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Alberta Farm and Ranch Workers: The Last Frontier of Workplace Protection - Arguments for a *Charter* Challenge to the Farm and Ranch Workers Exclusion from the Alberta *Occupational Health and Safety Act*

By: Kay Turner, Gianna Argento, Heidi Rolfe

Legislation commented on: *Occupational Health and Safety Act*, [RSA 2000, c O-2](#)

Editor's Note

This is the first in a series of four posts written by students in Law 696: Constitutional Clinical in the winter term of 2014 (supervised by Professor Jennifer Koshan). The students worked with several clients and developed arguments for constitutional challenges to the exclusion of farm workers from labour and employment legislation in Alberta. April 28, 2014 is the 18th Annual International Day of Mourning for workers killed and injured on the job, and the Edmonton and District Labour Council is focusing on the plight of farm workers in [their service](#) today (6:00 pm at Grant Notley Park, 11603-100th Avenue). The Calgary & District Labour Council is also holding a Day of Mourning [service](#) today (12:15 pm at the City of Calgary Workers Memorial, Edward Place Park, at the SE corner of City Hall). Accordingly, we launch this series with a post on Alberta's *Occupational Health and Safety Act*, which protects worker health and safety (but excludes most farm and ranch workers). Subsequent posts will deal with the exclusion of farm workers from the *Employment Standards Code*, RSA 2000, c E-9, the *Labour Relations Code*, RSA 200 c L-1, and the *Workers' Compensation Act*, RSA 2000 c W-15.

Introduction

In Alberta, farm workers are excluded from almost all the statutory employment rights available in the province, including occupational health and safety (OH&S), employment standards (minimum wage, hours of work, employment of children, etc.), the rules about unionization and collective bargaining, and worker's compensation. In this post, we will be discussing the exclusion of farm and ranch workers from the ambit of the Alberta *Occupational Health and Safety Act*, RSA 2000, c 23 (the "*OHSA*").

The *OHSA* creates minimum workplace standards designed to protect and promote the health and safety of workers. Government officers have the power to inspect worksites (*OHSA*, s 8) and to investigate serious injuries or accidents (*OHSA*, s 19). Workers have the right to refuse unsafe work and must inform their employers of the reasons for the refusal (*OHSA*, s 35). The

legislation is enforced by issuing orders to employers (*OHS*A, s 9-12, 14, 25, and 33) and employers can appeal these orders if they disagree with them (*OHS*A, s 16).

The *OHS*A applies to almost all workers and employers in Alberta, the only exceptions being farming and ranching occupations and domestic workers (see *OHS*A, s 1(s)).

Alberta is the only province that continues to exclude agricultural workers from its provincial OH&S legislation, and it has done so since the *OHS*A was first enacted in 1976 (see *Occupational Health and Safety Act*, RSA 1976, c 2 at s 1(g) and *Designation of Occupations Regulations*, Alta Reg 288/1976).

Not all jobs related to agriculture are excluded though. The *Farming and Ranching Exemption Regulation*, [AR 27/95](#) (the “*Regulation*”) specifies that only operations that directly or indirectly involved in the primary production of agricultural products (producing crops, raising and maintaining animals or birds, and keeping bees) are excluded from the *OHS*A. Operations involving the processing of food, greenhouses, mushroom farms, nurseries, sod farms, landscaping, and the raising or boarding of pets are included in the *OHS*A. However, excluded farm workers account for approximately 98% of Alberta’s farm workers (see Statistics Canada, [Census of Agriculture: Farms classified by industry, 2011](#)).

So what does this mean for agricultural workers? It means that they do not have a right to know about workplace hazards. They have no right to refuse unsafe work, and their employers do not have to ensure that their health and safety is a priority. Overall, their exclusion from *OHS*A protection means that they are more likely to be injured or put at risk at work.

