived from and aimed at protecting the specific freedom) from employer interference.) This basic sort of equality claim (we are excluded, for no good reason, from what others have) is the real claim being made in *Casinos du Québec.*

Such diagonal application involves, it is true, a “positive” claim. But we need to be very careful about positive claims. They come in two forms. Again, one positive but “vertical” — as in the *City of Toronto*[[53]](#footnote-53) case discussed in *Casinos* — involving positive obligations on **the state itself**.[[54]](#footnote-54) And the other positive but “diagonal” — involving (the positive act of) the state passing laws but to alter the pre-existing common law obligations of other **private actors**.

If we grasp these points, we can see that seeing “positive obligation” cases as a single category obscures the real issue — the public/private distinction. “Un train peut cache un autre.” Here is one rather large pay-off from this insight and where a closer reading of our cases[[55]](#footnote-55) reveals the origin of the very problematic and stricter “substantial interference” test endorsed, wrongly, in the *Casinos du Québec* decision. The basic intuition is that some higher threshold, i.e. stricter test (whether “substantial interference” with the freedom or “making its exercise impossible”[[56]](#footnote-56)) may be justified in the private actor case. But it has no role at all in standard vertical cases such as *BC Health*,[[57]](#footnote-57) or our “back to work” cases where the state is the perpetrator of the actual interference. There, the test should be what the court says is the test for all other state interferences with fundamental freedoms — did the state interfere in a way which cannot be justified under s. 1 of the *Charter*.[[58]](#footnote-58) Put simply, we get the (higher threshold) of “substantial interference” because it was (at least perhaps) justified in the type of case *Dunmore*[[59]](#footnote-59) was — as cases of the actions of private actors being the problem and being directly constitutionally regulated. Not the state. Failure to make the distinction between private actors (please, state, go to bat for my freedom against my employer) and state action (please, state, stop taking a bat to my freedom yourself) lies at the heart of the current disaster visited upon s. 2(d) by *Casinos du Québec*. In two sentences — Once you take *Dunmore*[[60]](#footnote-60) as the foundation of all, i.e. both types of 2 (d) cases, we are in trouble. We get a completely unjustified “higher” standard for straightforward state violations of the freedom.[[61]](#footnote-61)

1. **The (unused) life preserver of s. 15**

But there is more. Seeing the origins of, and revealing the problem with, the single (“substantial interference”) test for all s. 2 (d) violations — that is, seeing it for what it is (a double standard) — is worth doing. But this is all internal to s. 2 (d). It is about getting s. 2(d) right. But our real problem is that this is not our real problem.

Here is the really big point. These problems with the Court’s understanding of s. 2(d) are very real and very large. But the still larger point is that they are completely unnecessary. We can see that the really large constitutional mess being worked upon and enlarged in *Casinos* *de Quebec* has its origins and development in *Dunmore*’s inability to treat the case for what it really was — as an equality, i.e. s. 15 case. The reading down of s.15 from an equality provision to a non-discrimination provision is the real and very basic problem.[[62]](#footnote-62) *Dunmore*,[[63]](#footnote-63) and all our cases, are very simple — if we could escape this current legal conception of s.15. We could leave s. 2(d) alone, at least for now. We could avoid the parallel and unequal universes of the legal instantiation of our fundamental freedom of association. In *Dunmore*[[64]](#footnote-64) itself the court stumbled very close to this truth and an important passage from the case is quoted in *Casinos du Québec*:

[D]epending on the circumstances, freedom of association may, for example, prohibit the selective exclusion of a group from whatever protections are necessary to form and maintain an association, **even though there is no constitutional right to such statutory protection per se**.[[65]](#footnote-65)

The emphasized words in bold are the keywords. The SCC in *Casinos du Québec* is fixated upon, as in prior cases[[66]](#footnote-66), the idea that no one is entitled to any specific statutory regime aimed at instantiating the s. 2(d) freedom. Not the Wagner Act Model. Or any other model.

OK. Let’s take that point as a given. But conceding that point gets us nowhere. This is because the managers (and agricultural workers before them) were not asking for something that they are not entitled to “per se.” Our, and their, problem is a very different one. It is the following — even if it is true that **no one** **is** entitled “per se” to certain statutory protections (respecting, promoting, protecting — i.e. embodying/instantiating — a fundamental freedom), when **some** **are** given “such statutory protections,” **everyone** **is** entitled to be treated equally by the law. That is, those excluded are entitled to a good answer to the question why they were not given the same protection. This is what the legal and constitutional idea of equality is about: not that everyone must be treated the same — but that we must have a good reason for treating people differently. This is especially important when we are distributing the protection of fundamental freedoms — i.e. when we are “embodying”/”instantiating” them. To do this unequally is very un-Canadian.

