Court File No. 27216

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

TOM DUNMORE, SALAME ABDULHAMID and
WALTER LUMSDEN and MICHAEL DOYLE, on their own behalf
and on behalf of the UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION

Appellants
(Applicants)

- and -

ATTORNEY GENERAL FOR THE PROVINCE OF ONTARIO
and HIGHLINE PRODUCE LIMITED, KINGSVILLE
MUSHROOM FARM INC., and FLEMING CHICKS

Respondents
(Respondents)

FACTUM OF THE RESPONDENT,
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TABLE OF CONTENTS

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TABLE OF CONTENTS

Page

PART I - STATEMENT OF FACTS

A. NATURE AND HISTORY OF THE APPEAL

1. This is an appeal from the unanimous judgment of the Court of Appeal for Ontario which dismissed the Appellants' (Applicants') constitutional challenge to s. 80 of the *Labour Relations and Employment Statute Law Amendment Act*, 1995 S.O. 1995, c. 1 ("the *LRESLAA*") (also known as Bill 7), as well as s. 3(b) of the *Labour Relations Act, 1995* ("the *LRA*") (enacted as Schedule A to the *LRESLAA*). Section 80 of Bill 7 repealed the *Agricultural Labour Relations Act, 1994* (the "*ALRA*")(also known as Bill 91). Section 3(b) the *LRA* excludes agricultural workers from the application of the *LRA*.

2. The Court of Appeal upheld the decision of Sharpe, J. dated December 7, 1997 stating that "We agree with the judgment of Sharpe, J., both with the result at which he arrived and his reasons."

3. Sharpe, J. ruled that the right to engage in collective bargaining is not protected by s. 2(d) which is limited to protecting the individual right to associate and does not extend to protect the activities engaged in by an association. He found no basis for the claims either that the purpose of the legislation was to prohibit agricultural workers from forming trade unions, or that resistance from the private sector to unionization could give rise to a *Charter* claim.

4. Sharpe, J. held that the *Charter* does not impose a positive duty upon government to create a legislative scheme to enhance the freedom of association, but rather prohibits the government from interfering with it. Nor can the fact that the Legislature under one government has acted one way be taken as limiting the right of a subsequent Legislature under another government to change policies or repeal a particular legislative scheme. To hold otherwise would constitutionalise a broad class of statutes which once passed would be forever immune from repeal.

Decision of Sharpe, J. *[Dunmore v. Ontario] Appellant's Record (A.R.)*, Vol. III, pp. 478-482

5. Finally, Sharpe, J. ruled that agricultural workers did not constitute an analogous group for the purposes of an equality rights violation claim under s. 15 of the *Charter*, but rather were a disparate and heterogeneous group linked only by their occupational status. The legislative decision to exclude agricultural workers from the collective bargaining regime did not reflect stereotypical assumptions about their personal characteristics, but instead was based upon the policy-makers' perceptions of the characteristics and circumstances of the agricultural industry.

Decision of Sharpe, J. *A.R.*, Vol. III, pp. 482-493

B. SUMMARY OF THE POSITION OF THE ATTORNEY GENERAL

6. The position of the Attorney General may be summarized as follows:

a. this Court's recent decision in *Delisle v. Canada*, [1999] 2 S.C.R. 989 is a complete answer to the Appellants' Charter s. 2(d) challenge;

b. freedom of association protected by s. 2(d) of the *Charter* is an individual right that does not extend to protect the activities engaged in by, or the purposes of, the association;

c. there is no evidence of any government purpose to interfere with the right of agricultural workers to form an association; indeed nothing in either the *LRESLAA* or the *LRA* interferes with the Appellants' rights to freely associate;

d. the *Charter* does not impose upon governments either the obligation to take positive action to enhance association rights in general, nor does it require the passage of a specific Act (the *ALRA*) in particular;

e. the repeal of the *ALRA* through s. 80 of *LRESLAA* does not attract Charter scrutiny is not the proper subject of constitutional challenge, as the purpose of the *Charter* is to ensure that governments comply with the *Charter* when they act or make laws rather than to constitutionalise a broad class of statutes by rendering them immune from repeal once they are passed;

f. the exemption of agricultural workers from the *LRA* is constitutionally valid in any event and does not violate s. 15 of the *Charter* because the exemption is based not upon stereotypical assumptions in relation to the personal characteristics of agricultural workers, but rather the particular conditions and circumstances of the work involved; agricultural workers are a disparate and heterogeneous group defined only by occupational status and thus do not constitute an analogous ground for the purposes of equality rights analysis under s. 15;

g. In the alternative, the exemption of agricultural workers from collective bargaining is justified under s. 1 given the unique characteristics of agricultural production, the incompatibility of formalized labour relations with the family farm which persists as the overwhelmingly predominant unit of production in the agricultural sector in Ontario, and the economic vulnerability of the Ontario agricultural sector.

C. STATUTORY HISTORY AND FRAMEWORK

7. Since the inception of free standing provincial labour relations legislation in Ontario, and in particular since the first incarnation of the *Labour Relations Act* in the form of the *Collective Bargaining Act, 1943,* 7 Geo. VI, c. 4, s. 24 agricultural workers have been exempt from collective bargaining.

8. The only exception to this consistently held policy position occurred during the period in which the *ALRA* was in force, from June 23, 1994 until it was repealed on November 10, 1995.

9. In January 1992, the previous government established the Task Force on Agricultural Labour Relations to study and report on the Government's proposal to extend the *Labour Relations Act* to persons employed "in those portions of the agricultural and horticultural sector which utilize industrial or factory-like methods of production".

10. As indicated by the mandate of the Task Force, the political decision to repeal the agricultural exemption had already been made, indeed the previous government repealed the exemption before the Task Force could complete its report or make any recommendations. The consultation process therefore was not to determine whether removal of the agricultural exemption was appropriate or not, but rather to provide the form for the legislative inclusion of farm workers.

11. Accordingly, the Task Force proceeded with a clear and predetermined mandate, and the participation of representatives from the agricultural sector occurred in the knowledge that the removal of the agricultural exemption was a foregone conclusion.

12. The Task Force was established "in recognition of the unique characteristics of the agricultural and horticultural sectors for labour relations purposes".

Affidavit of Fudge, Ex. M, *Respondent's Record*, Vol. I, pp. 28-40

Affidavit of Brinkman, *A.R*, Vol. II, p. 318, para. 85

Hansard, Legislative Assembly of Ontario, October 23, 1995, p. 384

13. The previous government's preferred option favoured a limited extension of the Act to those sectors of agriculture where employees were working in factory-style agricultural operations in recognition of the fact that "the regulation of labour relations in the unique environment presented by the family farm seems neither necessary nor desirable".

14. The Task Force defined family farms on the basis of numbers. The definition provided by them in their report was farms employing fewer than six family members. According to this approach therefore, farms with larger families working on the farm, i.e. more than four children, or other relatives would not constitute family farms. Similarly, in keeping with the same rationale, farms with only four family members and one non-family employee would not be considered a family farm.

15. Submissions from the agricultural community rejected the distinction between family and "factory-style" farms as arbitrary and impracticable, as farms of considerable scale implementing technological processes could remain in substance family farms. It was submitted that the proposed distinction was based upon a misunderstanding of the modern farm.

16. The Task Force also considered and rejected other limited extensions of collective bargaining to the agricultural sector. The commodity-specific sector model was rejected as arbitrary, and many of the operations affected by the sectoral approach could properly be characterised as family farms. Similarly, a numerical threshold was rejected for related reasons in that it would result in different application to farms otherwise similarly situated.

17. Ultimately, therefore the Task Force concluded that any limitation of the extension of bargaining rights to the agricultural sector could not be justified. Accordingly, it recommended that the extension should apply to the sector as a whole, without limitation.

18. The Task Force, however, did recommend that the extension of the right to organize and bargain collectively should be subject to an absolute prohibition on the right to strike. In its view, the deficiency in the legislation of other provinces is the failure to address the "disastrous consequences" of a work stoppage that has "no parallel elsewhere in the Ontario economy" given the unique characteristics of agricultural production.

19. Consequently, the Task Force rejected simple repeal of the exemption and recommended the creation of a separate statute for the administration of agricultural labour relations that prohibited strikes and lock-outs and

imposed a model of compulsory arbitration based on final offer selection. It, however, recognized that the rigidity of the system was ill-suited to the disposition of non-compensation related items such as management rights or job security.

Affidavit of Fudge, Ex. M, *R.R.*, Vol. I, pp. 28-40.

20. The recommendations of the Task Force were largely incorporated into the *ALRA*.

21. In enacting the *ALRA*, members of the previous government including the Minister of Agriculture and Food reiterated that they did not want to affect, change or jeopardize the family farm, and generally asserted that the legislation was intended to target only the large corporate farms, alternatively referred to as "factory farms".

Affidavit of Brinkman, *A.R.*, Vol. II, pp. 292-297, paras. 34-35; and Ex.F, *R.R.*, Vol. I, pp. 76-94

22. Organized labour issued public statements consistent with this position, namely that it was not interested in unionizing the family farm. Union officials indicated that their target was workers on "factory farms". Indeed, the initial experience under the *ALRA* was that union activities were directed at mushroom and hatchery workers at larger operations with the highest levels of pay and the most generous employment benefits.