Agriculture is an inherently dangerous occupation – there are many hazards facing these workers every day, such as chemical and biological agents, long working days, physically demanding and repetitive tasks, hazardous equipment and livestock, unsafe transportation, inadequate housing and sanitation, and working alone (see Bob Barnetson, “No Right to be Safe: Justifying the Exclusion of Alberta Farm Workers from Health and Safety Legislations” (2012) 8:2 *Socialist Studies* 134 at 137). In fact, when compared to other industrial sectors, agriculture is the most dangerous occupation in terms of absolute numbers of fatalities (see W Pickett W, L Hartling, RJ Brison, and J Guernsey, “Fatal farm injuries in Canada” (1999) 160 *Can Med Assoc J* 1843). There are, on average, 17 fatalities occurring every year on Alberta farms (see Alberta, Agriculture and Rural Development, [1985-2011 Alberta Farm Fatalities](#)).

The end result of the *OHS*A exclusion is that some of Alberta’s most vulnerable workers are being excluded from the statutory regime that would make their basic health and safety a priority. Alberta’s regulatory response to this issue has been to focus on education and awareness campaigns (see [here](#)).

Charter Analysis

In order to attempt to address the potential illegality of the farm and ranch workers exclusion, we explored legal arguments based on s 7 and s 15 of the *Canadian Charter of Rights and Freedoms*, which are summarized below.

Section 7

The first *Charter* right that can be used to challenge the constitutionality of the *OHSA* exclusion is s 7, arguing that the exclusions engage both life and security of the person.

The *Charter*, s 7 reads: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” This is a two part right, and in order to make a successful claim under s 7, one must prove both that there has been a deprivation of life, liberty and/or security of the person and that this deprivation was in violation of the principles of fundamental justice.

On the first point, we argue that security of the person is engaged because the under- regulation of farm workplaces makes farm workers’ jobs substantively more dangerous. The regulation amounts to a government created risk of harm to the farm and ranch workers’ physical and psychological security of the person. The reasoning in *Canada (Attorney General) v Bedford*, 2013 SCC 72 strongly supports this argument. In that case, the Supreme Court struck down provisions of the *Criminal Code* regulating laws around prostitution that made the work of sex workers more dangerous. The Court found that the legal act of engaging in sex work was made more dangerous by the government regulatory scheme, and that this regulatory scheme engaged the security of the person rights of the sex workers (at para 60). We argue that the farm workers’ exclusion from the *OHSA* is similar. The issue in both cases is that the way in which government has legislated to regulate a workplace has made that workplace substantively more dangerous. This is also the basis for the life argument – that this government scheme makes farmworkers more likely to die, thus engaging their s 7 right to life.

The main issue with this argument is that the government may argue that the Court has yet to include positive obligations under s 7. The fact that the *OHSA* deals with under inclusive legislation may be seen to limit the application of s 7 in this situation. The Court has left the door open that it is possible for positive obligations to be recognized under s 7, but as of yet, such an obligation has not been recognized (see *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 at paras 83-84).

We have two arguments on this point. The first is that this would be an appropriate case for the court to read a positive obligation into s 7, as provincial governments should and do have a positive obligation to create safe work places for their workers. Though morally sound, precedent to support this argument is lacking, which is why we rely instead on a second argument – that this is not a request for a positive right at all, it is simply a deprivation.

The wording of the Act is clear that the intent of the *OHSA* is to apply to all workplaces in the jurisdiction of the Alberta government, and regulate their standards of safety. It then specifically removes farm and ranch workers from this regulation. There is precedent to suggest that contending that this type of under inclusive legislation engages *Charter* rights is a reasonable argument. Under both s 15 and s 2(d), the Court has found that under inclusive legislation can constitute a breach of the *Charter*. This was found in both *Vriend v Alberta* [1998] 1 SCR 493 and *Dunmore v Ontario (Attorney General)*, 2001 SCC 94. The Court in *Dunmore* said to this point: “...that a failure to include someone in a protective regime may affirmatively permit restraints on the activity the regime is designed to protect. The rationale behind this is that state action falls into suspicion not simply to the extent it discriminates against an unprotected class, but to the extent it substantially orchestrates, encourages or sustains the violation of fundamental freedoms” (at para 26, emphasis added). The idea is that once a government chooses to regulate,

it must do so in accordance with the *Charter*, and that a violation of rights created by a failure to include individuals in a regime can still be considered a deprivation.

