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## The Statutory Exclusion of Farm Workers from the Alberta *Labour Relations Code*

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Legislation commented on: *Labour Relations Code*, [RSA 2000, c L-1](#)

### Editor's Note

This is the second in the series of four posts written by students in Law 696: Constitutional Clinical in the winter term of 2014 (for the first post in this series see [here](#)). This post focuses on the exclusion of farm workers from Alberta's *Labour Relations Code*, RSA 2000, c L-1, (*LRC*), and is being published to coincide with May Day and International Workers' Day (May 1), as it concerns the inability of farm workers to unionize and collectively protect their interests. The following is a summary of the students' primary arguments regarding the unconstitutionality of the *LRC*'s exclusion of farm workers.

### **I. Background to the *LRC***

The *LRC* governs labour relations in the province of Alberta, which gives workers the right to form trade unions, collectively bargain, and to strike under certain conditions.

A number of groups are excluded from Alberta's *LRC*, though. Most groups that are completely excluded from the ambit of the Act are workers covered by alternate labour relations statutes, such as police, who are governed by the *Police Act* (RSA 2000, c P-18). However, farm workers and domestic workers are completely excluded from not only the *LRC* (s. 4(2)(e)) but from all other labour relations and most employment related statutes in Alberta as well (See *Employment Standards Code*, RSA 2000, c E-9 at s 2(3),(4) (*ESC*); *Occupational Health & Safety Act*, RSA 2000, c O-2 at s 1(s),(bb) (*OHS*A); and the *Workers' Compensation Regulation*, Alta Reg 325/2002 at s 2, Schedule A (*WCR*)). The exploitation of farm workers is an entrenched tradition in Alberta, and the advantages to the farmers are numerous: farm employers can set wages that are most advantageous to them, have a great deal of flexibility to hire and terminate workers (despite some protection offered by the *ESC*), can set dangerous and demanding tasks for these workers without fear that the workers will refuse to perform the task and/or make a meaningful complaint to a regulatory body because there is no effective and protected channel for such complaints (as farm workers are also excluded from the *OHS*A).

The current iteration of the *LRC* in Alberta was enacted in 1947 with the *Alberta Labour Act*, (SA 1947, c 8), Alberta's first comprehensive labour relations statute (Alberta Labour Relations Board, "History of the Labour Relations Board," (2010) Ch 4(a) at 2). The exclusion of farm workers from labour relations dates back at least to 1943, with [The Labour Welfare Act](#), SA 1943, c 5.

The historical justifications for the exclusion are many, and include keeping agricultural production high and food prices low, the unpredictability of the harvest season, government fears of socialism and aggressive unions, and the insistence of both farm owners and the government that "family" is entrenched in farm operations and therefore farms are not a suitable environment for the types of labour organization that is appropriate for other types of industry (Bob Barnetson, "The Regulatory Exclusion of Agricultural Workers in Alberta" (2009) 14 *Just Labour: A Canadian Journal of Work and Society* 50 at 63 (Barnetson 2009)).

At present, the government of Alberta identifies the key source of pressure to maintain the exclusion as coming from farmers themselves, who claim that the unique nature of "family farms" make farms unsuitable for labour regulation (Barnetson 2009 at 63). This objection is an articulation of the "agrarian myth": "farming is cast as a virtuous activity entailing personal sacrifice, for which society owes farmers debt. The agrarian myth is often invoked by claiming that the cost of regulation may imperil farms" (Alberta Federation of Labour, "[The Regulatory Exclusion of Agricultural Workers in Alberta](#)" (2009)). The ruling Progressive Conservative Party of Alberta also derives a large portion of its electoral support from rural constituencies (Barnetson 2009 at 63).

The government is unlikely to be able to continue to defend the exclusion along these lines. A large portion of the agricultural industry in Alberta takes the shape of sophisticated, mechanized operations that require a much larger staff than just the members of the nuclear family of the owners (Barnetson 2009 at 64; 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 (Barnetson 2012)). These workplaces have much in common with other workplaces that are covered by the *LRC*, significantly with respect to the level of danger that they present to workers (Barnetson 2009 at 50; Barnetson 2012 at 137). It is time for the government to respond to the actual realities of the agricultural workplace, and allow inclusion for farm workers in the *LRC*.

