Heenan Blaikie LLP

Labour & Employment in the News

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Ontario v. Fraser - The Supreme Court of Canada Significantly Narrows the Scope of the Constitutional Protection of Collective Bargaining

Earlier today, the Supreme Court of Canada released a landmark ruling in *Ontario (Attorney General) v. Fraser,* 2011 SCC 20 ("*Fraser*"), concluding that Ontario's *Agricultural Employees Protection Act,* 2002 ("*AEPA*") is constitutional. The Court rejected the Ontario Court of Appeal's position in *Fraser v. Ontario (Attorney General),* 2008 ONCA 760 that section 2(d) of the Charter requires the enactment of significant additional statutory protections for agricultural workers.

In fact, the Supreme Court's majority decision, written by Chief Justice McLachlin and Justice LeBel, determined that the Court of Appeal had significantly overstated the scope of collective bargaining rights that are protected by the guarantee of freedom of association in section *2(d)*. Based on a much narrower approach to collective bargaining under the *Charter,* the majority concluded that the *AEPA* satisfies the applicable constitutional requirements because it provides agricultural workers in Ontario with a meaningful process by which they can pursue workplace goals.

Justices Rothstein and Charron concurred in the result reached by the majority, but for quite different reasons. They would have reversed the Supreme Court's earlier decision in *BC Health Services* on the grounds that *BC Health Services* was wrongly decided and that the majority decision maintained an unworkable distinction between the process of collective bargaining and collective bargaining outcomes. It would appear that the door has now been opened to a further narrowing, or possibly even a complete rejection, of the constitutional protection afforded to collective bargaining in *BC Health Services.*

THE IMPLICATIONS OF THE *FRASER* DECISION

The Supreme Court's decision in *Fraser* represents a significant rethinking of recent developments in Canadian labour and constitutional law, most notably in relation to governments' obligations to guarantee a process of collective bargaining to employees. *Fraser* significantly clarifies and narrows the protection afforded to collective bargaining under section *2(d)* of the *Charter,* and confirms that legislators have considerable latitude in determining the labour relations provisions and schemes that will apply to particular industries and occupations.

In rejecting the expansive constitutional approach to collective bargaining that was adopted by the Ontario Court of Appeal, the Supreme Court also appears to be putting a brake on the constitutionalization of the current "Wagner Act" model of Canadian labour law. This process, which began in *Dunmore* and was seemingly accelerated in *BC Health Services,* may now be coming to an end.

Three aspects of the Supreme Court's decision in Fraser are especially notable.

1) NARROWING *BC HEALTH SERVICES*

The Fraser decision clarifies the 2007 ruling in *BC Health Services*, where the Supreme Court first held that section *2(d)* of the *Charter* guarantees a right to a process of collective bargaining. In fact, the Supreme Court's decision in *Fraser* must be viewed as a significant retrenchment from the broad reasoning in *BC Health Services.* The Supreme Court emphasized in *Fraser* that section *2(d)* only requires that employee associations be able to participate in a meaningful workplace process with an employer, which includes the right to make representations to the employer and to have those representations "considered by the employer in good faith." In the Supreme Court's words, only legislation that "makes good faith resolution of workplace issues between employees and their employer effectively impossible" will violate section *2(d)*. This characterization of section *2(d)* is considerably narrower than the view taken in *BC Health Services.*

2) NO LABOUR RELATIONS MODEL IS CONSTITUTIONALLY REQUIRED

Also notable in *Fraser* is the Supreme Court's strong rejection of the Ontario Court of Appeal's determination that *BC Health Services* requires lawmakers to enact a particular labour relations model or specific statutory requirements in order to comply with section *2(d)*. The Supreme Court considered the Court of Appeal's decision to be a serious overstatement of the right to a process of collective bargaining as set out in *BC Health Services*. In fact, the Supreme Court went so far as to state that the Court of Appeal's finding that certain aspects of Canada's labour relations system are constitutionally required by section *2(d)* was "at odds" with the reasoning in *BC Health Services*. Hence, it is now clear from Fraser that section *2(d)* of the *Charter* does not require the enactment of a particular model of industrial relations or a particular method of collective bargaining.

3) *BC HEALTH SERVICES* IN QUESTION

Perhaps the most surprising aspect of the *Fraser* decision, and also the most relevant for the employer community looking ahead, is that the divisions amongst the Supreme Court justices were not focused on the central issue in dispute, namely the constitutionality of the *AEPA*. In fact, eight of the Supreme Court's nine judges had little difficulty concluding that the *AEPA* does not violate section *2(d)*.

Instead, both the majority decision and the concurring reasons of Justices Rothstein and Charron focus squarely on the issue of whether the ruling in *BC Health Services* should be reversed. Justice Rothstein argues strongly in favour of such a reversal, relying in particular on academic commentary that was highly critical of *BC Health Services*. A substantial portion of the majority decision is directed toward rebutting Justice Rothstein's arguments. Notably, much of this rebuttal relies on a narrow interpretation of *BC Health Services*, thereby permitting the majority to declare that the defects identified by Justice Rothstein are not, in fact, present. Moreover, the majority makes two assertions that suggest that the reversal of *BC Health Services* could be on the horizon: (1) the majority states that it is too soon to declare that *BC Health Services* is an unworkable doctrine, as argued by Justice Rothstein; and (2) the majority argues that it would be inappropriate to reverse *BC Health Services* because none of the parties and interveners expressly sought this result.

The Supreme Court's preoccupation in *Fraser* with the continuing validity of *BC Health Services* is telling. The clear division in *Fraser* between the majority (who adopted a narrow view of *BC Health Services*) and concurring justices (who sought to reverse *BC Health Services*) suggests that the constitutional right to collective bargaining may now be hanging by a thread.

While the Supreme Court reached a clear consensus that the Ontario Court of Appeal's interpretation of *BC Health Services* went much too far in *Fraser*, there is no consensus regarding the best way forward. Far from settling the issue of the scope of the constitutional protection of collective bargaining, *Fraser* opens the door to a second wave of constitutional litigation in which *BC Health Services* could ultimately be reversed.■

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