

# A Review of the Employee Occupational Exclusions under the Ontario *Labour Relations Act, 1995*

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Professor Michael Lynk  
Faculty of Law  
Western University

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## **1. Executive Summary**

Select categories of employee occupational groups are excluded from access to collective bargaining under the Ontario *Labour Relations Act, 1995* and do not have access to meaningful collective bargaining through other labour statutes. These employee groups include agricultural and horticultural workers, domestic workers, managerial and supervisory employees, employees employed in a confidential capacity related to industrial relations, and employees in some of the regulated professions. Ontario, along with Alberta, has the largest number of statutory exclusions of employee occupational groups of any labour law jurisdiction in Canada.

A new direction on associational freedom in the Canadian workplace has been charted by the Supreme Court of Canada under the *Charter of Rights and Freedoms*, with important implications for legislative choices on employee occupational exclusions. In recent rulings on employee exclusions, the Court has stated that labour legislation cannot significantly interfere with the right of employees to either meaningful access to forming and joining unions, or to engage in meaningful collective bargaining. As well, the Supreme Court has pointed to the standards of international labour law as an interpretative beacon for reading the *Charter* on associational freedom. International labour law has adopted a universality approach regarding the inclusion of employee occupational groups within labour legislation.

Agricultural and horticultural workers have been excluded from coverage under the *OLRA* since its inception in the 1940s, with the exception of a two year period in 1994-95. Since 2002, they have been covered for industrial relations purposes by the *Agricultural Employees Protection Act, 2002*, which offers weaker access to employee voice and collective bargaining than the *OLRA* and has not led to any collective agreement activity. A significant number of agricultural and horticultural workers in Ontario are male migrant workers on restricted work visas from developing nations, who perform low-skilled and low-wage jobs with little control or voice over their working and living conditions.

Domestic workers have been excluded from coverage under the *OLRA* since its inception, with the exception of a three year period between 1992 and 1995. Most domestic workers in Ontario are female migrant workers on restricted work visas from developing countries, who live and work in the home of the family for whom they are providing care. While their work involves some skills, it is poorly remunerated. A special challenge to the extension of meaningful collective bargaining to domestic workers is their one-employer–one-employee workplace circumstance.

Employees in five specific regulated professions – law, medicine, dentistry, architecture and land surveying – are excluded from the *OLRA*, and do not have access to any other labour legislation. Employees in the other estimated 41 regulated professions do have access to collective bargaining, either through the *OLRA* or other equivalent labour statutes. Notwithstanding this formal statutory barrier, some members of these excluded professions – notably, lawyers working for the provincial government and physicians engaged in fee-for-services with the provincial government – have established sophisticated collective bargaining relations with the government.

Managerial and supervisory employees do not have access to collective bargaining under the *OLRA*. While the formal exclusion of this category of employees is common in Canadian labour legislation, some jurisdictions permit supervisory and lower-end managerial employees to form and join designated trade unions of managerial employees separate from the bargaining unit of general employees in order to extend the benefits of job security and fairness to this occupational group. This is not the case in Ontario.

Independent contractors do not have access to collective bargaining under the *OLRA* or any other labour legislation. While general labour legislation elsewhere in Canada does not include them, special labour statutes have provided collective bargaining status to specific groups of independent contractors, such as fishers and artists.

The *OLRA* also excludes hunters and trappers, as well as employees employed in a confidential capacity related to labour relations.

## **2. Introduction**

The purpose of this report is to review the justification for the employee occupational exclusions under the Ontario *Labour Relations Act, 1995* (“OLRA”). This report will focus on those groups who do not have meaningful access to form or join unions and to engage in meaningful collective bargaining. Some of the occupational groups that are expressly excluded under the *OLRA* have acquired meaningful access to collective bargaining through other labour legislation – such as teachers, police officers, firefighters and community college teachers – and their exclusion will not be explored in this report. However, other employee occupational groups that are excluded under the *OLRA* do not have any other statutory pathway to acquire meaningful collective voice and pursue meaningful collective bargaining. The statutory exclusion of these groups – specifically: agricultural and horticultural workers, domestic workers, managerial and supervisory employees, employees employed in a confidential capacity related to industrial relations, and employees in some of the regulated professions – has been, at various times over the past 25 years, debated in the Ontario legislature, critically discussed by the industrial relations and academic communities, commented upon by leading international bodies on freedom of association within the United Nations system, argued before the Ontario Labour Relations Board, and/or challenged through constitutional litigation in the Canadian courts. Recent developments, particularly in Canadian constitutional law, invite a fresh look at the justification for these exclusions.

All jurisdictions in Canada practice some form of statutory exclusion of employee occupational groups from access to collective bargaining. However, only one other jurisdiction – Alberta – excludes as many groups as Ontario. As the following list indicates, there are 13 employee occupational groups that are expressly excluded by one or more labour statutes across Canada, and that have no other statutory access to meaningful collective bargaining. Ontario excludes 11 of the employee groups:

- *Managers*: All 11 jurisdictions, including Ontario, exclude managers. However, several jurisdictions (Federal, British Columbia, Manitoba and Saskatchewan) permit lower level managers to form and join separate managerial employee bargaining units and unions in order to access collective bargaining.

- *Employees employed in a confidential capacity related to industrial relations:* All 11 jurisdictions, including Ontario, exclude these employees.
- *Agricultural workers:* Two jurisdictions – Alberta and Ontario – exclude agricultural workers. Agricultural workers in Ontario are covered by the *Agricultural Employees’ Protection Act, 2002* for labour relations purposes, which has not resulted in any active collective bargaining since the legislation’s inception.
- *Domestic workers:* Three jurisdictions – Alberta, New Brunswick and Ontario – exclude domestic workers.
- *Medical professionals:* Four jurisdictions – Alberta, Nova Scotia, Ontario and Prince Edward Island – exclude medical professionals.
- *Dentists:* Four jurisdictions – Alberta, Nova Scotia, Ontario and Prince Edward Island – exclude dental professionals.
- *Lawyers:* Five jurisdictions – Alberta, Nova Scotia, Ontario, Prince Edward Island and Quebec – exclude lawyers.
- *Architects:* Four jurisdictions – Alberta, Nova Scotia, Ontario and Prince Edward Island – exclude architects.
- *Engineers:* Two jurisdictions – Alberta and Nova Scotia – exclude engineers. Ontario has included engineers within the Ontario *Labour Relations Act* since 1971.
- *Land surveyors:* Ontario is the only jurisdiction to exclude land surveyors.
- *Hunters and trappers:* Only Ontario excludes hunters and trappers.
- *Nurse Practitioners:* Only Alberta excludes nurse practitioners.
- *Horticultural workers:* Two jurisdictions – Alberta and Ontario – exclude horticultural workers.

The review of these statutory exclusions is timely for several reasons. First, the Supreme Court of Canada has stated in recent years that the core values of the *Charter of Rights and Freedoms* – human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy – are all complemented and promoted by the institution of collective bargaining in Canada.<sup>1</sup> In its elaboration of this statement, the Court has said that collective

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<sup>1</sup> *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, at para. 81.

bargaining provides Canadian employees with the opportunity to gain some control over a major aspect of their lives, namely work; it establishes a form of workplace democracy and ensures the rule of law in the Canadian workplace; it increases the possibilities of economic and employment security; it places employers and employees on a more equal bargaining footing; it protects marginalized groups; and it makes possible a more equal society.<sup>2</sup> This linkage drawn by the Supreme Court between *Charter* values and collective bargaining is part of its enlarged thinking about fundamental associational freedoms that now appears to be well-rooted within Canadian constitutional thinking. Indeed, the Court's broader interpretation of s. 2(d) – the associational freedom guarantee – is likely to guide its thinking well into the future, for two reasons: First, it is more in line with the Court's long-standing broad and purposive readings of the religious freedom and expressive freedom guarantees found elsewhere in s. 2. And second, the Court has stated in recent rulings that it will pay close attention to the liberal principles of associational freedom found in international labour law, a move that brings s. 2(d) much closer in line to the Court's open approach towards international law found in numerous judgements in other areas of Canadian law.

Given that the *Charter* lies at the very heart of our legal system, the impact of the Court's recent rulings suggests that the social purpose of labour legislation – to enable employees to improve upon their individual bargaining position through the power of collective voice, and to ensure that the benefits of collective bargaining are widely accessible – should be made available to Ontarians in the labour force in a broad and liberal manner so as to enable the realization of these core *Charter* values within the workplace. Put another way, if collective bargaining, one of our most important public goods, now occupies a protected place within the *Charter*, then access to collective bargaining should be determined not only by reasons of economic and social policy, or only by the consequences of market and political strength, but also by considerations that are consistent with the fundamental rights and core values which animate our Constitution.

Second, a prevailing theme in modern industrial relations thought is that *all* employees – regardless of the work they perform and their position or status in the workplace – are

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<sup>2</sup> *Ibid*, at paras. 81-86. Also see *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, at para. 58.

intrinsically the vulnerable party in the employment relationship because of the inherent inequality in bargaining power between those who command and those who obey in the workplace.<sup>3</sup> In adopting this perspective, the Supreme Court of Canada has added that: "...the imbalance between the employer's economic power and the relative vulnerability of the individual worker informs virtually all aspects of the employment relationship."<sup>4</sup> According to this view, the concept of employment vulnerability, and the corresponding antidote of statutory protection and access to collective bargaining, would be a defining characteristic for anyone who is in an employment or employment-like relationship, wherever he or she may be located across the spectrum of the labour force.

Hand in hand with this understanding of the scope of employee vulnerability in the law is the concept of universality. This concept postulates that collective bargaining as a protective institution should be available to every occupational category of employee, a sort of labour law without borders. Indeed, universality has animated the work of the International Labour Organization and lies at the centre of its fundamental statement on freedom of association in the workplace with respect to the extension of collective bargaining coverage to all employees: "without distinction whatsoever".<sup>5</sup> Conversely, the concept of universality differentiates itself from the prevailing Wagner Act approach of particularity, where policy choices on statutory inclusion and exclusion of employee occupational groups have been shaped over the past seventy years by a lack of social power by some, the lobbying strength of others, traditional forms of workplace organization, and concerns about bargaining inconvenience.<sup>6</sup> As per this emerging approach by both the Supreme Court of Canada and the International Labour Organization, if

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<sup>3</sup> The leading statement is found in P. Davies & M. Freedland, *Kahn-Freund's Labour and the Law* (London: Stevens & Sons, 1983) (3<sup>rd</sup> ed.), at p. 18: "The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship." This passage has been approvingly cited by the Supreme Court of Canada in: *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 92.

<sup>4</sup> *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, at para. 34.

<sup>5</sup> *Convention (No.87) Concerning Freedom of Association and the Protection of the Right to Organize*, 68 UNTS 17, at Article 2: "Workers and employers, *without distinction whatsoever*, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation." [Italics added] This universalism also informs the two international covenants on human rights – the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* – which both use the term "everyone" when establishing the right to form and join a trade union. See footnotes 63 and 64.

<sup>6</sup> See generally: J-C Vinel, *The Employee: A Political History* (Philadelphia: University of Pennsylvania Press, 2013), and R Garcia, *Marginal Workers* (New York: New York University Press, 2012).



industrial democracy is at the cornerstone of modern collective bargaining and models itself after the larger political democracy, then it would follow that industrial citizenship is to be based on an inclusive and universal grounding.<sup>7</sup>

Indeed, the principle of universality in the statutory coverage for collective bargaining is not new in Canadian industrial relations. In 1968, the Woods Report – the single most comprehensive and influential study of labour relations in Canada in the post-war era – reviewed the existing statutory exclusions in the federal labour legislation and could find no justification for any of them when measured against the principle of freedom of association.<sup>8</sup> The Report recommended that the statutory right to collectively bargain should be extended to: (i) supervisory and junior managerial employees; (ii) employees working in a confidential capacity in matters relating to labour relations; (iii) licensed professionals; (iv) dependent contractors; (v) agricultural workers; and (vi) domestic workers.<sup>9</sup> It added that, for many of these occupational groups, their access to collective bargaining could be achieved through specially designated bargaining units. When the *Canada Labour Code* was subsequently enacted in 1973, it would contain among the most inclusive definition of “employee” among Canadian labour statutes.

The third and final reason for why this review is timely is the need to bring some rationality to the purpose of employee inclusions and exclusions under the *Labour Relations Act*. The present scope of collective bargaining under the *Act* may be viewed as a patchwork of inclusions and exclusions that may not always suggest an underlying logic and consistency. In Ontario, there are 46 regulated professions; employees belonging to 41 of these regulated professions are entitled to unionize and collectively bargain, either under the *OLRA* or another labour relations statute. Yet, employees in the remaining five regulated professions – medicine, law, dentistry, architecture and land surveying – are expressly excluded from coverage under the *Act* (and do

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<sup>7</sup> *Health Services and Support, supra*, note 1, at para. 85: “[A] constitutional right to collective bargaining is supported by the *Charter* value of enhancing democracy. Collective bargaining permits workers to achieve a form of workplace democracy and to ensure the rule of law in the workplace.... One of the most cherished hopes of those who originally championed the concept of collective bargaining was that it would introduce into the work place some of the basic features of the political democracy that was becoming the hallmark of most of the western world.”

<sup>8</sup> *Canadian Industrial Relations: Report of the Task Force on Labour Relations* (the “Woods Report”) (Ottawa: Privy Council Office, 1968). At the beginning of its section on employee inclusions and exclusions, the Woods Report stated, at para. 433, that: “Freedom to associate and to act collectively are basic to the nature of Canadian society and are root freedoms of the existing collective bargaining system.”

<sup>9</sup> *Ibid.*, at paras. 433-443.

not have access under any other legislation). Furthermore, among the five excluded regulated professions, several of them – lawyers working for the provincial government and physicians practising medicine on a fee-for-services basis, for example – have established sophisticated collective bargaining relationships with the provincial government, notwithstanding their lack of formal statutory access to collective bargaining. As well, some employees with already formidable, if transient, bargaining power – such as professional athletes – have acquired collective bargaining status under the *Act* to further enhance their position vis-à-vis their employers, while other employee groups with negligible individual bargaining power – agricultural and horticultural workers, and domestic workers, as an example – are incapable of accessing collective bargaining under the present legislation to improve upon their very modest status within the workforce. Further, lower level managers and supervisors do not enjoy statutory access to collective bargaining, notwithstanding the fact that they are work within a classic employment relationship that often lacks the true accoutrements of managerial authority, and that also entails the same vulnerabilities that other employees experience regarding employment security, fairness and voice. If the concept of “employee” in labour relations legislation is to have a viable, consistent and purposive meaning, it would appear to be as the definitional gateway that extends access to collective bargaining to all individuals who share a qualitatively similar status of vulnerability in the workplace relationship of command and obedience.<sup>10</sup> Both the rationality of the definition, and the broader purpose of the legislation, face the challenge of incongruence when employee groups that share qualitative similarities with other groups of employees who are included within the protections of labour legislation are excluded from these protections without a compelling justification.

In 2016, any review of the concept of employee exclusions from Canadian labour legislation must start with the prevailing principles of freedom of association as presently articulated by the Supreme Court of Canada. Fifteen years ago, this would have been unnecessary, given the Court’s early rulings on the *Charter* that the associational freedom guarantee in s. 2(d) possessed only a modest constitutional obligation. Five years ago, this would have been a difficult exercise, given the Court’s uncertain approach towards employee exclusions in the aftermath of its two

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<sup>10</sup> G. Davidov, “The Reports of My Death are Greatly Exaggerated: ‘Employee’ as a Viable (Though Over-Used) Legal Concept” in G. Davidov & B. Langille (eds.) *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oxford: Hart Publishing, 2006), 133.

rulings on the exclusion of Ontario farm workers from collective bargaining. Today, this is both a necessary and a somewhat less arduous exercise, in the wake of the Court's most recent ruling in *Mounted Police Association of Ontario*, its latest and clearest word yet on the application of the *Charter* to employee occupational exclusions.

### 3. Constitutional Standards, Occupational Exclusions and Limitations, and Freedom of Association

The *Canadian Charter of Rights and Freedoms* states, in Section 2(d), that Canadians enjoy freedom of association as a fundamental constitutional guarantee.<sup>11</sup> In a series of judgements issued in recent years, the Supreme Court of Canada has ruled that this freedom includes, in the workplace context, the general rights to join and organize unions,<sup>12</sup> to bargain collectively<sup>13</sup> and to strike.<sup>14</sup> Since 2001, the Court has moved away from its self-described “restrictive” and “narrow” approach towards associational workplace rights that typified its early caselaw on Section 2(d),<sup>15</sup> and instead embarked upon a more “generous and purposive” vision of the role of the *Charter* in Canadian labour relations law.<sup>16</sup> In particular, the Supreme Court’s constitutional approach towards employee occupational exclusions from, and limitations to, statutory access to collective bargaining has evolved significantly over the past two decades, to the point where the validity of at least some of these exclusions and limitations in labour relations statutes may now be said to be doubtful under the *Charter*.

Two important themes are evident in the recent evolution in the Supreme Court of Canada’s approach towards Section 2(d) with respect to the statutory exclusion of employee occupations. First, with the Court leaving behind its earlier abstentionist stance that legislative policy choices on employee exclusions were beyond constitutional scrutiny, governments and legislatures are now required to closely review their policy choices with respect to those statutory

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<sup>11</sup> Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (U.K.), 1982, c. 11 [*Charter*]. Section 2(d) of the *Charter* provides: “Everyone has the following fundamental freedoms: ... (d) freedom of association”.

<sup>12</sup> *Mounted Police Association of Ontario*, *supra*, note 2; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94.

<sup>13</sup> *Meredith v. Canada (Attorney General)*, 2015 SCC 2; *Health Services and Support*, *supra*, note 1.

<sup>14</sup> *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4.

<sup>15</sup> *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 SCR 989; *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 SCR 367; *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313; *RWDSU v. Saskatchewan*, [1987] 1 SCR 460; *PSAC v. Canada*, [1987] 1 SCR 424. For an insightful overview of this early caselaw, see: J. Fudge “Freedom of Association”, in E. Mendes & S. Beaulac, *Canadian Charter of Rights and Freedoms* (5<sup>th</sup> ed.) (Toronto: LexisNexis, 2013).

