

Dear attendees, This paper connects to several different papers I am working on at present concerning freedom of thought and freedom of association, while trying to connect them in a particular way toward a different argument. I have put shorter pieces on parts of this than I could, so there is more we can discuss certainly at the presentation. But I hope this version sets out that argument sufficiently as to give some prior idea of it. I look forward to the discussion and any feedback you care to offer.

Between Individuality and Sociality in the *Charter*: Reengaging the Significance of the Section 2(b) Freedom of Thought and Section 2(d) Freedom of Association

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I. Introduction

Beginning with a 2018 presentation on freedom of thought,¹ I have in recent years put the claim that full use of the *Canadian Charter of Rights and Freedoms* needs to involve attention to what I have called the “forgotten freedoms”—those freedoms contained within section 2 of the *Charter* that have not received much jurisprudential or scholarly attention. Through the first decades of *Charter* jurisprudence, only select parts of the text of section 2 came to have much meaning. But the text of section 2 goes well beyond religion, expression, and unionized association. My claim has been that section 2 protects more than 2½ freedoms, and I was glad to have other authors join in a project on the forgotten freedoms in 2019, leading to a collection seeking to develop more content in the other section 2 freedoms.²

My attention to the broader set of freedoms contained within section 2 has been largely motivated simply by the view that Canadians should have the full benefit of their *Charter*, concerned with giving meaning to words generally ignored by the courts and by scholars. But there are further reasons to be concerned with the forgotten freedoms, notably the ways in which attention to the full set of *Charter* freedoms may reshape dimensions of a holistic reading of the *Charter*. It is tautological that a holistic reading of a constitutional text hinges upon attention to

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¹ See Dwight Newman, “Interpreting Freedom of Thought in the Canadian Charter of Rights and Freedoms” (2019) 91 SCLR (2d) 107 for the published version of the initial 2018 presentation. I have subsequently published further on freedom of thought: Monica Fitzpatrick & Dwight Newman, “Freedoms of Thought, Opinion, and Belief as Protected Inner Freedoms” (2020) 98 Supreme Court Law Review (2d) 249-271; Dwight Newman, “Freedom of Thought in Canada: The History of a Forgetting and the Potential of a Remembering” (2021) 8 Eur J Comp L & Gov 226. [I have also been commissioned to write a chapter on freedom of thought in Canada for the *Cambridge Handbook to the Right to Freedom of Thought*].

² See Dwight Newman, Derek Ross, and Brian Bird, eds., *The Forgotten Fundamental Freedoms of the Charter* (Toronto: LexisNexis, 2020).

all parts of it, not simply selected parts with others effectively ignored. It is not tautological that a more holistic reading of the *Charter* might highlight. In the present paper, I focus on one important strand of what attention to some of the forgotten freedoms can help to highlight. In particular, I will use attention to the section 2(b) freedom of thought provision and the section 2(d) freedom of association (going beyond union contexts) to show how even the rights and freedoms provisions within the *Charter* (as opposed to simply rights limitations provisions) involves a more complex mediation of individuality and sociality than sometimes thought. [I would note that some have tended to see any social dimension to the rights provisions in the *Charter* as cabined within the language rights provisions and thus within a very different sort of right.] That claim is actually one that I would make about human rights instruments more broadly,³ and I will return to the significance of this conception in my concluding thoughts.

I will begin by arguing that understanding section 2(b) to contain an independent freedom of thought provision is right both doctrinally and philosophically, thus highlighting a highly individual provision protecting part of the *forum internum*, which I will also claim is becoming increasingly relevant in the context of technological developments. Next, I will argue that understanding section 2(d) to provide protection well beyond the union context is similarly truer to the nature of the provision, thus highlighting a highly social provision within the *Charter*. In the course of both arguments, I will suggest that certain litigation dynamics and associated path dependence have effectively led to a distortion of *Charter* interpretation, with that reality having implications for how we should regard the lack of judicial precedent in these contexts. In the last section, I will discuss a broader significance to this distortion, arguing that attention to these two provisions can assist with seeing the fuller potential of the *Charter*.

