COURT FILE NO.: 04-CV-266277CM2
DATE: 20060110

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
MICHAEL J. FRASER on his own behalf and on behalf of the UNITED FOOD AND COMMERCIAL WORKERS UNION CANADA, XIN YUAN LIU, JULIA McGORMAN and BILLIE-JO CHURCH	)	*Paul Cavalluzzo*, *Fay Faraday* and *Veena Verma*, for the Applicants
	)	
Applicants	)	*John Craig* and *Jodi Gallagher*, for the Ontario Federation of Agriculture, Intervening Party
- and -	)	
	)	
ATTORNEY GENERAL OF ONTARIO	)	*Robin Basu*, *Dan Guttman*, *Shannon Chare-Hall* and *Jeanette Gevikoglu*, for the Respondent
Respondent	)	
	)	
	)	
	)	**HEARD:** September 26-28, 2005

FARLEY J.

[1] In this application the constitutionality of provincial legislation was challenged by the Applicants as they asserted that legislation denies agricultural workers the rights to unionize and engage in collective bargaining – rights that are given to other workers who come under Ontario's *Labour Relations Act, 1995*, S.O. 1995, c.1 Sched. A ("*LRA*"). The application is brought by three agricultural workers – Xin Yuan Liu, Julia McGorman and Billie-Jo Church – along with Michael Fraser and the United Food and Commercial Workers Union ("UFCW") who represent agricultural workers in Ontario seeking the right to unionize and bargain collectively.

[2] The application concerns the rights of agricultural workers to freedom of association and equality under the *Canadian Charter of Rights and Freedoms*. The Applicants seek a declaration that s. 3(*b.1*) of the *LRA* and the entirety of the *Agricultural Employees Protection Act, 2002*, S.O. 2002, c. 6 ("*AEPA*") violate s. 2(*d*) and s. 15 of the *Charter*, cannot be saved under s. 1 thereof and are as a result unconstitutional and of no force and effect.

[3] In the appeal of *Dunmore* v. *Ontario (Attorney General)* (1999), 182 D.L.R. (4th) 471 (Ont. C.A.), affirming (1997), 37 O.R. (3d) 287 (Gen. Div.), the Supreme Court of Canada in *Dunmore* v. *Ontario (Attorney General)* (2001), 207 D.L.R. (4th) 193 (S.C.C.) ruled that the exclusion of agricultural workers from Ontario's *LRA* violated the right of these workers to freedom of association under s. 2(*d*) of the *Charter*. The Supreme Court in an 8-1 decision ruled that under the *Charter* the government had a positive duty to enact legislation to provide that protection which is necessary to ensure that agricultural workers can meaningfully exercise their right to organize pursuant to s. 2(*d*) of the *Charter* which states: "Everyone has the following fundamental freedoms: ...(d) freedom of association". The Court suspended its declaration of invalidity for 18 months to allow the Ontario government to enact a law consistent with the *Charter*.

[4] The Ontario government's response to the Court's ruling in *Dunmore* was as follows:

(a) It enacted s. 3(*b.1*) of the *LRA* which again excludes agricultural workers from coverage under that statute. Section 3(*b.1*) provides that the *LRA* does not apply to "an employee within the meaning of the *AEPA*."

(b) It enacted the *AEPA* which came into effect on 17 June 2003. Under the *AEPA*, agricultural workers are segregated under a separate statutory regime that gives them fewer rights than other workers in the province. In particular, the Applicants note that the *AEPA* does not protect the rights to unionize or engage in collective bargaining.

[5] The Applicants take the position that s. 3(*b.1*) of the *LRA* and the *AEPA* violate the right of agricultural workers to freedom of association under s. 2(*d*) of the *Charter* because this legislation is underinclusive in a manner that substantially impedes the exercise of freedom of association and that orchestrates, encourages and sustains the violations of the freedom of association for agricultural workers. In particular the Applicants assert as follows:

(a) The impugned statutes substantially impede the right of agricultural workers to organize and their ability to form and maintain employee associations by

  (i) failing to protect their right to unionize;

  (ii) failing to protect democratic choice of association by employees;

  (iii) failing to provide a mechanism to verify the legitimacy of an employee association; and

  (iv) failing to provide adequate protection from employer influence over employee associations.

(b) The impugned statutes also substantially impede the ability of agricultural workers to maintain employee associations and exercise the "collective dimension" of freedom of association by failing to protect their right to engage in collective bargaining. Instead the Applicants submit they create an illusory right of representation which invites employer actions to ignore or subvert the free exercise of association by employees.

[6] The Applicants further take the position that s. 3(*b.1*) of the *LRA* and the *AEPA* violate the right to equality under s. 15 of the *Charter* by denying agricultural workers equal protection and equal benefit of the law. In particular, agricultural workers are denied the rights to unionize and engage in collective bargaining that are granted to almost all other workers in the province. They are by the impugned statutes subject to differential treatment on the basis of their occupational status as agricultural workers that is substantively discriminatory.

[7] The Applicants assert that these violations of s. 2(*d*) and s. 15 are not demonstrably justifiable in a free and democratic society under s. 1 of the *Charter*. In particular, they claim that *Charter* rights are not minimally impaired. They cite that Ontario's position with respect to agricultural workers is out of step with most of Canada as in all provinces other than Alberta and Ontario agricultural workers have the right to unionize and bargain collectively under the general provincial labour relations regimes.

[8] The application was opposed by the Attorney General of Ontario and by the intervenor The Ontario Federation of Agriculture whose members include 38,000 farmers, farm organizations and farm operators.