<sup>16</sup> *Dunmore*, *supra*, note 12 is widely cited by labour law and constitutional observers as the Court’s turn-around decision in its approach to associational freedom under the *Charter*, including by the Court itself: see *Mounted Police*, *supra*, note 2, at para. 43. For the Court’s use of the terms “restrictive and narrow” and “generous and purposive” to describe the evolution of its Section 2(d) jurisprudence, see *Mounted Police*, paras. 30 and 41.

exclusions to ensure compliance with the new *Charter* norms. While the Supreme Court's approach in this area is still a constitutional work-in-progress, it has signalled, in its January 2015 ruling in *Mounted Police*,<sup>17</sup> that it will now inquire, in a searching manner, into whether a specific employee occupation that has been either excluded from, or effectively denied, meaningful access to collective bargaining amounts to a substantial interference with the associational rights guarantee. And second, the Court has stated in a number of leading constitutional rulings, most recently in *Saskatchewan Federation of Labour* in January 2015, that the tenets of international labour law, while not strictly binding, have now been accepted as influential criterion for the courts to consider when determining the compliance of Canadian labour legislation with the associational requirements of the *Charter*.<sup>18</sup> The importance of this theme for the purposes of this study is because the International Labour Organization has spoken regularly on the incompatibility under international labour law of specific employee occupational exclusions from domestic labour legislation.

Both of these themes will be considered in this sub-section.

i. *Charter Requirements for Associational Freedom after Mounted Police*

In January 2015, the Supreme Court of Canada issued its ruling in *Mounted Police*,<sup>19</sup> its latest word on the constitutionality of occupational exclusions from, or limitations to, statutory access to collective bargaining. Federal legislation had expressly excluded RCMP members from access to collective bargaining, primarily through an exclusionary definition of “employee” in the *Public Service Labour Relations Act* (“PSLRA”).<sup>20</sup> Instead, RCMP management, through its regulatory authority, had created the Staff Relations Representative Program (“SRRP” or “the Program”) to provide a constrained form of employee voice to RCMP members. The SRRP permitted members to raise some labour relations issues (which did not include wages or other

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<sup>17</sup> *Mounted Police*, *supra*, note 2.

<sup>18</sup> *Saskatchewan Federation of Labour*, *supra*, note 12.

<sup>19</sup> *Mounted Police*, *supra*, note 2.

<sup>20</sup> S.C. 2003, c. 22. Section 2(1)(d) of the *PSLRA* specifically excluded members of the RCMP from the *Act*. At the time, the RCMP was the only police force in Canada whose members neither had the right to organize or join an independent employee association, nor were unionized.

forms of compensation) with RCMP management through elected representatives, but it left the final word on the resolution of employment differences to management.

In *Mounted Police*, the Supreme Court ruled that the SRRP system fell short in providing RCMP members with a meaningful access to collective bargaining. As such, it declared that the RCMP *Regulations* regarding the Program violated Section 2(d) of the *Charter*, and were not saved by Section 1.<sup>21</sup> As part of the Court's decision, it held that the restrictive definition of "employee" in the *PSLRA*, which excluded RCMP officers from coverage, was also contrary to the *Charter*.

The Supreme Court of Canada, in *Mounted Police*, stated that associational rights under Section 2(d) are to be interpreted in a purposive, generous and contextual fashion.<sup>22</sup> Through that lens, and for the purposes of this study, there are three features of the *Mounted Police* judgement that are particularly pertinent.

### *Positive Duty*

First, governments in Canada now have a positive duty to ensure that employees – the inherently more vulnerable party in the employment relationship – enjoy a meaningful access to create and join an effective employee association and to engage in meaningful collective bargaining without substantial interference by governments. No longer is it constitutionally compliant for Canadian governments to maintain a stance of legislative neutrality or abstinence towards the right of employees to join and/or to organize a protective employees' association that would collectively bargain on their behalf.<sup>23</sup> The Supreme Court in *Mounted Police* endorsed the

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<sup>21</sup> Under the *Charter of Rights and Freedoms*, an infringement of a recognized *Charter* right by a government or state actor can nevertheless be justified under s. 1 if the infringement is deemed by the courts to be reasonable. The provision provides that: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The prevailing test for a s. 1 justification is the *Oakes* test (*R. v. Oakes*, [1986] 1 SCR 103), which requires the government or state actor to demonstrate that the infringement (i) meets a pressing and substantial objective, and (ii) is rationally connected to the objective, minimally impairs the infringed right, and there is proportionality between the infringement and the objective.

<sup>22</sup> *Mounted Police*, *supra*, note 2, at paras. 47-66.

<sup>23</sup> This echoes earlier comments made by the Supreme Court in *Dunmore*, where Bastarache J. stated in 2001 that: "[H]istory has shown, and Canada's legislatures have uniformly recognized, that a posture of government restraint

influential dissent by Chief Justice Brian Dickson in *Alberta Reference* in 1987, where he stated that a fundamental purpose of s. 2(d) is “to recognize the profoundly social nature of human endeavours and to protect the individual from ‘state-enforced isolation in the pursuit of his or her ends.’”<sup>24</sup> The Court continued:

Elaborating on this interpretative approach, Dickson C.J. states that the purpose of the freedom of association encompasses the protection of... (3) collective activity that enables ‘those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict.’<sup>25</sup>

Thus, in the context of the associational right to organize collectively, the Supreme Court ruled that s. 2(d) now protects three classes of activities: “(1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others in the pursuit to meet on more equal terms the power and strength of other groups or entities”,<sup>26</sup> such as governments and employers. Given this enriched reading of s. 2(d) by the Court, it would appear that, in the aftermath of *Mounted Police*, the *complete* exclusion of an occupational category of employees from any statutory access to collective bargaining would be a presumptive breach of the *Charter*, which could be saved only by a compelling justification from a Canadian government under the s. 1 analytical framework.<sup>27</sup>

### *Meaningfully Associate and Meaningful Collective Bargaining*

Second, the Supreme Court of Canada in *Mounted Police* ruled that the governing constitutional test with respect to satisfying the associational right to organize and/or join an employees’ association and to engage in collective bargaining is whether the law provides employees with *meaningful* access. Specifically, the Court said that s. 2(d) guarantees that employees have a constitutional right to both “meaningfully associate” in the pursuit of

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in the area of labour relations will expose most workers not only to a range of unfair labour practices, but potentially to legal liability under common law prohibitions on combinations and restraints of trade.” *Supra*, note 12, at para. 20.

<sup>24</sup> *Mounted Police*, *supra*, note 2, at para. 54, citing *Alberta Reference*, *supra*, note 15, at p. 365.

<sup>25</sup> *Ibid*, at para. 54, citing *Alberta Reference*, at p. 366.

<sup>26</sup> *Ibid*, at para. 66.

<sup>27</sup> At para. 129, the Court in *Mounted Police* stated: “The blanket prohibition of associational activity in pursuit of workplace goals imposed by P.C. 1918-2213 unquestionably violates s. 2(d) of the *Charter*.” And in para. 135, it continued: “The PSLRA exclusion is but part of a constitutionally impermissible purpose, designed to prevent the exercise of the s. 2(d) rights of RCMP members.”

collective workplace goals,<sup>28</sup> and to be able to engage in “meaningful collective bargaining” without substantial interference.<sup>29</sup> An employee representation system that “strips employees of adequate protections in their interactions with management” would fail the requirement to ensure a meaningful process of collective bargaining.<sup>30</sup>

In its elaboration of these terms, the Court provided the following context:

- The right to “meaningfully associate” requires a process that provides employees with a degree of (i) choice and (ii) independence in their ability to associate that is sufficient to enable them to determine their collective interests and meaningfully pursue them.<sup>31</sup> Choice and independence are integral to fulfilling the purpose of collective bargaining, which “is to preserve collective autonomy against the superior power of management and to maintain equilibrium between the parties,” and to enhance the fundamental values of human dignity, liberty and autonomy of workers.<sup>32</sup>
- Choice and independence are not absolute. Rather, they may be limited by the particular context of collective bargaining, including the industry and workplace in question.<sup>33</sup>
- The constitutionally required degree of *choice* in the workplace context is one that enables employees to have effective input into the selection of collective goals of their association. “Hallmarks of employee choice...include the ability to form and join new associations, to change representatives, to set and change collective workplace goals, and to dissolve existing associations.”<sup>34</sup> The accountability of the association to its members is another explicit feature involving choice.<sup>35</sup> While a variety of industrial relations models may satisfy this requirement of choice, the Court has indicated that the choice provided by labour legislation must belong to the employees, it must amount to a genuine choice, and it must lead to a meaningful and effective form of employee representation vis-à-vis management, including meaningful collective bargaining.
- The constitutionally acceptable degree of *independence* is that which ensures that the activities of the association are aligned with the interests of its members, and the association is genuinely autonomous and at arm’s length from management and its

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<sup>28</sup> *Ibid*, at para. 67.

<sup>29</sup> *Ibid*, at para. 72.

<sup>30</sup> *Ibid*. at para. 80.

<sup>31</sup> *Ibid*, at para. 81.

<sup>32</sup> *Ibid*, at para. 82.

<sup>33</sup> *Ibid*, at para. 99.

<sup>34</sup> *Ibid*, at para. 86.

<sup>35</sup> *Ibid*, at para. 87.



control.<sup>36</sup> This requirement ensures that one of the primary purposes of collective bargaining – creating and maintaining a balance of equality between employers and employees – is allowed to function properly.<sup>37</sup> An organization dominated by, or under the influence of, management would not meet this constitutional requirement.<sup>38</sup>

- Section 2(d) guarantees a process, rather than an outcome.<sup>39</sup> This would likely mean that the *Charter* mandates a legislative process that meaningfully facilitates the ability of employees to create and/or join a genuine employee’s association. It does not mandate that an employee organization must always be created as the ultimate outcome, only that the meaningful possibility is provided. Similarly, the *Charter* guarantee would also require that the process facilitates the ability of employees to engage in meaningful collective bargaining with employers. This would include a requirement that the parties bargain in good faith with each other. However, the guarantee does not mandate any particular bargaining outcome. Among other things, the guarantee would not necessarily protect the gains of collective bargaining achieved at one round of bargaining from being reversed or altered in subsequent negotiations between an employer and an employees’ association.
- Section 2(d) does not guarantee or mandate access to a particular industrial relations model, such as the Wagner Act model that predominates in Canada.<sup>40</sup> The Court noted that other models exist in Canada, such as the designated bargaining model. However, the Court said that, whatever model is legislatively selected, the litmus test for its constitutionality is that it must not “substantially interfere with meaningful collective bargaining”.<sup>41</sup>

Thus, not only would the *complete* exclusion of an employee occupational group likely be incompatible with contemporary *Charter* requirements, but granting only *partial* access to collective employee voice in a manner that substantially interferes with meaningful access to collective association and/or meaningful collective bargaining would also very likely breach *Charter* obligations. In both cases, the government is entitled to advance a justification argument under s. 1 of the *Charter*, but *Mounted Police* indicates that the justification bar has become considerably more demanding.

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<sup>36</sup> *Ibid*, at para. 83.

<sup>37</sup> *Ibid*, at para. 89.

<sup>38</sup> *Ibid*, at para. 88.

<sup>39</sup> *Ibid*, at para. 67.

<sup>40</sup> *Ibid*, at para. 67.

<sup>41</sup> *Ibid*, at para. 72.

### *The Incompatibility of the SRRP System with Charter guarantees*

The third significant theme to be extracted from *Mounted Police* is that even a state-created employee-representation system – with employee elections, and employee voice on some aspects of human resource management inside a complex national organization – may not be sufficient to satisfy the minimum requirements of associational freedom under the *Charter*. Such a system would lack *Charter* compliance if it does not either ensure meaningful access to associate through genuine employee choice and independence, and/or provide for meaningful collective bargaining.

When the Supreme Court applied its refinement of the constitutional principles on associational freedom to the RCMP's SRRP system, it determined that the system's flaws amounted to a substantial interference with collective bargaining. Accordingly, it was inconsistent with s. 2(d), and it was not saved under s. 1. In particular, the Court highlighted the following concerns about the SRRP system:

- *Lack of genuine employee choice.* The SRRP system was not freely chosen by RCMP members, and they did not control it. Although RCMP members were initially given a vote on the predecessor system to the SRRP, it was on a 'take-it-or-leave-it' basis. As well, while RCMP members could vote for their SRRP representatives, these representatives exercised little formal power or authority within the system.<sup>42</sup>
- *Lack of genuine associational independence.* The SRRP process and structure was plainly part of the RCMP management structure, and it therefore lacked genuine independence. Among other concerns, the SRRP system did not provide for the binding adjudication of workplace differences by a neutral decision-maker, the budget and the number of SRRP representatives was controlled by RCMP management, SRRP representatives could not communicate outside of the organization without the Commissioner's permission, any changes to the SRRP system required the approval of RCMP management, and SRRP members were prohibited from promoting alternative forms of employee representation.<sup>43</sup>
- *Lack of balance between employers and employees.* The SRRP system did not provide for an autonomous enough or an effective enough employee association to adequately balance employee interests against the inherently stronger position of management. In particular, the SRRP system did not permit or facilitate meaningful

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<sup>42</sup> *Ibid*, at paras. 119-120.

<sup>43</sup> *Ibid*, at paras. 113-118

collective bargaining, and negotiations on the central issue of wages for RCMP members were beyond its writ.<sup>44</sup>

- *Impermissible purpose.* The express purpose of the SRRP system and its predecessors, as well as the statutory exclusion of RCMP members from federal labour relations legislation, was to avoid collective bargaining with an independent association.<sup>45</sup>

The Court concluded its reasoning on the SRRP system by noting the direct and mutually reinforcing relationship between the exclusion of RCMP members from any statutory access to meaningful association and the management-initiated SRRP system of employee representation. Not only were both of these industrial relations policies constitutionally impermissible, but they were bound to each other: “Indeed, the PSLRA exclusion makes possible the current imposition of the SRRP, which we have found to substantially interfere in both purpose and effect with RCMP members’ right to a meaningful process of collective bargaining.”<sup>46</sup> A reasonable conclusion to draw from this statement by the Court is that meaningful access to associational freedom requires a genuine statutory pathway for employees to create or join an autonomous and effective employee organization capable of bargaining, on a broadly equal basis, enforceable collective agreements with the employer.

#### *Comparing Mounted Police to its s. 2(d) Precedents*

In light of *Mounted Police*, it is pertinent to briefly review the jurisprudential status of the Supreme Court of Canada’s three previous *Charter* rulings – *Delisle* (1999), *Dunmore* (2001) and *Fraser* (2011) – that had addressed the constitutionality of employee exclusions from meaningful association and meaningful collective bargaining.

*Delisle* – where the Court had ruled that the complete exclusion of RCMP members from the predecessor legislation of the PSLRA did not violate s. 2(d) of the *Charter* – was expressly overturned in *Mounted Police*. The Supreme Court in *Mounted Police* noted that *Delisle* had

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<sup>44</sup> *Ibid*, at paras. 119, 150-152.

<sup>45</sup> *Ibid*, at paras. 107-110, 129-135.

<sup>46</sup> *Ibid*, at para. 135.

been decided before its adoption of the new purposive and generous approach towards associational freedom beginning in 2001.<sup>47</sup>

In *Dunmore*, the Court held that the complete exclusion of agricultural workers in Ontario from labour relations legislation that could facilitate their access to collectively associate and to collectively bargain amounted to a substantial interference with the *Charter*'s guarantees. The principal dictums of *Dunmore* – (i) freedom of association has a collective dimension, (ii) the state can be constitutionally obligated in some circumstances to take positive steps to facilitate the exercise of a fundamental right, and (iii) labour legislation need not replicate the Wagner Act model in order to satisfy the constitutional guarantee of meaningful associational rights – were endorsed in *Mounted Police* and remain its enduring legacy. However, the effort by the Supreme Court in *Dunmore* to anchor its new direction within the constrained principles expressed in the 1987 *Labour Trilogy* is no longer accepted as good law in the aftermath of *Mounted Police*.<sup>48</sup> As well, the distinction accepted in *Dunmore* between employee 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” would appear to be passé following the ruling in *Mounted Police* and the demise of *Delisle*.<sup>49</sup>

The decision in *Ontario (Attorney General) v. Fraser*, in the aftermath of *Mounted Police*, presents a jurisprudential challenge.<sup>50</sup> In *Fraser*, the Court held that the *Agricultural Employees Protection Act*,<sup>51</sup> the Ontario legislation enacted to comply with the remedial direction from *Dunmore*, was compliant with the *Charter*. The *AEPA* excluded agricultural workers from the *OLRA*, but created a separate labour relations system for them. Among the principal features of this particular system are: the right of agricultural workers to form employee

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<sup>47</sup> *Ibid*, at paras. 124-127.

<sup>48</sup> *Ibid*, at paras. 41-44. “Good law” in these circumstances means that an older judicial judgement remains a persuasive legal precedent, and has not been either overturned or rendered doubtful by subsequent rulings.

<sup>49</sup> *Dunmore*, *supra*, note 12, at para. 41. In making the distinction, the Supreme Court in *Dunmore* was quoting from the influential 1968 *Canadian Industrial Relations: Report of the Task Force on Labour Relations* (the “Woods Report”) (Ottawa: Privy Council Office, 1968). Given that the Supreme Court in *Mounted Police* found that members of a professional police force were able to assert associational rights under the *Charter*, and the fact that the Court did not refer to this distinction in the 2015 decision, this suggests that the labour market strength of an occupational group is no longer a distinguishing factor for constitutional purposes when determining which groups can assert associational rights in the industrial relations arena.

<sup>50</sup> 2011 SCC 20.

<sup>51</sup> S.O. 2002, c. 16.

associations and participate in their activities, the right to make representations to employers on the terms and conditions of employment, and the right to be protected against interference in the exercise of these rights. The *AEPA* also requires employers of agricultural workers to provide the employee associations with an opportunity to make representations on employment concerns, and for employers to consider these representations. A provincial tribunal has been assigned to adjudicate disputes under the *AEPA*. However, this tribunal has virtually none of the remedial powers to resolve bargaining impasses and collective agreement differences that standard labour relations boards possess in Ontario. Also absent from this labour relations system is any legislative requirement for the employer to bargain with the employee association. As well, there is no mandatory dispute resolution mechanism under the *AEPA*, and any negotiated collective agreements would not appear to have any enforceable status.