II. Freedom of Thought in the *Canadian Charter of Rights and Freedoms*

Section 2(b) of the *Charter*, often simply called the “freedom of expression clause”, actually contains a longer list of freedoms: “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication”.⁴ The first freedom enumerated within it is freedom of thought.

³ For example, I have published on the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) containing not only collective rights, as sometimes asserted, but also individual rights: Dwight Newman, “Peoples and Persons in the UNDRIP”, in Oscar Pérez de la Fuente et al, eds., *Struggles for Recognition: Cultural Pluralism and the Rights of Minorities* (Madrid: Dynkinson, 2021) 239-247. I will further that claim in a forthcoming commissioned piece on “Individual and Group Rights” in the forthcoming *Oxford Handbook of the Rights of Indigenous Peoples in International Law*. I have also developed in a contemporaneous conference paper (at the *UDHR at 75 Conference* elsewhere on the University of Toronto campus on September 28, 2023) the converse claim in relation to the Universal Declaration of Human Rights (UDHR), where I argue based on specific evidence in the *travaux préparatoires* that the UDHR is not solely individualistic, as sometimes asserted, but contains a complex mediation of individual and social dimensions of rights.

⁴ *Canadian Charter of Rights and Freedoms*, 1982, s. 2(b) [Part I of the *Constitution Act*, 1982].

The inclusion of freedom of thought tracked language in prior human rights instruments, including *inter alia* the *Universal Declaration of Human Rights*, whose contents were significant for Canada's subsequent human rights instruments and whose *travaux préparatoires* I have thus previously argued should be considered helpful in understanding some of the philosophical presuppositions underlying the framework of rights in the *Canadian Charter of Rights and Freedoms*, including in understanding some of the rights and freedoms that have not received attention thus far.⁵ I will not here for present purposes repeat prior work on the contents of those *travaux* on freedom of thought, except to say that there is clear evidence of support for freedom of thought from across different cultures and legal traditions, and even some argument that it should be understood as one of the most central and sacred rights in the *UDHR*, and ultimately an inclusion of it as a freedom meant to mean something⁶—I will return to more on that meaning in a discussion of current comparative and international discussion on freedom of thought after first engaging with its presence in the *Canadian Charter*.

It is notable with freedom of thought that the *Charter* did not simply track the *UDHR* (or subsequent instruments). As I have shown previously, Canadian parliamentarians involved in drafting processes deliberately turned their minds toward freedom of thought and made a deliberate decision to locate freedom of thought differently within the *Charter* than in the *UDHR*. In the *UDHR*, thought appears alongside conscience and religion,⁷ and Canadian parliamentarians wanted to ensure that the contents of freedom of thought were not limited by that collocation.⁸ By placing freedom of thought in s. 2(b) instead of in s. 2(a), they hoped to avoid possible interpretive risks that might attend to placing the term “thought” too close to the term “religion”.⁹ There are some ironies to this in so far as some delegates in the *UDHR* drafting process were actually placing “thought” alongside “religion” precisely to show the greater breadth of “thought”, which would then offer a protection to non-religious scientific thought.¹⁰ But different legal systems have different presumptions on the interpretation of text, and each is entitled to use its approach. What is significant here is that there was extended, deliberate attention to freedom of thought in the *UDHR* drafting process and deliberate attention to its incorporation into the *Canadian Charter of Rights and Freedoms*. Its presence was not meant to be mere decorative language.

In that light, one could wonder why it is that freedom of thought has not been much developed in case law, or, for that matter, in scholarship. I would point to five reasons that stand out. First, one would be a fortunate thing about Canada that at the time of the adoption of the *Charter* in 1982, Canada was not in a situation involving gross violations of freedom of thought, as would have even then been the case in some countries. So, while freedom of thought was

⁵ See Newman, “Interpreting Freedom of Thought” (SCLR), *supra* note 1.

⁶ *Ibid.*, citing various portions of the *UDHR travaux*.