[9] In *Dunmore*, the Supreme Court of Canada determined that s. 3(*b*) of the then *Labour Relations Act*, R.S.O. 1980, c. 228 and the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c.1 ("*LRESLAA*") were unconstitutional as violating s. 2(*d*) of the *Charter* and such infringement could not be justified under s. 1 thereof. A breach of s. 15 was assumed.

[10] The *LRESLAA* was enacted by the Ontario government under the Progressive Conservative regime to repeal the short-lived statute *Agricultural Labour Relations Act*, S.O. 1994, c. 6, enacted the year before under the New Democratic Party regime which extended trade union and collective bargaining rights to Ontario's agricultural workers. Section 3(*b*) of the then *Labour Relations Act* excluded agricultural workers from the purview of that statute.

[11] Bastarache J. speaking for himself and six others stated at p. 1077 of *Dunmore*:

> To the extent they substantially impede the effective exercise of the freedom of association, both the *LRESLAA* and s. 3(*b*) of the *LRA* must be declared contrary to the *Charter*. Given the nature of these enactments, however, determining the appropriate remedy is not without difficulty. First, the respondents point out that the precise effect of striking down the *LRESLAA* would be to re-enact the statute it repealed, namely, the *ALRA*. As this Court is not in a position to enact such detailed legislation, nor to confer constitutional status on a particular statutory regime, I prefer to strike down the *LRESLAA* to the extent that it gives effect to the exclusion clause of the *LRA*. The precise effect of this remedy is to strike down that exclusion clause, which is the alternate remedy sought by the appellants. This remedy presents its own problems, as it obliges the legislature to extend the full panoply of collective bargaining rights in the *LRA* to agricultural workers. As such action is not necessarily mandated by the principles of this case, I would suspend the declarations of invalidity for 18 months, allowing amending legislation to be passed if the legislature sees fit to do so. (emphasis in original)

[12] The response of the legislature, then still under the Progressive Conservative regime, was to enact the *AEPA* and s. 3(*b.1*) of the *LRA* which provided again that agricultural workers were excluded from the purview of that statute. The question in this application then is rather simply: Does the *AEPA* (and its companion s. 3(*b.1*) of the *LRA*) pass muster as being an effective remedy meeting the minimum requirements of *Dunmore*? See the quote of Bastarache J. immediately above where he noted as to striking down the exclusion clause as to the *LRA*:

> This remedy presents its own problems, as it obliges the legislature to extend the full panoply of collective bargaining rights in the *LRA* to agricultural workers. As such action is not necessarily mandated by the principles of this case, ... (emphasis added)

[13] The position of the Applicants is that the freedom of association protected by s. 2(*d*) of the *Charter* in regards to agricultural workers is essentially obliterated by the prohibition against them and their employers being included in and subject to the *LRA*. They assert that the *AEPA* is so weak that there is not adequate protection for their right to associate. While I appreciate the concern that the Applicants have in this regard, I have reached the opposite conclusion. That being said, I would observe that what is involved here is whether the minimum has been achieved, not whether the *AEPA* is ideal legislation. There may be considerable differences as to quality and efficiency or for that matter the bells and whistles as to a luxury car versus a standard model. However, each vehicle is merely required to meet various minimum government standards before being sold to the public. Whether or not another statutory system would result in better efficiency, productivity, harmony and happiness for both worker and employer in the agricultural field is not the question before me. If the agricultural workers and those who wish to represent them are not satisfied with the *AEPA* and this decision, then they have two courses of action. They can appeal this decision. Alternatively, they may wish to lobby the government and take their cause public.

[14] Bastarache J. at p. 1039 of *Dunmore* cited the views of Wilson J. in *Lavigne* v. *Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211:

> In *Lavigne*, Wilson J. (writing for three of seven judges on this point) conducted an extensive review of this Court's s. 2(*d*) jurisprudence, concluding that "this Court has been unanimous in finding on more than one occasion and in a variety of contexts that the purpose which s. 2(*d*) is meant to advance is the collective action of individuals in pursuit of their common goals" (p. 253).

He went on to state at pp. 1039-40:

> As these dicta illustrate, the purpose of s. 2(*d*) commands a single inquiry: has the state precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals? In my view, while the four-part test for freedom of association sheds light on this concept, it does not capture the full range of activities protected by s. 2(*d*). In particular, there will be occasions where a given activity does not fall within the third and fourth rules set forth by Sopinka J. in *PIPSC*, *supra*, but where the state has nevertheless prohibited that activity solely because of its associational nature. These occasions will involve activities which

(1) are not protected under any other constitutional freedom, and (2) cannot, for one reason or another, be understood as the lawful activities of individuals. As discussed by Dickson C.J. in the *Alberta Reference*, *supra*, such activities may be collective in nature, in that they cannot be performed by individuals acting alone. The prohibition of such activities must surely, in some cases, be a violation of s. 2(*d*) (at p. 367):

> There will, however, be occasions when no analogy involving individuals can be found for associational activity, or when a comparison between groups and individuals fails to capture the essence of a possible violation of associational rights. ... The overarching consideration remains whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits. The legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature. [Emphasis added.]

This passage, which was not explicitly rejected by the majority in the *Alberta Reference* or in *PIPSC*, recognizes that the collective is "qualitatively" distinct from the individual: individuals associate not simply because there is strength in numbers, but because communities can embody objectives that individuals cannot. For example, a "majority view" cannot be expressed by a lone individual, but a group of individuals can form a constituency and distill their views into a single platform. Indeed, this is the essential purpose of joining a political party, participating in a class action or certifying a trade union. To limit s. 2(*d*) to activities that are performable by individuals would, in my view, render futile these fundamental initiatives. ...

