(24)

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

Interveners

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FACTUM OF THE RESPONDENT, FLEMING CHICKS

PART I STATEMENT OF FACTS

A. Nature of the Case and History of Appeal

1. The present case is an appeal brought by the Appellants from the unanimous judgment of the Court of Appeal for Ontario. The Court of Appeal dismissed an appeal of a decision of Sharpe J., as he then was, in which he dismissed an Application brought by the Appellants in the Ontario Court (General Division) challenging the constitutionality of

s. 80 of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1 (hereinafter, the "*LRESLAA*"), as well as s. 3(b) of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A (hereinafter, the "*LRA*"). Section 80 of the *LRESLAA* repealed the *Agricultural Labour Relations Act, 1994*, S.O. 1994, c. 6 (hereinafter, the "*ALRA*"). Section 3(b) of the *LRA* provides that agricultural workers are excluded from the application of the *LRA*.

B. Decisions of the Courts Below

2. Sharpe J. heard this case by way of an Application on October 21-23, 1997. His Honour held that the omission of agricultural workers from the statutory labour relations regime set out in the *LRA* did not violate the freedom of association of agricultural workers, as guaranteed by s. 2(d) of the *Canadian Charter of Rights and Freedoms.*

***Dunmore v.* Ontario *(Attorney General)* (1997), 155 D.L.R. (4th) 193 (Ont. Gen. Div.), *Appellants' Record*, Vol. III, p. 467.**

3. In his decision, Sharpe, J. found that the repeal of the *ALRA* by the *LRESLAA* denied agricultural workers the right to engage in collective bargaining. His Honour adopted the 1987 "labour trilogy" of decisions of the Supreme Court of Canada and held that the right to form a trade union is protected by s. 2(d) of the *Charter*, but held that that right does not extend to the activities of the association or trade union (i.e., collective bargaining). Sharpe J. did not find in the *LRESLAA* or in the *LRA* a governmental purpose to deny agricultural workers the right to form an association.

***Ibid.*, at pp. 204-06, *Appellants' Record*, Vol. III, pp. 478-80.**

4. Sharpe J. further held that the exclusion of agricultural workers from Ontario's statutory labour relations scheme did not violate the right to equal protection and equal benefit of the law of agricultural workers, as guaranteed by s. 15 of the *Charter*. His Honour found that, although agricultural workers may have been denied a legal benefit or protection enjoyed by other workers, namely the right to engage in collective bargaining,

the denial of this legal benefit did not flow from discrimination on an enumerated or analogous ground within the meaning of s. 15 of the *Charter*.

***Ibid.*, at pp. 209, 219, *Appellants' Record*, Vol. III, pp. 483, 493.**

5. In reaching this conclusion, Sharpe J. adopted the tests from the leading Supreme Court of Canada cases on the principles for defining an analogous ground under s. 15 of the *Charter*. His Honour upheld one of the core principles derived from these cases – namely, that discrimination based on an analogous ground is usually based upon certain personal traits or characteristics of the disadvantaged group.

***Ibid.*, at pp. 211-16, *Appellants' Record*, Vol. III, pp. 485-90.**

10 6. Sharpe J. found that the legislative distinction excluding agricultural workers from the collective bargaining regime does not reflect stereotypical assumptions about the personal characteristics of agricultural workers, but is based upon the Legislature's perception of the characteristics and circumstances of the agricultural industry, which are shared by agricultural workers as well as by farm owners and operators.

***Ibid.*, at p. 217, *Appellants' Record*, Vol. III, p. 491.**

7. Sharpe J. concluded that the economic disadvantage claimed by agricultural workers in the within Application was not sufficient to constitute the legislative classification "agricultural workers" as an analogous ground for the purposes of s. 15 of the *Charter*. His Honour held that economic disadvantage does not, by itself, establish
20 discrimination on an analogous ground within the meaning of s. 15. The absence of evidence that agricultural workers as a group can be identified by one or a combination of grounds enumerated by s. 15(1) or by any personal characteristics analogous thereto, was fatal to the Applicants' s. 15 claim.

***Ibid.*, at p. 217, *Appellants' Record.*, Vol. III, p. 491.**

C. Summary of the Position of the Respondent, Fleming Chicks

8. The position of the Respondent, Fleming Chicks, on the constitutional issues before the Court can be summarized as follows:

1. The repeal of any particular legislation is subject to *Charter* scrutiny only to the same extent that the regime it leaves in place is subject to *Charter* scrutiny – the government is free to repeal legislation if there were no constitutional obligation to enact that legislation in the first place.

2. Freedom of association is a right guaranteed to individuals; it does not protect the rights of associations nor does it guarantee the constitutional protection of the foundational or essential purpose of associations.

3. The government does not have a positive obligation under the *Charter* to enhance such associational rights of individuals.

4. The *LRESLAA* and the *LRA* do not violate the Appellants' freedom of association as guaranteed by the *Charter* because they do not in any way prohibit or discourage the Appellants from associating with each other.

5. The *LRA* does not violate agricultural workers' right to equal protection and equal benefit of the law under s. 15 of the *Charter*.

6. The employment status of agricultural workers is not an analogous ground for the purpose of s. 15 of the *Charter*, and therefore the distinction made in the *LRA* by excluding agricultural workers from its application does not invoke the application of s. 15 of the *Charter*.

7. In the alternative, the exemption of agricultural workers from the collective bargaining regime established by the *LRA* is justified under s. 1 of the *Charter* in that collective bargaining and the wholesale application of a formalized labour relations regime is inconsistent and incompatible with the economic structure and framework of the agricultural sector, which is dominated by family farm production, and also inconsistent and

incompatible with the heightened vulnerability of the production process in the agricultural sector in Ontario.

D. Statutory Framework

9. The *Labour Relations Act*, R.S.O. 1990, c. L.2, as repealed and re-enacted as the *Labour Relations Act, 1995* (defined above as the "*LRA*"), by s. 1 of the *LRESLAA*, establishes and regulates a collective bargaining regime whereby trade unions may be certified as the bargaining agent of employees for the purposes of collective bargaining with the employer. The *LRA* regulates the manner in which trade unions can become
10 certified as a bargaining agent, the manner in which collective bargaining may proceed between bargaining agent and employer in order to negotiate a collective agreement, and limits the ability of employers and employees to lock-out or strike during the term of a collective agreement.

Labour Relations Act, 1995.

***Labour Relations and Employment Statute Law Amendment Act, 1995*, s. 1.**

10. Agricultural workers have consistently been exempted from the application of the *LRA*, and its predecessor statutes. In 1994, the Ontario Legislature passed a separate
20 statute, the *ALRA*, establishing and regulating a collective bargaining regime applicable only to the agricultural sector. The *ALRA* allowed for trade unions to apply for certification as bargaining agent of employees for the purposes of collective bargaining with the employer. The *ALRA* prohibited strike and lock-out activity. The *ALRA* provided that where the bargaining agent and the employer were unable to come to agreement on terms of a collective agreement, the matter may be referred to a mediator appointed by the Minister of Labour. The *ALRA* further provided that if the mediator was unable to effect a collective agreement between the parties, the parties were obliged to appoint a "selector" to select all of the final offer made by one party or all of the final offer made by the opposite party on matters remaining in dispute between the parties.

30 ***Labour Relations Act, 1995*, s. 3(b).**

***Agricultural Labour Relations Act, 1994*, ss. 3, 10-21.**

11. Section 80 of the *LRESLAA* provided for the repeal of the *ALRA*.

***Labour Relations and Employment Statute Law Amendment Act, 1995*, s. 80.**

E. Facts in Evidence in the Court Below

(i) Professor Fudge

12. The evidence before Sharpe J. included competing affidavits on the social and economic status of agricultural workers and on the viability or appropriateness of collective bargaining in the agricultural sector.

10 13. The Applicants relied heavily on the evidence of Professor Judy Fudge to assert a claim of historical disadvantage by agricultural workers, the alleged social and political effects of their exclusion from labour relations legislation and this alleged impact on their ability to improve their conditions.

Affidavit of Professor Judy Fudge, sworn February 28, 1997, *Appellants' Record*, Vol. I, pp. 24-58.

