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The Constitutionality of the Exclusion of Farm Industries under the Alberta Workers' Compensation Act

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As part of the Constitutional Clinical Law class at the University of Calgary, we studied the constitutionality of the exclusion of farm workers from four statutes in Alberta; the *Occupational Health and Safety Act*, RSA 2000 c O-2 [*OHSA*], *Labour Relations Code* [*LSC*], RSA 200 c L-1, *Employment Standards Code*, RSA 2000 c E-9 [*ESC*], and the *Workers' Compensation Act*, RSA 2000 c W-15 [*WCA*]. With respect to the *WCA*, we developed arguments as to why the exemption of the agricultural industries from mandatory inclusion under the *Workers' Compensation Act* violates s 7 and s 15 of the *Canadian Charter of Rights and Freedoms* [*Charter*]. For earlier posts on the constitutionality of the *OHSA* and *LRC* see here and here.

The *Workers' Compensation Act*

In Canada, workers' compensation is characterized by a guaranteed no-fault benefits and insurance scheme funded by employers; the worker gives up his or her right to sue an employer in exchange for a statutory right to receive benefits in the event of an injury. Also, the employer enjoys immunity from negligence lawsuits. The *WCA* provides that compensation is payable to a worker who suffers an injury by an accident, and is also payable to the dependents of a worker who has died (see *WCA*, s 24). Compensation includes income replacement, as well as medical aid and vocational rehabilitation (*WCA*, s1(1)(f)).

Alberta's *WCA* provides for universal coverage for all workers and industries unless otherwise exempted under Schedule A of the *Workers' Compensation Regulation*, Alta Reg 325/2002. Currently there are 200 industries listed in Schedule A that are exempt from the mandatory application of the *WCA*. Employers in these exempt industries have the ability to opt in through an application to the WCB (*WCA*, s 14(2)). However, it is only the employers that can make an application; there is nothing in the *WCA* to allow an employee or group of employees in an exempt industry to make an application for coverage.

The exempted agricultural industries include those such as farming, fruit growers, egg producers, and feedlots to name a few (see the *Workers' Compensation Regulation* at Schedule A). It is estimated that most aspects of agricultural industries are captured by the exemption.

Section 15 Right to Equality

The test for determining if the equality rights under s 15(1) of the *Charter* have been violated is:

1. Does the law create a distinction on an enumerated or analogous ground?
2. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? (*Quebec (Attorney General) v A*, 2013 SCC 5 at para 324 [*Quebec v A*]).

Does the Law Create a Distinction on an Enumerated or Analogous Ground?

There are two ways in which the first part of the test can be approached; first, the exclusion of agricultural workers from mandatory inclusion in the *WCA* is a distinction that is made on the basis of occupational status as an agricultural worker; the second argument is that the distinction is made on the basis of disability.

Occupational Status as an Agricultural Worker

Occupational status is not an enumerated ground of discrimination in the *Charter*; therefore, to establish a s 15 violation, the argument has to be made that the occupational status as an agricultural worker is an analogous ground of discrimination. The argument here is that the courts have never stated with certainty that occupational status could not be an analogous ground in the right circumstances.

In *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 at para 169, Justice L'Heureux-Dubé, in a concurring judgment, held that agricultural workers were generally disadvantaged and should be seen as a protected group under s 15(1). The Alberta Court of Appeal in *Baier* v *Alberta*, 2006 ABCA 137 at para 56, also appears to have accepted that agricultural workers may be a protected group under s 15(1). These two cases can be used as persuasive authority to support the argument that the jurisprudence already recognizes occupational status of agricultural workers as an analogous ground. However, the strength of this argument is weakened by *Ontario (Attorney General) v Fraser*, 2011 SCC 20 at para 295, where Justices Rothstein and Charron, writing concurring reasons, did not accept that occupational status as an agricultural worker was a protected ground on the record before them. This underscores the importance of establishing a compelling evidentiary record about the vulnerability of agricultural workers in order for this argument to succeed. For further development of this argument see the earlier posts on the *OHSA* and *LRC*.

Discrimination on the Basis of Disability

The second way in which the s 15 argument can be framed under the *WCA* is that discrimination is occurring on the basis of a disability, which is an enumerated ground in s 15(1) of the *Charter*.

