Court File No. 27216

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for the Province of Ontario)

B E T W E E N:

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 QUÉBEC,
and CANADIAN LABOUR CONGRESS

Intervenors

FACTUM OF THE INTERVENOR, CANADIAN LABOUR CONGRESS

Sack Goldblatt Mitchell
Barristers & Solicitors
20 Dundas Street West
Suite 1130
Toronto, Ontario
M5G 2G8

Steven Barrett
Tel: (416) 979-6422
Fax: (416) 591-7333

Solicitors for the Intervenor, the
Canadian Labour Congress

Burke-Robertson
Barristers & Solicitors
70 Gloucester Street
Ottawa, Ontario
K2P 0A2

Robert E. Houston, Q.C.
Tel: (613) 236-9665
Fax: (613) 235-4430

Agents for the Solicitors for the
Intervenor, the Canadian Labour
Congress

TO: **The Registrar of this Court**

AND TO:

Gowling LaFleur Henderson LLP
Barristers & Solicitors
Commerce Court West
Suite 4900
Toronto, Ontario
M5L 1J3

Chris G. Paliare - LSUC No. 13367P
Tel: (416) 862-4318
Fax: (416) 862-7661

Solicitors for the Appellants

Martin J. Doane - LSUC No. 31819C
Barrister & Solicitor
35 Elmer Avenue
Toronto, Ontario
M4L 3R6
Tel: (416) 698-6266
Fax: (416) 686-8022

Solicitor for the Appellants

Gowling LaFleur Henderson LLP
Barristers & Solicitors
160 Elgin Street
Suite 2600
Ottawa, Ontario
K1P 1C3

Eduard Van Bemmel
Tel: (613) 232-8212
Fax: (613) 563-9869

Agents for the Solicitors for the Appellants

AND TO:

Attorney General for the Province of Ontario
Constitutional Law Branch
720 Bay Street, 7th Floor
Toronto, Ontario
M5G 2K1

RichardStewart/Sarah Kraicer
Tel: (416) 326-4452
Fax: (416) 326-4015

Solicitors for the Respondent, the Attorney General for the Province of Ontario

Burke Robertson
Barristers & Solicitors
70 Gloucester Street
Ottawa, Ontario
K2P 0A2

Robert E. Houston, Q.C.
Tel: (613) 236-9665
Fax: (613) 235-4430

Agents for the Solicitors for the Respondent, the Attorney General for the Province of Ontario

AND TO: **Fasken Martineau DuMoulin LLP**
Barristers & Solicitors
Toronto Dominion Bank Tower
P.O. Box 20
Toronto Dominion Centre
Toronto, Ontario
M5K 1N6

Alan L.W. D'Silva - LSUC No. 29225P
Darrel L. Kloeze - LSUC No. 38876J
Tel: (416) 366-8381
Fax: (416) 364-7813

Solicitors for the Respondent, Fleming Chicks

Lang Michener
Barristers & Solicitors
50 O'Connor Street
Suite 300
Ottawa, Ontario
K1P 6L2

Jacqueline V. Loignon
Tel: (613) 232-7171
Fax: (613) 231-3191

Agents for the Solicitors for the Respondent, Fleming Chicks

AND TO: **Heenan Blaikie**
Lawyers
200 Bay Street
P.O. Box 185, Suite 2600
South Tower, Royal Bank Plaza
Toronto, Ontario
M5J 2J4

Brian W. Burkett/Douglas G. Gilbert/
Jonathan L. Dye
Tel: (416) 360-6336
Fax: (416) 360-8425

Solicitors for the Intervener, the Labour Issues Coordinating Committee

Heenan Blaikie
Lawyers
81 Metcalfe Street
Suite 700
Ottawa, Ontario
K1P 6K7

E. Joy Noonan

Tel: (613) 236-1668
Fax: (613) 236-9632

Agents for the Solicitors for the Intervenor, the Labour Issues Coordinating Committee

AND TO: **Attorney General of Alberta**
9833 – 109 Street
4th Floor, Bowker Building
Edmonton, Alberta
T5K 2E8

Tel: (780) 422-0500
Fax: (780) 425-0307

Solicitors for the Intervenor, the Attorney General of Alberta

Gowling LaFleur Henderson LLP
Barristers & Solicitors
160 Elgin Street
Suite 2600
Ottawa, Ontario
K1P 1C3

Tel: (613) 233-1781
Fax: (613) 563-9869

Agents for the Solicitors for the Intervenor, the Attorney General of Alberta

AND TO:

Ministère de la Justice
1200, route de l'Église, 2e étage
St-Foy, Québec
G1V 4M1

Me. Renée Madore/Me. Monique Rousseau
Tel: (418) 643-1477
Fax: (418) 646-1696

Solicitors for the Intervenor, the Attorney General of Québec

Noël & Associésm s.e.n.c.
111, rue Champlain
Hull, Québec
J8X 3R1

Me. Sylvie Roussel

Tel: (819) 771-7393
Fax: (819) 771-5397

Agents for the Solicitors for the Intervenor, the Attorney General of Québec

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3. The CLC submits that the guarantee of freedom of association in s. 2(d) of the Charter not only protects the right of individuals to form, join and participate in trade unions, but also the right to bargain in association (i.e. collectively). Further, the exclusion of agricultural workers from comprehensive statutory collective bargaining schemes, which historically have been established as the virtually exclusive means by which employees can join trade unions and engage in collective bargaining, constitutes a restriction on both aspects of these constitutionally protected associational activities.

A. APPLICATION OF THE CHARTER

4. The courts below accepted that the *Charter* applied insofar as the challenge was to the *purpose* of the legislative exclusion/repeal, but held that once the *effect* of the exclusion/repeal was at issue, the *Charter* no longer applied. According to the judgments below, any interference with s.2(d) associational activity resulted from the actions of private employers and not the state; and, since there was no legal provision specifically prohibiting agricultural workers from forming or joining unions, there was no state action *(Appeal Book, vol. 3, pp. 480-81)*. However, either the *Charter* applies to legislation or it does not. Once it applies, as it must to deliberate legislative exclusion, the practical effect of the legislation must be considered to determine if there is interference with constitutionally protected rights or freedoms.[1] Thus, contrary to Justice Sharpe's view (relying on *Dolphin Delivery*) that the "applicants seek ... 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 fact is that the Legislature has already established a legislative scheme for recognizing freedom of association. This case involves the constitutionality of the exclusion of agricultural workers from that legislative regime. As such, the courts are duty bound to assess whether the exclusion interferes with the exercise of protected associational

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[1]Indeed, this Court has taken a broad view of the application of the *Charter* in the context of a legislative exclusion from access to a legislative scheme intended to extend rights and protections. See, for example, *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at paras. 52, 56, 57, 61.

