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
(Applicants)

\- and –

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

Respondents
(Respondents)

\- and –

LABOUR ISSUES COORDINATING COMMITTEE,
ATTORNEY GENERAL OF ALBERTA,
ATTORNEY GENERAL OF QUEBEC and CANADIAN LABOUR CONGRESS

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PART I
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STATEMENT OF FACTS
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6 1. The Intervenor, the Attorney General of Alberta accepts the facts as set out in the

7 Factums of the Respondent, The Attorney General of Ontario, and the Respondent, Fleming

8 Chicks.

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PART II

STATEMENT OF THE ISSUES

1. In his intervention, the Attorney General of Alberta wishes to address two issues arising from the Constitutional Questions stated by Mr. Justice Binnie on June 20, 2000:

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a) Ontario's refusal to create or continue a legislative scheme enhancing the effectiveness of agricultural workers' freedom of association is not a proper subject of *Charter* review.

b) Ontario's exclusion of persons employed in agriculture from collective bargaining is not "discrimination" within the meaning of s. 15(1) of the *Charter*.

1 **PART III**
2
3 **ARGUMENT**
4
5 **Section 2(b) – Ontario's refusal to create or continue a legislative scheme enhancing the**
6 **effectiveness of agricultural workers' freedom of association is not a proper subject of**
7 ***Charter* review.**
8
9
10 1. The Appellants' submissions regarding freedom of association seek to establish that
11 Ontario's repeal of the *Agricultural Labour Relations Act* ("ALRA") impairs agricultural
12 workers' freedom of association. The Attorney General of Alberta wishes to respond to one
13 strand of argument in particular, which we summarize as follows:
14
15 > Considered against the background of rights employers hold at common
16 > law to, *inter alia,* refuse to employ trade unionists and to deny union
17 > access to provide property, Ontario's failure to create legal restraints on
18 > such private action impairs agricultural workers' freedom of association in
19 > a manner that must be justified under s. 1.[1]
20
21 2. Mr. Justice Sharpe relied upon *Dolphin Delivery*[2] in rejecting this argument:
22 > The applicants' claim is that agricultural workers need the protection of
23 > legislation to curb the exercise of the private economic power of employers
24 > and to constrain the exercise of common law rights of property and
25 > contract. In my view, based upon the current state of the law as elaborated
26 > in *Dolphin Delivery*, the fact that the efforts of agricultural workers to form
27 > trade unions will be resisted or undermined by employers' private
28 > economic power or common law rights does not give rise to a *Charter*
29 > claim. On the applicants' argument, it is private power, not the state, that
30 > impedes the formation of unions by these workers, and *Dolphin Delivery*
31 > holds that the *Charter* does not reach the exercise of private power nor the
32 > exercise of common law rights by non-governmental parties.[3]
33
34 3. The Appellants criticize Mr. Justice Sharpe's conclusion as a misapplication of *Dolphin*
35 *Delivery*'s "government action doctrine," and mark various ways in which Ontario's repeal of

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[1] Appellants' Factum, paras. 75 -93; pages 20 - 25
[2] *RWDSU v. Dolphin Delivery Ltd.* [1986] 2 S.C.R. 573 **[Tab 1]**

1 the ALRA and its failure to otherwise enhance agricultural workers' freedom of association form
2 part of social and legal context in which agricultural workers face practical impediments to
3 forming and supporting a union. Thus, the Appellants concern themselves with:

4 a) whether repeal of the ALRA is a but/for cause of impediments to
5 agricultural workers' efforts at association,[4]
6
7 b) whether such impediments qualify as an indirect result of government
8 action,[5]
9
10 c) whether a failure to act may constitute, in appropriate circumstances, an act
11 in its own right,[6] and
12
13 d) whether the fact that private action is taken against a background of legal
14 rules renders an individual's act an act authorized or encouraged by the
15 state.[7]
16