Affidavit of Brinkman, *A.R.*, Vol. II, pp. 292-297, paras. 34-35; pp. 318-319, paras. 86-89; and Ex. D, F and O, *R.R.*, Vol. I, pp. 75, 76-94, 100-107

23. However, given the difficulties of setting rational and fair limits to the application of the *ALRA*, it was made to apply to the entire agricultural sector in an unqualified manner.

D. THE POSITION AND POLICY RESPONSE OF THE GOVERNMENT

24. The current Government took a different view of the effectiveness, appropriateness and desirability of extending collective bargaining to the agricultural sector and made the repeal of the *ALRA* an important issue in its election campaign. The Government repealed the *Act* with the benefit of the five years of public consultation which occurred while it was in opposition, as well as extensive discussions and submissions from the agricultural sector.

Affidavit of Brinkman, *A.R.*, Vol. II, p. 318, para. 85; and Ex. M, *R.R.*, Vol. I, pp. 96-99

25. The Minister of Labour indicated that the repeal of the *ALRA* was necessary to ensure the competitiveness and ultimate survival of the farm sector in the context of global harmonization, and in recognition of its

incompatibility with the unique characteristics of the agricultural sector, and inappropriateness to the family farm. He stated:

> Bill 91 prevented lock-outs and prevented strikes, so it created a very difficult situation, particularly when negotiations or communications broke down between an employer and an employee. Farm produce has to be harvested when ready, and whenever communications would break down, you can't lock out, you can't strike. When you don't talk, it's very difficult to get work done anywhere, but particularly in a farming operation.
>
> Affidavit of Parlet Bryan, Ex. A, *R.R.*, Vol. I, pp. 108-110

E. POLICY BASIS FOR THE EXCLUSION OF AGRICULTURAL WORKERS FROM THE *LABOUR RELATIONS ACT*

i) Introduction

26. Explaining the policy basis for the exclusion of agricultural workers from the *Labour Relations Act* requires a review of both the broader principles of labour relations and collective bargaining as well as analysis of the unique characteristics of the Ontario agricultural sector, which informed and influenced the legislative policy response in this regard.

ii) The Principles of Labour Relations and Collective Bargaining

a) *The Function of Labour Relations Legislation*

27. The purpose of the *LRA* is to facilitate collective bargaining between employers and trade unions. In establishing this kind of regime, and in extending the regime to certain fields of employment and denying it to others, the Act seeks, among other things, to encourage communication between employers and employees, to assist employers and trade unions in working together to resolve workplace issues, and to promote the speedy resolution of workplace disputes.

> Affidavit of Saunders, *A.R.*, Vol. II, p. 326, paras. 5-6

28. Certain fields of employment are excluded from the scope of the *Labour Relations Act* on the ground that the nature of employment in those fields is unsuited to, or does not lend itself to, the regime of collective bargaining that the Act establishes.

> Affidavit of Saunders, *A.R.*, Vol. II, p. 327, para. 7

29. Some fields are excluded from collective bargaining altogether because of an incompatibility with legislated collective bargaining, while others are excluded and placed under separate legislative regimes with different rules to address different issues and risks raised by collective bargaining in those areas. Examples of this second group include the provision of services that are essential to the community, as in the case of police and fire fighters where it has been determined that the costs of interruptions in, or disruptions to, the service in question are too costly for society to tolerate.

Affidavit of Saunders, *A.R.*, Vol. II, p. 327, para. 8

30. With respect to the first group, certain fields of employment are deemed to be incompatible with collective bargaining for institutional reasons in that they give rise to potential conflicts of interest, as in the case of the judiciary, labour mediators, and labour conciliators. In the case of doctors, dentists and certain other professional employees, the professional duties and codes of conduct of the employee are considered to be incompatible with unionization. Still others are closely interwoven into the fabric of private life, as in the case of domestic workers employed in private homes. Similar considerations apply in large part to the agricultural sector, the composition of which, as described below, continues to be based primarily upon the family farm and the personal and informal relationships inherent to this most basic and fundamental of societal units.

Affidavit of Saunders, *A.R.*, Vol. II, p. 327, para.9

Affidavits of Brinkman, *A.R.*, Vol. II, pp. 290-298, paras. 26-39; *A.R.*, Vol. III, pp. 400-406, paras. 19-27

31. Finally, some fields of employment are considered to be incompatible with collective bargaining because no dispute settlement mechanism can be devised which would achieve the legislative goal of facilitating collective bargaining. As will be explained, this is also the case with agricultural and horticultural workers.

Affidavit of Saunders, *A.R.*, Vol. II, p. 327, para.10

32. Ultimately, the determination as to whether collective bargaining is or is not appropriate in a particular sector is a product of several factors. These include the particular nature of employment, the risks and costs raised by collective bargaining in the specific circumstances, or as indicated, a perception that formalised or institutionalised collective bargaining is simply incompatible with certain fields, or aspects of human life.

Affidavit of Saunders, *A.R.*, Vol. II, p. 327, paras.7-10

33. The decision as to which policy is the preferred in all of the circumstances involves a weighing of complex values and policy considerations that are often difficult to balance. The weight given to the competing values and

policy choices will in large part depend upon the particular perspective, priorities, views, and assumptions of the policy makers, as well as the political and economic theory to which they subscribe.

Cross-examination of Fudge, *R.R.*, Vol. I, pp. 123-124, qq. 48-49; p. 125, q. 59-60

Cross-examination of Saunders, *R.R.*, Vol. I, pp. 142-143 , q. 39; p. 166, q. 182

34. Though it may be said that there is general agreement in liberal democratic society that legislative protection should exist for collective bargaining, there is no unanimity as to the boundaries or limits to which the application of labour relations is suitable or appropriate. Indeed there is a wide spectrum of views on this.

Cross-examination of Fudge, *R.R.*, Vol. I, pp. 122-124, qq. 45-50

35. As noted above, (paras. 13, 21-22) there was wide consensus that collective bargaining should not apply to the family farm.

36. The Appellants' expert witness Professor Judy Fudge, however, holds a more extreme view, arguing that there is no public policy basis for exempting very small family farms from collective bargaining regimes. She advocates broader based, multi-employer collective bargaining to bring smaller workplaces and individually employed workers such as domestics employed in the home within the purview of collective bargaining regimes.

Cross-examination of Fudge, *R.R.*, Vol. I, pp. 117-119, qq. 28-35; pp. 123-124, qq. 48-49

37. Others disagree as to the appropriate balance to be struck between the right to organize and the personal/private nature of the family and home. Professor Fudge acknowledges that the issue is controversial.

Cross-examination of Fudge, *R.R.*, Vol. I, p. 120, qq. 36-37; p. 121, q. 41

See Affidavit of Saunders, *A.R.*, Vol. II, p. 325; and Affidavits of Brinkman, *A.R.*, Vol. II, p. 282, *A.R.*, Vol. III, p. 391

38. Professor Fudge also disagreed with the recommendations of the Task Force strikes and lock-outs be prohibited despite the consensus that it was necessary to prevent "disastrous consequences" for the agriculture sector. She admitted having no expertise as an economist or agriculture policy analyst.

Cross-exam. of Fudge, *R.R.*, Vol. I, p. 115, q. 9; p. 116, qq. 18-19

b) *Dispute Settlement Mechanisms*

39. Collective bargaining cannot function without an effective mechanism to resolve disputes between employers and employees.

40. To be effective, a dispute resolution mechanism must achieve a balance of power between the trade union and the employer. This ensures that bargained or arbitrated outcomes fairly reflect the needs and interests of both parties, and it fosters conditions under which the parties are able to develop a co-operative and harmonious relationship, to their mutual benefit and to the benefit of society as a whole.

Affidavit of Saunders, *A.R.*, Vol. II, p. 328, paras.11-13

41. All Canadian collective bargaining statutes use one of two possible dispute resolution mechanisms: the right to strike and lock out, or a compulsory arbitration scheme. Apart from the repealed *ALRA*, the use of a compulsory arbitration scheme is confined to the public sector in Canada. The only exceptions are *ad hoc* "back to work" legislation usually with compulsory arbitration in its place, and the rarely used first contract arbitration where parties are unable to effect a first collective agreement.

Affidavit of Saunders, *A.R.*, Vol. II, pp. 328-329, para.14

Cross-exam. of Saunders, *R.R.*, Vol. I, pp. 145-147, qq. 81-87

42. Under Canadian labour relations law, private sector labour relations disputes are universally resolved through a strike or lock-out or through an agreement that is reached against the background of the right to strike or lock out. Private sector collective bargaining statutes typically provide for interest arbitration by mutual consent. However, parties rarely choose this option and consequently there is little private sector experience in this area. The *ALRA* was the only statute in Canada to ban strikes and impose compulsory arbitration in private sector labour relations.

43. It is widely accepted among labour relations experts that the right to strike is the preferred dispute resolution mechanism, because it is most likely to lead to voluntarily negotiated agreements and harmonious labour relations. The difficulty with compulsory arbitration is that it results in settlements which the parties have not bought into. This effect is exacerbated in the case of final offer selection which is based on the principle of winner-take-all as the arbitrator must select one of the two offers without change.

Affidavit of Saunders, *A.R.*, Vol. II, p. 329, paras.15-16

Cross-examination of Saunders, *R.R.*, Vol. I, pp. 144-145, qq. 78-79; pp. 149-151, qq. 92-95; p. 154, q.146; pp. 164-165, qq. 172-176, p. 192, q. 293

c) *The Right to Strike and Lock Out*

44. The "right to strike" and "lock out" mechanisms do not always produce a balance of power, and are not appropriate for all collective bargaining environments. For instance, in some fields such as the provision of essential services, the very threat of a strike would lead to unfair outcomes in collective agreements and would make harmonious labour relations impossible to achieve. Compulsory arbitration is often used as an alternative (e.g. police, fire fighters and hospital workers).