The thrust of the disability argument is that the *WCA* provides coverage for specific occupational diseases if they are set out in column 1 of Schedule B of the *Workers' Compensation Regulation* and if the disease was caused by the employment in the industry or process listed beside it in Column 2 of Schedule B of the *Workers' Compensation Regulation* (see s 20 of the *Workers' Compensation Regulation*). Two specific occupational diseases enumerated in Schedule B of the *Workers' Compensation Regulation* are silo filler's disease and farmer's lung. The argument here is that these diseases are likely to be caused by certain types of workplace exposure that only agricultural workers will experience. Excluding agricultural workers from compulsory

coverage indirectly discriminates on the basis of disability when an agricultural worker is afflicted with one of these diseases. The distinction that is created is that some worker disabilities are guaranteed mandatory coverage for occupational diseases under the *WCA*, and others are not. This amounts to effects-based discrimination based on the exclusion of agricultural workers from compulsory coverage for certain disabilities under the *WCA*.

Does the Distinction Create a Disadvantage by Perpetuating Prejudice or Stereotyping?

In Alberta, agricultural workers suffer tremendous legal disadvantage by being excluded from the protections found in most labour and employment statutes (see ss 1(s), 1(bb) of the *OHSA*; s 4(2)(e) of the *LRC*; and ss 2(3), 2(4) of the *ESC*). Although difficult to ascertain, the government's policy preference appears to be the avoidance of imposing additional regulatory costs onto family-run agricultural industries. This results in the creation of a large political, legal and social disadvantage for agricultural workers based on the assumption that agricultural business cannot afford the cost of regulation and that those employed on farms would likely be family members.

As L'Heureux Dubé J, noted in *Dunmore* (at para 169), agricultural workers often have lower levels of education and skill, and reduced labour mobility options, which also perpetuates disadvantage. The disadvantage in this case stems from the definition of 'compensation' under s 1(1)(f) of the *WCA* as including medical aid and vocational rehabilitation, from which agricultural workers are excluded. Disadvantage is perpetuated because an injured agricultural worker will likely receive health and welfare benefits of a lower quality through the public health system and other state services, than that same worker would have received if they had been covered by the *WCA*. The type of care received by agricultural workers is important because agriculture is a dangerous industry (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; W Pickett W, L Hartling, RJ Brison, and J Guernsey, "Fatal farm injuries in Canada" (1999) 160 Can Med Assoc J 1843; Alberta, Agriculture and Rural Development, 1985-2011 Alberta Farm Fatalities).

Potential Challenges with the s15 Argument

Other posts have discussed the possible issues with the arguments we have raised above. More specifically to the *WCA*, the government may argue that all of the employers undertaking business in one of excluded industries have the ability to opt in to the scheme; therefore, there is no distinction because all industries could receive coverage if they opted in. The response to this is that the *Act* does distinguish between mandatory and optional coverage, and this is the distinction that may be discriminatory. Also, a worker is a beneficiary of WCB coverage, but that worker has no ability to opt into the plan on his or her own; only an employer may opt in. It is the worker's *Charter* rights that are at issue here, not the employer's.

Another potential issue is that the *WCA* is not a state benefit; instead, it essentially provides for an insurance scheme, funded solely by employer contributions. The response to this argument is that the *WCA* can be coloured by any language or structured through any funding arrangement the government wishes, but this does not change the fact that the *WCA* is a statutory benefits scheme that is intended to broadly benefit workers through a state mandated compensation scheme. Both *Eldridge v British Columbia* (Attorney General), [1997] 3 SCR 624 at para 73, and *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54 at para 72, support the proposition that once the state provides for a benefit it must do so without discrimination.

Section 7 Right to Life, Liberty, and Security of the Person

In order to establish a breach of s 7, it must be shown that:

1. A deprivation to the right to life, liberty and security of the person has occurred, and
2. The deprivation is not in accordance with the principles of fundamental justice (*Gosselin v Quebec*, 2002 SCC 84, at para 205).

Has a deprivation to the right to life, liberty and security of the person occurred?

The argument is that the exclusion of agricultural industries from mandatory inclusion under the *WCA* is a deprivation to agricultural workers' rights to life and security of the person.

Based on the case law, the right to life is engaged when a state imposed deprivation can result in death; and security of the person is engaged when a state imposed deprivation, such as delay to access to health care, may result in detrimental physical and psychological effects (see *R v Morgentaler*, [1988] 1 SCR 30 at para 28; *New Brunswick (Minister of Health & Community Services) v G(J),* [1999] 3 SCR 46 at para 60; *PHS Community Services Society v Canada (Attorney General*), 2011 SCC 44 at para 91).

In this case, state-imposed deprivation occurs when an agricultural worker is injured and is forced to have long waiting times for access to health and medical care from the public health system because they are not included under the *WCA*. Injured workers covered under the *WCA* will likely have priority access to medical care and diagnostic tests because health care providers receive financial incentive to provide expedited services since the WCB pays additional fees for services performed in an accelerated time frame (see Workers' Compensation Board, *Physician's Reference Guide* at 11). It can be argued that the exclusion of agricultural workers from the *WCA* results in diminished quality and speed of health care, and other services that are provided by the WCB. When this is coupled with long delays in the public health system for more serious injuries, it can be argued that agricultural workers experience both physical and psychological detriment as a result of the exclusion of mandatory WCB coverage. It is this resulting physical and psychological trauma from the deprivation that engages the agricultural workers' rights to life and security of the person.

