

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

BETWEEN:

TOM DUNMORE, SALAME ABDULHAMID
and WALTER LUMSDEN AND MICHAEL DOYLE,
on their own behalf and on behalf of the
UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION

(Appellants)

- and -

ATTORNEY GENERAL FOR THE PROVINCE OF ONTARIO,
HIGHLINE PRODUCE LIMITED, KINGSVILLE
MUSHROOM FARM INC., and FLEMING CHICKS

(Respondents)

**CCPI Response to Memorandum of Attorney General of Ontario
opposing
the intervention motion of the Charter Committee on Poverty
Issues**

1. The Attorney General of Ontario (“**Attorney General**”) opposes CCPI’s motion to intervene primarily on the basis that CCPI intends to argue that social condition, economic disadvantage or poverty is an analogous ground of discrimination under section 15. The Attorney General alleges that this issue is “extraneous” to the appeal and lacks an evidentiary foundation for this Court to properly consider it

2. The “analogous grounds” argument which the Attorney General argues to be “extraneous” is one of six arguments identified in CCPI’s Notice of Motion. The other five are:

- the relationship between equality rights of working poor and those in receipt of public assistance;
- the relevance of characteristics of members of the group not subject to the impugned legislation in the “analogous grounds” analysis (in this case, foreign migrant workers);
- the obligations of governments to take positive measures to redress inequalities resulting from private market power imbalances;
- *Charter* review of the repeal of legislation consistent with the prohibition of retrogressive measures under international human rights law; and
- the importance of avoiding a rigid distinction between social and economic rights and civil and political rights in *Charter* interpretation.

3. All of these matters are distinct and all are directly implicated by the decisions of the courts below and the pleadings submitted by the parties to date.

Consideration of “Social Condition” or “Social and Economic Disadvantage” as Analogous Grounds of Discrimination is not Extraneous to the Present Case

4. Of these six issues, the one to which the Attorney General takes particular exception -- whether “social condition” is an analogous ground under section 15 -- has to date been the nub of this case. The lower courts found against the Appellants on the specific basis that economic disadvantage is not an analogous ground under the *Charter*

and does not define a group or personal characteristic for the purposes of section 15. In striking contrast to the Attorney General's contention that this is an extraneous issue, one need only have regard to what Sharpe J. identified as the pivotal issue in the equality rights claim before him:

In light of this factual record, in the end, **the applicants' case must turn on whether the economic disadvantage of a group of workers** identified as a group only by the fact that they work in a particular sector of the economy, **constitutes an analogous ground within the meaning of s. 15(1).**

Dunmore v. Ontario (Attorney General) (1997), 155 D.L.R. (4th) 193 at 217

5. After framing the central issue of the case in these terms, Sharpe J. proceeded to review relevant caselaw and conflicting authority with respect to economic disadvantage or poverty as an analogous ground of discrimination under section 15. The point of this analysis was to ascertain whether agricultural workers have a widely shared personal characteristic analogous to those listed in section 15 of the *Charter*. Ultimately, Sharpe, J. concluded, as a question of law, that "economic disadvantage" is not an analogous ground within the scope of s.15, and this holding "is fatal to their [the applicants'] s.15 claim":

[W]hile there is some academic support for the acceptance of economic disadvantage as an analogous ground (see Jackman, "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian Charter and Human Rights Law" (1994), 2 Review of Constitutional Studies 76), that view has not gained acceptance from the courts: see on this point the decision of the Divisional Court in *Masse v. Ontario (Ministry of Community and Social Services)* (1996), 134 D.L.R. (4th) 20, holding that the class of recipients of social assistance is (at 45) "heterogeneous and their status is not a personal characteristic within the meaning of s. 15(1)."

6. The Attorney General is effectively seeking to have this Court uphold the

reasoning and outcomes of some lower courts, upon which Sharpe J. relies, finding that economic disadvantage is not an analogous ground of discrimination, without hearing any argument from CCPI to the contrary.

7. For its part, the Attorney General has addressed the analogous grounds issue by reference to the decision in *Masse*. It argues that extending the protection of section 15 to a group whose primary shared characteristic is economic disadvantage would “overshoot the purposes of the *Charter* and render virtually all legislative distinctions vulnerable to *Charter* scrutiny.” CCPI wishes to put an opposing view before the Court. The view which CCPI will advance has been adopted, *inter alia*, by the Nova Scotia Court of Appeal (*en banco*) in its ruling in *Sparks*, itself the subject of analysis and commentary by Sharpe, J. in his decision.

