



***Ontario (Attorney General) v. Fraser*, 2011 SCC 20**
A Brief Comment – Patrick Nugent

On Friday April 29th the Supreme Court of Canada delivered its long-awaited decision in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20. This appeal was argued in December 2009 and was the Supreme Court’s first opportunity to provide some indication of what it meant in its 2007 decision in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27. It was in *Health Services* that the Supreme Court held that not only did freedom of association protect the right to come together in an association or union, but that the right to bargain collectively was also protected.

At issue in the *Fraser* decision was Ontario’s *Agricultural Employees Protection Act*. The *AEPA* provided limited provisions for agricultural workers to come together and present certain workplace bargaining positions to employers. The *AEPA* was enacted in response to the Supreme Court’s 2001 decision in *Dunmore*. *Dunmore* concerned the fact that the Ontario Labour Relations Code excluded agricultural workers from access to its provisions. The Supreme Court in *Dunmore* held that because the effect of this exclusion was to prevent agricultural workers from organizing at all, the employees’ freedom of association had been infringed. The Court directed the Ontario government to enact legislation to give effect to the employees’ freedom of association. The *AEPA* was the government’s response.

However, the *AEPA* did not provide agricultural workers with the same framework or protections that other employees enjoyed under Ontario’s Labour Relations Act. The appellants in *Fraser* focused on three main defects in the *AEPA*:

1. The *AEPA* does not contain a requirement that employers bargain in good faith;
2. The *AEPA* does not protect the exclusive right of a union that has the support of a majority of employees to represent those employees; and
3. The *AEPA* does not provide any mechanism for resolving bargaining impasses or require any mechanism for resolving disputes about the interpretation and application of collective agreements.

The effect of the limited protections in the *AEPA* and the absence of the three elements referred to above were that although agricultural workers could come together and present bargaining positions to employers and although employers were required to “listen” to these positions, employers could still effectively refuse to recognize the union and could refuse to actually bargain with the union. In the *Fraser* case, UFCW pointed

out that in the case of two agricultural employers that it had attempted to organize, those employers “listened” to the union’s presentations, but then refused to bargain with the union. UFCW pointed out that there is nothing in the *AEPA* that would even appear to require an employer to do anything other than “listen” and certainly nothing in the wording of the legislation that would require the employer to bargain with the union in any sense that the word “bargain” is commonly understood.

UFCW’s understanding of the legislation was reinforced by what the Ontario Minister of Agriculture had stated when the legislation was introduced in the legislature:

However, I need to make one thing very clear here. While an agricultural employee may join an association that is a union, the proposed legislation does not extend collective bargaining to agricultural workers.

And

I’d like to say that the Supreme Court was very clear. They said that agricultural workers across the province had the right to associate. They did not say that they had the right to collectively bargain.

After the employers refused to recognize the union or negotiate, UFCW then commenced the legal challenge that ended up in the Supreme Court as the *Fraser* decision. At the time the challenge was commenced, the *Health Services* decision had not been issued. Without the Supreme Court’s recognition of the right to collective bargain in *Health Services*, the judge who first heard UFCW’s challenge dismissed it. The Ontario Court of Appeal then heard the case and had the benefit of the Supreme Court’s reasons in *Health Services*. Chief Justice Winkler (previously prominent management-side counsel) wrote the Court of Appeal’s decision and agreed with UFCW that the *AEPA* violated the constitutional right to freedom of association.

The Court of Appeal held that the principles recognized in *Dunmore* and then elaborated upon in *Health Services* supported the contention that the constitution required legislation that contained the three elements listed above (duty to bargain in good faith, recognition of majoritarian exclusivity and a mechanism to resolve bargaining and interpretation disputes). As a result the Court of Appeal struck down the legislation.

The employers then appealed to the Supreme Court of Canada. By an 8-1 majority the Supreme Court allowed the appeal and found the *AEPA* to be constitutional. Chief Justice McLachlin and Justice Lebel wrote the reasons for judgment on their own behalf and on behalf of three other justices on the Court (total of five out of the eight). These reasons represent the legal outcome of the case.

In a mystifying parlour trick, Justices McLachlin and Lebel wrote that the *AEPA* was not what it appeared to be and they stated that in fact the legislation contained an implicit duty on employers to consider employee representations in good faith. Based on this finding, Justices McLachlin and Lebel found that the UFCW had prematurely given up

on the *AEPA*. The majority made this finding despite the fact that the presence of such a duty had occurred to no one prior to being expressed by these reasons, despite the fact that it contradicted the Minister's expressed intention when the legislation was introduced and despite the fact that it was inconsistent with the actual language of the *AEPA*. Based on this implied requirement, the majority found that UFCW should have complained to the tribunal established under the *AEPA*, should have argued that the employers had not acted in good faith in responding to their representations and should have demanded that the tribunal issue a remedy for the breach of a requirement the statute did not contain.

The majority also rejected the arguments that the constitutional right to freedom of association required the *AEPA* to grant a single union which had demonstrated majority support the exclusive authority to represent employees in bargaining and that the *AEPA* was deficient because it did not contain a mechanism for resolving bargaining or interpretation disputes.

Justice Rothstein wrote for himself and Justice Charron and held that the *AEPA* did not infringe the constitution. Justice Rothstein held that the Court ought to overturn *Health Services* itself because it was improper for the Court to have held that freedom of association protected the right to bargain collectively in the first place. Justice Rothstein appeared to recognize what the majority chose to ignore: that if *Health Services* was good law, then the *AEPA* breached employees' right to freedom of association.

Justice Abella wrote her own reasons in which she agreed with Chief Justice Winkler's reasons from the Court of Appeal. As Justice Winkler had done, Justice Abella found that if the right to bargain collectively was to mean anything, the *AEPA* had to be constitutionally deficient. In support of her findings, Justice Abella pointed out that in all the years since the *AEPA* was enacted in 2002 there was no evidence of a single negotiated collective agreement or even any negotiations.

CONCLUSIONS

What are we to take from the Court's decision in this case? The *Health Services* decision does not appear to have revolutionized labour law, as was first hoped. The Court in *Fraser* has not rejected its earlier finding that freedom of association includes the right to bargain collectively, but at the first opportunity to address this issue, on facts that could not be more compelling, the Court has used sleight of hand to avoid giving effect to this right. As a result, not only is it difficult to imagine lower courts being bold or creative in response to arguments about freedom of association, but it is also difficult to imagine them even giving effect to the plain meaning of this right.

Unions will have to think very carefully about committing resources to legal challenges based on freedom of association in general and *Health Services* in particular. Having said that, there may be one possible useful element of the majority decision in *Fraser*. Although the implied duty of good faith found by the majority of the Court is a very unsatisfying device to resolve this appeal, unions may be able to make some use of this

finding in arguing that even where good faith does not appear to be required by a statute, it is impliedly required by the constitution.