May 27, 2014

Challenging the Farm Work Exclusions in the *Employment Standards Code*

Written by: Graham Martinelli and Andrew Lau

Legislation commented on: *Employment Standards Code*, RSA 2000, c E-9

Editor's Note

This is the fourth and final post in the series written by students in Law 696: Constitutional Clinical in the winter term of 2014. For the other posts see here, here and here.).

Introduction

In 2014, an adolescent (age 12-14) working in the food industry in Alberta is restricted from participating in any work involving a deep fryer in a kitchen because deep fryers are deemed to be too unsafe for adolescents to operate (*Employment Standards Regulations*, Alta Reg 14/1997, s 51(a)). Regardless of the task engaged in, adolescents working in the food industry must be accompanied by an adult older than 18 years old whenever they work (*Employment Standards Regulations*, s 53(3)(b)). Yet, if that same child, or their younger sibling, worked on a farm instead of in a kitchen there would be no similar restrictions on the conditions of their employment. Farm children of *any* age younger than 15 can operate dangerous heavy equipment without adult supervision, and the laws of Alberta do almost nothing to regulate this scenario.

Our task in this semester's Constitutional Law Clinical program at the University of Calgary Faculty of Law was to challenge the farm worker exclusions present in the *Employment Standards Code*, RSA 2000, c E-9 (the "*ESC*") which result in several absurdities including the one outlined above.

The *ESC* is one of several pieces of Alberta labour and employment legislation that exclude farm workers from several of their key provisions (for posts on other exclusions see here, here and here.). We have divided the *ESC* exclusions relating to farm workers into three categories for the purposes of our analysis: Pay and Vacation exclusions (Part 2, Divisions 4-6 of the *ESC*), Hours of Work exclusions (Part 2, Division 2 of the *ESC*), and the aforementioned Child Labour exclusions (Part 2, Division 9 of the *ESC*). These exclusions can all be challenged under s 7 and s 15 of the *Canadian Charter of Rights and Freedoms* (the *Charter*).

Information on the Government of Alberta's likely justifications for these exclusions is sparse given the dearth of records of legislative debates (Hansard) from the time period in which they were originally written and the general lack of *ESC*-specific debates in the time period where we

do have good Hansard records. Nonetheless, from the information we do have, the exclusions appear to place farms, and family farms in particular, in a privileged position due to their key role in Alberta's economic history. As such, the legislative purpose behind the exclusions appears to be the dual goals of reduction of economic and administrative costs, as well as increasing access to labour for farm owners.

Section 7

Section 7 protects 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." While there are some arguments to be made under the other s 7 rights, the strongest arguments will likely emerge from the right to security of the person. If evidence can be lead to show that the exclusions lead to an increased likelihood of harm to farm workers then it is likely that a *prima facie* breach of security of the person would exist. The Hours of Work and Child Labour exclusions will likely provide evidence favourable to reaching these conclusions. Precedent in this area suggests that the harm suffered does not have to be particularly burdensome (see *Chaoulli v Quebec*, 2005 SCC 35 at para 105; *Canada v PHS Community Services Society*, 2011 SCC 44 at para 93). It is also noteworthy that the same precedent can be used to support a breach of right to life as well if the evidence compiled is strong enough to mount such a claim.

Section 7 is qualified by the requirement that violations of rights are acceptable if they are in accordance with the principles of fundamental justice. In this regard there are strong arguments that the Hours of Work and Child Labour exclusions are either arbitrary or overbroad, and depending on the evidence disproportionate (for definitions of these principles see *Canada (Attorney General) v Bedford*, 2013 SCC 72). The strongest arguments are as follows:

> Arbitrariness – Children lack the capacity to safely and competently carry out much of the work farm workers need to do, so excluding them from protection under the *ESC* does not meaningfully meet the objectives of increasing access to labour nor meaningfully decrease costs.
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> Overbreadth – All of the exclusions are targeted at the 'unique' nature of farm work, which is usually justified as relating to seasonal busy periods such as the harvest or calving. That the exclusions apply to work outside these busy periods is clear evidence of their overbreadth. The exclusions also appear to target the 'family farm' but are also operative for feedlots with hundreds of employees – this is again clearly overbroad.
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> Disproportionality – If there is strong evidence that injury and mortality rates amongst farm workers (both children and adults) are significantly worse than those of protected workers, then this will offer a compelling argument that the exclusions are disproportionate. If children are getting killed or maimed as a result of the exclusions then it will be exceedingly difficult for the government to argue that this harm to individuals is a proportionate price to pay for minor financial relief to farm owners.