## **II. Does the Exclusion Violate Section 2(d): Freedom of Association?**

Section 2(d) of the *Charter* states, "everyone has the following fundamental freedoms: ... (d) freedom of association". In the labour relations context, s 2(d) has traditionally been held to protect "the right to associate to achieve workplace goals in a meaningful and substantive sense" (*Ontario (Attorney General) v. Fraser*, 2011 SCC 20 at para 32). Notably, s 2(d) has now been held to protect at least a procedural right to collective bargaining (*Health Services and Support-Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at para 91, *Fraser* at paras 44-45). "Procedural" here means that there is no right to collectively bargain under a certain model, such as what is called the Wagner model, which is widely accepted as the most common form of collective bargaining in Canada. Also not protected under s 2(d) and the procedural right to collective bargaining is the right to a particular result, i.e. there is no guarantee a collective agreement can or will be reached. Thus, although the rights protected by s 2(d) are limited in this way, they do still exist.

The Supreme Court of Canada decisions of *Fraser* and *Dunmore v. Ontario* ((*Attorney General*), 2001 SCC 94) are the seminal cases on the exclusion of farm workers from labour relations legislation in Canada. In *Dunmore*, farm workers in Ontario, though historically excluded from labour relations legislation, were brought into the scheme with the passage of a new act (the *Agricultural Labour Relations Act*, 1994 SO 1994, c 6 (*ALRA*)). Under the *ALRA* farm workers had trade union and collective bargaining rights. However, the new law was only “the law” for about a year when a new labour statute was passed by a new government (the *Labour Relations and Employment Statute Amendment Act*, 1995 SO 1995, c 1), which essentially re-excluded farm workers from all labour relations statutes in the province once again. That statute was found to be unconstitutional on the grounds that it infringed the s 2(d) freedom of association of farm workers in the province.

The basis for the Court’s finding of unconstitutionality under s 2(d) was that the exclusion meant that farm workers had no ability to take any collective action whatsoever. In other words, the unique vulnerability of farm workers as an economically disadvantaged group who often work in isolated settings, close to their (farm owner) employers, means that farm workers, unlike some other groups (see e.g. *Delisle v Attorney General of Canada* [1999] SCR 989 at para 44, concerning RCMP officers) cannot form trade associations or have meaningful negotiations with their employers unless they have legislative protection.

In the *Fraser* case, the sequel to *Dunmore*, the Supreme Court re-examined the circumstances of farm workers in Ontario under new legislation that had been enacted post-*Dunmore*, the *Agricultural Employees Protection Act*, 2002, SO 2002, c 16 (*AEPA*), which expressly gave farm workers some labour rights, including “the rights to form and join an employees’ association, to participate in its activities, to assemble, to make representations to their employers through their association on their terms and conditions of employment, and the right to be protected against interference, coercion and discrimination in the exercise of their rights” (*AEPA* at s 1(2); see *Fraser* at para 6). However, the United Food & Commercial Workers (*UFCW*) and certain farm workers in the province challenged the legislation after they had attempted to collectively bargain with a large agricultural producer, had reached an impasse, and had no remedy that would force the employer to bargain in good faith.

The key question to be determined was: “does the legislative scheme or provision substantially interfere with the right to associate to achieve collective goals” (*Health Services* at para 90), including the right to collectively bargain. If so, s 2(d) will be violated. In *Fraser*, the test for a s 2(d) violation with regards to under-inclusive legislation in the labour relations context morphed into what some consider a more stringent standard: “whether the impugned law or state action has the effect of making it *impossible* to act collectively to achieve workplace goals” (*Fraser* at para 46, emphasis added). That impossibility could not be shown on the evidence in *Fraser*. Ultimately the constitutional challenge was unsuccessful because the Court found that the claim was “premature” and the workers had not given the legislation a sufficient chance to operate (*Fraser* at para 116).