As *Mounted Police* is such a recent ruling, the academic labour law community has yet to offer any detailed commentary on the precedential status of *Fraser* in the light of *Mounted Police*. Yet, because *Mounted Police* struck down an employee representation system as unconstitutional that, on its face, provided at least as much, if not more, collective employee voice for RCMP members than the *AEPA* has provided for agricultural employees in Ontario, reasonable questions may be raised about *Fraser*'s precedential durability. This study will not attempt to explore this question, aside from providing the following observations:

- *Fraser* is still applicable law. The Supreme Court of Canada did not formally reverse or overturn *Fraser* in *Mounted Police*.
- The Supreme Court in *Mounted Police* did revisit and provide more limiting explanations for two legal concepts that it had employed in *Fraser*. First, the Court in *Mounted Police* clarified that its use in *Fraser* of the term “effectively impossible” (to describe the degree of legislative interference with workplace associational freedom required in order to deem state action as unconstitutional) does not accurately describe the legal test for the infringement of s. 2(d), and any use of the term must be understood within the framework of the new purposive and generous approach to associational freedom.<sup>52</sup> And second, the Court stated that its use in *Fraser* of the term “derivative right” (to classify the status of collective bargaining in relationship to the “core” right to associate) was misplaced and should now be avoided, as it wrongly suggested that one aspect of the *Charter* right of associational freedom was secondary or subservient to other aspects of that right.<sup>53</sup>

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<sup>52</sup> *Mounted Police*, *supra*, note 2, at paras. 74-77.

<sup>53</sup> *Ibid*, at para. 79.

- *Fraser* has been heavily criticized by the academic legal community. (It may be noted that the Court has given significant weight to legal scholarly opinion and analysis in its rulings on associational freedom, particularly since *Dunmore* in 2001.)<sup>54</sup> A number of legal scholars whose work has been regularly relied upon by the Court in s. 2(d) cases have argued that *Fraser* provided only a thin approach to the values of collective bargaining and, as well, granted only a thin level of constitutional protection to a significant *Charter* guarantee, particularly in light of the weak legislative access granted to agricultural workers in Ontario by the *AEPA*.<sup>55</sup>

Whether the *AEPA* would withstand another constitutional challenge in the wake of *Mounted Police* can only be determined through future litigation, and need not be discussed here. The more important point is this: *Mounted Police* represents the latest thinking of the Supreme Court of Canada on associational freedoms and the exclusion of employee occupational groups. Accordingly, the question becomes whether it would make good industrial relations policy sense, in light of the current principles on associational freedoms as articulated by the Supreme Court of Canada, to review and re-assess the current statutory exclusion of the present employee occupational groups who remain outside the *OLRA* and who have no effective legislative access to meaningful collective representative and collective bargaining. This will be the approach taken in this review of those excluded groups.

ii. The Role of International Labour Law in Understanding the Requirements of s. 2(d) for Associational Freedom

The principles of international labour law and international human rights law have been accepted by the Supreme Court of Canada on a number of occasions as an influential source – “a

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<sup>54</sup> *Dunmore*, *supra*, note 12, at paras. 16-17, 22, 27, 29, 46, 52, 55, 56 and 63-64; *Health Services and Support*, *supra*, note 1, at paras. 29, 43-50, 52-62, 76-77, 82, 84-85, 91, 99-104 and 106; *Fraser*, *supra*, note 50, at paras. 35, 79, 87-88, 95, 137, 146-147, 169, 180, 184, 211-212, 218, 227-229, 235-237, 242-244, 248-249, 252, 267-268, 282, 314, 316-318, 327, 346-348 and 351; *Saskatchewan Federation of Labour*, *supra*, note 14, at paras. 3, 36-40, 44-49, 54-55, 60-61, 65, 67, 69-74, 86, 93, 110-111, 123, 153, 157 and 159; and *Mounted Police*, *ibid*, at paras. 19, 30, 48, 56, 85-87, 92, 94, 96, 98, 123, 133, 146-147, 197-199 and 206.

<sup>55</sup> Many of these critical commentaries are collected in F. Faraday, J. Fudge & E. Tucker, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012). Interestingly, the Court majority in *Mounted Police* favourably cited the book, at para. 92. Also see: J. Fudge, “Constitutional Rights, Collective Bargaining and the Supreme Court of Canada: Retreat and Reversal in the *Fraser* Case” (2012), 41 *Industrial Law Journal* 1; and A. Braley, “I Will Not Give You a Penny More Than You Deserve: *Ontario v. Fraser* and the (Uncertain) Right to Collectively Bargain in Canada” (2011), 57 *McGill Law Journal* 351.

magnetic guide” – for interpreting the scope of s. 2(d) of the *Charter*.<sup>56</sup> These principles are deemed by the Court to be relevant and persuasive authority in *Charter* interpretation. Indeed, it stated in *Fraser* that: “Charter rights *must* be interpreted in light of Canadian values and Canada’s international and human rights commitments.”<sup>57</sup> In *Saskatchewan Federation of Labour*, issued in January 2015, the Supreme Court affirmed its precedential view that “the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.”<sup>58</sup> The Court has relied upon international law as an influential source of its constitutional reasoning when it concluded that s. 2(d) of the *Charter* includes a right to strike,<sup>59</sup> a right to collectively bargain,<sup>60</sup> and, particularly for our purposes, a right to form and/or join employee associations.<sup>61</sup> (Indeed, this close attention by the Supreme Court to international labour and human rights law when reading s. 2(d) is consistent with its now-entrenched approach in other areas of domestic law – such as environmental law, criminal extradition law, refugee law, aboriginal law and family law, to name only a few – where the Court has regularly relied upon the conventions, treaties and other instruments of international law as an influential interpretative aid when reading the *Charter* or Canadian statutes.)<sup>62</sup> Following these decisions, it may be reasonably concluded that, in Canada, international labour law no longer amounts to a collection of soft law guidelines and aspirational declarations from a well-meaning, if distant, international organization, but now embodies a coherent collection of long-standing legal principles articulated in international covenants and treaties, and developed by several of the world’s leading forums on the meaning of freedom of association at work. Accordingly, these principles, while not binding or determinative, must be carefully considered when evaluating the constitutionality of domestic labour legislation.

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<sup>56</sup> The quoted term is from *Saskatchewan Federation of Labour*, *supra*, note 14, at para. 63.

<sup>57</sup> *Fraser*, *supra*, note 50, at para. 92. Emphasis in original.

<sup>58</sup> *Saskatchewan Federation of Labour*, *ibid*, at para. 64. Also see: *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] 3 SCR 157, at para. 23.

<sup>59</sup> *Saskatchewan Federation of Labour*, *ibid*, at paras. 62-75.

<sup>60</sup> *Health Services and Support*, *supra*, nota 1, at paras. 69-79.

<sup>61</sup> *Dunmore*, *supra*, note 12, at para. 27.

<sup>62</sup> Leading examples where the Supreme Court of Canada has relied upon international law when reading the Charter or Canadian statutes would include: *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 (environmental law); *Canada v. Khadr*, [2008] 2 SCR 125 (criminal extradition law); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR (terrorism law and refugee law); *Mitchell v. Minister of National Revenue*, [2001] 1 SCR 911 (aboriginal law); and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (extradition law and family law). See generally: P. Macklem, “The International Constitution” in F. Faraday et al, *Constitutional Labour Rights in Canada*, *supra*, note 5; and W. Schabas & S. Beaulac, *International Human Rights and Canadian Law – Legal Commitment, Implementation and the Charter* (3<sup>rd</sup> ed.) (Toronto: Thomson Reuters, 2007).

Moving forward, Canadian legislatures may ignore the norms and standards in international labour and human rights law only at their peril.

When turning to international law to interpret s. 2(d) of the *Charter*, the Supreme Court has relied upon two of the leading instruments in international human rights: the *International Covenant on Economic, Social and Cultural Rights*<sup>63</sup> and the *International Covenant on Civil and Political Rights*.<sup>64</sup> It has also approvingly cited and applied the International Labour Organization's *Convention (No.87) Concerning Freedom of Association and the Protection of the Right to Organize*.<sup>65</sup> All three instruments have been ratified by Canada, which means, in the words of the Court: "that these documents reflect not only international consensus, but also principles that Canada has committed itself to uphold."<sup>66</sup> In addition, the Court has placed considerable reliance on the interpretations of *Convention No 87* that have been issued by important bodies within the International Labour Organization (ILO), particularly the Committee on Freedom of Association (CFA) and the Committee of Experts on the Application of Conventions and Recommendations (CEACR).<sup>67</sup> Regarding the authority of the rulings of the CFA, the Supreme Court in *Saskatchewan Federation of Labour* stated that: "Though not strictly binding, the decisions of the Committee of Freedom of Association have considerable persuasive weight and have been favourably cited and widely adopted by courts, tribunals and other adjudicative boards around the world."<sup>68</sup>

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<sup>63</sup> 993 UNTS 2 ("ICESOR"). Article 8 requires state parties to ensure "the right of everyone to form trade unions and join the trade union of his choice".

<sup>64</sup> 999 UNTS 171 ("ICCPR"). Article 22 provides that "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests."

<sup>65</sup> 68 UNTS 17.

<sup>66</sup> *Health Services and Support*, *supra*, note 1, at para. 71. The foundation for this broad reliance on international law instruments in s. 2(d) jurisprudence began with the dissenting judgement of Chief Justice Brian Dickson in *Alberta Reference*, *supra*, note 15, at paras. 57-72. Virtually every aspect of his judgement, by now the most famous and influential dissent in the *Charter* era, has now been accepted by majorities of the Supreme Court in s. 2(d) caselaw, beginning with *Dunmore*.

<sup>67</sup> *Ibid*, at para. 76, where the Supreme Court of Canada approvingly stated that the interpretations from these ILO bodies "...have been described as the 'cornerstone of international law on trade union freedom and collective bargaining': M. Forde, "The European Convention on Human Rights and Labor Law" (1983), 31 Am. J. Comp. Law 301, at p. 302."

<sup>68</sup> *Saskatchewan Federation of Labour*, *supra*, note 14, at para. 69. This reliance appears to be well-placed. The authors of the authoritative encyclopedia on international labour law have stated that: "Decisions concerning Freedom of Association [by the Committee on Freedom of Association] are also regarded as creating precedents and as expanding upon or contributing to the principles concerning freedom of association. For this reason, they are unquestionably part of international labour law as established by the ILO." See: N. Rubin, with E. Kalula & B.



Following the Supreme Court of Canada's 2007 ruling in *Health Services and Support*, legal and industrial relations scholars debated as to whether the Court had properly applied international labour and human rights law when it widened the scope of s. 2(d) to include the right to collectively bargain and the right to organize. Professor Brian Langille of the University of Toronto argued in several articles that Canada did not bear obligations under the ILO conventions, and that the Supreme Court was badly mistaken in its reliance upon international labour law as part of the legal foundation to constitutionalize workplace rights within s. 2(d).<sup>69</sup> Less critical, but with a streak of caution, Professor Kevin Banks of Queen's University and Benjamin Oliphant have separately argued that care has to be judicially exercised when applying international legal norms to the *Charter's* guarantee of associational freedom to ensure that the norms fit with the factual context of the particular constitutional challenge.<sup>70</sup> And other scholars – Patrick Macklem of the University of Toronto, Roy Adams of McMaster University, and Keith Ewing of King's College, London (UK) and John Hendy, a practising British barrister – have disagreed with Professor Langille's thesis, maintaining that Canada is not only able, but required, under international law to extend a generous constitutional protection and statutory meaning to foundational workplace rights.<sup>71</sup> This debate found its way into the *Fraser* and *Saskatchewan Federation of Labour* cases, with Rothstein J. relying upon Professor Langille's thesis in his minority concurring and dissenting opinions, respectively, in these rulings, while the majority in both rulings sustaining the Court's new, more liberal, approach towards international law when

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Hepple, *Code of International Labour Law: Law, Practice and Jurisprudence* (Cambridge: Cambridge University Press, 2005), Vol. 1, p. 24.

<sup>69</sup> B. Langille, "The Freedom of Association Mess: How We Got Into It and How We Can Get Out of It" (2009), 54 *McGill Law Journal* 177; "Can We Rely on the ILO?" (2007), 13 *Canadian Labour and Employment Law Journal* 363. As well, Langille is critical of the Supreme Court of Canada for its reliance on the decisions of the ILO's Committee on Freedom of Association, which he maintains are neither binding nor authoritative, and for citing the ILO's 1998 Declaration on Fundamental Principles and Rights at Work, which is, in his view, an aspirational document with no legal content.

<sup>70</sup> K. Banks, "The Role and Promise of International Law in Canada's New Labour Law Constitutionalism" (2013), 16 *Canadian Labour and Employment Law Journal* 233; B. Oliphant, "Interpreting the Charter with International Law: Pitfalls and Principles" (2014), 19 *Appeal* 105.

<sup>71</sup> P. Macklem, "The International Constitution", *supra*, note 62; at p. 261; R. Adams, "The Supreme Court, Collective Bargaining and International Law: A Reply to Brian Langille" (2008), 14 *Canadian Labour and Employment Law Journal* 317; R. Adams, "Bewilderment and Beyond: A Comment on the *Fraser* Case" (2011), 16 *Canadian Labour and Employment Law Journal* 313; K.D. Ewing & J. Hendy, "Giving Life to the ILO – Two Cheers for the SCC", in F. Faraday et al (ed.), *Constitutional Labour Rights in Canada*, *supra*, note 54, at p. 286.

interpreting s. 2(d).<sup>72</sup> Given the Court’s full-throated re-endorsement in *Saskatchewan Federation of Labour* of the liberal approach towards the application of international labour and human rights law in *Charter* litigation, this debate appears to be settled, at least within judicial circles, for the time being.

For the purposes of this study, two principal themes should be noted. The first is that international labour and human rights law provides that *all* employee occupations are to be presumptively included within workplace legislation that ensures the right to meaningfully organize and the right to meaningful collective bargaining. Under these laws, exceptions to this presumptive right are to be very narrowly drawn. And second, the ILO has adopted detailed conventions to protect employees who work in particularly vulnerable and historically exploitative occupations, including agriculture and domestic service, as well as extending protections to migrant workers.

*“Without Distinction Whatsoever”*

Addressing the first theme, ILO *Convention No. 87* – one of its two foundational instruments on freedom of association and the right to organize in international labour law – provides that all employees have the right, “without distinction whatsoever”, to establish and join employee organizations for collective protection.<sup>73</sup> Both at its drafting stage in 1948, and through the more than 60 years of interpretation by the CFA and the CEACR, this associational right has been interpreted broadly and applied liberally to mean that, except for non-civilian members of the armed forces and the police, all occupations of workers should enjoy associational freedoms and meaningful access to collective bargaining.<sup>74</sup> Indeed, the purpose of the ILO’s broad

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<sup>72</sup> *Saskatchewan Federation of Labour*, *supra*, at note 14, majority statements on international law at paras. 62-75, and Rothstein J.’s comments at paras. 150-160; *Fraser*, *supra*, at note 50, majority statements on international law at paras. 91-95, and Rothstein J.’s comments at paras. 247-250.

<sup>73</sup> *Convention No. 87*, *supra*, note 5, Article 2: “Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorisation.” The other foundational instrument – *Convention No. 98 on the Right to Organize and Collective Bargaining* (1949) – has not been ratified by Canada, primarily due to federalism issues.

<sup>74</sup> It may be noted that the explicit exclusion of the right to organize and the right to collectively bargain for police forces and members of the armed forces in *Convention No 87* appears quaint in today’s world. In many countries, including Canada, police forces have become among the most densely unionized occupations within the work force: *Mounted Police*, *supra*, note 2. As well, members of the armed forces in a number of countries have acquired the

language and liberal application of this term is to ensure that all employees may meaningfully possess the foundational right to associate together at the workplace in order to improve their working lives, to enhance their social aspirations and to enlarge their democratic voice, and that governments are required to not only dismantle negative barriers to workplace freedom of association, but are to erect positive paths to enable the realization of that freedom. Legislation which either excludes or unjustifiably limits access to unionization and to the right to collectively bargain is likely incompatible with international norms.

The term “without distinction whatsoever” was deliberately chosen by the drafters of *Convention No. 87* in 1948 to convey the principle that the coverage of the associational right applies “in the widest sense” to all categories of workers.<sup>75</sup> The CEACR, in a seminal 1994 report on freedom of association, stated that the broad language in Article 2 of *Convention No. 87* was intended to convey “the universal scope of the principle of freedom of association”.<sup>76</sup> In a subsequent 2012 report, the CEACR held that the wide scope of employee coverage in Article 2 “should be considered as the general principle”, and the only employee occupational exceptions would be the non-civilian members of the armed forces and the police.<sup>77</sup> The CFA has taken a similar approach. In its considerable jurisprudence on the issue of employee occupational access to meaningful collective bargaining, it has interpreted and applied Article 2 as having universal coverage, and has ruled that a wide scope of employee categories falls within the scope and protection of *Convention No. 87*.<sup>78</sup> Among the occupational categories that the CFA has expressly found to fall within the scope of Article 2 are all members of the public

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right to join and form unions, and to collectively bargain: See generally R. Bartle & L. Heineken (eds.) *Military Unionism in the Post-Cold War Era: A Future Reality?* (Abingdon: Routledge, 2006).

<sup>75</sup> For a review of the drafting and interpretative history of Article 2 on *Convention No. 87*, see: J. Hodges-Aeberhard, “The Right to Organize in Article 2 of *Convention 87*: What is Meant by Workers “without distinction whatsoever?” (1989), 128 *International Labour Review* 177. At p. 180, the author stated: “Hence, this provision was to be interpreted in the widest sense as meaning that freedom of association should be recognized without distinction whatsoever as to occupation, sex, colour, race, creed, nationality, political opinion, etc., not only for workers and employers in private industry, but also for officials or employees of the public service.”

<sup>76</sup> Report of the Committee of Experts on the Application of Conventions and Recommendations, *Freedom of Association and Collective Bargaining* (Geneva: International Labour Organization, 1994), at para. 45.

<sup>77</sup> Report of the Committee of Experts on the Application of Conventions and Recommendations, *General Survey of the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization* (Geneva: International Labour Organization, 2012), at para. 63.

