Court File No. 27216

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for the Province of Ontario)

BETWEEN:

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

(Appellants)

- and -

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

(Respondents)

FACTUM OF THE APPELLANTS

PART I - STATEMENT OF FACTS

(1) Nature of the case.

1. The Appellant agricultural workers challenge the enactment of certain provisions of the *Labour Relations and Employment Statute Law Amendment Act* (the "*LRESLAA*")[1] which prevent agricultural workers from forming associations and exclude them from Ontario's system of labour relations. They challenge s. 80 of the *LRESSLA*, which repealed the *Agricultural Labour Relations Act* (the "*ALRA*"),[2] and s. 3(b) of Schedule A to the *LRESSLA*, which categorically excludes agricultural workers from the application of the Ontario *Labour Relations Act* (the "*OLRA*").[3] This legislation violates agricultural workers' freedom of association guaranteed by s. 2(d) and equality rights under s. 15(1) of the *Charter*.

2. At the time the *LRESLAA* was enacted in 1995, agricultural workers had only recently achieved access to Ontario's labour relations system, after decades of discriminatory exclusion. This access had enabled the formation of the first agricultural workers' union in Ontario history, represented by the United Food and Commercial

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[1] S.O. 1995, c. 1.

[2] S.O. 1994, c. 6.

[3] S.O. 1995, c. 1, Sch. A.

Workers Union (the "UFCW").

3. Canadian society has systematically marginalized agricultural workers and in so doing has
precluded them from becoming real citizens — individuals capable of participating fully in the country's political, economic and social life.

4. Eight other provinces and the federal government currently provide labour relations protection to agricultural workers within their jurisdictions. The Government of Ontario has stated that it took away labour relations protection to prevent unionization in the agricultural sector. The Government of Ontario essentially submits that agricultural workers lack the capacity to act responsibly; that if permitted to unionize they would act irrationally and destroy the viability of the agricultural sector, even if this meant destroying their own livelihoods in the process.

5. Agricultural workers invoke the *Charter* to reverse their aberrant treatment by Ontario which stereotypes them as intellectually deficient and economically irresponsible; which deems them less worthy than other groups in society of labour relations protection and the right to self-determination; and which consequently denudes them of their dignity.

(2) The disadvantaged condition of agricultural workers.

6. Agricultural workers have always occupied a disadvantaged place in Canadian society. They have widely been considered to be among its " most economically exploited and politically neutralized" groups.[4]

7. Agricultural labour has long been perceived as a "problem" in Canada because of the difficulty in securing a stable supply. Historically, farm work has been associated with the worst kinds of working conditions. At the turn of the century, programs restricting farm workers to agricultural employment were developed for disadvantaged children from Great Britain. At the same time, Canadian immigration officials developed various schemes to increase the supply of agricultural labourers. During World War II, interned Japanese Canadians and prisoners of war were used to ensure a reliable farm labour supply. In the post-war period, Canada once again adopted an agricultural immigration policy.

8. In the 1960s, Canada began to establish a variety of migrant worker programs, despite resistance from some public officials who worried about the increase in the number of Black

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[4] First Affidavit of Prof. Fudge, paras. 38-54, Record, pages 38 - 44.

[5] First Affidavit of Prof. Fudge, paras. 58-59, Record, page 46 and particularly Exhibit B-3 thereto, V. Satzdewich, *Racism and the Incorporation of Foreign Labour*: Farm Labour Migration to

workers.[5] Migrant worker programs now primarily involve workers from the Caribbean and from Mexico. Their numbers have regularly increased. In the late 1970s and early 1980s, the average number of agricultural workers annually brought to Canada under the Caribbean and Mexican Seasonal Agricultural Workers Program reached 4,700. These numbers started to increase significantly after 1987, when the federal government dropped the quota of 20% migrant workers of an operation's total workforce. By 1995, 11,071 workers were admitted to Canada under these programs. The overwhelming majority of migrant workers in Canada are employed in Ontario.[6] These workers constitute approximately 10% of Ontario's total labour force employed in the agricultural sector.

9. The disenfranchisement of agricultural workers resulted in their historical exclusion from employment-related legislation that would have improved their working conditions. They have been deprived of legal protections afforded to virtually every other class of worker in Canada except domestic workers.[7] In Ontario, the exclusion of agricultural workers from protective legislation has a long history. They were excluded from the first general minimum wages law in 1920 , from labour relations legislation in 1943, and from maximum hours of work and paid vacations law in 1944. Coverage under workers' compensation legislation was not provided to them until 1966, fifty-one years after such legislation was enacted to cover other sectors of the economy. To this day, they continue to be excluded from occupational health and safety legislation, and most of them still are denied basic statutory employment standards.[8]

10. There has been little improvement in the condition of agricultural workers over the years. Recent statistical profiles indicate that, overall, agricultural workers have remarkably low levels of educational attainment. Studies have indicated that between one-half and two-thirds of agricultural workers do not have a high-school diploma, and between one-quarter and one-third have less than a grade nine education. The result is that the vast majority of agricultural workers are untrained and therefore unable to do other work. Consequently, most agricultural workers are locked into this occupation.[9]

Canada since 1945, (Routledge, 1991) Record, page 78.

[6] First Affidavit of Prof. Fudge, paras. 55-68, Record, pages 45 - 50

[7] First Affidavit of Prof. Fudge, paras. 6-7, Record, pages 26 -27

[8] First Affidavit of Prof. Fudge, paras. 10-11, Record, page 28; Second Affidavit of Prof. Fudge, paras. 80-82, Record, pages 363 - 364.

[9] First Affidavit of Prof. Fudge, para. 43, Record, page 40; Affidavit of Dr. James White, Exhibit B, *A Profile of Ontario Farm Labour*, Record, page 235.

11. Wage levels remain very low, relative to other occupations. According to Statistics Canada, men who worked in the agricultural sector during 1990 at a full-time, full-year job in Ontario received lower earnings than any other occupational group. They had average earnings of $20,720 compared to $38,648 for the total population of male, full-time, full-year workers. Women agricultural workers have fared even worse than men. Their full time earnings in 1990 averaged $12,956, compared with $26,033 for the total population of full-time women. Overall, wage rates for agricultural workers will likely worsen, since the proportion of paid female workers in the agricultural sector is increasing at a much faster rate than that of male workers.[10]

12. When the examination of the earnings of agricultural workers is broadened to include part-time workers, the situation appears even worse. In 1991, for example, the average agricultural employment income in Ontario was $18,883 for men and $11,272 for women. The average employment income of all agricultural workers that year, both male and female, was 60% that of all workers in Ontario.[11]

13. Agricultural workers work long hours despite their low incomes. A 1987 Research Report prepared for the Ontario Task Force on Hours of Work and Overtime found that the average hours for full-time paid workers in the agricultural sector was 20% greater than for all other Ontario industries.[12]

14. The legal, historical and sociological literature demonstrates a shared understanding of the poor economic and social conditions experienced by agricultural workers, including problems related to low wages, health and sanitation, lack of education and chronic poverty. It is widely accepted that agricultural workers have limited skills, low occupational mobility and other related disadvantages that place them in a vulnerable position in the labour market. Indices of occupational status consistently assess their work at the lowest end of the prestige scale. Yet, by virtue of their second-class status, they do not possess the political power to change it, and the recognition of their disadvantage assumes the character of a self-fulfilling prophecy.[13]

15. Agricultural workers are comprised of a diverse array of minority racial and ethnic groups. This has had a pervasive influence on the negative perception of agricultural workers in Canada:

> "Hired farm workers have consistently come from groups of recent immigrants and

[10] First Affidavit of Prof. Fudge, para. 49, Record, page 42.
[11] First Affidavit of Prof. Fudge, paras. 44-50, Record, pages 41- 43.
[12] First Affidavit of Prof. Fudge, para. 44, Record, page 41.
[13] First Affidavit of Prof. Fudge, paras. 38-41, Record, pages 38 39.

established minorities (women, children and certain ethnic groups). Their association with low status employment in the secondary labour market helped to reinforce the persistent disregard farm labour has suffered in Canadian society."[14]

16. Agricultural workers depressed economic and social conditions are exacerbated by substandard accommodation and a lack of health benefits. For example, a federal task force commissioned by the Ministry of Manpower and Immigration in 1973 investigated working and living conditions on farms that covered the area from St. Catharines to Windsor. The task force determined that many agricultural workers who work seasonally in the industry are employed under intolerable and inhumane conditions involving farm workers and their families living in hovels, and where " child labour and other forms of exploitation were evident." The task force called for an end to the exploitation of defenceless workers and their families.[15]

17. Agricultural workers suffer a high rate of work-related injuries and illnesses due to their repetitive physical effort, unpredictable workloads, exposure to chemicals, pesticides and weather, and the dangers of farm machinery. On the basis of fatality rates, agricultural work is one of the most dangerous kinds of work in Canada, comparable to mining and substantially more dangerous than construction work .[16]

(3) Historical Background – The unjustified exclusion of agricultural workers from labour legislation and the emergence of a broad consensus to remedy this discrimination.

18. The historical and international context of the development of laws in Canada reveals the invidious nature of the exclusion of agricultural workers.

19. The labour provisions of the *Treaty of Versailles*, proclaimed at the end of World War I, heralded the birth of modern labour relations in Western industrialized countries. The *Treaty* declared that " labour should not be regarded merely as a commodity or article of commerce." It signified that workers' participation in their work environments should not be controlled only by employers' and employees' relative positions in an individualized labour market, but should, because of the importance of worklife to personal dignity, rest on a basis which was at least to some extent independent of market forces. The *Treaty* then enshrined the means by which workers could achieve such independence and dignity: " the right of

[14] E. Wall, Exhibit H to the First Affidavit of Prof. Fudge, Record, page 87.

[15] Exhibit V to the First Affidavit of Prof. Fudge, Ontario Federation of Labour, Research Report: " Harvest of Concern", (1974), Record, page 110.

[16] First Affidavit of Prof. Fudge, paras. 51-53, Record, pages 43 - 44.

association for all lawful purposes."[17]

20. Following World War I, the right of association and concerted activity was elaborated through numerous conventions negotiated under the auspices of the International Labour Organization (the "I.L.O."), formed under the terms of the *Treaty of Versailles*. The most important of these was *I.L.O. Convention 87 Concerning Freedom of Association and Protection of the Right to Organise*.[18]

21. International law expressed its intolerance of any distinction between the associational rights of agricultural workers and other kinds of workers. In 1921, the I.L.O. adopted *Convention 11 Concerning the Rights of Association and Combination of Agricultural Workers*.[19] Convention 11 provides that each member state ratifying the convention " undertakes to secure to all of those engaged in agriculture the same rights of association and combination as to industrial workers, and to repeal any statutory or other provision restricting such rights in the case of those engaged in agriculture. Canada has not ratified the Convention.[20]

22. In 1935, the United States federal government enacted the forerunner of all North American labour codes, the *National Labor Relations Act* (commonly known as the "*Wagner Act*").[21] Agricultural workers were excluded from the *Wagner Act*, as well as other U.S. "New Deal" legislation, including social security and employment standards legislation. Their exclusion was motivated by political and racial factors. At the time, the farm lobby was a powerful force in Congress and opposed the inclusion of agricultural workers in protective employment legislation. In contrast, agricultural workers as a group had virtually no political representation, and were particularly disadvantaged because Southern Democrats held the balance of power in Congress. In the southern states, the majority of agricultural workers were Black. Southern Democrats strongly opposed any legislation that might reform traditional racial and class patterns. In order to get the New Deal passed, the Roosevelt government was willing to compromise with Southern Democrats and preserve white hegemony in the

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[17] First Affidavit of Prof. Fudge, para. 70, Record, page 50.