17 4. The Attorney General says that abstract inquiries into whether particular effects may be
18 attributed to government or into the metaphysics of acts and omissions are profitless in the legal
19 context defined by the *Charter*. Attention must be paid instead to the substantive differences
20 between state and private action marked in *Dolphin Delivery*, and to whether impediments to
21 agricultural workers' union participation are the consequence of the former *rather than* the latter.
22 Inquiring into whether those practical difficulties are a consequence of government action
23 without regard to the legal distinction at issue ignores limitations on the *Charter*'s purposes that
24 are both substantive and intended.
25

26 5. In *Dolphin Delivery* this Court considered "whether or not an individual may found a
27 cause of action or defence against another individual on the basis of a breach of a *Charter* right.

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[3] *Dunmore v. A.G. Ontario* (1997), 155 D.L.R. (4th) 193, at 206-7; Appellant's Authorities, Vol. 1, Tab 7
[4] Appellants' Factum, paras. 78, 84; pages 21, ___
[5] Appellants' Factum, paras. 81 – 83; page ___
[6] Appellants' Factum, paras. 85 – 88; page 22 - 23

1 In other words, does the *Charter* apply to private litigation divorced completely from any
2 connection with government?" Answering these questions in the negative, Mr. Justice McIntyre
3 held that government action was necessary for the *Charter* to apply:
4
5 > I am in agreement that the *Charter* does not apply to private litigation. ...
6 > In my view, s.32 of the *Charter*, specifically dealing with the question of
7 > *Charter* application, is conclusive on the issue. ...[8]
8 >
9 > It is my view that s. 32 of the *Charter* specifies the actors to whom the
10 > *Charter* will apply. They are the legislative, executive and administrative
11 > branches of government. It will apply to those branches of government
12 > whether or not their action is invoked in public or private litigation. It
13 > would seem that legislation is the only way in which a legislature may
14 > infringe a guaranteed right or freedom. Action by the executive or
15 > administrative branches of government will generally depend upon
16 > legislation, that is, statutory authority. Such action may also depend,
17 > however, on the common law, as in the case of the prerogative. To the
18 > extent that it relies on statutory authority which constitutes or results in an
19 > infringement of a guaranteed right or freedom, the *Charter* will apply and
20 > it will be unconstitutional. The action will also be unconstitutional to the
21 > extent that it relies for authority or justification on a rule of the common
22 > law which constitutes or creates an infringement of a *Charter* right or
23 > freedom. In this way the *Charter* will apply to the common law, whether
24 > in public or private litigation. It will apply to the common law, however,
25 > only in so far as the common law is the basis of some governmental action
26 > which, it is alleged, infringes a guaranteed right or freedom.
27 >
28 > The element of governmental intervention necessary to make the *Charter*
29 > applicable in an otherwise private action is difficult to define.[9]
30
31
32 6. The notion of government action fails to fully explicate the holding in *Dolphin Delivery*.
33 For example, Mr. Justice McIntyre reasoned that:
34

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[7] Appellants' Factum, paras. 89, 90; page 23 - 24

[8] 32. (1) This *Charter* applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[9] *Dolphin Delivery*, *supra*, at 597-8 **[Tab 1]**

> ... I cannot equate for the purposes of *Charter* application the order of court with an element of governmental action. The courts are, or course, bound by the *Charter* as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute. To regard a court order as an element of government intervention necessary to invoke the *Charter* would, it seems to me, widen the scope of *Charter* application to virtually all private litigation. All cases must end, if carried to completion, with an enforcement order and if the *Charter* precludes the making of the order, where a *Charter* right would be infringed, it would seem that all private litigation would be subject to the *Charter*.[10]

Mr. Justice McIntyre's reasoning might seem to beg the question: if the notion of government intervention is to provide for us the reason why the *Charter* does not apply to private litigation, we cannot point to the fact that the *Charter* does not apply to private litigation to support the conclusion that a court order is not the sort of government intervention that attracts the *Charter*. The Attorney General says that this puzzle does not reveal a defect in His Lordship's reasoning, but instead indicates the importance of a second detectable rationale for the *Dolphin Delivery* doctrine.

