CITATION: Fraser v. Ontario (Attorney General), 2008 ONCA 760
Date: 20081117
Docket: C44886

COURT OF APPEAL FOR ONTARIO

Winkler C.J.O., Cronk and Watt JJ.A.

BETWEEN

Michael J. Fraser on his own behalf and on behalf of the United Food and Commercial Workers Union Canada, Xin Yuan Liu, Julia McGorman and Billie-Jo Church

Applicants (Appellants)

and

Attorney General of Ontario

Respondent (Respondent)

Paul J.J. Cavalluzzo and Fay C. Faraday, for the appellants

Robin K. Basu and Shannon M. Chace, for the respondent

John D.R. Craig and S. Jodi Gallagher, for the intervener the Ontario Federation of Agriculture

Heard: May 20 & 21, 2008

On appeal from the order of Justice James M. Farley of the Superior Court of Justice dated January 10, 2006 and reported at (2006), 79 O.R. (3d) 219.

WINKLER C.J.O.:

I. OVERVIEW

[1] This appeal is brought by the United Food and Commercial Workers Union Canada (the "UFCW"), its Canadian Director Michael Fraser, and Xin Yuan Liu, Julia McGorman and Billie-Jo Church, employees or former employees of Rol-Land Farms Ltd. ("Rol-Land"). Rol-Land is a mushroom factory in Kingsville, Ontario, that regularly employs between 270 and 300 workers. The factory operates on a year-round basis and is said to have annual sales approaching $50 million.

[2] The UFCW has engaged in ongoing efforts to organize the employees of Rol-Land for the purpose of representing them in collective bargaining. Indeed, a significant majority of the employees voted to have the UFCW act as their bargaining agent. Despite this mandate from the employees, Rol-Land has continuously ignored the UFCW's attempts to engage in a collective bargaining process. According to the record, the experience of the UFCW and the employees of Rol-Land does not appear to be unique in the Ontario agricultural industry. The UFCW's similar experiences at another operation were cited as an additional example of the difficulties of engaging in a collective bargaining process at factory farming operations.

[3] For decades, agricultural workers in Ontario have been excluded from the protection of the labour relations legislation governing nearly all other workers in the province. In 2001, the issue of their exclusion came before the Supreme Court of Canada on a constitutional challenge in *Dunmore v. Ontario*, [2001] 3 S.C.R. 1016 ("*Dunmore*").

[4] In *Dunmore*, the Supreme Court held that the exclusion of agricultural workers from the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A (the "*LRA*"), violated their freedom to organize, which it found to be guaranteed by s. 2(d) of the *Charter*. The court ordered that the Ontario government enact legislation to provide agricultural workers with the protection necessary for them to meaningfully exercise their freedom to organize.

[5] In response to *Dunmore*, the government enacted the *Agricultural Employees Protection Act, 2002*, S.O. *2002*, c. 16 (the "*AEPA*"). The legislation, which came into force on June 17, 2003, excludes agricultural workers from the *LRA* but provides certain protections for organizing.

[6] However, as is evident from this appeal, the enactment of the *AEPA* did not conclude matters. After failing to engage factory farm employers in collective bargaining on behalf of farm employees, the UFCW and the individual appellants brought an application disputing the constitutionality of the *AEPA*. The government and the Ontario

Federation of Agriculture, which intervened in these proceedings on behalf of Ontario farmers, opposed the challenge.

[7] The application judge dismissed the *Charter* challenge. However, the legal landscape has been altered since the application was originally heard and determined. When the application judge was seized of the case, the prevailing higher authority was *Dunmore* and the so-called labour trilogy: *Reference re Public Service Employee Relations Act* (*Alta.*), [1987] 1 S.C.R. 313; *PSAC v. Canada*, [1987] 1 S.C.R. 424; *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460. Applying those cases, the application judge held that the *AEPA* met the minimum s. 2(d) *Charter* requirements set out by Bastarache J. in *Dunmore*, which did not include *Charter* protections for collective bargaining.

[8] The UFCW appealed to this court. However, before the appeal was heard, the UFCW intervened before the Supreme Court of Canada in a labour relations case from British Columbia, arguing that the right to bargain collectively ought to be protected by s. 2(d) of the *Charter*: *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391 ("*B.C. Health Services*").

[9] Reversing the labour trilogy on the issue of collective bargaining, the Supreme Court concluded in *B.C Health Services* that freedom of association, as guaranteed by s. 2(d), protects "the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining": para. 87.

[10] Therefore, the central issues on this appeal are whether the impugned legislation violates s. 2(d) of the *Charter* by failing to provide agricultural workers in Ontario with sufficient statutory protections to enable them to exercise (a) their freedom to organize and (b) their right to bargain collectively.

[11] In light of the combined effect of *Dunmore* and *B.C. Health Services,* I conclude that the *AEPA* breaches s. 2(d). While the application judge correctly found that the *AEPA* provides the minimum requirements necessary to protect the appellants' freedom to organize, he did not have the benefit of the Supreme Court's judgment in *B.C. Health Services* to guide him in his analysis of the claims concerning collective bargaining. Taking into account the change in the legal landscape, I conclude that the *AEPA* substantially impairs the capacity of agricultural workers to meaningfully exercise their right to bargain collectively. This is not surprising in that the legislation itself was drafted with an apparent view to complying with the more limited interpretation of s. 2(d) set out in *Dunmore.*

[12] Moreover, the violation of s. 2(d) is not saved under s. 1 of the *Charter*. The objectives of protecting the family farm and farm production/viability are substantial and pressing goals, but the impugned legislation does not satisfy the *Oakes* proportionality

test: *R. v. Oakes,* [1986] 1 S.C.R.103. It is open to the government, however, to seek to draft new legislation that balances the rights of agricultural workers with the concerns about the family farm and the viability of the agricultural sector in a manner that can withstand s. 1 *Charter* scrutiny.

[13] I would therefore allow the appeal and declare the *AEPA* constitutionally invalid. However, I would also suspend this declaration of invalidity for 12 months from the date of these reasons in order that the government may determine the manner in which it wishes to statutorily protect the collective bargaining rights of agricultural workers. My reasons follow.

II. BACKGROUND

[14] Before turning to the legal issues, I will briefly discuss the history of labour relations in Ontario's agricultural sector and describe the key features of the *AEPA*. I will then review the decision in the court below and outline the issues raised on appeal. Other aspects of the factual underpinnings of this appeal will be examined in the context of my analysis of the legal issues.

A. Labour Relations in Ontario's Agricultural Sector

[15] Historically, agricultural workers in Ontario have been treated differently than most other workers. When most Ontario workers were first given statutory protections to organize and collectively bargain in 1943 under *The Collective Bargaining Act*, *1943,* S.O. 1943, c. 4, agricultural workers were excluded. They were also excluded from *The Labour Relations Act*, *1948*, S.O. 1948, c. 51, and all subsequent labour relations legislation in the province.

[16] The exclusion of agricultural workers resulted from concerns that permitting unionization and collective bargaining in the sector would add to labour costs, was inconsistent with the operation of family farms, and failed to recognize the vulnerability of a seasonal industry to labour disruption.

[17] Agricultural workers continued to be excluded from a statutory labour relations framework until 1994, when the Ontario government enacted the *Agricultural Labour Relations Act*, *1994,* S.O. 1994, c. 6 (the "*ALRA*").

[18] Although the *ALRA* was similar to the *Labour Relations Act,* R.S.O. 1990, c. L.2 (the "*LRA*, 1990") in the rights and protections extended to other workers, it contained special provisions to recognize the unique needs of the agricultural sector. For instance, the *ALRA* substituted final offer selection to resolve bargaining disputes in place of strikes and lockouts.