activity. *Dolphin Delivery* does not relieve the courts of this obligation.[2] Put another way, the appellants do not seek to apply the *Charter* directly to private action; rather, they argue that the deliberate legislative repeal/exclusion of agricultural workers impedes their ability to engage in protected associational activity.[3]

5. Given that there is a specific legislative exclusion at issue in this case, it is not necessary for this Court to consider whether, in the absence of such an exclusion, the *Charter* places a positive obligation on the state to put in place collective bargaining legislation so that workers can effectively enjoy their freedom to associate in the workplace context.[4]

10 **B. FREEDOM OF ASSOCIATION**

1. Freedom of Association Includes Forming, Joining, Maintaining and Participatory Activities

6. This Court has recognized that, at a minimum, freedom of association includes the right to form and belong to an association, to maintain an association, and to participate in its lawful activities.[5] Thus, legislation or

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[2]Justice Sharpe also relied upon this Court's decisions in *Haig v. Canada,* [1993] 2 S.C.R. 995 and *Native Women's Ass'n of Canada v. Canada,* [1994] 3 S.C.R. 627 in declining to apply the *Charter* to consider whether the effect of the legislative exclusion breached s. 2(d), but in those cases, the Court recognized that the *Charter* applied, but held that there was no breach of the freedom of expression guarantee in the specific context and circumstances of those appeals.

[3] See *Vriend v. Alberta, supra* note 1, at para. 65-66:

> The application of the Charter to the IRPA does not amount to applying it to private activity. It is true that the IRPA itself targets private activity and as a result will have an 'effect' upon that activity. Yet it does not follow that this indirect effect should remove the IRPA from the purview of the Charter. It would lead to an unacceptable result if any legislation that regulated private activity would for that reason alone be immune from Charter scrutiny.... The respondents' submission has failed to distinguish between 'private activity' and 'laws that regulate private activity'. The former is not subject to the Charter, while the latter obviously is.

[4]See the comments of Justice L'Heureux-Dubé in *Delisle v. Canada (Deputy Attorney General,* [1999] 2 S.C.R. 989 at para. 7, noting that this Court has left open the question of whether positive governmental action may be required in order to make a fundamental freedom meaningful, and observing that there may well be a:

> positive obligation on the part of government to provide legislative protection against unfair labour practice or some form of official recognition under labour legislation, because of the inherent vulnerability of employees to pressure from management, and the private power of employers, when left unchecked, to interfere with the formation and administration of unions.

[5]*Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 (hereinafter the "*Alberta Reference*"), per LeDain J. at pp 390-391; *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 (hereinafter the "*PIPSC* case"), per Sopinka J. at p. 401-402; *Delisle, supra*; *Canadian Egg Marketing Agency v. Richardson,* [1998]

governmental action which, in its ***purpose*** or ***effect***, interferes with or restricts the ability of individuals to choose to form, join and maintain membership in associations, and to fully participate in lawful associational activities (hereinafter generally referred to as "joining" activity), constitutes an infringement of section 2(d) of the *Charter*.

2. Freedom of Association Includes Engaging in Collective Bargaining Activity

7. The CLC submits that, in addition to confirming that s. 2(d) protects joining activity, prior caselaw leaves open and supports the principle that the ability of employees to bargain collectively in association is also protected by s. 2(d). Further, this interpretation is consistent with:

a) the application of settled s. 2(d) principles (in particular, protection for undertaking in concert activities which are lawful when carried out individually);

b) international law norms and obligations (including heightened international recognition of collective bargaining as a fundamental right and as an integral aspect of freedom of association); and

c) a purposive and contextual approach to the freedom of association guarantee itself (protecting associational activities which are essential to preserving and sustaining a free and democratic society and promoting the underlying values of the *Charter*).

a) Prior Caselaw

i) The 1987 Labour Relations Trilogy

8. In 1987, this Court decided what has come to be known as the labour relations freedom of association trilogy of cases. The issues in all three cases[6] primarily concerned the question of whether legislation which, in one way or another, restricted the right to strike, infringed s. 2(d) of the *Charter*. By a four to two majority, this Court held that the right to strike was not protected associational activity.

9. However, three of the six judges (Dickson, C.J.C., Wilson J., and McIntyre J.) held that elements of collective bargaining could be protected by s. 2(d) of the Charter.[7] For their part, former Chief Justice Dickson and Justice Wilson held that both the right to strike and the right to bargain should be protected by s. 2(d). For his part, Justice McIntyre, in PSAC, explicitly stated that his reasons did not "preclude the possibility that other aspects of collective bargaining [i.e., other than strike action] may receive Charter protection under the guarantee of freedom of association."

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3 S.C.R. 157.

[6] *Alberta Reference, supra* note ; *PSAC v. Canada*, [1987] 1 S.C.R. 424 (hereinafter *"PSAC"*); *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460.

[7] *PSAC,* per Dickson C.J.C. (dissenting in part) at pp 437-438, per McIntyre, J. at p. 453, and per Wilson J. (dissenting) at p. 455; *Alberta Reference*, *supra* note 5, per Dickson, C.J.C. (dissenting) at pp 359-371; *RWDSU v. Saskatchewan,* per Dickson C.J.C. at p. 475 and Wilson J. (dissenting) at p. 485.

10. Justice McIntyre adopted a view of freedom of association which would ensure that an individual is entitled to do in concert with others that which he or she may lawfully do alone. On this view, constitutional protection attaches to all group activities which can lawfully be performed by an individual, whether or not that individual has the constitutional right to perform those activities. As Justice McIntyre stated in the *Alberta Reference*, at p. 408:

> the Legislature...would be constitutionally bound to treat groups and individuals alike. A simple example illustrates this point: golf is a lawful but not constitutionally protected activity. Under the third approach, the Legislature could prohibit golf entirely. However, the Legislature could not constitutionally provide that golf could be played in pairs but in no greater number, for this would infringe the Charter guarantee of freedom of association.

Thus, assuming individuals are not prohibited from golfing, if the Legislature places restrictions on playing golf in concert, this would run afoul of freedom of association. As submitted below, this same approach, when applied to bargaining, would extend s. 2(d) protection to collective bargaining where bargaining is not prohibited for the individual.

11. According to Justice McIntyre, interpreting freedom of association to protect the collective pursuit of activity which is lawful when pursued individually would achieve the underlying objective of s. 2(d), namely, "guaranteeing the freedom of individuals to unite in organizations of their choice for the pursuit of objects of their choice..." (p. 409). While Chief Justice Dickson and Justice Wilson took a more expansive view of s. 2(d)[8], it is clear from their reasons that at least three of the six judges in the trilogy embraced the view that freedom of association protects the right of individuals to choose to do in association with others that which they are lawfully permitted to do as individuals.

ii) The 1991 PIPSC Decision

12. Four years after the trilogy, this Court issued its decision in *PIPSC*, which involved the issue of whether employees already covered by a collective bargaining regime had the constitutional right to choose a particular bargaining agent. Four judges (Dickson C.J.C., L'Heureux-Dubé J., Sopinka J. and La Forest J.) held that the right to choose a particular bargaining agent for employees covered under a collective bargaining regime was not protected by s. 2(d). The three dissenting Justices (by Cory J., Wilson J. and Gonthier J.) held that certain elements of collective bargaining included under such a regime, in particular the choice of bargaining agent, were constitutionally protected.

