WeirFoulds LLP

CASE LAW UPDATE

Richard Ogden, Associate, WeirFoulds LLP

Ontario (Attorney General) v Fraser

2011 SCC 20 (Released April 29, 2011)

Charter – Freedom of Association – Collective Bargaining – Agricultural Workers

In this case, the Supreme Court of Canada upheld the constitutionality of Ontario's special labour relations regime for agricultural workers. In doing so, the court affirmed its decision in *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 ("***BC Health Services***") as to the role of freedom of association in collective bargaining.

The *Agricultural Employees Protection Act*, *2002*, SO 2002, c 16 (the "**Act**") excludes farm workers from the regular provincial labour relations regime, but grants them rights to form and join an employees' association, to participate in its activities, to assemble, to make representations to the employers, and to be protected against interference in the exercise of those rights. The Act requires farm employers to give such associations the opportunity to make representations concerning employment conditions. Employers must then listen to or read those representations. The Agriculture, Food and Rural Affairs Appeal Tribunal, rather than the Labour Relations Board, would hear disputes about the application of the Act.

Justice Farley, writing at first instance and without the benefit of the Supreme Court's *BC Health Services* decision, upheld the Act. The Court of Appeal for Ontario allowed the appeal, holding that freedom of association in this context required: (1) a statutory duty to bargain in good faith; (2) statutory recognition of majoritarian exclusivity; and (3) a statutory mechanism for resolving disputes in the bargaining, interpretation and administration of collective agreements. Majoritarian exclusivity is the principle that only *one* group of employees, chosen by the majority, represents *all* employees. These became the issues before the Supreme Court.

Eight justices allowed the appeal, while Abella J. dissented. Chief Justice McLachlin and LeBel J., who together wrote the *BC Health Services* decision, wrote the majority opinion. They affirmed that freedom of association requires a process of engagement that permits employee associations to make representations to employers, and that employers must consider and discuss those representations with employees in good faith. The Act, properly interpreted, provides such a process.

The majority also held that freedom of association is infringed when it is substantively impossible for such a process of engagement to occur. Freedom of association does not, therefore, require a particular type of process, or indeed any conclusion to that process. For this reason the Act was constitutional even though it did not provide for majoritarian exclusivity, a statutory dispute resolution mechanism, or a statutory duty to bargain in good faith. Justice Abella agreed with the majority's approach but would have held that the Act unjustifiably infringed freedom of association and was unconstitutional.

The majority's judgment confirms the existence of the fine line between constitutionally protected procedural rights of collective bargaining and unprotected substantive rights. Employers must discuss and consider employee representations in good faith but need not reach agreement with employees.