Inequality and Identity at Work

Jennifer Koshan

University of Calgary

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A clinic at the University of Calgary law school in 2014 worked with unions and workers' rights groups to develop constitutional challenges to the historic exclusion of farm workers from labour and employment legislation in Alberta. After exploring arguments under sections 2(d), 7 and 15 of the Canadian Charter of Rights and Freedoms, we concluded that, based on the existing jurisprudence, the equality rights arguments under section 15 were the weakest. This article explores what is lost when we fail to recognize the identity-based harms that flow from government violations of equality rights. It considers the nature of these harms, why they may be minimized or ignored, and the consequences of ignoring those harms. These issues are examined in the context of workers' rights, and in particular those of farm workers, but the analysis is also relevant to broader contexts. The article concludes with thoughts on how the Supreme Court of Canada's approach to section 15 of the Charter should be modified in order to better capture identity-based harms.

En 2014, une clinique de la faculté de droit de l'Université de Calgary a travaillé en collaboration avec des syndicats et des groupes de défense des droits des travailleurs pour élaborer des contestations constitutionnelles à l'exclusion historique, en Alberta, des travailleurs agricoles des lois sur le travail et l'emploi. Après avoir étudié les arguments fondés sur le paragraphe 2(d) et sur les articles 7 et 15 de la Charte canadienne des droits et libertés, l'auteure conclut qu'en vertu de la jurisprudence actuelle, les arguments de droits à l'égalité invoquant l'article 15 sont les plus faibles. L'article pose la question de savoir ce qui est perdu lorsque ne sont pas reconnus les préjudices fondés sur l'identité qui résulteront de violations par le gouvernement de droits à l'égalité. Il étudie la nature des préjudices, demande pourquoi ils peuvent être minimisés ou laissés de côté, et les conséquences qui en découlent. Ces questions sont examinées dans le contexte des droits des travailleurs, en particulier des droits des travailleurs agricoles, mais l'analyse est tout aussi pertinente dans de plus vastes contextes. L'auteure conclut avec des réflexions sur la façon dont la Cour suprême du Canada applique l'article 15 de la Charte devrait être modifiée pour mieux cerner les préjudices fondés sur l'identité.

* Professor, Faculty of Law, University of Calgary. I wish to thank the constitutional clinical students for their diligent and passionate commitment to this project, and the clients for their tireless efforts to support the rights of farm workers. Thanks also to Kim Brooks for bringing together scholars interested in questions related to identity, and to the anonymous peer reviewers for their very helpful comments on an earlier version of this article.
Introduction

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Introduction

At a constitutional clinical course at the University of Calgary Faculty of Law in the winter of 2014, I worked with a group of students, unions and workers’ rights groups to develop constitutional challenges to the historic exclusion of farm workers from labour and employment legislation in Alberta.1 After exploring arguments under sections 2(d), 7 and 15 of the Charter, we concluded that, based on the existing jurisprudence, the section 15 arguments were the weakest.2


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This conclusion dovetails with other research exploring the transcendence of section 7 of the Charter over section 15 in actions challenging the harms of government (in)action. Issues involving the scope of grounds, assumptions about causation and choice, and the test for discrimination have presented barriers to claims under section 15, while broad understandings of security of the person and the principles of fundamental justice have paved the way for successful section 7 claims. The Bedford decision from late 2013 suggests a significant amount of overlap between section 15 and section 7, particularly in cases involving gross disproportionality, which focus on the adverse effects of government actions on certain individuals. Yet equality arguments were not made in Bedford or in other recent section 7 successes such as PHS Community Services. In other cases, such as Carter, section 7 arguments have been prioritized over those made under section 15. Relatively broad interpretations of section 2(d) of the Charter have also tended


4. Compare, e.g., the section 15 cases Withler v Canada (AG), 2011 SCC 12, [2011] 1 SCR 396 [Withler] (denying a claim of age discrimination in the context of pension benefits), Alberta (Aboriginal Affairs and Northern Development) v Cunningham, 2011 SCC 37, [2011] 2 SCR 670 (applying section 15(2) of the Charter to save the exclusion of some Métis persons from the receipt of benefits), and Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 SCR 567 (denying a claim of religious discrimination) to the section 7 cases Victoria (City) v Adams, 2008 BCSC 1363, 299 DLR (4th) 193 aff’d 2009 BCCA 563, 313 DLR (4th) 29 [Adams] (finding that a bylaw violated the right to security of the person for failing to permit homeless persons to sleep with overhead shelters in city parks), Canada (AG) v PHS Community Services Society, 2011 SCC 44, [2011] 3 SCR 134 [PHS Community Services] (finding that the state violated security of the person for failing to extend an exemption from the criminal law for a safe injection site), Canada (AG) v Bedford, 2013 SCC 72, [2013] 3 SCR 1101 [Bedford] (finding that criminal prohibitions on prostitution violate security of the person), and Carter v Canada (AG), 2015 SCC 5 [Carter] (finding that the criminal prohibition against assisted suicide violated s 7 of the Charter and that a decision on s 15 was unnecessary).


6. PHS Community Services, supra note 4. See also Adams, supra note 4.

7. In Carter, the appellants prioritized their s 7 claim because it included the larger group of persons desiring physician assistance even if they were not able to take their lives because of physical disability, whereas the s 15 claim focused on persons unable to take their lives because of physical disability. See Carter, supra note 4 (Oral argument, Appellant), online: Supreme Court of Canada <www.scc-csc.gc.ca/case-dossier/info/webcast-webdiffusion-eng.aspx?cas=35591>. The Court also prioritized s 7 in its reasons for decision (Carter, supra note 4 at para 93).
to overshadow discrimination claims in the context of constitutional challenges involving collective bargaining and other labour rights. ∗

This article explores what is lost when we fail to recognize identity-based harms that flow from government action or inaction. Identity-based harms can be defined as those stemming from, or failing to give due regard to, personal characteristics related to membership in historically disadvantaged groups, the sorts of harms that the guarantee of equality in section 15 of the Charter ought to protect against. It is important to consider the nature of these harms, why they may be minimized or ignored, especially when compared with those protected by other rights and freedoms, and the consequences of ignoring such harms. This article examines these questions in the context of workers’ rights, and in particular those of farm workers. Although the recently elected New Democratic Party government in Alberta has now passed amendments to include farm workers in the relevant legislation, my analysis is nevertheless germane to the challenges with identity-based claims under section 15 of the Charter more broadly. ∗

I begin by discussing cases involving the equality rights of workers decided by the Supreme Court of Canada, and consider these decisions in the context of the historic exclusion of farm workers from labour and employment legislation in Alberta. I then examine the underlying identity-based harms that section 15 is intended to protect against relative to the harms underlying other Charter rights and freedoms. I suggest reasons why the recognition of identity-based harms has been so difficult for the Court in the context of workers’ rights and argue that the failure to protect against these harms is significant. I conclude with some thoughts on how the Court’s section 15 analysis should be modified in order to better capture identity-based harms.

8. Dunmore v Ontario (AG), 2001 SCC 94, [2001] 3 SCR 1016 [Dunmore] (finding that the exclusion of farm workers from Ontario’s labour code violated s 2(d); the majority did not address s 15); Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia, [2007] 2 SCR 391, 2007 SCC 27 [Health Services] (finding that the denial of collective bargaining rights to health care workers violated s 2(d) but not s 15); Mounted Police Association of Ontario v Canada (AG), 2015 SCC 1 [Mounted Police Association of Ontario] (finding that a labour regime that denied a meaningful process of collective bargaining for RCMP members violated s 2(d) of the Charter); Saskatchewan Federation of Labour v Saskatchewan, 2015 SCC 4 [Saskatchewan Federation of Labour] (finding that denial of the right to strike for essential services workers violated s 2(d) of the Charter); but see Ontario (AG) v Fraser, 2011 SCC 20, [2011] 2 SCR 3 [Fraser] (finding that a specialized labour regime for Ontario farm workers post-Dunmore did not violate s 2(d) or s 15); Meredith v Canada (AG), 2015 SCC 2 [Meredith] (finding that wage rollbacks for RCMP members without consultation did not violate s 2(d)).