<sup>78</sup> Committee on Freedom of Association, Case No. 1900 (Canada) (1997), where it stated at para. 182 that: “Furthermore, by virtue of the principles of freedom of association, all workers – with the sole exception of members of the armed forces and police – should have the right to establish and to join organizations of their own choosing.”

service (aside from non-civilian members of the armed forces and the police), agricultural workers, managerial and supervisory employees, self-employed workers, domestic workers, and the liberal professions.<sup>79</sup>

The leading academic encyclopedia on international labour law has adopted this encompassing view on employee occupational inclusion within the scope of Article 2 of *Convention No. 87*. The *Code of International Labour Law* has stated that:

The guarantees of *Convention No. 87* should apply to all workers and employers, without distinction whatsoever, the only exceptions provided by the *Convention* being the armed forces and the police. Provisions prohibiting the right to organize for specific categories of workers, such as public servants, managerial staff, domestic staff or agricultural workers, are incompatible with the express provisions of the *Convention*.<sup>80</sup>

The *Code* went on to say that the associational freedoms established in Article 2 are to be extended to those persons where an employment relationship may not formally exist but where a workplace-like relationship of dependence and vulnerability may nevertheless pervade:

By virtue of the principles of freedom of association, all workers – with the sole exception of the armed forces and the police – should have the right to establish and join organizations of their own choosing. The criterion for determining the persons covered by that right, therefore, is not based on the existence of an employment relationship, which is often non-existent, for example, in the case of agricultural workers, self-employed workers in general or those who practice liberal professions, who should nevertheless enjoy the right to organize.<sup>81</sup>

### *Designated Occupations, Designated Conventions*

The second theme arising from international labour law that is relevant to this study goes to the series of ILO conventions which address the specific rights of agricultural workers, domestic workers and migrant workers to associate for the purposes of collective bargaining. The ILO has paid special attention to these groupings of workers because of the particular vulnerability, precariousness, entrenched patterns of discrimination and poverty that are commonly associated with these occupations and categories. The purpose of these designated conventions is to enhance the employment protections, and to reduce the labour market

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<sup>79</sup> Committee on Freedom of Association, *Digest of Decisions and Principles* (Geneva: International Organization, 2006) (5<sup>th</sup> revised ed.), at paras. 209-271. For the professions that the CFA includes as falling within the definition of “liberal professions”, see CFA Case No. 1900, *ibid*, at para. 194.

<sup>80</sup> *Code of International Labour Law*, *supra*, note 68, at p. 122.

<sup>81</sup> *Ibid*, at p. 132.

insecurities and marginalization, of these categories of workers through the improvement of both legislative standards and the legislative access to effective collective representation and effective recognition of collective bargaining.

### Agricultural Workers

The ILO has adopted several conventions which expressly provide agricultural workers with the right to associate. Article 1 of *Convention No 11 (1921) Concerning the Rights of Association and Combination of Agricultural Workers* provides that agricultural workers are to enjoy the same rights of association and combination as industrial workers.<sup>82</sup> The *Convention* provides no distinction as to the type of agricultural work performed. Likewise, *Convention No 141 (1975) Concerning Organizations of Rural Workers and Their Role in Economic and Social Development* affirmed the right of “all categories of rural workers” to establish and to join organizations, and to have their principles of freedom of association fully respected. In particular, the *Convention* reiterated the right of rural workers to organize on the same basis as industrial workers, stated that the law of the land shall not impair the associational guarantees, and that governments should “actively encourage” the formation of effective organizations for rural workers in order to allow these workers to play their role in economic and social development, improve their employment opportunities and standards of living, and contribute both to increasing, and achieving a better distribution of, the national income.<sup>83</sup> When applying *Convention No 87*, the CFA has repeatedly ruled that agricultural workers should enjoy the right to organize.<sup>84</sup> The CEACR, in a 2015 report on rural workers, has restated the broad application of the right to organize in international labour law.<sup>85</sup> The *Code of International Labour Law* states in its sum-up of international labour law on the issue that: “States should adopt a policy of active encouragement of [rural workers’ organizations], particularly with a view to eliminating obstacles to their establishment, their growth and the pursuit of their lawful activities.”<sup>86</sup> While

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<sup>82</sup> 38 UNTS 153. This Article was favourably cited by Bastarache J. in *Dunmore*, *supra*, note 12, at para. 27.

<sup>83</sup> Accessed at: [http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO:12100:P12100\\_INSTRUMENT\\_ID:312286>](http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO:12100:P12100_INSTRUMENT_ID:312286>), at Articles 1, 3, 5 & 6.

<sup>84</sup> *Digest*, *supra*, note 79, at para. 242.

<sup>85</sup> CEACR, *Giving a Voice to Rural Workers* (Geneva: ILO, 2015), where it stated, at para. 121: “The Committee recalls the broad scope of *Conventions Nos 11 and 141* and that the categories of workers entitled to exercise this right [to establish and join organizations] include ‘all those engaged in agriculture’...”

<sup>86</sup> *Code*, *supra*, note 68, at p. 420.

Canada has not ratified either ILO convention on agricultural workers, the weight of current international law would lean towards the crystallization of a legal obligation on Canadian governments to provide them with meaningful access to join employee associations and to engage in collective bargaining.<sup>87</sup>

### Domestic Workers

The ILO has recently adopted *Convention No 189 (2011) Concerning Decent Work for Domestic Workers*.<sup>88</sup> The purpose of the Convention is to ensure that domestic workers enjoy conditions of decent work, especially in light of the undervalued nature of the work, and the fact that domestic work is often performed by migrant labour, by members of disadvantaged communities, and by women and girls. Similar to the agricultural workers' conventions, *Convention No 189* provides that each ILO member shall take measures to respect, promote and realize the fundamental principles and rights at work, including "freedom of association and the effective recognition of the right to collective bargaining".<sup>89</sup> *Convention No 189* also deals, in great detail, with the employment standards rights of domestic workers. While Canada has not ratified *Convention No 189*, the CFA has long held that *Convention No 87* provides domestic workers with the right to form protective employee associations and to have effective access to collective bargaining.<sup>90</sup>

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<sup>87</sup> Strictly speaking, the fact that Canada has ratified neither *Convention No 11* nor *Convention No 141* would mean that it bears no formal obligations to implement the terms of either instrument. However, the right of agricultural workers to exercise freedom of association under both conventions is closely tied to the same freedom guaranteed under *Convention No 87*, which Canada has ratified. Furthermore, the body of caselaw from the Committee on Freedom of Association has long held that agricultural workers enjoy the same right to organize and collectively bargain under *Convention No 87* as industrial workers. As well, the right of workers, including agricultural workers, to organize and to collectively bargain has such a long-standing and widely-accepted basis in social practice and legislative norms worldwide as to likely make it an enforceable norm of customary international law, which has the same legal force as conventional international law. Finally, the Supreme Court of Canada regularly draws upon international and regional conventions that Canada has not ratified (and, in some cases, cannot ratify) for the purposes of interpreting the *Charter* and Canadian statutes; on this last point, see P. Macklem, "The International Constitution", *supra*, note 71.

<sup>88</sup> Accessed at: <[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:2551460](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:2551460)>. It came into force in September 2013.

<sup>89</sup> *Ibid*, Article 3.2(a).

<sup>90</sup> *Digest, supra*, note 79, at para. 267. This requirement is reinforced by ILO *Recommendation No 184 (1996) Home Work*, which, at para. 12, states that measures should be taken to encourage collective bargaining among home workers as a means to determine their terms and conditions of work.

## Migrant Workers

Finally, the United Nations and the ILO have adopted a number of instruments to protect the rights of migrant workers. (These conventions and recommendations are pertinent to our study because a significant number of agricultural workers and domestic employees in Ontario are workers who have migrated from labour-supplying countries with developing economies; this flow of migrant labour is largely facilitated through special migrant labour programs and agreements supervised by the federal government, while the labour and employment conditions of these workers fall under the workplace jurisdiction of the provinces.) The principal international instruments are the UN *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (1990),<sup>91</sup> the ILO *Convention No 97 (1949) Concerning Migration for Employment (Revised)*,<sup>92</sup> and the ILO *Convention No 143 (1975) Concerning Migrant Workers (Supplementary Provisions)*.<sup>93</sup> These conventions have four primary goals with respect to migrant workers: (i) to raise and protect the employment standards of migrant workers; (ii) to ensure the protection of basic human rights and freedoms, including all “individual and collective freedoms”; (iii) to ensure that migrant workers enjoy equality of opportunity and treatment with respect to employment and occupation on the same basis as nationals of the host country; and (iv) to ensure that migrant workers are granted sufficient legal personality to assert their employment and human rights before a competent legal forum in the host country. In particular, Article 26 of the UN *Rights of Migrant Workers Convention* protects the rights of migrant workers to join and participate in the activities of trade unions. While Canada has not ratified any of these three conventions, the broad language of ILO *Convention No 87* would suggest that governments in Canada have an obligation both to remove statutory barriers that would prohibit migrant workers from organizing, and to enact effective legislative pathways that would enable migrant workers to freely associate for the purposes of workplace issues and to be able to access meaningful collective bargaining, on the same basis as workers in Canada.

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<sup>91</sup> UNGA Res. 45/158 (18 December 1990). Accessed at: < [https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg\\_no=iv-13&chapter=4&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-13&chapter=4&lang=en) >

<sup>92</sup> 120 UNTS 70.

<sup>93</sup> Accessed at: < [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312288](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312288) >

In the sections of this study that will now examine the specific employee occupations that are exempted from coverage under the OLRA, I will include references as needed to international labour law where it speaks to these specific occupations.



## 4. Excluded Employee Occupational Categories

### A. Agricultural and Horticultural Workers<sup>94</sup>

Agricultural and horticultural workers are excluded from the *OLRA* by virtue of subsections 3(b.1) and (c).<sup>95</sup> Before 2002, agricultural workers were not covered by any labour legislation in Ontario, except for a brief period between 1994 and 1995. Since 2002, they have been covered by the *Agricultural Employees Protection Act, 2002* (AEPA), which provides agricultural workers with the ability to form employee associations and to make collective representations to employers.<sup>96</sup> However, it does not provide agricultural workers with the ability to engage in effective collective bargaining with their employers. The occupational exclusion of agricultural workers from the *OLRA* and from effective access to collective bargaining has been litigated twice at the Supreme Court of Canada over the past 14 years. Ontario is one of only two jurisdictions in Canada – Alberta being the other – which excludes agricultural workers from any effective access to collective bargaining.

#### *Legislative History*

When the Ontario legislature enacted the province's first comprehensive labour relations legislation – the *Labour Relations Act* – in 1948, agricultural workers were excluded from statutory coverage. Several policy reasons influenced the exclusion. First, agriculture was a dominant sector in the post-war provincial economy and based on a family-farm model, it was a seasonal industry with a limited growing and harvest season, much of its produce was perishable,

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<sup>94</sup> The *OLRA* refers to both agricultural and horticultural employees. In general parlance, horticultural is that branch of agriculture which refers specifically to vegetable garden plant growing. Throughout this section of this review, the use of the terms 'agricultural industry' and 'agricultural workers' shall refer to both agriculture and horticulture.

<sup>95</sup> S. 3 "This Act does not apply:

(b.1) to a person within the meaning of the *Agricultural Employees Protection Act, 2002*;

(c) to a person, other than an employee of a municipality or a person employed in silviculture, who is employed in horticulture by an employer whose primary business is agriculture or horticulture."

<sup>96</sup> SO 2002, c. 16. The access to collective bargaining by the agricultural work force in Ontario is restricted by the *AEPA* and its broad definition of "agriculture": "Agriculture" includes farming in all its branches, including dairying, beekeeping, aquaculture, the raising of livestock including non-traditional livestock, furbearing animals and poultry, the production, cultivation, growing and harvesting of agricultural commodities, including eggs, maple products, mushrooms and tobacco, and any practices performed as an integral part of an agricultural operation, but does not include anything that was not or would not have been determined to be agriculture under section 2 of the predecessor to the *Labour Relations Act, 1995* as it read on June 22, 1994."

and it was feared that the added labour costs that would accompany unionization would threaten the viable economic basis of the family farm.<sup>97</sup> And second, the *National Labor Relations Act* (the “Wagner Act”) – enacted by the U.S. Congress in 1935 to provide a comprehensive legal framework for industrial relations, and which served as the legislative model for Canadian labour legislation, including Ontario – had expressly excluded agricultural workers from coverage.<sup>98</sup> Subsequent amendments to, and revisions of, the Ontario *Labour Relations Act* over the next 45 years did not alter this agricultural worker exceptionalism.<sup>99</sup> The broad definition of “agriculture” under the OLRA excluded not only agricultural labourers on family farms engaged in the traditional agrarian duties of planting, harvesting and husbandry but also workers employed in more industrial-like settings, such as poultry hatcheries, greenhouse operations, medical marijuana grow-operations, and mushroom farms.<sup>100</sup>

A major legislative review of the agricultural employee exclusion was conducted by the Ontario government in the early 1990s, as part of a broader review of the province’s labour relations legislation. The Task Force on Agricultural Labour Relations, appointed by the Minister of Labour and including representatives of the agriculture and horticulture sector, unions and farm labour, issued two reports in 1992. Between them, the two reports unanimously recommended that agricultural workers should be granted the right to form unions and to

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<sup>97</sup> B. Walchuk, “Ontario’s Agricultural Workers and Collective Bargaining: A History of Struggle” (2009), 14 *Just Labour: A Canadian Journal of Work and Society* 150, at 152.

<sup>98</sup> 29 USC 7 (II) (1935). Some American legal scholars and historians have argued that the original exclusion of agricultural workers from the Wagner Act and the related workplace legislation in the 1930s was based on a troublesome compromise between northern New Dealers and southern segregationists, with the latter wishing to prohibit the unionization of its predominately black farm workers in the American South. See generally: J. Perea, “The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the *National Labor Relations Act*” (2011), 72:1 *Ohio State Law Journal* 95; and M. Linder, “Farm Workers and the Fair Labor Standards Act: Racial Discrimination and the Law” (1987), 65 *Texas Law Review* 1335.

<sup>99</sup> Legal exceptionalism for agricultural works in Ontario has not been limited to their exclusion from labour relations legislation. They also have been previously excluded, in part or in whole, from workers compensation legislation, employment standards legislation and occupational health and safety legislation. See E. Tucker, “Farm Worker Exceptionalism: Past, Present and the Post-Fraser Future”, in Faraday et al (eds). *Constitutional Labour Rights*, *supra*, note 55, at p. 30.

<sup>100</sup> *United Food and Commercial Workers Canada v. MedReleaf Corp.*, 2015 CanLII 85534 (OLRB); *Cuddy Chicks*, [1988] OLRB Rep May 468; *Wellington Mushroom Farm*, [1980] OLRB Rep May 813; and *Spruceleigh Farms*, [1972] OLRB Rep October 860. However, workers who are engaged in pure silviculture (i.e., forestry services and reforestation, as opposed to the planting and sale of trees) are eligible to certify under the OLRA: *Tamarack Tree Care Ltd. v. IBEW, Local 636*, 2013 CarswellOnt 280 (OLRB); and *CEP v. Northwest Agri-Forestry Services Ltd.*, [2000] OLRB Rep 294.

collectively bargain through the creation of a separate labour relations statute.<sup>101</sup> Based on the recommendations, the Ontario government subsequently enacted the *Agricultural Labour Relations Act* (ALRA), which came into effect in June 1994.<sup>102</sup> The *ALRA* permitted unionization and collective bargaining for agricultural workers; however, it prohibited strikes and lockouts, with a binding final offer arbitration system enacted as a substitute. Following a provincial election and a change in government in June 1995, the *ALRA* was repealed *in toto* in November 1995 and any certifications issued under its authority were annulled.<sup>103</sup> During the brief life of the *ALRA*, one union certification had been issued to represent approximately 200 workers at a mushroom factory in Leamington, and two other certification applications had been filed by employees working at agricultural production facilities but they had not been procedurally consummated by the time that the legislation was repealed.

The legislation reversion in Ontario to the complete exclusion of agricultural workers from access to any form of associational freedom and collective bargaining was subsequently challenged by the United Food and Commercial Workers (UFCW) through constitutional litigation. The Supreme Court of Canada ruled in 2001, in *Dunmore v. Ontario*, that the statutory exclusion, with no alternative legislative provision for associational freedom, amounted to a substantial interference with the *Charter*'s guarantees under s. 2(d), and was not saved under s. 1.<sup>104</sup> In compliance with the remedies ordered by the Court, the Ontario government enacted the *Agricultural Employees' Protection Act, 2002* (AEPA) in 2002, whose statutory framework resembled the "industrial voluntarism" approach to labour relations in Ontario that existed prior to the 1940s. The *AEPA* enabled agricultural workers to form employee associations and to make collective representations to their employers about their terms and conditions of work, but it only required employers to provide a reasonable opportunity to the employees or their representatives to make these representations, and to consider them. The *AEPA* did not oblige employers to engage in any form of collective bargaining with the employees' association, it did not contain a mechanism to resolve bargaining impasses and it did not provide for the legal enforcement of

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<sup>101</sup> Task Force on Agricultural Labour Relations, *Report to the Minister of Labour* (June 1992); and Task Force on Agricultural Labour Relations, *Second Report to the Minister of Labour* (November 1992).

<sup>102</sup> SO 1994, c.6.

<sup>103</sup> *Labour Relations and Employment Statute Law Amendment Act*, 1995 SO 1995 c. 1.

<sup>104</sup> *Supra*, note 12.

any agreements that were reached.<sup>105</sup> The *AEPA* designated the Agriculture, Food and Rural Affairs Appeal Tribunal to adjudicate any complaints under the legislation, a tribunal with no labour relations experience or expertise.<sup>106</sup> The UFCW subsequently challenged the constitutionality of the *AEPA*, maintaining that it was not compliant with the *Charter of Rights and Freedoms*' associational guarantee because it did not facilitate collective bargaining. In 2011, the Supreme Court of Canada upheld the constitutionality of the *AEPA* in *Ontario v. Fraser*, ruling in sum that the union had not presented sufficiently persuasive evidence to demonstrate that the legislation could not enable meaningful collective bargaining for agricultural workers.<sup>107</sup>

Collective industrial relations in the Ontario agricultural sector under the auspices of the *AEPA* have been non-existent. Since 2002, there appear to have been no reported collective agreements, voluntary or otherwise, reached between agricultural workers and their employers. As well, there appears to have been no decisions released by the Agriculture, Food and Rural Affairs Appeal Tribunal dealing with its powers to adjudicate complaints under the *AEPA*.