If the violation of farm workers' rights to life or security of the person are found to be arbitrary, overbroad, or grossly disproportionate, the violations will be contrary to the principles of fundamental justice, resulting in a breach of s 7 of the *Charter*.

Section 15

Section 15(1) of the *Charter* provides that "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability". In *R v Kapp* , 2008 SCC 41 at para 17, the Supreme Court set out the most recent version of the test to determine whether a law violates s 15. In order for the court to find that a law (or part of a law) violates s 15, the claimant must show that the challenged law (1) creates a distinction based on an enumerated or analogous ground, and (2) creates a disadvantage by perpetuating prejudice or stereotyping. Both components of the test must be satisfied to establish that a law violates s 15.

The first step of the test requires the claimant to show that they received differential treatment under the challenged law, and that the differential treatment was a result of the claimant belonging to a group that exhibits at least one of the characteristics set out in s 15 (race, national or ethnic origin, colour, etc.) or a characteristic that is analogous to them. The *ESC* excludes workers from key portions of the Act based on their employment on a farm or ranch.

Although agricultural workers are clearly subject to differential treatment under the *ESC*, the basis for that differential treatment does not fit within any of the characteristics listed in s 15 of the *Charter*. Therefore, a key challenge to successfully arguing that the *ESC* violates s 15 is successfully arguing that the statute makes a distinction based on a ground analogous to the listed characteristics. There are at least two possible grounds that can be put forward as analogous grounds. The first is the ground of 'occupational status as an agricultural worker'. Since the *ESC* explicitly contemplates that employees on farms and ranches should receive less protection under the statute, this is the most obvious analogous ground we can argue. The second analogous ground that can be argued for is the ground of 'immigration status as a temporary foreign worker'.

As noted in the posts on the other statutes, the main difficulty with arguing a s 15 violation on the basis of occupational status as an agricultural worker is establishing that such a characteristic is an analogous ground. The Supreme Court in *Corbiere v. Canada*, [1999] 2 SCR 203, stated that an analogous ground is one that is based on "a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity", and is "based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law" (at para 13). There have been several previous cases in which occupational status has been argued to be an analogous ground, but the argument has never been successful. However, the Supreme Court in *Baier v. Alberta*, 2007 SCC 31, when deciding against the claimant's s 15 challenge, stated that it could not find any basis for finding that occupational status is an analogous ground "on the evidence presented in [that] case", suggesting that such an argument could be successful in the future, if sufficient evidence was presented (at para 64). In her concurring opinion in *Dunmore v. Ontario*, 2001 SCC 94, Justice L'Heureux Dubé stated that "there is no reason why an occupational status cannot, in the right circumstances, identify a protected group." She found that the occupational status of agricultural workers constituted an analogous ground, since the government had no legitimate interest in expecting agricultural workers to change their employment status to obtain equal treatment, and due to their poor socioeconomic circumstances agricultural workers could change their occupation only at great cost (at paras 166-169). From these cases, it looks as if the chances for successfully arguing that occupational status as an agricultural worker should be included as an analogous ground may succeed with strong evidence.

It will be easier to successfully argue that immigration status as a temporary foreign worker ("TFW") is an analogous ground, given the similarities of the group with non-citizens, which the Supreme Court has already accepted as an analogous ground in *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143. As the *ESC* does not explicitly set apart TFWs for differential treatment, it will be more challenging to show that the statute actually makes a distinction based on this ground. In order to satisfy the first step of the *Kapp* test, we must show that TFWs are disproportionately disadvantaged by the exclusions in the *ESC* when compared with workers who are not TFWs. It can argued that the exclusions in the *ESC* interact with the disadvantages that TFWs already experience, resulting in adverse effects that are more severe than what non-TFW workers experience. For example, many TFWs are prohibited from working for other employers during their stay in Canada unless they go through a lengthy process to obtain a new Labour Market Opinion (see *Temporary Foreign Workers: A Guide for Employees*). This means that many TFWs are afraid to 'rock the boat' for fear of being fired and unable to find alternative employment, or worse, deported (the recent Tim Hortons scandal is illustrative). When combined with the reduced protections under the *ESC*, TFWs working as agricultural workers are in a difficult place indeed.

