FTR Now

The *Fraser* Decision: The Supreme Court of Canada Revisits Scope of *Charter*-Protected Collective Bargaining Rights

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On April 29, 2011, the Supreme Court of Canada issued its long-awaited judgement in the case of *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 ("*Fraser*"). In a decision that has surprised many, the Court found, by an 8-1 margin, that the *Agricultural Employees' Protection Act, 2002* ("*AEPA*") is constitutional. Moreover, while the majority of the Court confirmed that the protection afforded to "freedom of association" in section 2(d) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") extends to collective bargaining, the Court seems to have restricted the scope of that protection.

In this *FTR Now*, we will consider the *Fraser* decision and what it means for employers in Canada.

BACKGROUND

The *Fraser* decision has its genesis in a challenge by Ontario farm workers to their exclusion from the Ontario *Labour Relations Act, 1995*, and the enactment of the *AEPA*, which provides more limited associational protections for agricultural workers.

HISTORICAL OVERVIEW PRIOR TO *HEALTH SERVICES*

Historically, agricultural workers in Ontario have been excluded from the *Labour Relations Act*. In 1994, the government of then-Premier Bob Rae passed the *Agricultural Labour Relations Act, 1994*, which established a labour relations regime for the agricultural industry. This statute was repealed the following year, following the election of the Progressive Conservative government headed by then-Premier Mike Harris. This returned matters to the prior status quo, and agricultural workers were again excluded from the *LRA* and any other form of labour relations legislation.

Following the repeal of the *Agricultural Labour Relations Act, 1994*, a group of farm workers, in conjunction with the United Food and Commercial Workers Union Canada ("UFCW"), brought a *Charter* challenge to the *LRA* exclusion. This challenge was ultimately heard by the Supreme Court of Canada, and in the 2001 decision of *Dunmore v. Ontario*, the Supreme Court held that the exclusion of agricultural workers from the *LRA* violated their constitutional right to organise, which was protected by the freedom of association guaranteed in section 2(d) of the *Charter*.

The *Agricultural Employees' Protection Act, 2002* was enacted in direct response to the *Dunmore*

decision, and was intended to give content to the minimum constitutional right to organise recognized by the Supreme Court in that case. The *AEPA* extends five basic rights to agricultural workers:

1. The right to form or join an employees' association.
2. The right to participate in the lawful activities of an employees' association.
3. The right to assemble.
4. The right to make representations to their employers, through an employees' association, respecting the terms and conditions of their employment.
5. The right to protection against interference, coercion and discrimination in the exercise of their rights.

Moreover, when employees make representations to their employers, they may do so orally or in writing. If the representations are made orally, the employer must "listen to the representations" (s. 5(6)). If made in writing, the employer must "read them…[and]… give the association a written acknowledgment that the employer has read them" (ss. 5(6) and (7)).

The UFCW organised a couple of groups of agricultural workers under the *AEPA*, but, following unsuccessful attempts at negotiations with their employers, brought a new *Charter* challenge in conjunction with Mr. Fraser and various others. At the first instance, the Ontario Superior Court of Justice upheld the *AEPA* as it complied with the requirements of the *Dunmore* decision. This decision was appealed, but before the appeal was heard by the Ontario Court of Appeal, a significant event occurred.

THE *HEALTH SERVICES* DECISION

The significant event was the 2007 *Health Services* decision of the Supreme Court of Canada in which the Court found that "freedom of association" includes a right to collectively bargain as a protected constitutional right. In reaching this decision, the Supreme Court overturned a longstanding trilogy of its own prior cases which had found otherwise.

The language of the 2007 *Health Services* decision was very broad, and the newly recognized right was framed as "the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining".

It was found to guarantee to employees the right to unite, present their demands collectively, and engage in discussions with the employer in an attempt to achieve their objectives, and obliged the employer to meet with employees and discuss their demands.

While the right to collectively bargain was said not to guarantee a particular process of collective bargaining nor the necessary achievement of employees' objectives, the majority in *Health Services* imposed, as a matter of constitutional law, an obligation on employers to bargain in good

faith (a term of art in the labour law context). This aspect to the *Health Services* decision was controversial from the outset as it was not at all clear how the freedom of association could impose obligations on others to bargain with those who had chosen to associate.

THE ONTARIO COURT OF APPEAL DECISION IN *FRASER*

In late 2008, the Ontario Court of Appeal released its decision in the appeal of *Fraser*. Relying on the *Health Services* decision, the Court of Appeal found that, for the constitutional right of employees to collectively bargain to be meaningful, at a minimum the right must consist 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

It was this decision that was overturned by the Supreme Court on April 29.