[15] It would seem to me that in regard to collectivities, what is at the heart of associations contemplated by the freedom and right to associate pursuant to s. 2(*d*) of the *Charter* is the concept that individuals may band together in order to promote a cause which may not be in the direct beneficial interest of any one individual in the group. However, the platform upon which they have reached a consensus (a consensus not implying or requiring unanimunity) is advanced for the overall good of the collectivity. This may be contrasted with an individual promoting that person's own self interest. That is not to say that individuals cannot act altruistically; they can in the same way that groups may also act altruistically. However, when self interest alone is considered, it is the overall self-interest of the group which is developed through the ability to associate, as opposed to the group merely adopting and taking up the cause for possibly quite divergent views of each of the individuals comprising the group. It would seem to me that the views of McIntyre J. at p. 395 of *Reference re Public Service Employees Relations Act (Alta.)*; [1987] 1 S.C.R. 313 must be analyzed in that light.

[16] Bastarache J. at pp. 1041-2 of *Dunmore* addressed the question of "unionization" in relation to the issue of freedom of association:

> As I see it, the very notion of "association" recognizes the qualitative differences between individuals and collectivities. It recognizes that the press differs qualitatively from the journalist, the language community from the language speaker, the union from the worker. In all cases, the community assumes a life of its own and develops needs and priorities that differ from those of its individual

> members. Thus, for example, a language community cannot be nurtured if the law protects only the individual's right to speak (see *R. v. Beaulac*, [1999] 1 S.C.R. 768, at para. 20). Similar reasoning applies, albeit in a limited fashion, to the freedom to organize: because trade unions develop needs and priorities that are distinct from those of their members individually, they cannot function if the law protects exclusively what might be "the lawful activities of individuals". Rather, the law must recognize that certain union activities – making collective representations to an employer, adopting a majority political platform, federating with other unions – may be central to freedom of association even though they are inconceivable on the individual level. This is not to say that all such activities are protected by s. 2(*d*), nor that all collectivities are worthy of constitutional protection; indeed, this Court has repeatedly excluded the right to strike and collectively bargain from the protected ambit of s. 2(*d*) (see *Alberta Reference*, *supra*, *per* Le Dain J., at p. 390 (excluding the right to strike and collectively bargain), *per* McIntyre J., at pp. 409-10 (excluding the right to strike); *PIPSC*, *supra*, *per* Dickson C.J., at pp. 373-74 (excluding the right to collectively bargain), *per* La Forest J., at p. 390 (concurring with Sopinka J.), *per* L'Heureux-Dubé J., at p. 392 (excluding both the right to strike and collectively bargain), *per* Sopinka J. at p. 404 (excluding both the right to strike and collectively bargain)). It is to say, simply, that certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning.

Nothing in *Dunmore* suggests that the Supreme Court is backing off from its views that s. 2(*d*) does not encompass the right to strike and to collectively bargain. See also p. 1056 and pp. 1078-9 of *Dunmore*. See also *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia* (2004), 243 D.L.R. (4th) 175 (B.C.C.A.) at p. 204 and pp. 211-2.

[17] Bastarache J. at pp. 1043-4 of *Dunmore* observed:

> However, history has shown, and Canada's legislatures have uniformly recognized, that a posture of government restraint in the area of labour relations will expose most workers not only to a range of unfair labour practices, but potentially to legal liability under common law inhibitions on combinations and restraints of trade. Knowing this would foreclose the effective exercise of the freedom to organize, Ontario has provided a statutory freedom to organize in its *LRA* (s. 5), as well as protections against denial of access to property (s. 13), employer interference with trade union activity (s. 70), discrimination against trade unionists (s. 72), intimidation and coercion (s. 76), alteration of working conditions during the certification process (s. 86), coercion of witnesses (s. 87), and removal of Board notices (s. 88). In this context, it must be asked whether, in order to make the freedom to organize meaningful, s. 2(*d*) of the *Charter* imposes a positive obligation on the state to extend protective legislation to unprotected groups. More broadly, it may be asked whether the distinction between positive and negative state obligations ought to be nuanced in the context of labour relations, in the sense that excluding agricultural workers from a protective regime substantially contributes to the violation of protected freedoms.

[18] Section 1 of the *AEPA* states:

> 1 (1) The purpose of this Act is to protect the rights of agricultural employees while having regard to the unique characteristics of agriculture, including, but not limited to, its seasonal nature, its sensitivity to time and climate, the perishability of agricultural products and the need to protect animal and plant life.
>
> 1 (2) The following are the rights of agricultural employees referred to in subsection (1):
>
> 1. The right to form or join an employees' association.
> 2. The right to participate in the lawful activities of an employees' association.
> 3. The right to assemble.
> 4. The right to make representations to their employers, through an employees' association, respecting the terms and conditions of their employment.
> 5. The right to protection against interference, coercion and discrimination in the exercise of their rights.