14. Professor Fudge is a law professor at Osgoode Hall Law School and has admitted having no expertise as an economist or agricultural policy analyst.

Excerpts from the Cross-Examination of Judy Fudge on her Affidavits dated February 28, 1997 and September 23, 1997, QQ. 9,
20 **18, 19, *Record of the Attorney General of Ontario*, Vol. I, pp. 115-16.**

(ii) Professor Brinkman

15. For its part, the Attorney General of Ontario filed evidence of Professor George Brinkman of the Department of Agricultural Economics and Business, University of Guelph. Professor Brinkman holds a Ph.D. in agricultural economics and has taught for twenty-four years at the University of Guelph, specializing in agricultural price and income

policy, farm viability, farm structure, agricultural program evaluation, and rural development.

Affidavit of George Brinkman, sworn August 18, 1997, *Appellants' Record*, Vol. II, pp. 282-83.

16. Professor Brinkman's affidavit sets out the policy basis for excluding the agricultural sector from collective bargaining legislation in Ontario, and examines the economic profitability of the agricultural sector in Ontario, the special characteristics of agricultural production, and the family farm structure of the agricultural sector in Ontario, including the composition of the hired labour force in that sector.

10 17. Professor Brinkman makes the following eleven points in his initial affidavit filed on the Application:

1. The agricultural sector operates in a very fragile, internationally-competitive environment that was jeopardized by the *ALRA*. Farming is different than industrial style production processes and requires different labour relations.

2. The biological nature of agricultural production makes farming very time sensitive, often seasonal, and reactive. Farming therefore requires multi-task skills and flexibility that may be inconsistent with a formalized work structure that would likely arise under a collective bargaining regime such
20 as the one set out under the *ALRA*.

3. Any significant change in labour relations will have a major impact on family farms, as 98.5% of all Ontario farms are operated as family units.

4. The Ontario farm sector cannot afford any further cost adjustments. Aggregate farm income has been falling steadily in recent years and was negative (-$117 million) in 1996.

5. On average, farm operators earn much lower returns than hired farm workers, as farm operators averaged only $3,465 in farm income in 1995

and negative farm income in 1996. This income represents both the return to labour and management and the return to equity capital, which averaged about $300,000 per farm in 1995.

6. Although the *ALRA* does provide a ban on strikes, final offer arbitration increases the risks of, and potential for the imposition of unworkable terms and conditions. Bargaining also could result in working conditions detrimental to the survival of family farms.

7. The hired agricultural labour force is a very economically heterogeneous group. Consequently, concentrating on average wage rates, etc., can be very misleading.

8. Average wages for hired workers are low by most standards, but these wages are on average much higher than the labour return for farm operators. Furthermore, the low wages of hired farm workers result from low worker productivity, and working in a depressed, low-value industry rather than because of the absence of collective bargaining.

9. Hired workers are not covered by the same health and safety standards as other workers, but they are covered under the Workers Compensation scheme as well as Farm Safety Associations.

10. Given current trends in the economic conditions and nature of the agricultural sector in Ontario, the *ALRA* and collective bargaining may not benefit farm labour because any increase in wage costs is likely to precipitate mechanization and loss of jobs. The United Farm Workers Union in the U.S., for example, had approximately 300,000 members in California in the 1970's, but today this union and 8 others in California have only about 30,000 unionized farm workers.

11. Ontario's agriculture is much more complex than that in most other provinces, as it involves many more commodities and types of production, and is more labour intensive. Though other provinces, except Alberta,

allow collective bargaining for agricultural workers in varying degrees, the impact of unionization is likely to be much more significant in Ontario than in other provinces.

Affidavit of George Brinkman, *Appellants' Record*, Vol. II, pp. 284-85.

(iii) Dr. Saunders

18. The Attorney General of Ontario also filed affidavit evidence from Dr. Ron Saunders, Director of the Employment and Labour Policy Branch in the Ontario Ministry 10 of Labour. Dr. Saunders holds a Ph.D. in economics from Harvard University, and his responsibilities at the Ministry of Labour since 1986 have included labour adjustment policy, employment standards policy, labour market policy, and labour management policy.

Affidavit of Ron Saunders, sworn August 18, 1997, *Appellants' Record*, Vol. II, pp. 325-26.

19. In his affidavit, Dr. Saunders explains that the primary purpose of the *LRA* is to facilitate collective bargaining between employees and trade unions. Dr. Saunders sets out some of the policy reasons for the exclusion of persons employed in agriculture from the scope of the *LRA*, and from the collective bargaining regime provided for in that *Act*.

20 20. Dr. Saunders states that certain fields of employment are excluded from the scope of the *LRA*, on the grounds that the nature of employment in those fields is unsuited to or does not lend itself to the regime of collective bargaining that the *Act* establishes. According to Dr. Saunders, these fields of employment are considered to be incompatible with collective bargaining because no dispute settlement mechanism can be devised which would achieve the legislative goal of facilitating collective bargaining. This is one of the reasons why agricultural workers and horticultural workers are excluded from the *LRA*.

***Ibid.*, para..7, *Appellants' Record*, Vol. II, p. 327.**

21. In the case of agricultural workers, as with domestic workers employed in private homes, the employment activities are closely interwoven into the fabric of private life, and

are incompatible with unionization. The composition of the agricultural sector continues to be based primarily upon the family farm and the personal and informal relationships and methods of communication that are inherent to this most basic and fundamental of societal units.

***Ibid.*, paras. 9-10, *Appellants' Record*, Vol. II, p. 327.**

22. Under Canadian labour relations law, private sector labour relations disputes are universally resolved through a strike or lock-out or through an agreement that is reached against the background of the right to strike or to lock-out. The *ALRA* was unique as it was the only statute in Canada to ban strikes and impose compulsory arbitration in private sector labour relations.

***Ibid.*, para. 15, *Appellants' Record*, Vol. II, p. 329.**

23. In the public and broader public sectors, the services provided by trade union members are sometimes essential to the health, safety or welfare of the community at large. It is therefore widely recognized that the right to strike and lock-out is an inappropriate dispute resolution mechanism for many public sector employees. In place of the right to strike and lock-out, some collective bargaining regimes in the public sector use compulsory arbitration.

***Ibid.*, para. 19, *Appellants' Record*, Vol. II, p. 330.**

24. However, industrial relations experts have noted that compulsory interest arbitration regimes have a "chilling effect" on parties negotiating a collective agreement. A party that anticipates getting more from an arbitrator than from the opposite party in a negotiated settlement will have an incentive not to make concessions during negotiation.

***Ibid.*, para. 22, *Appellants' Record*, Vol. II, p. 331.**

25. Experts have also concluded that arbitration regimes tend to lead to higher wage outcomes than "right to strike" regimes, as arbitration awards tend to produce wage settlements that are increasingly divorced from the influence of the labour market. This insulation from the influence of the market would be potentially disastrous in volatile and highly competitive parts of the private sector economy. It is partly for this reason that

compulsory arbitration regimes have been confined to the public sector in Canada. The agricultural sector is particularly vulnerable due to disproportionately thin profit margins.

> ***Ibid.*, paras. 26-27, *Appellants' Record*, Vol. II, p. 332.**
>
> **Affidavit of George Brinkman, paras. 40-59, *Appellants' Record*, Vol. II, pp. 298-310.**

26. Therefore, the *ALRA* was an unprecedented piece of legislation as it represented a major shift in labour policy in the absence of the economic and social underpinnings that have been historically regarded as necessary in order to justify such a shift. It imposed upon the agricultural sector a form of dispute settlement that leads to higher wage outcomes than the right to strike and lock-out mechanism. It thereby compelled the agricultural sector of the economy to bear a higher cost burden than the industrial sector, despite the highly competitive nature of the agricultural sector as well as the chronically low profit margins associated with that sector.