The second part of the s 7 analysis asks whether the deprivation was carried out in accordance with the principles of fundamental justice. These principles are imprecise normative ideas, may evolve over time and sometimes overlap, but the overall goal of the analysis is to evaluate the rationality and normative balance struck by the law in question. The principles most often cited by the courts are arbitrariness, overbreadth, and gross disproportionality. We argue that each of these principles is violated by the farm and ranch workers exclusion from the *OHSA* – but will focus on arbitrariness and overbreadth in this post.

Arbitrariness

Arbitrariness was accepted as a principle of fundamental justice in *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, where the Court offered the following definition at para 129: “A law is arbitrary where it bears no relation to, or is inconsistent with, the objective that lies behind [it]” (see also *Bedford* at para 98). We argue that the limit which the exclusion places on farm workers’ s 7 rights is arbitrary because the objective of the *OHSA* – to keep workers safe in their workplace – is inconsistent with the exclusion of farm and ranch workers from workplace protections.

Overbreadth

The Court in *R v Heywood*, [1994] 3 SCR 761 at 793, tells us that a law will also violate society’s basic values if it is overbroad, in that the means used by the state are broader than is necessary for the legislative objectives to be achieved (see also *Bedford* at para 101). In this case, one of the main objectives of the exclusion appears to be the protection of family farms financially – i.e. the exclusion is said to be important because small farms cannot afford to meet the requirements of the *OHSA*.

For example, in 2008 Thomas Lukaszuk said (in a response to the Kevan Chandler fatality report): “we will make recommendations that achieve two things: keep our farmers safe but also keep them in business because the only way to make sure that a farmer doesn’t get hurt is just to put him out of business, and we are not willing to do that.” (Alberta, Legislative Assembly, Alberta Hansard, 27th Parl, 3rd Sess (24 March 2010) at 1848).

We argue that this concern, the protection of family farms financially as a purpose for the exclusion, is overbroad because the exclusion catches far more workers than those on family farms. The reality is that farm work is being done less on family farms, and more in large industrial operations. In *R v Northern Forage*, 2009 ABQB 439 at para 68, the Court took notice of this trend in Alberta’s agricultural operations: “There was a time when the primary means of farming was carried out by the single family farm, existing on a one quarter section homestead. Regrettably, such farming is all but extinct and instead has been replaced by modern farming operations”

If the concern of the government is to protect small farming operations, there are narrower legislative means of meeting this goal. The effects of the exclusion reach significantly further than the stated goal of the exclusion, making this violation of s 7 rights arbitrary and overbroad.

This is an abbreviated version of our arguments on s 7. Though there may be some hurdles in terms of establishing the violation of the right, we are confident that strong arguments can be made in favour of the unconstitutionality of the *OHSA* farm and ranch workers exclusion.

Section 15

We argue that the exclusion of farm and ranch workers from Alberta's *OHSA* is also likely to violate s 15 of the *Charter*. Section 15(1) of the *Charter* provides that “[e]very individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” In order for s 15 to be engaged, the claimants must first show that the law creates a distinction on one of the grounds enumerated in s 15(1) or an analogous ground. We know from *R v Kapp*, 2008 SCC 41 at para 17 that an analogous ground is “a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity.” (See also *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13).

There are three possible grounds to rely on under s 15: Farm workers are denied equal benefit and equal protection of the law based on the enumerated ground of sex, and the potential analogous grounds of occupational and immigration status. On the ground of sex, although the legislation does not make an explicit distinction on this basis, the vast majority of agricultural workers are male (approximately 90%) causing the farming and ranching exclusion under the *OHSA* to disproportionately affect men (see Farm Safety Advisory Council, [Enhanced Farm Safety Education and Training, Recommendations to the Minister of Alberta Agriculture and Rural Development](#) at 6). Interestingly, the other type of work that is excluded from the *OHSA* is domestic work, which disproportionately affects female workers.

