FARM AND RANCH WORKERS' RIGHTS

An ebook collection of
ABlawg posts about farm and
ranch workers' rights

DECEMBER 24, 2015

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Introduction: By Jennifer Koshan

Farm and Ranch Workers' Rights Ebook

This ebook is a compilation of posts written over the last few years concerning the exclusion of farm and ranch workers from Alberta's employment and labour legislation. The issue is a topical one given the new Alberta government's passage of Bill 6, the *Enhanced Protection for Farm and Ranch Workers Act*, as one of its first pieces of legislation in the 29th Legislature, 1st Session (2015). ABlawg posts on the rights of farm and ranch workers were tabled in the legislature during the debate over Bill 6 by the leader of the Alberta Liberals, Dr. David Swann (see Hansard, December 7, 2015), who has been a tireless advocate for the rights of these workers. With the passage of Bill 6 on December 10, 2015, most farm and ranch workers will now be included in the *Employment Standards Code*, RSA 2000 c E-9, *Labour Relations Code*, RSA 2000 c L-1, *Occupational Health and Safety Act*, RSA 2000 c O-2, and *Workers' Compensation Act,* RSA 2000 c W-15.

The first post in this collection, Who is a Farm Worker? And Why Does it Matter? sets the stage by examining a case considering the exclusion of farm and ranch workers from the *Occupational Health and Safety Act*. Before the legislative amendments were passed, courts were sometimes required to rule on the scope of the exclusions via interpretation of the relevant legislation. In *R v Northern Forage Inc*, 2009 ABQB 439, Justice Don Manderscheid concluded that the *Occupational Health and Safety Act* exclusion of some farm and ranch workers extended to those working in facilities where hay was compressed into bales. He noted that even though "this may not be a desired state of affairs if such situations lend themselves to undermine the intent of workers' safety and health legislation" (at para 70), "the role of the judiciary is to interpret rather than draft the legislation. This latter role is the sole purview of the Legislature" (at para 71).

The second post relates to a landmark decision from the Supreme Court of Canada on the rights of farm workers, *Dunmore v Ontario (Attorney General)*, [2001] 3 SCR 1016. In a January 2010 post, ABlawg's Top Cases and Legal Developments from the 2000s, and a Vote for Dunmore, I nominated *Dunmore* as the top constitutional decision of the 2000s for its recognition that the *Canadian Charter of Rights and Freedoms* may impose positive obligations on government. In *Dunmore*, agricultural workers were excluded from labour relations legislation in Ontario when the Conservatives came to power in the 1990s. A constitutional challenge by farm workers was successful, with the Supreme Court finding that freedom of association under section 2(d) of the *Charter* protects the right not to be excluded from a protective labour relations regime where the exclusion would substantially interfere with the effective exercise of freedom of association. The Court recognized the unique vulnerability of farmworkers as an economically disadvantaged group, often working in isolated settings close to their employers, which meant that they could not form trade associations or have meaningful negotiations with their employers unless they had legislative protection.

Next in this ebook is a series of posts that were produced in a constitutional clinical project at the Faculty of Law in winter 2014, where students explored the feasibility of constitutional challenges to the exclusion of farm and ranch workers from Alberta's employment and labour legislation. Based on the precedents in *Dunmore* and subsequent cases, the students concluded that the exclusions violated freedom of association under section 2(d) of the *Charter,* the right to life, liberty and security of the person under section 7 of the *Charter* by contributing to the

dangerous working conditions faced by many farm and ranch workers, and section 15 equality rights by depriving farm and ranch workers of the protections that most other workers enjoy in Alberta. They also concluded that these violations could not be justified by the government under section 1 of the *Charter*, as its traditional rationale of protecting the "family farm" was overbroad in light of the fact that many agricultural operations now occur on a large scale in Alberta. The students' analysis is discussed in the following posts: Kay Turner, Gianna Argento, and Heidi Rolfe, Alberta Farm and Ranch Workers: The Last Frontier of Workplace Protection (examining the *Occupational Health and Safety Act*); Brynna Takasugi, Delna Contractor and Paul Kennett, The Statutory Exclusion of Farm Workers from the Alberta Labour Relations Code; Nelson Medeiros and Robin McIntyre, The Constitutionality of the Exclusion of Farm Industries under the Alberta Workers' Compensation Act; and Graham Martinelli and Andrew Lau, Challenging the Farm Work Exclusions in the Employment Standards Code.

I wrote a follow-up post in March 2015, The Supreme Court's New Constitutional Decisions and the Rights of Farm Workers in Alberta, which argues that the government's constitutional mandate to include farm workers in labour and employment legislation was strengthened by several Supreme Court of Canada decisions from early 2015: *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 (CanLII), *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 (CanLII), and *Carter v Canada (Attorney General)*, 2015 SCC 5 (CanLII).

The final post in this ebook, Protection for the Rights of Farm Workers Finally Proposed in Alberta, discusses the repeal of the exclusions of farm and ranch workers by Bill 6, introduced in November, 2015. Bill 6 proved to be very controversial, and amendments were eventually passed which exempted family members and unpaid workers from inclusion in the *Occupational Health and Safety Act* and *Workers' Compensation Act*, as noted in commentary to this post.

While this chapter of the historical exclusion of farm and ranch workers from Alberta legislation may now appear to be over, there is still work for the government to do in developing regulations, policies and procedures under the revised legislation. Groups representing workers will also have work to do in ensuring that the legislation is implemented and enforced.

This ebook is organized chronologically by date of post (with the oldest first). Where appropriate the text also includes any commentary and response received on the individual posts. There is no index to the volume but it is readily searchable in this electronic form using key words and the "find" function in Adobe Acrobat or a similar program. I am responsible for the selection of posts for this ebook, and Evelyn Tang (JD 2016) is responsible for the hard work of putting the ebook together.

August 31, 2009

Who is a Farm Worker? And Why Does It Matter?

By: Jennifer Koshan

Case Commented On: *R v Northern Forage Inc*., 2009 ABQB 439

Alberta marked its 5th annual Farm Workers Day on August 20, 2009. As in previous years, the event provided an opportunity to advocate for equal protection for farm workers under Alberta's labour and employment laws. Farm workers are currently excluded from the following laws: (1) protections regarding wages, overtime, holidays, and hours of work (see *Employment Standards Code*, R.S.A. 2000, c.E-9, section 2(4)); (2) mandatory coverage for workers compensation (see *Workers' Compensation Regulation*, Alta. Reg. 325/2002, Schedule A); (3) work-related health and safety protections (see *Occupational Health and Safety Act*, R.S.A. 2000, c. O-2, section 1(s)); and (4) protections related to the unionization of workers (see *Labour Relations Code*, R.S.A. 2000, c. L-1, section 4(2)(e)). This makes Alberta one of the most lax provinces in Canada in terms of farm worker protection. Groups such as the Alberta Federation of Labour have called for an end to such exclusions, and a recent inquest into the fatality of agricultural worker Kevan Chandler led Judge Peter Barley to recommend that "paid employees on farms should be covered by the *Occupational Health and Safety Act*…" (at 7). Until the Alberta government amends the relevant legislation, however, questions may arise as to which workers are covered by the exclusions.