If the first step of the *Kapp* test can be satisfied on either of the above grounds, the second step may be satisfied fairly easily. To pass the second step, we must show that the *ESC* creates a disadvantage by perpetuating prejudice or stereotyping. The Supreme Court in *Kapp* set out four "contextual factors" to assist in identifying such discriminatory attitudes (2008 SCC 41 at para 19). These factors are the: (1) pre-existing disadvantage of the claimant group, (2) degree of correspondence between the differential treatment and the claimant group's actual circumstances, (3) whether the law has an ameliorative purpose or effect, and (4) nature of the interest affected. More recently, a majority of the Court in *Quebec (Attorney General) v A*, 2013 SCC 5, suggested that perpetuation of disadvantage may be sufficient to meet the second step of this test without proof of stereotyping or prejudice (see para 327 per Abella J), though in a concurring judgment Chief Justice McLachlin relied on the contextual factors.

Regarding the first factor, the fact that agricultural workers have been excluded from employment standards, workplace safety, workers' compensation, and labour statutes since the early 20th century is clear evidence of pre-existing disadvantage (see *The Labour Welfare Act*, SA 1943, c 5, s 3; *The Hours of Work Act*, SA 1936; *The Workmen's Compensation Act*, SA 1908, c 12, s 2). These exclusions have persisted despite the fact that the agricultural industry has a higher workplace injury rate than most other sectors, which further establishes that agricultural workers have experienced long-time disadvantage in Alberta (see *Occupational Injuries and Diseases in Alberta*). The pre-existing disadvantages experienced by TFWs have already been discussed above, and are equally applicable here. The perpetuation of historic disadvantage by the *ESC* exclusions may be sufficient to establish a violation of s 15.

As for the second factor, there is arguably little correspondence between the differential treatment and the claimant group's actual characteristics. The typical justification for the exclusion of agricultural workers is that the unique nature of agricultural work (i.e. its seasonal and weather-dependent nature) requires that employees work longer hours in order to make harvest deadlines. Another common justification is that it would be too economically burdensome for small farms to comply with employment standards and similar legislation. The problem with this reasoning is that it is contradicted by real-life experience. For example, after Ontario was required to include agricultural workers in its labour relations legislation in *Dunmore*, farms in Ontario did not experience a significant, sustained decline in their net income, which is what one would expect if the nature of the agricultural industry required

agricultural workers to be excluded (see *Statistics Canada Table 002-0053*). Additionally, other seasonal, weather-dependent sectors such as the construction industry are able to fulfill labour needs by simply hiring more workers.

The third factor is not particularly relevant here, as the exclusions of the *ESC* are not aimed at ameliorating some disadvantage experienced by a specific group, and also do not have such an effect.

The final factor also weighs in favour of finding that the *ESC* creates a disadvantage by perpetuating prejudice and stereotypes, as the effects of the exclusions are quite severe. The exclusions deny to agricultural workers basic employment rights that many Canadians possess and take for granted. The rights affected by the exclusions are also of high societal significance. It would not be a reach to presume that most Canadians would be appalled to hear that the *ESC* allows for practices such as employing children under 15 to work over 12 hours a day with no holidays or vacation, even during school hours. The effects are also severe on temporary foreign workers, whose rights and avenues of recourse are already limited even without the exclusions in the *ESC*.

In summary, if it can be shown that the *ESC* creates a distinction based on the ground of 'occupational status as agricultural worker' or 'immigration status as temporary foreign worker', then there is a good chance that the exclusions in the *ESC* of agricultural workers from various protections will be found to violate s 15 of the *Charter*.

Section 1

In *Bedford,* McLachlin CJ stated that the question to be asked in a s1 analysis is, "whether the negative impact of a law on the rights of individuals is proportionate to the pressing and substantial goal of the law in furthering the public interest" (at para 125). Whether a law is reasonable and demonstrably justified in a free and democratic society is determined by its adherence to the test arising from *R v. Oakes,* [1986] 1 SCR 103 at 138-139. Professor Hogg has distilled the original judgment into four criteria that that a law must satisfy in order to be saved by s1:

1) A Sufficiently Important Objective: The law must pursue an objective that is sufficiently important to justify limiting a *Charter* right
2) Rational Connection: The law must be rationally connected to the objective
3) Least Drastic Means: The law must impair the right no more than is ("reasonably") necessary to accomplish the objective.
4) Proportionate Effect: The law must not have a disproportionately severe effect on the persons to whom it applies. (Peter W Hogg, *Constitutional Law of Canada*, 5th ed, ch 38 at 18 citing *Oakes* at paras 138-139; see also *Dunmore* at para 56)

It should also be noted that there is some indication that no violation of a principle of fundamental justice found under a s7 analysis could ever be saved by a s1 application, but as of yet this remains uncertain (Hogg, ch 47 at 4). In *Bedford,* McLachlin CJ seems to address this uncertainty by contrasting the purposes of the principles of fundamental justice and s1. She contends that s7 deals with the impugned law's impact on individuals while s1 does the same in relation to the public interest (at para 125).