⁷ *Universal Declaration of Human Rights*, art. 18 (“Everyone has the right to freedom of thought, conscience and religion [...]”).

⁸ Newman, “Freedom of Thought in Canada” (Eur J Comp L & Gov), *supra* note 1.

⁹ *Ibid.*

¹⁰ This argument is made at several stages in the *travaux*: ____.

adopted into the text of the Constitution, it was in light of universal human rights values rather than in light of an immediate problem leading to immediate cases.

Second, a further reason, perhaps itself partly a result of that first one, is that some scholars, notably Peter Hogg, wrote immediately that freedom of thought was not particularly needed and that it did not need to be considered separately from expression, which would cover what freedom of thought covered.¹¹ In some ways, this claim built on longstanding claims in constitutional works with which judges would have been familiar, with A.V. Dicey having written in his *Introduction to the Study of the Law of the Constitution* that “what is called ‘freedom of thought’[...] is more accurately described as the ‘right to the free expression of opinion’”.¹² In others, it traded on Hogg’s effective tactic of offering to judges rules that would simplify their lives, with his practicality enhancing the influence of his suggestions. On this matter, as on others, his view was influential with the courts in the early years.

Third, this was particularly so because of the interpretive methodology adopted by the Supreme Court of Canada in its early case law. To put it perhaps obliquely, the Court did not encourage reliance upon drafting history in understanding the rights within the *Charter*.¹³ While this has changed in some respects, it nonetheless shaped the early jurisprudence.

Fourth, many cases where freedom of thought issues could be pertinent can actually be dealt with under freedom of expression. Courts have tended to do just that, even where it is somewhat inapt. Freedom of expression does not get at exactly the same thing as freedom of thought, but it may serve the purpose nonetheless in some cases, although we will soon see issues where the two freedoms further diverge. Nonetheless, the result is that the courts have not said anything about freedom of thought.

Fifth, there is then a crucial element of path dependence. In litigation, a lawyer facing a new case is going to consider using something that’s already established in the law where possible, rather than trying to forge a brand new argument based on some part of the *Charter* that hasn’t been developed. In fact, a lawyer could face problems (and even negligence allegations) if trying to use freedom of thought and not mentioning the freedom of expression argument that was well grounded in the case law. As a result, because the early case law did not see development of a freedom of thought jurisprudence, there is a certain stickiness to that situation over a longer period of time. That has actually been a pattern in some other countries as well,¹⁴ but and it has certainly been the pattern under the *Canadian Charter of Rights and Freedoms*.

Apart from a practical doctrinal view like that of Peter Hogg, concerned with whether the text adds something from a practical standpoint, a philosophical argument has been put questioning the role of an independent freedom of thought in a 2020 article by Fred Schauer.¹⁵ There, Schauer questions both whether an independent freedom of thought has any identifiable meaning

¹¹ [cite to earlier edition of Hogg’s constitutional law treatise – discussed in my past articles].

¹² A.V. Dicey, *Introduction to the Study of the Law of the Constitution* () 147.

¹³ See *Reference Re BC Motor Vehicle Act*, [1985] 2 SCR 486.

¹⁴ See discussions in the special issue of the *European Journal of Comparative Law & Governance* and in the forthcoming *Cambridge Handbook to the Right to the Freedom of Thought*.

¹⁵ Frederick Schauer, “Freedom of Thought?” (2020) 37:2 Soc Phil & Pol’y 72.

and, if it does, whether any such freedom has any actual implications. Notably, Schauer appears to accept the position that “[e]xternal compulsion in one form or another might force me to *say* things I do not believe, or might make me *do* things that are inconsistent with my deeper thoughts, beliefs, desires, and preferences, but [...] thoughts simply *are* free from external coercion and external knowledge”.¹⁶ However, Schauer himself realizes a problem with this train of argument, noting that it depends upon “deferring” consideration of various forms of technological manipulation.¹⁷

In some ways, Schauer turns out to be the unlucky philosopher who writes a clever argument about the uncertain meaning of an asserted freedom immediately before there is extensive legal work to give it meaning and who waves away technological issues immediately before they begin posing issues under the emergent legal meaning. I will first discuss major post-2020 moves to give freedom of thought clearer meaning within several branches, and then I will turn to some examples of how neuroscience and artificial intelligence (AI) developments show clear examples of threats to freedom of thought as understood within those branches.