The beauty of the idea of equality as our first approach to constitutional labour law cases is that it avoids the whole “judicial parallel universe/labour code” problem. We don’t need (and perhaps we do not want in a democracy which has provided a code which is causing those excluded to clamour for inclusion) a judicial model of freedom of association. We already have a democratically developed model. Our problem is unequal access to it. That is what the managers, and the agricultural workers before them, were complaining about.

What we need, and what the managers in these cases asked for, is a constitution which ensures equality of access to the legal model of freedom of association we have — whatever it is. This was certainly the claim made by the managers in the *Casinos du Québec.* They claim they were unfairly excluded. Their legal complaint was that they were treated unequally — that there was no good reason for treating them differently than other employees. Were they? Was there? Does the longstanding and two-fold rationale for their exclusion provide a good reason for upholding the exclusion under the lens of the *Charter’s* guarantee of equality? That was the question posed. In *Casinos du Québec* it is never addressed — either as a matter of our statutory or, now, judicial regimes. It, along with its well-known rationale, slipped overboard, unnoticed it seems, during the voyage into Chartered waters undertaken in *Casinos de Quebec* andremains, as of this writing, lost at sea.

 This particular tragedy, along with that visited upon the test for 2(d) violations, was avoidable. The s. 15 life preserver was there all along. And still is.

1. See, for its history and background, Eric Tucker, “The Supreme Court of Canada’s Misguided Gamble That Liberal Voluntarism Provides Meaningful Access to Collective Bargaining” [Tucker, “Liberal Voluntarism”]. [↑](#footnote-ref-1)
2. Including a dim view of this very case, see Bethany Hastie and Keegan Nicol, “Freedom of Association and the Resurrection of Effective Impossibility? A Comment on *Societe des casinos du Québec*”, Ottawa L Rev (forthcoming) [Hastie & Nicol, “Résurrection”]. See also Tucker, “Liberal Voluntarism”, *supra* note 1 at 2. And, more generally on the meaning of the ILO’s views for Canadian law, see Brian A Langille, "Can We Rely on the ILO?" (2006-07) 13 CLELJ 273. [↑](#footnote-ref-2)
3. My term, see Brian Langille, "The Freedom of Association Mess: How We Got into It and How We Can Get out of It" (2009) 54:1 McGill LJ 177 at 179—81, 204, 208—12 [Langille, “Freedom of Association Mess”]. [↑](#footnote-ref-3)
4. The Supreme Court of Canada’s term, see *Plourde v Wal-Mart Canada Corp*, 2009 SCC 54 at para 56. [↑](#footnote-ref-4)
5. On the meaning and significance of the right/ freedom distinction, see Brian Langille, "Why the Right-Freedom Distinction Matters to labor Lawyers - And to All Canadians" (2011) 34:1 Dal LJ 143 at 153—55 [Langille, “Right-Freedom Distinction”]. [↑](#footnote-ref-5)
6. Tucker, “Liberal Voluntarism”, *supra* note 1 at 3. If, dear reader, any of this seems unclear, you may be in the same unfortunate boat as the Supreme Court of Canada (“SCC”), see Langille, “Right-Freedom Distinction”, *supra* note 5. For more clarification, see generally Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1916-17) 26:8 Yale LJ 710; Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913-14) 23:1 Yale LJ 16. And, for a scintillating demonstration of the importance of these legal basics for labour lawyers, see Walter Wheeler Cook, "Privileges of Labor Unions in the Struggle for Life" (1917-18) 27:6 Yale LJ 779. [↑](#footnote-ref-6)
7. On this idea generally, see Bora Laskin, "The Protection of Interests by Statute and the Problem of Contracting

out" (1938) 16:9 Can B Rev 669 at 669, 674 (Laskin writes, “Law exists for the sake of enlarging the liberty of men, and as a consequence there must be restrictions on the liberty of man; based on this premise, law is to be regarded

