

# **Judging Bastarache:** **Justice Michel Bastarache's Record on Individual and Economic Freedom and Equality**

**By Chris Schafer with James McLean**



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through education, communication and litigation**

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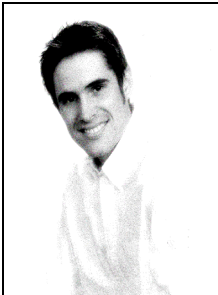
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## Introduction

When the Chrétien government appointed Justice Michel Bastarache to the Supreme Court of Canada in the fall of 1997, Canadians had little or no insight into what kind of judge and policymaker the new Justice would become. Nearly eleven years on, Canadians know little more about a man who has influenced their rights and freedoms for over a decade. Who is Justice Bastarache and how has he influenced Canadian law? What role has this Justice played in expanding or limiting Canadians' constitutional freedoms? What is his contribution to economic freedom? The answers to these questions are important because of the influence Canada's high court has on public policy in this country.

Canada's experience with constitutional democracy is only twenty-six years old. Prior to 1982, Canada functioned as a parliamentary democracy. This meant that Parliament and the provincial legislatures held legislative primacy over the Dominion.<sup>1</sup> This principle, known as the doctrine of parliamentary supremacy, held that there are "no absolute or immutable limits to legislative power"<sup>2</sup> and assumed that elected politicians were the most effective tools for protecting individual freedoms.

However, the adoption of the *Canadian Charter of Rights and Freedoms* in 1982, ushered in a new era in Canadian government. By enshrining certain rights and freedoms in a constitution, Parliament is no longer the sole entity able to alter and affect laws in the country. Further, Parliament's role in lawmaking has been challenged by section 52 of the *Charter*, which endows the courts with the authority to strike down or create (by way of "reading in") new laws. The net effect of these changes has meant that the *Charter* has supplanted the historical doctrine of parliamentary supremacy; replacing it with the U.S. model of constitutional democracy which grants judges a significant role in lawmaking.

Those who think that judges are more enlightened than elected representatives, should consider the U.S. Supreme Court decision in *Dred Scott v. Sanford*. Writing for the Majority, then Chief Justice Roger B. Taney wrote that African-Americans could never attain U.S. citizenship, and described them as "beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations..."<sup>3</sup> In effect, this landmark decision halted the progress that politicians had been making to stop the spread of slavery into the new U.S. territories. As this example illustrates, a judge's personal opinions

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<sup>1</sup> While Canada's Parliament and the provincial legislatures were essentially sovereign, they were limited by the federal-provincial division of powers in sections 91 and 92 of the *Constitution Act, 1867*.

<sup>2</sup> Patrick Monahan, *Constitutional Law: Second Edition* (Toronto: Irwin Law Inc., 2002) at 21.

<sup>3</sup> 60 U.S. (How.) 393 (1856) [*Dred Scott*].

about human nature, the appropriate role of government, and life's ultimate meaning and purpose are bound to influence the interpretation of the law.

Canadian justices (like their American counterparts) have found in the *Constitution* a new vehicle to actively affect the law. This new authority has proved to be very influential in affecting the rights and freedoms of Canadians. Post-1982, the Supreme Court of Canada has influenced and sometimes determined public policy with respect to a host of contentious public policy issues, including homosexual marriage, Sunday shopping, prisoner voting rights, and abortion to name just a few. Taken together, the implications of these and other decisions on the daily lives of Canadians are very important.

Transparency in the court room requires educating citizens about the ideologies and philosophies of the men and women who sit on our nation's highest Court. As Constitutional law scholar Andrew D. Heard once noted, knowing each judges' individual predilection is important because "it is the sum of the reactions of each judge to the arguments made, rather than the arguments themselves, which decides the ultimate disposition of the case."<sup>4</sup>

Accordingly, the retirement of the Honourable Mr. Justice Michel Bastarache on June 30, 2008, presents an excellent opportunity to evaluate and assess his contribution to Canadian jurisprudence. By shedding light on a largely unknown figure, Canadians will be in a better position to understand a person, and an institution, that exercise significant influence on the public policy that governs the lives of Canadians.

## **Summary**

In an attempt to review the philosophy of Justice Michel Bastarache on a range of issues that impact on individual and economic freedom and equality, we reviewed decisions of the Court in which he took part, from September 30, 1997 to April 30, 2008, that clearly implicate vital individual and economic freedoms, and equality before the law for individuals as individuals.

In this paper, by "individual freedom" we mean freedom of conscience and religion; freedom of thought, belief, opinion and expression, including freedom of the press; freedom of peaceful assembly; and association. By "economic freedom" we mean the basic human right to earn, own and enjoy private property, and such protections as due process (for example, that the government does not take an individual's property without a fair process, including just and timely compensation), and freedom of contract. With respect to "equality before the law" we mean equality of opportunity rather than equality of result or

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<sup>4</sup> Andrew D. Heard, "The Charter in the Supreme Court of Canada: The Importance of Which Judges Hear an Appeal" (1991) 24:2 *Canadian Journal of Political Science* 289 at 290.

condition, and the equality of individuals before the law rather than social or economic equality of groups according to race, gender, or other factors.

For the purposes of our analysis, a “pro-freedom” decision is one in which this Justice is supportive of one or more of the following: individual freedom, economic freedom, or equality before the law (equality of opportunity for individuals). A Justice who makes a pro-freedom decision 70 percent of the time or more is considered to be a stronger supporter of individual and economic freedom and/or equality before the law, whereas a Justice scoring below that percentage is considered to be weaker supporter of individual and economic freedom and/or equality before the law.

An examination of 37 cases which impact Canadians’ constitutional freedoms and their equality before the law reveals the following about Justice Michel Bastarache’s career on the Supreme Court of Canada:

- Overall, he has been a stronger supporter of freedom. He was part of pro-freedom decisions 73 percent of the time, and anti-freedom decisions 27 percent of the time.
- In non-unanimous decisions, he was a weak supporter of freedom. He was only pro-freedom 59 percent of the time, and anti-freedom 41 percent of the time.
- In decisions involving fundamental freedoms, he was a weak supporter of freedom. He was only pro-freedom 56 percent of the time, and anti-freedom 44 percent of the time.
- In decisions involving economic freedom, he was a strong supporter of freedom. He was pro-freedom 83 percent of the time, and anti-freedom 17 percent of the time.
- In decisions involving equality, he was a strong supporter of freedom. He was pro-freedom 87.5 percent of the time, and anti-freedom 12.5 percent of the time.

After an explanation of our methodology, summaries of the major cases from 1997 to 2008 dealing with individual and economic freedom and equality are provided. Following these descriptions, we conduct an analysis of the decisions by Justice Bastarache, and explain our findings more fully.

## **Methodology**

Assessing the decisions of the Supreme Court of Canada and its individual Justices is a difficult task. The compilation of cases to include in the assessment, in addition to the analysis itself, necessarily reflects the judgment of the authors.

In selecting the cases, we avoided certain issues that divide those who recognize the importance of individual and economic freedom, such as whether or not the state has a legitimate role in restricting pornography or prostitution.<sup>5</sup> The decision in *R. v. Kouril*<sup>6</sup>, where the Supreme Court decided that consensual sexual activity in private clubs poses no threat to society, and consequently should not be considered criminal, is an example of a case excluded from this analysis. We realize that our selection of cases will elicit disagreement from across the ideological spectrum.

The task of judging judges is complicated further by the very nature of judicial decision-making.<sup>7</sup> Cases are decided on the basis of the unique facts in each case, and only rarely on the basis of principles alone. Judicial opinions are usually both complex and nuanced, consequently providing greater or lesser strength for the underlying legal proposition. Sometimes a Justice will follow past precedents even if he or she thinks that the earlier case or cases were wrongly decided, and such decisions do not reveal the judge's personal philosophy on social, political, and economic issues. Similarly, a Justice who writes a decision is sometimes simply the spokesperson for several judges who assent to a majority or minority position, and the judgment itself may not necessarily reflect the nuances of individual opinions or philosophical orientations of the concurring Justices. Furthermore, the Justices' rankings are in part a function of the cases presented and selected for review by the author.

As such, a Justice's decision in any one case will not provide a complete picture of his or her views on the substantive legal issue in question. Sometimes the

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<sup>5</sup> Consequently, other cases excluded from this study include criminal law cases involving the *Charter's* section 2 fundamental freedoms and section 7 right to "life, liberty and security of the person." See also footnote 7, re exclusion of cases involving minority language education rights under section 23 of the *Charter*.

<sup>6</sup> [2005] 3 S.C.R. 789.

<sup>7</sup> With respect to equality issues, judging the judges is complicated even further in Canada as a result of the early interpretation—still in force—of the *Charter's* section 15 equality rights as meaning substantive equality (equality of condition or result) for groups rather than equality of opportunity for individuals. The substantive equality provision concerning affirmative action programs in section 15(2) of the *Charter* also complicate any analysis of equality that is undertaken. In addition, the minority language education rights under section 23 of the *Charter* grant special status to the linguistic minority French-or English-speaking population of each province. As such, the *Charter* cases that deal with s. 15(2) and 23 of the *Charter*, in addition to section 25 of the *Charter* (aboriginal rights), are excluded from this study.

It should also be noted that judicial decision making under the Charter is complicated further by the inclusion of section 1 of the *Charter*, which states that the rights and freedoms are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In this study, a decision is categorized as "pro-freedom" or "pro-equality" if the final decision upholds individual or economic freedom or equality before the law, regardless of whether or not, for example, a Justice or Justices reached a pro-freedom judgment solely as a result of their analysis under s. 1 of the *Charter*.

Court, or a particular Justice, may decide a less important case in a “pro-freedom” fashion, but in another more precedent-setting case may fail to protect individual freedom. Rather than attempting to assign different weights or scores to the Court’s decisions or the decisions of individual Justices on some sort of numeric scale, and in doing so introduce an untenable amount of subjectivity, Justice Bastarache was simply assigned a straight-forward “pro-freedom” or “anti-freedom” (or “pro-equality” or “anti-equality”) grade in each case, whether as author of a judgment, or as concurring in the majority or dissenting judgment.

With the above caveats aside, over time these factors will nevertheless balance out to produce a picture of the Court and the record of Justice Bastarache in protecting individual and economic freedom and equality before the law. This will especially be the case when analysis of the kind presented in this paper includes decisions of the Court and Justices from a greater number of years, as is planned for the future by the Canadian Constitution Foundation. We have selected cases from September 30, 1997 to April 30, 2008, that we believe provide the clearest insights into the view of Justice Bastarache on the proper scope of government involvement in the areas of individual and economic freedom and equality. We present our findings below.

## Summaries of Cases

**1998**

***Thomson Newspapers Co. v. Canada (Attorney General)***, [1998] 1 S.C.R. 877 (Pro-Freedom)

In a 4-3 decision, the Court struck down a *Canada Elections Act* prohibition on the broadcasting, publication or dissemination of opinion survey results during the final three days of an election campaign.

Majority (Pro-Freedom): McLachlin, Iacobucci, Major and **Bastarache**  
Dissent (Anti-Freedom): Lamer, L’Heureux-Dube and Gonthier JJ.