[19] However, the *ALRA* was short-lived. In 1995, a new government enacted the *Labour Relations and Employment Statute Law Amendment Act, 1995,* S.O. 1995, c.1 (the "*LRESLAA*") and replaced the *LRA, 1990* with the *LRA*. The *LRESLAA* repealed the *ALRA*, and returned agricultural workers to their status prior to its enactment, leaving them without any statutory protections for organizing and collective bargaining.

[20] The UFCW subsequently brought a constitutional challenge, arguing that excluding agricultural workers from the *LRA* violated agricultural workers' rights under the *Charter*. The UFCW was ultimately successful on appeal with the Supreme Court of Canada ruling in *Dunmore* that the government of Ontario had a positive duty to enact legislation to protect the freedom of agricultural workers to organize. As noted above, the Supreme Court's decision led to the enactment of the *AEPA*, which in turn led to this second *Charter* challenge.

B. The *AEPA*

[21] The *AEPA* has two key aspects. First, s. 18 specifically provides that the *LRA* "does not apply to employees or employers in agriculture." Similarly, s. 3(b.1) of the *LRA* provides that the Act does not apply "to an employee within the meaning of the [*AEPA*]."

[22] Second, the *AEPA* establishes a separate statutory regime that applies exclusively to employees "employed in agriculture". The purpose of the *AEPA* is set out in s. 1(1):

> The purpose of this Act is to protect the rights of agricultural employees while having regard to the unique characteristics of agriculture, including, but not limited to, its seasonal nature, its sensitivity to time and climate, the perishability of agricultural products and the need to protect animal and plant life.

[23] The rights referred to in s. 1(1) are listed in s. 1(2):

> 1. The right to form or join an employees' association.
>
> 2. The right to participate in the lawful activities of an employees' association.
>
> 3. The right to assemble.

4. The right to make representations to their employers, through an employees' association, respecting the terms and conditions of their employment.

5. The right to protection against interference, coercion and discrimination in the exercise of their rights.

[24] An "employees' association" is defined in s. 2(1) as "an association of employees formed for the purpose of acting in concert".

[25] Section 5 of the *AEPA* obliges employers to allow employees' associations a reasonable opportunity to make representations, orally or in writing, and obliges the employers to listen to, or read, such representations.

[26] Sections 8 to 10 of the *AEPA* provide employees with specific protections from interference, reprisals, intimidation and coercion by the employer. Section 8, for instance, prohibits an employer from interfering with the formation, selection or administration of an employees' association, or the representation of employees by an employees' association or the lawful activities of an association.

[27] The task of enforcing the *AEPA* is vested in the Agriculture, Food and Rural Affairs Appeal Tribunal (the "Tribunal"). In order to recognize that the nature of the Tribunal's jurisdiction under the *AEPA* differs from its customary jurisdiction over purely agricultural matters, at least two of its members are specifically appointed to hear matters under the *AEPA*: *Ministry of Agriculture, Food and Rural Affairs Act*, R.S.O. 1990, c. M.16, s. 14(1.2) – (1.3). There is no statutory requirement that any member of the Tribunal have expertise in labour relations.

[28] It is important to note what is missing from the *AEPA*. It does not impose an obligation on employers to bargain in good faith – or, indeed, to bargain at all – with an employees' association. The *AEPA* does not include mechanisms to resolve either bargaining impasses or disputes regarding the interpretation or administration of the collective agreement. Another notable omission from the legislation is that it does not preclude the formation of multiple employees' associations within a single workplace, purporting to simultaneously represent employees in that same workplace with similar job functions.

III. DECISION BELOW

[29] The UFCW and the individual appellants sought a declaration that the *AEPA* and s. 3(b.1) of the *LRA* violate s. 2(d) and s. 15 of the *Charter*, cannot be saved under s. 1, and therefore are unconstitutional and of no force and effect.

[30] The application judge dismissed their application. After comparing the protections for the freedom to organize in the *AEPA* to those listed in *Dunmore*, he concluded that the *AEPA* met the minimum statutory requirements necessary to protect the freedom to organize, as set out in *Dunmore* at para. 67:

> I conclude that at minimum the statutory freedom to organize in s. 5 of the *LRA* ought to be extended to agricultural workers, along with protections judged essential to its meaningful exercise, such as freedom to assemble, to participate in the lawful activities of the association and to make representations, and the right to be free from interference, coercion and discrimination in the exercise of these freedoms.

[31] With regard to the right to bargain collectively, the application judge pointed out, at para. 16, that "[n]othing in *Dunmore* suggests that the Supreme Court is backing off from its views that s. 2(d) does not encompass the right to strike and to collectively bargain."

[32] Finally, the application judge dismissed the s. 15 claim, finding that agricultural workers were not denied any benefit or protection on the basis of an enumerated or analogous ground.

IV. ISSUES AND SUBMISSIONS RAISED ON APPEAL

[33] The following issues are raised on this appeal:

1. Does the impugned legislation violate s. 2(d) of the *Charter* by substantially interfering with agriculture workers' freedom to organize and right to bargain collectively?

2. Does the impugned legislation violate the right to equality under s. 15 of the *Charter* by denying agricultural workers equal protection and equal benefit of the law based on their occupational status as agricultural workers?

3. If so, are the violations saved under s. 1?

4. If not, what is the appropriate remedy?

[34] The appellants submit that by excluding agricultural workers from the *LRA* and by subjecting them to the *AEPA*, the government has violated s. 2(d). In their submission, the *AEPA* fails to provide the necessary statutory protections to safeguard and facilitate agricultural workers' freedom to organize and their right to bargain collectively. These include a statutory duty to bargain in good faith and provisions authorizing the selection of an exclusive bargaining agent on a majority basis. They also complain that the *AEPA* provides insufficient protection against employer interference, and that it is enforced through a tribunal with no expertise in labour relations. Further, they argue that the legislation breaches s. 15 in that it subjects agricultural workers to differential treatment based on their occupational status as agricultural workers. These violations, they say, are not saved under s. 1.

[35] The respondent submits that the government met its constitutional obligations in enacting the *AEPA*. In the respondent's submission, the *LRA* is not the only regime that is constitutionally acceptable. The *AEPA* provides agricultural workers with the right to freely choose to participate in unionized or non-unionized forms of representation, and requires the employer to listen to any group chosen or formed by the employees to represent their interests. The *AEPA* contains strong protections against employer influence, says the respondent, and provides for an independent and expert tribunal to enforce those protections. The respondent further denies there is any breach of s. 15, saying the legislation does not draw a distinction on an enumerated or analogous ground. Even if there is a *Charter* breach, says the respondent, the legislation is justified under s. 1.

V. ANALYSIS

[36] While I agree with the application judge that the *AEPA* does not violate the appellants' freedom to organize, in light of the Supreme Court of Canada's decisions in *Dunmore* and *B.C. Health Services*, I cannot accede to the respondent's arguments when it comes to the right to bargain collectively. The failure of the *AEPA* to provide protections for collective bargaining constitutes a breach of s. 2(d) and demands a remedy if not justified by s.1. I begin my s. 2(d) analysis with a detailed discussion of *Dunmore* and *B.C. Health Services*, which underpin my analysis.

ISSUE 1: Does the impugned legislation violate the appellants' s. 2(d) rights?

A. The Scope of s. 2(d)

[37] In *Dunmore*, the applicants challenged the exclusion of agricultural workers from Ontario's labour relations regime on the basis that their exclusion violated s. 2(d) and s. 15 of the *Charter*. They argued that s. 2(d) encompasses the freedom to organize. Although collective bargaining was raised on the appeal, the Supreme Court characterized the appellants' claims as relating to the "'wider ambit of union purposes and activities'", and not collective bargaining: para. 12.