The foregoing would appear consistent with the *Rights of Labour Act*, R.S.O. 1990, c. R.33. With respect to the list of concerns Bastarache J. discussed at p. 1043, it would appear to me that the *AEPA* provides adequate (adequate in the sense of meeting minimum standards) protection as to these elements falling out of the freedom to associate in the labour context as does the *LRA*:

(a) statutory power to organize: s. 5 of *LRA*; see s. 1(2).1 of *AEPA*

(b) protection against denial of access to property: s. 13 *LRA*; see s. 7 of *AEPA*

(c) protection against employer interference with trade union activity: s. 70 *LRA*; see s. 8 of *AEPA*

(d) protection against discrimination against trade unionists: s. 72 *LRA*; see s. 9 of *AEPA*

(e) protection against intimidation and coercion: s. 76 *LRA*; see s. 10 of *AEPA*

(f) protection against alteration of working conditions during certification process: s. 86 *LRA*; see ss. 9 and 10 of *AEPA*

(g) protection against coercion of witnesses: s. 87 *LRA*; see s. 10 of *AEPA*

(h) removal of Board notices: s. 88 *LRA*; see s. 10 of *AEPA*.

I would note that as concerns items (f), (g) and (h) above, it may be that it would have been preferable to have mirrored the provisions of ss. 86-88 of the *LRA* more precisely to eliminate possible fears that alterations of working conditions as a tool to prevent the joining of an employees' association, the coercion of witnesses and the removal of Tribunal (under the special panel as provided pursuant to s. 19 of *AEPA* as to the *Ministry of Agriculture, Food and Rural Affairs Act*) notices would be considered legal and tolerated under the *AEPA*. To ask whether such would be considered legal and tolerated by the Tribunal is in my respectful view is to answer the

question in the only way reasonably possible. If the Tribunal felt that it was for some jurisdictional reason constrained from negatively sanctioning such activity, then one would presume that the Applicants or others of a like mind together with the UFCW would have a strong case to bring back in this regard. One would think it better to see how the Tribunal operates in fact before condemning it as powerless to deal with such abuses. This wait and see pragmatic approach is desirable with respect to possible concerns about lack of labour relations expertise/experience on the part of the specified panel roster of the Tribunal. There has been no use of the mechanics of the *AEPA* as to bringing a case before the Tribunal; the Applicants stated that it would be fruitless to bring a useless application before a useless Tribunal. I am of the view that this condemnation is premature. A successful application would do one of several things: be effective positively as to action; or morally give the wrongdoing employer a "bloody nose"; or if truly an empty process it would demonstrate the need for strengthening by legislative amendment. See also *Danson* v. *Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 at p. 1099 where Sopinka J. for the Court stated: "This Court has been vigilant to ensure that a proper factual foundation exists before measuring legislation against the provisions of the *Charter*, particularly where the effects of impugned legislation are the subject of the attack."

[19] There is nothing in the *AEPA* which would prevent the UFCW or any other union from attempting to organize agricultural workers into an employees' association, recognizing that such an employees' association would not thereby automatically have the right to strike nor the right to bargain collectively. See discussion in Peter W. Hogg, *Constitutional Law of Canada*, loose-leaf ed., Vol. 2 (Toronto: Carswell 1997) at p. 41-5/6 (2002). The *AEPA* provides that the employees' association may make representations to an employer concerning the terms and conditions of employment (s. 5 *AEPA*). These representations may be made by someone who is not a member of the association (s. 5(2)) so that a "union staffer" could perform that function. The representation may be made orally or in writing (s. 5(5)). One must read s. 5(6) and (7) in a purposive way in context. Thus while the employer need only give the association a written acknowledgment that the employer has read the written representations (s. 5(7)), it is implicit in the making of an oral representation that the recipient is hearing the oral representations as the employer has a duty to listen and the association speaker will have the opportunity then and there to enquire whether the recipient has heard the representations. As well the concept of listening and reading respectively involves the aspect of comprehending and considering the representations. Perhaps unfortunately there is no specific requirement that the employer respond to the substance of the representations; however, it should be noted that this would then involve the parties in a form of collective bargaining.

[20] *Delisle* v. *Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989 demonstrates that it is not an infringement of s. 2(*d*) to have a statutory regime which excludes a group from the standard labour legislation but which allows that group the right to participate in an employee association.

[21] Bastarache J. stated at p. 1052 of *Dunmore* in summarizing the discussion on s. 2(*d*):

> ... Insofar as the appellants seek to establish and maintain an association of employees, there can be no question that their claim falls within the protected ambit of s. 2(*d*) of the *Charter*. Moreover, the effective exercise of these freedoms may require not only the exercise in association of the constitutional rights and freedoms (such as freedom of assembly) and lawful rights of individuals, but the exercise of

> certain collective activities, such as making majority representations to one's employer. These activities are guaranteed by the purpose of s. 2(*d*), which is to promote the realization of individual potential through relations with others, and by international labour jurisprudence, which recognizes the inevitably collective nature of the freedom to organize.

It would seem to me that *AEPA* meets the minimum standards that Bastarache J. was talking about. It also appears to me to deal with his observations at pp. 1056-7 as to the freedom to organize and that the *AEPA* "instantiates" (*sic*: represents by an instance vs. gives effect to) it.

[22] Bastarache J. at pp. 1057-8 of *Dunmore* observed:

> ..., the notion that minimum legislative protection cannot be extended to agricultural workers without extending full collective bargaining rights is misguided.

See also his observation at p. 1077 above as to such "not [being] necessarily mandated". Thus it appears clear that the Supreme Court in *Dunmore* was not expecting that any replacement legislation would have to incorporate a complete panoply of collective bargaining rights.

