

THE SUPREME COURT OF CANADA RULES THAT THE EXCLUSION OF AGRICULTURAL WORKERS FROM THE ONTARIO *LABOUR RELATIONS ACT* VIOLATES THE *CHARTER*

Dunmore v. Ontario (Attorney General), 2001 S.C.C. 94

BACKGROUND

Agricultural workers, who had always been excluded from the provisions of the *Labour Relations Act*, were granted collective bargaining rights by the *Agricultural Labour Relations Act, 1994 (ALRA)*, an initiative of the Rae NDP Government. However, in 1995, the newly elected Progressive Conservative Government reinstated the “agricultural worker” exclusion under the *LRA* by repealing the *ALRA* pursuant to the *Labour Relations and Employment Statutory Law Amendment Act* (the “*LRESLAA*”). The *LRESLAA* also terminated any *ALRA* union certifications and any collective agreements.

Mr. Tom Dunmore, with the support of the United Food and Commercial Workers, challenged the agricultural worker exclusion from Ontario’s statutory labour relations regime. The applicants asserted that the law violated the freedom of association guaranteed under section 2(d) of the *Charter* as well as the right to equal protection and benefit of the law under section 15 of the *Charter*. Justice Sharpe rejected the claim in the General Division. Court of Appeal upheld that decision.

RULING OF THE SUPREME COURT OF CANADA

However, in an 8-1 ruling, the Supreme Court of Canada declared the exclusion of agricultural workers from the provisions of Ontario’s *LRA* violates the workers’ right to freedom of association guaranteed by the section 2(d) of the *Charter*.

Justice Bastarache, writing for the majority, held that the purpose of section 2(d) is to advance the collective action of individuals in pursuit of common goals – to allow the achievement of individual potential through interpersonal relationships and collective action. The purpose of section 2(d) commands a single inquiry: has the state precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals? Court held that section 2(d) could not be limited to activities that are performable by individuals. Rather, in some cases, section 2(d) should be extended to protect activities that are inherently collective in nature, in that they cannot be performed by an individual acting alone. The Court held that certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning. For example, the law must recognize that certain union activities – for example, making collective representations to an employer – may be central to freedom of association even though they are inconceivable on the individual level.

While the *Charter* does not ordinarily oblige the state to take affirmative action to safeguard the exercise of fundamental freedoms, section 2(d) may, in some cases, impose a positive obligation on the state to extend protective legislation to unprotected workers to make the freedom to

associate meaningful. To challenge underinclusion under section 2(d) of the *Charter*, workers have to demonstrate:

1. claims of underinclusion should be grounded in fundamental *Charter* freedoms rather than access to a particular statutory regime;
2. the evidentiary burden in cases where there is a challenge to underinclusive legislation is to demonstrate that exclusion from a statutory regime substantially interferes with the exercise of protected section 2(d) activity. Thus, a group that proves capable of associating despite its exclusion from a protective regime will be unable to meet the evidentiary burden required of a *Charter* claim; and
3. in order to link the alleged *Charter* violation to state action, the context must be such that the state can be truly held accountable for any inability to exercise a fundamental freedom.

In this case, the Supreme Court found that those three elements were met:

1. insofar as the appellants sought to establish and maintain an association of employees, their claim fell within the ambit of section 2(d). They did not claim a right to general inclusion in the labour relations act but simply a constitutional freedom to organize a trade union.
2. The appellants established that without the protection of the *LRA*, agricultural workers were substantially incapable of exercising the freedom to associate. The Court held: “The distinguishing features of agricultural workers are their lack of political impotence, their lack of resources to associate without state protection and their vulnerability to reprisal by their employers”. For example, government employees may be distinguished from agricultural workers given that they can access the *Charter* directly to suppress an unfair labour practice complaint
3. The Court found that what the legislature had done by reviving the *LRA* was not simply to allow private circumstances to subsist. Rather, it reinforced those circumstances by excluding agricultural workers from the only available channel for associational activity. The Court recognized a “chilling effect” on non-statutory union activity.