[38] A majority of the court (L'Heureux-Dubé J. concurring and Major J. dissenting) concluded that the complete exclusion of agricultural workers from the *LRA* substantially impeded their capacity to exercise their freedom to organize, as protected by s. 2(d). They found that "legislative protection is absolutely crucial if agricultural workers wish to unionize" and that without "certain minimum protections, the … freedom to organize … would be a hollow freedom": para. 42.

[39] In reaching this conclusion, the court distinguished the plight of agricultural workers from those of other less vulnerable groups. At para. 41, Bastarache J., writing for the majority, stated:

> [I]t is possible to draw a distinction between groups who are "strong enough to look after [their] interests without collective bargaining legislation" and those "who have no recourse to protect their interests aside from the right to quit". [Citation omitted].

[40] He recognized, at para. 41, that agricultural workers fall into the latter category:

> Distinguishing features of agricultural workers are their political impotence, their lack of resources to associate without state protection and their vulnerability to reprisal by their employers; as noted by Sharpe J., agricultural workers are "poorly paid, face difficult working conditions, have low levels of skill and education, low status and limited employment mobility". [Citation omitted.]

[41] Bastarache J. concluded, at para. 48, that the exclusion from the *LRA* breached s. 2(d):

> The inherent difficulties of organizing farm workers, combined with the threats of economic reprisal from employers, form only part of the reason why association is all

> but impossible in the agricultural sector in Ontario. Equally important is the message sent by s. 3(*b*) of the *LRA*, which delegitimizes associational activity and thereby ensures its ultimate failure. Given these known and foreseeable effects of s. 3(*b*), I conclude that the provision infringes the freedom to organize and thus violates s. 2(*d*) of the *Charter*.

[42] The majority in *Dunmore* further held that the violation of s. 2(d) was not saved under s. 1. The legislature was ordered to enact a statutory framework including protections for the freedom to organize. To reiterate the words of Bastarache J. at para. 67:

> I conclude that at minimum the statutory freedom to organize in s. 5 of the *LRA* ought to be extended to agricultural workers, along with protections judged essential to its meaningful exercise, such as freedom to assemble, to participate in the lawful activities of the association and to make representations, and the right to be free from interference, coercion and discrimination in the exercise of these freedoms.

[43] In *B.C. Health Services*, McLachlin C.J. and LeBel J., writing for the majority, summarized the three developing aspects of the law that were clarified in *Dunmore*. First, *Dunmore* held that only the associational aspect of an activity, and not the activity itself, is protected by s. 2(d): *B.C. Health Services,* at para. 32. Second, it required a more contextual approach to s. 2(d) (*B.C. Health Services,* at para. 33) – an approach that recognizes the history and current reality of labour relations in Canada. Third, it determined that s. 2(d) may place positive obligations on governments to extend legislation to particular groups: *B.C. Health Services,* at para. 34.

[44] McLachlin C.J. and LeBel J. explained this third aspect, at para. 34:

> *Dunmore* recognized that, in certain circumstances, s. 2(*d*) may place positive obligations on governments to extend legislation to particular groups. Underinclusive legislation may, "in unique contexts, substantially impact the exercise of a constitutional freedom" (para. 22). This will occur where the claim of underinclusion is grounded in the fundamental *Charter* freedom and not merely in access to a statutory regime (para. 24); where a proper evidentiary foundation is provided to create a positive obligation under the *Charter* (para. 25); and where the state can truly be held accountable

> for any inability to exercise a fundamental freedom (para. 26).

[45] In contrast to *Dunmore*, *B.C. Health Services* did not involve a positive rights claim. Rather, unions and individual health care workers challenged legislation that affected labour relations between health sector employers and their unionized employees. Among other things, the legislation invalidated important provisions of collective agreements then in force, and effectively precluded meaningful collective bargaining on a number of specific issues.

[46] The Supreme Court concluded (Deschamps J., dissenting in part) that the legislation did, in certain respects, violate s. 2(d). McLachlin C.J. and LeBel J. concluded that "s. 2(*d*) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues" and that "[i]f the government substantially interferes with that right, it violates s. 2(*d*) of the *Charter*": para. 19. In so holding, they acknowledged that "the reasons evoked in the past for holding that the guarantee of freedom of association does not extend to collective bargaining can no longer stand": para. 20.

[47] McLachlin C.J. and LeBel J. described collective bargaining, at para. 41, "as a fundamental aspect of Canadian society" and stressed "the importance of collective bargaining – both historically and currently – to the exercise of freedom of association in labour relations": para. 30. They noted, at para. 66, that "historically, [collective bargaining] emerges as the most significant collective activity through which freedom of association is expressed in the labour context."

[48] Collective bargaining, they explained, enhances values that underlie the *Charter* - human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy – in that it:

- gives workers "the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives": para. 82

- "palliate[s] the historical inequality between employers and employees": para. 84

- "permits workers to achieve a form of workplace democracy and to ensure the rule of law in the workplace": para. 85.

[49] The majority decision also took notice of international conventions, to which Canada is a party, that recognize the right of members of unions to engage in collective bargaining as part of the protections for freedom of association. It would be reasonable, they said, to infer "that s. 2(*d*) of the *Charter* should be interpreted as recognizing at least the same level of protection": para. 79.

[50] McLachlin C.J. and LeBel J. concluded that "s. 2(*d*) should be understood as protecting the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining": para. 87. They conceived of the right to bargain collectively as a right to a process, and not a right to certain substantive or economic outcomes: para. 91. It is not a right "to a particular model of labour relations, nor to a specific bargaining method" since it is impossible to predict how the current model of labour relations will evolve over time: para. 91.

[51] While the right is limited to the process of collective bargaining, it is not a hollow right. Rather, the right to bargain collectively is meant to support a meaningful process. In describing good faith collective bargaining, McLachlin C.J. and LeBel J. referred to the duty to engage in "meaningful dialogue", at para. 101; the right of workers to have their views heard in the context of a "meaningful process of consultation and discussion", at para. 114; and the importance of "meaningful discussion and consultation" to collective bargaining, at para. 92.

[52] In summary, the combined effect of *Dunmore* and *B.C. Health Services* is to recognize that s. 2(d) protects the right of workers to organize and to engage in meaningful collective bargaining. The decisions also recognize that, in certain circumstances, s. 2(d) may impose obligations on the government to enact legislation to protect the rights and freedoms of vulnerable groups.

[53] The test for determining whether a claimant making a positive rights claim under s. 2(d) is entitled to government action was initially laid down in *Dunmore.* The Supreme Court subsequently expanded the test for positive rights claims under s. 2 of the *Charter* in *Baier v. Alberta,* [2007] 2 S.C.R. 673, at para. 30 ("*Baier*"). Applying the *Baier* test in this context involves the following five inquiries:

1. Are the activities for which the appellants seek s. 2(d) protection associational activities?

2. Are the appellants seeking a positive entitlement to government action, or simply the right to be free from government interference? If the former, then the three so-called "*Dunmore* factors" must be considered.

3. Are the claims grounded in a fundamental freedom protected by s. 2(d), rather than in access to a particular statutory regime?

4. Have the appellants demonstrated that exclusion from a statutory regime has the purpose or effect of substantially interfering with the freedom to organize or the right to bargain collectively?

5. Is the government responsible for the inability to exercise the fundamental freedom?

B. Application of the *Baier* Test

(1) Are the activities for which the appellants seek s. 2(d) protection associational activities?

[54] The appellants submit that the continued exclusion of agricultural workers from the *LRA* and their treatment under the *AEPA* violates s. 2(d) by failing to provide the necessary protection for Ontario's agricultural workers to organize and to bargain collectively.