Affidavit of Saunders, *A.R.*, Vol. II, pp. 329-330, paras.17-19

45. Strikes in the agricultural sector, raise the same risks of failing to produce the balance of power which is necessary for the proper functioning of a collective bargaining regime. A strike during crucial periods of the year, dictated by season and climate, could result in the loss of an entire crop, the neglect and potential loss of livestock, and consequent economic loss so great as to threaten the economic survival of an employer.

Affidavit of Saunders, *A.R.*, Vol. II, p. 330, para.20

Affidavits of Brinkman, *A.R.*, Vol. II, pp. 287-290, paras.14-25; *A.R.*, Vol. III, pp. 406-408, paras. 28-32

46. Compulsory arbitration is intended to protect the affected parties from the devastating consequences of a strike where it has been determined that work stoppages cannot be tolerated, while maintaining access to collective bargaining. It does so, however, at a significant cost.

Affidavit of Saunders, *A.R.*, Vol. II, p. 330, para. 21

d) *Compulsory Arbitration*

47. Industrial relations experts have noted that compulsory interest arbitration regimes have a "chilling effect" on parties negotiating a collective agreement. A party that anticipates getting more from an arbitrator than from the opposite party in a negotiated settlement will have an incentive not to make concessions, since each concession may influence the arbitrator's decision to the detriment of the party making the concession.

Affidavit of Saunders, *A.R.*, Vol. II, p. 331, para.22

48. Experts have also noted a "narcotic effect", i.e., a tendency for negotiators to become accustomed to leaving the difficult decisions to arbitrators, so that, over time, consistently fewer and fewer settlements are negotiated as compared to regimes backed with the threat of strike. In the case of final offer selection, the threat

imposed by the scheme is designed to increase the rates of settlement, however, experience indicates the persistence of a chilling effect such that approximately 15% of cases are subjected to final offer selection.

Affidavit of Saunders, *A.R.*, Vol. II, p. 331; para.23

Cross-exam. of Saunders, *R.R.*, Vol. I, p. 152, q. 97; p. 153, q. 123; p. 155, q. 147; pp. 157-158, qq. 151-153; p. 162, q. 166; pp. 170-171, q. 198

49. Where responsibility for arriving at a collective agreement is ultimately shifted from the employers and trade unions to an arbitrator, the award is less likely to be responsive to the needs of the parties and is less capable of serving as a basis for future cooperative and harmonious labour relations.

Affidavit of Saunders, *A.R.*, Vol. II, p. 331, para.23

Cross-examination of Saunders, *R.R.*, Vol. I, pp. 149-151, qq. 92-95; pp. 164-165, qq. 172-176

50. The problem is exacerbated in "final offer" arbitration.

Affidavit of Saunders, *A.R.*, Vol. II, p. 331, para.24

Cross-examination of Saunders, *R.R.*, Vol. I, pp. 155-156, qq. 148-149; pp. 163-164, qq. 168-172; pp. 169-170, q. 190-193; p. 180, qq. 231-233

51. These weaknesses in the process of compulsory arbitration may be critical in certain areas of the economy, areas in which sensitivity to the needs of the particular work environment and in which harmonious labour relations are particularly important. They serve as good reasons not to extend the process of compulsory arbitration to those areas of the economy.

Affidavit of Saunders, *A.R.*, Vol. II, pp. 331-332, para. 25

52. Arbitration awards tend to produce wage settlements that, over time, are increasingly divorced from the influence of the labour market and tend to be higher than those obtained in strike regimes. Arbitrators' awards, and even negotiated settlements that are reached against a background of arbitration, tend to be based on previous arbitrators' awards, not on the labour market.

Affidavit of Saunders, *A.R.*, Vol. II, p. 332, para. 26

Cross-examination of Saunders, *R.R.*, Vol. I, p. 183, q. 272; pp. 184-185, qq. 275-276

53. This insulation from the influence of the market is potentially disastrous in volatile and highly competitive parts of the private sector economy. For that reason among others, with the exception (as already noted) of the

ALRA, compulsory arbitration has been confined to the public sector in Canada . It is noteworthy, however, that the agricultural sector is particularly vulnerable due to disproportionately thin profit margins.

Affidavit of Saunders, *A.R.*, Vol. I, p. 332, paras. 27-28

Affidavits of Brinkman, *A.R.*, Vol. II, pp. 298-310, paras. 40-59; *A.R.*, Vol. III, pp. 392-400, paras. 3-18

Cross-examination of Saunders, *R.R.*, Vol. I, pp. 168-169, qq.188-189; pp. 171-172, qq. 199-202 pp. 173-175, qq. 210-216; pp. 181, q. 239; pp. 194-195, qq. 298-301

iii) Collective Bargaining in the Agricultural Sector

a) *The Right to Strike and Lock Out*

54. The *ALRA* extended collective bargaining to the agricultural sector in Ontario for the first time, and compulsory arbitration to the private sector for the first time in Canada. In doing so, it acknowledged the inappropriateness of a right to strike and lock out in the Ontario agriculture sector.

Affidavit of Saunders, *A.R.*, Vol. II, pp. 332-333, para 29; and Exhibit G, *R.R.*, Vol. I, p. 111

55. The right to strike in the agricultural sector disturbs the balance of power that is essential to the creation and maintenance of any successful collective bargaining regime. The economic viability of a typical farm depends upon work being performed during the harvest season and during other critical periods determined by climate and season. As most crops are highly perishable, even a brief strike could result in the loss of an entire crop. Livestock must be tended constantly. Cows must be milked twice daily, stalls must be cleaned, eggs must be collected.

Affidavit of Saunders, *A.R.*, Vol. II, p. 333, para.30

Affidavit of Brinkman, *A.R.*, Vol. II, pp. 287-290, paras.14-25

56. Interruptions therefore during critical periods would be far more devastating than the effects of a strike upon an employer in any other sector of the economy. It would create an imbalance of power in favour of trade unions that would inevitably result in outcomes that did not reflect business needs, and would make harmonious labour relations in the agricultural sector impossible to achieve.

Affidavit of Fudge, Ex. M, *R.R.*, Vol. I, pp. 28-40

Affidavit of Saunders, *A.R.*, Vol. II, p. 333, para.31

Affidavits of Brinkman, *A.R.*, Vol. II, pp. 310-312, paras.60-67; *A.R.*, Vol. III, pp. 406-407, paras. 29-31

b) *The Agricultural Labour Relations Act*

57. The *ALRA* sought to extend collective bargaining to the agricultural sector while avoiding the consequences of a right to strike and lock out by imposing compulsory arbitration upon the private sector for the first time. In doing so it undertook two unusual and risky social experiments.

58. First, as explained in the following paragraphs, it embarked upon a major shift in labour policy in the absence of the economic and social underpinnings that have historically been regarded as necessary in order to justify such a shift. Second, it imposed upon the agricultural sector a form of dispute settlement that leads to higher wage outcomes. It thereby imposed higher costs upon the agriculture sector than the industrial sector, despite the highly competitive nature of the agricultural sector and the chronically low profit margins associated with the sector.

Affidavit of Saunders, *A.R.*, Vol. II, p. 333-334, paras.32-33

Affidavits of Brinkman, *A.R.*, Vol. II, pp. 285-287, paras.8-13; pp. 298-305, paras. 40-59; *A.R.*, Vol. III, pp. 392-398, paras 3-14

Cross-examination of Fudge, *R.R.*, Vol. I, p. 135, q. 179

c) *Justifications for Extending Collective Bargaining*

59. The agricultural sector in Ontario is not suffering from widespread labour relations difficulties requiring a legislatively sanctioned collective bargaining regime to relieve labour strife. There is no evidence of widespread public demand for extending collective bargaining rights to agricultural workers. Nor is the agricultural sector experiencing strong economic growth. On the contrary, as set out below, this sector has never faced more difficult competitive pressures.

Affidavit of Saunders, *A.R.*, Vol. II, p. 335, para 37

Affidavit of Brinkman, *A.R.*, Vol. II, pp. 317-318, paras. 84-85

60. Finally, contrary to the assertions of those seeking to justify the extension of collective bargaining to the agricultural sector, statistical and structural analysis does not support the contention that the landscape and composition of the agricultural sector in Ontario has changed dramatically in recent years from one based upon the family farm to one dominated by large, corporate agribusiness. In fact the evidence clearly demonstrates the opposite.

Affidavit of Saunders, *A.R.*, Vol. II, p. 335, para 38

d) *The Family Farm Structure of Ontario Agriculture*

61. 98.5% of all Ontario farms are family operated, 98.8% of farms that hire labour hire less than 10 "person year equivalents" ("Pys") and 96.7% hire less than 5.

Affidavits of Brinkman, *A.R.*, Vol. II, pp. 290-291, paras. 27-28; *A.R.*, Vol. III, pp. 401-404, para. 23

62. A family farm is a farm run as a family business, where most of the management, labour and capital is provided or supported (i.e. debt financing) by the family. An important distinction between family and non-family farm units is that the family is personally involved in providing on-going decision making and management, providing their own labour and supervising supplemental workers, taking the risks, and receiving the benefits as family income.