I. Discrimination against workers and section 15 of the Charter

1. The approach to discrimination generally

Although the Supreme Court of Canada’s approach to section 15 of the Charter has evolved over time, it has consistently required proof of a distinction between the claimant and others based on an enumerated or analogous ground that is discriminatory in either its purpose or effect. Analogous grounds were identified in Corbiere as those which are based on “a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity” and “characteristics... that the government has no legitimate interest in expecting us to change to receive equal treatment under the law.” Discrimination has been defined as variously involving the imposition of burdens or deprivation of benefits; the violation of essential human dignity; and the perpetuation of disadvantage, prejudice or imposition of stereotyping. It invariably involves comparative analysis, though the Court has been more flexible in its approach to comparison in recent years.

2. Discrimination against workers

In the more specific context of workers’ rights, the Supreme Court has recognized that work is a crucial component of personal identity. In the Alberta Reference, Chief Justice Dickson stated:

Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person’s employment is an essential component of his or her sense of identity, selfworth and emotional wellbeing. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person’s dignity and self-respect.

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11. Corbiere v Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203 at para 13, 173 DLR (4th) 1 [Corbiere].
15. Andrews, supra note 12 at 164; Law, supra note 13 at para 56; Withler, supra note 4 at para 63.
This passage has been cited by the Court numerous times in cases involving labour and employment matters such as mandatory retirement, damages for wrongful dismissal, and unions’ freedom of expression. However, a majority of the Court has never ruled in favour of a section 15 claim framed around the ground of occupational status. While there are claims of discrimination on other grounds that have been at least partially successful in the employment context, those tied to occupational status speak most closely to identity as a worker, and will be my focus here.

The protection of occupational status under section 15 of the Charter was first considered in Reference re Workers’ Compensation Act 1983 (Nfld). In one short paragraph, the Supreme Court unanimously dismissed the argument that mandatory coverage under workers’ compensation legislation, with a corresponding inability to sue one’s employer for damages related to workplace injuries, violated the Charter. According to the Court, “[t]he situation of the workers and dependents here is in no way analogous to those listed in s. 15(1)…[as] required to permit recourse under s. 15(1).”

The next case, Delisle v Canada (Deputy AG), was a challenge to the statutory inability of RCMP officers to form labour unions with the full range of rights extended to other groups of workers. A majority of the Court dismissed the claimant’s arguments under sections 2(b), 2(d) and 15 of the Charter. On the section 15 claim, the majority recognized that the impugned statute imposed differential treatment on Delisle, as it deprived RCMP members of a benefit available to most other public service employees. However, “professional status or employment of RCMP members” were not seen as analogous grounds under section 15,

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17. McKinney v University of Guelph, [1990] 3 SCR 229 at 300, 76 DLR (4th) 545, LaForest J.
20. See, e.g., Lavoie v Canada, 2002 SCC 23, [2002] 1 SCR 769 (with a majority finding discrimination on the basis of citizenship status in the context of requirements for employment with the federal public service, but upholding the requirements under s 1); Nova Scotia (Workers Compensation Board) v Martin, 2003 SCC 54, [2003] 2 SCR 504 (finding discrimination on the basis of disability in the context of workers compensation benefits); Newfoundland (Treasury Board) v NAPE, 2004 SCC 66, [2004] 3 SCR 381 (finding discrimination on the basis of sex in the context of the government reneging on a pay equity agreement in “fiscal crisis” legislation, but upholding the law under s 1).
22. Ibid at para 2.
23. Delisle v Canada (Deputy AG), [1999] 2 SCR 989, 176 DLR (4th) 513 [Delisle]. Although Delisle was overruled in Mounted Police Association of Ontario, supra note 8, the Court’s decision was based on s 2(d) rather than s 15. I discuss this decision below.
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as these were not “functionally immutable characteristics in a context of labour market flexibility.” 24 Furthermore, the distinction was not “suspect” as it was not of the kind that “often leads to discrimination and denial of substantive equality...in view in particular of the status of police officers in society.” 25 Nor was the distinction discriminatory, since it did not “adversely affect the appellant’s dignity” and it was not “based on a characteristic attributed stereotypically to police officers as a group.” 26 In a concurring judgment, Justice L’Heureux-Dubé agreed that the law did not violate section 15, although she framed discrimination more broadly when she stated that the law did not perpetuate the idea that “RCMP members are less worthy, valuable, or deserving of consideration than other public servants...[or] devalue or marginalize them within Canadian society.” 27

Delisle was followed two years later by Dunmore, where a majority of the Supreme Court found that the exclusion of farm workers from labour relations legislation in Ontario violated section 2(d) of the Charter. 28 Section 2(d) was interpreted to include the right not to be excluded from a protective labour relations regime where the exclusion would substantially interfere with the effective exercise of freedom of association. 29 Under section 2(d), the majority recognized the unique vulnerability of farm workers as an economically disadvantaged group, often working in isolated settings close to their employers, which meant that they could not form trade associations or have meaningful negotiations with their employers unless they had legislative protection. 30

The majority did not find it necessary to consider the section 15 claim in Dunmore, although Justice L’Heureux-Dubé did so in a concurring judgment. She found that “there is no reason why an occupational status cannot, in the right circumstances, identify a protected group,” citing the Alberta Reference, subsequent case law, and the opinions of scholars to support the notion that “employment is a fundamental aspect of an individual’s life and an essential component of identity, personal dignity,

24. Delisle, supra note 23 at para 44, Bastarache J. The Court had earlier decided that members of the Canadian Armed Forces were not a protected group under s 15 of the Charter, but this finding was not framed on the basis of occupational status: R v Généreux, [1992] 1 SCR 259, 88 DLR (4th) 100.
25. Delisle, supra note 23 at para 44.
26. Ibid at para 45.
27. Ibid at para 8.
29. Ibid at paras 25, 30. Note however that the Court was careful not to extend the scope of section 2(d) to protect collective bargaining or the right to strike—these matters were left for another day (ibid at para 68).
30. Ibid at para 41.
self-worth and emotional well-being.” The right circumstances were present in the case of agricultural workers, whose status was found to constitute an analogous ground for the purposes of section 15. Justice L’Heureux-Dubé noted that immutability of personal characteristics is not the only approach to analogous grounds under section 15 and that grounds should be protected when they relate to aspects of identity that “government has no legitimate interest in expecting claimants to change to receive equal treatment under the law.” Agricultural workers face historic disadvantage and lack political power and the government could not legitimately expect them to change their employment status to obtain equal treatment. The poor socioeconomic circumstances of agricultural workers supported the finding that they could change their occupation only at great cost and that this was not simply a matter of choice. In contrast, Justice Major, writing in dissent, found that occupational status as a farm worker was not a protected ground because farm workers were seen as a “disparate and heterogenous group” and any harm they sustained as a result of being excluded was no more than economic disadvantage.

In Baier, the Supreme Court considered Alberta legislation that restricted school employees from running for election as school trustees unless they took a leave of absence and resigned if elected. The claimants argued that the legislation violated sections 2(b) and 15. A majority of the Court held that there was no infringement of section 2(b), necessitating consideration of the section 15 argument, which was framed around occupational status as the relevant ground. This argument was rejected, with the majority indicating that there was no basis on the evidence presented to identify occupational status as an analogous ground. It noted that “[n]either the occupational status of school employees nor that of teachers have been shown to be immutable or constructively immutable characteristics,” and that neither of these groups was “a discrete and

32. Dunmore, supra note 8 at para 166.
33. Ibid.
34. Ibid at paras 168-169.
35. Ibid at para 215, adopting the reasons of Sharpe J in the Ontario Supreme Court (Dunmore v Ontario (AG)) (1997), 155 DLR (4th) 193 at 216-217, 48 CRR (2nd) 211.
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insular minority,” nor was the occupational status of school employee “a constant marker of suspect decision making or potential discrimination.”