[55] The activities of organizing and collective bargaining are associational activities within the scope of s. 2(d). In *Dunmore*, the Supreme Court stated that "[t]he freedom to organize lies at the core of the *Charter*'s protection of freedom of association": para. 37. To reiterate the words of McLachlin C.J. and LeBel J. in *B.C. Health Services*, "historically, [collective bargaining] emerges as the most significant collective activity through which freedom of association is expressed in the labour context": para. 66. Thus, the appellants satisfy this step of the test.

(2) Are the appellants seeking a positive entitlement to government action, or simply the right to be free from government interference?

[56] It is apparent that the appellants in this case are seeking a positive entitlement to government action. They claim that the *AEPA* is underinclusive in a manner that orchestrates, encourages and sustains the violation of agricultural workers' freedom of association. As outlined above, they seek statutory protections – beyond those afforded in the *AEPA* – which they say are fundamental to enable agricultural workers to organize and to bargain collectively. Consequently, the three *Dunmore* factors must be considered.

(3) Are the claims grounded in a fundamental freedom protected by s. 2(d), rather than in access to a particular statutory regime?

[57] The appellants assert that the *AEPA* fails to protect the freedom of agricultural workers to organize and their right to engage in a process of meaningful collective bargaining. They do not suggest that agricultural workers must be included within the *LRA*, thus recognizing that their constitutional rights may be adequately protected through another statutory framework. They are clear that they do not seek the right to strike.

[58] In *Dunmore* and *B.C. Health Services*, the Supreme Court recognized that the freedom to organize and the right to bargain collectively exist independently of statute. In *Dunmore*, the court referred to the "fundamentally non-statutory character" of the freedom to organize, which "exists independently of any statutory enactment": para. 24. Also, in *B.C. Health Services,* McLachlin C.J. and LeBel J. wrote that "[t]here is nothing in the statutory entrenchment of collective bargaining that detracts from its fundamental nature": para. 25. They continued, "[t]he history of collective bargaining in Canada reveals that long before the present statutory labour regimes were put in place, collective bargaining was recognized as a fundamental aspect of Canadian society": para. 41.

[59] Following *Dunmore* and *B.C. Health Services*, I conclude that the appellants' claims are grounded in the fundamental freedom of association rather than in the denial of access to the *LRA*.

(4) Have the appellants demonstrated that exclusion from a statutory regime has the purpose or effect of substantially interfering with the freedom to organize or the right to bargain collectively?

[60] Section 2(d) does not protect against all interferences with the freedom of association, rather only substantial interferences: *B.C. Health Services*, at para. 90; *Dunmore*, at paras. 23-25. A substantial interference can occur either through the purpose or the effect of government action, but it must "seriously undercut or undermine" an activity protected by s. 2(d): *B.C. Health Services*, at para. 92. As held in *Dunmore*, underinclusive legislation may substantially interfere with a claimant's rights under s. 2(d).

[61] The appellants submit that the *AEPA* regime is underinclusive because it fails to provide adequate statutory protections to enable agricultural workers to organize and to bargain collectively in a meaningful way. Thus, they contend that both the purpose and the effect of the *AEPA* interfere with the freedom of agricultural workers to organize and

their right to bargain collectively. While I do not accept this argument in its entirety, in my view, there is no doubt that, with respect to the right to bargain collectively, the interference with their s. 2(d) rights is substantial for the following reasons.

Purpose of the Legislation

[62] The appellants argue that the purpose of the legislation is to prevent agricultural workers from bargaining collectively. They point to statements that the Minister of Agriculture and Food for Ontario made during the legislative debate on the *AEPA* bill, which took place prior to the decision in *B.C. Health Services*. The Honourable Helen Johns stated:

> I'd like to say that the Supreme Court was very clear…. They did not say that [agricultural workers] had the right to collectively bargain: Ontario Legislative Assembly, *Official Report of Debates (Hansard)*, No. 93A (16 October 2002), at para. 2128 (Hon. Helen Johns).
>
> …
>
> However, I need to make one thing very clear here. While an agricultural employee may join an association that is a union, the proposed legislation does not extend collective bargaining to agricultural workers: Ontario Legislative Assembly, *Official Report of Debates (Hansard)*, No. 46B (22 October 2002), at para. 2339 (Hon. Helen Johns).

[63] In *Dunmore*, the Supreme Court was faced with similar evidence of legislative purpose, but declined to find that the legislative intent was to violate workers' freedom of association. Bastarache J. stated that "the fact that the *LRESLAA* pursues a collateral legislative objective, namely the protection of the family farm, makes it difficult to conclude without speculation that this protection was sought through the prevention of unionization *per se*": para. 32. He further noted that "s. 3(*b*) of the *LRA* does not, on its face, prohibit agricultural workers from forming workers' associations, while it does bar them from all statutory labour relations schemes": para. 32.

[64] He wrote at para. 33:

> The difficulties of assessing legislative intent cannot be overemphasized. Such an assessment strikes at the heart of the rapport between the legislatures and the courts and, if undertaken lightly, can become a rather subjective process of

> induction. Moreover, the kind of evidence that is required to go behind the wording of a statute and make a finding of unconstitutional purpose is, understandably, not often available on the legislative record. <u>On the facts of this case, therefore, I think it is more appropriate to focus on the effects of the impugned provisions, noting that some of the concerns raised by the above comments will inform the s. 1 analysis</u>. [Emphasis added.]

[65] Bastarache J.'s statements are equally applicable in this case. The *AEPA* does not, on its face, prohibit agricultural workers from collective bargaining. The respondent submits that the legislation's objectives include the protection of the family farm, farm production and farm viability. Recognizing the difficulties of assessing legislative intent in these circumstances, it is more appropriate to focus on the effect of the *AEPA*.

Effect of the Legislation

[66] The question is whether the evidence before this court demonstrates that the effect of the *AEPA* is to substantially impair the ability of agricultural workers to exercise their freedom to organize and their right to bargain collectively. In my view, the appellants have demonstrated that the impugned legislation substantially interferes with the ability of agricultural workers to bargain collectively. However, I am not persuaded that it impairs agricultural workers' ability to exercise their freedom to organize.

[67] Both the appellants and the respondent led evidence of the vulnerability of agricultural workers. The appellants' key expert was Professor Judy Fudge, who also gave evidence in *Dunmore*. Her evidence is that agricultural workers remain a vulnerable group with low skills, low education, low job mobility and low incomes.

[68] The respondent's experts, Professor Richard Chaykowski and Professor George Brinkman, also gave evidence on the vulnerability of the agricultural sector. Professor Brinkman recognizes that farm workers are low skilled, low educated and low paid but stresses that farm owners and operators are also economically vulnerable given the fragility of the agricultural sector.

[69] Based on this evidence, I agree with the application judge who found that agricultural workers remain a vulnerable group. At para. 23 he stated:

> In my view, the material before me does not represent any material change from that in 1997 before Sharpe J. at the trial level of *Dunmore* when he noted at p. 216 that agricultural workers are "poorly paid, face difficult working conditions,

> have low levels of skills and education, low status and limited employment mobility."

[70] Given the vulnerability of agricultural workers, the evidence shows that it has been virtually impossible for agricultural workers to organize and to bargain collectively with their employers without statutory supports. Except under the *ALRA*, the parties have not pointed to any instance where a union or employees' association has successfully organized and then been able to engage in the process of good faith collective bargaining on behalf of agricultural workers in Ontario.

[71] Accepting that agricultural workers require statutory supports for organizing and collective bargaining, the next question is whether the appellants have demonstrated that the *AEPA* fails to provide sufficient supports to comply with s. 2(d). In answering this question, I will first address the issue of collective bargaining and then turn to organizing.