### *Labour Market and Social Conditions of Agricultural Workers in Ontario*

The social science literature is rich in its description of the particularly vulnerable and precarious nature of the temporary migrant workers employed in the Ontario agricultural sector.<sup>108</sup> In 2013, there were approximately 20,845 temporary migrant labourers employed

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<sup>105</sup> This was by legislative design. The Ontario Minister of Agriculture and Food, the Honourable Helen Johns, stated in the Legislative Assembly of Ontario when introducing for debate the bill which would become the *AEPA*: "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." Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, No 46A, October 22, 2002, at p. 2339.

<sup>106</sup> The Agriculture, Food and Rural Affairs Appeal Tribunal has the jurisdiction to adjudicate issues dealing with a range of rural concerns, none of them dealing with industrial relations aside from the *AEPA*. Its mandate includes: the technical and cost apportionment of projects under the *Drainage Act*; disputes over the adjustment of loss under a crop insurance contract; exemptions for religious reasons from registration and/or paying the fee associated with joining an accredited farm organization; accreditation of farm organizations; disputes under the *Farm Products Marketing Act*; farmland classification for municipal taxation purposes; disputes under the *Farm Implements Act*; disputes under the *Agricultural Employees Protection Act*; and a number of other disputes under various statutes. Accessed under: <https://www.pas.gov.on.ca/scripts/en/BoardDetails.asp?boardID=643>.

<sup>107</sup> *Supra*, note 50.

<sup>108</sup> See, in particular: I. Fabiola Cruz-Lopez, *The Seasonal Agricultural workers Program: Looking at Mexican Participation Through a Magnifying Glass* (2013), University of Ottawa Ph. D. Thesis; P. Raphael, *The Social Organization of Labour Rights in Ontario: Governing Migrant Agricultural Workers Through the Agricultural*

through the Seasonal Agricultural Worker program (SAWP) and another 1,260 foreign labourers working through other federally administered agriculture migrant programs.<sup>109</sup> The Canadian Seasonal Agricultural Workers Program (SAWP) began in 1966 as a negotiated pilot project between Canada and Jamaica. It has expanded considerably to include migrant agricultural workers from Mexico, elsewhere in the Caribbean and countries in Central and South America.<sup>110</sup> The vast majority of the agricultural workers are from Mexico and Jamaica. SAWP is overseen by the Government of Canada, through Human Resources and Skills Development Canada (HRSDC) and the Foreign Agricultural Resource Management Service (FARMS), a non-profit organization which administers the program on behalf of agricultural employers. Workers are recruited through their home countries, and Citizenship and Immigration Canada processes their work permits. Once they arrive in Canada and their place of work, these migrant agricultural workers come under provincial legislation for the purposes of employment standards, workers' compensation, occupational health and safety and labour legislation. The terms of their employment are determined by standard form employment agreements issued by HRSDC, which include wages, health and safety requirements, the purpose, scope and length of employment, and various employee and employer obligations. A particular feature of their employment and immigration status is that they are confined to working only for their designated employer, with restrictive rules regarding their ability to change jobs while in Canada.

The academic scholarship on the working and social conditions of the temporary agricultural migrant labour force in Ontario has focused on three particular features of their employment precariousness and particular vulnerability. First, a number of scholars have argued that the migrant agricultural labour force in Ontario represents a vexatious version of “unfree labour”, a throw-back to a long-eclipsed employment status in Canada where employees were

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Employees Protection Act (2013), Ryerson University Ph. D Thesis (Paper 1970); P.T. Lenard & C. Strachle (eds.), *Legislated Inequality: Temporary Labour Migration in Canada* (Montreal: McGill-Queen's University Press, 2012); Faraday et al (eds.), *Constitutional Labour Rights in Canada*, *supra*, note 54; Walchik, “Ontario's Agricultural Workers...”, *supra*, note 97; K. Preibisch, *Patterns of Social Exclusion and Inclusion of Migrant Workers in Rural Canada* (Ottawa: The North South Institute, 2007); and T. Basok, *Tortillas and Tomatoes: Transmigrant Mexican Harvesters in Canada* (Montreal : McGill-Queen's University Press, 2002).

<sup>109</sup> Employment and Social Development Canada, *Labour Market Impact Assessments – Annual Statistics Table: Number of Temporary Foreign Worker Positive Labour Market Impact Assessments (LMIAs) under the Agricultural Occupations, Ontario* (Ottawa: ESDC, 2015).

<sup>110</sup> While SAWP is the primary federal government program through which temporary foreign agricultural workers come to Canada to work, a similar program – Agriculture Canada – has been created to facilitate the entry of temporary foreign workers from countries that have not signed bilateral migrant labour agreements with Canada.

effectively bound to their employer through on-site housing, workplace debt obligations and peonage, and restrictive laws and contracts that emphasized employee obligations. This label fits the condition of modern migrant agricultural work, these scholars maintain, inasmuch as these workers are highly dependent upon their employer because their restricted immigration and work permit status (which ties them to their employer and work location) and through their worksite living accommodations.<sup>111</sup> These workers cannot exercise, without exceptional difficulty, what every other person in the Canadian labour market has the formal right to do: to leave a job that is unsatisfactory and search for better work elsewhere. This diminished status of unfree labour is compounded by the inability of these migrant agricultural workers to effectively access collective voice and collective bargaining to articulate, defend and improve their employment interests.

Second, the academic literature has observed that the migrant agricultural labourers who work in Ontario through the various temporary migrant worker programs are overwhelmingly racialized minorities with generally low education and low occupational skill levels.<sup>112</sup> They work in a foreign culture whose customs, laws and relationships are distinctly different from their own societies. For those coming from Mexico, Central and South America, many of them have not mastered a working use of English, which further isolates them both at work and when they venture away from the farm. Migrant workers are usually unaware of their employment rights, and do not know how to challenge or report unsatisfactory working and living conditions.<sup>113</sup> A number of scholars have remarked upon the racial basis of the migrant labour program, both in its origins and through to the present day, where the ethnicity and the lack of effective power of the migrant agricultural workforce in Canada and Ontario replicates a troublesome racial hierarchy that does not fit well within the aspirational social and multicultural goals of a liberal democracy.<sup>114</sup>

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<sup>111</sup> See I. Fabiola Cruz-Lopez, *The Seasonal Agricultural Workers Program*, *supra*, note 108; P. Raphael, *The Social Organization of Labour Rights in Ontario*, *supra*, note 108; E. Tucker, “Farm Worker Exceptionalism: Past, Present and the Post-Fraser Future”, in Faraday et al (eds.), *Constitutional Labour Rights in Canada*, *supra*, note 55, at p. 30; Basok, *Tortillas and Tomatoes*, *supra*, note 108; V. Satzewich, *Racism and the Incorporation of Foreign Labour: Farm Labour Migration to Canada since 1945* (New York: Routledge, 1991).

<sup>112</sup> *Ibid.*

<sup>113</sup> M. Pang, *Temporary Foreign Workers* (Ottawa: Library of Parliament, 2013).

<sup>114</sup> See the extensive literature discussed in J. Perry, “Barely Legal: Racism and Migrant Farm Labour in the Context of Canadian Multiculturalism” (2012), 16:2 *Citizenship Studies* 189. Also see: F. Faraday, *Made in Canada: How the Law Constructs Migrant Workers’ Insecurity* (Toronto: Metcalf Foundation, 2012).

And third, the academic scholarship has noted that the working conditions of the migrant farm labourers are demanding, even harsh in many cases. The work usually involves long hours, physically challenging work, rudimentary living conditions and, commonly, adverse consequences for the health of many migrant agricultural workers.<sup>115</sup> Almost all of them live in dormitories at their workplace, in circumstances where both their working and their private lives are closely regulated by their employers.<sup>116</sup> Given the dependence of the migrant workers upon their employers for virtually every facet of the working and personal lives, particularly with regards to being able to obtain a visa to return for work the following year, workers may decide that staying quiet about a perceived abuse – such as withholding pay, failure to pay overtime, or a breach of the employment contract – is the wiser course. These jobs do not enhance the skills of the migrant workers, and they do not offer a pathway for these labourers to achieve better and more permanent work in Canada. Indeed, the very *raison d’être* of their presence in Canada – as guest workers without any legal claim to acquire more established resident status – is because they perform low-skilled work not desired by many Canadians and for wage and benefit standards that would not attract many Canadians.<sup>117</sup> They are treated distinctly differently than higher skilled migrant workers in Canada, who have easier paths to obtaining permanent status, who can generally stay in Canada longer while on the temporary work program, and who are eligible to bring their spouses to Canada.<sup>118</sup> Their restricted residency status, their social isolation and separateness, and their lack of effective access to any rights-based institution reinforces their modest labour force status, which many scholars suggest is by design, given the importance of a low-wage and comparatively docile workforce to the Ontario agricultural economy.<sup>119</sup>

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<sup>115</sup> J. Perry, *Bunkhouse Drama: An Examination of Control and Agency among Migrant Farm Workers in Ontario* (Ph. D. Thesis, University of Toronto, 2015); R. Mize & A. Swords, *Consuming Mexican Labour: From the Bracero Program to NAFTA* (Toronto: University of Toronto Press, 2011); J. Hennebry, *Not Just A Few Bad Apples: Vulnerability, Health and Temporary Migration in Canada* (Waterloo: International Migration Research Centre, Wilfred Laurier University, 2010); J. McLaughlin, *Trouble in our Fields: Health and Human Rights among Mexican and Caribbean Migrant Farm Workers in Canada* (Ph. D. Thesis, University of Toronto, 2009); and K. Preibisch, “Globalizing Work, Globalizing Citizenship: Community-Migration Worker Alliances in Southwestern Ontario”, in L. Golding & S. Krishnamurti (eds.) *Organizing the Transnational* (Vancouver: UBC Press, 2007), at p.97.

<sup>116</sup> Preibisch, *Patterns of Social Exclusion*, *supra*, note 108.

<sup>117</sup> P. Raphael, *The Social Organization of Labour Rights in Ontario*, *supra*, note 108.

<sup>118</sup> D. Nakache & P. Kinshita, *The Canadian Temporary Foreign Worker Program: Do Short-Term Economic Needs Prevail over Human Rights Concerns?* (Montreal: Institute for Research on Public Policy, 2010).

<sup>119</sup> *Ibid*; Faraday, *supra*, note 114.

### *Requirements Under International Labour Law*

The leading ILO forums on freedom of association have criticized Ontario in recent years for its statutory barriers to effective collective bargaining for agricultural workers. In a major report in 2015 on the labour and employment rights of rural workers throughout the world, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) specifically mentioned Ontario with respect to the limitations to collective bargaining under the *AEPA*, observing that:

Agricultural and horticultural workers in Ontario are equally excluded from labour relations legislation and the specific legislation enacted for agricultural and horticultural workers in the province does not afford the same level of protection as is enjoyed by workers covered by general labour relations legislation.<sup>120</sup>

The Committee on Freedom of Association (CFA) has issued two rulings arising from complaints with respect to the statutory status of agricultural workers and collective bargaining legislation in Ontario. The importance of these rulings go to their findings that the freedom of association guarantees in *Convention No 87* have been breached by the statutory barriers faced by agricultural workers in Ontario to effectively access collective bargaining. In *Case No. 1900 (Canada/Ontario)* (1997), the CFA adjudicated a complaint that the repeal of the ALRA violated international labour law by denying agricultural workers any protected access to collective bargaining. In its ruling upholding the complaint, the CFA requested the Government of Ontario to take the necessary legislative measures to guarantee that agricultural and horticultural workers: (i) could establish and join organizations of their own choosing, (ii) could access to machinery and procedures which facilitate collective bargaining, (iii) could enjoy effective protection from anti-union discrimination and employer interference, and (iv) could exercise the right to strike. It also requested that the trade union bargaining units representing agricultural workers that had been decertified in 1995 be re-certified.<sup>121</sup>

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<sup>120</sup> CEACR, *Giving a Voice to Rural Workers* (Geneva: ILO, 2015), at para. 123.

<sup>121</sup> Committee on Freedom of Association, *Case No 1900 (1997), Complaint against the Government of Canada (Ontario)*, at paras. 184, 197 and 194.



Subsequently, in *Case No 2704 (Canada/Ontario)* (2012),<sup>122</sup> issued in the aftermath of the Supreme Court of Canada's decision in *Ontario v. Fraser*, the CFA observed that *Fraser* did not adequately consider the scope of the associational freedom on collective bargaining. With respect to the *AEPA*, the CFA stated that: "the absence of any machinery for the promotion of collective bargaining of agricultural workers constitutes an impediment to one of the principle objectives of the guarantee of freedom of association: the forming of independent organizations capable of concluding collective agreements."<sup>123</sup> Addressing the Supreme Court's ruling in *Fraser*, the CFA said that the legislative ability of an employee organization of agricultural workers to present its requests respecting employment terms and conditions, even if considered in good faith by an employer, was insufficient to satisfy the right to collectively bargain under international labour law. It stated that it:

...welcomes the finding of the Supreme Court that agricultural employers have the duty to consider employee representations in good faith, but it is of the opinion that this duty, whether implied or explicit, is insufficient to ensure the collective bargaining rights of agricultural workers under the principles of freedom of association...In the Committee's view, the duty to consider employee representations in good faith, which merely obliges employers to give a reasonable opportunity for representations and listen or read them – even if done in good faith – does not guarantee such a process.<sup>124</sup>

In its recommendation, the CFA requested that the Ontario government review the *AEPA* to ensure that the legislation was reformed in order to provide for the "full and meaningful collective negotiations in the agricultural sector".<sup>125</sup>

## **B. Domestic Workers**

Domestic workers in Ontario – those employees who are directly employed by households to provide personal care at the home or residence of a family with children, an older person with personal care needs, or a person with an illness or disability without supervision and who live at the household – are expressly excluded from coverage under the *OLRA* by virtue of s. 3(a). There is no other labour legislation in Ontario which provides domestic workers with a path

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<sup>122</sup> Committee on Freedom of Association, *Case No 2704 (2012)*, Complaint against the Government of Canada (Ontario).

<sup>123</sup> *Ibid.*, at para. 399.

<sup>124</sup> *Ibid.*, at para. 398.

<sup>125</sup> *Ibid.*, at para. 401.

to meaningful collective bargaining. Ontario is one of only three jurisdictions in Canada – Alberta and New Brunswick are the other two – which exclude domestic workers from statutory access to collective bargaining. The domestic worker labour force in Ontario is overwhelmingly female, and it is overwhelming made up of workers from labour-exporting low-income regions who work in Canada, at least initially, on temporary work permits through the Live-in Caregiver Program administrated by the federal government. Low pay and benefits, social and work isolation, political invisibility and the lack of effective workplace protection are dominant characteristics of domestic labour.

### *Legislative History*

Domestic workers were excluded from coverage under the *OLRA* in its initial inception in the 1940s, following the lead of the *National Labor Relations Act* in the United States, upon which it was modeled. The legislative and social assumption behind the exclusion was that domestic workers, although working in an employment command relationship, formed an intimate social bond with the private households that they worked for, and the possibility of unionization would be an inappropriate barrier to maintaining that necessary bond.<sup>126</sup> In 1993, the Ontario government, as part of a major reform of labour legislation, removed the statutory exclusion of domestic workers from the *OLRA*, bringing it in line with the definition of “employee” in most other Canadian jurisdictions.<sup>127</sup> However, in doing so, the Ontario government did not alter the statutory definition of a “bargaining unit” – which requires the existence of more than one employee at a place of work – which effectively meant that most domestic workers, as the only employee working for an employer in the employer’s household, could not constitute a bargaining unit. The effect of the 1992 legislation reforms to the *OLRA*

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<sup>126</sup> Professor Audrey Macklin has noted the long-standing reluctance of Canadian governments to intervene in households that employ domestic labour, out of a concern for the privacy of homes and families: “Privileging a definition of the household as private and thus immune from both market behaviour and state intervention effectively effaces the domestic worker’s identity as an employee in a workplace.” See A. Macklin, “On the Inside Looking in: Foreign Domestic Workers in Canada”, in W. Giles & S. Arat-Koc (eds.) *Maid in the Market: Women’s Paid Domestic Labour* (Halifax: Fernwood Publishing, 1994) 32.

<sup>127</sup> J. Fudge, “Little Victories and Big Defeats: The Rise and Fall of Collective Bargaining Rights for Domestic Workers in Ontario”, in A. Bakan & D. Stasiulis (eds.) *Not One of the Family: Foreign Domestic Workers in Canada* (Toronto: University of Toronto Press, 1997), p. 119. Professor Fudge commented, at p. 132, that: “legal recognition of the right of domestic workers to bargain collectively was an acknowledgement of the value of their labour.”

created a formal *de jure* equality for domestic workers with most other Ontario employee occupations respecting their coverage under the *OLRA*, but, without a further statutory mechanism to provide some form of broader-based collective representation, *de facto* equality was left unaddressed and collective bargaining did not take root. In 1995, following a change of government and another major reform of the *OLRA*, the statutory exclusion of domestic workers was reinstated. This exclusion has been maintained since.<sup>128</sup>

### *Characteristics*

Domestic workers in Ontario have four particular social and employment characteristics pertinent to this study. First, they are largely a female and racialized migrant workforce that currently are in Canada, or initially came to Canada, on temporary work permits via the federal government's Live-in Caregiver Program (in place since 1992) through agreements with the Philippines and countries in the Caribbean. Under the terms of the Program, migrant domestic workers are issued work permits that total up to a maximum of 51 months. As part of their work permit, they are required to live in their designated employer's home, and can only change employers and homes if they apply for and receive a new work permit. Recent changes to the Program in 2011 required that a number of mandatory provisions be included in all employment contracts between households and domestic workers, including: living accommodation arrangements, overtime, holiday and sick leave entitlements, duties to be performed, hours of work, the terms of resignation or dismissal and the provision of health and workers' compensation benefits. Unlike some other temporary migrant worker programs, foreign domestic workers under the Program do have a path to acquire permanent residency if they complete a minimum of 24 months of work within a 36 month period (although the federal government has placed ceilings on the number of domestic workers who can apply for permanent residency each year.)<sup>129</sup>

Second, legal and social science scholars who have studied the employment and social status of domestic workers in Ontario and Canada have remarked upon the particular

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<sup>128</sup> Fudge, *ibid.*

<sup>129</sup> Pang, *supra*, note 113; Faraday, *supra*, note 114.

vulnerability and marginalization of this workforce.<sup>130</sup> This arises from their multiple employment and social insecurities: their temporary work status, their living arrangements under the same roof as their employer, language restrictions, their social and work isolation, their political invisibility, the fact that they are female, migrants and racialized, and the character of their relatively low-skilled and low-paid work. A primary theme in the social science writings is that these workers are heavily dependent upon the goodwill of their employers to protect and maintain the three dominant features of their lives in Canada: their employment, their domestic living arrangements and their immigration status. As migrant workers in Canada, they work and live in a country where they are unfamiliar with the prevailing cultural assumptions and patterns, where they have, at best, a rudimentary understanding of their rights under the employment regulatory system, and where many of them will be working and speaking in a language that is not their native tongue. Above all, they work and live in relative isolation, with little contact during working and home hours with others who share their social and ethnic background and their occupation. They have had only minimal input into negotiating their terms and conditions of their employment, they are often reluctant to challenge an employer's decision that contravenes their employment contract, and they have little effective recourse to the ordinary regulatory complaint routes should their complaint or concern be rejected by their employer. Among the more commonly reported features of workplace mistreatment includes a trend towards longer works hours than stipulated in their contracts or under the employment standards legislation, the persistent lack of boundaries between work hours and personal hours, and the pervasive feeling that they are under surveillance and lack personal privacy while living in their employer's household.

