

ABlawg's Top Cases and Legal Developments from the 2000s, and a Vote for Dunmore

By Jennifer Koshan

Cases Considered:

Dunmore v. Ontario (Attorney General), [2001] 3 S.C.R. 1016

It is the first month of a new year, and the first year of a new decade. Hence, it is a time for lists. Rolling Stone magazine has opined on the top albums, songs and movies of the 2000s, and the Globe and Mail has weighed in on the top 10 [nation builders](#) of the last decade. On the legal front, the Globe also lists the [top trials](#) of the decade in Canada as well as internationally. [The Court](#) has compiled some statistics on the Supreme Court's output over the 2000s, and plans its own series of posts on the top judgments of the last decade.

Here at ABlawg, some of our bloggers will be writing about the case or legal development they think was most important from the 2000s. Other bloggers will be compiling top ten lists within particular areas of law. In keeping with the focus of ABlawg, our contributions will be linked to the impact the cases or legal developments have had in this province.

My own pick for a case of significance is *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016. *Dunmore* was hailed for its recognition that the *Charter* may impose positive obligations on government. In this case, the obligation arose in the context of including agricultural workers within labour relations legislation as an aspect of freedom of association under section 2(d) of the *Charter*. While *Dunmore* hedged on the issue of whether the government had a duty to include protections for collective bargaining, it opened the door for the Court's later finding that there was such a duty in *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391.

Dunmore is also significant for its use of international law in the interpretation of *Charter* rights and freedoms. Generally speaking, cases under section 2(d) of the *Charter* have been at the forefront of recognizing the importance of international norms in *Charter* interpretation. *Health Services* is another case in point.

At the same time, there were elements of *Dunmore* that foreshadowed other trends in case law in the 2000s that were highly negative. A majority of the Court in *Dunmore* eschewed the opportunity to review the exclusion of agricultural workers from labour legislation as a violation

of equality rights contrary to section 15 of the *Charter*. The Court's imposition of positive obligations within a section designed to protect the fundamental *freedom* of association was a bit tortuous, and it was difficult to avoid the conclusion that the Court went out of its way to avoid section 15. This avoidance of equality-based obligations in *Dunmore* was followed by several cases in the 2000s where equality claims were wildly unsuccessful: see for example *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37; *Gosselin v. Québec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84; *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, 2002 SCC 83; *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357, 2004 SCC 65; *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381, 2004 SCC 66; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657, 2004 SCC 78; and *Health Services, supra*. The 2000s ended with a new approach to equality rights in *R. v. Kapp*, [2008] 2 S.C.R. 483, 2008 SCC 41, and my colleague Jonnette Watson Hamilton will be blogging on the significance of that case. But I think it is fair to say that the 2000s were a decade horribilis for equality, and the positive aspects of *Dunmore* on the section 2(d) front mask its negative implications for equality rights.

Dunmore spawned new legislation in Ontario, the *Agricultural Employees Protection Act*, 2002, S.O. 2002, c. 16 that gave rise to further litigation under section 2(d) of the *Charter*. *Fraser v. Ontario (Attorney General)*, 2008 ONCA 760, is currently before the Supreme Court, and will determine whether the Ontario government's minimalist response to *Dunmore* is now unconstitutional in light of the *Health Services* case. *Dunmore* and subsequent developments could thus also be seen to illustrate the notion of dialogue between the courts and legislatures championed by Peter Hogg and Allison Bushnell in "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997), 35 Osgoode Hall Law Journal 75. Others, however, would likely argue that the dialogue metaphor was thoroughly deconstructed in the 2000s (see for example the commentaries in volume 45(1) of the Osgoode Hall Law Journal, a special issue revisiting Hogg and Bushnell's article 10 years later).

What of the impact of *Dunmore* in Alberta? At the time the decision was released in 2001, Alberta and Ontario were the only provinces to exclude agricultural workers from their labour relations legislation. The Attorney General of Alberta intervened in *Dunmore* and argued in support of the constitutionality of this exclusion. Following the decision in *Dunmore*, one might have thought that Alberta would enact legislation similar to Ontario's *Agricultural Employees Protection Act*. Although minimalist, this Act formally complied with *Dunmore* by extending certain protections to agricultural workers, including the rights to form, join, and participate in the lawful activities of an employees' association without interference, coercion or discrimination, and the right to make representations to their employers through an employees' association respecting the terms and conditions of employment (section 1(2)). There has been no such legislation enacted in Alberta, and agricultural workers continue to be excluded from the *Labour Relations Code*, R.S.A. 2000, c. L-1, s.4(2)(e). Furthermore, agricultural workers are also largely excluded from the *Employment Standards Code*, R.S.A. 2000, c. E-9, s. 2(4), the *Occupational Health and Safety Act*, R.S.A. 2000, c. O-2, s.1(s)(i), and the *Workers' Compensation Act*, R.S.A. 2000, c. W-15, s.14(1). Their exclusion from these latter statutes is

not something that *Dunmore* itself provides a response to in light of its focus on section 2(d) of the *Charter*, as these statutes do not deal with association.

Overall, my vote goes to *Dunmore* not because it was a clear victory for farm workers or for *Charter* claimants, but because it has an important legacy, both positive and negative, for the *Charter* more broadly.