[72] The appellants' evidence, which details the UFCW's attempts to organize and to bargain collectively on behalf of agricultural workers at Rol-Land and Platinum Produce, shows that agricultural workers have been unable to bargain collectively under the *AEPA*.

[73] In 2002, after the Supreme Court's decision in *Dunmore*, the appellant Xin Yuan Liu and other workers at Rol-Land approached the UFCW to represent them and bargain on their behalf. By the spring of 2003, 70% of the workers at Rol-Land had become UFCW members.

[74] After Rol-Land refused to voluntarily recognize the UFCW as the employees' representative, the UFCW filed an application for certification with the Ontario Labour Relations Board. In the Board-supervised certification vote, the workers voted 132 to 45 in favour of certification, despite intimidation tactics by the employer. Resolution of that certification application is on hold pending the decision in this appeal.

[75] After the votes were counted, the UFCW wrote to the employer requesting meeting dates to commence negotiations toward a contract for Rol-Land workers. The UFCW received no response to this letter.

[76] The UFCW also attempted to bargain collectively on behalf of employees at Platinum Produce, an industrial hothouse greenhouse operation in Chatham, Ontario. While the employer expressed doubt that the UFCW could be an employees' association under the *AEPA*, it gave the union an opportunity to make brief representations. The meeting lasted approximately 15 minutes. The employer's position was that the company was not obliged to bargain with the union and the meeting was not to be considered collective bargaining towards a collective agreement.

[77] The UFCW subsequently presented Platinum Produce's counsel with a draft collective agreement setting out proposed terms. That meeting lasted approximately five minutes. Based on the record, the employer has not responded to the proposals or to other proposed meeting dates. There have been no further meetings or communications about terms and conditions of work.

[78] In my view, this evidence demonstrates that the *AEPA* − which excludes agricultural workers from the *LRA* and which provides no protections for collective bargaining − substantially impairs the ability of agricultural workers to engage in collective bargaining. When Rol-Land and Platinum Produce refused to bargain with the UFCW, the union and employees were left without any remedy under the *AEPA*, as the employers were under no statutory duty to bargain in good faith with the employees' chosen representative.

[79] In reaching this conclusion, I have considered the evidence in light of the so-called "two inquiries" set out in *B.C. Health Services*, which, generally speaking, are applicable when assessing whether a government measure affecting the process of collective bargaining amounts to substantial interference: para. 93. To the extent that the two inquiries may apply in the context of this case, the evidence demonstrates that the failure to provide any protections for collective bargaining seriously impairs the capacity of agricultural workers to come together and meaningfully engage in the very process of collective bargaining.

[80] If legislation is to provide for meaningful collective bargaining, it must go further than simply stating the principle and must include provisions that ensure that the right can be realized. At a minimum, the following statutory protections are required to enable agricultural workers to exercise their right to bargain collectively in a meaningful way: (1) a statutory duty to bargain in good faith; (2) statutory recognition of the principles of exclusivity and majoritarianism; and (3) a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements.

[81] Without a statutory duty to bargain in good faith, there can be no meaningful collective bargaining process. To quote the Supreme Court in *B.C. Health Services*, s. 2(d) protects "the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith": para. 90. Good faith collective bargaining "requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation": para. 90.

[82] In keeping with that goal, legislation dealing with collective bargaining must also provide a mechanism for resolving bargaining impasses. The bargaining process is jeopardized if the parties have nothing to which they can resort in the face of fruitless

bargaining. There exists a broad range of collective bargaining dispute resolution mechanisms. I reiterate that the appellants have stated that they do not seek the right to strike as the dispute resolution mechanism.

[83] Once bargaining has concluded, there must also be a statutory mechanism to resolve disputes relating to the interpretation and administration of the agreement. If an employer is able to unilaterally interpret the agreement that results from bargaining, that bargaining might as well have never occurred.

[84] Another key aspect of the collective bargaining process is the recognition of a representative organization. The International Labour Organization ("ILO") describes good faith in collective bargaining in the following passage, which McLachlin C.J. and LeBel J. quote twice in *B.C. Health Services*:

> H. The principle of good faith in collective bargaining implies recognizing representative organizations, endeavouring to reach an agreement, engaging in genuine and constructive negotiations, avoiding unjustified delays in negotiation and mutually respecting the commitments entered into, taking into account the results of negotiations in good faith. [Emphasis added.]
>
> (B. Gernigon, A. Odero and H. Guido, "ILO principles concerning collective bargaining" (2000), 139 *Intern'l Lab. Rev.* 33, at pp. 51-52).

[85] And, more than sixty years ago, Professor Bora Laskin described collective bargaining as follows:

> Collective bargaining is the procedure through which the views of the workers are made known, expressed through representatives chosen by them, not through representatives selected or nominated or approved by employers. More than that, it is a procedure through which terms and conditions of employment may be settled by negotiations between an employer and his employees on the basis of a comparative equality of bargaining strength. [Emphasis added.]
>
> ("Collective Bargaining in Canada: In Peace and in War" (1941), 2:3 *Food for Thought*, at p. 8.)

[86] The respondent submits that employee representatives need not be selected based on the principles of majoritarianism and exclusivity. The respondent says that exclusivity provisions are simply a feature of certain statutory regimes, such as the *LRA*, and are not typically found in the labour legislation of most European countries. I reject the respondent's submission on this point for three reasons.

[87] First, I am instructed by *Dunmore* and *B.C. Health Services* to apply a contextual approach that takes into account the history and current reality of labour relations in the Canadian context. Labour relations policy in Canada has long recognized that allowing multiple worker representatives for workers performing similar functions is conducive to employer influence over employee associations, and thus undermines collective bargaining. This policy is reflected in collective bargaining legislation across the country. A common element found within labour relations statutes across Canada is a mechanism to allow workers to select, on a majority basis, a trade union free of employer interference with exclusive bargaining rights to represent them.

[88] As stated by Donald D. Carter and the co-authors of *Labour Law in Canada*, 5th ed. (The Hague: Kluwer Law International, 2002), at pp. 286-287:

> A fundamental principle of Canadian collective bargaining law is that, once a trade union has acquired bargaining rights for a particular bargaining unit, it enjoys exclusive rights to bargain collectively on behalf of the employees in that bargaining constituency… The trade union's exclusive right to bargain imposes a corresponding obligation on the employer to recognize the trade union as bargaining agent for all employees in the bargaining unit, regardless of whether all of these employees are members of that trade union… These twin principles of 'majoritarianism' and 'exclusivity' are common threads running through all Canadian collective bargaining legislation. [Footnotes omitted.]

[89] Second, exclusivity is consistent with the *Charter* values underlying collective bargaining, as they are described by the Supreme Court in *B.C. Health Services*. Exclusivity provides workers with a unified, and thus, a more effective voice from which to promote their collective workplace interests. It therefore promotes workplace democracy and, thus, what the Supreme Court describes as "the *Charter* value of enhancing democracy": *B.C. Health Services*, at para. 85.

[90] Exclusivity is also key to mitigating the historical inequality between employers and employees, bringing about a more equitable balance of power in the workplace. It thus enhances equality, which the Supreme Court recognized was an important *Charter*

value promoted through collective bargaining: para. 84. "One of the fundamental achievements of collective bargaining", noted McLachlin C.J. and LeBel J., "is to palliate the historical inequality between employers and employees": *B.C. Health Services*, at para. 84.

[91] Majoritarian exclusivity is essential to ensure this balance of power. Not only does it empower a bargaining representative in its dealings with the employer, at the same time it confirms to the employer that the bargaining representative speaks with the support of the preponderance of the employees. As such, the notion of majoritarian exclusivity is a core value in any vibrant collective bargaining system in Canada.