The majority held that the legislated publication ban did not minimally impair a constitutional right such as freedom of expression that is vital to a free and democratic society. The effect of the law, according to the majority, is to deny Canadians important political information during a crucial time period in the democratic process.

***Canadian Egg Marketing Agency v. Richardson***, [1998] 3 S.C.R. 157 (Anti-Freedom)

In a 7-2 decision, the Court upheld provisions of the *Canadian Egg Licensing Regulations, 1987* and the *Canadian Egg Marketing Agency Quota Regulations*,

1986 that restricted farmers in the North West Territories (NWT) from exporting eggs to Canadian provinces. After marketing their eggs in both inter-provincial and intra-provincial trade, the farmers (Richardson) were sued by the regulatory agency (Canadian Egg Marketing Agency) for breaching federal trade regulations. The farmers challenged the constitutional validity of the regulations, arguing that excluding NWT farmers from the trade regime violated ss. 2(d) (freedom of association)<sup>8</sup> and 6 (mobility rights) of the *Charter*.

Majority (Anti-Freedom): Lamer C.J., L'Heureux-Dube, Gonthier, Cory, Iacobucci, **Bastarache**, Binnie JJ.

Dissent (Pro-Freedom): McLachlin, Major

The majority held that the regulatory scheme did not violate s. 6 of the *Charter* as it did not discriminate on the basis of residency. Stating that the purpose behind the egg marketing scheme was to ensure fairness in the market, the majority ruled that "the exclusion of the NWT producers is simply an application of the principle of quota allocation based on historical production patterns and shares the same unimpeached purpose."

The dissent interpreted s. 6 of the *Charter* as being centered on the individual, so as to allow the pursuit of a livelihood without regard to provincial boundaries. The federal egg marketing scheme failed to treat all people within Canada equally.

## 1999

***Law v. Canada (Minister of Employment and Immigration)***, [1999] 1 S.C.R. 497 (Pro-Freedom)<sup>9</sup>

The Court denied a 30-year-old woman, without dependent children or disability, survivor's benefits under the Canadian Pension Plan (CPP). The CPP reduces the survivor's pension for able-bodied surviving spouses without dependent children who are between the ages of 35 and 45 by 1/120<sup>th</sup> of the full rate for each month that the claimant's age is less than 45 years at the time of the contributor's death, so that the threshold age to receive benefits is age 35.

Majority (Pro-Freedom): Lamer C.J., L'Heureux-Dube, Gonthier, McLachlin, Iacobucci, Major, **Bastarache** JJ.

Dissent: Not Applicable

The Court found that "Parliament's intent in enacting a survivor's pension scheme with benefits allocated according to age appears to have been to

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<sup>8</sup> Since only the majority's analysis deals with s. 2 of the *Charter*, and the dissent does not, the analysis of the authors of this study focuses exclusively on s. 6 of the *Charter*.

<sup>9</sup> The analysis presented by the authors for this case does not comment on the new 3-part test for determining whether a violation of a section 15 equality right has occurred.

allocate funds to those persons whose ability to overcome need was weakest.” As such, the Court ruled that the intent was not to discriminate against a group that is actually better equipped to supplement their own income, but to help a section of society that did not enjoy the ability to completely provide for themselves.

This decision tends towards defining equality as equality of opportunity between individuals (equality before the law), rather than social or economic equality of outcome (equality of condition) according to a person’s membership in a group based on sex, race, age or other factors.

***Wells v. Newfoundland***, [1999] 3 S.C.R. 199 (Pro-Freedom)

In a unanimous decision, the Court required the Government of Newfoundland to honour its contractual obligations to a senior civil servant. The contract entitled the commissioner of the Public Utilities Board to hold office during good behaviour until the age of 70, and granted him the right to a pension after five years service. An assessment was undertaken by the Executive Council of the Government of Newfoundland which recommended the restructuring of the Board, to reduce the number of commissioners, and to eliminate the position that was held by Mr. Wells in this case. These recommendations were later encapsulated into the *Public Utilities Act*. The Act also had the effect of voiding the commissioner’s chances of receiving a pension as he was six months short of the five year requirement. Mr. Wells challenged the *Public Utilities Act*.

Majority (Pro-Freedom): Lamer C.J., L’Heureux-Dube, Gonthier, Cory, McLachlin, Iacobucci, Major, **Bastarache**, Binnie JJ.

Dissent: Not Applicable

While recognizing that the Government has the authority to restructure the Board, the Court ruled that contractual obligations compelled the Government to honour the benefits that were guaranteed to Mr. Wells. The Court found that a similar situation in the private sector would constitute a breach of contract and the Court ruled that the same standard applies to the public sector. In upholding the important principle of contractual obligation, the Court noted that, “In a nation governed by the rule of law, it is assumed that the government will honour its obligations unless it explicitly exercises its power not to...To argue that opposite is to say that the government is bound only by its whim, not its word.”

***Westbank First Nation v. British Columbia Hydro and Power Authority***, [1999] 3 S.C.R. 134 (Pro-Freedom)

In a unanimous decision, the Court found that the Westbank Indian Band did not have the constitutional authority to enact bylaws that taxed and penalized the

British Columbia Hydro and Power Authority for use of Indian lands granted by the Canadian government. Absent the necessary 'regulatory scheme' that would identify the levy as a regulatory charge, the Justices found that the bylaw was in fact a tax and thus outside the jurisdiction of the Westbank First Nation.

Majority (Pro-Freedom): Lamer C.J., Gonthier, McLachlin, Iacobucci, Major, **Bastarache**, Binnie JJ.

Dissent: Not Applicable

The Court assumed the task of determining the pith and substance of the levy to decipher whether it should be classified as a tax or a regulation. The principle of equality for all Canadians vests taxing powers exclusively in the federal and provincial governments, which together represent all Canadians. Accordingly, no entity has the right to impose a tax on the federal or provincial government. Having found that the levy was indeed a tax, all nine Justices agreed that it violated section 125 of the *Constitution Act, 1867* ("No Lands or Property belonging to Canada or any Provinces shall be liable to Taxation.") and declared it to be inapplicable.

***Delisle v. Canada (Deputy Attorney General)***, [1999] 2 S.C.R. 989 (Pro-Freedom)

In a 5-2 decision, the Court found that sections of the *Public Service Staff Relations Act (PSSRA)* and the *Canada Labour Code* that exclude members of the RCMP did not breach sections 2(b) (freedom of expression), 2(d) (freedom of association) and 15 of the *Charter*.<sup>10</sup>

Majority (Pro-Freedom): L'Heureux-Dube, Gonthier, McLachlin, Major, **Bastarache** JJ.

Dissent (Anti-Freedom): Cory, Iacobucci

Writing for the majority, Justice Bastarache found that the RCMP members' freedom of association rights were not infringed by their exclusion from the *PSSRA*. The majority held that freedom of association does not include the right to establish a particular type of association defined in a particular statute. According to the majority, "There is no general obligation for the government to provide a particular legislative framework for its employees to exercise their collective rights." The ability to form an independent association and carry on its activities exists independent of any statutory regime.

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<sup>10</sup> The Court found that section 15 of the Charter didn't apply in this case because the *PSSRA* and the differential treatment it imposed on the RCMP by excluding them from it, is not a distinction that is based on one or more grounds enumerated or analogous grounds under s. 15 of the Charter, in addition to the fact that members of the RCMP are not a traditionally disadvantaged group.

The majority found that the exclusion of the RCMP from the *PSSRA* did not infringe freedom of expression because this freedom only requires that government not interfere with its exercise. “The message of solidarity the appellant wishes to express by an association exists independently of any official form of recognition.”

Despite the fact that the *PSSRA* did not interfere with the freedom of RCMP members to associate informally in pursuance of their mutual interests as employees, the dissent argued that a statute such as the *PSSRA*, whose purpose or effect is to interfere with the formation of an employee association (under the *PSSRA* only) infringes s. 2(d) of the Charter.<sup>11</sup>

**65302 *British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804 (Pro-Freedom)**

In this taxation case, all nine Justices agreed<sup>12</sup> that a farmer’s over-quota levy with respect to the production of eggs was a deductible business expense. The egg producer in this case owned a poultry farm business and, due to local market conditions between 1984 to 1988, decided to produce more than what was allowed by the B.C. Egg Marketing Board. Upon learning of this over-quota, the Marketing Board charged the appellant with a levy of approximately \$270,000. The issue in this case arose when the Minister of National Revenue declared that the appellant was “disallowed” from including the levy as a ‘business expense’ when filing his yearly income tax returns.

Majority (Pro-Freedom):, Gonthier, McLachlin, Iacobucci, Major, Binnie JJ.

Dissent (Anti-Freedom): L’Heureux-Dube, **Bastarache**

The majority held that the deduction of fines and penalties incurred for the purpose of gaining or producing income from a business should not be disallowed for reasons of public policy; courts intervening in the name of public policy would only introduce uncertainty. According to the majority, “In the absence of Parliamentary direction in the *Income Tax Act* itself, outlays and expenses are deductible if made for the purpose of gaining or producing income.” The dissent disagreed with this rationale.

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<sup>11</sup> The dissent found it unnecessary to address ss. 2(b) and 15(1) of the *Charter*.

<sup>12</sup> While the dissent agreed with the majority with respect to the narrow question of whether a levy imposed pursuant to a provincial egg marketing scheme can be deducted as a business expense for the purposes of the *Income Tax Act*, it parted ways on the broader question of whether all types of fines and penalties are deductible as a matter of course when incurred in pursuit of bona fide business activity. As such, the dissent is categorized as “anti-freedom”.

***British Columbia (Public Service Employee Relations Commission) v. BCGSEU***, [1999] 3 S.C.R. 3 (Anti-Freedom)

In a unanimous decision, the Court struck down a minimum physical fitness standard that the British Columbia government had established for its fire fighters, in the interest of competence and public safety. The claimant was a female firefighter who was dismissed when she failed to meet the aerobic standard after four attempts. The Court found that the aerobic standard was discriminatory and a violation of both the *Canadian Human Rights Act* and section 15 of the *Charter*.

Majority (Pro-Freedom): Lamer C.J., L'Heureux-Dube, Gonthier, Cory, McLachlin, Iacobucci, Major, **Bastarache**, Binnie JJ.

Dissent: Not Applicable

The Court ruled that most (but not all) women have a lower aerobic capacity than most men, and most (but not all) women cannot increase their aerobic capacity enough (even with training) to meet the aerobic standard for fire fighters deemed necessary to carrying out their responsibilities effectively. This decision had the practical effect of lowering competency standards for fire fighters in order to facilitate the hiring of more women.

## **2000**

***Harper v. Canada (Attorney General)***, [2000] 2 S.C.R. 764 (Anti-Freedom)

The Court, 8-1, set aside an interlocutory injunction which prevented the enforcement of spending limits on citizens (referred to as “third parties” in the legislation) during the 2000 federal election campaign. Before the 2000 election writ was issued, Harper sought a declaration that the *Canada Elections Act* restrictions on citizens’ independent advocacy during federal elections were unconstitutional because they limited the right of free expression under section 2(b) of the *Charter*. The temporary injunction obtained by Harper in the lower courts would have suspended these provisions during the 2000 federal election, pending a full trial.