A wave of international attention to the meaning of freedom of thought emerged exactly at the time that Schauer was suggesting that it had never been given meaning. In 2021, the United Nations Special Rapporteur on Freedom of Religion or Belief ended up writing a report on freedom of thought that went to the United Nations General Assembly in October 2021.¹⁸ That report reflects a lot of international discussions, some comparative and international case law, and some international consensus around the shape of freedom of thought as a concept. This consensus has emerged quickly, perhaps because different scholars and legal bodies engaged with the concept are relying upon the same sources in the *UDHR* and associated philosophical work.¹⁹

A first branch of a freedom of thought guarantee includes a freedom not to disclose one's thoughts, or what I had called in my earlier articles on freedom of thought a freedom against overly intrusive investigation of one's thoughts. One could call this a *mental privacy* arm of freedom of thought or branch of freedom of thought. A second branch is a freedom from being punished for one's thoughts. We could call this a *mental liberty* branch of freedom of thought. A third branch is that individuals should be free from impermissible interferences with their thought. They should be free from coercion, from modification of their thoughts, and from manipulation of their thoughts in inappropriate ways. We could call this a *mental autonomy* branch. It obviously has delicate balances, as all of our thoughts are being impacted all the time, and, indeed, in thinking, we want to be impacted. But we do not want to be subject to inappropriate or impermissible interferences, and the Special Rapporteur valuably draws together some ideas there and suggests some qualitative distinctions for what amount to forms of inappropriate interference. So, we have the *mental privacy*, *mental liberty*, and *mental autonomy*

¹⁶ *Ibid.* at 73.

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branches to the freedom, all of them corresponding to what I have previously argued should receive protection under the Canadian *Charter* provision on freedom of thought.²⁰

The Special Rapporteur also suggests a possible fourth branch, which is the idea of an enabling environment for freedom of thought. That may be appropriate to speak of in an international human rights context, even while it might actually receive domestic protection through various rights and freedoms as well as various mechanisms and institutions. That said, the discussion on this branch appropriately challenges us, for threats to freedom of thought might not emerge so pervasively from the state as from private actors, and one has to wonder if the big issues are to be around the state's protective role in relation to freedom of thought.

Having identified branches to freedom of thought helps to make very clear that emerging neuroscience developments and artificial intelligence (AI) developments are coming to raise issues for freedom of thought in the legal sense (thus taking the claims beyond more generalized claims raised in some literature calling for more protection of freedom of thought based on emerging technological issues).

I referenced earlier, for example, the mental privacy dimension, freedom from disclosure of one's thoughts. There may be circumstances where one may have to disclose certain thoughts, but there is a protection to some degree of mental privacy. Some neuroscience literature is engaged with success in neuroimaging where in certain specific laboratory contexts, there is a 90% success rate on determining an individual's thoughts on certain types of questions based on a reaction visible in a neuroimaging scan.²¹ While that is in laboratory conditions and does not play out as strongly in real-world conditions, it is an example based on current technology, not science fiction, with every prospect of an increase over time. Neuroscience is developing in ways that may implicate freedom of thought in ways that haven't been addressed before.

Also in relation to the mental privacy dimension, consider AI-based systems that measure micro-expressions in your facial expressions that might last as little as one 25th of a second in duration. Obviously, some people are good at sensing how other people feel, but this is on a different level. And there are private actors already using some of this technology to investigate thoughts. One example is Deloitte using facial recognition software to measure the emotions of employees in certain high-value positions. And in particular, it monitors employees of Deloitte's clients for various reasons in order to try to determine what the emotions are of the senior staff there.²²

Interesting questions can also arise on the mental autonomy branch. Consider, for example, the micro-targeting of consumers.²³ There are fairly established ways in which presentation of information in certain ways can be used for manipulation purposes. Does that give rise to freedom of thought issues? This may involve private corporations, such as in social media contexts, that may have opportunities to influence individuals' thoughts.