Affidavit of Brinkman, *A.R.*, Vol. II, pp. 291-292, paras. 29-30

63. These farms not only are family owned and operated, but also operate with a set of personal and informal relationships between home and business and between family members and supplementary workers that is unique in modern businesses. On family farms there typically is a strong integration of family and personal life with the farm business. The centre of this integration is the farm home, which typically is located on the business property and serves as a centre of both business activity and social interaction.

Affidavit of Brinkman, *A.R.*, Vol. III, pp. 400-401, paras. 19-20

64. Farm families typically raise their children on their business properties and these children often become integrated into the farm work force. On many farms, housing is provided in the farmstead or on farm property for at least some of the permanent as well as seasonal employees. Farm children often spend time with hired help and their families. On many family farms, both spouses are involved in the record keeping, management decisions, farm work, and interaction with workers. The farm office is usually located within the family home, and the kitchen table often serves as the board room, briefing room, and contact location with workers. On some farms vehicles and equipment are shared with workers. Meals also may be shared, particularly during intensive work periods, where it is not uncommon for the farm family to cook meals in their home and bring food out to workers. Finally, working relationships with these hired workers are open, personal, informal, and integrated with the farm family life.

Affidavit of Brinkman, *A.R.*, Vol. III, pp. 400-401, para.20

65. It should be pointed out that the family farm in which personal and business life is integrated is not inconsistent with a sophisticated business unit. Nor does large size, incorporation, or the hiring of supplemental labour preclude a farm from operating substantively as a family farm. The critical issues are the relationships within the farm unit and the integration of personal and business life. The modern family farm may have evolved, but the family dynamic persists within the family farm.

Affidavit of Brinkman, *A.R.*, Vol. III, p. 401, para. 21

Cross-examination of Brinkman, *R.R.*, Vol. II, pp. 236-237, qq. 203-206

Cross-examination of Saunders, *R.R.*, pp. Vol. I, 137-139, qq. 28-30

66. There is no formally defined cut off point at which the family farm dynamic ends and non-family farm status begins. On larger multi-family farm units, a significant number of non-family workers could be hired without destroying the family farm dynamic. On smaller units, the number threshold would likely be smaller.

Affidavits of Brinkman, *A.R.*, Vol. II, pp. 292, paras. 31-33; *A.R.*, Vol. III, p. 401, para. 22

67. It is likely that farms hiring less than 10 Pys of labour are able to maintain the family farm dynamic in reasonable fashion, particularly since the Pys include both paid family and non-family labour and both seasonal and year-round labour. A significant number of the farms with 10 Pys or more also may operate with a family farm dynamic, particularly since larger farms tend to represent more multiple family units and are often incorporated. The impact of the practice of incorporation on hired Pys is important to note because in incorporated businesses the farm operators and family members typically are paid a wage from the corporation, and are therefore treated as hired labour. Some multi-family farms with multiple farmsteads likely could even maintain family farm status with 20 or more Pys.

Affidavit of Brinkman, *A.R.*, Vol. III, p. 404, para. 24

68. In summary, while it is not possible to determine the dividing line between family and non-family farms with absolute precision, with the appropriate background and based upon structural and statistical analysis, it is possible to reasonably estimate that 97.4% of Ontario farms currently (1996) operate as family farms in both ownership and operation.

Affidavit of Brinkman, *A.R.*, Vol. III, pp. 404-406, paras. 24-27

Cross-examination of Brinkman, *R.R.*, Vol. II, p. 235, q.199; p. 238, q. 303; p. 299, q.666; pp. 330, q .739

e) *Compulsory Arbitration in the Agricultural Sector*

69. Given that the right to strike and lock out was acknowledged to be inappropriate in the Ontario agricultural sector for the reasons already given, the extension of collective bargaining rights to the agricultural sector of the economy, necessarily depends upon the viability in that sector of compulsory arbitration. If compulsory arbitration is unsuitable for the private sector in general, or for the agricultural sector in particular, the suitability of collective bargaining in the agricultural sector is put into serious question or undermined.

Affidavit of Saunders, *A.R.*, Vol. II, p. 335, para.39

70. In fact, the combination of several key features of the agricultural sector are incompatible with compulsory arbitration. The thin profit margins of agricultural employers, and the fragile competitive situation of the agricultural sector in the global economy make compulsory arbitration unacceptably costly in that sector. Moreover, compulsory arbitration raises serious difficulties for, and inconsistencies with, the distinctive character of agricultural labour which requires an unusually high degree of flexibility and co-operation between employers and employees, combined with the continuing dominance of the family unit as the primary basis of the great majority of work relationships in the agricultural sector in Ontario.

Affidavit of Saunders, *A.R.*, Vol. II, pp. 335-336, para.40

i) Thin Profit Margins and Economic Vulnerability

71. Highlighting only a few examples from the evidence setting out the true extent of the economic vulnerability and decline of the agricultural sector in Ontario, it is noteworthy that:

i) in real purchasing power, Ontario aggregate farm incomes in 1994 and 1995 (before the negative year in 1996) averaged only 14% of those in 1973-75;

ii) the ratio of debt to income in Ontario agriculture has increased from around 2 ½ to one during the 1973-75 period to 17.4 and 15.7 to one in 1994-95 (and negative in 1996 due to the negative income) translating in dollar terms to $1.8 billion per year during 1973-75 to $6.9 billion in 1996;

iii) based on 1995 figures, net farm incomes were inadequate to provide for an adequate rate of return on both capital and labour ;

iv) 1995 net farm income of $344 million represents only a 1.5% return (Canada Savings Bonds provide a risk free return of 5%) leaving no return whatsoever for labour and management contributed over the year;

v) if absolutely no return is allocated to the $29.8 billion in equity capital in 1995, the average labour income would be only $3,465 per operator annually, only 22% of the average hired agricultural worker's earnings of $15,810 in 1990;

vi) even on the largest farms with sales of $1 million or more, profits for 1995 calculated on the basis of sales minus expenses including depreciation, determined in accordance with generally accepted accounting principles and adopted by Statistics Canada, were negative $29,984 (similar calculations for farms with sales of $500,000 to $999,999 showed profits of only $38,744, and those for farms with sales of $250,000 to $499,999 were $36,503) (figures for 1996 would be much lower because of the negative income received); and

vii) labour returns for tax filers on the largest farms (with gross sales of $200,000 or more, averaging $504,745) for 1995 were $2,503, only 16% of the 1990 average of hired farm wage earnings (returns would be lower for 1996 as aggregate net farm income declined from $344 million in 1995 to a loss of $117 million in 1996).

Affidavits of Brinkman, *A.R.*, Vol. II, pp. 298-312, paras. 40-66; *A.R.*, Vol. III, pp. 392-400, paras. 3-18

see also Cross-examination of Brinkman, *R.R.*, Vol. II, pp. 248-251, qq. 355-369; pp. 254-257, qq. 384-392; pp. 278-279, qq. 489-490; p. 284, q. 528; p. 308, q. 705; p. 313, q. 717; pp. 331-332, qq. 744-745

72. It is also worth noting that the high level of government assistance that has kept the sector minimally viable in the late 1980's and early 1990's will be more difficult to provide in the future under global trading agreements. Even the supply management industries (dairy, poultry and eggs) which produce a significant positive portion of our current net farm income could face extreme pressures in the future under WTO trade negotiations that could require substantial reduction in the high tariffs protecting these sub sectors. As a result, the Ontario agricultural sector is likely to continue to be a very low profit sector that can ill afford any cost increase if it is to remain viable.

Affidavit of Brinkman, *A.R.*, Vol. II, p. 300, paras. 43-44

73. In the case of final offer compulsory arbitration schemes, the degree of risk that at least part of an imposed settlement might be unreasonable is significantly increased.

Affidavit of Saunders, *A.R.*, Vol. II, p. 336, paras. 41-42

Cross-examination of Saunders, *R.R.*, Vol. I, pp. 16.37-165, qq. 168-176; pp. 169-170, qq. 190-198; pp. 180, qq. 230-233

Affidavit of Brinkman, *A.R.*, Vol. II, p. 310, para. 60

Cross-examination of Fudge, *R.R.*, Vol. I, pp. 133-134, qq. 165-166

ii) The Need for Innovative Solutions

74. In addition to the inflationary tendency of arbitration awards, studies show that the conservative character of the arbitration process and the effect of the parties not having bought into the outcome leads to less flexible and responsive agreements and tends to discourage innovative solutions to non-monetary issues, including human resource management.

Affidavit of Saunders, *A.R.*, Vol. II, pp. 336-337, para. 43

Cross-ex of Saunders, *R.R.*, Vol. I, pp. 175-176, qq. 217-219; pp. 177-179, qq. 225-228; p. 189, q. 283

75. This poses a serious threat to those areas of the economy where competition is great and flexibility and innovation are essential to survival. The agricultural sector in Ontario as a whole now faces intense competitive pressure as a result of the lifting of global trade barriers. The agricultural trade deficit has increased from $1.5 billion dollars in 1988 to 2.4 billion in 1996. Declining levels of farm income indicate that farmers are being forced to accept increasingly lower levels of return in order to maintain sales.

Affidavit of Saunders, *A.R.*, Vol. II, pp. 336-337, paras. 43-44

Affidavit of Brinkman, *A.R.*, Vol. I, pp. 285-287, paras. 8-13

Cross-examination of Brinkman, *R.R.*, Vol. II, p. 203, qq. 48-49; pp. 205-206, qq. 73-76; pp. 326-327, q. 736

iii) Dependence Upon Harmonious Labour Relations

76. The limited capacity of arbitration regimes to foster harmonious working relations between employer and employee is particularly significant in the agricultural sector, where flexibility and co-operation are essential.