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[8] They agreed, that freedom of association extends to the right to do collectively that which one is permitted to do as an individual, but held this was not the "exclusive touchstone" for s. 2(d). In their view, where the prohibition on associational activity attempts to preclude "associational conduct because of its concerted or associational nature" or "is aimed at foreclosing a particular collective activity because of its associational nature," this breaches s. 2(d) since it interferes with "the freedom of persons to join and act with others in common pursuits".

13. An examination of Justice Sopinka's reasons for the majority in *PIPSC* supports the conclusion that this Court has left open the question as to whether a blanket exclusion from collective bargaining may infringe the guarantee of freedom of association. In this respect, Justice Sopinka agreed with Justices McIntyre, Dickson and Wilson in the trilogy that s. 2(d) of the Charter protects the exercise in association of the lawful rights of individuals. According to Justice Sopinka, this approach to freedom of association is intended to guard against "an attack...aimed against the 'collective or associational aspect' of the activity".[9] Applying this test in the specific context of the *PIPSC* case, Justice Sopinka held that engaging in collective bargaining "is not an individual legal right **in circumstances in which a collective bargaining regime has been implemented**" [emphasis added], since where individuals are governed by a collective bargaining regime, they do not have the right to bargain individually (p. 404). In other words, the freedom of association of employees in *PIPSC* was not infringed, since they were included in a legislative scheme which allowed collective bargaining, while making individual bargaining unlawful. However, the basis for Justice Sopinka's holding that there was no s. 2(d) infringement on this ground does not apply in a situation where no collective bargaining regime has been implemented for affected employees. Indeed, the logic and rationale of his approach would dictate that s. 2(d) protects a right of individuals to bargain collectively where bargaining is not prohibited on an individual basis. Based on the Court's approach to date, this is the very essence of freedom of association.

iii) The 1998 Delisle Case

14. Following this Court's decision in *Canadian Egg Marketing Agency,*[10] confirming that freedom of association protects the right of individuals collectively to engage in activities which are lawful for an individual to pursue, in *Delisle* this Court recognized that this principle must equally apply to the labour relations context. As Justice Bastarache held (paragraphs 36 and 37), the government "cannot prohibit activities in association that RCMP members may carry on individually," and further, employees "may carry on any lawful activity that its members may carry on individually, including representing their interests." Thus, contrary to the Respondents' position, this

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[9]See p.403. This formulation is similar to that of Chief Justice Dickson in the *Alberta Reference*: see footnote 8 above, and paragraph 18 below.

[10]*Supra*, per Iacobucci J. and Bastarache J. at p. 232. As the discussion of s. 2(d) of the Charter in the *Egg Marketing* decision makes clear (see pp. 227-32), this Court has not yet fully defined the precise scope of freedom of association, insofar as it relates to the extent of protection for the associational aspect of activities which may be protected under s. 2(d). The CLC offers an approach to s. 2(d) which attempts to assist in the task of determining which associational activities should be protected by s. 2(d), one rooted in consideration of the underlying purposes and core values of freedom of association and of the *Charter* itself: see, in particular, paragraphs 28 to 33 below.

Court has not held that freedom of association can never protect the freedom to bargain collectively, or that collective bargaining is an activity and that activities can never be protected under s. 2(d). Rather, this Court's jurisprudence supports the position that s. 2(d) will protect group activities, at least to the extent that freedom of association protects the right to carry out in concert activity which is lawful if carried out individually.

15. However, because of the manner in which the Appellant in *Delisle* chose to frame the issue, the question of whether collective bargaining was constitutionally protected or interfered by the legislative exclusion of RCMP members was not squarely addressed by the Court.[11] Rather, the issue addressed by the Court was whether the denial of "protection against unfair labour practices" breached s. 2(d) of the *Charter* by interfering with the ability of RCMP members to form and join a union.[12]

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[11] Justice Bastarache, writing for the majority dismissing the appeal, concluded at the outset of his reasons that there is no infringement of s. 2(d) because RCMP members are protected "against any interference by management in the establishment of an employee association... independently of any legislative framework". In other words, the majority's approach to the appeal was primarily confined to the question of whether the impugned legislation infringed activity acknowledged to be protected by s. 2(d) of the *Charter*. The majority found that s. 2(d) already provided direct protection for that activity (ie. forming an employee association) because the employer was the government, and was therefore bound by the *Charter*, and that the evidence was that the Appellant and other RCMP members had been able to form and join their own independent employee association (see Bastarache J. at paragraphs 10 and 31). See also L'Heureux-Dubé J.'s reasons at paragraph 2. Indeed, as Cory and Iacobucci JJ observed in their reasons, the issue raised and decided in *Delisle* was <u>not</u> whether "the total exclusion of RCMP members from the....collective bargaining regime" violated s. 2(d); rather, the issue was whether the exclusion from the unfair labour practice provisions restricted the right to form a union (see paras. 149 and 151).

[12] To be clear (and as noted by Cory and Iacobucci at paragraph 51 of their dissenting reasons), several interveners (including the CLC) raised broader issues in *Delisle*, including whether s. 2(d) protects associational collective bargaining. However, as it turned out, the appellant in *Delisle* focussed his argument solely on the claim that s. 2(d) protected RCMP members from interference in the formation of a union, and that the purpose and effect of the legislation was to interfere in <u>this</u> protected associational activity. Both the majority and dissenting judgments approached the case on this basis, disagreeing primarily over the identification and assessment of the legislative purpose. On this appeal, however, the substance of the associational activity which the CLC submits is protected by s. 2(d) is different than that considered by the Court in *Delisle*, as is the alleged unconstitutional legislative purpose and effect and the specific factual and historical context in which the appeal arises.

b) Collective Bargaining Deserves Constitutional Protection Based on Application of Settled Section 2(d) Principles

16. An interpretation of freedom of association as including employees engaged in the activity of collective bargaining is supported by the principle - fully recognized by this Court in *PIPSC, Egg Marketing* and *Delisle* - that freedom of association protects the rights of individuals to collectively engage in activity where it is lawful to engage in that activity on an individual basis.[13] Insofar as individuals are not prohibited from bargaining with their employer, s. 2(d) must protect the freedom of individuals to collectively engage in bargaining activity, i.e. to engage in ***collective*** bargaining.[14]

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17. Generally speaking, the law approves of and protects bargains made by individuals. If individuals have the right to bargain individually with respect to the terms and conditions of contractual arrangements, then freedom of association must extend constitutional protection to engaging in such activity collectively. The fact that modern collective bargaining legislation does not permit individual bargaining, once a collective bargaining regime has been established for individual employees, does not alter the fact that, in the absence of coverage under any such collective bargaining regime, individual bargaining is permitted. Therefore, it is submitted that, absent a collective bargaining regime which prohibits individual bargaining, s. 2(d) of the Charter extends constitutional protection to employees to undertake in association with others bargaining activity that they are legally permitted to pursue as individuals.