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There may be nuanced questions over what crosses the line and what's permissible and some tests that need to be developed for that. There has been some discussion of what is called the “SEAM cycle”, where an AI system Surveils, Extracts data, Analyzes the data, and then as its output, attempts to Manipulate the user.²⁴ There are various forms of this basic pattern, but essentially these are geared towards in the private company context trying to make money for the company.

Obviously, there could be more traditional public *Charter* issues as well. If one used thousands of data points about individuals and predicted that particular individuals would be influenced by a particular policy, one might tell them about part of a party’s platform in a very micro-targeted way, and that might be legitimate. But using the data points to tell them lies about something likely crosses the line to manipulation. AI facilitates that. Much of this could have occurred before if someone were a very energetic doorknocker and got to every voter enough times and gathered enough information about them, but AI takes that to a new level. AI can facilitate particular interactions with individuals that intersect with those elements of the freedom of thought.

Both the mental privacy and mental autonomy branches of the freedom of thought can be identified as implicated by emerging technological challenges, with attention to further neuroscience literature and AI literature no doubt expanding the range of ways in which it is implicated. Freedom of thought is not a mere fact but a legal norm and one that is indeed engaged by current issues. It is an independent freedom that is increasingly relevant.

III. Freedom of Association

Section 2(d) of the *Charter* refers simply to “freedom of association”. To some, this freedom might not initially appear to be a “forgotten freedom”. After a period in which it was severely limited in a series of cases known as the *First Labour Trilogy*,²⁵ it has now spawned in the *Second Labour Trilogy* a very significant case law on rights to collective bargaining and, in its culmination, even a right to strike.²⁶ Governments have not forgotten s. 2(d)’s potential implications in this context, and they have made it the subject of legislation invoking the notwithstanding clause right from the early years of the *Charter* on through to the present.²⁷ Nonetheless, what has been protected through this case law is still only what I would call “half a freedom”. The development of freedom of association has been essentially solely in contexts of

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²⁵ *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *PSAC v. Canada*, [1987] 1 S.C.R. 424; *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460.

²⁶ *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3; *Meredith v. Canada (Attorney General)*, 2015 SCC 2, [2015] 1 S.C.R. 125; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245.

²⁷ See e.g. *The SGEU Dispute Settlement Act, S.S. 1984-85-86, c. 11* (Saskatchewan using the notwithstanding clause to end a labour dispute in the context of then-present legal uncertainty on whether the courts would uphold a right to strike that could challenge back-to-work legislation); *Keeping Students in Class Act*, 2022, S.O. 2022, c. 19 (Ontario’s use in the context of a recent use in a labour dispute with teachers, later repealed but nonetheless demonstrating use in a labour context subsequent to the judicial establishment of a right to strike).

issues on union rights and has not involved the development of freedom of association outside that union context, even if some judicial dicta has hinted at that possibility. The aim in this section is to understand some of its larger potential and why it has not reached that potential thus far.

A key passage in the Supreme Court of Canada's 2015 *Mounted Police* decision, while dealing with a labour rights context, contained *dicta* speaking of association more broadly. The judgment both revived the philosophical orientation of Dickson C.J.C.'s dissent in the early *Labour Trilogy* and rearticulated some of the historically broad scope of freedom of association:

The purposive approach, adopted by Dickson C.J. in the *Alberta Reference*, defines the content of s. 2(d) by reference to the purpose of the guarantee of freedom of association: “. . . to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends” (*Alberta Reference*, at p. 365). [....] The historical emergence of association as a fundamental freedom — one which permits the growth of a sphere of civil society largely free from state interference — has its roots in the protection of religious minority groups: M. Walzer, “The Concept of Civil Society”, in M. Walzer, ed., *Toward a Global Civil Society* (1995), 7, at p. 20. More recent history also illustrates how the freedom to associate has contributed to the women's suffrage and gay rights movements: J. D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* (2012), at p. 45; and D. Carpenter, “Expressive Association and Anti-Discrimination Law After *Dale*: A Tripartite Approach” (2001), 85 *Minn. L. Rev.* 1515.²⁸