Majority (Anti-Freedom): McLachlin, L'Heureux-Dubé, Gonthier, Iacobucci, **Bastarache**, Binnie, Arbour, LeBel

Dissent (Pro-Freedom): Major

Despite the fact that the Attorney-General in this case admitted to a violation of freedom of expression and an absence of evidence that the injunction would cause some harm, the majority favoured the presumption that legal restrictions on citizen spending during election campaigns are prima facie valid as serving the public interest.

The lone dissent by Major noted that, “We should be loathe to interfere with political speech, especially in the midst of a federal election.”

***Pacific National Investments Ltd. v. Victoria (City)***, [2000] 2 S.C.R. 919 (Anti-Freedom)

In a 4-3 decision, through an exercise of statutory interpretation, the Court opted to ignore contractual rights accruing to a land developer. The land purchase agreement between the developer, Pacific National Investments Ltd., and the British Columbia Enterprise Corporation (BCEC), a crown corporation, stated that it was binding only if the City granted the subdivision of the lands and passed the requisite zoning, which it did. However, the City later rezoned the two water lots such that the developer could no longer implement the plans. Pacific National Investments Ltd. sued for breach of contract and maintained that the rezoning by the City was effectively a “down-zoning,” in breach of the City’s implied obligations.

Majority (Anti-Freedom): Gonthier, Iacobucci, Arbour, LeBel  
Dissent (Pro-Freedom): Major, **Bastarache**, Binnie

According to the dissent, “...where a municipality enters a contract with a legitimate purpose, that contract must be honoured. The City should not be able to terminate with impunity a contract that it uniquely crafted, thoughtfully entered into, received the full benefit of, and concedes is lawful...The public interest would not be served by allowing the City to escape its commitments.”

In upholding the important principle of contractual obligation, the dissent acknowledged that, “[i]t would be contrary to business sense and to all obligations of fairness to conclude that the condition precedent regarding zoning had to be met but was not protected in any way from unilateral retraction.”

In ensuring that obligations accruing from a dutifully executed contract are met, the dissent, unlike the majority, acknowledged that although city councils cannot bind future councils, contracts can be carefully crafted in order to adequately meet the objectives of different parties. As such, in order to give this particular contract business efficacy, the City would owe compensation in the event that the

**2001**

***R. v. Mentuck***, [2001] 3 S.C.R. 442 (Pro-Freedom)

The Court decided, 9-0, to uphold freedom of expression by striking down a publication ban concerning police operational methods. According to the Court, “Such a ban would seriously curtail the freedom of the press in respect of an issue that may merit widespread public debate. It would also have a deleterious

effect on the right of the accused to a fair and public trial, which includes the right to have the media access the courtroom and report on the proceedings.”

Majority (Pro-freedom): McLachlin, L’Heureux-Dubé, Gonthier, Iacobucci, Major, **Bastarache**, Binnie, Arbour, LeBel  
Dissent: Not Applicable

The Court decided that the publication of the names and identities of the police officers in question would create a serious risk to the efficacy of current and similar police operations, and as such, that this particular aspect of the publication ban ought to remain in force. However, the Court noted that in general, the names of police officers who testify against accused persons “need not, and should not, be the subject of publication bans...”, thus reaffirming support for section 2(b) freedom of expression *Charter* rights.

***R. v. O.N.E.***, [2001] 3 S.C.R. 478 (Pro-Freedom)

For the reasons given in *R. v. Mentuck*, the Court held, 9-0 that a publication ban on information about undercover police investigative techniques should not have been ordered by the trial judge. According to the Court, “...such a ban would abridge freedom of the press in respect of discussions that lie at the core of freedom of expression and the accused’s right to a public trial would be seriously compromised by such a ban.”<sup>16</sup> The section 15 equality portion of this decision is not commented on. It was only addressed at any length by L’Heureux-Dubé, and was not central to the decision reached in the case.

Majority (Pro-freedom): McLachlin, L’Heureux-Dubé, Gonthier, Iacobucci, Major, **Bastarache**, Binnie, Arbour, LeBel  
Dissent: Not Applicable

The Court upheld a one-year publication ban on information that could identify the police officers involved in an investigative operation, including their names, likenesses and physical descriptions. The Court held that a publication ban was necessary to further the administration of justice. However, the Court noted that, “[t]he identity of police officers should not, as a matter of general practice, be shrouded in secrecy forever, absent serious and individualized dangers.”

***Dunmore v. Ontario (Attorney General)***<sup>13</sup>, [2001] 3 S.C.R. 951 (Anti-Freedom)

No law placed restrictions on farm employees to associate or to organize themselves into unions. Nevertheless, the Court held, 8-1, that the absence of

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<sup>13</sup> The section 15 equality portion of this decision is not commented on. It was only addressed at any length by L’Heureux-Dube, and was not central to the decision reached in the case.

agricultural workers from the provincial statutory labour relations regime violated their freedom of association under section 2(d) of the *Charter*.

The majority held that the "...freedom to organize exists independently of any statutory enactment, although its effective exercise may require legislative protection in some cases."

Majority (Anti-Freedom): McLachlin, Gonthier, Iacobucci, **Bastarache**, Binnie, Arbour, LeBel, L'Heureux-Dubé

Dissent (Pro-Freedom): Major

In arguing for the constitutionality of the absence of agricultural workers from the provincial statutory labour relations regime, the lone dissenter upheld the conception of fundamental freedoms as "negative freedoms," the exercise of which imposes no obligations on other people. According to Justice Major, "s. 2(d) does not impose a positive obligation of protection or inclusion on the state in this case. Prior to the enactment of the *Labour Relations Act*, agricultural workers had historically faced significant difficulties organizing and the appellants did not establish that the state is causally responsible for the inability of agricultural workers to exercise a fundamental freedom." The mere absence of one group of workers from a protective or pro-union labour relations statutory regime is not conclusive evidence of a *Charter* violation.

***Trinity Western University v. British Columbia College of Teachers***, [2001] 1 S.C.R. 772 (Pro-Freedom)

The Court, by a margin of 8-1, ordered the British Columbia College of Teachers to approve Trinity Western University's education program. At issue in this case was reconciling the religious freedoms of individuals attending Trinity Western University to become accredited teachers, with the alleged equality concerns of students in B.C.'s public school system who would be taught by teachers who graduated from a program that condemned homosexual behaviour.

Majority (Pro-Freedom): McLachlin, Gonthier, Iacobucci, Major, **Bastarache**, Binnie, Arbour, LeBel

Dissent (Anti-Freedom): L'Heureux-Dubé

The majority noted that "tolerance of divergent beliefs is a hallmark of a democratic society." According to the Court, "Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected."

Dissenting Justice L'Heureux-Dubé asserted a goal of "providing the best possible educational environment for public school students in British Columbia."

In so doing, she ignored the fact that “There is nothing in the TWU Community Standards, which are limited to prescribing conduct of members while at TWU, that indicates that graduates of TWU will not treat homosexuals fairly and respectfully.”

## 2002

### ***Gosselin v. Quebec (Attorney General)***, [2002] 4 S.C.R. 429 (Pro-Freedom)

This case concerned a (now-defunct) Quebec welfare regulation that reduced welfare payments in the late 1980s from \$434 to \$163 per month for able-bodied adult recipients under 30, unless they entered job training, community work, or school. In a 5-4 decision, the majority held that the welfare regulation did not breach the equality provisions of section 15 of the *Charter*. Further, in a 7-2 decision, the Court held that the regulation did not deprive the claimant of her section 7 *Charter* right to security of the person.

#### Section 15:

Majority (Pro-Freedom): McLachlin, Gonthier, Iacobucci, Major, Binnie

Dissent (Anti-Freedom): L’Heureux-Dubé, **Bastarache**, Arbour, LeBel

The majority held the regulation did not infringe the *Charter’s* section 15 equality right. The Court ruled that Ms. Gosselin and other able-bodied young adults did not suffer from pre-existing disadvantage and stigmatization on the basis of age, and that their human dignity was not undermined by this regulation.

#### Section 7:

Majority (Pro-Freedom): McLachlin, Gonthier, Iacobucci, Major, **Bastarache**, Binnie, LeBel

Dissent (Anti-Freedom): L’Heureux-Dubé, Arbour

The majority held that the regulation did not infringe the *Charter’s* section 7 right to security of the person. The dominant strand of jurisprudence on section 7 sees its purpose as protecting life, liberty and security of the person from deprivations that occur as a result of an individual’s interaction with the justice system and its administration. The majority rejected the interpretation of section 7 as the basis for a positive state obligation to guarantee adequate living standards.

### ***Ruby v. Canada (Solicitor General)***, [2002] 4 S.C.R. 3 (Pro-Freedom)

This case involved a constitutional challenge to a procedural section of the *Privacy Act*, that provides for mandatory *in camera* (“in closed chambers”) and *ex parte* (brought without notice to the other side) proceedings where the government denies an applicant’s request for access to personal information on the grounds of national security or the maintenance of foreign confidences. The

Court held, 9-0, that to the extent that the *in camera* provision in s. 51(2)(a) of the *Privacy Act* excluded both the appellant Ruby and the public from the proceedings in question, the provision violated the freedom of expression rights in section 2(b) of the *Charter*.

Majority (Pro-Freedom): McLachlin, L'Heureux-Dubé, Gonthier, Iacobucci, Major, **Bastarache**, Binnie, Arbour, LeBel.

Dissent: not applicable

Under the *Privacy Act*, section 51(2)(a) mandated that the hearing be held *in camera* and did not limit the *in camera* requirement to only those parts of a hearing that involved the merits of an exemption. The requirement that the entire hearing of a section 41 application, or appeal there from, be heard *in camera* was held by the majority of the Court to be too stringent. The appropriate remedy was to read down s. 51(2)(a) so that it applied only to the *ex parte* submissions mandated by s. 51(3) of the *Privacy Act*.

**R. v. Guignard**, [2002] 1 S.C.R. 472 (Pro-Freedom)

This case concerned a sign erected by Mr. Guignard on one of his buildings, expressing his dissatisfaction with the services of an insurance company. He was prosecuted by the City of Saint-Hyacinthe for violating a municipal planning by-law, which prohibited erection of advertising signs outside an industrial zone. In a 9-0 decision, the Court struck down sections of the by-law that violate freedom of expression.

Majority (Pro-Freedom): McLachlin, L'Heureux-Dubé, Gonthier, Iacobucci, Major, **Bastarache**, Binnie, Arbour, LeBel

Dissent: not applicable

The Court properly noted that, "Freedom of expression is fundamental to the life of every individual and plays a critical role in the development of our society." According to the Court, "Given the tremendous importance of economic activity in our society, a consumer's "counter-advertising" assists in circulating information and protecting the interests of society just as much as does advertising or certain forms of political expression." By restricting the right to use this optimum means of expression to certain designated places, the by-law in question infringed rights to freedom of expression under section 2(b) of the *Charter*.

**R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverage (West) Ltd.**, [2002] 1 S.C.R. 156 (Pro-Freedom)

The Court upheld, 9-0, the freedom of expression associated with union secondary picketing. Secondary picketing is the picketing of locations other than

the place of employment, such as retail outlets that sell the products produced by the company being picketed. The Court held secondary picketing to be generally lawful unless it involves tortious or criminal conduct.