The situation in Alberta is much more like the *Dunmore* scenario than the *Fraser* scenario—farm workers are completely excluded from the ambit of the *LRC*. In fact, s 4(2)(e) of Alberta’s *LRC* has the effect of completely precluding the ability of farm workers to take any collective action, or to participate in any process of collective bargaining such that it substantially interferes with the freedom of association rights of those workers guaranteed under the *Charter*.

As in any *Charter* challenge, the claimant would need to demonstrate that the legislative provision “has, either in purpose or effect, interfered with those activities” (*Dunmore* at para 13). As noted above, the purpose of excluding farm workers from the *LRC* seems to have been largely motivated by demands by farm owners to keep labour costs down and to generally promote farming in the province. There is no direct evidence from legislative debates about why the exclusion was first introduced because there is no accessible Hansard evidence from that time (see *Labour Welfare Act* (1943)). As such, and given that the purpose of the *LRC* as a whole is very much valid, the success of a constitutional challenge to s 4(2)(e) on the basis that its purpose infringes s 2(d) may be somewhat difficult to make. However, given that the exclusion has the effect of completely excluding farm workers from not only the ambit of the *LRC* but labour relations as a whole in Alberta, a constitutional argument based on the effects of the impugned provision ought to succeed.

The success of a challenge brought to this exclusion, especially in light of the challenges faced by the applicants in *Fraser*, will hinge in large part on the strength of the evidence for the unconstitutionality of s 4(2)(e) of the *LRC*. Many international conventions of the International Labour Organization also support the ability of all workers to take collective action, and specifically those working in agricultural. Given the difficult working conditions that farm workers often endure and their inherent economic disadvantage, the time is nigh to bring a constitutional challenge to this unjust exclusion on s 2(d) and other grounds.

### **III. Does the Exclusion Breach Section 7: Life, Liberty, and Security of the Person?**

Section 7 of the *Charter* protects the rights 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.” Exclusion from the *LRC* breaches farm workers’ life, liberty and security of the person interests in several ways. Farms are dangerous workplaces where tasks are physically demanding and frequently endanger workers’ life and security of the person (see [here](#)), and due to the fact that farm workers are realistically precluded from organizing or joining a union, there is no safe avenue of complaint for farm workers who are tasked with difficult and/or dangerous work; complaints may lead to termination of employment. The threats to personal safety engage life and security of the person, and the possibility of losing one’s job by speaking out about bad conditions and/or refusing work is arguably a breach of farm workers’ liberty interests.

The claimants need only establish a sufficient causal connection between the state-caused effect and the prejudice suffered, and government action or law need not be the only or even the dominant cause of the prejudice suffered by the claimant (*Bedford v Canada (Attorney General)*, 2013 SCC 72 at paras 75-76).

The government action in this case is the explicit exclusion of farm workers from the ambit of the *LRC*. The prejudice suffered by the claimants is death and injury at unsafe agricultural workplaces. The key to this argument is to convince the court that union oversight and protection would lead to both safer workplaces and workers empowered to refuse unsafe work without fear of reprisal from their employers. Or, put differently, since the farm workers cannot realistically join unions, they are isolated from the protections and regulation offered by unions, and cannot realistically assert their right to safe workplaces without fear of losing their jobs.

The claimants might make use of the “bicycle helmet” analogy from *Bedford*:

[87] The causal question is whether the impugned laws make this lawful activity more dangerous. An analogy could be drawn to a law preventing a cyclist from wearing a helmet. That the cyclist chooses to ride her bike does not diminish the causal role of the law in making that activity riskier. The challenged laws relating to prostitution are no different.

The “helmet” in the present situation is union membership, and since workers who are not covered by the *LRC* are vulnerable to termination if they attempt to organize or join unions, then the exclusion from the *LRC* makes farm work more dangerous by effectively keeping farm workers distanced from the protection offered by union membership.

Inclusion in the *LRC* would provide farm workers with a process that could lead to safer workplaces as they could enter into discussion and bargaining with employers without being afraid to lose their jobs. In this respect, the *LRC* would, by respecting the freedom of association and collective bargaining process, also contribute to the physical safety and security of these workers, and extend protection against loss of employment, a material contribution to their liberty interests.