primarily as a system of duties, involving the proper recognition of the interests of others as a necessary limitation upon self-interest” at 669.) [↑](#footnote-ref-7)
8. Except the SCC? See infra at n. and text. [↑](#footnote-ref-8)
9. On this score, the “agricultural exclusion” is, for example, irrational. [↑](#footnote-ref-9)
10. 1974 CarswellBC 704 (WL Can), [1974] 1 CLRBR 1 (BCLRB). [↑](#footnote-ref-10)
11. *Ibid* at para 9. [↑](#footnote-ref-11)
12. *Ibid* at para 10. [↑](#footnote-ref-12)
13. 2015 SCC 1 [*MPAO*]. [↑](#footnote-ref-13)
14. *Captains and Chiefs Association v Algoma Central Marine, a division of Algoma Central Corporation*, 2010 CIRB 531. [↑](#footnote-ref-14)
15. *Canadian Union of Public Employees v* *Children’s Aid Society of Ottawa-Carleton*, [2001] OLRB No 1234 (QL) [*Children’s Aid Society of Ottawa-Carleton*]. [↑](#footnote-ref-15)
16. *Ibid* at paras 35—40, Vice-Chair Pamela A Chapman [emphasis added] (As edited in *Labour and Employment Law: Cases, Materials and Commentary*, 9th ed (Toronto: Irwin Law, 2018) at 366—67). [↑](#footnote-ref-16)
17. On the statutory origins of the exclusion in the USA, see Tucker, “Liberal Voluntarism”, *supra* note 1 at 1 (noting that the original Wagner Act did not contain the exclusion). [↑](#footnote-ref-17)
18. *Canadian Charter of Rights and Freedoms*, s 2(d), Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. [↑](#footnote-ref-18)
19. *Ibid* at s 1. [↑](#footnote-ref-19)
20. 2024 SCC 13 [*Casinos du Québec*]. [↑](#footnote-ref-20)
21. And on the facts of *Casinos du Québec*, *ibid*, some of this actually occurred. On the “watered-downness” of what the managers had accomplished, see Hastie & Nicol, “Résurrection”, *supra* note 2. See also Tucker, “Liberal Voluntarism”, *supra* note 1. [↑](#footnote-ref-21)
22. See Brian Langille, "Why are Canadian Judges Drafting Labour Codes – And Constitutionalizing the Wagner Act Model?" (2009) 15:1 CLELJ 101 at 108. [↑](#footnote-ref-22)
23. Not only indifferent to the details but to the persistent statutory logic of defending the new employee rights and freedoms from undermining and interference by employers. This requires vigilance not only in express unfair labour practice cases but in connection with many other statutory issues — such as the definition of a trade union and the managerial exclusion itself. The whole statutory certification process, seen as a “system” for testing employee wishes, can be seen in the same light. [↑](#footnote-ref-23)
24. See Brian Langille & Benjamin Oliphant, "The Legal Structure of Freedom of Association" Queen's LJ 249; Langille, “Right-Freedom Distinction”, *supra* note 5; Brian Langille, "The Trilogy Is a Foreign Country, They Do Things Differently There" (2013) 45:2 Ottawa L Rev 285 at 295—97 [Langille, “Trilogy”]. [↑](#footnote-ref-24)
25. *Casinos du Québec*, *supra* note 20. [↑](#footnote-ref-25)
26. 2011 SCC 20 [*Fraser*]. [↑](#footnote-ref-26)
27. See *Delisle v Canada (Deputy AG)*, 1999 CanLII 649 at para 33(SCC); *Dunmore v Ontario (AG)*, 2001 SCC 94 at para 14 [*Dunmore*] (the majority writes, “In [*Delisle*], this Court clarified that s. 2(d) does not guarantee access to a particular labour relations regime where the claimants are able to exercise their s. 2(d) rights independently”); *Health Services and Support -- Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at paras 19, 91 [BC Health]; *MPAO*, *supra* note 13 at paras 67, 93; *Fraser*, *supra* note 28 at paras 41—42, 45; *Casinos du Québec*, *supra* note 20 at paras 19, 24, 26, 55. See also *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at para 57 [*SaskFed*] [↑](#footnote-ref-27)
28. *Fraser*, *supra* note 28. [↑](#footnote-ref-28)
29. *BC Health*, *supra* note 30. [↑](#footnote-ref-29)
30. Hastie & Nicol, *supra* note 2. [↑](#footnote-ref-30)
31. Tucker, “Liberal Voluntarism”, *supra* note 1. [↑](#footnote-ref-31)
32. A question I first asked 15 years ago, see Langille, “Freedom of Association Mess”, *supra* note 3. [↑](#footnote-ref-32)
33. *Ibid* at para 51. [↑](#footnote-ref-33)
34. *Ibid* seems to suggest or hint that the SCC understands the exclusion to be merely concerned with keeping managers out of the units of and unions chosen by those they manage. It certainly does that. But the exclusion is far broader than that. To repeat: **Managers are excluded from the Act — not from the bargaining units, or unions, of those they manage.** Whether this is a good idea — and a constitutionally permissible idea — is the issue avoided. [↑](#footnote-ref-34)
35. E.g., *supra* note 21. [↑](#footnote-ref-35)
36. Speaking of the common law, what is the status now of its distribution of common law rights and freedoms constituting the law of worker freedom of association “outside” the statute for all workers, not just managers? The common law is the legal territory upon which the SCC is operating in *Casinos du Québec*. That is the body of law which is being constitutionally operated upon. Managers are excluded from the statutes. Their law is the common law. That is the legal terrain which is being tilled in *Casinos du Québec*. Under that law, the managers have the freedom to strike but can be fired for doing so. This is as we have noted (n.2) what Tucker says is “freedom without rights”. But now we are told that Managers have the “right” to strike. What does that mean? As the dissenting Justices Rothstein and Wagner point out in *SaskFed*, *supra* note 30 at paragraph 111: “But the majority conflates this common law right to withdraw labour with the modern, statutory right to strike, which imposes obligations on employers: “Historically, there was no legal ‘right’ to strike at common law, entailing a correlative obligation on an employer to refrain from retaliatory measures, but rather a common law ‘freedom’ to do so” (B. Oliphant, “Exiting the Freedom of Association Labyrinth: Resurrecting the Parallel Liberty Standard Under 2(d) & Saving the Freedom to Strike” (2012), 70:2 *U.T. Fac. L. Rev.* 36, at p. 41). Thus, at common law, employers are not obligated to refrain from terminating striking workers or from hiring replacement employees to perform their functions (see B. Langille, “What Is a Strike?” (2009-2010), 15 *C.L.E.L.J.* 355, at pp. 368-69).” As I read it the majority judgement never responds to this allegation made in the dissent (that the majority has moved beyond a freedom to strike to conjoin it with a new (derivative) right/duty.) That is in itself rather extraordinary. But see *Medleaf 2020* ONAFRAAT 08where this ambiguity is resolved by saying the majority did **not** create the new right/duty as alleged by the dissent.