Majority (Pro-Freedom): McLachlin, L'Heureux-Dubé, Gonthier, Iacobucci, Major, **Bastarache**, Binnie, Arbour, LeBel  
Dissent: not applicable

The Court noted that “Both primary and secondary picketing engage freedom of expression, a value enshrined in s. 2(b) of the *Charter*.” In support of freedom, the Court held that freedom of expression vis-à-vis secondary picketing ought to be upheld because “Picketing which breaches the criminal law or one of the specific torts will be impermissible, regardless of where it occurs.”

2003<sup>14</sup>

***Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Quebec Inc.***, [2003] 3 S.C.R. 228 (Pro-Freedom)

The Court held, 7-0, that section 18.2 of the Quebec *Charter of Human Rights and Freedoms* does not protect an employee from dismissal where the employee is not available for work because he or she is incarcerated. According to Bastarache, “The purpose of the Act is not to eliminate completely the civil consequences of the sentence. Section 18.2 is therefore of no assistance to an incarcerated employee where the actual result of the dismissal is the fact that he is not available for work.”

Majority (Pro-Freedom): Gonthier, Iacobucci, **Bastarache**, Binnie, Arbour, LeBel, Deschamps  
Dissent: not applicable

In upholding the freedom of employers to dismiss employees who are not available for work because they are in prison, the Court notes that a distinction must be drawn between the civil consequences of a sentence that has been lawfully imposed on an offender, and the stigmatization an offender may suffer because of a past criminal conviction.

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<sup>14</sup> *Vann Niagara Ltd. v. Oakville (Town)*, [2003] 3 S.C.R. 158 was excluded from this study. Although the case deals directly with freedom of expression under the *Charter* in relation to a municipal by-law limiting the size of billboards, the short judgment of the Court, delivered orally by Arbour J., was insufficient in scope to allow for a thorough review of the judicial reasoning behind the decision of the Court.

***Trociuk v. British Columbia (Attorney General)***, [2003] 1 S.C.R. 835 (Pro-Freedom)

The Court held, 7-0, that the British Columbia *Vital Statistics Act* infringed the equality rights of fathers by providing mothers with absolute discretion to “unacknowledge” biological fathers on birth registration forms, and not include the surname of the father in a child’s surname.

Majority (Pro-Freedom): McLachlin, Gonthier, Iacobucci, Major, **Bastarache**, Binnie, Arbour

Dissent: not applicable

The Court notes that this section of the *Vital Statistics Act* constitutes discrimination on the basis of sex because it explicitly makes a distinction on the enumerated ground of sex under s. 15 of the *Charter*.

***Miglin v. Miglin***, [2003] 1 S.C.R. 303 (Pro-Freedom)

This case concerns the proper approach to determining an application for spousal support under the *Divorce Act*, where the spouses have executed a final agreement that addresses all matters respecting their separation, including a release of any future claim for spousal support. In upholding the final separation agreement, the majority defends freedom of contract by stating that striking down the agreement “...would seriously undermine the significant policy goal of negotiated settlement and would undermine the parties’ autonomy and freedom to structure their post-divorce lives in a manner that reflects their own objectives and concerns.”

Majority (Pro-Freedom): McLachlin, Gonthier, Iacobucci, Major, **Bastarache**, Binnie, Arbour

Dissent (Anti-Freedom): LeBel, Deschamps

The dissent rejects the freedom of individuals to structure their own affairs upon marital breakdown, thereby imposing legislative solutions. According to the dissent, “Excessive deference to separation agreements because they are presumed to represent the objective expression of the parties’ free will is an undesirable policy.”

**2004**

***Pacific National Investments Ltd. v. Victoria (City)***, [2004] 3 S.C.R. 575 (Pro-Freedom)

The Court held, 7-0, that the municipality of Victoria had no right to retain the benefit of the extra works and improvements furnished by the land developer

Pacific National Investments Ltd. without paying for them. The City of Victoria had agreed to re-zone 22 acres from the existing industrial designation to permit residential and commercial uses, on condition that the developer build roads, parkland, walkways and a new seawall, at a total cost exceeding \$1 million. However, when the developer applied for building permits to develop its two water lots, the City Council violated the contract by down-zoning these lots to permit only one-storey commercial buildings, thereby eliminating the two stories of residential condominiums.

Majority (Pro-Freedom): McLachlin, Major, **Bastarache**, Binnie, LeBel, Deschamps, Fish

Dissent: not applicable

The Court had rejected the breach of contract claim brought by the developer in a prior decision: *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 980. In 2000, the Court held that, under the provincial law governing municipalities, the City of Victoria lacked the statutory authority to make and be bound by an implied term to keep the zoning in place for a reasonable time to allow for completion of the project. However, in this 2004 decision, the Court decided that the City of Victoria had no right to retain the benefit of the extra works and improvements carried out by the developer without paying for them.

***Anderson v. Amoco Canada Oil and Gas***, [2004] 3 S.C.R. 3 (Pro-Freedom)

The Court upheld, 5-0, a contract for the sale of land, entered into almost one-hundred years ago. The contract divided the ownership interest in oil and gas on the basis of the phase the hydrocarbon was in under initial conditions at the time the contract for the sale of land was entered into.

Majority (Pro-Freedom): McLachlin, Major, **Bastarache**, Binnie, Deschamps

Dissent: not applicable

According to the Court, the parties chose to divide their interest by contract. "It is not open to a party to argue later that division was meaningless on the basis that no rights can attach until the substance is reduced to possession. When the substance, which was not in their possession at the time of the contract, is reduced to possession the date and terms of the contract govern their relative entitlement." In other words, the Court is saying that the terms of the historical contract govern entitlement to sub-surface petroleum rights that come into possession at some point in the future.

***Hodge v. Canada (Minister of Human Resources Development)***, [2004] 3 S.C.R. 357 (Pro-Freedom)

The Court held, 7-0, that former spouses, whether married or common law, do not qualify for a survivor's pension under the *Canada Pension Plan*, according to the clear wording of this legislation. Since former married spouses and former common law spouses are treated the same, there is no distinction on marital status and therefore no discrimination under section 15 of the *Charter*.

Majority (Pro-Freedom): McLachlin, Major, **Bastarache**, Binnie, LeBel, Deschamps, Fish (Iacobucci and Arbour took no part in this judgment)

Dissent: not applicable

The Court rejected the arguments that "economic dependency" continues to exist after the end of a common law relationship. This ruling's result is that the responsibility of common law spouses will not extend beyond the end of a common law relationship.

***Hartshorne v. Hartshorne***, [2004] 1 S.C.R. 550 (Pro-Freedom)

In a 6-3 decision, the majority upheld as fair a marriage agreement voluntarily entered into by two individuals. The agreement rendered the parties separate as to property, but with a provision that the wife would be entitled to a three percent interest in the matrimonial home for each year that the parties were married up to a maximum of forty-nine percent. Despite the fact that independent legal advice had been obtained by the wife, in addition to a right to spousal support included in the agreement, the dissent agreed with the trial judge opinion that the agreement was unfair, and that reapportionment was necessary.

Majority (Pro-Freedom): McLachlin, Iacobucci, Major, **Bastarache**, Arbour, Fish

Dissent (Anti-Freedom): Binnie, LeBel, Deschamps

The majority respected the right and the choice of spouses to substitute a consensual regime for the statutory regime that would otherwise be imposed on them. According to the majority, "...in a framework within which private parties are permitted to take personal responsibility for their financial well-being upon the dissolution of marriage, courts should be reluctant to second-guess their initiative and arrangement, particularly where independent legal advice has been obtained. They should not conclude that unfairness is proven simply by demonstrating that the marriage agreement deviates from the statutory matrimonial property regime."

***Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657 (Pro-Freedom)**

The Court upheld as valid, in a 7-0 decision, the provisions of the *Canada Health Act* and the relevant British Columbia legislation, which allow legislators to decide on funding for “ABA/IBI” autism therapy to autistic children. The Court rules that providing funding for non-core services to some groups but not to others is not discriminatory, in and of itself. The statutory scheme is by its very nature a partial health plan, not designed to meet all medical needs. As such, the exclusion of particular non-core services such as a specific autism therapy cannot be seen as Section 351 of the *Canada Elections Act* prevents a “third party” from circumventing (or attempting to circumvent) the restrictions in any manner, including by splitting itself into two or more entities or acting in collusion with another third party. The majority decided that this provision does not infringe s. 2(b) freedom of expression under the Charter. The minority felt that s. 351 was so connected to the spending limits in s. 350 that both sections are unconstitutional.

Majority (Pro-Freedom): McLachlin, Major, **Bastarache**, Binnie, LeBel, Deschamps, Fish

Dissent: not applicable

The Court upheld the principle that “...the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner.”

***Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827 (Anti-Freedom)**

In a 6-3 ruling, the Court upheld restrictions on communications by citizens (described as “third parties” under the law) during an election campaign. At issue were several new sections of the *Canada Elections Act*. Section 350 limits “third party” or citizen election advertising expenses to \$3,000 in a given electoral riding and \$150,000 nationally. Section 351 prohibits individuals or groups from splitting or colluding for the purposes of circumventing these spending limits. Sections 352 to 357, 359, 360 and 362 require a citizen to identify itself in all of its election advertising, to appoint financial agents and auditors, and to register with the Chief Electoral Officer. The Justices held that these restrictions do not violate the *Charter’s* section 2(d) right to freedom of association and the *Charter’s* section 3 right to vote.

All nine Justices agreed that restrictions on citizens (except one particular restriction<sup>15</sup>) infringe the right to freedom of expression under section 2(b) of the

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<sup>15</sup> Section 351 of the *Canada Elections Act* prevents a “third party” from circumventing (or attempting to circumvent) the restrictions in any manner, including by splitting itself into two or

*Charter*. The majority justified the infringement of freedom of expression as reasonable, ignoring the absence of evidence to support a connection between limits on citizen spending and “electoral fairness.” The majority stated that, “Perception is of utmost importance in preserving and promoting the electoral regime in Canada.”

Majority (Anti-Freedom): Iacobucci, **Bastarache**, Arbour, LeBel, Deschamps, Fish

Dissent (Pro-Freedom in part): McLachlin, Major, Binnie (Dissenting in Part)

The minority appreciates the importance of what is at stake in this case, namely the very foundation upon which democracy rests: the right of citizens to freely and effectively communicate their views on issues during an election campaign, using their own resources to do so. According to the minority, “The denial of effective communication to citizens violates free expression where it warrants the greatest protection—the sphere of political discourse. Section 350 puts effective radio and television communication beyond the reach of ‘third party’ citizens...Effective expression of ideas thus becomes the exclusive right of registered political parties and their candidates.”

The dissent is less supportive of freedom of expression rights on polling day, finding that the polling day blackout in section 323 of the *Canada Elections Act* infringes s. 2 (b) of the *Charter*, but is justified under s. 1 as a reasonable measure in a free and democratic society.<sup>16</sup>

***Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)***, 1 S.C.R. 76 (Pro-Freedom)<sup>17</sup>

The Court held, 6-3, that section 43 of the Criminal Code, which excludes reasonable physical correction of children by their parents and teachers from the assault provisions of the Code, does not offend the *Charter’s* section 7 right to “security of the person” or discriminate contrary to the *Charter’s* section 15 equality rights.

