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Bill 26 and the Rights of Farm and Ranch Workers in Alberta

By: Jennifer Koshan

Bill Commented On: Bill 26, *Farm Freedom and Safety Act, 2019* (First Session, 30th Legislature)

As promised in its election platform, the UCP government has taken steps to repeal parts of Bill 6, the *Enhanced Protection for Farm and Ranch Workers Act* – the NDP's initiative to extend labour and employment protections to farm and ranch workers. For previous posts on the need for Bill 6 and the changes that it made to labour and employment legislation in Alberta, see here. The latest development in this saga is last week's introduction of Bill 26, the *Farm Freedom and Safety Act, 2019*, which had second reading in the legislature on November 26, 2019. This post will describe the changes that Bill 26 seeks to make and discuss the possibilities of a constitutional challenge to the Bill.

The first thing to note is that Bill 26 does not touch the changes made by Bill 6 to the *Occupational Health and Safety Act*, SA 2017, c O-2.1. Bill 6 extended basic health and safety protections to paid, non-family farm and ranch workers as of January 1, 2016 (see the definitions of "occupation" and "worker" in s 1 of the Act). A new *Occupational Health and Safety Act* was passed in 2017, and farm and ranch employers continue to be obligated to ensure the health, safety and welfare of their workers (s 3); farm and ranch workers are able to refuse work that constitutes a danger to their or another worker's health and safety (s 31); OHS officers are authorized to inspect farm and ranch workplaces to ensure that work is not being carried out in a manner that is unhealthy or unsafe (ss 44, 51); and serious injuries and accidents on farm and ranch work sites must be reported and investigated (s 40). Technical working groups (TWGs) with representation from farm and ranch owners and workers were established to make recommendations regarding specific OHS standards for farm and ranch workers and this process resulted in revisions to the *Occupational Health and Safety Code*. Oddly, the government has said that while it will not repeal the changes to the *Occupational Health and Safety Act* made by Bill 6, "all farms and ranches will be exempt from the industry-specific safety standards put in place by the previous NDP government." One would have thought that industry-specific standards were exactly what farm and ranch owners wanted, rather than more general standards developed for other industries.

It is good news that Bill 26 will leave the changes to the *Occupational Health and Safety Act* intact – otherwise a strong argument could be made that the *Charter* rights of farm and ranch workers to security of the person (s 7) and to equality (s 15) were being violated (see here). It may be that the repeal of industry-specific standards in the *Occupational Health and Safety Code* has a similar impact on these rights, but we will have to wait and see what these changes will look like.

Bill 26 does deal with the issue of workplace injury insurance for farm and ranch workers. As a result of Bill 6, farm and ranch workers were included in the *Workers' Compensation Act*, RSA 2000, c W-15, unless they were unpaid workers or family members of the farm or ranch owner (although in that case, their employer was able to opt in). Workers compensation is a no-fault benefits and insurance scheme funded by employers where workers give up their right to sue an employer for negligence for a right to receive benefits in the event of an injury or death. Under Bill 26, farm and ranch owners will be provided with a choice between retaining workers compensation insurance and taking out private insurance (s 1.2(1)). Private insurance coverage must be authorized by regulation, and it remains to be seen whether it will provide benefits comparable to those under the *Workers' Compensation Act*. Even if it does, private insurance is not no-fault insurance and insurers may seek to limit their liability. As noted by Bob Barnetson in his post on Bill 26 for the Parkland Institute, private insurance "typically results in poor outcomes for injured workers because private providers seek to minimize claims in order to maximize profitability."

Farm and ranch owners will also be relieved of the obligation to insure workers employed on a farm or ranch with five or fewer employees, not including workers who are employed for less than six months or who are family members (s 1.2(2)). Given the large number of seasonal farm workers in Alberta, this new exemption for small farms will likely be significant. CBC news reports the government's estimate that Alberta has 41,000 farms with only roughly 9,000 considered to be large operations, which supports the concern that the new exemption for small farms in Bill 26 will exempt the vast majority of farms and ranches (see also Barnetson's post for more detailed statistics). Do workers on small farms and ranches not deserve the same workplace insurance protections as those on larger operations, even if those have now been watered down to include the option of private insurance? And wouldn't farm and ranch owners, even of small operations, also be better off with comprehensive insurance rather than the possibility of lawsuits in the event of workplace injuries? These concerns are not just hypothetical; there continue to be high numbers of workplace injuries and fatalities on Alberta farms and ranches each year (see Rachel Notley's comments in Hansard, November 26, 2019, p 2553).

Bill 26 also makes changes to the *Employment Standards Code*, RSA 2000, c E-9. Bill 6 had amended the *Employment Standards Code* to include non-family farm and ranch workers within the Act's general protections for matters such as holidays and general holiday pay, vacations and vacation pay, minimum wages and employees under the age of 18, but – following TWG consultations and recommendations – it continued to exempt these workers from provisions related to hours of work, overtime, and overtime pay (see s 2.1(1)). Bill 26 expands the definition of farm worker under the *Employment Standards Code* to include those employed in greenhouses and nurseries and who work with mushrooms, sod, trees, shrubs, and plants (s 2.1(4)), who will now have the same exemptions as other farm and ranch workers for hours of work, overtime, and overtime pay. By way of explanation of this change, the government's news release for Bill 26 quotes Albert Cramer, President of the Alberta Greenhouse Growers Association, to say "Being excluded from the definition of farms under the Employment Standards Code was a huge challenge for our industry and we are grateful that this has been rectified in the Farm Freedom and Safety Act."