7. This second rationale rests upon a purposive understanding of the *Charter*'s guarantees: the *Charter* does not attempt to identify, excuse, prevent or rectify the wrongs that may be done by one person to another in the course of their private interactions. Nor does it purport to regulate a person's exercise of his or her private rights. The *Charter* instead addresses relations between the individual and the state:

> The rights guaranteed by the *Charter* take effect only as restrictions on the power of government over the persons entitled to the rights. The *Charter* regulates the relations between government and private person, but it does not regulate the

[10] Ibid. at 600-1 **[Tab 1]**

relations between private persons and private persons. Private action is therefore excluded from the application of the *Charter*. ...[11]

***

The exclusion of private activity from the *Charter* was not a result of happenstance. It was a deliberate choice that must be respected. We do not really know why this approach was taken, but several reasons suggest themselves. Historically, bills of rights, of which that of the United States is the great constitutional exemplar, have been directed at government. Government is the body that can enact and enforce rules and authoritatively impinge on individual freedom. Only government requires to be constitutionally shackled to preserve the rights of the individual. ...[12]

8. Two subsequent cases demonstrate that the *Charter* presumes a substantive distinction between state and private action in marking its intended application. First, in *B.C.G.E.U. v. B.C. (A.G.)*[13] this Court scrutinized an injunction issued by Chief Justice McEachern, which restrained picketing at British Columbia courthouses by the appellant union, for its compliance with the *Charter*. This case was distinguished from *Dolphin Delivery* not because the character of the "state action" involved differed in *Dolphin Delivery* (the orders each prohibited picketing and were in substance identical), but because Chief Justice McEachern's order had a public rather than private purpose:

As a preliminary matter, one must consider whether the order of McEachern C.J.S.C. is, or is not, subject to *Charter* scrutiny. *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, holds that the *Charter* does apply to the common law, although not where the common law is invoked with reference to a purely private dispute. At issue here is the validity of a common law breach of criminal law and ultimately the authority of the court to punish for breaches of that law The court is acting on its own motion and not at the instance of any private party. The motivation for the court's action is entirely "public" in nature, rather than "private". The criminal law is being applied to vindicate the rule of law and the fundamental freedoms protected by the *Charter*.[14]

[11] Peter Hogg, *Constitutional Law of Canada*, as quoted at *Dolphin Delivery* at S.C.R. 594 **[Tab 1]**
[12] *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, at 262 per LaForest J. **[Tab 2]**
[13] [1988] 2 S.C.R. 214 **[Tab 3]**
[14] Ibid. at 243-4

9. Second, in *Daigle v. Tremblay*[15] the Respondent sought to uphold an injunction preventing a woman pregnant with his unborn child from having an abortion by reference to s. 7 of the *Charter*, claiming to protect a foetal right to "life, liberty and security of the person." Despite the fact that the private rights at issue in the case were wholly the creature of the *Civil Code of Lower Canada*, the Court concluded:

> This is a civil action between two private parties. For the Canadian *Charter* to be involved there must be some sort of state action which is being impugned. [citation] The argument which alleges that the *Charter* can, on its own, support the injunction at issue fails to impugn any state action. The respondent pointed to no "law" of any sort which he can claim is infringing his rights or anyone else's rights. This issue is to whether s. 7 could be used to ground an affirmative claim to protection by the state was not raised. Neither the respondent nor any of the interveners who referred to the Canadian *Charter* as a possible basis for the injunction challenged the correctness of *Dolphin Delivery* or offered any basis upon which it could be distinguished and, accordingly, it provides a full answer to the *Charter* argument.[16]

10. If, as in *B.C.G.E.U.* and *Dolphin Delivery*, substantially identical orders can be legally categorized, respectively, as state action and as action "divorced completely from any connection with government", it cannot be that the particular action in question is what determines whether or not the *Charter* applies. Further, if, as in *Tremblay v. Daigle,* what appears to be a paradigmatic exercise of Quebec's legislative jurisdiction fails to qualify as state action, it cannot be that the existence rather than the purpose of state action determines whether or not the *Charter* is intended to apply.