Health Services involved British Columbia legislation that interfered with the collective bargaining rights of health care workers. A majority of the Supreme Court extended its ruling in Dunmore, finding that procedural collective bargaining rights are protected under section 2(d). The Court based this decision on the history of collective bargaining in Canada, protection of collective bargaining in the international context, and Charter values. In considering Charter values, the Court noted that collective bargaining “enhances the Charter value of equality” as it “palliate[s] the historical inequality between employers and employees.” In light of the Court’s approach to section 2(d), a number of provisions in the legislation were found to substantially interfere with collective bargaining rights, and could not be justified under section 1. It was therefore unnecessary to consider section 15, but the majority did so anyway, dismissing the claim in one paragraph. The claimants’ argument was that the legislation directly discriminated against health care workers based on the analogous grounds of employment in the health care sector and status as non-clinical workers, and that it adversely impacted the workers on the enumerated ground of sex, since non-clinical health care workers was a group composed predominantly of women. The majority held that “the differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, and not to the persons they are” and that the statute in question did not reflect “the stereotypical application of group or personal characteristics.” Health Services is the only case in which the Supreme Court considered a claim of workers’ rights under section 15 that included an adverse effects discrimination argument in

37. Ibid at para 65, Rothstein J. In a concurring judgment, LeBel, Bastarache and Abella JJ dismissed the s 2(b) argument on other grounds and gave no additional reasons on s 15. Fish J dissented on s 2(b) and did not consider s 15.
38. Health Services, supra note 8.
39. Ibid at para 39, McLachlin CJ and LeBel J.
40. Ibid at para 84.
41. Ibid at para 100.
42. Ibid at para 165. Deschamps J wrote a judgment dissenting in part on s 2(d), but agreeing with the majority’s disposition of the s 15 claim (ibid at para 170).
addition to an argument of direct discrimination based on occupational status. The Court rejected both lines of argument.

*Fraser* was the follow up case to *Dunmore*, where agricultural workers challenged the statutory regime enacted by Ontario in response to the Supreme Court’s ruling. This regime was targeted at agricultural workers and provided a less robust slate of protections than that in Ontario’s general labour relations legislation. Farm workers were granted the rights to form and belong to employees’ associations, to participate in their activities, to make representations to their employers through their associations, and to be protected against interference in the exercise of their rights. A majority of the Court dismissed the challenge under both sections 2(d) and 15. Although the Court had extended section 2(d) to protect collective bargaining rights in *Health Services*, the majority in *Fraser* found that the evidence did not establish that the new law had the effect of making it “impossible to act collectively to achieve workplace goals.” Under section 15, the majority believed the claim was premature because, on the evidentiary record before the Court, “it [had] not been established that the regime utilizes unfair stereotypes or perpetuates existing prejudice and disadvantage.”

In a concurring judgment that is very brief on this point, Justices Rothstein and Charron rejected the equality argument on the basis that occupational status as an agricultural worker had not been established as a protected characteristic on the evidence. In a different concurring judgment, Justice Deschamps suggested that the majority “conflat[ed]...
freedom of association with the right to equality,” and indicated that “[t]o redress economic inequality, it would be more faithful to the design of the Charter to open the door to the recognition of more analogous grounds under s. 15, as L’Heureux-Dubé J. proposed in Dunmore.”\(^50\) Her judgment is not particularly clear on why she was unwilling to take this approach in Fraser, though she did indicate that such a move would amount to a “sea change” in the interpretation of equality rights.\(^51\)

These six decisions suggest that the Supreme Court may be open to finding that occupational status or a narrower subcategory such as agricultural workers constitutes an analogous ground of discrimination, but there are some serious hurdles. The Court’s rejections of the analogous grounds argument to date have focused on the lack of immutability of occupational status, the disparate and heterogeneous nature of the category (as opposed to a claim involving a discrete and insular minority), and the privileged status of some claimants as workers. The idea that the law may target the type of work performed rather than workers’ identity has also led to the dismissal of claims, which appears to involve the attribution of choice to the workers and the denial of a causal link between the law and the harms they sustained.\(^52\)

Section 15 claims based on the equality rights of workers have also failed because of the reluctance of some members of the Court to see the treatment of workers as discriminatory. Depending on the prevailing test for discrimination at the time, the treatment of workers has been seen as compliant with section 15 for not adversely impacting their dignity, not relying on stereotyping, not devaluing or marginalizing workers, or only imposing economic harms.

The cases also suggest that the Court sees the section 15 identity-based arguments as secondary to the claims based on other Charter rights. In every case where it had the option, the Court looked at the other Charter arguments first, and if it was able to avoid the section 15 claim and decide the case on other grounds, that was the Court’s preference.\(^53\) This tendency

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50. Ibid at para 319.
51. Ibid. For critiques of Fraser from multiple angles, see Fay Faraday, Judy Fudge & Eric Tucker, eds, Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case (Toronto: Irwin Law, 2012).
52. See Watson Hamilton & Koshan, “Adverse Impact,” supra note 43 at 211.
53. For a critique of the Court’s tendency to conflate rights and freedoms in labour cases, see Brian Langille, “Why the Right-Freedom Distinction Matters to Labour Lawyers—And to All Canadians” (2011) 34 Dal LJ 143. But see Judy Fudge, “Labour Rights as Human Rights: Turning Slogans into Legal Claims” (2014) 37 Dal LJ 601 at 614 n 56, arguing that Langille’s approach uses “a very formal (and thin) conception of equality.” The Court’s prioritization of other Charter arguments over equality arguments is a broader issue in section 15 claims outside the context of workers’ rights. See Watson Hamilton & Koshan, “Adverse Impact,” supra note 43 at 218.
may be based on the way the parties presented their claims, but that strategy may itself have been influenced by the Court’s reticence around discrimination claims. It is telling that in the Court’s most recent labour rights decisions, the parties relied on section 2(d) alone, even though section 15 arguments based on occupational status were available.54

The section 15 outcomes in the cases discussed in this section do not seem to turn on whether the legislation at issue dealt with labour and employment rights or other rights denied to particular groups of workers. They also do not depend on whether the claim is solely one of direct discrimination based on the analogous ground of occupational status or also includes an element of adverse effects discrimination based on an enumerated ground such as sex. On the other hand, the Court’s finding in Health Services that the government targeted health care workers because of the nature of their work rather than personal attributes suggests an unwillingness to recognize identity-based treatment that is unintentional or effects-based.55

3. Discrimination against farm workers

Based on this case law, it is not surprising that our clinic concluded that a challenge under section 15 of the Charter to the exclusion of Alberta farm workers from the relevant legislation was a difficult claim.56 We explored arguments of direct discrimination based on the analogous ground of occupational status as a farm worker and adverse effects arguments based on the grounds of immigration status (because many farm workers are migrant workers and may suffer heightened and unique harms based on that status)57 and sex (because farm workers

54. See Mounted Police Association of Ontario, supra note 8 and Meredith, supra note 8 (forgoing the claim that RCMP officers were an occupational group protected by s 15); Saskatchewan Federation of Labour, supra note 8 (forgoing the claim that essential services workers were an occupational group protected by s 15). This is not to say that I believe such claims would necessarily be meritorious; the relative privilege of RCMP members and essential services workers places them further from the key purposes of s 15 than, for example, farm workers.

55. This is a widespread problem in adverse effects discrimination cases. See Watson Hamilton & Koshan, “Adverse Impact,” supra note 43.

56. The analysis in this section is based on the clinical project (see supra note 2) as well as further research and analysis conducted by the author.

are disproportionately male and because farm work and its inherent dangers may be stereotyped as work that men should be able to endure without complaint).  