Affidavit of Saunders, *A.R.*, Vol. II, p. 337, para. 45

77. The timing of the biological processes in agriculture typically cannot be controlled by the farmer. Even in intensive operations like mushrooms and hatcheries, where the climatic environment is semi-controlled, biological processes are not precise and conditions can change rapidly from disease, pests, or changes in maturity, etc.

is largely pro-active. Because of these fundamental differences in production processes, agriculture requires a fundamentally different treatment in labour relationships.

Affidavit of Brinkman, *A.R.*, Vol. II, pp. 288-290, paras. 19-25

82. While it is possible to argue by exception and find instances in which these characteristics are not fundamental to a specific agricultural job, such an approach ignores the prevailing and basic conditions that exist throughout the agricultural sector. Similarly, it may be possible to find one or two examples in which isolated characteristics are shared with certain industries in the non-agricultural sector, but none has the package of characteristics that make the agricultural sector unique.

Cross-examination of Brinkman, *R.R.*, Vol. II, pp. 227-228, q. 163; p. 229, q. 166; pp. 292-293, qq. 566-567

Affidavit of Brinkman, *A.R.*, Vol. III, pp. 406-407, paras. 30, 32

83. Finally, in this regard, examples cited by the Appellants in the health care sector as analogous to the type of work undertaken in the agricultural sector are of limited value. Unlike the agricultural sector, all fall within the public or quasi-public sector, are government funded and operate under highly regulated conditions, and are thus isolated in large part from the highly competitive market pressures to which agriculture is subject. Furthermore, none of the examples cited share the unique integration of business and family life that is associated with the agricultural sector.

Affidavit of Brinkman, *A.R.*, Vol. III, p. 407, para.31

Cross-examination of Brinkman, *R.R.*, Vol. II, pp. 218, 220, qq. 125, 129

84. Moreover, the necessarily informal and personal nature of the work relationship inherent in the family farm which continues to dominate as the primary work unit in the agricultural sector in Ontario raises serious obstacles and questions as to the suitability of a collective bargaining regime including compulsory arbitration which, for the reasons stated, formalizes labour management relationships and has the effect of distancing the workplace parties. The interposition of a third party, the bargaining agent, between the employer and the employees runs counter to the personal, informal and flexible work relationships that are typical of the family farm.

Affidavits of Brinkman, *A.R.*, Vol. II, pp. 290-292, paras. 27, 29, 30; p. 310, para. 60; *A.R.*, Vol. III, pp. 400-406, paras. 19-27

Affidavit of Saunders, *A.R.*, Vol. II, pp. 331-332, 337-338, paras. 22-25, 45-47

95. The Canadian Farm Workers Union estimates that there are about 30,000 farm workers in B.C., but that only about 2% of the total hired farm work force is unionized (including those producing tree seedlings). Furthermore, the CALURA, Labour Unions publication also reports that the total unionized agricultural labour force for Canada in 1992 was only 2400 workers. Applying the 11.2% unionization rate reported for B.C. to the approximately 30,000 hired agricultural workers estimated by the Canadian Farm Workers Union, would generate 3360 union workers, more than the reported number of unionized workers for the entire country. As a result, the unionization statistics for B.C. should be used very cautiously.

Affidavit of Brinkman, *A.R.*, Vol. II, pp. 323-324, para. 107

96. In summary, given the profound differences between the agricultural sector of Ontario and that of other provinces, and the extremely limited level of unionization, the aggregate data available on the other provinces is of no real value in assessing the impact of unionization on the viability of Ontario's agricultural sector.

Cross-examination of Brinkman, *R.R.*, Vol. II, pp. 297-298, qq. 581, 585

PART II - POINTS IN ISSUE

97. It is the position of the Respondent that s. 80 of the *LRESLAA* and s. 3(b) of the *LRA*, and the consequent exclusion of agricultural workers from the province's labour relations regime does not infringe ss. 2(d) or 15 of the *Charter* and, in the alternative is justified under s. 1 of the *Charter*.

PART III - ARGUMENT

A. *CHARTER* S. 2(d)

i) Summary

98. It is submitted that this Court's recent decision in *Delisle v. Canada* is a complete answer to the Appellants' *Charter* s. 2(d) freedom of association challenge. In that case the issues were summarized by the majority as follows:

> The Appellants' position is that in the absence of any other applicable trade union regime, the express exclusion of RCMP members from the PSSRA regime encourages unfair labour practices and interferes with the creation of an independent employee association for RCMP members. In my view, neither the lack of rights under the PSSRA regime, nor the failure to provide RCMP members with a statutory or other associative regime can be confused with an infringement of their freedom of association.

Delisle v. Canada, [1999] 2 S.C.R. 989, para 24

ii) General Principles

99. Section 2(d) protects only an individual's right to associate, not an association's ability to engage in a particular activity even if "the activity is a foundational or essential purpose of the association". To the contrary, the "objects, purposes or activities which the association may wish to accomplish are irrelevant for *Charter* purposes". The broader approach to the guarantee has been rejected because it would confer greater rights on associations than are enjoyed by individuals, and because of its extremely broad implications for a wide range of group activities.

> *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 at 402-403 and 392-393
>
> *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157 at paras 109-113

100. This Court has consistently held in the labour relations context that s. 2(d) guarantees neither a right to bargain collectively nor a right to strike.

> [C]ollective bargaining is not an activity that is, without more, protected by the guarantee of freedom of association. Restrictions on the activity of collective bargaining do not normally affect the ability of individuals to form or join unions. Although collective bargaining may be the essential purpose of the formation of trade unions, the argument is no longer open that this alone is a sufficient condition to engage s. 2(d). Finally, bargaining for working conditions is not, of itself, a constitutional freedom of individuals, and it is not an individual legal right in circumstances in which a collective bargaining regime has been implemented.
>
> *Professional Institute, supra* at 401-404

101. In the court below, Sharpe, J. summarized the Court's conclusions this way:

> The Court found that legislative decisions to confer or withhold rights of collective bargaining are instruments of economic policy, concerning which there is a wide range of options and that governments are entitled to grant or withhold such rights unimpeded by the *Charter*.
>
> Decision of Sharpe, J. *A.R.*, Vol. III, p. 479

102. The Appellants argue, however, that the purpose and effect of the *LRESLAA* is to prohibit the existence of unions *per se* in the agricultural sector, as well as their protected activities.

iii) No Government Purpose or Effect to Limit the Right of Association

103. It is submitted that Sharpe, J. was correct when he concluded below:

> The purpose of the statute must be assessed by reference to its terms and to its effect, and not by a particular turn of phrase used by a cabinet minister as a shorthand way of explaining the intended effect of legislation in response to an inquiry from a concerned citizen.

> When one turns to *LRESLAA* itself, it is difficult in my view, to discern a governmental purpose to deny agricultural workers the right to form an association. The substantive issue of concern to both the Applicants and the Legislature is plainly the right to engage in collective bargaining. There can be no doubt that the purpose of *LRESLAA* is to deny agricultural workers that right, which, as already noted, does not enjoy constitutional protection. The Legislation says nothing about the right to form a trade union, and as will be seen, the real complaint of the Applicants is the failure of the Legislature to deal with certain matters they claim are essential to create the conditions necessary to form a trade union. I find it impossible to read into that failure a legislative purpose actively to deny the right of agricultural workers to form an association.
>
> Decision of Sharpe, J., *A.R.*, Vol. III, pp. 479-480

104. This analysis and approach are reiterated in this Court's reasons in *Delisle*. In that case the Court concluded that "absent ambiguity in the meaning of a provision it is primarily the statute as a whole which indicates its purpose." The majority warned against confusing the possible ultimate or strategic motives of some government players with the purpose of the statute, which on the face of the text, was not inconsistent with its effects, namely the exclusion of a group from the protection of a collective bargaining regime. And this, it held, did not violate the appellant's freedom of association.

Delisle, supra, para 19-22

105. In this case, the *LRESLAA* simply repealed the legislated collective bargaining regime for agricultural workers under the *ALRA*, terminated any agreements or rights under that Act, and prohibited employers from reprisals against workers on account of union activity under the *ALRA*. Any references by government representatives to the incompatibility of "unionization" to the agricultural sector must be interpreted in that context.

106. Nothing in either the *LRESLAA* or the *LRA* prevents agricultural workers in Ontario from forming a union or association. The prohibition in s. 3(b) of the *LRA* is limited to collective bargaining under that Act. In these circumstances this case is no different from *Delisle*, or the "Labour Trilogy" upon which it is ultimately based; there is no violation of s. 2(d).

Affidavit of Fudge, *A.R.*, Vol. III, pp. 374-375, paras. 121-122

iv) No Positive Obligation

107. The Appellants further argue that the failure of government to take positive legislative action in this regard to regulate the conduct of employers and protect agricultural workers from obstacles they may confront in such

activity has the effect of denying them the right to associate freely *per se* to improve their wages and working conditions.

108. Bastarache, J. for the majority in *Delisle* reiterated that s. 2(d) does not encompass a right to positive action to give effect to freedom of association through legislation in the view that to do so would necessitate entering "the complex and political field of socio-economic rights and unjustifiably encroach upon the prerogative of Parliament".