11. A purposive understanding of *Dolphin Delivery* allows us to give a positive characterization of just what it is that the *Charter* is not about. That is, it is unnecessary, when

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[15] [1989] 2 S.C.R. 530 **[Tab 4]**

considering whether the *Charter* is relevant to particular interactions between individuals, to seek to determine whether state action exists and in what amount, but necessary instead to examine the purpose of any associated state intervention and to evaluate whether that purpose is addressed by the *Charter*. In particular, we say that the *Charter* does not purport to create or mandate either causes of action or defences as between individuals in their private interactions. Where the state acts (whether through legislation as under the Civil Code, through law developed through judicial elaboration of cases, or through tribunals appointed for specific adjudicative tasks) to identify and then prevent or rectify wrongs done to one person by another, the *Charter* has no intended application. To use traditional language, the *Charter* is not about doing justice as between the parties to a private dispute.

12. This construal of *Dolphin Delivery* gives due regard to what the *Charter* itself says about the relationship between the rights and freedoms it guarantees and Canadians' other rights and freedoms. Section 26 is accompanied by the marginal note "Other rights and freedoms not affected by Charter", and provides:

> 26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of other rights and freedoms that exist in Canada.

The *Charter* creates neither defences (it does not deny the existence of other rights) nor causes of action (it does not deny the existence of other freedoms) as between private individuals. The Appellants here seek to construe the *Charter* so as to impose upon government a constitutional obligation to enhance what agricultural workers can achieve through their joint efforts by limiting third parties' private rights. This strategy mistakes the *Charter*'s purpose and ignores the *Charter*'s express direction as to how it is to be understood.

[16] Ibid. at 571

13. It often happens that people require others' co-operation if an attempt to form, support and participate in an association is to succeed. Those others may, without committing any private wrong, refuse their co-operation or actively impede those efforts. In the present case, the Appellants point to refusals by employers to employ trade unionists and to employers' denial of access to private property to union organizers as practical impediments to agricultural workers' efforts at association. The Attorney General says that no subtle reasoning is necessary to reach the conclusion that these impediments to effective association are not addressed by the *Charter*'s guarantee of freedom of association, because they are exemplars of what the *Charter* is not about. The present circumstances serve as well as any to illustrate the distinction between public and private that the *Charter* demands we respect.

14. The Appellants' arguments attempt to transform paradigmatic examples of individuals' exercise of their private rights, which the *Charter* does not address, by tracing the indirect social results of an equally paradigmatic example of government inaction. These arguments must be rejected, because they do not seek to locate matters of present concern with respect to the *Charter*'s purpose and express limitations. Instead, these arguments seek to erase a distinction that the *Charter* clearly presupposes, and fail for that reason as an attempt to understand its meaning.

Section 15 – Ontario's exclusion of persons employed in agriculture from collective bargaining is not "discrimination" within the meaning of s. 15(1) of the *Charter*.

15. The Attorney General directs his submissions regarding the equality rights asserted by the Appellants to whether Ontario's exclusion of "persons employed in agriculture" from its

collective bargaining regime amounts to discrimination within the meaning of Section 15 of the *Charter*. For this purpose, we may assume that this excluded group defines a ground of distinction analogous to those enumerated in s. 15(1):