This was the issue in *R v Northern Forage Inc*., 2009 ABQB 439. Northern Forage, a company based in Nampa, Alberta, produces Timothy hay. In January 2004, Yvon Daniel Poulin, an employee of Northern Forage, was killed working in a facility where the hay was compressed into bales. Northern Forage was charged with an offence under section 2(1)(a) of the *Occupational Health and Safety Act* (*OHSA*), which provides that "every employer shall ensure, as far as it is reasonably practicable for the employer to do so, the health and safety of workers engaged in the work of that employer". The company sought to defend itself against the charges on the basis that its operations were a "farming operation" and thus exempted from the *OHSA*. This argument was successful at trial in the Alberta Provincial Court, and the Crown appealed this decision to the Alberta Court of Queen's Bench. The relevant statutory provisions requiring interpretation are as follows:

> *OHSA*
>
> In this Act,
>
> …
>
> > (s) "occupation" means every occupation, employment, business, calling or pursuit over which the Legislature has jurisdiction, except
> >
> > > (i) farming or ranching operations specified in the regulations, and…

(bb) “worker” means a person engaged in an occupation;

2(1) Every employer shall ensure, as far as it is reasonably practicable for the employer to do so,

(a) the health and safety of

(i) workers engaged in the work of that employer…

Farming and Ranching Exemption Regulation, Alta Reg 27/1995 (“Exemption Regulation”)

2. The farming and ranching operations that are excluded are the operations that are directly or indirectly involved in the following:

(a) the production of crops, including fruits and vegetables, through the cultivation of land;

(b) the raising and maintenance of animals or birds;

(c) the keeping of bees.

3. Despite section 2, the following operations are included in the definition of “occupation” under the Act:

(a) operations involved in the processing of food or other products from the operations referred to in section 2;

(b) the operation of greenhouses, mushroom farms, nurseries, or sod farms;

(c) operations involved in landscaping; operations involved in the raising or boarding of pets.

Justice Don Manderscheid described his task as follows: “we must work through the various nested components that determine whether the employment circumstances of a particular agricultural worker are subject to or exempt from the provisions of the Act” (at para 11). More specifically, it was necessary to determine the following issues sequentially:

(1) the scope of “farming and ranching operations” (Act, s. 1(s), Exemption Regulation, s. 2),

(2) whether Northern Forage or its workers were engaged in operations “that are directly or indirectly involved … in the production of crops … through the cultivation of land” (Exemption Regulation, s. 2(1)),

(3) if so, whether compression of the Timothy hay amounted to “processing of food or other products” (Exemption Regulation, s. 3(a)) (at para 13).

Dealing first with the scope of "farming and ranching operations", Justice Manderscheid rejected the parties' arguments in respect of different dictionary definitions of the term "operations", noting that this term had to be interpreted in light of the other relevant sections of the Exemption Regulation, the *OHSA* as a whole and the objectives of the legislation. Doing so, Justice Manderscheid found that the term "operations" was not particularly meaningful, rather, it was "an arbitrary term that has been selected by the Legislature to 'label' [the] three exempt categories" (at para 16). In particular, he rejected the company's argument that "operation" meant "business", such that any entity that conducted one of the three exempted activities would be an exempt operation. Relying on the "legally understood" meaning of "business" ("anything which occupies the time and attention and labour of a man for the purpose of profit" (*Stewart v Canada*, 2002 SCC 46 (at para 51)), Justice Manderscheid reasoned that the company's definition would draw a distinction between commercial and non-commercial agricultural activities that was "without obvious policy rationale" (at para 21). This approach would also run contrary to the intent of the legislation, "that being the protection of the worker" (at para 22). Accordingly, Justice Manderscheid held that "the deciding factor which determines exempt or non-exempt status under the legislation might be better resolved by evaluating the nature of the tasks conducted by a specific worker rather than the nature of the business or employer organization in question" (*ibid.*).

The next issue was how to determine which worker activities were exempted. Justice Manderscheid noted that the Exemption Regulation exempted worker activities that were both <u>directly and indirectly involved</u> in "the production of crops, including fruits and vegetables, through the cultivation of land" (section 2(a)). Here his analysis becomes rather confusing, as he returns to the notion of a business or enterprise seemingly rejected above: "I fail to see where "the production of crops, including fruits and vegetables, through the cultivation of land" could rarely be restricted to one particular activity but most likely would require several activities, which together would comprise the total sequence of production, which in turn could encompass a business or enterprise" (at para 25). However, "As I have explained, I do not agree … that an "operation" is a business or enterprise, but do agree that to artificially distinguish and separate worker activities that are directly involved in crop production from worker activities indirectly involved in crop production, would lead to absurd results" (*ibid.*). With respect, this does not seem to add anything to the wording of the Exemption Regulation itself, which clearly includes worker activities that are both <u>directly and indirectly involved</u> in "the production of crops, including fruits and vegetables, through the cultivation of land."

Interpreting this section further, Justice Manderscheid relied on *Nampa (Village) v Alberta (Municipal Government Board)* 1998 ABQB 478, 236 AR 173 as authority for the proposition that a common-sense, logical approach should be taken as to whether a worker's activity is directly or indirectly involved in an aspect (but not necessarily all aspects) of the enumerated exempt categories (at para 32). Taking this approach, Justice Manderscheid agreed with the trial judge that worker activities occurring in the company's Compression Facility, including the de-stacking and compressing of Timothy hay, "are directly or indirectly involved in the production of [crops] and are therefore exempt from the operation of the Act" (at para 33).

Justice Manderscheid next had to consider whether the production of crops in question occurred "through the cultivation of land" (Exemption Regulation section 2(a)). The government argued that "cultivation of land" should be interpreted so as to restrict the exemption "to activities which occur on the land or in the field" (at para 36). Given that "the crop in question was the bailed [sic] Timothy hay and that the production of such a crop was complete once it is removed from

the land or the field" (at para 36), workers in the Compression Facility would not be exempt. Justice Manderscheid disagreed with this argument as follows:

> In my mind, this reasoning is flawed. The crop in question is the Timothy hay. The harvester of such a crop may choose to cut it and stack it on a hay rack and transport it to a storage facility where the harvester, immediately prior to storage, may choose to have the hay transformed into a smaller form by way of a hay bailer. Whether or not the crop of Timothy hay is bailed on the field or in a storage facility is immaterial to production of the crop. The Timothy hay remains the crop, not the bailed Timothy hay. … It is sufficient that the crop was grown via cultivation of land at some point in its overall production process. All worker activities that are directly or indirectly involved in that overall production process are exempt (at para 37).

It is difficult to find fault with this interpretation. The final interpretive issue was more contentious, however.

