Court File No. 32968

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

B E T W E E N:

ATTORNEY GENERAL OF ONTARIO

Appellant
(Respondent in the Court of Appeal)

- and -

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

Respondents
(Appellants in the Court of Appeal)

- and -

ONTARIO FEDERATION OF AGRICULTURE

Intervener
(Intervening Party in the Court of Appeal)

- and -

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GUIDE TO ABBREVIATIONS

Document references

Aff – Affidavit

AR – Appellant's Record

Cr-ex – Transcript of Cross-examination

Exh – Exhibit

Line - L.

QQ. - Questions

U-Ans – Undertaking Answer

Affidavits (Specific)

Affidavit of Tanya Basok (26 March 2004) - Basok Aff

Affidavit of George L. Brinkman (27 October 2004) - Brinkman Aff

Affidavit of Billie-Jo Church (28 March 2004) - Church Aff

Affidavit of Richard Chaykowski (26 October 2004) - Chaykowski Aff

Affidavit of Hector Delanghe (16 December 2004) - Delanghe Aff

Affidavit of Michael Fraser, sworn March 29, 2004 - Fraser Aff

Affidavit of Judy Fudge (5 August 2004) - Fudge Aff No. 1

Reply Affidavit of Judy Fudge (7 December 2004) - Fudge Aff No. 2

Reply Affidavit of Judy Fudge (29 March 2005) - Fudge Aff No. 3

Affidavit of Clarence Haverson (26 October 2004) - Haverson Aff

Affidavit of Darius Itorong (28 March 2004) - Itorong Aff

Affidavit of Xin Yuan Liu (28 March 2004) - Liu Aff

Affidavit of Julia McGorman (28 March 2004) - McGorman Aff

Affidavit of Stanley Dean Raper (28 March 2004) - Raper Aff No. 1

Affidavit of Stanley Dean Raper (6 December 2004) - Raper Aff No. 2

Reply Affidavit of Stanley Dean Raper (4 April 2005) - Raper Aff No. 3

Affidavit of Victor Satzewich (18 March 2004) - Satzewich Aff

James White, A Profile of Ontario Farms and Farm Labour - White Report

Witnesses

Basok – Prof. Tanya Basok (Respondents' witness on seasonal migrant agricultural workers)

Brinkman – Dr. George Brinkman (Appellant's witness, farm economics)

Chaykowski – Dr. Richard Chaykowski (Appellant's witness on labour relations policy)

Church – Billie-Jo Church (Applicant, former mushroom quality control employee)

Delanghe – Hector Delanghe (Intervener's witness, farmer)

Fraser – Michael Fraser (Applicant, Canadian Director of UFCW Canada)

Fudge – Prof. Judy Fudge (Respondents' witness on history of labour relations and international labour standards)

Haverson – Clarence Haverson (Appellant's witness, Ministry of Agriculture, Food and Rural Affairs)

Itorong – Darius Itorong (Respondents' witness, former mushroom harvester)

Liu – Xin Yuan Liu (Applicant, mushroom harvester)

Mawhiney – Gary Mawhiney (Appellant's witness, Ministry of Agriculture, Food and Rural Affairs)

McGorman – Julia McGorman (Applicant, mushroom quality control employee)

Raper – Stanley Raper (Respondents' witness, UFCW organizer of agricultural workers and Coordinator of Migrant Agricultural Worker Support Centres)

Satzewich – Victor Satzewich (Respondents' witness, history of use of unfree immigrant and migrant labour in agriculture, history of Seasonal Agricultural Workers Program)

White – James White (Respondents' witness, profile of farms and farm labour)

PART I: OVERVIEW AND STATEMENT OF FACTS

A. Overview of the Respondents' Position

1. Agricultural workers in Ontario have been trying for decades to unionize and bargain collectively with their employers. Throughout Ontario's history, except for a 17-month period in 1994-1995, agricultural workers have been expressly denied statutory protection for the rights to unionize and to bargain collectively. They have never been able to successfully engage employers in collective bargaining without statutory support. Ontario legislation continues to deny agricultural workers protection to bargain collectively. For decades, the Ontario Labour Relations Board has ruled that there is "no industrial relations basis" for denying agricultural workers protection for this fundamental right.

2. This appeal addresses whether denying agricultural workers statutory protection for the right to bargain collectively violates their fundamental freedom of association and their right to equality under s. 2(d) and s. 15 of the *Canadian Charter of Rights and Freedoms*.

3. The Respondents in this case are three agricultural workers – Xin Yuan Liu, Julia McGorman and Billie-Jo Church – and Michael Fraser and the United Food and Commercial Workers Union Canada ("UFCW Canada") who represent agricultural workers in Ontario seeking the rights to unionize and bargain collectively. The Respondents submit that s. 3(b.1) of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A 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*, that the violations cannot be justified under s. 1, and that the impugned provisions are unconstitutional and of no force and effect.

4. The Respondents submit that the Ontario Court of Appeal correctly ruled that the *AEPA* is unconstitutional because it substantially impairs farm workers' freedom of association by providing no statutory protection for collective bargaining. The Court of Appeal correctly declared the *AEPA* invalid and correctly ruled that the government has an obligation under s.2(d) to provide statutory protection to ensure that farm workers can exercise the right to bargain collectively in a meaningful and effective way.

5. Many of the principles that are being challenged by the Appellant Attorney General of Ontario ("Ontario") and Intervener Ontario Federation of Agriculture ("OFA") in this appeal have already been clearly decided by this Honourable Court.

6. In the 2001 appeal of *Dunmore v. Ontario (Attorney General)*, this Court ruled that

(a) the right to unionize is an exercise of the fundamental freedom of association that is protected under s. 2(d) of the *Charter*;

(b) legislation that affects the relationship between private sector farm employers and farm employees is subject to scrutiny under the *Charter*; and

(c) in view of agricultural workers' marginalized position and their inability to exercise freedom of association without statutory support, the government has a positive duty to enact legislation which ensures that farm workers can exercise freedom of association in an effective and meaningful way. This Court identified a non-exclusive list of minimum protections that would be needed to make the right to unionize effective but did not address the issue of collective bargaining.

Dunmore v. Attorney General (Ontario), [2001] 3 S.C.R. 1016

7. In the 2007 appeal of *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia* ("*B.C. Health Services*"), this Court went further and ruled that the right to bargain collectively is also protected as an exercise of freedom of association under s.2(d) of the *Charter*. Indeed, it stressed collective bargaining is "the most significant collective activity through which freedom of association is expressed in the labour context."

Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia, [2007] 2 S.C.R. 391 [hereinafter "*B.C. Health Services*"], esp. at para. 66

8. In both *Dunmore* and *B.C. Health Services* this Court held that Canadian labour relations history provides the critical context for understanding what kinds of statutory protections are necessary, in Canada, to enable workers to exercise their freedom of

association in an effective and meaningful way.

9. This appeal brings together the two streams of analysis from *Dunmore* and *B.C. Health Services.* The Respondents submit as follows. First, the impugned laws are unconstitutionally underinclusive in failing to protect the right to bargain collectively. On the evidence in this case, it is clear that farm workers require statutory support to exercise the right to bargain collectively. The *AEPA* continues to prevent the exercise of this right and in fact orchestrates, encourages and sustains violations of the right. Ontario has an obligation to enact legislation to protect an effective and meaningful right to bargain collectively for farm workers.

10. Second, by denying agricultural workers protection for the right to bargain collectively when that right is protected for virtually all other employees in the province, the impugned laws discriminate contrary to s. 15 by providing differential treatment on the analogous ground of the claimants' status as agricultural workers. This differential treatment imposes prejudicial burdens on agricultural workers that are not imposed on others and it perpetuates and reinforces farm workers' pre-existing disadvantage.

11. Third, the government has not demonstrated that the violations of s. 2(d) and s. 15 are demonstrably justified under s. 1. The government has failed to show that the impugned laws minimally impair *Charter* rights and that the depth of the infringements is rationally connected to the objectives, particularly of protecting the family farm. The impugned legislation was never intended to protect collective bargaining rights for farm workers. Even though farm workers in 8 provinces and in the federal jurisdiction have the right to bargain collectively, extending these rights in Ontario was never considered as an option. Even the after-the-fact evidence presented in this case is only directed at justifying the total exclusion from collective bargaining and not addressing whether the rights could have been minimally impaired. In all the circumstances, the appeal should be allowed, and s. 3(b.1) of the *LRA* and the *AEPA* in its entirety be declared unconstitutional.

B. Statement of Facts

12. In *Dunmore* and *B.C. Health Services*, this Court emphasized that efforts to exercise freedom of association and allegations that a statute impairs that fundamental freedom must be examined contextually to assess whether the statute safeguards a meaningful exercise of freedom of association. To that end, this section outlines the legal, historical and socio-economic context in which the Respondents have sought to bargain collectively.

> *Dunmore v. Ontario, supra* at para. 20-22, 35-48
> *B.C. Health Services, supra* at para. 30, 33

13. In summary, agricultural production in Ontario is increasingly dominated by large-scale industrial farm operations that are similar to non-agricultural production sectors. Farm work is increasingly performed by hired labour rather than farm owners and their families. Agricultural work is done by vulnerable workers, including a large proportion of immigrant and migrant workers, who are recruited specifically because of their vulnerability in the workforce. Their vulnerability is and has historically been reinforced by their exclusion from basic labour and employment protections with the result that agricultural workers have a very limited sense of legal entitlement. Despite repeated efforts over many decades, Ontario agricultural workers have been entirely unable to bargain collectively in the absence of protective legislation. The only group of Ontario farm workers that has ever successfully unionized and engaged an employer in collective bargaining did so under bargaining legislation that was in place for 17 months in 1994-1995. That bargaining unit was decertified by statute in 1995. The Respondents have been entirely unable to bargain collectively under the *AEPA* which imposes no duty to bargain in good faith.