> ... I do not wish to suggest that the claimant's association with a group which has historically been disadvantaged will be conclusive of a violation under s. 15(1), where differential treatment has been established. This may be the result, but whether or not it is the result will depend upon the circumstances and, in particular, upon whether or not the distinction truly affects the dignity of the claimant. There is no principle or evidentiary presumption that differential treatment for historically disadvantages persons is discriminatory.[17]
>
> ***
>
> The enumerated grounds function as legislative markers of suspect grounds associated with stereotypical, discriminatory decision making. They are a legal expression of a general characteristic, not a contextual, fact-based conclusion about whether discrimination exists in a particular case. As such, the enumerated grounds must be distinguished from a finding that discrimination exists in a particular case. Since the enumerated grounds are only indicators of suspect grounds of distinction, it follows that decisions on these grounds are not always discriminatory; if this were otherwise, it would be unnecessary to proceed to the separate examination of discrimination of the third stage of analysis in *Law, supra*, *per* Iacobucci J.
>
> The same applies to the grounds recognized by the courts as "analogous" to the grounds enumerated in s. 15. To say that a ground of distinction is an analogous ground is merely to identify a type of decision making that is suspect because it often leads to discrimination and denial of substantive equality. Like distinctions made on enumerated grounds, distinctions made on analogous grounds may well not be discriminatory. But this does not mean that they are not analogous grounds or that they are analogous grounds only in some circumstances. Just as we do not speak of enumerated grounds existing in one circumstance and not another, we should not speak of analogous grounds grounds existing in one circumstance and not another. The enumerated and analogous grounds stand as constant markers of suspect decision making or potential discrimination. What varies is whether they amount to discrimination in the particular circumstances of the case.
>
> ...
>
> Maintaining the distinction in *Law, supra,* between the enumerated or analogous ground analysis and the third-stage contextual discrimination

[17] *Law v. Canada* [1999] 1. S.C.R. 497, at 536 (para. 67) (Emphasis in original.) **[Tab 5]**

> analysis, offers several advantages. Both stages are concerned with discrimination and the violation of the presumption of the equal dignity and worth of every human being. But they approach it from different perspectives. The analogous grounds serve as jurisprudential markers for suspect distinctions. They function conceptually to identify the sorts of claims that properly fall under s. 15. By screening out other cases, they avoid trivializing the s. 15 equality guarantee and promote the efficient use of judicial resources. And they permit the development over time of a conceptual jurisprudence of the sorts of distinctions that fall under the s. 15 guarantee, without foreclosing new cases of discrimination. A distinction on an enumerated or analogous ground established, the contextual and fact-specific inquiry proceeds to whether the distinction amounts to discrimination in the context of the particular case. [18]

16. Following the then Madame Justice McLachlin in *Miron v. Trudel*, we say that the overarching purpose of s. 15(1) is:

> to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of merit, capacity, or circumstances.[19]

Assuming, therefore, that we are satisfied that history and social circumstance mark employment in agriculture as a legally suspect characteristic akin to race, sex or religion, we may first expect assurance that the category is not in this particular context being used as an irrelevant ground of exclusion of persons employed in agriculture[20], regardless of their merit, capacity and circumstances.

17. Although resting his decision upon his conclusion that "agricultural workers" is not a ground of distinction analogous to those enumerated in s.15(1), Mr. Justice Sharpe drew factual

[18] *Corbiere v. Canada,* [1999] 2 S.C.R. 203, at p. 216 - 219, per McLachlin and Bastarache JJ., Appellants' Authorities, Vol. 1, Tab 4

[19] *Miron v. Trudel* [1995] 2 S.C.R. 22; quoted in *Law v. Canada* [1999] 1 S.C.R. 497, at 528 (para.48) **[Tab 6]**

[20] See, generally, *Miron v. Trudel*, [1995] 2 S.C.R. 418, at 495-6, per McLachlin J., Appellants' Authorities, Vol.1, Tab 22

1 conclusions relevant to whether Ontario's exclusion of agricultural workers from collective
2 bargaining constitutes discrimination within the meaning of s. 15(1):

> 3 In my view, the evidence shows that the legislative decision to exclude
> 4 agricultural workers from the collective bargaining regime does not reflect
> 5 stereotypical assumptions about the personal characteristics of agricultural
> 6 workers individually or as a class. Rather, it is based upon the policy-
> 7 makers' perception of the characteristics and circumstances of the
> 8 agricultural industry.[21]
> 9