[23] However the Supreme Court was concerned about the weak position that agricultural workers find themselves in. In my view, the material before me does not represent any material change from that in 1997 before Sharpe J. at the trial level of *Dunmore* when he noted at p. 216 that agricultural workers are "poorly paid, face difficult working conditions, have low levels of skills and education, low status and limited employment mobility." Bastarache J. reached the conclusion that their freedom to organize had been substantially impeded by exclusion from protective legislation. However, now the agricultural workers have the benefit of the *AEPA* which allows them the basic protections under which to organize. Whether they do so or not will have to be seen. However, it would seem to me quite likely that to the extent that UFCW and other labour unions see that they have a role to play in such organizing, it would be, at least initially, with involvement in those businesses most akin to the traditional factory situation, such as the mushroom "farms/factories", especially when one considers the number of employees involved. As a side note, one may well contrast the traditional "family farm" with those enterprises which are essentially set up as "factories" of the traditional industrial type and question whether there might be fertile ground for lobbying for an amendment to the definition of what constitutes "agricultural" given Bastarache J.'s views on evolution at pp. 1074-7 referred to below. Bastarache J. observed at pp. 1062-3 of *Dunmore*:

> ... The most poignant chapter in this legislative history, but by no means the decisive one, is the *LRESLAA*. Through this enactment, the Ontario government not only renewed its commitment to preventing agricultural unions from collective bargaining, but prohibited even the <u>voluntary recognition</u> of agricultural associations, whatever their attributes might be. At the same time, it must be presumed that the legislature understood the history of labour relations and remained of the view that a protective regime was essential to the exercise of freedom of association in this area.

> The most palpable effect of the *LRESLAA* and the *LRA* is, in my view, to place a chilling effect on non-statutory union activity. By extending statutory protection to just about every class of worker in Ontario, the legislature has essentially discredited the organizing efforts of agricultural workers. ... By contrast, it is hard to imagine a more discouraging legislative provision than s. 3(*b*) of the *LRA*. The evidence is that the ability of agricultural workers to associate is only as great as their access to legal protection, and such protection exists neither in statutory nor constitutional form. Moreover, agricultural workers already possess a limited sense of entitlement as a result of their exclusion from other protective legislation related to employment standards and occupational health and safety (see *Employment Standards Act Regulations*, R.R.O. 1990, Reg. 325, s. 3(1)(*i*), excluding most agricultural workers from Parts IV-VIII of the *Employment Standards Act*, R.S.O. 1990, c. E.14; *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, s. 3(2)). In this context, the effect of s. 3(*b*) of the *LRA* is not simply to perpetuate an existing inability to organize, but to exert the precise chilling effect I declined to recognize in *Delisle*.
>
> Conversely, the didactic effects of labour relations legislation on employers must not be underestimated. It is widely accepted that labour relations laws function not only to provide a forum for airing specific grievances, but for fostering dialogue in an otherwise adversarial workplace. As P. Weiler has written, unionization introduces a form of political democracy into the workplace, subjecting employer and employee alike to the "rule of law" (see *Reconcilable Differences: New Directions in Canadian Labour Law* (1980), at pp. 31-32). In this context, the wholesale exclusion of agricultural workers from a labour relations regime can only be viewed as a stimulus to interfere with organizing activity. The exclusion suggests that workplace democracy has no place in the agricultural sector and, moreover, that agricultural workers' efforts to associate are illegitimate. As surely as *LRA* protection would foster the "rule of law" in a unionized workplace, exclusion from that protection privileges the will of management over that of the worker. Again, a contrast to *Delisle*, *supra*, is apposite: a government employer is less likely than a private employer to take exclusion from protective legislation as a green light to commit unfair labour practices, as its employees have direct recourse to the *Charter*.

[24] Bastarache J. then went on at pp. 1066-7 to discuss the justification for a different treatment of agricultural workers based on the requirements of the "family farm". He stated:

> ... For their part, the appellants [those representing the agricultural workers] maintain that the family farm no longer typifies Ontario agriculture and that the vulnerability of the agricultural production process, assuming it exists, does not militate against legislated collective bargaining. This discussion is however somewhat irrelevant in that the breach of the right of association does not extend to collective bargaining. What the government of Ontario must justify with regard to this appeal is its substantial interference with the right to form agricultural associations.

> Judging from the parties' evidence, I am satisfied both that many farms in Ontario are family-owned and –operated, and that the protection of the family farm is a pressing enough objective to warrant the infringement of s. 2(*d*) of the *Charter*. The fact that Ontario is moving increasingly towards corporate farming and agribusiness does not, in my view, diminish the importance of protecting the unique characteristics of the family farm; on the contrary, it may even augment it. Perhaps more importantly, the appellants do not deny that the protection of the family farm is, at least in theory, an admirable objective.

Again I do not see that the situation has materially changed since 1997. However, that situation envisaged an evolution: see Bastarache J. at pp. 1074-5:

> Turning to the Ontario legislation, my view is that the s. 1 justification suffers, first, from the lack of a recognition of the evolving nature of Ontario agriculture. To the extent the term "family farm" refers to a unique management style characterized by significant family involvement, it may indeed continue to describe the vast majority of farms in Ontario and across Canada. However, to the extent that it treats farm workers as members of that family rather than typical employees, it ignores an increasing trend in Canada towards corporate farming and complex agribusiness. On this point, the Attorney General's expert himself concedes that "[t]he modern viable family farm no longer consists of 20 acres and a few cows, but typically represents a sophisticated business unit with a minimum capital value of $500,000 to $1,000,000, depending on the commodity and type of operation". If this is the case, it is not only over-inclusive to perpetuate a pastoral image of the "family farm", but it may be that certain if not all "family farms" would not be affected negatively by the creation of agricultural associations.