In referencing association in contexts of religious association and political movements, the passage connects to the sort of broader content reflected in discussions on the scope of association in contexts like the *travaux* of the *UDHR*, where some of the drafting committee enumerated some of the range of association and the committee ultimately arrived at a view against enumerating specific forms of association so as to avoid limiting the clause.²⁹ However, to refer alongside unions only to religious association and political movements is still to refer only to specific types of organizations rather than the full range of what association can protect, which is the full social dimension of human life. Nonetheless, such *dicta* open possibilities that had tended to seem shut off by the course of development of Canada's section 2(d).

That course of development saw relatively rapid litigation of section 2(d) in a union rights context, culminating in the Supreme Court of Canada's 1987 *First Labour Trilogy*. The three cases that saw decisions from the Supreme Court of Canada in April 1987 were heard in June through October 1985 and reached those hearings after earlier decisions in light of disputes in 1982 and 1983. The *First Labour Trilogy* thus involved cases that headed up the court system essentially immediately after the adoption of the *Charter*.

That this occurred in this way was on account of several factors, including a complex economic period involving efforts by government employers at wage restraint, ongoing perceptions by

²⁸ *Mounted Police*, *supra* note ____, at paras 54-56.

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governments that they could choose how to resolve public union labour disputes on a unilateral basis when they chose to do so (and thus the presence of real issues about whether s. 2(d) would offer protection), and the availability of funds to facilitate litigation of the issues. This last element arises, of course, simply from the fact that significant money is at issue in labour contexts in a way that it is not in other association contexts, thus making labour issues almost inherently most likely to be easily litigated under s. 2(d) using a portion of those funds at issue. The result, though, is that the first precedents on association were set in the immediate context of those issues, with the courts directly considering disputes before them with obvious financial implications and thus perhaps inclining them to more judicial restraint, and with doctrines thus developed in ways that responded to that context.

Indeed, the first s. 2(d) issue before the Supreme Court of Canada (in the June 1985 argument in *Reference re Public Service Employee Relations Act (Alberta)*³⁰) concerned whether there was a right to strike, thus putting perhaps the most challenging s. 2(d) claim immediately before the Court. The case thus immediately saw almost all of the Attorneys General lining up with arguments to restrain s. 2(d), putting before the Court an impression of unanimous opposition to the argument by the very governments that had just adopted the *Charter*.

In such a context, the majority judgments in 1987 effectively rejected any idea that there would be significant protection for unions out of the freedom of association. Some of the judges were simply not philosophically prepared for a meaningful content for s. 2(d), at least when considered in this context. In the *Alberta Reference*, both the dissenting judgment of Dickson C.J.C. (with Wilson J. in support) and the majority-side opinion of McIntyre J. would start off by quoting Tocqueville on the significance of association,³¹ but McIntyre J. would go on to his own distinctive reasoning as he wrestled with what he saw as potential claims of group rights, ultimately trying to reason those through with a rather infamous analogy that seemed to compare labour unions to country clubs as he reasoned about whether an association-based group right would offer constitutional protection to golfing activities undertaken together.³² Justice McIntyre was technically writing alone, but the judgment of Le Dain J. (also writing for Beetz J. and La Forest J.)³³ contained relatively limited reasoning in a three-paragraph judgment about the deference of the courts to the legislators in the context of specialized determinations about the labour system, with the result that McIntyre J.'s judgment came in some ways to be understood to represent the philosophical position on association of the majority of the Supreme Court of Canada.

³⁰ *Supra* note ____.

³¹ *Alberta Labour Reference*, *supra* note ____, at paras 86 and 152-54.

³² *Ibid.* at para 155.