1. Agricultural Production in Ontario: The Rise of Agribusiness

14. Agriculture is the second largest industry in Ontario yielding cash receipts of $7.872 billion in 2001. Approximately 76,600 people in Ontario are engaged in agriculture of whom 32,100 are employees (non-family hired agricultural labour). This figure does <u>not</u> include all seasonal workers, foreign workers, and workers supplied by labour contractors.

Brinkman Aff, AR, Vol.II, Tab 24 at 31
White Report, AR, Vol. XXXI, Tab 70 at 138, 140, also 136-137

15. While the pastoral image of the small family farm remains evocative, agricultural production in Ontario is increasingly done by large-scale industrial farming operations or agribusiness and that trend has only progressed in the decade since *Dunmore* began.

Dunmore v. Ontario, supra at para. 62-63
White Report, AR, Vol. XXXI, Tab 70 at 141-144, 150, 152-155, 176
Wellington Mushroom Farm [1980] OLRB Rep. May 813 at para. 20-25
Superior Court of Justice Decision, AR, Vol. I, Tab 2, 11-13 at para. 23-24

16. Agriculture in Ontario is increasingly conducted by fewer, larger farms which use more hired employees who perform more weeks of paid labour per year. While there are fewer farms, they are larger, farm more land and produce more goods than before. In Ontario 24,013 farms report paid labour; 15,427 pay non-family labour. Nearly 60% of all farm wages are paid by just 1.9% of farms (the 1144 largest farms). Roughly 30% of the total weeks of paid farm labour is concentrated on only 241 large Ontario farms.

White Report, AR, Vol. XXXI, Tab 70 at 142-143, 148-150, 152-155, 160, 168
Chaykowski Aff, AR, Vol. IV, Tab 28 at 13
Statistics Canada, Farmers Leaving the Field, AR, Vol. III, Tab 31(Ex.3)
at 164-166
Delanghe Aff, AR, Vol. XXXVIII, Tab 86 at 165-168
F.A.R.M.S., Quest for a Reliable Workforce, AR, Vol. XX, Tab 64 at 64
Haverson Aff, AR, Vol. V, Tab 33 at 133

17. The highest concentration of farm workers is in large-scale industrial mushroom production, greenhouses and hatcheries – the three segments of agriculture where Ontario workers have previously tried to unionize. The Ontario Labour Relations Board has found that the organizational structure and operations of these farming businesses are "factory-like" and "[do] not differ in any material respect from a typical manufacturing plant."

Raper Aff No. 3, AR, Vol. XII, Tab 46 at 158-161
Wellington Mushroom Farm, supra at para. 6-18, 29
Cuddy Chicks Ltd., [1988] OLRB Rep May 468 at 469-470

18. These large-scale agribusinesses operate in large, indoor, climate-controlled

facilities, year-round, 24 hours per day. For example, mushroom factories often employ sixty to several hundred employees working in two or three shifts. The largest mushroom factories have as many as 600 full-time year-round employees.

Wellington Mushroom Farm, supra at para. 6-18, 29
Raper Aff No. 3, AR, Vol. XII, Tab 46 at 158-161; Raper Cr-ex, AR, Vol. XIII, Tab 47 at p. 33, 34, 41-47, L. 16-6, 3-21, 4-29, 25-15
Raper Aff No. 1, AR, Vol. XII, Tab 44 at 84-85 and Tab 44(Ex.4) at 101-108
Cuddy Chicks Ltd, supra at 469-470
Niagara Poultry Service, [1995] OLRB Rep. Nov. 1396 at para. 5-7,18-20
Spruceleigh Farms, [1972] OLRB Rep. Oct. 860 at para. 3-4, 6
White Report, AR, Vol. XXXI, Tab 70 at 147, 158, 165, 178

19. The individual Respondents worked at Rol-Land Farms Ltd., a mushroom factory in Kingsville, Ontario with 270-300 employees which described itself as a profitable "farming business" boasting annual sales approaching $50 million.

Hansard (16 April 1997), AR, Vol. IX, Tab 40 (Ex. 2) at 108-109

2. Ontario's Agricultural Work Force

20. The social, economic and political profile of farm workers today must be examined in view of the historical dynamics that have structured Ontario's agricultural labour market as one that is predominated by Canadian workers from the economic margins and that is heavily dependent on a large foreign migrant work force that is legally restricted to working in agriculture. The effect of these historical dynamics is that for many decades agricultural workers in Ontario have been comprised of vulnerable workers who are employed in agriculture precisely because of their socio-economic and political vulnerability. This vulnerability has in turn facilitated their continued institutional marginalization in law.

Fudge Aff No. 1, AR, Vol. XVII, Tab 64 at 64-73
Satzewich Aff, AR, Vol. XXXIII, Tab 75 at 155

21. Agricultural work is hard physical unskilled labour performed in dirty and difficult conditions. It has low wages and long hours. Nearly 40% of the work is seasonal. It is the fourth most dangerous job in Ontario and one of the least prestigious.

Fudge Aff No. 1, AR, Vol. XVII, Tab 64 at 64
Basok Aff, AR, Vol. XXXV, Tab 79 at 89-90, 102-103
White Report, AR, Vol. XXXI, Tab 70 at 186-187

22. As a result, for more than a century Ontario farmers have had difficulty recruiting and retaining workers who are willing to stay in agriculture for long periods. Workers who have other options take work outside of agriculture if it is available. While their faces change through history, what has remained consistent is that farm workers come from those populations with the fewest options and with the greatest difficulty finding employment in other economic sectors. They are workers with low skills, low education, low job mobility, recent immigrants who lack English language skills, the unemployed, and students. Since the 1950s and continuing today, hired farm labour has "depended heavily upon defects in society – unemployment, underemployment, illiteracy and discrimination." This profile of vulnerability has not changed since *Dunmore*. A new element since then is that labour contractors are increasingly recruiting recent immigrants in urban areas and bussing them into rural areas to work for cash as undocumented workers.

Fudge Aff No. 1, AR, Vol. XVII, Tab 64 at 64-65, 68-69, 73, 77 and Vol. XIX, Tab 64(Ex. 7) at 194, Vol. XX, Tab 64(Ex. 10) at 50-51
White Report, AR, Vol. XXXI, Tab 70 at 185-186
McGorman Aff and Church Aff, AR, Vol. XIV, Tabs 50 and 54 at 1, 109
Satzewich Aff, AR, Vol. XXXIII, Tab 75 at 126-128, 130, 145-150 and Vol. XXXIV, Tab 75 (Ex. 23) at 146-148
Raper Aff No. 1, AR, Vol. XII, Tab 44 at 79-81, Raper Cr-ex, AR, Vol. XIII, Tab 47 at 12-15, 46-47, QQ. 43-65 and QQ. 267-270
Basok Aff, AR, Vol. XXXV, Tab 79 at 89
Delanghe Aff, AR, Vol. XXXVIII, Tab 86 at 170-171

23. The large majority of workers in factory farms are non-white immigrants who have recently arrived in Canada. At Rol-Land Farms Ltd. where the Respondents work, 80% of workers are immigrants from Vietnam, China, Sudan, Cambodia, South and Central America, Portugal and the Middle East. Many of them speak little or no English.

Raper Aff No. 1, AR, Vol. XII, Tab 44 at 79-81
Liu Aff, AR, Vol. XVI, Tab 58 at 120; Liu Cr-ex, AR, Vol. XVI, Tab 59 at p. 178-179, QQ. 243-245
Church Cr-ex, AR, Vol. XV, Tab 55 at p. 159-160, L. 6-7
Basok Aff, AR, Vol. XXXV, Tab 79 at 103

24. Since the 1950s, the federal and provincial governments have actively intervened to recruit, and at times conscript, domestic labour to work in agriculture from regions of the country that consistently have high unemployment – the Maritimes, northern Ontario and Indian reserves. Since the early 1900s, these governments have also actively recruited foreign sources of labour: (a) "unfree immigrants" (including displaced persons and refugees) who in exchange for permanent residency are required to work in agriculture for a defined period of years; and (b) "unfree seasonal migrant labourers" from developing countries who have no right of permanent residence, cannot work outside agriculture, and must return to their country of origin when their work is completed. Competition between sending countries is institutionalized which undermines enforcement of worker rights.

> Fudge Aff No. 1, AR, Vol. XVII, Tab 64 at 65-71 and AR, Vol. XVIII, Tab 64 (Ex. 3) at 160-166; and AR, Vol. XX, Tab 64 (Ex. 11) at 65-68
> Satzewich Aff, AR, Vol. XXXIII, Tab 75, all, esp. at 125-136, 150-155
> Basok Aff, AR, Vol. XXXV, Tab 79 at 107-115
> Seasonal Agricultural Worker Program Employment Contracts (Caribbean and Mexican), AR, Vol. XXXV, Tab 79 (Ex. 3 , 4) at 146-154

25. Through these interventions, the governments have institutionalized migrant labour as a key element of Ontario's agricultural workforce. They institutionalized a system that recruits vulnerable workers under employment structures that heighten their vulnerability.