The case law presents several challenges to these arguments. Fraser may leave open an equality claim based on the analogous ground of occupational status as a farm worker, if a strong evidentiary foundation could be laid about the historic and longstanding vulnerability of farm workers and the cumulative impact of their exclusion from labour and employment protections. The argument here is that section 15 should protect as analogous grounds the kinds of occupational status that have been the basis for mistreatment and devaluation of particular groups of workers historically and protect against the perpetuation of identity-based harms in those contexts.  

There are some cases where certain kinds of occupational status have been recognized as protected grounds under the Charter and human rights legislation based on this sort of reasoning. Moreover, the Supreme Court has accepted the notion of “embedded” analogous grounds, such as Aboriginality-residence, suggesting that some kinds of occupational status could be protected even if that category is not more broadly recognized as an analogous ground. However, as Fay Faraday documents, the Court ignored these sorts of arguments and the strong evidentiary record of agricultural workers’ disadvantage and marginalization in Fraser in dismissing the section 15 claim.

One basis for denying analogous grounds status to farm workers that flows from the cases discussed above is perceptions about their choice of

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58. Arguments could also be made based on disability discrimination under the Workers’ Compensation Act, supra note 1 (see Medeiros & McIntyre, supra note 2), as well as class or social condition for all the statutes. However, class and social condition are not protected grounds under the Charter and so an analogous grounds analysis would be required.

59. See Faraday, supra note 57 at 131; Pothier, supra note 31.

60. Faraday, supra note 57 at 133, citing Confédération des syndicat nationaux c Québec (PG), 2008 QCCS 5076, 177 ACWS (3d) 956 (finding status as a home child care worker to be an analogous ground). See also NWT (WCB) v Mercer, 2014 NWTCA 1, 4 WWR 301 (finding that seasonal workers were protected against discrimination on the ground of social condition in human rights legislation).

61. Corbiere, supra note 11 at para 15.

occupation. While the Supreme Court has recently called into question the extent to which “choice” should be a relevant factor in Charter claims, the fact that immutability remains a key lens for examining analogous grounds means that assumptions about choice may continue to be influential at that stage, as the Court recently confirmed in Quebec v A. However, the analysis should look more broadly at whether the aspect of identity in question is one the government has no legitimate interest in expecting the claimants to change, or has historically served as the basis for “illegitimate and demeaning” decision making. In addition to the argument that choice should not be relevant as a matter of law, many farm workers may not have a real choice of occupation in fact, due to multiple layers of vulnerability and lack of labour mobility—a condition created, in part, by the state. Yet these arguments were made in Fraser, and did not persuade the Court to recognize occupational status as a farm worker as a protected ground.

Another possible basis from the case law for rejecting the analogous ground of occupational status as a farm worker is the perceived heterogeneity of the group. Courts have considered diversity within particular groups as an obstacle to finding analogous grounds in the area of occupational status, as noted above, but also in the context of


64. See Bedford, supra note 4 at paras 86-92; Quebec v A, supra note 14 at paras 336-343, Abella J for the s 15 majority.

65. Quebec v A, supra note 14 at para 343, Abella J (noting that choice “may be an important factor in determining whether a ground of discrimination qualifies as an analogous ground.”) See also the judgment of LeBel J, where choice was a key consideration in denying the equality claim.


67. Dunmore, supra note 8 at paras 43-45, Bastarache J, for the majority; ibid at para 169, L’Heureux-Dube J, concurring. See also Quebec v A, supra note 14 at paras 317, 355 (noting that marital status was recognized as a protected ground because of the absence of choice in fact in many cases).

68. Fraser, FOR, supra note 43 at paras 140-158.

69. See the discussion of Dunmore (Major J, dissenting) and Baier, supra notes 31-37 and accompanying text.
In other cases, more narrowly framed groups living in poverty—such as “the poor who beg”—have been denied analogous grounds status, as their claims have been seen to relate to activities rather than aspects of their identity. This line of reasoning aligns with the Supreme Court’s decision in *Health Services*, where discrimination against health care workers was attributed to the work they do rather than their identity as particular kinds of workers. Farm workers could also be characterized as a heterogeneous group given that they include domestic and migrant workers, those working on small farms and large industrial operations, and so on. However, these considerations should not undermine their claim to recognition as a group deserving of analogous grounds protection. Other grounds which include elements of heterogeneity, activity, or “choice” have been protected under section 15, such as marital and citizenship status. Nevertheless, it must be recognized that barriers remain to recognizing occupational status as a farm worker as an analogous ground.

Moving beyond the issue of grounds, establishing a distinction on the basis of occupational status as a farm worker would face other hurdles in the context of some of the relevant Alberta statutes. For example, the *Workers’ Compensation Act* excludes many other industries from mandatory coverage, making the comparative element of the discrimination test difficult to overcome. Similarly, the *Occupational Health and Safety Act* has only excluded some farm and ranch workers from its scope. While

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70. See, e.g., *Tanudjaja v Canada (AG)*, 2013 ONSC 5410, 116 OR (3d) 574 [*Tanudjaja (ONSC)*], aff’d 2014 ONCA 852, 123 OR (3d) 161, leave to appeal to SCC refused, 36283 (25 June 2015), [2015] SCCA No 39 (striking a claim related to lack of adequate housing brought under ss 7, 15). On the s 15 claim, the ONSC found that the homeless were too heterogeneous a group to qualify for analogous grounds protection, distinguishing *Falkiner v Ontario (Minister of Community and Social Services)* (2002), 59 OR (3d) 481, 212 DLR (4th) 633 (CA), because receipt of social assistance was said to be more objective and easier to identify than lack of adequate housing (*Tanudjaja (ONSC)* at paras 129-137). The ONCA found both the s 7 and s 15 claims to be non-justiciable. For analysis supporting poverty as an analogous ground, see, e.g., Martha 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) 2:1 Rev Const Stud 76.

71. See, e.g., *R v Banks*, 2007 ONCA 19 at paras 98-99, 84 OR (3d) 1, leave to appeal to SCC refused, 31929 (23 August 2007) (denying a s 15 challenge to a law prohibiting “squeegeeing” and related activities). See also *Boulter v Nova Scotia Power Inc.*, 2009 NSCA 17 at paras 42-43, 307 DLR (4th) 293, leave to appeal to SCC refused, 33124 (10 September 2009) (finding that poverty did not meet the test for analogous grounds under s 15); *R v PC*, 2014 ONCA 577, 121 OR (3d) 401 (rejecting a s 15 challenge of an accused person based on being indigent).

72. See *Leckey*, supra note 66 at 459.

73. *Workers’ Compensation Act*, supra note 1, s 14(1); *Workers’ Compensation Regulation*, Alta Reg 325/2002, Schedule A.

74. *OHSA*, supra note 1, s 1(8); *Farming and Ranching Exemption Regulation*, Alta Reg 27/1995 (including operations involving the processing of food, greenhouses, mushroom and sod farms, nurseries, landscapers, and pet breeders and boarders within the scope of the *OHSA*).
this kind of “separate but equal” comparative analysis has been rejected recently by the Court in other contexts, it would still present a potential hurdle.

There is also case law denying claims of adverse effects discrimination by farm workers on the basis of race and immigration status. In Peart, the Ontario Human Rights Tribunal examined a complaint by farm workers about their exclusion from provincial legislation requiring a coroner’s inquest following fatal workplace accidents in the mining and construction industries. The tribunal found that while the exclusion drew an adverse distinction against migrant farm workers on the basis of their race and immigration status, it was not discriminatory in light of the government’s purpose for singling out mining and construction workers. The evidence showed that workers in those industries face a greater risk of workplace fatalities from a greater range of sources than migrant farm workers, and the tribunal held that the government’s targeted approach to inquests did not perpetuate stereotyping or indicate that the lives of migrant farm workers were less worthy of protection when viewed in that context.