Memorandum of Argument Submitted by the Respondent Attorney General of Ontario on the Application for Leave to Appeal at paras. 47-49.

Dartmouth/Halifax County Regional Housing Authority v. Sparks (1993), 101 D.L.R. 4th 224 at 233-4.

Dunmore v. Ontario (Attorney General) (1997) *supra* at 219.

8. If CCPI were denied leave to intervene, and the Court were to accept the argument of the Attorney General and uphold the decisions of the courts below, the group described by Madame Justice L’Heureux- Dubé as “one of the most disadvantaged groups in society” would be denied the protection of section 15 without being able to make any argument before the Court to oppose this result. It is submitted that the Court would clearly benefit from hearing from CCPI before rendering a decision on the merits of the Attorney General’s arguments that including economic disadvantage within the ambit of section 15 would “overshoot the purposes of the *Charter*.”

R. v. Prosper, [1994] 3 S.C.R. 236 at para. 71

**Evidentiary Record With Respect to “Economic Disadvantage” or
“Social Condition” as an Analogous Ground in the Present Case**

9. The Attorney General argues that there is no evidence in this case with respect to social condition or economic disadvantage as an analogous ground under section 15. In fact, both parties have adduced considerable evidence relating to precisely this issue within the context of the case. The Attorney General has called evidence to establish that the economic disadvantage of agricultural workers and low wage workers in other occupations is unrelated to issues of systemic discrimination, prejudice and historical disadvantage of the sort which section 15 is designed to address. The Attorney General argues on the basis of this evidence that this Court should accept that low wages within particular occupations do not result from discriminatory attitudes or systemic inequalities but rather are a function of the value of products which the workers produce: “In any economic system, the long-term sustainable wages of workers are set by the value of what they produce.” This type of evidence is adduced by the Attorney General in favour of denying the working poor the protection of section 15 of the *Charter*. Evidence adduced by the Appellants, on the other hand, suggests that social and economic disadvantage among workers in particular occupations such as agriculture may relate to systemic “defects” in society - “unemployment, underemployment, illiteracy and discrimination”. These competing analyses of social and economic disadvantage and its relationship to occupational groupings provide, it is submitted, an ample evidentiary basis for CCPI to raise the question of whether social and economic disadvantage ought to be considered an analogous ground of discrimination in the context of the present case.

Memorandum of Argument of the Respondent Attorney General of Ontario in Response to the Application for Leave to Appeal (SCC) at par. 26;
Affidavits of Brinkman, Respondent’s Record, Tab 6, p. 66, 94-98, Tab 7, pp. 113-114.

First Affidavit of Prof. Fudge, Appeal Book Vol. II, Tab 8, p. 185, para.

42 and Exhibit “S” thereto, Fuller and Beale, “Impact of Socio-Economic Factors on Farm Labor Supply” (1967), 15 *Can. J. Agr. Eco.* 1237-43, 1238.

10. There is also an abundance of evidence in the record of this case with respect to the economic disadvantage of agricultural workers and the social and political marginalization and discrimination which accompanies such disadvantage. A variety of indicators of social and economic disadvantage were utilized by experts and there is considerable evidence on the record with respect to “the meaning of socioeconomic scales and the uses to which they may be legitimately put.” On the basis of this extensive evidence, Sharpe J. stated that:

For the purposes of the s. 15 analysis, I have no hesitation in finding on the evidence that agricultural workers are a disadvantaged group. They are poorly paid, face difficult working conditions, have low levels of skill and education, low status and limited employment mobility.

Dunmore v. Ontario (Attorney General) (1997) *supra* at 216

Blishen, Carroll and Moore, "The 1981 Socioeconomic index for occupations in Canada," 24 *Cdn. Rev. Soc. & Anthro.*, 465-488 (1987) at 465. Appellants’ Appeal Book, Volume III, Tab 8, Document R

Fuller and Beale, "Impact of Socio-Economic Factors on Farm Labor Supply," 15 *Can. J. Agr. Eco.* 1237-1243, (1967). Appellants’ Appeal Book, Volume III, Tab 8, Document S

11. In other words, there is ample evidence in the Case on Appeal that agricultural workers constitute a group with the shared characteristic of “social and economic disadvantage” or what has been identified in some human rights legislation as “social condition”. A central question before the Court in this case, therefore, is the significance of this shared characteristic in a section 15 analysis.