26. The vulnerability of agricultural workers has been embedded in law as farm workers have historically been excluded from almost all of the statutory rights and benefits provided to the vast majority of other workers in Ontario. Where they are covered, this has only come many decades after other workers won the same rights. For example, farm workers only gained protection under the *Occupational Health and Safety Act* in 2006 after UFCW Canada filed a constitutional challenge to their exclusion. Agricultural workers generally remain excluded from employment standards protections for minimum wages, overtime, vacation pay, public holiday pay, maximum hours worked in a day, maximum hours worked in a week, minimum prescribed rest periods between shifts, minimum rest periods in a week or two-week period, and minimum rest periods for meals. None of the legislation which applies to farm workers gives them protection to bargain collectively.

Fudge Aff No. 1, AR, Vol. XVII, Tab 64 at 73-76 and AR, Vol. XX, Tab 64 (Ex. 12) at 90-91
Raper Aff No. 2, AR, Vol. XII, Tab 45 at 122-134 and Tab 45 (Ex. A) at 129-136
Ontario Regulation 414/05
Ontario Regulation 285/01 made under the *Employment Standards Act, 2000*, sections 2(2), 4(3), 8, 9, 26, 27 which exclude farm workers from protections in *Employment Standards Act, 2000*, Parts VII, VIII, IX, X, XI

27. The impact of their exclusion from basic labour standards is that agricultural workers work long hours in difficult conditions: 40% regularly work more than 50 hours per week. During harvest, it is not unusual for migrant workers to work up to 14-16 hours per day, six days per week plus a half-day on Sundays. Agricultural workers also receive low wages, suffer a high rate of work-related injuries and illnesses, and face racial discrimination.

Fudge Aff No. 1, AR,Vol. XVII, Tab 64 at 75 and AR, Vol. XXIII, Tab 64 (Ex. 44) at 22-23
Liu Aff, AR, Vol. XVI, Tab 58, McGorman Aff, AR, Vol. XIV, Tab 50, Church Aff, AR, Vol. XIV, Tab 54 and Itorong Aff, AR, Vol. XVII, Tab 63
Basok Aff, AR, Vol. XXXV, Tab 79 at 101
Verduzco and Lozano Report, AR, Vol. VI, Tab 36 at 87-88
Preibisch Report, AR, Vol. XXV, Tab 65 (Ex. 9) at 122-124

28. It is from their own experiences of vulnerability at work and poor working conditions that farm workers approached UFCW Canada to unionize and bargain collectively.

Liu Aff, AR, Vol. XVI, Tab 58 at 119-122
Itorong Aff, AR, Vol. XVII, Tab 63 at 46-48
McGorman Aff, AR, Vol. XIV, Tab 50 at 1-3
Church Aff, AR, Vol. XIV, Tab 54 at 109-110
Raper Aff No. 2, AR, Vol. XII, Tab 45 at 120-122

3. History of Agricultural Workers' Exclusion From Labour Laws

a. Overview

29. The history of labour relations in Canada shows that the absence of legislative protection for the right to join a union and bargain collectively virtually guarantees that workers will not be able to exercise those rights. This has been particularly true for agricultural workers who, throughout Ontario's history, have not been able to bargain collectively without legislative protection and support.

Fudge Aff No. 1, AR, Vol. XVII, Tab 64 at 92-95, 105-106, 115
Dunmore v. Ontario, supra at para. 35-36, 39-48

30. In Ontario the rights to unionize and bargain collectively have been guaranteed for workers generally since the 1943 *Collective Bargaining Act.* The rights remain guaranteed for virtually all Ontario workers today under the *Labour Relations Act, 1995* ("*LRA*"). Workers who are covered under sector-specific labour relations statutes have rights to bargain collectively either on terms identical to or substantially similar to the *LRA*. By statute, agricultural workers in Ontario have been and continue to be explicitly denied the right to unionize and bargain collectively.

Fudge Aff No. 1, AR, Vol. XVII, Tab 64 at 92-98
Fraser Aff, AR, Vol. IX, Tab 40 at 88
See Table of Concordance between the *LRA* and Ontario's sector-specific bargaining statutes, Part VII, Tab H to this factum.
LRA, s. 3(b.1)

31. The only other Ontario workers who are denied the rights to unionize and to bargain collectively are workers whose roles require that they not be placed in an apparent conflict of interest (i.e. judges, labour mediators and labour conciliators, and certain supervisory employees); domestic servants; and employees in trapping, hunting, and horticulture.

LRA, s. 3
Fudge Aff No. 2, AR, Vol. XXIV, Tab 65 at 20-21

32. Ontario's legislation affecting agricultural workers is out of step with most of Canada. In every other province except for Alberta, agricultural workers have the right to unionize and bargain collectively under the general labour relations statute for the province. These rights were extended to agricultural employees "in recognition of the economic fact that they often work for a large agribusiness rather than on a small family farm."

See list of statutes set out at Part VII, Tab I to this factum.
Fudge Aff No. 1, AR, Vol. XVII, Tab 64 at 104-106
Paul Weiler, Reconcilable Differences, AR, Vol. XXII, Tab 64 (Ex. 32) at 88

33. Despite differences in the details of labour legislation across jurisdictions in Canada, all jurisdictions in Canada except Ontario and Alberta provide agricultural workers with the

following rights which are also available to workers in general:

(a) a mechanism to select on a majority basis a trade union free of employer interference with exclusive bargaining rights to represent them;

(b) prohibitions on employer unfair labour practices that might interfere with their right to form, join, and participate in a union of their choice for the purpose of collective bargaining;

(c) a legally enforceable duty on the employer to recognize and bargain in good faith with a union that is independent of the employer;

(d) a right to government assistance via mediation and conciliation services to resolve disputes that arise in the negotiation of a collective agreement;

(e) a mechanism – typically economic sanctions such as strikes and lockouts – for resolving negotiation disputes that reach impasse;

(f) legally enforceable collective agreements;

(g) a right to grievance arbitration to resolve collective agreement disputes;

(h) institutional and financial security for the trade union the workers have selected to represent them; and

(i) access to a regulatory and adjudicative tribunal that has experience with, and an understanding of, labour relations.

Fudge Aff No. 1, AR, Vol. XVII, Tab 64 at 104-106
cf. *LRA*, s. 7-19, 17, 18-21, 27, 35, 38, 40, 43, 45, 47, 48, 56, 70, 72, 73, 76, 79, 110-111

34. The fact that agricultural workers in most Canadian provinces have the rights to unionize and bargain collectively has not prevented those provinces from developing and sustaining agricultural production.

Fudge Aff No. 1, AR, Vol. XVII, Tab 64 at 104-105, 121-122

b. The *Agricultural Labour Relations Act*: Farm Workers' Short-Lived Right to Bargain Collectively

35. For a brief period, Ontario's agricultural workers were granted rights in line with agricultural workers in the rest of Canada. In 1994, the Ontario government enacted the

Agricultural Labour Relations Act, S.O. 1994, c. 6, ("*ALRA*") which gave agricultural workers the rights to unionize and bargain collectively under a comprehensive statute administered and enforced by the Ontario Labour Relations Board. The *ALRA* incorporated much of the *Labour Relations Act*, including exclusive rights of representation for unions with majority support, protection from unfair labour practices, the duty to bargain in good faith and the right to grievance arbitration. It included special provisions to address the situation of family members working on farms. Instead of strikes and lockouts, the *ALRA* substituted mediation and final offer selection to resolve bargaining disputes.

Agricultural Labour Relations Act, S.O. 1994, c. 6

36. The *ALRA* was the product of a broad 2-year consultation – conducted by the Task Force on Agricultural Labour Relations composed of employer, government and labour representatives – which led to a tripartite consensus that unionization and collective bargaining could work in the agricultural sector.

Fudge Aff No. 3, AR, Vol. XXVI, Tab 66 at 74-77,
Raper Aff No. 2, AR, Vol. XII, Tab 45 at 124-125
Fraser Aff, AR, Vol. IX, Tab 40 at 88
Task Force on Agricultural Labour Relations Background Studies, Task Force Report (June 1992), Task Force Report (November 1992), AR, Vol. XXIV, Tab 65 (Ex. 5) at 84-146, Tab 65 (Ex. 6) at 151-196, esp. at 153 and, AR, Vol. XXV, Tab 65 (Ex. 7) at 2-29, esp. at 3

37. The *ALRA* was in effect from June 1994 to November 1995. During this time one bargaining unit of agricultural workers was certified at a mushroom factory. UFCW Canada and the employer commenced bargaining, reached agreement on various issues but had not yet concluded a collective agreement when the legislation was repealed.

Fraser Aff, AR, Vol. IX, Tab 40 at 88-89
U-Ans Fraser, AR, Vol. XI, Tab 42(1) at 125

38. After a provincial election, in November 1995 the *ALRA* was repealed. A new *Labour Relations Act, 1995* was enacted that again expressly denied agricultural workers the right to unionize and bargain collectively. The repeal of the *ALRA* also terminated the

Union's representation rights and terminated the two other certification applications (at another mushroom factory and poultry operation) that were in progress.

Fraser Aff, AR, Vol. IX, Tab 40 at 89

39. The repeal of the *ALRA* was not preceded by any consultation or studies on the operation of the *ALRA*.

Fudge Aff No. 2, AR, Vol. XXIV, Tab 65 at 22
Chaykowski Cr-ex, AR, Vol. IV, Tab 30, p. 145-146, QQ. 353-355

c. The *Dunmore* Decision

40. The Union challenged the repeal of the *ALRA* and exclusion from the *LRA, 1995* in *Dunmore*, arguing that they violated s. 2(d) by denying agricultural workers' right to unionize. The issue of constitutional protection for collective bargaining was not raised in *Dunmore*. The Court found that s. 2(d) was violated and not justified under s.1. It held that under the *Charter* the government had a positive duty to enact legislation to provide that protection which is necessary to ensure farm workers can meaningfully exercise freedom of association. The Court suspended its declaration of unconstitutionality for 18 months to give the government time to draft appropriate legislation.