Peart reflects the difficulty that the current test for discrimination creates, particularly when the focus is on prejudice and stereotyping. These harms of discrimination are normally intentional in nature, and place the focus of analysis on the purpose of the challenged law rather than its effects. Even within this narrow focus, however, there are some persuasive arguments that the exclusion of farm workers from labour and employment legislation does engage these harms. For example, any rationale for the exclusions based on minimizing costs for family-run farms and maintaining their unique character is arguably grounded in stereotypical assumptions about the nature of agricultural operations that do not correspond to the actual needs and circumstances of farm

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75. See, e.g., Withler, supra note 4 at paras 55-60 (rejecting a “mirror comparator” analysis under s 15 of the Charter); Moore v British Columbia (Education), 2012 SCC 61 at para 30, [2012] 3 SCR 360 (a human rights case where a “separate but equal” approach was rejected in the context of the education needs of children with disabilities). See also Peart v Ontario (Community Safety and Correctional Services), 2014 HRTO 611 [Peart], where the human rights tribunal was prepared to find a distinction even though the legislation in question was targeted at a small segment of workers and excluded many others.
76. Peart, ibid.
77. Ibid at para 288.
78. Ibid at paras 289-345.
workers employed in large industrial operations.\textsuperscript{80} The government’s historical exclusion of farm workers may also be linked to the prejudicial view that they are not worthy of the protections to which other workers are entitled, or that they are less likely to fight their exploitation because of lack of capacity, resources, and labour mobility.\textsuperscript{81} This argument was not successful in \textit{Peart}, however, even though one would have thought it particularly strong in the case of migrant farm workers.

It is possible to argue that the focus of the discrimination analysis should be on disadvantage more broadly rather than prejudice and stereotyping narrowly, and the Supreme Court seems to be moving in this direction.\textsuperscript{82} If so, the historic exclusion of farm workers from labour and employment legislation could be shown to perpetuate their historical disadvantage. The exclusions have the following effects: farm workers have limited access to minimum standards of employment; they are subject to the risks inherent in dangerous, unregulated workplaces; they are typically not entitled to compensation or rehabilitation for their injuries; and they cannot organize collectively to make their working conditions less precarious. Moreover, farm owners are correspondingly advantaged: they can set wages and hours of work that are beneficial to them, employ child labourers, require dangerous tasks of their workers without fear they will complain to regulatory bodies, avoid payment of levies for workers’ compensation, and avoid dealing with collective associations of farm workers. Alberta’s former Conservative government was also advantaged because it depended on the rural vote for its ongoing power, which was arguably a factor in maintaining the exclusions.\textsuperscript{83} Cumulatively, these harms and the corresponding privileges to farm owners and government should be seen as discriminatory towards farm workers, but much would depend on the resolution of issues related to grounds, comparison and the test for discrimination.

\textsuperscript{80} Kerry Preibisch, “Local Produce, Foreign Labor: Labor Mobility Programs and Global Trade Competitiveness in Canada” (2009) 72:3 Rural Sociology 418. See also \textit{Kapp}, supra note 14 at para 23 for a discussion of the link between stereotyping and the “correspondence factor” from \textit{Law}, supra note 13 at para 88.


\textsuperscript{82} See \textit{Quebec v A}, supra note 14 at paras 327-333, Abella J (noting for the s 15 majority that prejudice and stereotyping are just two indicia of discrimination); \textit{Taypotat}, supra note 14, Abella J (focusing on the perpetuation of arbitrary disadvantage, with no mention of prejudice and stereotyping).

\textsuperscript{83} See Bob Barnetson, “Some Animals Are More Equal than Others: The Political Economy of Farm Work in Alberta” [unpublished manuscript on file with author]. See also Faraday, supra note 57 at 137 (noting that the Court in \textit{Fraser} failed to see the corresponding benefits to government and society flowing from the coerciveness of its policies concerning farm workers).
Compared with the arguments available under section 15, the arguments available to farm workers under sections 2(d) and 7 are relatively strong. Assuming a strong evidentiary record, a section 2(d) challenge to the exclusion of farm workers from Alberta’s Labour Relations Code would meet the test from Dunmore as the exclusion substantially interferes with collective bargaining rights. Although Fraser suggested that the standard for a violation of section 2(d) may have been heightened to one of “impossibility” of achieving workplace goals, the Court recently confirmed in Mounted Police Association of Ontario that the test remains one of substantial interference. At the same time, Fraser indicates that legislators could comply with their obligation to protect freedom of association by enacting a fairly minimalist statutory regime.

Under section 7, the claims are more novel, as there are few Supreme Court decisions involving the rights to life and security of the person in the context of labour and employment legislation. Moreover, the Court has shown reluctance to include economic rights within the scope of section 7 or to interpret section 7 to impose what it sees as positive obligations on the state outside the adjudicative context.

However, based on the strong precedents in PHS Community Services, Bedford, and Carter, an argument could be made that the historic exclusion of farm workers from the hours of work and child labour protections in the Employment Standards Code and from the workplace safety protections in the Occupational Health and Safety Act violate security of the person, and perhaps the right to life as well. These exclusions have increased the health and safety risks inherent in agricultural work, resulting in greater risks of bodily injury, serious psychological stress, and possible death. Similar arguments could be made with respect to the exclusion of farm workers from the Labour Relations Code, in that the lack of possibility

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84. Mounted Police Association of Ontario, supra note 8 at paras 73-77. See also Saskatchewan Federation of Labour, supra note 8 at paras 77-78.
85. Bill 6, supra note 9, fully includes farm and ranch workers in the Labour Relations Code, supra note 1.
87. See, e.g., Gosselin v Québec (AG), 2002 SCC 84 at paras 80-83, [2002] 4 SCR 429 (with a majority finding that s 7 does not protect the right to a particular level of social assistance adequate to meet basic needs).
88. PHS Community Services, supra note 4; Bedford, supra note 4; Carter, supra note 4; Employment Standards Code, supra note 1, s 2(4); OHSA, supra note 1, s 1(5).
Inequality and Identity at Work

of union oversight has deprived farm workers of safe workplaces, and the Workers’ Compensation Act, which has excluded farmworkers from rehabilitation and other benefits in ways that have adversely impacted their health.⁹⁰ Provided a sufficient causal connection could be shown between the exclusions and the increased risks to farm worker health and safety, violations of the rights to life and security of the person could be made out.⁹¹ As for the hurdles noted above, the impugned legislation clearly involves more than economic benefits. Furthermore, the government’s only positive obligation would be to extend the underinclusive legislation to the excluded group—farm workers—which is akin to the obligation recognized in Dunmore under section 2(d). The most significant hurdle to a section 7 claim by farm workers would be the lack of adjudicative context at play, but the Court has also been receptive to extending section 7 beyond this context.⁹²

Turning to the principles of fundamental justice under section 7, the historic exclusions of farm workers from the impugned legislation could be seen as arbitrary, overbroad, and grossly disproportionate as those terms were defined in Bedford.⁹³ Specifically, the exclusions lack a connection to the overall purposes of the legislation, go further than required in protecting the rights of family and small farm owners, and have adverse effects on farm workers which vastly outweigh their objectives.