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more entities or acting in collusion with another third party. The majority decided that this provision does not infringe s. 2(b) freedom of expression under the Charter. The minority felt that s. 351 was so connected to the spending limits in s. 350 that both sections are unconstitutional.

<sup>16</sup> This portion of the decision by the dissent is excluded from the study for the purposes of analytical simplicity.

<sup>17</sup> The analysis of this case examines the judicial decision with respect to the family and not the teaching profession. This decision was made for reasons of analytical simplicity because Justice Binnie dissents in part, reaching two separate conclusions with respect to the family and the teaching profession.

The majority held that the intrusion of the Criminal Code into family life should be limited. According to the majority, “The decision not to criminalize such conduct is not grounded in devaluation of the child, but in a concern that to do so risk ruining lives and breaking up families—a burden that in large part would be borne by children and outweigh any benefit derived from applying the criminal process.”

Majority (Pro-Freedom): McLachlin, Gonthier, Iacobucci, Major, **Bastarache**, LeBel, Binnie (dissenting in part)<sup>18</sup>

Dissent: (Anti-Freedom): Arbour and Deschamps

The minority would recognize children as de facto adults. This view would give the state power over, and into, family life because any assertion of “children’s rights” will, in practice, have to be asserted by the state or its agents rather than by parents, because children are incapable of asserting rights on their own.

The majority notes that children depend on parents for guidance and discipline, to protect them from harm and to promote their development within society. The majority respects the autonomy of the family unit and the need to protect families from state interference. The majority recognizes that s. 43 of the Code provides parents with the ability to carry out the reasonable education and correction of children without the threat of sanction by the criminal law.

## 2005

***Chaoulli v. Quebec (Attorney General)***, [2005] 1 S.C.R. 791 (Pro-Freedom)

In a 4-3 decision, the Court struck down Quebec’s ban on private health care insurance for medically necessary health services. On the basis of the Quebec *Charter of Human Rights and Freedoms*, the majority held that a total ban on private health insurance is not necessary to preserve a good public health system. However, the Court split evenly (3-3 with one abstainer, Deschamps) on whether the ban violated the *Canadian Charter of Rights and Freedoms*.

Majority (Pro-Freedom): McLachlin, Major, **Bastarache**, Deschamps<sup>19</sup>

Dissent (Anti-Freedom): Binnie, LeBel, Fish

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<sup>18</sup> Justice Binnie is included with the “pro-freedom” judges because of the conclusion he reaches. In his section 15 *Charter* analysis, he argues that the equality rights of children are violated by denying children the protection of the criminal law against the infliction of physical force. However, in his section 1 *Charter* analysis he argues that the infringement of children’s equality rights is justified because the legislative objective of limiting the intrusion of the Criminal Code into family life is pressing and substantial.

<sup>19</sup> Justice Deschamps decided this case under Quebec legislation, remaining silent on whether a prohibition on private health insurance violates the Charter’s section 7 right to “life, liberty and security of the person.” Nevertheless, her reasoning and analysis are pro-freedom like that of McLachlin, Major and Bastarache, by affirming the individual’s right to preserve his or her own health.

Chief Justice McLachlin and Justices Major and Bastarache concluded that the prohibition on private insurance contained in section 15 of the *Quebec Health Insurance Act* and section 11 of the *Hospital Insurance Act* violated the *Charter's* section 7 right to “life, liberty and security of the person,” and that this violation was not in accordance with the principles of fundamental justice. They further concluded that this infringement of section 7 could not be justified in a free and democratic society. In addition, the justices endorsed the conclusion of Justice Deschamps, who found that the prohibition against contracting for private health insurance was an unjustifiable violation of the Quebec *Charter* (the right to “life, liberty and personal inviolability”). As such, the majority ruling is pro-freedom because it affirms the individual’s right to use his or her own resources to access essential medical services outside of the government’s health care monopoly and waiting lists.

The dissent agreed with the majority that in some instances people might have their section 7 *Charter* rights to life or security of the person put at risk by the prohibition against private health insurance. But the dissent argued that this deprivation of life and of security of the person does not violate any principle of fundamental justice. They held that Quebec’s law was not arbitrary because the total ban on private health insurance was a rational and necessary means to preserving a public health system based on need rather than ability to pay.<sup>20</sup>

## 2006

***Multani v. Commission scolaire Marguerite-Bourgeoys***, [2006] 1 S.C.R. 256 (Pro-Freedom)

In an 8-0 decision, the Court struck down the prohibition against wearing a kirpan (a religious object that is a small dagger) to school. Different Justices used different analyses to arrive at their decisions: a constitutional analysis and an administrative analysis. Five Justices held that a total prohibition is an unjustifiable violation of religion under section 2(a) of the *Charter* (constitutional law analysis). Two Justices held that the school board’s council of commissioners made an unreasonable decision by disregarding the right to freedom of religion without considering the possibility of a solution that posed little or no risk to the safety of the school environment (administrative law analysis).

Majority (Pro-Freedom): McLachlin, **Bastarache**, Binnie, Fish, Deschamps, (Abella), (Charron), (Major took no part in this judgment)

Dissent: not applicable

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<sup>20</sup> The Canadian Constitution Foundation is supporting a constitutional challenge to Ontario’s health care laws, launched in 2007 by Lindsay McCreith and Shona Holmes. The Ontario laws challenged in this court action are similar to the Quebec law struck down by the Supreme Court of Canada in *Chaoulli*.

The constitutional analysis notes that a total prohibition against wearing a kirpan to school undermines the value of this particular religious symbol and sent students the message that some religious practices do not merit the same protection as others. Accommodating the plaintiff in this case by allowing him to wear his kirpan under certain conditions, is a pro-freedom interpretation of the Charter's section 2(a) freedom of religion and conscience.

## 2007

***Kingstreet Investments Ltd. v. New Brunswick (Finance)***, [2007] 1 S.C.R. 3, 2007 SCC 1 (Pro-Freedom)

In a unanimous decision, the Court held that the Government of New Brunswick must repay illegal taxes which it had collected in violation of Canada's Constitution. For nearly twenty years, pub owners were required to pay an additional 'user' charge on top of the retail price when purchasing alcohol from provincial liquor stores. Taxpayers challenged the constitutionality of this "user fee" as an indirect tax, which no province may collect.

Majority (Pro-Freedom): McLachlin C.J., **Bastarache**, Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein JJ.

Dissent: Not Applicable

The Court rejected the government's argument that it should be entitled to retain *ultra vires* tax in order to prevent "fiscal chaos." In a victory for citizens' political and economic liberty interests, the Court held the government accountable to the constitutional principles of "no taxation without representation," federalism, democratic accountability, and the rule of law.

***R. v. Bryan***, [2007] 1 S.C.R. 527, 2007 SCC 12 (Anti-Freedom)

In a 5-4 ruling, the Court upheld a *Canada Elections Act* provision that restricts the publication of election results on election night while polls are still open in parts of the country. While the majority found that the law did infringe Mr. Bryan's freedom of expression rights, they held that the infringement was justified under section 1 of the Charter.

Majority (Anti-Freedom): **Bastarache**, Deschamps, Fish, Charron, Rothstein JJ.

Dissent (Pro-Freedom): McLachlin C.J., Binnie, LeBel, Abella JJ.

Writing for the majority, Justice Bastarache ruled that the harmful effects of limiting free speech were outweighed by the beneficial results of having a fair election based on equal access to information. The dissent challenged the view that publishing polling results during an election would have a harmful effect,

stating that there was no evidence to support such a claim. Pointing out that Canadians have a right to know who their elected representatives are in a timely manner, the dissent stated that the impugned section does not minimally impair freedom of expression rights and should be declared void.<sup>21</sup>

***Canada (Attorney General) v. JTI-Macdonald Corp.***, 2007 SCC 30 (Anti-Freedom)

In a unanimous decision, the Court upheld as constitutional the *Tobacco Act* and the *Tobacco Products Information Regulations* that placed severe restrictions on tobacco companies' advertising. The legislation prohibited lifestyle advertising aimed at young persons, expanded the size of health warning labels from 33 percent to 50 percent, and placed a ban on sponsorship promotion. The tobacco companies challenged the constitutionality of the legislation, stating that their freedom of expression rights had been infringed.

Majority (Anti-Freedom): McLachlin C.J., **Bastarache**, Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein JJ.

Dissent: Not Applicable

While recognizing that freedom of expression rights had been infringed in this case, the Court held that the "expression at stake...is of low value" and banning the "half-truths" that are conveyed through tobacco advertisements is of great benefit in saving "millions of people who could be affected."

The ban on lifestyle advertising, health warnings and sponsorship promotion was upheld as constitutional because the Court saw the intent to wean people off of cigarettes as more beneficial to society than tobacco companies' ability to possess freedom of expression rights.

***Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia***, 2007 SCC 27 (Anti-Freedom)

The Court struck down sections of the *Health and Social Services Delivery Improvement Act* that invalidated provisions of existing collective agreements and prohibited collective bargaining in a variety of areas. The Court granted constitutional status to collective bargaining rights, and interpreted section 2(d) of the *Charter* as imposing a positive obligation on governments to bargain collectively.

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<sup>21</sup> This case dealt primarily with the release of election results in Atlantic Canada. The Dissent argued that the results in "32 districts" would not likely influence the opinions of Canadians. Further, the Dissent cited that this publication ban was irrelevant with the spread of the Internet.

Majority (Anti-Freedom): McLachlin C.J., **Bastarache**, Binnie, LeBel, Fish, Abella JJ.

Dissent (Anti-Freedom): Deschamps agreed with the majority, and only dissented in part.

The majority held that key provisions in the *Act* that restricted collective bargaining in areas dealing with contracting out, layoffs, and “bumping”, unduly infringed the appellant’s constitutional right to associate, and could not be justified under section 1 of the *Charter*.<sup>22</sup> The dissent agreed that the *Act* violated freedom of association rights, but held that some of the impugned sections could be saved by section 1 of the *Charter*.

The Court overturned the “labour trilogy”<sup>23</sup> in which it had ruled that the *Charter* does not provide a constitutional right to public employees to bargain collectively with governments. Both the majority and the dissent neglected the conception of fundamental freedoms as “negative freedoms,” the exercise of which imposes no obligations on other people.

### ***Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38 (Anti-Freedom)**

In a unanimous decision, the Court ruled that a family could not attempt to seek damages from social workers and a treatment centre for having taken away their child, thereby “depriving the family of a relationship with her”. In 1995, the Children’s Aid Society removed a 14-year-old girl from her parents, based on a story she had written at school about being sexually and physically abused.

After being placed in a foster home, the child was transferred to a treatment facility, and was later made a permanent ward of the Crown. The family of the child sued for damages, claiming that her detention in the treatment centre (away from the family) implied that “her parents had physically and sexually abused her,” and argued that this negligent conduct had caused “nervous shock, emotional distress and physical and mental illness.”

Majority (Anti-Freedom): McLachlin C.J., **Bastarache**, Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein JJ.