In order to successfully argue that the exclusion of farm workers from the *OHSA* violates s 15 of the *Charter* on the analogous grounds of occupational and immigration status, the first task will be to convince the court that these grounds should in fact be recognized as analogous to those enumerated in s 15. The grounds of discrimination enumerated in s 15(1) of the *Charter* are not exhaustive. For example, sexual orientation, marital status, and citizenship have been recognized as analogous grounds of discrimination in various Supreme Court decisions. The ground does not have to be immutable to be analogous, and the focus of the analysis should be on the group that is adversely affected.

In a concurring opinion in *Corbiere*, Justice L’Heureux Dubé reasoned at para 60 that an analogous ground may be recognized if it can be shown to be a fundamental nature of the characteristic that is “important to their identity, personhood, or belonging.” We argue that occupational status should be recognized as an analogous ground because a person’s occupation is a fundamental aspect of their life and identity, providing the individual with a means of financial support and a contributory role in society. In *Dunmore*, Justice L’Heureux Dubé found that one’s employment is an essential component of his or her sense of identity, self-worth, and emotional well-being, therefore constituting an important and defining personal characteristic (at para 167). In addition, *Corbiere* also indicates that when determining whether a ground is analogous to one of those enumerated in s 15 of the *Charter*, it is important to consider whether the claimant group is “lacking in political power, disadvantaged, or vulnerable to becoming disadvantaged or having their interests overlooked” (at para 60). We think the employment relationship is inherently one of vulnerability for workers, and that farm workers are a distinct and vulnerable group subject to a particular disadvantage that requires state protection.

In addition, we argue that immigration status should be recognized as an analogous ground under s 15(1). Immigration status can be seen as comparable to citizenship, which was recognized as an analogous ground in *Andrews v Law Society of BC*, [1989] 1 SCR 143. In this decision at para 75, the Court found that the characteristic of citizenship is “not within the control of the individual and, in this sense, is immutable.” The Court further reasoned that citizenship is not something that is consciously chosen by a person, and is therefore difficult to change, or changeable only at unacceptable personal cost. It is our position that since many farm workers in Alberta are Temporary Foreign Workers (TFWs) who are hired seasonally to work in the agricultural industry in the province, their immigration status is precarious and should be considered an analogous ground deserving of *Charter* protection.

The second element required to prove a s 15 claim is that the impugned legislation creates stereotyping and prejudice that leads to disadvantage (*Kapp* at para 17, although see *Quebec (Attorney General) v A*, 2013 SCC 5 at para 327, which suggests that perpetuation of disadvantage may be sufficient to meet the test). We argue that the exclusion of farm and ranch workers under Alberta’s *OHS*A perpetuates stereotyping and disadvantage as a result of attaching the exclusion to ‘farm work’ (occupational status), and generating adverse effects discrimination against TFWs and male workers. For example, the specifically developed programs geared towards the recruitment and employment of TFWs (such as the Seasonal Agricultural Worker Program) generates a situation of adverse effects discrimination that affects temporary foreign farm workers based on their immigration status. Farm workers in Alberta are subject to adverse effects discrimination based on the personal characteristics they possess, which perpetuates stereotyping and disadvantage.

It would also be advantageous to use an intersectionality, or combination of grounds approach. It is our position that the s 15 arguments are stronger if they are put forward as one comprehensive argument, rather than as separate claims based on different grounds. The intersectionality of grounds approach set out in *Falkiner v Ontario (Ministry of Community and Social Services)*, 2002 59 OR (3d) 481 (CA) arguably achieves a more comprehensive and fair analysis of the different ways in which this unique and vulnerable group of workers experiences discrimination. We argue that the *OHS*A exemption of farm workers violates s 15 on the enumerated and analogous grounds of sex, immigration status, and occupational status.