He went on to observe at pp. 1076-7:

> More importantly, the Attorney General offers no justification for excluding agricultural workers from all aspects of unionization, specially those protections that are necessary for the effective formation and maintenance of employee associations. It might be inferred that in order to protect the family farm and ensure the productivity of the farm economy, the legislature felt it necessary to discourage any form of union and to suffer that agricultural workers be exposed to a raft of unfair labour practices. Yet no policy could, in my view, be more repugnant to the principle of least intrusive means. If what is truly sought by s. 3(*b*) of the *LRA* is the protection of the family farm, the legislature should at the very least protect agricultural workers from the legal and economic consequences of forming an association. There is nothing in the record to suggest that such protection would pose a threat to the family farm structure, and if demonstrated that it would in some cases, the legislature could create the appropriate exceptions. I am of the view that the wholesale exclusion of agricultural workers from the *LRA* is not a reasonable limit on freedom of association and that it is not necessary to balance the effects of this exclusion against its stated purpose.

[25] Bastarache J. then stated at p. 1078:

> This raises the question of whether s. 2(*d*) requires that a minimum level of *LRA* protection be extended to agricultural workers. As implied by *Rodriguez*, *supra*, the *Charter* only obliges the legislature to provide a statutory framework that is consistent with the principles established in this case, including both the s. 2(*d*) and s. 1 analysis. In my view, these principles require at a minimum a regime that provides agricultural workers with the protection necessary for them to exercise their constitutional freedom to form and maintain associations. The record shows that the ability to establish, join and maintain an agricultural employee association is substantially impeded in the absence of such statutory protection and that this impediment is substantially attributable to the exclusion itself, rather than to private action exclusively. Moreover, the freedom to establish, join and maintain an agricultural employee association lies at the core of s. 2(*d*) of the *Charter*; the appellants' claim is ultimately grounded in this non-statutory freedom. For these reasons, I conclude that at minimum the statutory freedom to organize in s. 5 of the *LRA* ought to be extended to agricultural workers, along with protections judged essential to its meaningful exercise, such as freedom to assemble, to participate in the lawful activities of the association and to make representations, and the right to be free from interference, coercion and discrimination in the exercise of these freedoms.
>
> In choosing the above remedy, I neither require nor forbid the inclusion of agricultural workers in a full collective bargaining regime, whether it be the *LRA* or a special regime applicable only to agricultural workers such as the *ALRA*. For example, the question of whether agricultural workers have the right to strike is one better left to the legislature, especially given that this right was withheld in the *ALRA* (s. 10).

See discussion in Hogg, *supra*, at pp. 35-38/9 (2002) following a review of *Dunmore*. It seems to me that *AEPA* meets these minimum standards set out by Bastarache J. and that going beyond that should be left to the authority of the legislature. The courts ought not to usurp the political function; in this regard Bastarache J. was quite clear that he was not requiring as a function of the freedom of association that there be a full collective bargaining regime, nor the right to strike, nor that there be the possibility of what might be called "full unionization" as he repeatedly referred to "employee associations".

[26] In closing, Bastarache J. observed at p. 1079:

> Should a claim for inclusion arise in the future, the threshold question will be whether the provision relates to an activity falling within the framework established by the labour trilogy or that otherwise furthers the purpose of s. 2(*d*) of the *Charter*. If this threshold is crossed, the question becomes whether excluding agricultural workers from the provision in question substantially impedes this activity either in purpose or effect. If the effect of the exclusion is impugned, the claimant's position should be assessed in light of the considerations discussed above.

This "future claim" is the one that is before this court. It would appear to me that *AEPA* advances to at least the minimum degree required the ability of the agricultural workers to associate in a labour organized way for their collective good if they choose to and that *AEPA* does not impede that activity in purpose or effect. It may well be that there may be a "further future claim" if it is asserted that in practice the workings of the *AEPA* do not in fact protect the freedom to associate by the agricultural workers.

[27] The Applicants assert that *AEPA* violates s. 2(*d*) and continues to provide "underinclusive" protection for freedom of association by

(a) failing to protect agricultural workers' democratic choice of representative;

(b) enabling employers to subvert agricultural workers' majority democratic choice by recognizing multiple employee associations without regard for majority support; and

(c) failing to protect against employer influence over the right to organize.

With respect to (a), while it is true that there is no facility to require those who do not wish to join an employee association to either do so or financially support that association in the same way that a union which is certified under the *LRA* is able to so require, the *AEPA* does not preclude like minded workers from banding together. The *LRA* model is not the only model which achieves a democratic solution. With respect to (b), I think it a narrow misreading of s. 5 as to the employer giving "an" employees' association the right to make representations. It would appear clear from a purposive interpretation in the context of that legislation, that if there were multiple associations, then each could make representations as to their own members. One as well could equally argue that the majority rule giving a union the extensive right to represent workers could be considered to have certain anti-democratic elements as there could be concern that those who did not support that union being certified may not be as well represented by that union as those who did support that union being certified. In saying that I do not wish to nor intend to imply that that would be the result. The majority rule principle has been a concept of long standing in the political life of Canada. However notwithstanding great effort by the Canadian boundaries commissions to avoid gerrymandering so prevalent in the USA, there has been significant debate about the wisdom of adopting a proportional representation model. With respect to (c), I would observe that s. 8 of *AEPA* is quite clear-cut in providing protection against employer influence:

> s. 8 No employer, employers' organization or person acting on behalf of an employer or an employers' organization shall interfere with the formation, selection or administration of an employees' association, the representation of employees by an employees' association or the lawful activities of an employees' association, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

Similarly there is protection as to individual workers in s. 9 of *AEPA*:

> 9. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,
>
> (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of an employees' association or was or is exercising any other right under this Act;
>
> (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of an employees' association or exercising any other right under this Act; or
>
> (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of an employees' association or to cease to exercise any other right under this Act.