> **Affidavit of Ron Saunders, para. 33, *Appellants' Record*, Vol. II, p. 334.**

27. The *ALRA* provided for "final offer selection" in its compulsory arbitration scheme. In such a regime, the degree of risk and possible error that at least part of an imposed settlement might be unreasonable are significantly increased. A system ultimately based upon the selection of the final offer of only one of the parties in its entirety increases the risk that an unreasonable term or condition could be imposed on an employer in an economically vulnerable position. This creates particular risks for agricultural employees, whose profit margins are very thin.

> ***Ibid.*, paras. 41-42, *Appellants' Record*, Vol. II, p. 336.**
>
> **Affidavit of George Brinkman, para. 40, *Appellants' Record*, Vol. II, p. 298.**

28. Finally, harmonious labour relations are essential to the health of crops and the well-being of livestock, whose very survival depends upon the readiness of farm workers to meet their varying needs. The survival of the agricultural sector as a whole depends upon the ability of agricultural producers to adapt rapidly to the novel demands of a global marketplace.

Affidavit of Ron Saunders, para. 46, *Appellants' Record*, Vol. II, pp. 337-338.

Affidavit of George Brinkman, paras. 8-25, *Appellants' Record*, Vol. II, pp. 285-90.

29. Another policy reason for the exclusion of agricultural workers from the *LRA* is the prevalence of the family farm. Both affidavits of Professor Brinkman and Dr. Saunders refute the assertions of Professor Fudge, and state that statistical analysis simply does not support the contention that the landscape and composition of the agricultural sector in Ontario has changed dramatically in recent years from one based upon the family farm to one dominated by large and sophisticated agribusiness. Statistical evidence clearly demonstrates that 98.5% of the agricultural sector in Ontario continues to be composed of family farms.

Affidavit of Ron Saunders, para. 38, *Appellants' Record*, Vol. II, p. 335.

Affidavit of George Brinkman, para. 27, *Appellants' Record*, Vol. II, pp. 290-91.

30. A family farm is a farm run as a family business, where most of the management, labour and capital is provided or supported (i.e., by debt financing) by the family. An important distinction between family and non-family farm units is that the family is personally involved in providing on-going decision making and management, providing their own labour and supervising supplemental workers, taking the risks, and receiving benefits as family income.

Affidavit of George Brinkman, para. 29, *Appellants' Record*, Vol. II, pp. 291.

31. Dr. Saunders concludes that the interposition of a third party, the bargaining agent, between the employer and the employees in the agricultural sector runs counter to the personal, informal and flexible work relationships that are typical to the family farm.

Affidavit of Ron Saunders, para. 47, *Appellants' Record*, Vol. II, p. 338.

Affidavit of George Brinkman, paras. 27-32, *Appellants' Record*, Vol. II, pp. 290-92.

F. Fleming Chicks' Involvement in this Matter

32. The *ALRA* received Royal Assent on June 23, 1994. On October 26, 1995, 22 days after the Ontario Government introduced Bill 7 into the Legislature, the Appellant, the United Food and Commercial Workers International Union ("UFCW"), filed an application for certification for 65 employees at Fleming Chicks' chicken hatchery in Beamsville, Ontario. Fifteen days later, on November 10, 1995, Bill 7 was given Royal Assent. Despite the fact that the UFCW was never certified as the exclusive bargaining agent of the employees at Fleming Chicks, the Appellants named Fleming Chicks as a party to these proceedings.

10

Affidavit of Michael Doyle, sworn November 13, 1995, para. 20, *Appellant's Record*, Vol. 1I, p. 181.

Application for Certification for Fleming Chicks, Exhibit "H" to the Affidavit of Michael Doyle, sworn November 13, 1995, *Record of the Respondent, Fleming Chicks*, pp. 57-58.

33. Fleming Chicks is a small hatchery operation with 65 employees. Full time workers at Fleming Chicks typically earn $23,000 to $30,000 per year. Full time workers receive extensive benefits including paid vacations, statutory holidays or replacement vacation days in lieu of statutory holidays, extended health and dental care, and life insurance. Some workers participate in profit sharing and pension plans.

20

Application for Certification for Fleming Chicks, *Record of the Respondent, Fleming Chicks*, pp. 57-58.

Affidavit of George Brinkman, para. 89, *Appellants' Record*, Vol. II. p. 319.

34. The Appellants have submitted affidavit evidence of Mr. Dunmore describing the working conditions at the Respondent, Highline Produce Limited ("Highline"), as "horrendous". Fleming Chicks disputes that the working conditions of agricultural workers, in general, are as described by this affiant. Further, there is no evidence to suggest that the working conditions at Fleming Chick are poor or that collective bargaining is necessary to improve the working conditions at Fleming Chicks.

30

Affidavit of Tom Dunmore, sworn November 13, 1995, para. 6, *Appellants' Record*, Vol. 1I, pp. 198-99.

35. Moreover, there is no evidence in the record to support the assertion that there any reprisals or threats thereof against agricultural workers forming employee associations.

PART II POINTS IN ISSUE

36. The points in issue are as set out in the constitutional questions stated by Binnie J.:

1. Does s. 80 of *LRESLAA* limit the right of agricultural workers

   (a) to freedom of association guaranteed by s. 2(d) of the *Charter*; or

   (b) to equality before and under the law and equal benefit of the law without discrimination as guaranteed by s. 15 of the *Charter*?

2. Does s. 3(b) of the *LRA* limit the right of agricultural workers

   (a) to freedom of association guaranteed by s. 2(d) of the *Charter*; or

   (b) to equality before and under the law and equal benefit of the law without discrimination as guaranteed by s. 15 of the *Charter*?

3. If the answer to any part of questions 1 or 2 is in the affirmative, is the limitation nevertheless justified under s. 1 of the *Charter*?

Order of Binnie, J. on constitutional questions, June 20, 2000, *Appellants' Record*, Vol. I., pp. 21-22.

37. It is the position of the Respondent, Fleming Chicks, that the first two constitutional questions should be answered in the negative. If this Honourable Court answers question 1 or 2 in the affirmative, Fleming Chicks asserts that any constitutional limitation is justified under s. 1 of the *Charter*.

PART III ARGUMENT

A. Remedy Sought by Appellants

38. The *ALRA*, both in purpose and substance, was enacted to provide for collective bargaining rights in the agricultural sector of the economy. This is confirmed in the evidence of the Attorney General's expert witnesses and is self-evident from the preamble to the *ALRA*, which states as follows:

> It is in the public interest to extend collective bargaining rights to employees and employers in the agriculture and horticulture industries.
>
> ***Agricultural Labour Relations Act, 1994*, Preamble.**

39. By virtue of subsection 3(1) of the *ALRA*, certain provisions of the *LRA* relating to these collective bargaining rights were incorporated into the *ALRA*. This "whole package" of legislative collective bargaining rights and related provisions was repealed by the enactment of s. 80 of the *LRESLAA*.

> ***Agricultural Labour Relations Act, 1994*, s. 3(1).**
>
> ***Labour Relations and Employment Statute Law Amendment Act, 1995*, s. 80.**

40. The Appellants are seeking a declaration that s. 80 of the *LRESLAA* and s. 3(b) of Schedule A to the *LRESLAA* violate s. 2(d) and s. 15 of the *Charter* and are therefore of no force or effect. The effect of the order sought by the Appellants is to restore to life the *ALRA* and thereby re-enact a short-lived statutory regime that allowed for collective bargaining for agricultural workers in Ontario, and to reinstate therefore the "whole package" of legislative protections set out under the *ALRA*.

41. In his reasons for decision, Sharpe J. identified the Appellants' desired result as follows:

> What the applicants seek is to impose upon the province a positive duty to enhance the right of freedom of association

> by creating in their favour a legislative scheme conducive to the enjoyment of that important right...
>
> ***Dunmore, supra*, at p. 207, *Appellants' Record*, Vol. III, p. 481.**

42. Therefore, it is respectfully submitted that a fundamental threshold issue in this appeal is whether under either s. 2(d) or s. 15 of the *Charter* there is a constitutional obligation to provide agricultural workers with the "whole package" of rights under the *ALRA*.

43. In his reasons for decision Sharpe J. held that the argument advanced by the Appellants herein had been previously rejected by the Supreme Court of Canada. Namely, that by "dipping its toe in the water" and affording or enhancing the rights of some, the government was obliged to go all the way and ensure the enjoyment of rights by all. Sharpe J. held that such an argument is more properly the subject of a s. 15 claim.