[92] Third, for the collective bargaining process to be meaningful, it must be workable and fair for employees and employers. It is impractical to expect employers to engage in good faith bargaining discussions when confronted with a process that does not eradicate the possibility of irreconcilable demands from multiple employee representatives, purporting to simultaneously represent employees in the same workplace with similar job functions. It is not overstating the point to say that to avoid chaos in the workplace to the detriment of the employer and employees alike, it is essential that a representative organization be selected on a majoritarian basis and imbued with exclusive bargaining rights.

[93] The notion of majoritarianism is essential to trade unions because, in order for a trade union to be effective, it must have the support of the majority of workers. Conversely, it is unrealistic to expect an employer to bargain in good faith with a trade union that does not enjoy the support of the majority of the employees it represents.

[94] Moreover, I would reject the respondent's claim that the protections sought by the appellants – duties upon the employer to bargain exclusively with a majority-selected representative and to do so in good faith, as well as dispute-resolution mechanisms − are in fact provisions aimed at ensuring that the union can achieve its objectives, and thus deal with the substantive outcomes of collective bargaining, rather than the process.

[95] This argument is based on a narrow, literal interpretation of isolated portions of the reasons in *B.C. Health Services* that is inconsistent with the decision read as a whole. To give effect to this argument would be to disregard entirely the context of the Canadian notion of collective bargaining, which was at the foundation of the Supreme Court's reasoning.

[96] While it is true that the right to bargain collectively does not guarantee any particular outcome, it is disingenuous to characterize protections ensuring the effectiveness of the collective bargaining process as similarly ensuring any particular substantive outcome. Indeed, in *B.C. Health Services*, the Supreme Court stated that the right to bargain collectively must entail more than just the right to make representations,

it must also protect "the right of employees to have their views heard in the context of a meaningful process of consultation and discussion": para. 114.

[97] Turning next to the appellants' argument that the *AEPA* does not provide adequate statutory support for the freedom to organize, I would make the following comments.

[98] Based on the evidence in this case, I am not persuaded that the *AEPA* substantially interferes with the ability of agricultural workers to organize. The evidence relating to Rol-Land and Platinum Produce, as outlined above, shows that the UFCW has been successful in organizing agricultural workers since the advent of the *AEPA*. The primary difficulty has been that the union has been unsuccessful in engaging employers, who have no statutory duty to bargain in good faith, in the process of collective bargaining. To the extent there have been issues relating to employer interference, intimidation or coercion, an employee or employees' association may bring a complaint to the Tribunal, alleging a contravention of ss. 8 to 10 of the *AEPA*.

[99] I would note that certain issues raised by the appellants in relation to the freedom to organize – such as the issue of exclusivity − have been addressed in my discussion of the protections essential for collective bargaining. The freedom to organize and the right to bargain collectively are closely linked. A key reason for workers to organize is so they can engage in collective bargaining, and collective bargaining is not possible without organizing. The issue of exclusivity, which the appellants raised in relation to organizing, has been captured in my analysis of the protections necessary for collective bargaining. I recognize that in the practical world of labour relations this compartmentalization may seem artificial since the freedom to organize and the right to bargain collectively are so closely linked. However, this approach reflects the incremental advancement of the law in this area.

[100] With regard to the appellants' submission that the Tribunal is ineffective and that the *AEPA* does not provide sufficiently broad protection against interference, intimidation and coercion, I agree with the application judge that it is premature to address these issues, since there is no evidence of any attempts to bring forward any complaints to the Tribunal. That said, I agree with the appellants that robust protection from employer interference is critical to a meaningful labour relations scheme. The Supreme Court considered the issue of what qualifications are necessary to make determinations relating to labour relations matters in *C.U.P.E. v. Ontario* (*Minister of Labour*), [2003] 1 S.C.R. 539. This decision, no doubt, would be instructive in assessing the constitutional adequacy of the Tribunal should a time come when it is appropriate to do so.

[101] I conclude, therefore, that the appellants have demonstrated that the *AEPA* substantially interferes with s. 2(d) in that it fails to provide sufficient protections to enable agricultural workers to engage in a meaningful process of collective bargaining.

(5) Is the government responsible for the inability to exercise the fundamental freedom?

[102] The final inquiry is whether the government is responsible for the substantial interference with the s. 2(d) right. The respondent argues that the *AEPA* does nothing to actively preclude or impede collective bargaining and, therefore, the government cannot be found to be responsible for the appellants' inability to bargain collectively.

[103] *Dunmore* answers this argument. There the Supreme Court recognized that a government actor could be held responsible for the inability of workers to exercise their s. 2(d) rights against private employers, even if the government had not actively interfered with those rights. Applying *Dunmore*, I am satisfied that the government's legislative actions in the realm of labour relations are responsible for the appellants' inability to engage in a meaningful process of collective bargaining.

[104] *Dunmore* recognized the "chilling effect" that the *LRESLAA* and s. 3(b) of the *LRA* had on the efforts of agricultural workers to engage in non-statutory associational activity. Bastarache J. said that by extending statutory protection to just about every class of worker in Ontario except agricultural workers "the legislature [had] essentially discredited" their organizing efforts, particularly in light of their relative status in Canadian society: para. 45. Recognizing that the "ability of agricultural workers to associate is only as great as their access to legal protection", he said that s. 3(b) of the *LRA* did not simply "perpetuate an existing inability to organize" but exerted a "chilling effect": para. 45.

[105] Bastarache J. also noted, at para. 46, that "the didactic effects of labour relations legislation on employers must not be underestimated." Recognizing such an effect, the wholesale exclusion of agricultural workers from a labour relations regime acted as "a stimulus to interfere with organizing activity" and suggested that the efforts of agricultural workers to organize were "illegitimate": para. 46.

[106] Bastarache J. thus concluded that the inability of agricultural workers to organize was linked not just to private action but also to state action. "The inherent difficulties of organizing farm workers," explained Bastarache J., "combined with the threats of economic reprisal from employers, form only part of the reason why association is all but impossible in the agricultural sector in Ontario." The other equally important factor was the message sent by the provision excluding agricultural workers from the *LRA*, "which delegitimize[d] associational activity and thereby ensure[d] its ultimate failure": para. 48.

[107] The reasoning of Bastarache J. is apposite to this case. The exclusion of agricultural workers from a collective bargaining regime has a chilling effect on their

efforts to exercise their right to bargain collectively. Accordingly, the inability of agricultural workers to bargain collectively is linked to state action.

[108] In conclusion, I find that the appellants have demonstrated that the government has violated their s. 2(d) right to bargain collectively.

ISSUE 2: Does the impugned legislation violate the right to equality under s. 15 of the *Charter* by denying agricultural workers equal protection and equal benefit of the law based on their occupational status as agricultural workers?

[109] The appellants submit that the *AEPA* breaches the s. 15 equality rights of Ontario's agricultural workers in that it denies them benefits available under the law to other workers. They argue that the occupational status of being an agricultural worker is an analogous ground of discrimination for the purposes of s. 15 because work is a fundamental aspect of a person's identity and being an agricultural worker represents a particular form of vulnerability in Canadian society that depends on the convergence of multiple dynamics of discrimination. The differential treatment is substantively discriminatory because the laws perpetuate and reinforce the pre-existing disadvantage and marginalized position of agricultural workers.

[110] In contrast, the respondent submits that the legislation does not draw a distinction on an enumerated or analogous ground. Rather, the *AEPA* recognizes that the agricultural sector requires a different approach to labour relations.

[111] I accept the appellants' argument that the *AEPA* perpetuates and reinforces the pre-existing disadvantage of agricultural workers, but agree with the respondent that the distinction is not based on an enumerated or analogous ground. This view is supported by the Supreme Court's decisions in *B.C. Health Services* and *Baier*.