Therefore, the s 7 rights of farm workers are arguably breached by their exclusion from the *LRC* because they are a marginalized occupational group whose basic human dignity demands protection. This protection might be well provided by union membership, but this avenue is foreclosed. The government of Alberta has increased the level of isolation and therefore danger present in farm work by virtue of the explicit exclusion, and therefore the requirements of the sufficient causal connection test have been met.

The next question under s 7 is whether the law’s negative effects on life, liberty, or security of the person are in accordance with the principles of fundamental justice, with the relevant principles here being arbitrariness, overbreadth, and gross disproportionality. The specific questions are whether the law’s purpose, taken at face value, is connected to its effects and whether the negative effect is grossly disproportionate to the law’s purpose (*Bedford* at para 125).

### ***Arbitrariness***

A law is arbitrary if the effect on the individual claimant bears no relation to the law’s purpose (*Bedford* at para 111). The government will most likely assert that the purpose of the exclusion is to protect the unique identity of family farms, whose workers are often related by blood to the owner/operator, and to protect the fragile profits of farmers.

The claimants must endeavour to convince the court that if farm workers join unions, this will have little to no effect on the character of farms nor on the amount of money farmers will earn. Further – if the court is convinced that lack of union oversight has led to workers being faced with the choice of dangerous work or termination, then the claimants have a good argument that the effect of the exclusion – increased injuries and deaths on farms – bears no relationship to the purpose of the exclusion, and the exclusion is therefore arbitrary.

### ***Overbreadth***

A law is overbroad if there are some impacts of the law that bear no rational connection to the purposes of the law (*Bedford* at para 112). If the rationale for the exclusion is the protection of

family farms, then it doesn't make sense to exclude *every* farm worker from the *LRC* when a more restrictive exclusion for family farms would accomplish this goal. The law is therefore arguably overbroad.

### ***Gross Disproportionality***

A law is grossly disproportionate when the seriousness of the deprivation is out of sync with the purpose of the measure (*Bedford* at para 120). If farmers are concerned about changes to the character and finances of their farms due to farm workers joining unions, then farmers are welcome to enter into collective bargaining with their workers and/or with the unions who represent them in order to reach a deal that respects the interests of both sides. In other words, a proportionate solution, a solution that respects both farmer and farm workers, would be to permit farm workers the protection of the *LRC*. At present, the exclusion may well protect the interests of farm owners and operators, but at the entire expense of farm workers. The exclusion is therefore disproportionate.

Further, if the court was persuaded that lack of union membership increases the isolation and vulnerability of farm workers, especially with respect to inability to freely choose to refuse unsafe work, then the price that farm workers pay with their health, their bodily integrity, and their lives must be entirely disproportionate to the goal of protecting the character and profits of family farms. In our opinion, the strongest challenges to the *LRC* exclusion with respect to s 7 lie in overbreadth and gross disproportionality – the claimants must make it very clear to the court that while farmers' interests are served by the s 7 exclusion, these interests are being served at the expense of the interests and rights of their employees.

## **IV. Does the Exclusion Breach Section 15: The Right to Equality?**

Since the first interpretation of s 15 by the Supreme Court of Canada, the test for s 15 has undergone significant changes. This presents challenges for equality claimants. Although a *Charter* challenge to the exclusion of farm workers from the *LRC* is likely to have the most success under s 2(d), a claim under s 15 could also be made. Claimants can advance a s 15 challenge on three grounds: occupation, sex and immigration status. This post will focus on establishing occupational status of farm workers as an analogous ground (for arguments about sex and immigration status see [here](#)).

### ***Review of the Current Section 15 Test***

Section 15 is concerned with legislative distinctions that impose disadvantages on certain groups of people based on prohibited grounds (*Andrews v Law Society of British Columbia*, [1989] 1 SCR143). There will be a violation of s 15 when laws impose burdens or disadvantages in a discriminatory way based on grounds that were expressly enumerated in s 15(1), or on grounds analogous to them. The listed grounds are race, national or ethnic origin, colour, religion, sex, age and mental or physical disability. Grounds previously held to be analogous include sexual orientation (*Vriend v. Alberta*, [1998] 1 SCR 493) marital status (*Quebec v A* 2013 SCC 5) and citizenship (*Andrews*).