Dissent: Not Applicable

The Court reasoned that a social worker's duty of care towards children in need of protection necessarily eliminates any concern for, or consideration of, the

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<sup>22</sup> While the Court declared that the *Act* violated section 2(d) [freedom of association] of the *Charter*, it stated that section 15 [equality rights] had not been violated as the *Act* differentiated among people on the basis of vocation and not personal characteristics.

<sup>23</sup> *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, *PSAC v. Canada*, [1987] 1 S.C.R. 424, and *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460.

interests of the family unit. Assuming an adversarial relationship between parents and children, the Court ruled that the interests of the parents and of the child only align "occasionally." The Court assumed that "the child's best interest" should be defined exclusively by social workers and other agents of the government, not by parents.

While no reasonable person disputes the premise that social workers should be able to remove children from abusive parents, this decision serves to provide a blanket pre-approval of all child apprehensions, by denying parents the right to sue in the event of wrongful child apprehensions.

### ***Bruker v. Marcovitz*, 2007 SCC 54 (Pro-Freedom)**

After a married couple acquired a civil divorce in 1980, the husband agreed to grant his wife a Jewish religious divorce, or *get*<sup>24</sup>. However, after 15 years of repeated requests from the wife to grant the *get*, she took him to court for breach. In a 7-2 decision, the Court imposed damages for his breach.

Majority (Pro-Freedom): McLachlin C.J., **Bastarache**, Binnie, LeBel, Fish, Abella, Rothstein JJ.

Dissent (Anti-Freedom): Deschamps, Charron JJ.

The Majority found that any breach of the husband's religious rights was outweighed by the deleterious effects imposed on his wife, who was forced to remain married to her husband (in the eyes of their faith) against her will. The Court ruled that a person may not use religious faith to opt out of civil contracts entered into voluntarily by consenting adults.

## **Analysis**

### **Bastarache's Overall Record on Freedom**

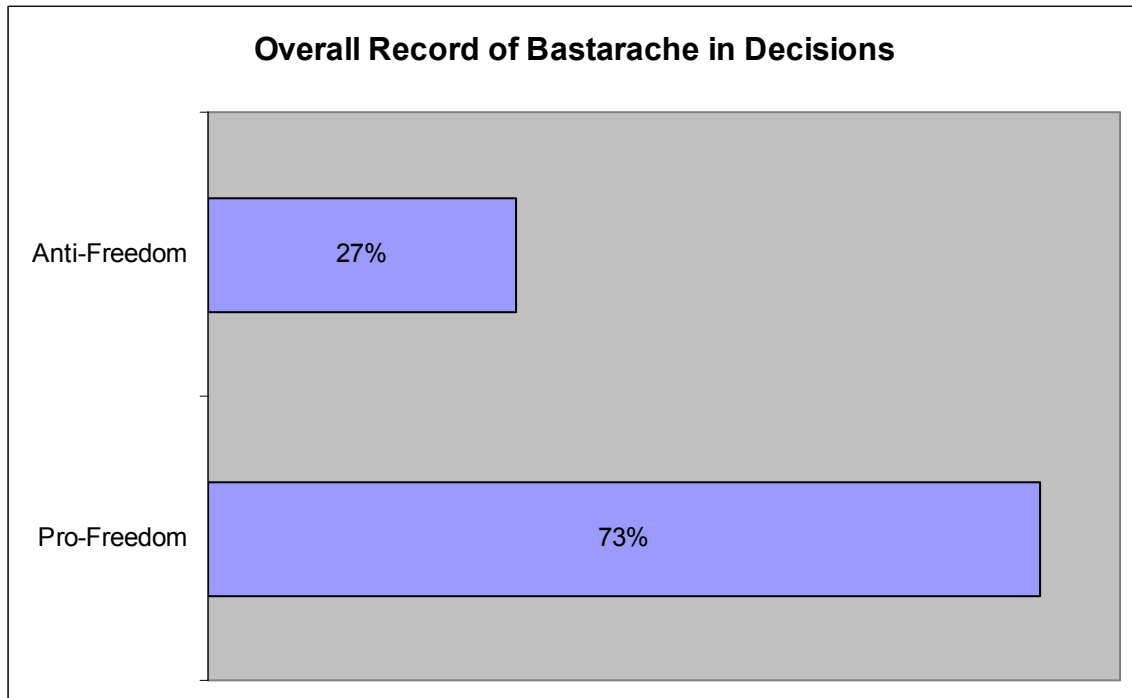
Examining the 37 cases in this study, we find that Justice Bastarache was part of pro-freedom<sup>25</sup> decisions 73 percent of the time (27 out of 37 cases) and anti-

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<sup>24</sup> Only a husband may grant a *get* to his wife, and if he refuses to do so, the divorce is not recognized under Jewish law and the wife is prohibited from remarrying.

<sup>25</sup> A "pro-freedom" decision is one in which Justice Bastarache is supportive of one or more of the following: individual freedom, economic freedom, or equality before the law (equality of opportunity for individuals). A Justice who makes a pro-freedom decision 70 percent of the time or more is considered to be a stronger supporter of individual and economic freedom and/or equality before the law, whereas a Justice scoring below that percentage is considered to be a weaker supporter of individual and economic freedom and/or equality before the law.

freedom decisions 27 percent of the time (9 out of 37 cases).<sup>26</sup> Thus, Justice Bastarache is a stronger supporter of individual and economic freedom and/or equality before the law.



### Bastarache’s Overall Record on Freedom in Non-Unanimous Decisions

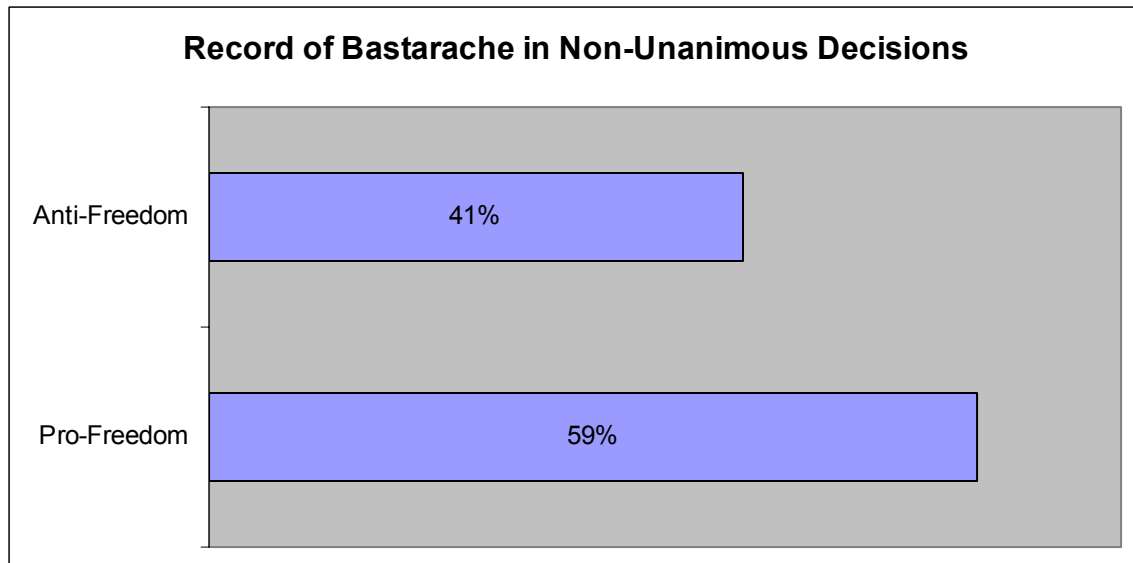
Bastarache’s record in defending freedom in non-unanimous decisions<sup>27</sup> is another way of examining his record. It is probably a better indicator than his overall record (noted above), because cases with non-unanimous decisions

<sup>26</sup> For the purposes of the analysis, *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, is counted twice, with the section 7 analysis counting as one case and the section 15 analysis counting as another case. As such, the total number of “cases” included for analysis in this study is 37, in respect of 36 Supreme Court rulings. This was done because Justice Bastarache for example, reached an anti-freedom decision with respect to his section 15 analysis, but reached a pro-freedom decision with respect to his section 7 analysis of the *Charter*.

<sup>27</sup> These decisions include: *Thomson Newspapers Co. v. Canada (Attorney General)*, *Canadian Egg Marketing Agency v. Richardson*, *Delisle v. Canada (Deputy Attorney General)*, 65302 *British Columbia Ltd. v. Canada*, *Harper v. Canada (Attorney General)* (2000), *Pacific National Investments Ltd. v. Victoria (City)* (2000), *Dunmore v. Ontario (Attorney General)*, *Trinity Western University v. British Columbia College of Teachers*, *Gosselin v. Quebec (Attorney General)* (s. 7 and s. 15), *Miglin v. Miglin*, *Hartshorne v. Hartshorne*, *Harper v. Canada (Attorney General)* (2004), *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, *Chaoulli v. Quebec (Attorney General)*, *R. v. Bryan*, *Bruker v. Marcovitz*. It should be noted that *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia* was not included as a non-unanimous decision because despite the fact that there was a dissent, Justice Deschamps agreed with the majority, and only dissented in part.

usually involve more contentious issues and are more likely to expose differences of opinion amongst the nine Justices.

Examining the 17 non-unanimous decisions included in this study, we find the Justice Bastarache was a part of pro-freedom decisions only 59 percent of the time (10 out of 17 cases) and anti-freedom decisions 41 percent of the time (7 out of 17 cases). Thus, Justice Bastarache was a weaker supporter of individual and economic freedom and/or equality before the law in non-unanimous decisions.