Refining the Characterization of the Ground of Discrimination

12. The Appellants have consistently argued that “agricultural workers” constitute an analogous group under section 15 and that social and economic disadvantage is a common characteristic of the members of this group. They also refer to other shared characteristics which qualify the group for the protection of section 15, including vulnerability to political and social prejudice, lack of political power, “immutability,” and recognition by legislatures or other official bodies as a group in need of protection. If the Court were to accept that social condition or social and economic disadvantage may be an analogous ground of discrimination under section 15, the Appellants’ approach could still be adopted and the nature of the comparison and ground of discrimination remain unaltered. This Court has recognized that a confluence or intersection of enumerated or analogous grounds may assist in determining whether a group is protected under section 15.

Appellants’ Factum in the Ontario Court of Appeal at
para.104

Law v. Canada, [1999] 1 S.C.R. 497 at paras. 93-94

13. On the other hand, as a possible alternative to the Appellants’ approach to the ground of discrimination, CCPI wishes to suggest that the ground of discrimination in the present case may be characterized by the term “social condition” or “social and economic disadvantage.” In other words, the Court might find that while the formal characteristic on the basis of which the impugned legislation denies protection is the “occupational status” of “agricultural worker”, the more significant distinction for the purpose of the section 15 analysis is the common social and economic disadvantage of those who work in this occupation. Such an approach would not alter the groups being compared or the evidence considered but rather, would refine the manner in which the differential treatment at issue and the evidence of social and economic disadvantage is framed within the section 15 analysis. As noted by this Court in *Law*:

[T]he claimant's characterization of the comparison may not always be sufficient. It may be that the differential treatment is not between the groups identified by the claimant, but rather between other groups. Clearly a court cannot, *ex proprio motu*, evaluate a ground of discrimination not pleaded by the parties and in relation to which no evidence has been adduced: see *Symes, supra*, at p. 762. However, within the scope of the ground or grounds pleaded, I would not close the door on the power of a court to refine the comparison presented by the claimant where warranted.

Law v. Canada, supra at para. 58

14. The Court may find that considering social condition or social and economic disadvantage as an analogous ground in the present case is helpful in refining the comparison and the ground at issue. Sharpe J., as well as the Court of Appeal of Ontario, clearly found that the analysis of the evidence and argument of the parties could be refined to focus on whether the "economic disadvantage" which is the predominant characteristic of disadvantage widely shared by agricultural workers, amounts to an analogous ground of discrimination.

15. Characterizing the ground of discrimination as social condition or social and economic disadvantage in the present case may well be preferable to the Court because it would avoid an unwieldy multiplicity of factually unique "analogous grounds" under section 15. This approach would further ensure that the question of whether a particular group is analogous to groups defined by enumerated grounds under section 15 does not displace the contextual and purposive analysis of whether discrimination has occurred in each case.

16. It is respectfully submitted that rather than raising issues extraneous to the present appeal, CCPI proposes to address the issue of social and economic disadvantage as an analogous ground in order to assist in properly conceptualizing and analysing the issues and evidence before the Court in this case and in order to assist the Court in addressing

the concerns that have been explicitly raised by the courts below.

Migrant workers

17. The other issue raised by CCPI, to which the Attorney General objects, is the suggestion that foreign migrant workers ought to be included in the analysis of the social, historical and legal disadvantage of agricultural workers despite the fact that they are not subject to the impugned legislation.

18. CCPI rejects the Attorney General's statement with respect to CCPI's purpose in seeking to include consideration of migrant agricultural workers, as well as the statement that "there is virtually no evidence in the case on appeal regarding this group." There is, in fact, an abundance of evidence about the relevant characteristics of migrant agricultural workers on the record. In addition, much of the statistical evidence about systemic patterns of economic disadvantage, low pay, employment patterns and working conditions among agricultural workers in the record applies to the entire sector and does not disaggregate federally regulated migrant workers from those under provincial jurisdiction.