The government argued that the company's Compression Facility operations involved "processing" of an agricultural product and were therefore not exempt from the legislation by virtue of Exemption Regulation section 3(a). The Court explained the work that went on in the Compression Facility as follows: "the bales of Timothy hay are … de-stacked, double compressed, re-tied, loaded on a pallet and covered by a plastic wrap. It is the total pallet that is covered by the plastic wrap and not the individual bales" (at para 40). In terms of whether this amounted to "processing", the legislature did not define this term, and Justice Manderscheid noted that the jurisprudence was not "entirely consistent", as meanings tend to vary with the legislation being interpreted (at para 43). Nevertheless, the law seemed clear that "activities which involved some form of transformation of the substance or composition of the original crop to an altered state would qualify as a "processing" of the original crop" (at para. 46, relying on *Elcan Forage Inc. v Weiler* (1992), 102 Sask. R. 197 at 202, 33 A.C.W.S. (3d) 249 (Sask. Q.B.), *Sunshine Coast Regional District (The) v Matkin and Matkin*, 2004 BCSC 679, and *Canada (ministre du Revenu national – M.R.N.) c Lomex, Inc.* (1998), 161 F.T.R. 169, 98 D.T.C. 6588 (F.C.T.D.)). Because the Timothy hay was not changed in composition during the compressing process, Justice Manderscheid held that the work in the Compression Facility did not amount to "processing" as contemplated in the case law.

None of these cases, however, deal with a legislative context in which the exclusion of farm workers from health and safety protections was being considered. The Court distinguished other cases where the definition of "processing" was construed more broadly, to include, for example, the packing of a product (*Re The Farm Products Marketing Act*, [1957] S.C.R. 198, 7 D.L.R. (2d) 25) and a "change in a product's appearance, quality or some other characteristic from what it was before the processing or the "transformation" took place" (*Notre Dame Seed Plant Ltd. v Manitoba (Provincial Municipal Assessor)*, 2004 MBCA 161, 190 Man.R. (2d) 149). It is unclear why Justice Manderscheid relied on a narrower definition of "processing", particularly given his earlier statement that the Exemption Regulation should be construed in light of the objectives of the overall legislative scheme – i.e. to protect farm workers.

Justice Manderscheid also cited case law to support the points that "the fact that a farming operation may include a component which is highly mechanized or industrialized should not determine whether or not such farming operation attracts or loses its exempt status as a farming operation" (at para. 55, citing *Spawnline Inc. v Ontario (Ministry of Labour)*, 1989 CarswellOnt 3597 (O.O.H.S.D.A.), and that "the fact that the farming operation may be conducted on a large

scale or enterprise model should also not be conclusive of whether or not such farming operation attracts or loses its exempt status as a farming operation" (at para 56, citing *Anderson v Bear Hills Pork Producers Ltd.*, 2000 SKQB 505, 198 Sask.R. 229). He concluded that "the fact that the bales of hay are further handled in the Compression Facility in the manner previously stated does not detract from the fact that the Compression Facility is integral to the farming operations conducted by the Respondent, and it is of no consequence that the crop undergoes further handling at a location other than the field where the initial crop was grown" (at para 58). Here Justice Manderscheid appears to slip back into a consideration of the location of the activity rather than whether it amounts to "processing", and it is unclear how the notion of "integral to the farming operations" is relevant to this issue.

The government's final argument was that the *OHSA* and Exemption Regulation should be interpreted so as to ensure its constitutionality. This is rather bizarre when one considers that it is the government that decided to exempt farm workers from this legislation in the first place. The government relied on *Dunmore v Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016 "as authority that legislation which discriminates against farm workers is contrary to s. 15, and an over-broad discrimination that cannot be justified under s. 1" (at para 62). *Dunmore*, however, considered the exclusion of farm workers from the right to unionize under Ontario's labour relations legislation, and the majority of the Supreme Court decided the case under section 2(d) of the *Charter*, the freedom of association guarantee. In obiter, Justice Claire L'Heureux Dube also found that the legislation in question may have violated section 15 of the *Charter*, but none of the other justices concurred with her on this point.

More fatal to the government's position was that it had only raised the *Charter* issue on appeal, and had not led sufficient evidence to support the *Charter* argument. Here, the Court noted that it would have expected to see evidence as to "the required comparator group… the purpose of the legislation, and relevant contextual factors" (at para 64). The Court cites *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 in support of this point despite the fact that more recent Supreme Court cases – *R v Kapp*, 2008 SCC 41 and *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9 — question the continued relevance of *Law* (see The End of Law: A New Framework for Analyzing Section 15(1) Charter Challenges).

Also problematic for the government was the Court's finding that the legislation in question did not involve a "genuine ambiguity" (at para 64). Here it relied on *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, where the Supreme Court differentiated between the interpretation of the common law and legislation using *Charter* values. It is well accepted that "where it will not upset the appropriate balance between judicial and legislative action, courts should apply and develop the rules of the common law in accordance with the values and principles enshrined in the *Charter*" (*Bell ExpressVu* at para 61). However:

> when a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that "it is appropriate for courts to prefer interpretations that tend to promote those [*Charter*] principles and values over interpretations that do not" …, it must be stressed that, to the extent this Court has recognized a "*Charter* values" interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations (*ibid*. at para 62, references omitted).

One might have thought that the interpretation of "processing" in section 3(a) of the Exemption Regulation involved a genuine ambiguity, but the Court said that this was a "question of specific contexts, rather than a fundamental lack of clarity in the text of the legislation itself" (at para 65).

The Court concluded by noting the vast changes in farming operations over the past decades, from the "single family farm, existing on a one quarter section homestead" to "modern farming operations that challenge one's imagination", involving "huge tracts of lands" and the employment of "numerous individuals" (at para 68). Justice Manderscheid noted that even though some of these operations are comparable to factories, workers may be excluded from health and safety protections, and that "this may not be a desired state of affairs if such situations lend themselves to undermine the intent of workers' safety and health legislation" (at para 70). However, "the role of the judiciary is to interpret rather than draft the legislation. This latter role is the sole purview of the Legislature" (at para 71). That being said, if Justice Manderscheid had found an ambiguity in the Exemption Regulation, more specifically with respect to the term "processing", he would still have been acting within his proper role as a judge while strictly interpreting the extent to which farm workers should be excluded from the protections set out in the OHSA. Alternatively, perhaps the government can take its arguments in this case to heart and reconsider the exclusion of farm workers from this and other legislation protecting employees.

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January 6, 2010

ABlawg's Top Cases and Legal Developments from the 2000s, and a Vote for *Dunmore*

By: Jennifer Koshan

Case Commented On: *Dunmore v Ontario (Attorney General)*, 2001 SCC 94

It is the first month of a new year, and the first year of a new decade. Hence, it is a time for lists. Rolling Stone magazine has opined on the top albums, songs and movies of the 2000s, and the Globe and Mail has weighed in on the top 10 nation builders of the last decade. On the legal front, the Globe also lists the top trials of the decade in Canada as well as internationally. The Court has compiled some statistics on the Supreme Court's output over the 2000s, and plans its own series of posts on the top judgments of the last decade.

Here at ABlawg, some of our bloggers will be writing about the case or legal development they think was most important from the 2000s. Other bloggers will be compiling top ten lists within particular areas of law. In keeping with the focus of ABlawg, our contributions will be linked to the impact the cases or legal developments have had in this province.

