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Court of Appeal Considers Scope of Right to Collectively Bargain

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In a decision released on November 17, 2008, the Ontario Court of Appeal considered the scope of the constitutional right of employees to collectively bargain. The Court found that, at a minimum, the right consists of:

- a statutory duty to bargain in good faith;
- statutory recognition of the principles of exclusivity and majoritarianism; and
- a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements

The decision, *Fraser v. Ontario (Attorney General)*, 2008 ONCA 760 (CanLII), involved a challenge to the constitutionality of the *Agricultural Employees Protection Act, 2002* ("*AEPA*"). The *AEPA* had its genesis in an earlier constitutional challenge to the exclusion of agricultural workers from the Ontario *Labour Relations Act, 1995* ("*LRA*"). In that earlier case, *Dunmore v. Ontario*, the Supreme Court of Canada held that the exclusion of agricultural workers from the *LRA* violated their constitutional right to organize, which was protected by the freedom of association guaranteed in s. 2(d) of the *Charter of Rights and Freedoms*.

The *Dunmore* decision did not go so far as to find that the freedom of association includes a right to collectively bargain, and there was a longstanding trilogy of cases from the Supreme Court that had held that it did not. However, that all changed in the 2007 *BC Health Services* decision of the Supreme Court in which it overturned the trilogy and found that the freedom of association does indeed include a right to collectively bargain.

In a judgment written by the Chief Justice of Ontario, the Court of Appeal applied the *BC Health Services* decision to the *AEPA*. As noted above, the Court of Appeal found that the right to collectively bargain requires at least three components:

- a statutory duty to bargain in good faith;
- statutory recognition of the principles of exclusivity and majoritarianism; and
- a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements

The *AEPA*, modeled on the earlier *Dunmore* decision, had none of these components, and was therefore found to be unconstitutional as violating the freedom of association, and could not be

saved under section 1 of the *Charter*. (A parallel challenge under section 15 – the *Charter*'s equality provision – was rejected by the Court.) The Ontario Legislature has been given 12 months to bring the law into compliance with the *Charter*, failing which the *AEPA* will become invalid.

Obviously, for employers with farming operations that have previously been exempt from the *LRA*, the *Fraser* decision is highly significant because, unless it is successfully appealed, it means that some segment of farm workers in Ontario will soon have significant organizing and collective bargaining rights.

Furthermore, all employers should take note of the three components that the Court of Appeal has said are a necessary part of the right to collectively bargain. The recognition of a duty to bargain in good faith is not surprising and was a significant topic of discussion in *BC Health Services*. The second component is a strong affirmation of the Canadian model of collective bargaining premised on a single bargaining agent for a group of employees, the majority of whom have signaled their support of the agent.

The third component is perhaps the most interesting. There has been much speculation as to whether courts would interpret the *Charter's* freedom of association provision as including a "right to strike". In *Fraser*, the Court of Appeal has said that there must be a statutory mechanism for resolving bargaining impasses, which suggests that the dispute-resolution mechanism does not necessarily have to be a strike-lockout model, but could be accomplished by interest arbitration, final offer selection or other means. The third component also requires a mechanism for resolving disputes over the interpretation of collective agreements, which is usually accomplished via a grievance-arbitration procedure (a mandatory requirement in the *LRA*).

Your regular Hicks Morley lawyer would be pleased to discuss with you the *Fraser* decision and how it might affect your organization.