The current test for a s15 violation was introduced by the Supreme Court in *R v Kapp*, 2008 SCC 41, and has two components. First, the law must create a distinction based on an enumerated or analogous ground. Second, the distinction must create a disadvantage by perpetuating prejudice

or stereotyping. However, after the Court’s decision in *Quebec v A*, there is some confusion about this second step (see [here](#)). This will be discussed below.

### ***Occupational Status***

The primary hurdle in a s 15 challenge to the *LRC* will be to establish occupation as an analogous ground. This argument may be difficult to make, as the Supreme Court has previously rejected occupational status as an analogous ground in particular cases. However, it is important to note two things. First, a majority of the Court has never categorically rejected occupational status as an analogous ground, despite having the opportunity to do so (see e.g. *Dunmore* and *Fraser*). Second, claimants can argue that occupational status *as farm workers* is an analogous ground, even if occupational status generally is not.

While the majority decision in *Dunmore* did not address the s 15 issue, L’Heureux-Dubé, J’s concurrent judgement establishes a s 15 breach on the basis that occupational status of farm workers is an analogous ground, for three main reasons: the historical disadvantage that farm workers have experienced; their lack of political capital to reduce the gap between themselves and society, and their inability to change their occupation without great personal cost (*Dunmore* at paras 165–167). Unsurprisingly, these three factors are consistent with the description of analogous grounds in *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, which defined analogous grounds as: “personal characteristic[s] that [are] immutable or changeable only at unacceptable cost to personal identity” ([1992] 2 SCR 203 at para 13).

#### Historical Disadvantage of Farm Workers

Given historical and factual realities, presenting evidence that farm workers have been historically disadvantaged should not be difficult. Indeed, there is support for this position in L’Heureux- Dubé, J’s judgment in *Dunmore*:

[168] agricultural workers have historically occupied a disadvantaged place in Canadian society and that they continue to do so today. For the purposes of the s. 15 analysis, I have no hesitation in finding on the evidence that agricultural workers are a disadvantaged group. They are poorly paid, face difficult working conditions, have low levels of skill and education, low status and limited employment mobility.

While this finding will be helpful, in order to be successful any challenge to the *LRC* must specifically establish the historical disadvantage of farm workers *in Alberta*. For instance, Professor Barnetson describes the lower wage and working conditions of farm workers who have not received legislative protection as compared to local sugar plant workers who are a part of the UFCW (2009 at 62). More evidence of this nature will be necessary to establish the historical disadvantage faced by Albertan farm workers.

#### Lack of Political Capital

Establishing the lack of political capital is particularly important to arguing that the exclusion of Alberta farm workers from the *LRC* is unconstitutional, especially as compared to their exclusions from the *ESC*, *OHSA* and *WCA*. This is because of the argument that the lack of protection that occurs as a result of the exclusion of Alberta farm workers from the areas of employments standards, occupational health and safety, and workers compensation can only be remedied if and when workers are given the ability to unionize and bargain collectively. Once

again, L’Heureux-Dubé, J’s decision in *Dunmore* is helpful here. She cites the following passage from *Andrews* regarding immigrants and their lack of political capital and concludes that the same can be said about farm workers, who are:

[168] ... a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among those groups in society to whose needs and wishes elected officials have no apparent interest in attending (*Dunmore*).

### Inability to Change Without Great Personal Cost

Establishing that occupational status as a farm worker cannot be changed without great cost to personal self is essential to the s 15 argument. Stereotypes and myths about farmers that have been previously utilized to exclude farm workers from legislation may assist us in this case. As noted above, Professor Barnetson describes the “agrarian myth” that farming is a virtuous activity that requires personal sacrifice (2009 at 65). While this myth has been used by the provincial government to justify the lack of legislative protections, it may assist us in establishing the important sense of personal fulfillment and identity a person experiences when being employed as a farm worker.

Finally, L’Heureux-Dubé, J’s comments in *Dunmore* regarding the importance of employment are useful in this context as well. She asserted that the Court has “repeatedly recognized that employment is a fundamental aspect of an individual’s life and an essential component of identity, personal dignity, self-worth and emotional well-being” (*Dunmore* at para 167).