> ***Dunmore, supra*, at p. 207, Appellants' Record, Vol. III, p. 481.**

44. Recently, in *Delisle v. Canada*, Bastarache J. for the Majority of the Court distinguished s. 2 and s. 15 of the *Charter* with respect to "underinclusive" legislation as follows:

> The structure of s. 2 of the *Charter* is very different from that of s. 15 and it is important not to confuse them. While s. 2 defines the specific fundamental freedoms Canadians enjoy, s. 15 provides they are equal before and under the law and have the right to equal protection and equal benefit of the law. The only reason why s. 15 may from time to time be invoked when a statute is underinclusive, that is, when it does not offer the same protection or the same benefits to a person on the basis of an enumerated or analogous ground (on this issue, see *Schachter v. Canada*, [1992] 2 S.C.R. 679), is because this is contemplated in the wording itself of s. 15.
>
> ***Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, at para. 25.**
>
> ***Figueroa v. Canada (Attorney General)* (2000), 50 O.R. (3d) 161, at pp. 192-93 (C.A.).**

45. The Majority of the Court in *Delisle* concluded that:

> On the whole, the fundamental freedoms protected by s. 2 of the *Charter* do not impose a positive obligation of protection or inclusion on Parliament or the government, except perhaps in exceptional circumstances which are not at issue in the instant case. In accordance with the decision of the majority of this Court in *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner), supra,* there is no violation of s. 2(d) of the *Charter* when certain groups of workers are excluded from a specific trade union regime. The ability to form an independent association and to carry on the protected activities described below, the only items protected by the *Charter*, exists independently of any statutory regime.
>
> ***Ibid.*, at para. 33.**
>
> ***Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1039.**
>
> ***R. v. Prosper*, [1994] 3 S.C.R. 236, *per* Lamer C.J. at pp. 265-67, *per* L'Heureux-Dubé J. at p. 288, and *per* McLachlin at p. 299.**

46. It is respectfully submitted that this appeal does not present the exceptional circumstances in which positive governmental action may be required – to make it the exception this Court would be giving constitutional protection to the "whole package" of rights under the *ALRA*. The Appellants are not merely seeking legislative protection for the right to form or join a union. Furthermore, there is no evidence showing that the Appellants are unable to form an employee association or a trade union. The limits to such an organization, such as the UFCW, are its exclusion from the activities set out under the *LRA*.

47. Finally, in a recent case involving the repeal of legislation to return to a pre-existing legislative regime, the Ontario Court of Appeal has held that if there were no constitutional obligation to enact in the first place, the legislature is free to return to a prior legislative regime without having to justify the repeal of the legislation under s. 1 of the

Charter. This is the case even if the legislation being repealed had the effect of enhancing *Charter* values.

> It would be ironic, in my view, if legislative initiatives such as the 1993 Act with its costs and administrative structures should, once enacted, become frozen into provincial law and susceptible only of augmentation and immune from curtailing amendment or outright repeal without s. 1 justification. If such were the case, it could have an inhibiting effect on legislatures enacting tentative, experimental legislation in areas of complex, social and economic relations.
>
> ***Ferrell v. Ontario (Attorney General)* (1998), 42 O.R. (3d) 97, at p. 110 (C.A.).**

48. It is respectfully submitted that the government had no constitutional obligation under either s. 2 or s. 15 to include agricultural workers within the collective bargaining regime or to maintain the *ALRA* in the first place, and therefore the repeal of that legislative scheme does not violate the Appellants' *Charter* rights in any way.

B. Freedom of Association

1. Content and Purpose of s. 2(d) of the *Charter*

49. It has been held by this Court that freedom of association in s. 2(d) of the *Charter* has two fundamental components:

(a) *Charter* protection will attach to the exercise in association of such rights as have *Charter* protection when exercised by the individual; and

(b) Freedom of association means the freedom to associate for the purposes of activities which are lawful when performed alone.

> ***Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 397, *per* McIntyre J. (hereinafter, the "*Alberta Reference*").**

50. Section 2(d) of the *Charter* guarantees the fundamental freedom of association. This Court has discerned four separate propositions concerning the coverage of the s. 2(d) guarantee of freedom of association;

> ...first, that s. 2(d) protects the freedom to establish, belong to and maintain an association; second, that s. 2(d) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association; third, that s. 2(d) protects the exercise in association of the constitutional rights and freedoms of individuals; and fourth, that s. 2(d) protects the exercise in association of the lawful rights of individuals.
>
> ***Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367, at p. 402 (hereinafter, "*PIPS*").**
>
> ***Delisle, supra*, at para. 11.**
>
> ***Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, at para. 112.**

51. Several important points arise out of this Court's decisions concerning the scope of the freedom of association guarantee found in s. 2(d) of the *Charter*. Firstly, the freedom guaranteed by s. 2(d) is a freedom belonging to the individual and not to the group formed through its exercise.

***Alberta Reference, supra*, at p. 397.**

52. As a corollary to the proposition that freedom of association does not give groups a greater constitutional right than individuals belonging to the group, this Court has consistently held that the freedom of association does not protect an activity carried on by an association solely on the ground that the activity is a "foundational or essential purpose" of an association.

***Canadian Egg Marketing Agency, supra*, at para. 113.**

53. As well, since the fact of association will not by itself confer additional rights on individuals, the association itself does not acquire a constitutionally guaranteed freedom to do what is unlawful for the individual to do.

***Alberta Reference, supra*, at p. 409.**

54. This Court has recognized that s. 2 of the *Charter* generally imposes a negative obligation on the government and not a positive obligation of protection or assistance. As stated by Bastarache J. in *Delisle*:

> This means then that except perhaps in exceptional circumstances, freedom of expression requires only that Parliament not interfere. In my view, the same is true for freedom of association.
>
> ***Delisle, supra*, at para. 27.**

2. The Right to Freedom of Association in the Labour Context

10 55. This Court has consistently held that the guarantee of freedom of association in s. 2(d) does not constitutionally protect the right to engage in collective bargaining, nor the right to be included in a statutory collective bargaining regime.

> ***Alberta Reference, supra*, at p. 390.**
>
> ***PSAC v. Canada*, [1987] 1 S.C.R. 424, at p. 453.**
>
> ***PIPS, supra*, *per* L'Heureux-Dubé J. at p. 392, and *per* Sopinka J. at p. 404.**
>
> ***Delisle, supra*, at paras. 28 and 33.**

56. Further, the Supreme Court of Canada has specifically held that restrictions on the activity of collective bargaining do not ordinarily affect the ability of individuals to form
20 an association or join a union. As is self-evident from the Appellants' role in these proceedings, nothing in the *LRESLAA* or the *LRA* denies agricultural workers the right to associate with other agricultural workers in pursuit of common goals. Contrary to the Appellants' assertions, the *LRESLAA* and the exclusion of agricultural workers from collective bargaining do not affect agricultural workers' rights to pool resources and efforts, to form a union, to lobby governments or to pursue the aforementioned goals. No provision of the *LRESLAA* or the *LRA* prevents a group of agricultural workers from forming an association to express their views orally, physically or legally.

> ***Labour Relations and Employment Statute Law Amendment Act, 1995*, ss. 80 and 81.**
>
30 ***Labour Relations Act, 1995.***

***Dunmore, supra*, at pp. 205-06, *Appellants' Record*, Vol. III, pp. 479-80.**

***PIPS, supra, per* Sopinka J. at p. 404.**

57. In *Delisle,* the Majority of this Court rejected the appellant's argument that the exclusion of RCMP members from a statutory trade union regime was a violation of the appellant's freedom of association. Bastarache J. for the Majority of the Court concluded that:

> In my view, the conclusion of my colleagues and the compensatory remedy they propose is the equivalent of recognizing a right to positive action to give effect to freedom of association through legislation. The basis of such a right must necessarily follow from the right to union representation. I am of the view that this would be to enter the complex and political field of socio-economic rights and unjustifiably encroach upon the prerogative of Parliament. Therefore, I find that para. (e) of the definition of "employee" in s. 2 of the *PSSRA* does not infringe s. 2(d) of the *Charter* in its purpose.