Fraser Aff, AR, Vol. IX, Tab 40 at 89-90
Dunmore v. Ontario, supra at para. 66-67

41. In response to the *Dunmore* ruling, the government enacted the *Agricultural Employees Protection Act, 2002* ("*AEPA*") which came into force on 17 June 2003.

42. Before enacting the *AEPA*, no government studies, papers or reports were prepared that refuted the recommendations of the Task Force on Agricultural Labour Relations.

Chaykowski Cr-ex, AR, Vol. IV, Tab 30 at 147, Q. 360

43. In developing its response to *Dunmore*, the government's consultation documents reveal that including farm workers within the *Labour Relations Act* or granting them rights

to bargain collectively were never presented as an option.

> Fudge Aff No. 1, AR, Vol. XVII, Tab 64 at 107-108; OMAF, "Rights of Association for Agricultural Workers: A Response to Dunmore v. Ontario", AR, Vol. XXIII, Tab 64 (Ex. 46) at 28, 23, 26; Hansard (7 October 2002), AR, Vol. XXIII, Tab 64 (Ex. 47) at 57 and 60

4. The *Agricultural Employees Protection Act*

44. The *AEPA* has two key aspects. First, it excludes agricultural workers from the *Labour Relations Act*. Section 3(b.1) of the *Labour Relations Act, 1995* provides that the Act "does not apply ... to an employee within the meaning of the *Agricultural Employees Protection Act, 2002*." This is reinforced by s. 18 of the *AEPA* which states that "[t]he *Labour Relations Act, 1995* does not apply to employees or employers in agriculture."

> *LRA*, s. 3(b.1)
> *AEPA*, s. 18, 20

45. Second, the *AEPA* establishes a separate statutory regime that applies exclusively to a broadly defined group of employees "employed in agriculture".

> *AEPA*, s. 2(1)

46. The *AEPA* states that agricultural employees have these general rights: (a) the right to form or join an "employees' association"; (b) the right to participate in the lawful activities of an employees' association; (c) the right to assemble; (d) the right to make representations to their employers, through an employees' association, respecting the terms and conditions of their employment; and (e) the right to protection against interference, coercion and discrimination in the exercise of their rights.

> *AEPA*, s. 1(2), s. 2

47. The *AEPA* grants agricultural workers the right to form or join an "employees' association" which is defined as "an association of employees [employed in agriculture] formed for the purpose of acting in concert". The *AEPA* provides that no employer "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". It prohibits employers from interfering, intimidating, coercing or discriminating against agricultural workers simply because they have formed, joined or participated in the lawful activities of an employee association.

AEPA, s. 1(2), 8-10

48. The *AEPA* provides that "the employer shall give an employees' association a reasonable opportunity to make representations respecting the terms and conditions of employment of one or more of its members who are employed by that employer." Whether an employees' association has had a "reasonable opportunity" to make representations is determined with reference to the timing of representations relative to planting, harvesting or other "concerns that may arise in running an agricultural operation" and the "frequency and repetitiveness of the representations". Where an employee association makes representations, the employer only has an obligation to "listen to the representations if made orally, or read them if made in writing."

AEPA, s. 5

49. In introducing the legislation, then-Minister of Agriculture Helen Johns made clear that these rights do not constitute a right to collective bargaining:

> "I need to make one thing very clear here. While an agricultural employee may join an association that is a union, the proposed legislation does not extend collective bargaining to agricultural workers."
>
> Fudge Aff No. 1, AR, Vol. XVII, Tab 64 at 115; Hansard (7 October 2002), AR, Vol. XXIII, Tab 64 (Ex. 47) at 60 [emphasis added]

50. While the *AEPA* sets out a bare right to make representations,

(a) the *AEPA* does not impose any obligation on an employer to bargain in good faith – or to bargain at all – with an employees' association. There is no obligation to attempt to reach any agreement and no right to have a legally

binding collective agreement. There is no mechanism for resolving bargaining disputes about the terms and conditions of employment. There is no right to dispute resolution to enforce any terms and conditions of work.

Fudge Aff No. 1, AR, Vol. XVII, Tab 64 at 115-117
AEPA, s. 5(6)
cf. *LRA*, s. 17, 18-21, 27, 33, 35, 40, 43, 48, 56

(b) The *AEPA* does not guarantee a right to make representations at regular or predictable intervals. An employees' association need only be given a "reasonable opportunity" based on factors that stress employer convenience.

AEPA, s. 5(1), (3)
cf. *LRA*, s. 17, 58, 59

(c) The *AEPA* limits an employees' association to making representations on behalf of "one or more of its members". There is no right to make representations which reflect majority positions and no protection for employees' identity as members of the association.

AEPA, s. 5(1)
cf. *LRA*, s. 7(13), 45, 119

(d) The *AEPA* does not give an employees' association exclusive rights of representation but in fact anticipates that multiple employee associations may exist at a single workplace.

cf. *LRA*, s. 45
Fudge Aff No. 1, AR, Vol. XVII, Tab 64 at 93-95, 112-114; Ministry of Agriculture and Food Fact Sheet (June 2003), AR, Vol. XXIII, Tab 64 (Ex. 49) at 79

51. The rights in the *AEPA* are enforced by the Agriculture, Food and Rural Affairs Appeal Tribunal ("Agriculture Tribunal") created under the *Ministry of Agriculture, Food and Rural Affairs Act*. Complaints under the *AEPA* can only be dealt with by Agriculture Tribunal members on a special roster whose appointment specifically states that they are

entitled to hear matters under the *AEPA*. This is done "to recognize that the Agriculture Tribunal's jurisdiction under the *Agricultural Employees Protection Act, 2002* differs in nature from the rest of the Agriculture Tribunal's jurisdiction, such that a special roster for the purposes of proceedings under that Act is appropriate." The Agriculture Tribunal's jurisdiction typically addresses issues relating to crop insurance, product marketing commissions and boards, tax assessment on farm land, and environmental negotiation.

Ministry of Agriculture, Food and Rural Affairs Act, esp at s. 14(1.2)-(1.4)

52. If the Agriculture Tribunal finds a breach of the *AEPA*, it has remedial powers to determine what, if anything, a person or entity shall do or refrain from doing with respect to the contravention, which includes the power to order an employer to reinstate, hire or compensate a person who has been discriminated against for participating in an employees' association.

AEPA, s. 11(5), (6)

53. The *AEPA* is not administered by a tribunal that has experience and expertise in labour relations. Unlike the Ontario Labour Relations Board which is a tripartite board with equal management and labour representation, there is no requirement that the Agriculture Tribunal members who hear complaints under the *AEPA* have any expertise in labour relations. The Agriculture Tribunal does not have a trained staff of labour relations officers who can inquire into a complaint, attempt to settle it and report to the Tribunal.

Fudge Aff No. 1, AR, Vol. XVII, Tab 64 at 116-117
cf. *LRA*, s. 110, s. 96(1)-(3)
cf. *I.L.W.U. Local 514 v. Prince Rupert Grain Ltd.*, [1996] 2 S.C.R. 432 at para. 21-26 re expertise of labour relations boards

5. Agricultural Workers' Current Attempts to Unionize

54. In 2002, after this Court's ruling *Dunmore*, the Respondent Xin Yuan Liu and other workers, approached UFCW Canada to seek union representation at Rol-Land Farms Ltd.

Raper Aff No. 1, AR, Vol. XII, Tab 44 at 81

Liu Aff, AR, Vol. XVI, Tab 58 at 120-122
Itorong Aff, AR, Vol. XVII, Tab 63 at 47-48

55. By the spring of 2003, 70% of the 270-300 workers at Rol-Land Farms signed union cards and became members of the Union. When the Union clearly had majority support of the workers, UFCW Canada approached Rol-Land Farms Ltd. asking it to voluntarily recognize the Union as the employees' representative. The employer gave no response.

Fraser Aff, AR, Vol. IX, Tab 40 at 92-93 and Tab 40 (Ex. 3) at 116
Raper Aff No. 1, AR, Vol. XII, Tab 44 at 81

56. In June 2003 the Union filed an application for certification with the Ontario Labour Relations Board. In the Board-supervised certification vote, despite intimidation tactics by the employer, the workers overwhelmingly voted 132-45 in favour of having UFCW Canada as their union and collective bargaining agent. Resolution of that certification application is on hold pending this appeal.

Raper Aff No. 1, AR, Vol. XII, Tab 44 at 81-83
Court of Appeal Decision, AR, Vol. I, Tab 4 at 49, para. 74

57. After the votes were counted, UFCW Canada wrote to the employer requesting meeting dates to commence negotiations to settle on a mutually agreeable contract for Rol-Land Farms workers. The Union received no response to the letter.

Fraser Aff, AR, Vol. IX, Tab 40 at 94 and Tab 40 (Ex. 4) at 118

58. Even though the Respondents and the majority of workers at Rol-Land Farms Ltd. democratically chose UFCW Canada as their exclusive representative, Rol-Land Farms Ltd. continues more than six years later to refuse to recognize the Union. Instead, at a meeting convened at the workplace, the owner of Rol-Land Farms told workers that the Union would never be allowed in and that he intended to fight the Union.

Raper Aff No. 1, AR, Vol. XII, Tab 44 at 83-84
Liu Aff, AR, Vol. XVI, Tab 58 at 124

59. Instead of recognizing the workers' chosen representative, Rol-Land Farms Ltd. appointed an employee to establish a separate "employees' association" that would appear as an alternative to the Union. The "employees' association" which is perceived as "an extension of management" only ever had 7 or 8 members, 5 of whom later quit. Nevertheless, this is the group the employer recognizes as the "employees' association".