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18. Further, as noted above, this Court has also ruled that legislative restrictions aimed at "the collective or

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[13]For academic commentary, see R.Raggi, "An Independent Right to Freedom of Association" (1977) 12 *Harv. C. Rts - C. Lib. Rev.* 1at 11 ("The basic value of this associational action is that it allows an individual to achieve through collective effort what he might not otherwise be able to achieve for himself") [CLC Authorities, Tab 1]; D. Beatty & S. Kennett, "Striking Back: Fighting Words, Social Protest and Political Participation in Free and Democratic Societies", (1988) 67 Canadian Bar Review 573 at pp. 585-86 [Tab 2]; F. Leader, *Freedom of Association: A Study in Labour Law and Political Theory*, (New Haven: Yale UP, 1992) chapter 3[Tab 3].

[14]A distinction may be made between certain elements or features of a collective bargaining scheme and the core activity of collective bargaining itself. Thus, specific elements or features of a statutory collective bargaining scheme may not be constitutionally protected under s. 2(d) (perhaps because there is no lawful individual counterpart to a particular element or feature). However, in the case of bargaining collectively with an employer, there is a lawful individual counterpart - namely, individual bargaining.

associational aspect of the activity" can infringe the freedom of association guarantee.[15] It is submitted that, insofar as the record establishes that the agricultural workers exclusion was predominantly animated by a desire to ensure that agricultural employers are not subject to collective bargaining with their employees, the exclusion is, in fact, directed precisely at the collective or associational nature of the activity of collective bargaining. No law seeks to interfere with individual bargaining; it is only when bargaining activity takes on an associational or collective aspect that the legislative restriction is imposed.[16]

c) Protection of Collective Bargaining Supported by International Law Norms and Obligations

10 19. Since the 1987 labour relations trilogy, this Court has increasingly recognized that international human rights obligations must inform the interpretation of *Charter* rights and freedoms. As this Court recently explained in *Baker v. Minister of Immigration,* international human rights norms are a "critical influence on the interpretation of the scope of the rights included in the Charter".[17] Indeed, as Justice L'Heureux-Dubé stated in *R. v. Ewanchuk,* [1999] 1 S.C.R. 330, at para. 73: "our *Charter* is the primary vehicle though which international human rights achieve domestic effect." This approach is consistent with the longstanding presumption that, where possible, statutory and constitutional provisions are to be interpreted in a manner that is consistent with and respectful of Canada's international obligations.[18]

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[15]See text at footnotes 7 and 8.

[16]By contrast, in *PIPSC*, the legislative restriction was not aimed at the collective or associational aspect of the activity, since employees were included in the legislative collective bargaining scheme, and indeed were lawfully protected in their capacity to bargain together collectively. Thus, when Sopinka, J. stated at p.405 that collective bargaining for working conditions was not constitutionally protected, this was in the context of a legislative scheme which outlawed individual bargaining and provided for collective bargaining for the affected employees. Furthermore, in *Delisle*, the s. 2(d) claim was restricted to joining activity, so this issue was not squarely considered by this Court (see footnote 11 above).

[17]*Baker v. Minister of Immigration*, [1999] 2 S.C.R. 817, at para 70; *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, per La Forest, J. at 895. See also, *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, per Dickson, C.J.C. at 1056 (adopting the following passage from Dickson C.J. in the *Alberta Reference:*

> "The content of Canada's international human rights obligations is, in my view, an important *indicia* of the meaning of 'the full benefit of the *Charter's* protection.' I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified";

[18]A. Bayefsky, *International Human Rights Law*, (Toronto: Butterworths, 1992) at 67-109; R. Sullivan, *Driedger on the Construction of Statutes, 3rd ed.* (Toronto: Butterworths, 1994) at 220.

20. Over the past decade, there has been increasing international law recognition that collective bargaining is a core component of freedom of association. It is critical that this Court assess the implications of these international law developments in determining whether s. 2(d) of the Charter should be interpreted to include the right of workers to bargain collectively. Otherwise, there is a significant risk that the *Charter* will fall behind the international community in its protection of human rights, and that Canada will be found to be in breach of its international obligations.

21. Freedom of association has a specific and widely recognized core meaning at international law and, in particular, under international covenants and treaties to which Canada is a party. It includes at a minimum the right of workers to form and join unions and to engage in collective bargaining activities. As set out below, these minimum components of freedom of association are now recognized by Canada and by the international community as fundamental human rights.

22. In 1972 Canada ratified the International Labour Organization (ILO) *Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organize.*[19] Article 3 of *Convention No. 87* provides, *inter alia*, that workers' and employers' organizations shall have the right to "organize their administration and activities and formulate their programmes", and requires that "public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof." The ILO has consistently ruled that the right to collectively bargain with employers constitutes an element of freedom of association protected by *Convention No. 87.*[20]

23. However, in addition, there have been a number of significant recent developments in the international law recognition of collective bargaining as a fundamental human right, and in the international protection of collective bargaining as an essential element of freedom of association.[21] In 1993, at the World Conference on Human Rights, Canada was one of 171 countries that approved the *Vienna Declaration on Human Rights* A/CONF.157/24 [Tab 7]. The *Vienna Declaration* reaffirmed the commitment of all states to fulfill their obligations to observe and protect

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[19]67 U.N.T.S. 18 (1948)[Tab 6].

[20] In his *Alberta Reference* dissent, Chief Justice Dickson relied on Canada's international law obligations in concluding that s. 2(d) should protect collective bargaining (p. 348 to 359). The majority did not consider international law. nor has the majority in this Court's subsequent 2(d) labour decisions taken into account international law, in determining the scope of s. 2(d) in the trade union context.

[21]This history is reviewed in: R. Adams, "Collective Bargaining: The Rodney Dangerfield of Human Rights" (1999) 50 Labor L.J. 204 [Tab 4]; J. Bellace, " ILO Fundamental Rights at Work and Freedom of Association" (1999) 50 Labor L.J. 191 [Tab 5].

all human rights and fundamental freedoms, recognizing core labour rights (including collective bargaining) as human rights. Two years later, at the 1995 World Summit for Social Development in Copenhagen[22], Canada joined 117 countries in recognizing four basic workers' rights, including freedom of association and collective bargaining (as well as, the prohibition of forced labour and child labour, equal remuneration for men and women for work of equal value and non-discrimination in employment). The Summit's Programme of Action called on governments to ratify ILO conventions on these human rights, to respect them even if they had not ratified them, and to use international labour standards as a benchmark for their national legislation.