[112] In *B.C. Health Services*, there was also a s. 15 claim based on a number of grounds, including sex, employment in the health care sector, and status as non-clinical workers. In rejecting the s. 15 claim, McLachlin C.J. and LeBel J. found there was no differential treatment based on a personal characteristic. At para. 165 they explained:

> The courts below found no discrimination contrary to s. 15 of the *Charter*. We would not disturb these findings. Like the courts below, we conclude that <u>the distinctions made by the Act relate essentially to segregating different sectors of employment, in accordance with the long-standing practice in labour regulation of creating legislation specific to particular segments of the labour force, and do not amount to discrimination under s. 15 of the *Charter*. The differential</u>

> <u>and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, and not to the persons they are.</u> Nor does the evidence disclose that the Act reflects the stereotypical application of group or personal characteristics. Without minimizing the importance of the distinctions made by the Act to the lives and work of affected health care employees, the differential treatment based on personal characteristics required to get a discrimination analysis off the ground is absent here. [Emphasis added.]

[113] There was also a s. 15 claim made in *Baier*. In dismissing the claim, Rothstein J. rejected the submission that "occupational status" could ground a s. 15(1) claim in that case. He wrote at paras. 63 and 65-66:

> I find that there is differential treatment of school employees under the LAEA Amendments, as compared with the comparator group identified by the appellants, which consists of municipal employees. However, this differential treatment is not based on an enumerated or analogous ground.
>
> …
>
> I cannot find any basis for identifying occupational status as an analogous ground on the evidence presented in this case. Neither the occupational status of school employees nor that of teachers have been shown to be immutable or constructively immutable characteristics. School employees cannot be characterized as a discrete and insular minority. The appellants have not established that the occupational status of school employees is a constant marker of suspect decision making or potential discrimination.
>
> In *Delisle*, Bastarache J. for the majority, at para. 44, held:
>
>> [T]he appellant has not established that the professional status or employment of RCMP members are analogous grounds. It is not a matter of functionally immutable characteristics in a context of labour market flexibility. A distinction based on

> employment does not identify, here, "a type of decision making that is suspect because it often leads to discrimination and denial of substantive equality" (*Corbiere*, at para. 8), in view in particular of the status of police officers in society.
>
> It has not been demonstrated that this reasoning with respect to RCMP officers, should not apply to teachers and other school employees. [Citation omitted.]

[114] Likewise, in view of the record in this case, there is no basis for finding that "agricultural worker" is an analogous ground. The *AEPA* identifies an economic sector and limits the access of workers within that sector to aspects of a particular labour relations scheme. "Agricultural worker" includes workers with different qualifications, personal backgrounds and occupations within an economic sector. The category of "agricultural worker" does not denote a personal characteristic of the type necessary to support a s. 15 discrimination claim.

[115] Accordingly, I would dismiss the appellants' s. 15 claim.

ISSUE 3: Is the violation of s. 2(d) saved under s. 1?

[116] In *Oakes*, at pp. 138-39, Dickson C.J. formulated the test for determining whether a law is a reasonable limit on a *Charter* right or freedom. First, the party seeking to uphold the impugned law has the burden of proving on a balance of probabilities that the objective of the law is pressing and substantial. Second, "the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified": *Oakes*, at p.139. This involves a proportionality test.

[117] There are three components to the proportionality test: (a) "the measures adopted must be carefully designed to achieve the objective in question", and they "must not be arbitrary, unfair or based on irrational considerations" but, rather, "must be rationally connected to the objective"; (b) the measures "should impair 'as little as possible' the right or freedom in question"; and (c) "there must be a proportionality between the <u>effects</u> of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of 'sufficient importance'": *Oakes,* at p. 139 (emphasis in original; citation omitted).

[118] In this case, the respondent submits that the policy of excluding agricultural workers from the *LRA* and including them in the *AEPA* is based on a balancing of a complex set of factors that, taken together, render the agricultural sector incompatible with the *LRA* model. The creation of an alternative regime reflects the balancing of these

important objectives, is rationally connected to the objectives, and satisfies the minimal impairment test.

(a) Pressing and Substantial Objective

[119] The respondent characterizes the objectives of the *AEPA* as follows:

> 1. to provide an effective legislative mechanism to protect agricultural employees' freedom of association and their organizing and associational efforts and to give them the opportunity to address workplace concerns collectively, without precluding voluntary collective bargaining;
>
> 2. to protect agricultural production and farm viability, given the characteristics of Ontario's agriculture sector that, when taken together, make it unique: its seasonal nature, its sensitivity to time and climate, the perishability of agricultural products, the need to protect animal and plant life, and severe economic vulnerability;
>
> 3. to protect family farms which, along with small to medium sized farms, are usually characterized by factors that make the *LRA* model unsuitable, such as informal labour relations, thin or non-existent management and human resources structures and little or no differentiation between the job functions of owners and those of hired labour.

[120] I note that these objectives are somewhat broader than the objectives stated in s. 1(1) of the *AEPA*:

> 1.1 The purpose of this Act is to protect the rights of agricultural employees while having regard to the unique characteristics of agriculture, including, but not limited to, its seasonal nature, its sensitivity to time and climate, the perishability of agricultural products and the need to protect animal and plant life.

[121] In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, McLachlin J. explained how the scope of the legislative objective is to be defined for the purpose of a s. 1 analysis at paras. 110-111:

> Section 1 of the *Charter* states that it is the limits on *Charter* rights and freedoms that must be demonstrably justified in a free and democratic society. It follows that under the first part of the *Oakes* test, the analysis must focus upon the objective of the impugned limitation, or in this case, the omission. Indeed, in *Oakes*, *supra*, at p. 138, Dickson C.J. noted that it was the objective "which the measures responsible for a limit on a *Charter* right or freedom are designed to serve" (emphasis added) that must be pressing and substantial.
>
> However, in my opinion, the objective of the omission cannot be fully understood in isolation. It seems to me that some consideration must also be given to both the purposes of the Act as a whole and the specific impugned provisions so as to give the objective of the omission the context that is necessary for a more complete understanding of its operation in the broader scheme of the legislation. [Emphasis in original.]

[122] Focusing on the objective of the omission in this case (i.e., the failure to provide agricultural workers with the necessary statutory protections to exercise the right to bargain collectively) and taking into account the *AEPA* as a whole, I find that the main objectives of the *AEPA* are to protect the family farm and farm production/viability. I conclude that these objectives are sufficiently pressing and substantial objectives to meet the first step of the *Oakes* test. While protecting employees' freedom of association is stated as one of the *AEPA*'s objectives, it is not relevant for the purpose of the s. 1 analysis, since the focus in characterizing the objective is on the infringement.

[123] In *Dunmore*, the Supreme Court accepted that the protection of the family farm was a pressing and substantial objective. Bastarache J. noted that "[t]he fact that Ontario is moving increasingly towards corporate farming and agribusiness does not … diminish the importance of protecting the unique characteristics of the family farm": para. 52.

[124] The court in *Dunmore* was also satisfied that ensuring farm productivity was a sufficiently pressing and substantial objective to pass the first stage of s. 1 scrutiny. On this issue, Bastarache J. stated at para. 53:

> With respect to the economic rationale, I disagree with the appellants that "[t]he Government has provided no evidence that the Ontario agricultural sector is in a fragile competitive position or that it is likely to be substantially affected by small changes in the cost and operating structure of Ontario farming". The Attorney General notes that agriculture occupies a volatile and highly competitive part of the private sector economy, that it experiences disproportionately thin profit margins and that its seasonal character makes it particularly vulnerable to strikes and lockouts. Moreover, these characteristics were readily accepted by the Task Force leading to the adoption of the *ALRA*, which recommended a system of compulsory arbitration in order to guard against the economic consequences of strikes and lockouts. [Reference omitted.]