³³ As a footnote to why the cases were decided by such a limited grouping, it is worth noting that the cases were heard initially by a seven-member panel of the Court, with the mid-1980s already showing some strains on the Court and a growing backlog problem which would later be met by having various important constitutional issues heard by as few as five justices in very important cases. While they were under reserve, though, tragedy would strike the Court, and Justice Chouinard passed away in February 1987 from brain cancer, thus bringing the panel that would be part of the judgments down to six justices.

The *First Labour Trilogy* was obviously subject to extensive scholarly critique, but this was essentially on a reactive basis. What the Court did not have before the judgments rendered so soon after the adoption of the *Charter* was any sort of scholarly development of a theory of freedom of association. Nor did it have case law based on any other sort of association whose principles might have guided association in the labour context. Instead, these decisions about association rendered in the context of financially-laden disputes on which a number of the justices were inclined to defer to legislators would become the leading cases on association. They would then shape a restrained approach to s. 2(d) in other contexts as well.

By contrast, by 2015, the Supreme Court of Canada would end up saying that s. 2(d) did protect a right to strike.³⁴ This culmination of what has been called the *New Labour Trilogy* or *Second Labour Trilogy* came in the wake of various cases leading up to it, albeit again with the means for litigation being in the labour context more so than in other potential association contexts.

Add to this means element of why the case law would again develop on labour issues that if there were the means to some extent in the most quickly enumerated other association contexts, political association and religious association, path dependence in light of the earlier labour decisions made attempts at an association argument perhaps half-hearted, with those concerned with political association more inclined to argue under s. 3 (consider *Figueroa*) and those concerned with religious association more inclined to argue under s. 2(a) (consider *Trinity Western University 2018*).³⁵

The new case law would, to some degree, build up gradually, partly with a personnel at the Court with different biographical backgrounds oriented to labour law and to ideas of collective rights. For example, Justice LeBel, coming from a background in administrative law and labour law, and Justice Abella, coming from work on labour and human rights issues amid her corporate/commercial practice, would author a number of the judgments in the sequence. While framed in terms of the individual reading of association emanating from earlier case law, LeBel J.'s 2001 judgment in *Advance Cutting and Coring Ltd.* would emphasize the significance of unions.³⁶ He coauthored with McLachlin C.J.C. the opinion in *BC Health Services* in 2007,³⁷ which began to recognize a procedural right of collective bargaining, expanding this in a similarly coauthored opinion in *Fraser* in 2011 to recognize a right to associate to achieve collective goals that would thus protect various bargaining activities.³⁸ This set the stage for their coauthored opinion in the first of the *New Labour Trilogy/Second Labour Trilogy, Mounted*

³⁴ *Saskatchewan Federation of Labour*, *supra* note ____.

³⁵ The latter context would also see the Supreme Court of Canada articulate a principle sure to stymie development on other freedoms. Referencing arguments on religious freedom, expression, and association, the majority judgment contained this troubling passage: “The factual matrix underpinning a *Charter* claim in respect of any of these protections is largely indistinguishable. Further, the parties themselves have almost exclusively framed the dispute as centring on religious freedom. In our view, the religious freedom claim is sufficient to account for the expressive, associational, and equality rights of TWU’s community members in the analysis”: *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293 at para 77.

³⁶ *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, 2001 SCC 70.

³⁷ *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, 2007 SCC 27.

³⁸ *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3.

Police in January 2015, which would entrench under s. 2(d) “a meaningful process of collective bargaining that provides employees with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests”.³⁹ The simultaneously released, and similarly coauthored decision in *Meredith* would seek to show that an alternative consultative process might sometimes meet this s. 2(d) standard,⁴⁰ demonstrating LeBel J.’s practicality and recognition for an ongoing role of legislative choices. And the third case, appearing weeks later and thus able to cite to *Mounted Police* as an established precedent, would see Abella J. take up the pen to entrench the right to strike.⁴¹ That latter judgment is subject to possible critique on technical grounds (in so far as its use of authorities contains errors⁴²), but it does continue from the series of cases leading up to it. Through a number of these decisions, LeBel J.’s 2001 judgment in *Advance Cutting and Coring* returns to define an interpretive approach to s. 2(d),⁴³ highlighting some of the significance of the turn present in his appointment to the Court.