Section 1 Justification

Charter rights are not absolute - infringements of farm workers’ s 7 and s 15 rights can be justified under s 1 of the *Charter* if they are reasonable limits that can be “justified in a free and democratic society.” This section gives the government the opportunity to make its case as to why an otherwise infringing law can be saved, or justified, on the basis of balancing the violated rights with other societal interests. In order for a limit to be justified under s 1, it must meet the test from *R v Oakes*, [1986] 1 SCR 103.

Pressing and Substantial Objective

At the first stage of the *Oakes* test, the government must show that its legislative objective is “pressing and substantial.” The purpose of the exclusion of farm workers from the *OHS*A is not at all clear. The government has relied on a variety of different rationales to explain the exclusion of agricultural workers, including: (1) that farms (and family farms in particular) are

unique workplaces and cannot be regulated, and (2) that farmers either don't want or can't afford regulation (see Barnetson at 139).

If the objective of the exclusion is to address the fact that farms are unique and can't be regulated, we would argue that the type of work is not unique. When compared to included occupations like landscaping or construction, the risks are very similar (physical tasks, outdoors, dangerous machinery, etc.) and all of these occupations need labour flexibility due to their seasonal nature. We would argue that the nature of the workplace is not unique either. Modern agriculture is dominated by large operations that hire many workers – these workplaces have more in common with a factory than the pastoral ideal of a “family farm” (*Northern Forage* at para 68). Further, the mixed use of a workplace is not fatal to any other occupation – many small family-owned businesses are regulated under the *OHS*A.

Rational Connection

We also argue that there is no rational connection between the objective of the *OHS*A and the exclusion. Any limitation of a *Charter* right cannot be arbitrary or unconnected to the purpose of the law. The overall purpose of the *OHS*A is to protect workers by ensuring that workplaces are safe. It can be argued that the exclusion has the directly opposite effect on farm workers – it results in a substantively more dangerous workplace.

Minimal Impairment

In order for a law that infringes a *Charter* right to be justifiable, the right must be impaired as little as reasonably possible. If the government can achieve its objective in a way that places less of a burden on *Charter* rights, then the government must use those means. We argue that the exclusion would also fail at this stage of the *Oakes* test.

If the legislative objective behind the exclusion is to protect family farms from regulation, the complete exclusion of all agricultural workers cannot be justified. The current *OHS*A exclusion covers the vast majority of agricultural operations in Alberta – everything from a small family-run farm with no hired workers to a large industrial feedlot is treated in the same manner. It would be much less impairing to target family farms in the exclusion, perhaps by limiting the exclusion to operations with no hired workers or tying it to farm income if the financial burden on families is the driving concern. A similar argument was successful in *Dunmore* (finding the exclusion of all farm workers from Ontario's labour relations legislation was not minimally impairing).

If the legislative objective of the exclusion is to address farm safety in a manner that is appropriate to this “unique” industry, it may be argued for the government that existing education programs are the best alternative because they are entirely voluntary. However, the government cannot simply use the least impairing means if it does not actually achieve the legislative objective. In this case, fatality rates in Alberta's agricultural industry have remained consistently high for many years, which may indicate that the Province's education and awareness programs are not sufficient.

Proportionality between Deleterious and Salutary Effects

The final step in the *Oakes* test assesses the proportionality of a law by balancing the negative effects of the limitation of a right against the positive effects that the law may have on society as a whole. The benefits of the *OHS*A exclusion might be that farm employers can regulate their

workplaces in a way that is most appropriate to their specific industry, and that there is less administrative and financial burden on employers. However, the drawbacks are severe – farm workers are injured more often than other occupations and they appear to be discriminated against based on the demographics of their workforce and their occupational status.

We would argue that faced with this balance, it is difficult for the government to assert that the overarching benefits of this law outweigh the effects that the rights violations have on farm and ranch workers. The appropriate remedy under s 52 of the *Constitution Act, 1982* would be to sever the exclusion of farm and ranch workers from the *OHSA*.

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