Having found a *prima facie Charter* violation, the Court then considered section 1 of the *Charter* which allows for reasonable limitations that are demonstrably justified in a free and democratic society. To fall within section 1, the parties seeking to uphold the limit on agricultural workers’ freedom to organize must establish that the objective underlying the exclusion was of sufficient importance to warrant overriding the constitutionally protected freedom and, further, that the means chosen to reach the objective were proportionate. While the Court held that unionization would threaten the flexibility and cooperation characteristic of the family farm, this did not justify the wholesale exclusion of agricultural workers from the labour relations regime. In addition, reliance on the family farm justification ignores the increasing trend toward corporate farming and complex agribusiness.

As a result, the Court declared section 3(b) of the Ontario *LRA* unconstitutional and the *LRESLAA* unconstitutional to the extent that it gave effect to the exclusion of agricultural workers in section 3(b) of the *LRA*. The Court's declarations were suspended for 18 months to allow for amending legislation to be passed. The Court stated that the *Charter* only obliges the legislature to provide a statutory framework that is consistent with the principles established in the case:

In my view, these principles require at a minimum a regime that provides agricultural workers with the protection necessary for them to exercise their constitutional freedom to form and maintain associations. . . . At a minimum the statutory freedom to organize in section 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 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.

In choosing the above remedy, I neither require nor forbid the inclusion of agricultural workers in a full collective bargaining regime, whether it be the *LRA* or a special regime applicable only to agricultural workers such as the *ALRA*. For example, the question of whether agricultural workers have the right to strike is one better left to the legislature.

IMPACT

It is important to note that the decision does not entitle agricultural employees to wholesale participation in the collective bargaining regime. The remedy is limited to the extension of the “statutory freedom to organize in section 5 of the *LRA* . . .with protections judged essential to its meaningful exercise, such as freedom to assemble, to participate in 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”. If the government chooses to implement legislation to achieve this end, that legislation may be limited. Most importantly, the legislation will not necessarily confer the right to strike.

An important issue that arises is whether the decision opens the door for other groups who are currently excluded from collective bargaining to challenge the applicable exclusions. There are a number of groups that are excluded from collective bargaining – notable are domestic workers, school principals and vice principals. If any of those groups choose to litigate their exclusion, they will face the hurdle of establishing that, in the absence of *LRA* protection, they are substantially incapable of exercising the freedom to associate. It is important to note that the Court relied on a number of “distinguishing features of agricultural workers” including “their political impotence, their lack of resources to associate without state protection and their *vulnerability* to reprisal by their employers”. If similar factors are not present in a different case, the *Dunmore* decision may be distinguished. For example, the Court suggested that government employees may be distinguished given that they can access the *Charter* directly to suppress an unfair labour practice complaint. Thus, while the *Dunmore* decision will provide excluded

groups with an argument, the outcome of any challenges is not a certainty. Those groups may now have a toehold if they choose to litigate, but it is not a shoe in.

The issue of the inclusion of principals and vice-principals in bargaining units has long been hotly contested. Statutory collective bargaining was introduced for teachers in 1975 with the *School Boards and Teachers' Collective Negotiations Act, 1975*. That *Act* provided that principals and vice-principals were statutory members of the teachers bargaining unit, but were denied the right to strike.

The Harris government enacted the *Education Quality and Improvement Act, 1997* ("Bill 160") which removed principals and vice-principals from the collective bargaining units to which other teachers belonged. Organizations representing school teachers in Ontario brought an application for a declaration that those provisions were of no force and effect because they violated rights guaranteed by the *Charter*. Justice Southey dismissed the application. In doing so he relied on Justice Sharpe's decision in *Dunmore* as support for the proposition that collective bargaining rights are not protected by the *Charter* right to freedom of association.