[18] 67 U.N.T.S. 17 (1948); Canada ratified I.L.O. *Convention No. 87* in 1972.

[19] 38 U.N.T.S. 153 (1921).

[20] First Affidavit of Prof. Fudge, para. 71, Record, page 50 -51. To date, 116 member nations of the I.L.O. have ratified Convention 11.

[21] Ch. 372, 49 Stat. 449 (1935).

[22] First Affidavit of Prof. Fudge, paras. 12-15, Record, pages 29 - 30; M. Linder, "Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal" (1987), 65 Texas L.R. 1335, at 1353.

Southern United States.[22]

23. In 1943, Ontario enacted the province's first labour legislation, modelled on the *Wagner Act*, creating a framework for the establishment of labour unions.[23] Like the U.S. legislation, the Ontario legislation excluded agricultural workers, despite their disadvantaged status, and the strong intolerance of such differentiation by the international community. There is no commentary or legislative debate explaining the rationale for the exclusion. The Ontario Legislature simply adopted the discriminatory U.S. exclusion, effectively importing into Ontario the *Wagner Act*'s racial taint.

24. Subsequently, as the exclusion of agricultural workers was maintained, two principal reasons for it were advanced: (1) the nature of farming, including its seasonality, the perishable nature of produce, and the need for uninterrupted husbandry of crops and livestock; and (2) the perception that agricultural workers were ill-suited to function within labour legislation's industrial relations model, given that most farms were owned and operated by small family units. Neither of these reasons ever provided a convincing justification for the exclusion. In recent years they have weakened further.[24]

25. The denial of labour relations protection for agricultural workers has been criticized extensively by academics, public policy groups and public officials on several grounds. In conjunction with Canada's increasing sensitivity to human rights, they have argued that the exclusion discriminates against a disadvantaged group by denying the group's members the capacity to associate in unions and thereby improve their working conditions and socio-economic status. Simultaneously, conditions in Ontario's agricultural sector have changed significantly.[25] Domination of Ontario agricultural production by small family farms has waned, and been replaced by industrial style, large scale agricultural production. "[T]he growth of 'agribusiness' in Canada has meant that the small farmer is no longer the typical agricultural employer."[26]

26. In 1968, the federally appointed Woods Task Force on Industrial Relations in Canada concluded that the exclusion of agricultural workers from statutory labour relations was unjustified.[27] In a widely recognized 1975 law journal article, Professors Neilson and Christie

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[22] First Affidavit of Prof. Fudge, paras. 12-15, Record, pages 29 - 30; M. Linder, "Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal" (1987), 65 Texas L.R. 1335, at 1353.

[23] *An Act to Provide for Collective Bargaining*, S.O. 1943, c. 4.

[24] First Affidavit of Prof. Fudge, para. 17, Record, page 30.

[25] First Affidavit of Prof. Fudge, para. 18, Record, pages 30 - 31.

[26] First Affidavit of Prof. Fudge, paras. 19-25, 27, Record, pages 31 - 34, citing H.W. Arthurs et al., *Labour Law and Industrial Relations in Canada* (Butterworths, 1993) at 216; Second Affidavit of Prof. Fudge, paras. 29-31, Record, pages 348 - 349.

[27] First Affidavit of Prof. Fudge, para. 30, Record, page 36.

contended that legislative equality for agricultural workers was long overdue. "In a society that is becoming highly conscious of rights and equality before the law", they said, " it seems unlikely that the right to minimum protection on the job will continue to be denied to farm workers, particularly in view of the increasingly industrial nature of farming."[28] Likewise, in 1980, the Ontario Labour Relations Board commented, in reluctantly applying the statutory agricultural exclusion to employees in a mushroom operation, that there was no " industrial relations basis" for their exclusion.[29]

27. The Hon. George Adams has attacked the family farm rationale for the exclusion:

> "[I]t has been argued that the agricultural exemption was originally rooted in the desire to preserve the 'family farm' by insulating it from increased labour costs and confrontational tactics deemed to be associated with unionization. Modern economic reality, though, dictates that a large proportion of agricultural production is effected by large farming complexes and corporations, often referred to as 'agribusinesses'... While it may be suggested that a strike at harvest time grants unfair bargaining power to farm workers and might result in great waste, arguably the current exclusions grant unfair bargaining power to employers and economic losses occasioned by strikes are a common by-product of the collective bargaining system. It is the spectre of loss on both sides that encourages compromise and settlement. A middle ground might be dispute resolution by compulsory arbitration."[30]

28. Professor David Beatty has written:

> "The claim of preserving a unique social institution like the family farm, while a principled one, could never justify excluding all agricultural workers as the Ontario legislation, for example, does. The latter enactment is an instance of the grossest kind of over-inclusion which the principle of the reasonable alternative would effectively proscribe. A blanket exclusion of the kind enacted by Ontario is a needless and therefore unreasonable restriction of the freedom of workers who

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[28] K. Neilson and I. Christie, "The Agricultural Labourer in Canada: A Legal Point of View" (1975-76), 2 Dalhousie L.J. 330 at 368.

[29] *Wellington Mushroom Farm*, [1980] OLRB Rep 813, at 819.

[30] G. Adams, *Canadian Labour Law*, 2nd ed. (Canada Law Book, 1996), at 6-50.

[31] D. Beatty, *Putting the Charter to Work: Designing a Constitutional Labour Code* (McGill-Queen's, 1987), at 91-92.

labour for larger and more commercial agricultural enterprises."[31]

29. These views are supported by recent evidence. Data from the federal government's Census of Agriculture indicate that small farms owned and operated by a family unit increasingly provide a much smaller percentage of agricultural production. Ontario farms classified by gross receipts of $500,000 or more in 1990 constant dollars increased from 420 in 1971 to 1,868 in 1991 and non-family farm incorporations tripled over the same period. From 1975 to 1993, the number of paid agricultural workers increased 22.2% to 55,000 workers, while during the same period, the number of unpaid family workers decreased by 38.9% to 11,000 workers. Labour concentration within the agricultural sector is high: approximately 10% of farms account for approximately one-half the wages paid. This concentration extends to so-called " family farms". The Government of Ontario's expert witness, Prof. George Brinkman, claims that "the modern viable family farm no longer consists of twenty 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."[32] In 1991, of the farms reporting hired agricultural labour, those with a capital value in excess of $500,000 utilized 1,282,642 weeks of paid labour. The remaining farms reporting hired labour in 1991 only utilized 426,789 weeks of paid labour. In sum, agricultural workers are becoming concentrated on fewer, larger, corporate farms.[33]

30. The pleas for agricultural workers' rights were heeded in most Canadian jurisdictions years ago. By the late 1970s, eight provinces and the federal government included agricultural workers in their labour relations systems. Only Alberta and Ontario maintained their wholesale exclusions.[34]

(4) The Ontario Government finally addresses the discriminatory treatment of agricultural workers by enacting the Agricultural Labour Relations Act.

31. In January 1992, the Ontario Government established a "Task Force on Agricultural Labour Relations" to study the Government's proposal to extend the *OLRA* to agricultural workers employed in those parts of the agricultural sector which utilized industrial methods of production. The Task Force was co-chaired by delegates of the Ministries of Labour and Agriculture and comprised of representatives from the agricultural community and organized labour. It consulted with a wide variety of organizations, representative of all sectors of the

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[31] D. Beatty, *Putting the Charter to Work: Designing a Constitutional Labour Code* (McGill-Queen's, 1987), at 91-92.

[32] First Affidavit of Prof. Brinkman, para. 31, Record, page 292.

[33] First Affidavit of Prof. Fudge, paras. 19-27, Record, pages 31- 35; Affidavit of Dr. James White, Exhibit B, *A Profile of Ontario Farm Labour*, Record, Page 235.

[34] First Affidavit of Prof. Fudge, para. 28, Record, page 35.

agriculture industry. It surveyed the characteristics of the agricultural sector in Ontario, and the relevant law in Ontario, the rest of Canada and the United States. The Task Force not only concluded that agricultural workers should be included in Ontario's labour relations system, but that there was no justification for limiting access to workers involved in industrial farms: the system should be open to all agricultural workers.[35]

32. The Ontario Government followed the Task Force's recommendations. On June 23, 1994, it enacted the *ALRA*. The *ALRA* abolished the exclusion of agricultural workers from the *OLRA* and integrated them under the *OLRA*, enabling them to form unions and bargain collectively. The *ALRA* prohibited strikes and lockouts. It substituted in their place a dispute resolution process that: (i) emphasized the preference for negotiated settlements between the parties; (ii) provided a conciliation and mediation service to assist the parties in reaching a negotiated settlement; and (iii) provided a "final offer" arbitration process to resolve all outstanding matters following exhaustion of the negotiation process. The *ALRA* also provided significant protections to "family farms".

33. Soon after the *ALRA*'s enactment, Ontario's first agricultural workers' union was formed. On April 6, 1995, the UFCW was certified as the union for approximately 200 employees of Highline Produce Limited in Leamington, a sophisticated factory farm operation which annually produced over ten million pounds of mushrooms.[36]

34. Notably, the working conditions at Highline were "horrendous" prior to the UFCW's certification. The employees received only two holidays per year: Christmas day and New Year's day. It was not until January 1995, when Highline learned of the employees' intentions to unionize, that the employees started to receive weekly overtime pay after 44 hours work. The employees had no pension plan, no seniority rights, and no job security. Health and safety issues were constantly in dispute between the employees and Highline.[37]

35. In October 1995, the UFCW filed two further applications for certification with the Labour Relations Board for large groups of employees at Kingsville Mushroom Farm Inc. and Fleming Chicks.[38] These were the last attempts to unionize agricultural workers in Ontario.

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[35] First Affidavit of Prof. Fudge, para. 29, Record, page 35.

[36] Affidavit of Michael Doyle, para. 2, Record, page 177; Affidavit of Tom Dunmore, paras. 2, 4 and 5, Record, page 198.

[37] Affidavit of Tom Dunmore, para. 6, Record, pages 198 - 199.

[38] Affidavit of Michael Doyle, para. 20, Record, page 181.

(5) The Ontario Government enacts the LRESSLA, which repeals the ALRA and excludes agricultural workers from Ontario's system of labour relations, for the express purpose of preventing the formation and maintenance of agricultural workers' unions.

36. On October 4, 1995, the new Ontario Government introduced Bill 7, the long title of which was: *An Act to restore balance and stability to labour relations and to promote economic prosperity and to make consequential changes to statutes concerning labour relations*. Bill 7 provided for the repeal of the *ALRA*, and the termination of any certification rights and collective agreements. It further provided for the exclusion of agricultural workers from the application of the *OLRA* and a new, broader definition of "agriculture".