THE SUPREME COURT OF CANADA DECISION IN *FRASER*

As noted at the outset, the Supreme Court overturned the Ontario Court of Appeal decision by an 8-1 margin. However, there were four sets of reasons issued in the Supreme Court's decision, and they reveal a significant degree of disagreement within the Court over the scope of freedom of association.

THE MAJORITY REASONS ON FREEDOM OF ASSOCIATION

Chief Justice McLachlin and Mr. Justice LeBel wrote the reasons on behalf of the five-member majority. Thus, these reasons will stand as the decision of the Court.

The majority reasons clearly reaffirm the basic conclusion of *Health Services* that "freedom of association" encompasses a right to collectively bargain. However, they do so in words that seem narrower than the language of the *Health Services* decision itself:

[40] The majority of the Court in *Health Services* affirmed that bargaining activities protected by s. 2(d) in the labour relations context include good faith bargaining on important workplace issues (para. 94; see also paras. 93, 130, 135). **This is not limited to a mere right to make representations to one's employer, but requires the employer to engage in a process of consideration and discussion to have them considered by the employer.** …

…

[51] In our view, the majority decision in *Health Services* should be interpreted as holding what it

repeatedly states: that workers have a constitutional right to make collective representations and to have their collective representations considered in good faith. (Emphasis added.)

Similarly, the majority reaffirmed the earlier finding that “freedom of association” does not give a right to a particular model of collective bargaining, including the “Wagner” model that is enshrined in the *LRA* and almost all labour relations statutes in Canada and the United States:

[54] Our colleague [Rothstein J.] appears to interpret *Health Services* as establishing directly or indirectly a Wagner model of labour relations. The actual holding of *Health Services*, as discussed above, was more modest. ***Health Services* affirms a derivative right to collective bargaining, understood in the sense of a process that allows employees to make representations and have them considered in good faith by employers, who in turn must engage in a process of meaningful discussion**. … No particular bargaining model is required. (Emphasis added.)

Thus, the majority concluded that the Ontario Court of Appeal was incorrect in finding that a meaningful good faith bargaining right required the importation of Wagner model notions of exclusivity and majoritarianism or a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of any collective agreement arrived at.

Rather, the majority found that the provisions of the *AEPA* satisfied the collective bargaining requirements first identified in *Health Services*. In so doing, the majority implied into the *AEPA* a requirement on employers not only to “listen” or “read” the representations (which is all that the statute explicitly provides), but also a requirement to “consider [the] representations in good faith”.

The majority did not explicitly state what this obligation would entail, but presumably it would entail at least some requirement to “discuss” the representations, given the majority’s earlier comments on the scope of the *Charter*’s right to collectively bargain.

Finally, the majority held that it was premature to determine whether the enforcement mechanisms of the *AEPA* are insufficient to ensure that meaningful consideration is given by employers to the employees’ representations, and it encouraged the Agriculture, Food and Rural Affairs Appeal Tribunal to “interpret its powers, in accordance with its mandate, purposively, in an effective and meaningful way.”

THE CONCURRING REASONS

There were two sets of concurring reasons, agreeing in the result, but for very different reasons.

First, Mr. Justice Rothstein, writing for himself and Madame Justice Charron, strongly advocated for the Supreme Court to overturn the earlier *Health Services* decision. In lengthy and compelling reasons, Rothstein J. argued that *Health Services* had incorrectly expanded the scope of freedom of association, which should be significantly more limited:

[125] In my view, s. 2(d) protects the liberty of individuals to associate and engage in associational activities. Therefore, s. 2(d) protects the freedom of workers to form self-directed employee associations in an attempt to improve wages and working conditions. What s. 2(d) does not do, however, is impose duties on others, such as the duty to bargain in good faith on employers.

In the view of Rothstein J., the question of which particular labour relations regime should apply, and what mutual rights and obligations it should contain, are matters best left to the Legislature, which has been the traditional position of the courts.

Madame Justice Deschamps wrote for herself, and would have expressly narrowed the finding of *Health Services* to its particular facts. In her view, the ambit of freedom of association in the employment context should be limited to what was set out in the 2001 *Dunmore* case.

THE DISSENTING REASONS

Madame Justice Abella dissented, and would have upheld the decision of the Ontario Court of Appeal. In her view, *Health Services* created “a completely different jurisprudential universe”. Moreover, she would have found that the *AEPA* did not include any obligation on the employer to respond; thus, it could not satisfy the good faith bargaining obligations imposed by the *Charter*. In her view, the Ontario Court of Appeal correctly identified the minimum constitutional requirements needed to ensure meaningful collective bargaining.