One of the government’s primary responses to a challenge would likely be to rely on previous cases where occupational status has been rejected as an analogous ground. However, many of these cases can be distinguished.

In *Delisle*, an RCMP officer argued that provisions of the *Public Service Staff Relations Act*, RSC, 1985, c P-35 and *Canada Labour Code*, RSC, 1985, c L-2 that prevented unionization were contrary to s 15 of the *Charter*. The Supreme Court rejected this argument on the basis that the occupational status of a RCMP officer was not an immutable characteristic. However, L’Heureux-Dubé, J distinguished this finding in her opinion in *Dunmore*. She stated that “unlike the RCMP officers in *Delisle*, agricultural workers suffer from disadvantage, and the effect of this distinction is to devalue and marginalize them within Canadian society” (at para 168).

Similarly, in *Baier*, the Supreme Court held that occupational status was not an analogous ground (*Baier v. Alberta*, 2007 SCC 31 at para 103). In this case, the claimant challenged the constitutionality of amendments to Alberta’s *Local Authorities Election Act*, RSA 2000, c L-21, which prevented school employees from running in elections unless they took a leave of absence and resigned if elected. The Court rejected the s 15 claim on the basis that in this specific case, occupational status of school employees could not be seen as constructively immutable (*Baier* at para 64). This case supports our position in two ways. First, the Supreme Court’s emphasis that there is no basis to establish occupational status as an analogous ground *in this case* can be used to argue that under the right circumstances occupational status can be an analogous ground.



Second, in its decision on this matter the Alberta Court of Appeal rejected the occupation of teachers as an analogous ground by directly contrasting them with farm workers. Specifically, the Court stated that teachers are respected professionals with high employment mobility, while farm workers might only be able to alter their profession with great cost due to their status in society and low level of training and education (*Baier v Alberta*, 2006 ABCA 137 at para 56). Given this comparison we might assume that the Alberta Court of Appeal is favourable to establishing the occupational status of farm workers as an analogous ground.

### Government Arguments Regarding Choice

The government may argue that because an individual voluntarily chooses to become a farm worker, their occupational status is precluded from being considered as an analogous ground. For instance, a claimant's choice not to get married may be a consideration in determining the validity of legislation that excludes *de facto* spouses from spousal support rights which were afforded to married spouses. However, the majority on the s 15 issue in *Quebec v A* held that the issue of choice should be considered not in the s 15 analysis to determine whether there has been a *Charter* breach, but in the s 1 analysis to determine whether the breach is justified. Abella J noted that s 15 has rarely been interpreted so as to prevent a legislative distinction from being considered discriminatory on the basis that the claimant chose a certain state of affairs (at paras 336-37).

### ***Second part of the Kapp Test***

After the Court's decision in *Quebec v A* the exact nature of the second part of the s 15 test, which focuses on whether the distinction was discriminatory, is unclear. The majority s15 decision written by Abella J focused on historical disadvantage, while the concurring decision by McLachlin J focused on the four contextual factors from *Law v Canada Minister of Employment and Immigration*, [1999] 1 SCR 497, to establish whether discrimination perpetuates prejudice or stereotypes.

Following Abella J's approach, historical disadvantage is a foundational concern in the second part of the s 15 analysis. If the state worsens the historical disadvantage of a group rather than improve their status compared to the rest of society, then the legislative distinction will be discriminatory (*Quebec v A* at paras 336-37). Accordingly, to be successful, the claimants must demonstrate that the exclusion of Alberta farm workers from the *LRC* perpetuates an existing disadvantage that farm workers have historically experienced. The evidence discussed above regarding establishing historical disadvantage can be applied here.

## **V. Conclusion**

The exclusions of farm workers from the *LRC* can be challenged under s 2(d), s 7 and s 15 of the *Charter*. Once these breaches are established, we argue that it will be difficult for the government to justify the exclusion under s 1, given the general inconsistency between the government's stated goal to protect family farms and the wholesale exclusion of all farm workers, including those who are employed at larger farming operations.

As such, s 4(2)(e) of the *LRC* ought to be struck down as unconstitutional.

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