37. The Ontario Minister of Labour specified the main purpose of the agricultural workers' exclusion on October 4, 1995 in statements she made in the Legislature upon introducing Bill 7:

> " Mr. Speaker, our labour law reforms also include the repeal of the NDP government's Bill 91—the *Agricultural Labour Relations Act*. **This action recognizes that unionization of the family farm has no place in Ontario's key agricultural sector."**[39] [emphasis added]

38. Similarly, on October 4, 1995, the Minister of Agriculture, stated in the Legislature:

> "I too am pleased to elaborate on an important aspect of the labour law reform package just announced by my colleague the Minister of Labour. I am referring, of course, to the repeal of the *Agricultural Labour Relations Act*, Bill 91. Our farmers, who are on the agrifood industry's front lines, are looking to us to help them maintain their competitive edge in the global marketplace. . . . **[T]he *Agricultural Labour Relations Act* is aimed directly at unionizing the family farm. We do not believe in the unionization of the family farm."**[40] [emphasis added]

39. The Ontario Government repeated these statements of purpose in a media kit issued on October 4, 1995, for the purpose of explaining the significance and implications of Bill 7.[41] The kit also contained additional statements reflecting the purpose of the legislation. A section entitled: "Questions and Answers: Repeal of the Agricultural Labour Relations Act (Bill 91)" provided:

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[39] Reprinted and distributed in Ont. Government Media Kit, Exhibit D to the Affidavit of Michael Doyle, Record page 187.

[40] *Hansard*, Legislative Assembly of Ontario, October 4, 1996.

[41] Ont. Government Media Kit, Exhibit D to the Affidavit of Michael Doyle, Record, page 182.

Q: Why is the Government repealing the *Agricultural Labour Relations Act* (Bill 91)?

A: The horticulture and agriculture sectors are extremely sensitive to time and to climate conditions as these directly affect production of many agricultural commodities. For this reason, **these sectors would have great difficulty adapting to the presence of unions.** [emphasis added]

40. Bill 7 surprised Ontario agricultural workers. There had been no discussion or notification by the Government that it was considering repealing the *ALRA*. On October 20, 1995, the UFCW sent a letter to the Minister of Labour expressing its concerns, and asking for a meeting prior to any further steps being taken to repeal the *ALRA*. The Minister did not respond until January 17, 1996, well after Bill 7 had been passed into law. In her response, the Minister confirmed that the Government's purpose in repealing the *ALRA* was to prevent unionization in the agricultural sector:

> " The Government repealed Bill 91 because of the Government's view that unionization in the agricultural sector is incompatible with the unique characteristics of that sector."[42]

41. Bill 7 was passed into law on November 10, 1995 as the *LRESLAA*.[43] Section 80 repealed the *ALRA*. Schedule A to the *LRESLAA* formed the new Ontario *Labour Relations Act*, s. 3(b) of which specifically excluded agricultural workers from the Act.

(6) The Appellants challenge the repeal of the ALRA and the exclusion of agricultural workers from the OLRA under ss. 2(d) and 15(1) of the Charter. Sharpe J. dismisses the challenge. The Court of Appeal upholds Sharpe J.'s judgment.

42. The Appellants commenced the present constitutional challenge on November 14, 1995 by Notice of Application. The Appellants sought an interim injunction suspending the operation of sections 80 and 81 and Schedule A of the *LRESLAA*. The motion for an interim injunction was heard on November 16, 1995 by MacDonald J. He dismissed the motion on the basis that the legal test for interim relief had not been met.

43. Sharpe J. heard the case on the merits on October 21-23, 1997. He held that the

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[42] Letter of UFCW to Hon. E. Witmer, Record, page 193; Responding letter of Hon. E. Witmer to UFCW, Record, page 195.

[43] S.O. 1995, c. 1.

[44] *Dunmore v. Ontario (A.-G.)* (1998), 155 D.L.R. (4th) 193 (Ont. Gen.Div.), Record, page 467. Sharpe J.'s reasons for judgment are discussed extensively in Part III of this factum.

repeal of the *ALRA*, and the exclusion of agricultural workers from the *OLRA* did not *prima facie* breach ss. 2(d) and 15 of the *Charter*, and that it was unnecessary for him to address s. 1.[44]

44. The Court of Appeal dismissed the appeal, stating in its brief endorsement: "We agree with the judgment of Sharpe J., both with the result at which he arrived and his reasons."[45]

PART II - POINTS IN ISSUE

45. The points in issue follow closely the constitutional questions set by Binnie J.:[46]

(1) Do the repeal of the *ALRA* and the exclusion of agricultural workers from the *OLRA* limit agricultural workers' freedom of association guaranteed by s. 2(d) of the *Charter*?

(2) Do the repeal of the *ALRA* and the exclusion of agricultural workers from the *OLRA* limit the right of agricultural workers to equality before and under the law and equal benefit of the law without discrimination as guaranteed by s. 15 of the *Charter*?

(3) If any part of questions 1 or 2 is answered affirmatively, is the limitation nevertheless justified under s. 1 of the *Charter*?

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[44] *Dunmore v. Ontario (A.-G.)* (1998), 155 D.L.R. (4th) 193 (Ont. Gen.Div.), Record, page 467. Sharpe J.'s reasons for judgment are discussed extensively in Part III of this factum.

[45] Endorsement of Ontario Court of Appeal, Record, page 495.

[46] Order of the Honourable Mr. Justice Binnie dated June 20, 2000, Record, page 21.

PART III - ARGUMENT

(1) Section 2(d) of the Charter — The purpose and effect of s. 80 of the LRESLAA and s. 3(b) of the OLRA is to limit agricultural workers' freedom of association.

(a) The Importance of Freedom of Association

46. Freedom of association is one of the prime constituents of a democratic society. " Through association individuals are able to ensure that they have a voice in shaping the circumstances integral to their needs, rights and freedoms...The purpose of the constitutional guarantee of freedom of association is...to recognize the profoundly social nature of human endeavours and to protect the individual from State-enforced isolation in the pursuit of his or her ends."[47]

47. Freedom of association is most essential where individuals are confronted by powerful entities, such as government or an employer:

> "Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict."[48]

48. For disempowered individuals like agricultural workers, these are not abstract words. They furnish the practical means to achieve "equal personhood" in Canadian society.[49]

49. This purposive view of the scope of freedom of association accords with the recognition in *Oakes* that "a commitment to social justice and equality" underlies all *Charter* guarantees.[50]

50. At a minimum, freedom of association under the *Charter* guarantees: (1) the right to form, maintain and participate in an association, including a trade union; (2) the exercise in

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[47] *Ref. Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 (the " ***Alberta Reference***") at 334, 364-65, per Dickson C.J.C.

[48] *Alberta Ref., supra*, at 365-66, per Dickson C.J.; see also *Alberta Ref.* at 395 per McIntyre J., 391, per Le Dain J.; *Lavigne v. OPSEU*, [1991] 2 SCR 211 at 316 per La Forest J., 343 per McLachlin J.

[49] See David Beatty, "Shop Talk: Conversations About the Constitutionality of our Labour Law" (1989), 27 Osgoode Hall L.J. 381 at 388-91.

[50] *R v. Oakes*, [1986] 1 S.C.R. 103 at 136.

association of the constitutional rights and freedoms of individuals; and (3) the exercise in association of the lawful rights of individuals.[51]

51. The Appellants base their s. 2(d) case on all three minimum aspects of the freedom of association, but concentrate on the first and most fundamental one — the bare freedom to form and maintain an association. In *PIPS*, Sopinka J. said that:

> "Any governmental restriction on the formation of or membership in associations would fall afoul of this aspect of s. 2(d), which may safely be regarded as the narrowest conception of the freedom of association."[52]

52. The Appellants' case fits precisely within this defined scope of s. 2(d). The impugned provisions of the *LRESLAA* constitute a restriction orchestrated by the Government of Ontario to limit the formation and existence of unions in Ontario's agricultural sector.

(b) The purpose of the impugned provisions of LRESLAA was to prevent the formation and maintenance of agricultural workers' unions and to terminate any such existing unions. This purpose violates s. 2(d) of the Charter.

53. The determination of legislative purpose is an exercise in statutory interpretation. This Court has endorsed a contextual approach:

> "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[53]

54. This approach does not change for constitutional review. In determining the purpose of an impugned legislative provision, a court must look to both intrinsic and admissible extrinsic

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[51] *Alberta Ref., supra; Public Service Alliance of Canada v. Can.*, [1987] 1 S.C.R. 424 (*"PSAC"*); *and Saskatchewan v. R.W.D.S.U.*, [1987] 1 S.C.R. 460; *Professional Institute for the Public Service of Canada v. N.W.T.*, [1990] 2 S.C.R. 367 at 402-403 (*"PIPS"*); *Delisle v. Canada (A.-G.)*, [1999] 2 S.C.R. 989 at para. 35.

[52] *PIPS, ibid*, at 401-2.

[53] *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21 quoting with approval E. Dreidger, *Construction of Statutes*, 2nd ed. (Butterworths, 1983) at 87.

[54] *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 25.

sources regarding the provision's legislative history and the context in which it was enacted.[54] Legislation is not different in kind from non-legislative government action: it is a governmental response to circumstances, and those circumstances must be explored and taken into account.

55. The law should be characterized in light of circumstances existing at the time of the enactment and in view of the perspective of the legislator."[55]

56. Admissible evidence includes statements made by members of legislatures and other government documents relating to the legislation in issue. In *Upper Churchill*, McIntyre J. said:

> "I am also of the view that in constitutional cases, particularly where there are allegations of colourability, extrinsic evidence may be considered to ascertain not only the operation and effect of the impugned legislation but its true object and purpose as well."[56]

57. In characterizing legislation, a court should consider the actual or predicted practical effect of the legislation in operation.[57]

58. This Canadian interpretive approach dovetails with the American approach. In *Village of Arlington Heights*, the U.S. Supreme Court issued its most detailed outline of the kind of evidence available to claimants to prove colourable purpose behind government action. The Court identified, "without purporting to be exhaustive," several subjects properly belonging to a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." This evidence can include "[t]he historical background of the decision . . . . particularly if it reveals a series of official actions taken for invidious purposes." General historical facts also would include " the specific events leading up to the challenged decision." Also, " [t]he legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decision making body."[58]

59. In the present case, every level of statutory analysis indicates that the purpose of the impugned legislative provisions was to limit the formation of agricultural workers' unions and due to the unique nature of the agricultural industry, to prevent these workers from forming

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[54] *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 25.

[55] *Ibid.*

[56] *Re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297 at 318.

[57] *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at 482.

[58] *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, at 266-68.

any meaningful association.

60. The purpose of the government action represented by the legislative provisions is patent on their face. They were enacted together and designed to work in conjunction with one another. Section 80(1) of the *LRESSLA* repealed the *ALRA*, which was created a short time before for the purposes of enabling agricultural workers to form and maintain unions and to bargain collectively with their employers. Section 80(3) of *LRESSLA* terminated the associational status of existing agricultural workers' unions. Section 3(b) of Sch. A of the *LRESSLA* reinstated the exclusion of agricultural workers from the *OLRA*, thereby closing off their only remaining practical means for forming associations together.

61. Further, the Appellants adduced uncontested evidence that in the labour sphere, it has long been known that without a supportive statutory system of labour relations, workers do not have the freedom to associate and act collectively.[59] This is especially true in relation to the most disadvantaged groups of workers. The Government of Ontario has not denied in this case that it appreciated this reality when it repealed the *ALRA* and enacted the exclusion of agricultural workers from the *OLRA*. The Government knew exactly what the impact would be.