In the international context, but with great relevance to the circumstances of domestic workers in Ontario, a major report on domestic workers prepared by Professor Adelle Blackett of

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<sup>130</sup> See generally, J. Fudge, "Global Care Chains, Employment Agencies, and the Conundrum of Jurisdiction: Decent Work for Domestic Workers in Canada" (2011), 23:1 *Canadian Journal of Women and the Law* 235; A. Blackett, "Regulating Decent Work for Domestic Workers" (2011), 23:1 *Canadian Journal of Women and the Law* 1; P-C Hsing & K Nichol, "Policies on and Experiences of Foreign Domestic Workers in Canada" (2010), 4/9 *Sociology Compass* 766; S. Bernstein, "The Regulation of Paid Care Work in the Home in Quebec: From the Hearth to the Global Marketplace", in J. Fudge & R. Owens (eds.) *Prekarious Work, Women and the New Economy: The Challenge to Legal Norms* (Oxford: Hart Publishers, 2006); D. Stasiulis & A. Bakan (eds.), *Negotiating Citizenship: Migrant Women in Canada and the Global System* (Toronto: University of Toronto Press, 2005); and A. Bakan & D. Stasiulis (eds.) *Not One of the Family: Foreign Domestic Workers in Canada* (Toronto: University of Toronto Press, 1997).

McGill University that was issued in 2010 by the International Labour Organization commented on several fundamental features of domestic work in the context of their employment vulnerability:

- Domestic work is significantly undervalued, and the lack of equivalent statutory protections and rights that virtually all other employee occupational groups enjoy only reinforces this undervaluation. To be sure, this work is regulated, but primarily by strong non-state employer norms shaped by the private nature of the work's character and location;
- Domestic work is simultaneously work-like-every-other and work-like-no-other. It needs to enjoy the same meaningful rights and protections that other workers enjoy, but these rights and protections must be shaped to the particular nature of work and the particular vulnerabilities of domestic work;
- Domestic workers, even in countries with high living standards, are among the most marginalized of workers in the labour force, for whom decent work is often a distant aspiration; and
- The goal of labour legislation, in this context, should be to ensure that domestic work is governed by a rights-based approach rather than a status-based approach, grounded upon respect for the domestic worker's labour rights rather than a dependency upon the employer's *noblesse oblige*.<sup>131</sup>

Third, the academic scholarship has observed that the current regulatory system for managing the immigration status and employment voice of migrant live-in domestic workers, for reasons that mirror the circumstances of migrant agriculture workers in Ontario described above, constitute a form of “unfree labour”.<sup>132</sup>

And fourth, the particular employment relationship between domestic workers and their employers – commonly: a sole employee employed by a sole employer, where the worksite is the employer's home – raises challenges to the current labour relations model in Ontario that provides statutory access to collective bargaining. The statutory challenge lies with the requirement in the *OLRA* that a bargaining unit consist of more than one employee.<sup>133</sup> The organizing challenge is that the *OLRA* is built on the assumption that collective bargaining is based on a single workplace and a single bargaining unit (although practical exceptions do exist). The industrial relations challenge is that unions rarely attempt to organize smaller workplaces

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<sup>131</sup> International Labour Organization, *Law and Practice Report on Decent Work for Domestic Workers* (Geneva: ILO, 2010), paras. 1-47. Also see: A. Blackett, “The Decent Work for Domestic Workers Convention and Recommendation, 2011” (2012), 106 *American Journal of International Law* 778.

<sup>132</sup> *Supra*, note 130.

<sup>133</sup> *OLRA*, at s. 9(1).

(the usual rule of thumb is that they will only organize workplaces with at least 20 to 50 employees, depending on the union) because of the servicing and resource costs. The bargaining challenge is that a single employee unit would not have any true bargaining clout to secure more meaningful employment equality within the domestic live-in sector, even if the other social barriers facing migrant workers did not present an impediment. Thus, without re-imagining how collective bargaining or an effective form of collective voice could meaningfully work for the domestic worker employment relationship, the removal of their exclusion from the *OLRA*, even if accompanied by the relaxing of the two-employee bargaining unit minimum, would not advance the possibilities of genuine collective bargaining for this occupational sector.

If access to some form of meaningful collective voice and collective bargaining was to be adopted for domestic workers in Ontario, the menu of choices would likely be based on some variation of broader-based bargaining. While this would require a move away from the classic collective bargaining model anchored in the *OLRA*, our industrial relations system has proven to be adaptable to the specific characteristics of different industries (such as the construction industry and the professional sports industry, which have adapted and reshaped the Wagner Act model to address the nonconforming and fluid nature of the employment relationship in these sectors). The International Labour Organization has described the challenges of facilitating an effective collective voice for domestic workers as a “logical obstacle course” to moving from the individual to the collective voice, and has provided a useful list of steps to address the challenge:

- (i) Form a collective of workers and employers
- (ii) Collectively decide within each group on certain standards
- (iii) Negotiate this standard with each other, and
- (iv) Ensure that the employer complies with the agreed-upon standards<sup>134</sup>

One path by which this could be accomplished is through the creation of geographic bargaining units, with regulatory formulas for determining employer and employee representation, and the establishment of public agencies to assist the parties in negotiations and contract administration.

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<sup>134</sup> C. Hobden, *Domestic Workers Organize – But Can They Bargain?* (Geneva: International Labour Organization: ILO’s Work in Progress, 2015).

The ILO's Committee on Freedom of Association has stated that domestic workers are entitled to the same protections and guarantees of Convention No. 87, including the right to join and form occupational organizations, on the same basis as all other workers.<sup>135</sup> The ILO's Committee of Experts on the Application of Conventions and Recommendations noted in 2012 that the labour legislation in a number of countries did not yet allow domestic workers to enjoy "trade union rights", and commented: "The Committee therefore regularly emphasizes the need to ensure not only that domestic workers are covered by the relevant [labour relations] legislation, but also that, in practice, they benefit from the guarantees set forth in the *Convention* [No. 87]".<sup>136</sup> In *Decision No. 1900* (1997), the CFA criticized the 1995 reforms to the *OLRA* for, among other things, reinstating the exclusion of domestic workers from having any statutory access to collective bargaining. As a remedy, the CFA requested the Ontario government to take the necessary measures to facilitate collective bargaining for, among other groups, domestic workers.<sup>137</sup>

### **C. Workers in Regulated Professions: Architecture, Dentistry, Land Surveying, Legal and Medical Professions**

Section 1(3) of the *OLRA* expressly excludes from coverage anyone who is "a member of the architectural, dental, land surveying, legal or medical professions entitled to practice in Ontario and employed in a professional capacity." Only four jurisdictions in Canada – Alberta, Nova Scotia, Ontario and Prince Edward Island – exclude medical, legal, dental and architectural

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<sup>135</sup> CFA, *Digest of Decisions and Principles of the Freedom of Association Committee* (Geneva: International Labour Organization, 2006) (5<sup>th</sup> ed., revised), at para. 267.

<sup>136</sup> Committee of Experts on the Application of Conventions and Recommendations, *General Survey on the Fundamental Conventions Concerning Rights at Work* (Geneva: International Labour Organization, 2012), at para. 73. The CEACR made a similar observation in its seminal 1994 report, where it noted that the personal nature of the services rendered by domestic workers and the isolation in which they work does not remove them from the protection of Convention No. 87. See: *General Survey of the Reports on the Freedom of Association* (Geneva: International Labour Organization, 1994), at para. 90.

<sup>137</sup> Committee on Freedom of Association, *Case No 1900* (1997), *Complaint against the Government of Canada* (Ontario), at para. 194.

professionals from collective bargaining. Ontario is the only jurisdiction to exclude land surveyors. These exclusions cover all members of the regulatory bodies established by statute in Ontario to supervise these professions:

- The Ontario Association of Architects, with approximately 5,200 members (including 3,500 architects), regulated by the *Architects Act*.<sup>138</sup>
- The Royal College of Dental Surgeons of Ontario, with approximately 9,300 members, regulated by the *Dentistry Act, 1991*<sup>139</sup> and the *Regulated Health Professions Act, 1991*.<sup>140</sup> Dentists in Ontario also have a voluntary-membership organization – the Ontario Dental Association – which advocates for Ontario dentists on professional issues.
- The Association of Ontario Land Surveyors, which is regulated by the *Surveyors Act*.<sup>141</sup>
- The Law Society of Upper Canada, with approximately 48,000 members (including 44,000 lawyers), regulated by the *Law Society Act*.<sup>142</sup> Lawyers in Ontario also have a voluntary-membership advocacy body – the Ontario Bar Association – to advance their professional interests.
- The College of Physicians and Surgeons of Ontario, with approximately 40,000 members, regulated by the *Medicine Act*<sup>143</sup> and the *Regulated Health Professions Act, 1991*. In addition, physicians in Ontario have a voluntary advocacy body – the Ontario Medical Association – for their professional interests, which also bargains as their exclusive representative with the Ontario government for the determination of medical fees.

The traditional labour relations stance towards the unionization of employees in the regulated professions was aptly captured by the 1977 ruling of the Ontario Labour Relations Board in *Parkdale Community Legal Services*, where it stated:

Over the years the place of professionals in collective bargaining has been the subject of much discussion. Among reasons that have been suggested for the statutory exclusion from collective bargaining in Ontario of members of certain professions are the following: *firstly* that while Ontario's early labour laws allowed these professionals to bargain, the professionals themselves sought exclusion because they felt their separate community of interest was not being sufficiently protected; *secondly*, a belief among some professionals that it is unethical for service-oriented professions having a statutory monopoly over the practice of a profession to be able to

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<sup>138</sup> RSO 1990, c. A.26.

<sup>139</sup> SO 1991, c. 24.

<sup>140</sup> SO 1991, c. 18.

<sup>141</sup> RSO 1990, c. S.29.

<sup>142</sup> RSO 1990, c L.8.

<sup>143</sup> SO 1991, c. 30



withdraw their services from the public; *thirdly*, a concern that it is undignified for members of professions to engage in collective negotiations over monetary issues; *fourthly*, a belief that professionals don't need the assistance of collective bargaining because normally professions have their own self-regulating associations; and *fifthly*, a concern that even if it is appropriate for professionals to organize, the existing labour legislation, designed with the ordinary employee in mind, would be inappropriate for professionals without fundamental alternations — including perhaps, no-strike provisions, voluntary inclusion under the terms of a collective agreement and restricted managerial definitions. *Lastly*, it has been suggested that professionals are unsuited to collective bargaining because they are an "upwardly mobile" breed and possess a fiercely independent approach to their work resulting in a closer identification with management than with employees and unions.<sup>144</sup>

For the purposes of this study, three themes are pertinent to mention with respect to the five regulated professions that are excluded from access to collective bargaining in Ontario. First, within these professions, there are a variety of workplace relations across the employment spectrum. In architecture and land surveying, a significant number of professions work as partners or employees in relatively small-sized professional firms. Among physicians and dentists, a large number work in very small practices based on either a solo practice or on the partnership or space-sharing model, with relatively few professionals in an employment relationship. Among these five professional groupings, lawyers have the greatest variety in the organization of their workplaces, with professional practices that run from solo and very small firms (based either on partnerships, or on one lawyer-owner employing other lawyers) to very large firms with hundreds of lawyers each, a large minority who are partners and the rest who are predominately junior lawyers in an employment relationship with the firm; as well, large groups of lawyers work in a clear employment relationship in the provincial, municipal and quasi-public sectors, or in-house for private firms and organizations.

Second, while many within these professions are either very well or relatively well remunerated, and while many of the professionals in these fields consider that they work within an ethos of entrepreneurship and self-reliance, modern workplace issues that are commonplace patterns in Canada – the burden of lengthy work hours, the intrusion by work technology into what was once considered private time, the representation and voice of women and minorities, the prevalence of stress and mental illness, and concerns over remuneration, benefits and

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<sup>144</sup> [1977] 2 Can. LRBR 542 (OLRB), at para. 7.

working conditions – have also become pressing challenges in the professional workplace.<sup>145</sup> As well, issues of control by professionals over workplace direction and the exercise of professional judgement, particularly in larger hierarchical workplaces, have acted as an incentive to seek forms of collective organization that will articulate and advance their job concerns.<sup>146</sup>

And third, the search for greater control over the quality of their working lives, as well as initiatives to protect or extend professional control over their activities, has led some within these five professions to adopt different forms of collective voice, ranging from the creation or strengthening of advocacy organizations for their specific profession to experimenting with different forms of collective bargaining. Increasingly, members of a wide range of regulated professions, including members of the five excluded professions, are shedding traditional views towards collective bargaining and establishing union or union-like organizations to negotiate their employment working conditions.<sup>147</sup>

There are approximately 19 different non-health professions and 27 different health professions that are regulated by legislation in Ontario. Members of the architectural, dental, land surveying, legal and medical professions are the only regulated professions in the province that are expressly excluded by legislation from access to collective bargaining. The members of all other regulated professions have formal statutory access to collective bargaining. In some regulated professions, unionization is highly concentrated (i.e., nursing and public school teaching), in other professions, unionization rates are moderate and are mostly found in larger public service workplaces (i.e., engineers in public utilities, physiotherapists in hospitals, social workers in children’s aid societies, health care facilities and municipalities), and in yet other

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<sup>145</sup> See generally: J. Hagan & F. Kay, “Even Lawyers Get the Blues: Gender, Depression, and Job Satisfaction in Legal Practice” (2007), 41:1 *Law & Society Review* 51; F. Lee, M. Stewart & J. Brown, “Stress, Burnout and Strategies for Reducing Them: What’s the Situation among Canadian Family Physicians?” (2008), 54 *Canadian Family Physician* 234; J. Shamian & F. El-Jardali, “Healthy Workplaces for Health Workers in Canada: Knowledge Transfer and Uptake in Policy and Practice” (2007), 7 (Sp) *Healthcare Papers* 6; J. Wallace, “It’s About Time: A Study of Hours Worked and Work Spillover among Law Firm Lawyers” (1997), 50:2 *Journal of Vocational Behaviour* 227; J. Wallace, “Organizational and Professional Commitments in Professional and Non-Professional Organizations” (1995), 40:2 *Administrative Science Quarterly* 228.

<sup>146</sup> See generally S. Campbell & L. Haiven, “Struggles on the Frontier of Professional Control: Leading Cases from Canada” (2012), 33:4 *Economic and Industrial Democracy* 669.

<sup>147</sup> *Ibid.*

professions, unionization rates are modest or non-existent outside of the provincial or municipal public service (i.e., chartered accountants, auditors, pharmacists).

### *Lawyers*

Although lawyers are expressly excluded from coverage by the *OLRA*, collective bargaining for lawyers does take place in several workplaces. The Ontario government has voluntarily recognized, and collectively bargains with, two bargaining units of lawyers within the Ontario public service, notwithstanding an express exclusion for the same five professional categories in the *Crown Employees Collective Bargaining Act, 1993*.<sup>148</sup> The Ontario government bargains with the Ontario Crown Attorneys Association (OCAA) on behalf of approximately 850 Crown Attorneys, Assistant Crown Attorneys and Crown Counsel. After the parties established a Framework Agreement in 2000, they went on to conclude a series of successive collective agreements on salaries, benefits and other terms and conditions of work, and with binding grievance and arbitration provisions. As well, the Association of Law Officers of the Crown (ALOC), which represents approximately 750 lawyers and articling clerks (but excluding those lawyers represented by OCAA) employed in the Ontario public service, has also negotiated a series of successive collective agreements with the provincial government.

### *Physicians*

Within the medical profession, the Ontario government has voluntarily recognized the Ontario Medical Association via a Representation Rights Agreement as the exclusive representative for physicians practising in Ontario (with the exception of those physicians employed directly by the Ontario government and Ontario medical residents) for the purposes of negotiating physician compensation for those medical services funded, in whole or in part, by the Ontario government. The Agreement incorporates some of the hallmarks of collective bargaining and industrial relations in Ontario, including exclusive representation, good faith consultation and bargaining, a dispute resolution process (although no binding process), and a mechanism for bargaining a renewal agreement. The Agreement is shaped by the particular relationship between

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<sup>148</sup> SO, 1993, c. 38, s. 1(3).

physicians and the Ontario government, where physicians providing medical services to the public receive negotiated fee-for-services from the government as contractors (and not as employees), subject to certain restrictions with respect to the services offered and fees that can be charged directly to patients.

In addition to recognizing and negotiating collectively with the OMA, the Ontario government also negotiates with the Association of Physicians and Dentists in Public Service (who are directly employed by the government). As well, the Professional Association of Residents of Ontario (PARO) is the exclusive representative for all medical residents (physicians-in-training) in the province, and bargains collective agreements on their behalf with the Council of Academic Hospitals of Ontario.

### *Multiple Professional Voices*

A common feature among some of the larger regulated professions in Ontario is the existence of two or even three different bodies and/or organizations that all play a significant role in the working life of the members of the profession. First is a legislatively-created regulatory body that is assigned responsibility for issues related to credentials, qualifications, continuing education, licensing standards and professional discipline. Second, a number of regulated professions in Ontario have created a voluntary-membership association to act as their advocacy voice with government and the public on professional matters. And third, there is among some of the regulated professions in Ontario a high or moderate rate of unionization and collective bargaining. All, or some, of these three institutional faces of the regulated profession are present in the following fields:

- *Nurses*: Registered nurses, registered practical nurses and nurse practitioners in Ontario are regulated by the College of Nurses of Ontario (approximately 160,000 members, including 107,000 registered nurses) under the *Nursing Act, 1991*<sup>149</sup> and the *Regulated Health Professions Act, 1991*. Nurses are “employees” for the purposes of the *OLRA*, and a significant number of them are members of various public sector unions that collectively bargain on their behalf.<sup>150</sup> Separately, nurses have also

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<sup>149</sup> SO 1991, c. 32.