19. The Affidavit of Professor Judy Fudge, sworn February 28, 1997, includes an entire section on "Migrant Agricultural Workers" along with a collection of exhibits containing extensive information about this group. The record includes evidence that seasonal migrant agricultural workers form the "backbone" of the seasonal labour force in some agricultural sectors in Ontario. The evidence also establishes that the federally regulated migrant workers share the same characteristics of low pay and inadequate legislative protections as those who are subject to the provincial legislation. Further, the evidence shows that the creation of a separate federally regulated program was at least in part a response to racist fears that permitting Caribbean agricultural workers to enter Canada through normal immigration channels would result in "a substantial increase in

Negro immigration to Canada” giving rise to “racial problems.” As has been recognized by L’Heureux-Dube J. in the context of domestic workers, it is important to appreciate the experience of immigrants and visible minorities in understanding the disadvantage of the group as a whole.

Affidavit of Judy Fudge, Sworn February 28, 1997 at pp. 21 - 26 particularly para. 58.

Egan v. Canada, [1995] 2 S.C.R. 513 at para. 80

Ellen Wall, "Personal Labour Relations and Ethnicity in Ontario Agriculture," in V. Satzewich (Ellis-Don.), Deconstructing the Nation: Immigration, Multiculturalism and Racism in 90s Canada (Toronto: Garamond, 1992), 261-275. (Exhibit B-1)

V. Satzewich, Racism and the Incorporation of Foreign Labour: Farm Labour Migration to Canada since 1945 (London: Routledge, 1991). (Exhibit B-3)

Kathryn Neilson and Innis Christie, "The Agricultural Labourer in Canada: A Legal Point of View," 2 Dalhousie Law Journal 330-368 (1975-76).

The Quest for a Reliable Workforce in the Horticulture Industry, Foreign Agricultural Resource Management Services (F.A.R.M.S.) 1995, 1.

Linder, Migrant Workers and Minimum Wages: Regulating the Exploitation of Agricultural Labour in the United States (Westview Press, 1992).

Report of the Ontario Task Force on Health and Safety in Agriculture 1985 (Exhibit W.)

Bolaria, "The Health Effects of Powerlessness: Women and Racial Minority Immigrant Workers" in Bolaria and Dickinson, (eds.), Sociology of Health Care in Canada (Toronto: Harcourt Brace, 1988), 439-459. (Exhibit X)

Irving Andre, "The Genesis and Persistence of the Commonwealth Caribbean Seasonal Agricultural Workers Program in Canada," 28 Osgoode Hall Law Journal 243-301 (1990) (Exhibit Y)

Table of Seasonal Annual Workers to Canada, 1966-1995.(Exhibit Z)

Agreement for the Employment in Canada of Seasonal Agricultural Workers from Mexico, January, 1996. ((Exhibit AA-1)

Agreement for the Employment in Canada of Commonwealth Caribbean Seasonal Agricultural Workers, January, 1996. (Exhibit AA-2)

Memorandum of Understanding Between the Government of Canada and the Government of the United Mexican States Concerning the Mexican Seasonal Agricultural Workers Program, April 27, 1995. (Exhibit AA-3)

Memorandum of Understanding Between the Government of Canada and the Government of Jamaica Concerning the Commonwealth Caribbean Seasonal Agricultural Workers Program, December 5, 1994. (Exhibit AA-4)

Employer Information Package, Foreign Agricultural Resource Management Services (F.A.R.M.S.) (Exhibit BB)

20. It is submitted that the point which CCPI intends to raise is critical, both for analogous grounds analysis in general and for the analysis of the group in question in the present case. CCPI intends to argue that particularly in the context of the present case, the analysis of characteristics of the group in question ought not to be limited to those members who fall under provincial jurisdiction and thereby exclude those who frequently work and live side by side these workers but who, on account of citizenship status, come under federal regulation. CCPI intends to argue on the basis of the evidence before the Court in this case that the nature of the disadvantage of the group and the economic, political and social marginalization experienced by its members are best understood by considering the group as a whole.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Raj Anand

Of Counsel for the Proposed Intervener
Charter Committee on Poverty Issues

SCHEDULE “A”

1. *Dunmore v. Ontario (Attorney General)* (1997), 155 D.L.R. (4th) 193 (Gen. Div.)
2. *Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1993) 101 D.L.R. (4th) 224 (N.S.C.A.)
3. *Law v. Canada*, [1999] 1 S.C.R. 497
4. *R. v. Prosper*, [1994] 3 S.C.R. 236
5. *Egan v. Canada*, [1985] 3 S.C.R. 513