62. The *de facto* bar to unionization and collective action erected by exclusion from a statutory labour relations system has been historically demonstrated. When criminal prohibitions against union organization were removed in Canada in the last quarter of the 19th century, workers were, in principle, free to form and join unions. However, this theoretical freedom was translated into practice infrequently, and with great difficulty. Workers who sought to organize a union were confronted with the threat of economic reprisals by their employer. An employer could, with impunity, refuse to employ unionists, negotiate with the union, or abide by any undertakings given to the union. If the employer chose to dismiss unionists or to refuse to recognize a union, the union could attempt to call a strike or impose other economic sanctions, but the employer could then seek relief in the civil or criminal court and be reasonably confident of success. Thus, the freedom to associate for the purpose of forming a union, which was notionally a lawful activity, amounted in practical terms "to no more than the freedom to suffer serious adverse legal and economic consequences."[60]

63. The widespread introduction of labour relations legislation in Canada in the 1940s, including the introduction in Ontario, was an acknowledgement by law makers that

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[59] First Affidavit of Prof. Fudge, paras. 75, 77, Record, pages 52 - 53.

[60] First Affidavit of Prof. Fudge, paras. 78 and 79, Record, page 53.

legislation was necessary to enable workers' freedom of association. Indeed, one of the key features of the legislation was the prohibition against "unfair labour practices" that interfered with the ability of workers to form and participate in a union. This statutory feature remains the cornerstone of freedom of association for workers across Canada today.[61]

64. It is widely recognized that a statutory labour relations system is especially critical for the freedom of association of workers who reside on their employer's premises — a characteristic of many agricultural workers. Labour relations legislation, including the *OLRA*, has created a special right of access for union organizers to assist such workers in forming unions. Without this protection, union organizers face legal impediments in reaching workers who reside on employers' premises. Owners of private property have the exclusive right to decide who has access to their property, absent a competing statutory right.[62]

65. The exclusion of workers from a statutory labour relations system also denies them protection from legal liability under common law restrictions on " combinations" and " restraints of trade". Absent a statutory prohibition, employers may now, with impunity, discharge agricultural workers for union activity. Further, striking agricultural workers can be sued by their employers for the value of lost production or for any perceived harm caused by picketing.

66. The lack of a protective legislative regime for agricultural workers has the known effect of creating a barrier to their freedom to associate and to act collectively.[63] The historical record confirms this understanding in the agricultural sector. Prior to the enactment of the *ALRA*, there had never been an agricultural workers' union in Ontario. The repeal of the *ALRA* and the specific exclusion of agricultural workers from the Ontario's labour relations system was *ipso facto* a ban against the association of agricultural workers.

67. Cementing this interpretation are the multiple statements issued by responsible members of the Government of Ontario, and the Government itself, that the purpose of the impugned provisions of the *LRESSLA* was to prevent the "unionization" of agricultural workers.

68. The Government of Ontario used plain language to signify its plain intention. It made no pretence that agricultural workers could form or remain in the unions in the absence of the *ALRA* or general inclusion in the *OLRA*. Despite the fact that there was no *de jure* bar to agricultural workers forming or maintaining a union, there was a practical bar. As the

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[61] First Affidavit of Prof. Fudge, paras. 80-81, Record, pages 54 - 55.

[62] First Affidavit of Prof. Fudge, paras. 82-83, Record, pages 55 - 56; *Cadillac Fairview Corp. v. RWDSU* (1989), 64 D.L.R. (4th) 267 (Ont. C.A.); *Russo v. Ont. Jockey Club* (1987), 62 O.R. (2d) 731 (H.C.J.); and *Harrison v. Carswell*, [1976] 2 S.C.R. 200.

[63] First Affidavit of Prof. Fudge, para. 83, Record, pages 55 - 56.

Government said in its media kit about the single agricultural workers' union then in existence: " Upon repeal of Bill 91, the workers in this bargaining unit will cease to be represented by the union." The Government of Ontario recognized that absent inclusion in a labour relations system, there was no chance at all that agricultural workers could unionize.

69. Finally, Ontario's objective is confirmed in the affidavits of the Government's expert witnesses, George Brinkman and Ron Saunders. They make extended arguments that unionization of agricultural workers is incompatible with the nature of work in the agricultural sector. Prof. Brinkman's central argument is that "the most important reasons for the exclusion of hired agricultural workers from the *OLRA* are related to the biological nature of production and the importance of timing and flexibility in farming. ... If the operation is jeopardized at any point in this continuous process, the farmer could obtain lower yields and/or poorer quality product, or even lose its crop entirely". Their arguments make clear that the Government and the agricultural industry fear unionization *per se*, not just the associational activity of collective bargaining.[64]

70. Accordingly, Sharpe J.'s rationale for rejecting the Appellants' purpose-based challenge under s. 2(d) was flawed:

> "[I]t is difficult, in my view to discern a governmental purpose to deny agricultural workers the right to form an association. The substantive issue of concern to both the applicants and to the legislature is plainly the right to engage in collective bargaining. There can be no doubt that the purpose of *LRESLAA* is to deny agricultural workers that right, which, as already noted, does not enjoy constitutional protection. The legislation says nothing about the right to form a trade union, and as will be seen, the real complaint of the applicants is the failure of the legislature to deal with certain matters they claim are essential to create the conditions necessary to form a trade union. I find it impossible to read into that failure a legislative purpose actively to deny the right of agricultural workers to form an association."[65]

71. Respectfully, Sharpe J. mischaracterized the Appellants' case and analyzed it selectively. He failed to read the language of the impugned provisions in their entire context. He failed to characterize the impugned legislation in light of circumstances existing at the time of its enactment and in view of the perspective of the legislator. He failed to analyze the

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[64] Affidavits of George Brinkman and Ron Saunders sworn August 18, 1997, Record, pages 282 and 325.

[65] Reasons for Judgment of Sharpe J., Record, page 467.

legislation's underlying purpose by reference to its obvious, practical effect.

72. The Appellants deny that *"the* substantive issue of concern" to them "is plainly the right to engage in collective bargaining." First and foremost, agricultural workers simply wish to unionize. Further, as outlined above, unionization in the agricultural sector was the primary concern of the Government of Ontario. Sharpe J.'s restricted vision of the purpose of labour law and labour unions contradicts the regular scope of union activity in Canada.

73. Workers desire unionization for a multitude of purposes related to their empowerment and participation in both the workplace and society at large. In the workplace, unionization introduces a form of political democracy: it promotes autonomy, self-determination and the 'rule of law'. It protects employees from the abuse of managerial power, thereby enhancing the dignity of workers as people.[66] In society at large, unionization plays an equally dignifying role. This is particularly true for disadvantaged groups, such as agricultural workers. Trade unions fulfill important social, political and charitable functions. Unions enable workers to pool resources in order to obtain comparable information to that of employers and other large societal entities. They enable workers to express themselves cogently and forcefully, and through such expression " to stand up to the institutionalized forces that surround" them. Unions give workers access to courts. Many significant constitutional challenges on behalf of workers would never have been brought without the assistance of unions. Unions engage in political education and action. Indeed, unions enable concerted action on important societal matters through such mechanisms as consumer boycotts, public marches and peaceful secondary picketing. Through unions, workers have gained influence in public policy and political matters.[67] Protest against governments in Canada has frequently taken the form of a withdrawal of labour. In 1983, for example, B.C. unions withdrew their labour under the umbrella of Operation Solidarity to protect against the Social Credit government's budget, which they alleged constituted a "direct attack on the areas of labour and social rights and welfare-related services." More recently, Ontario workers, led by the largest unions in the province, engaged in rotating " Days of Action" where workers withdrew their services in different communities around the province to protest against the government's policies.[68] In short, unions make it feasible for workers to pursue common goals and to overcome individual vulnerability that would otherwise be unachievable.[69]

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[66] P. Weiler, *Reconcilable Differences* (Carswell, 1980) at 31-32.

[67] See generally *Lavigne v. OPSEU*, [1991] 2 S.C.R. 569 concerning union spending for political purposes and, for a recent example of union political action, see *Ont. (A-G) v. Ontario Teachers Federation* (1997), 36 O.R. (3d) 367 (Gen.Div.) relating to a political protest by Ontario teachers about changes to the education system.

[68] David Wright, "Unions and Political Action: Labour Law, Union Purposes and Democracy" (1998), 24 Queen's L.J. 1 at paras. 10 and 11.

[69] Neilson, *supra*, at 256; *Alberta Ref., supra*, at 368; H.W. Arthurs, *supra*, at 46-48; and see generally First Affidavit of Prof. Fudge, Record, page 24.

74. This wider ambit of union purposes and activities was tacitly acknowledged by the breadth of the Government of Ontario's actions. If, as Sharpe J. found, the Government's purpose was only to deny agricultural workers the ability to bargain collectively, then the legislative provisions would not have been so comprehensive in their destruction of agricultural labour relations. It would not have repealed all of the *ALRA*'s provisions, including those that afforded agricultural workers the bare capacity to form unions. It would not have repealed, for instance, the provisions that gave union organizers access to private property or the provisions prohibiting employers from firing agricultural workers for union activity.

(c) Even if the purpose of the impugned legislation is construed as constitutionally benign, the practical effect is to prevent the formation and maintenance of associations of agricultural workers in violation of s. 2(d) of the Charter.

75. As set out above, the consequence of the impugned provisions of the *LRESLAA* is to limit the ability of agricultural workers to form and maintain associations.

76. Sharpe J. did not dispute this factual proposition (nor did the Respondents). Instead, he utilized s. 32 and *Dolphin Delivery*[70] to deny the Appellants' effects-based challenge under s. 2(d). He held that the Ontario Government could not be held accountable under the *Charter* because the impact on agricultural workers was not a direct product of government action:

> "In my view, based upon the current state of the law as elaborated in *Dolphin Delivery*, the fact that the efforts of agricultural workers to form trade unions will be resisted or undermined by employers' private economic power or by the assertion of their common law rights does not give rise to a *Charter* claim. On the applicants' argument it is private power, not the state, that impedes the formation of unions by these workers, and *Dolphin Delivery* held that the *Charter* does not reach the exercise of private power nor the exercise of common law rights by non-governmental parties."[71]

77. Sharpe J. buttressed this point by finding that the s. 2(d) challenge was tantamount to seeking to impose positive obligations on government:

> "What the applicants seek to do is to impose upon the province a positive duty to enhance the right of freedom of association by creating in their favour a legislative scheme conducive to the enjoyment of that important right...The Supreme Court of

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[70] *RWDSU v. Dolphin Delivery Ltd*, [1986] 2 S.C.R. 573.

[71] Reasons for Judgment of Sharp J., Record, page 481.

> Canada has left open the possibility that in certain circumstances, positive government action may be required in order to make negative freedoms meaningful: *Haig v Canada* (1993), 105 DLR (4th) 577 at 607; *Native Women's Assn. of Can. v Canada* (1994), 119 D.L.R. (4th) 224 at 245. In both cases, however, the Court rejected the argument advanced by the applicants in this case, namely, that by "dipping its toe in water", and affording or enhancing the rights of some, the government was obliged to go all the way and ensure the enjoyment of rights by all.[72]

78. With respect, Sharpe J. misapplied the government action doctrine. His holding considerably narrows the scope of reviewable government action under s. 32 of the *Charter*. *Dolphin Delivery* held that the inquiry into whether there is reviewable government action under s. 32 is a straightforward search into whether there is a legislative or other government action related to a violation of a *Charter* right. The circumstances of the present case squarely fit this model of cause and effect. As of June 1994, agricultural workers enjoyed the capacity to form and participate in labour unions. The Appellants and certain other individual agricultural workers utilized this new capacity to join together to form the first agricultural workers' union in Ontario. Subsequently, the Government of Ontario enacted the impugned provisions of the *LRESLAA*, which resulted in the destruction of the sole agricultural workers' union in the province, and the imposition of a barrier limiting the ability of the Appellants and agricultural workers generally to form and participate in unions. In other words, but for the Government of Ontario's legislative action in the fall of 1995, agricultural workers would now enjoy the freedom to associate.