More significantly, Bill 26 completely exempts farm and ranch workers who work on a farm with five or fewer employees, not including workers employed for less than six months or who are family members, from the *Employment Standards Code*. Similar to the *Workers' Compensation Act*, this exemption will exempt the vast majority of farms and ranches from the *Employment Standards Code.* Again, do workers on small farms and ranches not deserve the same employment protections as those on larger operations – which already exclude protections for hours of work, overtime, and overtime pay in keeping with the nature of farm and ranching work? What is the evidence that it has been too difficult to implement other employment standards protections – such as the minimum wage – on small farms?

The exemption of small farms and other changes to the *Workers' Compensation Act* and the *Employment Standards Code* are – thankfully, in my view – a far cry from the UCP's promise to "Kill Bill 6." The government did carry out consultations this summer and it may be that farm and ranch owners persuaded them to make more modest changes in light of the fact that they have adapted to the regime implemented by Bill 6. Or, it may be that the UCP is hoping that these more modest changes will be seen as a partial win for farm and ranch workers. However, arguments can be made that the rights of farm and ranch workers to equality and security of the person are violated by the new exclusions (see here and here). Rachel Notley highlighted one of these arguments in Question Period, namely that the exclusions have an adverse impact on people of colour in light of the large number of farm workers who are temporary foreign workers (see Hansard, November 26, 2019, p 2556). The exclusions also create more precarious conditions of work and potentially less access to benefits for workplace injuries, engaging s 7 of the *Charter* as well as s 15.

It is true that some other provinces also exempt small or family farms from their labour and employment protections – in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 (CanLII), the Supreme Court pointed to regimes in Quebec and New Brunswick in suggesting that protection of small and family farms was a valid legislative objective that might justify the exclusion of some farm workers, at least from labour legislation. However, government justifications of rights violations must be an evidence-based exercise, and if constitutional challenges were mounted to the exclusion of small farms from the *Workers' Compensation Act* and *Employment Standards Code*, or to the broader swath of farms now covered by the *Code*'s exclusions, the government would need to establish a pressing and substantial basis for these exclusions. The views of farm and ranch owners would not suffice, but their experience with Bill 6 might, if in fact that there was evidence that Bill 6 has had a negative impact on these owners. No such evidence was brought forward by the government during second reading of Bill 26.

The only full repeal in Bill 26 is with respect to the *Labour Relations Code*, RSA 2000, c L-1. Bill 6 had ended the exclusion of farm and ranch workers from this legislation, allowing them to join trade unions and collectively bargain with their employers, amongst other benefits. The TWG for labour relations considered "adding the exemption for agricultural workers back into the Code" but was not able to reach consensus on this issue. Bill 26 repeals the provisions in Bill 6 which included these workers in the *Labour Relations Code*, such that persons employed on farming or ranching operations are once again excluded from the Code's protections. Interestingly, the definition of farming or ranching operations will continue to exclude greenhouses, mushroom farms, nurseries and sod farms, meaning that workers in those

operations are within the scope of the *Labour Relations Code*. It may be that unionization of these groups of workers would enable them to acquire some of the benefits they are excluded from under the *Employment Standards Code* through collective bargaining. However, it must be noted that there have been no attempts at unionization in these sectors or more broadly for farm and ranch workers since Bill 6 came into force. The government is using this fact to argue that it need not be worried about a constitutional challenge to Bill 26's repeal of labour protections for farm and ranch workers – it calls this "a hypothetical question" because farm workers never tried forming a union "when it was legal under the NDP."

The repeal of labour relations protections for farm and ranch workers will be retroactive to the date Bill 26 had first reading in the legislature (see s 3(4)), meaning that no unionization drives can take place while the Bill is in process. This legislative history is similar to that of the law challenged in *Dunmore* – the NDP government in Ontario had passed a law including farm workers in labour relations legislation, which was repealed by the Conservative government when they won the next election. However, a key difference is that in Ontario, farm workers did organize during the time period when they had an opportunity to do so. They and their union clearly had standing to bring a constitutional challenge arguing that the repeal of their inclusion under labour relations legislation violated their freedom of association under s 2(d) of the *Charter* – an argument that was successful in *Dunmore*, based on their absolute exclusion from the regime.

What would be the position of a group of farm workers or a union in Alberta seeking to bring a constitutional challenge to their exclusion from the *Labour Relations Code* in Bill 26? It is important to recognize that farm and ranch workers were only included in the Code as of January 1, 2018, which is when this part of Bill 6 came into effect. Farm workers are a vulnerable group and it may be unrealistic to have expected them to organize in the small window of time that Bill 6 was in force, especially taking into consideration that the UCP has always said that its plan was to repeal Bill 6. If a group of farm workers was now to seek standing to bring a constitutional challenge to Bill 26, their failure to organize between January 2018 and April 2019 should not be held against them. It would also be open to a union to challenge Bill 26 on the basis of public interest standing, particularly in light of the vulnerable position of farm workers (see *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 (CanLII)). And given the absolute exclusion of farm and ranch workers from the labour relations regime in Alberta, even those working for non-family and large farms, they would have a very strong case indeed.

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