***Delisle, supra*, at para. 23.**

58. Further, the Majority of this Court in *Delisle* concluded that there is not a violation of s. 2(d) simply because one group of workers is included in a regime while another is not.

***Delisle, supra*, at para. 28.**

59. Bastarache J., for the Majority of the Court in *Delisle*, stated as follows:

> Freedom of association does not include the right to establish a particular type of association defined in a particular statute; this kind of recognition would unduly limit the ability of Parliament or a provincial legislature to regulate labour relations in the public service and would subject employers, without their consent, to greater obligations toward the association than toward their employees individually. I share the opinion expressed by McIntyre, J. in *Reference re Public Service Employee Relations Act (Alta.), supra*, at p. 415, when he states that labour relations is an area in which a deferential approach is required in order to leave Parliament enough flexibility to act. The effects of para. (e) of the definition of

"employee" in s. 2 of the *PSSRA* do not infringe the Appellant's freedom of association.

***Delisle, supra*, at para. 33.**

3. Purpose of the Legislation

60. It is acknowledged that in examining the constitutional validity of any particular piece of legislation, the Court must have regard to both the purpose and the effect of the legislation.

10 ***R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 331.**

***Delisle, supra*, at para. 14.**

61. It is submitted that extrinsic evidence of legislative purpose is only helpful when the purpose of the legislation is ambiguous or unclear. As set out in the Majority decision in *Delisle*:

> Although extrinsic sources may be used to interpret legislation and to determine its true meaning, when the meaning of the challenged provision is clear, they are of little assistance in determining the purpose of a statute in order to evaluate whether it is consistent with the *Charter*.
> 20 Generally, the Court must not strike down an enactment which does not infringe the *Charter* in its meaning, form or effects, which would force Parliament to re-enact the same text, but with an extrinsic demonstration of a valid purpose. That would be an absurd scenario because it would ascribe a direct statutory effect to simple statements, internal reports and other external sources which, while they are useful when a judge must determine the meaning of an obscure provision, are not sufficient to strike down a statutory enactment which is otherwise consistent with the
> 30 *Charter*. Legislative intent must have an institutional quality as it is impossible to know what each member of Parliament was thinking. It must reflect what was known to the members at the time of the vote. It must also have regard to the fact that the members were called upon to vote on a specific wording, for which an institutional explanation was provided. The wording and justification thereof are important precisely because members have a duty to understand the meaning of the statute on which they

> are voting. This is more important than speculation on the subjective intention of those who proposed the enactment.
>
> ***Delisle, supra*, at para. 17.**

62. The combined effect of subsections 80(2) and (3) of the *LRESLAA* merely provides that any trade union certified under the *ALRA* as the bargaining agent for agricultural workers under the regime of that *Act* ceases to be their bargaining agent, and any collective agreement negotiated by such bargaining agent ceases to have effect.

63. Nowhere in that provision or elsewhere in the *LRESLAA*, or in the *LRA*, can any governmental purpose be discerned of an intent to deprive agricultural workers of their rights to belong to a trade union or otherwise associate with each other or to prevent the Appellants from forming any "meaningful association", as alleged by the Appellants herein. The legislation merely limits any trade union or employee association from participating in the collective bargaining regime established by the *LRA*.

64. This Court has warned against confusing possible ultimate or strategic motives of some government players with the purpose of a statute. In the *Delisle* case, for example, while the Court's attention was drawn to the Report of the Preparatory Committee, expert reports, as well as the social and historical context, this extrinsic evidence did not convince the Majority of the Court that the purpose of the legislation was other than that which was clearly expressed in the text of the legislation itself.

> ***Delisle, supra, per* Bastarache J. at para. 20.**

65. It is submitted that Sharpe J.'s finding on this point is entirely correct in light of the clarity of the language used in the impugned legislation and the lack of ambiguity in the text of the legislation. Sharpe J. was unable to find a government purpose in the *LRESLAA* or the *LRA* to deny agricultural workers the right to form an association:

> The substantive issue of concern to both the applicants and the legislature is plainly the right to engage in collective bargaining. There can be no doubt that the purpose of *LRESLAA* is to deny agricultural workers that right, which, as already noted, does not enjoy constitutional protection.

> The legislation says nothing about the right to form a trade union, and as will be seen, the real complaint of the applicants is the failure of the legislature to deal with certain matters they claim are essential to create the conditions necessary to form a trade union. I find it impossible to read into that failure a legislative purpose actively to deny the right of agricultural workers to form an association.

10 ***Dunmore, supra*, at p. 206, *Appellants' Record*, Vol. III, p. 480.**

4. The Legislation Does Not Have the Effect of Depriving the Appellants of Constitutionally Protected Rights

66. There is no evidence that the government is encouraging farmers to impede the freedom of association of agricultural workers, as asserted by the Appellants.

67. The effect of s. 3(b) of the *LRA* is to prevent agricultural workers from participating in the statutory collective bargaining regime established by the *LRA*.

***Labour Relations Act, 1995*, s. 3(b).**

68. The Appellants argue that their exclusion from the statutory collective bargaining regime will have the effect of preventing them from exercising their right to freely
20 associate. However, the evidence in the Court below does not support, in any way, this allegation.

69. In fact, the only evidence brought by the Appellants themselves in the Court below indicated that they anticipated the effect of the statutory exclusion would be their inability to "join a trade union and collectively bargain with fellow employees for improved working conditions, health and safety, fair wages and benefits".

***Affidavit of Tom Dunmore*, para. 11, *Appellants' Record*, Vol. II, p. 199.**

70. It is clear from the evidence of the Appellants that the main item of concern was their inability to negotiate the terms of their working conditions with their employers, and
30 not their fear of losing their employment on the grounds of their voluntary membership in

employee organizations. What they decry is the resultant lack of economic influence that any employee organizations might have without the benefit of certification as a bargaining agent under the *LRA*.

***Ibid.*, paras. 11, 13, *Appellants' Record*, Vol. II, pp. 199-200.**

71. The Appellants also filed an affidavit of Michael Doyle, Assistant to the Canadian Director of the UFCW. Mr. Doyle deposed in his affidavit that he believed that serious and substantial harm would befall the UFCW and the employees of Highline Produce Ltd. with the repeal of the *ALRA* in that, among other things, the UFCW had expended much time, effort and capital in anticipation of organizing employees in the agricultural sector and had relied on the *ALRA* in doing so. Therefore, the UFCW's reputation amongst employees in the agricultural industry would be seriously harmed and any good-will which had been fostered would be lost or seriously diminished. This evidence reflects the types of ongoing activities of the UFCW.

Affidavit of Michael Doyle, sworn November 13, 1995, paras. 15, 17, *Appellants' Record*, Vol. II, p. 179.

72. Furthermore, there is no legal restriction under the *LRA* on the Appellants from forming or seeking membership in a trade union or other employee organization. There is also no prohibition or restriction under the *LRA* on trade unions or employee organizations from advocating on behalf of agricultural workers either in the workplace, in the political arena, or before the courts. In fact, this application and the subsequent appeals have been brought by the individual Appellants on their own behalf and also on behalf of the UFCW. Equally, the UFCW was instrumental in bringing an earlier application involving the constitutionality of the exclusion of agricultural workers from the collective bargaining regime, the *Cuddy Chicks* case, which was appealed to this Court. As such, it is clear that the trade union continues to be involved in advocating on behalf of the rights of agricultural workers, without any reprisals, economic or otherwise.

***Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5.**

73. In fact, the UFCW participated in a Task Force on Agricultural Labour Relations between January 1992 and the Royal Assent of the *ALRA*.

> **Submission of the United Food and Commercial Workers International Union to Minister of Labour on The Repeal of Bill 91, *Agricultural Labour Relations Act, 1994*, October 17, 1995, Exhibit "E" to the Affidavit of Michael Doyle, sworn November 13, 1995, p. 3, *Record of the Respondent, Fleming Chicks*, p. 50.**

74. The composition of the Task Force itself was comprised of two representatives from organized labour and one representative of farm workers. The Task Force accepted submissions from a wide variety of organizations with interest in the agricultural sector, including the Labourers' International Union of North America.