Although some of the arguments available under sections 2(d) and 7 overlap with those that apply under section 15—as the Court itself has noted⁹⁴—only the section 15 arguments truly get at the notion of “farm worker exceptionalism”: the idea that farm workers have been excluded

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⁹⁰ This argument is supported by Chaoulli v Quebec (AG), 2005 SCC 35, [2005] 1 SCR 791 [Chaoulli].
⁹¹ See Bedford, supra note 4 at paras 74-78.
⁹² See Chaoulli, supra note 90 at paras 123-124, where three out of seven justices applied s 7 outside the adjudicative context, finding that Quebec’s legislative prohibition on private health insurance violated the rights to life and security of the person.
⁹³ Bedford, supra note 4 at paras 97-123 (finding the criminal prohibitions on prostitution-related activities to engage all three principles). See also: PHS Community Services, supra note 4 at paras 129-133 (finding the government’s refusal to extend an exemption for a safe injection site to be arbitrary and grossly disproportionate); Carter, supra note 4 at paras 85-88 (finding the criminal prohibition on assisted suicide to be overbroad).
⁹⁴ See Health Services, supra note 8 at para 81, Mounted Police Association of Ontario, supra note 8 at para 58, and Saskatchewan Federation of Labour, supra note 8 at paras 53-55 (all noting the equality interests engaged by freedom of association).
because of their identity as farm workers. While Alberta has been somewhat of an outlier in terms of the breadth and depth of farm worker exclusions, exceptionalism is not restricted to this context. Farm workers in other provinces continue to be denied full protection under some labour and employment legislation, and in Alberta, domestic workers are also excluded from the relevant legislation. Perhaps not coincidentally, domestic workers are disproportionately identified by immigration status, race and sex as well.

The greater likelihood of success of the associational and security of the person arguments as compared to the identity-based arguments leads to the questions explored in the next section. To take a step back from the specific arguments related to farm workers, what is the nature of the harms protected by the relevant rights, why do the identity-based harms seem to be minimized or ignored by the courts, and what are the consequences?

II. What is lost when work based inequalities and identities are not recognized?

It is well accepted that courts are to take a purposive approach in analyzing Charter claims by focusing on the harms that different Charter rights are intended to protect against. What are the relevant harms in the context of workers’ rights?

Section 2(d) of the Charter protects both individual and collective interests. The Supreme Court has noted that “freedom of association must take into account the nature and importance of labour associations as institutions that work for the betterment of working conditions and the protection of the dignity and collective interests of workers in a...

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96. See, e.g., Tucker, “Farm Worker Exceptionalism,” supra note 95 at 34-35, noting that farm workers in Ontario continue to be excluded from some aspects of occupational health and safety and employment standards legislation. See also the Exemptions, Special Rules and Establishment of Minimum Wage Regulation, O Reg 285/01; Farming Operations Regulation, O Reg 414/05.

97. See Employment Standards Regulation, Alta Reg 14/1997, s 6 (excluding domestic workers from hours of work and overtime protections), Labour Relations Code, supra note 1, s 4(2)(f) (excluding persons employed in domestic work in private dwellings); OHSA, supra note 1, s 1(6)(ii) (excluding household servants from the scope of occupations covered by the Act).

98. See, e.g., Pothier, supra note 31 at 43; Daiva Stasiulis & Abigail B Bakan, “Negotiating Citizenship: The Case of Foreign Domestic Workers in Canada” (1997) 57 Feminist Rev 112. Class or social condition is also relevant to both groups of workers: see Stasiulis and Bakan, ibid at 112 and the discussion above at notes 58, 70.

fundamental aspect of their lives: employment." Furthermore, “human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy” are values that “are complemented and indeed, promoted” by section 2(d) of the Charter. In its most recent decisions on section 2(d), the Court described freedom of association in terms of empowering those who are vulnerable and marginalized to assert their voices and to correct imbalances of power. Since Dunmore, section 2(d) has extended beyond the mere protection against state interference to include the right to state protection of associational freedoms where that protection is necessary to the exercise of those freedoms. To frame freedom of association, as interpreted by the Court, in terms of the harms it is designed to protect against, we might say that it provides workers with a means of remedying the usual disadvantage, power imbalance, and vulnerability they face in negotiating fair terms and conditions of work. At the same time, the Court has been clear that associational rights are largely procedural in nature, protecting processes such as the formation of associations, collective bargaining, and the right to strike without guaranteeing any particular substantive outcome.

Section 7 of the Charter guarantees the rights not to be deprived of life, liberty, or security of the person contrary to the principles of fundamental justice. The right to life protects against laws and state actions that increase the risk of death. Liberty includes the right to make fundamental and inherently personal decisions free from state interference, such as where to reside, how to raise one’s children and, perhaps, one’s choice of occupation. Security of the person has been defined to include freedom from state interference with bodily integrity and personal autonomy and

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100. Dunmore, supra note 8 at para 37, citing Delisle, supra note 23 at para 6, L’Heureux-Dubé J.
101. Health Services, supra note 8 at para 81. See also Mounted Police Association of Ontario, supra note 8 at para 58, Saskatchewan Federation of Labour, supra note 8 at paras 53-55.
102. Mounted Police Association of Ontario, supra note 8 at paras 55-58; Saskatchewan Federation of Labour, supra note 8 at paras 54-57. See also United Food, supra note 19 at paras 31-32.
103. Dunmore, supra note 8 at para 41.
104. Faraday, supra note 57 at 136; Fraser, supra note 8 at para 89; Mounted Police Association of Ontario, supra note 8 at para 82.
105. See, e.g., Mounted Police Association of Ontario, supra note 8 at para 67.
106. Carter, supra note 4 at para 62, citing Charrul, supra note 90 and PHS Community Services, supra note 4. The Court in Carter declined to rule on whether the right to life also protects the right to a certain quality of life and to die with dignity.
107. Godbout v Longueuil (City), [1997] 3 SCR 844 at para 66, 152 DLR (4th) 577; B (R) v Children’s Aid Society of Metropolitan Toronto, [1995] 1 SCR 315 at para 80; R v Malmo-Levine, 2003 SCC 74 at para 85, [2003] 3 SCR 571. Liberty was not the focus of our clinic’s arguments for the inclusion of farm workers in labour and employment legislation, and to the extent that it may be seen to reinforce arguments about “choice” of occupation that undermine s 15 arguments, it may not be helpful in this context.
decision making with respect to one’s body.\textsuperscript{108} It also includes a right of access to medical treatment necessary to protecting life and health.\textsuperscript{109} Beyond physical security, the section has also been interpreted to provide freedom from serious and profound state-imposed psychological and emotional stress, including harms such as “stigmatization... loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work.”\textsuperscript{110} Although courts have been cautious about including economic rights within the scope of section 7, as I indicated above, it arguably protects workers’ rights to be free from state-imposed risks to bodily and psychological integrity, such as the exclusion from protective legislation. The principles of fundamental justice ensure that such harms are not imposed in ways that are contrary to our basic values, for example through laws that are arbitrary, overbroad or grossly disproportionate to the government’s objectives.\textsuperscript{111}

As noted above, section 15 of the Charter has been subject to varying interpretations over time, perhaps because it protects against harms which are seen as “elusive” and “more than any of the other rights and freedoms guaranteed in the Charter,” lacking in precise definition.\textsuperscript{112} In Andrews, the Supreme Court defined discrimination as the imposition of burdens or deprivation of benefits based on grounds relating to the personal characteristics of the individual or group.\textsuperscript{113} The Court also spoke about discrimination as oppression, noting that “the worst oppression will result from discriminatory measures having the force of law.”\textsuperscript{114} In contrast, equality was said to entail “the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.”\textsuperscript{115} The role of enumerated and analogous grounds under section 15 was to “limit those distinctions which are forbidden by the section to those which involve prejudice or disadvantage” as well as stereotyping.\textsuperscript{116} As stated in Turpin,

\begin{thebibliography}{116}
\bibitem{108}R v Morgentaler, [1988] 1 SCR 30 at 56, Dickson CJC [Morgentaler]; Rodriguez v British Columbia (AG), [1993] 3 SCR 519 at 587-588, 107 DLR (4th) 342, Sopinka J. These definitions of security of the person were applied in: PHS Community Services, supra note 4; Bedford, supra note 4; Carter, supra note 4.
\bibitem{109}Morgentaler, supra note 108 at 90, Beetz J; Chauli, supra note 90.
\bibitem{111}Bedford, supra note 4 at para 96.
\bibitem{112}Andrews, supra note 4 at 164.
\bibitem{113}Ibid at 174-175.
\bibitem{114}Ibid at 172.
\bibitem{115}Ibid at 171.
\bibitem{116}Ibid at 181.
\end{thebibliography}
decided a few months after Andrews, the protected grounds focus on aspects of identity linked to “social, political and legal disadvantage in our society.” Andrews and Turpin thus viewed discrimination in terms of a number of harms, including oppression, lack of due regard, prejudice, stereotyping, and disadvantage.