0 18. The Appellants do not appear to significantly dispute Mr. Justice Sharpe's conclusion
1 that Ontario's exclusion of agricultural workers from collective bargaining is not a consequence
2 of an attribution of stereotypical characteristics to agricultural workers as a group and is instead a
3 response to characteristics and circumstances of the agricultural industry.[22]
4

5 19. The Appellants rely primarily upon a second dimension of s. 15(1)'s purpose, identified
6 in cases such as *Eaton v. Brant County Board of Education*:

> .7 The principles that not every distinction on a prohibited ground will
> :8 constitute discrimination and that, in general, distinctions based on
> i9 presumed rather than actual characteristics are the hallmarks of
> ?0 discrimination have particular significance when applied to physical and
> ?1 mental disability. Avoidance of discrimination on this ground will
> ?2 frequently require distinctions to be made taking into account the personal
> ?3 characteristics of disabled persons. In *Andrews v. Law Society of British*
> ?4 *Columbia* [citation], MacIntyre J, stated that the "accommodation of
> ?5 differences ... is the essence of true equality." This emphasizes that the
> ?6 purpose of s. 15(1) of the *Charter* is not only to prevent discrimination by

[21] *Dunmore v. Ontario* (A.G.) (1998), 155 D.L.R. (4th) 194 (Ont. Gen. Div.), at 216, Appellants Authorities Vol. 1, Tab 7

[22] Appellants' Factum para. 112 ; page 31. *But see*, Appellants' Factum, para. 121; page 32 "[S]tereotypes are reflected in the evidence of the Government's expert witnesses that if agricultural workers are empowered to bargain collectively, they would irrationally and destroy the agricultural sector. This attitude treats agricultural workers as if they would be incapable of acting responsibly 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 Appellants do not refer to the record in support of this characterization of these experts' testimony. Our review of the record reveals no attribution of any distinctive lack of foresight to agricultural workers. Rather, Ontario's experts appear to draw conclusions about the consequences of collective bargaining for agriculture from its characteristics and effects elsewhere in the economy.)

1 the attribution of stereotypical characteristics to individuals, but also to
2 ameliorate the position of groups within Canadian society who have
3 suffered disadvantage by exclusion from mainstream society as has been
4 the case with disable persons.
5
6 The principal object of certain of the prohibited grounds is the elimination
7 of discrimination by the attribution of untrue characteristics based on
8 stereotypical attitudes relating to immutable conditions such as race or sex.
9 The other equally important objective seeks to take into account the true
0 characteristics of this group which act as headwinds to the enjoyment of
1 society's benefit and to accommodate them. ...[I]t is the failure to make
2 reasonable accommodation, to fine-tune society so that its structures and
3 assumptions do not result in the relegation and banishment of disabled
4 persons from participation, which results in discrimination against them.
5 The discrimination inquiry which uses "the attribution of stereotypical
6 characteristics" reasoning as commonly understood it simply in appropriate
7 here. It may be seen rather as a case of reverse stereotyping which, by not
8 allowing for the condition of a disable individual, ignores his or her
9 disability and forces the individual to sink or swim within the mainstream
20 environment. It is recognition of the actual characteristics, and reasonable
21 accommodation of these characteristics which is the central purpose of s.
22 15(1) in relation to disability.[23]
23

24 20. To similar effect, Mr. Justice LaForest, speaking for a unanimous Court in *Eldridge v.*
25 *B.C. (A.G.)*[24], endorsed Chief Justice Lamer's general approach to this aspect of s.15(1):

26 Not only does s.15(1) require the government to exercise greater caution in
27 making express or direct distinctions based on personal circumstances, but
28 legislation equally applicable to everyone is also capable of infringing the
29 right to equality enshrined in that provision, and so of having to be justified
30 under s.1. Even in imposing generally applicable provisions, the
31 government must take into account differences which in fact exist between
32 individuals and so far as possible ensure the provisions will not have a
33 greater impact on certain irrelevant personal characteristics than on the
34 public as a whole. In other words, to promote the objective of the more
35 equal society, s.15(1) acts as a bar to the executive enacting provisions
36 without taking into account their possible impact on already disadvantaged
37 classes of persons.