> **Task Force on Agricultural Labour Relations, Report to the Minister of Labour, June 1992, Exhibit "M-1" to the Affidavit of Judy Fudge, sworn February 28, 1997, *Record of the Respondent, Fleming Chicks*, pp. 2, 34.**

75. Similar arguments about the "chilling effect" on employee organizations and their ability to effect change in the workplace were raised in the *Delisle* case, and rejected by Bastarache J. on behalf of the Majority. The appellant in that case argued that the express exclusion of RCMP members from the collective bargaining regime encouraged unfair labour practises and interfered with the creation of an independent employee association for RCMP members. Bastarache J. held that neither the lack of rights under the collective bargaining regime, nor the failure to provide RCMP members with a statutory or other associative regime, can be confused with an infringement of their freedom of association.

> ***Delisle, supra*, at para. 24.**

76. On this point, Bastarache J. for the Majority of the Court stated as follows:

> The appellant argues that the specific and exclusive exclusion of RCMP members from any statutory regime has an important chill on freedom of association because it clearly indicates to its members that unlike all other employees, they cannot unionize, and what is more, that they must not get together to defend their interests with respect to labour relations. Even if this were true, it should first be noted that the greater protection offered by trade union representation is completely separate from the simple

> creation of an independent association; second, one must admit that the exclusion of RCMP members is hardly exclusive. Numerous other groups such as the armed forces, senior executives in the public service, and indeed judges are in a similar situation. The chill is therefore greatly reduced, if it exists at all.

***Delisle, supra*, at para. 30.**

77. Therefore, it is respectfully submitted that the Appellants have failed to establish, both from an evidentiary or a legal perspective, that the impugned legislation in any way infringes upon their s. 2(d) right to freedom of association.

C. Equality Rights

1. Content and Purpose of s. 15 of the *Charter*

78. In order to give proper value to the important purpose of s. 15 of the *Charter*, courts must recognize that it is not sufficient to merely show differential treatment of persons under the law, a claimant must also show that the alleged differential treatment is "discriminatory" in order to establish a *Charter* violation. The concept of discrimination underlying s. 15 of the *Charter* relates to distinctions on personal characteristics. As stated by McIntyre J. in *Andrews v. Law Society of British Columbia*:

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed. [Emphasis added]

***Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 132, at pp. 174-75.**

79. This Court has affirmed that the determination of whether a distinction in treatment constitutes "discrimination" within the meaning of s. 15 is to be undertaken in a purposive way. The protection of equality rights is concerned with distinctions which are truly discriminatory.

> ***Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at paras. 25-26.**
>
> ***Andrews*, *supra*, at pp. 180-82.**

80. As part of this purposive approach, this Court has also affirmed that s. 15 guarantees protection against discrimination on enumerated or analogous grounds – those deeply personal and immutable characteristics that are at the core of personality and human dignity. The purpose of s. 15 is to target "the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion."

> ***Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 13.**

81. In keeping with the analytical focus that a Court must have in finding both inequality and discrimination for the purposes of a violation of s. 15 of the *Charter*, this Court has unanimously confirmed that a Court must make three broad inquiries in determining a discrimination claim under s. 15(1):

1. Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

2. Was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds?

3. Does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage?

> ***Law*, *supra*, at para. 39.**

***Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at paras. 3 and 55.**

82. This Court has affirmed that the purpose of s. 15 is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping or political or social prejudice. Thus, the Court has described the type of legislation which will be found to invalidate the equality guarantee of s. 15 of the *Charter* as follows:

> Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition of value as a human being or as a member of Canadian society.

***Law*, *supra*, at para. 51.**

83. Iacobucci J. stated, in *Law*, that for the purpose of analysis under s. 15 of the *Charter*, human dignity speaks to the realization of personal autonomy and self-determination. It is concerned with physical and psychological integrity and empowerment.

> Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits.... 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. [Emphasis added.]

***Law*, *supra*, at para. 53.**

2. Formal Distinction Based on One or More Personal Characteristics

84. In the *Delisle* case, involving the exclusion of RCMP employees from the application of the *PSSRA*, Bastarache J. found that the effect of the statute was to impose differential treatment on RCMP members, depriving them of a benefit available to most other public service employees. Therefore, Bastarache J. found that the first item of analysis was met.

***Delisle, supra*, at para. 42.**

85. However, the analytical framework set out by Iacobucci J. in *Law* clearly shows that, to be discriminatory, the formal distinction must be based on one or more personal characteristics of the claimant. It is submitted that the distinction made by the Legislature between agricultural workers and other workers who are under the application of the *LRA* is not based on any personal characteristic or trait of agricultural workers, other than that they are employed in a particular sector of the economy. This factor will be analyzed in further detail in the two other analytical steps taken in analyzing a s. 15 claim.

3. Enumerated and Analogous Grounds

86. It is respectfully submitted that the Appellants fail on the second part of the s. 15 analytical framework, and that the distinction made by the *LRA* is not based on any analogous or enumerated ground found in s. 15.

87. The Court has warned against conflating the second and third stages of the *Law* framework of analysis. To establish a violation of s. 15, a claimant must first establish that the distinction complained of is made on the basis of an enumerated or analogous ground, and then also establish that the distinction on the facts of the case affronts the guarantee against discrimination in s. 15.

***Corbiere, supra*, at para. 12.**

88. In *Law*, Iacobucci J. stipulated that a ground or grounds will not be considered analogous under s. 15 unless it can be shown that differential treatment premised on the

ground has the potential to bring into play human dignity. The ground will be recognized as an analogous ground if to do so would serve to advance the fundamental purpose of s. 15.

***Law*, *supra*, at para. 93.**

89. In order to determine whether a ground is analogous to those enumerated in s. 15, the Court must look for grounds of distinction that are similar to the grounds enumerated – such as race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. As stated by McLachlin and Bastarache JJ. in *Corbiere*:

> What then are the criteria by which we identify a ground of distinction as analogous? The obvious answer is that we look for grounds of distinction that are analogous or like the grounds enumerated in s. 15 – race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second state of the *Law* analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion. Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.

***Corbiere, supra*, at para. 13.**

See also *Miron v. Trudel*, [1995] 2 S.C.R. 418, at paras. 147-48.

90. This Court has therefore confirmed that the enumerated grounds, and therefore also the analogous grounds for the purpose of s. 15, are those that are based on a "personal characteristic that is immutable or changeable only at unacceptable cost to personal identity."

> ***Corbiere*, at para. 13.**
>
> ***Egan*, *supra*, at para. 5.**

91. This analysis of analogous grounds is consistent with the development of human rights legislation and the protection of discrimination against personal characteristics. The grounds enumerated in the *Universal Declaration of Human Rights*, the *Racial Discrimination Act, 1944*, the *Human Rights Code* (Ontario) and section 15(1) of the *Charter* reflect profoundly personal characteristics including, *inter alia*, race, creed, colour, sex, marital status, disability, sexuality, and ancestry.

> ***Universal Declaration on Human Rights*, G.A. Res. 217 (III) (1948), art. 2.**
>
> ***Racial Discrimination Act, 1944*, S.O. 1944, c .51.**
>
> ***Human Rights Code*, R.S.O. 1990, c. H.19, as amended, ss. 1, 2, 3.**
>
> ***Andrews*, *supra*.**

92. Section 15(1) of the Charter is intended to provide protection from discrimination with respect to deeply personal characteristics or characteristics which cannot be changed without unacceptable personal cost. This protection is offered to these individuals and groups who are identifiable by such personal characteristics.

93. In *Delisle*, Bastarache J. found that the professional status or employment of RCMP members is not an analogous ground for the purpose of s. 15, because such status or employment is not a "matter of functionally immutable characteristics in a context of labour market flexibility."

> ***Delisle, supra*, at para. 44.**

94. Sharpe J. in the Court below similarly found that, on the evidence before him, the Appellants had not established that agricultural workers can be characterized by any

particular identifying personal characteristics, rather, "the evidence before me indicates that agricultural workers are a disparate and heterogeneous group."