My own pick for a case of significance is *Dunmore v Ontario (Attorney General)*, [2001] 3 SCR 1016. *Dunmore* was hailed for its recognition that the *Charter* may impose positive obligations on government. In this case, the obligation arose in the context of including agricultural workers within labour relations legislation as an aspect of freedom of association under section 2(d) of the *Charter*. While *Dunmore* hedged on the issue of whether the government had a duty to include protections for collective bargaining, it opened the door for the Court's later finding that there was such a duty in *Health Services and Support – Facilities Subsector Bargaining Assn. v British Columbia*, [2007] 2 SCR 391.

Dunmore is also significant for its use of international law in the interpretation of *Charter* rights and freedoms. Generally speaking, cases under section 2(d) of the *Charter* have been at the forefront of recognizing the importance of international norms in *Charter* interpretation. *Health Services* is another case in point.

At the same time, there were elements of *Dunmore* that foreshadowed other trends in case law in the 2000s that were highly negative. A majority of the Court in *Dunmore* eschewed the opportunity to review the exclusion of agricultural workers from labour legislation as a violation of equality rights contrary to section 15 of the *Charter*. The Court's imposition of positive obligations within a section designed to protect the fundamental *freedom* of association was a bit tortuous, and it was difficult to avoid the conclusion that the Court went out of its way to avoid section 15. This avoidance of equality-based obligations in *Dunmore* was followed by several cases in the 2000s where equality claims were wildly unsuccessful: see for example *Lovelace v Ontario*, [2000] 1 SCR 950, 2000 SCC 37; *Gosselin v Québec (Attorney General)*, [2002] 4 SCR

429, 2002 SCC 84; *Nova Scotia (Attorney General) v Walsh*, [2002] 4 SCR 325, 2002 SCC 83; *Hodge v Canada (Minister of Human Resources Development),* [2004] 3 SCR 357, 2004 SCC 65; *Newfoundland (Treasury Board) v N.A.P.E.*, [2004] 3 SCR 381, 2004 SCC 66; *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, [2004] 3 SCR 657, 2004 SCC 78; and *Health Services*, *supra*. The 2000s ended with a new approach to equality rights in *R v Kapp*, [2008] 2 SCR 483, 2008 SCC 41, and my colleague Jonnette Watson Hamilton will be blogging on the significance of that case. But I think it is fair to say that the 2000s were a decade horribilis for equality, and the positive aspects of *Dunmore* on the section 2(d) front mask its negative implications for equality rights.

Dunmore spawned new legislation in Ontario, the *Agricultural Employees Protection Act*, 2002, S.O. 2002, c. 16 that gave rise to further litigation under section 2(d) of the *Charter*. *Fraser v Ontario (Attorney General)*, 2008 ONCA 760, is currently before the Supreme Court, and will determine whether the Ontario government's minimalist response to *Dunmore* is now unconstitutional in light of the *Health Services* case. *Dunmore* and subsequent developments could thus also be seen to illustrate the notion of dialogue between the courts and legislatures championed by Peter Hogg and Allison Bushnell in "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997), 35 Osgoode Hall Law Journal 75. Others, however, would likely argue that the dialogue metaphor was thoroughly deconstructed in the 2000s (see for example the commentaries in volume 45(1) of the Osgoode Hall Law Journal, a special issue revisiting Hogg and Bushnell's article 10 years later).

What of the impact of *Dunmore* in Alberta? At the time the decision was released in 2001, Alberta and Ontario were the only provinces to exclude agricultural workers from their labour relations legislation. The Attorney General of Alberta intervened in *Dunmore* and argued in support of the constitutionality of this exclusion. Following the decision in *Dunmore*, one might have thought that Alberta would enact legislation similar to Ontario's *Agricultural Employees Protection Act*. Although minimalist, this Act formally complied with *Dunmore* by extending certain protections to agricultural workers, including the rights to form, join, and participate in the lawful activities of an employees' association without interference, coercion or discrimination, and the right to make representations to their employers through an employees' association respecting the terms and conditions of employment (section 1(2)). There has been no such legislation enacted in Alberta, and agricultural workers continue to be excluded from the *Labour Relations Code*, R.S.A. 2000, c. L-1, s.4(2)(e). Furthermore, agricultural workers are also largely excluded from the *Employment Standards Code*, R.S.A. 2000, c. E-9, s. 2(4), the *Occupational Health and Safety Act*, R.S.A. 2000, c. O-2, s.1(s)(i), and the *Workers' Compensation Act*, R.S.A. 2000, c. W-15, s.14(1). Their exclusion from these latter statutes is not something that *Dunmore* itself provides a response to in light of its focus on section 2(d) of the *Charter*, as these statutes do not deal with association.

Overall, my vote goes to *Dunmore* not because it was a clear victory for farm workers or for *Charter* claimants, but because it has an important legacy, both positive and negative, for the *Charter* more broadly.

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April 28, 2014

Alberta Farm and Ranch Workers: The Last Frontier of Workplace Protection

By: Kay Turner, Gianna Argento, and 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's is also holding a service today for the Day of Mourning (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 (*OHSA,* ss. 9-12, 14, 25, and 33) and employers can appeal these orders if they disagree with them (*OHSA*, s 16).

The *OHSA* applies to almost all workers and employers in Alberta, the only exceptions being farming and ranching occupations and domestic workers (see *OHSA*, 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 *OHSA* 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 *OHSA.* Operations involving the processing of food, greenhouses, mushroom farms, nurseries, sod farms, landscaping, and the raising or boarding of pets are included in the *OHSA*. 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 *OHSA* 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 *OHSA* 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 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 *OHSA* 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 *OHSA* 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 *OHSA* 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 *OHSA*.

Rational Connection

We also argue that there is no rational connection between the objective of the *OHSA* 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 *OHSA* 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 *OHSA* 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 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 *OHSA* 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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Alberta Farm and Ranch Workers: The Last Frontier of Workplace Protection

Comments:

Bob Barnetson says:

April 30, 2014 at 7:40 am

> Great analysis. Much looking forward to reading the follow-on posts!

Bernard Bee says:

May 1, 2014 at 12:07 am

> Your post is really informative. I really like the information which you have shared in your post. Keep sharing such wonderful post in future also.

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May 2, 2014

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

By: Brynna Takasugi, Delna Contractor, and Paul Kennett

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) (*OHSA*); 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 *OHSA*).

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 sectors. 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 s. 15 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).

<u>Historical Disadvantage of Farm Workers</u>

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*:

> [165] 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.

<u>Lack of Political Capital</u>

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 s. 15 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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The Statutory Exclusion of Farm Workers from the Alberta Labour Relations Code

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May 14, 2014

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

By: Nelson Medeiros and Robin McIntyre

Legislation Commented On: *Workers' Compensation Act,* RSA 2000 c W-15

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,* s. 1(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 s. 15 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) thatthe 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 s. 15 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.*

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

Comments:

Bob Barnetson says:

May 14, 2014 at 7:34 pm

> Interesting angles on this one–especially the article 7 angle; the question is whether anyone has the dosh to take a challenge like this forward.

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May 27, 2014

Challenging the Farm Work Exclusions in the Employment Standards Code

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 (ages 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.
>
> 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.
>
> 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 s. 1 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 s. 1:

> 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 s. 7 analysis could ever be saved by a s. 1 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 s. 1. She contends that s. 7 deals with the impugned law's impact on individuals while s. 1 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 s. 1 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 s. 7 breach and denying a s. 1 defense is that the arguments and evidence led will be virtually identical for both.