As well there is s. 10 as to intimidation:

> 10. No person, employees' association, employers' organization or other entity shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of an employees' association or of an employers' organization or to refrain from exercising any right under this Act or from performing any obligations under this Act.

It would not appear to me that the additional provisions of s. 70, s. 87, s. 119(1) and s. 15 of the *LRA* are necessary to assist in policing the foregoing requirements of the *AEPA*.

[28] Finally it would seem to me to be a premature and unfair complaint that the Tribunal charged under the *AEPA* with dealing with complaints – namely the Agriculture, Food and Rural Affairs Appeal Tribunal – is bereft of expertise in labour relations given its bipartite composition of labour and agricultural experienced personnel. That Tribunal should be given a fair opportunity to demonstrate its ability to appropriately handle the function given to it by the *AEPA*.

[29] The Applicants argued strenuously that the freedom of association incorporated the aspect of collective bargaining. They pointed out at para. 209 of their factum:

> 209. The amendment that was proposed in the legislative hearings to which the Court refers was that s. 2(d) be amended to add the words "including the freedom to organize and bargain collectively." The intention was to protect both those aspects of collection action but not the right to strike. The amendment as a whole was opposed on the following grounds:

> "Our position on the suggestion that there be specific reference to freedom to organize and bargain collectively is that that is already covered in the freedom of association that is provided already ... in the *Charter*.
>
> ...
>
> "...this new language adds nothing which is not already provided in the right of association".
>
> *Minutes of Proceedings of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada*, Issue No. 43, 22 January 1981, at 69-70 [emphasis added]
> cf. *Alberta Labour Reference*, *supra* at 231-232, per McIntyre J.

However that excerpt (including the view of McIntyre J. at pp. 412-3 of *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313) does not meet the requirements of *Reference Re British Columbia Motor Vehicle Act*, [1985] 2 S.C.R. 486 nor *R.* v. *Heywood*, [1994] 3 S.C.R. 761. See also *Pepper* v. *Hart*, [1993] A.C. 593 (HL). But perhaps the strongest point to be made in observing that those comments by the then Attorney General for Canada before the Committee should not be taken as supporting that proposition in our analysis in this case is that the Supreme Court of Canada has repeatedly stated in various cases as indicated above (see *Dunmore* at p. 1042) that collective bargaining has been excluded from the protective ambit of s. 2(*d*). I note in passing that the Applicants are not seeking the right to strike.

[30] The Applicants assert that the exclusion of agricultural workers from the *LRA* and their treatment under the *AEPA* violate their right to equality under s. 15 of the *Charter*. Section 15(1) provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[31] The elements of the s. 15 test are set out in *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at p. 548; this 3 step framework is not to be applied on a strict mechanical basis. Bastarache J. did not find it necessary to deal with s. 15 given his conclusions as to s. 2(*d*). It should be emphasized that in his reasons Bastarache J. assumed a breach of s. 15, but even with that assumption being taken as true and proven, that would not have changed the remedy given in *Dunmore*. However Sharpe J. carefully considered the implications of s. 15 in his *Dunmore* decision. The Ontario Court of Appeal endorsed the Appeal Record as follows in its totality:

> We agree with the judgment of Sharpe J., both with the result at which he arrived and his reasons. We did not call on counsel for the respondents because the submissions of counsel for the appellants, able as they were, did not create any doubts in our minds about the correctness of the judgment in appeal. The appeal is dismissed. This is not a case for costs.

I did not find that the Application Record before me was materially different in any substantial way than that which Sharpe J. summarized in his reasons.

[32] Sharpe J. observed at pp. 302-3:

> ...The current state of the law and the debate between various members of the court was summarized by La Forest J. in *Eldridge v. British Columbia (Attorney General)*, October 9, 1997 [now reported 46 C.R.R. (2d) 189 at p. 218, 151 D.L.R. (4th) 577]:
>
> > While this court has not adopted a uniform approach to s. 15(1), there is broad agreement on the general analytic framework: see *Eaton v. Brant County Board of Education* (1997), 41 C.R.R. (2d) 240 at p. 258, [1997] 1 S.C.R. 241 at p. 270; *Miron*, *supra*; and *Egan*, *supra*. A person claiming a violation of s. 15(1) must first establish that, because of a distinction drawn between the claimant and others, the claimant has been denied "equal protection" or "equal benefit" of the law. Secondly, the claimant must show that the denial constitutes discrimination on the basis of one of the enumerated grounds listed in s. 15(1) or one analogous thereto. Before concluding that a distinction is discriminatory, some members of this court have held that it must be shown to be based on an irrelevant personal characteristic: see *Miron*, *supra*, *per* Gonthier J., and *Egan*, *supra*, *per* La Forest J. Under this view, s. 15(1) will not be infringed unless the distinguished personal characteristic is irrelevant to the functional values underlying the law, provided that those values are not themselves discriminatory. Others have suggested that relevance is only one factor to be considered in determining whether a distinction based on an enumerated or analogous ground is discriminatory: see *Miron*, *supra*, *per* McLachlin J., and *Thibaudeau v. Canada* (1995), 29 C.R.R. (2d) 1, [1995] 2 S.C.R. 627, *per* Cory and Iacobucci JJ.
>
> Accordingly, if the applicants are unable to demonstrate that they have been denied equal protection or equal benefit of the law on the basis of discrimination on an analogous ground, it becomes unnecessary to consider how the case falls to be decided under these competing approaches to equality.