24. In 1996, the OECD, of which Canada is a founding member, recognized these core labour rights, including collective bargaining, as fundamental human rights. In a report approved by its directing body, the OECD stated that these core labour rights:

> embody important human rights and ... they derive from the Universal Declaration of Human Rights. The universality of these basic labor rights has been highlighted in the conclusions of the recent World Social Summit. In addition three United Nations acts... which contain relatively detailed provisions on core labor standards, have been ratified by over 120 countries, suggesting that these standards receive near-universal adherence. It is also important to note that all countries which are members of the ILO subscribe to the principles of freedom of association and collective bargaining by virtue of their membership.[23]

25. In the *1996 Singapore Ministerial Declaration* WT/MIN(96)/Dec [Tab 10], the World Trade Organization reaffirmed this international consensus, stating:

> We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization is the competent authority to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards.

26. The culmination of these developments was the ILO's groundbreaking *1998 Declaration of Fundamental Principles and Rights at Work.*[24] The *Declaration* recognized the preeminence of certain fundamental rights, including freedom of association and the effective recognition of the right to bargain collectively. The *Declaration* elevated these fundamental rights to the level of ILO constitutional commitments, providing in paragraph 2 that:

> [A]ll members, even if they have not ratified the Conventions in question [including Conventions Nos. 87 and 98[25]], have

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[22] *Programme of Action of the World Summit for Social Development*, (1995) [Tab 8].

[23] *Trade, Employment and Labour Standards*, (Paris: OECD, 1996) at p.10 and 27; [Tab 9].

[24] adopted June 18, 1998, 37 I.L.M. 1233 [Tab 11]. The Government of Canada took an active role in the creation of the *Declaration*, particularly through its delegate, Mr. Moher, who served as Chairperson and Reporter of the drafting Committee.

[25] ILO Convention (No. 98) *Right to Organise and Collective Bargaining Convention* (1949)[Tab 12], which explicitly protects the right to bargain collectively, is considered to protect fundamental rights or core labour standards and has been ratified by 147 countries. Although Canada has not ratified the

> an obligation arising from the very fact of membership in the organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely
>
> (a) freedom of association and the effective recognition of the right to collective bargaining;[26]

27. Thus, over the past decade an international consensus has emerged that collective bargaining constitutes a fundamental human right and an integral component of freedom of association in the labour context.[27] For its part, Canada has unequivocally supported these developments. Given this Court's emphasis on the importance of considering international norms and obligation in interpreting the scope of *Charter* rights and freedoms, this international consensus should inform the consideration of whether collective bargaining falls within the scope of the freedom of association guarantee. Otherwise, the scope of freedom of association for Canadian workers under the *Charter* would be significantly more restrictive than that recognized by the international community, including Canada.

d) Protection of Collective Bargaining Further Supported by Purposive and Contextual Interpretation of the Freedom of Association Guarantee

28. Interpreting freedom of association to include the freedom of workers to bargain collectively is also consistent with the underlying purpose of the guarantee, and various core and structural *Charter* values, including promoting equality, securing human dignity, enhancing democratic participation, and advancing the rule of law itself. The CLC submits that this Court should to adopt a purposive, contextual, independent and substantive approach to s. 2(d). Under this approach, there are certain associational activities which would be recognized as falling within

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convention, Canada has now accepted that it is bound by virtue of its subscribing to the *1998 Declaration*.

[26] Also included in this list are: (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.

[27] This is to be contrasted with the view expressed by Justice LeDain and two other members of this Court in the *Alberta Reference* that the right to collectively bargain is no more than a mere statutory right created by modern legislation. Employee efforts to engage in collective bargaining predates any such legislation and has historically been the mechanism through which workers have attempted to associate together in order to overcome their relatively unequal position with their employers. The fact that some elements of the current labour relations scheme are modern developments in no way diminishes the reality that collective bargaining legislation regulates and implicates the underlying exercise of freedom of association. As the Woods Task Force observed:

> "freedom to associate and to act collectively are basic to the nature of Canadian society and are root freedoms of the existing collective bargaining system... Collective bargaining legislation establishes rights and imposes duties derived from these fundamental freedoms..." (p. 138).

the ambit of the protection of s. 2(d), because they are essential to preserving and sustaining a free and democratic society and promoting the underlying values of the *Charter* itself.[28]

29. In the trade union context, an approach to the scope of freedom of association as encompassing collective bargaining is supported by the underlying purposes and interests of freedom of association. These purposes were most fully (and unanimously) identified by this Court in *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211. In *Lavigne*, all members of the Court observed that at the core of freedom of association, there lies, as Justice McIntryre put it in the *Alberta Reference* case, "...a rather simple proposition: the attainment of individual goals, through the exercise of individual rights, is generally impossible without the aid and cooperation of others."[29]
10 Indeed, Justice Wilson's description of collective bargaining in *Lavigne*, as a "mechanism by which individuals come together and form a union to represent their interests" (p. 296) would seem to squarely place collective bargaining within the recognized purposes of the *Charter* guarantee of freedom of association.

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[28]Academic commentators have also urged the Court to adopt an interpretation of freedom of association which protects associational activity which promotes fundamental *Charter* values and is essential to a free and democratic society (a proposition not directly considered by the Court in the trilogy or subsequent s. 2(d) cases). For example, Beatty & Kennett, *supra*, note 13 at pp. 601-3 [Tab 2], have suggested that a distinction should be made between some associational activities such as laws restricting the activities of gun clubs, and other associational activities such as collective bargaining, since:

> collective bargaining, like speech or thought or assembly, is an activity which is integral to the deeper moral value of autonomy and personal self-government which underlies our whole theory and tradition of liberal democratic government.

Similarly, Macklem, has suggested in "Developments in Employment Law: The 1990-91 Term"(1992) 2 S.C.L.R. (2d) 227 at p. 239, note 53:

> Another approach... would be for the judiciary to begin to make substantive judgements about the merits and importance of different types of groups and group activity in light of the purposes of the Charter. Some activities essential to some groups may well deserve substantive protection against governmental interference, subject to s. 1 of the Charter, simply because of their centrality and importance to social and democratic life.

[29]See Wilson J., speaking for three of the seven judges at p. 251; La Forest J., speaking for three other judges at p. 317; and McLachlin J. at p. 343. As Justice Wilson concluded in *Lavigne*, at p. 253, s. 2(d) is intended to advance "the collective action of individuals in pursuit of their common goals". For Justice McLachlin, at p. 343, "freedom of association protects the freedom of individuals to interact with, support and be supported by, their fellow humans in the varied activities in which they choose to engage". For Justice La Forest, at. P. 317, "the essence of the freedom is the protection of the individual's interest in self-actualization and fulfillment that can be realized only through combination with others".