An application of the facts to the s. 1 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.*

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Challenging the Farm Work Exclusions in the Employment Standards Code

Comments:

Bob Barnetson says:

May 28, 2014 at 7:24 am

> Very interesting. The question for progressives is who has the dosh to mount challenges based on this analysis?

Jennifer Koshan says:

May 30, 2014 at 7:30 am

> Good question Bob. We hope one of the unions will take this on, but litigation really shouldn't be required – the government should do the right thing and amend the legislation to bring Alberta in line with every other province in Canada. Perhaps the leadership candidates for the PC party should be asked for their position on protecting farm workers? Then again, former premier Redford promised to change the laws but didn't follow through on that promise.
>
> Thanks for compiling these posts on your blog: http://albertalabour.blogspot.ca/. The students found your work very helpful in developing their arguments.
>
> Jennifer

Graham Martinelli says:

June 10, 2014 at 3:31 pm

> Thank you both for your comments.
>
> I tend to agree with Professor Koshan's assessment that ideally this type of reform should simply be adopted by the Government of Alberta as a matter of 'doing the right thing'.
>
> I'm hopeful that political leaders will be interested in removing the exclusions, but practically I have my doubts that doing the right thing will be a compelling enough rationale. A political cost benefit analysis between helping children and mostly migrant workers (who can't vote) contrasted with being perceived as in any way attacking the 'family farm' ideal (which could potentially cost votes) leads to the conclusion that this issue is untenable for the parties (I hesitate to pluralize) that have a realistic chance of forming a provincial government. Moral benefit aside – there's little to no political benefit and a significant political risk. This hasn't traditionally been a recipe for political action.

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This likely means that change will need to be forced by the domestic courts, pressured by an international legal challenge, or wait until farm workers have union rights so that the ESC exclusions can be challenged in a collective bargaining setting.

Jennifer Koshan says:

June 11, 2014 at 10:55 am

The Calgary Herald published an editorial yesterday on the exclusion of farm workers from Alberta legislation citing the work of Law 696 Constitutional Clinical students. The editorial urges the government to "remedy the injustices immediately and, as every other province in Canada has done, ensure that the people who work to get food to our tables enjoy the same protections as every other worker under the law." See http://www.calgaryherald.com/opinion/editorials/Editorial+Fairness+farm+workers/9926057/story.html

Dick Bos says:

December 3, 2014 at 3:47 pm

Perhaps the wise and learned should do a little more homework.
I am a farmer in Alberta and I am required to cover my employees, yes TFW and Canadians with WCB and we bonus our employees to make up for vacation pay.
You also have your wording "LMO" incorrect as this application is called an LMIA.
It is bogus to say that a TFW worker would have difficulty in transferring to another occupation off a farm. All the employee has to do to transfer is have the business he or she would like to work for request a valid work permit in their name.
PLEASE DO YOUR HOMEWORK BEFORE SUGGESTING ALBERTA FARM WORKERS WHO GET THE FOOD TO YOUR TABLE ARE NOT PROTECTED UNDER THE LAW.

Graham Martinelli says:

December 31, 2014 at 12:56 pm

Hi Mr. Bos,

I'd like to respond to your points one at a time:

1) This post discusses the Employment Standards Code, not the Workers Compensation Act. Regardless, please see my colleagues' post here for an explanation of why you as a farm owner are not required to provide WCB coverage – regardless, of whether or not, you elect to provide coverage anyways. The same applies to Vacation pay – you may elect to pay, but you are not required to do so.

http://ablawg.ca/2014/05/14/the-constitutionality-of-the-exclusion-of-farm-industries-under-the-alberta-workers-compensation-act/

2) LMO was the correct term when this article was published. There is now a phasing in of the new LMIA terminology. Please see below for more detail.

http://www.esdc.gc.ca/eng/jobs/foreign_workers/reform/restrict.shtml

3) Respectfully, I disagree with your assessment re: the ease of transferring to alternative employment under the TFW program. On sudden termination a TFW will have little to no opportunity to seek out new employment as they are required to leave the country within a very short time period following the termination of their employment. Further, if they're seeking employment in a different sector they will likely need a new LMIA. In practice, this means that by the time new work permits and new LMIAs are acquired the TFW has already been forced to leave the country.

Dick Bos says:

January 6, 2015 at 6:58 pm

I am not sure where you are going with this matter of TFW having difficulty finding employment. First off I employ a number of foreign workers who have worked for me for 8 years. Why would any employer send an employee back to their home country or terminate their employment other than very legitimate reasons. I am sure I do not have to explain this to you.
Do you have any idea as to what costs are incurred to the employer in bringing TFW over include the cost of housing, transportation, airfare and just the time spent doing endless paper work? No one in their right mind would do this unless there was a good enough reason. So the challenge to you is to find out why we need these employees, not to try and challenge a system, the TFW program that is the backbone of farmers operations. Thanks.

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March 3, 2015

The Supreme Court's New Constitutional Decisions and the Rights of Farm Workers in Alberta

By: Jennifer Koshan

Cases Commented On: *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 (CanLII); *Meredith v Canada (Attorney General)*, 2015 SCC 2 (CanLII); *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 (CanLII); *Carter v Canada (Attorney General)*, 2015 SCC 5 (CanLII)

As I was saying to my constitutional law students the other day, the first few weeks of 2015 have been remarkable for the sheer number of *Charter* decisions released by the Supreme Court of Canada, including several that have overturned previous decisions in important ways. Of the eight SCC decisions released to date in 2015, five are major *Charter* rulings. Several of these decisions have implications for a project on the rights of farm workers that I worked on with a group of constitutional clinical students in the winter of 2014. The students' posts on the constitutionality of excluding farm workers from labour and employment legislation are available here, here, here and here. In this post, I will outline the impact these recent *Charter* decisions have on the students' arguments. In a nutshell, they make the claims of farm workers for legislative protection even stronger, refuting the argument of Premier Jim Prentice that we need "more research and debate" before taking action on these unconstitutional exclusions.

The Decisions

In the first decision relevant to farm workers, *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1, the Court built on its earlier ruling in *Health Services and Support — Facilities Subsector Bargaining Assn. v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391, where the majority had found that section 2(d) of the *Charter* protects collective bargaining. In *Mounted Police*, the majority reasons by McLachlin CJ and LeBel J found that the exclusion of RCMP members from federal collective bargaining legislation violated section 2(d) of the *Charter*, overruling the Court's earlier decision in *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989.

The majority defined freedom of association to contain constitutive, derivative and purposive elements. The *constitutive* formulation of section 2(d) is the narrowest, and protects the freedom to belong to or form an association (at para 52); the *derivative* element protects associational activities that relate to other constitutional freedoms (at para 53); and the *purposive* approach adds the protection of collective activities that enable "those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict" (at para 54, citing the dissenting judgment of Dickson CJ in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 at 366). The purposive approach dictates the protection of a meaningful process of collective bargaining, which includes elements of choice (i.e. input into the selection of collective goals) and independence (i.e. autonomy from managerial power) (at paras 81-83). The majority also

affirmed that the test for a violation of section 2(d) is one of substantial interference with associational activities, not the "impossibility" of achieving workplace goals (at paras 74-75, clarifying its decision in *Ontario (Attorney General) v Fraser*, [2011 SCC 20](), [2011] 2 SCR 3 (which had used the language of "impossibility")).