> There is nothing in the evidence to indicate that they are identified as a group by any personal trait or characteristic other than that they work in the agricultural sector. The evidence indicates that farm owners and operators also suffer from low wages, and that many have low education levels. The low status and prestige of farm workers is similar to that of other manual labourers.

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***Dunmore, supra*, at p. 216, *Appellant's Record*, Vol. III, p. 490.**

95. Sharpe J.'s finding that the legislative classification "agricultural workers" is not an analogous ground for the purposes of s. 15 is consistent with the similar finding by Bastarache J. in *Delisle* that employment status is not an analogous ground, and is consistent with a line of similar findings in this and in other Courts.

96. For example, in *Cosyns v. Canada (Attorney General)*, the Ontario Divisional Court found that the occupation or employment status of a tobacco farmer, or his participation in the tobacco industry, could not be considered a ground of discrimination analogous to those enumerated in s. 15.

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***Cosyns v. Canada (Attorney General)* (1992), 7 O.R. (3d) 641, at p. 658 (Div. Ct.).**

***Haddock v. Ontario (Attorney General)* (1990), 73 O.R. (2d) 545, at p. 564 (H.C.J.).**

***Beaudet v. Ministre du Revenu National* (1995), 170 N.R. 321, at p. 322 (Fed. C.A.).**

***Major v. Québec (Procureur général)*, [1994] R.S.Q 1622, at pp. 1629-33 (S.C.).**

***Lloyd v. Ontario (Minister of Community and Social Services)*, unreported decision of Ont. Div. Ct., March 10, 1989.**

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***Lister et al. v. Ontario (Attorney General)* (1990), 73 O.R. (2d) 354, at pp. 366-67 (H.C.J.).**

***OPSEU v. National Citizens Coalition Inc.* (1990), 74 O.R. (2d) 260, at pp. 265-66 (C.A.).**

97. Therefore, it is respectfully submitted that Sharpe J. was correct in finding that agricultural workers do not constitute an analogous ground for the purposes of s. 15 of the *Charter*, and therefore the Appellants have not established that their exclusion from the labour relations regime in Ontario is in violation of their s. 15 rights.

4. Substantive Discrimination Contrary to s. 15

98. If this Honourable Court finds that there has been a distinction made in a law based on an enumerated or analogous ground, the Court must then go on to determine whether the distinction is discriminatory and contrary to the purpose of s. 15. Broadly speaking, the Court must assess whether the legislative distinction violates the human dignity of the Appellants in that the legislation is contrary to the purpose of the *Charter* in remedying such ills as prejudice, stereotyping and historical disadvantage.

99. It is essential for the purpose of this analysis to keep in mind that the Court has consistently held that the *Charter* is a document of civil, political and legal rights, and is not a *Charter* of economic rights.

***Egan, supra*, at para. 37.**
***Alberta Reference, supra*, at p. 413.**

100. It is submitted that it is not sufficient to show that one occupational group is treated differently than another occupational group to establish that there is discrimination under s. 15. The difference in treatment must be shown to undermine a basic right to human dignity and basic human rights. To make this determination, the Court must have reference both to the nature of the group and the interest adversely affected by the distinction.

***Egan, supra, per* L'Heureux-Dubé at para. 13.**

101. It is submitted that the disadvantage of agricultural workers complained of by the Appellants must be viewed in the context of the economic sector in which they operate. Therefore, while the Appellants make the claim that agricultural workers earn, on average, less than many other workers in other sectors, this must be considered in light of the fact

that the agricultural sector itself is not a sector of the economy characterized by high levels of profitability.

Affidavit of George Brinkman, para. 40, *Appellants' Record*, Vol. II, p. 298.

102. Therefore, the fact that agricultural workers may earn relatively less than other workers, is not due to any prejudice, stereotype, or historical disadvantage visited upon those workers by the government or society at large, but is true only because they operate in a sector of the economy which has relatively low profitability compared to other sectors of the economy.

10 103. Similarly, the Court must look to the purpose and effect of the impugned legislation to determine whether the exclusion of agricultural workers from the collective bargaining regime in Ontario serves to perpetuate such a prejudice, stereotype or historical disadvantage. It is submitted that the exclusion of agricultural workers from the collective bargaining regime is not predicated on any prejudice or stereotype regarding the inherent worthiness of agricultural workers to participate in collective bargaining, rather, the legislative distinction is made to respect the unique nature of the agricultural sector that is dominated by family farms and in which the employment relationships, unlike any other sector of the economy, are primarily based on family and personal relationships within the family farm context.

20 ***Ibid.*, paras. 29-32, *Appellants' Record*, Vol. II, pp. 291-92.**

104. Equally important, the exclusion of agricultural workers from a collective bargaining regime is made in respect of the inherent fragility and vulnerability of the cycle of production within agriculture, in which agricultural operations rely on the necessity of being able to maintain production in crucial seasonal periods during which farms may be especially vulnerable to work stoppages or delays that are part and parcel of a collective bargaining regime.

***Ibid.*, paras. 14-19, *Appellants' Record*, Vol. II, p. 287-88.**

Affidavit of Ron Saunders, para. 46, *Appellants' Record*, Vol. II, pp. 337-38.

105. Moreover, the exclusion of agricultural workers from the collective bargaining regime is also made in respect of the economic reality that the agricultural sector is, by and large, less profitable than other sectors of the economy in which a labour relations regime is more suited. Farm owners and employers in the agricultural sector share the same burden of "disadvantage" complained of by the Appellant in many cases. Equally, in many cases, agricultural workers are able to realize more profit from the agricultural sector than farm operators and owners, and workers are able to do so at less risk to their personal and family finances.

Affidavit of George Brinkman, paras. 52-53, *Appellants' Record*, Vol. II, p. 306.

106. Therefore, viewed in the context of the agricultural sector as a whole, and in the context of the purpose of the legislation, it is submitted that the exclusion of agricultural workers from the collective bargaining regime in the *LRA* is not in any way predicated upon prejudice or stereotypes about the personal characteristics and traits of those workers.

107. It is submitted that the exclusion of agricultural workers from the legislative regime of the *LRA* does not violate s. 15 of the *Charter* in that it does not constitute discrimination for the purposes of s. 15. There is no distinction made by the legislation on the basis of enumerated or analogous grounds, in the sense that "agricultural workers" are a heterogeneous group, made up of people of different characteristics and traits, and that the only characteristic they share in common is their choice of employment sector.

108. Moreover, the distinction made with respect to agricultural workers is not based on any prejudice or stereotypical beliefs about the value or lack of value to be accorded agricultural workers, either by the legislature or by society at large. The legislative distinction is made in respect of the nature and unique characteristics of the agricultural economy, and is not based in any way on an assumption that agricultural workers are less worthy of the protection of the legislature, from the standpoint of their human dignity and sense of worth.

D. Section 1

109. The Respondent, Fleming Chicks, submits that there is no violation of either s. 2(d) or s. 15 of the *Charter* in the case at hand. If this Court should find that the legislation violates either section of the *Charter*, the Respondent then relies on the written submissions raised by the Attorney General of Ontario that the legislative provisions are reasonable and can be justified under s. 1 of the *Charter*.

E. Remedy

110. The Appellants seek the unusual and unprecedented remedy of requiring the legislature to re-enact a legislative regime that has been deemed unsuitable and inappropriate by the legislature.

111. It is submitted that this remedy requested by the Appellants would put the Court in the place of the Legislature by requiring that the government adopt in its entirety a legislative scheme, with provisions entirely unique to the agricultural sector and a legislative and adjudicative process quite different from that contained in the impugned legislation.

112. It is also submitted that an immediate declaration of the invalidity of the exclusion of agricultural workers from the application of the *LRA* would serve to throw employment relations in the agricultural sector into turmoil, as agricultural workers would immediately gain access to an entire scheme of labour relations and collective bargaining, including the right to strike, which even the repealed *ALRA* and the Legislature found to be an inappropriate regime for the agricultural sector.