 But whatever that means (derivative right/duty not to be fired as well as the freedom?), this must be legally so at common law for all employees. If there is a derivative right/duty, it is a new one for the common law. But there is not one common law for managers and one for the managed. (Nor for government employees and non-governmental employees.) But there is also another obvious issue — and problem. Most employees, unlike managers, are not excluded from our statutes. Can it be the case that those employees “inside” and those employees “outside” have different legal constellations of rights/duties and freedoms constituting their right to strike? For example, can excluded employees strike for recognition (the situation at common law) while included employees cannot? Can they have “minority” unions while those inside cannot? Does anyone really think those sorts of outcomes are the intent of the Wagner Act Model? That those outcomes were seen to be legal results flowing from the exclusion? I don’t. [↑](#footnote-ref-36)
37. *Ibid.* [↑](#footnote-ref-37)
38. To his credit, Justice Rowe sees this point very clearly in his concurring judgement, see *ibid* at paras 203—16. [↑](#footnote-ref-38)
39. For more on this point see Hastie and Nicol supra n 2 and Tucker, “Liberal Voluntarism”, supra note 1. [↑](#footnote-ref-39)
40. *Dunmore*, *supra* note 30. [↑](#footnote-ref-40)
41. See Langille & Oliphant, *supra* note 26; Langille, “Right-Freedom Distinction”, *supra* note 5; Langille, “Trilogy” *supra* note 26 at 295—97. [↑](#footnote-ref-41)
42. *SaskFed*, *supra* note 30. [↑](#footnote-ref-42)
43. Prior cases of this sort include the three cases in the original trilogy — i.e., *ibid*, *BC Health*, *supra* note 30, and *MPAO*, *supra* note 13. [↑](#footnote-ref-43)
44. *Dunmore*, *supra* note 30. [↑](#footnote-ref-44)
45. See the illuminating discussion of this basic point in Mark V Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, NJ: Princeton University Press, 2008). [↑](#footnote-ref-45)
46. *Dunmore*, *supra* note 30. [↑](#footnote-ref-46)
47. Cases in this line include *ibid*, and *Fraser*, *supra* note 28. [↑](#footnote-ref-47)
48. *Dunmore*, *supra* note 30. [↑](#footnote-ref-48)
49. *Fraser*, *spura* note 28. [↑](#footnote-ref-49)
50. Alan Bogg, one of the leading theoreticians of freedom of association, is alive to this point, see Alan Bogg, “Freedom of Association” in Guy Davidov, Brian Langille & Gillian Lester, eds, *Oxford Handbook of the Law of Work* (Oxford: Oxford University Press, 2024) 425 at 438. And very occasionally, a member of the SCC will catch a glimpse of it as Justice Deschamps did in her concurring decision of *Fraser*, *supra* note 28 at para 318:

*Dunmore* was concerned with economic inequality. It was based on the notion that the *Charter* does not ordinarily oblige the government to take action to facilitate the exercise of a fundamental freedom. Recognition was given to the dichotomy between positive and negative rights. To get around the general rule, a somewhat convoluted framework was established for cases in which the vulnerability of a group justified resorting to government support.  I agree with 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, that this detour appears to have been an artifice designed to sidestep the limits placed on the recognition of analogous grounds for the purposes of s. 15. [↑](#footnote-ref-50)
51. *Dunmore*, *supra* note 30. [↑](#footnote-ref-51)
52. 1995, SO 1995, c 1, Schedule A. [↑](#footnote-ref-52)
53. *Toronto (City of) v Ontario (AG)*, 2021 SCC 34 [*Toronto*]. [↑](#footnote-ref-53)
54. The positive promotional acts of the state in labour law are large — creation of labour relations boards, provision of conciliation services, maintaining a list of arbitrators, and on and on. [↑](#footnote-ref-54)
55. See Langille, “Right-Freedom Distinction”, *supra* note 5; Langille, “Trilogy”, *supra* note 26 at 293—97. [↑](#footnote-ref-55)
56. An aside. I think the intuition in *Dunmore*, *supra* note 30 (“substantial” interference) and *Fraser*, *supra* note 28 (“impossibility”) comes from the insight that while the state can always de jure take away the freedom of agricultural workers — private actors can only do so de facto through private economic power. The question is: when does private power approximate the absolute power of the state? Perhaps, and I think this is the intuition it was acting upon, when that power can do what the state can do — take away the freedom — i.e. make it “impossible” to exercise the freedom, see Langille & Oliphant, *supra* note 26 at 263, 267—68, 291—92. But note that in *Casinos du Québec*, we get not a single word about the grudging (See *MPAO*, *supra* note 13 at paras 73—77) abandonment of the “impossibility” standard. This is rather remarkable in itself. Was the current court aware of this twist and turn? [↑](#footnote-ref-56)
57. *BC Health*, *supra* note 30. [↑](#footnote-ref-57)
58. I don’t have time to develop this completely, but it seems we have not fully appreciated what human rights lawyers have been saying for some time. We need three categories of cases to cover the sorts of cases we see. 1. **respect** cases(state itself must respect the freedom) — these are simple **negative/vertical** cases asking for restrictions on state interferences as in *BC Health*, *supra* note 30, or our currently fashionable back to work laws.) 2. **protect** cases — **positive/diagonal** application to private actors — i.e. not only must the state respect and not itself interfere with the freedom it must also, in some cases, protect it from interference by private actors (using their common law entitlements) and alter the common law to do so. This is really what happened in *Dunmore*, *supra* note 30. 3. **Promote** — **positive/vertical** cases seeking obligations on the state itself to promote the freedom — as discussed in the freedom of expression context in *Toronto*, *supra* note 64*.* For more discussion, see Langille, “Right-Freedom Distinction”, *supra* note 5 at 158, n 40. [↑](#footnote-ref-58)
59. *Dunmore*, *supra* note 30. [↑](#footnote-ref-59)
60. *Dunmore*, *supra* note 30. [↑](#footnote-ref-60)
61. See Langille, “Right-Freedom Distinction”, *supra* note 5 at 156—63; Langille, “Trilogy”, *supra* note 26 at 293—96. The fact that the Court can calmly report, without any evaluation as to whether this is a good idea, that ss. 2(b) and 2(d) are, in light of prior cases, to be subject to different thresholds is alarming. We should take note — not just of the arbitrary distinction — but the Court’s indifference to its “evolution.” [↑](#footnote-ref-61)
62. Langille, “Freedom of Association Mess”, *supra* note 3 at 209—12. See also Brian A Langille, “Speaking Rationality to Power” in Vanessa MacDonnell, Gerald Chan, and Stephen Bindman, eds, *Justice Rosalie Silberman Abella: A Life of Firsts*(Toronto: Irwin Law, 2024) (forthcoming). [↑](#footnote-ref-62)
63. *Dunmore*, *supra* note 30. [↑](#footnote-ref-63)
64. *Ibid*. [↑](#footnote-ref-64)
65. *Casinos du Québec*, *supra* note 20 at para 18 (quoting *Dunmore*, *supra* note 30 at para 28) [emphasis added]. [↑](#footnote-ref-65)
66. See fn 30 *supra*. [↑](#footnote-ref-66)