Applying these principles, the majority held that the regime imposed on RCMP members interfered with a meaningful process of collective bargaining, in violation of section 2(d) of the *Charter*. This was not a case involving "a complete denial of the constitutional right to associate" (at para 105), since RCMP members did have some ability to put forward workplace concerns via a Staff Relations Representative Program (SRPP). However, the SRPP was an organization that RCMP members "did not choose and [did] not control", and it "lack[ed] independence from management", leaving members "in a disadvantaged, vulnerable position", thus amounting to substantial interference with their collective bargaining rights (at para 106). This violation could not be justified under section 1 of the *Charter,* as the government's objectives – "to maintain and enhance public confidence in the neutrality, stability and reliability of the RCMP by providing a police force that is independent and objective" – was not rationally connected to a separate labour relations regime (at paras 142, 143-153). The Court struck down the impugned provisions of the relevant legislation, noting however that it was not mandating a specific labour relations regime for the RCMP, such as inclusion with other public sector workers in the *Public Service Labour Relations Act*, SC 2003, c 22 – "Parliament remains free to enact any labour relations model it considers appropriate to the RCMP workforce, within the constitutional limits imposed by the guarantee enshrined in s. 2(*d*) and s. 1 of the *Charter*" (at para 156).

In the second relevant decision, *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, a majority of the Court found that the right to strike was guaranteed under section 2(d) of the *Charter*. This decision was long-awaited by the labour rights movement, though it was foreshadowed in *Mounted Police*, where the majority noted the importance of "recourse to collective action by employees" (at para 72). The majority in *Saskatchewan Federation of Labour* affirmed the goals underlying freedom of association: "[h]uman dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy" (at para 53, quoting *Health Services* at para 81), and found that the right to strike was "essential to realizing these values and objectives" (at para 54). This finding was said to be supported by international law, including guarantees of the right to strike in article 8(1) of the *International Covenant on Economic, Social and Cultural Rights*, 993 UNTS 3; article 45(1) of the *Charter of the Organization of American States*, Can TS 1990 No 23; and ILO *Convention No. 87 concerning freedom of association and protection of the right to organize,* as interpreted by the Committee of Experts on the Application of Conventions and Recommendations, *Freedom of Association and Collective Bargaining* (1994) (at paras 65-67). The majority also recognized "an emerging international consensus that, if it is to be meaningful, collective bargaining requires a right to strike" (at para 71), citing case law from the European Court of Human Rights, and case law and constitutional protections in Germany, Israel, France, Italy, Portugal Spain, and South Africa (at paras 72-74).

On the basis of these principles, the majority found that Saskatchewan's *Public Service Essential Services Act*, SS 2008, c P-42.2 [*PSESA*], substantially interfered with section 2(d) of the *Charter* because it denied workers designated as "essential" the ability to participate in any work stoppages (at para 78). Importantly, the Court recognized that the availability of alternative dispute resolution mechanisms as an alternative for addressing the breakdown of collective bargaining were relevant to the justification analysis under section 1 of the *Charter* rather than to whether there was a violation of section 2(d). In this case, the government could not meet its

burden under section 1 because the *PSESA* failed the minimal impairment test by unilaterally authorizing public employers to designate workers as "essential" with no adequate review mechanism and no meaningful dispute resolution mechanism (at para 81). The *PSESA* was declared unconstitutional, with the declaration suspended for one year (para 103).

The third decision relevant to farm workers is *Carter v Canada (Attorney General)*, 2015 SCC 5, which I blogged on here. The key points to reiterate from *Carter* are that the right to life under section 7 of the *Charter* protects individuals from government actions that increase the risk of death directly or indirectly (at para 62), and the right to security of the person protects against state actions that cause physical or serious psychological suffering (at para 64).

Significance of the Decisions for Farm Workers

These decisions are important in several ways to the claims of Alberta farm workers that their exclusion from labour and employment legislation violates the *Charter*.

First, the argument that the exclusion of farm workers from the *Labour Relations Code*, RSA 2000, c L-1, violates section 2(d) of the *Charter* is strengthened. *Mounted Police* affirmed an expansive definition of freedom of association, with constitutive, derivative and purposive elements. Moreover, while *Fraser* had suggested that the test for a violation of section 2(d) may have changed from "substantial interference" to the "impossibility" of achieving workplace goals, the Court clarified in *Mounted Police* that the test remains one of substantial interference. In the case of farm workers, their exclusion from the *Labour Relations Code* fails to accord them even the narrowest level of protection under section 2(d), the constitutive freedom to belong to or form an association. The exclusion thus substantially interferes with their freedom of association. This conclusion is supported by international law and comparative law, and the Court's decision in *Saskatchewan Federation of Labour* supports the reliance on a broad range of sources in this regard. *Mounted Police* and *Saskatchewan Federation of Labour* also support the conclusion that the complete exclusion of farm workers from Alberta's labour relations regime could not be justified under section 1 of the *Charter*. However, farm workers must be aware that both cases allow for the possibility of specialized labour relations regimes for certain types of workers, consistent with the Court's decision in *Fraser* (upholding a specialized labour regime for farm workers in Ontario).

Second, the argument that the exclusion of farm workers from the *Employment Standards Code*, RSA 2000, c E-9, *Occupational Health and Safety Act*, RSA 2000, c O-2, and *Workers' Compensation Act,* RSA 2000 c W-15 violates section 7 of the *Charter* is affirmed by *Carter*. The exclusion of farm workers from these protective benefit regimes makes their working conditions more dangerous or their post-accident health more precarious, thus increasing the risk of death or serious bodily harm, and the exclusions therefore violate the rights to life and security of the person. The section 7 claims remain novel, as there are few Supreme Court decisions involving the rights to life and security of the person in the context of labour and employment legislation, and the Court has shown reluctance to protect economic rights under section 7 and to apply it outside the adjudicative context. For example, in *Gosselin v Québec (Attorney General)*, [2002] 4 SCR 429, 2002 SCC 84 at paras 80-83, a majority of the Court found that section 7 does not protect the right to a particular level of social assistance adequate to meet basic needs. On the other hand, in *Chaoulli v Quebec (Attorney General)*, [2005] 1 SCR 791, 2005 SCC 35, three out of seven justices applied section 7 outside the adjudicative context, finding that Quebec's legislative prohibition on private health insurance violated the rights to life and security of the person. Based on *Carter*, and provided that a sufficient causal connection can be

shown between the exclusions and the increased risks to farm worker health and safety, violations of the rights to life and security of the person could be established. And, as noted in the students' earlier posts, there are strong arguments that these violations are also contrary to the principles of fundamental justice under section 7 for being arbitrary, overbroad, and grossly disproportionate.