Delisle, supra, para 23

109. He concluded that the structure of ss. 2 and 15 of the *Charter* are very different and ought not be confused. By its nature, freedom generally imposes a negative obligation on government as compared to a positive obligation of protection or assistance. Accordingly exclusion of one group from a legislative scheme does not preclude protection of another. Nor for that matter does it restrict changes in the extent of coverage, or the groups affected. To find otherwise would dictate an all or nothing policy whereby the state could not assist one group without assisting all. He found therefore that the appellant's freedom of association was not infringed by the creation of a statutory regime which does not apply to him, and that comparative reasoning of this kind should be reserved to s. 15.

Delisle, supra, paras. 25-29, 33

Decision of Sharpe, J., *A.R.*, Vol. III, p. 481

110. The Appellants' complaint in this case is necessarily directed at private action, and accordingly falls outside *Charter* protection. Employer conduct as it relates to the association activities of agricultural workers does not constitute government action within the meaning of s. 32 of the *Charter*. No legislation compels or encourages employers to dismiss, replace or seek damages against striking workers. Government is simply absent in this regard.

> We must take care to distinguish between effects which are wholly caused, or are contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision.

Symes v. Canada, [1993] 4 S.C.R. 695 at 764-765

McKinney v. University of Guelph, [1990] 3 S.C.R. 229 at 261-263, 318

Decision of Sharpe, J., *A.R.*, Vol. III, pp. 480-481

111. The effect of s. 80 of the *LRESLAA* was to repeal the *ALRA*. It did not enact any substantive provision which can be measured against the requirements of the *Charter*. By framing the challenge as they have, the

Appellants must be taken as claiming a constitutional right to the *ALRA* itself. As indicated, s.2(d) does not impose a constitutional obligation on government to positively enhance association rights in general, let alone pass a specific piece of legislation such as the *ALRA*.

Decision of Sharpe, J. *A.R.*, Vol. III, pp. 481-482

112. It is submitted therefore, that the repeal of the *ALRA* does not attract Charter scrutiny. The purpose of the *Charter* is to ensure that governments comply with the *Charter* when they make laws and choose to act.

McKinney v. *University of Guelph, supra* at 261

113. This principle is consistent with the Court's decision in *Vriend v. Alberta*, [1998] 1 S.C.R. 493. While holding that the exclusion from the Alberta *Human Rights Code* of sexual orientation as a prohibited ground of discrimination infringed s. 15 of the *Charter*, Cory, J.'s reasons are contingent upon the fact that the challenged legislation drew a distinction through omission. He wrote "(t)he fact that it is the underinclusiveness of the Act which is at issue does not alter the fact that it is the legislative act which is the subject of *Charter* scrutiny". This is not so with the repeal of the ALRA.

Vriend v. Alberta, [1998] 1 S.C.R. 493 at paras. 55, 61

114. As found by the Court below, if there is no duty to act, a government must also be free to repeal legislation of a predecessor government, even if it enhances or encourages the exercise of a *Charter* right. The effect otherwise is to grant the relevant statute(s) constitutional status, whereby legislatures are bound by the laws of previous governments, and are precluded from changing policies and implementing alternative measures in the given area.

Decision of Sharpe, J., *A.R.*, Vol. III, p.482

115. This finding was recently affirmed by the Ontario Court of Appeal in a unanimous decision dismissing a *Charter* challenge to the repeal of the *Employment Equity Act*. The Court held that unless there is a constitutional obligation to act in the first place, the legislature must be free to return to the *status quo ante*, without having to justify it under s. 1 of the *Charter*.

Ferrel v. Ontario, (1998) 42 O.R. (3d) 97 at 106, 110-112, appeal to the S.C.C. denied

116. The Appellants also appeal to international law in support of their position. International treaties to which Canada is a party are not incorporated into domestic law and are not enforceable in Canadian courts. The courts

will apply statute and common law, even if it is inconsistent with a treaty which is binding upon Canada. Moreover, the Supreme Court of Canada has already held that freedom of association does not the include the right to collectively bargain even though this right may be protected in international law.

Re Public Service Employee Relations Act, [1987] 1 S.C.R. 313

Francis v. The Queen, [1956] S.C.R. 618

Capital City Communications v. C.R.T.C., [1978] 2 S.C.R. 141

117. The real issue before the Court therefore, is the constitutionality of the exclusion of agricultural workers from collective bargaining regimes under s. 3(b) of the *LRA* that is left after the repeal of the *ALRA*. For the reasons stated and listed below, the Attorney General of Ontario submits that the exclusion found in this section is constitutionally sound.

B. *CHARTER* S. 15(1)

118. This Court has recognized that making legislative distinctions is an inherent part of the process of government and that not every legislative distinction or classification will run afoul of the *Charter*.

> [I]t was never intended in enacting section 15 that it become a tool for the wholesale subjection to judicial scrutiny of variegated legislative choices in no way infringing values fundamental to a free and democratic society. Like my colleague, I am not prepared to accept that all legislative classifications must be rationally supportable before the courts. Much economic and social policy making is simply beyond the institutional competence of the courts. Their role is to protect against incursions on fundamental values, not to second guess policy decisions.
>
> *Andrews v. Law Society of Upper Canada*, [1989] 1 S.C.R. 143 at 194 and 168

119. Recently, this Court stated that the following three step inquiry should be adopted as a general guideline to equality rights analysis under s. 15 of the Charter.

> A) Does the impugned law a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
>
> B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?
>
> C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that

the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

Law v. Canada [1999] 1 S.C.R. 497 at para. 88

120. The Court has indicated that a discrimination claim must be founded upon a conflict between the impugned law and the purpose of s. 15(1). The purpose of s. 15 can be characterized as preventing the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and deserving of concern, respect and consideration.

Law supra at paras. 42, 43, 51, 73, 88

121. Consequently, legislation which has the effect of perpetuating or promoting the view that the individual is less capable or less worthy of recognition or value as a human being based upon personal traits or circumstances which do not relate to individual needs, capacities or merits will run afoul of s. 15. Conversely, differential treatment which does not violate human dignity will not.

Law supra at paras. 51-53, 64

i) Distinction Upon One or More Personal Characteristics

122. While it is acknowledged that the exclusion of agricultural workers from a legislated labour relations scheme draws a distinction between farm labourers and other groups, it is submitted that the class of "agricultural workers" is distinguished by an economic feature; namely, employment in a certain sector of the economy, irrespective of their individual characteristics, and whoever they may be. This is not a personal characteristic. While economic distinctions may be symptomatic of s. 15(1) characteristics, in this case, the economic distinction is not, in fact, based on any personal characteristic. Accordingly, it is submitted that the Appellants have failed to satisfy the very first stage of the s. 15 analysis.

Egan v. Canada, [1995] 2 S.C.R. 513 at 544

ii) Analogous Grounds

123. Recognition of the basis of differential treatment as an analogous ground depends upon whether it would further the purposes of s. 15(1). This involves consideration of whether differential treatment in the particular

situation has the potential to violate human dignity. The Courts below concluded that agricultural workers do not constitute an analogous group for the purposes of s. 15, and that nothing in the evidence indicates that they are identified as a group by any personal trait or characteristic other than that they work in the agricultural sector.

Decision of Sharpe, J. *A.R.*, Vol. III, pp. 490-491

Corbiere v. Canada [1999] 2 S.C.R. 203, para 58

124. The legislative scheme challenged by the Appellants relies wholly upon distinctions drawn on the basis of occupational status. The courts have consistently held that occupational status is not an analogous ground and that groups defined solely by their occupation cannot claim the *Charter's* protection based on such considerations.

Delisle v. Canada, supra at 1023-1024

A & L Investments (1993), 13 O.R. (2d) 799 (Gen. Div.), at 821-822, aff'd May 28, 1997 (C.A.)

Cosyns v. Canada (A.G.) (1992), 7 O.R. (3d) 641 (Gen. Div.) at 657-659

Major c. Quebec (Procureur General), [1994] R.J.Q. 1622 at 1629-1633 (S.C.)

R. v. Greenbaum; R. v. Sharma (1991), 77 D.L.R. (4th) 334 (O.C.A.); [1993] 1 S.C.R. 650

Lloyd v. Ontario , unreported decision of Ont. Div. Crt, March 10, 1989

Lister et al. v. Ontario (Attorney General) (1990), 72 O.R. (2d) 354 (H.C.J.) at 366

OPSEU v. National Citizens Coalition Inc. (1990), 74 O.R. (2d) 260 (C.A.) at 265

Haddock v. Ontario (Attorney General) (1990), 73 O.R. (2d) 545 (H.C.J.) at 564

Jones v. Ontario; Rheaume v. Ontario (1992), 7 O.R. (3d) 22 (C.A.) at 25, 26

Rubin v. Canada, [1990] 3 F.C. 642 at 648 (T.D.)

125. In *Delisle*, the Court found that the exclusion of RCMP workers from the trade union regime did not affect their dignity because the basis for the exclusion related only to the nature of the work and functions involved. In other words the basis for the distinction was unrelated to those considerations which the Court relied upon in Corbiere for a finding of analogous grounds, namely:

> ...stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity.

