Heenan Blaikie LLP

Labour & Employment in the News

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LABOUR & EMPLOYMENT IN THE NEWS

Ontario v. Fraser – Supreme Court of Canada Allows the Appeal

This morning, the Supreme Court of Canada released its decision in *Ontario (Attorney General) v. Fraser* ("*Fraser*") concerning the extent of the constitutional protection of collective bargaining for Ontario agricultural workers under section 2(*d*) of the *Canadian Charter of Rights and Freedoms* ("*Charter*").

The Supreme Court determined that the Ontario Court of Appeal's decision in *Fraser v. Ontario (Attorney General)*, 2008 ONCA 760 should be overturned on the basis that the Court of Appeal seriously overstated the scope of collective bargaining rights under section 2(*d*). As a result, the appeal brought by the Attorney General of Ontario, in which the Ontario Federation of Agriculture and numerous other organizations intervened, has been **allowed** and the *Agricultural Employees Protection Act, 2002* ("*AEPA*") has been found to satisfy constitutional requirements.

Fraser is clearly one of the most significant labour and constitutional decisions in Canadian history.

We will be providing a more detailed analysis of the Supreme Court's decision and its implications for Canadian employers later today.

BACKGROUNDER: THE ONTARIO COURT OF APPEAL'S DECISION IN *FRASER V. ONTARIO*

In its 2008 decision, the Ontario Court of Appeal determined that the exclusion of agricultural workers from Ontario's *Labour Relations Act* ("*LRA*") and their inclusion in a separate statutory regime, the *AEPA*, was unconstitutional because it failed to provide adequate statutory protections to allow these workers to engage in collective bargaining. The Court of Appeal found that while the *AEPA* allowed workers to form or join employee associations (including unions) and to make representations to their employers regarding their employment, unlike the *LRA*, it did not compel employers to respond to and bargain with employees, did not regulate labour disputes, and did not limit representation rights to a single association or union per group of employees.

The Ontario Court of Appeal identified four protections that the Legislature was required to enact to enable agricultural workers to exercise their right to bargain collectively:

- A duty to bargain in good faith;
- A requirement that employee representatives be selected based on the principles of majoritarianism and exclusivity;
- A mechanism for resolving labour disputes (i.e., strikes and lockouts);
- A mechanism for resolving disputes regarding the interpretation and administration of collective agreements.

While the Court of Appeal was not entirely clear in this regard, it appeared to suggest that the constitutional right of collective bargaining in section 2(*d*) of the *Charter* generally requires statutory protection of the above-noted features.

At the time the Court of Appeal's decision was released, many observers commented that it may be in conflict with the Supreme Court of Canada's 2007 finding in the *B.C. Health Services* case that the constitutional protection for collective bargaining does **not** guarantee a particular model of labour relations.

The Supreme Court of Canada heard the appeal in *Fraser v. Ontario* in December 2009 and the matter has been under reserve since that time.■

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