30. Including collective bargaining as protected associational activity is also supported by core *Charter* values. In addition to promoting equality[30], collective bargaining serves to protect and advance the dignity of workers. As Justice La Forest stated in *McKinney v. University of Guelph*,[1990] 3 S.C.R. 229, at p. 300: "work is inextricably tied to the individual's self-identity and self-worth." In *Machtinger v. HOJ Industries*, [1992] 1 S.C.R. 986, this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. In *Wallace*, this Court noted that, "for most people, work is one of the defining features of their lives," and quoted approvingly from the following passage from Dickson C.J. in the *Alberta Reference* case:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

31. Collective bargaining also promotes employee autonomy, participation, self-determination, and the 'rule of law' in the workplace.[31] As Professor Weiler notes[32], the role of unions and collective bargaining has never been and is not strictly economic[33]:

> An apt way of putting it is to say that good collective bargaining tries to subject the employment relationship and the work environment to the 'rule of law'. Many theorists of industrial relations believe that this function of protecting the employee from the abuse of managerial power, thereby enhancing the dignity of the worker as a person, is the primary value of collective bargaining, one which entitles the institution to positive encouragement from the law....

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[30]See *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 and *Slaight Communications*, *supra*, and the discussion in footnote 39 below.

[31]Even in the United States, where the nature of the constitutional protection of freedom of association is much less extensive than that set out under the *Charter* (including the absence of an independent guarantee of freedom of association), both the United States Supreme Court and lower courts have held that the right to organize and to bargain collectively is a fundamental constitutionally protected right: see *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 at 33 [Tab 14]; *Amalgamated Utility Workers (C.I.O) v. Consolidated Edison Co. of New York*, 309 U.S. 261 at 263-64 [Tab 15]; *Thomas v. Collins*, 323 U.S. 518; *International Union v. Wisconsin Employment Relations Board*, 69 S. Ct. 516 at 524; and *United Federation of Postal Clerks v. Blount*, (1971) 325 F. Supp. 879.

[32]Weiler, *Reconcilable Differences*, (Toronto: Carswell, 1980) at pp. 31-32. See also Beatty and Kennett, *supra*, note 13, at pp. 598-99.

[33]See also Woods Task Force *Report on Canadian Industrial Relations* (1968) at p. 96-97:

> One of the most cherished hopes of those who originally championed the concept of collective bargaining was that it would introduce into the work place some of the basic features of political democracy that was becoming the hallmark of the western world. Traditionally referred to as industrial democracy, it can be described as the substitution of the rule of law for the rule of men in the work place.... The consequent restraints which collective bargaining has placed on management have provided workers with a measure of dignity, self-respect and security that they would not otherwise have gained.

> ....collective bargaining is the most significant occasion upon which most of these workers ever participate in making social decisions about matters that are salient to their daily lives. This is the essence of collective bargaining. Instead of merely taking what their employers offered - even the most generous, paternalistic of employers - employees take their destiny into their own hands, deciding what kind of working conditions they want, and then actively pursue those objectives, with all of the risks that may entail.

32. In addition to these specific *Charter* values, the various rights and freedoms guaranteed in the *Charter* are rooted in our common commitment as Canadians to nurturing and sustaining a free and democratic society. As Justice La Forest noted in *Lavigne, supra*, at p. 317:

> ...there is a community interest embodied in the freedom of association. This interest might be expressed in the interests of society in the contributions in political, economic, social and cultural matters which can be made only if people are **free to work in concert**." [emphasis added]

This community interest in individuals being free to work in concert is furthered by an interpretation of s. 2(d) which seeks to protect those associational activities which are essential to a free and democratic society and which promote *Charter* values. In the specific context of workers' freedom of association, collective bargaining is an associational activity which (as recognized both by Canada and internationally) plays an essential role in preserving and sustaining a free and democratic society and promoting the underlying values of the *Charter* itself, and as such, should be protected under s. 2(d).

33. In the *Egg Marketing* case, Justices Iacobucci and Bastarache recognized that there was as yet no consensus on the precise line between those activities with an associational aspect (and which are therefore protected by s. 2(d)), and other group activities for which s. 2(d) protection is sought merely because the activities are carried out collectively.[34] While certain members of this Court have previously expressed policy and jurisprudential concerns related to the recognition of constitutional protection for any associational activity at all under s. 2(d), and collective bargaining activity in particular[35], this Court has accepted that s. 2(d) protects at least some

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[34]See note 10 above.

[35]In the *Alberta Reference*, Justice LeDain expressed the concern that protecting collective bargaining under s. 2(d) would be inconsistent with the principle of judicial deference in labour relations matters. However, this approach runs contrary to the entire purpose of entrenching constitutional rights and freedoms, and is not one which this Court would ever suggest be followed in the case of other fundamental freedoms such as expression and religion. Indeed, in many cases, this Court has made clear that the definition and application of the rights and freedoms protected by the *Charter* must be kept analytically distinct and separate from the s. 1 analysis, and there is no basis for importing a different approach to s. 2(d). Moreover, as illustrated by this Court's decision in *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083, and the application of s. 1 in the dissenting judgment in *Delisle,* the

activities with an associational aspect. This includes the activities of forming, joining, maintaining and participating in lawful activities of an association. It also includes activities performed in association which are lawful when performed alone.[36] However, an overarching purposive and contextual approach to s. 2(d) would also protect those associational activities which are essential to preserving and sustaining a free and democratic society and promoting the underlying values of the *Charter*.[37] For the reasons set out above, collective bargaining should also be accorded s. 2(d) protection under this approach to the freedom of association guarantee.

3. Purpose and Effect of Agricultural Workers' Exclusion Interferes with Protected s. 2(d) Associational Activity

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34. In determining whether legislative provisions breach the *Charter,* the Court has consistently held that it is necessary to look not only to the legal effect of legislative provisions, but also to the practical effect of the legislation on the exercise of constitutionally protected rights and freedoms in the actual context in which it operates.[38] Furthermore, in assessing the true purpose and effect of the agricultural workers exclusion, it is necessary to have full regard to the context in which the statutory provision operates, including in this case not only the inherent vulnerability and inequality of employees in the workplace,[39] but also the particular disadvantage and vulnerability

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refinement of the s. 1 test since the *Oakes* test was first developed means that any concern for deference can be taken into account, where appropriate. In any event, the blanket exclusion of agricultural workers excludes them altogether from any "balance" between organized labour and employers, to which Justice Le Dain suggested deference was owed.

[36] As submitted above, this principle alone supports the conclusion that collective bargaining in this case is protected by s. 2(d).