79. Sharpe J.'s analysis injects a new element into the s. 32 test, at least in relation to the fundamental freedoms. It is not enough that government action limits the enjoyment of guaranteed constitutional rights in order to justify scrutiny by the court under the *Charter*. Applicants must demonstrate that this government-induced impact is experienced independent of the private sector's influence.

80. This Court has recently cautioned against attempts to contort the meaning of s. 32 to limit the application of the *Charter*. It has advocated instead a simple threshold determination of whether any governmental conduct is implicated in the purported unconstitutional effect in question. In *Vriend*, the majority stressed that " [u]ndue emphasis should not be placed on the threshold test since this could result in effectively and unnecessarily removing significant matters from a full *Charter* analysis."[73]

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[72] Reasons for Judgment of Sharp J., Record, page 481.

[73] *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 52.

81. The fact that the barrier to freedom of association created by the *LRESSLA* employs private power, does not remove the legislation from the purview of government action. The Government is still implicated in the result: it is simply a partner with the private sector in the deed. Indirect coercion by legislation which triggers, encourages, enables or orchestrates a limitation of *Charter* rights *prima facie* infringes the *Charter*.

82. For example, in *Edwards Books,* Ontario's *Retail Business Holidays Act* was challenged. The Act prohibited retail stores from opening on Sunday. This Court held that the law infringed s. 2(a) of the *Charter* because its indirect effect was to impose an economic (i.e., privately generated) burden on those retailers who observed a sabbath on a day other than Sunday. That effect created "competitive pressures" to abandon non-Sunday Sabbath, which constituted a violation of freedom of religion. Clearly, the direct cause of the "competitive pressures" were competing businesses, i.e. private actors, operated by Christians or others who did not observe a non-Sunday Sabbath. Nonetheless, this Court was content that the legislation was responsible for this result. Dickson C.J.C. said:

> "The first question is whether indirect burdens on religious practice are prohibited by the constitutional guarantee of freedom of religion. In my opinion indirect coercion by the state is comprehended within the evils from which s. 2(a) may afford protection. The Court said as much in the *Big M Drug Mart Ltd.* case[.]...It matters not, I believe, whether a coercive burden is direct or indirect, intentional or unintentional, foreseeable or unforeseeable. All coercive burdens on the exercise of religious beliefs are potentially within the ambit of s. 2(a)."[74]

83. **The indirect** infringement of *Charter* freedoms by government action was also dealt with in *Big M*:

> "Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others."[75]

84. The *LRESLAA* is a form of control exerted by the Government over agricultural workers. Just as the Ministers of Labour and Agriculture each said, *the Act* prevents unionization in the agricultural sector. This cause and effect relationship is all that is necessary to engage the *Charter*.[76]

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[74] *R. v. Edwards Books and Art*, [1986] 2 S.C.R. 713, at 758.

[75] *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, at 336-37.

[76] *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493, at para. 52.

85. While this Court has recognized a distinction between positive and negative freedoms, Sharpe J. employed the distinction too mechanically, without sensitivity to the context within which the government action took place.

86. One of the precepts of modern constitutional analysis is that "[c]ontext is important... A sign that says 'men only' looks very different on a bathroom door than a courthouse door."[77] Context explains whether an action is benign or invidious; neutral or offensive. In certain contexts, an omission to act is tantamount to a positive act. At the very least, a realistic analysis of government action must be employed to do justice to the *Charter* guarantees.

87. Professor Timothy Macklem has underlined this distinction using examples from everyday experience to show that some failures to act can be acts in their own right:

> "If I run into a colleague on the street and fail to offer my hand or say hello I do not simply fail to act, as I would have if I had failed to telephone that colleague. On the contrary, my failure to engage in the social expected greeting amounts to an act of rudeness, as my failure to telephone would not, unless a of course a call had been promised. Similarly, we recognize that a failure to applaud a performance amounts to an act of criticism or censure; that a failure to defer to those in authority amounts to an act of disrespect, perhaps rebellion; that a failure to speak up for a friend amounts to an act of disloyalty. What these examples reveal is that social context affects the application of the distinction between acts and omissions."[78]

88. This court in *Vriend* dealt with the dangers of approaching issues of positive and negative obligations in a non-contextual manner. "[T]he language of s. 32 does not limit the application of the *Charter* merely to positive actions encroaching on rights or the excessive exercise of authority." Questions which raise issues of neutrality must be dealt with at the stage of rights analysis. Even a "legislature's silence" may not be "neutral". A circumstantial analysis must be undertaken. There is nothing in the *Charter* that says a "deliberate choice not

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[77] *Granovsky v. Canada (Min. of Employment and Immigration)*, [2000] S.C.J. No. 29, May 18, 2000 (Quicklaw) per Binnie J., at para. 59, quoting the dissent of Marshall J. in *City of Cleburne v. Cleburne Living Centre Inc.*, 473 U.S. 432 (1985) at 468-69.

[78] T. Macklem, *"Vriend v. Alberta: Making the Private Public* (1999), 44 McGill L.J. 197 at 229.

[79] *Vriend, supra*, paras. 50-66.

to legislate" should not be considered government action and thus open to *Charter* scrutiny.[79]

89. This Court has on other occasions expressed its reservations about a non-contextual, positive/negative approach to the fundamental freedoms.[80] Such an approach fails to capture the complexities of our modern legal order. Private action is often the product of legal rules. Modern economists and social scientists have long recognized that individuals' "preferences" or "choices" are endogenous to the background legal landscape. In other words, "voluntary" private actions can often be viewed as artifacts of a legal regime, and thus products of government action. Governments should not be able to immunize themselves from *Charter* scrutiny by choosing to affect fundamental freedoms through indirect rather than direct means. Wilson J. addressed this in the context of the application of the *Charter* to permissive legislation (a debate which mirrors this one):

> "[I]t must be recognized that if this Court were to hold without qualification that the *Charter* does not apply to permissive legislation, the door would surely be open to widespread abuse at the hands of government...As a general observation I would think that in each case all the circumstances would have to be carefully examined to determine whether government had significantly encouraged or supported the act which is called into question. Depending upon the context, the enactment of a permissive provision may indeed support a finding of governmental approval or encouragement of a particular activity sufficient to invoke the protective guarantees of the *Charter*."[81]

90. The present case lends itself to this realistic analysis. Given the historical and current context of agricultural labour relations, there can be no doubt that by passing the impugned provisions of the *LRESLAA*, the Government of Ontario is encouraging farmers to impede the freedom of association of agricultural workers. This action is not neutral. The Government is orchestrating a state of affairs. In all of the circumstances, the failure to include agricultural workers in the province's labour relations scheme is not simply a failure to extend protection for the freedom of association: it is an overt denial of the freedom.

91. This analysis coheres with decided s. 32 methodology. In like terms, this Court has held that the *Charter* applies to private entities that are in some way " controlled" by government or perform government functions, and that interpreting s. 32 in this manner "is entirely sensible from a practical perspective."[82]

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[79] *Vriend, supra*, paras. 50-66.

[80] See, for example, *Haig v. Canada*, [1993] 2 S.C.R. 995, 1039.

[81] *Lavigne, supra*, 247-48.

[82] *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844.

92. Finally, Sharpe J. stated that whether the government has legislated in the area and selectively enhanced the rights of some, is not relevant to the determination of the rights of others. This Court effecitvely disagreed in its pair of referendum decisions: *Haig* and *Libman*. In a nutshell, selective treatment under a legislative regime must be examined as part of the context to determine whether the government act in question was tantamount to a positive or neutral restriction of constitutional rights.

93. In *Haig*, this Court held that there is no constitutional right to participate in a referendum. Even though a referendum is a platform for expression, it is a statutorily created one. A government is under no constitutional obligation to extend this platform to anyone, let alone to everyone. Section 2(b) of the *Charter* does not impose upon government a positive obligation to consult its citizens through a referendum or to express their opinions in a referendum.[83] Subsequently, in *Libman*, an individual challenged certain provisions of the federal *Referendum Act*, which placed restrictions on the reimbursement of campaigning expenses as violating sections 2(b) and (d) of the *Charter*. In order to qualify for reimbursement of a wide variety of expenses, a person had to belong to one of the national committees recognized under the Act, or to a group affiliated with one. Notably, the effect of these provisions was not to bar expression or association. It was only to provide certain advantages to persons and groups who brought themselves within the requirements of the Act. Nevertheless, this Court held that the impugned provisions infringed the freedom of expression and association of a variety of persons who wished to participate in the referendum, but who could not or did not wish to affiliate themselves with the national committees, because the provisions effectively placed "restrictions" on such persons.[84] This Court construed the government's conduct in *Libman*, unlike its conduct in *Haig*, as tantamount to a positive restriction on fundamental freedoms, rather than neutral underinclusiveness.

(d) The agricultural workers' position under s. 2(d) accords with the purpose of the Charter and is not inconsistent with Delisle.

94. Respect for freedom of association requires that agricultural workers be included in some fashion in the *OLRA*'s regime. Their circumstances are unlike those of the RCMP members in *Delisle* who, as part of the public sector, retained the ability to invoke the *Charter* at any instance of direct interference by their employer with their freedom of

[83] *Haig v. Canada*, [1993] 2 S.C.R. 995 at 1040-41.

[84] *Libman v. Quebec (A-G)*, [1997] 3 S.C.R. 569 at paras. 34-37.

[85] *Delisle, supra*, at paras. 10, 32.

association.[85]

95. Unlike the situation in *Delisle*, the effect, if not the purpose, of the impugned legislation is to prevent agricultural workers from forming work related associations -- not just associations recognized under the *OLRA* -- but any association of agricultural workers.

96. Unlike members of the RCMP, agricultural workers as a group are socially, politically and economically disadvantaged. The ability to associate is essential to enable them to improve their working conditions and social status, to express themselves in the political forum, and to participate equally and fully in Canadian society.

97. The Appellants' position harmonizes with the " commitment to social justice and equality" that underlies s. 2(d) of the *Charter*.[86]

98. Finally, the interpretation advanced by the agricultural workers is consistent with the values and principles of relevant international human rights law.[87] These values and principles support full, government enforced freedom of association, and especially disdain the discriminatory failure to guarantee agricultural workers and other disadvantaged groups freedom of association.[88]

99. Recently, the Canadian Labour Congress submitted a complaint to the I.L.O. concerning the enactment of the *LRESSLA*. The complaint alleged that the exclusion from Ontario's labour relation's system of agricultural workers, domestic workers and other groups violated international standards and principles concerning freedom of association and collective bargaining. The Government of Ontario filed materials in reply. The complaint was upheld by the I.L.O.'s Freedom of Association Committee. The Committee said:

> " The Committee would recall in this respect the need to ensure by specific provisions accompanied by civil remedies and sufficiently dissuasive sanctions the protection of workers against acts of anti-union discrimination at the hands of the employer.
>
> The Committee therefore considers that the absence of any statutory machinery for the promotion of collective bargaining and the lack of specific protective measures against anti-union discrimination and employer interference in trade union activities constitutes an impediment to one of the principle objectives of the guarantee of

[85] *Delisle, supra*, at paras. 10, 32.