Potential Issues with the s 7 Argument

The first issue with this argument, and potentially the most problematic, is that the court may find that the claimants are attempting to impose a positive obligation on the government to provide benefits, and that s 7 can only be argued in an adjudicative context. Although the court in *Gosselin* left open the possibility that s 7 may impose positive obligations, as of yet no court has found that it does. The response is that this argument is not imposing a positive obligation but rather, the government has acted by enacting the *WCA*, and as such it must comply with the *Charter*. The success of this argument is largely dependent on the concurring judgment of McLachlin CJC and Major J in *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 where they stated:

> [104] The *Charter* does not confer a freestanding constitutional right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*.

The second potential issue is proving that this is a true life and security of the person argument and not a masked economic benefit argument. Central to this argument is that the *WCA* provides much more than financial compensation. It will be necessary to prove that the WCB can provide expedited services to injured workers covered by the *WCA*; that injured agricultural workers are forced to face long delays in the Alberta Health care system; and these two factors result in different qualitative outcomes for an injured worker. As noted by McLachlin CJC and Major J in *Chaoulli*:

> [158] In sum, the prohibition on obtaining private health insurance, while it might be constitutional in circumstances where health care services are reasonable as to both quality and timeliness, is not constitutional where the public system fails to deliver reasonable service.

The third potential issue is that it may be difficult to show that this is a true deprivation as the *WCA* does not prohibit individuals from accessing medical treatment or other private services. To prove that this is a true deprivation, it must be shown that the expediency and scope of the services available under the *WCA* to injured workers are greater than those services publicly available; the fact that alternative treatment options are available does not diminish the deprivation faced by agricultural workers facing longer delays to get treatment outside of the *WCA* regime.

Lastly the government may argue that being an agricultural worker is a choice and that workers can choose a different career if they wish to be covered under the *WCA*. The government advanced a similar argument in both *Bedford v Canada (Attorney General)*, 2013 SCC 72 at para 86, and *PHS Community Services Society* (at paras 91 and 101) but it was dismissed in both cases. Similar to the s 15 arguments above, there is an argument that can be made that a person's occupation is not a choice, but an integral part of a person's identity. Also, agricultural workers are arguably a marginalized group, often with low education and skill levels, which would be a barrier to entering other careers easily.

Is the deprivation in accordance with the principles of fundamental justice?

The second stage of the s 7 test concerns the principles of fundamental justice. At this stage it is relevant to consider arbitrariness, overbreadth, and gross disproportionality to determine if the exclusion of agricultural industries in the *WCA* is in accordance with the principles of fundamental justice (*Bedford* at para 96).

With respect to arbitrariness, the question is whether the objective of the impugned law bears no relation to, or is inconsistent with its effects (*Bedford* at para 98). The purpose of the *WCA* exclusion is generally thought to be to protect the financial interests of agricultural industries by not forcing mandatory participation in the *WCA* based on the assumption that agricultural industries may not be able to pay these additional costs because they are small, family-run businesses. However, the exclusion may actually be more harmful than beneficial since an injured agricultural worker, not covered by the *WCA*, may bring a claim in negligence, resulting in potential liability for the business owner. An example of this is the case of Kevan Chandler, who was an agricultural worker killed during the course of his employment; the employer declared bankruptcy after a settlement to a tort claim was reached with Mr. Chandler's widow (Bob Barnetson, *The Most Unsafe Workplace in Alberta: Why Farm Workers Have So Few Rights and Protections*, Alberta Views; see also Judge Peter Barley, Report to the Minister of

Justice and Attorney General. Public Fatality Inquiry, Kevan John Chandler). The exclusion of agricultural industries is arbitrary because while the purpose of the exclusion is to financially protect agricultural business owners, the effect is that it may actually place the same owners at greater financial risk due to liability in tort law.

The overbreadth analysis essentially examines whether the law overreaches in its effects, even though it may be rational in some cases (*Bedford* at para 112). In the case of agricultural industries, even though the exclusion from the *WCA* may provide financial relief for smaller or family run agricultural businesses, it is overbroad because it also extends to other agricultural businesses that may be run by larger or successful agricultural businesses that could afford these additional costs.

Lastly, gross disproportionality examines whether the negative effect on an individual is balanced with the state's objective or whether it is grossly disproportionate to that objective (*Bedford* at para 103). In this case the protection of the financial interests of all agricultural industries is grossly disproportionate to the potential life threatening physical and psychological harm caused to agricultural workers by the exclusion from the *WCA*.