[37]This approach to the purpose and content of freedom of association also draws considerable support from democratic political theory: A. de Tocqueville, *Democracy in America*, trans. H. Reeve, (New York: Modern Library, 1981), at p. 104 [Tab 16]; I. Cotler, "Freedom of Association, Conscience and Religion", in Tarnopolsky & Beaudoin eds., *Canadian Charter of Rights and Freedoms: Commentary*, (Toronto: Carswell ,1982), at pp. 154 -155 [Tab 17]; Jenks, *Human Rights and International Labour Standards*, (Stevens & Sons Ltd., 1960) at 49 [Tab 18].

[38]See, for example, *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, per Dickson, C.J.C. at 331-334; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, per Dickson, C.J.C. at p. 752; *R. v. Morgentaler*, [1988] 1 S.C.R. 30, per Dickson C.J.C. at pp 57-63 and per Beetz, J. at pp 91-106; *Black v. Law Society of Alberta,* [1989] 1 S.C.R. 591, per La Forest at 618-619; *Law v. Canada (Minister of Employment and Immigration)*,[1999] 1 S.C.R. 497.

[39]In *Wallace v. United Grain Growers Ltd., supra*, this Court drew together its earlier decisions to emphasize the "unique characteristics" of the employment contract and, in particular, the absence of free

experienced by agricultural workers, who as found by Justice Sharpe are "poorly paid, fac[ing] difficult working conditions, hav[ing] low levels of skill and education, low status, and limited employment mobility."[40]

35. While the impugned legislative exclusion does not legally prohibit agricultural workers from forming or joining a trade union and/or from engaging in collective bargaining, the practical effect is virtually the same, impeding agricultural workers from engaging in this constitutionally protected activity.[41] The history of collective bargaining and trade unionism in Canada, and the record in this case, demonstrates that the exclusion of agricultural workers from access to collective bargaining legislation effectively prevents them from forming and joining trade unions, and participating in collective bargaining activity. Canadian governments have extensively regulated, structured and channeled the method through which Canadian workers are able to engage in collective bargaining, to the point where collective bargaining is virtually synonymous with bargaining under these legislative schemes. This is particularly the case for disadvantaged and vulnerable workers such as agricultural employees, who simply cannot effectively form and join trade unions or participate in collective bargaining, having been excluded from the statutory regime.[42]

36. Having so extensively regulated collective bargaining activity, and having established a normative legislative structure applicable to most employees in both the private and public sectors, the state can hardly now contend that exclusion from the basic normative legislative structure for collective bargaining - which has been in place across Canada for over 50 years - is not intended to prevent,[43] and does not have the effect of preventing[44]

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bargaining power resulting from the inequality of power and information between employees and their employers. The Court also recognized employees as a vulnerable group in society, a vulnerability "underscored by the level of importance which our society attaches to employment, and which "informs virtually all facets of the employment relationship", citing with approval from P. Davies & M. Freedland, *Kahn-Freund's Labour and the Law*, 3rd ed. (London: Stevens & Sons, 1983) as follows:

> The relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination.

[40]Case on Appeal p. 490; See also the Appellants' Factum at paras. 6-17, 111.

[41]The CLC adopts the Appellant's submissions respecting unconstitutional purpose and focuses its submissions on the *effect* of the exclusion: see Appellants' Factum at paras. 36-39, 53-74.

[42]See, for example, the Fudge Affidavits, Appeal Book vol. 1, pp. 52-57 and, Vol. 3, pp. 372-373.

[43]In the context of freedom of expression, this Court held in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 that where legislative or governmental restrictions are enacted in order to control or guard against the presumed effect of such expressive activity, such restrictions is to interfere

excluded employees from engaging in collective bargaining.[45]

37. In this context, blanket exclusion of agricultural workers from the protection of collective bargaining legislation, otherwise applicable to most other employees, must also be viewed as active state encouragement of actions by employers which inhibit or interfere with the right to join a trade union. The deliberate exclusion of agricultural workers from access to collective bargaining legislation cannot help but undermine both the freedom to form and join unions and to engage in collective bargaining activity. While the following comments of this Court in *Vriend* were made in the context of an equality challenge, the approach to assessment of the legislative effect is equally applicable here:

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> It cannot be claimed that human rights legislation will help to protect individuals from discrimination and at the same time contend that an exclusion from the legislation will have no effect...
>
> The very fact that sexual orientation is excluded from the IRPA, which is the Government's primary statement of policy against discrimination certainly suggests that discrimination on the ground of sexual orientation is not as serious or as deserving of condemnation as other forms of discrimination. It could well be said that it is tantamount to condoning or even encouraging discrimination against lesbians and gay men.[46]

Similarly, it cannot be simultaneously claimed that collective bargaining legislation will help protect employees from

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with the protected activity: see pp. 978-79. Similarly, here, in so far as the purpose of excluding certain groups of employees from access to a comprehensive collective bargaining regime applicable to most other employees is rooted in the professed concern over the effect which access to collective bargaining would have, it follows that the exclusion has been enacted for the purpose of controlling or guarding against the effects of this protected associational activity.

[44]While the courts below did not consider collective bargaining to be protected as associational activity under s. 2(d) of the *Charter*, Justice Sharpe specifically found that "there can be no doubt that the purpose of [the agricultural exclusion] is to deny agricultural workers the right to engage in collective bargaining." (Appeal Book, p. 480).

[45]As Professor Beatty has commented:

> At a minimum, it is a deliberate decision of the legislative branch not to show the same respect for the farmworkers' freedom of association.... Refusing to extend the 'protection and benefit' of our Labour Relations Acts to agricultural workers means their freedom to associate is governed by the common, judge-made law.... [D]enying them the protection to the statutory scheme has left them vulnerable to a wide variety of actions by their employers designed to obstruct the formation of a union." D. Beatty, *Putting the Charter to Work*, (Kingston & Montreal: McGill-Queen's University Press, 1987) at 89-90.

More generally, see H. Arthurs et al., *Labour Law and Industrial Relations In Canada*, 4th ed. (Markham: Butterworths, 1993), at pp 196-199 [Tab 19]. Further, this conclusion is consistent with the finding of the ILO Freedom of Association Committee in Case No. 1900 (See footnote 54).

[46]*Vriend v. Alberta*, *supra*, per Cory J. at paras. 99 to 103.

employer interference in joining trade unions and collective bargaining, and that an exclusion from the legislation will have no effect. On the record, the government was well aware that the exclusion would have the effect of preventing agricultural workers from joining trade unions and collectively bargaining; indeed, this was the very rationale for the exclusion.