Raper Aff No. 1, AR, Vol. XII, Tab 44 at 83
Itorong Aff, AR, Vol. XVII, Tab 63 at 49
Liu Aff, AR, Vol. XVI, Tab 58 at 124-125
Church Aff, AR, Vol. XIV, Tab 54 at 113
Fraser Aff, AR, Vol. IX, Tab 40 at 94 and Tab 40 (Ex. 5) at 120
McGorman Cr-ex, AR, Vol. XIV, Tab 51 at 80, QQ. 706-708

60. This experience of attempting to bargain under the *AEPA* is echoed at Platinum Produce, an industrial hot house greenhouse operation in Chatham, Ontario where workers have also sought certification to have UFCW Canada represent them under the *Labour Relations Act*. That application is also on hold pending this appeal.

Raper Aff No. 3, AR, Vol. XII, Tab 46 at 163-164

61. UFCW Canada approached Platinum Produce asking it to voluntarily recognize the Union as the representative of the workers and to sign a collective agreement. While the employer expressed doubt that the Union could be an employees' association under the *AEPA*, it gave the Union an opportunity to make representations. The meeting, held in July 2004, lasted approximately 15 minutes. The employer's position was that they were not obligated to bargain with the Union and the meeting was not to be considered collective bargaining towards a collective agreement. In about August 2004, the Union presented the employer's counsel with a draft collective agreement setting out proposed terms. That meeting lasted approximately 5 minutes. Since then, the employer has not responded to the proposals or to other proposed meeting dates. There have been no further meetings or communication about terms and conditions of work.

Raper Aff No. 3, AR, Vol. XII, Tab 46 at 164

62. The employees' and Union's experience with the practical operation of the *AEPA* is that it is ineffectual in establishing any real or effective collective bargaining between agricultural employees and employers. First, there is no requirement that an employee association actually be representative of employees or be democratically chosen. Employers can and do use the ability to have multiple associations as an additional way to control employees in the workplace. Second, the *AEPA* does not require employers to do anything other than passively listen to oral representations or read written representations. There is no requirement that employers actually engage in meaningful and constructive discussions or take any actions to respond to employee representations. If employers fail to take any action to respond to representations, there are no consequences under the *AEPA*. The Tribunal has no jurisdiction to require employers to engage in good faith with and respond to employee representations. From the workers' perspective the *AEPA* gives the illusion of representation without ensuring that either the representation or actions to respond to employee representations are genuine. The *AEPA* provides no protection for the right to bargain collectively.

Raper Aff No. 3, AR, Vol. XII, Tab 46 at 164-165

PART II: RESPONDENTS' POSITION ON THE ISSUES

63. The Respondents submit that s. 3(b.1) of the *Labour Relations Act, 1995* and the entirety of the *Agricultural Employees Protection Act, 2002* violate s.2(d) and s. 15 of the *Charter*, that the violations cannot be justified under s. 1 and that the impugned provisions should be declared of no force and effect. They submit that Constitutional Questions 1, 3, 5, and 7 should be answered in the affirmative and that Constitutional Questions 2, 4, 6, and 8 should be answered in the negative. They respectfully request that the appeal be allowed with costs.

PART III: LEGAL ANALYSIS

A. Section 2(d): The Freedom of Association

1. Overview of the Respondents' Position

64. The Respondents submit that the *AEPA* and exclusion from the *LRA* violate s. 2(d) by failing to provide the legal protection needed to safeguard farm workers' right to bargain collectively. The impugned statutes are underinclusive in a way that orchestrates, encourages and sustains the violation of farm workers' freedom of association.

65. The Respondents recognize that s. 2(d) does not provide a constitutional guarantee to a specific legislative scheme or a particular model of labour relations. Under s. 2(d), the Respondents do not seek to constitutionalize the *Labour Relations Act, 1995.* From the outset they have made clear that they are not seeking the right to strike and that, in the agricultural context, bargaining disputes can be settled by some form of binding mediation or arbitration as was recommended by the Task Force on Agricultural Labour Relations and adopted in the short-lived *Agricultural Labour Relations Act.*

> *Dunmore v. Ontario, supra* at para. 24-26
> *B.C. Health Services, supra* at para. 19, 91
> Fraser Aff, AR, Vol. IX, Tab 40 at 91
> Task Force on Agricultural Labour Relations, First Report (June 1992), AR, Vol. XXIV, Tab 65 (Ex. 6) at 156, 163-168, and Task Force, Second Report (November 1992), AR, Vol. XXV, Tab 65 (Ex. 7) at 11-16
> *Agricultural Labour Relations Act*, s. 10-22

66. The Respondents seek to protect the fundamental freedom of association and argue that having regard to labour relations statutes informs the analysis in important ways:

(a) the uniformity of statutory protections for unionization and collective bargaining across all Canadian jurisdictions is striking and provides an important context in which to assess the nature of legal support that is needed to ensure that the fundamental freedom can be effectively exercised;

(b) Canadian labour relations history, experience and rationales for adopting specific legal protections to safeguard against employers' subversion of freedom of association likewise provide important context for assessing if the

impugned laws genuinely protect farm workers' freedom of association; and

(c) examining the *AEPA* in the context of farm workers' particular history of legal disentitlement and in the context of the statutory support afforded to other workers is important for assessing the didactic effect of the *AEPA* on this group of marginalized workers.

To draw on this labour relations history does not constitutionalize the *LRA* model. Rather, it recognizes the reality of what protections are needed to make the fundamental freedom of association accessible in practice in the Canadian context.

Dunmore v. Ontario, supra at para. 20-22, 35, 39-42, 44-48
B.C. Health Services, supra at para. 99, 41-68, 35

2. Framework for Legal Analysis on Section 2(d)

67. To determine if freedom of association has been violated, one inquires whether the state has precluded activity because of its associational nature thereby discouraging the collective pursuit of common goals. A claimant must establish that the activity for which they seek protection falls within the activities protected by s. 2(d) of the *Charter*; and that the impugned legislation has, either in purpose or effect, interfered with these activities.

Dunmore v. Ontario, supra at para. 13, 16

68. In certain situations, the state will have a duty to enact legislation to ensure the meaningful exercise of freedom of association. This duty will arise where the state has entered a particular field of regulation – i.e. labour relations – but has enacted legislation that is underinclusive. Exclusion from a protective regime can amount to an affirmative interference with freedom of association because by the selective exclusion of a particular group, the "government is creating conditions which in effect substantially interfere with the exercise of a constitutional right."

Dunmore v. Ontario, supra at para. 22

69. Underinclusive legislation will violate the freedom of association where:

(a) the claim for underinclusion is grounded in a fundamental *Charter* freedom rather than access to a particular statutory regime;

(b) the absence of government intervention through protective legislation may in effect "substantially impede" the enjoyment of fundamental freedoms; and

(c) the underinclusive state action "substantially orchestrates, encourages or sustains the violation of fundamental freedoms."

Dunmore v. Ontario, supra at para. 24-26, 28-29, 69
Baier v. Alberta, [2007] 2 S.C.R. 673 at para. 27, 30

3. Collective Bargaining is Protected Under Section 2(d)

a. Interpretive Principles on the Scope of s. 2(d)

70. The scope of s. 2(d) must be interpreted using a broad, generous and purposive approach which aims to protect the full range of associational activity contemplated by the *Charter* and to honour Canada's obligations under international human rights law.

Dunmore v. Ontario, supra at para. 13
Reference re Public Service Employee Relations Act (Alberta), [1987] 1 S.C.R. 313 at 393-394 per McIntyre J.; at 334-335, 348-371, per Dickson C.J.C. [hereinafter "*Alberta Labour Reference*"]
B.C. Health Services, supra at para. 30, 33-34, 38-86

71. This Court has already ruled that the right to bargain collectively is an exercise of freedom of association that falls within the scope of s. 2(d)'s protection. Collective bargaining is an exercise of freedom of association that is consistent with the language and purpose of s. 2(d), is consistent with the purposes of the *Charter* as a whole, and is supportive of the values of human dignity, equality, liberty, respect for the autonomy of the person and enhancement of democracy which underlie the *Charter* as a whole. *Charter* protection for collective bargaining is consistent with Canada's obligations under international human rights law. Finally, collective bargaining is a fundamental freedom that predates the *Charter* and any statutory regimes and is in fact "the most significant activity through which freedom of association is expressed in the labour context."

B.C. Health Services, supra at para. 19-20, 39-41, 64-67, 69-79, 80-86, 87
Dunmore v. Ontario, supra at para. 16-17, 26-29, 37-41
Fudge Aff No. 1, AR, Vol. XVII, Tab 64 at 98-103, 123-128

72. Contrary to the OFA's suggestions, the scope of s. 2(d) protection for collective bargaining by farm workers is not restricted based on notions of judicial deference on questions of labour relations, images of the family farm, features of agricultural production or arguments about potential costs. It is fundamental to *Charter* analysis that the scope of *Charter* rights is defined broadly and any limitation on such rights is considered only under s. 1 of the *Charter.* The OFA incorrectly seeks to bring into the s. 2(d) analysis arguments to justify restricting s. 2(d) rights. Those arguments properly belong only under s. 1. The analytical distinction between s. 2(d) and s. 1 is essential to ensure that claimants are given the full benefit of the *Charter*'s protection, that substantive *Charter* rights are not truncated, and that those seeking to uphold a violation properly bear the onus to justify that infringement. Accordingly, farm workers are entitled to the broad protection for collective bargaining that was recognized in *B.C. Health Services.* Any argument to restrict this substantive right must be addressed only under s. 1.

Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712 at 765-766
Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 177-178
R. v. Zundel, [1992] 2 S.C.R. 731 at 758, para. 36-37
R. v. Turpin, [1989] 1 S.C.R. 1296 at 1328

73. Contrary to Ontario and the OFA's suggestions, the scope of s. 2(d) protection for farm workers is not limited to exercising the right to organize that was outlined in *Dunmore* and their remedy for a s. 2(d) breach is not limited to the remedies ordered in *Dunmore. Dunmore* did not address the right to bargain collectively. Moreover, the law on s. 2(d) changed with *B.C. Health Services* to expressly protect collective bargaining under s. 2(d). Again, farm workers are entitled to the full scope of this *Charter* protection.

Dunmore v. Ontario, supra at para. 42

74. Finally, contrary to Ontario and the OFA's suggestions, s. 2(d) does not provide reduced or 'more limited' protection for collective bargaining in a case involving under-

inclusive legislation. Ontario and the OFA's proposal that the scope of s. 2(d) rights differs based on a supposed "positive rights"/"negative rights" paradigm is flawed. This approach is a triumph of form over substance that leaves the broad purpose of the *Charter* unfulfilled. This Court has repeatedly rejected analyses that place form over substance.

> See, for example:
> *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 at para. 28 [hereinafter "*Meiorin*"]
> *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 61

75. Describing a *Charter* claim as 'positive' or 'negative' simply describes the form of government interference. A s. 2(d) violation can occur when a government law interferes by directly eliminating or stopping an existing exercise of s. 2(d) rights (i.e. *B.C. Health Services*). A s. 2(d) violation can equally occur when a government law interferes by creating conditions that from the outset prevent the exercise of s. 2(d) rights (i.e. *Dunmore*). This Court has already ruled that drawing distinctions between negative freedoms and positive rights must not be "dogmatic" because the distinctions "are not always clearly made, nor are they always helpful." As Chief Justice Dickson stated in the *Alberta Labour Reference*, "This conceptual approach to the nature of 'freedoms' may be too narrow since it fails to acknowledge situations where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms."

> *Haig v. Canada*, [1993] 2 S.C.R. 995 at 1038-1039
> *Alberta Labour Reference, supra* at 361 per Dickson C.J.C. [in dissent]

76. In an analogous situation in the human rights context, this Court unanimously rejected the notion that there was legal significance to whether an interference with rights occurred directly or indirectly. The Court called this attempt to classify the form of interference "artificial", "malleable", "chimerical", "unrealistic" and a matter of form over substance. The Court ruled that the effect of an interference with rights does not change based on how it is expressed and that the scope of protection for substantive rights is the same regardless of how the interference is brought about.

> *Meiorin, supra* at para. 27-31

77. This Court should once more, as it did in *Dunmore*, reject the positive rights/negative rights framework under the *Charter*. This analysis improperly takes the focus off substantive rights. The form of interference does not alter the substance of *Charter* rights. It does not alter the scope of collective activity protected under s. 2(d). While the method of proving substantial interference with a *Charter* right and the appropriate remedy may vary based on whether government interference arises directly or through underinclusive laws, the scope and standard of *Charter* protection does not vary. Accordingly, farm workers are again entitled to full protection for the procedural right to bargain collectively that was recognized in *B.C. Health Services*.

Dunmore v. Ontario, supra at para. 19-20, 22, 26, 28-29, 34, 42

b. Scope of *Charter* Protection for Collective Bargaining

78. In *B.C. Health Services*, this Court ruled that "s. 2(d) should be understood as protecting the right of employees to associate for the purposes of advancing workplace goals through a process of collective bargaining."

B.C. Health Services, supra at para. 87; also para. 19

79. This s. 2(d) protection "does not cover all aspects of 'collective bargaining' as that is understood in the statutory labour regimes that are in place across the country." It does not guarantee access to any particular statutory regime. It does not protect the particular objectives that employees may collectively seek through bargaining.

B.C. Health Services, supra at para. 19, 89, 91

80. What s. 2(d) does protect is "the right of employees to associate in a process of collective action to achieve workplace goals". It guarantees the process through which collective goals are pursued. Section 2(d) protects a "procedural right to collective bargaining" which is described broadly as "the right of employees to join together in a union to negotiate with employers on workplaces issues or terms of employment".

B.C. Health Services, supra at para. 19, 41, 89

81. Legislation will violate s. 2(d) where it "substantially interferes" with the activity of collective bargaining in that the intent or effect of the law "seriously undercut[s] or undermine[s] the activity of workers joining together to pursue the common goals of negotiating workplace conditions and terms of employment with their employer".

B.C. Health Services, supra at para. 90, 92

82. Very importantly, this Court ruled that "the fundamental precept of collective bargaining" is the duty to consult and negotiate in good faith. The Court emphasized that s. 2(d) requires that legislation respect and protect this duty to bargain in good faith:

> It follows that the state must not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith. Thus the employees' right to collective bargaining imposes corresponding duties on the employer. It requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation.

B.C. Health Services, supra at para. 90, 97 [emphasis added]

83. To find that the right to collective bargaining under s. 2(d) has been violated, two inquiries must be made. The inquiry "in every case is contextual and fact-specific":

(a) The first inquiry looks at whether legislation affects a matter that is important to the process of collective bargaining – whether interference with a particular matter affects the capacity of union members to come together and pursue collective goals in concert. The more important the matter affected, the more likely there will be substantial interference with the s. 2(d) right.

(b) The second inquiry looks at the manner in which the legislative measure impacts on the collective right to good faith negotiations and consultation: "does the legislative measure ... in issue respect the fundamental precept of collective bargaining – the duty to consult and negotiate in good faith?"

B.C. Health Services, supra at para. 92-97, 112

84. The Court stressed that "the duty to negotiate in good faith...lies at the heart of collective bargaining". Consideration of that duty sheds light on what constitutes improper interference with collective bargaining. Adopting the analysis developed under ILO instruments, the Court described what constitutes the process of bargaining in good faith:

> The principle of good faith in collective bargaining implies recognizing representative organizations, endeavouring to reach an agreement, engaging in genuine and constructive negotiations, avoiding unjustified delays in negotiation and mutually respecting the commitments entered into, taking into account the results of negotiations in good faith.
>
> *B.C. Health Services, supra* at para. 98

85. Relying on the uniformity of process that has been protected under Canadian labour legislation, the Court elaborated that a process of collective bargaining that is conducted in good faith requires that (a) the parties have an "obligation to actually meet and to commit time to the process"; (b) the parties have "a duty to engage in meaningful dialogue and they must be willing to exchange and explain their positions. They must make a reasonable effort to arrive at an acceptable contract"; and (c) "the right to collective bargaining cannot be reduced to a mere right to make representations".

> *B.C. Health Services, supra* at para. 99-107, 114 [emphasis added]

c. Importance of Canadian Labour Relations History

86. In both *Dunmore* and *B.C. Health Services*, this Court has recognized that Canadian labour relations history is of bedrock importance to understanding the nature and scope of the collective activity protected under s. 2(d) and the kinds of statutory protections which are necessary to make the fundamental freedom of association effective in practice.

> *Dunmore v. Ontario, supra* at para. 20-22, 35, 39-42, 44-48
> *B.C. Health Services, supra* at para. 25, 30, 33, 40-67, 99-107

87. Even though freedom of association is a fundamental constitutional freedom, this Court has recognized that, because of the power imbalance between individual employees

and employers, freedom of association is particularly difficult for workers to exercise without statutory support. It is "as difficult to exercise as it is fundamental". Failure to provide statutory support, particularly in the private sector, forecloses the effective exercise of freedom of association. This Court recognized that "the history of labour relations in Canada illustrates the profound connection between legislative protection and the freedom to organize". Workers' ability to effectively exercise freedom of association is so intertwined with and dependent on statutory support that the capacity to exercise the freedom is in very large measure commensurate with the statutory protection.

> *Dunmore v. Ontario, supra* at para. 20-22, 35-38,40-48
> *B.C. Health Services, supra* at para. 40-63, 35, 90, 92

88. Despite this profound connection between statutory support and effective exercise of freedom of association, Canadian labour statutes do not create the rights to bargain collectively. Rather, the statutory rights derive from the fundamental freedom and are reflective of the kinds of support that the Canadian experience has shown are needed to make the fundamental freedom effective for individuals. This relationship between the freedom and statutes is confirmed in the 1968 Woods Task Force Report which remains the most authoritative statement of principles underlying Canadian labour law and policy:

> Freedom to associate and to act collectively are basic to the nature of Canadian society and are root freedoms of the existing collective bargaining system. Together they constitute freedom of trade union activity: to organize employees, to join with the employer in negotiating a collective agreement, and to invoke economic sanctions, including taking a case public in the event of an impasse. Collective bargaining legislation establishes rights and imposes duties derived from these fundamental freedoms, just as legislation in other fields protects and controls corporate action."
>
> Fudge Aff No. 1, Vol. XVII, Tab 64 at 97; Task Force on Labour Relations (1968), AR, Vol. XXII, Tab 64 (Ex. 33) at 92 [emphasis added]
> *B.C. Health Services, supra* at para. 25

89. Accordingly, the Court of Appeal was correct in analysing and relying on Canadian labour relations history and the scope of statutory protection for collective bargaining to

inform what minimum statutory supports are needed to provide effective protection for farm workers to exercise their procedural right to bargain collectively.