He went on to observe at p. 308:

> This review of the cases dealing with the analogous grounds element in the s. 15(1) analysis indicates that while there is no precise test to determine what constitutes an analogous ground, there are certain principles which are to guide courts in this area. The first principle underlying the analogous grounds requirement is that s. 15 does not permit courts to review all legislative distinctions, nor does it confer on courts a mandate to remedy all forms of perceived injustice in our society. While the

> Supreme Court has insisted upon a contextual approach which has reference to the social and economic realities, it is equally clear from these pronouncements that the court does not see s. 15(1) as a guarantee against all forms of social and economic disadvantage, whatever their cause. The second and related principle is that the focus of s. 15(1) is upon discrimination that denies human dignity by granting or withholding benefits based upon certain personal traits or characteristics, either listed in s. 15(1) or identified by their similarity to those listed. Traits and characteristics that fall into this category may be identified in a number of ways, but broadly tend to be matters that history and experience show to have been the subject of stereotypical application of presumed group characteristics that deny individual human dignity.

[33] It would appear to me that the "category" of agricultural worker is an industry or sector classification but not a personal attribute occupational status. Clearly there are a wide variety of jobs in the agricultural sector. Sharpe J. then went on to observe at pp. 308-9:

> The applicants have led evidence to the effect that agricultural workers have historically occupied a disadvantaged place in Canadian society and that they continue to do so today. For the purposes of the s. 15 analysis, I have no hesitation in finding on the evidence that agricultural workers are a disadvantaged group. They are poorly paid, face difficult working conditions, have low levels of skill and education, low status and limited employment mobility. However, with reference to identifying personal characteristics, the evidence before me indicates that agricultural workers are a disparate and heterogeneous group. There is nothing in the evidence to indicate that they are identified as a group by any personal trait or characteristic other than that they work in the agricultural sector. The evidence indicates that 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 other 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 the 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.
>
> ...
>
> In light of this factual record, in the end, the applicants' case must turn on whether the economic disadvantage of a group of workers, identified as a group only by the fact that they work in a particular sector of the economy, constitutes an analogous ground within the meaning of s. 15(1). I hardly need state that the wisdom, or lack thereof, from the perspective of labour relations policy, of the decision to exclude agricultural workers from collective bargaining has no bearing on this question.

> In my view, the disadvantaged position occupied by agricultural workers is not sufficient to constitute the legislative classification "agricultural workers" as an analogous ground for the purposes of s. 15. Economic disadvantage is often the product of discrimination on an analogous ground, and hence serves as a marker that may indicate the presence of such discrimination. There are, however, many causes of economic disadvantage that do not attract the scrutiny of s. 15, and a showing of economic disadvantage does not, by itself, establish discrimination on an analogous ground within the meaning of s. 15. In my view, the absence of evidence of any traits or characteristics analogous to those enumerated in s. 15 which serve to identify those who make up the group of agricultural workers is fatal to their s. 15 claim.

Finally, at pp. 311-2 he stated:

> There are many forms of injustice in our society, particularly those resulting from uneven distribution of wealth, that cannot be remedied by the courts through interpretation of the *Charter* and that must be remedied through the legislative process. The flaw in the applicants' argument is that it focuses upon disadvantage alone whereas a s. 15(1) analysis requires evidence that the disadvantage point to a particular cause, namely discrimination on "stereotypical attribution of group characteristics".
>
> ...
>
> As I have already noted, there is no evidence before me to indicate that agricultural workers as a group can be identified by any combination of the grounds enumerated in s. 15(1), or by any *personal characteristic* analogous thereto.

[34] I am in agreement with the approach and views of Sharpe J. with respect to his s. 15 analysis. His approach would seem to be in accord with the views expressed since then in *Gosselin* v. *Quebec (Attorney General)*, [2002] 4 S.C.R. 429 and *Hodge* v. *Canada (Minister of Human Resource Development)*, [2004] 3 S.C.R. 357. See also *R.* v. *Hy and Zel's Inc.*, 2005 CanLII 32194 (Ont. C.A.) at paras. 34-41.

[35] Since I have concluded that the Applicants have not demonstrated that there has been a breach of either s. 2(*d*) or s. 15 of the *Charter*, I do not find it necessary to deal with the issue of s. 1 thereof or the question of an appropriate remedy. The application is dismissed for the foregoing reasons. I had at the end of the hearing views of the parties as to costs; the Applicants are to pay the AG forthwith and in any event by February 17, 2006 $5,000 in costs. Order accordingly.

[36] In conclusion, I wish to thank all counsel involved who cooperated extensively in the preparation of compendiums of documents and authorities which then allowed them to focus on their points with great clarity in advancing the interests of their clients in the finest tradition of the bar.

J.M. FARLEY

Released:

January 10, 2006

COURT FILE NO.: 04-CV-266277CM2
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ONTARIO

SUPERIOR COURT OF JUSTICE

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Applicants

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REASONS FOR JUDGMENT

FARLEY J.

Released: January 10, 2006