Delisle, supra at 1024, para 43

126. It is submitted that this reasoning is directly applicable to the case at hand. The evidence in this case demonstrates that agricultural workers are a disparate and heterogeneous group comprised of, among others, students, farm families, former farmers, and foreign workers brought in under a highly structured federal employment program, linked only by common employment in a particular economic sector. Sharpe, J.

acknowledged that they are poorly paid, face difficult working conditions, and have low levels of skill and status, but found the following:

> ...farm owners and operators also suffer from low wages, and that many have low education levels. The low status and prestige of farm workers is similar to that of manual labourers. In my view, the evidence shows that the legislative decision to exclude agricultural workers from the collective bargaining regime does not reflect stereotypical assumptions about the personal characteristics of agricultural workers, either individually or as a class. Rather, it is based upon the policy-maker's perception of the characteristics and circumstances of the agricultural industry. The effects of legislative exclusion impact the diverse group of individuals who work in that sector of the economy and who are not otherwise identifiable as a group.

Decision of Sharpe, J., *A.R.*, Vol. III, p. 490

Affidavit of Fudge, *A.R.*, Vol. I, pp. 45-49, paras. 55-68; and Exhibit E, Annex B, *R.R.*, Vol. I, pp. 14-18

127. There is no evidence that any protected group is disproportionately affected by the exclusion of agricultural workers from provincial collective bargaining regimes. The only discrete group of workers which arguably could be characterized as an enumerated or analogous group is off-shore workers. However, these workers enter the country pursuant to a highly structured program between the federal government and the sending country and are therefore beyond the reach of provincial labour legislation, and are accordingly irrelevant for assessment of analogous grounds.

Affidavits of Fudge, *A.R.*, Vol. I, pp. 46-49, paras. 60-66, Exhibits Z, AA-1, AA-2, AA-3, AA-4, *R.R.*, Vol. I, p. 61-74; *A.R.*, Vol. III, p. 369, para. 100

Affidavit of Brinkman, *A.R.*, Vol. II, p. 319, para. 91

128. The agricultural workforce is further divided into two distinct workforces: full-time and seasonal. According to the Appellants' own expert witness, the personal characteristics of these two groups of employees differ. Seasonal workers account for roughly half of the total hired labour in Ontario agriculture. They are employed in agriculture on average for only ten weeks and go on to earn income from other sources during the greater part of the year.

Affidavit of Fudge, *A.R.*, Vol. I, p.41, para. 46; Exhibit E, *R.R.*, Vol. I, pp. 1-18, Exhibit J, pp. 23-27

129. Indeed, the agricultural workforce in general is highly transient. Securing a stable supply of farm labour has proven to be a significant problem in Ontario. Many labourers work only one harvest and do not return to the industry. The evidence in this case is that the vast majority of agricultural workers are not migrants who move from farm to farm. To the contrary, once a worker leaves a farm he or she tends to leave the industry altogether. The

offshore workers program is one response to this problem. According to the program's administrators, without offshore workers, Ontario's horticultural industry would "stagnate and decline".

Affidavit of Brinkman, *A.R.*, Vol. II, pp. 313, paras. 68-69

Affidavits of Fudge, *A.R.*, Vol. I, pp. 26-27, 46, 48-49, paras.6, 58, 65; Exhibit E, *R.R.*, Vol. I, pp. 1-18; Exhibit J, pp. 23-27; *A.R.*, Vol. III, pp. 361, 369, 373, paras. 72-73, 101, 116,

130. The fact that we are dealing with a purely economic as compared to a personal characteristic is highlighted by the fact that membership in the class is often of brief duration. In these circumstances, occupational status is unlikely to be of defining importance to an individual and so cannot support a finding of an analogous group for *Charter* purposes.

Masse et al v. Ontario (1996) 134 D.L.R. (4th) 20 (Ont. Div. Ct.) Leave ot appeal to O.C.A. and S.C.C. denied at 59 (*per* O'Brien J.)
Miron v. Trudel (1995) 5 S.C.R. 418 at 497 (*per* McLachlin J.)

131. The Appellants point to varying characteristics of agricultural workers in support of their argument that they constitute an analogous group: low levels of skill and education, the low status of agricultural work, low wages, and limited occupational mobility, as well as legislative distinctions in the area of labour and employment law. Those characteristics which attach to the individual (low levels of skill and education) are not a function of his or her occupational status. Nor are they indicia on their own of an analogous group. Those characteristics which attach to the employment (low status, low wages, legislative distinctions) are a function of the particular characteristics of the agricultural industry.

Affidavit of Fudge, *A.R.*, Vol. I, pp. 39-40, 44, paras. 39-43, 54

132. Low levels of education and skill characterize many occupational groups, including manual labourers generally and some farm owners and operators. In fact, Statistics Canada figures indicate that farm workers enjoy higher levels of education than do farm owners and operators.

Affidavit of Fudge, Exhibit I, *R.R.*, Vol. I, pp. 20-22

Cross-examination of Fudge, *R.R.*, pp. 129-130, qq. 91-94

133. The Appellants also point out that farm work is "consistently assessed at the lowest end of the prestige scale." However, this also does not by itself indicate an analogous group. Moreover, the status of agricultural

workers is on par with other manual labourers. Their status is also roughly equivalent to the status of farm owners and operators.

Affidavit of Fudge, Exhibit R, *R.R.*, Vol. I, pp. 41-54

Cross-examination of Fudge, *R.R.*, Vol. I, p. 126, qq. 64-65

134. Low wages in the agricultural sector result not from discriminatory attitudes towards agricultural workers but from the low value of the products they produce. In any economic system, the long-term sustainable wages of workers are set by the value of what they produce. This value is determined, in turn, by both the worker's productivity and the value or price of the product he or she produces. Workers in other industries may earn more than agricultural workers because they are more skilled and produce higher valued products. In any event, wage rates can be deceiving because many agricultural workers receive a wide variety of non-pecuniary benefits. Wages of farm workers, on average, remain higher than the farm labour income of farm operators.

Affidavits of Brinkman, *A.R.*, Vol. II, pp. 285, 313-314, 316-317, paras. 7(H), 71-73, 80-81; *A.R.*, Vol. III, pp. 398-399, para.16

Cross-examination of Brinkman, *R.R.*, Vol. II, pp. 300-301, qq. 671-678

Affidavit of Fudge, *A.R.*, Vol. I, pp. 43-44, para.52

135. The Appellants also point to low occupational mobility as illustrative of the disadvantage faced by agricultural workers. However, the instability of the agricultural labour force suggests that there is actually a relatively high degree of mobility amongst agricultural workers.

136. The Appellants refer to other legislative distinctions in the labour and employment law context in support of their argument that agricultural workers face discrimination. They point to the fact that agricultural workers are excluded from coverage under the *Occupational Health and Safety Act*, the *Employment Standards Act*, and the *Labour Relations Act, 1995*. Agricultural workers are subject to separate employment standards and workplace safety regimes specifically designed to address the agricultural sector. The policy concerns underlying these parallel legislative distinctions all relate to the unique circumstances of the agricultural industry. For instance, in the employment standards field, a report prepared for the Ontario Task Force on Hours of Work and Overtime concluded that the wholesale inclusion of agricultural workers under the *ESA* was inadvisable on the basis of the biological and environmental factors at play in the agricultural sector as well as "the fierce price competition" faced

by farmers. In making their case for discrimination, the Appellants must do more than simply point to the very distinction of which they complain.

Affidavit of Fudge, *A.R.*, Vol. II, pp. 28, 39, paras. 10-11, 40; Exhibit U, *R.R.*, Vol. I, pp. 55-60

Affidavit of Brinkman, *A.R.*, Vol. II, pp. 314-316, paras. 74-79

Haddock v. Ontario (1990) 73 O.R. (2d) 545 (H.C.J.) at 564

137. Moreover, employment standards legislation, like labour relations regimes, include and exclude different groups to varying degrees for policy reasons based not on personal characteristics of the workers, but on the circumstances of a given industry. Agricultural workers are simply one of many groups which are excluded from these regimes for valid policy reasons.

Affidavit of Brinkman, *A.R.*, Vol. II, pp. 315-316, paras. 77-79

138. Finally, it should be noted that not all agricultural workers share the same economic features. Workers at larger operations with more employees typically enjoy higher wages, employment benefits and working conditions than are found at smaller family farms. Their work also tends to be higher status. Studies indicate that the blurring of personal and business life in the workplace has a negative effect upon the status of workers. Consequently, workplaces with more employees and in which personal relations and the family dynamic do not predominate are less likely to experience this effect.

Affidavit of Brinkman, *A.R.*, Vol. II, pp. 318-319, paras. 86-90

Affidavit of Fudge, *A.R.*, Vol. I, pp. 32-33, paras. 23-24; Exhibit H, *A.R.*, Vol. 1, p. 87

Cross-examination of Fudge, *R.R.*, Vol. I, pp. 127-128, qq. 81-84

139. Unions have indicated that organizing efforts will be directed at larger establishments and not at smaller family farms. If this is the case, then, ironically, the group most likely to benefit from the extension of collective bargaining rights to the agricultural sector are those with the highest status, highest wages and most generous employment benefits. This is not the segment of the agricultural workforce upon which the Appellants rely for the purposes of establishing an analogous group.

Affidavit of Brinkman, *A.R.*, Vol. II, pp. 318-319, paras. 86-90

iii) Discrimination

140. It is submitted that for the reasons stated the legislative distinction is not discriminatory. The policy decision not to have a collective bargaining regime in the agricultural sector does not reflect stereotypical assumptions about

the personal characteristics of agricultural workers either individually or as a class. To the contrary, the distinction affects a diverse and changing group of individuals and is based on the actual characteristics and circumstances of the agricultural industry.