[86] *Oakes, supra*, at 136.

[87] *Baker v. Canada (Min. of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 69-71.

[88] I.L.O. Convention 11, *supra*.

[89] I.L.O. Case No. 1900, *Complaint against the Government of Canada (Ontario)* presented by the Canadian Labour Congress, at paras. 186 - 187.

freedom of association, that is the forming of independent organizations . . ."[89]

(2) Section 15 of the Charter — Section 80 of the LRESLAA and section 3(b) of Sch. A of the LRESLAA limit agricultural workers' equality rights.

100. Sopinka J.'s statement in *PIPS* frames the Appellants' s. 15(1) challenge:

> "It seems obvious . . . that a government could not grant collective bargaining rights that would contravene the equality rights guarantees contained in s. 15(1) of the *Charter*."[90]

101. The inquiry into whether legislation violates s. 15(1) involves three broad stages of analysis:

(a) *Differential Treatment* — Do the impugned legislative provisions (a) draw a formal distinction between the claimants and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimants' already disadvantaged positions within Canadian society, resulting in substantially differential treatment between the claimants and others on the basis of one or more personal characteristics?

(b) *Grounds* — Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

(c) *Discrimination* — Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimants in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the claimants are less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration?[91]

102. This three-stage inquiry is not to be undertaken according to a fixed formula or rigid test. Rather, s. 15(1) is to be interpreted and applied in a purposive and contextual manner, to avoid the pitfalls of a formalistic approach, and thereby fulfill the central purpose of the guarantee in s. 15(1): protection against the violation of essential human dignity.[92] The court

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[89] I.L.O. Case No. 1900, *Complaint against the Government of Canada (Ontario)* presented by the Canadian Labour Congress, at paras. 186 - 187.

[90] *PIPS, supra*, at 408.

[91] *Law v. Canada (Min. of Employment and Immigration)*, [1999] 1 S.C.R. 497, para. 88; see also *Corbiere v. Canada (Min. of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 55.

[92] *Lovelace v. Ontario*, [2000] S.C.J. No. 36 (Q.L.), at para. 54.

must examine the legislative, historical and social context of the distinction and the reality and experience of the individuals affected by it.[93]

(a) First Stage Analysis – Differential Treatment:
In excluding agricultural workers from Ontario's labour relations system, the impugned legislation draws a formal distinction between the Appellants and others based on the personal characteristic of being an agricultural worker, depriving the Appellants of equal benefit of the law.

103. There has been no issue taken at this first stage of the equality analysis in the courts below, at least with respect to the issue of "differential treatment". By denying agricultural workers access to Ontario's labour relations system, the impugned legislative provisions draw a formal distinction between agricultural workers and virtually all other workers in the province, based on the characteristic of being an agricultural worker. As Sharpe J. said:

> "It is clear that agricultural workers have been denied a legal benefit or protection enjoyed by other workers, namely the right to engage in collective bargaining...The central issue to be resolved is whether their exclusion from the collective bargaining regime constitutes discrimination on an 'analogous ground'."[94]

(b) Second Stage Analysis – Analogous Grounds:
Agricultural labour constitutes an analogous ground of discriminatory treatment.

104. The "enumerated" and "analogous" grounds under s. 15(1) of the *Charter* identify types of decisions or actions that are constitutionally suspect because they often lead to discrimination and denial of substantive equality. They function as "jurisprudential markers" for suspect distinctions.[95]

105. The fundamental consideration at the second stage, if the ground is not enumerated or already recognized as analogous, is whether recognition of the basis of differential treatment as an analogous ground would prevent the violation of essential human dignity.[96]

106. Social inequality is created and reinforced by certain dominating images. The

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[93] *Ibid, Corbiere*, at para. 56.
[94] Reasons for Judgment of Sharp J., *supra*, at 209.
[95] *Corbiere, supra*, at paras. 7-11.
[96] *Corbiere, supra*, at para. 58.

enumerated grounds and the analogous grounds identified to date generally reflect invidious metaphors or narrative structures that harbour ascriptive characteristics. These socially defined differences have little to do with merit, but influence society's general perception because of differential access to the means or sources of power in society.

107. Exclusion based on these invidious metaphors reinforces their power and ostensibly validates the messages of inequality that they communicate. The enumerated and analogous grounds can be viewed to some degree as "attitudinal engines" that propel social inequality.

108. The enumerated and analogous grounds are not limited to focal points for stereotyping:

> "[I]t is not only through the 'stereotypical application of presumed group or personal characteristics' that discrimination can occur, although this may be common to many instances of discrimination. As stated by Sopinka J. in *Eaton* v. *Brant County Board of Education*, [1997] 1 S.C.R. 241, at paras. 66-67:
>
> > [T]he purpose of s. 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons.
> >
> > The principal object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex... The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them."[97]

109. This conceptual structure aligns with the classic sociological understanding of inequality in Canada as a "vertical mosaic", which conceives of inequality primarily in terms of the relative control that different groups are able to acquire within the country's economic, social and political power structures.[98]

110. Various indicators have emerged from s. 15(1)'s recognized purpose to help identify whether the basis for differential treatment at issue is a suspect marker, and therefore an analogous ground. This Court has stated unequivocally that no single indicator is essential to the determination, and that the indicators identified to date are not exhaustive.[99] The main indicators identified to date focus on the nature of the group drawn by the distinction at issue.

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[97] *Vriend, supra*, at para. 72.

[98] See generally J. Porter, *The Vertical Mosaic: An Analysis of Social Class and Power in Canada*, (University of Toronto Press, 1965).

[99] *Miron v. Trudel*, [1995] 2 S.C.R. 418.

They include:

- distinguishing personal characteristic as a matter of "defining importance" to individuals"[100], linking them as members of a group;[101]
- historic vulnerability to political and social prejudice;[102]
- lack of political power;[103]
- social and economic disadvantage;[104]
- lack of full control over personal characteristic; or "immutability" of personal characteristic; or personal characteristic changeable at great cost to personal identity; (e.g. religion or citizenship);[105]
- composed, to a significant degree, of groups defined by enumerated grounds;[106]
- personal characteristic serving as the basis for stereotypical decisions made not on the basis of merit; and
- legislative/judicial recognition; consensus of legislatures or other official bodies in broader society that a group deserves protection.[107]

111. The Appellants demonstrated that agricultural workers possess a myriad of these indicators. They established that agricultural workers have historically been subjected to social, economic and political disadvantage; that agricultural workers remain disadvantaged in Canadian society; that the group "agricultural workers" is made up, to a significant degree, of groups defined by enumerated grounds such as women, young people, and individuals defined by race and national or ethnic origin; that "agricultural work" or the status of being an agricultural worker has served as the basis for stereotypical decisions made not on the basis of merit; that a consensus exists in broader Canadian and international society that agricultural workers need and deserve labour relations protection; that agricultural workers lack political

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[100] *Ibid*, at para. 146.

[101] *Mirhadizadeh v. Ontario* (1989), 69 O.R. (2d) 422 (C.A.) at 426.

[102] *Turpin, supra*, at 1333; *Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 172.

[103] *Andrews v. Law Society (B.C.)*, [1989] 1 S.C.R. 143, at 151, 195.

[104] *R. v. Turpin*, [1989] 1 S.C.R. 1296, at 1333; *Miron, supra*, at para. 147.

[105] *Andrews v. Law Society (B.C.)*, [1989] 1 S.C.R. at 195; *Miron, supra*, at paras. 153.

[106] *Dartmouth/Halifax County Reg. Housing Auth. v. Sparks* (1993), 101 D.L.R. (4th) 224 (N.S.C.A.).

[107] *Egan v. Canada*, [1995] 2 S.C.R. 513, at 602; *Miron, supra*, at para. 148.

power; and that the status of being an "agricultural worker" links and defines the members of this group in a unique and pejorative way.

112. As discussed in Part I of this factum, there is a strong consensus among Canadian legislatures, official bodies, and the academic community that agricultural workers as a group should not suffer discrimination. Moreover, the international community supports such protection as demonstrated by I.L.O. *Convention 11 Concerning the Rights of Association and Combination of Agricultural Workers* which provides that each ratifying state "undertakes to secure to all of those engaged in agriculture the same rights of association and combination as to industrial workers, and to repeal any statutory or other provision restricting such rights in the case of those engaged in agriculture." The failure of Ontario and Alberta to extend associational rights to agricultural workers has meant that the Canadian government has felt incapable of undertaking Convention 11's obligations.[108]

113. However, Canada did ratify I.L.O. *Convention 87 Concerning Freedom of Association and Protection of the Right to Organise* which provides, in part:

> *Article 1* - Each Member of the International Labour Organization for which this Convention is in force undertakes to give effect to the following provisions.
>
> *Article 2* - Workers and employers, **without distinction** whatsoever, shall have the right to establish and . . . join the organizations of their own choosing[.]
>
> *Article 8* - . . . 2. The law of the land shall not be such as to impair, nor shall it be so applied to impair, the guarantees provided for in this Convention.
>
> *Article 11* - Each member of the International Labour Organization for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organize.[109]

114. The two international human rights covenants to which Canada is a signatory, the *UN International Covenant on Economic, Social and Cultural Rights* [110]and the *UN International Covenant on Civil and Political Rights*,[111] require parties to undertake to ensure the right of everyone to form and join unions and prohibit the placing of restrictions on this right, except " those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedom of others", noting that this limitation on the right is not to be interpreted as vitiating the guarantees of

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[108] First Affidavit of Prof. Fudge, para. 71; Record, pages 50 -51.

[109] First Affidavit of Prof. Fudge, para. 72. Record, page 51.

[110] G.A. Res. 220 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966).

[111] G.A. Res. 220 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.No. Doc. A/6316 (1966).

I.L.O. Convention 87.

115. In rejecting the Applicants' s. 15(1) challenge, Sharpe J. generally accepted their evidence but focussed his analysis narrowly on the determination of whether agricultural workers could be identified as a group by any "personal trait", and whether the legislative distinction at issue was the product of stereotypical assumptions:

> ". . . 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. . . . 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."[112]

116. Given the focus of the *Charter* and s. 15 on the protection of human dignity, there is no reason in principal why an occupational status cannot, in the right circumstances, identify a protected group. This Court has recognized that work occupies a central role in modern society. Not only does it provide individuals with a means of survival, but it constitutes for many, a primary constituent of how they interact in society generally. Work is an essential component of individual identity, self-worth and emotional well-being. Thus, the conditions in which an individual works "are highly significant in shaping the whole compendium of a person's dignity and self-respect".[113]

117. Although presented with the opportunity to do so on a number of occasions, this Court has never declared categorically that a ground of differential treatment based on an occupational status may not be subject to scrutiny under s. 15(1). In *Genereux*, a case which involved a claim of discrimination on the basis of military employment, Lamer C.J.C. stated on behalf of the majority:

> "For the purposes of this appeal, the appellant cannot be said to belong to a category of person enumerated in section 15(1), or one analogous thereto.

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[112] Reasons for Judgment of Sharp J., Record, page 490.

[113] *Alberta Reference, supra*, at 368; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986.