38. The Respondents point to the *Delisle* decision as precluding the claim that the deliberate legislative exclusion of agricultural workers interferes with the exercise of protected s. 2(d) forming, joining and participating activity. However, in holding that the effect of the legislative exclusion in *Delisle* did not interfere with constitutionally protected joining activity, the majority of this Court relied heavily upon the fact that RCMP members were independently protected under the *Charter* from action which interfered with their constitutionally protected right to form, join and participate (since their employer was government), upon the evidence that RCMP members had been able to engage in constitutionally protected joining activity despite the legislative exclusion, and on the fact that numerous other similarly advantaged or powerful groups (i.e. armed forces, senior executives in the public services and judges) were also excluded from collective bargaining legislation.[47] By contrast, in this appeal, agricultural workers are not only particularly vulnerable and disadvantaged, but also enjoy no independent constitutional protection (because they are not employed by government). Further, the evidence supports the conclusion that agricultural workers cannot meaningfully engage in constitutionally protected joining and bargaining activity in the face of the legislative exclusion.[48]

39. The Respondents also argue that *Delisle* precludes a finding of s. 2(d) infringement because, at most, exclusion of agricultural workers from collective bargaining legislation raises concerns of underinclusiveness which can only be addressed under s. 15. Apart from the different legal and evidentiary context in which this appeal arises, the CLC submits that:

1) Justice L'Heureux Dubé recognized in *Delisle* that, in a different case, one "where there exists no

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[47]Furthermore, in earlier cases where this Court had considered the interpretation and application of s. 2(d) of the *Charter* in the labour relations context, all of the affected employees were covered by a collective bargaining regime. The challenge in those cases was to a particular temporary alteration of the scheme (i.e. wage controls in *PSAC v. Canada* and back to work legislation in *RWDSU v. Saskatchewan*), or to a particular feature of the labour relations scheme (i.e. the mechanism for choice of bargaining agent in the *PIPSC* case and the method of resolving collective bargaining impasses in the *Alberta Reference*). In none of those cases was it alleged that either the purpose or effect of the legislative measure was to interfere with joining activity.

[48]See references in footnote 42, and the evidence summarized below: see Appeal Book p. 480.

Charter protection.... it might be demonstrated that the selective exclusion of a group of workers... has the purpose or effect of encouraging private employers to interfere with employee associations";[49]

2) unlike the argument considered in *Delisle*, the infringement here does not arise because of differential treatment in and of itself, but because of the practical effect of the exclusion on agricultural workers' protected s. 2(d) activities, i.e. joining and bargaining together;

3) this Court has recognized in relation to s. 2(a) of the *Charter* that the purpose or effect of differential treatment can interfere with constitutionally protected activity - as Chief Justice Dickson observed, "protection of one religion and the concomitant non-protection of others imports disparate impact destructive of religious freedom of the collectivity;"[50]

4) there is a significant and material difference between the state enhancing constitutional freedoms on a disparate basis (e.g. providing a megaphone or funding a theatre) and the state withholding protection necessary for the effective enjoyment of the freedom, where the effect of that withholding is to severely undermine the ability to engage in protected activity at all.

40. The Respondents contend that the Appellants are trying to assert a constitutional right to trade union certification under collective bargaining legislation. However, this confuses questions of constitutional violation with questions of remedy. The breach in this case arises because the exclusion, in purpose and effect, impacts adversely on associational activity which is constitutionally protected, i.e. joining and bargaining activity. If the Government is unable to justify this breach under s. 1, the appropriate remedy would include removal of the exclusion. While the result would be that agricultural workers could join and bargain under the same or similar rules established by the Legislature for other workers, this does not change the nature of the breach or the need for a remedy.

C. SECTION ONE OF THE *CHARTER*

41. It is submitted that this is a case in which the government should be put to a strict s. 1 test. All of the contextual factors militate against affording the government any level of deference in the decision to exclude agricultural workers from the comprehensive collective bargaining regime.[51]

42. Moreover, in determining whether impugned state action can be demonstrably justified in a free and democratic society, this Court has frequently referred to international human rights law, including the rulings of international human rights bodies.[52] In this respect, ILO expert bodies have consistently ruled that there is no

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[49] *Delisle*, per L'Heureux-Dubé, paras. 6 and 7.

[50] *R v. Big M Drug Mart, supra,* at p. 337.

[51] See the approach of Cory and Iacobucci JJ in *Delisle* to the s. 1 context and deference factors at paras. 128-132. See also, *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 at para. 87.

[52] *Slaight Communications*, at p.1056-7; *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 750 ; *Canada (Canadian. Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892; *R. v. Sharpe*, 2001 SCC 2,

incompatibility between agricultural employment and collective bargaining.[53] Indeed, the ILO has repeatedly found Canada to be in breach of its international obligations as a result of the exclusion of agricultural workers from collective bargaining, and has repeatedly, albeit to no avail, called on Canada to remedy this breach.[54] Taken together with the stark reality that eight other provinces do not exclude agricultural workers from access to collective bargaining, with no evidence of any serious difficulties, there is a particularly heavy onus on the government to justify the s. 2(d) infringement, an onus which has not been met in this case. Finally, even if all agricultural workers could be regarded as providing essential services, legislatures across Canada have been able to accommodate collective bargaining in essential services through a variety of alternative dispute resolution mechanisms,[55] none of which require or justify the complete and blanket exclusion of access to collective bargaining.

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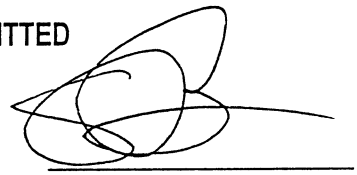
PART IV - REMEDY REQUESTED

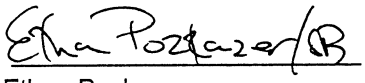
43. The Intervener CLC requests that the Appeal be allowed on the terms requested by the Appellant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



February 7, 2001

20 Steven Barrett



Ethan Poskanzer

Counsel for the CLC

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paras. 175-179.

[53]See, for example: Comments of the ILO Committee of Experts ("CEACR"): Individual Observation concerning Convention No. 87, Honduras [Tab 21]; Jordan [Tab 22]; and Rwanda [Tab 23].

[54]See, for example, Complaint against the Government of Canada (Ontario) presented by the Canadian Labour Congress (CLC) Report No. 308, Case(s) No(s). 1900 [Tab 24]; 1999 CEACR: Individual Observation concerning Convention No. 87, Canada [Tab 25]; 1998 CEACR: Observation concerning Convention No. 87, Canada [Tab 26]; Committee on Freedom of Association Committee: Introduction to Report 316 (June1999) [Tab 27].

[55]See, for example, the discussion of varying approaches to essential service dispute resolution in G. Adams, *Canadian Labour Law*, 2nd ed., looseleaf (Aurora: Canada Law Book, 1993) paras. 11.930 to 11.990 [Tab 20]; see also paras 6.820 to 6.860 for a discussion of the agricultural workers exclusion.

PART V - TABLE OF AUTHORITIES

SECONDARY MATERIALS