<sup>150</sup> The principal nursing union in Ontario, the Ontario Nurses’ Association, represents approximately 60,000 registered nurses and allied health professionals, working under approximately 160 collective agreements. Other health care and public sector unions in Ontario represent smaller numbers of nurses.

established the Registered Nurses Association of Ontario, with voluntary membership, to act as their advocate body on professional matters.

- *Engineers*: Professional engineers in Ontario are regulated by Professional Engineers Ontario under the authority of the *Professional Engineers Act*.<sup>151</sup> Professional engineers have been expressly included within the definition of “employee” under the LRA since 1971,<sup>152</sup> and long-standing collective bargaining relationships have been established on behalf of engineers employed at a number of larger energy providers, including Hydro One, Toronto Hydro, Ontario Power Generation, and Bruce Power. Separately, professional engineers have created the Ontario Society of Professional Engineers, with voluntary membership, to act as an advocacy body for their professional interests.
- *Teachers*: Teachers in Ontario are regulated by the Ontario College of Teachers (with approximately 240,000 members) under the *Ontario College of Teachers Act, 1996*.<sup>153</sup> Collective bargaining on behalf of teachers in the provincially regulated and funded school boards in Ontario has been long-established under the *School Boards Collective Bargaining Act, 2014* and its predecessors,<sup>154</sup> and teaching has one of the highest rates of unionization of any occupation in Ontario.
- *Social workers*: Social workers and social service workers in Ontario are regulated by the Ontario College of Social Workers and Social Service Workers under the authority of the *Social Work and Social Service Work Act, 1998*.<sup>155</sup> An indeterminate number of social workers, primarily in the public and quasi-public sector, are represented by a variety of unions for collective bargaining purposes. Separately, social workers have established the Ontario Association of Social Workers, as a voluntary organization, to represent their professional interests.

Three observations can be made about the presence of unions and collective bargaining where they exist among the regulated professions in Ontario. First, unions that represent, and collectively bargain for, members of a profession in their capacity as employees have co-existed alongside regulatory bodies and professional advocacy organizations without any evident irreconcilable differences arising. Each of the institutions and bodies within the profession – the regulatory body, the professional advocacy association and the union – have distinct roles and responsibilities to play, which together appear to enhance the professionalism, the collective voice, the employment interests and the job satisfaction of the membership. There is little reason

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<sup>151</sup> RSO 1990, c. P.28.

<sup>152</sup> See D. Fraser & S. Goldenberg, “Collective Bargaining for Professional Workers: The Case of the Engineers” (1974), 20 *McGill Law Journal* 456.

<sup>153</sup> SO 1996, c. 12.

<sup>154</sup> SO 2014, c.5.

<sup>155</sup> SO 1998, c. 31.

to think, should the statutory exclusion that prevents the remaining five professions from access to collective bargaining be removed, that any different outcome would occur.

Second, the industrial relations experience in Ontario and elsewhere has shown that the desire for collective bargaining among those regulated professionals in Ontario who have sought unionization to advance their workplace interests has been overwhelmingly in the public and quasi-public sectors, where the professional member is most clearly in the role of an employee, working along many other similarly-situated employees of the same profession. This observation is not to say that the right to collective bargaining should be limited to those professionals working in the public or quasi-public service, but rather it is those professionals in the public sector who will most likely take initial advantage of it.

And third, collective bargaining is an inherently flexible institution, which can accommodate a variety of employment and quasi-employment relations. Physicians in Ontario – who are both highly-trained professionals and, in many cases, the owners of, or partners in, their medical practice – bargain collectively with the Ontario government over the fees for service in a relationship that resembles classic collective bargaining in more traditional employment relationships.

### *International Labour Law*

In international labour law, the Committee on Freedom of Association of the ILO has stated that members of the liberal professions are to enjoy the right to organize.<sup>156</sup> With specific reference to Ontario, the CFA stated, in 1997, that the professional occupations excluded from the right to organize and the right to collective bargaining – it specifically mentioned the legal, dental, medical, land surveying and architectural professions – should be granted those rights, either through inclusion within the *OLRA* or through occupationally specific regulations.<sup>157</sup>

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<sup>156</sup> *Digest of Decisions and Principles*, *supra*, note 79, at para. 254.

<sup>157</sup> CFA, Decision 1900, *supra*, note 121, at para. 194.

#### D. Employees in Managerial Positions

Managerial employees in Ontario are excluded from access to collective bargaining through s. 1(3)(b) of the *OLRA*, which states that: “[N]o person shall be deemed to be an employee who, in the opinion of the Board, exercises managerial functions...” The traditional and prevailing reason for the exclusion of managerial employees from collective bargaining has been to ensure that the employer has a cadre of managerial employees in the upper and middle sectors of the enterprise hierarchy who can effectively direct those beneath them. For industrial relations purposes, this ensures that the productive mission of the enterprise can be achieved, aided by the loyalty of those in management positions; for employees lower in the hierarchy, this exclusion also ensures that their union is independent of employer influence and not dominated by managerial employees who have been placed within its ranks during the certification process.<sup>158</sup> Drawing these clear lines ensures the avoidance of conflicts of interest, and the functionality of a true countervailing system of bargaining equals with distinct interests to defend and reconcile.

In practice, the primary focus of the Ontario Labour Relations Board in addressing the issue of managerial exclusions has gone to the narrow question of whether a lower-end manager or supervisor exercises ‘effective control’ or makes ‘effective recommendations’ over the economic lives of other employees, such that they are functioning as true managers in the interests of the enterprise. If so, the Board would determine that they are not “employees” for the purposes of the *OLRA*, and they are excluded from the general employee bargaining unit.<sup>159</sup> The larger question – whether lower and middle level managerial employees should enjoy access to collective bargaining within their own bargaining units in order to protect and further their employment interests – has been traditionally answered in a restrictive manner in Ontario because of the exclusionary definition in the *OLRA*. The consequence is that, in Ontario, managerial employees who effectively perform supervisory duties over other employees are

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<sup>158</sup> J. Sack, M. Mitchell & S. Price, *Ontario Labour Relations Board Law and Practice* (3<sup>rd</sup> ed.), (Toronto: LexisNexis, looseleaf, 2014 update), chap. 2.99- 2.162.

<sup>159</sup> *Hydro Electric Commission of the Borough of Etobicoke*, [1981] OLRB Rep 38. The Ontario Labour Relations Board in *Borough of Etobicoke* laid out the significant factors in determining whether an employee was performing managerial duties: “Participation in the hiring, discharge and disciplining of employees; participation in employees’ performance evaluation; participation in the grievance procedure; and the power to give time off and assign overtime.”

entirely excluded from access to collective bargaining, whereas they are entitled to participate in joining unions and engaging in collective bargaining in other Canadian jurisdictions.<sup>160</sup>

The issue of the exclusion of managerial employees within their own bargaining units for collective bargaining purposes has been debated within Canadian labour law policy for close to half a century. The influential federal report on Canadian industrial relations (the “Woods Report”), issued in 1968, stated that statutory exclusions from collective bargaining for junior managerial and supervisory positions were “unjust” for those in the lower ends of management, and recommended their inclusion within labour legislation, subject to their placement in stand-alone units.<sup>161</sup> George Adams, a former chair of the Ontario Labour Relations Board, wrote in 1991, after the end of his tenure on the Board, that the exclusion of managerial employees from collective bargaining was “one of the most important exclusions meriting significant re-thinking”. He noted that these front-line supervisors, professionals and technical staff have the same need for collective bargaining as other employees, and that other Canadian jurisdictions have accepted the right of these employees to access the institutions of industrial relations.<sup>162</sup> The 1995 review of the *Canada Labour Code* (the “Sims Report”) endorsed the broad approach taken by the Canada Labour Relations Board towards managerial employees and collective bargaining, noting the general trend in both the public and private sectors towards the ‘flattening out’ of organizational structures and the more liberal and downward spread of responsibilities and duties.<sup>163</sup> The essence of these arguments is that there is a stratum of employees who perform vital managerial and supervisory duties for the enterprise, and for whom inclusion within a bargaining unit of the employees whom they overview would undermine the necessary demarcation of interests, but who also experience the same general vulnerability and inequality

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<sup>160</sup> The federal sector, British Columbia, Manitoba and Saskatchewan permit bargaining units of lower-level managerial and supervisory employees.

<sup>161</sup> *Canadian Industrial Relations: Report of the Task Force on Labour Relations* (Ottawa: Privy Council Office, 1968), at paras. 436-7.

<sup>162</sup> G. Adams, “Towards a New Vitality: Reflections on 20 Years of Collective Bargaining Regulations” (1991), 23 *Ottawa Law Review* 139.

<sup>163</sup> A. Sims et al, *Seeking a Balance: Canada Labour Code Part I Review* (Ottawa: Minister of Public Works and Government Services, 1995), pp. 47-8.



of bargaining power with their employer that is the premise for the establishment of the collective bargaining system.<sup>164</sup>

Accepting the right of lower and some mid-level management employees to access collective bargaining through labour legislation has been endorsed by a number of jurisdictions in Canada for several decades. The *Canada Labour Code* has expressly allowed, since 1973, for the certification of designated bargaining units for managerial employees.<sup>165</sup> In an early ruling, the Canada Labour Relations Board articulated the *Code*'s underlying approach towards collective bargaining and employee inclusions:

There is no dispute, the Board believes, with the recognition that the Canadian Parliament, together with the provincial Legislatures, is committed to the fundamental policy that collective bargaining must be facilitated and enhanced for as many people as possible. Collective bargaining rights are not a privilege, not a concession, not a favour, they are a basic right which will not be withdrawn from any employee unless there are very serious reasons.<sup>166</sup>

In 1980, the Canada Board in *Cominco* observed that the idea that the placement of managerial employees into their own bargaining units would constitute a conflict of interest in the performance of their supervisory duties was “outdated”.<sup>167</sup> It went on to explain its approach:

Similarly, the fact a person is a supervisor and as such directs the work of others, corrects and reprimands where necessary, allocates work among men and equipment, evaluates or assesses new and longstanding employees, authorizes overtime when necessary, calls in manpower when needed, trains others, receives training to supervise, selects persons for advancement, authorizes repairs, can halt production when problems arise, schedules holidays and vacations, verifies time worked, authorizes shift changes for individuals, and requisitions supplies when needed does not create the conflict of potential conflict that disentitles him to freedom of association. The loyalty and integrity of such a person is not altered by union membership or representation.<sup>168</sup>

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<sup>164</sup> B. Bilson, “‘Which Side Are You On?’ Loyalty and Conflict of Interest as Criteria in Determining Employee Status” (Paper Presented at the Workshop on the Rights to Organize and Bargain Collectively in Canada and the United States, 1-2 February, 2001).

<sup>165</sup> RSC, 1985, c. L-2, s. 27(5): ‘Where a trade union applies for certification as the bargaining agent for a unit comprised of or including employees whose duties include the supervision of other employees, the Board may, subject to subsection (2), determine that the unit proposed is the application is appropriate for collective bargaining’.

[S. 27(2) permits the Board to include or exclude any employees from the unit proposed by the trade union.]  
<sup>166</sup> *Vancouver Wharves Ltd*, 1974, cited in *Captains & Chiefs Assn. v. Algoma Central Marine*, [2010] CIRBD No. 40.

<sup>167</sup> *United Steelworkers of America v. Cominco* (1980), 40 di 75, at 88.

<sup>168</sup> *Ibid*, at 90. Also see: *CEWC v. Island Telephone Company Limited* (1990), 81 di 126, where the Canada Board stated, at 128: “Membership in a trade union is not co-extensive with lesser corporate loyalty, nor is it *per se* indicative of a conflict of interest *vis-a-vis* professional standards and integrity.”

In *BC Telephone Co.*, the Canada Labour Relations Board in 1977 explained the policy behind the general statutory inclusion for managerial employees:

In so doing, the *Code* accommodates what is now a familiar reality. Particularly in a large enterprise, many persons may wield some measure of authority over other employees without necessarily performing management functions such as would warrant their being excluded from the protection and benefits of the *Code*. Yes, in some cases, the nature of their work may be such that they cannot and should not be included in the same bargaining unit as the employees they supervise... Yet, they need not only be resolved by a ruling that a person is not an “employee” with resulting deprivation of the protection of the *Code*. As long as the persons involved do not truly perform “management functions” these legitimate interests can be accommodated by the creation, where this is appropriate, of separate ‘supervisory’ units.<sup>169</sup>

Similarly, the Saskatchewan Labour Relations Board, in 1997, commented that:

...it is difficult to see why a unit of middle management employees would, as such, be an inappropriate unit. Though, as we have said, these employees may be characterized by a significant degree of decision-making authority, their vulnerability if they go unrepresented in the current environment makes their decision to seek whatever protection they may achieve through collective bargaining perfectly understandable.”<sup>170</sup>

The Board in Saskatchewan acknowledged the placement of lower and middle-level managerial employees in their own bargaining unit would not be free of some secondary and residual conflicts. However, in the Board’s view, these lesser conflicts could be managed, and should not fundamentally affect the effective operation of productive industrial relations in any particular workplace. It continued:

Insofar as this is true [the creation of secondary conflicts], the performance of their duties may be enhanced by the creation of a separate bargaining unit for them. The rationale for separate units for this “middle management” group has depended on looking at them from two perspectives. For those employees further down the administrative scale, these persons may function as part of the management structure. Looking from their own vantage point, however, their influence over essential management decisions is limited, their input into industrial relations scanty, and their ability to control their own terms and conditions of employment negligible.<sup>171</sup>

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<sup>169</sup> *Telephone Supervisors’ Association of British Columbia v. British Columbia Telephone Company* (1977), 33 di 361, at 376.

<sup>170</sup> *PIPSC v. Saskatchewan*, [1997] Sask. LRBR 530, at 550.

<sup>171</sup> *Ibid.*, at 549.

## *International Labour Law*

The Committee on Freedom of Association has consistently stated that managerial and supervisory employees are to enjoy the same access to collective bargaining as other employees. It cautioned that the definition of managerial employee should not be so narrow as to weaken the potential employee organization representing managers such as to restrictively deprive it of much of its potential membership. To be excluded from any access to collective bargaining, a true “manager” should be confined only to those employees who “genuinely represent the interests of management”. The CFA has also said that, given their particular role in managing and supervising other employees, it is consistent with *Convention No. 87* to place managers and supervisors in their own distinct bargaining units and unions.<sup>172</sup> In one of its leading decisions, concerning the exclusion of managerial and supervisory employees from labour legislation in Quebec, the CFA ruled that this was in violation of *Convention No. 87* and requested the Government of Quebec to:

...amend the *Labour Code of Quebec* in order that managerial personnel enjoy the rights flowing from the general provisions of collective labour law and may establish associations that enjoy the same rights, prerogatives and means of redress as other workers’ organizations, with particular regard to mechanisms for collective bargaining and dispute settlement and protection against acts of employer domination or interference, all in accordance with the principles of freedom of association.<sup>173</sup>

## **E. Independent Contractors**

The *OLRA* excludes from its coverage persons who work as independent contractors in the Ontario labour market. The *Act*, however, does provide that the intermediate employment category of ‘dependent contractor’ falls within the definition of ‘employee’.<sup>174</sup> This inclusion

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<sup>172</sup> CFA, *Digest, supra*, note 79, paras. 247-250.

<sup>173</sup> CFA, Case No 2257 (2005), Complaint against the Government of Canada (Quebec), at para. 470. Respecting Canada, the CFA has made similar rulings with respect to managerial exclusions: under the Ontario *Education Quality Improvement Act* concerning public school principals and vice-principals (Case No 1951 (1998)), and the federal *Public Service Reform Act* (Case No 1670 (1993)) and the *Public Service Staff Relations Act* (Case No 903 (1979)) regarding middle level managers and supervisors in the public service.

<sup>174</sup> S. 1 of the *OLRA* expressly includes dependent contractors as falling within the definition of “employee”. The *Act* defines an ‘dependent contractor’ as: “a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation

was added to the *OLRA* in 1975 in order to provide access to collective voice and collective bargaining for persons who are, in appearance, self-employed and outside of a formal employment relationship, but who, in actuality, work in a subservient economic position for another person or company *and* are under an obligation to perform duties for the other person or company in a manner that is analogous to an employee. Economic dependence and control are the key legal indicators.<sup>175</sup> When determining the status of a proposed bargaining unit of dependent contractors, the Ontario Labour Relations Board has sought to look for substance over form in the workplace relationship.<sup>176</sup> In the intervening years, the Board has certified bargaining units of dependent contractors made up of dump truck owner-operators,<sup>177</sup> taxicab drivers,<sup>178</sup> home daycare providers,<sup>179</sup> newspaper delivery drivers,<sup>180</sup> nursing service providers<sup>181</sup> and haulage truck owner-operators,<sup>182</sup> among others. However, on other occasions, the Board has declined to certify bargaining units of self-employed contractors. In these cases, it has ruled that the persons in the proposed unit were more akin to independent contractors because, although they shared some of the characteristics of dependent contractors, they employed other persons,<sup>183</sup> they earned their income widely from a number of companies rather than one or two companies,<sup>184</sup> or their economic mobility and “on-call” status was relatively slight and the “waiting time” payments made to them by the company were more in the nature of “opportunity costs” than payment for services.<sup>185</sup> The prevailing assumption underlining the *OLRA* distinction would appear to be that persons who work as independent contractors have the necessary skills and economic status to take care of themselves in the labour market without the need for statutory intervention or a pathway to a certified collective voice.

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to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor”.

<sup>175</sup> The following rulings are among the leading rulings by the Labour Relations Board with respect to the interpretation of the dependent contractor provision in the *OLRA*: *Airline Limousine*, [1988] OLRB Rep 225; *Adbo Contracting Co. Ltd.*, [1977] OLRB Rep 197; and *Nelson Crushed Stone*, [1977] OLRB Rep 104.

<sup>176</sup> For background discussion, see generally: G. Adams, *Canadian Labour Law* (Toronto: Carswell, 2015 loose-leaf) (2<sup>nd</sup> ed.), chap. 6.