[23] [1997] 1 S.C.R. 241, at 272-3, per Sopinka J. (paras. 65, 66) **[Tab 7]**

[24] [1997] 3 S.C.R. 624, at 673, quoting *Rodrigues v. B.C. (A.G.)* [1997] 3 S.C.R., at 549, per Lamer C.J.C. (dissenting). **[Tab 8]**

1 21. The two dimensions of discrimination within the meaning of s.15(1) respond to different
2 paradigm examples of discrimination. In some cases, particularly where a legal benefit or
3 burden is explicitly allocated on the basis of an enumerated or analogous ground, the issue is
4 most aptly considered in terms of whether government's rationale for use of such a distinction
5 involves attribution of stereotypical characteristics to the affected group, or whether instead it
6 responds to unexceptionable policy concerns. Other cases present themselves as cases in which
7 government pursues obviously unexceptionable purposes (e.g., provision of hospital care to the
8 public), but selects means that ignore the distinctive attributes of members of groups defined by
9 enumerated and analogous grounds (hospital care is of limited use to the deaf if they can't
0 communicate with the doctor), and thus unequally benefit the group in question. In such a case
1 the government in effect attributes "mainstream" characteristics to a protected group, which the
2 group does not share. In both cases the central concern is a government's failure to attend to the
3 actual circumstances of affected individuals in choosing its policy goals and legislative means.
4

15 22. The Appellants do not appear to accuse Ontario of proceeding upon attributions of
16 stereotypical characteristics to agricultural workers rather than the characteristics and
17 circumstances of the agricultural industry; nor do they claim that Ontario has somehow falsely
18 universalized characteristics of non-agricultural workers in excluding agricultural workers from
19 collective bargaining legislation (it is difficult to know even what this means in these
20 circumstances.)

21

22 23. Instead, the Appellants support their contention that Ontario's exclusion of agricultural
23 workers from its collective bargaining legislation is discriminatory by reference to:

a) the characteristics of the group excluded ("The basis for finding that agricultural work constitutes an analogous ground largely furnishes a positive answer to this stage of analysis."[25]); and

b) the significance of collective bargaining for agricultural workers (collective bargaining is said to be "the primary means available to other Canadians to improve their social, economic and political conditions … ."[26])

24. Neither of these considerations speak to the significance of Ontario's distinctive treatment of agricultural workers: agricultural workers' characteristics and circumstances are what they are independent of whether other workers acquire a right to bargain collectively, and collective bargaining's possible value to agricultural workers is what it is independent of whether others have that right. The Appellants fail to address the issue at hand, which is whether or not *distinct legal treatment* demeans or offends the dignity of persons employed in agriculture:

> Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected by the law?[27]

25. We say that by failing to address whether Ontario's *reasons* for distinct treatment of persons employed in agriculture are discriminatory in either of the ways identified, and by focusing instead on how agricultural workers' position in society could be improved by participation in collective bargaining, the Appellants misperceive s.15(1)'s purpose. The purpose of s. 15(1) is not to identify human dignity as an overarching social good and insist the law make more of it; rather, it is to require that human dignity not be impaired by differential allocation of legal benefits and burdens.

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[25] Appellant's Factum, para. 131, page 35
[26] Appellant's Factum, para. 132, page 35
[27] *Law v. Canada*, supra, at 530 (para. 53) **[Tab 5]**

1 **PART IV**

2 **ORDER REQUESTED**

3

4 26. The Intervenor the Attorney general for Alberta asks that the Constitutional Questions

5 set by Mr. Justice Binnie be answered in the negative, for the reasons described herein.

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12 ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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14 DATED at the City of Edmonton, in the Province of Alberta, this 8th day of

15 February, 2001.

16

17

18 ______________________________

19 Rod Wiltshire

20 Counsel for the Intervenor

21 Attorney General of Alberta

PART V

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