This definition of discrimination prevailed for some time, although differences of opinion developed amongst members of the Court, for example with respect to the degree to which government purposes should be taken into account at the discrimination stage of analysis. The Court’s next major consolidation of the test for discrimination came in Law, where it focused on “the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice.” Human dignity was said to protect a number of interests: personal autonomy and self-determination; self-respect and self-worth; physical and psychological integrity and empowerment; and to protect against the harms of oppression, marginalization, and devaluation.

In the Supreme Court’s recent section 15 decisions it has purported to return to Andrews, with a focus on discrimination as the perpetuation or imposition of prejudice or stereotyping and, sometimes, disadvantage. Critics have noted that the range of harms protected in this formulation is actually narrower than in earlier cases such as Andrews, and that a focus on stereotyping and prejudice in particular may create barriers in cases involving unintentional or effects-based discrimination. The Court addressed this critique in Quebec v A, with the section 15 minority insisting that prejudice and stereotyping are “crucial markers” of discrimination, and a majority indicating that section 15 protects against other harms,

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118. This debate was most pronounced in a trilogy of cases from 1995, where the Court was deeply divided on the question of whether discrimination related to “irrelevant personal characteristics.” See Egan v Canada, [1995] 2 SCR 513, 124 DLR (4th) 609; Miron v Trudel, [1995] 2 SCR 418, 124 DLR (4th) 693; Thibaudeau v Canada, [1995] 2 SCR 627, 124 DLR (4th) 449.
119. Law, supra note 13 at para 88.
120. Ibid at paras 42, 53.
121. Kapp, supra note 14 at paras 17, 24; Withler, supra note 4 at paras 37-39.
122. For a summary of the critiques see Bruce Ryder, “The Strange Double Life of Canadian Equality Rights” (2013) 63 SCLR (2nd) 261 at 278. See also Koshan and Watson Hamilton, “Continual Reinvention,” supra note 10 at 38-42; Margot Young, “Unequal to the Task: ‘Kapp’ing the Substantive Potential of Section 15” in Sanda Rodgers & Sheila McIntyre, eds, The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat (Markham, ON: LexisNexis Canada, 2010) 183. To the extent that this interpretation of s 15 imposes internal limits, it could be seen as similar to s 7, though s 15 has not been accorded the same leeway under s 1 that s 7 has. See Bedford, supra note 4 at para 129.
including the perpetuation of disadvantage more broadly. In its most recent section 15 decision, *Taypotat*, the Court spoke of discrimination as “arbitrary disadvantage,” thus maintaining its focus on the purpose of government actions rather than their effects on disadvantaged groups.

Commentators have also weighed in on the harms of discrimination. For example, in response to critiques of the Court’s “human dignity” jurisprudence, Denise Réaume has tried to rehabilitate that concept to include a focus on autonomy, self-determination, inherent worth, and access to dignity-constituting benefits. Sophia Moreau has contributed to the discussion by defining discrimination in terms of prejudicial and stereotypical decision making, perpetuation of oppressive power relations, denial of access to basic goods, and interference with deliberative freedoms. Colleen Sheppard posits a theory of inclusive equality that focuses on the prevention of social exclusion and marginalization. For Sheppard, equality has substantive, procedural and relational aspects: “it is critical to examine both the inequitable substantive outcomes in various social contexts as well as unfairness and exclusions in the structures, processes, relationships, and norms that constitute the institutional contexts of our daily lives.”

Moving beyond the Canadian context, Iris Marion Young described five oppressions that are relevant to a consideration of (in)equality and discrimination: exploitation, marginalization, powerlessness, cultural imperialism, and violence. Nancy Fraser has questioned whether these harms can be usefully reduced to two categories, those relating to political economy and culture, requiring remedies of redistribution and recognition.

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123. *Quebec v A*, supra note 14 at paras 169, 185, LeBel J, for the minority on this point; *ibid* at paras 327-333, Abella J, for the majority on this point.
124. *Taypotat*, supra note 14 at paras 16, 18, 20, 28, 34, Abella J [emphasis added]. The term “arbitrary disadvantage” was used only once by Justice Abella in *Quebec v A* (see supra note 14 at para 331).
127. Sophia Moreau, “What is Discrimination?” (2010) 38:2 Philosophy & Public Affairs 143 at 147 (deliberative freedoms are “freedoms to have our decisions about how to live insulated from the effects of normatively extraneous features of us”).
respectively. These categories are potentially significant in the case of workers’ rights, which primarily engage economic forms of oppression—exploitation, marginalization, and powerlessness.

To summarize, the right to equality protects against the harms of disempowerment, marginalization, exploitation, devaluation, social exclusion, prejudice, stereotyping, and disadvantage that are based on or fail to give due regard to protected grounds of identity. Although there is some overlap, particularly with respect to protection of individual autonomy, the harms that section 15 protects against are distinct from those engaged by section 7 in the sense that they are grounded in group identity. The harms encompassed by section 2(d) are less obviously distinct from those covered by section 15. However, associational rights can be seen as more process oriented than equality rights, which may require substantive (re)distribution of resources and benefits in some cases. These differences in the nature of harms, as well as the remedies they may demand, make it crucial to protect the rights of workers under section 15 in addition to sections 2(d) and 7.

The harms engaged by section 15 are all present in the context of farm workers’ historic exclusion from labour and employment legislation. They have been excluded precisely because farm workers are members of a vulnerable group that is easy to ignore, and they are unable to assert their interests due to their isolation from one another, lack of education, socio-economic disadvantage, and precarious immigration status. Whether intentionally or unintentionally, the government has devalued, excluded, exploited, and marginalized this group of workers to the corresponding advantage of farm owners, government, and society more broadly.

Why are these identity-based harms so difficult for the Court to recognize, and what are the consequences of failing to do so?


131. See Fraser, “Recognition or Redistribution?,” supra note 130 at 177-178. Exploitation is defined as exercising one’s capacities under the control of others; marginalization is the condition of expulsion from systems of labour and social life; powerlessness describes the condition of having power exercised over a person by others without having any corresponding power. See Young, Justice and the Politics of Difference, supra note 129 at 49; 53; 56; see also Fraser, “Recognition or Redistribution?,” supra note 130 at 174-175.

132. See Fraser, FOR, supra note 43 at para 133, arguing that “equality analysis provides a more complete context that illuminates why this particular group of workers is denied the law’s protection” [emphasis added].
One might posit that it is the abstract nature of the harms engaged by section 15 that makes them “elusive,” particularly up against the more concrete harms encompassed by section 7. Section 15 rights also have a collective dimension as compared with the individual rights guaranteed by section 7, with the latter being the paradigm in western liberal democracies. And deferential courts may wish to avoid imposing positive obligations on the government to rectify identity-based harms. However, section 2(d) is also a relatively abstract right with a strong collective element to it, and, as interpreted by the Supreme Court, it may lead to obligations on the part of the state beyond non-interference, though as noted above those obligations will be largely procedural. The obligations that would flow from a successful identity-based challenge to the exclusion of farm workers from labour and employment legislation would largely fall on private employers rather than on government, and would not result in the sort of cost implications to government that may cause courts to be deferential. However, this is still a redistributive consequence of recognizing farm workers’ rights under section 15, which may explain the courts’ hesitation to do so.