<sup>177</sup> *Nelson Crushed Stone*, [1977] OLRB Rep 104.

<sup>178</sup> *Windsor Airline Limousine Service*, [1981] OLRB Rep 398.

<sup>179</sup> *Andrew Fleck Child Centre (Re)*, [1987] OLRB Rep 5.

<sup>180</sup> *Toronto Star Newspapers Ltd.*, [2001] OLRB Rep 168.

<sup>181</sup> *Huntsville District Memorial Hospital*, [1998] OLRB Rep 968.

<sup>182</sup> *Nighthawk Timber Co.*, [1998] OLRB Rep 269.

<sup>183</sup> *Eastern Eavestroughing Ltd.*, [2008] OLRB rep 368 (construction contractors); *Canada Crushed Stone*, [1977] OLRB Rep 806 (trucker owner-operators)

<sup>184</sup> *Craftwood Construction Co. Ltd.*, [1980] OLRB Rep 1613 (trucker owner-operators).

<sup>185</sup> *The Citizen (Southam, Inc.)*, [1985] OLRB Rep 819 (newspaper delivery drivers).

In recent years, a number of scholars have questioned the importance and the efficacy of the distinction drawn by the *OLRA* and the Labour Relations Board between employees and dependent contractors, on the one hand, and independent contractors on the other.<sup>186</sup> These critical academic writings acknowledge that the traditional purpose of this distinguishing line is to preserve the regulation of the employment relationship within the operating assumptions of the *OLRA*. They argue, however, there is a deeper point that is unrecognized and unfulfilled by the *Act*: the need to protect the growing percentage of the Ontario labour force that is self-employed and, while bearing the essential legal characteristics of an independent contractor, are also economically vulnerable and in a disadvantaged bargaining position vis-à-vis the companies or entities that they are contracting with. Vulnerability and precariousness, this recent scholarship maintains, does not rest exclusively and only on the “employee” side of this line, a feature that has also been noted by the Ontario Labour Relations Board.<sup>187</sup> Consequently, the economic and legal distinction between employees, dependent contractors and independent contractors is not only becoming elusive and difficult to apply,<sup>188</sup> and also subject to deliberate misclassification in order to reduce the benefit liabilities of an employment relationship,<sup>189</sup> but the broad purpose of workplace legislation is diminished if the impact of the distinction is to

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<sup>186</sup> See C. Cranford, J. Fudge, E. Tucker & L. Vosko, *Self-Employed Workers Organize: Law, Policy and Unions* (Montreal: McGill-Queen’s University Press, 2005); J. Fudge, E. Tucker & L. Vosko, “Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada” (2003), 10 *Canadian Labour and Employment Law Journal* 193; J. Fudge, E. Tucker & L. Vosko, *The Legal Concept of Employment: Marginalizing Workers* (Ottawa: Law Commission of Canada, 2002); G. Davidov, “The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection” (2002), 52 *University of Toronto Law Journal* 357; and B. Langille & G. Davidov, “Beyond Employees and Independent Contractors: A View from Canada” (1999), 21 *Comparative Labor Law and Policy Journal* 6. Also see: M. Linder, “Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness” (1999), 21 *Comparative Labor Law and Policy Journal* 187.

<sup>187</sup> In *Adbo Contracting Co. Ltd.*, *supra*, note 175, the Board defined the difference between a dependent contractor and an independent contractor, while noting that they could both share the characteristic of economic vulnerability: “Mere economical vulnerability, however, is not a sufficient basis for a finding that a person is a dependent contractor, since this is a condition that may be experienced by the true entrepreneur, just as much as the individual worker. There must exist, therefore, a type of economic dependence closely analogous to that of the individual worker.” Quoted in: J. Sack & M. Mitchell, *Ontario Labour Relations Board Law and Practice* (3<sup>rd</sup> ed.) (Toronto: LexisNexis, 2015, loose-leaf), para. 2.82.

<sup>188</sup> As an illustrative example, the prevailing test applied by the Ontario Labour Relations Board to distinguish between a dependent contractor and an independent contractor is the 11 part analysis first developed in *Algonquin Tavern*, [1981] OLRB Rep 1057, which has become one of the most complex tests in contemporary labour law. Separately, the Supreme Court of Canada, in *671122 Ontario Ltd. v. Sagez Industries Canada Ltd.*, [2001] 2 SCR 983, at para. 46, has noted that: “...there is no one conclusive test, which can be universally applied to determine whether a person in an employee or an independent contractor”.

<sup>189</sup> Davidov, *supra*, note 186, at pp. 362-365.

exclude a significant and vulnerable segment of the working population from statutory protection or a pathway to meaningful collective voice. As a result, these scholars assert, there exists the need for a public policy and statutory response to this labour market phenomenon, for which there already exist useful and adaptable models enacted over the years by various Canadian jurisdictions. And in addition to this academic attention to the plight of independent contractors, the 1995 review of the *Canada Labour Code* remarked upon the growing labour market insecurity of those who work as independent contractors, and the need to provide them with some form of statutory pathway to collective representation.<sup>190</sup>

Two features from the recent scholarship are important to highlight. First, the percentage of the labour force that is engaged in self-employment rose between the 1980s and the late 1990s in Canada,<sup>191</sup> before flattening out through the 2000s and 2010s. Between 2001 and 2012, the percentage of self-employed workers in the Canadian economy had stabilized between 15 per cent and 16 per cent of all employed workers.<sup>192</sup> In 2011, a significant majority of the self-employed in the Canadian economy (68 per cent) employed no paid help and, of those, 73 per cent (making up about half of the total self-employed, or about 1.3 million workers) were unincorporated, suggesting a more modest and subordinate position within the economy.<sup>193</sup> In difficult economic times, self-employment tends to rise as paid employment declines, as it did after October 2008, with the greatest increases reported to be among women, workers over the age of 45, workers with a high school education or less, and those living alone or with a non-working spouse.<sup>194</sup> While this trend towards self-employment contains a number of positive features, especially the development of entrepreneurial initiatives and organizational skills, the Organization for Economic Cooperation and Development has noted that this trend is, for some,

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<sup>190</sup> Seeking a Balance, *Report of the Task Force to Inquire into Part 1 of the Canada Labour Code* (Ottawa: Public Works and Government Services Canada, 1995), pp. 240-1.

<sup>191</sup> Cranford et al, *supra*, note 186, at pp. 5-14.

<sup>192</sup> Statistics Canada, Key Small Business Statistics, Table 10, accessed at: < <https://www.ic.gc.ca/eic/site/061.nsf/eng/02724.html>> (Accessed 24 November 2015).

<sup>193</sup> *Ibid*, Figure 10. According to Statistics Canada, “self-employed workers involved in unincorporated activities are ‘active owners of a business, farm or unincorporated office and independent workers who do not have a business as such (child-care workers, newspaper delivery agents, etc.)’”. It appears that Statistics Canada includes, within these self-employed figures, persons who would be classified under the *OLRA* as dependent contractors and independent contractors.

<sup>194</sup> Statistics Canada, *Self-Employment in the Downturn* (March 2010), accessed at: <http://www.statcan.gc.ca/pub/75-001-x/2010103/article/11138-eng.htm#a5> (accessed: 25 November 2015). The

a survival strategy for those who cannot find any other means of earning a living.<sup>195</sup> The spectrum of the self-employed is broad and heterogeneous, ranging from independent professionals and highly skilled entrepreneurs who own incorporated businesses to skilled craftspeople, all the way to relatively low-skilled workers and freelancers who do not own very much by way of productive tools or facilities and who do not exercise much control over how their work is produced.<sup>196</sup> Those at the lower-middle and lower end of the self-employed labour market invariably receive modest remuneration for their work, have access to limited or no employment-related benefits, lack much economic autonomy, and only rarely have the ability to develop saleable equity in their enterprise beyond their own labour.<sup>197</sup> As well, scholars have observed that visible minorities, immigrants and women who participate in the labour market as self-employed workers tend to earn less, and endured measurably more economic precariousness, than self-employed white Canadian-born men.<sup>198</sup>

The second feature that the recent scholarship has focused upon has been the forms of collective representation that may be considered for independent contractors and self-employed workers.<sup>199</sup> Two fundamental aspects have been cited. First, the dominant model of collective representation as found in the *OLRA* – based invariably on a single workplace, a single employer, a largely stable workforce and an ongoing and indefinite employment relationship – is unsuited to the organizing of independent contractors and self-employed workers, who work at various sites for various companies over a wide variety of time periods and without the stability of a regular relationship and with the constant prospect of having the work re-assigned to someone else. Simply widening the definition of “employee” in the *OLRA* would not likely result in a meaningful extension of collective voice to these types of workers. Any form of statutory framework to enable independent contractors to acquire a meaningful collective voice would likely have to account for the particular features of their labour (particularly the fluid and individual character of the work), including (i) the ability of these workers to determine who they

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<sup>195</sup> OECD (2015), Self-employment rate (indicator). doi: 10.1787/fb58715e-en (Accessed on 25 November 2015).

<sup>196</sup> Cranford et al, *supra*, note 186, at pp. 5-9.

<sup>197</sup> Fudge et al, “Employee or Independent Contractor”, *supra*, note 186, at pp. 194-6.

<sup>198</sup> J. Fudge, “Self-Employment, Women and Precarious Work: The Scope of Labour Protection” in J. Fudge & R. Owens (eds.), *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (Oxford: Hart Publishing, 2006); and Crawford et al, *supra*, note 186.

<sup>199</sup> The most engaged discussion of this feature is found in Cranford et al, *supra*, note 186, at pp. 171-192.

will associate with (as opposed to the standard Wagner Act approach of directing labour relations boards to determine the appropriate bargaining unit); (ii) the setting aside of the necessity of demonstrating majority support for an association; (iii) the enabling of meaningful bargaining with a multiplicity of employers/companies or even industry-wide negotiations, and (iv) the ineffectiveness and inappropriateness of strikes and lockouts, and the difficulty in achieving first contract agreements.<sup>200</sup>

This leads to the second aspect of this feature: the broader Wagner Act model as practiced in Canada and Ontario has proven to be pluralistic and adaptable in facilitating a variety of viable forms of workplace representation for different types of workers whose labour does not conform to a standard employment relationship. This has included representation for self-employed workers in the resource industries (such as independent fishers),<sup>201</sup> those specially-skilled workers with tangential and fluid relationships with a variety of employers within a particular industry (such as workers in the construction industry, or stage and screen actors),<sup>202</sup> those workers with well-paid but finite working careers in employment relationships that require a mixture of collective and individual agreements (such as professional athletes)<sup>203</sup> and, as discussed above, those self-employed workers in a dependent contractor relationship (such as those who distribute newspapers, or who deliver rural mail).<sup>204</sup>

A flourishing example of a contemporary statutory response to the desire by some independent contractors to acquire meaningful access to collective bargaining is the *Status of the*

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<sup>200</sup> *Ibid.*, at pp. 185-6.

<sup>201</sup> See the collective bargaining legislation enacted in New Brunswick and in Newfoundland & Labrador for the fishery industry: *Fisheries Bargaining Act*, SNB 1982, c. F-15.01; and the *Fishing Industry Collective Bargaining Act*, RSNL 1990, c. F-18. Also see: W. Clement, *The Struggle to Organize: Resistance in Canada's Fishery* (Toronto: McClelland & Stewart, 1986).

<sup>202</sup> For construction workers, see: *OLRA*, ss. 126-150; also see: S. McArthur, J. Bloch, R. Salisbury & L. Brown, *Canadian Construction Labour and Employment Law* (Toronto: LexisNexis, 2015, loose-leaf). For stage actors, see the Canadian Theatre Agreement (2015-2018) negotiated between the Professional Association of Canadian Theatres and the Canadian Actors' Equity Association: <http://www.caea.com/EquityWeb/EquityLibrary/Agreements/Theatre/TheatreLibrary.aspx>, accessed on 24 November 2015.

<sup>203</sup> See generally: P. Weiler, *Leveling the Playing Field: How the Law Can Make Sports Better for Fans* (Cambridge: Harvard University Press, 2000).

<sup>204</sup> E. Tucker, "Star Wars: Newspaper Distribution Workers and the Possibilities and Limits of Collective Bargaining", in Cranford et al, *supra*, note 186; and J. Fudge "Deemed to be Entrepreneurs: Rural Route Mail Couriers and Canada Post", in Cranford et al, *supra*, note 186.



*Artist Act*, enacted by the federal government in 1992.<sup>205</sup> The express purpose of the *Act* is to provide artists with the right to freedom of association and expression through the enablement of artists' associations to promote their professional and socio-economic interests.<sup>206</sup> The legislation was adopted by the federal government to enable cultural workers to collectively address the low levels of income and the labour market precariousness that many of them experience.<sup>207</sup> The *Act* explicitly defines an artist as an 'independent contractor' and exempts 'employees' in the cultural field, it enables artists who work under federal areas of jurisdiction (such as those affected by the *Copyright Act* or those whose work involves federally-regulated broadcasters) to join artists' associations, it establishes a certification process through the Canada Industrial Relations Board with modifications for this nature of work (i.e., the certification of the 'most representative' association; and the duration of three year certifications, with a renewal procedure), it contains a duty to bargain in good faith for scale agreements, it provides for the exercise and regulation of 'pressure tactics' by either side in support of bargaining positions, and it exempts the artists' associations from the prohibitions of the *Competition Act*. By retaining the 'independent contractor' status of artists, the *Act* enables them to enjoy benefits under the *Income Tax Act*. As of 2010, 24 artists' associations had been certified under the *Act* as exclusive bargaining agents in 26 defined sectors.<sup>208</sup> In a similar vein, Quebec enacted two pieces of legislation in 1987 to enable cultural workers to join artists' associations to collective bargain with cultural companies and bodies on minimum terms for the production of cultural goods.<sup>209</sup> This initiative by Quebec is significant, given that the constitutional division of powers in Canada assigns to the provinces the bulk of regulatory authority over the production of cultural works outside of broadcasting and copyright, such as book publishing, art, and theatre, film and music productions.

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<sup>205</sup> SC 1992, c. 33.

<sup>206</sup> *Status of the Artist Act*, *ibid*, ss. 3 and 7.

<sup>207</sup> See generally: G. Neil, *Status of the Artist in Canada* (Ottawa, Canadian Conference of the Arts, 2010); L. Vosko, "The Precarious Status of the Artist: Freelance Editors' Struggle for Collective Bargaining Rights", in Cranford et al, *supra*, note 186; and E. MacPherson, "Collective Bargaining for Independent Contractors: Is the *Status of the Artist Act* a Model for Other Industrial Sectors?" (1999), 7 *Canadian Labour and Employment Law Journal* 355.

<sup>208</sup> Neil, *ibid*, p. 12.

<sup>209</sup> Quebec has also enacted two statutes in this area: *An Act Respecting the Professional Status of Artists in the Visual Arts, Arts and Crafts and Literature, and Their Contracts with Promoters*, RSQ c. S-32.01; and *An Act Respecting the Professional Status and Conditions of Engagement of Performing, Recording and Film Artists*, RSQ, c. S-32.1.

## **F. Other Exclusions**

The *OLRA* also excludes employees employed in a confidential capacity regarding labour relations<sup>210</sup> and hunters and trappers.<sup>211</sup>

### *Confidential Employees*

The purpose of the exclusion of employees employed in a confidential capacity regarding labour relations is to ensure an arm's length relationship between the employer and the union by preventing those confidential employees from being involved in a conflict of interest. The Ontario Labour Relations Board has developed a small and consistent jurisprudence that recognizes the relatively humble nature of many of these positions, and therefore has sought a narrow exclusion of this class of employees from access to unionization and collective bargaining. The governing test is that only an employee who has consistent access to confidential information on matters relating to labour relations (and not just personnel or general employment matters) should be excluded; occasional access to such information is insufficient to justify exclusion.<sup>212</sup> The Ontario Board has also ruled that there is no necessary contradiction in the fact that an employee can belong to a union and can have access to collective bargaining, on the one hand, and nevertheless maintain a duty of fidelity to the employer to keep certain information confidential.<sup>213</sup>

The consequence of this exclusion is that a small cadre of employees who consistently perform work of a confidential nature relating to labour relations, but who otherwise occupy administrative positions that perform very similar work to, and have very similar employment status (in terms of pay, benefits and duties) as, other administrative employees in the enterprise

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<sup>210</sup> *OLRA*, at s. 1(3)(b).

<sup>211</sup> *OLRA*, at s. 3(b).

<sup>212</sup> *Greater Essex County District School Board v. CUPE, Local 1348*, 2012 ONSC 5591. See generally: J. Sack et al, *Ontario Labour Relations Board Law and Practice*, *supra*, note 152, at paras. 2.163-174.

<sup>213</sup> *Town of Innisfil*, [1994] OLRB Rep. 76.

who belong to a union, have no access to collective bargaining, notwithstanding their relatively humble positions. Their continued exclusion from general employee bargaining units is justified. Nonetheless, the Wagner Act model of labour law is flexible enough and innovative enough to enable employees in these positions to have access to specialized bargaining units, with their own employee organization, to allow them to benefit from the fruits of collective bargaining, as long as the interests of the employer with respect to confidential information related to labour relations can be protected.

International labour law has stated that labour legislation should not create an “excessively broad interpretation of the concept of ‘worker of confidence’” such that their right of association is denied.<sup>214</sup>

### *Hunters and Trappers*

The original policy rationale for the exclusion of hunters and trappers from coverage under the *OLRA* is unclear.<sup>215</sup> Hunters and trappers often formally work for themselves and sell their pelts, fur-skins, meats and other animal products to buyers. Other hunters and trappers may be employed by recreational companies, or by hunting, trapping and animal-control companies. Hunters and trappers in Ontario are required to be licensed under the *Fish and Wildlife Conservation Act, 1997* and its regulations,<sup>216</sup> and the provincial government regulates the industry through licensing, mandatory education, harvesting quotas and the establishment of limited hunting and trapping seasons. Ontario is the only jurisdiction in Canada that excludes hunters and trappers from statutory access to collective bargaining.

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<sup>214</sup> CFA, *Digest, supra*, note 79, at para. 251.

<sup>215</sup> There appears to be no caselaw, and no academic or policy discussion, of this exclusion.

<sup>216</sup> SO 1997, c. 41. Also see *Ontario Regulation 665/98 (Hunting)* and *Ontario Regulation 667/98 (Trapping)*.

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