[125] Bastarache J.'s words are also apt in this case.

(b) Proportionality

[126] Accepting the importance of the objectives described above, the question is whether the measures chosen by the legislature are reasonable and demonstrably justified. Needless to say, in an area like this one where the legislature must resolve complex economic and social issues and weigh competing interests, a large measure of deference is required. However, the difficulty for the government in this case is that it did not have the benefit of *B.C. Health Services* in deciding how to weigh competing policy considerations, including the protection of the right of agricultural workers to bargain collectively.

(i) Rational Connection

[127] As noted above, the proportionality test applicable at the second stage of the *Oakes* analysis requires the government to first establish that "the measures adopted [are] carefully designed to achieve the objective in question". In other words, "they must not be arbitrary, unfair or based on irrational considerations." Rather, "they must be rationally connected to the objective": *Oakes*, at p. 139. This element of the *Oakes* test has been described as "not particularly onerous": see *Little Sisters Book and Art Emporium v. Canada* (*Minister of Justice*), [2000] 2 S.C.R. 1120, at para. 228.

[128] In *Dunmore*, the Supreme Court considered whether there was a rational connection between the goals of protecting family farms and ensuring farm productivity

or viability, and the exclusion of agricultural workers from the *LRA*. Bastarache J. stated at paras. 54 and 55:

> At this stage, the question is whether a wholesale exclusion of agricultural workers from the *LRA* is carefully tailored to meet its stated objectives. Put differently, can the formation of agricultural unions rationally be regarded as a threat to the unique characteristics of Ontario's agriculture? Or conversely, does a regime which substantially impedes the right to form agricultural unions advance the cause articulated by the Attorney General? In my view, the Attorney General has demonstrated that unionization involving the right to collective bargaining and to strike can, in certain circumstances, function to antagonize the family farm dynamic. The reality of unionization is that it leads to formalized labour-management relationships and gives rise to a relatively formal process of negotiation and dispute resolution; indeed, this may well be its principal advantage over a system of informal industrial relations. In this context, it is reasonable to speculate that unionization will threaten the flexibility and cooperation that are characteristic of the family farm and distance parties who are otherwise, to use the respondent's words, "interwoven into the fabric of private life" on the farm. That said, I hasten to add that this concern ought only be as great as the extent of the family farm structure in Ontario and that it does not necessarily apply to the right to form an agricultural association. In cases where the employment relationship is formalized to begin with, preserving "flexibility and co-operation" in the name of the family farm is not only irrational, it is highly coercive. The notion that employees should sacrifice their freedom to associate in order to maintain a flexible employment relationship should be carefully circumscribed, as it could, if left unchecked, justify restrictions on unionization in many sectors of the economy.
>
> Even less convincing than Ontario's family farm policy, in my view, is a policy of denying the right of association to agricultural workers on economic grounds. While this may be a rational policy in isolation, it is nothing short of arbitrary where collective bargaining rights have been extended to almost every other class of worker in Ontario. The reality, as

> acknowledged by all parties to this appeal, is that many industries experience thin profit margins and unstable production cycles; this may be due to unpredictable and time-sensitive weather conditions, as in the case of agriculture, or to other factors such as consumer demand and international competition. In my view, it would be highly arbitrary to accept this reasoning in respect of almost every industry in Ontario, only to extend it in respect of vulnerable agricultural workers to the point of denying them the right to associate. … I conclude that the respondents have not met the onus of proof with regard to the economic rationale. [Emphasis added.]

[129] I would adopt similar reasoning in this case. In my view, the wholesale exclusion of agricultural employees from a collective bargaining scheme is not adequately tailored to meet the objective of protecting the family farm. As Bastarache J. indicated, the idea that employees should sacrifice their freedom to associate to maintain a flexible employment relationship should be carefully circumscribed. Accepting that collective bargaining "can, in certain circumstances, function to antagonize the family farm dynamic", that "concern ought only be as great as the extent of the family farm structure".

[130] Bastarache J.'s reasoning with regard to concerns about economic viability and farm production is also apposite. It is arbitrary to exclude all agricultural workers from a collective bargaining scheme on economic grounds, where collective bargaining has been extended to almost every other class of worker in Ontario, even in other industries that also face thin profit margins and unpredictable production cycles. Thus, I conclude the *AEPA* is not rationally connected to either of these stated objectives.

(ii) Minimal Impairment

[131] The second component of the *Oakes* proportionality test requires the court to consider whether the impugned law minimally impairs the *Charter* right: *Oakes*, at p. 139. Has the legislature impeded the appellants' right to bargain collectively more than is reasonably necessary to achieve its stated objectives? In my view, it has.

[132] The *AEPA* excludes <u>all</u> employees in the agricultural sector from a regime that provides for collective bargaining. There is no attempt to minimize the impairment by carving out family farms that are allegedly incompatible with a more formal labour relations regime. Rather, all farms, including factory farms, are excluded from collective bargaining.

[133] The *AEPA* fails to recognize the evolving nature of Ontario agriculture, which includes an "increasing trend … towards corporate farming and complex agribusiness": *Dunmore*, at para. 62. In discussing minimal impairment in *Dunmore*, Bastarache J. stated "it is not only over-inclusive to perpetuate a pastoral image of the 'family farm', but it may be that certain if not all 'family farms' would not be affected negatively by the creation of agricultural associations": para. 62.

[134] As noted by Bastarache J., while a line-drawing process may be difficult, it is not impossible: para. 64. By way of example, in New Brunswick, farming operations without five or more employees are exempt from the province's labour relations regime: *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, s. 1(5)(a). In Québec, the line has been drawn at farms that have three workers who are ordinarily and continuously employed at the location: *Labour Code*, R.S.Q. c. C-27, s. 21. These examples, of course, are not exhaustive of the alternative approaches available to address the issues raised by this case.

[135] In this case, the legislature made no attempt to engage in a line-drawing exercise to exclude family farms or to tailor a collective bargaining system that recognizes the challenges facing the agricultural sector. Before *B.C. Health Services*, there was clearly no effort to tailor appropriate protections for a feasible collective bargaining regime. Rather, the intent was to create an alternative process.

(iii) Proportionality between Effects and Objectives

[136] As I am of the view that the government has not satisfied the first two components of the *Oakes* proportionality test, it is not necessary to balance the effects of this exclusion against its stated purposes – the final component of the *Oakes* proportionality inquiry.

[137] I conclude that the violation of s. 2(d) under the *AEPA* cannot be justified under s. 1.

ISSUE 4: Remedy

[138] For the foregoing reasons, I would allow the appeal and declare that the *AEPA* is unconstitutional in that it substantially impairs the right of agricultural workers to bargain collectively because it provides no statutory protections for collective bargaining. The *AEPA* is declared invalid and the government is ordered to provide agricultural workers with sufficient protections to enable them to exercise their right to bargain collectively, in accordance with these reasons.

[139] However, I would suspend this declaration of invalidity for 12 months from the date of these reasons to permit the government time to determine the method of statutorily protecting the rights of agricultural workers to engage in meaningful collective bargaining. This is not a situation where there is only one appropriate response to this decision. It is up to the legislature to assess the options, taking into account constitutional, labour relations and other factors, and to design a constitutionally acceptable model. The declaration of invalidity is suspended in recognition that such a process takes time.

[140] If the parties cannot agree on costs, they may file brief written submissions not exceeding three pages, double-spaced, within 20 days of the release date of this decision with the Registrar of this court.

RELEASED: November 17, 2008
("EAC")

"Winkler C.J.O."
"I agree E.A. Cronk J.A."
"I agree David Watt J.A."