113. It is submitted that if this Court should find the *LRA* to be in violation of constitutional guarantees, the legislature would have numerous options available to it to ensure that the rights of agricultural workers are protected within the scope of constitutional guarantees. These policy choices could range from total adoption of the collective bargaining regime under the *LRA*, to providing for a completely separate and

distinct collective bargaining regime such as the *ALRA*. Intermediate options include any number of policy choices on what provisions of the *LRA* are especially constitutive of the constitutional rights of agricultural workers and providing that agricultural workers should gain, in some legislative fashion, the benefit of those provisions.

114. It is submitted that, as for legislative and policy choices as to the proper way in which to guarantee the constitutionality of legislation, it is for the government to decide the proper scope and application of legislation, and not for the courts to impose an entire legislative framework, thereby supplanting the government's role in policy-making.

115. For these reasons, it is submitted that the appropriate remedy in the present case, if this Court were to find breaches of certain *Charter* rights, would be to suspend the declaration of invalidity of the violating legislation in order to allow the Legislature the time to decide upon the appropriate legislative remedy for the *Charter* breach.

116. Therefore, the Respondent, Fleming Chicks, respectfully submits that if this Honourable Court should find that the exclusion of agricultural workers from the legislative regime of the *LRA* does violate the *Charter*, the appropriate remedy is, as submitted by the Attorney General of Ontario, to suspend the order invalidating the exclusion for a period of one year to allow the legislature to fashion a regime that does not violate the *Charter* rights of agricultural workers.

***Schachter v. Canada*, [1992] 2 S.C.R. 679, at pp. 715-17.**

PART IV ORDER REQUESTED

117. The Respondent, Fleming Chicks, therefore respectfully submits that the first and second constitutional questions should be answered in the negative, and that this appeal should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

January 5, 2001

Alan L.W. D'Silva
Of Counsel for the Respondent, Fleming Chicks

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Darrell L. Kloeze
Of Counsel for the Respondent, Fleming Chicks

PART V TABLE OF AUTHORITIES

APPENDIX "A" STATUTORY PROVISIONS RELIED UPON

Human Rights Code, R.S.O. 1990, c. H.19

1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status or handicap. R.S.O. 1990, c. H.19, s. 1; 1999, c. 6, s. 28 (1).

2. (1) Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status, handicap or the receipt of public assistance. R.S.O. 1990, c. H.19, s. 2 (1); 1999, c. 6, s. 28 (2).

(2) Every person who occupies accommodation has a right to freedom from harassment by the landlord or agent of the landlord or by an occupant of the same building because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, marital status, same-sex partnership status, family status, handicap or the receipt of public assistance. R.S.O. 1990, c. H.19, s. 2 (2); 1999, c. 6, s. 28 (3).

3. Every person having legal capacity has a right to contract on equal terms without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status or handicap. R.S.O. 1990, c. H.19, s. 3; 1999, c. 6, s. 28 (4).

Code des droits de la personne, L.R.O. 1990, c. H.19

1. Toute personne a droit à un traitement égal en matière de services, de biens ou d'installations, sans discrimination fondée sur la race, l'ascendance, le lieu d'origine, la couleur, l'origine ethnique, la citoyenneté, la croyance, le sexe, l'orientation sexuelle, l'âge, l'état matrimonial, le partenariat avec une personne de même sexe, l'état familial ou un handicap. L.R.O. 1990, chap. H.19, art. 1; 1999, chap. 6, par. 28 (1).

2. (1) Toute personne a droit à un traitement égal en matière d'occupation d'un logement, sans discrimination fondée sur la race, l'ascendance, le lieu d'origine, la couleur, l'origine ethnique, la citoyenneté, la croyance, le sexe, l'orientation sexuelle, l'âge, l'état matrimonial, le partenariat avec une personne de même sexe, l'état familial, l'état d'assisté social ou un handicap. L.R.O. 1990, chap. H.19, par. 2 (1); 1999, chap. 6, par. 28 (2).

(2) L'occupant d'un logement a le droit d'y vivre sans être harcelé par le propriétaire ou son mandataire ou un occupant du même immeuble pour des raisons fondées sur la race, l'ascendance, le lieu d'origine, la couleur, l'origine ethnique, la citoyenneté, la croyance, l'âge, l'état matrimonial, le partenariat avec une personne de même sexe, l'état familial, l'état d'assisté social ou un handicap. L.R.O. 1990, chap. H.19, par. 2 (2); 1999, chap. 6, par. 28 (3).

3. Toute personne jouissant de la capacité juridique a le droit de conclure des contrats à conditions égales, sans discrimination fondée sur la race, l'ascendance, le lieu d'origine, la couleur, l'origine ethnique, la citoyenneté, la croyance, le sexe, l'orientation sexuelle, l'âge, l'état matrimonial, le partenariat avec une personne de même sexe, l'état familial ou un handicap. L.R.O. 1990, chap. H.19, art. 3; 1999, chap. 6, par. 28 (4).

CHAPTER 51.

An Act to prevent the Publication of Discriminatory Matter Referring to Race or Creed.

Assented to March 14th, 1944.
Session Prorogued April 6th, 1944.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Prohibition against publishing or displaying discriminating signs, etc.

1. No person shall,—

(*a*) publish or display or cause to be published or displayed; or

(*b*) permit to be published or displayed on lands or premises or in a newspaper, through a radio broadcasting station or by means of any other medium which he owns or controls,

any notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against any person or any class of persons for any purpose because of the race or creed of such person or class of persons.

Effect of Act.

2. This Act shall not be deemed to interfere with the free expression of opinions upon any subject by speech or in writing and shall not confer any protection to or benefit upon enemy aliens.

Penalty.

3. Every one who violates the provisions of section 1 shall be liable to a penalty of not more than $100 for a first offence nor more than $200 for a second or subsequent offence and such penalties shall be paid to the Treasurer of Ontario.

Recovery of penalties.

4.—(1) The penalties imposed by this Act may be recovered upon the application of any person with the consent of the Attorney General, to a judge of the Supreme Court by originating notice and upon every such application the rules of practice of the Supreme Court shall apply.

Order of judge.

(2) The judge, upon finding that any person has violated the provisions of section 1 may, in addition to ordering pay-

ment of the penalties, make an order enjoining him from continuing such violation.

Enforcement of section.

(3) Any order made under this section may be enforced in the same manner as any other order or judgment of the Supreme Court.

Short title.

5. This Act may be cited as *The Racial Discrimination Act, 1944.*

Universal Declaration on Human Rights
G.A. Res. 217 (III) (1948)

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Déclaration universelle des droits de l'homme

Article 2

Chacun peut se prévaloir de tous les droits et de toutes les libertés proclamés dans la présente Déclaration, sans distinction aucune, notamment de race, de couleur, de sexe, de langue, de religion, d'opinion politique ou de toute autre opinion, d'origine nationale ou sociale, de fortune, de naissance ou de toute autre situation.

De plus, il ne sera fait aucune distinction fondée sur le statut politique, juridique ou international du pays ou du territoire dont une personne est ressortissante, que ce pays ou territoire soit indépendant, sous tutelle, non autonome ou soumis à une limitation quelconque de souveraineté.

SERVICE OF A COPY HEREOF ADMITTED
THIS 8 DAY OF January 2001

Gowling Lafleur Henderson

Solicitors for the Solicitors for the Appellants
agents the Solicitors for the Intervener,
the Attorney General of Alberta

SERVICE OF A COPY HEREOF ADMITTED
THIS 8 DAY OF January 2001

R. Hoolan & Burke-Robertson

Solicitors for the Solicitors of the Respondent,
agents the Attorney General for the
Province of Ontario
the Solicitors for the Intervener,
the Canadian Labour Congress

SERVICE OF A COPY HEREOF ADMITTED
THIS 8 DAY OF January 2001

Solicitors for the Solicitors to the Intervener,
agents the Labour Lawyers Coordinating
Committee

SERVICE OF A COPY HEREOF ADMITTED
THIS 8 DAY OF January 2001

Solicitors for the Solicitors for the Intervener,
agents the Attorney General of Quebec