90. Analysis of labour relations models adopted in other countries does not assist in resolving the question of what kinds of statutory supports are needed to protect effective rights to bargain collectively in Canada. The structure that any country creates to instantiate freedom of association is a single interdependent package which is a product of specific social, economic, political and religious factors and choices in that country's history. It is not possible to transplant isolated elements or features from another country's domestic labour relations model into the Canadian context. Attempting to do so does a real disservice to understanding the significance of any particular feature in the complex history and balance of the other country's instantiation of freedom of association and a disservice to understanding Canada's own labour relations history and experience. The Court of Appeal decision, written by the Chief Justice of Ontario who has deep labour relations experience and expertise, correctly rejected Ontario's attempt to rely on features in domestic labour laws in Europe to justify denying protections to Ontario farm workers.

> M.G. Mitchnick, Union Security and the *Charter* (1987) at 7-8
> R. Blanpain, "Comparativism and Labour Law and Industrial Relations", in Comparative Labour Law and Industrial Relations in Industrialized Market Economies, 7th ed (2001) at 18-20
> Otto Kahn-Freund, "Uses and Misuses of Comparative Law", (January 1974) 37:1 Modern Law Review 1 at 12, 20-21, 27
> Court of Appeal Decision, AR, Vol. I, Tab 4 at 53-54, para. 86-87

4. Agricultural Workers' Right to Bargain Collectively is Violated

91. The Supreme Court has ruled that "laws or state actions that prevent or deny meaningful discussion and consultation about working conditions between employees and their employer may substantially interfere with the activity of collective bargaining."

> *B.C. Health Services, supra* at para. 96; see also para. 35, 92

92. That is precisely the situation in this appeal. In this case, the impugned legislation

is squarely directed at agricultural workers' capacity to bargain collectively. By excluding farm workers from statutory protection for collective bargaining, the impugned laws deny and foreclose the very process of collective bargaining that is protected under s. 2(d). This constitutes a clear breach of the s. 2(d) freedom of association.

93. Ontario's submission that by not expressly prohibiting collective bargaining, the *AEPA* provides sufficient statutory protection to effectively exercise the right to bargain collectively is entirely divorced from Canadian labour relations history and from the evidence in this case. Ontario presents a wholly decontextualized and theoretical analysis. The same "no prohibition" argument was made regarding the right to organize and was rejected in *Dunmore*.

Dunmore v. Ontario, supra at para. 23

94. There is ample evidence on the record to establish that without statutory protection for collective bargaining agricultural workers are unable to undertake that exercise of freedom of association. Whether there is interference with farm workers' freedom of association must be analyzed contextually having regard to the long history of farm workers' exclusion from protective legislation, Canadian labour relations history, the current reality of farm workers' experience and Canadian jurisprudence.

a. Labour Relations History: The Need for Statutory Support

95. The history of labour relations in Canada has demonstrated that, in the absence of laws which safeguard rights to bargain collectively with an employer, workers – and in particular farm workers – have not been able to effectively exercise this right.

Fudge Aff No. 1, AR, Vol. XVII, Tab 64 at 92-98, 105-106
Dunmore v. Ontario, supra at para. 20, 35, 42, 45

96. International and Canadian labour policy have also long recognized that without statutory support, farm workers will be unable to exercise their right to bargain collectively. A1935 international survey of labour in agriculture noted:

> The question of government intervention is the pivotal question of collective bargaining in agriculture. Though it must not be thought that such bargaining is in essence other than a voluntary settlement between the parties, yet unless backed to some extent by the public authority it is likely to fail in its object.
>
> Fudge Aff No. 1, AR, Vol. XVII, Tab 64 at 115
> Louise E. Howard, Labour in Agriculture (1935), AR, Vol. XXIII, Tab 64 (Ex. 50) at 91

97. The Woods Task Force Report likewise expressed specific concern that farm workers were excluded from collective bargaining legislation and that "[t]heir exclusion as employees from collective bargaining does not, however, seem to us to be justified."

> Task Force on Labour Relations (1968), AR, Vol. XXII, Tab 64 at 94

98. In *Dunmore*, this Court held that legislative support is "absolutely crucial" in order for agricultural workers in Ontario to be able to exercise their freedom of association.

> *Dunmore v. Ontario, supra* at para. 40-42

99. The Ontario Superior Court of Justice and the Court of Appeal both found on the record that farm workers in Ontario remain, just as they were in *Dunmore*, a vulnerable group of workers. The Court of Appeal found that "the evidence shows that it has been virtually impossible for agricultural workers to organize and to bargain collectively with their employers without statutory supports" and, further, that "the *AEPA* perpetuates and reinforces the pre-existing disadvantage of agricultural workers".

> Superior Court of Justice Decision, AR, Vol. I, Tab 2 at 11-12, para. 23
> Court of Appeal Decision , AR, Vol. I, Tab 4 at 47-48, 61, para. 67-70, 111

100. The Respondents submit that legislative support remains crucial to farm workers' ability to exercise their freedom of association and is crucial to enable them to exercise the right to bargain collectively. Farm workers' exclusion from the *LRA* and their treatment under the *AEPA* renders the statutory framework underinclusive in a manner that orchestrates, encourages and sustains violations of the right to bargain collectively.

b. Labour Relations History: Evidence of the Supports Needed for Effective Collective Bargaining

101. The evidence of labour relations history also clearly establishes that certain minimum procedural supports are needed for employees to effectively exercise their right to bargain collectively. In particular, Canadian labour relations history has established that statutory support for the duty to bargain in good faith and recognition of exclusive rights of representation for bargaining agents with majority support, are fundamental to ensuring that the right to bargain collectively can be effective.

102. As early as 1944, Bora Laskin identified the failure to statutorily enforce "upon employers a duty to bargain collectively with the trade union representing the majority of their employees" as the principal defect that undermined unions' ability to make collective representations. To rectify this defect, the rights of collective bargaining – specifically including a duty to bargain in good faith – have been affirmatively protected in Canadian labour laws since PC1003 in 1944 and have remained cornerstones of contemporary Canadian labour legislation to this day.

> Fudge Aff No. 1, AR, Vol. XVII, Tab 64 at 94-96
> *B.C. Health Services, supra* at para. 99
> Bora Laskin, "Union Recognition and Collective Bargaining" (Fall 1944), vol. 8(1) Public Affairs 48-56, AR, Vol. XXII, Tab 64 (Ex. 30) at 59

103. The evidence also establishes that since the 1930s, Canadian labour relations policy and law have recognized that allowing multiple employee representatives without regard to whether an association has majority support is conducive to employer influence over employee associations and undermines rather than promotes workers' effective exercise of freedom of association. Bora Laskin stated that the failure of Ontario's early labour laws to certify employees' majority choice of representative allowed employers to "make a mockery of freedom of association" by ignoring employees' choice and by fostering employee representation committees and company unions at the expense of independent trade unions. The principle of exclusive representation has been a cornerstone of all Canadian labour legislation since 1944 because in its absence

employers were free to, and did, actively subvert employees' freedom of association.

> Fudge Aff No. 1, AR, Vol. XVII, Tab 64 at 93-94, 115-116
> Bora Laskin, "Recent Labour Legislation in Canada" (1944), XXII Can. Bar Review, AR, Vol. XXII, Tab 64 (Ex. 29) at 45-46
> *LRA*, s. 45, 56
> This Court has already addressed the constitutionality of exclusive representation models in *Lavigne v. O.P.S.E.U.*, [1991] 2 S.C.R. 211 and *R. v. Advance Cutting & Coring Ltd.* [2001] 3 S.C.R. 209

104. Moreover, the evidence establishes that rather than being simply a model of labour relations, the procedural supports for collective bargaining that are enacted in the *LRA* are the model for labour relations that has been adopted in Canada. The Canadian model for labour relations – what the OFA refers to as the "Wagner model" – has made the right to bargain collectively effective by protecting the obligation to bargain exclusively with the union that enjoys majority support; the duty to bargain in good faith; the right to a legally binding collective agreement; mechanisms to resolve bargaining disputes; and grievance arbitration to enforce the collective agreement. This protective regime is enacted not only in the *Labour Relations Act, 1995* but in every piece of labour relations legislation with the exception of the *AEPA*. While each labour relations statute contains variations in how the key elements of the Canadian model are implemented, the *AEPA* is the only statute that contains none of these procedural supports for collective bargaining.

> *LRA*, s.3(b.1), 7-10, 17, 18-21, 27, 35, 40, 45, 43, 48, 56, 79
> *AEPA*, s. 18
> Table of Concordance at Part VII, Tab H of this factum

105. The labour relations history also establishes that farm workers in every province except Ontario and Alberta have their right to bargain collectively protected on the same Canadian labour relations model as all other workers – including the duty to bargain in good faith, the right of exclusive representation, and the right to effective dispute resolution mechanisms for bargaining impasse and collective agreement enforcement.

c. The *AEPA* and *LRA* Deny Farm Workers Protection for the Right to Bargain Collectively

106. The *LRA* is underinclusive. It wholly excludes farm workers from protections for collective bargaining. The *AEPA* is underinclusive because it fails to provide any protection to ensure that the right to bargain collectively exists and is meaningful and effective.

107. The ILO ruled that the *AEPA* violates Canada's obligations under international human rights law by failing to provide agricultural workers the right to bargain collectively.

> Fudge Aff No. 1, AR, Vol. XVII, Tab 64 at 125-126
> ILO, Committee on Freedom of Association, Report 330 (March 2003), AR, Vol. XXIII, Tab 64 (Ex. 57) at 145
> ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations (June 2003), AR, Vol. XXIII, Tab 64 (Ex. 58) at 148

108. The evidence is that Ontario farm workers have never been able to exercise their right to bargain collectively in the absence of statutory support. The only instance in which farm workers have been able to bargain collectively was under the short-lived *ALRA*.