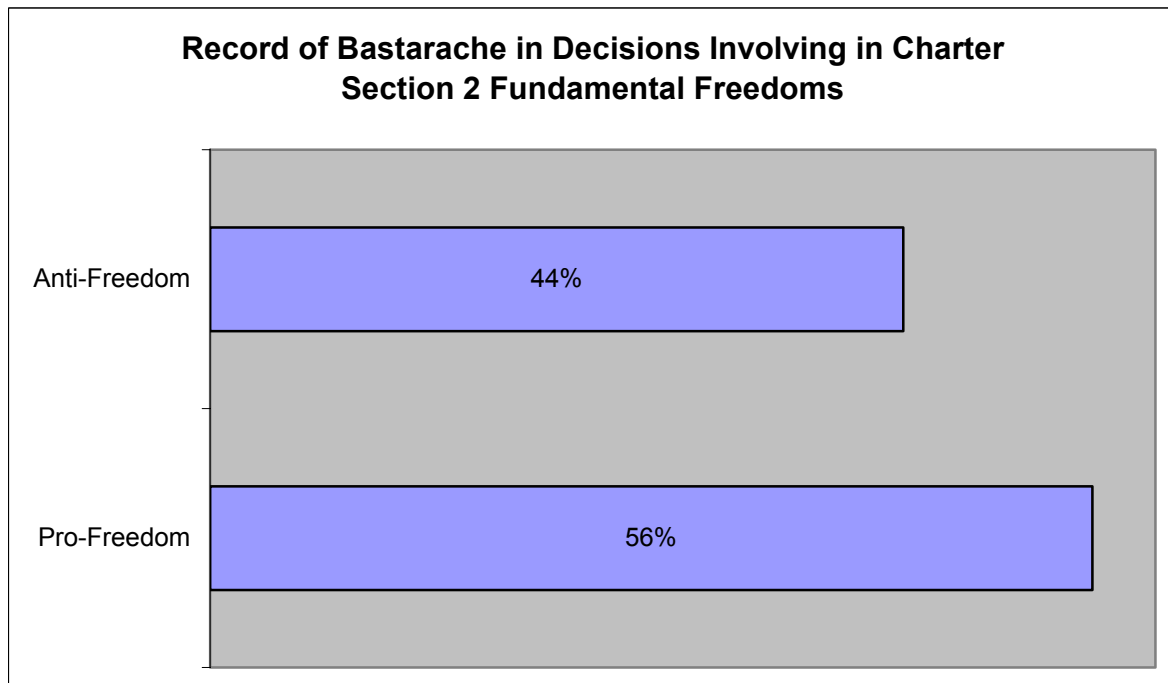
### **Bastarache's Record in Decisions Involving Fundamental Freedoms**

In decisions involving the fundamental individual freedoms<sup>28</sup> under section 2 of the *Charter*,<sup>29</sup> Justice Bastarache was a part of pro-freedom decisions only 56 percent of the time (10 out of 18 cases) and anti-freedom decisions 44 percent of the time (8 out of 18 cases). Thus, with respect to cases involving fundamental

<sup>28</sup> These decisions include: *Thomson Newspapers Co. v. Canada (Attorney General)*, *Canadian Egg Marketing Agency v. Richardson*, *Delisle v. Canada (Deputy Attorney General)*, *Harper v. Canada (Attorney General) (2000)*, *R. v. Mentuck*, *R. v. O.N.E.*, *Dunmore v. Ontario (Attorney General)*, *Trinity Western University v. British Columbia College of Teachers*, *Ruby v. Canada (Solicitor General)*, *R. v. Guignard*, *R.W.D.S.U.*, *Local 558 v. Pepsi-Cola Canada Beverage (West) Ltd.*, *Hartshorne v. Hartshorne*, *Harper v. Canada (Attorney General) (2004)*, *Multani v. Commission scolaire Marguerite-Bourgeois*, *R. v. Bryan*, *Canada (Attorney General) v. JTI-Macdonald Corp.*, *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*, *Syl Apps Secure Treatment Centre v. B.D.*

<sup>29</sup> These freedoms include: freedom of conscience and religion; freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; freedom of peaceful assembly; and freedom of association.

freedoms during his career on the Supreme Court of Canada, Justice Bastarache was a weaker supporter of fundamental individual freedoms.

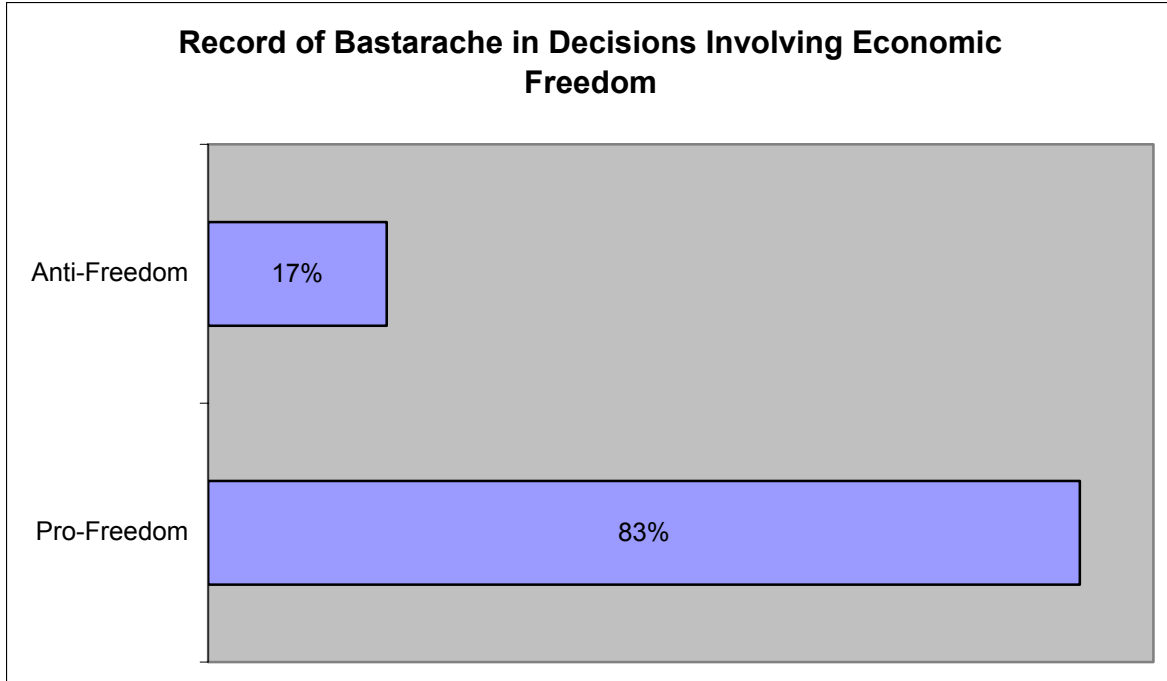


### **Bastarache's Record in Decisions Involving Economic Freedom**

With respect to the cases<sup>30</sup> studied that concerned economic freedom<sup>31</sup>, Justice Bastarache was a part of pro-freedom decisions 83 percent of the time (10 out of 12 cases) and anti-freedom decisions 17 percent of the time (2 out of 12 cases). Thus, with respect to cases involving economic freedom, during his career on the Supreme Court of Canada, Justice Bastarache was a strong supporter of economic freedom.

<sup>30</sup> These cases include: *Canadian Egg Marketing Agency v. Richardson*, *Wells v. Newfoundland*, *Westbank First Nation v. British Columbia Hydro and Power Authority*, *65302 British Columbia Ltd. v. Canada*, *Pacific National Investments Ltd. v. Victoria (City)*, *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Quebec Inc.*, *Miglin v. Miglin*, *Pacific National Investments Ltd. v. Victoria (City)*, *Anderson v. Amoco Canada Oil and Gas*, *Chaoulli v. Quebec (Attorney General)*, *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, *Bruker v. Marcovitz*.

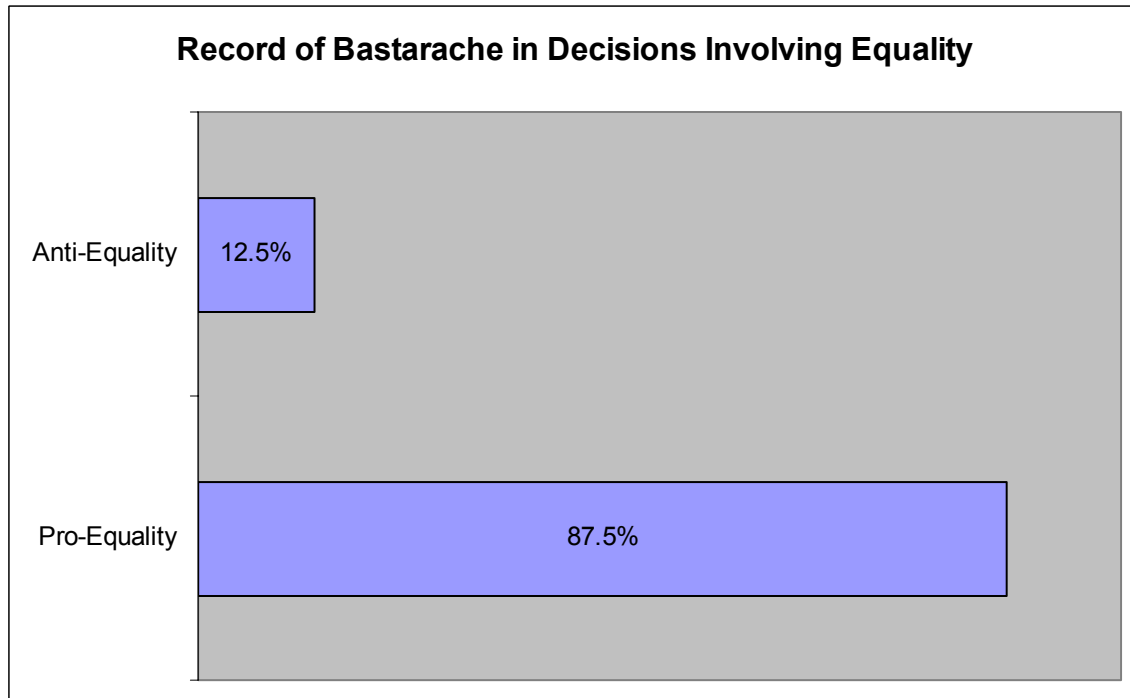
<sup>31</sup> As aforementioned, by economic freedom we mean the basic human right to earn, own and enjoy private property; freedom of contract; and such protections as due process (that the government does not take an individual's property without a fair trial or without just and timely compensation).



**Bastarache’s Record in Decisions Involving Equality**

In decisions involving issues of equality,<sup>32</sup> Justice Bastarache was a part of pro-equality decisions 87.5 percent of the time (7 out of 8 cases) and anti-equality decisions 12.5 percent of the time (1 out of 8 cases). Thus, with respect to cases involving equality, during his career on the Supreme Court of Canada, Justice Bastarache was a strong supporter of equality.

<sup>32</sup> These decisions are: *Law v. Canada (Minister of Employment and Immigration)*, *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, *Trinity Western University v. British Columbia College of Teachers*, *Gosselin v. Quebec (Attorney General)*, *Trociuk v. British Columbia (Attorney General)*, *Hodge v. Canada (Minister of Human Resources Development)*, *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*.



## Conclusion

The role of the Supreme Court of Canada is to fulfill its constitutional obligation of safeguarding individual and economic freedom and protecting individuals from excessive government power. Justice Bastarache fulfilled this obligation with respect to cases involving economic freedom (reaching pro-freedom decisions 77 percent of the time) and equality (reaching pro-freedom decisions 87.5 percent of the time), although he fell short with respect to cases involving fundamental freedoms (only reaching pro-freedom decisions 59 percent of the time).

The Justice who replaces Michel Bastarache will exert significant influence over public policy in Canada. A 2007 analysis of decisions of the Supreme Court of Canada by the Canadian Constitution Foundation entitled, *Judging the Judges: The Supreme Court of Canada's Record on Individual and Economic Freedom and Equality*, found that although the Supreme Court currently has more Justices that are stronger supporters of freedom than those who are weaker supporters of freedom, any future appointments of Justices who are weaker supporters of freedom could shift the composition of the Court towards one that is weaker in its support of freedom than that of the current Court.<sup>33</sup>

<sup>33</sup> This may be exacerbated if, in a future analysis, any or all of the excluded Justices in the 2007 study by the Canadian Constitution Foundation (Justices Rothstein, Charron, and Abella) turn out to be weaker supporters of freedom.

In selecting the next Supreme Court of Canada Justice, the Prime Minister and the all-party nominations committee<sup>34</sup> should consider carefully the value which a prospective candidate places on individual freedom, economic liberty, and equality before the law.