Section 1: Can the infringements be reasonably justified in a free and democratic society?

If the court finds that the exclusion of agricultural workers from the *WCA* is a breach of s 7 or s 15, the government would have the opportunity to justify the exclusion under s 1 of the *Charter*. The following analysis examines the two stage test for the s 1 justification from *R v Oakes*, [1986] 1 SCR 103, at paras 73-74.

Is The Objective of the Legislation Pressing and Substantial

Agricultural industries have been excluded from the *WCA* since its inception, which makes it particularly difficult to ascertain the objective of the exclusion. However, it is likely that the government may argue, similar to the s 7 arguments, that the purpose of the exclusion is to protect the financial interests of agricultural business owners. The government would likely argue that mandatory inclusion in the *WCA* would provide an unsustainable financial burden on agricultural business, which is important to protect the cost and availability of the food supply. The onus would be on the government to provide evidence that agricultural business owners cannot afford to pay into the *WCA* fund, and that paying into the fund would indeed bankrupt them or drive up the price of food for consumers.

Proportionality

Rational Connection between the Rights Violation and the Aim of the Legislation

If the aim of the legislation is to protect the financial security of family agricultural business owners, the government will have to prove on the balance of probabilities that the exclusion of all farm industries from *WCA* is rationally connected. In *Chaoulli* (at para 155), McLachlin CJC and Major J found that despite the government having an interest in protecting the public health regime, there was no evidence that the prohibition on the purchase and sale of private health insurance protected the health care system; as such they were unable to prove a rational connection between the prohibition and the objective. Similarly, in this case it will be difficult for the government to prove the violation is rationally connected to the aim. The government certainly has an interest in ensuring that the family farm does not go bankrupt, however,

evidence can be led that paying into the *WCA* fund is more cost effective over the long term, particularly because it would protect agricultural employers from expensive lawsuits, which as discussed previously can and has bankrupted farms.

Minimal Impairment of the Impugned Provision on Charter Rights

In *Chaoulli* (at para 156) McLachlin CJC and Major J found that the denial of access to timely and effective medical care to those who need it was a prohibition that went further than necessary to protect the public system, and therefore it was not a minimal impairment. Similarly in this case, the exclusion of all agricultural industries goes further than necessary to protect the 'family run farm', because the exclusion captures in its ambit the large corporate run businesses as well. A cursory review at other provinces' workers' compensation schemes reveals that there are other ways to protect the family run farm which affect the rights of agricultural workers more minimally. For example, the Manitoba scheme excludes from coverage only family run farms (*Man Reg* 196/205, Schedule A, s 15(1)). Furthermore, Abella J noted in *Quebec v A* that the court has "generally been reluctant to defer to the legislature in the context of total exclusions from a legislative scheme" (at para 361). A more suitable scheme may be the mandatory inclusion of all agricultural industries with ability of business owners to opt out if proof of financial hardship is provided. There are strong arguments that the exclusion is not minimally impairing.

Proportionality between the Effect on the Charter Guarantee and the Attainment of the Legislative Goal

In *Chaoulli*, McLachlin CJC and Major J found (at para 156) that the denial of access to timely and effective medical care was not proportionate to the beneficial effects of the prohibition on private insurance to the health system as a whole. It is a difficult argument to make that one individual's financial security is more important, or just as important, as another individual's security of the person, or life, which is why the negative impact on the rights of injured agricultural workers due to the delay in access to medical care is not proportionate to the beneficial impact of the law in terms of saving farm owners money.

Conclusion

Providing that the factual basis for the s 7 and s 15 arguments can be established, the courts may find that the exclusion of agricultural industries from mandatory inclusion under the *WCA* is a breach of agricultural workers' right to equality, and rights to life and security of person. The arguments under s15 will be challenging due to the uncertainty with occupational status as an analogous ground, and whether sufficient evidence can be led to illustrate the perpetuation of disadvantage based on disability as a result of the exclusion of agricultural workers in the *WCA*. There is a stronger likelihood that the s 7 arguments will have more success, provided it is successfully argued that no positive obligation is being demanded of the government, and that unreasonable delay in accessing health care can be proved. The biggest hurdle in arguing s 7 or s 15 regarding the *WCA* is that it does provide the ability for excluded industries to opt into the scheme. This will be a difficult argument to address, but with the right evidence it could be surmounted. If the arguments under s 7 or s 15 are successful, it is not likely that the infringement could be justified under s 1 of the *Charter*, given the predicted justification arguments the government will make. The appropriate remedy would be to strike the various exclusions of farm workers from the *Workers' Compensation Regulation.*