The *Advance Cutting and Coring* decision’s articulation of a principle taking a generous interpretive approach to s. 2(d) and the *Mounted Police dicta* on the wider range of association probably together set the stage for more arguments to take freedom of association beyond the half-freedom presently recognized. That position has been profoundly shaped by litigation dynamics and path dependence, which affected not just an individual freedom like thought but a social freedom like association.

IV. Concluding Thoughts

The underdevelopment of some constitutionally entrenched freedoms to the point of being half-forgotten or even nearly entirely forgotten thus has many connections to particular circumstantial factors of litigation processes and associated path dependence. That some *Charter* text has not been fully meaningful even four decades out from the *Charter*’s adoption does not necessarily represent a specifically considered judgment but rather an effectively random result. As a result, the underdevelopment of these freedoms should not function so as to continue to constrain them.

That sort of reasoning might, of course, appear to apply in broader ways that are of concern for the stability of a legal system based significantly on precedent. Litigation dynamics will also have affected past cases on rights and freedoms that have not been forgotten but that instead have clear precedents on them. Circumstantial factors may have impacted how a case was seen by the justices hearing it. And so on. But there are legal doctrines that specifically engage with these considerations. The idea of distinguishing cases based on their facts responds in some ways to the second. And doctrine on when it is possible to reengage with constitutional precedents responds in some ways to the former. The position advanced here should not be read in some

³⁹ *Mounted Police*, *supra* note ____, at para 5

⁴⁰ *Meredith*, *supra* note ____.

⁴¹ *Saskatchewan Federation of Labour*, *supra* note ____.

⁴² See Dwight Newman, “A Court Gone Astray on the Right to Strike”, *National Post* (26 February 2015).

⁴³ It is cited in several of these cases: ____.

radical way but as nonetheless urging the development of those freedoms that for legally extraneous reasons were forgotten.

Doing so in the Canadian *Charter* context has a larger significance than it may even first appear. The current picture of the human person contained in the section 2 jurisprudence is one who can claim a right to engage in any activity intended to contain a meaning (other than violence or threats of violence), who can claim certain rights based on individual and potentially even idiosyncratic beliefs having a nexus with religion, and who can sometimes have certain rights in the context of being part of a labour union. Such a picture of the human person (admittedly slightly exaggerated, but not entirely) is radically incomplete relative to the set of fundamental freedoms meant to be protected by the *Charter*. A fuller protection of the range of fundamental freedoms within section 2 encompasses freedoms ranging from those protecting the sacred inner self, such as in the context of freedom of thought, on through to those protecting social forms of human life, in a full picture of human association. Section 2 has much more to do than it has been permitted to do thus far. And, the *Charter*, like other human rights instruments, engages in a more complex mediation of individual and social dimensions of human life than often realized.

Engaging with the full text also has implications for those parts of the text already developed. One of the key principles of constitutional interpretation is that interpretation of the constitutional text should be holistic. Different pieces of the Constitution must be understood in light of each other. But if only some parts are developed and others are not, those that are developed will be understood in distorted ways not taking account of those parts that remain underdeveloped. As a result, a fuller recognition of underdeveloped freedoms will impact upon developed ones as well.

All of this said, the very factors of path dependence that raise an argument against continuing simply on the same paths also pose obstacles to change. Lawyers cannot simply go and argue new grounds when others may serve their client—indeed, were they to fail to argue established grounds, they would act negligently. And judges must take the arguments before them. However, there are three ways in which different legal actors can contribute to improving the present situation. First, lawyers can present alternative arguments in at least some elemental way. Second, judges can ask questions about potential alternative avenues and even include *dicta* about them (if not ready yet to use them). Third, scholars can creatively engage with the full record, with the full text, and with a fuller sense of the Constitution and its picture of the fundamental freedoms. History need not remain destiny, and the underdevelopment of the forgotten freedoms is yet redeemable.