SECTION 15 OF THE *CHARTER*

Somewhat lost in the *Fraser* decision was the Court’s more limited, yet potentially significant, discussion of section 15 of the *Charter*. Section 15 is the *Charter*’s equality rights provision, and extends its protections to a number of listed and analogous grounds. Traditionally, employment status has not been found to be an analogous ground for section 15 purposes.

On its face, the *Fraser* decision does not change that result, and the section 15 claim was dismissed. However, it is interesting to note that, rather than dismissing the section 15 claim on the basis that employment status is not an analogous ground, the majority found that the claim was “premature”. Moreover, Madame Justice Deschamps strongly suggested that the approach to section 15 should be expanded to cover claims such as the one being made in this case.

Thus, while it remains the case for the time being that employment status is not an analogous ground for section 15 of the *Charter*, the Court’s handling of the issue suggests that this may be an area for future argument.

LESSONS FOR EMPLOYERS

What lessons can be drawn from the *Fraser* decision? Probably the one undisputed lesson is that

the Supreme Court continues to struggle with the ambit of freedom of association in the employment context. While the majority's decision will govern for the present, employers can expect that the issue will likely be revisited at some point in the future.

EMPLOYERS IN THE AGRICULTURE INDUSTRY

For employers in the agricultural industry in Ontario, the most immediate result is that agricultural workers remain excluded from the *LRA* and its detailed obligations relating to collective bargaining. Thus, the sector will not be subject to a full Wagner model of labour relations for the foreseeable future.

Having said that, agricultural workers will be entitled to organise under the *AEPA*. Where they do so, and make representations to their employers respecting terms and conditions of employment, the employers will be obligated to consider those representations in good faith. This likely extends to having "discussions" with the representatives of the employees.

The key, and currently unanswered, question for agricultural employers is what is the full ambit of good faith consideration of the representations. Will this be found to be something akin to actual negotiations, requiring good faith efforts to reach an actual agreement? The *Fraser* judgement does not shed much light on this fundamental question, and appears to leave it to the Tribunal to develop through its decisions enforcing the statute. Thus, agricultural employers face a significant degree of uncertainty and ambiguity in what is expected of them under the *AEPA*.

OTHER PRIVATE SECTOR EMPLOYERS

For other private sector employers, the *Fraser* decision will have less immediate ramifications because these employers, if unionized, are already subject to the good faith bargaining requirements of the *LRA*. Moreover, in the private sector, employees wishing to unionize will still be able to avail themselves of the certification process of the *LRA*.

The *Fraser* decision leaves other important matters in a state of significant uncertainty. For example, there has been significant debate as to whether "freedom of association" protects a right to strike. What, then, is the effect of the Supreme Court overturning the Ontario Court of Appeal's finding that a meaningful protection for collective bargaining must include a statutory enforcement mechanism? It certainly suggests that the government need not choose any particular form of enforcement mechanism, thereby weakening the argument for constitutional protection of strike action.

A second key issue is the status of existing exemptions found in the *LRA* or other labour relations statutes across the country. Since the Supreme Court has reaffirmed a constitutional right for "workers…to make collective representations and to have their collective representations considered in good faith" by their employers, can there be any justification for excluding any

categories of employee from having at least minimal access to collective representational rights? This is another important question that remains open following *Fraser*.

IMPLICATIONS FOR THE GOVERNMENT AS EMPLOYER AND AS LEGISLATOR

The Supreme Court's decision reaffirms that the Government, as employer, will have to ensure that it extends a certain degree of good faith bargaining rights to its employees. The Government will have a further question as to the exclusion of categories of employees from collective bargaining or other forms of collective representation – a decision that could be challenged directly under the *Charter*.

With respect to legislating in the labour relations field more generally, the *Fraser* decision continues to impose limits on governments, and may reinforce the need to extend some form of collective representation rights to other groups of employees. However, the *Fraser* decision should lay to rest the debate that governments are restricted to a Wagner model of labour relations, and should signal that governments are permitted to tailor their labour relations regimes.

Perhaps the most interesting question following *Fraser* is its effect on government attempts to control public costs through the imposition of limits on existing and future collective agreements (as was recently done in the non-union broader public sector under Ontario's Bill 16 wage restraint legislation).

While, on the one hand, the majority of the Court upheld the *Health Services* decision (suggesting that such attempts would be difficult to justify), on the other hand, the *Fraser* decision appears to pull back from some of the stronger statements in *Health Services*. This tension is heightened by the very different nature of the underlying disputes in the two cases – one dealing with collective bargaining and the other with representation rights. Nevertheless, the *Fraser* decision suggests that the question of the government's ability to control public costs through legislation is not foreclosed.

If you would like to discuss what the *Fraser* decision may mean for your organisation, please contact your regular Hicks Morley lawyer.