A third point of note is that none of the decisions blogged on here included findings that the impugned legislation or government actions violated section 15, the *Charter*'s equality guarantee. That claim was made but not ruled on in *Carter* (see here), but discrimination claims were not advanced in the labour rights decisions, even though the laws in those cases targeted particular groups of workers. This is likely because the Court has not been receptive to section 15 arguments in the workers' rights context in the past. The Court rejected a section 15 claim brought by RCMP members in *Delisle*, avoided ruling on a similar claim brought by farm workers in *Dunmore v Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 SCR 1016 (relying on a violation of section 2(d) of the *Charter* instead), and, by a majority, rejected such a claim by farm workers in *Fraser*. It is interesting to note that the decisions in *Mounted Police* and *Saskatchewan Federation of Labour* are steeped in language about the vulnerability, disempowerment and inequality of workers in the context of freedom of association, even in the case of workers who are relatively privileged compared to farm workers. However, the Court has still shown a reluctance to protect occupational status as an analogous ground under section 15, even in the case of more limited forms of occupational status such as being a farm worker. Perhaps the decisions in *Mounted Police* and *Saskatchewan Federation of Labour* will facilitate equality claims in future cases, but at present, the potential success of section 15 claims by farm workers remains uncertain.

Concluding Thoughts on a Fourth Case

On the same day that it released *Mounted Police,* the Court handed down *Meredith v Canada (Attorney General)*, 2015 SCC 2, which stands as a contrast to the other decisions discussed in this post. In *Meredith*, the majority applied its test from *Mounted Police* to a different scenario facing RCMP members – the unilateral rollback of wage increases by the Treasury Board and via the *Expenditure Restraint Act*, SC 2009, c 2 (*ERA*) following the global financial crisis in 2008. Writing for the majority once again, McLachlin CJ and LeBel J noted that while section 2(d) of the *Charter* protects the right to meaningful collective bargaining, it does not guarantee a specific outcome (at para 25). In this case, the RCMP's collective bargaining regime had been found unconstitutional in *Mounted Police*, but the majority indicated that the process for wage negotiations – a Pay Council – still "attract[ed] scrutiny" under section 2(d). I find this part of the judgment rather confusing, so I will set out the Court's reasoning in full (at para 25):

> [T]he record here establishes that, in the absence of a true collective bargaining process, RCMP members used the Pay Council to advance their compensation-related goals. In our view, the *Charter* protects that associational activity, even though the process does not provide all that the *Charter* requires. The legal alternatives available are not full collective bargaining or a total absence of constitutional protection. Interference with a constitutionally inadequate process may attract scrutiny under s. 2(*d*). Accordingly, we must examine whether the *ERA* substantially interfered with the existing Pay Council process, so as to infringe the appellants' freedom of association.

It is difficult to understand how government action that interferes with a "constitutionally inadequate process" would not only "attract scrutiny" under the *Charter*, but would itself be

tainted by the same constitutional inadequacy. Here we have not only a constitutionally inadequate wage negotiation process, but also an interference with that process in the form of unilateral rollbacks. One would have thought that the federal government's unilateral actions – which clearly attract scrutiny under section 32 of the *Charter*, as the *Charter* applies to actions of the executive and legislative branches – would have compounded the violation of freedom of association, but that the government could nevertheless attempt to justify its actions under section 1 of the *Charter* based on the specific context at hand. In *Meredith*, however, the majority found that the federal government's interference with the constitutionally inadequate bargaining process did not violate section 2(d). It noted that the wage roll-backs over 2008, 2009 and 2010 were "consistent with the going rate reached in agreements concluded with other bargaining agents inside and outside of the core public administration" and "did not preclude consultation on other compensation-related issues, either in the past or the future" (at para 28).

With respect, these are considerations that are relevant to justification under section 1 of the *Charter*, not whether there was a *Charter* violation. As noted by Justice Abella in dissent (at para 62):

> The unilateral rollback of three years of agreed-upon wage increases without any prior consultation is self-evidently a substantial interference with the bargaining process… The fact that the rollbacks were limited to a three-year period does not attenuate the key fact that they were unilateral. Nor does the fact that consultation was possible on other more minor compensation issues minimize the severity of the breach.

She was of the view that this violation of section 2(d) could not be saved by section 1, as the government's fiscal restraint objectives "[did] not give the government an unrestricted licence in how it deals with the economic interests of its employees" (at para 65). This was particularly so since the government consulted with "almost every other bargaining agent in the core public service" (at para 71).

Interestingly, neither the majority or dissenting opinions (nor the concurring opinion by Rothstein J) cite the Court's earlier decision in *Newfoundland (Treasury Board) v NAPE*, [2004] 3 SCR 381, 2004 SCC 66, where the Court unanimously upheld the cancellation of pay equity payments under section 1 of the *Charter* based on a "fiscal crisis" in spite of the discriminatory impact of that action on female workers. *NAPE* has been widely criticized (see e.g. the alternative judgment of the Women's Court of Canada here), but the majority in *Meredith* went even further by failing to find a breach of section 2(d) in the case of unilateral wage rollbacks implemented without any consultation.

Meredith sounds a cautionary note in the midst of the Court's other, more expansive rulings on section 2(d) of the *Charter*. In my opinion, the majority in *Meredith* should have taken heed of a compelling line from Justice Abella's reasons in *Saskatchewan Federation of Labour* (at para 76): "If the touchstone of *Charter* compliance is deference, what is the point of judicial scrutiny?" As it stands, the Court's affirmation of the constitutionality of unilateral wage rollbacks in a time of fiscal constraint may be a little too close to home for some of us in this province.

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November 19, 2015

Protection for the Rights of Farm Workers Finally Proposed in Alberta

By: Jennifer Koshan

Legislation Commented On: Bill 6, *Enhanced Protection for Farm and Ranch Workers Act*

On November 17, 2015 the Minister of Jobs, Skills, Training and Labour Lori Sigurdson introduced Bill 6 in the Alberta Legislature. She described the *Enhanced Protection for Farm and Ranch Workers Act* as an omnibus bill that:

> proposes to amend workplace legislation so Alberta's farm and ranch workers will enjoy the same basic rights and protections as workers in other industries. Proposed changes would remove the exemption of the farm and ranch industry from occupational health and safety, employment standards, and labour relations legislation. Bill 6 also proposes to make workers' compensation insurance mandatory for all farm and ranch workers. If passed, Alberta would join every other jurisdiction in Canada in applying workplace legislation to Alberta's farms and ranches. This is a historic day for Alberta (Hansard, November 17, 2015).

In a constitutional clinical course in winter 2014, my students undertook research and discussions with labour and employment groups and concluded that these changes were constitutionally mandated. Their conclusions, based on analysis of case law under *Charter* section 2(d) (freedom of association), section 7 (the right to life, liberty and security of the person) and section 15 (equality rights) can be found in ABlawg posts here:

Kay Turner, Gianna Argento, Heidi Rolfe, Alberta Farm and Ranch Workers: The Last Frontier of Workplace Protection

Brynna Takasugi, Delna Contractor and Paul Kennett, The Statutory Exclusion of Farm Workers from the Alberta Labour Relations Code

Nelson Medeiros and Robin McIntyre, The Constitutionality of the Exclusion of Farm Industries under the Alberta Workers' Compensation Act

Graham Martinelli and Andrew Lau, Challenging the Farm Work Exclusions in the Employment Standards Code

See also my post The Supreme Court's New Constitutional Decisions and the Rights of Farm Workers in Alberta, which argues that the constitutional mandate to include farm workers in labour and employment legislation was strengthened by a number of Supreme Court decisions from earlier this year.