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<sup>34</sup> With respect to the process to replace Justice Bastarache, Justice Minister Rob Nicholson has announced that he will draw up a list of candidates in consultation with the four provincial attorney's general in the Atlantic region, and other "leading members of the legal community," in addition to the public through e-mail. Once Minister Nicholson has an initial list, he will give the names to a committee composed of five Members of Parliament, including two Conservatives and one each from the Liberals, Bloc Quebecois and NDP, which will narrow the candidates to a short list of three, with Prime Minister Harper making the final selection.

– **Appendix –**

**List of excluded cases by year**

**1998**

*R. v. Rose*, [1998] 3 S.C.R. 262

*R. v. Warsing*, [1998] 3 S.C.R. 579

*Consortium Developments (Clearwater) v. Sarnia (City)*, [1998] S.C.R. 3

*R. v. MacDougall*, [1998] 3 S.C.R. 45

*R. v. M.R.M.*, [1998] 3 S.C.R. 393

*Degelder Construction Co. v. Dancorp Developments Ltd.*, [1998] 3 S.C.R. 90

*Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112

*Ordon Estate v. Grail*, [1998] 3 S.C.R. 437

*R. v. Pearson*, [1998] 3 S.C.R. 620

*R. v. Arp*, [1998] 3 S.C.R. 339

*R. v. Gallant*, [1998] 3 S.C.R. 80

*R. v. Cook*, [1998] 2 S.C.R. 597

*R. v. Cuerrier*, [1998] 2 S.C.R. 371

*Eurig Estate (Re)*, [1998] 2 S.C.R. 565

*Gauthier v. Beaumaont*, [1998] 2 S.C.R. 3

*Elie Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129

*R. v. White*, [1998] 2 S.C.R. 72

*Merck Frosst Canada Inc. v. Canada (Minister of National Health and Welfare)*,  
[1998] 2 S.C.R. 193

*R. v. Menard*, [1998] 2 S.C.R. 109

*Continental Bank Leasing Corporation v. Canada*, [1998] 2 S.C.R. 298

*R. v. Hodgson*, [1998] 2 S.C.R. 449

*Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626

*Schreiber v. Canada (Attorney General)* [1998] 1 S.C.R. 841

*R. v. Williams*, [1998] 1 S.C.R. 1128

*R. v. Caslake*, [1998] 1 S.C.R. 51

*R. v. Charemski*, [1998] 1 S.C.R. 679

*Reference re Secession of Quebec*, [1998] 1 S.C.R. 217

*Vriend v. Alberta*, [1998] 1 S.C.R. 493

*Neuman v. M.N.R.*, [1998] 1 S.C.R. 770

*R. v. Al Klippert Ltd.*, [1998] 1 S.C.R. 737

*Union of New Brunswick Indians v. New Brunswick (Minister of Finance)*, [1998] 1 S.C.R. 1161

*R. v. Puskas*, [1998] 1 S.C.R. 1207

*Canderel Ltd. v. Canada*, [1998] 1 S.C.R. 147

*Hall v. Quebec (Deputy Minister of Revenue)*, [1998] 1 S.C.R. 220

*Toronto College Park Limited v. Canada*, [1998] 1 S.C.R. 183

*R. v. Bisson*, [1998] 1 S.C.R. 306

*Duha Printers (Western) Ltd. v. Canada*, [1998] 1 S.C.R. 795

*Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079

*Battlefords and Distric Co-operatives Ltd. v. RWDSU, Local 544*, [1998] 1 S.C.R. 1118

*Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982

*Ikea Ltd. v. Canada*, [1998] 1 S.C.R. 196

## **1999**

*Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108

*Francis v. Baker*, [1999] 3 S.C.R. 250

*Perron-Malenfant v. Malenfant (Trustee of)*, [1999] 3 S.C.R. 375

*Poulin v. Serge Morency et Associes Inc.* [1999] 3 S.C.R. 351

*Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423

*R. v. F(W.J.)*, [1999] 3 S.C.R. 569

*Winters v. Legal Services Society*, [1999] 3 S.C.R. 160

*R. v. Liew*, [1999] 3 S.C.R. 227

*R. v. Mills*, [1999] 3 S.C.R. 668

*Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622

*65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804

*British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868

*Royal Bank of Canada v. W.Got Associates Electric Ltd.*, [1999] 3 S.C.R. 408

*Hickey v. Hickey*, [1999] 2 S.C.R. 518

*Bazley v. Curry*, [1999] 2 S.C.R. 543

*Jacobi v. Griffiths*, [1999] 2 S.C.R. 570

*Best v. Best*, [1999] 2 S.C.R. 868

*Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625

*Orlowski v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 733

*Bese v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 722

*R. v. LePage*, [1999] 2 S.C.R. 744

*Allsco Building Products Ltd. v. U.F.C.W., Local 1288P*, [1999] 2 S.C.R. 1136

*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817

*Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 S.C.R. 753

*R. v. Stone*, [1999] 2 S.C.R. 290

*R. v. G. (B.) [B.G.]*, [1999] 2 S.C.R. 475

*M. v. H.*, [1999] 2 S.C.R. 3

*U.F.C.W., Local 1518 v. Kmart Canada*, [1999] 2 S.C.R. 1083

*Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142

*Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201

*R. v. Godoy*, [1999] 1 S.C.R. 311

*Sail Labrador Ltd. v. Challenge One (The)*, [1999] 1 S.C.R. 265

*R. v. Ewanchuck*, [1999] 1 S.C.R. 330

*Smith v. Jones*, [1999] 1 S.C.R. 455

*R. v. Campbell*, [1999] 1 S.C.R. 565

*M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619

*R. v. White*, [1999] 2 S.C.R. 417

*Vancouver Society of Immigrant and Visible Minority Women v. Canada (Minister of National Revenue – M.N.R.)*, [1999] 1 S.C.R. 10

*R. v. Sundown*, [1999] 1 S.C.R. 393

*R. v. Gladue*, [1999] 1 S.C.R. 668

*R. v. Monney*, [1999] 1 S.C.R. 652

*R. v. Beaulac*, [1999] 1 S.C.R. 768

*Chartier v. Chartier*, [1999] 1 S.C.R. 242

*Bracklow v. Bracklow*, [1999] 1 S.C.R. 420

**2000**

*R. v. Mentuck*, [2001] 3 S.C.R. 442

*R. v. O.N.E.*, [2001] 3 S.C.R. 478

*Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764

*Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772

*Free World Trust v. Électro Santé Inc.*, [2000] 2 S.C.R. 1024

*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120

*Whirlpool Corp. v. Camco Inc.*, [2000] 2 S.C.R. 1067

*Whirlpool Corp. v. Maytag Corp.*, [2000] 2 S.C.R. 1116

*R. v. Araujo*, [2000] 2 S.C.R. 992

*Syndicat de l'enseignement du Grand-Portage v. Morency*, [2000] 2 S.C.R. 913

*R. v. Simard*, [2000] 2 S.C.R. 911

*Martel building Ltd. v. Canada*, [2000] 2 S.C.R. 860

*R. v. Knoblauch*, [2000] 2 S.C.R. 780

*R. v. Avetysan*, [2000] 2 S.C.R. 745

*R. v. Beauchamp*, [2000] 2 S.C.R. 720

*R. v. Charlebois*, [2000] 2 S.C.R. 674

*R. v. Russell*, [2000] 2 S.C.R. 731

*Musqueam Indian Band v. Glass*, [2000] 2 S.C.R. 633

*R. v. J.-L.J.*, [2000] 2 S.C.R. 600

*R. v. Sutton*, [2000] 2 S.C.R. 595

*R. v. N.M.P.*, [2000] 2 S.C.R. 857

*R. v. M.O.*, [2000] 2 S.C.R. 594

*R. v. Darrach*, [2000] 2 S.C.R. 443

*R. v. Lévesque*, [2000] 2 S.C.R. 487

*Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, [2000] 2 S.C.R. 409

*Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307

*R. v. D.D.*, [2000] 2 S.C.R. 275

*R. v. Caouette*, [2000] 2 S.C.R. 271

*R. v. Hamelin*, [2000] 2 S.C.R. 273

*R. v. Morrissey*, [2000] 2 S.C.R. 90

*R. v. Oickle*, [2000] 2 S.C.R. 3

*R. v. Starr*, [2000] 2 S.C.R. 144

*F.N. (Re)*, [2000] 1 S.C.R. 880

*Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842

*Lovelace v. Ontario*, [2000] 1 S.C.R. 950

*Will-Kare Paving & Contracting Ltd. v. Canada*, [2000] 1 S.C.R. 915

*R. v. Khan*, [2000] 2 S.C.R. 915

*R. v. Cacheway*, [2000] 1 S.C.R. 838

*Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783

*Reference re Gruenke*, [2000] 1 S.C.R. 836

*R. v. A.R.B.*, [2000] 1 S.C.R. 781

*Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703

*R. v. Jolivet*, [2000] 1 S.C.R. 751

*Laflamme v. Prudential-Bache Commodities Canada Ltd.*, [2000] 1 S.C.R. 638

*Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551

*Sansalone v. Wawanesa Mutual Insurance Co.*, [2000] 1 S.C.R. 627

*Ajax (Town) v. CAW, Local 222*, [2000] 1 S.C.R. 538

*R. v. G.D.B.*, [2000] 1 S.C.R. 520

*Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494

*R. v. A.G.*, [2000] 1 S.C.R. 439

*R. v. Arrance*, [2000] 1 S.C.R. 488

*R. v. Arthurs*, [2000] 1 S.C.R. 481

*R. v. Biniaris*, [2000] 1 S.C.R. 381

*R. v. Molodowic*, [2000] 1 S.C.R. 420

*R. v. Wust*, [2000] 1 S.C.R. 455

*Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298

*Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342

*Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360

*R. v. Brooks*, [2000] 1 S.C.R. 237

*R. v. Wells*, [2000] 1 S.C.R. 207

*R. v. Bunn*, [2000] 1 S.C.R. 183

*R. v. L.F.W.*, [2000] 1 S.C.R. 13

*R. v. Proulx*, [2000] 1 S.C.R. 61

*R. v. R.A.R.*, [2000] 1 S.C.R. 163

*R. v. R.N.S.*, [2000] 1 S.C.R. 149

*Kovach v. British Columbia (Workers' Compensation Board)*, [2000] 1 S.C.R. 55

*Lindsay v. Saskatchewan (Workers' Compensation Board)*, [2000] 1 S.C.R. 59

*Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, [2000] 1 S.C.R. 44

*Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3

## **2001**

*Antwerp Bulkcarriers, N.V. (Re)*, [2001] 3 S.C.R. 951

*Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907

*R. v. Larivière*, [2001] 3 S.C.R. 1013

*Sam Lévy & Associés Inc. v. Azco Mining Inc.*, [2001] 3 S.C.R. 978

*Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746

*Privacy Act (Can.) (Re)*, [2001] 3 S.C.R. 905

*Prévost-Masson v. General Trust of Canada*, [2001] 3 S.C.R. 882

*R. v. Khan*, [2001] 3 S.C.R. 823

*Smith v. Canada (Attorney General)*, [2001] 3 S.C.R. 902

*R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575

*R. v. Golden*, [2001] 3 S.C.R. 679

*R. v. Hynes*, [2001] 3 S.C.R. 623

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