109. There is absolutely no evidence that <u>any</u> group of workers has been able to bargain collectively with an employer under the *AEPA*. The two groups of workers who have organized with the UFCW at Rol-Land Farms and Platinum Produce are the only known associations under the *AEPA*. In both cases, the employer refused to bargain with the Union and the *AEPA* provides no recourse in the face of such a refusal. Neither Ontario nor the OFA produced <u>any</u> evidence of any other employee associations or any successful attempts to bargain collectively under the *AEPA*.

> Court of Appeal Decision, AR, Vol. I, Tab 4 at 48, para. 70

110. The *AEPA* does not protect agricultural workers' right to bargain collectively. What the *AEPA* grants is a "mere right to make representations" which this Court has directly stated is contrary to s. 2(d) of the *Charter*. At its highest, the *AEPA* only requires that the employer "listen to the representations if made orally, or read them if made in writing." But, "bargaining involves a giving and taking, it involves more than just the right to make

requests." Unless there is a mutual obligation to bargain in good faith, the right to make representations to a party that has no obligation to engage is meaningless. To adopt the words of Justice Cory in *P.I.P.S.C. v. Northwest Territories*: "The voiced grievances would have no more effect than casual complaints about the weather."

AEPA, s. 5(5)-(7)
P.S.A.C. v. The Queen, [1987] 1 S.C.R. 424 at 437-438 per Dickson C.J.C. [in dissent]
P.I.P.S.C. v. Northwest Territories, [1990] 2 S.C.R. 367 at 382-383 per Cory J. [in dissent]
B.C. Health Services, supra at para. 114

111. The *AEPA* does not protect the duty to bargain in good faith that this Court has said is the essence of collective bargaining. Other than the *AEPA*, there is no labour relations legislation anywhere in Canada that gives workers a right to make representations in the absence of a corresponding duty on the employer to negotiate.

112. The *AEPA* also specifically allows for fragmentation of employee representation. It fails to protect exclusive bargaining rights for the association with majority support. This fragmentation is anomalous. No other labour laws in Canada permit multiple representations from workers with a single community of interest.

Fudge Aff No. 1, AR, Vol. XVII, Tab 64 at 104

113. Not recognizing the duty to bargain, the *AEPA* also lacks all the other procedural protections for collective bargaining that are found in other Canadian labour relations statutes (dispute resolution mechanisms for bargaining impasse and enforcement of collective agreements.)

114. This lack of statutory support is particularly corrosive when viewed in the context of farm workers' historical exclusion from almost all legal protections and benefits for employees and their continued exclusion from core minimum employment standards. Their exclusion from collective bargaining laws exacerbates this existing state of legal disentitlement that undermines farm workers' ability to protect their rights in the workplace.

115. As stated in *Dunmore*, "the didactic effects of labour relations legislation on employers must not be underestimated". The contrast between the *LRA* protections afforded to all other workers and the *AEPA* which applies to farm workers could not be more stark. By denying the procedural protections available to all other workers, and by denying these protections to the very group of workers who historically have had the least protection for their rights, the didactic effects of the *AEPA* are an express invitation to disregard farm workers' attempts to bargain collectively. Through the *AEPA* the state facilitates and normalizes employers' refusal to engage in good faith with farm workers.

Dunmore v. Ontario, supra at para. 46

116. Moreover, the *AEPA* revives practices which, since the 1930s, have been known to palpably undermine employees' efforts to unionize and bargain collectively. Predictably, the *AEPA* yields the same results as these earlier laws:

(a) With no protection for the duty to bargain in good faith, the Respondents were unable to engage in collective bargaining. Rol-Land Farms refused to bargain with the Union. While Platinum Produce heard and received the Union's representations in very brief meetings, it also refused to bargain.

(b) With no protection for exclusive representation, Rol-Land Farms ignored the employees' majority choice of the Union as their exclusive representative and instead promptly created a company-supported "association".

d. No Evidence that the *AEPA* Protects Collective Bargaining

117. The *AEPA* was never intended to protect collective bargaining. In introducing the *AEPA*, the Minister of Agriculture specifically described it by saying that "the proposed legislation does not extend collective bargaining to agricultural workers." It ill suits Ontario to now suggest, contrary to that evidence, that the *AEPA* does provide support for collective bargaining.

Hansard (7 October 2002), AR, Vol. XXIII, Tab 64 (Ex. 47) at 60

118. The legislature is presumed to know labour relations history. Where the legislature adopts a labour relations model that deviates from every other regime in Canada, the model must be subject to scrutiny. There is a heavy onus on the government to establish that the deviation from the Canadian model is based on some study or report and to establish that the deviation will in fact support, and is intended to support, the right to bargain collectively.

119. In the present case, there is absolutely no evidence that the *AEPA* was developed based on any study or report about the efficacy of collective bargaining for farm workers. In fact, the cursory consultations leading to the *AEPA* made clear that granting farm workers the right to bargain collectively was never presented as an option.

120. The absence of any such study or report is particularly glaring when the *AEPA* was enacted in the face of the two tripartite Task Force Reports detailing how collective bargaining could be protected for farm workers on a modified version of the *LRA* model. Again, before the *ALRA* was repealed and before the *AEPA* was enacted, no studies or reports were prepared that either examined the experience of farm workers under the *ALRA* or refuted the recommendations of the Task Force on Agricultural Labour Relations.

121. The Respondents stress that the evidence from Ontario's witness Prof. Richard Chaykowski is "after the fact" evidence. Prof. Chaykowski was retained by the government only after the Union's application in this matter was filed. He was not consulted about the *AEPA* when it was being developed and the view he presents was not put forward by the government at the time the *AEPA* was introduced. Prof. Chaykowski has no expertise with farm workers and his theoretical analysis is not based on any empirical study of Ontario farm workers' experiences with collective bargaining. Most significantly, his mandate in preparing his affidavit was only to consider economic and policy rationales for excluding agricultural workers from collective bargaining laws. He was not asked to consider, and did not consider, if farm workers could be included in collective bargaining laws whether it be the *LRA* or any modified collective bargaining law that could apply to the sector.

Chaykowski Cr-ex, AR, Vol. IV, Tab 30 at 76, 77, 78-80, 147-148, QQ 18-25, 27-30, 35-49, 363

122. The Respondents submit that the Court of Appeal correctly found that the impugned legislation interferes with agricultural workers' s. 2(d) freedom of association.

5. Government Responsibility for the Violation of Section 2(d)

123. Ontario argues that the Court of Appeal erroneously applied the *Charter* to private actors. Ontario advanced this same argument in *Dunmore*. It was rejected by the Court.

124. The Court of Appeal did not apply the *Charter* to private conduct. It applied the *Charter* to legislation – the *LRA* and the *AEPA* – which is core government conduct squarely subject to the *Charter* under s. 32. The democratically-adopted *Charter* is intended to constrain how legislatures enact laws. Its application is not anti-democratic as Ontario suggests.

Vriend v. Alberta, supra at para. 131-142

125. Laws that apply in the private sector by their very nature and intent shape the kinds of relationships that can develop between private actors. Laws can privilege or encourage certain relationships or can suppress or discourage others. The *Charter* requires that statutes not shape relationships in a way that violates substantive *Charter* rights. The history of labour relations shows that without statutory protection, freedom of association remains a "hollow" right. For this reason, the Court in *Dunmore* ruled that the distinction between public/private realms and positive/negative state obligations must be more nuanced than the "rigid dichotomy" proposed by Ontario. The Court specifically found that state regulation of farmers' relationship with their employees is subject to the *Charter*:

> Once the state has chosen to regulate a private relationship such as that between employer and employee, I believe it is unduly formalistic to consign that relationship to a 'private sphere' that is impervious to *Charter* review. ... The boundaries of that realm [where the *Charter* does not intrude] are marked, not by an *a priori* definition of what is 'private', but by the

> absence of statutory or other governmental intervention. ... I am not prepared to say that the relationship between farmers and their employees falls within that boundary.
>
> *Dunmore v. Ontario, supra* at para. 29, also 19-20, 22, 26, 28, 34, 42
> See also, *Vriend v. Alberta, supra* at para. 65-66

126. *Dunmore* found that a posture of government restraint in the area of labour relations privileges the will of management, exposes workers to unfair labour practices and forecloses the exercise of freedom of association. As in *Dunmore*, legislation that excludes farm workers from statutory protections designed to safeguard freedom of association does not simply permit private interference with the fundamental freedom but implicates government in creating conditions that discredit farm workers' exercise of the fundamental freedom and that substantially orchestrate, encourage, sustain or reinforce interference with this freedom. Government cannot distance itself from the effect of its laws.

> *Dunmore v. Ontario, supra* at para. 20, 26, 43–48

127. In finding that the *AEPA* violates s. 2(d), the Court of Appeal did not apply s. 2(d) to private employers and did not subject farm employers to "compulsion". Finding that the state had a pro-active obligation to enact supportive legislation, the Court of Appeal simply ruled that such legislation must in fact protect what this Court has already ruled is the content of the procedural right to collective bargaining that is protected by s. 2(d).

128. In finding that, at minimum, statutory protection for farm workers' right to bargain collectively must include the duty to bargain in good faith, exclusive representation, dispute resolution mechanisms for bargaining impasse and a mechanism to enforce the agreements reached in bargaining, the Court of Appeal safeguards the minimum procedural rights that are protected in every other labour relations regime in Canada. The Court of Appeal creates no imbalance in power between employers and employees. In requiring the minimum procedural protections that are afforded under all other Canadian labour relations statutes, the Court of Appeal's decision reflects the Canadian experience of what is actually needed to balance power in the employer-employee relationship. This