Bill 6 proposes the following measures:

- Part 1 will repeal sections 2(3) and (4) of the *Employment Standards Code*, RSA 2000 c E-9. These sections currently exclude farm and ranch workers from provisions of the *Employment Standards Code* relating to Hours of Work, Overtime and Overtime Pay, General Holidays and General Holiday Pay, Vacations and Vacation Pay, and Restrictions on the Employment of Children. It will also repeal section 138(1)(l) of the *Code* and section 1.1 of the *Employment Standards Regulation,* AR 14/97, both of which provide definitions of agricultural operations encompassed by the current exclusions. For arguments that these exclusions violate sections 7 and 15 of the *Charter* see Martinelli and Lau, above. The proposed amendments in this Part would come into force upon Proclamation, which the government anticipates for spring 2016. A government news release indicates that the delay is to allow "consultations with industry regarding exemptions that may be needed for unique circumstances such as seeding or harvesting".

- Part 2 will repeal section 4(2)(e) of the *Labour Relations Code*, RSA 2000 cL-1, which currently excludes farm and ranch workers from the entire *Labour Relations Code*. The exclusion deprives farm and ranch workers of the right to join a trade union and have that union collectively bargain on its behalf, the right to strike, and protection from unfair labour practices on the part of employers. For arguments that these exclusions violate sections 2(d), 7 and 15 of the *Charter* see Takasugi, Contractor and Kennett, above. The proposed amendments in this Part would come into force upon Proclamation in spring 2016. The government also contemplates the possibility of special provisions in this legislative context "to address the unique aspects of the farm and ranch industry" (see here).

- Part 3 will repeal section 1(s)(i) of the *Occupational Health and Safety Act*, RSA 2000 cO-2, as well as the *Farming and Ranch Exemption Regulation,* AR 27/95. These provisions currently exclude farm and ranch workers, as defined in the *Regulation*, from workplace standards designed to protect the health and safety of workers, including the right to refuse unsafe work. For arguments that these exclusions violate sections 7 and 15 of the *Charter* see Turner, Argento, and Rolfe, above. Part 3 also proposes amendments to the *Occupational Health and Safety Code 2009,* adopted under the *Occupational Health and Safety Code 2009 Order,* AR 87/2009. These amendments would, unless expressly provided otherwise, maintain the exclusion of some farm and ranch workers from the *Code*. According to the government's news release, it intends to develop specific occupational health and safety standards for farms and ranches that would presumably be included in the *Code*. The proposed amendments in Part 3 would come into force on January 1, 2016, with the government promising detailed standards by 2017.

- Part 4 will repeal a number of exclusions in the *Workers' Compensation Regulation,* AR 325/2002, Schedule A, by striking out the categories of farm and ranch workers who are currently excluded from mandatory workers compensation coverage, i.e. those involved in: agrology and agronomy services; operation of apiaries; artificial breeding services; breeding of animals, birds, fish or reptiles; collection of urine from pregnant mares;

operation of dude ranches; commercial egg production; farming; farming contracting, including haying and threshing; operation of commercial feed lots; fertilizer spreading services; commercial fruit growing operations; game farms; horse exercising, training or racing; commercial poultry production; commercial rabbit production; ranching; operation of riding academies or horse stables; and commercial vegetable growing. For arguments that the current exclusions violate sections 7 and 15 of the *Charter* see Medeiros and McIntyre, above. The proposed amendments in Part 4 would come into force on January 1, 2016.

A number of town hall meetings will take place before the end of December to allow broad consultation into the proposed changes. The government has also developed a website on the Enhanced Protection for Farm and Ranch Workers Act that permits input to be provided online.

As noted in the government's FAQ, Alberta is the only province where Occupational Health and Safety (OHS) legislation does not apply to farms and ranches. Ontario was one of the last provinces to extend its OHS legislation to farm workers, which it did in 2006. Ontario was also a hold out in extending labour relations protections to farm workers. Although Bob Rae's NDP government did so in 1994, and farm workers were covered for a short time, the Mike Harris Conservatives repealed that legislation when they came to power in 1995. This resulted in litigation culminating with the Supreme Court of Canada's decision in *Dunmore v Ontario (Attorney General)*, [2001] 3 SCR 1016, 2001 SCC 94. In *Dunmore*, the Court held that the blanket exclusion of farm workers from labour relations protections violated their freedom of association under section 2(d) of the *Charter*, and could not be justified by the government under section 1 on the basis of protecting "family farms". As noted by the Court, farming has changed drastically over the last 100 years and often takes place in large scale commercial operations, making the family farm justification overbroad.

In spite of the decision in *Dunmore* (which I nominated as one of the top cases of the 2000s on ABlawg several years ago), successive Conservative governments in Alberta continued to maintain a blanket exclusion of farm and ranch workers from not just the *Labour Relations Code*, but from the *Employment Standards Code, Occupational Health and Safety Act* and *Workers' Compensation Act* as well. This was in spite of some excellent advocacy on behalf of these workers by the Alberta Federation of Labour, the United Food and Commercial Workers, the Calgary Workers Resource Centre, the Farm Workers Union of Alberta, and Dr David Swann. It is about time that the government is proposing to extend to farm and ranch workers the same legislative protections enjoyed by other workers in this province and by farm and ranch workers elsewhere in Canada.

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Protection for the Rights of Farm Workers Finally Proposed in Alberta

Comments:

Jennifer Koshan says:

December 10, 2015 at 8:43 am

After much discussion and debate, Bill 6 was amended and passed third reading in the Legislature this week.

The amendments revise Bill 6 to exempt from mandatory OHSA and WCA coverage the following:

- family members of shareholders, sole proprietors or partners of farms / ranches, with "family member" defined as "the spouse or adult interdependent partner of the shareholder, sole proprietor or partner" or "whether by blood, marriage or adoption or by virtue of an adult interdependent relationship, a child, parent, grandparent, sibling, aunt, uncle, niece, nephew or first cousin of the shareholder, sole proprietor or partner or of the shareholder's, sole proprietor's or partner's spouse or adult interdependent partner", as well as "any other person prescribed by the regulations to be a family member."
- workers to whom "no wages, as defined in the Employment Standards Code, are paid … for the performance of farming or ranching work", or, even if wages are paid, the following workers for the performance of farming or ranching work:

"shareholders of a corporation engaged in a farming or ranching operation of which all shareholders are family members of the same family"

"family members of a shareholder of a corporation engaged in a farming or ranching operation of which all shareholders are family members of the same family"

"family members of a sole proprietor engaged in a farming or ranching operation"

"family members of a partner in a partnership engaged in a farming or ranching operation where all partners are family members of the same family."

The text of the amendments can be found here: http://www.assembly.ab.ca/ISYS/LADDAR_files/docs/bills/bill/legislature_29/session_1/20150611_am-006-A1.pdf

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