Another concern may relate to a floodgates type of argument, that if occupational status was protected for farm workers, it would be more difficult to deny the claims of other groups identified by occupational status or other statuses more broadly. However, recognizing other analogous

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134. For cases discussing positive obligations in the context of section 15, see, e.g., Eldridge v British Columbia (AG), [1997] 3 SCR 624, 151 DLR (4th) 577; Vriend v Alberta, [1998] 1 SCR 493, 156 DLR (4th) 385. For literature discussing the courts’ deference in this context, see, e.g., Hester A Lessard, “‘Dollars Versus [Equality] Rights’: Money and the Limits on Distributive Justice” (2012) 58 SCLR (2nd) 299; Sheila McIntyre, “Deference and Dominance: Equality Without Substance” in McIntyre & Rodgers, Diminishing Returns, supra note 63, 95.

135. See the discussion of Dunmore, supra notes 29-30 and accompanying text. See also Fraser, supra note 8, which affirms the point that s 2(d) does not require a particular model of labour relations.

136. If a government was instead seeking to protect the private sphere from the imposition of equality-based obligations, this might also be problematic. See Brenda Cossman & Judy Fudge, “Introduction: Privatization, Law and the Challenge to Feminism” in Brenda Cossman & Judy Fudge, eds, Privatization, Law and the Challenge to Feminism (Toronto: University of Toronto Press, 2002) 3 (discussing the harms of privatization strategies). See, however, Dunmore, supra note 8, where the Court found that protection of family farms was a pressing and substantial objective under s 1 of the Charter, and Quebec v A, supra note 14, where the majority held that excluding de facto spouses from support and property benefits was justified on the basis of protecting individual choices in the context of marital status.

137. Fudge argues that recognition claims have been much more successful under the Charter than redistribution claims. See Fudge, “Recognition, Redistribution and Imperialism,” supra note 133 at 341, 349.
grounds, particularly embedded grounds such as Aboriginality-residence, has not resulted in a flood of claims to open up the broader underlying ground.\textsuperscript{138} Attaching analogous grounds status to those aspects of identity that relate to the underlying harms of discrimination—oppression, marginalization, devaluation, exploitation, and disadvantage—would ensure that section 15 remains focused on its purpose and does not extend to protecting the interests of relatively privileged groups of workers.\textsuperscript{139}

There is, however, a possible tension inherent in the analogous grounds requirement that Nancy Fraser’s work illuminates.\textsuperscript{140} Including a group holding particular personal characteristics within section 15 is to recognize the significance of their identity, particularly in terms of the impact of government actions. However, farm workers seek this sort of recognition primarily as a means of trying to eradicate the differences in their treatment as compared to other workers. This would normally be true of other workers seeking recognition under section 15 as well—their occupational status is relevant only to the extent that they are seeking the same benefits accorded to other workers. The same can be said of some other groups seeking recognition of their status under section 15, such as the poor. To recognize occupational status or poverty as an analogous ground is significant for the purpose of remedying the inequality attached to that status through redistribution. The analogous grounds component of the analysis, focused on recognition as it is, may create a conceptual tension for courts in cases claiming redistributive remedies.\textsuperscript{141} It is also possible that courts are simply seeking to avoid redistribution regardless of any tensions with recognition rights.

Finally, it could be contended that recognition of farm worker rights under section 15 is not necessary, as their interests are adequately protected under sections 2(d) and 7. As I have argued, however, there are key differences in the harms protected by these sections and the remedies required to eradicate them. To focus on sections 2(d) and 7 without recognizing the unique harms of discrimination would reduce section 15 to an equal protection clause rather than a freestanding guarantee of equality rights. More pragmatically, in the case of farm workers, section

\begin{itemize}
\item \textsuperscript{138} See, e.g., Siemens v Manitoba (AG), 2003 SCC 3, [2003] 1 SCR 6 (confirming that residence is not an analogous ground).
\item \textsuperscript{139} See Fraser, FOR, supra note 43 at para 153.
\item \textsuperscript{140} See supra note 130 and accompanying text. See also Fudge, “Recognition, Redistribution and Imperialism,” supra note 133 at 350.
\item \textsuperscript{141} Redistributive remedies are permitted under the Charter, but typically only where the government has decided to accord a particular benefit and has been underinclusive in doing so. See, e.g., Schachter v Canada, [1992] 2 SCR 679, 93 DLR (4th) 1.
\end{itemize}
2(d) and section 7 arguments are only available or are stronger for some legislative exclusions, whereas section 15 engages all of the exclusions and their cumulative impact. Beyond the specific context of farm workers’ rights, it is crucial that we recognize discrimination as a significant harm worthy of protection in its own right, given the important reconciliatory and remedial functions that section 15 can perform in addressing historical identity-based harms perpetrated against workers and other disadvantaged groups.

Conclusion

I have endeavoured to show why the protection of identity-based harms is important and why courts may be struggling with such claims in the context of farm workers’ rights and more broadly. It must be recognized that equality rights claims will not solve all social problems, take ongoing work to implement effectively, and may create unintended consequences.142 Nevertheless, they remain a key site of reform, raising the question of how courts might modify section 15 analysis in order to better capture the harms of inequality.

First, there must be a greater willingness to recognize certain forms of status as analogous grounds under section 15. Courts should not be deterred by the potential heterogeneity of groups such as farm workers or the possible mutability or “choices” behind their characteristics. Instead, they should focus on how the underlying harms of discrimination are engaged by some identity-based characteristics, including some categories of occupational status.143 This broader approach to analogous grounds would be consistent with the current recognition of other status-based grounds, and it would permit the recognition of other forms of status such as poverty.144 It would also encourage recognition of the sort of intersecting grounds of identity that may be at play in the case of some workers, such as race, immigration status, and gender.145 Even if the recognition of some status-based grounds is significant primarily for the purposes of attenuating group differences,


143. The Supreme Court has recognized grounds based on historical disadvantage, vulnerability and powerlessness in previous cases. See Sealy-Harrington, supra note 66 at para 48. See also Pothier, supra note 31 at 41; Colleen Sheppard, “Grounds of Discrimination: Towards an Inclusive and Contextual Approach” (2001) 80 Can Bar Rev 893 at 908.

144. On the other hand, marital and citizenship status are legal forms of status (see Leckey, supra note 66 at 459), whereas occupational status and poverty are forms of socio-economic status. This may raise the issues regarding recognition versus redistribution rights noted above (supra notes 140-141 and accompanying text), though marital and citizenship claims may also involve the redistribution of benefits.

145. See Faraday, supra note 57 at 135; Pothier, supra note 31 at 43.
for example by extending benefits to excluded groups, this is an accepted aim of section 15 analysis.146

Second, analysis of whether section 15 is violated must account for a broader range of harms, in keeping with the purposive interpretation required of all Charter rights and freedoms. As recognized in Quebec v A and as reflected in the work of the commentators discussed in Part II, the harms of inequality go beyond stereotyping, prejudice, and arbitrary disadvantage. A narrow focus on those harms may fail to capture the kinds of inequalities that farm workers, other groups of workers and other socio-economically constituted groups are subjected to. A broader approach to the harms of discrimination would also better recognize claims of adverse effects discrimination, where the government’s actions are rarely intentional and therefore difficult to characterize in terms of prejudice, stereotyping, or arbitrariness.147

Finally, to the extent that courts’ reluctance to accord recognition and remediation to identity-based harms stems from deference to governments because of concerns about the costs of redistribution, the solution is a continued critique of such deference. As the Supreme Court itself recently stated in the labour rights context, “If the touchstone of Charter compliance is deference, what is the point of judicial scrutiny?”148

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146. See, e.g., Miron v Trudel, supra note 118 (recognizing marital status so as to extend benefits).
148. Saskatchewan Federation of Labour, supra note 8 at para 76, Abella J, for the majority (critiquing the dissenting justices’ refusal to include the right to strike within the scope of s 2(d)).