> I emphasize, however, that my conclusion here is confined to the context of this appeal. I do not wish to suggest that military personnel can *never* be the objects of disadvantage or discrimination in a manner that could bring them within the meaning of s. 15 of the *Charter*. Certainly it is the case, for instance, that after a period of massive demobilization at the end of hostilities, returning military personnel may well suffer from disadvantages and discrimination peculiar to their status, and I do not preclude that members of the armed forces might constitute a class of persons analogous to those enumerated in s. 15(1) under those circumstances."[114]

118. As Lamer C.J.C.'s statement indicates, one of the key questions in assessing whether a group can be identified for s. 15 purposes is whether there is a sufficient nexus between the identifying trait and the indicators of protected grounds as determined by this Court, most importantly a history of political, social and economic disadvantage experienced by virtue of being a member of the group so identified. In the right circumstances, occupational status may constitute such an identifying feature and therefore an analogous ground under s. 15(1).

119. This Court's jurisprudence demonstrates that heterogeneity is not a bar to protection under s. 15 of the *Charter*. Agricultural workers are no more heterogenous than women, married persons, non-citizens or other groups defined by the enumerated grounds and those analogous grounds identified to date. Indeed, in looking at the relative heterogeneity and the consistency and totality of disadvantage experienced by members of the groups within the political, social and legal context, it is agricultural workers that much more strongly deserve the imprimatur of a "group".

120. *Corbiere* answers Sharpe J.'s concern about declaring one kind of occupational status to constitute an analogous ground, when occupational status generally, and specific broad occupations, have been held not to constitute an analogous ground. This Court decided in *Turpin* that province of residence did not constitute an analogous ground. Nonetheless, this Court held in *Corbiere* that "Aboriginality-residence" or "off-reserve" status does constitute an analogous ground.

121. With respect, Sharpe J. failed to recognize that the treatment of agricultural workers in Canadian society stems in part from the imposition of stereotypical attributes. These stereotypes are reflected in the evidence of the Government's expert witnesses that if agricultural workers were empowered to associate in unions and to bargain and express themselves collectively, they would behave irrationally and destroy the agricultural sector. This attitude treats agricultural workers as if they would be incapable of acting responsibly

[114] *R v. Genereux*, [1992] 1 S.C.R. 259 at 310-311.

when given the capacity to act in association with one another; that they are mentally inferior and not worthy of full participation in Canadian society. The assumptions and preconceived notions underlying the exclusion of agricultural workers from labour relations legislation strike at the heart of human dignity. The exclusion says to agricultural workers that they are worthy of less consideration than other workers and of farmers.

122. The analogous grounds model is richer than that conceived by Sharpe J. It encompasses personal circumstances that can form the axis around which inequality coalesces. As this Court said in *Law*: "[H]uman dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits."[115]

123. With respect, Sharpe J. failed to consider the second dimension of the analogous grounds analysis, identified by Sopinka J. in *Eaton*, which extends the purview of recognized grounds beyond those that serve simply as focal points for stereotyping. Agricultural workers have been historically marginalized to such an extent in the social, economic and political spheres, that they are disabled from fully participating in Canadian life. The composite of characteristics shared by agricultural workers has resulted in them being singled out historically for differential treatment and the imposition of political and social prejudice. In his analysis, Sharpe J. too strongly dichotomized the modern notion of human rights embodied in the *Charter* with " economic rights". " Human rights" were historically equated with traditional natural law concepts, and preoccupied with civil and political liberties. As such, human rights did not traditionally encompass " economic rights", which tend to be more context specific, and thus not "innate." Modern legal realism and the secularizing of law has shifted the focus from the natural rights tradition, to the question of social justice and the study of the actual position of people in society. The modern conception of human rights, stresses dignity and equality and has moved towards encompassing their necessary pre-conditions. Under the modern conception, human rights provide the infrastructure necessary to lead an equal, dignified life. And it is widely recognized in the social sciences as well as the legal spheres, that a dignified life is inextricably linked to economic and social considerations, and access to power.[116]

124. Recently, the integration of economic and social rights in contemporary human rights was strongly endorsed by the panel appointed by the Minister of Justice to review the *Canadian Human Rights Act,* headed by the Hon. G. La Forest (the "Panel"). In its report

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[115] *Law, supra,* at para. 53.

[116] See generally, R.J. Vincent, *Human Rights and International Relations,* (Cambridge University Press, 1995) at 9-36.

[117] *Report of the Canadian Human Rights Act Review Panel - Promoting Equality: A New Vision,* (Department of Justice, 2000), Recommendation Nos. 124-129.

entitled "Promoting Equality: A New Vision", the Panel recommended that "social condition" be added to the prohibited grounds for discrimination listed in the Act.[117]

125. The Panel cited the position put forward by the Canadian Association of the Non-Employed:

> "[T]he international community has recognized for some time that human rights are indivisible and that social and economic rights cannot be separated from political, legal and equality rights, and that it is time for Canada to also recognize poverty as a human rights issue."[118]

126. The Panel wrote:

> "Our research papers and the submissions we received provided us with ample evidence of widespread discrimination based on characteristics related to social conditions such as poverty, low education, homelessness and illiteracy. We believe there is a need to protect people who are poor from discrimination."[119]

127. In support of its recommendation, the Panel performed an analysis of whether a ground of "social condition" was similar to other grounds included in the *CHRA*, and, by extension, to the enumerated grounds in the *Charter* (which substantially overlap those in the *CHRA*.) The analysis was based on the current test for analogous grounds under the *Charter*. In concluding that social condition met the test for an analogous ground under the *Charter*, the Panel noted:

> "The Panel can hardly dispute the fact that characteristics such as poverty and a low level of education have historically been associated with patterns of disadvantage.
>
> . . . .
>
> Research done for the Panel shows that poverty is immutable in the sense that it is beyond the control of most poor, at least over considerable periods of their lives. There is evidence that poverty is inherited because individuals whose parents were poor are more likely to live in poverty."[120]

128. Canadian Courts and academics have recently recognized that s. 15 must be flexible

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[117] *Report of the Canadian Human Rights Act Review Panel - Promoting Equality: A New Vision*, (Department of Justice, 2000), Recommendation Nos. 124-129.

[118] *Ibid*, at section (f), p. 4.

[119] *Ibid.*

[120] *Ibid.*

enough to address inequality which is the product of complex social identities and intersecting characteristics of disadvantage. For example, the Nova Scotia Court of Appeal held in *Sparks*[121] that "public housing tenants" were a protected group under Section 15 of the *Charter*, relying on evidence that this relatively heterogeneous group included individuals identified by recognized grounds of discrimination such as race and sex, as well as previously unrecognized grounds such as income.

129. Owing in part to the number of migrant workers, agricultural workers as a group are in large measure defined by and perceived to possess ascriptive characteristics associated with the enumerated grounds of race, national or ethnic origin and colour.

(c) Third stage analysis — Discrimination:
The exclusion of agricultural workers discriminates by withholding a benefit in a manner which reflects the stereotypical application of presumed group or personal characteristics, and which otherwise has the effect of perpetuating the view that agricultural workers are less worthy of recognition or value as human beings and as members of Canadian society.

130. At this stage, the analysis shifts to the present. "Does the distinction undermine the presumption upon which the guarantee of equality is based — that each individual is deemed to be of equal worth regardless of the group to which he or she belongs?" [122] The Court must evaluate the impugned legislation by considering its application from the perception of the claimant. Three of the four *Law* factors are applicable in the present case: pre-existing disadvantage, correspondence, and importance of affected interest.

131. The basis for finding that agricultural work constitutes an analogous ground largely furnishes a positive answer to this stage of analysis.

132. The exclusion of agricultural workers from Ontario's labour relations system perpetuates the historic disadvantages experienced by them in Canadian society. It takes away from them some of the primary means available to other Canadians to improve their social, economic and political conditions: the freedom to associate in labour unions and collectively bargain with their employers. More than most other groups in society, agricultural workers need the ability to unionize and collectively bargain. The impugned provisions effectively sentence agricultural workers to continued marginalization in Canadian society. The differential treatment at issue perpetuates the view that agricultural workers are less capable

[121] N. Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity," (1993), 19 Queen's L.J. 179 at 181. See also *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 61.

[122] *Corbiere*, *supra*, para. 16.

and less deserving of consideration, and less worthy of recognition or value as human beings and as members of Canadian society.

(3) *Section One of the Charter — The limits on agricultural workers' freedom of association and equality rights are not demonstrably justified in a free and democratic society.*

133. If this Court determines that the purpose of the impugned provisions of the *LRESSLA* was to prevent the formation and existence of unions, there can be no recourse to s. 1 of the *Charter* to save the legislation. Legislation with an unconstitutional purpose cannot be justified under s. 1.[123]

134. On the other hand, if this Court finds that the Appellants have established a *prima facie* case of infringement of s. 2(d) or s. 15 due to the legislation's unconstitutional effects, the Appellants submit that the Government cannot meet its onus under s. 1 of the *Charter*.

135. Professor Judy Fudge, in her Second Affidavit, provides an exhaustive factual response to the Government's section one case. Accordingly, the Appellants' submissions in this section are brief.

136. Since *Oakes,*[124] courts have recognized that the application of its analytical work requires close attention to the context in which the impugned legislation operates. Where the legislation under consideration involves balancing competing interests in matters of social policy, the *Oakes* framework should be applied flexibly, not mechanically. However, while governments must be afforded latitude to determine the proper distribution of resources in society, courts should not defer to the legislature merely because an issue is a "social" one.[125]

(a) No Pressing and Substantial Objective and No Rational Connection to the Limitation.

137. The Government must prove that the objective of the specific limitation that infringes the *Charter* — and not the purpose of the entire statute — is pressing and substantial.[126] The

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[123] *Big M Drug Mart, supra* per Dickson, J. at 352-353 and per Wilson J. at 36 -362; *McKinney v. University of Guelph,* [1990] 3 S.C.R. 229 per La Forest J. at 302-303.

[124] *R. v. Oakes,* [1986] 1 S.C.R. 103.

[125] *Eldridge v. British Columbia (Attorney General),* [1997] 3 S.C.R. 624.

[126] *Vriend v. Alberta,* [1998] 1 S.C.R. 493, at 554-557.

scope of the objective should not be unduly broadened in order to insulate it from full s. 1 scrutiny.[127]

138. The objective for purposes of s. 1 analysis must be the objective that originally motivated the government action in question. The law does not permit an *ex post facto* analysis or recognize a doctrine of "shifting purpose."[128] The Ontario Government has asserted that its actions under the *LRESLAA* amount to no more than re-enacting the original exclusion of agricultural workers which the *ALRA* had remedied. If this submission is accepted, the applicable purpose is the Government's objective at the time the original exclusion was enacted.

139. The exclusion contained in the 1943 Act simply followed the approach taken in the U.S. *Wagner Act* which had excluded agricultural workers on racial grounds.[129] This purpose cannot be justified under s. 1.

140. However, the Government has submitted that its objectives in repealing the *ALRA* and enacting the *LRESLAA* were twofold: (1) to preserve the family farm as the dominant mode of farming in Ontario, and (2) to assist family farms to remain competitive in the global agricultural sector.