With all due respect to the Chief Justice, this distinction does not make sense in application. That a law has a sufficiently important objective, is rationally connected to its objective, and accomplishes its goal in the least drastic manner are not significantly affected by a distinction between the individual interest and the public interest. Further, a s1 disproportionality analysis can only be made in reference to proven evidence of harm to an individual so the distinction the Chief Justice outlined would have minimal impact here as well. What this means practically for a lawyer alleging a s7 breach and denying a s1 defense is that the arguments and evidence led will be virtually identical for both.

An application of the facts to the s1 test returns a generally favourable result. In *Dunmore* the Supreme Court of Canada recognized the protection of the family farm as a sufficiently important objective so we are unlikely to be successful arguing to the contrary. Rational connection can be rebutted in the case of the Child Labour exclusions on the basis that children offer no cost savings as compared with an adult in the context of filing an employment role, but generally the exclusions appear to be rationally connected with their objective. The least drastic means analysis will provide strong opportunity for argument. The exclusions could target busy periods specifically, or set minimum work age and alternative education options for child workers. The disproportionality analysis will depend on the severity of the evidence of harm that we will be able to gather; the greater the evidence of harm, the greater the likelihood that the exclusions will be found to be disproportionate.

International Law

The *Charter*-based arguments above may be further strengthened by Canada's obligations in the international sphere. Although international treaties and conventions may not be strictly binding on Canada, the Courts may nevertheless be influenced by international law when interpreting whether a statute violates the Constitution (see e.g. *Baker v Canada*, [1999] 2 SCR 917 at 70).

Article 10(3) of the *International Covenant on Economic, Social, and Cultural Rights*, which Canada has signed and ratified, states that, "[s]tates should … set age limits below which the paid employment of child labour should be prohibited and punishable by law" (16 December 1966, 993 UNTS 3, Art 10(3)). The exclusions in the *ESC* violate Article 10 by allowing children of any age to work on farms and ranches. However, the word "should" in Article 10 may dampen the urgency of the provision.

Article 32 of the *Convention on the Rights of the Child*, another convention that Canada has ratified, uses more obligatory language, explicitly stating that state parties must "recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development" (20 November, 1989, 1577 UNTS 3, Art 32). The Convention goes on to oblige states to enact legislation and take other administrative, social, and educational measures to provide for a minimum age (or ages) for employment, appropriate regulations for work hours and conditions, and for effective measures to enforce the above. Again, the exclusions in the *ESC* clearly contravene this international convention by failing to regulate the hours, work conditions, or minimum age for children employed as farm workers.

Conclusion

There are several opportunities to challenge the *ESC* exclusions based on a breach of *Charter* rights. In particular, there are reasonable arguments to be made in the context of security of the person providing that sufficient evidence of harm can be admitted. Challenges raised in the context of the Child Labour exclusions should be particularly compelling, as the exclusions seem to be poorly and overly simplistic attempts to address the legislative objective as defined herein. Depending on the evidence of harm that can be gathered, there is potential to strike this exclusion altogether based on s 7. Likewise, the Pay and Vacation exclusions, and the Hours of Work exclusions appear to be too broadly constructed to survive close judicial scrutiny.

There is also a fairly solid case to be made that the exclusionary provisions in the *ESC* violate s 15 of the *Charter* so long as we can establish occupational status as an agricultural worker as an analogous ground, or show that the exclusions have a disproportionately adverse effect on temporary foreign workers. Given the existing jurisprudence, strong, cogent evidence will be required to successfully argue for the inclusion of occupational status as an agricultural worker as an analogous ground. However, cases like *Baier* and the concurrence in *Dunmore* suggest that such an endeavor is not altogether impossible. Showing that agricultural workers are disproportionately affected by the exclusionary provisions in the *ESC* is somewhat less challenging, but will still require strong evidence to be successful.

If successful, these arguments would support the conclusion that the exclusions of agricultural workers from the *ESC* should be struck down under s 52 of the *Constitution Act, 1982*.