Decision of Sharpe, J., *A.R.*, Vol. III, p. 490-491

141. It is worth noting in this regard that this Court has indicated that in referring to the existence of correspondence between a legislative distinction and the actual situation of different individuals or groups, the legislation need not correspond perfectly with social reality to comply with Charter s. 15.

Law, supra, para. 105

C. *CHARTER* S. 1

142. If this Court finds an infringement of either s.2(d) or s.15(1), it is submitted that the infringement can be justified under s.1.

i) Interpretive Principles

143. Section 1 of the *Charter* is not a rigid, inflexible formula, but varies according to the circumstances of the case and the nature of the right at stake. Infringements will be justified as reasonable limits where:

(a) the legislation's objective is "pressing and substantial" and sufficiently important to warrant overriding a constitutionally protected right or freedom;

(b) the means chosen to achieve the objective are proportional to the objective sought.

R. v. Oakes, [1986] 1 S.C.R. 103 at 138-140

R. v. Keegstra, [1990] 3 S.C.R. 697 at 734-738

144. Where the state is not acting as a "singular antagonist", but is mediating between the competing interests of different groups, the proportionality branch of the s.1 test does not require that the legislature adopt the "least intrusive" measure: the government must only have a reasonable basis for acting as it did. The question is not whether the impairment of rights is minimal but whether it is one which "reasonably balances the competing social demands which our society must address".

> [I]n matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best

struck. Vulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude.

> When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for those difficult choices. Thus, as courts review the results of legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.

Irwin Toy v. Quebec (A.G.), [1989] 1 S.C.R. 927 at 989-990

Reference Re ss. 193 and 195 of the Criminal Code, [1990] 1 S.C.R. 1123 at 1199

R. v. Chaulk, [1990] 3 S.C.R. 1303 at 1341-1343

McKinney v. University of Guelph, supra at 314

145. In particular, this Court has recognized that the judiciary is not institutionally well suited to resolve complex economic and social issues. Where social science evidence is inconclusive, the courts should not substitute its own view for the legislature's regarding the competing social science evidence. The court should refrain from engaging in line-drawing exercises which are properly the domain of the legislature.

Irwin Toy v. Quebec (A.G.), supra at 989-990

146. Indeed, the Court has reiterated this view in the employment and labour relations context of determining the delicate balance between management and labour.

> The rights for which constitutional protection are sought - the modern rights to bargain collectively and to strike, involving correlative duties or obligations resting on an employer - are not fundamental rights or freedom. They are the creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as requiring specialized expertise. It is surprising that in an area in which this Court has affirmed a principle of judicial restraint in the review of administrative action we should be considering the substitution of our judgment for that of the Legislature by constitutionalizing in general and abstract terms rights which the Legislature has found it necessary to define and qualify in various ways according to the particular field of labour relations involved. The resulting necessity of applying s. 1 of the *Charter* to a review of particular legislation to this field demonstrates in my respectful opinion to the extent to which the Court become involved in a review of legislative policy for which it is really not fitted.

Re Public Service Employee Relations Act, [1987] 1 S.C.R. 313 at 391-392

(ii) Legislative Objective

147. The objectives underlying the government's decision to repeal the *ALRA* and reinstate the *LRA's* exclusion of agricultural workers were twofold:

(1) to recognize the unique characteristics of Ontario agriculture and its resulting incompatibility with legislated collective bargaining; and

(2) to further the purpose of the *LRA* by extending legislated collective bargaining only to fields of employment where the Act's purposes can be realized.

Respondent's Factum, paras. 24-25

148. Even the Task Force on Agricultural Labour Relations and the previous provincial government which introduced the *ALRA* recognized these as important government objectives. It is submitted that these objectives satisfy the first part of the s.1 test.

Respondent's Factum, paras. 7-23

R.W.D.S.U. v. Saskatchewan, [1987] 1 S.C.R. 460 at 480 (per Dickson C.J.)

(iii) Proportionality

149. It is submitted that the exclusion found in s.3 of the *LRA* is neither arbitrary nor irrational. The policy basis for the decision was threefold: the special characteristics of the agricultural industry as discussed above, the recognition that unionization of the family farm is undesirable combined with evidence of the impossibility of drawing any fair and workable distinctions within the agricultural sector in this respect, and the obstacles to fashioning an appropriate dispute resolution mechanism.

Respondent's Factum, paras. 26-07

150. Significant consensus exists that (i) unionization is not appropriate for the vast majority of Ontario agricultural operations; and (ii) the special characteristics of agriculture make it incompatible with a traditional collective bargaining scheme. Controversy, however, exists with respect to the extent of the *ALRA's* reach and the choice and availability of an appropriate dispute resolution mechanism.

Respondent's Factum, paras. 7-21, 35-36, 56-87

151. Despite general and unsubstantiated statements that the *ALRA* was not directed at and would not affect family farms, the Act was unqualified in its application. Given all of the evidence, it was reasonable for the

Government to conclude that the Act created an unacceptable risk to family farms, and that simply limiting the application of the Act did not adequately address this concern.

Respondent's Factum, paras. 21-23

Cross-examination of Fudge, *R.R.*, Vol. I, pp. 117-118, qq. 28-29; pp. 118-119, qq. 32-33; pp. 131-132, qq.121-124

Cross-examination of Brinkman, *R.R.*, Vol. II, p. 201-202, qq. 28-31; pp. 280-281, qq. 498-499

152. Moreover, the Appellants' own evidence is that despite the previous government's preference for a limited extension of the Act to factory-style agricultural operations only, experts concluded that limiting the application of the Act to certain sectors of agriculture was both arbitrary and impracticable, and could not be justified.

Respondent's Factum, para. 10 and 19

153. The decision to extend collective bargaining rights into some areas of the economy and not into others is the product of complex social and economic policy-making. This is illustrated by the fact that Ontario's labour relations legislation wholly excludes some occupations and places others under separate modified regimes.

Respondent's Factum, paras. 27-39

154. The government is entitled to address the employment issues faced by agricultural workers through mechanisms other than collective bargaining. Ontario is one of only two provinces to extend Workers Compensation coverage to agricultural workers. Farm Safety Associations and the Work Well program are both run by the Workers Compensation Board specifically for agricultural workers. The province has also passed a regulation under the *Employment Standards Act* to specifically address the needs of fruit, vegetable and tobacco harvesters. This group of seasonal workers is generally acknowledged to be the most disenfranchised and least likely to receive non-pecuniary benefits in their employment.

Affidavit of Brinkman, *A.R.*, Vol. II, pp. 314-317, paras. 74-82

155. Nor is it clear that extending collective bargaining rights to agricultural workers is an appropriate way of addressing the circumstances of the most disadvantaged workers. The evidence upon which the Appellants rely for their s.15 argument shows that the lowest paid, lowest status workers are found on small-scale agricultural operations. It would also be impossible, given the small size of the operations, to organize this group of workers without organizing the family farm.

Affidavit of Brinkman, *A.R.*, Vol. II, pp. 318-320, paras. 86-94

156. As discussed above, the *ALRA* was the only statute in Canada to impose final offer selection in private sector labour relations. It was a risky social experiment. The evidence and analysis available suggests that the Act was incompatible with the unique characteristics of the agricultural sector and would adversely affect the viability of the industry.

Respondent's Factum, paras. 59-87, 91

Affidavit of Judy Fudge, *A.R.*, Vol. III, pp. 354-355, para. 52

157. Ultimately, trying to divine the optimal legislative response to employment issues in the agricultural sector would lead this Court into complex social and economic policy-making for which it is ill-suited.

Affidavit of Saunders, *A.R.*, Vol. II, pp. 326-327, paras.6-10

158. Finally, in embarking upon an assessment of difficult policy decisions of this kind it is important to note that the Supreme Court of Canada has concluded that:

> The fact that Legislatures in other jurisdictions have taken a different view proves only that the Legislatures there adopted a different balance to a complex set of competing values.

McKinney v. University of Guelph, supra at 314

D. REMEDY

159. If this Court should determine there has been an infringement of the *Charter* which cannot be saved under section one, the Court has four remedial options open to it. The Court may strike down the law to the extent of its inconsistency with the *Charter*, strike down and temporarily suspend the declaration of invalidity, or read down or read in.

Schachter v. Canada [1992] 2 S.C.R. 679 at 695

160. Reading in is employed in cases of underinclusiveness to extend benefits to the excluded group. However, reading in is not appropriate where remedial precision is lacking and a range of constitutionally permissible alternatives exists. Nor is reading in appropriate where it would interfere unduly with the legislative objective. As a general matter, "[i]t should not fall to the courts to fill in the details that will render legislative lacunae constitutional".

Schachter v. Canada, supra, at 705-710

161. Striking down the exclusion would result in the *LRA* being extended to cover agricultural workers. This is not an appropriate remedy. Crafting an appropriate labour relations regime for the agricultural sector is a complex

endeavour, as illustrated by the discussions leading up to the passage of the *ALRA* and the ultimate form of the legislation itself. Nor, for the same reasons, is this Court in a position to enact a new scheme.

162. For these reasons, the Respondent submits that the only appropriate remedy if this Court finds a constitutional defect is a declaration that the exclusion is invalid with a suspension for one year.

PART IV - ORDER REQUESTED

163. The Respondent submits that this Appeal should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:

October 27, 2000

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PART V

TABLE OF AUTHORITIES

Page Cited

Page Cited

Hansards