141. With respect to preserving family farms, the Government's evidence does not contain a definition or description of what is meant by a "family farm." Since the concept lacks definition, there is no evidence as to the number of such farms in Ontario and no evidence that the purported dominance of this model of farming would be substantially affected by unionization. There is no rational basis for denying legislative protections to employees in one category of family owned or operated businesses (i.e., farms) while family-run businesses of all sizes exist in many sectors where the *OLRA* governs labour relations.[130] In any event, the Government's witness states that to be viable in today's economy, a "family farm" must be a "sophisticated business unit with a minimum capital value of $500,000 to $1,000,000." Therefore, the legislation cannot be aimed at protecting" family farms" as small-scale operations in which a farmer and his or her family provide almost all of the labour. Instead, the legislation is aimed at protecting large agribusinesses.

142. The objective of assisting "family farms" to remain competitive suffers from a similar lack

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[127] *Vriend, supra,* at 555.

[128] *Big M, supra,* at 335 per Dickson C.J.C.

[129] First Affidavit of Prof. Judy Fudge, paras. 12-17, Record, pages 29 - 30.

[130] Second Affidavit of Prof. Judy Fudge, paras. 19-35 Record, pages 345 - 350. Prof. Fudge notes, for example, that family-owned businesses exist in the retail sales sector, ranging from an operation the size of Eatons to a small retail store operated by family members and one hired employee.

of evidentiary support. The Government has provided no evidence that the Ontario agricultural sector is in a fragile competitive position or that it is likely to be substantially affected by small changes in the cost and operating structure of Ontario farming.[131] Rather, Ontario's global competitiveness has improved in recent years, even encompassing the period during which the *ALRA* was in effect. Ontario's agricultural exports have increased at a faster rate than its agricultural imports.[132] The wealth of farm owners has increased substantially in the last three decades. Between 1971 and 1996, average farm equity, using 1996 constant dollars, increased by almost 100% from $251,000 to $480,000.[133] Furthermore, there is no evidence to show that unionization and collective bargaining negatively affect competitiveness. To the contrary, there is some indication that unionization may be efficiency-enhancing.[134]

143. To the extent that the Government points to the need for timely harvesting of crops and the care of living entities as characteristics of agriculture which make it unsuitable for unionization and collective bargaining, this rationale breaks down upon scrutiny. Other sectors whose workers are not excluded from labour relations legislation face serious concerns related to spoilation, care of living beings, time-sensitive processes and potentially devastating consequences of work stoppages. These sectors include steelwork, brewing, firefighting and health care.[135] Indeed, many of these unionized sectors cover timely matters dealing with the preservation of human life.

144. Finally, and perhaps most tellingly, all other provinces except Alberta, as well as the federal government, include agricultural workers in their labour relations legislation. Not only does this indicate that the purported objectives are not pressing and substantial, but also that they lack any rational connection to the impugned legislation. The Government has adduced no evidence to show that permitting unionization of agricultural workers in other jurisdictions has (a) harmed the family farm dynamic, or (b) rendered the sector uncompetitive.

(b) The objective could be satisfied through less intrusive means.

145. If the alleged objective is found to be pressing and substantial, it cannot satisfy the minimal impairment requirement of the test. Even where the legislation in question balances competing policy interests, this Court has made it clear that a government must do more than establish a reasonable basis for its action; it must show that the legislation impairs its citizens'

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[131] Second Affidavit of Prof. Judy Fudge, paras. 3-6. Record, pages 339 - 341; see also, First Affidavit of Prof. Judy Fudge, para. 26, Record, page 34.

[132] Cross-examination of George Brinkman, at q. 50-74, Record, pages 422 - 426.

[133] Cross-examination of George Brinkman, at q. 318-328, Record, pages 431 - 433.

[134] Second Affidavit of Prof. Judy Fudge, paras. 69-70, Record, page 360.

[135] Second Affidavit of Prof. Judy Fudge, paras. 7-18, Record, pages 341 - 345.

rights as little as possible to meet its objective. As La Forest J. wrote in *Eldridge*:

> " [T]he leeway to be granted to the state is not infinite. Governments must demonstrate that their actions infringe the rights in question no more than is reasonably necessary to achieve their goals."[136]

146. With respect to the Government's desire to protect "family farms", Professor David Beatty has called the blanket exclusion of all agricultural workers " the grossest kind of over-inclusion" which, in the name of protecting the family farm, infringes the rights of workers who work for larger commercial agricultural enterprises.[137]

147. Furthermore, the inclusion of agricultural workers in labour relations legislation need not be avoided on the ground that it would grant unfair bargaining power to workers in a fragile industry.[138] George Adams has noted that the spectre of significant economic loss on both sides of the bargaining table is common in many industries. However, insofar as the agricultural industry is uniquely vulnerable, these concerns could be addressed by adopting a " middle ground" such as dispute resolution by compulsory arbitration.[139]

148. The *ALRA* itself, which was enacted following a study of legislative treatment of agricultural workers in North America and extensive consultation with members of the agricultural sector, is an example of how the Government's objective could be advanced through less intrusive means. Key features of the *ALRA* included: significant protection for " family farms", a prohibition against strikes and lockouts, and a dispute-resolution process which provided conciliation and mediation services, as well as "final offer" arbitration when the parties could not resolve matters through negotiation.[140]

149. If the Government's purpose was only to deny agricultural workers the ability to bargain collectively and not the ability to form unions, then the impugned legislation is overly intrusive. The Government repealed the *ALRA* in its entirety, including those provisions that afforded agricultural workers the bare capacity to form unions. An approach carefully tailored to meet the Government's purported objective while preserving agricultural workers' rights

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[136] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at 686

[137] D. Beatty, *Putting the Charter to Work: Designing a Constitutional Labour Code* (McGill-Queen's, 1987), at 91-92. See also the Second Affidavit of Prof. Judy Fudge, paras. 19-35, Record, pages 345 - 350.

[138] See generally the Second Affidavit of Prof. Judy Fudge, Record, page 339.

[139] G. Adams, *Canadian Labour Law*, 2nd ed. (Canada Law Book, 1996), at 6-50.

[140] *ALRA, supra*, preamble and Parts III and V.

would have led the Government to retain, for instance, the provisions of the *ALRA* that gave union organizers access to private property or the provisions prohibiting employers from firing agricultural workers for union activity.

150. In short, the Government chose the most intrusive measure - a wholesale exclusion - in the face of other reasonable measures.

(c) The deleterious effects of the exclusion clearly outweigh any salutary effects.

151. The final stage of the proportionality analysis requires a balancing of the positive effects of the limitation on rights against the harmful effects of the infringement.[141]

152. The deleterious effects of the exclusion of agricultural workers from the *OLRA* are clear: they are deprived of access to unionization and collective bargaining which are fundamentally important in a free and democratic society to redress the balance of power between employers and vulnerable workers, and they are treated differently from other workers in a manner than strikes at the heart of their human dignity.

153. As set out above, the salutary effect of limiting the potentially harmful effects of unionization and collective bargaining on family farms and on the competitiveness of the agricultural industry could have been addressed through less intrusive measures. Therefore, it is not possible to say that the Government has struck an effective balance between these competing interests.

PART IV - ORDER REQUESTED

154. The Appellants request the following relief:

1. A declaration that s. 80 of the *LRESLAA* and s. 3(b) of Schedule A to the *LRESLAA* violate s. 2(d) of the *Charter*, are not saved by s. 1, and are therefore of no force or effect;

2. A declaration that s. 80 of the *LRESLAA* and s. 3(b) of Schedule A to the *LRESLAA* violate s. 15 of the *Charter*, are not saved by s. 1, and are therefore of no force or effect; and

3. Their costs in this Court and in the courts below.

NOTICE TO THE RESPONDENT: Pursuant to subsection 44(1) of the *Rules of the Supreme Court of Canada*, this appeal will be inscribed by the Registrar for hearing after the respondent's factum has been filed or on the expiration of the time period set out in paragraph 38(3)(b) of the said Rules, as the case may be.

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[141] *Libman, supra,* at para. 38; *Delisle, supra,* at para 148 per Cory and Iacobucci JJ.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Chris G. Paliare

Martin J. Doane

Table of Appellant's Authorities

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27.	*R. v. Edwards Books and Art*, [1986] 2 S.C.R. 713.	22
28.	*R. v. Genereux*, [1992] 1 S.C.R. 259.	32
29.	*R. v. Gladue*, [1999] 1 S.C.R. 688.	14
30.	*R. v. Morgentaler*, [1993] 3 S.C.R. 463.	15
31.	*R. v. Oakes*, [1986] 1 S.C.R. 103.	13, 26, 36
32.	*R. v. Turpin*, [1989] 1 S.C.R. 1296.	29
33.	*Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27.	14
34.	*Re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297.	14
35.	*Reference Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313.	13, 32
36.	*Russo v. Ont Jockey Club* (1987), 62 O.R. (2d) 731 (H.C.J.).	17
37.	*R.W.D.S.U. v. Dolphin Delivery Ltd*, [1986] 2 S.C.R. 573.	20
38.	*Saskatchewan v. R.W.D.S.U.*, [1987] 1 S.C.R. 460.	13
39.	*Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252.	15
40.	*Vriend v. Alberta*, [1998] 1 S.C.R. 493.	21, 22, 23, 28, 36
41.	*Wellington Mushroom Farm*, [1980] OLRB Rep. 813.	8

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No.	Article/Text	Page No.
42.	Adams G., *Canadian Labour Law*, 2nd ed. (Canada Law Book, 1996).	7, 8, 39
43.	Arthurs H.W. et al., *Labour Law and Industrial Relations in Canada* (Butterworths, 1993).	19
44.	Beatty D., *Putting the Charter to Work: Designing a Constitutional Labour Code* (McGill-Queen's, 1987).	8, 39
45.	Beatty D., "Shop Talk: Conversations About the Constitutionality of our Labour Law" (1989), 27 Osgoode Hall L.J. 381.	13
46.	Iyer, N., "Categorical Denials: Equality Rights and the Shaping of Social Identity," (1993), 19 Queen's L.J. 179 at 181.	35
47.	Linder M., "Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal" (1987), 65 Texas L.R. 1335.	6
48.	Macklem T., "*Vriend v. Alberta:* Making the Private Public (1999), 44 McGill L.J. 197.	23
49.	Neilson K. and Christie I., "The Agricultural Labourer in Canada: A Legal Point of View" (1975-76), 2 Dalhousie L.J. 330.	7, 19
50.	*Report of the Canadian Human Rights Act Review Panel - Promoting Equality: A New Vision*, (Department of Justice, 2000).	34
51.	Vincent R.J., *Human Rights and International Relations*, (Cambridge University Press, 1995)	33
52.	*Weiler P., Reconcilable Differences (Carswell, 1980).*	18
53.	*Wright D., "Unions and Political Action: Labour Law, Union Purposes and Democracy" (1998), 24 Queen's L.J. 1.*	19

Appendix

Legislative and Constitutional Documents

1. *An Act to Provide for Collective Bargaining,* S.O. 1943, c. 4.

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

3. *Canadian Charter of Rights and Freedoms,* Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), s. 1, 2 & 15.

4. *I.L.O. Convention 87 Concerning Freedom of Association and Protection of the Right to Organise,* 67 U.N.T.S. 17 (1948).

5. *I.L.O. Convention 11 Concerning the Rights of Association and Combination of Agricultural Workers,* 38 U.N.T.S. 153 (1921).

6. *Labour Relations and Employment Statute Law Amendment Act,* S.O. 1995, c. 1, s. 80, and Sch. A, s. 3(b).

7. *Labour Relations Act,* R.S.O. 1995, c. 1, Sch. A, s. 1-3.